

**No. 23-35452**

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

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Marc Thielman, Ben Edtl, Janice Dysinger, Don Powers, Sandra Nelson, Chuck Wiese,  
Loretta A. Johnson, Terry Noonkester, Steve Corderio, Jeanine Wenning, Diane Rich,  
Pam Lewis, Senator Dennis Linthicum, Janice Dysinger

*Plaintiffs-Appellants*

v.

Shemia Fagan, Clackamas County, Washington County, Multnomah County, Lane  
County, Linn County, Marion County, Jackson County, Deschutes County,  
Yamhill County, Douglas County, Klamath County, Coos County,

*Respondents-Appellees.*

On Appeal from the United States District Court  
for the District of Oregon  
No. 3:22-cv-1516-SB  
Hon. Stacie F. Beckerman

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**APPELLANTS' OPENING BRIEF**

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## INTRODUCTION

Imagine a hypothetical jurisdiction (“Jurisdiction”) where one party (the “Party”) controls the executive, legislative, and judicial branches of government. Imagine further that the Jurisdiction has established an election system that is designed to keep the Party in power. The Party has built into the election system multiple mechanisms that allow the Party to control the reported outcome of elections.

In the Jurisdiction ballots are spread indiscriminately allowing those sympathetic to or paid by the Party to collect ballots and forge votes. The rules of the Jurisdiction allow the creation of unlimited fake voter identifications that can be used by the Party. Entities sympathetic to the Party gather up excess ballots and mark them to favor the Party. The only barriers to invalid ballots entering the system are ineffective and easily defeated by large numbers of invalid ballots and technology. No chain of custody exists to track the ballots from the hands of the citizen to the machines that do the counting. Exploiting these vulnerabilities, the Party embeds a stream of fake ballots manufactured by the Party into the flow of legitimate ballots to vote-counting stations.

Ballots received at the vote-counting station are anonymized so that a voter is unable to determine whether their vote was counted or not. Effective controls do not exist to prevent a paid Party election worker from replacing a stack of actual

ballots with a stack of fake ballots marked in a way that favors the Party. There is no mechanism to go back and recount authentic votes or to determine which ballots are authentic.

The election is designed by the Party to last for several weeks allowing the Party to see how the vote is progressing. It even extends for a week after the official election day with loopholes designed to permit late ballots to be submitted. The Party employs a feedback system to react to the vote count by adjusting the level of fake ballots that it feeds into the system to cause members of the Party to prevail while still making the results look plausible. The Party even lets a few members of the opposition win their elections to further camouflage the predetermined outcome of the overall election in which the Party will retain overwhelming control.

The votes are counted by machines that run on computer software responsive to instructions by outside entities during the election. The Party has embedded in the software ways of manipulating the result and the computer software dutifully executes the commands that are given by apparatchiks employed by the Party.

For appearances sake, the Party permits superficial observation of the process, but does not allow observation at a sufficient depth that would uncover the corruption that the Party has built into the system. Similarly, the Party touts its

audit system for public show, but the audit system has never been used. The Party has to deal with pesky public information requests, an idealistic way for the public to feel that it can hold the Party accountable; but the Party has numerous ways to frustrate those requests and never permits the release of enough information for the citizens to get a grasp on the extent of the corruption.

With each election cycle, the Party further cements its control of the election system and improves its methods of maintaining control of power. The citizens try valiantly to vote the Party out of office, but the Party, with its lock on the election process, maintains its control over all three branches of government election after election.

Meanwhile, the quality of life in the Jurisdiction degrades from year to year. The unrest among the people increases year after year. Allegations of rigged elections abound. The Party responds with platitudes, gaslighting the people by claiming that the Jurisdiction runs the most secure and cleanest elections anywhere. Just trust us, they say, we are protecting you.

How do the citizens escape the boxed canyon in this hypothetical? What are their options? The people should be choosing their leaders, but in the Jurisdiction, the Party thwarts the will of the people to keep itself in power. They put on an election for show, but control the outcome to keep themselves in power. The people know how this ends—they know of the example of Venezuela. Fortunately,



for the people, the Jurisdiction is not in South America; the Jurisdiction is in the United States and the people have the protection of the United States Constitution.

Does this hypothetical describe Oregon? The answer to the question of whether Oregon's government is fraudulently manipulating elections to keep the same party in power is—we don't know. By outward appearances it could very well be the case. What Plaintiffs see are characteristics and anomalies that are entirely consistent with fraudulent manipulation of elections by those in power. The hypothetical aptly describes Oregon's election system from the outside looking in and what might be happening on the inside. Significantly, Oregon's election system prevents the people from knowing what is happening on the inside and whether the results are fair.

Therein lies the problem that this lawsuit seeks to address. Plaintiffs have no confidence in Oregon's election system and there is no process that would give citizens confidence in the fairness of Oregon's elections. "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 election.'"<sup>1</sup>

Whether or not Oregon's government is corrupt is not the question in this lawsuit.

The problem that this lawsuit addresses is the existence of an election system that

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<sup>1</sup> *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).

would protect a corrupt government, whether or not it is actually corrupt, because the election system is out of the control of the people.

Such an election system cannot be allowed to exist in the United States where governments are instituted among the people, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to those ends, it is the right of the People to abolish it.<sup>2</sup>

### **JURISDICTIONAL STATEMENT**

The action arises under federal law, including 42 U.S.C. § 1983 and 1988, to redress the deprivation, under the color of state 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 June 29, 2023.<sup>3</sup> This appeal was timely filed on June 29, 2023.<sup>4</sup> This appeal is from a final judgment that disposed of all of Plaintiffs' claims.

### **ISSUES PRESENTED**

1. Whether Plaintiffs have standing to challenge the Oregon's vote-by-mail election system because, as Oregon voters, they lack confidence in the

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<sup>2</sup> THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

<sup>3</sup> ER-3.

<sup>4</sup> ER-67.

fairness of Oregon's elections and there are no processes that would give Plaintiffs confidence in the fairness of Oregon's elections.

### STATEMENT OF THE CASE

Plaintiffs-Appellants are voters in Oregon.<sup>5</sup> Plaintiffs have pleaded a myriad of facts that should prevent anyone from having confidence in the integrity of Oregon elections.<sup>6</sup> By way of a few examples, Oregon has more registered voters than people eligible to vote;<sup>7</sup> many Oregon counties, including Multnomah (its most populous) have removed 5 or fewer voters from their voter rolls in a 4 year period and in violation of federal law;<sup>8</sup> Oregon recently enacted a law allowing a voter registration where the only identification required is four digits of an alleged social security number, which is an identification that is impossible to verify;<sup>9</sup> college students receive two ballots and are encouraged to recycle the unused one by special interests who then fill them out;<sup>10</sup> public observation of elections is a sham;<sup>11</sup> an audit process touted by Oregon has never been used and is a sham;<sup>12</sup>

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<sup>5</sup> ER-17-18.

<sup>6</sup> ER-22-61.

<sup>7</sup> ER-29 ¶ 84.

<sup>8</sup> ER-32 ¶¶ 95-97.

<sup>9</sup> ORS § 247.019(2)(a)(A) (Addendum 1).

<sup>10</sup> ER-36-37.

<sup>11</sup> ER-50-51.

<sup>12</sup> ER-51.

there is no chain of custody for ballots;<sup>13</sup> Defendants thwart Plaintiffs ability to obtain public records by raising the prices from approximately \$100 up to a range of \$50,000 - \$100,000.<sup>14</sup>

On October 8, 2022, Plaintiffs sued Oregon's Secretary of State and a number of counties asserting constitutional violations and seeking an injunction against Oregon's mail-in voting and computerized tabulation election system.<sup>15</sup>

Oregon's Secretary of State filed a Rule 12(b)(1) motion to dismiss for lack of standing and a Rule 12(b)(6) motion to dismiss for failure to state a claim.<sup>16</sup> On June, 29, 2023, the District Court granted the motion to dismiss for lack of standing and did not rule on the motion to dismiss for failure to state a claim.<sup>17</sup> The District Court ruled that Plaintiffs had failed to show an injury of fact necessary for standing for two reasons: (1) Plaintiffs were asserting a generalized claim not particularized to the Plaintiffs; and (2) Plaintiffs claim was not concrete because their injury was too speculative.<sup>18</sup> Plaintiffs appealed the same day and seek expedited review by this Court.

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<sup>13</sup> ER-37-41, 51.

<sup>14</sup> ER-48-49.

<sup>15</sup> ER-77; ER-13-66.

<sup>16</sup> ER-81 Dkt No. 73.

<sup>17</sup> ER-4-12.

<sup>18</sup> ER-8-11.

## SUMMARY OF THE ARGUMENT

I. Plaintiffs are voters in Oregon. Plaintiffs' right to vote and to have confidence in the fairness of elections is of fundamental significance under our constitutional structure. "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 election."<sup>19</sup> In other words, when there is a lack of confidence in the integrity of the election system, there is no self-governance. Due to the extraordinary facts pleaded, Plaintiffs lack of confidence in the fairness of Oregon's elections. Plaintiffs' injuries are inherently personal and concrete, satisfying the standing requirement for injury in fact.

II. In view of the pleaded facts, no one should have confidence in Oregon's election system. Rather, than protect the sanctity of Plaintiffs' votes, Oregon has flipped the script and enacted laws and designed a system that opens the door to voter fraud and erects barriers preventing Plaintiffs from determining whether an election was fair. In a telling example, Oregon enacted a law that permits the online registration of a voter where the only identification is four digits of a social security number. Anyone can invent four-digit numbers. This law cannot rationally be understood as anything other than an effort to enable

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<sup>19</sup> *Degraffenreid*, 141 S. Ct. at 734 (2021) (J. Thomas dissenting) (emphasis added) (cleaned up).

criminals to create fake voters. The litany of confidence destroying features of Oregon's election system is long.

