

No. 23-35124

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JENNIFER RAE GUNTER, an Oregon Elector; CHRISTINA
LYNN MILCAREK, an Oregon Elector; CHELSEA ANNE
WEBER, an Oregon Elector,

Plaintiffs-Appellants

v.

SHEMIA P. FAGAN, in her individual capacity and as
Secretary of State for the State of Oregon; LISA GAMBEE, in
her individual capacity and as Wasco County Clerk; KATHY
SCHWARTZ, in her individual capacity and as Wasco County
Commissioner; STEVE KRAMER, in his individual capacity
and as Wasco County Commissioner; SCOTT HEGE, in his
individual capacity and as Wasco County Commissioner

Defendants-Appellees.

On Appeal from the United States District
Court for the District of Oregon
No's. 3:22-cv-01252-MO / 3:22-cv-01675-MO
Hon. Michael W. Mosman

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT	2
I. ARTICLE III STANDING	2
II. FAILED TO STATE A CLAIM.....	17
III. STATUTE TRUMPS AGENCY GUIDELINE/MANUAL.....	17
IV. ARGUMENT CONCLUSION.....	30
V. CONCLUSION	36
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

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TABLE OF AUTHORITIES

Cases	Page(s)
<i>Babbitt v. United Farm Workers National Union</i> , 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).....	10
<i>Baker v. Hayden</i> 313 Kan. 667, 672, 490 P.3d 1164 (2021),.....	13
<i>Bell Atl. Corp. v Twombly</i> 550 U.S. 544, 555 (2007).....	16
<i>Burris v. Cross</i> 583 A.2d 1364, 1372 (Del. Super. 1990).....	33
<i>Clapper v. Amnesty International</i> , <i>USA (2013)</i>	9
<i>Clinton v. City of New York</i> , 524 U.S. 417, 430–31 (1998).....	9
<i>Curling v. Raffensperger</i> <i>Supp. 3d 1311, 1318-19 (N.D.Ga.2019)</i>	16,17
<i>Czyzewski v. Jevic Holding Corp.</i> , (2017).....	9
<i>Davis v. FEC</i> , 554 U.S. 724, 734 (2008).....	6
<i>Garland Favorito et al. v. Alex Wan et al</i> ;	10
<i>KNEA v. State</i> 305 Kan. 739, 747, 387 P.3d 795 (2017),.....	13
<i>Los Angeles v. Lyons</i> 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983),.....	11

Lujan v. Defenders of Wildlife,
504 U.S. 555, 560 (1992).....3

Massachusetts v. Environmental Protection Agency,
549 U.S. 497, 517, 522 (2007).....7

National Latino Media Coalition v. Federal Communications Commission
816 F.2d 785, 788 (D.C. Cir. 1987)22

Pennsylvania v. West Virginia,
262 U.S. 553, 593, 43 S. Ct. 658, 67 L. Ed. 1117 (1923)..... 10

Rosenblum v. Rosenblum
181 Misc. 78, 42 N.Y.S.2d 626, 630, 15

Simmons v. Block
782 F.2d 1545, 1550 (11th Cir. 1986)30

*Sons of Confederate Veterans et al. v. Henry County Board of
Commissioners*,..... 10

*Sons of Confederate Veterans et al. v. Newton County Board of
Commissioners*,..... 10

State v. Eileen Cassidy
(A-58-16) (078390).....29

State v. Stoll
312 Kan. 726, 734, 480 P.3d 158 (2021), 13

Supreme Court decision in Delaware
C.A. No. 2022-0641-NAC & C.A. No. 2022-0644-NAC, 10

Teigen v. Wisconsin elections commission
..... 15

Town of Cheswold v. Cent. Delaware Bus. Park
188 A.3d 810, 816 (Del. 2018)34

<i>Valley Forge Christian College,</i> 454 U.S. at 472, 102 S. Ct. 752	10
<i>Warth,</i> 422 U.S. at 501, 95 S. Ct. 2197	10
<i>XL Specialty Ins. Co. v. WMI Liquidating</i> Tr., 93 A.3d 1208, 1216 (Del. 2014)	34
<i>Zavilla v.Masse</i> 112 Colo. 183, 147 P.2d 823, 827,	15

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Statutes & Constitutional Provisions

5 U.S.C. 552 22,27,28

5 U.S.C. 553 22,27,28

52 U.S.C. 20921 25

52 U.S.C. 20961 25

52 U.S.C. 20962 25,26

52 U.S.C. 20971 2,24

1st Amendment 7,30

14th Amendment 15

Rule 165-007-0350..... 2,30

ORS 246.550 2,30

ORS 246.046 2,20,30

Rules

FRAP 32-1 47

FRAP Rule 30-1.3 1

FRAP Rule 30-1.4 1

Other Authorities

EAC Voting System Test Laboratory Accreditation Program Manual .. 21,26

EAC Voting System Testing and Certification Program Manual 18

Federal Registry 21,22,25,26,27,28

Help America Vote Act (HAVA) of 2002 18

Voluntary Voting System Guidelines of 2005 26

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INTRODUCTION

Under FRAP Rule 30-1.3. No Excerpts Required for Pro Se Party. If such a party does not file excerpts, counsel for appellee or respondent must file Supplemental Excerpts of Record that contain all the documents that are cited in the pro se opening brief or otherwise required by Rule 30-1.4, as well as the documents that are cited in the answering brief. Excerpts/SER missing from Appellee's Brief cited in Appellant's brief are [ECF 25] and [ECF 1,41].

