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2
3
4 BEFORE THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF COLUMBIA

6 IN THE MATTER OF THE PETITION)
7 of the Board of County Commissioners)
8 of COLUMBIA COUNTY, a political)
subdivision of the State of Oregon,)

9 Petitioner.

Case No.

10 For a Judicial Examination and)
11 Judgment of the Court as to the)
12 Regularity, Legality, Validity and)
13 Effect of the Proposed Ordinance)
Regulating the Employment of)
Unauthorized Aliens)

PETITION FOR VALIDATION OF
LOCAL GOVERNMENT ACTION
(Special Statutory Proceeding; ORS
33.710 to 33.720; No Jury Trial Available)

14
15 Petitioner alleges, as follows:

16 1.

17 Columbia County (the "County") is a political subdivision of the State of Oregon.
18 The Board of County Commissioners (the "Board") serves as the governing body of the
19 County.

20 2.

21 ORS 33.710(2)(e) authorizes the circuit court to conduct a judicial examination
22 and provide a judgment of the court as to the regularity and legality of any decision of
23 the governing body that raises novel or important legal issues that would be efficiently
24 and effectively resolved by a proceeding before the question becomes effective, when
25 the decision will (A) require a significant expenditure of public funds; (B) significantly
26 affect the lives or businesses of a significant number of persons within the boundaries
27 of the governing body; or (C) indirectly impose a significant financial burden on the cost
28 of conducting business within the boundaries of the governing body.

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1 3.

2 ORS 33.710(2)(f) authorizes the circuit court to conduct a judicial examination
3 and provide a judgment of the court as to the regularity and legality of the authority of a
4 county governing body to enact any ordinance, resolution, or regulation.

5 4.

6 ORS 33.720(1) provides that a judicial examination under ORS 33.710 to 33.720
7 shall be in the nature of a proceeding in rem, and that the court shall follow the practice
8 and procedure of an action not triable by right to a jury. Jurisdiction of the County is
9 obtained by publication of notice directed to the County; and jurisdiction of the electors
10 of the County is obtained by publication of notice directed to all electors, freeholders,
11 taxpayers and other interested persons without naming them individually.

12 5.

13 This petition is filed pursuant to ORS 33.710 and 33.720 for a judicial
14 determination and judgment of the Court as to the regularity, legality and effect of
15 proposed Ordinance No. 2008-6, entitled "In the Matter of Adopting an Ordinance
16 Regulating the Employment of Unauthorized Aliens." A true copy of proposed
17 Ordinance No. 2008-6 is attached hereto as Exhibit "1" and is incorporated herein by
18 this reference.

19 6.

20 At the general election on November 4, 2008, the voters of the County approved
21 Initiative Measure 5-190, the Employment of Unauthorized Aliens initiative. A true copy
22 of the ballot title for the Employment of Unauthorized Aliens initiative is attached hereto
23 as Exhibit "2" and is incorporated herein by this reference. A true copy of the County
24 Clerk's certification of election results for Measure 5-190 is attached hereto as Exhibit
25 "3" and is incorporated herein by this reference.

26 7.

27 Ordinance No. 2008-6, "In the Matter of Adopting an Ordinance Regulating the
28 Employment of Unauthorized Aliens" will implement Measure 5-190, while correcting

1 several inadvertent drafting errors and legal problems in the Measure. Exhibit "A" to
2 Ordinance No. 2008-6 shows the amendments the County proposes to make to the
3 text of Measure 5-190 as bold font for additions, and as strikeout for deletions.

4 8.

5 ORS 203.060 states:

6 "Ordinances adopted under ORS 203.030 to 203.075 shall be
7 subject to judicial review and invalidation on account of
8 unreasonableness, procedural error in adoption, or conflict
9 with paramount state law or constitutional provision."

10 Ordinance No. 2008-6 is proposed to be adopted under ORS 203.030 to 203.075. The
11 County seeks a determination whether Ordinance No. 2008-6 is subject to invalidation
12 on account of unreasonableness, procedural error in adoption, or conflict with
13 paramount state law or constitutional provision.

