



November 7, 2022

Via First Class and Registered Mail

Oregon Elections Officers and County Clerks
via all addresses listed at end of letter

***Re: Litigation Hold Notice; Protecting Voting Rights for All Oregonians by
Ensuring Every Valid Vote is Counted and Invalid Votes are Not Counted***

Dear Oregon Elections Officers and County Clerks,

Our firm represents the Oregon Republican Party, who wants to ensure that Oregon's 2022 general election is free and fair. We look forward to continuing to work with you to ensure full transparency and integrity that will increase public confidence in Oregon's elections process.

We know you and your teams have been working very hard to facilitate this election. You are the front line of democracy. We understand that you face significant stresses and pressures and yet still do wonderful work for all Oregonians.

Thank you. We appreciate you and your work.

Please know that we have the highest respect for the important job that you do. Please consider this letter in light of that respect for you and your team.

1. It is unconstitutional to count ballots received after the election without a legible postal indicator showing timely mailing.

As you well know, your work includes a legal obligation to follow the United States and Oregon Constitutions, as well as validly enacted federal and state laws. When state statutes conflict with federal law or the Oregon constitution, then those state statutes are unconstitutional. This is one of those times.

a. Oregon voters were repeatedly promised that only ballots timely received or postmarked by election day would be counted in this election.

Oregon's state and county elections officers have repeatedly (and correctly) told voters in the lead up to this election that all mailed ballots "**must be received or mailed with a valid postmark by 8 PM Election Day.**" Oregon Secretary of State, Letter to Voters, p.2 in [Oregon Voters Pamphlet](#) (emphasis in original); *see also* Vote, p.7 in Oregon Voters Pamphlet ("If you mail your ballot it must be postmarked by the USPS by 8 pm on election day.") (emphasis in original); Frequently Asked Questions, p.10 in Oregon Voters Pamphlet ("How do I return my ballot? . . . If you mail your ballot, it must be postmarked by USPS on or before 8 pm on November 8.") (emphasis in original); <https://sos.oregon.gov/elections/Pages/faq.aspx> ("you can mail your ballot on election day so long as it is picked up and postmarked by the post office that

day.”); <https://sos.oregon.gov/elections/Pages/security.aspx> (“Starting in 2022, if mailed close to election day, all ballots must be post-marked by the USPS by election day to count.”); [Multnomah County](#) (“Voted ballots must be received at any County Elections office in Oregon or an Official Ballot Drop Site location by 8 p.m., Tuesday, Nov. 8, or mailed and postmarked by Nov. 8, to be counted.”); [Washington County](#) (“Ballots that are mailed must be postmarked by Election Day”); [Clackamas County](#) (ballots returned via mail “Must be postmarked by Election Day and received at the Election office within 7 days.”); [Benton County](#): “Ballots returned via USPS must be postmarked no later than Election Day and received by the Elections Office by the 7th day after the election”); [Lane County](#) (if returned by US Mail, “Ballots must be postmarked by Election Day.”); [Lincoln County](#) (“mail it in time to be received in the office of the County Clerk by Election Day”); [Clatsop County](#) (“You may mail your ballot: Ballots received from the USPS after election day will be accepted if they are postmarked on or before election day and received by the 7th day after the election and you have signed the envelope.”).

The Oregon Republican Party seeks to ensure that voters receive the election security for ballot submission that was promised repeatedly by both state and local elections officials.

b. The United States Constitution, federal laws, and Oregon Constitution prevent counting ballots that are not timely received or postmarked by election day.

Oregon’s legislature recently enacted an election statute that is partially unconstitutional and conflicts with what elections officials have communicated to voters. The statute allows ballots *without* any legible postal indicator proving timely mailing to be counted even if received up to seven days after the election. ORS 254.470(8).

Acceptance of undated ballots for seven days post-election allows ballots cast and mailed *after* election day to be improperly counted. Further, any erroneous or improper ballot separation could result in late ballots that were not even received from the post office at all being included in the counted votes. Any improperly counted ballots dilute the valid votes of all properly cast ballots and thereby violate the voting rights of the millions of Oregon voters who timely cast their ballots.

There is notable risk that a situation similar to Our Oregon / Defend Oregon’s illegal ballot harvesting activities in 2018 will repeat. *See* <https://www.oregonlive.com/politics/2019/02/oregon-secretary-of-state-proposes-95k-fine-for-ballots-turned-in-late.html> Those actions resulted in the largest election fine in state history. It would be even worse if this time ballot harvesters mailed ballots late so that some improper ballots could be counted due to the 7-day presumption.