In response to Appellee's Brief, footnote page 12, Plaintiffs request this panel give full equity and equality of grievances as Plaintiffs are proceeding pro se, on limited time, budget and without perfection which may not compare to seasoned law counsel. Nonetheless the controversy is unequivocally ripe, traceable, and plausible. All lower court and appeal documents should be given full review. Plaintiffs didn't argue everything that was put in their original filings. It is our understanding that the appellate court would review ALL filings from the lower court, therefore in respect of judicial equity, word limitations, lack of professional representation, and time constraints we spoke to standing, statute and the lower courts w/prejudice ruling. That doesn't negate the weight of all constitutional claims documented in the lower court now on appeal because we were unable to include them all efficiently. Plaintiffs have, throughout every preceding, conducted themselves and presented to the best of their abilities.

ARGUMENT

I. ARTICLE III STANDING

1. In Judge Mosman’s opinion [ECF Doc 19 pg. 5] he stated, “Plaintiffs have not alleged that they suffered an injury in fact as a result of any purported wrongdoing by Defendant Fagan, Wasco Defendants or Washington Defendants.” In Plaintiff’s FAC [ECF 17] and Wasco [ECF 1] we stated multiple wrongdoings throughout complaints such as, not limited to:
 - a. ([ECF 17] No. 36) “This lack of VSTL EAC accreditation not only violates Federal codes, pursuant to 52 U.S. Code § 20971¹(b)(2)(a), and official policy of the EAC for accrediting VSTL, but also violates Oregon Elections Division Chapter 165 Rule 165-007-0350², ORS 246.550³ and ORS 246.046⁴”.
2. Plausible failed federal standards of the VSTL’s rendered the SOS certifications invalid. Failure to ensure voter safety, equality, and utilizing an unaccredited VSTL for certification of Oregon machines is wrongdoing by all defendants. Deciding to procure such unlawful machines is also

¹ <https://www.law.cornell.edu/uscode/text/52/20971>

² https://oregon.public.law/rules/oar_165-007-0350

³ https://oregon.public.law/statutes/ors_246.550

⁴ https://oregon.public.law/statutes/ors_246.046

Wasco defendants wrongdoing.

3. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Court refers to injury in fact as “an invasion of a legally protected interest,” but in context, here and in the cases cited, it is clear the reference is to **any interest** that the Court finds protectable under the Constitution, statutes, or regulations. Those rights such as equal protections and rights to suffrage Plaintiffs have asserted amongst others in both complaints (FAC SOS [ECF 17]) and (Wasco [ECF 1]) Plaintiffs have suffered irreparable damage to their liberty interests by improper investigations and oversight by Defendants in their positions of trust as a parent party **authority** to plaintiffs. Defendants have been participating in illegal activities, that of elections, and subjecting Plaintiffs likewise illegally.
 - a. “**Authority**” as defined by *Black's Law Dictionary Sixth Edition*, is “*The official right or permission to act, esp. To act legally on another behalf.*” Defendants are an election authority.
4. Representing ourselves on topics within our complaints which had adverse effects on Plaintiffs monetarily, by media⁵ and even the SOS who attempted to skew public opinion and dismiss citizens legitimately

⁵ <https://www.oregonlive.com/politics/2022/09/oregon-voter-offices-flooded-with-records-requests-from-2020-election-deniers.html>

pleaded violations (FAC [ECF 17] Pg. 34 No. 65) Plaintiffs are being attacked by Media as “2020 election deniers” and “prolific records requestors” for asserting their constitutional rights and asking questions.

5. Plaintiffs unequivocally have a personal vested stake in elections they participate in. Elections must mean something, otherwise if the outcome never matters, why would people vote in the first place? It’s true that Plaintiffs haven’t alleged that their votes weren’t counted. It’s also **not known for certain** to either Plaintiffs or Defendants that our votes were counted **as intended**. Defendants haven’t provided proof as such. The only thing Plaintiffs can potentially prove is that their “voting envelope” was received and processed. Once separated from envelope, it’s impossible to prove that our cast vote was counted fully and not diluted thereafter. Plaintiffs **know** the facts surrounding VSTL EAC accreditation and the requirements of Oregon SOS oversight to use machines only certified for use from accredited laboratories (VSTL) as required by law. Plaintiffs also know machines used in Oregon elections and nationwide have commercial off-the-shelf (COTS) product parts from other nations (FAC [ECF 17] Pg. 27 No. 55(22) & Pg. 29 No. 56) and software on some of the machines was no longer supported by Microsoft (FAC [ECF 17] Pg. 31 No. 61 & Pg. 32 No. 61(e)).

6. Federal VSTL's without up-to-date accreditation certificates are plausible by the evidence shown through Plaintiffs' Complaint. If VSTL's weren't **properly accredited**, then votes were counted on unlawful machines subject to tampering. It would further render the SOS certification nullified under Oregon law.
 - a. Example: Customer enters the bank for a deposit, that customer hands the money and deposit slip showing the amount in which is to be verified by the bank teller. Once counted and correct the teller hands a receipt to the customer so they have record of the accurate deposited amount that will be represented in their account.
 - b. Our vote trail and vote tally weight are unknown without receipt. Plaintiffs voted, that is known because they filled out their ballots and submitted them. VSTL's lawful compliance is unknown because there are discrepancies with VSTL accreditations, rendering the SOS certification VOID. Plaintiffs have been given no factual receipt of assurance of their participation past the envelope leaving their hands.
7. Further, Plaintiff Gunter still awaits her **unfulfilled** FOIA from the EAC and NIST and continues to this day (FAC pg. 19 b. [ECF 17] Exhibit Q). Additionally, Mrs. Shannon Berlant (FAC [ECF 17] Exhibit O) has filed suit against both the EAC and NIST surrounding such record topics.

Appellants submitted a Motion to Supplement their record on appeal on August 1, 2023.

