

1 EGAN, J., concurring.

2 I fully agree with and endorse the majority's disposition and reasoning in
3 this case. I write separately to draw attention to the disturbing implications at the heart of
4 Intervenor's arguments and the Ordinance itself because, as George Orwell wrote in
5 1946, "if thought corrupts language, language can also corrupt thought. A bad usage can
6 spread by tradition and imitation even among people who should and do know better."

7 During the course of argument, Intervenor's counsel referred to alleged
8 United Nations (UN) and "international firearms laws." Those references allude to the
9 conspiracy theory that the UN has or will impose *mandates* upon the federal government
10 that will require state and local governments to do the bidding of the UN, specifically to
11 disarm the American public in violation of the Second Amendment to the United States
12 Constitution and Article I, section 27, of the Oregon Constitution. In other words,
13 Intervenor's came before this court and referenced *UN mandates*, which, as explained
14 below, is a well-documented trope meant to invoke white supremacist, antisemitic fear of
15 a takeover of our country by outsiders and minorities who are manipulated by an elite
16 class of supervillains.

17 One purported "solution" to this entirely fictitious problem--a solution
18 which has been advocated for by a group called the Constitutional Sheriffs and Peace
19 Officers Association (CSPOA)--is for county sheriffs to be given the power to determine
20 which firearms laws are constitutional. In keeping with that "solution," Section 3 of the

1 Ordinance provides:

2 "It shall be the duty of the Sheriff of Columbia County to determine * * *
3 whether any federal, state or local regulation affecting firearms, firearms
4 accessories and ammunition, that is enforceable within his/her jurisdiction,
5 violates the Second, Ninth, or Tenth Amendments to the Constitution of
6 these United States, or Article 1, sections 27 and 33 of the Constitution of
7 the State of Oregon, as articulated herein."

8 As explained below, both counsel's argument concerning *UN mandates* and
9 the Ordinance's solution have their origins in the ideology of white supremacist
10 nationalism which runs contrary to the tenets of our constitutional republic.

11 *The Purpose of this Concurrence*

12 As noted, I agree with the majority's disposition and reasoning in this case;
13 the majority opinion grapples with justiciability and preemption in a manner appropriate
14 for an appellate court.

15 On occasion, however, individual members of the court must call out
16 illegitimate *quasi-legal* arguments and theories for what they are--*viz.*, antisemitic and
17 racist tropes. Otherwise, those *quasi-legal* arguments and theories gain an air of legal
18 legitimacy from which future litigants may seek to advance unconstitutional causes. The
19 duty of a judge to call out such *quasi-legal* arguments and theories for what they are is
20 particularly acute when counsel for a party comes before this court and asks us to adopt
21 such a trope in upholding a facially invalid ordinance.

22 I must be clear that the flawed *quasi-legal* argument offered by Intervenors-
23 -*viz.*, the UN wants to disarm Americans--and the proposed solution--*viz.*, imposing a
24 duty on county sheriffs to determine which laws are constitutional--have their origins in

1 the insidious effort to oppress, in violation of fundamental notions of due process and
2 equal protection under the rule of law.¹ And in doing so, the Ordinance undermines, not
3 elevates, the rights guaranteed by the United States Constitution.

4 *The Ordinance is Contrary to the Tenets of Our Constitutional Republic*

5 As noted, the plain language of Section 3 of the Ordinance mandates that a
6 *singular* county sheriff have the duty to determine the constitutionality of any state or
7 federal law concerning firearms. According to the Interveners, that provision would
8 prevent the imposition of *UN mandates* in Columbia County, Oregon.

9 Section 3 of the Ordinance raises the question: What is the role of sheriffs
10 and what is the role of courts under our system of government? That question brings to
11 bear just one of the many foundational problems with the Ordinance: Deciding whether a
12 law is unenforceable because it is unconstitutional is not the function of a county sheriff.
13 See ORS 206.010 (setting forth the duties of Oregon sheriffs). Instead, under our system
14 of government, it is unquestionably the province and duty of the courts. US Const, Art
15 III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court,
16 and in such inferior Courts as the Congress may from time to time ordain and

¹ This journalistic function of a concurrence was best characterized by Judge James in *State v. Bledsoe*, 311 Or App 183, 197, 487 P3d 862, *rev den*, 368 Or 637 (2021) (James, J., concurring):

"Judicial opinions serve many functions, and one of those is journalistic. Our opinions are dispatches from the edge--moments, recounted for posterity, of how Oregon's laws * * * and the lives of its citizens, intersect."

1 establish."); Or Const, Art VII (Amended), § 1 ("The judicial power of the state shall be
2 vested in one supreme court and in such other courts as may from time to time be created
3 by law."); *see also Marbury v. Madison*, 5 US 137, 177, 2 L Ed 60 (1803) ("It is
4 emphatically the province and duty of the judicial department to say what the law is.").

