

No. 23-35124

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

JENNIFER RAE GUNTER, et al,

Plaintiffs-Appellants

v.

SHEMIA P. FAGAN; LISA GAMBEE;
KATHY SCHWARTZ; STEVE KRAMER;
SCOTT HEGE

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

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The action arises under federal law, including 42 U.S.C. § 1983 to redress the deprivation, under the color of law, of rights, privileges, and immunities secured to Plaintiffs by the Constitution of the United States. This Court has jurisdiction over Plaintiffs' appeal from the final decision of the United States District Court for the District of Oregon under 28 U.S.C. § 1291.

Judgment was entered on February 6th, 2023 [ECF 51, 52]. This appeal was timely filed on February 14, 2023 [ECF 53], within 30 days after entry of judgment, pursuant to 28 U.S.C. 2107(a).¹ This appeal is from a final judgment that disposed of all of Plaintiffs' claims.

ISSUE(S) PRESENTED

Plaintiffs believe Judge Mosman erred in dismissing their civil complaints based on Lack of Standing, Federal Statute, and that Plaintiff's cases should be dismissed with prejudice.

STATEMENT OF THE CASE

This appeal arises as a matter of all Defendant's failure in lawfully conducting Oregon State elections and their failed actions to investigate under ORS

¹ <https://www.law.cornell.edu/uscode/text/28/2107>

246.046 which states: “The Secretary of State and each county clerk shall diligently seek out **any** evidence of violation of **any** election law”.

Oregon Elections Division Chapter 165 Rule 165-007-0350 Section 1 states: All voting systems submitted for certification pursuant to ORS 246.550 (Examination and approval of equipment by Secretary of State) **must** be certified by the Elections Assistance Commission (EAC) **or** be examined by a federally accredited voting systems testing laboratory (VSTL)”.

The Oregon Secretary of State (SOS) and Wasco’s failure to report/investigate the Election Assistance Commission (EAC) failure to follow their own guidelines of statutory law under HAVA were not met and has put Plaintiffs and all Oregonians at risk. This failure allows access by foreign and domestic actors to control our elections by vote dilution, marginalization, and fractionalization through Commercial Off The Shelf (COTS) equipment such as black box systems.

At the option of the State (Section 1.4 Scope)², the SOS failed in the first step of her approval process of using systems only examined by a **fully accredited** and **recertified** VSTL. As the rules are mandatory for participants, the SOS’s verification of such was missed and severely put every Oregon voter

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

at risk and in-turn the nation. (52 U.S.C. Subtitle II, Ch. 209: Election Administration Improvement³ -Subpart3-technical guidelines development committee-Part B-Testing, Certification, Decertification and **Recertification** of voting system hardware and software §20971 (a)(2)”.

- a. Defendants and Judge Mosman rely on a single section in this statute, §20971 (c)(2), that outlines “revocation” only, disregarding §20971 (c)(1) which states, “shall monitor and review, on an ongoing basis, the performance of the laboratories accredited by the Commission (EAC) under this section, and shall make such recommendations to the Commission as it considers appropriate with respect to the **continuing accreditation** of such laboratories.” One cannot revoke something that is expired or not legal to begin with. It **must be a valid certificate** to revoke and accreditation certificates are not to exceed the period of (2) years.
- b. If words matter in law, Plaintiffs point out there are 4 sections to this statute, they ignored the entire code surrounding the Commission of the EAC and their role in elections (relating to the adoption of

³ <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title52-chapter209&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGl0bGU1Mi1jaGFwdGVyMjA5LXN1YmNoYXB0ZXIyLXBhcnRE%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>

voluntary voting system guidelines)⁴, instead Defendant's cherry picked a very small portion. Judge Mosman is correct that Plaintiffs did not quote revocation, we quoted accreditation is only provided for 2 years and is **not** infinite. Under Defendants same quoted Statute 52 USC 20971 under section (c), (1), "the performance of the laboratories accredited by the Commission under this section, and shall make such recommendations to the Commission as it considers appropriate with respect to the **continuing** accreditation of such laboratories". Plaintiffs believe there are procedural policies that must be met. (Plaintiff's Response in Opposition to SOS MTD [ECF 25] No. 35).

