

JENNIFER RAE GUNTER

Email: Jennof4@gmail.com
1601 G St., The Dalles, OR 97058
Phone: 541-993-5366

CHRISTINA LYNN MILCAREK

Email: tina.milcarek@gmail.com
1496 Foxglove Street, Woodburn, OR 97071
Phone: 708-932-0959

CHELSEA ANNE WEBER

Chels3721@yahoo.com
19000 S Pear Rd., Oregon City, OR 97045
Phone: 503-422-0933

Plaintiffs, appearing Pro Se

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

JENNIFER RAE GUNTER, an individual,
CHRISTINA LYNN MILCAREK, an
individual, and **CHELSEA ANNE WEBER**,
an individual,

Plaintiffs,

v.

SHEMIA FAGAN, in her individual
capacity and as Secretary of State for the
State of Oregon

Defendant

JENNIFER RAE GUNTER; an individual,
et al.,

Plaintiffs,

v.

Case No.s: **3:22-cv-01252-MO (Lead)**
3:22-cv-01675-MO (Trailing)
3:22-cv-01743-MO (Trailing)

**PLAINTIFFS RESPONSE IN
OPPOSITION TO DEFENDANTS' LISA
GAMBEE, KATHY SCHWARTZ,
STEVE KRAMER, AND SCOTT HEGE
MOTION TO DISMISS**

LISA GAMBEE, in her individual capacity
and as Wasco County Clerk, et al.,

Defendants

JUDY ANN MORRISE, an Oregon Elector;
and **SARA MARIE GENTA**, an Oregon
Elector,

Plaintiffs,

v.

KATHRYN HARRINGTON, et al.,

Defendant

LR 7-2 CERTIFICATION

The undersigned hereby certifies that this Response is 6,280 words including headings, footnotes, and quotations, but excluding the caption, and signature block.

LR 7-1 CERTIFICATION RESPONSE

1. The Secretary of State's (SOS) counsel has been the only **initiating** party since SOS filing their notice of like case for Wasco, it is factual to state that Plaintiffs first notice of Wasco Case removal from County Court and filed in Federal was from the SOS's Attorney, not from the Wasco County Circuit Court Judge John Wolf or Wasco Counsel. To date no Judges Opinion/Order or correspondence from Wasco County Court house has been sent to Plaintiffs.
 - a. Plaintiff Gunter sent a courtesy notice to Wasco defendants on 10/27/22 and cc'd law counsel Kristen Campbell asking them to contact Plaintiffs through their counsel after service, concluding future contact with them personally. There has not been a

conferral with Plaintiffs prior to Wasco case removal to Federal court and their issues surrounding case claims.

2. Wasco County Defendants have not attempted to make their own individualized contact prior or after removing the case and filing in Federal Court on 10/31/22. It is not factual to Plaintiffs' beliefs that a good faith effort in the span of 23 days at that time had been made by Defendants through Plaintiff Gunter prior to the day of submitting a Motion to Dismiss. Plaintiffs wholly disagree with Wasco County Defense that a good faith effort constitutes one email sent the eve/day before Thanksgiving.

3. All other correspondence has involved or been initiated by the Secretary of State's communication copying Wasco Counsel on group emails. Additionally, Plaintiffs initiated conferral on 11/18/22 to stay on track of the courts scheduling order deadlines for discovery discussions by giving all parties four days to communicate. That request went unanswered, then Plaintiffs sent a follow-up email on 11/22/22. No response was offered prior to the date of 11/22/22 until Plaintiffs informed the parties that they would be filing a Motion for Clarification with the courts. That email prompted a reply to Plaintiffs, stating objections.

RESPONSE IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS

4. Case 3:22-cv-01675-MO (Wasco) **and** Case 3:22-cv-01252-MO (SOS) surrounds the people's business, public trust, and therefore public interest surrounding election laws and protocol. Wasco County Defendants and SOS have entered into a trust agreement with the people that wield the power that employs them. **Any** act in an official and personal capacity

while holding offices of trust for the people that violates **any** law affecting, denying, or pausing a constitutional right is a crime and irreparable.

