Memorandum of Law On Proposed Curry County "Second Amendment Sanctuary" Ordinance

Introduction: In 2019 there was submitted to the County Commission of Curry County, Oregon, a proposed "Second Amendment Sanctuary Ordiance" (SASO). In this was **Section 2. Findings"** and **Section 4. Penalties**. Provisions of these will be cited in discussion of these lawfulness of the proposed ordinance. Such citation does not indicate agreement with the factual or legal validity of these findings. There has been no evidence submitted to the County Commission that could result in findings. Nor has there been current and legitimate legal authority submitted sufficient to demonstrate the legal validity of findings quoted here.

This memorandum is offered to fill that need. It is offered as guidance for the Commissioners as to the legality of this ordinance. They can then better understand what could occur should these findings be accepted or these penalties imposed.

Review of Laws by State and Federal Courts in General

The SASO contains language to be adopted by Curry County prohibiting Oregon, the United States and all other localities from passing **any laws** regarding firearms. It also states that local and state law enforcement officers have the right to **disobey** the federal and state laws about firearms and to refuse to enforce them. It is actually difficult to find authority for the simple propositions that are: "States govern us and can pass laws"; and "Police and citizens must

obey the law." No one in my 40 years' legal experience has argued this before. But the following authorities give us some rules to follow in such an unusual position.

The Oregon Supreme Court is "the highest judicial tribunal of the judicial department of government in this state", ORS 1.002. And it thus has the final word about the meaning of Oregon laws and the Oregon Constitution

A state law may restrict a clear constitutional right. In Ginsberg v. New York, 390 U.S. 629 the United States Supreme Court held that New York could regulate the types of reading material that children under seventeen could purchase. This is state control over the core First Amendment right to acquire and read content.

The federal courts and the United States Supreme Court have the right to review the federal constitutionality of state actions and those of the lesser jurisdictions, the counties. Citizens and police do not. And they have the right to invalidate actions that are not constitutional. As the United States Supreme Court ruled, so long ago in Marbury v. Madison, 5 U.S. 137 (1803)

> *So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury is the crucial first case that set up the authority and the duty of the Supreme court to have the "last say" on the

interpretation of laws'; particularly their constitutionality. This is the principle of judicial review that our entire legal system is bound by.

As are Justices. In this case, the Court also notes its oath (shared here by Curry County and Oregon law enforcement) to uphold the Constitution and laws of the country.

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or, to take this oath, becomes equally a crime. *Id* at 180."

Marbury teaches us that judges must enforce the United States Constitution because it is the job of that division of government: the judiciary. Judges must also do so because they have sworn an oath.

Curry County is not allowed to write ordinances that violate or urge the violation of laws regulating firearms found in the Oregon statutes and Constitution or the United States Constitution. Respect for the 2nd Amendment is important. But it is not the only consideration in passing laws to both guarantee the rights of some and the safety of all. The following is the actual process that courts use to review whether a law involving a Second Amendment right is valid.

The Second Amendment Rights:

Findings related to the proposed Second Amendment Sanctuary Ordinance (hereinafter SASO) state that in District of Columbia v. Heller, 128 S.Ct. 2783 (2008) the U.S. Supreme Court upheld the individual's right to bear arms as protected by the Second Amendment of the [United States] Constitution. Heller also found that an individual can bear arms not only as part of a militia, but as an individual for self protection and protection of his home. This first part of the proposed findings is legally accurate.

From that point, however, the legal arguments veer wildly off course. The "Findings" propose that no government can pass gun laws and law enforcement should defy them.

> **"J.** the right to keep and bear arms is a fundamental individual right that shall not be infringed and all local, state, and federal acts, laws, orders, rules or regulations regarding firearms, firearm accessories, and ammunition are a violation of the Second Amendment.
>
> **K.** Local government have the legal authority to refuse to cooperate with state and federal firearm laws that violate these rights and to proclaim a Second Amendment Sanctuary for law-abiding citizens in their cities and counties."