- c. How can a Congressionally passed act (HAVA), that charged the EAC to ensure election safety and integrity boil down to a single section in the statute? Defendants and Judge Mosman would have Plaintiffs believe that the EAC can accredit a VSTL one time, and the accreditation be infinite. If the VSTL had to follow specific rules and guidelines to be "**accredited**" (which the statute does **NOT** outline how to accomplish), the EAC's Program Manuals are clearly

⁴ [52 USC Subtitle II, CHAPTER 209, SUBCHAPTER II: COMMISSION \(house.gov\)](https://uscode.house.gov/view.xhtml?path=/prelim@title52/subtitle2/chapter209/subchapter2&edition=prelim)
<https://uscode.house.gov/view.xhtml?path=/prelim@title52/subtitle2/chapter209/subchapter2&edition=prelim>

detrimental in order to have their accreditation “**renewed**” when their two-year certificate expires. The consequences of an expired accreditation are voting machines not being properly certified (unsecure) which damages our entire nation, the State of Oregon and all its counties leading to exploitation, dilution/fractionalization of Plaintiffs votes.

All defendants have failed to act on implementing protections surrounding a protected class, that of voters and those with rights to suffrage to ensure election laws are properly in compliance. Plaintiffs are a protected class that of voters and have rights to suffrage, to vote by full equal representations and not that of voting dilution through failed administrative actions. *U.S. v. Moseley*, *Reynolds v. Simms*, *South v. Peters*, *Anderson v. United States*, *Baker v. Carr*:

- a. The right to an undiluted vote is an Article I, 1st and 14th Amendment issue as addressed by the Supreme Court. In *U.S. v. Moseley*, the court held: We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box. In *Reynolds v. Sims*, the Court noted: (T)he right of suffrage can be denied by a **debasement or dilution of the weight of a citizen's vote** just as effectively as by wholly prohibiting the free exercise of the franchise.

b. The Court also included reasoning from Justice Douglas, in *South v.*

Peters: "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. . . . It also includes the right to have the vote counted **at full value without dilution or discount**. . . . *South v. Peters*, 339 U.S. 276 (1950)

c. Lawful elections are the backbone of our local, state, and national government. The right to vote is **protected** by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62. "[e]very voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his **vote fairly counted**." *Anderson v. United States*, 417 U.S. 211, 227 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

"Officials violating the law in regard to the preservation of a government of the people, by the people, and for the people are consequentially in violation of the U.S. Constitution. Thus, one of the most basic requirements of a 42 U.S.C. § 1983 claim is that defendant personally cause — either by directing or knowing of and **acquiescing** in — the deprivation of a Plaintiffs' constitutional

rights. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)”.

Wisconsin Supreme Court agrees in *Teigen v WEF* and *DSCC et al*⁵;
“Wisconsin elected officials "deriv[e] their just powers from the consent of the governed... 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.”

- a. Plaintiffs and citizens across The United States of America have **not** consented to these representation failures and unresponsive actions of preventable failure. Defendants have inadequately protected Plaintiffs surrounding HAVA and the EAC. Many such cases of this exact issue have been brought by the people since the 2020 election demanding rightful corrections.

SUMMARY OF THE ARGUMENT

On August 24th, 2022, Plaintiffs filed a civil action suit against the Oregon Secretary of State as the Chief Election Officer for various improprieties related to election laws and procedures according to the Congressionally passed Help

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<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=542617>

America Vote Act of 2002 (HAVA)⁶ during 2020 elections. Additionally, Plaintiffs filed a second civil action against the Wasco County Clerk and Commissioners for similar issues surrounding their failures to ensure election integrity and take corrective actions.

These suits and appeal seek to protect Plaintiffs rights under the 10th, 14th, 19th and 26th amendments of the US Constitution and to preserve our proper 1st Amendment representation through Plaintiffs rights to suffrage. The method by which elections in Oregon were conducted in 2020, 2022, and now upcoming in 2023 **cannot** be shown to provide 100% fair representation as guaranteed to **every citizen under the U.S. and Oregon Constitution**.

Plaintiffs had submitted exhibits with each case, supplemental authority for both cases [ECF 34, 43] and were granted judicial notice [ECF 27].