5. The Secretary of States Oath of Office **and** Wasco County's Oaths (as required by law) affirms their main purpose is to protect and maintain our natural and individual rights while conducting the people's business. By way of obfuscation, under the color of law, Wasco County and the SOS have failed to follow law processes based upon the SOS own policy guidelines by issuing certificates of approval for systems tested by Voting System Test Labs (VSTL) with fraudulent accreditation signatures, expired accreditations (election year 2020) and fraudulent extended dates of accreditation (election year 2022). Wasco County by and through their positions of trust and administration, failed to report such malfeasance and dereliction of duty by the actions of all defendants.

6. Wasco County Defendants, as stated, do not claim immunity but the Secretary of State has in their MTD, regardless, what is **very clear is that they all took a binding oath of office to support the Constitution of the United States** (Article VI¹), the **Constitution of the State of Oregon** (Article XV Section 3), the laws thereof, and to the duties of the office they hold.

a. How can officials have immunity if they have taken a binding oath? Is oath taking (as required by the Constitutions) purported now as a meaningless action in Oregon?

i. This is a current topic which has been docketed with the Supreme Court of the United States to be heard on January 6, 2023 under Brunson v. Alma S. Adams et al No. 22-380.

7. Defendants named herein were put on notice, sufficiently and thoroughly by plaintiff Gunter of VSTL's lack of proper accreditation which affects machine and software certifications

¹ <https://constitution.congress.gov/constitution/article-6/>

in Oregon and our country. They were fully aware and informed of the shortcomings, deficiencies, and wrongdoing that needed to be immediately corrected to restore confidence in this nation's most sacred democratic process – that of voting.

8. Plaintiffs could assume Wasco County, had in good faith, conducted their own investigation, contacted the SOS, EAC, VSTL's and NIST (National Institute of Science and Technologies) offices to inquire about such VSTL topics set forth in complaint prior to a lawsuit being commenced. Instead, silence has been given and a mere one-time vague hollow assurance by their county law Counsel Kristen Campbell. Plaintiff Gunter has not hired Counsel Campbell but does have a trust contract as they are employees to their citizens through their oath of office and elections. In turn, Plaintiff's Milcarek and Weber as Oregon taxpayers, are also affected by Wasco's inaction in which affect their county and likewise have a vested interest in the actions of all officials in Oregon.

9. Plaintiff Gunter had made good efforts to suggest discussions and problem solve on the issue at hand at the local level, however, all efforts were ignored and met with silence by all defendants being unresponsive. Interestingly, the Defendants appeared to make such efforts within days of Plaintiff's lawsuit for detailed comments in an article interview². This action does not instill or provide requested transparency to the **taxpayers** but merely suggests damage control of self-preservation.

10. As a result of the way the 2020 and November 8, 2022 election was conducted, Plaintiff's and many other similarly situated taxpayers were unconstitutionally disenfranchised and economically harmed through the use of unlawful machines, administrative practices, and

² <https://columbiacommunityconnection.com/the-dalles/wasco-county-suit-takes-aim-at-midterm-election-counting-in-oregon-nation?fbclid=IwAR0A4U00c220D3MeirHWBYGTgc77PcW3WGib2XPczYTQZH6tuliREcWv1MQ>

failures surrounding elections. All Defendants (including lead case 3:22-cv-01252-MO) allowing unlawful/unconfirmed tally counts to be certified for a candidate, Plaintiffs have been forced to adhere to policies implemented by selected candidates that are damaging this state and country.

- a. U.S. Supreme Court's ruling in *United States ex rel. Accardi v. Shaughnessy* (1954) by the EAC own admission of “administrative error”, foundation of the rule of law under the Accardi doctrine, the EAC did not observe their own rules and guidelines. Therefore, the EAC as well violated the laws set by HAVA, affording a **domino-effect** substantive restraints and violations of protected persons (class) from arbitrary or capricious treatment, in turn thrusting forward onto the SOS and Wasco County’s future failure of complete investigation and diligence to protect their voters and infrastructure. Even government officials **must** follow agency regulation and guidelines.

11. Defendants cannot escape their obligations to abide by the Constitution of the State of Oregon, the Constitution of the United States of America, and all state and federal statutory laws pertaining to the conducting of elections. These are not vague or theoretical.

