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19CV02825

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COLUMBIA

BRUMBLES, RAVEN, Petitioner, v. COLUMBIA COUNTY, COLUMBIA COUNTY CLERK, acting by and through its agent, DONALD CLACK, Respondents.	)	Case No. 19CV02825 RESPONDENTS' RESPONSE TO PETITION CHALLENGING MEASURE 19-1 DETERMINATION

Comes now Columbia County and Columbia County Clerk (Respondents) and hereby responds to Petitioner Raven Brumbles Petition Challenging the County Clerk's Measure 19-1 Determination.

Respondent, Columbia County Clerk, is the responsible party for the initial processing of any prospective initiative petition filed in Columbia County pursuant to ORS 250.155 *et seq*. ORS 250.168 requires the Clerk to determine whether a prospective petition for an initiative measure meets the requirements of Article IV, Section 1(2)(d) and Article VI, Section 10 of the Oregon Constitution.[1] Prospective Petition 19-1 does not comply with constitutional requirements, as set forth herein, and was properly rejected by Respondents. The County Clerk

[1] Article VI, Section 10 allows for the adoption, amendment, revision or repeal of a county charter. Columbia County does not operate under a charter, and therefore, Article VI, Section 10 does not apply here.

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notified Petitioner that the Prospective Petition was rejected on January 14, 2019, as required by and in compliance with ORS 250.168(3).

1. Applicable law.

ORS 250.168 provides:

> "(1) Not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine in writing whether the initiative measure meets the requirements of section (1)(2)(d) , Article IV, and section 10, Article VI of the Oregon Constitution."

Article IV, Section 1(2)(d) provides:

> "An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith."

ORS 250.168 and Article IV, Section 1(2)(d) require the County Clerk to reject prospective petitions that do not include the full text of a proposed law or amendment to existing law, and that embrace more than one subject.

In addition to the constitutional provisions identified in ORS 250.168, Article IV, Section 1(5) provides, in relevant part:

> "The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal ***legislation*** of every character in or for their municipality or district." (Emphasis added)

Article IV, Section 1(5) requires the Clerk to reject prospective petitions that are administrative rather than legislative in nature. *Foster v. Clark*, 309 Or 464, 472 (1990) ("Proposed initiative measures addressing administrative matters properly are excluded from the ballot.").

Therefore, the Oregon Constitution and ORS 250.168 require the Clerk to answer the following three questions in the affirmative or a prospective petition must be rejected: 1) Does the prospective petition include the full text of the proposed law or amendment to law; (2) Does the prospective petition embrace a single subject; and (3) Is the prospective petition legislative rather than administrative in nature. Prospective Petition 19-1 was properly rejected on all three questions.

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2. Prospective Petition 19-1 does not include the full text of the proposed law.

The proposed ordinance would amend existing acts, laws, rules, regulations, and orders, but fails to set out the full text of the affected enactments and show the proposed changes thereto. This determination is clear by the text of the proposed ordinance, the intent of which is to amend current federal, state and local acts, laws, rules, regulations, and orders regarding firearms, firearms accessories, and ammunition to make them "null and void" in Columbia County. Section 3, entitled "Prohibitions", reads as follows:

> "A. Other than in compliance with an order of a District or Circuit court, and ***notwithstanding any other law, regulation, rule or order to the contrary***, no agent, department, employee or official of Columbia County, a political subdivision of the State of Oregon, 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 regarding personal firearms, firearm accessories, or ammunition.
>
> 2) Utilize any assets, county funds, or funds allocated by any entity to the county, in whole or in part, to engage in any activity that aids in the enforcement or investigation relating to personal firearms, firearm accessories or ammunition." (Emphasis added).

The effect of this language is to change current laws, rules, and regulations that might otherwise require the County to participate in enforcement or use funds or assets to aid in enforcement or investigation of personal firearms, firearm accessories or ammunition. Language in Section 4 of the proposed ordinance lends even yet more support for Respondents' position. Section 4, entitled "Penalties" states, as follows:

> "A. All local, state and federal acts, laws, orders, rules, or regulations, which restrict or affect an individual person's or The Peoples' general right to keep and bear arms, including firearms, firearm accessories or ammunition shall be foreign laws and defined as Extraterritorial Acts and ***are invalid*** in this county. Such Extraterritorial Acts shall not be recognized by Columbia County, are specifically rejected by the voters of this county, and ***shall be considered null, void and of no effect in Columbia County Oregon***[**.**]" (Emphasis added).

