No. 23-35124

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER RAE GUNTER, an Oregon Elector; CHRISTINA LYNN MILCAREK, an Oregon Elector; CHELSEA ANNE WEBER, an Oregon Elector,

Plaintiffs-Appellants,

v.

SHEMIA P. FAGAN, in her individual capacity and as Secretary of State for the State of Oregon; LISA GAMBEE, in her individual capacity and as Wasco County Clerk; KATHY SCHWARTZ, in her individual capacity and as Wasco County Clerk; STEVE KRAMER, in his individual capacity and as Wasco County Clerk; SCOTT HEGE, in his individual capacity and as Wasco County Clerk,

Defendants-Appellees.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

The district court had jurisdiction over this federal question case under 28 U.S.C. § 1331.

B. Finality of Judgment and Appellate Court Jurisdiction

The district court entered final judgment of dismissal on February 8, 2023. (SER-3-8). This court has jurisdiction under 28 U.S.C. § 1291.

C. Date of Entry of Judgment and Timeliness of Notice of Appeal

Final judgment of dismissal was entered on February 8, 2023. (SER-73 (Docket #20)). The notice of appeal was filed on February 21, 2023. (SER-64-69). Accordingly, the notice of appeal is timely under Fed. R. App. P. 4(a)(1)(A), because it was filed with 30 days after the judgment was entered.

ISSUE(S) PRESENTED

1. When appellants failed to establish that they suffered an injury in fact as a result of actions by the Oregon Secretary of State (SOS), did the district court correctly dismiss their claims because they lacked standing?

2. When appellants failed to adequately plead that the SOS erroneously certified Oregon's election systems, did the district court correctly dismiss their claims because they failed to state a claim?

STATEMENT OF THE CASE

A. Nature of the case

Plaintiffs filed this case under 42 U.S.C. § 1983 and 18 U.S.C. § 242, alleging that defendants had acted unlawfully by failing to ensure the integrity of vote tallying machines in Oregon. Plaintiffs asked the district court to require the Oregon Secretary of State to immediately halt the use of any electronic voting machines in Oregon and to require the use of hand-counted paper ballots, require defendants to provide all correspondence related to the certification and accreditation of electronic voting machines, order the Oregon Attorney General to open an investigation of criminal and fraudulent election violations, prohibit defendants from the destruction or deletion of any election records, and to take other steps related to vote counting.

B. Course of proceedings and disposition below

Plaintiffs filed a complaint under 42 U.S.C. § 1983 and 18 U.S.C. § 242. (SER-24 (First Amended Complaint)). Defendants filed a motion to dismiss. (SER-9-22). The district court granted defendants' motion to dismiss and entered judgment dismissing plaintiff's complaint with prejudice and without leave to amend. (SER-3). Plaintiffs appeal that final order and judgment.

SUPPLEMENTAL STATEMENT OF FACTS

Defendant Secretary of State provides the following statement of undisputed facts pertinent to the issues on appeal. Defendant supplements those facts as needed in responding to plaintiffs' argument.

Plaintiffs filed a complaint challenging the Secretary of State's certification of ballot tally machines used by county officials to administer Oregon elections. (SER-24 (First Amended Complaint (FAC))). The complaint alleged violations of their federal constitutional rights. Under the 14th Amendment, they alleged that their rights had been infringed because "the right to vote consists of not only casting a ballot, but having that vote counted accurately, as it was case." (SER-32 (FAC ¶ 30)). Under the 10th Amendment, they alleged that federal agencies, by "provid[ing] services on a prioritized basis at the request of state and local election officials * * * [are] improperly usurping the authority of the respective states to manage their own elections[.]" (SER-47 (FAC ¶ 49)). Plaintiffs also alleged that Oregon's administration of elections violates their rights under the 19th Amendment, which provides that the right to vote shall not be denied "on account of sex," and under the 26th Amendment, which guarantees the right to vote for United States citizens "who are eighteen years of age or older[.]" (SER-31 (FAC ¶¶ 25-27)). Finally, although not entirely clear, plaintiffs may have been raising claims under the

Oregon Public Records Law, Or. Rev. Stat. 192.314. They contended that the Secretary of State and county elections official were "increasingly delaying or ignoring responses" to public records requests. (SER-56 (FAC ¶ 63)).