- a. Furthermore, such records from a FOIA production are needed to supply proper documentation that should exist in the first place to prove the claims that Defendants “employ multiple procedures to ensure election results are reliable” (Appellee’s Brief pt. 3 ¶4 pg. 10). Missing in their statement is how SOS ensures her certification for use, and how she verified they utilized only properly accredited VSTL’s for testing election machines. The SOS equipment is **not** certified to count **any** ballot unless it was tested **FIRST** by an accredited VSTL.
 - b. Is it not a reasonable expectation that VSTL verification would be necessary 1.) to ensure reliable results 2.) that VSTL’s credentials be fully intact according to regulations and verifiable when relied on for use in Oregon?
 - i. It’s very probable that Defendants haven’t exercised the same verifications to the EAC and NIST they should’ve conducted **before** precertification testing.
8. In *Davis v. FEC*, 554 U.S. 724, 734 (2008) (“[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and

direct.”). It’s a threat to our republic, individual rights, individual prosperity, and disparity along with being immediate and direct when selected, non-elected individuals can plausibly be in office now and directly affect plaintiffs, through their actions conducting daily business i.e. enacting laws, increasing taxes, unjust executive orders to name some.

9. “[W]here a harm is concrete, though widely shared, the Court has found injury in fact.” *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 517, 522 (2007) (internal quotation marks omitted). The Court, however, found that “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’” *Id.* at 517, 521. Here lies the same issue by failing to ensure that Oregon election machines have been tested by a legitimate VSTL with verifiable credentials according to regulation standards.
10. Although Plaintiffs have a grievance that affects all parties of a nation (including Defendants and all Oregonians), it also affects Plaintiffs individually at the core of their 1st Amendment right, their right to a legal undiluted vote and election. As an example, it is egregious to think that if everyone suffers a power outage it can’t be individualized because it’s experienced by everyone, respectfully one could experience the loss of food from their refrigeration methods, while another could experience loss of

Internet service for their stay-at-home job requirements, both damaging them financially in the realms of prosperity and disparity of the generalized power outage. People experienced individualized damage from the same cause. This is comparable to a general society participating in unlawful elections.

- a. Plaintiffs state their injury in fact as their constitutionally protected right to vote that has been nullified with the use of illegal machines. It is literally the difference between participating in a legal election versus an illegal election.
11. If possible future harm isn't a sufficient argument, why do we have red flag laws or detain those that might be harm to themselves or others? Why have seat belt laws become a necessity if not to reduce future harm. Irreversible psychological harm happens when a voter participates in an illegal election they thought was legal stemming from their **trust** in the conduct of those who were charged to oversee it. Further, why invoke environmental laws but for the mere possibility of future harm. A plausible claim includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Defendants are liable to identify and act in correcting deficiencies when conducting the people's business, to circumvent any mere possibility of harm that may happen,

protecting/preserving **any** constitutional rights that are of **any** citizen's vested interest they serve.

12. In adopting a “certainly impending” standard, the five-Justice majority observed that earlier cases had not uniformly required literal certainty. *Id.* at 15 n.5. *Clapper v. Amnesty International USA (2013)* limitation on standing may be particularly notable in certain contexts, such as national security, where evidence necessary to prove a “certainly impending” injury may be unavailable to a plaintiff. Plaintiffs are awaiting unfulfilled FOIA's, that's distinctively different from other lawsuits. Cases with much less exercised efforts have been dismissed “without prejudice”.
13. *Czyzewski v. Jevic Holding Corp.*, (2017) (holding that the “mere possibility” that a plaintiff's injury will not be remedied by a favorable decision is insufficient to conclude the plaintiff lacks standing because of want of redressability); *see also Clinton v. City of New York*, 524 U.S. 417, 430–31 (1998) (holding that the imposition of a “substantial contingent liability” qualifies as an injury for purposes of Article III standing).
 - a. Unfulfilled records request and FOIA request do indeed fall under contingent liability, rendering the outcome uncertain. Defendants are liable in their positions of trust, representation, and caretaking. Therefore, vested interest also lies in our offices of representations.

14. Plaintiffs expect equal treatment in Oregon comparable to other states, such as GA, and why wouldn't we expect and demand equal treatment as voters across this nation?^{6 7}
15. To meet the injury-in-fact requirement, a Plaintiff must show a "distinct and palpable" injury. *Warth*, 422 U.S. at 501, 95 S. Ct. 2197. Threatened harm can provide the basis for a finding of injury-in-fact. *Valley Forge Christian College*, 454 U.S. at 472, 102 S. Ct. 752. Where the harm is threatened, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979), quoting, *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S. Ct. 658, 67 L. Ed. 1117 (1923) (other citations omitted). "However, [a] plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of

⁶ *Garland Favorito et al. v. Alex Wan et al*; and *Sons of Confederate Veterans et al. v. Henry County Board of Commissioners*; *Sons of Confederate Veterans et al. v. Newton County Board of Commissioners*

The Georgia Supreme Court decided on October 25, 2022, in *SONS OF CONFEDERATE VETERANS et al. v. HENRY COUNTY BOARD OF COMMISSIONERS* that "an injury arises when the public duty imposed by a statute is violated.

⁷ See recent Supreme Court decision in Delaware (C.A. No. 2022-0641-NAC & C.A. No. 2022-0644-NAC

the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not conjectural or hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983).

a. Lack of VSTL accreditation is a real, immediate, and continued danger under Oregon and Federal law. If not rectified by Defendants and the courts, it will remain rippling throughout Oregon by the lack of Defendants actions. Isn't oversight verification? Are Defendants implying, they are to watch "only" and not act while laws, protocols and regulations are violated, and agency failures continue?

16. Plaintiff's intended vote (free speech and personal/individual representation) is their property.

a. Property Definition

i. A thing or things belonging to someone; possessions collectively.

