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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

(Portland Division)

JENNIFER RAE GUNTER, an individual
CHRISTINA LYNN MILCAREK, an individual, and **CHELSEA ANNE WEBER**,
an individual,

Plaintiffs,

v.

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

Defendants.

JENNIFER GUNTER, an individual, *et al.*,

Plaintiffs,

v.

Case No.: 3:22-cv-01252-MO (Lead Case)

**REPLY IN SUPPORT OF DEFENDANTS'
LISA GAMBEE, KATHY SCHWARTZ,
STEVE KRAMER, AND SCOTT HEGE
MOTION TO DISMISS**

Case No.: 3:22-cv-01675-MO (Consolidated)

LISA GAMBEE, in her individual capacity
and as Wasco County Clerk, *et al.*,

Defendants.

JUDY ANN MORRISE, an Oregon Elector;
and SARA MARIE GENTA, an Oregon
Elector,

Plaintiffs

KATHRYN HARRINGTON, *et al.*

Defendants.

Case No.: 3:22-cv-01743-MO (Consolidated)

I. INTRODUCTION.

Plaintiffs' Response to the Wasco County Defendants' Motion to Dismiss does nothing more than reprise the allegations in their complaint. While acknowledging that they must plead a particularized injury that can be remedied by a decision from this court, Plaintiffs fail to point to any allegations, beyond a generalized "dilution" of votes, to establish such injury. This is because they cannot. Even if this Court accepts as true Plaintiffs' allegations that the voting machines were not properly certified,¹ there has been no manipulation of the vote, no uncounted votes, no improperly counted votes, and no illegal votes. Plaintiffs do not allege any such facts because they cannot. Plaintiff's claims thus rest on a fallacy, and they cannot plead generalities and aphorisms to paper over that fact. Accordingly, their case should be dismissed.

II. POINTS AND AUTHORITIES.

a. Plaintiffs Fail to Allege a Concrete Injury that Would Grant them Standing.

It is axiomatic that to have standing to bring a civil action for relief, a party must have suffered a "concrete and particularized" injury in fact that can be remedied by the Court. *Lujan*

¹ This is also false. Wasco County's vote tabulating machines were properly certified. If necessary, the Wasco County Defendants will rely on evidence of that fact in a Motion for Summary Judgment.

v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also*, *Eckles v. State of Oregon*, 306 Or. 380, 386 (1988) (in order to have standing to enjoin governmental action, a plaintiff must allege a government action that “injures the plaintiff in some special sense that goes beyond the injury the plaintiff would expect as a member of the general public.”). Plaintiffs concede as much. Pltf’s Resp. at 10, ¶ 20.b.

Yet nowhere in their complaint do Plaintiffs allege such an injury. Rather, they allege that they have been “underrepresented, misrepresented, marginalized, and disenfranchised” through “fraudulent, negligent machine certifications and false voting system test laboratory accreditation . . . diluting their voice and diluting their county’s voice.” Compl., at 9, ¶ 17. Such conclusory allegations are insufficient to survive a motion to dismiss. *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009). This court is not required to accept as true a plaintiff’s “labels and conclusions” or a mere “recitation of the elements of a cause of action.” *Id.* Such “naked assertions” that are “devoid of further factual enhancements” are insufficient to survive a 12(b)(6) motion to dismiss. *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 55 U.S. 544, 557 (2007)).

Plaintiffs “naked assertion” of injury is insufficient to survive Defendants’ motion to dismiss. Plaintiffs do not allege how, as a result of the alleged improper certification of voting machines, they were injured. They do not allege (because they cannot) that their votes were not counted or that other votes were improperly counted due to the certification issue. Accordingly, Plaintiffs have failed to allege the necessary injury in fact to grant them standing to bring this action and their case should be dismissed.

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b. Plaintiffs Fail to Allege a Violation of Oregon or Federal Voting Law that Entitles Them to Relief.

Plaintiffs First and Second Claims for Relief allege that Defendants have “prevent[ed] or attempt[ed] to prevent the correct operation of any voting machine or vote tally system” in violation of ORS 260.645 and otherwise failed to comply with Oregon voting laws. Compl. at 44, ¶¶ 44.a. – f. However, there is no private right of action for such a claim. Rather, violations of Oregon’s voting statutes are prosecuted as crimes under ORS 260.993 or enforced as a civil matter by the Secretary of State. ORS 260.995. Plaintiff’s First and Second Claims for Relief must therefore be dismissed. It is impossible to understand the basis for Plaintiffs’ remaining Third through Sixth Claims for Relief, and they also must therefore be dismissed.

III. CONCLUSION.

For the reasons set forth above and in Defendants’ initial Motion to Dismiss, this action should be dismissed in its entirety and with prejudice.

DATED this 20th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2023, I served the foregoing **REPLY IN SUPPORT OF DEFENDANTS' LISA GAMBEE, KATHY SCHWARTZ, STEVE KRAMER, AND SCOTT HEGE MOTION TO DISMISS** on the following:

<p>Jennifer Rae Gunter 1601 G St. The Dalles, OR 97058 jennof4@gmail.com Christina Lynn Milcarek 1496 Foxglove Street Woodburn, OR 97071 tina.milcarek@gmail.com Chelsea Anne Weber 1900 S. Pear Rd. Oregon City, OR 97045 chels3721@yahoo.com</p> <p>Plaintiffs in Lead Case</p>	<p>Judy Ann Morrise 3665 SW 78th Ave. Portland, OR 97225 judy.morrise@gmail.com Sara Marie Genta 5005 SE Lincoln St. Portland, OR 97215 sara.genta@gmail.com</p> <p>Plaintiffs in Consolidated Case</p>
<p>Oregon Department of Justice Brian Simmonds Marshall Senior Assistant Attorney General Trial Division 100 SW Market Street Portland OR 97201 Brian.S.Marshall@doj.state.or.us</p> <p>Attorney for Defendant Shemia Fagan</p>	<p>Thomas Carr, County Counsel Jason Bush, Senior Assistant County Counsel 155 N First Avenue, Suite 340, MS 24 Hillsboro, OR 97124 tom_carr@washingtoncountyor.gov jason_bush@washingtoncountyor.gov</p> <p>Attorneys for Washington County Defendants</p>

by the following indicated method(s):

- by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorney at the last known office address of the attorney, and deposited with the United States Post Office at Portland, Oregon on the date set forth above.
- by **emailing** and transmitting full, true and correct copies thereof to the parties through the **court's Cm/ECF system** on the date set forth above.

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By: /s/ Christopher Lundberg
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