III. The District concluded that Plaintiffs' injury was not particularized because it was a generalized grievance shared by all Oregon's citizens. The District Court was incorrect because a particularized injury does not necessarily mean that it cannot be widespread. Plaintiffs have standing because it has long been recognized that impairment of the right to vote is individual and personal in nature and gives rise to standing. Plaintiffs' claims are concrete as there is nothing speculative about the litany of confidence destroying features in Oregon's election system.

### **STANDARD OF REVIEW**

This Court reviews de novo a district court's order granting a motion to dismiss for lack of standing.<sup>20</sup> This Court will accept all factual allegations in the complaint as true and construes the pleadings in the light most favorable to Plaintiffs.<sup>21</sup> This Court also presumes that general allegations embrace those specific facts that are necessary to support the claim.<sup>22</sup>

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<sup>20</sup> *Meland v. Weber*, 2 F.4<sup>th</sup> 838, 843 (9th Cir. 2021).

<sup>21</sup> *Id.*

<sup>22</sup> *Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015).

## ARGUMENT

### I. The Plaintiff voters have standing.

#### A. The standards for standing at issue in this case.

“Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies. The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process.”<sup>23</sup> To establish Article III standing, a plaintiff must demonstrate that he or she has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>24</sup>

The District Court’s dismissal of Plaintiffs’ claims was based on an erroneous application of the first prong, “injury in fact.”<sup>25</sup> Defendants did not challenge that Plaintiffs satisfied the second (traceability) and third (redressability) prongs of standing.

Plaintiffs satisfy the second prong of standing because Defendants are responsible for running Oregon’s defective election system.<sup>26</sup> Plaintiffs satisfy the third prong because the Court can remedy Plaintiffs’ injuries by issuing an

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<sup>23</sup> *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014).

<sup>24</sup> *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2018).

<sup>25</sup> ER-8-12.

<sup>26</sup> ER-18-22.

injunction prohibiting Defendants from operating a mail-in vote, computer tabulated election system.<sup>27</sup>

The District Court ruled that Plaintiffs failed to show an “injury in fact” in two respects: (1) their claims were not particularized; and (2) their claims were not concrete.<sup>28</sup>

To establish an injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized,” and is “actual or imminent.”<sup>29</sup> By particularized, the Supreme Court means that “the injury must affect the plaintiff in a personal and individual way.”<sup>30</sup> By concrete, the Supreme Court means that the injury must actually exist.<sup>31</sup> A concrete injury means “real and not abstract.”<sup>32</sup>

**B. The legal basis for Plaintiffs’ injury in fact.**

“Voting is of the most fundamental significance under our constitutional structure.”<sup>33</sup> It is how the people govern themselves. Elections are the lifeblood of a democracy. “There is no right more basic in our democracy than the right to

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<sup>27</sup> ER-66.

<sup>28</sup> ER-8-12.

<sup>29</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>30</sup> *Id.* n. 1.

<sup>31</sup> *Spokeo*, 578 U.S. at 340.

<sup>32</sup> *Id.*

<sup>33</sup> *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).



participate in electing our political leaders.”<sup>34</sup> The right to vote is a fundamental political right.<sup>35</sup> The right to have one’s vote counted is as strong as the right to put a ballot in the ballot box.<sup>36</sup>

However, merely holding elections is not enough. Iran holds elections—China 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 election.”<sup>37</sup> Stated another way, when there is a lack of confidence in the integrity of the election system, there is no self-governance.

The Plaintiffs are each voters.<sup>38</sup> They have standing to bring their constitutional claims because they lack confidence in Oregon’s election system operated by Defendants.<sup>39</sup>

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud *drives honest citizens out of the democratic process* and breeds distrust of our government. *Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.* The *right of suffrage can be denied by a debasement or dilution of the weight*

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<sup>34</sup> *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014).

<sup>35</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>36</sup> *United States v. Mosely*, 238 U.S. 383, 386 (1915).

<sup>37</sup> *Degraffenreid*, 141 S. Ct. at 734 (2021) (J. Thomas dissenting) (emphasis added) (cleaned up).

<sup>38</sup> ER-17-18.

<sup>39</sup> ER-189.

*of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>40</sup>

Voting rights are inherently individual and personal in nature.<sup>41</sup> “Voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage.”<sup>42</sup>

The extraordinarily defects in Oregon’s election system outlined in Section II cause Plaintiffs’ crisis of confidence, which in turn causes disenfranchisement<sup>43</sup> and a loss of self-governance,<sup>44</sup> which necessarily means a loss of freedom. It is hard to articulate an injury more personal than the loss of one’s freedom at the hands of the government. Plaintiffs’ injuries met the standard for a particularized injury.

Plaintiffs’ injuries are concrete based on the detailed facts asserted in the First Amended Complaint. These defects and anomalies are real and not abstract. As explained in Section II, the Amended Complaint details extraordinary defects and anomalies in Oregon’s election system that have destroyed Plaintiffs’ confidence.

While lack of confidence may be intangible and not objectively measurable, that is not a barrier to court action. In perhaps the most significant civil rights case

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<sup>40</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (emphasis added).

<sup>41</sup> *Gill v. Whitford*, 138 S.Ct. 1916, 1929 (2018).

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See Degraffenreid*, 141 S. Ct. at 734 (J. Thomas dissenting).

of the 20<sup>th</sup> 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 unconstitutional.<sup>45</sup> 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.”<sup>46</sup>

If a “feeling” was concrete enough for the United States Supreme Court to overturn generations of precedent on the merits in a landmark civil rights case, it is enough for standing this case. Moreover, the damage to Plaintiffs is not merely from a feeling. The damage to Plaintiffs is literally the loss of their freedom. Self-governance exists *only when* the people have confidence in the fairness of elections.<sup>47</sup> Without self-governance, Plaintiffs have literally lost their freedom. Plaintiffs have suffered concrete, particularized and actual injury.

As the next section will show, this case involves far more extreme and dire injuries to Plaintiffs than the injuries suffered in partisan gerrymandering cases that are often found to satisfy the requirements for standing.<sup>48</sup>

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<sup>45</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954).

<sup>46</sup> *Id.* at 494 (emphasis added).

<sup>47</sup> *E.g.*, *Purcell*, 549 U.S. at 4.

<sup>48</sup> *See e.g.*, *Gill*, 138 S. Ct. at 1930.

**II. In view of the pleaded facts, no one should have confidence in Oregon's election system.**

Election fraud is nothing new. It has happened throughout history. A purpose of government is to represent the people by protecting the sanctity of each vote. However, Oregon has flipped the script. It has enacted laws and designed a system that opens the door to voter fraud and erects barriers preventing its citizens from determining whether an election was fairly held. While election anomalies abound, Oregon's officials display a profound lack of curiosity for investigation of such anomalies. This is only allowed to happen because it benefits the people in power by keeping them in power.

Defendants purport to want free and fair elections, and they repeat that mantra constantly, but their actions and Oregon's laws speak louder than words.

**A. Oregon's 100% vote-by-mail system is inherently insecure.**

Oregon's statutory scheme for elections requires vote by mail with ballots scanned by computerized vote tally systems.<sup>49</sup> Oregon began local voting by mail in 1981 and instituted a 100% vote-by-mail system during the 2000 election.<sup>50</sup>

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<sup>49</sup> ER-23.

<sup>50</sup> Oregon Secretary of State, *Oregon Vote-by-Mail*, <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf> (2000) (last visited Aug. 7, 2023) (Addendum 9).

Vote-by-mail was sold as a convenient and cost-effective way to vote.<sup>51</sup> It was also touted as a way to increase the integrity of elections.<sup>52</sup>

Our Founders created a decentralized system of elections because they knew that governments could not be trusted to conduct honest elections.<sup>53</sup> But Oregon threw those concerns out the window with mail-in voting, despite the well-known risks of fraud that are “*vastly more prevalent*” than in-person voting.<sup>54</sup> “Voting by mail is now common enough and problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner.”<sup>55</sup>

At its core, mail-in voting replaces the oversight inherent with in-person voting at polling places with something akin to an honor system.<sup>56</sup> Judge Posner has written that “absentee voting is to voting in person as a take-home exam is to a proctored one.”<sup>57</sup> Judge Posner further noted that voting fraud is a serious problem in the U.S. elections that are facilitated by mail-in voting.<sup>58</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> ER-23-24 ¶¶ 68-70.

<sup>54</sup> *DeGraffenreid*, 141 S. Ct. at 735-36 (emphasis added) (J. Thomas dissenting) (citing Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N. Y. TIMES (Oct. 6, 2012) (Addendum 11)).

<sup>55</sup> *Id.* at 736.

<sup>56</sup> *Id.* at 735.

<sup>57</sup> *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

<sup>58</sup> *Id.*

As explained by Heather Gerken, now Dean of Yale Law School, mail-in voting permits simpler and more effective alternatives to commit fraud on a large enough scale to swing an election.<sup>59</sup> Gerken further explained, “You could steal some [mail-in] ballots or stuff a ballot box or bribe an election administrator or fiddle with an electronic voting machine,” which explains, “why all the evidence of stolen elections involves absentee ballots and the like.”<sup>60</sup>

**B. Extraordinary confidence-destroying facts concerning Oregon’s election process are pleaded.**

1. *Oregon’s failure to maintain voter rolls violates federal law and enables illegal ballot trafficking.*

Nationwide, organized, criminal ballot trafficking is a well-documented fact.<sup>61</sup> Such illegal ballot trafficking is occurring in Oregon.<sup>62</sup> Based on analytics, there are two major mule rings in Oregon, one in Portland and one in Eugene.<sup>63</sup> Plaintiffs understand that an organized crime syndicate is intent on stealing the results of Oregon’s elections.<sup>64</sup>

By its nature, ballot trafficking requires a large number of phantom voters listed on the voter rolls as if they were real, legitimate voters. The only votes that can be counted are from people listed on voter rolls. Oregon is notoriously bad in

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<sup>59</sup> *Degraffenreid*, 141 S. Ct. at 735-36 (J. Thomas dissenting).