“Extending the date by which ballots may be cast by voters . . . fundamentally alters the nature of the election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 206 L. Ed. 2d 452, 140 S. Ct. 1205, 1207 (2020). Notably, the United States Supreme Court went out of its way to vacate an erroneous lower court decision upholding Pennsylvania’s 2020 presumption that ballots arriving three days after the election were valid even without a postmark. *Bognet v. Sec’y Commonwealth of Pennsylvania*, 980 F.3d 336, 362–63 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 209 L. Ed. 2d 544, 141 S. Ct. 2508 (2021).

Federal law sets out a single election day. 2 U.S.C.A. § 7 (West). The 9th Circuit upheld Oregon's original early vote-by-mail process because it still left "election day as the 'consummation' of the process." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001). By the same logic, no ballots can be cast after election day as set by federal law. Because ORS 254.470(8) allows ballots cast after election day to be counted, ORS 254.470(8) is preempted by federal law.

Oregon Constitution, Art. 2, Sec. 1 requires: "All elections shall be free and equal" and Art. 2, Sec. 14 requires: "The regular general biennial election in Oregon . . . shall be held on the first Tuesday after the first Monday in November." Both provisions are violated by Oregon's 7-day presumption that allows ballots mailed after election day to be counted.

Based on this letter, each election official has an independent duty to challenge all ballots received after 8pm on election day from USPS without a legible postal indicator showing they were timely cast. ORS 254.415. To the extent that it is necessary, please also consider this letter notice that such a challenge will be forthcoming for each such ballot once we are provided with the relevant ballot envelopes or names for such ballots.

c. Requested Next Steps

Our quarrel is with the unconstitutionality of ORS 254.470(8), not with you. We recognize that the legislature's decision to enact unconstitutional requirements places you in a very difficult position, especially since the legislature also approves part of the funding for your offices. We request that you balance competing concerns here as follows:

- Please maintain full chain-of-custody records and evidence for all ballots received after 8pm on election day.
- Please proceed with evaluating signature validity for ballots received after 8pm on election day as you otherwise planned.
- Please proceed with evaluating postal indicators for mailed ballots received after 8pm on election day as you otherwise planned.
- **Please isolate any ballots and ballot envelopes received after 8pm on election day from USPS without a legible postal indicator showing they were timely cast. Please delay opening such ballots per ORS 254.426. If you choose to ignore ORS 254.426, please at least tally any such ballots separately from all other ballots and maintain separation for those ballots and their ballots envelopes** until either (1) it is conclusively determined that those ballots (along with any other questionable ballots, such as those subject to Elections Directive 2022-09) could not change the outcome of any election contest after the ballot cure period ends on November 29, 2022 or (2) there is a final court decision regarding the ballots and any appeal period has expired. *See* order of Supreme Court: *Republican Party v. Boockvar*, 208 L.Ed. 2d 293, 293-94 (Nov. 6, 2020) (ordering "(1) that all ballots received by mail after 8:00 p.m. on November [8

without a legible postal indicator showing they were timely cast] be segregated and kept ‘in a secure, safe and sealed container separate from other voted ballots,’ and (2) that all such ballots, if counted, be counted separately.”)

- Please ensure that election observers are allowed in the rooms where all of these processes are taking place. Observers must be close enough to be able to monitor and challenge signatures or ballots if needed. As you know ORS 254.482, requires that, if requested, county clerks “shall permit authorized persons to be at the office of the county clerk to watch the receiving and counting of votes.” While the *number* of observers can be limited to “not interfere with an orderly procedure at the office of the county clerk,” observer *access* itself cannot be unreasonably limited. As the Oregon Supreme Court recently recognized, this statute clearly contemplates that “ballot status information . . . may be released as part of the election verification process (for example, to allow members of the public to challenge a ballot.” *Whitehead v. Fagan*, 369 Or. 112, 115, 501 P.3d 1027, 1028 (2021).