14 9.

15 Section 8 of Measure 5-190 states:

16 "(t)his measure may not be amended, modified, or repealed
17 without being referred to the voters."

18 However, ORS 203.035(1) states:

19 "...the governing body or the electors of a county
20 may by ordinance exercise authority within the county
21 over matters of county concern, to the fullest extent
22 allowed by Constitutions and laws of the United States
23 and of this state, as fully as if each particular power
24 comprised in that general authority were specifically
25 listed in ORS 203.030 to 203.075."

26 ORS 203.035(1) gives the County governing body the same authority as it gives
27 electors to exercise authority over matters of county concern. The County seeks a
28 determination whether Section 8 of Measure 5-190 supercedes the authority granted to
the governing body by ORS 203.035(1). In addition, the County seeks a determination
whether the County is authorized to adopt, amend and repeal Ordinance No. 2008-6,
implementing Measure 5-190, without referring such action to the voters.

10.

Measure 5-190 and Ordinance No. 2008-6, implementing Measure 5-190, are

1 based primarily on Arizona's Legal Arizona Workers Act (House Bill 2779)(hereinafter
2 referred to as the "Arizona Act"), a copy of which is attached hereto as Exhibit "4" and is
3 incorporated herein by this reference. The Arizona Act was enacted on July 2, 2007,
4 and became effective on January 1, 2008. The Arizona Act amended certain existing
5 provisions in the Arizona statutes and added new provisions which were codified as
6 Sections 23-211 through 23-214 of the Arizona Revised Statutes. The Arizona Act
7 establishes a state-wide scheme for sanctioning employers that employ aliens who are
8 unauthorized to work. In addition, the Arizona Act imposes a mandatory obligation on
9 every Arizona employer to participate in the federal Basic Pilot Program for checking
10 employment eligibility (also known as "E-Verify"). The Arizona Act sanctions employers
11 who employ aliens who are unauthorized to work by suspending "licenses", as defined
12 in the Arizona Act. Measure 5-190, and Ordinance No. 2008-6, implementing Measure
13 5-190, sanction employers who employ aliens who are unauthorized to work by
14 suspending or revoking "licenses" as defined in the Measure, and in some cases
15 imposing civil fines in the amount of \$10,000.

16 11.

17 The Federal Immigration Reform and Control Act of 1986, 8 U.S.C. Section
18 1324a, (hereinafter, the "IRCA") states in part:

19 "The provisions of this section preempt any State or
20 local law imposing civil or criminal sanctions (other
21 than through licensing and similar laws) upon those
22 who employ or recruit or refer for a fee for employment,
23 unauthorized aliens." 8 U.S.C Section 1324a(h)(2).

24 The IRCA is set forth in Exhibit "5" which is attached hereto and is incorporated herein
25 by this reference. In *Chicanos Por La Causa, Inc. (CPLC) v. Napolitano*, No. 07-
26 017272 D.C. No. CV-07-01355-NVW, the United States Court of Appeals for the Ninth
27 Circuit addressed whether the IRCA preempts the Arizona Act, and held that the
28 Arizona Act is a "licensing law" within the savings clause of the IRCA (Section
1324a(h)(2)), and therefore is not preempted. The Ninth Circuit adopted Black's Law
Dictionary definition of "licensing" as "(a) governmental body's process of issuing a

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1 license". *Id.*, at 13074. The Ninth Circuit also adopted Black's Law Dictionary definition
2 of "license" as "a permission, usually revocable, to commit some act that would
3 otherwise be unlawful." *Id.*

4 In *CPLC v. Napolitano* the Ninth Circuit upheld the Federal District Court
5 decision No. CV 07-02496-PHX-NVW (2008) (the "Wake decision"), which cites
6 legislative history on the adoption of the IRCA. A copy of the Wake decision is attached
7 hereto as Exhibit "6" and is incorporated herein by this reference. The Wake decision
8 cites the following legislative history:

9 "The penalties contained in this legislation are
10 intended to specifically preempt any state or local
11 laws providing civil fines and or criminal sanctions
12 on the hiring, recruitment or referral of undocumented
13 aliens." HR Rep No. 99-682(I), at 58 (1986).

