



November 8, 2022

Via First Class and Certified Mail and Email

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

Re: Litigation Hold Notice; Persons Who are Not Registered to Vote in This Election Are Not Eligible to Vote in This Election

Dear Oregon Elections Officers and County Clerks,

Our firm represents the Oregon Republican Party, who wants to ensure that every eligible voter should have the opportunity to vote—but no one else. 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 followed the law.

In Oregon's vote-by-mail system, eligibility necessarily includes registering to vote "not less than 20 calendar days immediately preceding any election." Oregon Constitution, Art. II, Sec. 2(1)(c); *Barilla v. Ervin*, 886 F.2d 1514, 1523 (9th Cir. 1989) ("Oregon's 20-day cutoff is undeniably 'necessary'").

Online voter registration is easy and [takes just three minutes](#). Many Oregonians are also registered to vote through a 21-day notice and opt-out period after DMV interactions. All Oregonians had the opportunity to register to vote for the current election by October 18, 2022.

Last week, Oregon's Secretary of State issued a [press release](#) directing county elections officers to send ballots to 7,767 persons who apparently never registered to vote for this election. Although we requested clarification on exactly what occurred within two hours of the Secretary's public announcement, the Secretary's office did not respond to all our questions. See Exhibit A. Based on currently known information, the Secretary's directive appears to contradict Oregon law.

1. Oregon Law Prohibits Sending or Counting Ballots for Persons Who Are Not Registered to Vote

Any voter who timely registered to vote should have received a ballot already, so the Secretary's press release must concern individuals who did not take the three minutes required to timely register to vote. The Secretary's press release also indicates that these individuals were not automatically registered to vote. Thus, these individuals are not eligible to vote in this election.

ORS 247.017(4) requires that for automatic voter registration to occur: "A county clerk **may not send** a ballot to, or add to an elector registration list, a person who meets eligibility requirements until at least **21 calendar days after** the Secretary of State or county clerk

provided notification to the person as described in subsection (2) of this section.” (emphasis added). Evidently these 7,767 people did not go through the 21-day notice and opt-out period required for automatic voter registration.

Further, the Secretary of State’s office has not clarified whether this list was screened against normal things like change of address (ORS 247.555; 247.563), duplicate registrations in other states through ERIC (ORS 247.555; 247.563), records of deceased individuals (ORS 247.555; 247.570), etc. before directing counties to send ballots. These are significant concerns.

Based on current information: (1) the Secretary of State did not have legal authority to direct counties to send 7,767 new ballots to persons who were not registered to vote in this election; (2) county elections officials did not have legal authority to send such ballots; and (3) these 7,767 new ballots are not eligible to be counted under Oregon law.

Based on this letter, each election official has an independent duty to challenge all of the 7,767 ballots in their county under ORS 254.415. To the extent that it is necessary, please also consider this letter notice of a challenge to each such ballot that you receive.

We recognize that the Secretary’s directive places you in a very difficult position given that the Oregon Constitution and Oregon statutes prohibit mailing or counting ballots for individuals who were not timely registered to vote. If any such ballots are returned, we request that you do the following:

- Please keep a separate list of any of these 7,767 new ballots sent by your county.
- Please proceed with evaluating signature validity for ballots on this list that are timely received under the normal process.
- **Please carefully follow the instructions in [Elections Directive 2022-09](#) that “Ballots shall be held separately when returned and shall not be opened, separated from envelopes, or tallied until the expiration of the deadline for resolving challenged ballots.”** The Secretary of State’s Office has subsequently clarified that “The ‘expiration of the deadline for resolving challenged ballots’ is meant to refer to ORS 254.431(2),” which is November 29, 2022. *See* Exhibit A; *see also* 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.”)

2. Public Records Request

This letter also constitutes an official public records request under ORS Chapter 192 for copies of (1) a list of any of these 7,767 new ballots sent by your county, including the name of each person on the list; (2) all ballot envelopes you receive for all 2022 general election ballots

that are part of the 7,767 new ballots sent by your county; and (3) all communications regarding this issue, including with the Secretary of State's office or other county elections officials.

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 Elections Directive 2022-09, 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 sent pursuant to Elections Directive 2022-09. 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
steve@shermlaw.com

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

Via First Class and Certified Mail

Stefanie Kirby, Baker County Clerk
1995 3rd St., Suite 150
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skirby@bakercounty.org

Via First Class and Certified Mail

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Via First Class and Certified Mail

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Via First Class and Certified Mail

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Via First Class and Certified Mail

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Derrin (Dag) Robinson, Harney County Clerk

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Kelly Magaña Deputy County Clerk
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Via First Class and Certified Mail

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Salem OR 97310
elections.sos@sos.oregon.gov

Exhibit A

From: [RUNKLES PK * SOS](#)
To: [Steve Elzinga](#)
Cc: [SCROGGIN Deborah * SOS](#)
Subject: RE: Clarifications on 7,767 New Ballots
Date: Thursday, November 3, 2022 11:12:36 AM

The “expiration of the deadline for resolving challenged ballots” is meant to refer to ORS 254.431(2).