1. Ballots cast are Plaintiffs held Free Speech, holding our election statements of choices for our selected representation and is to **remain unaltered.**

a. Personal Property, FAC No. 20, No. 63, Wasco Complaint Count 5, Wasco MTD Response, No. 11(a), No. 15, No. 44(c). Government Property FAC No. 27, No. 65, Wasco MTD Response, No. 11.

17. Plaintiffs noted in FAC, [ECF 17] Page 25 & 26. No. 54, how Dr. Alex J. Halderman, highlighted the vulnerabilities of voting machines and the need for secure elections. (Appellants Motion to Supplement Record, filed July 7, 2023), he underscores the dangers of compromising individual votes and manipulating election outcomes **without detection**. This is why the VSTL accreditation compliance is imperative for Oregon certifications.
- a. Cybersecurity and Infrastructure Security Agency, said last year that the vulnerabilities Halderman and Springall found “present risks that should be **mitigated** as soon as possible.”⁸
 - b. Dominion Voting Machines were certified in June 2019 based on a Pro V&V Test Report, despite Pro V&V’s EAC accreditation certificate having **expired more than 2 years earlier**, in Feb 2017. The certificate of active accreditation was not renewed until **after the election**, in Feb 2021. Pro V&V also affected and compromised Clear Ballot Voting Systems; the vendor used in Oregon.
18. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a

⁸ <https://www.cisa.gov/news-events/ics-advisories/icsa-22-154-01>

personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

a. Do plaintiffs have a dog in this the fight? The answer is unequivocally yes, we have a personal stake in the outcome of our elections and to participate in a legal one!

19. *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable." *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

a. Its probable that the SOS erroneously certified Oregon election machines ignoring Election Director Stephen Trout's warning letter (FAC [EFC 17] Page 31 No. 61 Exhibit L) surrounding Oregon elections, along with Senator Ron Wyden's warning of the importance of accreditation (Page

31 & 32 No. 61 & 62)^{9 10 11 12}. There should've been valid Accreditation Certificates showing Pro V&V and SLI Compliance had current accreditation from the EAC. Instead, it appears the SOS was more focused on State Vendors and self-interest, as noted in her recent resignation where **she apologizes for harming public trust**.¹³ If there's no weight in the meaning of public trust why would an apology and resignation be needed. Her failed actions are still impending with each election. Regardless of whose name is listed under the SOS title "now", it hasn't been rectified.

20. Plaintiffs have shown they have standing in their own right because they've had to divert resources from their usual activities to remedy, cure program deficiencies and represent themselves in lawsuits. Plaintiffs

9

<https://www.wyden.senate.gov/imo/media/doc/071219%20Wyden%20Windows%207%20Letter%20to%20EAC.pdf>

¹⁰ <https://support.microsoft.com/en-us/topic/october-13-2020-kb4580387-security-only-update-9781ea5e-4fab-9f66-7528-77e9c5649081#:~:text=For%20Windows%20Embedded%20Standard%207%2C%20extended%20support%20ends,on%20the%20screen%20until%20you%20interact%20with%20it.>

¹¹ <https://www.wyden.senate.gov/imo/media/doc/wyden-pro-vandv-election-cybersecurity-letter.pdf>

¹² <https://www.wyden.senate.gov/imo/media/doc/wyden-sli-compliance-election-cybersecurity-letter.pdf>

¹³ <https://www.opb.org/article/2023/05/01/oregon-secretary-state-shemia-fagan-cancels-cannabis-consulting-contract-apologizes/>

adjusted their daily lives and activities to remedy a wrong that's been forged against them from those that are to serve us.

a. "The word "liberty" in these Constitutional Amendments includes and comprehends all personal rights and their enjoyment." *Rosenblum v. Rosenblum*, 181 Misc. 78, 42 N.Y.S.2d 626, 630. "It embraces freedom from duress; freedom from governmental interference in exercise of intellect, in formation of opinions, in the expression of them, and in action or inaction dictated by judgment," *Zavilla v. Masse*, 112 Colo. 183, 147 P.2d 823, 827; ***Blacks Law 5th Ed.*** Plaintiffs' liberties (14th amendment) have been violated by the use of illegal machines which nullifies results produced by them.

21. Wisconsin Supreme Court agrees ¶22 "If the right to vote is to have any meaning at all, elections must be conducted according to law. Throughout history, tyrants have claimed electoral victory via elections conducted in violation of governing law" wrote the courts majority in *Teigen v. Wisconsin elections commission* Additionally stating ¶23 "The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate." Defendants failed actions, inactions, and governmental

interference has tainted and damaged the full pride and enjoyment Plaintiffs had in their elections. We are left with belief that our votes are meaningless.

22. Plaintiffs provided more than several ways our voting systems shouldn't have received state certification by defendant Fagan. This is the proverbial "chink in the armor" that invalidates any results stemming from the abuse of these machines, resulting in the abridgment of Plaintiff's rights.
23. Standing requires that at least one Plaintiff has suffered a personal injury tied to the conduct of each defendant, here it has been met. Factual allegations must be enough to raise a right to relief above the speculative level "*Bell Atl. Corp. v Twombly*, 550 U.S. 544, 555 (2007). Personal injury is not being able to participate in legal elections, which ties Defendant's failed conduct to provide procedural assurance of vote integrity.
24. In *Curling v. Raffensperger Supp. 3d 1311, 1318-19 (N.D.Ga.2019)* the court relied on three core categories of factual allegations to reach its conclusion that plaintiffs had suffered a non-speculative injury; "First, evidence from election security experts bolstered the curling plaintiffs' claims as non-speculative". "Second the harm that the Curling plaintiffs alleged was not speculative because at least some manifestations of that

harm had already occurred.” “Third the Curling plaintiffs alleged that harm would recur because the defendants knew of the voting systems inadequacies and failed to take adequate corrective or preventative measures.”