The Secretary of State (and the other defendants) moved to dismiss. She argued that plaintiffs lacked Article III standing, because their claims were based on generalized grievances rather than individualized injury. She further argued that plaintiffs failed to state a claim because they had not established that the Secretary of State had erroneously certified election systems. Finally, the Secretary of State argued that once the court dismissed plaintiffs' federal claims, there was no longer a basis for supplemental jurisdiction over the state law claims. (SER-14-22).

The district court granted the motion and dismissed the case with prejudice and without leave to amend. (SER-3). The court ruled that plaintiffs had not suffered an injury in fact as a result of any actions by defendants. Rather, the harms alleged by plaintiffs were "conjectural or hypothetical, not actual or imminent," and they thus lacked Article III standing. (SER-7). The court further ruled that, even if plaintiffs had standing, their claims failed as a matter of law, because the accreditation of the voting system was valid. On that basis, the court determined that further amendment was futile. (SER-7-8).

SUMMARY OF ARGUMENT

The district court correctly dismissed plaintiffs' complaint because they lack Article III standing. Plaintiffs lack Article III standing because they failed to allege an injury in fact. Their allegations only amount to a claim that they have an interest in government officials acting in conformity with the law, which does not state an Article III case or controversy. Moreover, plaintiffs' claims are too speculative. They do not argue that their votes were not counted. Their claim that defendants' failure to ensure the integrity of Oregon's voting system has resulted in their belief that their votes have not been counted is nothing more than a chain of possibility which does not establish an injury caused by defendants.

The district court also correctly dismissed plaintiff's complaint because they failed to state a claim. Plaintiff did not allege—let alone provide any evidence—that accreditation for any of the labs that certified Oregon's voting machines had been revoked. In the absence of a revocation the validity of the labs' accreditation and the validity of the vote counting was not at issue.

Finally, the district court did not abuse its discretion when it dismissed plaintiff's complaint with prejudice and without leave to amend. Dismissal with prejudice is appropriate when further amendment would be futile. Because plaintiffs cannot amend their claim to establish Article III standing or

establish a claim, dismissal with prejudice and without leave to amended was appropriate. This court should affirm.

ARGUMENT

A. Standard of review

This court reviews *de novo* the district court's dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Stone v. Travelers Corp.*, 58 F.3d 434, 436–37 (9th Cir. 1995). It also reviews a grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(1) *de novo*. *Banks v. Northern Trust Corporation*, 929 F.3d 1046, 1049 (9th Cir. 2019).

B. Applicable law

1. Article III standing requires an injury in fact.

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81, 120 S. Ct. 693, 145

L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A "concrete and particularized" injury "must actually exist[;]" that is, it must be "real," not "abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quotations omitted). It "must affect the plaintiff in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) (quotation omitted). And to be "actual or imminent," a threatened injury must be "certainly impending"—"allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (cleaned up). A complaint that fails to allege facts sufficient to establish standing requires dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See, e.g., Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1123 (9th Cir. 2010).

2. Fed. R. Civ. P. 12(b)(6) requires facts sufficient to state a claim for relief.

In assessing dismissal of claims pursuant to Fed. R. Civ. P. 12(b)(6), the court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A plausible claim includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *United States v. Corinthian Colls.*, 655 F.3d 984, 991 (9th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L .Ed. 2d 929 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

3. Federal and state election law

Congress enacted the Help America Votes Act (HAVA) following the 2000 presidential election. Pub. L. No. 107–252, 116 Stat. 1666 (2002) (codified in scattered sections of 2, 5, 10, 36, and 52 U.S.C.). Under HAVA, the Election Assistance Commission ("EAC") is charged with providing for the "testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories." 52 U.S.C. § 20971(a)(1). Based on this authority, the EAC set up a Testing and Certification Program, which is designed to ensure that competent laboratories are testing voting systems and software, and that they are following accepted standards in their testing. As part of this program, the EAC promulgated the Voluntary Voting System Guidelines ("VVSG"). The VVSG are used to guide the EAC's

implementation of the Testing and Certification Program. Under the Testing and Certification Program, independent testing laboratories are certified and accredited as a Voting System Test Laboratory ("VSTL") by the EAC. "[N]o laboratory may be accredited for purposes of this section unless its accreditation is approved by a vote of the [EAC]." 52 U.S.C. § 20971(b)(2)(A). Additionally, "[t]he accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission." 52 U.S.C. § 20971(c)(2).