<sup>60</sup> Addendum 16.

<sup>61</sup> ER-24-25 ¶¶ 72-73.

<sup>62</sup> ER-25 ¶ 74.

<sup>63</sup> ER-26 ¶ 77.

<sup>64</sup> ER-25 ¶ 75.

maintaining the accuracy of its voter rolls. There are more people registered to vote than are eligible to vote in Oregon.<sup>65</sup>

Residents of Lane County investigated the state of their voter rolls. There are 171 locations in Lane County with eight or more voters registered to vote at a single address. They found registrations tied to locations that do not exist, such as vacant lots, vacant buildings, and street corners. They found 105 registrations with no address on file. They visited 40 addresses having 8 or more voter registrations. In their survey, they found that only 40% of registrations were valid and a total of 307 were invalid registrations. For example, an address on Amazon Parkway had 85 registered voters—but no one lives there. A Walmart parking lot in Eugene has twelve registered voters—no one lives there.<sup>66</sup>

The problem is statewide. Judicial Watch, a watchdog organization, sent a certified letter to Defendant Shemia Fagan, on November 16, 2021, asserting violations of Section 8(a)(4) of the National Voter Registration Act of 1993 (NVRA), which mandates that states conduct a general program that makes a reasonable effort to remove the names of ineligible voters. Judicial Watch cited data reported by Oregon to the Election Assistance Commission (“EAC”). Oregon’s data shows that fourteen Oregon counties reported removing five (5) or fewer voter registrations pursuant to Section 8(d)(1)(B) in that four-year period

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<sup>65</sup> ER-29 ¶ 84.

<sup>66</sup> ER-29-30 ¶ 85.

with many removing no registrants at all. Specifically, over four years, the counties removing five or fewer registrants are: Multnomah (Oregon's most populated county) with five removals, Lane County with two removals, Klamath, Columbia, Tillamook, Sherman and Wasco County (one removal), and Wallowa, Harney, Lake, Sherman, Jackson, Gilliam and Wheeler Counties (zero removals). The letter goes on to note that eleven other Oregon counties reported similarly low removals pursuant to the NVRA over the past two years: Marion County (one removal), Douglas County (five removals), Yamhill County (one removal), Josephine County (one removal), Polk County (zero removals), Coos County (three removals), Lincoln County (six removals), Union County (Five removals), Malheur and Baker Counties (zero removals).<sup>67</sup> These impossibly low numbers cannot possibly reflect actual loss of registered voters due to people who die or move out of the county. Defendants are expending no effort to abide by their obligations under the National Voter Registration Act.

In a sample of 4,400 Washington County voter records reviewed by one citizen, 13% (558) were dead; 185 of the dead were designated as active voters; 373 of the dead were designated as inactive. Twelve of these dead voters cast post-mortem votes. The longest deceased person among them died in 2010.<sup>68</sup> In a canvas of 248 records performed by another Washington County citizen, 85

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<sup>67</sup> ER-32 ¶¶ 95-97.

<sup>68</sup> ER-50-51 ¶ 160.



registered voters had moved away from Washington County before the 2020 election and still voted in Washington County.<sup>69</sup>

Lane County Election officials have stated publicly that they have not updated the voter rolls in over four years and had no plan to do so prior to the 2022 general election.<sup>70</sup> Multnomah County has a population of 839,000 people, which means that thousands of registered voters will have changed residences during the prior four years. With mail-in voting, Multnomah County is sending out thousands of unsecured ballots to people who have moved away.<sup>71</sup> Oregon has no system to detect and prevent a person who moves from one county to another to receive multiple ballots and vote more than once.<sup>72</sup>

Oregon lawmakers appear eager to keep expanding the voter rolls with even more phantom voters. In 2021, Oregon enacted a law that prohibits removing registered voters from the active voter rolls for not voting for any period of time.<sup>73</sup> The law also moved a substantial number of inactive voters from the inactive list to the active list.<sup>74</sup> So when a registered voter moves out of a county, under Oregon law they will remain listed as an active registered voter in that county indefinitely. Every election, a ballot will be printed for them and mailed. That ballot can be

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<sup>69</sup> ER-52 ¶ 161.

<sup>70</sup> ER-30 ¶ 86.

<sup>71</sup> ER-33 ¶ 99.

<sup>72</sup> ER-34 ¶¶ 101-102.

<sup>73</sup> ER-33 ¶ 98 citing ORS § 247.275 (Addendum 3).

<sup>74</sup> ER-33 ¶ 98.

scooped up by criminal elements, marked, and inserted into the election system—an illegal vote that will get counted.

In 2022, Oregon enacted a law that permits registration of a voter where the only identification required is four digits of a social security number.<sup>75</sup> Further, the registration could be done online with an electronic copy of a signature. It is not a difficult task for a criminal to invent four-digit numbers. Such invented numbers cannot be verified because 4 digits does not uniquely identify anybody. Under this new law, a criminal organization could, for example, register an unlimited number of phantom voters under many different four-digit numbers that they have invented. On its face, such a highly irregular statute, cannot rationally be understood as anything other than an effort to encourage registration of phantom voters.<sup>76</sup>

The pleaded facts demonstrate how Oregon's law and practices undermine the purpose of a voter roll to prevent unauthorized votes from being counted. As a result, Plaintiffs can deduce a motive—the purpose of refusing to clean voter rolls is to maximize the number of ballots sprinkled around the State knowing that many will find their way into the hands of criminals who will find ways to insert illegal

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<sup>75</sup> ORS § 247.019(2)(a)(A) (Addendum 1).

<sup>76</sup> *Cf. Miller v. Johnson*, 515 U.S. 900, 914 (1995).

ballots into the system. With bloated voter rolls and refusal to clean them up, Defendants are enabling illegal ballot trafficking.<sup>77</sup>

2. *Stacks of fake ballots are generated for input into the system.*

Students at the University of Oregon receive two ballots. One at their University address and the other at their home address (many of whose homes are out of state). Students were encouraged to “recycle” their extra ballots by a known partisan.<sup>78</sup> A special interest collected these “recycled” ballots and then solicited help with filling out ballots. Those that helped, report that they were told how to fill out the ballot.<sup>79</sup> No part of this story describes legitimate activity. Obviously, the special interest had a way to get the ballots into the system to be counted, or they would not have wasted their time. And this was not a minor operation. The University of Oregon has 30,000 students with 30,000 excess ballots. The same occurs at other Oregon universities. That this is allowed to happen speaks volumes.

Bad actors, such as Antifa, exploit the insecure nature of mail in ballots by posting “how to vote more than once” instructions on social media. The instructions included suggestions on how to harvest ballots from your neighbors and fill them out “in order to save democracy from Christine Drazen.”<sup>80</sup>

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<sup>77</sup> ER-31 ¶¶ 90, 92.

<sup>78</sup> ER-36 ¶ 108.

<sup>79</sup> ER-36 ¶ 109.

<sup>80</sup> ER-33-34 ¶ 100.

In 2021, Oregon enacted a law permits the counting of ballots received by mail up to seven days after an election.<sup>81</sup> The law was constructed with a loophole which allows ballots without a postmark received after election day to be counted.<sup>82</sup> This law makes it even easier for criminals to cheat. After seeing the results of the election as of election day, criminals now have seven more days to mail in more phantom votes to affect the results of an election.<sup>83</sup>

Chris Dudley was a popular Republican gubernatorial candidate who was leading his Democratic opponent by 1% at midnight on Election Day in 2010. The next morning it was reported that approximately 44,000 ballots were “discovered” in Multnomah County and would need to be counted. At the end of the “counting” Dudley lost the race by approximately 1% or about 22,000 votes.<sup>84</sup> In approximate numbers, that means that nearly all of the 44,000 ballots “discovered” in Multnomah County were marked for Chris Dudley’s opponent. The source of these ballots is highly suspicious.

3. *An ineffective signature check is the only control.*

Signature verification is a very imprecise and poor way of confirming someone’s identity. Determining whether a signature matches the official record is

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<sup>81</sup> ER-31-32 ¶ 93 referring to ORS § 254.470(6)(e)(B)(ii) (Addendum 6).

<sup>82</sup> ER-31-32 ¶ 93 referring to ORS § 254.470(8) (Addendum 7).

<sup>83</sup> ER-31-32 ¶ 93.

<sup>84</sup> ER-37 ¶ 113.

a subjective judgment. Signatures vary over time, and they are dissimilar from day to day.<sup>85</sup>

Signatures can be forged. Actual signatures are readily available from initiative petitions on which citizens write their name, address, and signature. Initiative signature sheets are routinely scanned making them easily distributable by computer. A CNC machine can be easily programmed to forge signatures from scanned images. Even without resorting to machines, it does not take much for a signature to be imitated by a human.<sup>86</sup>

Signature verification leads to far higher rates of ballot challenges and rejections.<sup>87</sup> Clackamas County rejected 5,000 ballots in the 2022 election for signature mismatch.<sup>88</sup> That figure, 5,000 rejected ballots, is an astonishing number revealing an astounding problem. Each of those 5,000 ballots was either a fake or a legitimate ballot. Both explanations are really bad and very destructive to confidence in the integrity of the election. A large number of fake ballots would only show the extent of the criminal activity that is targeting the election. If thousands of fake ballots were caught in Clackamas County, it stands to reason that many more fake ballots made it past the checkers. Just like drug trafficking over the border, only a fraction of the illegal contraband is caught. A large number of

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<sup>85</sup> ER-41 ¶ 121.

