IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COLUMBIA

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| BRUMBLES, RAVEN, Petitioner, v.COLUMBIA COUNTY, COLUMBIA COUNTY CLERK acting by and through its agent DONALD CLACK Respondent | Case No. 19CV02825 **REPLY TO PETITION CHALLENGING** **COUNTY CLERK’S MEASURE 19-1 DETERMINATION** |
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**SUMMARY**

The County Clerk fails to properly apply Article IV, Section 1 of the Oregon Constitution to IP 19-1 in its review. The County Clerk errantly asserts that IP 10-1 it is amending some undisclosed law, but errs by failing to recognize the legal difference between an amendment and new legislation. In an effort to insist that some other County Ordinance is being “amended” the Clerk twists and confuses the concepts of amend and repeal, but neither argument gets the Clerk to the outcome he desires. As described below, IP 19-1 does not qualify as an amendment under Article IV, Section 1 jurisprudence, and even if IP 19-1 did repeal some law, repealed laws are not required to be included in the full text. There is no text being added or subtracted from any existing law that could qualify IP 19-1 as an amendment. None is cited, none exists. The Clerk makes the mistake of characterizing his argument about what he considers a repeal, as an amendment. A close review of the wording IP 19-1 also clarifies that no law is actually being repealed by IP 19-1 but even if it were, the text of any law being repealed by a ballot measure is not required to be included. The Clerks arguments about full text fail.

The Clerk’s subjective opinion on the substantive merits of the proposed measure is inappropriate in an Article IV Section 1(2)(d) review. *Lowe v. Keisling*, 130 Or App 1 (1994). The County Clerk’s concern that the prohibition contained in IP 19-1 might mean that certain county employees can’t have meetings, or can’t work together, or can’t spend money they wayt they want to, does not amount to making IP 19-1 administrative, in fact the County Clerk’s argument proves that IP 19-1 is legislative, because it puts guidelines, policy, a framework around what the County officials can and cannot do. It doesn’t tell them what to do on Tuesday, or who they can meet with at all, instead IP 19-1 creates the legal framework in which the County and its officials must operate. That is clearly an exercise of legislative power. Nonetheless the Clerk tries to make substantive arguments about the merits of IP 19-1 that are legally and procedurally inappropriate and premature for during an Article IV, Section 1 review. The Clerk’s subjective opinion about the practical effects of the proposed measure is inappropriate for Article IV Section 1(2)(d) review. The voters of Columbia County are given the authority to enact legislation pursuant to Or. Const. Art. IV, Section 1(2) and 1(5), and the political opposition of a County Clerk cannot deprive the voters of that opportunity.

The parties appear to agree in their briefing that the three applicable tests for review are:

1) Whether the proposed measure includes the full text;

2) Whether the proposed measure embraces a single subject; and

3) whether the proposed measure is legislative in nature.

 For the reasons below, the County Clerk’s arguments on these three legal issues is incorrect and proposed measure 19-1 must be approved for circulation to the voters.

**1) Measure 19-1 contains the full text of the proposed ordinance.**

The County Clerk erroneously claims that IP 19-1, as a county ordinance would “amend” “existing laws, rules, regulations, and orders”. However, the Clerk fails to cite to a single such law, rule, regulation or order or explain how it would be amended. That is because the County Clerk is wrong, there is not a single word, letter, or clause in any existing statute or ordinance that is being changed by IP 19-1. The first piece of evidence that the Clerk is wrong is that they didn’t and can’t cite a single word from some pre-existing law that is being deleted, added to, or subtracted from. That is the test for whether something is an ‘amendment’ or not. In legislation, an amendment means an alteration in the draft of a bill proposed, or in a law already passed. *Warren v. Crosby*, 24 Or. 558, 562 (1893) The County Clerk makes the preposterous argument that excluding the word ‘amendment’ in a petition would eviscerate the full text rule from the Oregon Constitution. The Clerk apparently doesn’t understand the definition of an amendment. “Amendment” is defined in Blacks Law Dictionary as: 1) A formal revision or addition proposed or made to a statute, constitution, or other instrument; 2) The process of making such a revision; or 3) A change made by addition, deletion, or correction; and alteration in wording.” Blacks Law Dictionary, 2nd Edition (2001).

