May 22, 2013

To the Honorable Chair Senator Diane Rosenbaum ,
Vice Chair Senator Ted Ferrioli,
Senator Lee Beyer,
Senator Ginny Burdick,
Senator Bruce Starr

I oppose SB 2199A ,

The subject of this bill has been before this body numerous times. It asks to remove the requirement to destroy the Unused ballots on election night. The citizens have asked to require the destruction of the unused ballots on election night to promote confidence in our election. This is common practice for elections throughout the ages for many countries and cultures. Sadly, This is not Oregon's practice currently, although ORS 254.483 asks for it. Currently the unused ballots are kept in the elections office until after any recall could be demanded.(about a month after the election) . Some offices lock the ballots up, some do not. It is not a consistent practice.

I also refer you photo of the Robert McCullough email to a prior Legislative session regarding this bill. His back ground on fraud research is quite remarkable, please see his CV, also attached. He describes the reason it is so important that the ballots are destroyed. His video regarding the electronic security further explains some of the concerns. Combine the two and you will see why we asked that the ballots be destroyed.

There is an Emergency clause at the end of the bill. To declare this bill an emergency, after our history of conflict over ORS 254.483 meaning, seems only to prevent the will of the people from bringing forth an initiative.

This is an important bill for the people. It is an extraordinary event for citizens to take their officials to court to try to secure their elections. During the trial, Judge You Lee Yim You stated that there was a conflict with the statutes, thus the Secretary was responsible to make rules to harmonize the process. I ask that you please provide better clarity that would remove conflict and destroy the Unused ballots on election day. I have given you the documents from the trial for you to decide yourself. The Memo from our attorney James Buchal gives good advice on some solutions, I beg you to consider. It grieved me to take these steps. I took no pleasure in doing so. I appealed to the officials for years before taking these steps. Confidence in our election system is our motivation and goal, I mean no disrespect to any officials, only to have confidence in the process.

Please amend the bill with a real solution so the people will have confidence in Oregon's election process. At the very least please remove the Emergency clause.

Respectfully,
Janice Dysinger

McCullough Research

Andrew Nisbet
Principal

Date: January 20, 2011

To: Voter Integrity Project

From: Andrew Nisbet
Robert McCullough

Subject: Electronic Security at Multnomah Elections Office

The level of security at the Multnomah County Election Division Office, although generally sound, has one vulnerability that is sufficient to render the election results suspect.

The location of the six tally machines and their relationship to the personal computer is critical to the credibility of the result. All seven machines are located in a locked room – the "Red Room". The tally machines are highly secured complete with printers to report both audits – changes to the machines – and results. The six tally machines are connected to a standard personal computer through Ethernet cables.

While the tally machines are highly secured, the personal computer that actually reports the results is not.

In 2007, the Multnomah County Auditor addressed the issue of Electronic Security at the Morrison facility:

> Additionally, at the request of an observer, Elections expanded the testing to include a comparison of printed totals from each tally machine to the compiled totals from the computer. Finally, they were responsive to our interim report on tally system programming and implemented several additional controls for this process, such as keeping

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> the sealed public certification results in the custody of someone other than the individual who runs the test.[1]

After 8 p.m. on the day of the election the personal computer is linked by Ethernet cables to the six ballot counting machines and totals are calculated. At the first public test of the ballot counting machines, staff was asked if the individual totals of six ballot counting machines were compared with the computer's results and the answer given was no. On the night of the election Janice Dysinger asked if she could have the totals from each of the six ballot counting machines so we could compare them with the computer's results the answer given was that the ballot counting machines don't generate totals. This statement would appear to contradict the 2007 Elections Audit quoted above.

When asked about post-election checking of tally machine totals against the results from the personal computer, Eric Sample of the elections staff indicated that this was not part of the procedure.

At the first public test of the ballot counting machines we were told that the network serving the tally machines and the personal computer was isolated. Andrew Nisbet asked if he could check to see if the system in the red room was actually isolated. He was told that this would have to wait until after the election.

It is not possible for observers or staff to monitor this part of the system, as the connections between the tally machines and the personal computer are not in plain sight. While it would be possible to tap into the network out of sight of the elections staff or election observers, this is not required to adjust the results of the tally machines.

The vulnerability of the connections pales when one considers that the unity machine has several unsecured USB ports.[2] What that means is that anyone who has had 30 seconds of unobserved access to the personal computer could adjust the programming or directly overwrite the election results. Best practices for mission critical equipment is to reduce

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[1] Elections Office Audit, June 27, 2007, page 14.

[2] Universal Serial Bus (USB) is a standard communications capability available on almost all computers. USB "keys", "sticks", or "drives" are small devices routinely used to transfer files between computers. A USB "key" is easily carried. Standard USB devices are ½" by ¼" by 1".

access to the absolute minimum – often by using software to block unauthorized data transfers and physical elimination of data entry devices like USB ports.

The security of the elections process would be dramatically enhanced if:

1) The personal computer was physically secure in its own locked enclosure.
2) The software on the personal computer was checked before use. One option might be to secure the hard drive of the personal computer in a different location until needed.
3) The personal computer had an external audit log, preferably in hard copy, comparable to those on the tally machines. Absent an external audit log, the

operating system on the personal computer should be upgraded to Windows Server 2008 R2 and the operator should not be granted administrator status.[3]

4) The USB ports (and any other unneeded access ports) on the personal computer should be disabled.
5) The personal computer and the tally machines be subject to the testing as outlined in the 2007 Elections Office Audit.
6) The personal computer and the tally machines should be subject to video surveillance.
7) The Ethernet network – and the hub connecting its nodes – should be in plain sight.

Given the answers of the elections staff during the public tests of the tally machines, it is possible that the personal computer results would not be checked against the tally machines. Moreover, if the tally machines are "zeroed out" in subsequent tests, it might well be impossible to verify the election results against the tally machines at a later date.

We requested a report from the tally machines and compared it against the summary provide from the personal computer and saw no anomalies for the current election.

We would like to make it clear that the character of the elections staff is not in question. Their conduct of the election staff during the public tests of the tally machines was forthright and competent. Notwithstanding, reporting the results of the highly secured and tested tally machines on a relatively unsecured and untested personal computer is likely to provide a temptation for misbehavior. This is especially true when checks and balances suggested by the 2007 audit report appear not have been implemented three years later.

[3] The elections staff was unable to describe the degree of software security during the public tests. The standard Windows software is renowned for its lack of security. More sophisticated operating systems provide substantially upgraded safeguards against intrusion.

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3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF MULTNOMAH

LISA MICHAELS, JANICE DYSINGER, DELIA LOPEZ and JOHN PAYNE, Plaintiffs, v. KATE BROWN, in her official capacity as Oregon Secretary of State, TIM SCOTT, in his official capacity as Multnomah County Director of Elections, Defendants.	Case No. 1209-11226 DECLARATION OF TIM SCOTT IN SUPPORT OF DEFENDANT SCOTT'S MOTION TO DISMISS PLAINTIFFS' WRIT OF MANDAMUS

In support of Defendant Scott's Motion to Dismiss Plaintiffs' Motion for an Order to Show Cause and for Preliminary Injunction, Defendant Tim Scott declares:

1. I am the Director of Elections for Multnomah County, and have held this position for 4 years.

2. The following are the steps taken by the Multnomah County Elections Division to account for blank ballots:

a. Regular Ballots are ordered from the vendor in an amount that is normally 110% of our active voter registration file which fluctuates between 400,000 and 430,000 registered voters.

b. In addition, we order a set of Test ballots (contain watermark) and a set of Duplication ballots (contain watermark) separate from the above described Regular ballots.

c. Test ballots are used to create the logic and accuracy test election for the tally system.

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d. Duplication ballots are used for duplicating any ballot that is not machine readable.

e. Regular, Test and Duplication ballots are all Official ballots.

f. All ballots are inventoried upon receipt to make sure that we have received what we ordered.

g. We utilize most of the Regular ballots ordered when we prepare and mail one ballot to each active registered voter.

h. Remaining Regular ballots are used to reissue ballots to voters who did not receive their ballot for whatever reason, voters who have updated from inactive to active and are then eligible for a ballot, or voters who registered after the mailed ballots were prepared.

i. Remaining Regular ballots described above are also issued to registered voters throughout the voting period up until and after 8:00 pm on Election Day, for the reasons stated below in section 3 of this declaration.

j. All Regular ballots are stored in an area that is monitored by 3 video cameras - 2 cameras in the ballot issuing area and one actually inside the room where ballots are stored.

k. Anyone accessing the ballot storage area is visible on camera.

3. The blank Regular ballots are used as follows on Election Day and thereafter until the Election has been certified:

a. Any person in line at the Elections Office at 8:00 pm on Election Day is eligible to receive a ballot and vote in the election.

b. Sometimes there is a line at 8:00 pm and the last Regular ballot is not issued until after 8:00 pm.

c. After the last Regular ballot has been issued, the ballot storage area is locked and sealed with tamper evident seals.

d. The seal numbers are recorded and witnessed by Elections staff and observers if they are in the building.

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1 4. The ballots are not destroyed until the Elections Division has certified the results of
2 the election to the Secretary of State, which usually occurs between 20 and 23 days after Election
3 Day. At that time, the ballot storage room is unsealed and unlocked in the presence of observers.
4 All unused Regular ballots are then counted and the number of ballots is compared to the number of
5 ballots ordered and the number of ballots used. All unused ballots are then destroyed.
6
7 5. The process described above has been in place since the May 2011 election in
8 response to concerns raised by Plaintiffs following a visit to the Multnomah County Elections
9 Division in December 2010, related to the demand for a recount filed by Delia Lopez.
10 6. In 2010, the shredding of the unused ballots was cancelled due the fact that there
11 was a recount called. I believed that the perception of a shredding truck pulling up to the elections
12 office during a recount of an active election could have been perceived negatively by the public.
13 The public may have thought that we were shredding voted ballots for the election. I chose to hold
14 off the shredding until the recounts were completed.
15
16 7. In the 2008 Presidential election, there were approximately 30 people still in line at
17 the Elections Division waiting to vote after 8:00 pm. Each of these individuals was issued a blank
18 Official ballot to cast their votes as required by law, and that process was not completed until
19 approximately 8:30 pm. There were voters inside the Elections Division voting until approximately
20 9:00 pm.
21
22 8. In Multnomah County there are 25 ballot drop sites that are open until 8:00 pm.
23 Ballots are collected from the drop sites by staff, and the ballots from these drop sites arrive at the
24 Elections Division up until 9:30 pm. In addition, Multnomah County voters place ballots in the
25 Clackamas County and Washington County drop sites, and those ballots are not received by
26

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1 Multnomah County Elections until the day after Election Day. Multnomah County ballots are also
2 placed in drop sites in other counties throughout the state, which trickle in to Multnomah County
3 over the next few days after Election Day.
4
5 9. All ballots collected before and after 8:00 pm on Election Day are machine counted,
6 and if one is not machine readable, a duplicate ballot must be prepared. A team of two elections
7 staff of different political party work together to transfer the votes from the unreadable ballot to a
8 blank ballot. Both ballots are marked with a unique number so that the two can be paired back up in
9 the case of a recount and then the copy is run through the tally machine and the original is filed.
10 Since the process of tallying ballots continues beyond 8:00 pm on Election Day it would be
11 impossible to duplicate machine unreadable ballots without blank ballots on hand.
12
13 10. At 8:00 pm on Election Day all elections staff in Multnomah County are fully
14 occupied with the essential task of processing any ballot received in time to be counted. Due to the
15 large number of unused ballots required to be prepared for any circumstance it would take many
16 staff several hours to count the unused ballots and then shred them. I believe the primary duty on
17 election night and thereafter until all voted ballots are counted, is to process the voted ballots.
18 11. Statute requires that county elections officials certify the results of the election to the
19 Secretary of State no later than the 20th day after Election Day. During that 20 day period is a 10
20 day challenge period where voters whose ballots were challenged for signature issues can provide
21 evidence that they signed the ballot and their ballot could be accepted and counted. Also during that
22 20 day period elections staff are reconciling the number of ballots reported as accepted in the
23 Oregon Centralized Voter Registration System against the number of ballots tallied, examining any
24 discrepancies and determining the cause of those discrepancies. During the entire 20 day period
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26

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ballots are being periodically run into the tally machines. Any time ballots are being run through the tally machines there is a potential to have an unreadable ballot that would need to be duplicated.

12. After the November 2010 election and recounts Lisa Michaels filed a public records request asking to count the unused ballots prior to shredding. I allowed her and several others to count the unused ballots. Multnomah County elections does not in any way endorse the results of their count of unused ballots because observed counting procedures were inconsistent and unverifiable.

13. After the May 2012 Primary there were 60,907 blank ballots shredded. This was a county wide election with 197 ballot styles involved in the election.

14. After the January 2012 Special Election there were 533 ballots shredded. This was a small portion of Multnomah County with only about 50,000 voters involved in the election.

15. Generally, a larger election with many ballot styles will have a larger percentage of blank ballots left over.

I make this declaration in support of Defendant Scott's Motion to Dismiss Plaintiffs' Writ of Mandamus and declare under penalty of perjury that the foregoing is true and correct.

Tim Scott

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CERTIFICATE OF SERVICE

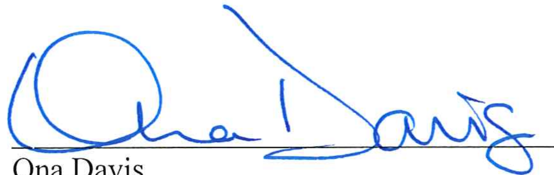
I hereby certify that on September 27, 2012, I served the foregoing **DECLARATION OF TIM SCOTT IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' WRIT OF MANDAMUS** on:

James L. Buchal
Murphy & Buchal, LLP
3425 SE Yamhill, Suite 100
Portland, Oregon 97214

John Dunbar
Oregon Department of Justice
1515 SW 5th Avenue, Suite 410
Portland, Oregon 97201

by **mailing** to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.

by **email** to said person(s) at jbuchal@mbllp.com and john.dunbar@state.or.us.



Ona Davis
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6 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
7 FOR THE COUNTY OF MULTNOMAH
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LISA MICHAELS, JANICE DYSINGER, DELIA LOPEZ and JOHN PAYNE, Relators, Petitioners and Plaintiffs, v. KATE BROWN, in her official capacity as Oregon Secretary of State, TIM SCOTT, in his official capacity as Multnomah County Director of Elections, Defendants.	Case No. 1209-11226 **COMPLAINT**

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17 Relators, petitioners and plaintiffs allege:
18 1.
19 Relator, Petitioner and Plaintiff LISA MICHAELS is a resident of Washington County,
20 Oregon and a registered voter.
21 2.
22 Relator, Petitioner and Plaintiff JANICE DYSINGER is a resident of Multnomah County,
23 Oregon and a registered voter.
24 3.
25 Relator, Petitioner and Plaintiff DELIA LOPEZ is a resident of Douglas County, Oregon and
26 a registered voter.
27
28

James L. Buchal, OSB #92161
MURPHY & BUCHAL LLP
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4.

Relator, Petitioner and Plaintiff JOHN PAYNE is a resident of Multnomah County, Oregon and a registered voter.

5.

For brevity, these parties will be referred to as "plaintiffs".

6.

Defendant KATE BROWN is the Oregon Secretary of State. She is sued in her official capacity only.

7.

Defendant TIM SCOTT is the Director of Elections for Multnomah County. He is sued in his official capacity only.

8.

Plaintiffs have a continuing interest in the integrity of Oregon's vote by mail system, which is threatened as alleged herein.

9.

Defendant TIM SCOTT is required by ORS 254.483(1) to destroy blank, unused ballots immediately after 8:00 p.m. on election day, has failed and refused to do so in prior elections, and threatens to do so in the upcoming election scheduled for November 6, 2012.

10.

Upon information and belief, defendant KATE BROWN, acting through her subordinate Steve Trout, has advised TIM SCOTT not to obey ORS 254.483.

11.

Plaintiffs have no adequate remedy at law, and have been and will continue to be irreparably injured by reason of defendants' continuing refusal to implement the provisions of ORS 254.483(1).

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FIRST CAUSE OF ACTION: PETITION FOR A WRIT OF MANDAMUS

12.

Plaintiffs reallege paragraphs 1 through 11 as if set forth herein.

13.

Plaintiffs are entitled to a writ of mandamus directing TIM SCOTT to destroy all unused ballots immediately after 8:00 p.m. on election night.

SECOND CAUSE OF ACTION: APPEAL UNDER ORS 246.910

14.

Plaintiffs reallege paragraphs 1 through 13 as if set forth herein.

15.

Defendants' continuing practice of refusing to destroy unused ballots immediately after 8:00 p.m. on election night constitutes a failure to act which adversely affects plaintiffs within the meaning of ORS 246.910.

