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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 GUNTER, an individual, et al.,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:22-CV-01252-MO (Lead Case)

PLAINTIFFS RESPONSE IN OPPOSITION
TO DEFENDANTS' FORESTER, TREECE,
FAI, HARRINGTON, ROGERS AND
WILLEY MOTION TO DISMISS

Case No. 3:22-CV-01675-MO
(Consolidated)

Case No. 3:22-CV-01743-MO
(Consolidated)

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

Plaintiffs,

v.

KATHRYN HARRINGTON, et al.,

Defendants.

LR 7-1 CERTIFICATION

Plaintiffs Morrise and Genta have made a good faith effort to resolve the dispute with Defendants' Counsel. On February 1, 2023 Plaintiff Morrise and Defendants' Counsel Bush held a telephone conference and were unable to resolve the dispute.

LR 7-2 CERTIFICATION

The undersigned hereby certify that this response is 779 words including headings, footnotes, and quotations, but excluding the caption, and signature block.

RESPONSE IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS

1. Plaintiffs join with the lead case Plaintiffs Gunter et al. (thus incorporating by reference case 3:22-cv-01252-MO) in their facts, arguments and pleadings from their lead case ECF filing numbers 25, 27, 34, 41 and 43.
2. The motion to dismiss to which this is a response states that "This case is based on the same factual basis and makes the same legal claims as the lead case, Gunter, et al. v. Fagan, United States District Court Case No. 3:22-cv01252-MO. Compare 3:22-cv-01252-MO, [ECF 1] with 3:22-cv-01743-MO, [ECF 2]." The defendants did not provide facts or evidence that, in fact or law, counters the facts and evidence from Plaintiff's original complaint. The core of Plaintiffs'

factual basis is that Washington County election machines were unlawfully utilized to count ballots, votes and certify election results as they were not properly certified by either the EAC or the Oregon Secretary of State, as the VSTL EAC accreditation expired in February 2017.

Defendants were responsible by law to ensure proper election machine certification, prior to any purchase or usage.

3. In response defendants claim in their motion to dismiss that plaintiffs only claim “theoretical harm” and that without actual harm plaintiffs have no standing to sue. It is well established that potential harm is still harm. For example in each of *Save Our Community v. City of San Jose* (9th Circuit), *Massachusetts v. EPA* (U.S. Supreme Court), *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (U.S. Supreme Court), *Sierra Club v. Morton* (U.S. Supreme Court) and *Center for Biological Diversity v. National Highway Traffic Safety Administration* (D.C. Circuit Court) plaintiffs successfully established standing based on their claims of potential harm, despite not having suffered a direct or immediate injury. The courts found that the potential harm was sufficient to establish standing, as the plaintiffs showed that they could be directly impacted by the defendant’s actions. Failure to certify voting machines possibly leading to invalid elections is just such a case with potential harm that is concrete, particularized and imminent.

For further clarification consider that legal action may be taken against a drug manufacturer by individuals who have not yet suffered actual harm, but who claim to be at risk of harm in the future as a result of taking an improperly tested drug. Drug manufactures have a responsibility to adequately test drugs, even as the defendants in this case had the responsibility to have the voting machines tested/inspected by a properly accredited VSTL prior to purchase or usage in elections. Just as drug manufacturers are liable for the potential harm to those who took an improperly

tested drug, but as of yet have suffered no harm, the defendants are liable for any potential failures in the electoral process caused by their own negligence. No one can absolutely guarantee that a drug is safe in all cases and no one can guarantee that voting machines will always perform correctly but must mitigate these risks and follow any laws/rules requiring proper inspection/testing and certification. When these rules/laws are not adhered to, there is the potential of injury due to negligence. In the case of improperly certified voting machines the potential harm is that the electorate is not represented by the officials they voted for. Plaintiffs believe there is no greater threat to our state and country than an injuring and undermining of public confidence in elections. This harm is concrete in that the electorate is not properly represented, particularized in that improper representation can result in improper governance, and imminent in that the effects of improper governance are immediate.

4. Due to a lack of resolution to the foregoing, plaintiffs request remedy of the situation so it does not repeat. Otherwise the integrity of our elections will continually be called into question and the potential for illegitimate elections will still exist. Oregon laws already provide an avenue to hand count votes on paper ballots, rendering the need for electronic election equipment unnecessary.

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 1st day of February 2023,

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