Under HAVA, states may choose to participate in EAC's Testing and Certification Program. "At the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software by the laboratories accredited by the [EAC] under this section." 52 U.S.C. § 20971(a)(2). "The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State." 52 U.S.C.A. § 21085.

The Secretary of State is Oregon's chief elections officer. Or. Rev. St. 246.110. The Secretary of State has oversight responsibilities, including for the certification of vote tally machines (i.e., the machines that county election officials use to scan and count paper ballots). *See* Or. Rev. St. 246.120; 246.530; 246.550. The Secretary of State does not directly conduct elections by

distributing, receiving, or counting ballots; that is the role of county election officials. *See, e.g.*, Or. Rev. St. 246.200(1); 254.185.

Oregon election officials employ multiple procedures to ensure election results are reliable. These measures include using only equipment certified by the Secretary of State to count ballots. Or. Rev. St. 246.550(4). Other key safeguards include publicly testing the accuracy of this equipment before it is used in each election (Or. Rev. St. 254.525); publicly auditing election results by comparing machine counts to hand counts of the ballots after each election (Or. Rev. St. 254.532); recounting by hand when two candidates with the most votes are within a margin of 0.2 percent (Or. Rev. St. 258.280, 258.290); recounting on demand by any candidate or political party, regardless of a contest's vote count (Or. Rev. St. 258.161); and allowing candidates to contest elections in state court (Or. Rev. St. 258.016, 258.036).

C. The district court correctly found that plaintiffs lack Article III standing.

On appeal, plaintiffs contend that the district court erroneously concluded that they have not suffered an injury-in-fact and, therefore, erred by dismissing the case for lack of standing. Plaintiffs' argument is not entirely clear. It appears to be that defendants have a duty of care to plaintiffs to follow the law and ensure the integrity of voting systems. The alleged failure to do so, which creates vulnerabilities in the voting system, leads plaintiffs to believe that their

votes have not been properly counted and, thus, defendants' failure to protect voters is a harm to plaintiffs. App Br 9-12. But that is insufficient to establish that plaintiffs have suffered an injury sufficient to establish Article III jurisdiction over their case.

Properly understood, plaintiffs' argument is merely that they have an interest in government officials conducting an election in conformity with the Constitution and applicable statutes. But the Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. *See also, Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) ("An injury to the right 'to require that the government be administered according to the law' is a generalized grievance." (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989))), *cert. den.*, 141 S. Ct. 1379 (2021).

Moreover, any harm-in-fact to plaintiffs is too speculative. In *Clapper*, the plaintiffs argued that they had standing based on their fear that in the future, government officials would seek to surveil their communications with foreign individuals, the Foreign Intelligence Surveillance Court ("FISC") would grant

such a request, and the government would then carry out the surveillance. 568 U.S. at 410–11. The Supreme Court rejected that argument, holding that the threatened future injury was too speculative to constitute injury for standing purposes. *Id.* at 410–14. The Court noted that the plaintiffs' claimed injury rested on a "highly attenuated chain of possibilities" and held that such possibilities were not enough to establish a "certainly impending" injury. *Id.*

Here, plaintiffs do not argue that their votes were not counted. Indeed, they acknowledge that "they have no way of knowing if their vote was accurately represented or merely diluted/fractionalized[.]" App. Br. 9. Thus, their claim that defendants' alleged failure to ensure the integrity of Oregon's voting system resulted in their belief that their votes have not been counted is nothing more than a "speculative chain of possibilities [that] does not establish that injury * * * is certainly impending or is fairly traceable" to defendants' actions. *See Clapper*, 568 U.S. at 414.[1]

[1] As noted above, plaintiffs' complaint alleged that defendants' actions violated the 19th and 26th Amendments. On appeal, plaintiffs do not appear to pursue that claim. The contend that they are "women and a protected class and a loss of representation satisfies the injury in fact requirement," but provide no analysis to support that conclusory statement or explain why defendants' actions violated the 19th or 26th amendment. App Br 12. Accordingly, this court should decline to review any such claim. *See Greenwood v. F.A.A.*, 28 F3d 971, 977 (9th Cir 1994) (declining to review a claim which was not "argued specifically and distinctly" in the opening brief).

D. The district court correctly found that plaintiffs' allegations of system certification and security failures do not state a claim.