- a. When elections are not conducted lawfully through contractual agreements, it breaks federal and state statute therefore damaging and diluting 1st amendment free speech, equal representation, and suffrage rights while lending critical infrastructure to bad actors. At the very least it is a mismanagement of time and the people’s monies.
- b. If defendants knew prior that they were going to file a Motion to Dismiss, Plaintiffs wonder, would they not take it upon themselves to confer with Plaintiffs prior to

submitting this case to Federal court? Why bypass conferral in hopes to piggyback from the SOS case outcome, while misusing taxpayer funds.

i. 5 CFR 6701.107 and Title 5 §2635.704 Use of government property and 2635.705

Use of official time.

c. Entering into unlawful election contracts with uncertified vendors of critical infrastructure is also wasteful and a misuse of taxpayer funds.

d. Wasco County Defendants chose to move their case to Federal court based on the case filing and claim, therein solidifying its action of their choice, asking for dismissal with prejudice is over-reaching. Plaintiffs believe that County and State Officials duties may intertwine, however, they are very specific based on County and State business differences.

e. Requesting a dismissal with prejudice also verifies defendants lack of concern surrounding the people business, Plaintiffs' election property, and its lawful function therein that they are tasked with in care, trust, to oversee and maintain.

12. All defendants in both Cases have obfuscated by filing MTD rather than answer all facts and supply supportive evidence of discussion set forth in Plaintiff's complaints. Defendants merely supplied a sub chapter on revocation as an excuse and interpretation instead of conducting a thorough review in its entirety, whereas, Plaintiffs have thoroughly supplied detailed evidence to the contrary.

13. Every single party, judicial branch, and person that touches, reads, considers, and investigates this case should have grave concerns on their and the citizens most precious right to proper representation and investigate fully and not look for outs and excuses. It's a clear current

day betrayal of our country's economic, and moral state when reflecting on the excuses for maladministration, and official positions of abuse and failures.

- a. Have we come so far as a country to not have transparent accountability but rather look for any mere loophole to self-preserve? Our children will be the beneficiaries of such failures and will be forced to watch the United States fall as a great Nation and they'll never know the freedoms it afforded to, We the People.

14. The main object of the duties and restrictions imposed on election officers is to afford every citizen having a constitutional right to vote an opportunity to exercise that right, to prevent those not so entitled from voting, and to ensure the conduct of the election so that the true number of legal votes and their effect can be ascertained with certainty. *Findley v. Sorenson*, 35 Ariz. 265, 269-70, 276 P. 843, 844 (1929). Relief is available where the results are rendered uncertain due to the maladministration of the election. *Id.* The election may be nullified if rendered uncertain.

- a. VSTL's proper accreditation are still **rendered uncertain to date** in this great Nation.
 - i. Cases across this Nation of similar topics have been filed and are still in litigation. To name a few of such cases:
 1. Missouri- 4:22-cv-00682-RLW Graeff v. United States Election Commission et. al
 2. Kentucky 3:22-cv-45-REW Mekus v. Adamas et. al
 3. South Carolina - 3:22-cv-2872-SAL-JPG Zigmantanis et. al v. McMaster et. al
 4. Florida 8:22-cv-1955-WFJ-MRM Benson v. DeSantis et. al
 5. Texas 4:22-cv-00576-P-BJ Strongin et. al v. Scott et. al

15. Plaintiffs, being the taxpayers, own the election property which is critical infrastructure and has not been held in compliance, nor held secure by contractual procedures but left at risk to the voters by remaining out of compliance.

16. The results of the November 2020 and November 8, 2022 election controlled the outcome, not only of individual races in Oregon and across the country, it also controlled the balance of power between the two major political parties in the United States Congress affecting **all citizens economic prosperity or disparity.**

- a. By using election equipment/software not in compliance does indeed factually affect the outcome and weight of the proper representation for the people as it lends the infrastructure to bad actors and risks corrupting our Republic.

17. How the Defendants handled their administrative election duties is a legitimate and ongoing matter of irreparable public harm, concern, and public debate. Plaintiff Gunter has received no answers to date of proper diligence and investigation but only received hollow assurance of “just trust us” insinuations.

18. Congress enacted the Civil Rights Act of 1871, 17 Stat. 13, which was titled in pertinent part “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States,” and which is codified in the still-existing 42 U.S.C. § 1983.

19. Failure to ensure proper procedures are followed for our elections (which have been designated “critical infrastructure on January 6th 2017”³ and that VSTL’s are properly in compliance is every elected official’s public duty in upholding the laws, constitutions, and trust of citizens they serve.

