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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON



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

Plaintiffs,

v.

SHEMIA FAGAN, in her individual capacity and as Secretary of State for the State of Oregon,

Defendant.

Case No. 3:22-cv-01252-MO

DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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## I. INTRODUCTION

Three Oregon voters bring this suit to challenge the Secretary of State's certification of ballot tally machines used to count ballots. Their suit must be dismissed for three reasons.

First, the plaintiffs' claims are based on generalized grievances regarding the Secretary's compliance with the law, rather than connected to an individualized injury. Consequently, under the case-or-controversy requirements of Article III, they lack standing, and this Court lacks jurisdiction.

Second, the plaintiffs fail to state a claim. Their central argument—that the Secretary has erroneously certified election systems—misunderstands the statutory structure that governs the accreditation of voting systems test labs. Contrary to the plaintiffs' assertion, it was appropriate for the Secretary to rely on the testing those labs conducted, in compliance with her own rules for certifying election systems. All of the plaintiffs' claims are based on their incorrect reading of election statutes, and all should be dismissed. More fundamentally, the Ninth Circuit has held that such routine election administration disputes do not give rise to federal constitutional claims at all. Thus, the plaintiffs' 14th Amendment right-to-vote claim fails as a matter of law. Their claims under the 10th, 19th, and 26th Amendments fare no better.

Third, this Court lacks jurisdiction over the plaintiffs' state-law claims. Once the plaintiffs' federal claims are dismissed, there is no longer a basis for supplemental jurisdiction. In any event, the relief they seek against the Secretary of State is barred by the 11th Amendment.

Accordingly, this case should be dismissed.



## II. BACKGROUND

### A. Elections in Oregon

The Secretary of State is Oregon's chief elections officer. ORS 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* ORS 246.120, 246.530, 246.550. The Secretary of State does not directly conduct elections by distributing,



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receiving, or counting ballots; this is the role of county election officials. *See, e.g.*, ORS 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. ORS 246.550(4). Other key safeguards include publicly testing the accuracy of this equipment before it is used in each election (ORS 254.525); publicly auditing election results by comparing machine counts to hand counts of the ballots after each election (ORS 254.532); recounting by hand when two candidates with the most votes are within a margin of 0.2 percent (ORS 258.280, 258.290); recounting on demand by any candidate or political party, regardless of a contest's vote count (ORS 258.161); and allowing candidates to contest elections in state court (ORS 258.016, 258.036).



**B. Plaintiffs' Claims**

Mindful of the Court's obligation "to construe the pleadings liberally and to afford the [pro se plaintiffs] the benefit of any doubt," *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010), the defendant recites the claims the plaintiffs may seek to assert in their First Amended Complaint (FAC).

**1. Voting systems certification and security claims (FAC ¶¶ 31–47, 53–62)**

The plaintiffs challenge whether the Secretary of State validly certified the ballot tally machines used by county officials to administer Oregon elections. The plaintiffs claim they "cannot confirm that Pro V&V was accredited to test ClearVote 2.1 in 2020 and ultimately approved by the SOS for use in the 2020 and 2022 Elections in Oregon." FAC ¶ 42(a). The plaintiffs also allege that the systems used to count ballots in Oregon elections "are subject to tampering through a 'trapdoor' mechanism inherent in all election systems." FAC ¶ 53.

In addition, "Plaintiffs ask the court for a judicial review of the [U.S. Election Assistance Commission] under the [Help America Vote] Act … ." FAC ¶ 71. But the Election Assistance Commission is not named as a defendant.



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**2. 14th Amendment claims (FAC ¶¶ 24, 30)**

The plaintiffs claim that their federal constitutional rights under the 14th Amendment have been infringed because "the right to vote consists of not only casting a ballot, but having that vote counted accurately, as it was cast." FAC ¶ 30.

**3. 10th Amendment claims (FAC ¶¶ 48–52)**

The plaintiffs claim 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 in violation of the Tenth Amendment to the United States Constitution." FAC ¶ 49.