IP 19-1 is self-contained, it inserts no language into any pre-existing law, and deletes no language from any pre-existing law. It does not purport to change a single word from any existing law, and the County Clerk did not, and cannot honestly, assert that any of the words in IP 19-1 are intended to be inserted into the Oregon Revised Statutes, or Oregon Administrative Rules, or any existing provision of the County Code[[1]](#footnote-1).

The truth of the matter is that IP 19-1 proposes a brand new prohibition on certain activities – namely County enforcement of foreign firearms laws.[[2]](#footnote-2) IP 19-1 directly recognizes that other laws, rules or regulations on firearms may exist, and groups and defines any such laws, rules or regulations as “Extraterritorial Acts”. IP 19-1 makes no effort to change a single word in any of those “Extraterritorial Acts”. IP 19-1 simply prohibits County agents (with exceptions) from enforcing those Extraterritorial Acts. It states that said Extraterritorial Acts will not be enforced… “shall not be recognized”, … “considered null, void, and of no effect in Columbia County”… IP 19-1 does include any language from other statutes or ordinances, because it doesn’t change the language in any other statutes or ordinances. Notably, IP 19-1 does not prohibit Columbia County from having or enforcing its own firearm regulations, and therefore preserves local control for the residents of Columbia County.

The County Clerk’s argument on the alleged “amending” is such a stretch on the word ‘amend’ that they are forced to conflate and confuse amending and repealing in their argument. The Clerk’s argument falsely and misleadingly asserts that IP 19-1 amends federal, state, local acts, laws, rules … “to make them ‘null and void.’” The County Clerk conveniently and deceptively leaves off the key provision which clarifies that IP 19-1 does not amend anything, it says, “Such Extraterritorial Acts shall **not be recognized** by Columbia County”, and “shall be **considered** null, void and of no effect in Columbia County Oregon.” Section 4(A)(emphasis added). Thus, IP 19-1 does not purport to amend any such Extraterritorial Acts at all. In fact, IP 19-1 specifically recognizes that said laws exist, and will continue to exist when it states, “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 ….of the County… shall: …” Section 3. Thus, regardless of the continued, unchanged existence of those other laws, the named Columbia County actors face the prohibition. The crux of IP 19-1 is to recognize that certain firearm laws from foreign jurisdictions cannot enforced by certain Columbia County officials (with exceptions). The recognition that those Extraterritorial laws exist, demonstrates that IP 19-1 doesn’t “amend” any existing law, it simply creates a new prohibition on the official state actors of Columbia County.

To demonstrate further how IP 19-1 doesn’t “amend” the text of anything is the fact that IP 19-1 is inward looking. IP 19-1 applies only to Columbia County and certain Columbia County actors. On the face of the measure, it applies only internally in Columbia County, and not even on any city within Columbia County (IP 19-1 Section 4(F)(d). Nothing in IP 19-1 purports, or implies that IP 19-1 would have any impact or effect on any law outside of Columbia County, or any other jurisdiction. Accordingly, the Clerk’s assertion that some federal or state law is amended, is a specious and simply untrue. Certain Federal or State laws might become unenforceable by local Columbia County officials, but that does not amend the text of any federal, state or other law. Thus because there is no text amendment, nothing requires additional language to be included in the text of IP 19-1.

The County Clerk’s argument assumes that laws are actually being repealed by enactment of IP 19-1. Thus underlaying assumption is fatal to the Clerk’s full text argument. He assumes that laws are being repealed (repealed by implication - i.e.overwritten without being edited) but then the Clerk uses the case law for amendments to make his case. The County clerk is wrong that anything is being repealed, but to the extent that a law was being repealed by being “considered null, void and of no effect in Columbia County” , or by the language that says “not be recognized in Columbia County”, then the Clerk’s position fails for that reason as well. A ballot measure that repeals another law does not violate Article IV Section 1(2)(d) by omitting the text of what is being repealed.