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https://www.eac.gov/sites/default/files/eac_assets/1/6/starting_point_us_election_systems_as_Critical_Infrastructure.pdf

20. Lawful machine use and VSTL accreditation is still a question on national, state and local levels, therefore irreparably damaging plaintiffs' equal protection.

- a. One cannot simply go back in time to fix what has been broken, it remains fractured and violated forever.
- b. Continued use of the election machine systems that are not legally certified from an accredited VSTL and cannot be proven to have **not** been penetrated by our foreign adversaries due to trap doors, black box, Wi-Fi access and COTS usage is the very definition of a particularized injury in fact to the plaintiffs. **Defendants have not provided a single fully executed timely application for re-accreditation from the VSTL's in this country or validly signed certificate from the commission chair or supplied EAC and NIST responsive records for their FOIA's.**
- c. Plaintiffs have no means with which to measure the accuracy or efficiency of the voting machines transparently. Plaintiffs do not have access to the source code, software, or hardware for automatic tabulation equipment. Therefore, Plaintiffs are unable to know how their vote was represented, that's undermining Plaintiffs' confidence in a free and fair election. Their paper ballot may have been counted but was it represented and not manipulated after it left Plaintiffs possession and entered through machine tabulation process?

21. All defendants willfully partook, solicited, adopted, approved, and accepted funding for their county surrounding elections, spending/using public taxpayers' monies by entering into binding contracts with Clear Ballot Group Inc., accepting and signing contracts for Albert Sensors and Services and Grants awarded under/through the SOS (from HAVA Federal Funds) when conducting elections and the purchasing of all election equipment. All the above

mentioned can be entered into and abolished at any time by Wasco County as they are the Governing body and vested with Legislative power by statute or charter in the transactions of county business.

- a. All defendants in this case and in the lead case, have partnered with both the cyber security and infrastructure security agency (CISA) and DHS knowingly and willingly (18 USC 1001) a violation punishable by removal from office (18 USC in 1918). All contracts which federalize our elections because the federal government cannot intrude into areas of state sovereignty without a clear constitutional mandate. Congress has currently not delegated this authority to Department of Homeland Security (DHS). Defendants through contracts purportedly have agreed to data and IP address sharing which is a clear violation to the privacy of Plaintiffs private data through said election security software and equipment contracts and grants.

22. In fact, there is no law or constitutional provision that states County and State Officials must/shall **only** use electronic machines and tabulators. Defendants decided by motion and votes to partake in those contracts involving election machines and software, therefore binding them to the procedures of compliance.

23. Wasco County had the ability and authority to choose hand counting the cast votes on a ballot, by way of counting boards, but they chose the ease of the mechanical process and ignored the Plaintiff's evidence which they were bound by law to investigate.

24. Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's "rights, privileges, or immunities secured by the Constitution and laws" of the United States, and we have given that provision the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms. *Maine v. Thiboutot*, 448 U.S. 1,

4, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980). See also *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S. Ct. 2068, 2083, 129 L.Ed.2d 93, 115 (1994).

- a. Rights to equal voting representation and having our 1st Amendment accurately represented **without manipulation** (hidden code or algorithms in the machines) by out of compliance VSTL's, is a deprivation against our privileges. It is not enough that a paper ballot gets counted, but to ensure the vote on the paper has **not** been diluted and/or manipulated is a necessity, and not negotiable. Plaintiffs, as registered voters, may bring equal protection challenges to complaints of vote dilution (*Baker v. Carr*, 369 U.S. 186, 206, 82 S. Ct. 691, 7 L.Ed. 2d 663 (1962), (*Harper v. Va. State Bd. Of Elections*)
 - i. Votes can be fractionalized in the software that "abridge" a vote from counting fully. In 2003, Bev Harris, author and founder of BlackBoxVoting.org, came across 40k voting machine files that contained the secret files called GEMS for the central tabulator that ultimately controls what goes in and out of every voting machine. In 2016, she shared these files with Bennie Smith, a Memphis programmer, who was appointed as the commissioner of Shelby County Elections, demonstrated how easy it was to fractionalize votes. He discovered that votes were being counted as money, with 2 decimal places (but hidden and unseen by the naked eye) in the master computer, therefore affecting an election. These claims are serious - democracy is not a vote by the people, but an illusion of democracy with chosen leaders by those who created such vulnerabilities. Bennie conducted a demonstration on how a simple thumb drive, remote access or hack could successfully alter votes in less than 20

seconds. See the referenced YouTube Video where Bennie conducted the demonstration⁴.

