

**COPY**

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF LINCOLN )

SECOND JUDICIAL CIRCUIT

\*\*\*\*\*

WE THE PEOPLE for FREE, FAIR, and  
TRANSPARENT ELECTIONS, LLC,

Plaintiff,

OTHER HEARING

vs.

SHERI LUND, LINCOLN COUNTY AUDITOR  
And LINCOLN COUNTY AUDITOR'S OFFICE,  
in and for LINCOLN COUNTY, SOUTH DAKOTA,

Defendant.

41CIV.22-000463

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BEFORE: The Honorable John Pekas  
Circuit Court Judge  
Sioux Falls and Canton, South Dakota.

APPEARANCES: Mr. R. Shawn Tornow  
Attorney at Law  
PO Box 90748  
Sioux Falls, South Dakota

For the Plaintiff;

Mr. Joseph Meader  
Mr. William Golden  
Attorneys at Law  
104 North Main Street Suite #200  
Canton, South Dakota

For the Defendant.

PROCEEDINGS: The above-entitled proceedings commenced  
at 8:00 a.m., on the 13<sup>th</sup> day of September,  
2022, in Courtroom 6A, at the Minnehaha  
County Courthouse, Sioux Falls, South  
Dakota.

Roxane R. Osborn  
605-782-3032  
Sioux Falls, South Dakota

1 THE COURT: All right. Let's go ahead and go on the  
2 record, I do apologize, I have another hearing starting at  
3 8:30. We don't have a lot of time this morning. This is  
4 41CIV.22-463. It's, WE THE PEOPLE for FREE, FAIR and  
5 TRANSPARENT ELECTIONS, LLC., versus the Lincoln County  
6 Auditors and Sheri Lund. And, ah, may I note appearances,  
7 please.

8 MR. MEADER: Thank you, Joe Meader and Bill Golden on  
9 behalf of Lincoln County.

10 MR. TORNOW: R. Shawn Tornow, Tornow Law Office on behalf  
11 of the plaintiff.

12 THE COURT: Thank you. And, ah, we're here, I believe on  
13 the motion that was to go ahead and to vacate the order  
14 entered last week, and, ah, Mr. Tornow, I did get up early  
15 this morning, and I actually saw that there was a filing at  
16 about 4:30 in the morning. You must have been burning the  
17 candle at both ends, but, ah, I don't even know if you had a  
18 chance to even review it, Mr. Golden or Mr. Meader.

19 MR. MEADER: I did.

20 THE COURT: All right. Thank you. And are you ready to  
21 proceed then at this time, Mr. Tornow?

22 MR. TORNOW: Yes.

23 THE COURT: All right. And are you ready to proceed at  
24 this time, Mr. Meader?

25 MR. MEADER: Yes, Judge.

1 THE COURT: All right. So, please, proceed whenever  
2 you're ready. Mr. Tornow.

3 MR. TORNOW: Do you want me to go ahead on the initial  
4 order to vacate, or their, their motion, or the order, or  
5 their motion to vacate, how do you want to go forward?

6 THE COURT: I'll let you go ahead and do the motion to  
7 vacate, Mr. Meader.

8 MR. MEADER: Thank you, Judge. Um, it's Lincoln County's  
9 position that this order took the form of a preliminary  
10 injunction, as such there's several statutory requirements  
11 that need to take place for that order to come in to  
12 existence. The first is because there was no, um, joint  
13 motion by the parties or stipulation, that there should have  
14 been a motion by plaintiffs in this case to that effect.

15 There was no motion. And as such Lincoln County had no  
16 notice of the fact that this order was coming to be. In fact,  
17 the counties had -- the county and the plaintiffs had not had  
18 any communication at all in regards to the case. The only  
19 communication came in the form of our auditor and our office  
20 being served papers that this case even existed.

21 It's Lincoln County's position that because we didn't  
22 have a stipulation there should have been a motion, and  
23 because we didn't have notice, we were not able to stipulate  
24 and, therefore, there should have been hearing on the matter  
25 for us to be able to appear in front of Your Honor to argue in

1 favor, or against, or to formulate some sort of language, ah,  
2 that would properly address the order overall. None of that  
3 happened here.