16.

Plaintiffs are entitled to judgment ordering TIM SCOTT to destroy all unused ballots immediately after 8:00 p.m. on election night.

THIRD CAUSE OF ACTION: REVIEW OF ORDER

17.

Plaintiffs reallege paragraphs 1 through 16 as if set forth herein.

18.

Defendants' continuing practice of refusing to destroy unused ballots immediately after 8:00 p.m. on election night constitutes constitutes agency action wrongfully withheld as to which plaintiffs are aggrieved within the meaning of ORS Chapter 183.

19.

Petitioners are entitled to recover their costs and fees pursuant to ORS 183.497 or otherwise.

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FOURTH CAUSE OF ACTION: DECLARATORY JUDGMENT

20.

Petitioners reallege paragraphs 1 through 16 as if set forth herein.

21.

ORS 28.020 provides:

> "Any person . . . whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

22.

The rights of petitioners are affected by defendants' unlawful construction of ORS 254.483, and petitioners are entitled to declaratory relief under ORS Chapter 28.

WHEREFORE plaintiffs pray for:

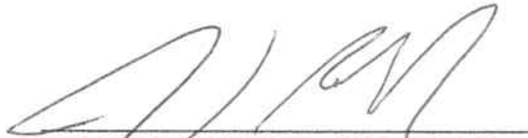
1. Judgment or writ ordering defendant TIM SCOTT to obey ORS 254.483;

2. Judgment or writ restraining defendant KATE BROWN from interfering with the proper execution of ORS 254.483 by county clerks;

2. For their costs and attorney fees pursuant to ORS 183.497 and otherwise.

4. For such other and further relief as the Court deems just and proper.

Dated: September 6, 2012.



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MEMORANDUM

To: Whom It May Concern

From: James L. Buchal

Date: February 19, 2013

Re: HB 2199: A Threat and an Opportunity

House Bill 2199, filed at the request of the Secretary of State, enacts changes to Oregon law relating to ballot security. One portion of the bill is a good first step, and the other is a step backwards. For this reason, I am recommending that parties interested in ballot security pursue amendments to the bill as outlined herein. In general, proposed new material is italicized.

Section 1 of the bill amends ORS 254.074, which requires county clerks to file security plans with the Secretary of State. The bill does not change the fundamental problem with existing law, which is that the plans are confidential and not subject to disclosure, so no one other than the Secretary of State can ever audit adequacy or compliance.[1] The law as it stands insulates the plan from a public records act request, which means that only those inside the clerk's or Secretary of State's office can see the plans, yet those parties are often partisan. Removing ORS 254.074(2) would allow public feedback on and promote improvement in the plans; the notion that attacks on election integrity would be facilitated by knowledge of the security plans seems far-fetched.

The bill tightens up the security plan slightly by adding a requirement that the county clerks add information about video recording of the counting areas. I would propose three additions as required elements of the security plan. The first is based on the Clackamas County experience; add a requirement that the plan address:

> *(K) Procedures to limit access to vote-counting-machine-readable writing instruments in counting areas."*

The second relates to treatment of duplicate ballots. This subject is addressed below, but the bill as drafted fails to account for circumstances in which ballots are duplicated in the days before voting is over. So subsection (D) should be amended as follows:

> (D) Security procedures for processing ballots*, including but not limited to procedures for ensuring that marking duplicated or test ballots are marked and*

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[1] An enterprising member of the Legislature could try getting a copy of the most recent plan in Multnomah County and releasing it for public feedback.

treated as such, and procedures for ensuring that blank ballots returned to the clerk and not counted remain segregated until destruction or mutilation.

Third, the security plan provides an opportunity to increase citizen involvement in security, as for example by expanding transportation security as follows:

(C) Security procedures for transporting ballots, *including provision for election observers to accompany county agents involved in ballot transportation.*

Section 1 of the bill also expands the county clerk's duties with regard to certification, adding requirements that he or she account for the use of blank ballots within the clerk's office. This change is coupled with a portion of Section 2 removing existing language which requires each county to "provide for the security of, and shall account for, unused ballots". In its place would be detailed requirements to submit a record of ballots printed and their various dispositions. Here the language needs considerable tightening and I would suggest the following:

(3) For each election, at the time the county clerk certifies the results of an election, the clerk shall submit to the Secretary of State a record *accounting for the disposition of all blank ballots received or printed, including:*

(a) The number of ballots received or printed by the clerk.[2]

(b) The number of ballots mailed to voters.

(c) The number of ballots issued to voters at the office of the county clerk.

(d) The number of ballots returned after mailing or issuance, but not counted, including:

(i) The number of ballots returned undeliverable.
(ii) The number of ballots in rejected envelopes.

(e) The number of tallied ballots.

(f) The number of test ballots.

(g) The number of ballots used for duplication.

(h) The number of unused ballots, not including test ballots, remaining at the end of voting on the day of the election.

[2]This covers counties where clerks can print their own ballots, a factor the Secretary of State has carelessly ignored.

(i) The number of archived ballots.

For purposes of this subsection, "number of ballots" includes a breakdown by ballot type or style where multiple ballot types or styles are used. The Secretary of State shall investigate any county certification where the number reported in response to subsection (a) is not equal to the total of subsections (b)- (c) and (f)- (h) and publicly report the results of such investigation within ninety days after certification.

The purpose of this additional language is to pin down all the ballot uses and true them up. The existing bill does not make it clear how these numbers should add up, if at all. Proposing this language will help smoke out additional uses of ballots that are not covered by the Secretary's proposed language, and produce a more complete accounting. (Since not all ballots are returned by voters, the sum of subsections (d) and (e) will generally be less than (b) plus (c).)

Section 2 of the bill eliminates the requirement that the clerk immediately destroy all absentee and regular ballots after 8:00 p.m. on election night. This is a vital protection that is followed in all civilized countries. In its place is a requirement that the clerks "mark each unused ballot as an unused ballot or seal, secure and account for each unused ballot". I would suggest the following substitute for ORS 254.283:

(1) Each county clerk is responsible for the safekeeping and disposition of ballots.

(2) At the end of voting on the day of the election, the county clerk shall *destroy all unused ballots or physically mutilate them in such a fashion that they can no longer be counted by vote-counting machines, provided that the county may save a single set of ballot types or styles for archival purposes.*[3]

Some countries, for example, drive a spike through the unused ballots; others actually burn them. The Secretary's suggestion that the unused ballots simply be marked as unused is impractical, as it would require stamping or printing on each ballot; her suggestion that the clerks might simply "seal" and "secure" them is not adequate insofar as this may mean no more than putting them into a locked room to which any number of people have access.

Even the term "seal" is useless in this context. Some counties (albeit perhaps not in Oregon) have been known to use adhesive seals that, like Post-Its®, can be peeled off and replaced. Multnomah County used seals that had places for those sealing them to report their identities and date of sealing, but never filled out the information.

Section 3 of the bill imposes a new requirement that anyone picking up a ballot from a voter deliver it to the clerk's office within two days. One might want to consider shortening this period to 24 hours, though it is difficult to imagine how the rule would be enforced in

[3] Current law does not authorize the practice of saving an unused archival set, but counties do this.

practice. Unfortunately, the county clerks may not scan in ballots as delivered until two days after they are delivered to the clerk's office (my personal experience in the last election).

Robert McCullough – *Curriculum Vitae*

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Professional Experience

1985-present	Managing Partner, McCullough Research: provide strategic planning assistance, litigation support, and planning for a variety of customers in energy, regulation, and primary metals
1996-present	Adjunct Professor, Economics, Portland State University
1990-1991	Director of Special Projects and Assistant to the Chairman of the Board, Portland General Corporation: conducted special assignments for the Chairman in the areas of power supply, regulation, and strategic planning
1988-1990	Vice President in Portland General Corporation's bulk power marketing utility subsidiary, Portland General Exchange: primary negotiator on the purchase of 550 MW transmission and capacity package from Bonneville Power Administration; primary negotiator of PGX/M, PGC's joint venture to establish a bulk power marketing entity in the Midwest; negotiated power contracts for both supply and sales; coordinated research function
1987-1988	Manager of Financial Analysis, Portland General Corporation: responsible for M&A analysis, restructuring planning, and research support for the financial function; reported directly to the CEO on the establishment of Portland General Exchange; team member of PGC's acquisitions task force; coordinated PGC's strategic planning process; transferred to the officer's merit program as a critical corporate manager

1981-1987	Manager of Regulatory Finance, Portland General Electric: responsible for a broad range of regulatory and planning areas, including preparation and presentation of PGE's financial testimony in rate cases in 1980, 1981, 1982, 1983, 1985, and 1987 before the Oregon Public Utilities Commission; responsible for preparation and presentation of PGE's wholesale rate case with Bonneville Power Administration in 1980, 1981, 1982, 1983, 1985, and 1987; coordinated activities at BPA and FERC on wholesale matters for the InterCompany Pool (the association of investor-owned utilities in the Pacific Northwest) since 1983; created BPA's innovative aluminum tariffs (adopted by BPA in 1986); led PGC activities, reporting directly to the CEO and CFO on a number of special activities, including litigation and negotiations concerning WPPSS, the Northwest Regional Planning Council, various electoral initiatives, and the development of specific tariffs for major industrial customers; member of the Washington Governor's Task Force on the Vancouver Smelter (1987) and the Washington Governor's Task Force on WPPSS Refinancing (1985); member of the Oregon Governor's Work Group On Extra-Regional Sales (1983); member of the Advisory Committee to the Northwest Regional Planning Council (1981)
1979-1980	Economist, Rates and Revenues Department, Portland General Electric: responsible for financial and economic testimony in the 1980 general case; coordinated testimony in support of the creation of the DRPA (Domestic and Rural Power Authority) and was a witness in opposition to the creation of the Columbia Public Utility District in state court; member of the Scientific and Advisory Committee to the Northwest Regional Power Planning Council
1976-1979	Graduate student, Cornell University: worked as an economist for Institutional Research directly for the Vice-President of Planning; co-investigator on a major grant from the Department of Labor's Bureau of International Labor Affairs; performed statistical and demographic analysis for the New York State Consumer Protection Agency
1973-1976	Research Assistant, Economics Department, Portland State University: summer work for the U.S. Bureau of Land Management and the Institute on Aging

1974	Economist, Legislative Research: researched bills before the legislature on issues from land use to economic development
1973	Researcher, Willamette Management Associates: responsible for economic research and writing in various financial periodicals; supported corporate valuation analysis

Economic Consulting

2010	Analysis for Eastern Environmental Law Center of 25 closed cycle plants in New York State
2010	Advisor on BPA transmission line right of way issues
2009-2010	Advisor to Gamesa USA on a marketing plan to promote a wind farm in the Pacific Northwest
2009-2010	Expert witness in City of Alexandria vs. Cleco
2008-2009	Consultant to AARP Connecticut and Texas chapters on the need for a state power authority (Connecticut) and balancing energy services (Texas)
2008-present	Advisor to the American Public Power Association on administered markets
2008-2010	Expert witness in Snohomish PUD No. 1/Morgan Stanley litigation
2008	Expert witness on trading and derivative issues in Barrick Gold litigation
2008-present	Advisor to Jackson family in Pelton/Round Butte dispute
2006-present	Advisor to the Illinois Attorney General on electric restructuring issues
2006-present	Expert witness for Lloyd’s of London in SECLP insurance litigation
2006-2007	Advisor to the City of Portland in the investigation of Portland General Electric
2005-2006	Expert witness for Antara Resources in Enron litigation

2005-2006	Advisor to Utility Choice Electric
2005-2007	Expert witness for Federated Rural Electric Insurance Company and TIG Insurance in Cowlitz insurance litigation
2005-2007	Advisor to Gray's Harbor PUD on market manipulation
2005-2007	Advisor to the Montana Attorney General on market manipulation
2004-2005	Expert witness for Factory Mutual in Northwest Aluminum litigation
2004	Advisor to the Oregon Department of Justice on market manipulation
2003-2006	Expert witness for Texas Commercial Energy
2003-2004	Advisor to The Energy Authority
2002-2005	Advisor to the U.S. Department of Justice on market manipulation issues
2002-2004	Expert witness for Alcan in Powerex arbitration
2002-2003	Expert witness for Overton Power in IdaCorp Energy litigation
2002-2003	Expert witness for Stanislaus Food Products
2002	Advisor to VHA Pennsylvania on power purchasing
2002	Expert witness for Sierra Pacific in Enron litigation
2002-2004	Advisor to U.S. Department of Justice
2002-2007	Expert witness for Snohomish PUD in Enron litigation
2001-2005	Advisor to Nordstrom
2001-2005	Advisor to Steelscape Steel on power issues in Washington and California
2001-2008	Advisor to VHA Southwest on power purchasing

2001-present	Expert witness for City of Seattle, Seattle City Light and City of Tacoma in FERC's EL01-10 refund proceeding
2001	Advisor to California Steel on power purchasing
2001	Advisor to the California Attorney General on market manipulations in the Western Systems Coordinating Council power markets
2000-present	Expert witness for Wah Chang in PacifiCorp litigation
2000-2001	Expert witness for Southern California Edison in Bonneville Power Administration litigation
2000-2001	Advisor to Blue Heron Paper on West Coast price spikes
2000	Expert witness for Georgia Pacific and Bellingham Cold Storage in the Washington Utilities and Transportation Commission's proceeding on power costs
1999	Expert report for the Center Helios on Freedom of Information in Québec
1999-2002	Advisor to Bayou Steel on alternative energy resources
1999-2000	Expert witness for the Large Customer Group in PacifiCorp's general rate case
1999-2000	Expert witness for Tacoma Utilities in WAPA litigation
1999-2000	Advisor for Nucor Steel and Geneva Steel on PacifiCorp's power costs
1999-2000	Advisor to Abitibi-Consolidated on energy supply issues
1999	Advisor to GTE regarding Internet access in competitive telecommunication markets
1999	Advisor to Logansport Municipal Utilities
1998-2001	Advisor to Edmonton Power on utility plant divestiture in Alberta
1998-2001	Energy advisor for Boise Cascade

1998-2000	Advisor to California Steel on power purchasing
1998-2000	Advisor to Nucor Steel on power purchasing and transmission negotiations
1998-2000	Advisor to Cominco Metals on the sale of hydroelectric dams in British Columbia
1998-2000	Advisor to the Betsiamites on the purchase of hydroelectric dams in Québec
1998-1999	Advisor to the Illinois Chamber of Commerce concerning the affiliate electric and gas program
1998	Intervention in Québec's first regulatory proceeding on behalf of the Grand Council of the Cree
1998	Market forecasts for Montana Power's restructuring proceeding
1997-1999	Advisor to the Columbia River Intertribal Fish Commission on Columbia fish and wildlife issues
1997-1998	Advisor to Port of Morrow regarding power marketing with respect to existing gas turbine plant
1997-1998	Expert witness for Tenaska in BPA litigation
1997	Advisor to Kansai Electric on restructuring in the electric power industry (with emphasis on the California markets)
1997-2004	Expert witness for Alcan in BC Hydro litigation
1996-1997	Bulk power purchasing for the Association of Bay Area Cities
1996-1997	Advisor to Texas Utilities on industrial issues
1996-1997	Expert witness for March Point Cogeneration in Puget Sound Power and Light litigation
1996	Advisor to Longview Fibre on contract issues
1995-present	Bulk power supplier for several Pacific Northwest industrials

1995-1997	Advisor to Tacoma Utilities on contract issues
1995-1999	Advisor to Seattle City Light on industrial contract issues
1995-1996	Expert witness for Tacoma Utilities in WAPA litigation
1994-1995	Advisor to Idaho Power on Southwest Intertie Project marketing
1993-2001	Northwest representative for Edmonton Power
1993-1997	Expert witness for MagCorp in PacifiCorp litigation
1992-1995	Advisor to Citizens Energy Corporation
1992-1994	Negotiator on proposed Bonneville Power Administration aluminum contracts
1992	Bulk power marketing advisor to Public Service of Indiana
1997-2003	Advisor to the Manitoba Cree on energy issues in Manitoba, Minnesota and Québec; Advisor to the Grand Council of the Cree on hydroelectric development
1991-2000	Strategic advisor to the Chairman of the Board, Portland General Corporation
1991-1993	Chairman of the Investor Owned Utilities' (ICP) committee on BPA financial reform
1991-1992	Financial advisor on the Trojan owners' negotiation team
1991	Advisor to Shasta Dam PUD on the California Oregon Transmission Project and related issues
1990-1991	Advised the Chairman of the Illinois Commerce Commission on issues pertaining to the 1990 General Commonwealth Rate Proceeding; prepared an extensive analysis of the bulk power marketing prospects for Commonwealth in ECAR and MAIN
1988	Facilitated the settlement of Commonwealth Edison's 1987 general rate case and restructuring proposal for the Illinois Commerce Commission; reported directly to the Executive Director of the Commission; responsibilities included

	financial advice to the Commission and negotiations with Commonwealth and interveners
1987-1988	Created the variable aluminum tariff for Big Rivers Electric Corporation: responsibilities included testimony before the Kentucky Public Service Commission and negotiations with BREC's customers (the innovative variable tariff was adopted by the Commission in August 1987); supported negotiations with the REA in support of BREC's bailout debt restructuring
1981-1989	Consulting projects including: financial advice for the Oregon AFL-CIO; statistical analysis of equal opportunity for Oregon Bank; cost of capital for the James River dioxin review; and economic analysis of qualifying facilities for Washington Hydro Associates
1980-1986	Taught classes in senior and graduate forecasting, micro-economics, and energy at Portland State University