12 The Wake decision finds that the Arizona Act imposes no fines or criminal sanctions
13 and therefore is not inconsistent with the legislative history of the IRCA. *Id.*, at 14.
14 However, the Ninth Circuit did not specifically address whether civil fines, like the ones
15 proposed in Ordinance No. 2008-6 are preempted under the IRCA. A copy of the Ninth
16 Circuit's decision in *CPLC. v. Napolitano* is attached hereto as Exhibit "7" and is
17 incorporated herein by this reference.

18 The County seeks a determination whether Ordinance No. 2008-6 is preempted
19 by the IRCA.

20 12.

21 The County may exercise authority within the County over "matters of county
22 concern". ORS 203.035(1) In *CPLC v. Napolitano* the Ninth Circuit reaffirmed the
23 holding in *De Canas v. Bica*, 424 U.S. 351, 356, 365 (1976), explaining that:

24 "The Supreme Court there upheld a state law prohibiting
25 the employment of unauthorized aliens against a
26 preemption challenge because it concluded that
27 the authority to regulate the employment of
28 unauthorized workers is 'within the mainstream' of
the state's police powers." *Id.*, at 13073.

The Ninth Circuit Court further held that:

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1 “We conclude that, because the power to regulate the
2 employment of unauthorized aliens remains within the
3 states’ historic police powers, an assumption of non-
preemption applies here.” *Id.*, at 13074.

4 While it is clear that the employment of unauthorized aliens is a matter of state
5 concern, neither the Supreme Court in De Canas nor the Ninth Circuit in CPLC v.
6 Napolitano addressed whether employment of unauthorized aliens is a matter of
7 county concern as required by ORS 203.035. The County seeks a determination
8 whether the employment of unauthorized aliens is a matter of county concern.

9 Ordinance No. 2008-6 requires employers to verify the employment eligibility of
10 employees within the state of Oregon but outside the County. The County seeks a
11 determination whether the employment of employees outside of the County is a matter
12 of county concern.

13
14 13.

15 Section IJ of Ordinance No. 2008-6 defines, a “license” to mean “***any agency
16 permit, certificate, approval, registration, charter or similar form of authorization that is
17 required by law and that is issued by any agency for the purposes of operating a
18 business in the County, including a) a building permit issued by the County or any city
19 within the County; and b) any business license.” The County seeks a determination
20 whether the definition of “license” in Ordinance No. 2008-6 is consistent with the
21 definitions of “licensing” and “license” adopted in CPLC v. Napolitano, No. 07-017272
22 D.C. No. CV-07-01355-NVW at 13074.

23 14.

24 The definition of “license” in Ordinance No. 2008-6 includes a business license
25 issued by the County or any city within the County. Columbia County does not issue
26 business licenses. One or more cities within the County may issue business licenses.
27 However, ORS 203.040 provides:

28 “Except by consent of the governing body or the
electors of a city and except in cities not regularly

1 operating as such through elected governmental
2 officials, ordinances adopted under ORS 203.030
3 to 203.075 in exercise of the police power shall not
4 apply inside an incorporated city.”

5 Neither the governing body or the electors of the cities within the County have
6 consented to the applicability of either Measure 5-190 or Ordinance No. 2008-6 inside
7 their incorporated cities. The County seeks a determination whether Ordinance No.
8 2008-6 would apply within the incorporated cities in the County despite ORS 203.040.

9 15.