<sup>86</sup> ER-41 ¶ 122.

<sup>87</sup> *Degraffenreid*, 141 S. Ct. at 736 (J. Thomas dissenting).

<sup>88</sup> ER-43 ¶ 130.

legitimate votes being rejected is an unacceptable disenfranchisement of real voters. A lot of effort is required to cure a rejected ballot, and very few are ever cured. Rejected ballot notices are routinely sent out so late, many after the deadline for cure, that there is essentially no ability for even the most alert and dedicated voter to cure his or her ballot.<sup>89</sup>

Authorities have apparently recognized the optics problem of high signature match rejection rates. An Oregon video training seminar explains: “You’re looking for reasons to keep the signature in, to validate the signature, rather than looking for reasons to throw the signature out. . . . We’re looking for any reason to keep the signature.”<sup>90</sup> Of course, this instruction just makes it easier for forged signatures to get through.

4. *Public observation of elections does nothing but decrease confidence.*

The act of observing elections is a sham. Observers cannot see the process, follow what is going on, bring up problems in real-time, or make any input.<sup>91</sup> Observers watching the signature verification process in Multnomah County disagreed with decisions being made on signature verification. All concerns that were raised were ignored.<sup>92</sup> And of course, if nothing is done immediately, there is no going back when the ballot is removed from the envelope, destroying the

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<sup>89</sup> ER-42-43 ¶¶ 125, 126, 129.

<sup>90</sup> ER-41-42 ¶ 123.

<sup>91</sup> ER-50 ¶ 153.

<sup>92</sup> ER-50 ¶ 153.

connection between the ballot and the envelope. There is no way to undo or appeal a faulty decision approving a signature match.

On election day, Washington County rejected the signature on many ballots—signatures that to the observer looked just fine—while approving others that did not resemble the master signature. The observers on that day sought to challenge about 230 signatures, but the vast majority were accepted by the workers despite the challenge. There is no mechanism for effectively challenging the signatures because once it is accepted, it is *fait accompli*, the ballot goes into the counter. There is no avenue for appeal and there no way to undo the process.<sup>93</sup>

Vote counting in Douglas County lasted for 35 days. Douglas County does not allow in-person observation. Observers must watch the action through cameras. The cameras were only on for portions of 7 days out of the 35 days. The images were so small that an observer could not identify with any certainty whether the papers being fed into the tally machines were in fact ballots. In the envelope opening area, there was no access to see any of the signature verification process. The election observation process in Douglas County is a sham, designed to check a box, but not designed to give the people confidence that their votes are being properly counted.<sup>94</sup>

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<sup>93</sup> ER-51 ¶ 158.

<sup>94</sup> ER-50 ¶ 154.

In Washington County, the observation room is equipped with video screens displaying the output of cameras in the work room. The cameras are 20-30 feet from the action, preventing the observers from seeing any detail of the work. The cameras are wide angle security cameras, not suitable for observation of any detail. There are 10 cameras and only 4 screens set up to rotate every 45 seconds, so that no task being performed by the election workers can be followed by the observers. The election observation process in Washington County is a sham, designed to check a box, but not designed to give the people confidence that their votes are being properly counted.<sup>95</sup>

5. *The purported audit process is a sham.*

Oregon's Director of Elections, in a Directive issued September 22, 2021, relied on "risk limiting audits" as one of the pillars of Oregon's purported "transparent" and "robust" security measures. Rules and procedures for "risk limiting audits" are promulgated in ORS 254.532. However, Luke Belont, the Deputy Elections Director admitted to an observer in Washington County that no county in Oregon has the infrastructure to do a risk limiting audit. No county in Oregon actually performs the risk limiting audits that Oregon touts.<sup>96</sup>

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<sup>95</sup> ER-50 ¶ 155.

<sup>96</sup> ER-51 ¶ 159.



6. *There is no chain of custody for ballots.*

Plaintiff Marc Thielman queried Lane County Elections Supervisor Drew Pryor about whether the County could produce Thielman's ballot. Pryor explained that once the ballot was out of the envelope, there was no way to identify that it belonged to Thielman. Nor is there any way to determine that ballots were not switched. Indeed, Pryor confirmed that the County can print blank ballots but there is no control that would prevent a bad actor from printing ballots.<sup>97</sup> Thielman went on to submit a public records request for his ballot which was rejected by the County.<sup>98</sup>

Election workers are allowed to take large bags capable of carrying volumes of paper ballots in and out of secure tabulation rooms.<sup>99</sup> Mark Cosby is a Lane County resident who surveilled the Lane County Election Office parking lot on election night, November 2022. Mr. Cosby witnessed a crowd of people leaving the building late at night carrying various bags, duffle bags, and backpacks that were heavy and bulky, consistent with carrying paper.<sup>100</sup> People leaving the Election Office building late at night with large bags loaded with what appeared to be a large amount of paper, is destructive to Plaintiffs' confidence in the integrity of elections.

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<sup>97</sup> ER-39-41 ¶¶ 118-119.

<sup>98</sup> ER-41 ¶ 120.

<sup>99</sup> ER-37-38 ¶ 114; ER-40-41 ¶ 119.

<sup>100</sup> ER-37-38 ¶ 114.

In Washington County, workers admitted there was not chain of custody for the ballots. There is no record of when the ballots were picked up and dropped off. According to the Election Assistance Commission, a lack of a chain of custody—by itself—demonstrates that an election is not transparent. There does not appear to be any chain of custody in any part of the system in Washington County.<sup>101</sup>

This failure to have a chain of custody showing that one's vote actually counted is constitutionally significant because Plaintiffs not only have a constitutional right to vote—just as powerful, is their constitutional right to have their vote counted.<sup>102</sup> Oregon is incapable of showing Plaintiffs that their votes were actually counted.

7. *Computerized systems present an inherent and undeniable security risk.*

The use of computers to tally votes have been criticized for two decades.<sup>103</sup> Other countries have banned the use of computers in their election processes due to risks to election integrity.<sup>104</sup>

There is not a computerized voting system in the United States that is manufactured entirely in the United States. Most are manufactured entirely outside of the United States with foreign components. The laptops used by our voting

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<sup>101</sup> ER-51 ¶ 156.

<sup>102</sup> *Mosley*, 238 U.S. at 386.

<sup>103</sup> ER-52-61 ¶¶ 163-188.

<sup>104</sup> ER-52 ¶ 165.

systems are made in Communist China. They are made under supervision of officers from Chinese Communist state organizations like the People's Liberation Army. There is no system to determine whether those systems are deliberately compromised. There are entire Chinese Communist state organizations under the Ministry of State Security in China with thousands of people dedicated to the compromise of Western technology and computers. These are not fly-by-night hackers as visualized in Hollywood movies. These are state actors committed to compromise Western computers. Our voting systems are comprised of components that were not protected in manufacture. There is no way to fix that. One cannot monitor that kind of insecurity or vulnerability out of these components because the compromises can be embedded in way that they cannot be overcome or detected.<sup>105</sup>

Oregon's election computer systems are not rigorously tested. The certification entities, such as Pro V&V do not allow testing to military standards. In addition, what testing has been done has found that the machines were replete with vulnerabilities. Every single machine tested can be hacked into within minutes. These vulnerabilities have never been mitigated—they have just been ignored. The entities used by the EAC to test election equipment have limited technical capability and operate under strong incentives to provide favorable test

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<sup>105</sup> ER-43-44 ¶ 131.

reports for equipment lest they lose business from the EAC. Systems certified by the EAC can be readily hacked. The EAC certification process is a sham.<sup>106</sup>

In recent years, the EAC certification process is particularly deficient because not a single one of the testing labs were legitimately accredited by the EAC to perform testing at the time of the 2020 Election as required by law.<sup>107</sup>

Wi-Fi modems are present in every voting tabulator which invites hacking. The only way to effectively disable wireless access to a computer is by physically removing the modem (or other connectivity component) from the electronic board, or to have never installed it. Wi-Fi modems should never be installed on any voting tabulator, but every tabulator has them.<sup>108</sup>

In the 2022 primary election, Mei Wong was running for the Metro District 2 seat. During the election, Wong took multiple screen shots over time, documenting the progress of her race as reported on the Oregon Secretary of State Election website. An unknown array of computers were involved with unknown human intervention. The results witnessed and documented by Wong defy explanation: between 4:36 am and 4:44 am on May 29, her vote total decreased by 6,371; between 8:32 pm and 8:36 pm on May 29, her vote total decreased by

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<sup>106</sup> ER-44 ¶ 132.

<sup>107</sup> ER-44 ¶ 133.

<sup>108</sup> ER-44 ¶ 134.