The Section goes on to list nine general types of laws that would be "null, void, and of no effect" in Columbia County, as follows:

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> "1) Any tax, levy, fee, or stamp imposed on firearms, firearm accessories, or ammunition not common to all other goods and services on the purchase or ownership of those items by citizens.
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> 2) Any registering or tracking of firearms, firearms accessories, or ammunition.
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> 3) Any registering or tracking of the owners of firearms, firearm accessories, or ammunition.
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> 4) Any registration and background check requirements on firearms, firearm accessories, or ammunition for citizens; and
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> 5) Any Extraterritorial Act forbidding the possession, ownership, or use or transfer of any time of firearm, firearm accessory, or ammunition by citizens of the legal age of eighteen and over; and
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> 6) Any Extraterritorial Act ordering the confiscation of firearms, firearm accessories, or ammunition from citizens, and
>
> 7) Any prohibitions, regulations, and/or use restrictions related to ownership of non-fully automatic \firearms, including but not limited to semi-automatic firearms that have the appearance or feathers similar to fully automatic firearms and/or military "assault-style" firearms by citizens; and
>
> 8) Any prohibition, regulations, and/or use restrictions limiting hand grips, stocks, flash suppressors, bayonet mounts, magazine capacity, clip capacity, internal capacity, or types of ammunition available for sale, possession or use by citizens; and
>
> 9) Any restrictions prohibiting the possession of open carry or concealed carry, or the transport of lawfully acquired firearms or ammunition by adult citizens or minors supervised by adults."

It is important to note that this list is explicitly not exclusive. Therefore, the proposed ordinance would make null, void, and of no effect other "Extraterritorial Acts" not even generally identified by the text. "Extraterritorial Acts" is defined in Section 4, as "(a)ll local, state and federal acts, laws, orders, rules, or regulations, which restrict or affect an individual person's or The Peoples', general right to keep and bear arms, including firearms, firearm accessories or ammunition[.]" Section 4.F then lists general exceptions to the nullified yet unspecified laws. The categories of laws that would be voided under the proposed ordinance are extremely broad, and include restrictions on regulating weapons in public buildings, likely including the Columbia County Courthouse and school grounds. The proposed ordinance would also likely change the current law requiring concealed handgun licenses and prohibiting seizure of evidence or forfeiture of

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currently illegal weapons. These examples just scratch the surface of the laws that might be amended by this proposed ordinance. However, because the proposed ordinance does not set out the text of the laws, rules and regulations that are proposed for amendment, and in what ways, or much less, cite the laws meant to be nullified, it is impossible for Respondents, this Court, or for a voter to determine the accurate and full extent of the amendments, leaving the true effect of the proposed ordinance a matter of speculation.

In *Kerr v. Bradbury*, 193 Or.App 304 (2004), an initiative petition sought to amend two statutes, but included only the amendatory text. Plaintiffs argued that full text of the proposed law within the meaning of Article IV, Section 1(2)(d) refers to the full text of the law as amended. The Court of Appeals agreed. The Court explained the purpose of the full text requirement, stating that the framers of the constitution enacted Article IV, Section 22 to ensure that legislators not be required to vote "in the dark", that is, without knowing the effect of the proposed enactment on existing statutes. The Court cited cases from courts in other states with similar constitutional provisions, characterizing their purposes in similar terms. *See In re. Miller*, 29 Ariz. 582 (1926) (Without setting out in full the act as it was intended to read after amendment, "no one could possibly know by reading the act itself what the law was, but before a legislator could vote understandingly upon such an amendment, or one called upon to construe the law after its adoption could do so intelligently, it would be necessary for [the person] to ascertain how the original act with all previous amendments, if any, read. This place[s] an unnecessary burden upon both and the purpose of this provision[s] to prevent legislation in any such manner.")

