IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

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| WASHINGTON COUNTY,<br><br>Plaintiff,<br><br>v.<br><br>TIM SIPPEL,<br><br>Defendant. | Case No. 22CV07782<br><br>OREGON SECRETARY OF STATE'S REPLY IN SUPPORT OF THE MOTION TO INTERVENE<br><br>**ORS 20.140 - State fees deferred at filing** |

Defendant Tim Sippel, through his counsel, opposes the Secretary of State's motion to intervene on three grounds:

(1) the Secretary's interest here is too attenuated to support her intervention;

(2) the Secretary's position that the release of the ClearBallot database and the files it references is exempt from disclosure is not meritorious because, among other reasons, it would not compromise the security of election systems in the 15 Oregon counties that use ClearBallot systems; and

(3) it is unfair for the Secretary and the county to both argue that Mr. Sippel is not entitled to the election database he requests.

None of these arguments are persuasive.

1. The Secretary has a direct interest in the judgment. If the Court enters a judgment requiring the release of the ClearBallot database, that judgment would compromise the security of the election systems used in 15 Oregon counties. Secretary's Proposed Complaint in Intervention ¶ 8. Releasing such data without restriction would be the direct result of the Court's judgment and would not be contingent on the outcome of any future case against the Secretary.



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For example, in Colorado, the public release of data compromised election equipment, requiring its Secretary of State to decertify the equipment for use in future elections. *See* Statement from Colorado Secretary of State Jena Griswold Regarding Ongoing Investigation into Security Protocol Breach in Mesa County (Aug. 10, 2021), https://www.coloradosos.gov/pubs/newsRoom/pressReleases/2021/PR20210810MesaCounty.html.

It is the public release of the data itself, rather than this case's legal effect in a subsequent case, that risks such harm. That makes this case unlike cases when a trial court could safely deny intervention because putative intervenors could protect their interests in a subsequent proceeding. *Cf. Taylor v. Portland Adventist Med. Ctr.*, 242 Or App 92, 103 (2011) ("should defendant later bring an action against the [intervenors] for indemnity, the [intervenors] would be free to argue that they were not negligent at all"); *Samuels v. Hubbard*, 71 Or App 481, 489 (1984) ("A judgment against [the defendant] in this case neither decides this point nor impairs intervenors' ability to raise it in another proceeding.").

2. Mr. Sippel's premature arguments that the database he requests is not subject to any public records exemption depend on a series of unsupported and erroneous factual propositions: that the data he requests solely consists of the county's work product rather than ClearBallot's trade secrets (at 4–5); that the definition of work product under the county's contract with ClearBallot is coextensive with the statutory definition of a "computer program" (at 3–5); and that the cybersecurity of the ClearBallot system can be ignored because preventing physical access to the system is sufficient (at 5–6). To take just that last example, the National Academy of Sciences' authoritative report on election security squarely rejects Mr. Sippel's claim that cybersecurity is unnecessary for a system that is not connected to the internet. *See* National Academies of Sciences, Engineering, and Medicine, *Securing the Vote: Protecting American Democracy* (2018), at 90, https://nap.nationalacademies.org/read/25120/chapter/7#90



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("Even when systems are not directly connected to networks, they are vulnerable to attack through physical or wireless access.").

But none of these factual and legal disputes are appropriate to resolve on a motion to intervene. As the District Attorney's letter opinion conveyed, this case turns on factual determinations it could not make without adversarial evidentiary presentations. *See* Complaint, Exh. A, at 7. The present motion is to determine whether the Secretary has a sufficient interest to allow her to intervene. She need not prove the merits of her position at this stage; in a case like this, even on a motion for summary judgment, a party only must attest that it is prepared to call an expert witness at trial to support its factual contentions. *See* ORCP 47 E. There is no question that 14 other counties use the ClearBallot system, and that the Secretary has an interest in protecting the security of elections systems in those counties.

Mr. Sippel's contention that the Secretary's position that granting his request would not "reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken … to protect … information processing … systems, including the information contained in the systems," ORS 192.345(23), must be decided with a factual record. If the Court agrees with Mr. Sippel that it must make that determination at the outset of this case, the Secretary requests that the Court schedule an evidentiary hearing on this motion so she may present her evidence.

3. The Secretary's participation would not unfairly prejudice Mr. Sipple. He has retained counsel, whose fees the Court may require the county to pay. *See* ORS 192.431(3) (providing for attorney fee awards in public records cases); ORS 192.415 (applying the ORS 192.431 procedures to public bodies other than state agencies). This case would be tried to the Court, so there is no concern of jury confusion. And the Court retains authority to control the trial to avoid the "needless presentation of cumulative evidence." ORE 403. If the Secretary's evidence simply persuades the Court that Mr. Sippel is not entitled to the database he requests, that is facilitating the Court's just adjudication of the merits of his claim, not *unfair* prejudice.



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The Court should grant the motion to allow the Secretary to present her evidence and arguments to the Court so they may be evaluated on their merits.

DATED April 14, 2022.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on April 14, 2022, I served the foregoing OREGON SECRETARY OF STATE'S REPLY IN SUPPORT OF THE MOTION TO INTERVENE upon the parties hereto by the method indicated below, and addressed to the following:

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| Jason Bush<br>Washington County Counsel<br>155 N First Ave Ste 340<br>Hillsboro, OR 97124<br>*Of Attorneys for Plaintiff* | ___ HAND DELIVERY<br>_X_ MAIL DELIVERY<br>___ OVERNIGHT MAIL<br>_X_ SERVED BY E-FILING<br>_X_ SERVED BY EMAIL:<br>jason_bush@co.washington.or.us |
| Stephen Joncus<br>Joncus Law PC<br>13203 SE 172nd Ave.<br>Suite 166, #344<br>Happy Valley, OR 97086 | ___ HAND DELIVERY<br>_X_ MAIL DELIVERY<br>___ OVERNIGHT MAIL<br>___ SERVED BY E-FILING<br>_X_ SERVED BY EMAIL<br>steve@joncus.net |

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