**4. 19th Amendment and 26th Amendment claims (FAC ¶¶ 25–27)**

The plaintiffs generally allege that Oregon's administration of elections violates their rights under the 19th Amendment, which guarantees that "[t]he right … to vote shall not be denied or abridged … on account of sex," and the 26th Amendment, which guarantees that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged … on account of age." *See* FAC ¶¶ 25–27.



**5. Public records claims (FAC ¶¶ 63–65)**

The plaintiffs may be raising claims under the Oregon Public Records Law, ORS 192.314, contending the Secretary of State and county elections officials are "increasingly delaying or ignoring responses," FAC ¶ 63, to public records requests.

## III. LEGAL STANDARDS

### A. Fed. R. Civ. P. 12(b)(1) Standard

"[L]ack of *Article III* standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "To establish Article III standing, a plaintiff 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (quoting *Spokeo, Inc. v. Robins*,



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578 U.S. 330, 338 (2016)). Plaintiffs bear the burden of persuasion to establish subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994). In addition, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek … ." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

**B. Fed. R. Civ. P. 12(b)(6) Standard**

Under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). A claim is plausible on its face only if it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. 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 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).



## IV. ARGUMENT

**A. Plaintiffs Lack Standing.**

"[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya*, 658 F.3d at 1067. To meet this constitutional "case or controversy" requirement, the plaintiffs must establish that (1) they have suffered an "injury in fact"; (2) the injury is fairly traceable to the challenged conduct; and (3) the requested relief would redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To allege a cognizable injury, a plaintiff must demonstrate that the defendant infringed on a legally protected interest and created a "concrete and particularized" and "actual or imminent" harm, as opposed to one that is "conjectural or hypothetical." *Id*. at 560 (internal quotations omitted). A plaintiff must "identify some personal harm resulting from application of the challenged statute or regulation." *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008). "[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's



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interest in the proper application of the law does not count as an 'injury in fact.'" *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013)).

The plaintiffs make a series of assertions that the Secretary and local election officials have not followed their procedures to certify voting equipment. Even if these claims were not legally (and factually) baseless, these allegations would not show that they suffered a personal injury—something beyond "an abstract and generalized harm to a citizen's interest in the proper application of the law," *Carney*, 141 S. Ct. at 498. For example, the FAC does not contain facts sufficient to show that their votes will not be counted. Rather, they allege (albeit erroneously) that certain election procedures required by state law have not been followed.

Nor is bare suspicion that their ballots will not be counted accurately sufficient for standing. "'[T]hreatened injury must be *certainly impending* to constitute injury in fact'[;] '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)) (emphasis added). The plaintiffs' "speculative chain of possibilities does not establish that injury based on" alleged vote dilution "is certainly impending or is fairly traceable to" the election administration practices the plaintiffs challenge. *See Clapper*, 568 U.S. at 414; *see also Lake v. Hobbs*, No. CV-22-00677-PHX-JJT, 2022 WL 3700756, at *9 (D. Ariz. Aug. 26, 2022) (granting motion to dismiss for lack of standing) ("[A] long chain of hypothetical contingencies must take place for any harm to occur—(1) the specific voting equipment used in Arizona must have 'security failures' that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must change the outcome of the election.").

Because the plaintiffs have only raised generalized grievances, and they have not alleged that they will personally suffer a cognizable injury, the FAC must be dismissed.





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**B. The FAC Fails to State a Claim.**

**1. Plaintiffs' election system certification and security allegations do not state a claim.**

The centerpiece of the plaintiffs' complaint is that the Secretary unlawfully certified certain tally machines for use in Oregon elections. The requirements for how votes are counted and with what systems is largely a matter of state law. The plaintiffs do not identify any violations of federal constitutional or statutory requirements. And the plaintiffs' state-law theory—that a test lab lacked the certification from the U.S. Election Assistance Commission (EAC) required by the Secretary's own rules—fails as a matter of law, as the EAC itself has determined.