In each of these combined cases both defendants and plaintiffs have fully incorporated their responses in all their filings in each case. To save and respect this courts time on a combined case such as this, with like issues of their complaints surrounding federal accreditations for Voting System Test laboratories (VSTL) of which the SOS relies on to certify Oregon voting machines, we will address the topics surrounding our case dismissal and the reasons for our appeal to this honorable court. Those argument topics include:

⁶ <https://www.congress.gov/107/plaws/publ252/PLAW-107publ252.pdf>

- I. Article III standing
- II. Statute trumps an agency guideline/manual
- III. Mosman dismissal with prejudice
- IV. Conclusion of Argument

ARGUMENT

I. ARTICLE III STANDING

1. Judge Mosman stated “feeling devastatingly disenfranchised” [ECF 19,51,52] is not enough, illuding in his opinion that the only “statement” of harm was Plaintiffs’ feelings. Personal injury is the failure of care in administrative duties by the SOS and WASCO, subjecting Plaintiffs to the dilution of their voice, their 1st Amendment right, in which they have no way of knowing if their vote was accurately represented or merely diluted/fractionalized using improperly checked machines from a properly accredited VSTL. The Defendants failure to hold the EAC accountable to their own guidelines was an **imperative** intervention, as a parent party to the people, on the people’s behalf.

a. Defendants failing in the duties, care and trust of their positions while representing Plaintiff’s voice. Defendants catching the agency’s (EAC) failure and acting on our behalf such as invoking Parens Patriae. The government, or any other authority, regarded as the legal protector of citizens

unable to protect themselves, could have fully remedied the situation.

Defendants have the opportunity and avenues for protecting the people, their failure to do so is clearly harm against Plaintiffs.

b. The EAC quietly publishing a “notice of clarification” after the 2020 election does not qualify as formal proceedings to alter the current agency rules/policies. Nor does it excuse them from upholding the established rules that have undergone those proper formal proceedings under the Administrative Procedural Act.

c. Plaintiffs stated how the EAC’s website has quietly changed to align with their “notice of clarification” (See Plaintiffs Response in Opposition to SOS MTD, [ECF 25] No. 36-38.

d. Representatives are chosen by the public to decide on its behalf the policies and actions to be pursued by a government and are **charged with acting in the best interests of their constituents**. In doing so, representatives are **accountable to their constituents for their actions and lack thereof**, making harm traceable back to Defendants.

e. While feeling the lack of confidence and disenfranchisement may be intangible and not objectively measurable, that is NOT a barrier to court action. In perhaps the most significant civil rights case of the 20th Century, the United States Supreme Court eschewed objective criteria and relied solely on

intangible psychological factors to rule that segregation of white and black children in schools was unconstitutional⁷. In *Brown*, even though the tangible factors (such physical facilities) may be equal, “to separate [blacks] from others of similar age and qualifications solely because of their race **generates a feeling** of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁸ If a “feeling” was concrete enough for the United States Supreme Court to overturn generations of precedent in a landmark civil rights case, it is enough for this case. Moreover, the damage to Plaintiffs is **not** merely from a feeling. The damage to Plaintiffs’ is literally the loss of their earned freedom and proper representations. (Plaintiffs First Amendment of Verified Complaint, [ECF 17] Page 5. No. 18 “**unelected or selected officials**”). Self-governance exists only when the people have confidence in the fairness of elections⁹. Without self-governance, Plaintiffs have literally lost their freedom. Plaintiffs have suffered concrete, particularized and actual injury even if “Feeling devastatingly disenfranchised” was the only thing they claimed. Even intangible interests can count for Article III Standing and is not novel¹⁰. *Spokeo, Inc v. Robins* 2016 citing free speech¹¹; free

⁷ *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954)

⁸ *Id.* at 494 (emphasis added)

⁹ *E.g.*, *Purcell*, 549 U.S. at 4

¹⁰ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)

¹¹ *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009)

exercise¹²; psychological harm and constitutional standing¹³.

f. The above facts demonstrate why Plaintiffs have been devastatingly disenfranchised by Oregon's election system. Oregon's, count by computer, election system is designed and operated in a way that shuts out the public and generates suspicion and distrust in our government¹⁴ and relies on unchecked policies of the agency (EAC).