2. Public Records Request

This letter also constitutes an official public records request under ORS Chapter 192. Please provide the following public records:

(1) copies of ballot envelopes for all 2022 general election ballots received from the post office after 8pm on election day containing a present and legible postal indicator that are counted;

(2) copies of ballot envelopes for all 2022 general election ballots received from the post office after 8pm on election day containing a present and legible postal indicator that are *not* counted;

(3) copies of ballot envelopes for all 2022 general election ballots received from the post office after 8pm on election day containing a present but illegible postal indicator;

(4) copies of ballot envelopes for all 2022 general election ballots received from the post office after 8pm on election day containing no postal indicator;

(5) copies of ballot envelopes for all 2022 general election ballots received after 8pm on election day from other county elections officers;

(6) copies of ballot envelopes for all 2022 general election ballots received after 8pm on election day from any source other than the post office or other county elections officers;

(7) any and all records related to chain of custody for ballots referenced in requests 1-6 above; and

(8) any and all records related to logging the numbers of ballots received in different categories, including but not limited to all those referenced in requests 1-6 above.

We are open to either physical copies or electronic scans, whichever would be most efficient for your office. However, if you have electronic scans, those would be preferable. We would prefer to receive the copies as soon as possible, so we are open to picking them up directly from you, receiving them by email or secure transfer, or whatever other delivery method is most efficient.

This request is being made under Oregon's public records laws (ORS Chapter 192). This request is in the public interest for ensuring full transparency on a topic of significant recent public discussion, so we request that you waive any fees. If you choose not to waive fees, please notify us prior to accruing total fees greater than \$25.

We are glad to discuss possible modifications of this request if they are needed to make this request easier to fulfill. Please advise if you need anything else from us to follow your office's public records request policy or process. Please let us know if you have any questions.

3. Litigation Hold Notice

Due to circumstances that are outside both our control and yours, we also must notify you of a litigation hold. Should improper ballots or other errors affect enough votes that it could change the outcome of an election contest, the Oregon Republican Party could be forced to file a lawsuit to protect the voting rights of all Oregonians and ensure that this election is free and fair. Such a lawsuit would necessarily include you and your office as parties.

In light of this, we write to outline your legal obligations to preserve all evidence relating to ballots, elections processes, election communications, all categories of records identified in the above public records request, and all information and documents relating to any ballot received after 8PM on election day. Because you are on notice of these claims, you must take all necessary steps to ensure the preservation of discoverable or potentially discoverable information.

You are required to preserve all information including all tangible objects, documents, and electronically stored information ("ESI") that may be related in any way to the potential claims and allegations in this matter. This obligation extends to each entity to whom this letter is sent, as well as to each entity's employees, officers, directors, owners, representatives, agents and any other persons acting by, or on behalf each entity, and encompasses information on personal devices, such as cell phones, computers and tablets.

ESI that should be preserved in its native format (along with its associated metadata) includes, but is not limited to, email and other electronic communications, word processing documents, spreadsheets, graphs, charts, presentations, databases, calendars, telephone records and voice mail, text messages, internet data, networks and network access information, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, including but not limited to, CDs, DVDs, external hard drives, thumb drives and floppy discs, laptops, tablets, desktops, personal digital assistants, handheld wireless devices, mobile telephones, smart phones, paging devices, and audio systems.

You have an obligation to preserve all evidence that is potentially relevant to this matter and suspend routine destruction policies where necessary to preserve evidence, including backups. The laws and rules prohibiting destruction of evidence apply to ESI in the same manner that they apply to other evidence. Due to its format, ESI is especially vulnerable to deletion,

modification, or corruption and you must take extra precautions to preserve this information until the final resolution of this matter. Those obligations include:

1. Discontinue all data destruction and backup tape recycling policies;
2. Preserve and not dispose of relevant hardware unless an exact replica of the files (a mirror image) is made; and
3. Maintain all other pertinent information and tools needed to access, review, and reconstruct all requested or potentially relevant electronic data.

You also may have potentially relevant ESI stored on your behalf by third parties (such as a vendor or consultant under contract). These third parties are under the same obligation as you to comply with the litigation hold.

4. Conclusion

We thank you again for your hard work in furtherance of what we all hope will be a smooth and secure election. We sincerely hope that no litigation is necessary. That would serve the best interest of all. However, in order to ensure election integrity and protect public confidence in the elections process, the Oregon Republican Party will take any legal action necessary to ensure that all valid votes are counted without being illegally diluted by invalid votes.

Yours truly,

SHERMAN, SHERMAN, JOHNNIE & HOYT, LLP

s/ Steve Elzinga

Steve Elzinga | Partner
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P.S. This letter was sent to all Oregon Elections Officers and County Clerks at the following addresses:

Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

Debbie Klug, Columbia County Clerk
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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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Via First Class and Registered Mail

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