Related to initiatives, the Court cited several additional cases explaining the purpose of the full text rule. *See eg*. *Mervyn's v. Reyes,* 69 Cal.App.4th.93 (1998) ("The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition."; *State v. Fulton*, 99 Ohio St. 168 (1919) (publication of full text of amended constitutional provision required because it is "essential for the elector to have***the section which is proposed to be added or subtracted from. If he is to vote intelligently, he must have this knowledge. Otherwise, in many instances he would be required to vote in the dark."). The Court in *Kerr* held this same purpose applies to Article IV, Section 1(2)(d) determinations related to local initiative measures.

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A year after the *Kerr* decision the Oregon Supreme Court addressed the full text constitutional requirement in *State v. Upton*, 339 Or 673 (2005). In *Upton,* Plaintiff sought to invalidate SB 528, which provided for jury input into sentencing guidelines addressed in current statutes. The defendant argued that SB 528 was unconstitutional because the text of the bill failed to set forth the text of the sentencing guideline statutes. *Id at 725.* The State argued that existing statutes remained valid laws, unchanged by SB 528. The Court agreed, stating that SB 528 did not offend the full text requirement because it didn't "change" existing laws. Unlike the facts in Upton, here the proposed ordinance would change existing acts, laws, rules, and regulations by making them "null, and void".

Petitioner argues that prospective petition 19-1 does not repeal or amend any existing law. This is an absurd argument given the text of the petition, which clearly nullifies and voids a wide range of federal, state and local laws, rules, and regulations as they apply to Columbia County. The petition is intended to partially repeal such statutes or amend them in some other way so as to nullify them as applied in Columbia County. If Petitioner's position were affirmed, the full text constitutional requirement would effectively be eviscerated because a Chief Petitioner could simply avoid having to comply with it by omitting the word "amendment" in a prospective petition even if the obvious effect is to amend current law.

If the prospective petition were to go to the voters as written, voters would not be able to discern the depth and breadth of their vote. It is imperative that petitioner be required to set forth each and every act, law, rule, regulation or order that is intended to be "null and void" in Columbia County so that voters have a full understanding of the measure. Petitioner does not even set forth specific statutes that he intends to be null and void in Columbia County. Neither the voters nor regulators in Columbia County should be required to speculate as to what laws would be amended. Voters must be provided sufficient information so that they can intelligently evaluate whether to sign the initiative petition and make an informed decision should the measure qualify for a ballot.

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3. Petition 19-1 Embraces More Than One Subject.

The Oregon Supreme Court has adopted a two-part test for determining whether a proposed law embraces only a single subject.[2] First, the Court reviews whether there is a "unifying principle logically connecting all provisions" in the measure so that it can be said to embrace a single subject; and second, if there is a unifying principle, the court examines whether any "other matters" contained in the measure are "properly connected" to the unifying principle. *McIntire v. Forbes*, 322 Or 426, 443-44 (1996); *State ex rel. Caleb v. Beesley*, 326 Or 83, 91 (1997) ("Caleb"). Oregon courts have found the above standard satisfied as long as the proposed law addresses a single substantive area of the law, even if it "includ[es] a wide range of connected matters intended to accomplish the goal of that single subject." *State v. Mercer*, 269 Or App 135, 139 (2015), citing *Caleb*, 326 Or at 93. In *McIntire*, the Oregon Supreme Court further described the historical circumstances and purpose leading to the Article IV, Section 20 single-subject requirement, that being to prevent "logrolling". "Logrolling" is defined as "…combining [unrelated] subjects representing diverse interests in order to unite members of the legislature who favored either in support of all." *Id*. at 439. (Emphasis added).