4 It's Lincoln County's understanding that this order came  
5 to be signed in an ex parte manner, and as our brief states,  
6 the only ex parte orders that I'm aware that come to exist are  
7 temporary protection orders or search warrants, um, and that's  
8 -- there's a reason for those orders being generally  
9 disfavored, Judge. Ah, parties need to be able to argue that  
10 merits of the order on their behalf in front of a judge and  
11 put it on the record.

12 Um, the other thing I'll state as an aside in this matter  
13 is that Mr. Tornow's brief mentions the fact that Lincoln  
14 County should have known that we waived such a right to be  
15 able to address this order on the merits by having stipulated  
16 in another case to preserve those records. That is not the  
17 case in front of Your Honor. That is a separate matter and  
18 that should not be considered for purposes of this order.

19 I would argue alternatively that Mr. Tornow's argument  
20 also fails for that reason because he, himself, being an  
21 attorney of record in that other case would have known that  
22 Lincoln County already stipulated to preserve those records  
23 and that this order would have become unnecessary. So, I  
24 don't believe the argument works either way.

25 As far as standing, um, I believe it's a pretty

1 elementary understanding that Lincoln County being one of the  
2 parties involved in the order has standing to argue the  
3 wording of the order itself. As such, I believe Lincoln  
4 County has the opportunity to speak that any named party would  
5 possibly have been able to be included in that order had the  
6 statutory requirements been met. They had not.

7 But then further that the order addressed parties that  
8 have not been named in this litigation or any other litigation  
9 for that matter. Um, and that was the reason that Lincoln  
10 County addressed the jurisdictional issue as far as what I  
11 would say these 65 other counties were involved.

12 Um, overall, Judge, to be frank, I was unsure of how to  
13 address the brief after Your Honor already signed the order to  
14 vacate, but I would generally say that I believed that that  
15 was proper considering the fact that there had been no motion,  
16 no hearing, and there had been no general discussion between  
17 the parties otherwise to stipulate to any sort of language in  
18 the order.

19 And, finally, Judge, I would just mention as far as the  
20 jurisdiction also goes that, um, the parties, I guess, the 65  
21 other counties that were proposed were never served in this  
22 matter. They were only faxed this order after the fact and so  
23 as far as the procedural requirements go, I would just say  
24 that the 65 other counties also fail that statutory  
25 requirement that they were given notice and appeared before

1 Your Honor in such a manner.

2 THE COURT: Thank you.

3 MR. MEADER: Unless, Your Honor, has any questions, I  
4 would rest.

5 THE COURT: Thank you, Mr. Meader, and are you ready to  
6 proceed, Mr. Tornow?

7 MR. TORNOW: Yes, thank you. First of all, Judge, um,  
8 as we pointed out, and you did indicate, and I appreciate  
9 that, that we-we did file our responsive brief early this  
10 morning, and that's because for whatever reasons, and I'm not  
11 casting aspersions, um, but we were not served. I, I still  
12 haven't been served with their brief, um, as part of the  
13 motion to vacate that was only filed yesterday.

14 Um, I, I do understand it's within the Odyssey system. I  
15 can't explain why it's not there. We've submitted, and I  
16 think our Exhibit A shows we didn't have it, and I can tell  
17 you we still don't have it. I'm not saying they did anything  
18 wrong because I see that it, it is on file, but I point that  
19 out because I, I guess, and in addition to that, I would say  
20 that their brief really is untimely, and, and I'm not  
21 necessarily doing a tit-for-tat type argument, but when they  
22 claim, well, there was no notice. We have these issues with  
23 the, the, the order that was entered on September 1<sup>st</sup>, when, in  
24 fact, we have the stipulation, and, and I'll address that as  
25 part of the due process.