3,855; between 5:44 am and 5:45 am on June 4, her vote total decreased by 6,376; between 4:57 am and 4:58 am on June 10, her vote total decreased by 6,390.<sup>109</sup>

It is axiomatic that as tabulated results come into the Secretary of State's office, vote totals should increase as more Counties report their results and more votes are added. There has been no explanation by any governmental entity as to why Wong's vote totals decreased on at least four separate occasions. Adding to the suspicion of nefarious action, is that most of these decreases occurred in the wee hours of the morning, when few would be looking. Rather than trying to explain or investigate what happened, the government—at all levels—gave Wong the runaround.<sup>110</sup>

8. *Defendants act to thwart attempts to ascertain the integrity of the election process.*

Public record requests are virtually the only tool available to the public to investigate election integrity. Once upon a time, Janice Dysinger was able to obtain the ballot images and the cast vote record from Multnomah County for a charge of \$159.62. She obtained the same from Lincoln and Clatsop, and Polk Counties for \$60, \$64, and \$120 respectively.<sup>111</sup>

But word got out that the ballot images, along with the cast vote record, can yield important information to investigate the integrity of an election. Now, county

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<sup>109</sup> ER-45 ¶ 137.

<sup>110</sup> ER-45 ¶ 137.

<sup>111</sup> ER-48 ¶ 147.

election clerks are quoting astronomical charges to obtain public information. A quote from Benton County was \$6,798.75. A quote from Harney County was \$7,939.78. A quote from Linn County was \$77,376.05. A quote from Deschutes County was \$93,703.52.<sup>112</sup> One county election clerk admitted that the Secretary of State's office told her to hold off on responding to any public records requests.<sup>113</sup>

The Secretary of State's office also directed county election officials to carefully screen ballot images for cases where a voter wrote their name on the ballot. Of course, voters are not supposed to write their name on the ballot. If an occasional voter writes their name on a ballot, they have intentionally waived their right to secrecy. The Secretary of State elevates this purported concern for ballot secrecy of the rare person who intentionally waived their right to secrecy, over the concerns of the public who are entitled to access to public records. The effect of the Secretary of State's directive is to increase the cost of obtaining ballot images two orders of magnitude, from hundreds of dollars up to a range of \$50,000 to \$100,000. That is a very convenient way for Oregon to obstruct public records requests. The obvious intent of the Secretary is not to protect the rare citizen who waived their anonymity, but to create a cost barrier for the public to access the public's records.<sup>114</sup> Like so many other examples, this demonstrates that the

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<sup>112</sup> ER-48 ¶ 148.

<sup>113</sup> ER-48-49 ¶ 149.

<sup>114</sup> ER-48-49 ¶ 149.

mindset of those in power is that they get to run elections as they wish without public scrutiny. Like so many of the other examples, this also raises the question: what are they hiding?

Douglas County seeks to charge more than \$51,000 for the ballot images from the 2020 election for a public records request made by Terry Noonkester. Noonkester has made additional public records requests in Douglas County. But Douglas County made the arbitrary decision that it would not respond to additional public records requests from Noonkester until she either cancelled or paid for her request for ballot images. Douglas County made this arbitrary decision without any authority under the law for the purpose of obstructing further discovery.<sup>115</sup>

Public records belong to the people, but Oregon bureaucrats are keen to resist attempts by the public to obtain these records. Plaintiffs know that when people behave like this, they likely have something to hide.<sup>116</sup>

Rhonda McNeal spoke with Lane County Elections Supervisor Drew Pryor and asked if she could be assured that her ballot was received and collected. She asked if she could come in and see her envelope and ballot. Pryor told her that “all ballots are immediately shredded once they are scanned for your protection. This way there is no risk that anyone can find out how you voted, as we take ballot

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<sup>115</sup> ER-49 ¶ 150.

<sup>116</sup> ER-49 ¶ 151.

secrecy very seriously.”<sup>117</sup> Pryor later admitted to Thielman that ballots are not shredded.<sup>118</sup> Why did Pryor lie to McNeal?

Deborah Scroggin, Oregon Elections Director at the time, called Janice Dysinger, a long-time advocate for fair elections, and ordered her not to speak about elections in public anymore—an absolutely outrageous act by an Oregon government official. A government official is far out-of-bounds when she believes that she has the authority to supervise a citizen’s free speech rights.<sup>119</sup>

Tim Sippel sought an election database from Washington County in a public records request. The County told him that he could not have it. The Washington County District Attorney ordered Washington County to produce the database. Washington County and the Secretary of State sued Tim Sippel to prevent the release of the database. In the course of the litigations, the Attorney General admitted publicly that ballot tabulator machines are “vulnerable to attack.” A bench trial in the Sippel case was held in September 2022 and witnessed by a crowd of Oregon citizens. Many of the Oregon citizens in attendance found the reasons offered by the Secretary of State and Washington County for withholding the ballot database to be frivolous.<sup>120</sup>

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<sup>117</sup> ER-38 ¶ 115.

<sup>118</sup> ER-38 ¶ 117.

<sup>119</sup> ER-49-50 ¶ 152.

<sup>120</sup> ER-47-48 ¶¶ 142-146.



9. *The insidious practice of ballot harvesting is legal in Oregon.*

Ballot harvesting is legal in Oregon and is a source of widespread abuse. Interest groups, like unions, search out vulnerable citizens, such as are found in nursing homes, and get votes from them. Ballot harvesters are trained to focus on the elderly and elderly residence homes. A witness states, “They would gather and brag about how they assisted ‘blind’ elderly people with filling out their ballots, one harvester stating, ‘I filled it out...Not the way they told me to, but I filled it out.’” Oregon’s adoption of ballot harvesting in its law is another way that Oregon encourages cheating by taking off the restrictions on how ballots can be collected and letting criminals do what they will do.<sup>121</sup>

**III. The District Court’s errors in denying Plaintiffs standing.**

**A. Finding that Plaintiffs’ harm was not particularized, the District Court mistakenly focused on the size of the population harmed.**

The District Court found that plaintiffs’ injury was not particularized because it “is shared by all of Oregon’s citizens and is a state-wide issue.”<sup>122</sup> “In so doing, the district court mistakenly focused only on the size of the population allegedly harmed.”<sup>123</sup> “Particularized” does not necessarily mean that the harm

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<sup>121</sup> ER-35-36 ¶ 107.

<sup>122</sup> ER-8.

<sup>123</sup> *See Novak v United States*, 795 F.3d 1012, 1018 (9th Cir. 2015).

cannot be widespread.<sup>124</sup> “Indeed, the instances in which the Supreme Court has labeled a plaintiff’s claim a generalized grievance invariably appear in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to law.”<sup>125</sup> This is not such a case. Plaintiffs’ claims are not abstract—they are individual and personal.

**B. Plaintiffs’ injuries are individual and personal due to the very nature of the right to vote.**

As explained in Section I, “voting is of the most fundamental significance under our constitutional structure.”<sup>126</sup> It is how the people govern themselves. Elections are the lifeblood of a democracy. “There is no right more basic in our democracy than the right to participate in electing our political leaders.”<sup>127</sup> The right to vote is a fundamental political right.<sup>128</sup> The right to have one’s vote counted is as strong as the right to put a ballot in the ballot box.<sup>129</sup>

As shown in Section II, Plaintiffs allege facts that cause their lack of confidence and that show disadvantage to themselves as individuals, thereby

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<sup>124</sup> *See id.* (“The fact that a harm is widely shared does not necessarily render it a generalized grievance.” (quoting *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011), citing also *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998)).

<sup>125</sup> *Id.* (cleaned up).

<sup>126</sup> *Illinois State Board of Elections*, 440 U.S. at 184.

<sup>127</sup> *McCutcheon*, 572 U.S. at 191.

<sup>128</sup> *Reynolds*, 377 U.S. at 562.

<sup>129</sup> *Mosely*, 238 U.S. at 386.

demonstrating Plaintiffs’ standing to sue.<sup>130</sup> The impairment of Plaintiffs’ right to vote is necessarily personal and individual.<sup>131</sup> Plaintiffs are “asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law.”<sup>132</sup>

It is a constitutional imperative that the election process itself allows citizens to have confidence in the fairness of the election. An election process that fails to meet that standard is unconstitutional and should be struck down. Plaintiffs’ lack of confidence in Oregon’s election system is well-demonstrated by the very nature of vote-by-mail system and the facts pleaded.

**C. The District Court was mistaken in its application of the requirement that the harm be “concrete.”**

The District Court found that lack of confidence in a voting system is too speculative to be concrete.<sup>133</sup> But, there is nothing speculative about Plaintiffs’ allegations as outlined in Section II. Indeed, no one knowing those facts should

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<sup>130</sup> See *Baker v. Carr*, 369 U.S. 186, 206 (1962) (“voters who allege facts showing disadvantage to themselves as individuals have standing to sue.”).

<sup>131</sup> See *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (We have long recognized that a person’s right to vote is individual and personal in nature. Thus, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage.) (cleaned up).

<sup>132</sup> *Id.* at 208.

<sup>133</sup> ER-10-11 (“The Court finds that Plaintiffs’ lack of confidence in Oregon’s voting systems is . . . too speculative to qualify as a concrete injury.”)

have confidence in the integrity of Oregon’s election system. However, the District Court did not explain its conclusion, leaving Plaintiffs to guess what the Court considered speculative.

What the District Court may have meant is that the existence of these facts may not, in fact, result in actual election fraud. But Plaintiffs have not asserted a case of election fraud. They have asserted a case of lack of confidence in the integrity of the election. Plaintiffs are harmed by their crisis of confidence in Oregon’s election system. Plaintiffs’ crisis of confidence is enough to show a concrete injury because “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 election.”<sup>134</sup> The harm to Plaintiffs is literally the loss self-governance, which is the same thing as saying that they have lost their freedom. A loss of personal freedom is anything but abstract.

Alternatively, the District Court may have meant is that Plaintiffs have not claimed a tangible injury. A tangible injury is not required because “concrete” is not synonymous with “tangible.”<sup>135</sup> “Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible

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<sup>134</sup> *Degraffenreid*, 141 S. Ct. at 734 (J. Thomas dissenting).

