STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

SOUTH DAKOTA CANVASSING GROUP, Plaintiff, vs. MINNEHAHA COUNTY, DAVISON COUNTY, LINCOLN COUNTY, AND PENNINGTON COUNTY, SOUTH DAKOTA, Defendant(s).	49CIV. 23-003402 **PLAINTIFF'S BRIEF** **and** **CERTIFICATE OF SERVICE**

COMES NOW South Dakota Canvassing Group, by and through their attorney of record, Steven G. Haugaard, of Haugaard Law Office, P.C., and submits this Brief in support of their Appeal of the decision issued from the South Dakota Office of Hearing Examiners which denied the Plaintiff's request for disclosure of public records.

ISSUES ON APPEAL

The Issues addressed in this Brief are as follows:

1. The South Dakota Office of Hearing Examiners Administrative Law Judge ("ALJ") erred in its "Decision and Order" identified as PRR 23-05 as signed and served on October 26, 2023 in regard to the application of both state constitutional and statutory law as well as federal law.

2. The South Dakota Office of Hearing Examiners ALJ did not hold a formal hearing and therefore there is no transcript of any testimony of evidence or verbal arguments to submit to this Court. However, South Dakota Canvassing Group did submit extensive documentation and evidence as to the nature of and existence of the public records which were requested.

3. The South Dakota Office of Hearing Examiners ALJ committed reversible error in its failure to find that the requested election-related public records were, in fact, public records which have been unreasonably and in bad faith wrongfully denied, in part, in

light of the provisions of SDCL § 1-27-1, SDCL § 1-27-1.1 and SDCL § 1-27-1.3.

4. The Office of Hearing Examiner ALJ erred in that she failed to correctly consider the state and national election requirements as are referenced in the materials submitted in support of the public records request.

5. The Office of Hearing Examiner ALJ incorrectly applied Res Judicata as well as other legal theories in denying the request for public records. South Dakota Canvassing Group, the requesting entity, was a separate and distinct entity and the evidence in support of the request, including a transcript of the statements of the election materials producer, demonstrated the public nature of the information requested.

6. The Office of Hearing Examiner ALJ erred in that she failed to apply state law in liberally construing the public nature of the information requested.

7. The Office of Hearing Examiner ALJ erred in that she failed to correctly apply the law as to the disclosure of information associated with elections certification.

8. As part of Appellant's appeal, this Court, pursuant to SDCL § 1-27-40.2, is justified in awarding costs, disbursements, and a civil penalty in this matter.

PREFACE

At the outset of this Brief, I am now advised of the actions being taken by the South Dakota Secretary of State to clarify the current law as to public records. Attached hereto is an email (Exhibit 1) received from the Minnehaha County Auditor along with a copy of Senate Bill 48 (Exhibit 2), which was pre-filed on January 4, 2024, and will be heard in the Senate State Affairs Committee at the request of the Secretary of State. That Bill identifies the public position now being taken by the Secretary of State. That proposed Bill will clarify SDCL 12-17B-13 to state in pertinent part "…the cast vote record and the ballot images collected from the automatic tabulating equipment, if any, are public records." (Emphasis supplied) That is the information Petitioners have been requesting all along and have been denied by the public officials who claimed that the information either didn't exist or was

'proprietary' and not subject to disclosure. The claim of non-existence is not true of all counties and the claim of 'proprietary information' was never true.

Given this "new public position", it is the request of the Plaintiffs that the Court hereby issue its Order directing that the counties, which are named in these proceedings, immediately make available the public information requested by the Plaintiffs.

In lieu of an immediate Judgment in favor of the Plaintiffs, South Dakota Canvassing Group hereby submits the following Facts, Arguments, and Analysis in support of their position that the Administrative Law Judge be Ordered to hear and consider the requests made by the Petitioners.

FACTS

SD Canvassing Group, the Plaintiff, requested election related materials from several county Auditors. That request was denied asserting that the materials were not available pursuant to the South Dakota statutes in regard to "Freedom of Information".