1 I, I find it a little bit troubling that they filed their  
 2 brief only the day before when it could have been filed last  
 3 week. That having been said, I think our bigger and more  
 4 important argument is that their concerns are really covered  
 5 by principals of Res judicata, and I've cited -- they've cited  
 6 no case authority for their due process argument, but I cited  
 7 *Farmer versus South Dakota Department of Revenue* 2010 case  
 8 South Dakota 35, that-that generally has some analogies, I  
 9 believe, and, and the-the reason that there is res judicata  
 10 here that, and they say, well, it's a separate action, of  
 11 course it's a separate action. That's-that's what res  
 12 judicata is about, but it does have the same parties. It  
 13 meets the criteria that there was a judgment on the merits  
 14 given that the court did enter an order on August 26<sup>th</sup>. And we  
 15 know, Judge, that this is a unique case because it's so time  
 16 sensitive. It was very much time sensitive as to September  
 17 3<sup>rd</sup>, um, and, and the court entered its order that covers  
 18 Lincoln County. We, we, we would submit in its entirety as  
 19 per that order.

20 So, the fact that we have this parallel order that deals  
 21 really with other counties, um, they-they haven't worked any  
 22 due process to that because again they don't -- we would  
 23 submit, and we've argued they don't have standing to make that  
 24 argument for Brule County, Douglas County, Ziebach County.  
 25 Those counties as was envisioned in the order that you signed

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1 on September 1<sup>st</sup>, um, those counties can certainly appear and  
2 say, you know, to use an old adage from you know our child,  
3 our childhood years you know you're not the boss of me, you  
4 can't tell me what to do. That seems rather implausible when  
5 we're simply seeking transparency here, and open records that  
6 are public records versus the destruction of records. So, I,  
7 I don't know that that would even come about, and I would note  
8 that these other counties did receive a copy of the order, um,  
9 and again to whatever extent they may challenge that we, we  
10 would address that at the time. That hasn't happened.

11 So, we would submit again that that it meets the criteria  
12 of res judicata as to Lincoln County. We point out that, um,  
13 I pointed out that, that, that the question decided in the  
14 form or action is the same as the one decided here. We're  
15 talking about simply preservation of records versus allowing  
16 public officials to destroy those records potentially  
17 beginning on September 3<sup>rd</sup>.

18 Um, as to point three that the parties are the same, I  
19 can tell you I can attest that as you know both cases deal  
20 with a public records request, one of which took the avenue of  
21 going through the office of hearing examiner with Jessica  
22 Pollema being the named party therein. Here we have, We the  
23 People for Free, Fair and Transparent Elections, LLC, which,  
24 of course, Jessica Pollema, is, and it's on file with the  
25 Secretary of State one of the members, up there, there's



1 several members, but she's one of the members of that entity  
2 as well.

3 So, we think the parties overlap as well, and that there  
4 and-and again as to .4 res judicata that there was a full and  
5 fair opportunity to litigate the issues, that was done, we  
6 would submit, by stipulation as a part of the first order.

7 I-I would point out when they say, well, there was no one  
8 hearing, it was ex parte, I-I want to make clear so the record  
9 is clear that as the court is aware once this-this action, the  
10 We The People action was filed, um, on the 31<sup>st</sup> I believe about  
11 noon, shortly thereafter before any appearance had been made,  
12 before I knew who-who might appear or who might not appear.  
13 The reason I say that is in the other action where the order  
14 is applicable, Minnehaha County went and got outside counsel.  
15 I didn't know if that would happen here or not, um, but before  
16 any of that took place, and I note that Mr. Meader made his  
17 notice of appearance I think not until late in the day, I want  
18 to say about 5:00 o'clock on September 1<sup>st</sup>. I simply placed a  
19 call to Your Honor and left a message about having another  
20 order. It's time sensitive. It would be you know in the same  
21 general form as the prior order, um, and wondered if there was  
22 anything more we could do in that regard.

23 As you know, and-and-and I'm just saying this for the  
24 record, I simply showed up the next day. You were in the  
25 midst of trial, um, when we caught eyes you indicated, do you

1 have an order? You-you listened to the voicemail, it made  
2 sense and you signed it.