10 Ordinance No. 2008-6 defines a “license” to include a “building permit”. Building
11 permits are regulated under state law. Two Oregon Revised Statutes address County
12 authority regarding the state building code. ORS 455.020(4) provides:

13 “This Chapter and any specialty code does not limit
14 the authority of a municipality to enact regulations providing
15 for local administration of the state building code; local
16 appeals boards; fees and other charges; abatement of
17 nuisances and dangerous buildings; enforcement through
18 penalties, stop-work orders or other means; or minimum
19 health, sanitation and safety standards for governing the
20 use of structures for housing, except where the power of
21 municipalities to enact such regulations is expressly
22 withheld or otherwise provided by statute.***”

23 ORS 455.040(1) additionally provides:

24 “The state building code shall be applicable and uniform
25 throughout this state and in all municipalities, and no
26 municipality shall enact or enforce any ordinance, rule
27 or regulation relating the same matters encompassed
28 by the state building code but which provides different
requirements unless authorized by the Director of the
Department of Consumer and Business Services.”

Upon finding that an employer has intentionally or knowingly employed an unauthorized
alien, for a first violation Sections IIF(1) and (2) of Ordinance No. 2008-6 permit or
require the Board of County Commissioners or the Court to order suspension of
licenses, including building permits, held by the employer. For a second violation within
the probationary period, the Ordinance requires the Board of County Commissioners or
Court to permanently revoke all licenses, including building permits, and to permanently
deny the employer the right to obtain licenses, including building permits in the future.

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1 The suspension, revocation or denial of building permits under Ordinance No. 2008-6 is
2 not related to any of the listed areas of permitted regulation under ORS 244.020(4).
3 Furthermore, the Director of the Department of Consumer and Business Services has
4 not authorized the suspension, revocation or denial of building permits for the
5 intentional or knowing employment of unauthorized aliens. The County seeks a
6 determination whether ORS 455.020(4) and ORS 455.040(1) prohibit the suspension,
7 revocation or denial of building permits as required by Ordinance No. 2008-6.

8 16.

9 Ordinance No. 2008-6 defines "license" to include "any agency permit, certificate,
10 approval, registration, charter or similar form of authorization that is required by law and
11 that is issued by any agency for the purpose of operating a business in this county****"
12 Columbia County issues several forms of land use permits "for the purpose of operating
13 a business". For example, such permits include, but are not limited to, Surface Mining
14 Operating Permits and Home Occupation Permits. A true copy of Article V of the
15 Columbia County Surface Mining Ordinance (the "SMO") is attached hereto as Exhibit
16 "8", and is incorporated herein by this reference. Article V prohibits mining without an
17 operating permit. A true copy of Columbia County Zoning Ordinance Section 1507,
18 related to Home Occupations, is attached hereto as Exhibit "9", and is incorporated
19 herein by this reference. Section 1507 prohibits home occupations without a permit.

20 A decision to grant, deny, or revoke an operating permit, a home occupation
21 permit, or other land use permit is a land use decision as defined in ORS 197.015(10).
22 Land use decisions must be made in accordance with the Statewide Planning Goals,
23 local Comprehensive Plan and land use regulations that apply. ORS 197.835.
24 Processes for the denial or revocation of land use decisions are set forth in Oregon law.
25 Specifically, ORS 197.763 requires notice and opportunity to be heard before a quasi-
26 judicial land use decision is made. Furthermore, the Oregon Land Use Board of
27 Appeals has exclusive jurisdiction to review any land use decision of a local
28 government, special district or a state agency in a manner provided in ORS 197.830 to

1 197.845. ORS 197.835. To the extent that the suspension, denial or revocation of a
2 “license” in Ordinance No. 2008-6 is a land use decision, the Ordinance does not follow
3 statutory land use processes. The County seeks a determination whether the
4 suspension, denial or revocation of a “license” as defined in Ordinance No. 2008-6
5 conflicts with Oregon land use laws, rules or regulations, and whether the County can
6 suspend, deny or revoke such licenses if such actions conflict with Oregon land use
7 laws.

8 17.

9 Section VIIA of Ordinance No. 2008-6 states:

10 “All County officials are required to enforce and uphold this
11 Ordinance. Willful refusal to follow the terms of this
12 Ordinance and perform the duties assigned herein, shall
13 constitute official misconduct and shall be dealt with
14 accordingly.”