SD Canvassing asked that the denial be reconsidered by the Administrative Law Judge. Her decision did not consider the new factual elements which included:

1) An ES&S officer who stated that the Cast Vote Records (CVR) ARE owned by the counties and DO NOT contain 'personally identifiable information';
2) Several other jurisdictions across the United States recognize that the CVRs are NOT 'proprietary' and are available for disclosure when requested;
3) Some South Dakota county auditors wanted to disclose the requested information but were instructed by their county attorneys not to disclose; and
4) Over 500 pages of compelling factual information which describes why the information is possessed by the public and therefore should be disclosed upon request.

Much of what the Defendants assert is simply not accurate. The CVR Data and Machine Log Data does 'belong to' and is 'possessed by' the counties. Educating the counties as to the existence of this data has been a fundamental problem in this matter. The knowledge base of the counties also varies as to what they actually possess in their electronic records and what they can access through the software.

The following is additional clarification of what currently exists and what is required to comply with the Federal and State guidelines as well as the contract with the election equipment provider, ES&S:

> Minnehaha, Lincoln, Pennington, and Davison County all have the EMS System necessary to decrypt the flash drives and computer files with the CVR's and audit logs on them. The county purchased a laptop and software that costs the counties over $8,000/yr for licensing and maintenance fees. This software that the counties pay for is specifically used for producing the reports and documents that have been requested by the citizens of the counties, and our group.
>
> As per the ES&S Task Force Meeting transcript, ES&S executives and staff admitted that they do not train South Dakota election officials or Secretary of State officials or employees how to access or use the CVR's or audit logs. (Page 39) "Specifics about cast vote records and audit logs, that's not really something that we've addressed in the trainings, but that's maybe something that we can add to our checklist." Jared Schwab, ES&S regional manager and consultant to South Dakota.

However, per the ES&S contracts signed by each county, the county commission or the county auditor agree to: (Page 87 of the appeal)

1. **Customer shall have completed a full software training session for each product selected.**

    1. **Customer shall have completed training at a proficiency level to successfully use the hardware (firmware) and software products.**

    2. Customer shall have the ability to install firmware and application software and make changes to date and time settings.

    3. Customer shall have the ability to change consumable items. Any other changes made by the customer must be pre-approved in writing by ES&S.

    4. **Customer shall store the equipment in accordance with ES&S requirements set forth herein.**

2. **Customer shall have reviewed a complete set of user manuals.**

3. **Customer shall have reviewed the Training Checklist.**

4. Customer shall be responsible for the installation and integration of any third-party hardware or software application or system purchased by the customer, unless otherwise agreed upon, in writing, by the parties.

If ES&S has admitted to our State and County officials in a meeting at ES&S headquarters that they do not train on the basic auditing tools necessary for a proper audit of an electronically tabulated election, yet the contract requires it, the terms of the contract have been violated.

Also, Minnehaha, Lincoln, Pennington, and Davison County user manuals specifically address the Cast Vote Records and Audit Logs, while the counties repeatedly denied release of public records claiming they did not exist.

As per the EAC Election Management Guidelines, page 43 says "Election officials should review the audit log documentation or obtain a complete description of audit log codes or descriptions from the voting system manufacturer for the audit logs on the voting

system. Election officials should become familiar with the content of these logs and learn how to print them out. **Familiarization will help officials recognize events that look anomalous or that they do not belong."**

Page 66, End to End Voting System Acceptance Test references, Optical Scanners, the CVR's, and the memory devices for the CVR's. **Using and reviewing the CVR's and audit logs is necessary to ensure the voting system is functioning correctly. It will also verify that votes cast in and other election data can be uploaded to the election management system and that these votes will be tabulated correctly.**

As additional factual support, I am attaching hereto a copy of Mr. Walter Daugherity's CV. (Exhibit 3) He has served as an expert witness in other election-related cases. His credentials show that he is fully capable of analyzing and explaining the intricacies of various electronic voting systems. I did not have time to obtain an affidavit from Mr. Daugherity, but I have included the following email response I received from him. My question to him was "Who actually 'owns' the CVR and the Machine Log Data:

"The cast vote record data and the machine log data are possessed by the county, since the county owns the ES&S machines and the cast vote records and the machine log records were created in the ES&S machines by the county's act of holding an election. Thus, these are now "existing public records" in the custody of the county.""