Unfortunately, their important Second Amendment case holds just the opposite. Heller clearly finds: "the right secured by the Second Amendment is **not unlimited**." id. at 626. As was also quoted in Heller #2, Heller v. D.C., 670 F.3d 1244 (2010) at 5

> [Heller gave some examples to illustrate the boundaries of that right. For instance, the [Supreme] Court noted "the Second Amendment does not protect those weapons not typically

possessed by law abiding citizens for lawful purposes, such as short barreled shotguns." Id. at 625 (citing U.S. v. Miller, 307 U.S. 174 (1939). This limitation upon the right to keep and bear arms was "supported by the historical tradition of **prohibiting the carrying of dangerous and unusual weapons**. *Id* at 626. It also provided a list of some "presumptively lawful regulatory measures".

"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the **possession of firearms by felons and the mentally ill**, or **laws forbidding the carrying of firearms in sensitive places** such as schools and government buildings, or **laws imposing conditions and qualifications on the commercial sale of arms.** *Id* at 626-27 and n.26.

Heller then explains that **these are not the only restrictions** on the Second Amendment that will be allowed. The Court said it was not "undertaking a exhaustive historical analysis today of the full scope of the Second Amendment" *Id.* at 626.

Since then many Courts, including the Supreme Court of Oregon, the Ninth Circuit (the federal appeals court governing Oregon) and the United States Supreme Court have further defined the nature and extent of restrictions on gun ownership. These are offered below.

First Step: What Types of Gun Owners, Buyers and Sellers Have Never Had 2nd Amendment Protection?

Heller uses what has been called a "two step analysis" in evaluating laws' constitutionality under the 2nd Amendment. The first step is whether the laws are like "long standing" prohibitions that historically deny protection to certain actors such as felons and the mentally ill. Next, they look at the nature of the weapon, is it

"unusually dangerous"? Guns and actors in these categories cannot find 2nd Amendment protection.

In State of Oregon v Hirsch, 114 P.3d 1104 (2005) the Supreme Court of Oregon held, as allowed by Heller that the state may keep felons from owning firearms.

In Voisine v. United States, 136 S.Ct. 2272 (2016) the United States Supreme Court very recently held that federal law can prohibit domestic violence misdemeanants from owning firearms. This expands the categories of offenders who cannot have guns beyond that announced in Heller. After Voisine, certain misdemeanor offenders, as well as felons, can also be kept from having guns.

This case was followed in the Ninth Circuit by U.S. v. Chovan, 735 F.3d 1127 (2013) that upheld a federal statute prohibiting gun ownership by a domestic violence misdemeanant. The United States Supreme Court denied *certiorari* to the defendant there, allowing the Ninth Circuit's ruling to stand as valid. Chovan v. U.S., 135 S.Ct. 187 (2014)

In United States v. Dugan, 657 F3d 998 (2011) the Ninth Circuit found that an illegal drug user cannot possess firearms. In United States v. Potter, 630 F3d 1260 (2011) the Court found that Heller upheld "longstanding prohibitions on the possession of firearms by felons...[and] laws imposing conditions and qualifications on the commercial sale of arms". The Appellant was contesting his conviction of the use of firearms in furtherance of drug trafficking. He argued it must be vacated because he has a 2nd Amendment right to bear arms. The Court cites McDonand v. City of Chicago, 130

S.Ct. 3020 (2010) in holding that "the Second Amendment protects a personal right to **bear arms for *lawful purposes.***" As drug trafficking is not a lawful purpose, they upheld a federal statute denying the right to use guns in furtherance of it. See also Van Der Hule v. Holder, 759 F.3d 1043 (2014).

As you can see, the United States Supreme Court, the Ninth Federal Court of Appeals and the Oregon Supreme Court have upheld laws keeping guns from certain types of people (e.g., felons and the mentally ill) as these people have always been denied access and were never thought to have 2nd Amendment protection. Likewise they have found that no one can lawfully use guns to commit criminal acts.

The proposed SASO bans **any statute** about guns, It would leave guns in the hands of spouse abusers, felons and drug dealers, even those using guns in furtherance of drug trafficking. Thus this ordinance implements no lawful 2nd Amendment right and is illegal.

Step 1 Continued: In What Places Can Gun Carrying or Sales be Prohibited under Heller?