3 So, I want to make it clear that there wasn't some  
4 meeting that we had here that we did, it was simply a-a phone  
5 message when there had been no, ah, no one had appeared. They  
6 hadn't even been served yet, but-but I was so concerned given  
7 that it was August 31<sup>st</sup>, and we have the holiday coming being  
8 very concerned about Friday afternoon before the holiday of  
9 whether it would even be possible to get such an order.  
10 That's why the phone message and-and thus your order.

11 As to the, um, ah, the issue again I guess as to due  
12 process we think we've-we've established that there was, in  
13 fact, um, that was covered. We would submit by, by and  
14 through their stipulation, because, Judge, with all due  
15 respect to counsel, when-when they initially said we have  
16 problems with this order, even with the order being vacated it  
17 changed their position not one iota. They're still bound to  
18 keep all the records. I, I believe there was some press  
19 release. The auditor said, well, now, you know I wasn't  
20 planning to get rid of the records. Quite honestly, we think  
21 that's true for all of the auditors, um, and that's why this  
22 order was not of any monumental significance, um, it was  
23 simply making clear, ah, that that would be required.

24 What I pointed out in my brief that I also want to touch  
25 on, if there, if there's some argument about, well, it covers

1 future elections that's really a moot point because those are  
2 covered under both federal law and state law, but until we get  
3 the point of we're at the 21<sup>st</sup> month many, many, many months  
4 from now, your order wouldn't have any different or differing  
5 effect I should say in that regard.

6 So, you know, overall, I guess this-this case is -- has-  
7 has always been time sensitive. The court is aware of that.  
8 Counsel was aware of that as to the other matter. Again, they  
9 are, um, if they're not almost identically the same case  
10 they're certainly kissing cousins of cases, and we're not  
11 asking of anything to any greater extent here, and-and again  
12 Lincoln County is bound by it by the original order. So,  
13 their complaints and-and their claim that they have standing  
14 as to the wording of the order, um, I-I beg to differ in that  
15 respect. And in that regard, again, they've cited no  
16 authority in that regard how they have standing in that  
17 regard. I did cite the *Lippold v. Meade County Board of*  
18 *Commissioners* case from 2018. I think it's somewhat  
19 analogous, um, in that Supreme Court there specifically dealt  
20 with, well, who has the standing to deal with these, um, for  
21 lack of a better term sort of jurisdictional issues, and they  
22 found there that there wasn't appropriate standing, um, by  
23 those folks that had tried to raise the issue about the  
24 establishment of the, making Buffalo Chip a city. So, we  
25 think that goes here, that Lincoln County can't say, and, by

1 the way, I do note in their motion and maybe it's just  
2 standard form, but they say that they're appearing here on  
3 behalf of the state. They're not. They're here on behalf of  
4 Lincoln County. They're not the attorney general's office  
5 dealing with maybe a secretary of state issue about these  
6 local auditors or these county auditors. And, again, if those  
7 county auditors, we've not heard from had any such issue, um,  
8 they could certainly appear, and we would deal with it at that  
9 time. We think therefore the order was appropriate. It  
10 should be vacated. It should not have and-and the court's  
11 going to do what the court's going to do, um, but we would  
12 submit that-that their claim of authority to-to strike that  
13 order is not sufficient, and, and I guess I would just say  
14 this in the end, we really don't think given that we have  
15 these parallel cases of just seeking open records from public  
16 officials and-and only asking them not to destroy those  
17 records really shouldn't be something that takes, um, you know  
18 the proverbial act of Congress to stop from happening, um, and  
19 we think the order was appropriate in and of itself especially  
20 given the-the court's prior order, and we would ask that, ah,  
21 um, that order be reinstated as the court may so chose.

22 THE COURT: Thank you, Mr. Tornow, and brief reply.

23 MR. MEADER: Quickly, Judge. I would just state that,  
24 once again, I believe Mr. Tornow at one moment says that this  
25 doesn't change anything for Lincoln County, but then in the

1 next sentence says that this was so time sensitive that he  
2 wasn't able to talk contact counsel for Lincoln County who he  
3 knew to exist from the other case. I believe those two  
4 thoughts are competing in ideas, um, that is why statute  
5 allows parties certain time to answer a lawsuit, um, because I  
6 hadn't filed a notice of appearance yet has no bearing for  
7 whether counsel should have been given notice or that a motion  
8 should have been drafted to allow parties to appear before  
9 Your Honor in an expediated manner.