g. Merely holding elections is **NOT** enough. China holds elections— Iran holds elections—and the once free country of Venezuela holds elections— all for show. “Elections enable self-governance **only** when they include processes that ‘give citizens (including the losing candidates and their supporters) **confidence in the fairness of the elections.**”¹⁵

2. Plaintiffs are voters, women and a protected class and a loss of representation satisfies the injury in fact requirement¹⁶. Plaintiffs have suffered injury in fact based on elections being conducted below shrouds of doubt, insufficient protocols, and defendants' failure. **Plaintiffs have a personal stake**

¹² *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)

¹³ *Rachel Bayefsky, Psychological Harm and Constitutional Standing* (2016)

¹⁴ *See Purcell*, 549 U.S. at 4

¹⁵ *Republican Party v. DeGraffenreid*, 141 S. Ct. 732, 734 (2021) (J. Thomas dissenting in denial of certiorari) (quoting *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (emphasis added)

¹⁶ *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

and involvement in their elections.

3. Article III of the Constitution requires Plaintiffs in Federal Court to allege an actual “case or controversy.” The failure to abide by current law and standards, as well as the lack of proper certification and failure to hold the EAC accountable indeed creates a case or controversy. The vulnerability of the voting machines to manipulation from failed VSTL Accreditations and Certifications, and the lack of both knowledge of and transparency of the number and extent of these vulnerabilities, is also a case or controversy. The EAC’s inability and failure to follow their own rule is a case and controversy that the Defendants should have remedied on Plaintiff’s behalf in their duties of care they owed Plaintiffs.

a. A threatened injury may constitute an injury in fact where there is “a credible threat of harm” in the future¹⁷, rather than a speculative fear “of hypothetical future harm,”¹⁸

b. Machines have **not** been proven to be in proper compliance and secured from outside influence by the glaring FACTS of the agency’s (EAC) failure.

4. Plaintiffs case filings, exhibits, and the declaration of Ms. Terpeshore Maras (Plaintiffs First Amendment of Verified Complaint [ECF 17], Exhibit A) is

¹⁷ *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010)

¹⁸ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)

used as evidence to prove that the procedures laid out in HAVA, certification processes of VSTL accreditation and VVSG 1.0 and 2.0 were not followed, as this honorable court will discover. Although participation in the program is voluntary, adherence to the **program's procedural requirements is mandatory for participants** (Plaintiffs Response in Opposition to SOS MTD [ECF 25] No. 22)¹⁹.

Ms. Maras affidavit thus far has been **unchallenged and undisputed**. The breaches of procedure were known, or should have been known, by **all** defendants. Further defendants were derelict in their duty; thus, this dereliction creates vulnerabilities that violate defendant's oath of office, laws of the state of Oregon, Federal regulations, universally agreed upon rules, laws and procedures around the use of digital voting equipment and infrastructure in place to guarantee fair and equal protection of Plaintiff's vote further tethering the harm back to Defendants.

a. Lawsuit against EAC failures is pending, *Graeff v. United States Election Assistance Commission et. al* Case No. 4:22-cv-00682 RLW.

b. Plaintiff Gunter's FOIA from the EAC is **unanswered** to date of this filing (Original response for records was slated for October 2022, then pushed to March 2023. The EAC has **failed** to produce records and failed to further correspond with updates to Plaintiff Gunter).

¹⁹ <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl>

c. EAC FOIA Lawsuit surrounding record production is still pending in 9th Circuit of the Portland Oregon Division²⁰.

5. In regards to standing of citizens in election-related matters, recent decisions from the Georgia Supreme court²¹ ruled: *[O]nly plaintiffs with a cognizable injury can bring a suit in Georgia courts. Unlike federal law, however, that injury need not always be individualized; sometimes it can be a generalized grievance shared by community members, especially other residents, taxpayers, voters, or citizens.*

a. Plaintiffs have been subjected to ballot measures, higher taxes by inflicting harm by measures unlawfully passed by fractionating votes to benefit a party or person. All above traceable to Plaintiffs by and through Oregon Voting and those that oversee elections.

6. To Plaintiffs knowledge and belief, the courts cannot accept a citizen does not have a remedy in a voting act²².

7. Plaintiffs believe our vote was undermined and our country has the illusion of fair elections²³ therefore, damaging all citizens confidence.