The printing in full of sections referred to in the proposed legislation is not demanded by a constitutional requirement that the full text of the proposed legislation be set forth in an initiating petition. Opinion of the Justices, 309 Mass. 555, 560, 34 N.E.2d 431 (1941). The same rule should apply to repealed statutes. As a practical matter, the inclusion of the text of repealed statutes in the new enactment would create a substantial volume of surplus verbiage, and could produce confusion. The text of repealed statutes, like that of statutes referred to in the proposed measure, would be no part of the enacted statute should it pass, and some means would have to be found for eliminating such surplusage after enactment. No useful purpose would be served by quoting at length either the related statutes referred to in the proposed measure but left unchanged thereby or the statutes to be repealed thereby. Since such matter is no part of the proposed law, it need not be made a part of the initiating petition. The full-text requirement of our constitution means exactly what it says. The petition must carry the exact language of the proposed measure. It need include nothing more. *Schnell v. Appling*, 238 Or. 202, 204-05, 395 P.2d 113, 114 (1964).

*Kerr v. Bradbury*, 193 Or. App. 304, 310 (2004). The Oregon Supreme Court interpreted Article IV, section 1, to require publication only of amendatory wording, and that construction is controlling. *Kerr v. Bradbury*, 193 Or. App. 304 (2004). Any repealing language would not be required.

In summary, there are no words being added to, or subtracted from any pre-existing federal, state or local law, constitution or regulation, thus no amendment is being made, and no additional “text” is required to be inserted into IP 19-1.

**2) IP 19-1 embraces one subject and matters connected to that subject.**

The County Clerk correctly cites the applicable legal test for the single subject rule, which is: whether there is a single subject or a “unifying principle” and then if there are any other matters whether those matters are properly connected to that subject and the unifying principle. *McIntire v. Forbes*, 322 Or 426 (1996). But then the Clerk doesn’t apply that test.

 Every single section of IP 19-1, and nearly every subsection of IP 19-1 uses the word “firearm”, “arms” or “second amendment”. Only Section 2, subsections A, G, H, I (which are recitals about the constitution) and Section 4, subsection A(8) (which is about firearm ammunition and accessors), and the severability and effective date clause don’t use those words. Section 4 “Penalties” subsections B-F and Sections 5-7 are the enforcement mechanisms so they directly relate to the unifying principle and topic of firearms enforcement. The subject here is clearly firearms, or more precisely -- enforcement of firearms regulations by Columbia County. The clerk goes on to list what he calls “general legal topics” from IP 19-1 Section 4, but he neglects to accept the reality that every one of those relates to firearms and is talking about firearms, the subsections use the words firearm itself: A(1) firearm taxes; A(2) firearm registration; A(3) firearm tracking; A(4) firearm background checks; A(5) firearm transfers of possession; A(6) confiscation of firearms; A(9) open and concealed carry of firearms.

The County Clerk makes a poor attempt to characterize those as unrelated topics, it is as if he is trying to make the argument that because taxes don’t relate to background checks, that somehow there is more than one subject. The defect in the Clerk’s argument is that the proposed measure deals with enforcement of firearms taxes, firearms background checks etc. Every one of the substantive subsections in 19-1 directly deal with the single subject of firearms, and are directly related to the unifying principle of enforcement of firearms regulations by Columbia County. They are all matters that are directly, and expressly related to the single subject because they are exclusively about firearms[[3]](#footnote-3) and the enforcement of firearm regulations. IP 19-1 has only a few substantive sections (Sections 3, 4, 5), the Oregon Supreme Court has ruled that many other initiatives, much more complex in nature and even more detailed, were properly single subject[[4]](#footnote-4).