- ii. Also, as outlined in Plaintiffs Complaint, Exhibit B of Terpeshore Maras Affidavit regarding VSTL accreditation, black box voting, trap door vulnerabilities and using COTS. Voters are deprived of the capability of knowing that their vote was accurately counted and not diluting neighboring counties and marginalizing all residents. To date Maras affidavit has not been disproven regarding, COTS, black box and VSTL accreditations.

25. Plaintiffs attended Washington County v. Tim Sippel, 22cv07782 (Or. Cir. Wash. Cty.) to listen to the testimony and evidence presented as they also use Clear Ballot systems. Plaintiffs heard witness Ryan (Jack) Cobb (expert/qualified from Pro V&V) testify to the following (Courtroom405J_20220920-1517_01d8cd0402664e0)⁵.

- a. Timestamp 00:31:07 to 00:32:00 - Mr. Cobb testified that the 2.1 Clear Vote system has wireless modems in it and as certified, they use Dell laptops that have wireless modems in them.
- b. Timestamp 00:43:59 to 00:45:10 - Mr. Joncus (Defendants Lawyer) stated that Mr. Cobb had testified earlier about air gapped machines during the elections then asked if nefarious code could be installed at an earlier time, such as when the machines were not air gapped. Mr. Cobb stated, “Yes, that is a possibility”. Mr. Joncus asked if there is anything in his testing protocol that looks for nefarious code on a machine. Mr. Cobb said yes, using hash values and extracting the firmware or software and

⁴ <https://m.youtube.com/watch?v=Fob-AGgZn44>

⁵ https://www.dropbox.com/s/2i7lvsbfnn0fppb/Courtroom405J_20220920-1517_01d8cd0402664e0.mp3?dl=0

going through a clean PC and running the hash values and see if they see what they expect to be on the machine is on the machine. Mr. Joncus then asked if Pro V&V had done that in Washington County or any County in Oregon to which Mr. Cobb replied, “No”.

- c. Mr. Cobb made no mention that Pro V&V ever re-applied by application for renewal to avoid expiration. Instead, he commented he’s been audited every 2 years (EAC & NIST), they never received a certificate, no one ever updated the website and there was a clerical error.

26. Plaintiffs also heard the testimony of witness Mickie Kawai (former Washington County Clerk) testify to the following (Courtroom405J_20220920-1316_01d8ccf332d552b0)⁶.

- a. Timestamp 01:14:16 to 01:16:00 – Mr. Joncus stated that it sounded like some of the computers in the voting systems have wireless modems. Witness Kawai stated that they are all disabled. Mr. Joncus asked how they are disabled to which she replied, manually. There is a location where you can go in and disable them in the settings. Mr. Joncus asked if there was a password associated with those settings and witness Kawai stated, “not that I know of”.
- b. This is a glaringly different answer under penalty of perjury from what our country’s citizens have been told about wireless capabilities/access.

27. Plaintiffs also heard in the Washington testimony and in court audio records that Mr. Joncus asked Witness Wayne Flynn (expert witness qualified) on 9/20/22 if Washington County has Albert Sensors (Courtroom405J_20220920-921_01d8ccd268ac2420)⁷:

⁶ https://www.dropbox.com/home/Machines?preview=Courtroom405J_20220920-1316_01d8ccf332d552b0.mp3

⁷ https://www.dropbox.com/home/Machines?preview=Courtroom405J_20220920-0921_01d8ccd268ac2420.mp3

- a. Timestamp 00:55:21 to 00:56:04 - Mr. Flynn stated, I have been instructed that by revealing that information, it would be a violation of one of the security measures that I cannot talk about per public records laws.

28. “In late 2021, Lincoln County commissioners terminated their agreement for an Albert sensor, just 13 months after it was signed, deciding the device was more of a liability than a safeguard. Their skepticism was rooted in the fact that shortly after the sensor was installed, the county fell victim to a crippling ransomware attack.”⁸

- a. "This Albert sensor didn't do a damn thing about it," said Lincoln County Commissioner Rob Coffman, a Republican. "It didn't function as it was advertised."
- b. A disconnected Albert Sensor in Lincoln County Wash.