²⁰ *Berlant v US EAC* (3:23-cv-257-SI)

²¹ *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*

²² See recent Supreme Court decision in Delaware (C.A. No. 2022-0641-NAC & C.A. No. 2022-0644-NAC)

²³ *Wesberry v. Sanders*, 376 U.S. 17 (1964)

8. The GA court's reasoning in Plaintiff's case should be extended here as the Equal Protection Clause demands Plaintiffs have the same voting rights in Oregon as they would have residing in Georgia or **anywhere** in the United States.

9. Invalid or fraudulent votes debase or dilute the weight of each validly cast vote²⁴. The unequal treatment of votes within a state, and unequal standards for processing votes raise equal protection concerns (14th Amendment violation).

a. **Defendants** in both cases **have not** proven and **cannot** prove our votes were counted fairly, accurately, and with 100 percent weight of Plaintiff's full intention on unlawful machines. But rather they obfuscate and rely on their choice of a subchapter and single section of a statute, **rather the law of the statute as a whole**.

10. A particularized traceable injury is the failure of care to investigate while authorizing/using machines that have the ability to dilute votes. Plaintiffs pleaded with Defendants (and all Counties across Oregon) for protection to ensure the safety of their 1st Amendment rights (see Exhibit T in Plaintiffs Response in Opposition to SOS MTD [ECF 25] No. 45).

²⁴ *Bush v. Gore*, 531 U.S. at 105

11. Even Justice Thomas agrees we have the opportunity to correct equal protection concerns (First Amended Complaint [ECF 17] No. 30²⁵).

12. **ARTICLE III STANDING ARGUMENT CONCLUSION:** With such clear disregard for Election Rules, Plaintiffs can assume the worst, it is indeed plausible many laws, policies, regulations, and executive orders over these years since 2020 were illegally enacted creating harm and imposing **real financial and societal** burdens to Plaintiffs while fully damaging their equal protection and full voice representation. This lack of proper certification violates the Federal and State laws and standards for which defendants were **responsible to follow** in Oregon and is a constitutional failure to properly protect our voting rights. Defendants knew, or reasonably should have known, that the accreditation and verification process was not in accordance with law and regulations. Thus, defendants were derelict in their duty, and this injured Plaintiffs by compromising the integrity of our vote.

II. STATUTE TRUMPS AGENCY GUIDELINE/MANUAL

13. The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA). The EAC was mandated through

²⁵ *State of Texas vs. Commonwealth of Pennsylvania, State of Georgia, state of Michigan, and state of Wisconsin (2020)*

Congress to enact accreditation procedures for VSTL to inspect and certify electronic voting systems for use by the states, as well as audits the use of HAVA funds.

14. It is critical that a statute cannot be interpreted in its entirety and not by ways of obfuscating and hand picking by Defendants choice to fit their nonfeasance. Plaintiffs First Amendment of Verified Complaint [ECF 17] No. 47, (c.) states, “Which leads to the reasoning that this is not a viable excuse, nor do Plaintiffs believe the EAC has the statutory authority to operate outside the Congressional scope of the HAVA act”.

a. Plaintiffs Response in Opposition to SOS MTD [ECF 25] at No. 21.

1) According to the EAC’s own Website: “In order to meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC’s Voting System Test Laboratory Accreditation Program. **The procedural requirements of the program are established in the proposed information collection, the EAC Voting System Test Laboratory Accreditation Program Manual²⁶. Although participation in the program is voluntary, adherence to the program’s procedural requirements is mandatory for participants. The procedural requirements of this Manual will supersede any prior laboratory**

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

accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's **Voting System Testing and Certification Program Manual** (OMB 3265-0019²⁷).”²⁸

2) [ECF 25] No 35 states: Defense alleges that a “**purpose clause**” is a fact when it is a simple statement of intent that appears at the beginning of a part or sub part either as a standalone section or as a part of another section. Revocation in the VSTL program manual is a standalone section (section 5). The purpose of the section is **not** to imply accreditation be infinite, only how there is protocol and how it is to be carried out. A section just can't be rolled into another section for incorporation. Each is a standalone section and has procedures in place for that action²⁹.