 Thus, every substantive provision of the entire proposed IP 19-1 relates to either firearms, firearm accessories and enforcement of the prohibition contained in IP 19-1. These are the same subject so we don’t even need to go as far as the test for “matters properly connect to”, but IP 19-1 would pass that test as well. Apparently the County Clerk doesn’t realize that enforcement of firearms regulations is related to firearm registration, firearm tracking, firearm ownership, firearm possession, firearm transfers etc. and that the penalties of a fine, and private right of action for violation of IP 19-1 are again, directly and exclusively related to violation of the same firearm regulation enforcement prohibition. The subject is the same, and every provision is directly related to each other.

 In his argument about single subject, the County Clerk makes illegitimate, premature and inappropriate arguments about “contract law”, “budget law”, “preemption”, “nullification” and argues about whether voters will or will not support IP 19-1. Neither the County Clerk’s subjective opinion about those matters, nor the actual merits of any of those kids of argument is ripe for consideration during an Article IV, Section 1 review by a County Clerk, nor an ORS 250.168 appeal. As explained in Petitioner’s opening Petition, the Oregon Supreme Court and Court of Appeals have ruled many times that a court cannot inquire into the substantive validity of a measure -- i.e., into the constitutionality, legality or effect of the measure's language -- unless and until the measure is passed. *Lowe v. Keisling*, 130 Or App 1 (1994). To do otherwise would mean that the courts would on occasion be issuing an advisory opinion. *Foster v. Clark*, 309 Or 464, 469-470 (1990). “Courts have jurisdiction and authority to determine whether a proposed initiative or referendum measure is one of the type authorized by Or Const Art I § 1(5) to be placed on the ballot. \* \* \* On the other hand, a court may not inquire into general questions of constitutionality, such as whether the proposed measure, if enacted, would violate some completely different portion of the constitution." *Lowe v. Keisling*, 130 Or App at 15-16 (1994) citing *Holmes v. Appling*, 309 Or at 469-71.

 The County Clerk has ignored the law, failed to apply the legal standards correctly and seeks to insert his own opinion about the policy merits of IP 19-1. The Clerk complains about the practical effects on contracts, future budgets, pre-emption, and more. That is improper. *Lowe v. Keisling*, 130 Or App at 15. The voters have the right to propose ballot measures to the residents of their County to enact legislation. All legislation may have multiple effects on the government that enacted it, that is simply not one of the constitutionally sound basis for the Clerk refusing to approve IP 19-1 for circulation. Does the County Clerk seriously intent to argue that Measure 11 (mandatory minimum sentencing); Measure 5 (property tax limitations); Measure 70 (creating the state lottery) and others, didn’t affect budgets, contracts, and the day to day or year to year administration of governments? Legislation by its very nature, creates the boundaries in which IP 19-1 squarely relates to a single subject -firearms in Columbia County and the matters that are closely connected to that subject like enforcement. IP 19-1 should be approved for circulation.

 **3). IP 19-1 is a legislative prohibition on county officials taking certain actions.**

“In classifying an enacted or proposed law as legislative in character (and subject to the initiative and referendum provisions in the Oregon Constitution) and not executive, administrative, or adjudicative in nature, Oregon courts assess the law to determine if it makes policy of general applicability and is more than temporary in duration (and is thus legislative in nature), or if it applies previous policy to particular actions, or is otherwise compelled in substance or process by predicate policy (and is thus executive, administrative, or adjudicative in nature)”. *Rossolo v. Multnomah Cty. Elections Div*., 272 Or App 572, 584 (2015). Whether a particular municipal activity is 'administrative' or is 'legislation' often depends not on the nature of the action but the nature of the legal framework in which the action occurs." *Foster*, at 474; see also *Lane Transit District v. Lane County*, 327 Or 161, 168-69 (1998). As the County Clerk recognizes, there is currently no County policy or County legislation that includes the prohibition contained in IP 19-1. Section 3 of IP 19-1 is literally an outright prohibition that applies permanently to County actors. The main substantive provision of IP 19-1 is:

A. Other than compliance with an order of the court, notwithstanding any law, regulation, rule or order to the contrary, no agency of the Columbia County Government, political subdivision of this county, or employee of an agency or political subdivision of this county acting in his or her official capacity shall:

 1) Knowingly and willingly, participate in any way in the enforcement of any act, law, order, rule, or regulation issued regarding a personal firearm, firearm accessory, or ammunition.