29. Plaintiffs understanding is that the sensor is used to monitor malicious traffic⁹ and is also considered a “black box system – a node on the county network that the county cannot control and cannot monitor”.

- a. Plaintiff Gunter has obtained Albert Monitoring Services agreement for Wasco County which contains the following.

⁸ <https://www.npr.org/2022/08/28/1119692541/washington-state-albert-sensor-cybersecurity-election-security>

⁹ <https://www.cisecurity.org/services/albert-network-monitoring>

- b. Section 7.3.3 By receiving the Services, Local Government consents to CIS disclosing relevant aspects of **Local Government's Confidential Information to its officer, employees, and federal partners for the purposes of security analysis and intelligence on third party threat actors...**
 - c. Section 7.3.4 CIS may use de-identified aggregated data of its service recipients, including Local Government, **in any format for any purpose...**
 - d. Section 7.4 Local Government's Consent and Authorization for CSS and State of Oregon. In exchange for receipt of the Services, Local Government authorizes CIS to distribute information CIS generates and collects as part of the services.... **This includes Local Government's Confidential Information...**
 - e. Section 30 Records, Maintenance, and Access...
30. According to the federal registry and their requirements for the agency (EAC) to make rules to administer the program equitably or fairly under section Section 231(b) of the Help America Vote Act (HAVA) of 2002 ([52 U.S.C. 20971\(b\)](#)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards.
- a. To make rules (or a program manual full of rules)- the agency must publish proposed rules (or manual) in the federal register. They must allow for a period of time for public comments. Then they issue the final rules (or manual) and the final version gets published in the federal register.
 - b. In order to meet its statutory requirements under HAVA § 20971(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the EAC Voting System

Test Laboratory Accreditation Program Manual. Although participation in the program is voluntary, adherence to the program's procedural requirements is **mandatory for participants**.

- c. The manual as set forth by the statute standards, as mandated, which **outlines the details** of the statute requirements.

31. As in the SOS response, which Wasco joins in all matters in their MTD, all defendants take this regulation of “revocation” out of context to deflect from wrong doing. The EAC and Defendants use this as a wide brush to claim VSTLs are accredited until revoked implying what could be infinite and forever without checks and balances ever again. Defendants are seemingly implying that all VSTL accreditations done and recorded every two years as required and adhered to in prior years as part of the reapplication process of VSTL accreditations where for mere looks only and have no meaning essentially. . . . Plaintiffs wholly disagree! The regulation clearly states that the accreditation is for 2-year periods **only** and reapplication must be submitted based on a very strict window of time. Wasco and SOS simply missed this detail in their verification duties.

32. Weighted votes and black box security issues left undetected from VSTL’s with expired accreditation is indeed acts of discrimination based on the way Plaintiffs may have voted and how it subjects them to dilution of their vote, discriminatory measures, and pre-prejudices. Neither defendant took precautions of diligence to ensure an astringent verification process was followed to protect plaintiffs’ equal representation and 1st Amendment security’s while voting prior to machine usage and approvals.

33. A court must “overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.” *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986).

34. Any defense counsel in our great country claiming a vote is not denied because a person’s paper “ballot” was merely counted on a machine tally system whether that tally system be in compliance of the law or not is sufficient enough in a state’s obligation without upholding the constitution and law is **erroneous**. One could assume by that stance telling a mortgage company “I mailed my house payment, just trust me” is enough. That is equally a ridiculous argument. This government is plagued by massive unaccountability, while citizens are held to a far stricter standard.

- a. A vote must be counted in fact and its whole intention not in hopes or guessing. The insinuated idea of “it’s good enough” is **egregious**.
 - i. Have plaintiffs been provided unequivocal proof in responsive filings of VSTL accreditation by The State, County or EAC FOIA completed? Were VSTL timely applications submitted, and audits performed to be in accreditation compliance? They have not been supplied.
- b. Why has the SOS and Wasco County only settled for mere memos and not requested the EAC provide factual evidence based on the contractual procedures outlined by HAVA and supplied to the courts for their counter arguments? Did they themselves verify the truth and facts at question? Have all defendants contacted the EAC, NIST, and VSTL for documentation under their administrative duties, requirements and diligence when holding positions of trust?