SASO 4 (A) (9) penalizes all laws on the possession of firearms including concealed and open carry. But gun sale, possession and use is often restricted in certain areas.

In Nordyke v. King, 644 F.3d 776 (2009) the Ninth Circuit heard a challenge brought by the Nordykes to Ordinance No. 0-2000-22 (the Ordiance) codified at section 9.12.120 which makes it a misdemeanor to bring onto or possess a firearm or ammunition on County Property. It does not mention gun shows. The Nordykes wished to hold a gun show at the public fairgrounds in Alameda County. The Ninth Circuit

there held that prohibiting firearm possession on municipal property fits in the exception from the 2nd Amendment for "sensitive places" that Heller recognized.

One other local case explained the meaning of this category, and shed light on regulations regarding gun sales, rather than simply gun possession for self defense. Teixeira v. County of Alameda, 873 F.3d 670 (2017) upheld an ordinance prohibiting firearms sales near residentially zoned districts, schools, day care centers and liquor stores. Teixeira argued that this law infringes upon his 2nd Amendment rights and that of his customers. The Ninth Circuit found that the 2nd Amendment **does not give a freestanding right to sell guns.** Nor does Teixeira's inability to find a location for his store deprive his customers of the core right of gun ownership for self defense, as they can buy elsewhere.

Type of Gun

SASO 4 (A) states that there can be no act forbidding the possession, ownership, or use...of any type of firearm. But this approach was not successful for the defendant in U.S. v. Henry, 688 F.3d 637 (2012). He appealed his conviction for illegal possession of a homemade machine gun, claiming he had a 2nd Amendment right to possess such a gun. The Ninth Circuit rejected this argument because machine guns are "dangerous and unusual weapons" that are unprotected by the 2nd Amendment. Dist of Columbia v. Heller, 128 S.Ct. 2783 (2008). Mr. Henry's conviction was affirmed.

In a different context, the United States Supreme Court considered whether a stun gun was entitled to 2nd Amendment protection. Caetano v. Massachusetts, 136 S.Ct. 1027 (2016) quoted Heller which held that the 2nd Amendment "extends...to...arms...that were not in existence at the time of the founding", 128 S.Ct. 2783.

The Second Step: Balancing the Right to Bear Arms for Self Defense with the State's Right to Protect Citizens from Gun Crimes.

This next group of cases involves restrictions on 2nd Amendment rights that are not in the historic, longstanding categories. These cases show how Courts decide what is more important when deciding whether or not to uphold a gun law: an individual's 2nd Amendment rights or the State's efforts to protect groups of citizens. Here is how Courts look at these things.

1.What level of scrutiny must be used to determine whether novel regulation is unconstitutional? The level of scrutiny will depend upon how close the law comes to the core of the 2nd Amendment right and the severity of the law's burden on the right

2. In most cases "intermediate scrutiny" is correct. Most restrictions do not prevent someone owning and using a firearm for self defense. They only effect, say, the time, place and manner of having a gun.

3. To it to survive intermediate scrutiny, the State must show the gun law is substantially related to an important government

objective The government's interest in gun laws is usually to protect police officers, aid in crime control and prevent shootings of civillians.

4. Does the law carry out these purposes?

Using this test for decision making, let's look what happened when several types of gun laws were evaluated for constitutionality under the 2nd Amendment.

Constitutionally of Waiting Period Laws

SASO 4 (A) (4) penalizes those who carry out legal registration and background checks.

In Silvester v. Harris, 843 F.3d 816 (2016) the Ninth Circuit **upheld a 10 day waiting period**. Using intermediate scrutiny, it found that "the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. The waiting period provides time not only for background checks, but for a cooling off period to deter violence resulting from impulsive purchases of firearms." Thus the State established that there is a reasonable fit between important safety objectives and the application of the waiting period laws to plaintiffs.

"Common" Assault Weapons, Gun Locks or Cases, Large Capacity Magazines and Hollow Point Bullets

SASO 4 (A) (7) penalizes those who make or enforce statutes or ordinances that prohibit or regulate "ownership of non-fully

automatic firearms, including but not limited to semi automatic firearms that have the appearance or features similar to fully automatic firearms and/or military "assault-style" firearms by citizens. And SASO 4 (A) (8) prohibits attachments that may make semi-automatics function more like automatics.