10 I would quickly say, also, that, um, once again that the  
11 parties in this case are Lincoln County and the plaintiff.  
12 The 65 other auditors are not named in this lawsuit. They  
13 were not served. They were not made aware of this lawsuit.  
14 They were not made aware of the possibility of this order  
15 until they were faxed it, um, and that's just the simple fact.  
16 It's not an issue of standing to argue that. It's  
17 jurisdiction. It's something that Your Honor can address  
18 himself and that that is an important part of the litigational  
19 process that parties are served and given notice. So, I don't  
20 believe even if you are, um, convinced by the argument of  
21 standing, I believe you can address that on yourself by  
22 yourself, Your Honor.

23 And, finally, I would just state that Mr. Tornow's  
24 argument that the preservation of records shouldn't require a  
25 motion. I would disagree with that on its base. It is a form

1 of a preliminary injunction by telling a party something that  
2 they cannot do, ah, when there's other statut--statutory  
3 authority otherwise.

4 Finally, Judge, I would just say that, um, I would agree  
5 with Mr. Tornow that these events came to happen rather  
6 quickly. I don't have the dates in front of me, and I can  
7 present that if Your Honor would request a post-motion brief,  
8 but I believe within a period of five days the LLC was formed.  
9 The complaint was filed. The parties were served, and then  
10 this order was signed. I only say that to the effect that the  
11 time sensitivity could have been addressed at an earlier time  
12 and place, and it was a creation of the plaintiffs themselves  
13 by this late creation filing, serving an order, signing, ah, I  
14 would also just state that the order, itself, is a mere image  
15 of the other litigation except for the simple fact that it  
16 changes the parties that are named to the entire State of  
17 South Dakota, and I believe that's a material change from the  
18 other signed order that should have been made aware to court  
19 and counsel. That is a substantive change, and it should have  
20 been addressed on the merits.

21 THE COURT: Thank you, Mr. Meader, and I do appreciate  
22 the parties coming early this morning. You know when I first  
23 got on the bench I had the opportunity of having my chambers  
24 adjacent to, ah, ah, Judge Larry Long, former attorney general  
25 and then, of course, our presiding judge, and he smiled at me

1 one morning when I was going over something similar to a  
2 situation that we have right now, and he said, there isn't  
3 anything I can't fix without a signature of my pen, and that's  
4 exactly what I did in this case, is I went ahead and I signed  
5 and I vacated the order that was presented, primarily because  
6 of the notice situation, and the claims of no notice.

7       However, ah, there is presented to the court as the  
8 parties talked about this stipulation for order requiring  
9 preservation of records, it's in a different file, but yet  
10 Lincoln County's listed and in this particular stipulation it  
11 does indicate that the parties are agreeing to the entry of an  
12 order preserving the machine logs related to not only that,  
13 but the cast vote records of the ballots.

14       And the concern I have is when I read the news is my  
15 concern is that are there really CVR's? From what was  
16 indicated from our Secretary of State Barnett, ah, do we have  
17 CVR's in these cases, and that's the concern I believe when  
18 we're talking about that time sensitive nature. I believe the  
19 software was billed to the state and the counties as having  
20 the CVR functionality, and if it doesn't have that  
21 functionality then that creates a problem because we paid for  
22 that, and the people of South Dakota should have the right to  
23 have that information, if it wasn't provided, then I think  
24 there's a reason why we have to have transparency in  
25 government.

1           So, with that being said, and with the situation related  
2 to the lack of notice, I do believe that, ah, it's appropriate  
3 to go ahead and talk about other situations that, ah, of  
4 course, the plaintiff could have come in here. We could be  
5 here on a writ of mandamus. We could be a writ of prohibition  
6 on destroying the ballots. We could be here on a writ of quo  
7 warranto. There are plenty of common law writs that, of  
8 course, are binding on officials, ah, and that avenue could  
9 have been utilized. Reciprocally, we could have had just a  
10 motion to intervene by, of course, ah, I believe, ah, the  
11 plaintiff in We the People could have intervened in the matter  
12 of the public record request. That intervention also could be  
13 allowed.