5 There is no dispute that courts, not sheriffs, decide whether a law violates
6 the First Amendment to the United States Constitution or Article I, section 8, of the
7 Oregon Constitution; no dispute that courts, not sheriffs, decide whether, for example, a
8 county policy concerning search and seizure runs afoul of the Fourth Amendment to the
9 United States Constitution or Article I, section 9, of the Oregon Constitution; and no
10 dispute that courts, not sheriffs, decide when governmental conduct has violated the Due
11 Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the
12 United States Constitution. Similarly, there can be no dispute that courts, not sheriffs,
13 decide when a "federal, state or local regulation affecting firearms, firearms accessories
14 and ammunition," violates the Second Amendment to the United States Constitution or
15 Article 1, sections 27 and 33 of the Oregon Constitution.

16 Those observations about the roles of courts and sheriffs in our system of
17 government in no way denigrate the courageous work of those who serve as sheriffs and
18 deputy sheriffs in Oregon. It is sheriffs and deputy sheriffs, *not judges*, who perform the
19 often-dangerous task of enforcing criminal laws, solving crimes, and protecting our
20 courtrooms. That work is essential to ensuring our communities are safe for Oregonians
21 and democracy. And that system of checks and balances--that division of labor--is an

1 essential and an enduring feature of our republic, which is violated by Section 3 of the
2 Ordinance.

3 The Ordinance raises another question: Can laws enacted by a county
4 supersede those enacted by the legislative branches of the state and federal governments?
5 The answer to that question is also no.

6 Pursuant to the Supremacy Clause of the United States Constitution,
7 Columbia County, Oregon, cannot enact an Ordinance that contravenes federal law.
8 *AT&T Communications v. City of Eugene*, 177 Or App 379, 401, 35 P3d 1029 (2001), *rev*
9 *den*, 334 Or 491 (2002) ("The Supremacy Clause of the United States Constitution,
10 Article VI, clause 2, invalidates state or local laws interfering with, and being contrary to,
11 federal law." (Internal quotation marks omitted.)); *see also Altria Group, Inc. v. Good*,
12 555 US 70, 76, 129 S Ct 538, 172 L Ed 2d 398 (2008) (explaining that state laws that
13 conflict with federal laws are "without effect"). Nor can Columbia County, Oregon,
14 enact an Ordinance that contravenes Oregon law. *La Grande/Astoria v. PERB*, 281 Or
15 137, 142, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978) ("[T]he validity
16 of local action depends * * * on whether it contravenes state or federal law."). Yet, the
17 Ordinance does just that by declaring federal and state enactments are to be treated as if
18 they are "null, void and of no effect in Columbia County, Oregon" and giving the sheriff
19 of Columbia County, rather than the courts, final say concerning the constitutionality of
20 enactments concerning firearms.

21 Put plainly, the Ordinance is repugnant to the separation of powers under

1 the United States Constitution and the Oregon Constitution, and is repugnant to the
2 framers' constitutional design. It debases--not protects--the rights guaranteed thereunder.

3 *The Antisemitic and Racist Origins of the Ordinance*

4 The conclusion that the Ordinance is patently violative of the state and
5 federal constitutions raises another question--what is the motive behind the Ordinance?

6 The sponsors of Initiative Measure 5-270 and Initiative Measure 5-278,
7 which became the Ordinance, failed to offer up a substantive statement in support of, or
8 an explanation for, their proposals that would have explained their purpose in sponsoring
9 those measures.² But in recent years, "Second Amendment Sanctuary Ordinances" have
10 been proposed around the United States and adopted in hundreds of counties³ as part of a

² See *Official Columbia County Voters' Pamphlet, General Election, Nov 6, 2018* (no statement in support of the proposed ordinance); *Official Columbia County Voters' Pamphlet, General Election, Nov 3, 2020*.

In the 2020 Voters' Pamphlet, the only statement in support of Initiative Measure 5-278 came from Oregon Firearms Federation OFF. In its hyperbolic rhetoric, OFF stated:

"Even as Portland politics continues to condone chaos on our streets, efforts continue to make sure you are helpless to protect yourself and your family. * * * Year after year, politicians in Salem and extremists in Portland work overtime to enact new laws and rules to restrict your 2nd Amendment rights or make self-defense firearms useless, if available at all. * * * [T]he same people who are looting and destroying property are demanding that police be neutered."

This statement offered no meaningful explanation of Initiative Measure 5-278.