Education

Unfinished Ph.D.	Economics, Cornell University; Teaching Assistant in micro- and macro-economics
M.A.	Economics, Portland State University, 1975; Research Assistant
B.A.	Economics, Reed College, 1972; undergraduate thesis, "Eurodollar Credit Creation"

Areas of specialization include micro-economics, statistics, and finance

Volunteer Activities

Chairman	Portland State University Economics Department: advisory committee
Member	Portland State College of Arts and Sciences: advisory committee
Board Member:	Eastmoreland Neighborhood Association
Board Member:	Academus Project

Professional Affiliations

American Economic Association; American Financial Association; Econometric Society; National Association of Forensic Economics

Papers and Publications

July 2009	"Fingerprinting the Invisible Hand", *Public Utilities Fortnightly*
February 2008	Co-author, "The High Cost of Restructuring", *Public Utilities Fortnightly*
March 27, 2006	Co-author, "A Decisive Time for LNG", *The Daily Astorian*
February 9, 2006	"Opening the Books", *The Oregonian*
August 2005	"Squeezing Scarcity from Abundance", *Public Utilities Fortnightly*
April 1, 2002	"The California Crisis: One Year Later", *Public Utilities Fortnightly*
March 13, 2002	"A Sudden Squall", *The Seattle Times*
March 1, 2002	"What the ISO Data Says About the Energy Crisis", *Energy User News*
February 1, 2001	"What Oregon Should Know About the ISO", *Public Utilities Fortnightly*
January 1, 2001	"Price Spike Tsunami: How Market Power Soaked California", *Public Utilities Fortnightly*
March 1999	"Winners & Losers in California", *Public Utilities Fortnightly*
July 15, 1998	"Are Customers Necessary?", *Public Utilities Fortnightly*
March 15, 1998	"Can Electricity Markets Work Without Capacity Prices?", *Public Utilities Fortnightly*

February 1998	"Coping With Interruptibility", *Energy Buyer*
January 1998	"Pondering the Power Exchange", *Energy Buyer*
December 1997	"Getting There Is Half the Cost: How Much Is Transmission Service?", *Energy Buyer*
November 1997	"Is Capacity Dead?", *Energy Buyer*
October 1997	"Pacific Northwest: An Overview", *Energy Buyer*
August 1997	"A Primer on Price Volatility", *Energy Buyer*
June 1997	"A Revisionist's History of the Future", *Energy Buyer*
Winter 1996	"What Are We Waiting for?" *Megawatt Markets*
October 21, 1996	"Trading on the Index: Spot Markets and Price Spreads in the Western Interconnection", *Public Utilities Fortnightly*
October 1996	"Knowing When to Save Millions", *Competitive Utility*
January 1996	"Predators and Prey", *Competitive Utility*
November 29, 1995	"Should We Be Waiting for FERC? (Or Congress, or the State Commissions)", *Megawatt Markets*
October 1995	"Estimating the Competitive Dividend", *Competitive Utility*

McCullough Research Reports

March 1, 2010	"Translation" of the September 29, 2008 NY Risk Consultant's Hydraulics Report to Manitoba Hydro CEO Bob Brennan
December 2, 2009	"Review of the ICF Report on Manitoba Hydro Export Sales"
June 5, 2009	"New York State Electricity Plants' Profitability Results"
May 5, 2009	"Transparency in ERCOT: A No-cost Strategy to Reduce Electricity Prices in Texas"

April 7, 2009	"A Forensic Analysis of Pickens' Peak: Speculation, Fundamentals or Market Structure"
March 30, 2009	"New Yorkers Lost $2.2 Billion Because of NYISO Practices"
March 3, 2009	"The New York Independent System Operator's Market-Clearing Price Auction is Too Expensive for New York"
February 24, 2009	"The Need for a Connecticut Power Authority"
January 7, 2009	"Review of the ERCOT December 18, 2008 Nodal Cost Benefit Study"
August 6, 2008	"Seeking the Causes of the July 3rd Spike in World Oil Prices" (updated September 16, 2008)
April 7, 2008	"Kaye Scholer's Redacted 'Analysis of Possible Complaints Relating to Maryland's SOS Auctions'"
February 1, 2008	"Some Observations on Societe Generale's Risk Controls"
June 26, 2007	"Looking for the 'Voom': A Rebuttal to Dr. Hogan's 'Acting in Time: Regulating Wholesale Electricity Markets'"
September 26, 2006	"Did Amaranth Advisors, LLC Attempt to Corner the March 2007 NYMEX at Henry Hub?"
May 18, 2006	"Developing a Power Purchase/Fuel Supply Portfolio: Energy Strategies for Cities and Other Public Agencies"
April 12, 2005	"When Oil Prices Rise, Using More Ethanol Helps Save Money at the Gas Pump"
April 12, 2005	"When Farmers Outperform Sheiks: Why Adding Ethanol to the U.S. Fuel Mix Makes Sense in a $50-Plus/Barrel Oil Market"
April 12, 2005	"Enron's Per Se Anti-Trust Activities in New York"
February 15, 2005	"Employment Impacts of Shifting BPA to Market Pricing"
June 28, 2004	"Reading Enron's Scheme Accounting Materials"
June 5, 2004	"ERCOT BES Event"

August 14, 2003	"Fat Boy Report"
May 16, 2003	"CERA Decision Brief"
January 16, 2003	"California Electricity Price Spikes"
November 29, 2002	"C66 and Artificial Congestion Transmission in January 2001"
August 17, 2002	"Three Days of Crisis at the California ISO"
July 9, 2002	"Market Efficiencies"
June 26, 2002	"Senate Fact Sheet"
June 5, 2002	"Congestion Manipulation"
May 5, 2002	"Enron's Workout Plan"
March 31, 2002	"A History of LJM2"
February 2, 2002	"Understanding LJM"
January 22, 2002	"Understanding Whitewing"

Testimony and Comment

April 7, 2009	Testimony before the U.S. Senate Committee on Energy and Natural Resources, "Pickens' Peak"
March 5, 2009	Testimony before the New York Assembly Committee on Corporations, Authorities and Commissions, and the Assembly Committee on Energy, "New York Independent System Operators Market Clearing Price Auction is Too Expensive for New York"
February 24, 2009	Testimony before the Energy and Technology Committee, Connecticut General Assembly, "An Act Establishing a Public Power Authority" on behalf of AARP
September 16, 2008	Testimony before the U.S. Senate Committee on Energy and Natural Resources, "Depending On 19th Century Regulatory Institutions to Handle 21st Century Markets"

January 7, 2008	Supplemental Comment ("The Missing Benchmark in Electricity Deregulation") before the Federal Energy Regulatory Commission on behalf of American Public Power Association, Docket Nos. RM07-19-000 and AD07-7-000
August 7-8, 2007	Testimony before the Oregon Public Utility Commission on behalf of Wah Chang, Salem, Oregon, Docket No. UM 1002
February 23 and 26, 2007	Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. EL03-180
October 2, 2006	Direct Testimony before the Régie de l'énergie, Gouvernement du Québec on behalf of the Grand Council of the Cree
August 22, 2006	Rebuttal Expert Report on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. H-01-3624
June 1, 2006	Expert Report on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. H-01-3624
May 8, 2006	Testimony before the U.S. Senate Democratic Policy Committee, "Regulation and Forward Markets: Lessons from Enron and the Western Market Crisis of 2000-2001"
December 15, 2005	Direct Testimony before the Public Utility Commission of the State of Oregon on behalf of Wah Chang, Wah Chang v. PacifiCorp in Docket UM 1002
December 14, 2005	Deposition before the United States District Court Western District of Washington at Tacoma on behalf of Federated Rural Electric Insurance Exchange and TIG Insurance Company, Federated Rural Electric Insurance Exchange and TIG Insurance Company v. Public Utility District No. 1 of Cowlitz County, No. 04-5052RBL
December 4, 2005	Expert Report on behalf of Utility Choice Electric in Civil Action No. 4:05-CV-00573
July 27, 2005	Expert Report before the United States District Court Western District of Washington at Tacoma on behalf of Federated Rural Electric Insurance Exchange and TIG

	Insurance Company, Federated Rural Electric Insurance Exchange and TIG Insurance Company v. Public Utility District No. 1 of Cowlitz County, Docket No. CV04-5052RBL
May 6, 2005	Rebuttal Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No.EL03-180, et al.
May 1, 2005	Rebuttal Expert Report on behalf of Factory Mutual, Factory Mutual v. Northwest Aluminum
March 24-25, 2005	Deposition by Enron Power Marketing, Inc. before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No.EL03-180, et al.
February 14, 2005	Expert Report on behalf of Factory Mutual, Factory Mutual v. Northwest Aluminum
January 27, 2005	Supplemental Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. EL03-180, et al.
April 14, 2004	Deposition by Enron Power Marketing, Inc. and Enron Energy Services before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No.EL03-180, et al.
April 10, 2004	Rebuttal Testimony on behalf of the Office of City and County Attorneys, San Francisco, California, City and County Attorneys, San Francisco, California v. Turlock Irrigation District, Non-Binding Arbitration
February 24, 2004	Direct Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No.EL03-180, et al.
March 20, 2003	Rebuttal Testimony before the Federal Energy Regulatory Commission on behalf of the City of Seattle, Washington, Docket No. EL01-10, et al.

March 11-13, 2003	Deposition by IdaCorp Energy L.P. before the District Court of the Fourth Judicial District of the State of Idaho on behalf of Overton Power District No. 5, State of Nevada, IdaCorp Energy L.P. v. Overton Power District No. 5, Case No. OC 0107870D
March 3, 2003	Expert Report before the District Court of the Fourth Judicial District of the State of Idaho on behalf of Overton Power District No. 5, State of Nevada, IdaCorp Energy L.P. v. Overton Power District No. 5, Case No. OC 0107870D
February 27, 2003	Direct Testimony before the Federal Energy Regulatory Commission on behalf of the City of Tacoma, Washington and the Port of Seattle, Washington, Docket No. EL01-10-005
October 7, 2002	Rebuttal Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. EL02-26, et al.
October 2002	Expert Report before the Circuit Court of the State of Oregon for the County of Multnomah on behalf of Alcan, Inc., Alcan, Inc. v. Powerex Corp., Case No. 50 198 T161 02
September 27, 2002	Deposition by Morgan Stanley Capital Group, Inc. before the Federal Energy Regulatory Commission on behalf of Nevada Power Company and Sierra Pacific Power Company, Docket No. EL02-26, et al.
August 8-9, 2002	Deposition by Morgan Stanley Capital Group, Inc. before the Federal Energy Regulatory Commission on behalf of Nevada Power Company and Sierra Pacific Power Company, Docket No. EL02-26, et al.
August 8, 2002	Deposition by Morgan Stanley Capital Group, Inc. before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. EL02-26, et al.
June 28, 2002	Direct Testimony before the Federal Energy Regulatory Commission on behalf of the City of Tacoma, Washington, Docket No. EL02-26, et al.

June 25, 2002	Direct Testimony before the Federal Energy Regulatory Commission on behalf of Public Utility District No. 1 of Snohomish County, Washington, Docket No. EL02-26, et al.
June 25, 2002	Direct Testimony before the Federal Energy Regulatory Commission on behalf of Nevada Power Company and Sierra Pacific Power Company, Docket No. EL02-26, et al.
May 6, 2002	Rebuttal Testimony before the Public Service Commission of Utah on behalf of Magnesium Corporation of America in the Matter of the Petition of Magnesium Corporation of America to Require PacifiCorp to Purchase Power from MagCorp and to Establish Avoided Cost Rates, Docket No. 02-035-02
April 11, 2002	Testimony before the U.S. Senate Committee on Commerce, Science and Transportation, Washington D.C.
February 13, 2002	Testimony before the U.S. House of Representatives Subcommittee on Energy and Air Quality, Washington D.C.
January 29, 2002	Testimony before the U.S. Senate Committee on Energy and Natural Resources, Washington D.C.
August 30, 2001	Rebuttal Testimony before the Federal Energy Regulatory Commission on behalf of Seattle City Light, Docket No. EL01-10
August 16, 2001	Direct Testimony before the Federal Energy Regulatory Commission on behalf of Seattle City Light, Docket No. EL01-10
June 12, 2001	Rebuttal Testimony before the Public Utility Commission of the State of Oregon on behalf of Wah Chang, Wah Chang v. PacifiCorp in Docket UM 1002
April 17, 2001	Before the Public Utility Commission of the State of Oregon, Direct Testimony on behalf of Wah Chang, Wah Chang v. PacifiCorp in Docket UM 1002
March 17, 2000	Rebuttal Testimony before the Public Service Commission of Utah on behalf of the Large Customer Group in the Matter of the Application of PacifiCorp for Approval of Its

	Proposed Electric Rate Schedules and Electric Service Regulations, Docket No. 99-035-10
February 1, 2000	Direct Testimony before the Public Service Commission of Utah on behalf of the Large Customer Group in the Matter of the Application of PacifiCorp for Approval of Its Proposed Electric Rate Schedules and Electric Service Regulations, Docket No. 99-035-10
November 8, 1999	Expert Report before the United States Court for the Western District of Washington at Tacoma on behalf of the City of Tacoma, Washington, City of Tacoma, Washington v. Western Area Power Administration in C9605699-RJB
January 25, 1996	Declaration in Opposition to Motion for Partial Summary Judgment before the United States District Court Western District of Washington at Seattle on behalf of March Point Cogeneration Company, March Point Cogeneration Company v. Puget Sound Power and Light Company in C95-1833R

Presentations

October 15, 2009	"The Mysterious New York Market", EPIS, Tucson, Arizona
October 14, 2009	"Do ISO Bidding Processes Result in Just and Reasonable Rates?", legal seminar, American Public Power Association, Savannah, Georgia
June 22, 2009	"Pickens' Peak Redux: Fundamentals, Speculation, or Market Structure", International Association for Energy Economics
June 5, 2009	"Transparency in ERCOT: A No-cost Strategy to Reduce Electricity Prices in Texas", Presentation at Texas Legislature
May 8, 2009	"Pickens' Peak", Economics Department, Portland State University
April 7, 2009	"Pickens' Peak: Speculators, Fundamentals, or Market Structure", 2009 EIA energy conference, Washington, DC
February 4, 2009	"Why We Need a Connecticut Power Authority", presentation to the Energy and Technology Committee, Connecticut General Assembly
October 28, 2008	"The Impact of a Volatile Economy on Energy Markets", NAESCO annual meeting, Santa Monica, California
April 1, 2008	"Connecticut Energy Policy: Critical Times…Critical Decisions", House Energy and Technology Committee, the Connecticut General Assembly
May 23, 2007	"Past Efforts and Future Prospects for Electricity Industry Restructuring: Why Is Competition So Expensive?", Portland State University
February 26, 2007	"Trust, But Verify", Take Back the Power Conference, National Press Club, Washington, D.C.
May 18, 2006	"Developing a Power Purchase/Fuel Supply Portfolio"
February 12, 2005	"Northwest Job Impacts of BPA Market Rates"

January 5, 2005	"Why Has the Enron Crisis Taken So Long To Solve?", Public Power Council, Portland, Oregon
September 20, 2004	"Project Stanley and the Texas Market", Gulf Coast Energy Association, Austin, Texas
September 9, 2004	"Back to the New Market Basics", EPIS, White Salmon, Washington
June 8, 2004	"Caveat Emptor", ELCON West Coast Meeting, Oakland, California
June 9, 2004	"Enron Discovery in EL03-137/180"
March 31, 2004	"Governance and Performance", Public Power Council, Portland, Oregon
January 23, 2004	"Resource Choice", Law Seminars International, Seattle, Washington
January 17, 2003	"California Energy Price Spikes: The Factual Evidence", Law Seminars International Seattle, Washington
January 16, 2003	"The Purloined Agenda: Pursuing Competition in an Era of Secrecy, Guile, and Incompetence"
September 17, 2002	"Three Crisis Days", California Senate Select Committee, Sacramento, California
June 10, 2002	"Enron Schemes", California Senate Select Committee Sacramento, California
May 2, 2002	"One Hundred Years of Solitude"
March 21, 2002	"Enron's International Ventures", Oregon Bar International Law Committee, Portland, Oregon
March 19, 2002	"Coordinating West Coast Power Markets", GasMart, Reno, Nevada
March 19, 2002	"Sauron's Ring", GasMart, Reno, Nevada
January 25, 2002	"Deconstructing Enron's Collapse: Buying and Selling Electricity on The West Coast", Seattle, Washington