15 ORS 162.405 states:

16 “(1) A public servant commits the crime of official
17 misconduct in the second degree if the person knowingly
18 violates any statute relating to the office of the person.
19 (2) Official misconduct in the second degree is a Class C
20 misdemeanor.” (Emphasis added).

21 ORS 162.415 states:

22 “(1) A public servant commits the crime of official
23 misconduct in the first degree if with intent to obtain
24 a benefit or to harm another:
25 (a) The public servant knowingly fails to perform a duty
26 imposed upon the public servant by law or one clearly
27 inherent in the nature of the office; or
28 (b) The public servant knowingly performs an act
constituting an unauthorized exercise of official duties.
(2) Official misconduct in the first degree is a Class A
misdemeanor.”

Ordinance No. 2008-6 changes the statutory definitions for official misconduct.
The County seeks a determination whether Section VIIA of Ordinance No. 2008-6 can
authorize a sentence of imprisonment despite the language of ORS 153.018.

18.

According to ORS 162.405 and 162.415, official misconduct is either a Class C
or Class A misdemeanor. Sentences for misdemeanors can include fines and

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1 imprisonment. ORS 161.615. However, ORS 203.065 provides that a violation of an
2 ordinance adopted pursuant to the County's authority granted in ORS 203.035 is a
3 Class A violation. And, ORS 153.018(1) provides that a person convicted of a violation
4 is subject to a fine, but not imprisonment. ("****the law creating a violation may impose
5 other penalties in addition to a fine but may not impose a term of imprisonment."). The
6 County seeks a determination whether Ordinance No. 2008-6 is consistent with ORS
7 153.018 despite authorizing imprisonment.

8 19.

9 Ordinance No. 2008-6 requires the Board of County Commissioners or the court
10 to impose a fine in the amount of \$10,000 against contractors or subcontractors who
11 are found to violate the Ordinance. The \$10,000 fine called for in the Ordinance
12 greatly exceeds the amount of fines established for Class A violations. ORS
13 153.018(2). Although ORS 203.065(1) allows the County to establish fine amounts
14 greater than established by statute in ORS 153.018(2), case law suggests that fines in
15 excess of \$1,000 are criminal in nature, subject to the protections of the criminal justice
16 system, i.e. the right to a jury, and the right to counsel. (See Brown v. Multnomah
17 County Dist. Ct., 280 Or 95, 105, 570 P2d 52, 58 (1977), where the court noted that a
18 fine of \$1,000 for driving under the influence of intoxicants, "if not in itself a criminal
19 rather than civil penalty, must be at the margin of legislative discretion. At the least it is
20 strong evidence of the punitive significance that the legislature meant to give this fine."
21 A copy of Brown is attached hereto as Exhibit "10" and is incorporated herein by this
22 reference. But, see State v. Roeder, 209 Or App 199, 207, 147 P2d 363, 367(2006),
23 rev. denied 342 Or 474, 155 P.3d 52 (2007), "****the proper focus is not on the amount
24 of the penalty involved, viewed as some abstract 'absolute,' but instead on the amount,
25 viewed in relation to the remedial purposes of the statutory scheme." A copy of Roeder
26 is attached hereto as Exhibit "11" and is incorporated herein by this reference. The
27 County seeks a determination whether the \$10,000 fine required to be imposed under
28 Ordinance No. 2008-6 is criminal in nature.