³ A conservative estimate of the number of Second Amendment Sanctuary Ordinances and Resolutions adopted by local governments in the United States is 860. And by some estimates, approximately 1,900 counties are covered by Second

1 nationwide effort promoted by the CSPOA.⁴ Such ordinances have notably consistent
2 language.⁵

3 CSPOA claims to eschew racist ideology, but in fact its leaders embrace
4 racist and white nationalist ideologies. The growing "constitutional sheriffs" movement
5 intends to increase the risk of conflict between local law enforcement and federal
6 authorities. The movement is animated by the *deeply flawed* and ahistorical view that
7 county sheriffs hold ultimate law-enforcement authority in each individual county
8 outranking federal and state authority. This *deeply flawed* and legally incorrect analysis
9 holds that the superiority of county authority is deeply rooted in Anglo-American law.
10 The anti-democratic ideas and *quasi-legal theories* propounded by the CSPOA and
11 embedded in Second Amendment Sanctuary Ordinances have their origins in the writings
12 of William Potter Gale, who founded the *posse comitatus* movement in the 1960s. They
13 also have their origins in the writings of the Aryan Nation, an antisemitic, white

Amendment sanctuary legislation because of legislation passed at either the state or county level..

⁴ See *Statement of Positions: The Right to Keep and Bear Arms (RTKBA) The Second Amendment*, CSPOA, <https://cspoa.org/sop/> (accessed Jan 5, 2023); *Resolution of the Constitutional Sheriffs and Peace Officers Association*, Jan 24, 2014, CSPOA, <https://cspoa.org/wp-content/uploads/cspoa-resolution-Final-20140128.pdf> (accessed Jan 5, 2023).

⁵ See footnote 3. With over 860 Second Amendment Sanctuary Ordinances and Resolutions from all over the United States, every section of the Ordinance is simply a reflection of the multitude of sections and subsections of other ordinances or resolutions in effect somewhere around the country.

1 supremacist group.

2 The premise of such writings is the antisemitic and racist conspiracy theory
3 that Jews are at the heart of America's problems, that people of color are unwitting pawns
4 to be manipulated by one side or the other, and that zealots must prepare for a final battle
5 in the last days. The proponents of these ideas claim that a cabal of elites or globalists
6 (code words for Jews) in the UN, or the fictional New World Order or Zionist
7 Occupational Government, manipulate our federal government and, by extension, state
8 governments. These ideas are, of course, nothing new, unique, or intelligent: They are,
9 instead, just a rehashing of the ancient trope of a secret Jewish government; they are the
10 retelling of a lie that led to the murder of over six million Jews within living memory.

11 That same racist and antisemitic dogma was reflected in the language of
12 militiamen who carried assault rifles as counterforces to political protest while African
13 Americans in Ferguson, Missouri, were arrested for mere suspicion of carrying guns;
14 reflected the treatment of white people with guns as contrasted against the disparate state
15 sanctioned killing of minorities with guns; and used by the Oath Keepers and Proud Boys
16 to attempt to create a false narrative of badge verses badge conflicts at the Oregon State
17 Capitol on December 21, 2020, and again at the United States Capitol on January 6,
18 2021. The dogma can also be identified by the shape of the language and arguments used
19 to support Second Amendment Sanctuary Ordinances that claim to protect an *absolute*
20 *right* to guns, and the authority of county sheriffs to enforce that *absolute right*.

21 Intervenor's reference at oral argument about *UN mandates* in support of an

1 *absolute right* to firearms threatens to give legal foundation to a world view that
2 embraces religious, racial, and ethnic hatred.⁶ The arguments propounding *unfettered*
3 *access* to guns, ammunitions, and implements of destruction give rise to waging of war
4 on government because the proponents believe that our government is infected by those
5 they hate. This hate is unquestionably embedded in the trope that the *UN* or some other
6 nefarious entity is manipulating government behind the scenes and that the courts are
7 simply tools of those manipulations. As a judge, sworn to uphold the Oregon
8 Constitution and the United States Constitution, I cannot stand by without identifying the
9 origins of that argument, and the origins of the Ordinance.

10 The history of white supremacist ideology in this country is older than the
11 United States Constitution; it dates to the moment enslaved Africans were brought ashore
12 in North America in 1619. The long arc of American democracy has mitigated some of
13 its largest evils by ending chattel slavery, granting women's suffrage, ending *de jure*
14 racial and gender discrimination, and more recently ending prohibitions against same-sex
15 marriage and supporting efforts to eradicate discrimination against LGBTQ+ individuals.
16 However, as Mr. Orwell reminded us nearly 80 years ago, "[o]ne cannot change this all in
17 a moment, but one can at least change one's own habits, and from time to time one can
18 even, if one jeers loudly enough, send some worn-out and useless phrase--some * * *
19 lump of verbal refuse--into the dustbin, where it belongs."

⁶ Attorneys, particularly during legal argument, must be cautious with their language. As Desmond Tutu observed, "Language is very powerful. Language does not just describe reality. Language creates the reality it describes."

1 Thus, to the dustbin goes the argument of *UN mandates* and *constitutional*
2 *sheriffs*.