2) Utilize any assets, county funds, or funds allocated by the state to the county, in whole or in part, to engage in any activity that aids any agency, agent, or corporation providing services to the state or federal government in the enforcement or any investigation pursuant to the enforcement of any act, law, order, rule, or regulation issued regarding a personal firearm, firearm accessory, or ammunition.

These two prohibitions are general in nature, permanent, and apply globally to the entire class of county actors when acting in their official capacity. IP 19-1 is clearly not the kind of day to day business decision that administrators of a county make. Moreover, logically a county administrator could not prohibit such government actors, nor create the penalties created by IP 19-1. A monetary fine, and civil cause of action are clearly only available through the exercise of legislative powers.

Another factor that can weigh on whether an initiative is legislative or administrative is whether there is a prior legislative policy requiring the action being proposed in the ballot measure. The Oregon Supreme Court has said that the crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or executing a law already in existence. *Campbell v. Eugene*, 116 Or 264, 276 (1925). In the present case, there is no prior policy prohibiting County officials from enforcing foreign firearms laws such as contained in IP 19-1. In fact, quite the opposite is true. The County Clerk essentially admits that IP 19-1 is a change, would be new law and thus would be legislative, when he points out in his argument that IP 19-1 would cause the County to take actions that are contrary to its current day to day administrative activity. If that is true, that is practically the definition of new legislative policy – when it forces a change to a variety of undefined and to be determined administrative actions. The County Clerk says this might mean that County personnel would have to change existing practices (change whether it can meet with certain people or have certain meetings, or work in certain partnerships), and affect the manner and means of how the county conducts its day to day administrative business. Thus, IP 19-1 makes legislation. That legislation is a significant change from the prior non-policy. A simple review of IP 19-1 demonstrates that it is both permanent in nature, and of general applicability that will guide and direct the county generally but does not get into the weeds of day to day administration any more than say the 1st, 2nd 4th, 5th, Amendment of the United States Constitution does. Yes, a civil rights protection may create a blanket prohibition on the government taking certain acts, but that does not make it administrative.

 Should IP 19-1 obtain enough signatures to appear on the ballot, the voters will be asked to make the decision if they want to prohibit Columbia County officials from using County time and money to enforcing certain firearms laws. There is no other Columbia County ordinance that requires such a prohibition. Thus, IP 19-1 is also not implementing any prior policy.

The County Clerk makes the mistake of asserting that the firearms laws from other jurisdictions are the pre-existing policy. If that was true, then IP 19-1 would have to be implementing THOSE pre-existing policies. *Rossolo v. Multnomah Cty. Elections Div*., 272 Or App 572, 584 (2015) (explaining that if a ballot measure applies previous policy, or is compelled by prior legislation, it may be administrative). But again, there is no pre-existing policy or legislation that dictates or even suggests that Columbia county can or should prohibit the actions prohibited by IP 19-1. If there was some existing policy or legislation that was being implemented via IP 19-1 then the County Clerk would have to point that out. They cannot, because IP 19-1 does not implement any prior policy or legislation, it creates new legislation, it is different than anything on the proverbial books as it relates to Columbia County. There simply is no prior ordinance or County legislation OR policy that requires the prohibitions contained in IP 19-1. Those facts dictate that IP 19-1 be classified as legislative. The prohibition contained in 19-1 is being made from scratch to provide additional, currently non-existent, protections to residents of Columbia County.