January 18, 2002	“Deconstructing Enron’s Collapse”, Economics Seminar, Portland State University
November 12, 2001	“Artifice or Reality”, EPIS Energy Forecast Symposium, Skamania, Washington
October 24, 2001	“The Case of the Missing Crisis” Kennewick Rotary Club, Kennewick, Washington
August 18, 2001	“Preparing for the Next Decade”
June 26, 2001	“Examining the Outlook on Deregulation”
June 25, 2001	Presentation, Energy Purchasing Institute for International Research (IIR), Dallas, Texas
June 6, 2001	“New Horizons: Solutions for the 21st Century”, Federal Energy Management-U.S. Department of Energy, Kansas City, Kansas
May 24, 2001	“Five Years”
May 10, 2001	“A Year in Purgatory”, Utah Industrial Customers Symposium-Utah Association of Energy Users, Salt Lake City, Utah
May 1, 2001	“What to Expect in the Western Power Markets this Summer”, Western Power Market Seminar, Denver, Colorado
April 23, 2001	“Emerging Markets for Natural Gas”, West Coast Gas Conference, Portland, Oregon
April 18, 2001	“Demystifying the Influence of Regulatory Mandates on the Energy Economy” Marcus Evans Seminar, Denver, Colorado
April 4, 2001	“Perfect Storm”, Regulatory Accounting Conference, Las Vegas, Nevada
March 21, 2001	“After the Storm 2001”, Public Utility Seminar, Reno, Nevada
February 21, 2001	“Future Imperfect”, Pacific Northwest Steel Association, Portland, Oregon

February 12, 2001	"Power Prices in 2000 through 2005", Northwest Agricultural Chillers, Bellingham, Washington
February 6, 2001	Presentation, Boise Cascade Management, Boise, Idaho
January 19, 2001	"Wholesale Pricing and Location of New Generation Buying and Selling Power in the Pacific Northwest", Seattle, Washington
October 26, 2000	"Tsunami: Market Prices since May 22nd", International Association of Refrigerated Warehouses, Los Vegas, California
October 11, 2000	"Tsunami: Market Prices since May 22nd", Price Spikes Symposium, Portland, Oregon
August 14, 2000	"Anatomy of a Corrupted Market", Oregon Public Utility Commission and Oregon State Energy Office, Salem, Oregon
June 30, 2000	"Northwest Market Power", Governor Locke of Washington, Seattle, Washington
June 10, 2000	"Northwest Market Power", Oregon Public Utility Commission and Oregon State Energy Office, Salem, Oregon
June 5, 2000	"Northwest Market Power", Georgia Pacific Management
May 10, 2000	"Magnesium Corporation Developments", Utah Public Utilities Commission
May 5, 2000	"Northwest Power Developments", Georgia Pacific Management
January 12, 2000	"Northwest Reliability Issues", Oregon Public Utility Commission
December 10, 1999	"Reducing Bidder 'Creativity'"
June 22, 1999	"How to Buy Power in the Pacific Northwest: A Buyer's Perspective", Megawatt Daily, Generation Week and Financial Times Energy Conference

June 8, 1999	"Winners and Losers in California. An Overview of the Deregulated California Energy Market", Western Power Trading Forum
June 7, 1999	"Market Power under AB-1890"
May 17, 1999	Presentation, ISO Market Oversight Committee Seminar sponsored by the Power Industry Computer Application Group, San Jose, California
May 16, 1999	"Electric Market Risk: Clearing Out the Cobwebs"
March 1, 1999	"Electric Competition, One Year Later: Winners and Losers in California"
January 25, 1999	"Coping With Capacity Prices", Metals Week Aluminum Meeting
January 14, 1999	"Factors Driving the Market: Buying and Selling Electricity in the West", Seattle, Washington
December 16, 1998	"Electric Markets: Western Power Markets" (analysis of responses to recent changes in western power markets), Las Vegas, Nevada
November 5, 1998	"Electric Markets – Challenges and Solutions", Puget Power's industrial customers
October 20, 1998	"Evaluating Electric Supply Risk", Georgia Pacific, Bellingham, Washington
September 15, 1998	"Marketing Priest Rapids and Wanapum", Grant County PUD No. 2
September 14, 1998	"Future Pricing Structure in Competitive Markets"
July 16, 1998	"Proactive Strategies and Electricity Markets", Abitibi Consolidated, Inc.
June 18, 1998	"Visions of Power Markets of the Future", Pacific Northwest Gas/Electric Integration Group
June 26, 1998	"Pricing Strategies" (technical pricing and contract trends), American Management Association

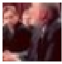
June 13, 1998	"Succeeding In Aggregation", New Mexico Retail Association, Durango, Colorado
May 20, 1998	"Managing Electricity Price Risk: Practical Methods in the Emerging Markets", Tacoma City Light, Tacoma, Washington.
May 19, 1998	"Participation in BPA's Conscription Process: Opportunity or Extortion?", Snohomish Public Utilities Board
May 14, 1998	"FORSCOM Utility Deregulation Panel of Experts"
May 7, 1998	"Running a Competitive Bidding Program for Energy Services and Supplies", InfoCast-The Institutional Energy Users Forum, San Francisco, California
May 5, 1998	"A Revisionist's History of the Future", Tacoma City Light Board
February 19, 1998	"Selecting a Power Supplier: Fundamentals, Fundamentals, Fundamentals", LSI Conference
December 12, 1997	"Tools of the Trade: End-User Purchasing Strategies in the New Market", Energy Institute Conference, Las Vegas, Nevada
November 18, 1997	"Buying Cheap Power in California", InfoCast, Santa Monica, California
November 17, 1997	"RFP Development: A Step-by-Step Guide", AIC Conference, Chicago, Illinois
October 27, 1997	"Negotiating a Better Deal for Your Power Supply", InfoCast, Chicago, Illinois
August 14, 1997	"Selecting Aggregation Partners That Offer the Greatest Benefits", Center for Business Intelligence, Boston, Massachusetts
July 25, 1997	"Buying Cheap Power in the Northeast and Mid-Atlantic States" InfoCast, Boston, Massachusetts
June 23-24, 1997	"Negotiating A Better Deal for Your Power Supply" InfoCast, Chicago, Illinois

June 20, 1997	“Buying Cheap Power in California: Markets Meet Ab-1890”, InfoCast, San Francisco, California
June 3, 1997	“How Regional Issues Have Shaped the Landscape for Tomorrow’s Competition” (keynote address), Electricity Choices for Consumers
April 9, 1997	“Electric Competition”, (opening presentation) at GasMart, Chicago, Illinois
May 15, 1997	“The Fifth Fiasco”, Clark County PUD’s Energy Symposium
April 3, 1997	“Economic Evaluations of Municipalization”, InfoCast, Municipalization in a Changing Power Industry”, Arlington, Virginia
January 28, 1997	“Power Supplies for New Municipals Designing an Effective RFP and Evaluating Responses”
January 20, 1997	“Clark County Utilities: A Revisionist View of the Future”, Clark County Executive Retreat
January 16, 1997	“Getting the Best Deal for the Customer”, Law Seminars Annual Energy Meeting
January 10, 1997	“Markets, Transmissions & Resources: Overview of the US/Canadian Power Market”, Edmonton Power Authority
November 27, 1996	“Evanston Energy Supply Solutions”, Energy Symposium, Evanston, Illinois
November 18, 1996	“Assessing Real Power Markets for Real Customers”
November 14, 1996	“Stakeholders under Restructuring: Return of Competition Shifts Interest of Players Dramatically”, NWPPA Annual Energy Meeting
November 6, 1996	“Watching the Hippos Dance: Electricity in the 1990’s”
October 28, 1996	“California Gas Forecasts Base”
October 20, 1996	“Breaking up Is Hard to Do” (restructuring the marketplace after competition), EEI Distribution Committee

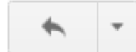
September 14, 1996	"West Coast Overview: Summary of Progress in Region Retail Wheeling III", Washington, D.C.
September 7, 1996	"What Do Industrials Need?", PowerMart
August 26, 1996	"Power Supplies for New Municipals: Designing an Effective RFP and Evaluating Responses"
August 21, 1996	"Timing New Industrial Power Contracts"
June 24, 1996	"Electricity/Gas Cross Market Opportunities: Exploiting the Synergies between Gas and Electricity Will Increase the Supply of Both Commodities", InfoCast, Electric/Gas Symposium
June 5, 1996	"Lions, Tigers, and Bears: The New Zoology of the North American Electric Business", (opening presentation), PowerMart
May 17, 1996	"Sliding Towards Home: New Markets and New Prices Will Be Determined by the Customer", Northwest Pulp and Paper Association
May 10, 1996	"Fifty Ways to Leave Your Lover: Another Argument for Choosing Interruptability"
May 9, 1996	"Power Supply Option under Central Lincoln's 1981 Power Sales Contract: Competition is Keen"
April 17, 1996	"Surviving the New Industrial Markets Shifts"
March 21, 1996	"Market Fundamentals West Coast Forecast 1996-2010", Seattle City Light Senior Management
March 19, 1996	"Energy Strategies for the Turn of the Century" Weyerhauser Corporation Senior Management
February 23, 1996	"Is PoolCo Just the Status Quo?"
February 3, 1996	"Acquiring and Using a Resource Portfolio in Open Access: A Profile of Change for Large Industrial Users"
February 3, 1996	"Primary Metals: Energy Supply Case Study", Pasha Symposium on Energy Supply

February 2, 1996	"Supply Power to Industrials: Competitive Bidding", Houston, Texas
February 2, 1996	"Power Contracts: Writing the Deal"
January 26, 1996	"Western States Power Supply" (on industrial rates)
December 18, 1995	"Alberta Power Pool: 1996" (analysis of creation and implementation of the Alberta Power Pool)
December 12, 1995	"Big Rivers Electric Cooperative: A Stranded Investment Case Study" (overview, history and market value of BREC stranded investment)
December 4, 1995	"Predators and Prey: 1995 through 2010 in the WSCC" (on surplus power and plummeting natural gas prices), NELPA/ Portland State University Energy Symposium
October 18, 1995	"Teaching the Hippopotamus to Dance: Bringing the Competitive Electric Market to Evanston" (on competition in the marketplace)
October 12, 1995	"Teaching the Hippo to Dance: Negotiating With the 'New' Utility" Presentation, Pulp and Paper Association Annual Energy Meeting
October 10, 1995	"Teaching the Hippopotamus to Dance: Negotiating with a New Utility" (discussion of competition and market positioning for industry)
August 28, 1995	"Retail Wheeling as a Quid Pro Quo for Plant Location" (on competition, regulation and innovative solutions) Infocast, New York
August 20, 1995	"Restructuring in Alberta and California", Governor's Energy Symposium, Springfield, Illinois
June 22, 1995	"Bringing Ports and Utilities Together", Pacific Northwest Ports Association
June 12, 1995	"Using the 'R' Word: Bonneville's Decision to Release 4000 Megawatts to the Market", NELPA Annual Accounting Meeting
February 16, 1995	"Stranded Costs: Accountants Full Employment for the 1990's", Northwest Electric Light & Power

January 10, 1995	"Competition in the 1990s: Hard Work, Low Prices, Opportunities for Expansion", Industrial Customers of Northwest Utilities Annual Meeting
March 28, 1994	"Market Opportunities in Transmission: The Next Decade in the Pacific Northwest", NELPA



Robert McCullough Robert@mresearch.com Feb 25 (5 days ago)



to me, Sen.Tedferrioli, sen.jasonatkin., sen.alanbates, sen.ginnyburdi., sen.p

Images are not displayed.

Display images below - Always display images from Robert@mresearch.com

Senate Committee Members:

Ms. Dysinger has referenced a study we undertook for her last year. The lack of digital security at Multnomah Elections is troubling. While the counting machines are highly secure, the PC used to accumulate and report the votes is not. Any elections employee with access to the counting area can change the election results without difficulty. By any normal commercial security standards, the PC used to accumulate the votes is unsecured.

The presence of unused ballots after the election would allow someone to both mark the ballots and change the election results. Only a complete recount -- including checking the envelopes -- could find the breach in security.

As one elections official said during our review: "These things don't happen in Oregon." I honestly believe this is true. However, making sure that they continue to not happen here does involve taking prudent measures to avoid security breaches.

Yours,

Robert McCullough

2 attachments — Download all attachments

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CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

YOULEE YIM YOU
JUDGE

PHONE (503) 988-3404
FAX (503) 276-0956
Youlee.You@ojd.state.or.us

October 9, 2012

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John Dunbar
Oregon Department of Justice
1515 SW 5th Ave., Suite 410
Portland, Oregon 97201

Jacqueline Weber
Multnomah County Attorney's Office
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Re: *Lisa Michaels, Janice Dysinger, Delia Lopez, and John Payne v. Kate Brown and Tim Scott*, Multnomah County Circuit Court Case No. 1209-11226

Dear Counsel:

Thank you for your professionalism and courtesies at the hearing yesterday. You raised many interesting and important legal arguments at the hearing and in your briefing. Because I want to get a decision to you as soon as possible, I am not able to address all of them. However, I am addressing below the issues that I believe are dispositive.

1. Plaintiffs' request for preliminary injunction is denied.

Plaintiffs' request for preliminary injunction is denied. As you know, preliminary injunction is an extraordinary remedy and must be granted only sparingly. To obtain a preliminary injunction, plaintiffs must establish certain elements. Two of those elements are (1) a likelihood to succeed on the merits, and (2) a likelihood to suffer irreparable harm. Plaintiffs have failed to prove these two elements in this case.

a. <u>Plaintiffs have failed to prove a likelihood to succeed on the merits.</u>

The provisions of ORS 254.483 contradict each other. Subsection (1) provides that "[i]mmediately after 8 p.m. on the day of an election … [t]he county clerk shall destroy all unused absentee and regular ballots in the county clerk's possession." However, subsection (2) requires that, immediately after 8 p.m., "[e]ach county shall provide for the security of, and shall account for, unused ballots." To "destroy" means to annihilate while to "secure" means to keep safe. The language of sections (1) and (2) is contradictory.

To make matters more complicated, ORS 253.045 contains a provision that is also contradictory to ORS 254.483(1). It provides that "all unused absentee ballots" shall be destroyed "as soon as practicable after the election."

The court must harmonize conflicting statutes where possible. Here, however, the statutes are so contradictory, they are impossible to reconcile. Moreover, if the court reconciled the statutes in the manner suggested by plaintiffs, it would defeat the purpose of the entire statutory scheme, which is to provide citizens with a mechanism to vote. As defendants contend, if all unused ballots are destroyed immediately after 8 pm, any citizen who is in line at 8 pm and entitled to vote but who needs a replacement ballot would be denied the right to vote. "An intent plainly expressed by the words of a statute may be rendered dubious by the context." *Gilbertson v. Culinary Alliance and Bartenders' Union, Local No.* , 204 Or 326, 340 (1955). "[I]t is the court's duty to adopt the interpretation which will give effect to the entire statute rather than one which will wreck a substantial and important part of it." *Id.*

b. <u>Plaintiffs have failed to prove they are likely to suffer irreparable harm.</u>

The testimony at the hearing showed that numerous procedures are in place to ensure unused ballots are safeguarded after 8 pm. For example, the boxes containing the unused ballots are sealed, there are witnesses who observe the sealing, the boxes are then placed in a locked room, and there are video cameras directed at the boxes. The risk that the unused ballots would be used for fraudulent purposes therefore is low and plaintiffs have failed to establish a likelihood of irreparable harm.

2. <u>Plaintiffs' request for a peremptory writ of mandamus is also denied.</u>

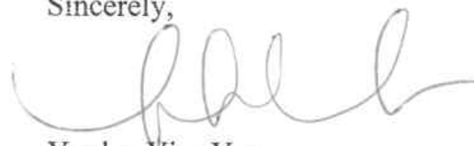
Mandamus is also an extraordinary remedy and is available only to enforce a clear right. Here, as discussed above, the statutes are contradictory and plaintiffs have therefore failed to establish that there is a clear right to have the ballots destroyed immediately after 8 pm.

Plaintiffs ask the court to issue a peremptory writ ordering defendant Tim Scott to destroy the ballots after all of the citizens in line have voted or at a time such as 9 pm. The court, however, lacks authority to do this. Where the statutes regarding the destruction of ballots are contradictory, the court cannot substitute its own judgment and decide that the ballots should be destroyed at a time it believes is reasonable.