35. The Court has also recognized the Constitution guarantees that “free and uncorrupted choice” shall be afforded to all in the decision of who should lead them. In the first instance, this general rule applies to secure one’s vote, such that a legally cast vote is actually counted, and not discarded, **cancelled, nullified, or otherwise spoiled**. Thus, the Supreme Court has stated: “[t]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place.” *United States v. Classic*, 313 U.S. 299, 315, 61 S. Ct. 1031, 1037-38, 85 L.Ed. 1368, 1377-78 (1941).

36. The Framers were deeply suspicious of partisan manipulation of the electoral process. They knew that “Those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it.” 1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911), p. 578.

37. Thus, the Framers added the First Amendment to the Constitution, ensuring protection of “[t]he special structural role of freedom of speech in a representative democracy.” Amar, *The Bill of Rights: Creation and Reconstruction* (1998), p. 25.

38. The Amendment serves as a critical safeguard of democratic self-governance, ensuring that “those in power” may not “derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it.” *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004).

- a. Plaintiffs’ free speech representation of democracy is rendered uncertain, spoiled, oppressed, factionalized, diluted and irreparable to date and continues.

39. “There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the

ballot counted.” Reynolds, *supra* at 555, n. 29. And counted properly. United States v. Mosley, 238 U.S. 383, 386 (1915).

- a. Plaintiffs’ ballots may have been counted but are plaintiffs votes on their ballots **properly represented** when using uncertified machines? The issues at hand renders plaintiffs weighted cast votes uncertain.

40. Wasco County stated no direct opinion on their actions and the SOS actions or lack thereof. The SOS should not be afforded sovereign immunity as they also had a recourse and a personal choice for the way elections were overseen and conducted via directives. Why would all officials not be held equally liable, regardless of their position, all are elected by the people and wield their powers from the people.

41. In Fitzpatrick v. Bitzer (1976), the court held that Congress could subject states to suit in federal court through laws and acted under its 14th amendment power to readdress discriminatory state action.

- a. The Supreme Court does allow suits against state officers in certain circumstances, thus mitigating the effect of sovereign immunity. In particular, the Court does not read the Amendment to bar suits against state officers that seek court orders to prevent future violations of federal law. Moreover, suits by *other* states, and suits by the United States to enforce federal laws, are also permitted. The Eleventh Amendment is thus an important part, but only a part, of a web of constitutional doctrines that shape the nature of judicial remedies against states and their officials for alleged violations of law.

42. Plaintiffs have not asked for monetary damages but have asked that all defendants uphold the Constitution in their offices and duties of trust while conducting the people’s business in their

contractual oaths of upholding such matters. Plaintiffs have asked the court to compel defendants in such matters.

43. There is no immunity for any party from liability arising out of the negligent performance of a proprietary or ministerial act by local governmental employee, whether that be SOS or Wasco Defendants. The elements of liability are care of duty, breach, causation, and what damages have been caused. The State and officials have duty of trust and care owed to the public under due diligence of procedural verifications and they're bound by their contractual oath of office. The state and county levels, when conducting elections, are to verify all law protocols and procedures are followed and investigated thoroughly as they are subject to the duties of their position.

- a. Have all duties surrounding trust and care been followed? One simply should not read and rely on a few sentences of a statute and claim "good enough", that's our safety clause going forward.

44. Neither Wasco Defendants or the SOS are employed by the Federal Government or the State but employed through the public via elections and paid by public funds that supply their salaries on a financial scale. Defendants have circumvented our state sovereignty by entering into contracts with federal agencies.

- a. Many of our laws are derived from British Common Law. Historically, under the doctrine of "sovereign immunity," you were not permitted to sue the king.
 - i. Plaintiffs are not suing their State, they are suing the overseers/managers of their business and the maladministration happenings while occupying a public trust position.

- b. In *Ex Parte Young*, the Supreme Court held that a private litigant can bring suit against a state officer for prospective injunctive relief in order to end “a continuing violation of federal law.” The 11th amendment does not stop a federal court from issuing an injunction against a state official who is violating federal law. Although the state official may be abiding by state law, he is not permitted to violate federal law, and a federal court can order him to stop the action with an injunction. [*Ex Parte Young*, 209 U.S. 123 (1908)]
- c. The county and state manage the people’s money, property and enter into binding contracts by their choices, therefore it is the people that have the right of trust by law to their property’s safety and compliance.
- d. An outlined complaint has been filed that is an ongoing violation of federal law and constitutionally protected rights and seeks relief properly characterized as prospective.