<sup>135</sup> *Spokeo*, 578 U.S. at 340.

injuries can nevertheless be concrete.”<sup>136</sup> The fact that Plaintiffs’ crisis of confidence injury is intangible does not justify the District Court’s conclusion.

Without any explanatory analysis, the District Court cited three district court cases<sup>137</sup> and one Second Circuit case<sup>138</sup> in support of its conclusion. These cases do not bear on whether Plaintiffs’ crisis of confidence injury is concrete.

The *Crist* case from the Second Circuit involved a voter who challenged the policy a presidential debates commission because it limited the participation of candidates to those having demonstrated a particular measure of popularity.<sup>139</sup> The alleged injury to Crist was his to his right of free speech to hear third party candidates.<sup>140</sup> The Second Circuit found that Crist’s free speech claim concerning a third party’s participation in a debate was abstract and therefore not concrete.<sup>141</sup> The *Crist* case fails to address whether voters lacking confidence in an election system have stated a concrete claim.

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<sup>136</sup> *Id.* citing *Pleasant Grove City v. Sumnum*, 555 U. S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993) (free exercise).

<sup>137</sup> *Lake v. Hobbs*, 623 F. Supp. 3d 1015 (D. Ariz. 2022); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020); and *Stein v. Cortes*, 223 F. Supp. 3d 423 (E.D. Pa. 2016).

<sup>138</sup> *Crist v. Comm’n on Presidential Debates*, 262 F.3d 193 (2d Cir. 2001).

<sup>139</sup> *Id.* at 194.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 195.

The *Lake* case from the District of Arizona is currently on appeal in this Court.<sup>142</sup> *Lake* was wrongly decided below, but is also distinguishable because (according to the district court) the lawsuit alleges the substantial likelihood of future injury from fraud.<sup>143</sup> In contrast, Plaintiffs do not allege fraud—they allege a lack of confidence in Oregon’s elections due to a myriad of characteristics of Oregon’s election system.

The *Trump* case is inapposite because the theory of harm asserted in that case was voter fraud causing vote dilution, not a crisis of confidence in the election system.<sup>144</sup> The *Stein* case is inapposite because there was an apparent failure to plead the plaintiff’s injury<sup>145</sup> and a failure to respond to the standing challenge.<sup>146</sup> The cases cited by the Court do not address Plaintiffs’ crisis of confidence injury asserted in this case.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for consideration of Plaintiffs’ claims on their merits.

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<sup>142</sup> *Lake v. Hobbs*, 22-16413 (9th Cir.).

<sup>143</sup> *Lake*, 623 F. Supp. 3d at 1027-28.

<sup>144</sup> *Trump*, 493 F. Supp. 3d at 342.

<sup>145</sup> *Stein*, 223 F. Supp. at 432 (“Neither Plaintiff has alleged that she or he has suffered an actual injury.”)

<sup>146</sup> *Id.* (“At the December 9 hearing, Intervenors argued persuasively that Plaintiffs lack standing. Remarkably, Plaintiffs did not respond.”) (cleaned up).

Date: August 7, 2023

JONCUS LAW P.C.

/s/ Stephen J. Joncus  
Stephen J. Joncus

*Attorney for Appellants*

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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)** 23-35452

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

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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/ Stephen Joncus **Date** August 7, 2023  
(use "s/[typed name]" to sign electronically-filed documents)

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-35452

I am the attorney or self-represented party.

This brief contains 9,141 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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

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 FRAP 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.

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 \_\_\_\_\_.

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**No. 23-35452**

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

---

Marc Thielman, Ben Edtl, Janice Dysinger, Don Powers, Sandra Nelson, Chuck Wiese,  
Loretta A. Johnson, Terry Noonkester, Steve Corderio, Jeanine Wenning, Diane Rich,  
Pam Lewis, Senator Dennis Linthicum, Janice Dysinger

*Plaintiffs-Appellants*

v.

Shemia Fagan, Clackamas County, Washington County, Multnomah County, Lane  
County, Linn County, Marion County, Jackson County, Deschutes County,  
Yamhill County, Douglas County, Klamath County, Coos County,

*Respondents-Appellees.*

On Appeal from the United States District Court  
for the District of Oregon  
No. 3:22-cv-1516-SB  
Hon. Stacie F. Beckerman

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**APPELLANTS' ADDENDUM**

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## ORS § 247.019

Current through the 2023 Regular Session of the 82nd Oregon Legislative Assembly, with Acts effective through July 1, 2023, pending classification of undesignated material and text revision by the Oregon Reviser.

*LexisNexis® Oregon Annotated Statutes > Title 23 Elections (Chs. 246 — 260) > Chapter 247- Qualification and Registration of Electors (§§ 247.002 — 247.991) > Registration (§§ 247.009 — 247.288)*

### **247.019 Electronic voter registration; rules.**

---

- (1) The Secretary of State by rule shall adopt an electronic voter registration system to be used by qualified persons who have a valid:
  - (a) Oregon driver license, as defined in ORS 801.245;
  - (b) Oregon driver permit, as defined in ORS 801.250;
  - (c) State identification card, issued under ORS 807.400; or
  - (d) Social Security number.
- (2)
  - (a) The electronic voter registration system shall:
    - (A) Require a person registering to vote under subsection (1)(d) of this section to enter only the final four digits of the person's valid Social Security number;
    - (B) Allow a person registering to vote under subsection (1)(d) of this section to electronically submit an image of the person's signature; and
    - (C) Allow a qualified person to complete and deliver a registration card electronically.
  - (b) A registration card delivered under this section is considered delivered to the Secretary of State for purposes of this chapter.
- (3) A person who completes a registration card electronically under this section consents to the use of the person's driver license, driver permit or state identification card signature, or an electronically submitted image of the person's signature, for voter registration purposes.

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(4) If available, the Department of Transportation shall provide to the Secretary of State a digital copy of the driver license, driver permit or state identification card signature of each person who completes a registration card under this section.

(5) The electronic voter registration system may also include an application programming interface to allow third-party organizations to securely submit registration cards electronically on behalf of individuals. In order to submit registration cards under this subsection, a third-party organization must be approved as a voter registration organization under a process designed by the Secretary of State by rule.

## History

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2009 c.914 § 2; 2022 c.19, § 1, effective January 1, 2023.

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## ORS § 247.275

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*LexisNexis® Oregon Annotated Statutes > Title 23 Elections (Chs. 246 — 260) > Chapter 247- Qualification and Registration of Electors (§§ 247.002 — 247.991) > Updating Registration (§§ 247.275 — 247.340)*

### **247.275 Limits on considering registration of elector inactive; rules.**

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- (1) Notwithstanding any other provision of ORS chapters 246 to 260, the registration of an elector may not be considered inactive due to an elector not voting or updating the elector's registration for any period of time.
- (2) The registration of an elector shall be considered active if the only reason for the registration of an elector being considered inactive is that the elector neither voted nor updated the elector's registration for any period of time.
- (3) The Secretary of State may adopt rules necessary to implement this section.

### **History**

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2021 c.233, § 2, effective September 25, 2021.

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## ORS § 254.470

Current through the 2023 Regular Session of the 82nd Oregon Legislative Assembly, with Acts effective through July 1, 2023, pending classification of undesignated material and text revision by the Oregon Reviser.

*LexisNexis® Oregon Annotated Statutes > Title 23 Elections (Chs. 246 — 260) > Chapter 254- Conduct of Elections (§§ 254.005 — 254.990) > Voting (§§ 254.365 — 254.482)*

### Notice

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🚩 This section has more than one version with varying effective dates.

### **254.470 Procedures for conducting election by mail; rules.**

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(1) The Secretary of State by rule shall establish requirements and criteria for the designation of places of deposit for the ballots cast in an election. The rules shall also specify the dates and times the places of deposit must be open and the security requirements for the places of deposit. At a minimum, the places designated under this section shall be open on the date of the election for a period of eight or more hours, but must be open until at least 8 p.m. At each place of deposit designated under this section, the county clerk shall prominently display a sign stating that the location is an official ballot drop site.

(2)

(a) Except as provided in paragraphs (b) and (c) of this subsection, the county clerk shall mail by nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope not sooner than the 20th day before the date of an election and not later than the 14th day before the date of the election, to each active elector of the electoral district as of the 21st day before the date of the election.

(b) If the county clerk determines that an active elector of the electoral district as of the 21st day before the date of the election does not receive daily mail service from the United States Postal Service, the county clerk shall mail by



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nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope to the elector not sooner than the 20th day before the date of an election and not later than the 18th day before the date of the election.

(c) In the case of ballots to be mailed to addresses outside this state to electors who are not military or overseas electors, the county clerk may mail the ballots not sooner than the 29th day before the date of the election.

(3) For an election held on the date of a primary election:

(a) The county clerk shall mail the official ballot of a major political party to each elector who is registered as being affiliated with the major political party as of the 21st day before the date of the election.

(b) The county clerk shall mail the official ballot of a major political party to an elector not affiliated with any political party if the elector has applied for the ballot as provided in this subsection and that party has provided under ORS 254.365 for a primary election that admits electors not affiliated with any political party.

(c) An elector not affiliated with any political party who wishes to vote in the primary election of a major political party shall apply to the county clerk in writing. The application must be completed, signed and submitted by the elector electronically, in person or by mail, in a manner determined by the secretary by rule and must indicate which major political party ballot the elector wishes to receive. Except for electors described in subsection (4) of this section, and subject to ORS 247.203, the application must be received by the county clerk not later than 5 p.m. of the 21st day before the date of the election.