**a. The FAC fails to state a federal claim.**

**i. Federal statutory claims**

So long as a state's systems meet federal statutory requirements for voting systems, the approval of voting systems are a matter of state law, not federal law. *See* 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State."); *see also* 52 U.S.C. § 20971(a)(2) ("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 Commission under this section."). The FAC does not allege, and provides no facts sufficient to show, that Oregon's voting systems fail to meet the federal statutory requirements for voting systems. *See* 52 U.S.C. § 21081(a)(1)(A). Thus, the FAC does not state a federal statutory claim.



**ii. 14th Amendment claim**

The plaintiffs claim that Oregon's use of ballot tally machines interferes with their right to vote and thus violates the Fourteenth Amendment. The Ninth Circuit "ha[s] drawn a distinction between 'garden variety' election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140



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F.3d 1218, 1226 (9th Cir. 1998), *as amended on denial of reh'g and reh'g en banc* (June 23, 1998). To state a federal claim under this standard, a plaintiff must allege "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Id.* at 1226–27. "Mere fraud or mistake will not render an election invalid." *Id.* at 1226.

The FAC does not allege a constitutional violation under this test. The FAC does not allege that the plaintiffs will detrimentally rely on Oregon's election law in the exercise of their right to vote in the forthcoming general election. Nor does it plausibly allege that the use of ballot tally machines in the forthcoming election will result in widespread disenfranchisement. Rather, the FAC contends that the Secretary has erroneously certified certain machines in violation of state law. This sort of "garden-variety" dispute over election administration that is governed by state law, not federal constitutional law. *See Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020) (holding alleged state-law violations as insufficient to state a federal constitutional claim).



**b. The FAC fails to state a state-law claim**

By state statute, a ballot tally machine must be certified by the Secretary before it is used in Oregon elections. ORS 246.550(4). By rule, the Secretary provides that for such a system to be approved, it "must be certified by the Elections Assistance Commission (EAC) or be examined by a federally accredited voting systems testing laboratory (VSTL)." O.A.R. 165-007-0350(1).

The FAC acknowledges that the EAC has accredited two voting systems testing laboratories: Pro V&V and SLI. *See* FAC ¶ 45; *see also* 52 U.S.C. § 20971(b)(2)(A) ("The Commission shall vote on the accreditation of any laboratory under this section … ."). The plaintiffs' claim hinges on their assertion that these labs' EAC accreditations "expired." FAC ¶ 45.



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That assertion is incorrect as a matter of law because it conflicts with the statute, which provides that "[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).

The EAC itself agrees, writing:

> 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.

EAC, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (accessed 9/17/2022). The EAC issued a similar statement about its accreditation of the other lab, SLI. *See also id.*, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/sli-compliance-division-gaming-laboratories (statement on EAC's 2007 accreditation of SLI Compliance).[1]



In the face of this statutory provision, the plaintiffs rely on their reading of an EAC policy manual to suggest that neither of the nation's Voting Systems Test Laboratories were accredited when they tested tally machines used in Oregon. FAC ¶¶ 41–42. But a statute trumps agency policy. Moreover, "a court should defer to the agency's construction of its own regulation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019). The EAC has definitively rejected the interpretation of the policy manual that the plaintiffs advance. The Court should defer to the EAC's judgment.

[1] The Secretary asks this Court to take judicial notice of the EAC's legal position. Even if the plaintiffs disagree with the EAC's legal position, the fact of its position is not "subject to reasonable dispute." Fed. R. Evid. 201(b).



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Plaintiffs' claim that the Secretary's certification of certain tally machines was unlawful fails as a matter of law and should be dismissed.

**2. Plaintiffs do not state a 10th Amendment claim.**

The plaintiffs' Tenth Amendment claim is also meritless. "If [federal] legislation compels a state to participate in a federal program without its knowing agreement to the conditions of participation, it may conflict with the Tenth Amendment principle that Congress may not directly commandeer the states 'to administer or enforce a federal regulatory program.'" *Sauer v. U.S. Dept. of Educ.*, 668 F. 3d 644, 652–53 (9th Cir. 2012) (quoting *Printz v. United States,* 521 U.S. 898, 935 (1997)). The FAC's allegations that Oregon election officials voluntarily accepted the assistance of federal agencies does not allege a violation of the 10th Amendment under this standard. *See Printz*, 521 U.S. at 935–36 (O'Connor, J., concurring) (explaining that holding a law "violates the Tenth Amendment to the extent it forces States … to participate" does not prohibit States from "voluntarily continu[ing] to participate in the federal program").