- a. Items that support the above are contestation, which the inadequacies should have given corrective and preventative actions. Election Director Trout’s Letter (FAC [ECF 17] Exhibit L), Berlant’s un-addressed Complaint against Fagan (FAC [ECF 17] Exhibit O- SB-31).

II. FAILED TO STATE A CLAIM

25. Wasco Case [ECF 1] – 6 Counts

- a. Use of machines not tested by an actively accredited VSTL with an up-to-date valid certificate, rendering certification of Oregon machines invalid.
- b. Failure to act. Any act of impropriety is null and void, erroneous and repugnant to the constitution.

III. STATUTE TRUMPS AGENCY GUIDELINE/MANUAL

26. Defense contends that Plaintiff’s failed to state a claim around revocation and without that, the validity of the lab’s accreditation was not an issue,

Appellees Brief Pg.13 D. ¶1. It's common sense you cannot revoke that which was not in compliance in the first place. Plaintiffs are and have been contending that the accreditation is invalid, as it expired, because reapplication for accreditation plausibly never happened based on the lack of documentation proving otherwise as regulations require.

a. The topic is and has been accreditation which this court should take into consideration as the lower court should have likewise. According to Oregon Law and Federal Law, machine certification is only valid when tested by an accredited VSTL. Oregon as a voluntary participant must comply with the federal standards outlined within HAVA.

27. As noted in Plaintiff's FAC [ECF # 17] Page 25 No. 53, Terpesehore Maras, who was a Federal Contractor (Exhibit A – No. 100-103), if the “accredited” non-federal entities have NOT received EAC accreditation, it was the responsibility and subsequent failure of the state to uphold its own or (their) standards that are federally regulated. In which Plaintiffs have argued the same in their filings.

28. Plaintiff's reply to Appellee's Brief points Pg. 14/15 is that Defendants claim “a federal statute trumps a regulation”. In Plaintiffs understanding and belief, that's **inaccurate**. Federal statutes are the laws enacted by the federal legislative branch, the United States Congress. Federal regulations

are issued by the various federal administrative agencies, which get their authority to regulate from specific statutes. Regulations are designed to “implement and interpret statutes.” You literally need the regulations for statute interpretation. Its a fantasy and completely unreasonable to think you can read a statute solely on its face without seeking clarifications. Statute “only” verbiage simply does not prevail when regulation helps with its meaning and purpose.

- a. Plaintiff’s reply to Defendant’s Brief weblink points on page 14 showing an excerpt of the EAC website verbiage (last accessed June 16, 2023) which cannot be considered absolute authority as it’s only a website post. The information shown must comply with the rulemaking processes and changes to those rules must follow under the Administrative Procedural Act, a web statement doesn’t comply with those standards. Historically speaking that announcement and verbiage has **never** been on the forefront of the EAC site prior to the 2020 election, it’s something new and is still of huge controversy. It’s a simple sleight of hand if people aren’t paying attention.
 - i. Noted specifically in Plaintiffs’ response in Opposition Motion to dismiss [ECF 25] (Point No.36-41 pg. 15-18).
- b. Plaintiffs believe that the failures of Defendants are very clear as a

matter of law. These discrepancies can easily be found from a person's couch in their pajamas, as the Plaintiffs have identified those discrepancies throughout their complaints, why Defendants have not is shocking. Additionally, once Plaintiff's pointed out these discrepancies and they failed to act, they have violated ORS 246.046 (FAC [ECF 17] Pg 15, No. 40). Shannon Berlant's Complaint against Fagan went unaddressed (FAC [ECF 17] Exhibit O-SB-31).

- i. "The Secretary of State and each county clerk shall diligently seek out **any** evidence of violation of **any** election law."
- c. Reply to Appellee's brief page 13 D. Plaintiffs have identified the text in the Manual (FAC [ECF 17] Exhibit B, Pg. 11 2.1 and Pg. 39 3.8) that contradicts/challenges the statute, as without the guidelines the statute is merely empty words that would leave any agency or person guessing as to its meaning and the "how to" without creating a procedure for it. Without the manual verbiage, protocols and guidelines as a reference, a person is at a stalemate for the full meanings of accreditation, revocation, and who a laboratory is as it's not defined within the statute.
- d. Again, one must ask how you become accredited in the first place? The statute doesn't outline the nature and process of accreditation and

maintaining that status. The word accreditation in a statute is meaningless without explanation of how its achieved. There are no such details of the program requirements within the statute itself.

However, the manual outlines the details of the program requirements accreditation process (3.8 expiration and renewal of accreditation), compliance management program, and revocation of accreditation.¹⁴

29. Administrative laws at the federal level are typically called rules (or regulations). Rules are promulgated to implement, interpret, or prescribe law or policy. The terms "rules" and "regulations" have the same meaning in the context of federal administrative law and are used interchangeably. Rules are published in two official sources: the Federal Register and the Code of Federal Regulations. ([ECF 41] Wasco MTD Response pg.16 No. 30).
30. Federal agencies such as the EAC and NIST are organizational arrangements created by Congress in order to carry out law and policy. **Agencies** provide the detailed rules and guidance needed in order to clarify and properly execute statutes. Agencies cannot act unless Congress has delegated the authority for them to do so and must not act beyond that authority.
31. Rulemaking is the process used by federal agencies in creating, amending, or

14

https://www.eac.gov/sites/default/files/eac_assets/1/28/VSTLManual%207%208%2015%20FINAL.pdf

repealing rules. **Congress grants rulemaking authority to federal agencies in order to implement legislative statutes.** "[R]egulations issued pursuant to this authority carry the force and effect of law and can have substantial implications for policy implementation."

a. "A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law."