Moreover, the legislature has created a mechanism for this type of situation. Under ORS 246.110, the Secretary of State, as the chief elections officer, is vested with the "responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws." The Secretary of State "may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the elections laws." ORS 246.150. Thus, by law, the Secretary of State is vested with the authority to decide what to do under this circumstance and her decision is entitled to deference.

I am filing this letter in the court file and, to avoid any further delay, on this same date issuing an order dismissing plaintiffs' petition for writ of mandamus and denying the motion for preliminary injunction.

Sincerely,



Youlee Yim You

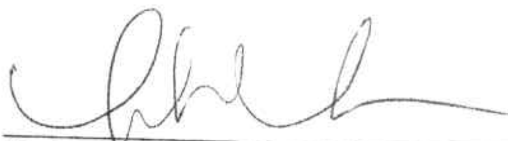
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LISA MICHAELS, JANICE DYSINGER, DELIA LOPEZ, and JOHN PAYNE, Plaintiffs, v. KATE BROWN, in her official capacity as Oregon Secretary of State, TIM SCOTT, in his official capacity as Multnomah County Director of Elections, Defendants.	Case no. 1209-11226 ORDER ON PLAINTIFFS' PETITION FOR WRIT OF MANDAMUS AND MOTION FOR PRELIMINARY INJUNCTION

For the reasons stated in the court's letter dated October 9, 2012, plaintiffs' petition for writ of mandamus and motion for preliminary injunction are denied.

IT IS SO ORDERED.

Dated this 9th day of October, 2012.



Youlee Yim You, Circuit Court Judge

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LISA MICHAELS, JANICE DYSINGER, DELIA LOPEZ and JOHN PAYNE, Relators, Petitioners and Plaintiffs, v. KATE BROWN, in her official capacity as Oregon Secretary of State, TIM SCOTT, in his official capacity as Multnomah County Director of Elections, Defendants.	Case No. 1209-11226 **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTIONS AND IN OPPOSITION TO MOTION TO DISMISS**

Summary of Argument

The defendants admit that they refuse to enforce the plain language of ORS 254.483, raising arguments as to why they do not wish to do so. The law does not afford them any discretion to disobey the statute, and the writ of mandamus is the appropriate remedy to compel Mr. Scott to perform a nondiscretionary duty. As to the Secretary, she can and should be enjoined from further efforts to exercise her general supervisory authority to undermine the plain meaning of ORS 254.483.

I. THE STATUTES DO NOT PERMIT OREGON OFFICIALS ANY DISCRETION TO RETAIN UNUSED ABSENTEE OR REGULAR BALLOTS AFTER 8:00 P.M.

A. ORS 254.483 Is Specific and Controlling.

Plaintiffs do not believe that there are any inconsistencies among the various statutes cited by the parties. Prior to this litigation commencing, the primary argument of defendants concerned

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an alleged inconsistency between ORS 254.483 and 253.045. Attached hereto as Exhibit 1 is a copy of Senate Bill 74, which was enacted in 2007 and made the initial round of changes to the election laws now claimed to create inconsistencies. If one reviews its provisions, one can see in § 43 (Exhibit 1, at 18), that under former ORS 254.483, when elections were conducted in polling places, "immediately after the close of the polls", the election boards at the various polling places were to "destroy all unused ballots which are printed or identified for a particular election". One can see in § 15 (Exhibit 1, at 6), that at that time, the absentee ballots were in the hands of the county clerks, and pursuant to former ORS 253.045, they were to destroy all unused absentee ballots "as soon as practicable after the election".

The comprehensive revision of the statute left this language in ORS 253.045, but also, as seen in § 43 (Exhibit 1, at 18), specifically modified the "immediately after the close of the polls" language to "immediately after 8:00 p.m. on the day of an election", and expressly transferred the responsibility to immediately destroy unused ballots to the county clerk, since the ballots were now in his or her possession. There can be no doubt that the Legislature intended that all ballots be immediately destroyed, even if the language concerning absentee ballots persisted.

The primary argument now concerns provisions that allegedly give a right to Oregonians to show up at the county elections office at 7:59:59 with no ballot and have the right to receive an unused blank ballot. The statutes provide no such literal right. The statute involved is ORS 254.470(10), which provides:

> "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."

(*See also* Exhibit 1, at 17 (§ 40).) The words "shall be considered to have begun the act of voting" do not expressly provide a right to a replacement ballot after 8:00 p.m.

The right to a replacement ballot is governed by a different statute: ORS 254.480. In order "to vote a replacement ballot, the elector must complete and sign a replacement ballot request

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form". ORS 254.480(1). The statute provides detailed steps for the clerk to file after receiving the form:

> "Upon receiving a request for a replacement ballot, the county clerk shall:
>
> "(a) Verify the registration of the elector and ensure that another ballot has not been returned by the elector;
>
> "(b) Note in the list of electors that the elector has requested a replacement ballot;
>
> "(c) Mark the return identification envelope clearly so that it may be readily identified as a replacement ballot; and
>
> "(d) Issue the replacement ballot by mail or other means.

ORS 254.480(3). There is no indication that the Legislature sought to impose upon county clerks a duty to complete all these tasks *after* the 8:00 p.m. election deadline, and, indeed, it would be nearly impossible to comply with ORS the requirement to "ensure that another ballot has not been returned by the elector" given the masses of ballots arriving on election evening.

It is presumably for this reason that ORS 254.470(7) does not impose an absolute duty upon the county clerks to make replacement ballots available until the last minute. The Secretary's claim that the statutes provide that voters in line "shall" receive a replacement ballot (Sect'y Response at 7) is not supported by any statutory language. Rather, the statute says that

> "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."

The lack of a mandatory requirement to make ballots available at the last minute, coupled with the verification requirements, strongly suggests that the county clerks are not under a duty to provide replacement ballots for those voters standing in line at 8:00 p.m. on election day. All this being said, plaintiffs are not going to assert that Mr. Scott has made a "false return" to the writ (*see* ORS 34.210(1)) if he schedules the shredding service to arrive at 8:00 p.m., and the scheduling service

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winds up waiting a few minutes, if that might be required, in order to accommodate those few voters.

As a matter of statutory interpretation, however, the general policies in favor of exercise of the franchise in this context cannot overcome the very specific duty to destroy unused ballots immediately after 8:00 p.m. This is a long-standing axiom of statutory construction, which this Court must apply pursuant to ORS 174.030(2): "When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." While plaintiffs deny any inconsistency at all, to the extent the Court finds one, the specific intent to destroy unused ballots must control.

B. No Deference Principle Can Overcome the Plain Language of ORS 254.483.

Citing *Springfield Education Ass'n*, 290 Or. 217, 223 (1980), the Secretary argues that the express command to "destroy all unused absentee and regular ballots in the county clerk's possession" contains "inexact terms which require agency interpretation and judicial review *for consistency with legislative policy*". (Sect'y Response at 12; emphasis added.) Conspicuously absent from the Secretary's presentation is any explanation how keeping the unused ballots around advances the obvious legislative policy of preventing election fraud.

As to the "inexact terms," the Secretary notes that "regular ballot" is not defined by statute or rule. But the words quite clearly fall in the *first Springfield* classification of those "statutory terms which impart relative precise meaning, *e.g.*, 21 years of age, male, 30 days, Class II farmland, rodent, Marion County". *Springfield*, 290 Or. at 223. We are not dealing with terms like "reasonable" or "in the public interest"; put another way, there are many types of "rodents," but that does not make the term "inexact" within the meaning of *Springfield.*

The initial argument advanced by the Secretary is that maintaining a stock of blank regular ballots is required to duplicate ballots. With Mr. Scott's testimony, we know that the special, watermarked duplicate ballots that are used for this purpose, not regular ballots. Mr. Scott provides a simple explanation of a distinction between regular ballots, test ballots, and duplication ballots,

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1 the latter two categories of which contain "watermarks" to distinguish them from the regular ballots. (Scott Decl. ¶ 2.) Because these test ballots or duplication ballots are watermarked, it is reasonable to construe ORS 254.238 not to apply to them, such that the County Clerk can, even after the destruction of the regular ballots, perform such tests and duplication of already-cast ballots without a continuing supply of unused regular ballots.[1]

The "regular ballots" are simply those which are regularly cast by voters. It is quite clear that the Legislature does not want this sort of ballot available after the election, and there is nothing inexact about the command to destroy them "immediately after 8:00 p.m. on the day of an election". RCW 254.483. As the *Springfield* court explained, even with respect to an "inexact" term, "its meaning is not a question of lexigraphy, but rather a question of the policy which is incorporated in the legislative choice of that word". *Springfield*, 290 Or. at 226. That policy is to prevent fraud.

Mr. Trout argues that the term "regular ballot" "does not include numerous types of ballots, including "vote by mail ballots, challenged ballots, provisional ballots, replacement ballots and duplicate ballots".[2] Mr. Trout is, of course, not the Secretary, and his testimony is not a formal agency interpretation to which any deference is required. *See Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 366, 385 (2009) (less deference where "agency itself has not articulated a position on the issue").

Indeed, the only formal agency interpretation in the record is the Vote by Mail Procedures Manual, which represents the considered opinions of the Secretary on the subjects it addresses, and has the status of an agency rule. *But the Manual nowhere offers any interpretations of ORS 254.483(1), or any guidance on when to destroy the unused ballots.*

---

[1] And even if regular ballots were required, the "duplication" process is an administrative innovation, not required by statute. The Secretary's desire for a particular administrative device, not expressly required (or even authorized) by statute, cannot overcome the plain language of ORS 254.483. The language of page 41 of the Manual, upon which defendants rely, does appear to *require* any duplication process; it merely describes the process if employed. (*Cf.* Sect'y Response at 9, imputing a mandatory requirement that is simply not there.) One might as easily simply tally the ballots interpreted by hand on a handwritten sheet.

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1 The Secretary also raises the issue of disabled voters, citing ORS 254.445, which provides
2 that if an elector is "unable to mark the ballot, the elector may request and shall receive the
3 assistance of two persons of different parties provided by the clerk or of some other person chosen
4 by the elector in marking the ballot". This has nothing to do with ballot duplication or the issues in
5 this case.

6 Perhaps the height of sophistry is the claim that if the clerks did not have blank ballots on
7 hand to duplicate ballots, and if there were last-minute ballots received that could not be read by the
8 machines, "voters who ballots were subjected to hand counts would be at a disadvantage when
9 compared to voters whose votes were machine counted". (Sect'y Response at 13.) If they cannot
10 fill out the ballots properly, they are already subject to human error through the bizarre process of
11 divining their imagined intent and recording it on a duplicate ballot, and the hand counting adds no
12 disadvantage of legal significance.

13 **C. Legislative History Supports Plaintiffs' Position.**

14 The Secretary suggests that the command for immediate destruction "predates the shift to
15 vote by mail" (Sect'y Response at 9), but the provision was expressly retained in Senate Bill 74 and
16 carefully moved to control the official in possession of the ballots at 8:00 p.m. It is of special
17 relevance that the Legislature has repeatedly refused to change its important anti-fraud policies
18 notwithstanding repeated requests by the Secretary and others to do so. Defendants do not dispute
19 that the Legislature rejected multiple attempts to amend the statute to remove the requirement that
20 the unused ballots be destroyed immediately after 8:00 p.m. on election night.

21 The County offers Exhibit 2 to the Declaration of Ms. Weber as "legislative history"
22 suggesting that the Legislature recognized "a direct conflict" between ORS 254.483(1)'s command
23 to destroy the ballots and ORS 254.483(2)'s command to account for unused ballots. (*But see*
24 Exhibit 2, at 2 (characterizing issue as "apparent contradiction").

25

26 [2] Mr. Trout also claims that "unused" is an "imprecise term" because blank ballots can be used for more than one purpose. But if they are used for any purpose, they are no longer unused.

27

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That conflict is imaginary, and the fact that the Secretary of State could have her imaginative proposal included in staff measure summaries merely demonstrates her influence over the staff. The documents themselves carefully state: "***This summary has not been adopted by or officially endorsed by action of the committee***" (Exhibit 2, at 1, 2 & 3; emphasis in original.) As such, they do not represent Legislative action at all.

II. MANDAMUS IS THE ONLY ADEQUATE REMEDY AGAINST THE COUNTY.

ORS 34.110 provides:

> "A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court, corporation, board, officer or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a *plain, speedy and adequate* remedy in the ordinary course of the law." (emphasis added).

Destruction of "all unused absentee and regular ballots" on election night is precisely "an act which the law specially enjoins". The County admits that it will follow the directions of the Secretary of State to eschew this act, and that properly places the matter before the Court for issuance of a writ of mandamus.

The courts of Oregon have not hesitated to issue writs of mandamus against the Multnomah County Director of Elections, where, as here, he has no discretion to refuse the relief requested. *State ex rel. Dahlen v. Ervin*, 158 Or. App. 253, 267 (1999). Plaintiffs seek to compel the performance of an act which must be performed immediately after 8:00 p.m. on election night, or no remedy will be adequate. The ordinary course of the law cannot provide a remedy in these circumstances.

A. There Is No Plain, Speedy and Adequate Remedy at Law.

In the case of *State ex rel. Dewberry v. Kulongoski*, 346 Or. 260 (2009), the Supreme Court made it clear that to defeat mandamus, the alternative remedy proposed would have to be plain, speedy and adequate. The alternative remedies here proposed are not plain, speedy or adequate.

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The *Dewberry* court emphasized that "a 'plain' remedy is one that is obvious, clear, *and without uncertainty*". *Id.* at 271 (emphasis added). The scope of a Circuit Court's authority to issue mandatory injunctions against public officials is inherently fraught with uncertainty. Defendants, for example, mount a vigorous challenge to the availability of equitable relief on the ground that plaintiffs have shown no irreparable injury. They would like to require that plaintiffs show clear and convincing evidence of past fraud before enforcing an anti-fraud statute, but where, as here, the duty to act is mandatory and nondiscretionary, mandamus requires no such showing.

As to ORS 246.910 jurisdiction, the County also suggests that ORS 246.910 provides a "plain, speedy and adequate remedy," but fails to cite ORS 246.910(5), which provides that "the remedy provided in this section is cumulative and does not exclude any other remedy . . .". By its terms, the passage of this statute is not intended to interfere with mandamus relief. Moreover, the statute is silent on the question of remedy, and the case of *League of Oregon Cities v. State*, 334 Or. 645 (2002) creates significant uncertainty as to the timing of the action. *See generally id.* at 684-92 (Durham, J., dissenting).

The County also contends that a Declaratory Judgment would provide an adequate remedy at law. The matter is certain one as to which, in the fullness of time, a declaratory judgment interpreting ORS 254.483 might be issued. But the "ordinary course of the law" is not speedy enough to provide an adequate remedy, and even if the court were to merely declare the law, there is no guarantee that the county, particularly under the misguided direction of the Secretary of State, would acquiesce in the court's ruling. *See also* Point V. *infra* (difficulties in joinder, if relevant, support use of mandamus).

Most generally, as the Supreme Court has explained,

> "A writ of mandamus may issue even when other remedies exist, if the other remedies are inadequate or not sufficiently speedy. [*State ex rel. Ricco v. Biggs,* 198 Or. 413, 425 (1953)]; *see also [State ex rel. Scott v. Dobson*, 171 Or. 492,] 499 ("'The mere fact that there is another remedy will not prevent the issuance of the writ of mandamus if the other remedy is not adequate[.]'") (quoting 38 CJ 561). An adequate remedy must provide "relief upon the very subject matter of the application, and be equally convenient, beneficial, and effective." *State ex rel.*

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Pierce v. Slusher, 117 Ore. 498, 501, 244 P 540 (1926) (internal quotation marks and citation omitted) (emphasis added). An adequate remedy, therefore, is a remedy that is sufficient and as equally convenient and effective as mandamus."

State ex rel. Dewberry v. Kulongoski, 346 Or. 260, 272 (footnote omitted). No other remedy is as convenient and effective as mandamus.

The County has also suggested that the mere existence of alternative counts demonstrates the availability of alternative remedies, but pursuant to ORCP 16C, "a party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both."

III. EQUITABLE RELIEF AGAINST THE SECRETARY IS APPROPRIATE.

Plaintiffs have demonstrated all of the elements required to obtain a preliminary injunction against the Secretary to forbid her from enforcing her erroneous interpretation of ORS 254.483. As set forth above, the correctness of plaintiffs' case on the merits is sufficient to require an immediate writ of mandamus against Mr. Scott to compel the destruction of the ballots. It is manifestly in the public interest that the Legislature's important anti-fraud precautions be given effect. Nor is there any hardship whatsoever to be demonstrated by the Secretary.