(d) If the primary election ballot includes city, county or nonpartisan offices or measures, the county clerk shall mail to each elector who is not eligible to vote for party candidates a ballot limited to those offices and measures for which the elector is eligible to vote.

(4) For each elector who updates a voter registration after the deadline in ORS 247.025, the county clerk shall make the official ballot, the return identification envelope and the secrecy envelope available either by mail or at the county clerk's office or at another place designated by the county clerk. An elector to whom this subsection applies must request a ballot from the county clerk.

(5) The ballot shall contain the following warning:

Any person who, by use of force or other means, unduly influences an elector to vote in any particular manner or to refrain from voting is subject to a fine.

(6)

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- (a) Upon receipt of any ballot described in this section, the elector shall mark the ballot, sign the return identification envelope supplied with the ballot and comply with the instructions provided with the ballot.
- (b) The elector may return the marked ballot to the county clerk by United States mail or by depositing the ballot at the office of the county clerk, at any place of deposit designated by the county clerk or at any location described in ORS 254.472 or 254.474.
- (c) The ballot must be returned in the return identification envelope.
- (d) Subject to paragraph (e) of this subsection, if a person returns a ballot for an elector, the person shall deposit the ballot in a manner described in paragraph (b) of this subsection not later than two days after receiving the ballot.
- (e) If the elector deposits the ballot at the office of the county clerk, at any place of deposit designated by the county clerk or at any location described in ORS 254.472 or 254.474, the ballot must be received at the office of the county clerk, at the designated place of deposit or at any location described in ORS 254.472 or 254.474 not later than the end of the period determined under subsection (1) of this section on the date of the election. If the elector returns the ballot by mail:
- (A) The ballot must be received at the office of the county clerk not later than the end of the period determined under subsection (1) of this section on the date of the election; or
- (B) The ballot must:
- (i) Have a postal indicator showing that the ballot was mailed not later than the date of the election; and
- (ii) Be received at the office of the county clerk not later than seven calendar days after the date of the election.
- (f) If a county clerk receives a marked ballot for an elector who does not reside in the clerk's county, the ballot shall be forwarded to the county clerk of the county in which the elector resides not later than the eighth day after the election.
- (7) The following shall appear on the return identification envelope:
- (a) Space for the elector to sign the envelope.
- (b) A notice designed by rule by the Secretary of State, in consultation with the county clerks, explaining that by signing the ballot the elector is attesting under penalty of perjury that the ballot was mailed no later than the date of the election.
- (c) A summary of the applicable penalties for knowingly making a false statement, oath or affidavit under the election laws.

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- (8)** If the elector returns the ballot by mail, and a postal indicator is not present or legible, the ballot shall be considered to be mailed on the date of the election and may be counted if the ballot is received no later than seven calendar days after the election.
- (9)** An elector may obtain a replacement ballot if the ballot is destroyed, spoiled, lost or not received by the elector. Replacement ballots shall be issued and processed as described in this section and ORS 254.480. The county clerk shall keep a record of each replacement ballot provided under this subsection. Notwithstanding any deadline for mailing ballots in subsection (2) of this section, a replacement ballot may be mailed, made available in the office of the county clerk or made available at one central location in the electoral district in which the election is conducted. The county clerk shall designate the central location. A replacement ballot need not be mailed after the fifth day before the date of the election.
- (10)** A ballot shall be counted only if:
- (a)** It is returned in the return identification envelope;
  - (b)** The envelope is signed by the elector to whom the ballot is issued, unless a certified statement is submitted under ORS 254.431; and
  - (c)** The signature is verified as provided in subsection (11) of this section.
- (11)** The county clerk shall verify the signature of each elector on the return identification envelope with the signature on the elector's registration record, according to the procedure provided by rules adopted by the Secretary of State. If the county clerk determines that an elector to whom a replacement ballot has been issued has voted more than once, the county clerk shall count only one ballot cast by that elector.
- (12)** At 8 p.m. on election day, electors who are at the county clerk's office, a place of deposit designated under subsection (1) of this section or any location described in ORS 254.472 or 254.474 and who are in line waiting to vote or deposit a voted ballot shall be considered to have begun the act of voting.
- (13)**
- (a)**
    - (A)** Except as provided in subparagraph (B) of this paragraph, the name of the Secretary of State may not appear in the secretary's official capacity on the return identification envelope, secrecy envelope or on any instructions or materials included with the ballot if the secretary is a candidate in the election for which the ballot is printed.

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**(B)** This paragraph does not prohibit the name of the Secretary of State from appearing in the secretary's official capacity in the voters' pamphlet.

**(b)** The name of the county clerk or other filing officer may not appear in the official capacity of the county clerk or filing officer on the return identification envelope, secrecy envelope or on any instructions or materials included with the ballot if the county clerk or filing officer is a candidate in the election for which the ballot is printed.

**(c)** As used in this subsection, "filing officer" has the meaning given that term in ORS 254.165.

**(14)** As used in this section, "postal indicator" means a postmark or other indicator on a mailed ballot, identified by the Secretary of State by rule, that demonstrates the date or time at which a ballot was mailed.

## History

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1981 c.805 § 2; 1983 c.199 § 2; 1985 c.575 § 2; 1987 c.357 § 3; 1987 c.733 § 7a; 1993 c.493 § 44; 1995 c.607 § 43; 1995 c.712 § 65; 1995 c.742 § 17; 1999 c.410 § 57; 1999 c.999 § 54a; 1999 c.1002 § 11; 2001 c.104 § 79; 2001 c.805 § 7; 2001 c.965 § 14; 2005 c.797 § 47; 2007 c.71 § 78; 2007 c.154 § 40a; 2008 c.53 § 5; 2009 c.511 § 24; 2013 c.520, § 18, effective June 26, 2013; 2013 c.679, § 3, effective July 29, 2013; 2013 c.617, § 3, effective January 1, 2014; 2015 c.169, § 3, effective January 1, 2016; 2017 c.749, § 50, effective August 18, 2017; 2018 c.70, § 4, effective April 3, 2018; 2019 c.638, § 3, effective September 29, 2019, operative January 1, 2020; 2019 c.508, § 3, effective January 1, 2020; 2019 c.638, § 3, effective September 29, 2019; 2021 c.551, § 1, effective January 1, 2022.

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## Oregon Secretary of State

Elections Division

255 Capitol St. NE, Suite 126, Salem, OR 97310

503-986-1518

<http://sos.oregon.gov/voting-elections>

## Oregon Vote-by-Mail

On Nov. 7, 2000, Oregon became the nation's 1st all vote-by-mail state. Here's how history was made.

### 1980s

- 1981 Oregon Legislature approves a test of vote-by-mail (VBM) for local elections.
- 1987 VBM made permanent; majority of counties use it for local/special elections.

### 1990s

- June 1993 First special statewide election by mail; 39% voter turnout.
- May 1995 Second special statewide election by mail; 44% turnout.
- Spring/summer 1995 Legislature OKs proposal to expand VBM to primary and general elections. Governor vetoes the bill.
- December 1995 Oregon becomes 1st state to conduct primary election totally by mail to nominate candidates to fill a vacancy in a federal office; 58% turnout.
- January 1996 Oregon becomes 1st state to conduct general election totally by mail to fill a vacancy in a federal office, when it selects Sen. Ron Wyden to replace Sen. Bob Packwood; 66% turnout.
- March 1996 Oregon holds country's 2nd VBM presidential primary; 58% turnout. (First VBM presidential primary held by North Dakota, just weeks prior to Oregon.)
- May 1997 Sixth special statewide election by mail; 42% turnout.
- Spring/summer 1997 Oregon House of Representatives approves proposal to expand VBM to primary and general elections. The bill dies in a Senate committee. The Governor would've signed the bill into law.
- November 1997 Seventh special statewide election by mail; 60% turnout.
- May 1998 Primary election at the polls. 41% of registered voters in Oregon are permanent absentee voters. Overall, the state posts a record-low turnout of 35%. Absentee ballots represent nearly  $\frac{2}{3}$  of all ballots cast. Oregon becomes 1st state to have more ballots cast by mail than at the polls during a polling place election. Absentee voter turnout was 53%, compared to 22% at the polls.
- June 1998 Supporters of expanding VBM to primary and general elections use the initiative process to put the issue on the November general election ballot. No paid signature gatherers are used to put measure on the ballot – a first since 1994.
- Nov. 3, 1998 Voters decide to expand VBM to primary and general elections, by a vote of 757,204 to 334,021.
- Nov. 2, 1999 Eighth special statewide election by mail; 38% turnout.

### 2000s

- May 2000 Presidential primary election VBM; 51% turnout.
- November 2000 First VBM presidential general election; 79% turnout.
- May 2002 Primary election VBM; 46% turnout.

- September 2002 Special election for 2 statewide measures VBM; 44% turnout.
- November 2002 General election VBM; 69% turnout.
- January 2003 Special election for a statewide measure VBM; 66% turnout.
- September 2003 Special election for a statewide measure VBM; 35% turnout.
- February 2004 Special election for a statewide measure VBM; 63% turnout.
- May 2004 Presidential primary election VBM; 46% turnout.
- November 2004 Presidential general election VBM. Voter registration exceeds 2 million, with 86% turnout.
- May 2006 Primary election VBM; 38% turnout.
- November 2006 General election VBM; 70% turnout.

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The New York Times

<https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html>

## ***Error and Fraud at Issue as Absentee Voting Rises***

**By Adam Liptak**

Oct. 6, 2012

TALLAHASSEE, Fla. — On the morning of the primary here in August, the local elections board met to decide which absentee ballots to count. It was not an easy job.

The board tossed out some ballots because they arrived without the signature required on the outside of the return envelope. It rejected one that said “see inside” where the signature should have been. And it debated what to do with ballots in which the signature on the envelope did not quite match the one in the county’s files.