National Latino Media Coalition v. Federal Communications

Commission, 816 F.2d 785, 788 (D.C. Cir. 1987).

32. To make any changes to agency rules it must go through 5 U.S. Code § 552 - Public information; agency rules, opinions, orders, records, and proceedings¹⁵ and 5 U.S. Code § 553 - Rule making¹⁶ (visual map¹⁷).
33. Point being, in defendants brief and lower court filings, implying a 1x only accreditation without renewal has never been announced, given public notice, or published in the Federal Register. As Plaintiffs cannot find that 1.) a two-year expiry of accreditation has been increased 2.) that a certificate of accreditation may be signed by someone other than the Chair of the

¹⁵ <https://www.law.cornell.edu/uscode/text/5/552>

¹⁶ <https://www.law.cornell.edu/uscode/text/5/553>

¹⁷ <https://www.reginfo.gov/public/reginfo/Regmap/regmap.pdf>

Committee 3.) that accreditations are infinite 4.) or re-application is **not** needed after accreditation **expires**. With all these discrepancies its plausible and highly likely a federal agency (EAC) has failed their own protocol and procedures in-turn rendering huge national security issues surrounding our state and country's elections. Which solidifies Defendants failed diligence, verifications, and the protection to Plaintiff's, and clarifies their illegal use of an unaccredited VSTL for certifying machines.

34. Any Notice of Clarification or an interpretation of a current rule, by the EAC's own words, it's a "replacement". They changed the foundation of the expiration rule and replaced it with "reassessment"¹⁸ and inserted the revocation excuse that Congress intended to be for a NIST recommendation. Additionally, a NOC was dated July 23, 2021, WELL after the expiration of the VSTL's certifications expired, and 5 years after the May 31, 2015 effective date VSTL manual, FAC [ECF 17] Exhibit B.

¹⁸ https://www.eac.gov/sites/default/files/2021-07/NOC%202021.01_VSTL%20Accreditation%20Status.pdf

Notice of Clarification

NOC 21-01: VSTL Accreditation Status

Issued by Program Director on July 23, 2021

Section of Manual to Be Clarified:

Voting System Test Laboratory Manual, version 2.0:

3.8. Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

Conclusion:

As of the date of this document, section 3.8 in the Voting System Test Laboratory Manual, version 2.0 is replaced with the following:

3.8. VSTL Accreditation Reassessment. The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission consistent with Chapter 5 of this manual. Reassessment of VSTLs shall occur two years from the date their most recent Certificate of Accreditation was issued, or at the discretion of the EAC. VSTLs in good standing shall request reassessment their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before and no later than 30 days prior to the reassessment date, or a date chosen at the discretion of the EAC. VSTLs in good standing shall retain their accreditation while the review and processing of their application is pending and should circumstances leave the EAC without a quorum to conduct the vote as specified under Section 3.5.5.

35. Additionally, Defense and the lower courts claim this revocation statement under 52 U.S.C. § 20971(c)(2)¹⁹ trumps agency guidelines and manuals and the statute should be read literally, without detailed guidance of the EAC authority or NIST, the statute doesn't outline how to accomplish

¹⁹ <https://www.law.cornell.edu/uscode/text/52/20971>

accreditation, you need the agency's direction.

a. If Plaintiffs are being literal, as Defense suggests, who is the

“Commission” and how is “revocation” performed? To find that, we must return to a higher portion of the Statute²⁰: In simple terms, if we are wanting to apply the revocation argument as Defense has implied, the entire statute canon need be applied equally.

36. In 52 USC Part A, subpart 1, § 20921²¹, “There is hereby established as an independent entity the Election Assistance Commission (hereafter in this subchapter referred to as the “**Commission**”)
37. In 52 USC Part A, subpart 3, § 20961²², the “Development Committee” shall assist the Executive Director of the Commission in the development of the voluntary voting system guidelines. Once the “Commission” adopts voluntary voting system guidelines, they “shall” publish in the Federal Register the recommendations it provided under this section to the Executive Director of the Commission concerning **the guideline adopted**.
38. Again, as to the literal reference of “revocation”, what are the rules and requirements? We must again refer to a higher portion of the statute - part 3,

²⁰ <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-209/subchapter-II/part-A>

²¹ <https://www.law.cornell.edu/uscode/text/52/20921>

²² <https://www.law.cornell.edu/uscode/text/52/20961>

§ 20962²³(a) General requirement for notice and comment (public notice, public comments, public hearing, publication in the Federal Register) and (d)(1) Process for Adoption.

- a. In FAC, [EFC 17] Pg. 20 No 3, Exhibit D, show's that Clear Vote Voting System (Clear Count 2.1 and Clear Design 2.1) was used for Wasco County which conformed with the Federal Voluntary Voting System Guidelines (VVSG) Version 1.0 (2005)²⁴.
- b. On page 3 of the VVSG 1.0, it sites: “The VVSG is one of several inter-related EAC promulgated guidelines and programs concerned with maintaining the reliability and security of voting systems and the integrity of the overall election process. The performance of national certification testing of voting systems **is restricted to testing labs that have been formally accredited to be technically competent to evaluate systems for conformance to the Voting System Performance Guidelines.**”
- c. Nowhere in the VVSG 1.0 does it provide details on how **a test lab obtains accreditation or how it may be revoked** which is why the

²³ <https://www.law.cornell.edu/uscode/text/52/20962>

²⁴

https://eac.gov/sites/default/files/document_library/files/VVSG.1.0_Volume_1.PDF

procedural requirements of the program are established in the VSTL Accreditation Program Manual published by the EAC (FAC [EFC 17] No. 35 – Exhibit B)²⁵.