14           So, once again, we have multiple different avenues to go  
15 ahead and try to get some efficiencies with even what, ah, Mr.  
16 Tornow indicated is substantially related litigation, and so  
17 I'm going to go ahead and at this point ask the parties to go  
18 ahead and to have a conversation on how you want to proceed  
19 with a stipulation as to the entry of the order that was done  
20 in the other case or I'm going to go ahead and give leave to,  
21 of course, ah, have Mr. Tornow file a motion to intervene or  
22 take whatever action he wants to go ahead because at this  
23 point the parties have already agreed to preserve the records,  
24 and so we need to look at some judicial economy as well to go  
25 ahead and try to get some efficiencies here because the



1 parties are substantially the same.

2 Now, in getting regarding the, ah, ah, the jurisdictional  
3 issue related to the other counties. In the other order, I  
4 can see that it's binding on Pennington County, Minnehaha  
5 County, and Lincoln County, ah, and now, of course, it's been  
6 expanded to the rest of the counties that, of course, Mr.  
7 Tornow was indicating. At that point, I think that those  
8 parties need to be given notice, they need to be served and  
9 have an opportunity to appear, but I'm not, ah, going to be  
10 expand-expanding it to those other counties. At this point  
11 I'm going to limit it just to Lincoln County, but once Mr.  
12 Tornow decides on whether he wants to intervene into the other  
13 case, ah, that would clearly then potentially involve  
14 Pennington and Minnehaha County.

15 And I might also mention the fact that I don't know where  
16 the voting information goes, if it's kept actually at the  
17 auditor's office, or if it's transported for calculating  
18 purposes to the Secretary of State. I know there's, there's  
19 some process involved in that. If the Secretary of State has  
20 some of the voting information that, of course, Lincoln County  
21 has, and whether it was a federal election it could be  
22 triggered and there could be jurisdiction given the fact that  
23 there's potential triggering of federal law, but at this  
24 particular juncture, I'm going to go ahead and leave that up  
25 to Mr. Tornow. You can have a conversation with Mr. Meader or

1 Mr. Golden, and you guys can figure out how you want to  
2 proceed, but at this point I am going to be reinstating that  
3 order. I think it's appropriate and given the fact that we've  
4 already stipulated to the same in the other case.

5 So, you can decide how you want to proceed with that, Mr.  
6 Tornow, so you can prepare an order accordingly.

7 MR. GOLDEN: Your Honor, may we just have one  
8 clarification?

9 THE COURT: Sure.

10 MR. GOLDEN: I assume that order excludes all of the  
11 other counties?

12 THE COURT: Yes, correct.

13 MR. GOLDEN: That are not a party.

14 THE COURT: Correct.

15 MR. GOLDEN: Thank you.

16 THE COURT: Now, but what-what happens in the future if  
17 Mr. Tornow wants to go ahead and serve the other counties  
18 that's -- then we'll be back talking about that later. Okay.  
19 All right. Thank you. And, by the way, ah, they could also  
20 request a change in venue. I mean we're in a motion practice  
21 at this point, so, ultimately, I think it's up to them on how  
22 they want to proceed.

23 Anything else?

24 MR. TORNOW: Now, thank you, Judge.

25 THE COURT: All right. And I do appreciate you folks

1 being here so early in the morning, but as I indicated I have  
2 another hearing that's supposed to start right now. So, I'll  
3 let you prepare the order, Mr. Tornow.

4 MR. TORNOW: Thank you.

5 THE COURT: Thank you.

6 (No further proceedings were had.)

STATE OF SOUTH DAKOTA)  
  :SS  
COUNTY OF MINNEHAHA  )

CERTIFICATE

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 19, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 11<sup>th</sup> day of October, 2022.

/s/ 

Roxane R. Osborn  
Court Recorder  
Notary Public - South Dakota  
My commission expires: May 9, 2024