“This ‘r’ is not like that ‘r,’” Judge Augustus D. Aikens Jr. said, suggesting that a ballot should be rejected.

Ion Sancho, the elections supervisor here, disagreed. “This ‘k’ is like that ‘k,’” he replied, and he persuaded his colleagues to count the vote.

Scenes like this will play out in many elections next month, because Florida and other states are swiftly moving from voting at a polling place toward voting by mail. In the last general election in Florida, in 2010, 23 percent of voters cast absentee ballots, up from 15 percent in the midterm election four years before. Nationwide, the use of absentee ballots and other forms of voting by mail has more than tripled since 1980 and now accounts for almost 20 percent of all votes.

Yet votes cast by mail are less likely to be counted, more likely to be compromised and more likely to be contested than those cast in a voting booth, statistics show. Election officials reject almost 2 percent of ballots cast by mail, double the rate for in-person voting.

“The more people you force to vote by mail,” Mr. Sancho said, “the more invalid ballots you will generate.”

Election experts say the challenges created by mailed ballots could well affect outcomes this fall and beyond. If the contests next month are close enough to be within what election lawyers call the margin of litigation, the grounds on which they will be fought will not be hanging chads but ballots cast away from the voting booth.

In 2008, 18 percent of the votes in the nine states likely to decide this year's presidential election were cast by mail. That number will almost certainly rise this year, and voters in two-thirds of the states have already begun casting absentee ballots. In four Western states, voting by mail is the exclusive or dominant way to cast a ballot.

The trend will probably result in more uncounted votes, and it increases the potential for fraud. While fraud in voting by mail is far less common than innocent errors, it is vastly more prevalent than the in-person voting fraud that has attracted far more attention, election administrators say.

In Florida, absentee-ballot scandals seem to arrive like clockwork around election time. Before this year's primary, for example, a woman in Hialeah was charged with forging an elderly voter's signature, a felony, and possessing 31 completed absentee ballots, 29 more than allowed under a local law.

The flaws of absentee voting raise questions about the most elementary promises of democracy. "The right to have one's vote counted is as important as the act of voting itself," Justice Paul H. Anderson of the Minnesota Supreme Court wrote while considering disputed absentee ballots in the close 2008 Senate election between Al Franken and Norm Coleman.

Voting by mail is now common enough and problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner. The list includes the 2000 presidential election, in which problems with absentee ballots in Florida were a little-noticed footnote to other issues.

In the last presidential election, 35.5 million voters requested absentee ballots, but only 27.9 million absentee votes were counted, according to a study by Charles Stewart III, a political scientist at the Massachusetts Institute of Technology. He calculated that 3.9 million ballots requested by voters never reached them; that another 2.9 million ballots received by voters did not make it back to election officials; and that election officials rejected 800,000 ballots. That suggests an overall failure rate of as much as 21 percent.

Some voters presumably decided not to vote after receiving ballots, but Mr. Stewart said many others most likely tried to vote and were thwarted. "If 20 percent, or even 10 percent, of voters who stood in line on Election Day were turned away," he wrote in the study, published in *The Journal of Legislation and Public Policy*, "there would be national outrage."

The list of very close elections includes the 2008 Senate race in Minnesota, in which Mr. Franken's victory over Mr. Coleman, the Republican incumbent, helped give Democrats the 60 votes in the Senate needed to pass President Obama's health care bill. Mr. Franken won by 312 votes, while state officials rejected 12,000 absentee ballots. Recent primary elections in New York involving Republican state senators who had voted to allow same-sex marriage also hinged on absentee ballots.



There are, of course, significant advantages to voting by mail. It makes life easier for the harried, the disabled and the elderly. It is cheaper to administer, makes for shorter lines on election days and allows voters more time to think about ballots that list many races. By mailing ballots, those away from home can vote. Its availability may also increase turnout in local elections, though it does not seem to have had much impact on turnout in federal ones.

Still, voting in person is more reliable, particularly since election administrators made improvements to voting equipment after the 2000 presidential election.

There have been other and more controversial changes since then, also in the name of reliability and efficiency. Lawmakers have cut back on early voting in person, cracked down on voter registration drives, imposed identification requirements, made it harder for students to cast ballots and proposed purging voter rolls in a way that critics have said would eliminate people who are eligible to vote.

But almost nothing has been done about the distinctive challenges posed by absentee ballots. To the contrary, Ohio's Republican secretary of state recently sent absentee ballot applications to every registered voter in the state. And Republican lawmakers in Florida recently revised state law to allow ballots to be mailed wherever voters want, rather than typically to only their registered addresses.

"This is the only area in Florida where we've made it easier to cast a ballot," Daniel A. Smith, a political scientist at the University of Florida, said of absentee voting.

He posited a reason that Republican officials in particular have pushed to expand absentee voting. "The conventional wisdom is that Republicans use absentee ballots and Democrats vote early," he said.

Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats.

There is a bipartisan consensus that voting by mail, whatever its impact, is more easily abused than other forms. In a 2005 report signed by President Jimmy Carter and James A. Baker III, who served as secretary of state under the first President George Bush, the Commission on Federal Election Reform concluded, "Absentee ballots remain the largest source of potential voter fraud."

On the most basic level, absentee voting replaces the oversight that exists at polling places with something akin to an honor system.

"Absentee voting is to voting in person," Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has written, "as a take-home exam is to a proctored one."

### **Fraud Easier Via Mail**

Election administrators have a shorthand name for a central weakness of voting by mail. They call it granny farming.

“The problem,” said Murray A. Greenberg, a former county attorney in Miami, “is really with the collection of absentee ballots at the senior citizen centers.” In Florida, people affiliated with political campaigns “help people vote absentee,” he said. “And help is in quotation marks.”

Voters in nursing homes can be subjected to subtle pressure, outright intimidation or fraud. The secrecy of their voting is easily compromised. And their ballots can be intercepted both coming and going.

The problem is not limited to the elderly, of course. Absentee ballots also make it much easier to buy and sell votes. In recent years, courts have invalidated mayoral elections in Illinois and Indiana because of fraudulent absentee ballots.

Voting by mail also played a crucial role in the 2000 presidential election in Florida, when the margin between George W. Bush and Al Gore was razor thin and hundreds of absentee ballots were counted in apparent violation of state law. The flawed ballots, from Americans living abroad, included some without postmarks, some postmarked after the election, some without witness signatures, some mailed from within the United States and some sent by people who voted twice. All would have been disqualified had the state’s election laws been strictly enforced.

In the recent primary here, almost 40 percent of ballots were not cast in the voting booth on the day of the election. They were split between early votes cast at polling places, which Mr. Sancho, the Leon County elections supervisor, favors, and absentee ballots, which make him nervous.

“There has been not one case of fraud in early voting,” Mr. Sancho said. “The only cases of election fraud have been in absentee ballots.”

Efforts to prevent fraud at polling places have an ironic consequence, Justin Levitt, a professor at Loyola Law School, told the Senate Judiciary Committee September last year. They will, he said, “drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns.”

“That is,” he said, “a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.”

### **Clarity Brings Better Results**

In 2008, Minnesota officials rejected 12,000 absentee ballots, about 4 percent of all such votes, for the myriad reasons that make voting by mail far less reliable than voting in person.

The absentee ballot itself could be blamed for some of the problems. It had to be enclosed in envelopes containing various information and signatures, including one from a witness who had to attest to handling the logistics of seeing that “the voter marked the ballots in that individual’s presence without showing how they were marked.” Such witnesses must themselves be registered voters, with a few exceptions.

Absentee ballots have been rejected in Minnesota and elsewhere for countless reasons. Signatures from older people, sloppy writers or stroke victims may not match those on file. The envelopes and forms may not have been configured in the right sequence. People may have moved, and addresses may not match. Witnesses may not be registered to vote. The mail may be late.

But it is certainly possible to improve the process and reduce the error rate.

Here in Leon County, the rejection rate for absentee ballots is less than 1 percent. The instructions it provides to voters are clear, and the outer envelope is a model of graphic design, with a large signature box at its center.

The envelope requires only standard postage, and Mr. Sancho has made arrangements with the post office to pay for ballots that arrive without stamps.

Still, he would prefer that voters visit a polling place on Election Day or beforehand so that errors and misunderstandings can be corrected and the potential for fraud minimized.

“If you vote by mail, where is that coming from?” he asked. “Is there intimidation going on?”

Last November, Gov. Rick Scott, a Republican, suspended a school board member in Madison County, not far from here, after she was arrested on charges including absentee ballot fraud.

The board member, Abra Hill Johnson, won the school board race “by what appeared to be a disproportionate amount of absentee votes,” the arrest affidavit said. The vote was 675 to 647, but Ms. Johnson had 217 absentee votes to her opponent’s 86. Officials said that 80 absentee ballots had been requested at just nine addresses. Law enforcement agents interviewed 64 of the voters whose ballots were sent; only two recognized the address.

Ms. Johnson has pleaded not guilty.

Election law experts say that pulling off in-person voter fraud on a scale large enough to swing an election, with scores if not hundreds of people committing a felony in public by pretending to be someone else, is hard to imagine, to say nothing of exceptionally risky.

There are much simpler and more effective alternatives to commit fraud on such a scale, said Heather Gerken, a law professor at Yale.

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8/7/23, 9:45 AM

“You could steal some absentee ballots or stuff a ballot box or bribe an election administrator or fiddle with an electronic voting machine,” she said. That explains, she said, “why all the evidence of stolen elections involves absentee ballots and the like.”

Amanda Cox contributed reporting from New York.

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