39. Additionally, the rules in the EAC VSTL Manual that clearly define laboratory accreditation expiration as every two years, and the Chairman as the only signing authority, was published on **August 25, 2008**, in the Federal Register and underwent the public notice and comment process. After the 2020 election, when the EAC started to receive questioning that the VSTLs accreditations had expired - the EAC issued opinions and memos about the VSTL accreditations. According to the Chevron deference doctrine, the court needs to give higher priority to the manual, over the later issued opinions and memos which didn't undergo **any public notice and comment process** and have **no force of law**.
- a. Any Notice of Clarification or webpage statement issuance is **unsatisfactory under the Administrative Procedures Act** to suffice as a rule change. However, it continues to be used to manufacture justifiable reasoning for not renewing a VSTLs accreditation. These aren't de minimis changes. This "edit" as well as any changes, **must** go through

25

https://www.eac.gov/sites/default/files/eac_assets/1/28/VSTLManual%207%208%2015%20FINAL.pdf

the proper oversight processes required by law!

b. The rule making processes under **5 USC 552 & 553** weren't followed.

This also should've been caught and addressed by all Defendants.

40. This significant departure from prior strict adherence to the EAC's administrative policy (two-year expiry of accreditation) wasn't covered by any press release, memo or opinion posted to their website or into the Federal Register **prior to** the November 2020 election. Plaintiff also couldn't find any documented notice and public comment process for this change to a 3-year expiry, (as noted in Appellees EAC web site link pg.14) like the original policy implementation of the 2-year expiry policy. It's important to note, none of the VSTL Manual requirements 2.0 have changed. Sec. 3.6.1.3²⁶ **still** states, "*The effective date of the certification, which shall not exceed a period of two (2) years;*" and Sec. 3.6.1. **still** states, "A Certificate of Accreditation shall be issued to each laboratory accredited by vote of the Commissioners, and it **still** states', "*The certificate shall be signed by the Chair of the Commission.*" However, it somehow became acceptable to bypass the Commission altogether, much less meet their own policy requirements for the Chairman signing specifically.

26

https://www.eac.gov/sites/default/files/eac_assets/1/28/VSTLManual%207%208%2015%20FINAL.pdf

41. An easy comparison to help understand why Plaintiff's vote (and the votes that were cast for them) after being tabulated through these illegal machines are being nullified, is an Intoxilyzer machine. What makes the printout results of an Intoxilyzer machine admissible in a court of law is that they're legally certified under the Scientific Laboratory Standards and meet all state and federal laws. If there's any "chink in the armor" or irregularities found, the printout from that machine isn't admissible in any legal way.
42. In fact, in *State v. Eileen Cassidy* (A-58-16) (078390) the New Jersey Supreme Court found that because proper legal protocol wasn't followed, the results from the Alcotest machine analyzer against her were inadmissible. This case jeopardizes an additional 20k plus DWI cases to also be thrown out for inadmissibility as the court ruled the breath test results for these 20,667 cases also inadmissible. This means that the readings cannot be used in DWI prosecutions.
43. The EAC has procured requirements and standards within their VSTL Manual, that are not being followed, yet these voting systems are producing a result that Plaintiffs are supposed to rely on. If the EAC isn't meeting its own standards that the law requires adherence to, there's **no legal use of the results produced** from that machine. Instead of a "black box" dealing with alcohol results like above, we have a black box dealing with whether our

election tallies are accurate. We're getting results that are being aggregated into our election management system from uncertified tabulators that don't comply with the laws, and policies currently in place. The Supreme Court has already determined in *Simmons v. Block* 782 F.2d 1545, 1550 (11th Cir. 1986). A court must "overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."

IV. ARGUMENT CONCLUSION

44. The simplicity of the matter, its plausible, very likely and concrete that VSTL's haven't been properly accredited or maintained their proper accreditation status. In-turn causing a violation under ORS of 246 under rule 165 "that only accredited VSTL systems may be approved by the SOS" in-turn thrusting harm onto Plaintiffs' and a clear traceable injury by all defendants for their failure to verify protocols and standards were followed and in compliance to protect our vote. Plaintiffs' rights to equal protection, to their 1st Amendment, equal representation that's represented by and through casting their ballots and having them counted on unlawful election mechanics and software are now shattered. Our right to participate in a legal election was nullified. The case and controversy has been established for jurisdiction. When the mere plausibility has been proven it renders probable

Oregon election machines un-certified. Specifically, through Plaintiff Gunter's FOIA request AND the case of *Berlant v. EAC* will further render Plaintiffs' claims just, indisputable, and ripe for redress of grievances even further. A prejudice ruling allows for no such future relief to Plaintiffs, however favorable that is to the Defendants.

45. Proper Federal VSTL accreditation at its foundational core is critical to Oregon's lawful practices. Standing has become the courts way out of making a highly controversial decisions giving enormous power to a single federal district court in cases where state officials agree with the outcome. Appellant's here have a right to defend our constitutional amendments that have been damaged, beyond just mere paper filings but obtaining actual relief for our damages through a full trial and discovery processes.
46. It's possible that the court might have to answer this question in very near future cases. Plaintiffs don't believe we should be bound on redress of our grievances by suffering a prejudiced ruling. Plaintiffs also believe that a federal court from deciding a question that has affected the rights of litigants, if an important right is denied, and the application of mootness would mean that the denial of that right—though likely to continue—would escape judicial review, the court has jurisdiction to consider the case and, if appropriate, indicate the right and question. These actions suggest that the

majority of courts and defendants have been trying to avoid a judicial hot potato.

a. The threat here of prosecution under the law is real, here there's a clear connection when these violations are proven that the state would prosecute on the position of the Plaintiffs as a parent party and violation of state and federal laws, even against a federal agency's failures.