The Secretary, citing a federal case which is not controlling on this Court insofar as State procedural questions are concerned,[3] focuses on the question of irreparable harm, arguing that the mere "possibility" of irreparable harm is never sufficient to impose equitable relief. This position is contrary to the plain language of ORCP 79A, which provides that relief is appropriate where, as

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[3] As the Secretary acknowledges, the federal courts remain split on the meaning of the case, *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008). The case involved an attempt to utilize asserted noncompliance with the National Environmental Policy Act (NEPA), 43 U.S.C. § 4321 *et seq.*, to enjoin the U.S. Navy from training sailors in antisubmarine warfare using sonar which might injure marine animals. It was important to the decision that NEPA "imposes only procedural requirements" and the ultimate holding was that "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors". *Winter*, 555 U.S. at 23. As far as the undersigned counsel can tell, no Oregon court has ever followed *Winter*, or could do so consistent with ORCP 79.

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here, defendants "is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment".

Plaintiffs are entitled to official compliance with law protecting the integrity of this election, and it is a violation of their rights to a fair election to suffer a violation of ORS 254.483.

There is a general insinuation in the papers of defendants that the elections process is rigorously monitored, and each and every ballot is somehow accounted for. But none of the testimony of Ms. Michaels advanced in her initial Declaration is disputed, and perhaps most importantly, neither defendant offers an explanation of why, if the unused ballots were actually accounted for, Ms. Michaels was required to count them herself because no accounting information was available.[4] Mr. Scott offers hypothetical testimony that "it would take staff many hours to count the unused ballots and then shred them" (Scott Decl. ¶ 10), but offers no evidence that any such count was made in 2010 or otherwise.

If in fact there were a reliable accounting *as the unused ballots were used*, it would be child's play to calculate the number of ballots remaining as of 8:00 p.m. This is what the Legislature meant by stating that the county "shall account for . . . unused ballots" in ORS 254.483(2); the statute does not suggest that the election process be interrupted with an independent count of blank ballots commencing at 8:00 p.m., and it would be absurd to require any such interruption. And, of course, the County did not bother to make any count at all in 2010.

IV. THE ACTION WAS TIMELY FILED.

This action was filed September 6, 2012. Over the vigorous objections of plaintiffs, defendants sought to delay the show cause hearing to October 8th, arguing before the Presiding Judge that this schedule would be adequate to allow resolution of the issues presented and to resolve

[4] Mr. Scott, in addressing this allegation, responds merely that he allowed the count, but does not endorse its results because of "inconsistent and unverifiable" counting procedures. (Scott Decl. ¶12.)

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1 any necessary appeal. Now the Secretary argues at great length that this constitutes an "eleventh-
2 hour" challenge to the process, even though the case might have been heard last month.

3 As far as plaintiffs are concerned, the case presents a single and straightforward question of
4 statutory interpretation, which is not particularly time-consuming to resolve. For this reason, it is
5 difficult to see how any delay in presenting this action has been detrimental or prejudicial to the
6 rights of defendants or others; the meaning of the statute does not change as a function of time, and
7 although plaintiffs will seek to present witnesses, none are really necessary to determine the
8 meaning of the statute, and certainly defendants have not identified any who have become
9 unavailable through the passage of time.

10 As a practical matter, plaintiffs will testify that they were unable to afford to file suit, unable
11 to find an attorney willing to prosecute it, and that only the willingness of the undersigned attorney
12 to initiate it *pro bono publico*[5] eventually enabled it to proceed. If the Secretary's peculiar views on
13 joinder are endorsed, such that electors must serve papers in every county in Oregon to commence
14 suit, few outside the rich and powerful will ever be able to vindicate an interest in lawful
15 administration of the elections laws.

16 It is certainly true that the Oregon Supreme Court has not favored last-minute challenges,
17 principally because "[t]he matter could have been litigated in the circuit court with ample time for
18 the narrowing and clarification of issues through the normal judicial process". *State ex rel.*
19 *Fidanque v. Paulus,* 297 Or. 711, 718 (1984). More importantly, the Supreme Court's comments in
20 this regard have all involved questions of whether or not particular initiatives should be placed on
21 the ballot:

22 > "In light of the great value ascribed to the exercise of the initiative power by the people, by the Oregon constitution, and the courts, and the substantially negative
23 > impact that rushed, last minute reviews would have on the exercise of the initiative power, this court has been and should be very wary of last minute
24 > challenges."

25

26 [5] $1,400 in donations toward the costs of suit were thereafter received, and plaintiffs reserve the right to seek an award of fees in this action.

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Id.; see also State ex rel. Kiesling v. Norblad, 317 Or. 615 (1993); *Meyer v. Bradbury*, 341 Or. 288 (2006).

But this case has no effect on the contents of any ballot, or upon any elector's exercise of the franchise. All it concerns is whether unused ballots should be shredded *after the election. It is difficult to conceive any legally-cognizable effect of judicial error at all.* The only effect of the relief sought is to eliminate the risk of fraud.

V. THERE ARE NO COGNIZABLE JOINDER ISSUES.

The Secretary contends that the case cannot proceed unless each and every county is joined as a defendant. The *Dewberry* case discussed above is controlling Supreme Court authority to the contrary. In that case, a challenge to the State's entering into a contract to allow a tribal casino, the State contended that the tribe was an indispensable party. The Supreme Court explained that the ordinary rules of joinder did not apply to mandamus actions:

> "ORS 34.130 outlines various procedures applicable to mandamus proceedings, including filing requirements, service requirements, and intervention by adverse parties. As to intervention of parties, ORS 34.130(4)(a) provides that, prior to the return date of an alternative writ, "any adverse party may intervene in the mandamus proceeding as matter of right" and, after that date, "the court in its discretion may allow an adverse party to intervene." ORS 34.130 does not state that any parties, other than a relator and a defendant, are required to participate. Under the mandamus statute, therefore, the only required parties in a mandamus proceeding are the relator and the defendant. Adverse parties are permitted, but not required, to intervene in the action in all circumstances. ORS 34.130(4). *Put another way, no party other than the defendant is required to be joined by the relator in the mandamus proceeding.*"

Id. at 268. Plaintiffs are entitled to have the officials in Multnomah County obey the law, without regard to what other counties may do.

As for the relief against the Secretary, the Secretary claims the power to make the rules uniform throughout the state, *see* ORS 246.110 to .120, and it is her error of law which plaintiffs seek to remedy. The Court's injunction restraining the Secretary from continuing to mislead the counties about the proper interpretation leaves the counties free to implement the statute. Insofar as

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1 the Secretary is the decisionmaker on the question of how to interpret ORS 254.483, she represents
2 the interests of all counties here.

3 The Secretary raises the specter that counties might somehow lose their ability to protect an
4 individual interest, but another party's abstract interest in statutory construction cannot mandate
5 joinder or few actions involving statutory interpretation could ever proceed. Nor are the other
6 counties at any risk of any "liability"; certainly there is no threat of damages if they erroneously
7 implement ORS 254.483, and that they might lose a future case enforcing plaintiffs' interpretation
8 of ORS 254.483, is a risk present in every statutory interpretation case.

9 The Secretary also cites ORS 246.110, outlining her "responsibility to obtain and
10 maintain uniformity in the application, operation and interpretation of elections laws".
11 Once this Court has explained to the Secretary that ORS 254.483 means what it says, she
12 may easily vindicate that interest by issuing a statewide directive to all clerks to obey the
13 law; the injunction sought by plaintiffs should be written to only bar her misstatements of
14 that law.

15 Finally, plaintiffs note that the joinder issue, if it exists at all with respect to the non-
16 mandamus cause of action, *is itself a reason for granting mandamus* in preference to the other
17 remedies. *Dewberry*, 346 Or. at 273-74 (difficulty in joining other parties supports use of
18 mandamus remedy).

19 Conclusion

20 For the foregoing reasons and the reasons stated in our opening memorandum, the requested
21 relief should be granted.

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Dated: October 5, 2012.

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PROOF OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On October 5, 2012, I caused the following document to be served:

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTIONS AND IN OPPOSITION TO MOTION TO DISMISS

in the following manner:

( ) (BY HAND)

(X) (BY FIRST CLASS US MAIL)

( ) (BY FAX)

(X) (BY E-MAIL)

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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 LISA MICHAELS, JANICE DYSINGER, DELIA LOPEZ and JOHN PAYNE, 7 Plaintiffs, 8 v. 9 10 KATE BROWN, in her official capacity as Oregon Secretary of State, TIM SCOTT, in his official capacity as Multnomah County 11 Director of Elections, 12 Defendants.	Case No. 120911226 SECRETARY BROWN'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION **ORS 20.140 - State fees deferred at filing**

13
14 Plaintiffs have not established that they are entitled to a preliminary injunction—relief
15 that is extraordinary in the average case, and which would be particularly extraordinary and
16 disruptive here. Plaintiffs will not prevail on the merits. The Secretary has broad authority to
17 ensure uniform administration of the election laws, including the ability to advise counties on
18 when and how ballots should be destroyed in order to best satisfy sometimes conflicting statutory
19 requirements. For example, while plaintiffs seek the destruction of all unused ballots at 8 p.m.,
20 plaintiffs ignore provisions that require that voters in line at 8 p.m. must be allowed to vote. In
21 order to provide for uniform administration of the statutes in each of the counties, the Secretary
22 has advised that ballots should be destroyed after an election is certified. The Secretary's advice
23 reconciles seeming inconsistencies in the statutes and allows for a uniform and efficient
24 administration of elections.
25 Plaintiffs' claim also fails on the merits because they have named only one county in this
26 case, despite the fact that other counties have engaged in the same practice as that by Multnomah

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1 County. Plaintiffs complain about an email by the Secretary's Election Division Director,
2 providing advice regarding the ballot destruction issue. That email was sent to Washington
3 County, but plaintiffs have named only the Multnomah County elections director. The other
4 county clerks are necessary parties, and the failure to name them is counter to the legislative
5 mandate that Oregon election laws be applied uniformly. Plaintiffs' case suffers from a number
6 of other procedural defects, the most significant of which is their delay in bringing this case. By
7 their own account, Plaintiffs have been investigating these matters since at least December 2010,
8 almost two years before they filed this suit.

9 Plaintiffs also fail to carry their burden on the other requirements for injunctive relief.
10 They cannot demonstrate that they will be irreparably harmed without the relief they seek. The
11 current process has been in use for several years. No proof of any impropriety has been offered.
12 To the contrary, the affidavit by the lead plaintiff shows that Multnomah County officials
13 provided information about their procedures when requested. It is true that the lead plaintiff's
14 affidavit is replete with innuendo. But innuendo is not a substitute for proof, and there is no
15 proof that irreparable harm will result if relief is not granted on this expedited motion.

16 The balance of the equities and the public interest also disfavor the relief sought here.
17 Eleventh-hour pre-election challenges are strongly disfavored. This Court should reject
18 plaintiffs' demand that the Court issue injunctive relief during the month before a major election.
19 The balance of hardships, as well as the public interest, sharply disfavor the preliminary
20 injunction sought here. Plaintiffs' motion should be denied.

21 **I. STANDARDS FOR A PRELIMINARY INJUNCTION**

22 **A. General Requirements**

23 ORCP 79 provides that preliminary injunctions "may be allowed" in certain
24 circumstances.

25 A(1) **Circumstances.** Subject to the requirements of Rule 82A(1),
a temporary restraining order or preliminary injunction may be
26 allowed under this rule:

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(a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief; or

(b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual.

Oregon courts typically apply the federal standards when deciding whether to grant preliminary injunctive relief. Under the federal standard, a plaintiff "must establish" four elements to obtain a preliminary injunction or a temporary restraining order:

(1) that they are "likely to succeed on the merits";

(2) that they are "likely to suffer irreparable harm in the absence of preliminary relief";

(3) that "the balance of equities tips in [their] favor"; and

(4) that "an injunction is in the public interest."

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008).

Under *Winter*, plaintiffs must establish each of the four required elements, *id.*; the failure to establish any one of the elements is fatal to their motion.[1] The Court rejected the Ninth Circuit's use of a sliding scale test that allowed a plaintiff to obtain preliminary injunction where the claims were strong on the merits, but there was only a "possibility" of irreparable harm. *Id.* at 21-22. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may

[1] Federal courts have split after *Winter*: some apply it as written, and others (including the Ninth Circuit) have found that a "sliding scale" is still permissible as to elements other than irreparable harm. In the Fourth Circuit's view, *Winter* "articulates four requirements, each of which must be satisfied as articulated." *Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F3d 342, 346-47 (4th Cir 2009) (citing 129 S. Ct. at 374, 376), *vacated on other grounds*, 130 S. Ct. 2371 (2010). At least one Ninth Circuit panel, despite the reversal in *Winter*, continues to permit a "sliding scale test" as to the first and third elements. *Alliance for the Wild Rockies v. Cottrell*, 632 F3d 1127, 1131-35 (9th Cir 2011).

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1 only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.
2 Thus, a "preliminary injunction will not be issued simply to prevent the possibility of some
3 remote future injury." *Id.* (quotations omitted).

4 A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter*,
5 555 U.S. at 24. In each case, courts "must balance the competing claims of injury and must
6 consider the effect on each party of the granting or withholding of the requested relief." *Amoco*
7 *Production Co.* v. *Gambell*, 480 U. S. 531, 542 (1987). "In exercising their sound discretion,
8 courts of equity should pay particular regard for the public consequences in employing the
9 extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982).

10 Like the federal decisions, Oregon decisions also recognize that injunctive relief is an
11 "extraordinary remedy" that should be granted sparingly. *Jewett v. Deerhorn Enters. Inc.*, 281
12 Or. 469, 473 (1978); *see also Wilson v. Parent*, 228 Or. 354, 370 (1961) ("extraordinary relief by
13 injunction is a remedy which should be exercised sparingly and cautiously and should be
14 awarded only in clear cases reasonably free from doubt").

15 The Oregon decisions also apply the same four requirements used in the federal
16 decisions. First, "clear and convincing proof" on the merits is required. *Jewett*, 281 Or. at 473;
17 *Wilson*, 228 Or. at 370. Second, an injunction is "to be granted only on clear and convincing
18 proof of irreparable harm when there is no adequate legal remedy." *Gildow v. Smith*, 153 Or.
19 App. 648, 653 (1998). Third and fourth, the Court should consider the "relative hardship likely to
20 result to the defendant if the injunction is granted and to the plaintiff if it is denied," as well as
21 the impact of an injunction on the public interest. *York v. Stallings,* 217 Or. 13, 23-25 (1959).

22 **B. Special Caution in Election Cases.**

23 In election cases, Oregon courts also disfavor court challenges that are made close in time
24 to an election. In *State ex rel. Keisling v. Norblad*, 317 Or. 615 (1993), for example, the
25 Supreme Court warned of the "basic principle" that "extreme caution" should be used in a case
26 like this one.

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> Whenever any court is asked to order a change in the election process, especially a late change in a time-sensitive process, extreme institutional caution should be exercised by the judicial branch.

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4 *Id.,* 317 Or. at 625. The Oregon Supreme Court "has been and should be very wary of last
5 minute challenges." *State ex rel Fidanque v. Paulus*, 297 Or. 711, 718 (1984). The Supreme
6 Court has reiterated its "general concern over eleventh-hour challenges to proposed measures
7 that have qualified for the ballot." *Meyer v. Bradbury*, 341 Or. 288, 294 n. 5 (2006). In
8 exercising the "extreme institutional caution" ordered in *Keisling*, the court has repeatedly
9 dismissed as untimely pre-election challenges that were filed at the eleventh hour.

10
II. STATUTORY BACKGROUND

11
A. The Secretary's Role in the Election Process.

12 Among other things, the Secretary of State is responsible for insuring uniformity in
13 elections. "The Secretary of State is the chief elections officer of this state, and it is the
14 secretary's responsibility to obtain and maintain uniformity in the application, operation and
15 interpretation of the election laws." ORS 246.110. "In carrying out the responsibility under ORS
16 246.110, the Secretary of State shall prepare and distribute to each county clerk detailed and
17 comprehensive written directives, and shall assist, advise and instruct each county clerk, on
18 registration of electors and election procedures which are under the direction and control of the
19 county clerk." ORS 246.150. The Secretary is given broad rulemaking authority, and the
20 Legislature has recognized that efficiency is a legitimate consideration, along with impartiality
21 and accuracy. Thus, "[t]he Secretary of State may adopt rules the secretary considers necessary
22 to facilitate and assist in achieving and maintaining a maximum degree of correctness,
23 impartiality and efficiency in administration of the election laws." *Id.* If a County official
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1 disagrees with an interpretation by the Secretary, she may seek court relief to enforce her

2 interpretation. ORS 246.820.[2]

3 **B. Provisions Regarding Ballots.**

4 The Secretary is sometimes called upon to reconcile various statutory mandates. That is

5 the case here.