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Section II.D of Ordinance No. 2008-6 provides that appeals from a decision of the Board of County Commissioners shall be *de novo* to the Columbia County Justice Court. Sections IIF(1)(b) and IIF(2)(a) of Ordinance No. 2008-6 require the Justice Court to order an employer who is a contractor or a subcontractor to be fined the sum of \$10,000 for a violation of the Ordinance. Section VII.B authorizes the Justice Court, upon a citizen petition, to make appointments of "special County Counsel" to perform enforcement functions in the event any County official fails to enforce the Ordinance. The Columbia County Justice of the Peace District was established by Ordinance No. 2007-6 under the authority of ORS 51.010 et seq. A true copy of Ordinance No. 2007-6 is attached hereto as Exhibit "12" and is incorporated herein by this reference. The Columbia County Justice of the Peace District is not a court of record. ORS 51.025. ORS 51.080 sets forth the civil jurisdiction of a justice court and limits the recovery of money or damages to \$7,500. There is no statutory authorization for a Justice Court to make appointments of "special County Counsel" to perform enforcement functions. The County seeks a determination whether the Justice Court is authorized to order fines in the amount of \$10,000. The County also seeks a determination whether the Justice Court has authority to make appointments of "special County Counsel."

WHEREFORE, Petitioner prays:

1. That the Court fix a time and place for a hearing on this petition and direct the publication of a notice to Columbia County, Oregon, and to all electors, freeholders, taxpayers and other interested persons. Such notice shall be served on all parties in interest by publication of such notice at least once a week for three successive weeks in a newspaper of general circulation published in Columbia County, Oregon, where these proceedings are pending. Jurisdiction of this Court shall be complete within ten days after the date of final publication of such notice.

- 1 2. That any person interested may at any time before the expiration of the ten day
2 period appear and contest the validity of Ordinance No. 2008-6, entitled "In the
3 Matter of Adopting an Ordinance Regulating the Employment of Unauthorized
4 Aliens".
- 5 3. That these proceedings be tried forthwith and judgment rendered expeditiously,
6 declaring as follows:
- 7 A. Whether Ordinance No. 2008-6 is subject to invalidation on account of
8 unreasonableness, procedural error in adoption, or conflict with
9 paramount state law or constitutional provision.
- 10 B. Whether Section 8 of Measure 5-190 violates ORS 203.035(1).
- 11 C. Whether the County is authorized under ORS 203.035 to adopt, amend
12 and repeal Ordinance No. 2008-6 without referring such action to the
13 voters.
- 14 D. Whether Ordinance No. 2008-6 is preempted by the Federal Immigration
15 Reform and Control Act of 1986, 8 U.S.C. Section 1324a.
- 16 E. Whether the employment of unauthorized aliens in Columbia County is a
17 matter of County concern.
- 18 F. Whether the employment of unauthorized aliens outside of Columbia
19 County is a matter of County concern.
- 20 G. Whether the definition of "license" in Ordinance No. 2008-6 is consistent
21 with the definitions of "licensing" and "license" adopted in CPLC v.
22 Napolitano.
- 23 H. Whether Ordinance No. 2008-6 applies within the incorporated cities in
24 the County despite ORS 203.040.
- 25 I. Whether ORS 455.020(4) and ORS 455.040(1) prohibit the suspension,
26 revocation or denial of building permits as required by Ordinance No.
27 2008-6.
- 28 J. Whether the suspension, revocation or denial of a "license" as defined in

1 Ordinance No. 2008-6 conflicts with Oregon land use laws, rules or
2 regulations, and whether such actions need to comply with Oregon land
3 use laws.

4 K. Whether Section VII of Ordinance No. 2008-6 is lawful despite the
5 definition of official misconduct in ORS 162.405 and 162.415.

6 L. Whether Ordinance No. 2008-6 is consistent with ORS 153.018 despite
7 the fact that the Ordinance authorizes a penalty of imprisonment for
8 violations of the Ordinance.

9 M. Whether the \$10,000 fine required to be imposed under Ordinance No.
10 2008-6 is criminal in nature.

11 N. Whether the Columbia County Justice Court is authorized to order fines in
12 the amount of \$10,000.

13 O. Whether the Columbia County Justice Court has authority to make
14 appointments of "special County Counsel".

15 4. That the Court shall order other relief as it deems just and equitable.

16
17 DATED this _____ day of _____, 2008.

18
19 Sarah E. Hanson, OSB #98361
20 Of Attorneys for Petitioner
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