From: Steve Elzinga <steve@Shermlaw.com>
Sent: Thursday, November 3, 2022 9:01 AM
To: RUNKLES PK * SOS <PK.RUNKLES@sos.oregon.gov>
Cc: SCROGGIN Deborah * SOS <Deborah.SCROGGIN@sos.oregon.gov>
Subject: RE: Clarifications on 7,767 New Ballots

P.K.,

Thank you for your follow up. I will note that the sources you referenced do not answer my clarification questions below, and I understand from your email that no such clarifications will be provided.

That said, the directive was helpful to review. Thank you for including in the directive the requirement that there be “an identifying feature on the return envelope for the purpose of separating it from ballots not subject to this directive” and that “Ballots shall be held separately when returned and shall not be opened, separated from envelopes, or tallied until the expiration of the deadline for resolving challenged ballots.” (underlining added). Is the deadline referenced here the 14th calendar day after the date of the election per ORS 254.426(5) or some other date?

Thank you,
Steve

Steve Elzinga | Partner

| S | S | J | H | Sherman Sherman Johnnie & Hoyt, LLP | *Attorneys at Law* |
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From: RUNKLES PK * SOS <PK.RUNKLES@sos.oregon.gov>
Sent: Wednesday, November 2, 2022 2:05 PM

To: Steve Elzinga <steve@Shermlaw.com>
Cc: SCROGGIN Deborah * SOS <Deborah.SCROGGIN@sos.oregon.gov>
Subject: RE: Clarifications on 7,767 New Ballots

Steve:

Thank you for your inquiry. The Secretary has already provided public information through a [press release](#) and a [directive to clerks](#), both of which are available on our website; I have hyperlinked them for you. The Secretary is also committed to transparency by fulfilling requests submitted under the Oregon Public Records Law. As you know, if you require records, you may submit requests through our web portal, [here](#).

P.K.

From: Steve Elzinga <steve@Shermlaw.com>
Sent: Wednesday, November 2, 2022 1:36 PM
To: RUNKLES PK * SOS <PK.RUNKLES@sos.oregon.gov>; SCROGGIN Deborah * SOS <Deborah.SCROGGIN@sos.oregon.gov>
Subject: RE: Clarifications on 7,767 New Ballots

Circling back regarding the questions below. Please provide clarification.

Steve Elzinga | Partner

| S | S | J | H | Sherman Sherman Johnnie & Hoyt, LLP | *Attorneys at Law* |

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From: RUNKLES PK * SOS <PK.RUNKLES@sos.oregon.gov>
Sent: Monday, October 31, 2022 5:01 PM
To: Steve Elzinga <steve@Shermlaw.com>; SCROGGIN Deborah * SOS <Deborah.SCROGGIN@sos.oregon.gov>
Subject: RE: Clarifications on 7,767 New Ballots

Message received, Steve.

From: Steve Elzinga <steve@Shermlaw.com>
Sent: Monday, October 31, 2022 4:56 PM

To: SCROGGIN Deborah * SOS <Deborah.SCROGGIN@sos.oregon.gov>

Cc: RUNKLES PK * SOS <PK.RUNKLES@sos.oregon.gov>

Subject: Clarifications on 7,767 New Ballots

Importance: High

Director Scroggin,

I just saw the press release on the 7,767 new ballots to be issued based on the software error by Secretary Atkins' team over six years ago. I would appreciate clarification on whether the 7,767 list has already been screened for normal things like change of address (ORS 247.555; 247.563), duplicate registrations in other states through ERIC (ORS 247.555; 247.563), records of deceased individuals (ORS 247.555; 247.570), etc. as required by Oregon law. Can you please clarify which, if any, of this screening has or will occur before ballots are sent?

Also, ORS 247.017(4) requires that for automatic voter registration to occur: "A county clerk may not send a ballot to, or add to an elector registration list, a person who meets eligibility requirements until at least 21 calendar days after the Secretary of State or county clerk provided notification to the person as described in subsection (2) of this section." Have these 7,767 people already received this 21-day notice as required by Oregon law?

Given how quickly this is developing, the election occurring next week, and in the need for full transparency and voter confidence in the elections processes, I would appreciate a quick response. If I should direct these questions to someone else, please let me know who. I have copied P.K. to ensure counsel is in the loop on these questions.

Thank you,
Steve

Steve Elzinga | Partner

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