45. At the very least, the simple fact remains in both cases, that is the one of choice. Choice to enter into funding and equipment contracts surrounding elections. Choice to ignore violations that were brought to their attention. The secretary of state has/had the opportunity to issue directives and guidance and **inform** counties by which glaring issues have arisen. Wasco County had the ability and choice to use hand counting of ballots and forego tabulation machines. Instead, the State and Wasco County took the stance of doubling down and relying on a single sub section of a statute and not seeking the proof that is required and mandated under a congressionally passed act of proper VSTL accreditations. All of which should have been verified by the state and at county levels prior to conducting elections, thereby protecting Plaintiff’s 1st Amendment representation from dilution.

46. Using mechanical election equipment is based on speed and time efficiency alone, it does **not** benefit the General public but rather lends to malicious behaviors and only benefits those who are conducting and operating the elections itself. Would the public not benefit from lawfully conducted elections and care by and through investigation?

47. Would the public not be supportive of hand counting elections when **properly informed** and **provided transparency** of the issue regarding lab accreditations? Plaintiffs believe the public would very much benefit from that information and appreciate the state and county's protection until such issues are resolved surrounding critical infrastructure safety. Plaintiffs and public were afforded no such transparency.

48. As in the SOS's own response, "REPLY IN SUPPORT OF DEFENDANTS MOTION TO DISMISS FIRST AMENDED COMPLAINT" on page 2, the law in turn, "relies" on federal accreditations of test laboratories. Plaintiffs argue that HAVA created the EAC to set guidelines and requirements for the states in their voluntary participation.

49. Defendants have had the opportunity, also the responsibility and access to records and processes, to make their concerned citizens whole regarding positions of trust, on all unresolved matters of security surrounding critical. Safety in duties of trust should be a staple in our society when serving the public. Instead of producing the proper documentation as proof, both the SOS and Wasco County continue to confuse the public and waste taxpayer funds with MTD and sovereign immunity arguments.

- a. SOS had the perfect opportunity to audit the prior SOS records when she took office to ensure all prior procedures were followed and the proper documentation in place based on the rules set by the EAC Manual. If she had done that, she could easily have provided a safety net to herself, County Clerks, and the public to avoid litigation.

b. In turn Wasco County auditing the SOS would have ensured they were in compliance and provide a safety net for themselves and their County Citizens.

50. To grant the SOS sovereign immunity is to paint a dangerous broad stroke of lawlessness regarding election law and statute interpretations as an outlined overseer of elections. What is the point of the role of election overseer or any position if immunity is always enacted, where is the accountability and relief for the people when embracing immunity? It enables the SOS simply to choose on their own accord their personal interpretation of election statutes and not delve further into any statute requirement but merely what they deem to be sufficient enough in carrying out their own intentions and negligence. It lends to a very dangerous and unequitable outcome for all its state citizens and county election officials. That is mere abrogation to evade one's duty under the law. Nor does it lend to judicial economy by and through appeals processes that will follow. Further, the SOS's own actions have thrust every county in Oregon into the same maladministration actions in the checks and balances of their position through seemingly complete blind trust.

Plaintiffs fully incorporate their response, "PLAINTIFFS RESPONSE IN OPPOSITION TO MOTION TO DISMISS" from Case No. 3:22-CV-1252-MO.

For the foregoing reasons here and in all responsive documents and complaints, Defendants' Motion to dismiss should be **denied**. If the Court grants the motion in whole or in part, Plaintiffs should be given leave to amend the Complaint.

Respectfully submitted this 6th Day of January 2023.

/s/ Jennifer Rae Gunter
1601 G St.

The Dalles, OR 97058
Telephone: 541-993-5366

/s/ Christina Lynn Milcarek
1496 Foxglove Street
Woodburn, OR 97071
Telephone: 708-932-0959

/s/ Chelsea Anne Weber
19000 S Pear Rd.
Oregon City, OR 97045
Phone: 503-422-0933

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