In addition, the U.S. Constitution expressly provides for federal authority over federal elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Places of choosing Senators." Art. I, § 4 (emphasis added). The authority granted to the States under this "Clause functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.'" *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 9 (2013) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'" *Id.* (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). Even if the FAC did complain of federal *mandates* regarding Oregon's primary and general



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elections, such mandates are expressly authorized by the Constitution, because those elections include races for federal office.

For both reasons, none of the plaintiffs' allegations about federal cooperation in the administration of Oregon's election suggest a constitutional violation, let alone one tied to a personal injury suffered by the plaintiffs.

**3. Plaintiffs do not state a 19th or 26th Amendment claim.**

The plaintiffs' 19th and 26th Amendment claims also must be dismissed. The 19th Amendment bans purposeful discrimination in voting among otherwise qualified voters on the basis of sex. *See Jones v. Governor of Fla.*, 15 F.4th 1062, 1068 (11th Cir. 2021). The 26th Amendment establishes the same nondiscrimination requirement on the basis of age. *See League of Women Voters v. Detzinger*, 314 F. Supp. 3d 1205, 1221–23 (N.D. Fla. 2018) (collecting cases). None of the plaintiffs' allegations suggest that the use of election machines was adopted to disadvantage certain voters on the basis of sex or age, or even that they have that effect. Thus, there is no basis to infer that the plaintiffs' voting rights have been "denied or abridged on account of" sex or age. These non-discrimination claims must therefore be dismissed.



**4. Plaintiffs do not state a claim under Oregon's Public Records Law.**

Plaintiffs allege that an unstated number of public records requests have been left unfulfilled. First, none of the plaintiffs' allegations establish that the Secretary has failed to fulfill her obligations under the Public Records Law. Second, none of the allegations suggest that the Secretary of State has disobeyed any lawful order to produce records, or even that the state-law dispute resolution procedures created by the Public Records Law have been invoked. *See generally* ORS 192.411, 192.427, 192.431.

In any event, these state-law claims are clearly procedurally barred. *See* § IV.C, below.



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**C. Plaintiffs' State-Law Claims Should Be Dismissed for Lack of Jurisdiction.**

**1. The Court should decline supplemental jurisdiction over Plaintiffs' state-law claims.**

The only basis for this Court's subject-matter jurisdiction over the plaintiffs' state-law claims is supplemental jurisdiction under 28 U.S.C. § 1367. A "district court[] may decline to exercise supplemental jurisdiction over a claim … if the district court has dismissed all claims over which it has original jurisdiction … ." 28 U.S.C. § 1367(c)(3). "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). Thus, if the Court dismisses the plaintiffs' federal claims, the Court should also decline jurisdiction over the plaintiffs' state-law claims.

**2. Plaintiffs' state-law claims are barred by the 11th Amendment.**

None of the plaintiffs' state claims can be heard in federal court, because "the Eleventh Amendment deprives federal courts of jurisdiction to order state actors to comply with state law." *Hale v. State of Ariz.*, 967 F.2d 1356, 1369 (9th Cir. 1992), *on reh'g*, 993 F.2d 1387 (9th Cir. 1993); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding *Ex Parte Young* is "inapplicable in a suit against state officials on the basis of state law"); *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005) (holding state-law claim for declaratory and injunctive relief under *Ex parte Young* was barred by *Pennhurst*). Thus, plaintiffs "state statutory argument cannot provide a basis for the injunctive relief Plaintiffs request because Defendants have sovereign immunity from this Court's jurisdiction to issue an injunction instructing state officials on how to conform their conduct to state law." *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1257–58 (D. Or. 2021). Thus, the plaintiffs' state-law claims cannot be heard by this Court.





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## V. CONCLUSION

The First Amended Complaint should be dismissed.

DATED October 3, 2022.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 3, 2022, I served the foregoing DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT upon the parties hereto by the method indicated below, and addressed to the following:

| | |
|---|---|
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