He went on to provide the following information as well:
Section 301 of the Civil Rights Act of 1960 required the preservation of all records relating to elections. This is now codified at 52 U.S.C. §§ 20701-20706. Note that per U.S. Department of Justice Publication "Federal Law Constraints on Post-Election 'Audits'," July 28, 2021, the "materials covered by Section 301 extend beyond 'papers' to include other 'records.' Jurisdictions must therefore also retain and preserve records created in digital or electronic form." This necessarily includes the "digital or electronic" cast vote records and the "digital or electronic" machine log records created in the ES&S machines by the county's act of holding an election.

*"Officer of election" is defined at https://www.law.cornell.edu/uscode/text/52/20706. Requirements of sections 20701-20705 apply to these "officers of election" AND ALSO "custodians" AND ALSO "Any person, **whether***

or not an officer of election or custodian*, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required."*

52 USC § 21081(a)(2)(A) says "The voting system shall produce a record with an audit capacity for such system.

To possess the required "audit capacity," all data specified by the National Institute of Standards and Technology (NIST) requirements listed at https://doi.org/10.6028/NIST.SP.1500-103 must be included, since the 2002 Help America Vote Act established the Election Assistance Commission which in turn directed NIST to promulgate standards for what must be included in a Cast Vote Record (CVR) report. Thus, all the CVR data specified there is part of the required "audit capacity"; else the voting system would not be completely auditable as required."

Mr. Daugherity's statements are consistent with the information we now have from ES&S.

Throughout this entire effort the individuals within the state / counties have been unclear as to what was and what was not proprietary and / or 'owned' by the state / counties. We have finally come to a point where the Plaintiff's assertions are found to be true; that the Plaintiff is entitled to this 'public' information. Neither the ALJ nor the attorneys for the Counties have yet acknowledged this, in spite of what is being sent out from the Secretary of State's office.

At some point, the elected officials and / or their attorneys, when they finally understand the issues and are presented with an unequivocal statement from the Secretary of State, are ethically bound to admit that the Plaintiffs are entitled to the requested information and disclose it to them.

ARGUMENT AND ANALYSIS

A decision based upon the legal constructs of "res judicata" or "claim preclusion" or "issue preclusion" are appropriate when the same legal question is applied to the same facts. In the instant case, a similar legal question is now appropriately applied, but to an entirely different set of known facts. Thus, neither res judicata, claim preclusion, nor issue preclusion apply.

The prior decision upon which the ALJ applied the law to the facts revolved around a request for information which was then deemed to contain "personally identifiable information".

Further, it was believed that the electronic process of storing certain information was a "proprietary" element of the ES&S election software system. Since that time and prior decision there have been many new facts that have come to light and that renders the application of res judicata, claim preclusion, and / or issue preclusion inappropriate and injudicious.

The following cases illustrate the limitations of res judicata, issue preclusion, and claim preclusion.

In the case of Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S.Ct. 1589 (May 14, 2020) the Supreme Court held that because Marcel's 2011 Action challenged different conduct – raised different claims – from the 2005 Action, Marcel cannot preclude Lucky Brand from raising new defenses. (Pages 6-12)

The Court went on to explain that a common transaction or 'common nucleus of operative facts' must be established to show that the claim in the previous litigation is the same as the claim in the current litigation for purposes of claim preclusion. The Court ultimately found that the actions at issue took place after the conclusion of the previous litigation.

Likewise, the issue now before this court is similar to Lucky Brand in that it was only after previous litigation by a different entity that SD Canvassing was made aware of the fact that even ES&S was of the opinion that the requested information was / is the possession of the counties / state. Now, in addition to that, we find that even our own Secretary of State shares that same view and is now proposing legislation to memorialize that fact.

In the case now before this court, the facts as presented by the Plaintiff have finally been affirmed. Thus, new known facts mandate a new outcome, both from this court and from the Administrative Law Judge.

In the case of Armstrong v. Miller, 20 NW 2d 282, ND Supreme Court 1972, the court

distinguished the bringing of a claim in a representative capacity, as opposed to one's personal capacity, and found that there is a sufficient distinction that will allow an action to proceed where a party is now serving in a different capacity. In this case the SD Canvassing Group is a new entity.