47. Because the court cannot retroactively make the Plaintiffs votes have undiluted unfractionalized full weight as intended and cast in the 2020 election and each election after, the court can grant upon relief hand counting until a full investigation has been concluded and direct the AG to conduct such investigation.

48. For a threshold determination that an "actual controversy" exists²⁷. An "actual controversy" has four elements:

a. (1) It must be a controversy involving the rights or other legal relations of the party seeking relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose

²⁷ XL Specialty Ins. Co. v. WMI Liquidating Tr., 93 A.3d 1208, 1216 (Del. 2014) (quoting Gannett Co., Inc. v. Bd. of Managers of the Delaware Criminal Justice Info. Sys., 840 A.2d 1232, 1237 (Del. 2003)).

interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination²⁸.

49. Since the actual controversy requirement is jurisdictional plaintiffs bear the burden of establishing all four elements. “This description should be liberally exercised in order to advance the remedial purpose of the act”²⁹.
50. Plaintiffs addressed many prongs of the actual controversy test, arguing that 1) the controversy involves their legal right to vote in a verifiable secure way and not have their votes marginalized or diluted and the legality of the machines/systems they’re required to use to exercise their right to vote and how a county can negate all other votes cast because there’s a chance that there are vulnerabilities that could be exploited to undermined election integrity 2) the defendants lack of action and/or response demonstrates their interest in contesting the claim; 3) plaintiffs have an interest in elections that are legally protected 4) the action is ripe because it pertains to current law, violated rights, future violations, and facts.

²⁸ Id. at 1217 (quoting *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 479–80 (Del. 1989)).

²⁹ *Burris v. Cross*, 583 A.2d 1364, 1372 (Del. Super. 1990); see also 10 Del. C. § 6512 (“This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.”).

51. A case is right for judicial review when the dispute has matured to the point where the plaintiffs have suffered or will eminently suffer an injury³⁰. ‘litigation sooner or later appears to be unavoidable and where the material facts are static.’³¹ It cannot reasonably be disputed that the state of Oregon will continue to hold elections on a regular basis, and that it will use electronic voting systems in those elections. Plaintiffs FAC alleged that Oregon’s electronic voting systems are not legally certified and that they were used in the 2020 election. It is a reasonable inference that the state will continue to use those electronic voting systems in all upcoming elections.
- a. Absent any serious indication that the defendants and the EAC intends to address allegations, the material facts are sufficiently static-and not unknown or changing-to satisfy the rightness requirement for a judgment reversal from the court of appeals. Plaintiff’s understanding is that a fixed and reoccurring nature of elections and the lack of using lawful equipment provides proof of any potential injury, past injury, and reoccurring injury with every election.

52. As defense stated in Appellees Brief pg. 6 **A. Standard of Review** this court may review de novo the district court’s dismissal. Appellants although

³⁰ Town of Cheswold v. Cent. Delaware Bus. Park, 188 A.3d 810, 816 (Del. 2018).

³¹ Id. (quoting XL Specialty, 93 A.3d at 1217).

unfamiliar with that term would expect the court allow the same courtesy to unrepresented parties as they would to those who could afford legal counsel in such cases as civil rights and equality. Plaintiffs rely on the just treatment of the 9th circuit to review all evidence and issues presented here and from the lower court. In this case here where federal law entangles state law both needing lawful compliance, all the issues at large must be taken in full consideration. Further suggesting a de novo review to our understanding is usually under the circumstances of a full trial, here in plaintiffs' case no such action has taken place of a full trial process or discovery to remedy the issue.

53. A grave and massive injustice has taken place against Plaintiffs, Our Beloved United States, and its trusting citizens. This Injustice can never be corrected from the ever-flowing sands of eternally lost time that has been swept away through obfuscation, misfeasance, malfeasance, maladministration, and self-preservation by those who are to serve the plaintiffs/public. This fracture will simply remain as a festering scar upon plaintiffs and this nation for all History passing as a bad debit onto societies youth if not remedied now. Appellant's have been deceived, manipulated, and lied to that they participate in lawful elections. We're not free to participate in **any** election other than those that are laid in front of us within our own state and country, therefore entrapping Plaintiff's to exercise their

rights under illegal actions, and pretenses.

54. Do our Constitutional Rights and the Laws not matter because there's no case law that is 100% specific to our complaint? Are we really only free on paper? Who benefits from unlawful elections? Not the Plaintiffs or Oregon voters.

"If an election . . . can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of the nation for the national good." John Adams, Inaugural Address in the City of Philadelphia (Mar. 4, 1797), reprinted in Inaugural Addresses of the Presidents of the United States at 10 (1989).

CONCLUSION

Plaintiffs request for the foregoing reasons, the judgment and opinion rendered from Judge Mosman of the Federal 9th District Court on February 6th, 2023 [ECF 19,51,52] should be reversed allowing for Plaintiffs leave to amend any deficiencies, add defendants, and remand these cases back for consideration of Plaintiffs' claims on the merits, with direction to reassign this case to different district judge.

Date: August 1, 2023

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Signature s/ Jennifer Rae Gunter

Date: August 1, 2023

Signature s/ Christina Lynn Milcarek

Date: August 1, 2023

Signature s/ Chelsea Anne Weber

Date: August 1, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I am the attorney or self-represented party.

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I certify that this brief (*select only one*):

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Signature s/ Jennifer Rae Gunter

Date August 1, 2023

Signature s/ Christina Lynn Milcarek

Date August 1, 2023

Signature s/ Chelsea Anne Weber

Date August 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that on August 1st, 2023, I served the Appellant's Reply Brief to the parties listed below and filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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