Petitioner argues that the proposed ordinance includes one subject: "the prohibition on enforcement of certain firearms regulations by Columbia County." This position is clearly wrong from the text of the proposed ordinance. The proposed ordinance embraces a wide range of substantive areas of the law because it would nullify and void a vast array of federal, state and local laws, rules, and regulations as they relate to Columbia County, some yet unknown. We know from the list of general legal subjects included in Section 4, that the substantive areas of the law include at least the following: taxes and fees; registration; background checks; criminal possession; search and seizure; forfeiture; and open carry and concealed carry. In addition, we know from Section 3, that the proposed ordinance also embraces the following additional

[2] The Oregon Constitution contains two "single-subject rules": one for initiatives (Article IV, section 1(2)(d)) and one for legislative acts (Article IV, section 20). The Oregon Supreme Court has held that both rules have the same meaning, and therefore, cases interpreting both rules are relevant to any single-subject analysis. *OEA v. Phillips*, 302 Or. 87, 93 (1986); *State ex rel. Caleb v. Beesley*, 326 Or 83, 93 (1997). Accordingly, although section 1(2)(d) pertains to the proposed initiative here, cases interpreting section 20 are equally instructive.

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substantive areas of the law: state preemption,[3] local budget law,[4] and contract law.[5] Furthermore, without knowing the full extent of the laws, rules, and regulations proposed for amendments it is impossible for Respondent, the Court, or a voter to determine the full range of substantive laws embraced in the proposed ordinance.

This is a clear example of "logrolling". Petitioner seeks to entice voters by simplifying the subject of the ordinance to "enforcement" of a general right to keep and bear arms and restrict "enforcement of certain firearms regulations." However, the measure rolls in multiple substantive areas of the law, some which a voter might not otherwise support. An example of this is the nullification of criminal laws prohibiting the possession of firearms in public buildings, including but not limited to the Columbia County Courthouse and schools.[6] Some voters may support this. Others support a prohibition on removal of firearms from someone who has been determined to be a danger to themselves or others. Would someone be willing to vote "yes" on the proposed ordinance despite not supporting one or both of the included prohibitions? Respondents' argue, likely yes.

4. Measure 19-1 is Administrative.

Oregon courts have long held that actions that are "administrative" and not "legislative" in nature do not carry with them the right of initiative and referendum. *See Foster v. Clark*, 309 Or 464 (1990); citing *Monahan v. Funk*, 137 Or 580 (1931). In *Foster*, the Oregon Supreme Court explained that the administrative limitation was deemed necessary because to allow those powers would be to annul or delay executive conduct, which would destroy the efficiency necessary to successful administration of the business affairs of government. The Oregon Supreme Court has defined legislative activity as "making laws of general applicability and permanent nature, and administrative activity as that 'necessary * * * to carry out legislative

[3] ORS 166.170 preempts the County from legislating on most matters related to firearms and ammunition, as follows: "(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly."
[4] As it relates to prohibition on funding.
[5] Contracts; specifically federal and state grant agreements require the County to comply with State and Federal Acts, statutes, rules, regulations and orders.
[6] The proposed ordinance exempts the nullification of possession laws only in State or Federal buildings. Neither the County Courthouse nor schools are State or Federal buildings.

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policies and purposes already declared.'" *Lane Transit District v. Lane County*, 327 Or 161, 167 (1998), quoting *Monahan*, 137 Or at 584 (1931).

Several cases illustrate the court's application of its "legislative" and "administrative" definitions. In *Foster*, the proposed initiative sought to reverse a City of Portland decision that renamed a street. 309 Or at 472. The Court found that because the City had a policy and procedure in place for renaming streets at the time the initiative was filed, the act of renaming a street was administrative. Moreover, the initiative did not seek to change the City's framework for renaming streets, which could be legislative, but merely sought to change a specific decision. *Id*. at 472-475.