Further, in 31 A.L.R. 3d 1056, 1057 states "The mutuality rule has been expressed by the courts in varying language. Thus, it has been stated that an estoppel by judgment is mutual if both litigants are concluded by the judgment, and that otherwise it binds neither." This concept is not completely 'on point' but is akin to the issue in this case. That is, are the parties the same? Are the claims the same? Should all citizens be bound by the previous actions? This matter is one of 'public interest' and was not brought in the nature of a claim for damages. Rather, every citizen and any organization with a goal of protecting their constitutional interest and the public interest is in a position to make these requests and to raise the questions of public access. The protections sought should never suffer final disposition when nearly a million citizens' rights are at stake. Especially now that we know that the information sought IS a public record.

In Bank of Hoven v. Rausch, 449 NW 2d 263, SD: Supreme Court 1989, Justice Sabers writes in his dissent as to the subject of 'res judicata' that "The majority fails to mention and then ignores the fact that Rausch's counterclaim did not arise until after the trial and judgment in Rausch 1." "….It is basic that one cannot be forced to assert facts or claims which do not exist."

Again, this is where the Plaintiff now finds itself. Possessing "newly found" facts which entirely alter the issue under consideration. This Court must decide whether Plaintiff had the opportunity to bring the current case before. In the case now before this Court, there was NOT the opportunity to bring the same case as the facts of public ownership and protection of personally identifiable information was not as clearly known. Now it is.

The pursuit of truth in this matter is much like any other evolving issue of public interest and benefit, it takes time and development of facts which were not previously available or known. Here, the real party in interest is the Public, and the Public should never be precluded from knowing the truth of their established government processes.

For the sake of accurate analysis, when the public comes to understand that ES&S does not consider the information sought to be either 'proprietary' or containing 'personally identifiable information', then, because of previous litigation, should all citizens be barred from ever seeking similar information? Do the actions of the parties presently involved 'preclude' any further inquiries from citizens in this Republic when they apply newly revealed facts?

Much of what the Defendants assert is simply not accurate. The CVR Data and Machine Log Data does 'belong to' and is 'possessed by' the counties. Educating the counties as to the existence of this data has been a fundamental problem in this matter. The knowledge base of the counties varies as to what they actually possess in their electronic records and what they can access.

As of January 4, 2024 the South Dakota Legislature's Senate State Affairs Committee has filed a Bill, SB 48, at the request of the Secretary of State. That Bill CLEARLY states that "…the cast vote record and the ballot images…, if any, are public records.". (Emphasis supplied) That is the information Plaintiff has been requesting all along and have been denied by the public officials who claimed that the information either didn't exist or was 'proprietary' and not subject to disclosure. The claim of 'proprietary information' was not true.

CONSTRUCTION OF LAWS and TRANSPARENCY

Reverting to consideration of the law as it should have been applied to the Plaintiff's initial request, we can begin with some basic laws of interpretation. For example, consider some

of the election law statutes and other transparency laws:

In SDCL 12-6-64. Liberal construction of primary election laws.
The laws of this state pertaining to primary elections shall be liberally construed so that the real will of the voters may not be defeated by a mere technicality. **Source:** SL 1929, ch 118, § 58; SDC 1939, § 16.0248.

SDCL 12-19-34. Informalities do not invalidate election--Liberal construction.
No mere informality in the matter of carrying out or executing the provisions of this chapter shall invalidate the election or authorize the rejection of the returns thereof, and the provisions of this chapter shall be liberally construed for the purposes herein expressed or intended.
Source: SL 1944 (SS), ch 2, § 8; SDC Supp 1960, § 16.0617; SL 1974, ch 118, § 145.

The presumptions reflected in these laws is that the public interest and transparency are paramount to our system of governance. Had there ever been a valid concern in regard to "personally identifiable information", there was always an option to employ redaction per SDCL 1-27-1.10 if the releasing entity believed that the information would disclose the identity of an individual or any of that persons 'PII'.