6 **1. Destruction as soon as practicable**

7 ORS 253.045, found in a chapter regarding absentee ballots, provides that "all unused

8 ballots" shall be destroyed by county clerks "as soon as practicable after the election." ORS

9 253.045 provides:

10

11 > **Preparation and disposition of ballots.** (1) The clerk shall print as many absentee ballots as may be necessary as soon as possible after receiving the information concerning candidates and measures to be voted on at an election, but not later than the 45th day before the election.

12

13 > (2) The clerk is responsible for the safekeeping and disposition of the ballots, and shall destroy all unused ballots as soon as practicable after the election.

14

15 **2. Destruction immediately after 8 p.m.**

16 Yet another provision, which deals with "absentee and regular ballots," provides that "all

17 unused absentee and regular ballots in the county clerks possession," and that this shall occur

18 "[i]mmediately after 8 p.m. on the day of an election." ORS 254.483(1). At the same time, this

19 provision also requires that each county shall "provide for the security of, and shall account for

20 unused ballots," and that it shall do so "[i]mmediately after 8 p.m. on the day of an election."

21 ORS 254.483(2). ORS 254.483 provides:

22 [2] ORS 246.820(1) provides:

23 **Order to compel county clerk, city elections officer or elections official to comply with interpretation, rule, directive or instruction.** (1) Whenever it appears to the Secretary of State

24 that a county clerk, city elections officer or a local elections official has failed to comply with an interpretation of any election law made by the Secretary of State under ORS 246.110 or has

25 failed to comply with a rule, directive or instruction made by the Secretary of State under ORS 246.120, 246.140 or 246.150, the Secretary of State may apply to the appropriate circuit court for

26 an order to compel the county clerk, city elections officer or local elections official to comply.

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> **Procedures after 8 p.m. on election day; unused ballots.** Immediately after 8 p.m. on the day of an election:
>
> (1) The county clerk shall destroy all unused absentee and regular ballots in the county clerk's possession.
>
> (2) Each county shall provide for the security of, and shall account for, unused ballots.

The term "regular ballot" is not defined by the statute, and is used only once in ORS chapter 254, at ORS 254.483(1). The term—and this provision—date back to a time when precinct polling places were used, instead of vote by mail.

3. Voters in line at 8 p.m. may vote after 8 p.m.

Yet another statute provides yet another standard for the 8 p.m. hour. ORS 254.470(10) provides that voters who are still in line at 8 p.m. shall be considered "to have begun the act of voting." Having begun the act of voting, those voters have the same right to vote as anyone who voted before 8 p.m. (Trout Dec. ¶ 7). If all unused ballots were destroyed immediately after 8 p.m., as plaintiffs demand, these voters could not vote. ORS 254.470(10) provides:

> **Procedures for conducting election by mail; rules.**
> ***
> (10) 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.

4. Provisions that further assist "exercise of the right to franchise."

Other provisions further complicate the matter. Voters who are in line but who have lost their ballots, or whose ballots have been destroyed, spoiled, or not received, shall receive a "replacement ballot, after completing a replacement form. ORS 254.470(7), ORS 254.480. Requests for a replacement ballot may be made "in person." ORS 254.480(1). Replacement ballots "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." ORS 254.470(7).

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1 Upon a request by a voter for a replacement ballot, a county elections official "must," among
2 other things, "verify the registration of the elector and ensure the elector has not voted another
3 ballot." ORS 254.480(3); Secretary of State Vote by Mail Manual, at p. 31 (April 2012).[3] A
4 voter also may update his or her registration "at any time before 8 p.m. on the day of the
5 election." ORS 247.303. These requirements can impose additional burdens on election
6 evening, such that the need for ballots can continue after 8 p.m.
7 These are not insignificant concerns. The Legislature has declared that "[i]t is the policy
8 of this state that all election laws and procedures shall be established and construed to assist the
9 elector in the exercise of the right of franchise." ORS 274.005. The destruction of all unused
10 ballots immediately after 8 p.m. would make it extremely difficult, if not impossible, to satisfy
11 the other statutory requirements that apply. It can take an hour for voters in line at 8 p.m. to
12 complete the act of voting. If all ballots were destroyed immediately after 8 p.m., there would be
13 no ballots for those voters. Their right to vote would be denied. Voters seeking replacement
14 ballots, who by law also have begun to vote at 8 p.m. and are entitled to finish, would be
15 disenfranchised. Voters who update their registrations during election evening, and then seek to
16 vote, could similarly be disenfranchised if all unused ballots were destroyed immediately after 8
17 p.m. That would be directly contrary to Oregon's stated policy that its election laws should be
18 "construed to assist the elector in the exercise of the right of franchise." ORS 247.005.
19 **5. Duplicate Ballots.**
20 Plaintiffs' arguments also seek to frustrate the use of duplicate ballots. While plaintiffs
21 do not say so, they appear to challenge an administrative rule establishing the procedures to be
22 used with duplicate ballots. During elections, county elections officials receive a number of
23 voted ballots that are damaged or are not readable by the tally equipment. This can happen when
24
25 [3] ORS 254.470(1) (Secretary of State shall Secretary of State by rule shall establish requirements and criteria for the designation regarding ballot deposit, security); ORS 254.480 (Secretary may designate additional methods of request for replacement ballots); OAR 165-007-0030 (adopting
26 Vote by Mail Manual).

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1 a ballot is ripped, has coffee stains, has white-out, has holes punched through, or has been
2 subjected to many of the different things that prevent machine reading of a ballot. (Trout Dec.
3 ¶ 11). As required by the Oregon Vote by Mail Manual, such ballots must be duplicated onto a
4 blank ballot and then machine counted. The Manual has been formally adopted as an Oregon
5 Administrative Rule issued by the Secretary of State. OAR 165-007-0030. Many such ballots
6 are duplicated after 8 p.m. on election day. Duplicate ballots also are used to tally votes by
7 disabled voters, such as those with neurological problems, who need to use alternatives to paper
8 ballots. *See* ORS 254.445. The use of duplicate ballots is important to the election process.
9 Though plaintiffs suggest that hand counts can be used instead of machine counts, machine
10 counts are more accurate. (Trout Dec. ¶ 14). Not surprisingly, accuracy in election counts is
11 another legislative goal. ORS 246.150.

12 **C. The Secretary's Position**

13 Plaintiffs are correct that the Secretary, through her Elections Division Director Steve
14 Trout, has taken the position that Oregon law does not require destruction of all unused ballots
15 immediately after 8 p.m. on election day. As plaintiff Lisa Michaels notes, this position is found
16 in an email sent almost a year ago, on October 9, 2011, which she obtained from Washington
17 County. (Michaels Dec. ¶ 25-26, Ex. 9, at 2-3). The "County employee" who received this
18 email, Mr. Hobernicht, is the clerk of Washington County.[4] (Trout Dec. ¶ 19). In the email to
19 the Washington County clerk, the Elections Division Director explained that the "immediate
20 destruction" provision predates the shift to vote by mail. In that earlier era, elections involved
21 numerous polling places in the many precincts, and the concern was that ballot boxes might be
22 stuffed with unused ballots after the polls closed. The Elections Divisions Director also noted
23 that the term "regular ballots" referred to polling place ballots, and no longer applies to vote by
24 mail elections.

25
[4] Ms. Michael's declaration also refers to Sia Lindstrom, a "Senior Deputy County
26 Administrator." *See* Michaels' Decl. ¶ 26. Lindstrom is also a Washington County employee.

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> Historically, regular ballots have been defined as polling place ballots, and absentee ballots have been defined as ballots that will be sent to a voter who will be unable to cast his/her ballot at a polling place. The destruction of ballots was very important when we had polling place elections because extra ballots could be marked and then stuffed in the ballot box without any way to account for these extra ballots. That is why during polling place elections unused ballots had to be destroyed immediately at 8pm. Our move to vote by mail has resulted in a much more secure and accountable election process. While stating that absentee and regular ballots shall be destroyed immediately, the section says nothing about other types of ballots such as vote by mail ballots, provisional ballots, or duplicate ballots. That is why it is informative to continue reading to section 2 of the statute which states "Each county shall provide for the security of, and shall account for, unused ballots." If all ballots were destroyed at 8pm what would be the purpose of this statute?
>
> We continue to assert that counties are acting according to the law in not destroying all unused ballots at 8 pm on election night. Given the conflicting statutes, and the Legislature's desire to maintain the security and accounting of all ballots, we believe that the most legally defensible position is to have each county maintain the security and accounting of all ballots until the election is certified. Once the ballots are destroyed, there is no way to prove how many ballots were destroyed, and as a result counties would not be able to have a true accounting of all ballots which would violate ORS 254.483(2). We continue to work with legislators on both sides of the aisle to clean up the language relating to unused ballots and hope to have a bill during this February session that will focus on maintaining security and an accounting of all ballots at all steps of the election process.

17 (Trout Dec. ¶ 19). Mr. Trout's email illustrates a number of the reasons why the Court should
18 deny the extraordinary relief sought here.
19

20 **III. PLAINTIFFS HAVE NOT SATISFIED THE REQUIREMENTS FOR THE EXTRAORDINARY RELIEF SOUGHT HERE.**

21 **A. Plaintiffs' claims fail on the merits.**

22 To obtain injunctive relief, plaintiffs must show, at "an irreducible minimum that there is
23 a fair chance of success on the merits." *Stanley v. Univ. of S. Calif.*, 13 F.3d 1313, 1319 (9th Cir.
24 1994). Plaintiffs' claims fail because they have not presented clear and convincing evidence that
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1 they are likely to prevail on the merits. Their claims also fail because plaintiffs failed to name
2 necessary parties and unreasonably delayed in bringing this action.

3 **1. The Secretary's position is a reasonable interpretation of the statute and is entitled to deference.**

4 Plaintiffs' complaint does not identify the conduct by the Secretary that they challenge,
5 but one of their affidavits attached an email by the Secretary's Elections Director, dated
6 October 26, 2011. (Michaels Dec., Ex. 9, at p. 2). The statements in that email are entitled to
7 deference. The outcome sought by plaintiffs would mean that no ballots were available to
8 voters still in line at 8 p.m. That result would also leave no ballots available for use as duplicate
9 ballots. (Trout Dec. ¶ 11).

10 Oregon law vests the Secretary of State with broad powers. The Secretary administers
11 the most critical aspect of Oregon political life: elections, an area fraught with difficult
12 technology, inflexible deadlines, and sharp competition. It is her "responsibility to obtain and
13 maintain uniformity in the application, operation and interpretation of the election laws." ORS
14 246.110. She also has broad authority to adopt the rules that she considers "necessary to
15 facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality
16 and efficiency in administration of the election laws." ORS 246.150.

17 Courts generally defer to agency interpretations of the laws that the agencies administer.
18 The degree of deference accorded to the agency depends on "the scope of the responsibilities for
19 substantive policy and for its administration that are assigned to the agency under the law at
20 issue." *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 223 (1980) (quoting
21 *Morgan v. Stimson Lumber Co.*, 288 Or. 595, 602 (1967)). By law, the Secretary has broad
22 responsibilities in the administration of elections, and her opinions should receive deference
23 here.

24 Oregon courts have created three "classifications" for statutory terms. Each of these
25 classification is associated with a different degree of agency authority.
26

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> (1) Terms of precise meaning, whether of common or technical parlance, requiring only fact-finding by the agency and judicial review for substantial evidence;
>
> (2) Inexact terms which require agency interpretation and judicial review for consistency with legislative policy; and
>
> (3) Terms of delegation which require legislative policy determination by the agency and judicial review of whether that policy is within the delegation.

Springfield Educ. Ass'n, 290 Or. at 223. This case fits within the second category. As shown below, the agency's interpretation is entitled to deference because it is consistent with legislative policy.

a. "Regular ballot" and "unused ballot" in ORS 254.483(1) are inexact terms.

The term "regular ballot" in ORS 254.483(1) is an inexact term. It is not defined by statute or by rule, and it is not used in the Vote by Mail Manual. A vote by mail ballot, like most ballots in the vote by mail era, is an "official" ballot. *See, e.g.*, ORS 254.470. (Trout Dec. ¶ 4). The term "regular ballot" dates back to a time when votes were cast at numerous polling places in precinct voting stations scattered across the State. (Trout Dec. ¶ 4). "Regular ballot" does not include numerous types of ballots, including vote by mail ballots, challenged ballots, provisional ballots, replacement ballots, and duplicate ballots. *See* ORS 254.070, 254.080, Vote by Mail Manual at pp. 31, 32, 41-42.

The term "unused" ballot in ORS 254.483(1) is also imprecise. Blank ballots can be used for more than one purpose, including "duplicate ballots" designated by counties for use in the counting process, in order to replace voted ballots that have been bent, folded, or otherwise can't be machine counted. (Trout Dec. ¶ 11; Vote by Mail Manual at p. 41-42). When such a ballot is rejected by a counting machine, duplicate ballots are then filled out and run through the machine, in order to aid efficiency in the election process. Plaintiffs argue that a hand count should be

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1 required, but that would be an inefficient remedy which could make it difficult to certify election
2 results in a timely way. Besides being time consuming, hand counts are less accurate than
3 machine counts. Thus, voters whose ballots were subjected to hand counts would be at a
4 disadvantage when compared to voters whose votes were machine counted. This would frustrate
5 the statutory directives of uniform elections that are "correct," or accurate, and "impartial." ORS
6 246.150. (Trout Dec. ¶ 16). It also runs counter to the express policy goal favoring the "right
7 of exercise of the franchise." ORS 247.005. The Secretary's position is consistent with that
8 goal.

9
10 **b. "Regular ballot" and "unused ballot" must be read in the context of the other elections laws, including those giving the Secretary the authority to administer the laws efficiently and uniformly.**

11 Statutory context also supports the Secretary's position. To interpret a statute and
12 determine the legislature's policy intent, the Court may always consider the law's text, its
13 context, and also its legislative history, even when there is no ambiguity apparent on the face of
14 the statute. *State v. Gaines*, 346 Or. 160, 171-72 (2009).
15 The context of the law includes other provisions of the same statute and other related
16 statutes. *PGE v. Bureau of Labor & Industries*, 317 Or. 606, 611 (1993). Here, the statutory
17 context also includes another provision that provide for destruction "as soon as practicable,"
18 rather than "immediately" after 8 p.m. *See* ORS 253.045(2). The provision requiring destruction
19 immediately after 8 p.m. of all "regular and unused ballots" also must be considered in the
20 context of the elections laws giving the Secretary of State the responsibility to ensure uniformity
21 in the application of the elections laws, and the need to administer the elections laws fairly and
22 efficiently. *See* ORS 246.110, 246.150. Interpreting statutes so as to require an excessive
23 burden on some (but not all) counties forced to conduct hand counts would run counter to the
24 Secretary's statutory duty to ensure uniformity and efficiency. (Trout Dec. ¶¶ 8, 14, 16). Once
25 again, because the Secretary's interpretation squares with the "right of exercise of the franchise,"
26 ORS 247.005, the Secretary's interpretation is well founded and is entitled to deference.

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1 **2. Plaintiffs failed to name necessary parties.**

2 Plaintiffs case also fails because they have failed to name all Oregon counties, who are
3 necessary parties to this suit. The counties are responsible for tallying the ballots. In fact,
4 "[e]xcept as otherwise provided by law, the county clerk is the only elections officer who may
5 conduct an election in this state," including "processing votes." ORS 246.200. *See also* ORS
6 246.210 (subject to direction from Secretary, "a county clerk may exercise general supervision of
7 administration of election laws by each local elections official in the county for the purpose of
8 achieving and maintaining a maximum degree of correctness, impartiality, efficiency and
9 uniformity in the administration by local elections officials."). The counties and their clerks will
10 take the impact of the relief that plaintiffs seek, and they should have been named in this suit.
11 But plaintiffs have named the elections director from only one county, Multnomah County.
12 Because plaintiffs have failed to name the clerks of the other 35 counties in Oregon, the Court
13 should deny the relief sought here, and plaintiffs' case should be dismissed.