These restrictions, too, have been reviewed by local federal courts and upheld. In Friedman v. City of Highland Park, 746 F.3d 953 (2014) using the "balancing test" held that semi-automatic assault weapons and magazines holding over 10 rounds could be banned. The Supreme Court denied *certiorari*, leaving this holding stand under the 2nd Amendment.

In Jackson v. City and County of San Francisco, 746 F.3d 953 (2014) the Ninth Circuit upheld a requirement of gun cases or locks for handguns in the home. It held that "a modern gun safe is not a "severe burden" [on 2nd Amendment rights] because a modern gun safe may be opened quickly." *Id* at 964. The Court reasoned that guns kept in the home are most often used in suicides and against family and friends rather than in self defense and that children are particularly at risk of injury and death." *Id* at 965. The Court concluded that the law served a significant government interest in reducing the number of gun related injuries and deaths resulting from having an unlocked handgun in the home.

Friedman v. Highland Park, Illinois, 784 F.3d 406 (2015) also upheld restrictions on semi automatic assault weapons that can accept large-capacity magazine and has one of five other features: a

pistol grip without a stock (for semi-automatic pistols, the capacity to accept a magazine outside the pistol grip), a folding, telescoping or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator. Some weapons such as AR-15's and AK47's were banned by name. This ban was upheld.

It is helpful to look at the district where Heller arose to see why. Heller v. District of Columbia, 670 F.3d 1244 (2010) (Heller II) There, the plaintiffs claimed that semi-automatic assault weapons could not be banned as a "dangerous and unusual" weapon. They claimed that assault weapons are "typically possessed by law abiding citizens for lawful purposes." *Id* at 625.

The Court agreed that semi-automatic rifles and magazines holding more than ten rounds are indeed "in common use", accounting for 5.5 percent of all firearms and 14.4 percent of all weapons produced in the U.S. for the domestic market. And that large capacity magazines were also common, as 4.7 million magazines were imported into the U.S. between 1995 and 2000.

Though these weapons are common and deserving of some 2nd Amendment protection, the Court questioned whether there is a substantial relationship or reasonable "fit" between the prohibition on assault weapons and magazines holding more than 10 rounds and the state's essential interest in protecting police officers and controlling crime. They found that the following evidence showed that the District's prohibition is substantially related to the "end" of protecting police and controlling crime.

> [T]he military features of semi-automatic assault weapons are designed to enhance their capacity to shoot multiple human targets very rapidly; and "pistol grips on assault rifles...help stabilize the weapon during rapid fire and allow the shooter to spray fire from the hip position...
>
> [A]ssault weapons] account for a larger share of guns used in mass murders and murders of police...
>
> Semi-automatics can fire almost as rapidly as automatics. A 30 Round magazine of UZI was emptied in slightly less than 2 seconds on full automatic, while the same magazine was emptied in just five seconds on semi-automatic.
>
> Attacks with semi-automatics with [magazines holding more than ten rounds result in more shots fired, persons wounded and wounds per victim.
>
> [And lastly] high capacity magazines are dangerous in self defense situation because the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risk to others in the household, passers by and bystanders. *Id* at 35

Conclusion

In the cases cited above, the Federal Appeals Court that rules on constitutionality under the 2nd Amendment as well as the U.S. Supreme Court and the Supreme Court of Oregon have upheld restrictions on the possession and sale of many types of weapons and ammunition, waiting periods, places of sales, background checks and the possession of guns by some classes of people. SASO would do away with all these.

Therefore anyone who challenged SASO would have a high likelihood of success in a trial and appellate court; while costing Curry County attorney's fees and court costs to defend SASO. Or

worse, the family of a person or persons killed while a shooter used a gun or ammunition allowed by SASO (but banned by many federal and state statutes) could sue Curry County for its failure to follow and enforce protective laws. Let's not put Curry County or its citizens in that position.

Respectfully submitted,

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