15. Agencies are to follow their own policy/guidelines.

a. Case authority: 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

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https://www.eac.gov/sites/default/files/eac_assets/1/6/Cert_Manual_7_8_15_FINAL.pdf

²⁸ <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl>

²⁹

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

laws set by HAVA, affording a **domino-effect** substantiative restraints and violations of protected persons (class) from arbitrary or capricious treatment, **in turn thrusting forward onto the SOS and Wasco County’s failure of complete investigation and diligence to protect** their voters and infrastructure. Even government officials **must** follow agency regulation and guidelines. The Accardi doctrine was later strengthened in *Service v. Dulles* 354 US 363 (1957) [4] and *Vitarelli v. Seaton*, 359 US 535 (1959). Furthermore, in *Simmons v. Block*, states that “A court must “overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself” 782 F. 2d 1545, 1550 (11th Cir. 1986).

b. Defendants were required under ORS 246.046 to “**seek out election violations**”. Had they done a proper investigation, they would have caught the EAC’s failure of not observing their own rules and guidelines. This failure to follow Oregon Law (which also violates Federal Law) further harmed Plaintiffs by their failure to act and uphold their Oaths.

16. Plaintiff’s First Amended Complaint [ECF 17] No. 35 and Plaintiffs Response to WASCO MTD [ECF 41] No. 30 notes the requirements for agencies to make rules and administer the program equitably and fairly under section 231(b) of the Help America Vote Act 52 USC 20971(b) requires that the EAC provide for the accreditation and revocation of independent non-federal

laboratories qualified to test voting systems to federal standards. How VSTL standard details are revealed in their entirety pertains to the whole statute canon at the foundational development of law.

a. “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and **with a view to their place in the overall statutory scheme.**” *Davis v. Michigan*³⁰.

17. Without fiduciary diligence defendants have subjected Plaintiffs to foreign adversaries due to trap doors, blackbox, Wi-Fi accesses and COTS usage is the very definition of a particularized injury in fact. See Plaintiff’s Response in Opposition to Wasco MTD [ECF 41] at page 10 No. 20, a-c. There is no way to measure the accuracy of the voting machines transparently, as Plaintiffs do not have access to the source codes, software, or hardware for automatic tabulation equipment therefore plaintiffs are unable to know how their vote was represented, undermining plaintiffs’ confidence in a free and fair election. Plaintiffs have no way of knowing that their vote was represented properly and not manipulated. *South v. Peters* “important to have it counted as intended.”

a. When not ensuring the EAC followed their own guidelines, as outlined, you then have a vote that can be fractionalized to abridge a vote from counting fully (Plaintiff’s Response in Opposition to Wasco MTD [ECF 41] No

³⁰ *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)

24(a-ii).

18. Plaintiff has supplied full factual supportive evidence of the SOS and Wasco's failure to hold the EAC accountable³¹. This has harmed and put at risk Plaintiff's 1st Amendment voice representation through their vote and subjected us to dilution through unfair and unequal practices by hidden codes, manipulation and algorithms that have **gone unchecked** fractionalizing Plaintiffs votes and the entire state.

a. Wasco uses such mechanics through their alert sensor "black box known as COTS product" this is a node in the county's network that the county cannot control or monitor therefore harming the protected class of voters (Plaintiffs Response in Opposition to SOS MTD [ECF 25] No 8., see *Commerce v. House of Reps*³².)

19. Plaintiff's Response in Opposition to Wasco MTD [ECF 41] No. 30 noted, Plaintiffs discussion of federal registry and the requirements for agencies to make rules and administer the program equitably and fairly under section 231(b) of the Help America Vote Act 52 USC 20971(b) requires that the EAC

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https://oregon.public.law/statutes/ors_246.046#:~:text=ORS%20246.046%20Secretary%20of%20State%20and%20county%20clerks,any%20evidence%20of%20violation%20of%20any%20election%20law.

³² See *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 317, 331–32, 119 S.Ct. 765, 142 L.Ed.2d 797 (2002)

provide for the accreditation and revocation of independent non-federal laboratories qualified to test voting systems to federal standards.

a. Page 16, No. 30(a), statement that the EAC must publish proposed manuals in the federal registry.

b. Page 16, No. 30(b), In order to meet the statutory requirements under HAVA 20971 the EAC developed the accreditation program³³.

c. Page 17, No. 32, Plaintiffs stated acts of discrimination by using weighted votes from Black Box system leads to acts of discrimination.

d. Thus, Plaintiffs assert proper standing in these issues of protecting our 1st and 14th, and 19th Amendment rights to an undiluted vote and equal protection of our right to suffrage by a secure, fair, lawful and transparent process.