We would then apply **SDCL 1-27-1.10. Redaction of certain information.**
In response to any request pursuant to § 1-27-36 or 1-27-37, a public record officer may redact any portion of a document which contains information precluded from public disclosure by § 1-27-3 or which would unreasonably invade personal privacy, threaten public safety and security, disclose proprietary information, or disrupt normal government operations. A redaction under this section is considered a partial denial for the application of § 1-27-37. **Source:** SL 2009, ch 10, § 15.

There is a point in time at which public officials can no longer enjoy 'immunity' for failing to disclose information which they now know to be a 'public record'. That point in time is now. Plaintiff does not seek to cause any public upset, but Plaintiff is making a valid request for information that is now known to be a public record.

Per SDCL 1-2-1.23 even state related Settlement Agreements are considered open to public inspection, so the idea that election data is somehow private and privileged should raise the ire of every citizen.

The Unified Judicial System recognizes the benefits of public access to public court

records. SDCL 15-15A-1(3) sets forth a rule for access to publicly filed court records that "…Promotes governmental accountability".

A hearing was requested of the ALJ in an effort to personally highlight the new factual elements which were submitted to her and were diametrically opposed to the basis upon which a previous decision was made in regard to a different entity. Thus, the Plaintiff once again asks that either the requested information be provided to the Plaintiff or that it be given the opportunity to have a hearing at which time Plaintiff would highlight the important factual elements and apply the law to those facts.

The bottom line is, now that the facts are known, why would there be any reason to prevent access to records that are possessions of the public? There no longer exists any reason to continue to pay private counsel to restrict access to these public records. The reason these records were originally sought was to confirm whether there had been voting irregularities or not. The way to answer that question is to simply disclose the information and bring this matter to conclusion. The public has a right to know that their election officials understand the election equipment and that the elections are conducted in a fair and accurate manner.

If this Court is concerned about the possibility that some material being requested is legally excluded from public access, then the Plaintiff asks that this Court conduct an 'in camera' review of the material to be assured that the information is and should be available to the public without the possibility of violating any protections afforded by the state's "Public Records and Files" laws.

The Court should also bring into the balance the fact that this matter is not one in which the parties are seeking some type of personal gain such as compensation for a property interest or business matter. Rather, the parties are seeking the best interests of the general public. In fact,

rather than defending the denial of public access, the counties should be seeking full disclosure of the records to ensure that they are truly and accurately performing their public duties.

Given the fact that we are now hearing of a shift in the narrative of the Secretary of State in that the requested information is now viewed as "public", there is all the more reason why this matter should be heard and all the more reason why the Plaintiff should be allowed to pursue additional discovery.

I personally believe that there is a significant lack of knowledge of the actual workings of the election systems and software. HOWEVER, I absolutely do not understand why there was a rush by the counties to deny information when they were presented with new information. Duty to their office and citizens as well as the responsibility to perform their 'due diligence' should have prompted the counties to engage in a dialogue and find the truth instead of sullying the reputation of concerned citizens.

This is a matter of public interest and is being pursued for the sake of ensuring that the most fundamental right of participation in our Constitutional Representative Republic by means of a Democratic election is protected and upheld.

A fundamental principle of our law is that 'For every wrong, there is a remedy.' That remedy is to either grant immediate access to the requested public information, or to remand this matter to the ALJ for the purpose of a thorough hearing of the facts and law.

As part of Appellant's appeal, this Court, pursuant to SDCL Chapter 1-27 and SDCL Title 15, is justified in awarding costs, disbursements, and a civil penalty in this matter. Plaintiffs request the Court recognize and order compensation for the personal financial investment as well as the unnecessary lengths to which the Plaintiffs have been forced to go to obtain public information.

Dated this 5th day of January, 2024.

HAUGAARD LAW OFFICE, P.C.

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CERTIFICATE OF SERVICE

The undersigned, Steven G. Haugaard, Attorney for South Dakota Canvassing Group, hereby certifies that on January 5, 2024 a true and correct copy of the Plaintiff's Brief and Certificate of Service, was served by and through the Odyssey File & Serve electronic filing system and/or U.S. First Class Mail upon the Hearing Examiner, counsel of record and the agencies as listed below:

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Dated this 5th day of January, 2024.

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