14 ORCP 29 defines a necessary party as one who "(1) in that person's absence complete
15 relief cannot be accorded among those already parties, or (2) that person claims an interest
16 relating to the subject of the action and is so situated that the disposition in that person's absence
17 may (a) as a practical matter impair or impede the person's ability to protect that interest or (b)
18 leave any of the persons already parties subject to a substantial risk of incurring double, multiple,
19 or otherwise inconsistent obligations by reason of their claimed interest." This is a fact-specific
20 inquiry, dependent on the circumstances of the particular case, and is left to the discretion of the
21 trial court. *Steers v. Rescue 3, Inc.,* 146 Or. App.746, 749 (1997).[5]

22

[5] ORCP 29 A and B provide:

23 A Persons to be joined if feasible. A person who is subject to service of process shall be
joined as a party in the action if (1) in that person's absence complete relief cannot be accorded
24 among those already parties, or (2) that person claims an interest relating to the subject of the
action and is so situated that the disposition in that person's absence may (a) as a practical matter
25 impair or impede the person's ability to protect that interest or (b) leave any of the persons
already parties subject to a substantial risk of incurring double, multiple, or otherwise
26 inconsistent obligations by reason of their claimed interest. If such person has not been so joined,

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1 In this case, complete relief cannot be provided unless the counties are joined. Plaintiffs
2 have named the Secretary, but the counties conduct the elections, not the Secretary. And
3 plaintiffs complain about Multnomah County, but other Oregon counties engage in the same
4 practice that plaintiffs complain about. (Trout Dec. ¶ 19). Those counties have an interest in the
5 practice here, and the failure to name them all could impair their ability to protect that interest or
6 subject them to multiple or inconsistent liabilities. The failure to name the counties also runs
7 counter to the statutory need for "uniformity" in the administration of Oregon elections. *See*
8 ORS 246.110. Had plaintiffs acted in a timely way, the Court might have the power to enjoin
9 enforcement of rules or interpretations by the Secretary, but unless the counties are named, the
10 Court does not have power to enjoin those other counties to comply with the Court's orders.
11 Failure to name the counties also could, as a practical matter, impair their ability to protect their
12 interest. Given the "public stake in settling disputes by wholes," 146 Or. App.at 754, rather than
13 piecemeal, the Court should not issue a preliminary injunction that binds one county without
14 naming them all first.[6] Injunctive relief should not issue.

15 **3. Plaintiffs' claims also fail due to their delay.**

16 Plaintiffs' motion for expedited, extraordinary equitable relief also should be rejected due
17 to the long delay by plaintiffs in filing this case. Plaintiffs' unreasonably delayed here.

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18 the court shall order that such person be made a party. If a person should join as a plaintiff but
19 refuses to do so, such person shall be made a defendant, the reason being stated in the complaint.

20 B Determination by court whenever joinder not feasible. If a person as described in subsections A(1) and (2) of this rule cannot be made a party, the court shall determine whether in
21 equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered
22 by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective
23 provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate;
24 fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

25 [6] Separate standards govern whether the counties are necessary parties for purposes of plaintiffs' claims for declaratory relief. Since there is no such thing as "preliminary declaratory relief,"
26 these standards are not pertinent to plaintiffs' motion for a preliminary injunction.

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1 Plaintiffs filed this case on September 6, 2012. But they began investigating alleged
2 improprieties regarding ORS 254.483 in December 2010, nearly two years before they sued.
3 (*See* Michaels Decl. ¶¶ 11-12, 21). Plaintiffs claim that they made "efforts to enforce ORS
4 254.483" in October 2011, in response to the email correspondence between Director of
5 Elections Steve Trout and Washington County elections officials. That was almost a year ago.
6 (*See id.* ¶ 26, Ex. 9). Plaintiffs offer no explanation for waiting nearly a year to file this case, so
7 close to the upcoming election. At the same time, they seek expedited, extraordinary relief. That
8 request should be denied.

9 Had plaintiffs sought relief at an appropriate time, even if plaintiffs managed to persuade
10 the Court to issue the relief they seek, the counties could have taken some steps to mitigate the
11 loss of uniformity, efficiency, and accuracy that would result. Once ballots are received and
12 opened, so that they may be machine counted, most are indistinguishable from each other. While
13 it is possible to print ballots in advance in a way that would distinguish between each of the
14 eleven different types of ballots, it would be very difficult to do this for the November 2012
15 election. For example, if plaintiffs persuaded a Court to order that counties destroy all unused
16 absentee ballots at 8 pm, regardless of the need to make sure voters in line were allowed to vote,
17 the Secretary might have issued guidance as appropriate. For example, she could have directed
18 counties to print specially marked "duplicate" or "replacement" ballots for use so that they would
19 be readily recognizable, as compared to the "absentee" or "regular" ballots described in ORS
20 243.483(1). Specially designated "duplicate" ballots also could have been printed to satisfy the
21 need for duplicate ballots mandated by the Vote by Mail Manual. Attempting this now would be
22 extremely difficult. (Trout Dec. ¶ 15).

23 Oregon courts are particularly sensitive to delay in elections litigation. In any pre-
24 election challenge to the electoral process, the Oregon courts "ha[ve] been and should be very
25 wary of last minute challenges." *State ex rel Fidanque v. Paulus*, 297 Or. 711, 718 (1984).
26 Plaintiffs filed this action just 56 days before the November election, one week before the

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Secretary must begin sending ballots to military and overseas voters, and after the ballot printing process has begun. (*See* Trout Decl. ¶ 13). In light of plaintiffs' eleventh-hour preliminary injunction filing, plaintiffs' motion is untimely and should be denied.

4. Plaintiffs' claims suffer from several other defects.

Plaintiffs bring four claims in their complaint. All of the claims against Secretary Brown fail due to additional procedural defects. Several are set forth below. As a result of these defects, plaintiffs' claims fail on the merits, providing additional grounds for denying the relief sought here.

a. Plaintiffs fail to state a claim under ORS 246.910 because plaintiffs failed to commence this action within a reasonable time.

Plaintiffs' second claim is brought under ORS 246.910 against Multnomah County Elections Director Tim Scott. Secretary Brown is not named in the claim. (Compl. ¶ 15). In any event, the claim fails because plaintiffs failed to commence this action within a reasonable time.

ORS 246.910(1) provides:

> A person adversely affected by any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, or by any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.

The Oregon Supreme Court has held that actions under ORS 246.910(1) must be filed "within a reasonable time." *Ellis v. Roberts*, 302 Or. 6, 13 (1986). The Court determined that 60 days is a reasonable time for challenging an act or failure to act by the Secretary of State and rejected an action not filed within 60 days as untimely. *See id.* at 19 (dismissing as untimely a claim brought 11 months after the challenged act by the Secretary of State). The Court reasoned that "delay puts an unreasonable burden on the court" and that an "eleventh-hour action in the trial court" provides insufficient time for "the narrowing and clarification of issues through the

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1 normal judicial process .... If these actions are not brought within a reasonable time after they
2 first could have been brought, meaningful judicial review will be difficult, if not impossible." *Id.*
3 Plaintiffs failed to bring this action within 60 days of the alleged act or failure to act by
4 the Secretary of State. Their action was not brought within a reasonable time. Plaintiffs bring
5 this action nearly two years after they began investigating these matters, and over ten months
6 after the October 26, 2011 email from Elections Director Steve Trout to Washington County
7 officials describing the Secretary of State's position on ORS 254.483. (Michaels Decl. ¶ 11,
8 Ex. 9). Plaintiffs' challenge under ORS 246.910 is untimely and, therefore, the court has no
9 jurisdiction to hear plaintiffs' claim. *See League of Oregon Cities v. State*, 334 Or. 645, 657
10 (2002).

11 **b. Plaintiffs' claims under the Administrative Procedures Act fail.**

12 The Court lacks jurisdiction over plaintiffs' third claim, which seeks review of an order
13 under the Oregon Administrative Procedures Act (APA). This claim appears to be against both
14 defendants, but plaintiffs' complaint does not clearly identify exactly what act by the Secretary is
15 being challenged, but it appears to be the October 2011 email from the Elections Division
16 Director. Pursuant to the APA, a petition for review of such an agency order must be filed
17 within 60 days. ORS 183.484(2). "The timely filing of a petition for judicial review of agency
18 action is a jurisdictional requirement." *G.A.S.P. v. Environmental Quality Comm'n*, 201 Or App
19 362, 366, 118 P2d 831 (2005). It is proper for a court to dismiss on this basis due to lack of
20 jurisdiction. *Id.*[7]
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24 [7] Plaintiffs' complaint and briefing do not even mention the Vote by Mail Manual. To the extent plaintiffs argue that they are making such a challenge, plaintiffs appear to be challenging the
25 rules for duplicate ballots, which were established in the Vote by Mail Manual. OAR 165-007-0030. Generally, challenges to rulemaking are to be made in the Court of Appeals. *See* ORS
26 183.400. If plaintiffs wish to make such a challenge, they are in the wrong court.

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2 **c. Plaintiffs have no right to declaratory relief here.**

3 Plaintiffs' fourth claim, for declaratory relief, suffers from a number of problems. For

4 example, plaintiffs fail to name other counties who engage in the practice that plaintiffs complain

5 about. The Declaratory Judgments Act requires that they should have been named. ORS 28.110

6 provides:

7 > When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. ****

8

9 Every county would be affected by the relief sought against the Secretary. The other counties

10 have an interest in this case, and no declaration may issue to their prejudice unless they are

11 named.

12 Moreover, plaintiffs cannot circumvent the jurisdictional 60-day timeframe for review

13 under the APA by filing a declaratory judgment action after that time has passed. *Harrington v.*

14 *Water Resources Department*, 216 Or App 16, 25, 171 P3d 1001 (2007) (and citations

15 therein). The same principle – that plaintiffs cannot circumvent the reasonable timeframe of 60

16 days – should apply to review of elections actions under ORS 246.910.

17 **d. Mandamus relief is not available.**

18 Plaintiffs' first claim seeks a writ of mandamus directing the Multnomah County

19 elections director to destroy all unused ballots immediately after 8:00 p.m. on elections night.

20 (Compl. ¶¶ 12-13). While plaintiffs seek a judgment or writ against Secretary Brown in their

21 prayer, the mandamus claim itself does not name Secretary Brown. (*Id.*). In any event, the claim

22 fails.

23 The mandamus statute provides that the "writ shall not be issued in any case where there

24 is a plain, speedy and adequate remedy in the ordinary course of the law." ORS 34.110.

25 Mandamus is not available where agency review is an adequate legal remedy. *Scovell v.*

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Goldschmidt, 106 Or. App. 111, 114, *rev. den.*, 311 Or. 432 (1991) (reversing grant of writ where available remedy existed under APA, and petitioner could have sought action under those provisions). To the extent that plaintiffs could state a claim, they had available remedies under the APA and ORS 246.910. Mandamus relief is not available where, as here, plaintiffs could have pursued remedies in the ordinary course of law but failed to do so in a timely way.

Plaintiffs' own pleading and briefing assert that they have adequate remedies at law. In their complaint, plaintiffs bring claims under ORS 246.910 and the APA. (Compl. ¶¶ 14-19). In their brief, plaintiffs acknowledge that "the statutes afford ample authority for the relief sought outside the mandamus context." (Pls.' Br. at 4). Plaintiffs therefore concede that they had "ample" opportunity to challenge the Secretary's interpretation through the ordinary course of law. As a result, plaintiffs will not succeed on the merits of their claim for mandamus relief, and the Court should deny their "motion" for a writ of mandamus.

Plaintiffs may argue that they lack a speedy remedy because the election is so close. Plaintiffs may also argue that they lack a remedy at law because of the need to join the other counties. Plaintiffs created those problems through their own delay, as well as their failure to name the counties. They cannot use those self-created problems to justify an argument that they must have mandamus relief now. *Cf. State v. Paulus*, 297 Or .646 (1984) ("the time required for appeal is not a factor" in determining whether the ordinary remedy is 'speedy'.") As demonstrated above, in Section III(A)(3), plaintiffs' failure to timely pursue their remedies "in the ordinary course of law" does not create the need for mandamus relief here. Plaintiffs' mandamus claim fails.

B. Plaintiffs have not demonstrated irreparable harm.

Preliminary injunctive relief also should be rejected due to the lack of irreparable harm. An injunction is "an extraordinary remedy, to be granted only on clear and convincing proof of irreparable harm when there is no adequate legal remedy." *Gildow v. Smith*, 153 Or. App. 648,

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1 653 (1998) (denying injunction based on lack of irreparable harm). As the Supreme Court stated
2 in *Winter*, a "preliminary injunction will not be issued simply to prevent the possibility of some
3 remote future injury." 129 S. Ct. at 375 (quotations omitted). Thus, the asserted irreparable
4 injury "must be neither remote nor speculative, but *actual and imminent*." *Siegel v. LePore*, 234
5 F.3d 1163 (11th Cir. 2000) (rejecting challenge to election procedures where results of
6 procedures were wholly speculative) (quotations omitted) (emphasis added). In this case,
7 plaintiffs must show that they will be irreparably harmed by defendants' interpretation of ORS
8 254.483. Plaintiffs have failed to do so, and the Court may deny their motion on this basis alone.
9 Plaintiffs have presented no evidence that defendants' interpretation of the election laws
10 impairs the accuracy of elections, much less the clear and convincing evidence required for a
11 preliminary injunction to issue. Instead, plaintiffs' sole argument for irreparable harm is that
12 "[t]he obvious purpose of 254.483(1) is to protect the security of Oregon elections" and that
13 "permitting such ballots to remain on the premises of the county clerks poses an unacceptable
14 *risk* to the integrity of Oregon elections." (Pls.' Br. at 3 (emphasis added)). Risk of harm,
15 however, is insufficient to demonstrate irreparable harm, which is required for preliminary
16 injunctive relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21-22 (2008)
17 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent
18 with our characterization of injunctive relief as an extraordinary remedy that may only be
19 awarded upon a clear showing that the plaintiff is entitled to such relief.").
20 The declaration of lead plaintiff Lisa Michaels demonstrates that plaintiffs have failed to
21 meet their burden with respect to irreparable harm. While the declaration is replete with
22 innuendo, Ms. Michaels ultimately concedes that the alleged conduct merely "suggest[s]
23 misconduct," and requests injunctive relief to "remove any opportunity for misconduct."
24 (Michaels Decl. ¶ 27). In the absence of clear and convincing proof, plaintiffs have failed to
25 demonstrate that they will be irreparably harmed without the relief they seek. And because other
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1 counties are not named, there is no guarantee that the order sought by plaintiffs will prevent the
2 harm plaintiffs complain about in other parts of the State.
3
4 **C. Plaintiffs fail to show that the balance of equities tips in their favor, or that the public interest favors relief.**
5 Plaintiffs also fail to satisfy the third and fourth basic requirements for injunctive relief:
6 that the balance of equities tips in their favor, and that the public interest favors relief. Several
7 factors here weigh against the relief sought:
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9
- the statutory goal of "uniformity" in elections, ORS 246.110, so that ballots are counted uniformly from county to county, which may be frustrated if some counties are forced to conduct hand counts,

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11
- the statutory goal of "correctness" or accuracy in elections, ORS 246.150, which is inconsistent with the use of hand counts;

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13
- the cost of attempting to satisfy plaintiffs' demands, at the same time that the state and county governments are facing dramatic losses of revenue, in the face of the statutory goal of "efficiency" in elections, ORS 246.150;

14
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- the lack of proof that plaintiffs will be irreparably harmed by the destruction at an appropriate time, as opposed to the 8 p.m. hour sought by plaintiffs;

16
17
- the delay by plaintiffs in filing suit, despite admonitions by the Supreme Court against eleventh hour pre-election challenges; and

18
19
- the State's express policy of promoting the right to vote – the "exercise of the right of franchise," ORS 247.005 -- by protecting the votes of military and overseas voters, handicapped voters, and those who are still in line waiting to vote at 8 p.m.

20 The public interest and the balance of the equities weigh sharply against the relief sought by
21 plaintiffs.
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IV. CONCLUSION

2 Plaintiffs' motion for a preliminary injunction should be denied.

3 DATED September 27, 2012.

4 Respectfully submitted,

5 ELLEN F. ROSENBLUM
Attorney General

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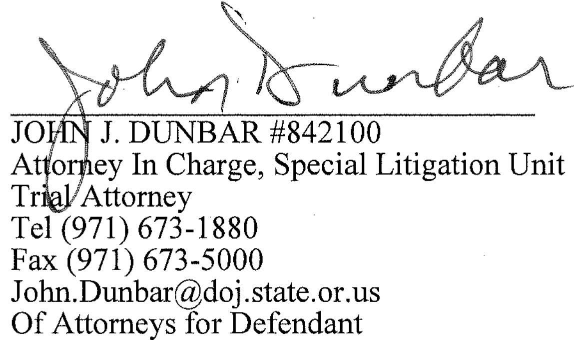
7 

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Department of Justice
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1 **CERTIFICATE OF SERVICE**

2 I certify that on September 27, 2012, I served the foregoing SECRETARY BROWN'S

3 MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY

4 INJUNCTION upon the parties hereto by the method indicated below, and addressed to the

5 following:

6

7 James L. Buchal
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9 Of Attorneys for Plaintiff

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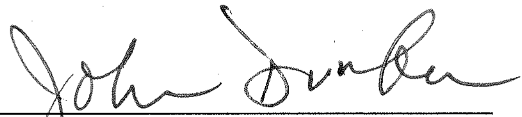

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