20. It is unproven to date, if the Secretary of State and Wasco County have acted at all to conduct their own investigation of the EAC or even contacted the EAC in regards to the agency's specific handling surrounding the VSTL accreditations.

21. **STATUTE TRUMPS AGENCY CONCLUSION:** Plaintiffs believe the judge erred in his conclusion. Plaintiffs assert the importance of the entire

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

statute cannon, not just a sub part or a single section. The question that needs to be considered is how do you get to a section of revocation that defendants are claiming as the only factual matter or importance for VSTL under statute? Plaintiffs argue by “all the steps prior”, as laid out under the whole statute, how does a person understand the statute? Plaintiffs argue from the agency powers under the statute and their mission of providing safety and protocol to our election infrastructures aka guidelines and manual details that provide the **statutes depth and requirements** under voluntary participation surrounding voting machines. If such an entire statute cannon has not been applied or seemingly needed over the years, why was the EAC ever created for **oversite** of elections outlining the expectations/regulations **under HAVA**?

III. MOSMAN DISMISSAL WITH PREJUDICE

22. Plaintiffs believe they have provided factual harm of agency and representation failure to act and conduct lawful election practices which is concrete and traceable harm to Plaintiffs. A dismissed with prejudice ruling is extreme and removes Plaintiffs’ ability to hold Defendants accountable for their negligence to follow the law and their Constitutional Oaths. Even if a statute might trump a manual or guideline there is case precedent supporting the facts that agency must follow their own set standards. **Defendants could have held**

and still can hold the EAC accountable for their failures. Yet, they have not!

23. Through Defendant's official position titles and job standards of oversight, Defendants should have given full attention to detail and protections on Plaintiffs behalf. Defendants are Plaintiffs represented protection and if they fail to act, then that indeed inflicts harm as it's their job to oversee elections as a whole to ensure accuracy and accountability on behalf of the state, each county, and its citizens. If nothing is done and election violations disregarded, it is in fact negligence on all parties past and present and remains so to the date of this filing. When a state actor voluntarily participates (by choice), adherence to the **program's procedural requirements is mandatory** under HAVA. This is clearly a traceable failure from Defendants back to Plaintiffs.

24. When an elected official fails to act on a "preventable failure", it indeed constitutes traceable harm of specific injury in fact, specifically when warned and given opportunity to correct the failure.

25. The statute and the agency's (EAC) actions surrounding such is **not** moot, but vital surrounding the **validity of election machines**. Judge Mosman has not, nor has Defendants explained in any supporting documents on how a VSTL accomplishes accreditation through a "statute" without a guideline surrounding that action, but Plaintiffs have clearly laid that process out.

IV. ARGUMENT CONCLUSION

26. Plaintiff's government officials (SOS and WASCO) have taken advantage of misapplying a statute section versus its entirety, rather they choose a section to best suit their nonfeasance/misfeasance/malfeasance. It's obfuscation in all forms of government. A statute cannon, in its **entirety**, needs to be fully applied by standards of law.

27. In each complaint and responsive document filed under Case 3:22-cv-01252-MO and 3:22-cv-01675-MO, Plaintiffs state the lack of adherence to required EAC standards and Voluntary Voting System Guidelines, certifications, and Defendants breach of trust and protections on Plaintiff's behalf. These vulnerabilities indeed pose an **actual, threatened, imminent, traceable, particularized injury**.

28. Plaintiff's vote was illegally lent to dilution, our rights violated without full disclosure, knowledge, or the ability to check the "black boxes" around the voting computer systems and source code due to lack of transparency.

29. The injury is "traceable" to Defendant as the Secretary of State, Wasco and their agents are **solely responsible for securing and conducting elections**, including doing their diligent homework and verifying each component, voting computer, and all systems, databases, guidelines etc. meet the legally and

professionally required standards of testing, certification, and security.