As set out, the district court concluded that plaintiffs failed to state a claim because they did not allege—let alone provide any evidence—that the EAC had revoked any of the labs' accreditations. In the absence of a revocation by the EAC under 52 U.S.C. § 20971(c)(2), the validity of the labs' accreditation was not at issue. (S.E.R 7-8).

On appeal, plaintiffs argue that the district court's conclusion is incorrect. They appear to contend that the EAC manual for the test laboratory accreditation program must be read in conjunction with HAVA and, when read together, the certification for certain Oregon tally machines was no longer valid. They argue that the district court's conclusion is erroneous because it failed to consider "the entire statute cannon [*sic*], not just a sub part or a single section." App. Br. 17-24.

But plaintiffs fail explain how the plain text of 52 U.S.C. § 20971(c)(2)—"[t]he accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission"—means something different than what it says. They do not identify text in the EAC manual that contradicts that statute even if read in conjunction with it. Moreover, the EAC agrees that 52 U.S.C. § 20971(c)(2) controls the process for loss of accreditation. The EAC website includes

information on the accreditation of two voting system test laboratories, Pro V&V and SLI Compliance. In confirming that both laboratories are currently accredited, the EAC cites 52 U.S.C. § 20971(c)(2) as the controlling statute:

> Pro V&V was accredited by the EAC on February 24, 2015. Federal law provides that EAC accreditation of a voting system test laboratory cannot be revoked unless the EAC Commissioners vote to revoke the accreditation: "The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission." 52 U.S. Code § 20971(c)(2). The EAC has never voted to revoke the accreditation of Pro V&V. Pro V&V has undergone continuing accreditation assessments and had new accreditation certificate issued on February 1, 2021.

https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last accessed June 16, 2023).

> SLI Compliance was accredited by the EAC on February 28, 2007. Federal law provides that EAC accreditation of a voting system test laboratory cannot be revoked unless the EAC Commissioners vote to revoke the accreditation: "The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission." 52 U.S. Code § 20971(c)(2). The EAC has never voted to revoke the accreditation of SLI Compliance. SLI Compliance has undergone continuing accreditation assessments and had a new accreditation certificate issued on February 1, 2021.

https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/sli-compliance-division-gaming-laboratories (last accessed June 16, 2023).

Finally, even if plaintiffs were to identify text in the EAC manual that contradicted 52 U.S.C. § 20971(c)(2), the statute would nonetheless prevail.

See Pac. Gas & Elec. Co. v. United States, 664 F.2d 1133, 1136 (9th Cir.1981) (a federal statute trumps a federal regulation).

In sum, plaintiffs' argument that the Secretary of State's certification of certain tally machines was unlawful fails as a matter of law. Accordingly, the district court correctly dismissed their complaint under Fed. R. Civ. P 12(b)(6).

E. The district court correctly dismissed plaintiff's complaint with prejudice and without leave to amend.

This court reviews a dismissal with prejudice and without leave to amend for an abuse of discretion. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). Dismissal with prejudice is appropriate when "further amendment would be futile." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Plaintiffs argue that dismissal with prejudice was unwarranted, but do not explain how further amendment would salvage the case. They merely contend that defendants failed to follow the law and perform their official duties. App. Br. 24-25. But for the reasons set out above, that is not an actionable claim. Accordingly, the district court did not abuse its discretion.

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CONCLUSION

This court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellee's Brief is proportionately spaced, has a typeface of 14 points or more and contains 3,430 words.

DATED: June 16, 2023

/s/ Jeff J. Payne

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IN THE UNITED STATES COURT OF APPEALS

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JENNIFER RAE GUNTER, an Oregon Elector; CHRISTINA LYNN MILCAREK, an Oregon Elector; CHELSEA ANNE WEBER, an Oregon Elector, Plaintiffs-Appellants, v. SHEMIA P. FAGAN, in her individual capacity and as Secretary of State for the State of Oregon; LISA GAMBEE, in her individual capacity and as Wasco County Clerk; KATHY SCHWARTZ, in her individual capacity and as Wasco County Clerk; STEVE KRAMER, in his individual capacity and as Wasco County Clerk; SCOTT HEGE, in his individual capacity and as Wasco County Clerk, Defendants-Appellees.	U.S.C.A. No. 23-35124 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellee

Shemia P. Fagan, certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I directed the Appellee's Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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