 The County Clerk complains that a flat prohibition upon County employees may be hard to implement and affect the County’s daily administration of affairs. Yes, ordinances, rules are policy by their very nature are legislative and the government sometimes must adjust its practices to conform to the law. IP 19-1 specifically enacts a new local law that prohibits the County and all of its actors from doing two substantive things. The County will almost certainly have to modify its behaviors and ensure that its actions follow and comport to the new law. However, the policy itself – such as IP 19-1, is not the administrative decision, the administrative decision is the actions that the County takes to comply with the requirements of 19-1, when and if it becomes new County legislation. Once again, in his argument the County Clerk appears to get the definitions backwards. Legislation enacts the rule, creates the boundary of civil conduct. That is what IP 19-1 establishes, a rule, a prohibition. If IP 19-1 passes, then the County Commissioners and other departments or agencies will be tasked with the administrative aspects of making sure they follow the IP 19-1 prohibition in their daily affairs.

 The substance of IP 19-1 is legislative because it squarely meets the judicial definitions of legislative in nature, creates new policy, and is entirely outside the realm of anything Columbia County has done or could do administratively.

**CONCLUSION**

For the reasons explained above, the County Clerk’s analysis is incorrect. IP 19-1 complies with the full text rule and relates to a single subject that is legislative in nature.

DATED this 15th day of February 2019.

Tyler Smith & Associates, P.C.

s/ Tyler Smith\_\_\_\_\_\_\_\_\_\_\_

Tyler Smith, OSB# 075287

Of Attorneys for Petitioner

181 N. Grant Street, Suite 212

Canby, OR 97013

Phone: 503-266-5590; Fax: 503-212-6392

Tyler@RuralBusinessAttorneys.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15th of February 2019 I caused a true copy of **REPLY TO PETITION CHALLENGING COUNTY CLERK’S MEASURE 12-72 DETERMINATION and Exhibits** **1 and 2** 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:

Raven C. Brumbles

67251 Maple Crest Road

Deer Island, OR 97054

Donald Clack

Columbia County Elections

230 Strand St.

St. Helens OR 97051

Columbia County Clerk

230 Strand St.

St. Helens OR 97051

 Mailing was done by \_\_X\_ first class mail, and by \_\_\_\_ certified or \_\_\_\_ registered mail,

return receipt requested with restricted delivery, or \_\_\_\_ express mail, eFiling \_\_X\_\_\_, and e-mail \_\_\_\_.

DATED this 15th day of February 2019.

Tyler Smith & Associates, P.C.

s/ Tyler Smith\_\_\_\_\_\_\_\_\_\_\_

Tyler Smith, OSB# 075287

Attorney for Petitioner

181 N. Grant Street, Suite 212

Canby, OR 97013

Phone: 503-266-5590; Fax: 503-212-6392

Tyler@RuralBusinessAttorneys.com

1. The County Clerk erroneously attempts to argue about possible pre-emption in a footnote, but that kind of argument has been expressly rejected by the Oregon Supreme Court as being premature as an unconstitutional advisory opinion if made before the measure has even been passed by the voters. *Lowe v. Keisling*, 130 Or App 1 (1994); *Foster v. Clark*, 309 Or 464, 469-470 (1990); *Holmes v. Appling*, 309 Or at 469-71. [↑](#footnote-ref-1)
2. Brand new for Columbia County, however other Counties in Oregon have already passed measures the same or similar to IP 19-1 and qualified for the ballot and were enacted – raising issues under *Bush v. Gore*, 531 U.S. 98 (2000). [↑](#footnote-ref-2)
3. Firearm accessories, parts and ammunition are also clearly the same “subject” for purposes of Article IV, Section 1 analysis and the County Clerk does not argue the contrary. [↑](#footnote-ref-3)
4. “The fact that Measure 3 adds almost two pages of provisions dealing with forfeitures to a single section of the Oregon Constitution is consistent with that designation. The measure imposes various procedural and substantive limitations on forfeiture proceedings, establishes priorities for and limitations on the distribution of forfeiture proceeds (including proceeds from federal forfeiture proceedings that are available to the state), creates a state agency to monitor and report on forfeitures, and provides a civil penalty for violating its provisions. *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or. 496, 503, 145 P.3d 151, 154-55 (2006)(measure upheld and constitutional and one-subject). [↑](#footnote-ref-4)