In *Lane Transit District*, the initiative proposed to limit the salary of the Transit Director. The court found that the act of setting a specific salary of a specific director was an administrative act. 327 Or at 168-169. In *Rossolo v. Multnomah County Elections*, 272 Or App 572 (2015), the Court of Appeals further explained that initiatives that are executive, administrative, or adjudicative in nature (and outside the scope of the Constitution) are properly rejected by the County. The Court cited *In Re Option of the Justices, 66 N.H 629,* stating "the law is said to be rule, not a transient, sudden order to and concerning a particular person but something permanent, uniform and universal." The Court further said, the action of a municipal council may relate to questions or subjects of a permanent or general character, or to those which are temporary and restrictive in their operation and effect; and ordinarily an ordinance relates to the former, while the latter may be adopted by resolution. "Whatever may be the requirement as to the form of enactment, the former is municipal legislation, while the latter is not." *Id.* at 584-585. Furthermore, "* * *there is a well-marked distinction between acts that are legislative, and that lay down a rule of action for the citizens or the city, and acts that relate to daily administration of municipal affairs. The latter may be well described as 'business' to be transacted by councils, and may be properly left to them to dispose of by 'order or resolution'. (Citing *Shaub v. Lancaster City*, 156 Pa 362, 366 (1893).

By contrast, *State ex rel. Dahlen v. Ervin*, 158 Or App 253, 255 (1999) involved an initiative to amend the Multnomah County charter to establish new requirements for the siting of corrections facilities. Although a corrections facility had been sited, and the County argued that the ultimate goal of the initiative was to undo the County's siting decision, the court held that the

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initiative was a legislative act. *Id*. at 256-257. The court distinguished the initiative from those in *Foster* and *Lane Transit District*:

> "This case is the converse of *Foster* and *Lane Transit District*. The proposed initiative does not attempt to change a specific siting decision of the county but, rather, to change the framework within which the county makes siting decisions.* * * Adopting a policy, and establishing procedures for implementing that policy, are the essence of legislation." *Id*. at 257.

Here, the proposed ordinance violates the municipal legislation rule. The "Extraterritorial Acts" set forth in the proposed ordinance are existing law. The proposed ordinance would have the County "refuse to cooperate" with such laws; prohibit "participation in any way with enforcement of any Extraterritorial Act"; and prohibit the County from using funds or assets that "aids in the enforcement or investigation" of such Acts. Like *Foster*, *Lane Transit District* and *Rossolo*, the proposed ordinance relates to how the County implements existing laws and contracts, as well as to implementation of local budget laws, acts that relate to daily administration of municipal affairs. Prohibiting "cooperation" is clearly not making law or policy of general applicability. Rather, the act of cooperating is an executive or administrative activity necessary to carry out legislative policies and purposes already declared and is part of the day to day administration of municipal affairs. Similarly, prohibiting "participation in any way" with financing or enforcement of existing law might mean that County personnel couldn't even sit in on a meeting of law enforcement partners. Again, the manner and means the County takes to implement existing law or to work in partnership with state and federal agencies is clearly part of the day to day administrative activity necessary to conduct its business. *Lane Transit District v. Lane County*, 327 Or 161, 167 (1998). If the County was required to affirmatively "refuse to cooperate" or was prohibited from "aiding in any way in the enforcement or investigation" of such existing law and contracts, the affect would be to annul or delay executive conduct which would destroy the efficiency necessary for successful administration of the business affairs of the County. *Foster v. Clark*, 309 Or 464 (1990).

Finally, to the extent that the proposed ordinance seeks to prohibit "orders" that are deemed "Extraterritorial Acts", the measure is administrative. Generally orders implement existing policy and relate to a specific person or thing and are administrative in nature.

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5. Conclusion.

As set forth herein, Initiative Petition 19-1 was properly rejected by the County Clerk. The proposed ordinance violates the "full text", "single-subject" and "administrative" requirements for initiative petitions. The Court should dismiss Petitioner's Petition Challenging County Clerk's Measure 19-1 Determination.

Dated this 6th day of February, 2019.

/s Sarah Hanson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th of February, 2019, I caused a true copy of the RESPONDENTS' RESPONSE TO PETITION CHALLENGING MEASURE 19-1 DETERMINATION to be served upon the following named parties, or their registered agents or their attorney by first class mail as indicated below and addressed to the following:

Tyler Smith
Attorney for Petitioner
181 N. Grant Street, Suite 212
Canby, OR 97013

Mailing was done by X first class mail, and by __ certified or ___ registered mail, return receipt requested with restricted delivery, or __ express mail, eFiling X, and email __.

DATED this 6th day of February, 2019.

s/ Sarah Hanson
Sarah Hanson, OSB #983618
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