30. In addition to the threat of vote dilution, Plaintiffs have suffered financial and other injuries through potentially selected governmental representation through unlawfully installed laws, taxations, and economic disparities (see Plaintiffs Response in Opposition to SOS MTD [ECF 25] No. 4). While Plaintiffs could have tried to clumsily calculate injury in dollars, Plaintiffs instead state and link the extent of the vulnerabilities and compromises to these systems that affect them. The full exact extent is currently unknown due to self-preservation and obfuscating records request and FOIAs locally and nationally. Plaintiff Gunter's EAC FOIA has still gone unanswered to date of this filing which relates to the validity of VSTL proper protocol of certification and Defendant's failure to verify.

31. Plaintiffs believe, as pro se parties, that we plainly stated and linked the harm that was inflicted on us to the best of our ability as non-lawyer parties. Allowing for potential election interference by foreign actor's, anomalies and vote dilution which equals inflicting economic harm and free speech voice dilution while still utilizing systems that are at national question to cite such few.

32. Defendants' failure to act and seek out election violations does constitute a fiduciary failure, create criminal liability, is theft by deception, using unlawful

election equipment and software. Furthermore, failure of their oaths of office to defend against all enemies foreign and domestic.

33. 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 harm. The SOS and Wasco's main purpose is to protect and maintain rights for its citizens, it is their contractual failure with the people in their positions of trust by not reporting dereliction under their administration duties.

34. If the officials that represent Plaintiffs do not hold any man, woman, agency or entity outside of their office accountable to the full standard of representing their constituent's safety and protections, we have fallen solely into the abyss of self-interest of a person in an authority position and their full political agenda.

35. Relying on a single statute section or statement to hide an agency and Defendants nonfeasance, is egregious, and a massive obfuscation to ensure proper statute application for secure elections and is a matter of national security as the machines were designated as "critical infrastructure"³⁴. The statute itself does not explain how to accomplish accreditation, you find the details of the

³⁴ <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>

“how to” from the commission (EAC) that was charged to oversee the program. How do you accomplish certification, testing, accreditation, continuing accreditation, revocation listed within the statute? By and through the EAC’s criteria specifically!

36. In Judge Mossman’s opinion and order [ECF 19,51,52] paragraph 1 in his applied legal standard quote stating a case lacking Article III standing must be dismissed because subject matter jurisdiction is absent. Plaintiffs have met the requirement to establish standing (1) the suffered injury in fact is being subjected to vote dilution, unethical election practices and failures (2) it is fairly and fully traceable back to the conduct of the defendants and an agency (3) the likelihood of a favorable judicial decision is removing election machines as a full remedy to the situation. Plaintiffs stated in Response in Opposition to SOS MTD [ECF 25] No. 31-33 jurisdictional counterpart is 242 U.S.C 1983 is 28 U.S.C 1343. Plaintiffs should have been afforded procedural safeguards and granted leave to amend because the statute interpretation as a whole is not futile, but factual at its core.

37. Plaintiffs request the court to address the need of the entire statute canon in its entirety for interpretation and intent. To accomplish the items as laid out in statute 52 U.S.C. 20971, 52 U.S. Code Subchapter II - COMMISSION shall provide as a whole such details for the requirements within the statute.

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 their leave to amend and the case remanded for consideration of Plaintiffs' claims on the merits, with direction to reassign this case to different district judge.

Date: April 17, 2023

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

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) 23-35124

The undersigned attorney or self-represented party states the following:

- I am unaware of any related cases currently pending in this court.
- I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Jennifer Rae Gunter

Signature s/ Christina Lynn Milcarek

Signature s/ Chelsea Anne Weber

Date April 17, 2023

Date April 17, 2023

Date April 17, 2023

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

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I am the attorney or self-represented party.

This brief contains 6,107 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

[X] complies with the word limit of Cir. R. 32-1.

[] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

[] it is a joint brief submitted by separately represented parties;

[] a party or parties are filing a single brief in response to multiple briefs; or

[] a party or parties are filing a single brief in response to a longer joint brief.

[] complies with the length limit designated by court order dated _____.

[] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Jennifer Rae Gunter **Date** April 17, 2023

Signature s/ Christina Lynn Milcarek **Date** April 17, 2023

Signature s/ Chelsea Anne Weber **Date** April 17, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Description of Document(s) (*required for all documents*):

Appellant's Opening Brief
Statement of Related Cases
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