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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARC THIELMAN; BEN EDTL; JANICE DYSINGER; DON POWERS; SANDRA NELSON; CHUCK WIESE; LORETTA JOHNSON; TERRY NOONKESTER; STEVE CORDERIO; JEANINE WENNING; DIANE RICH; PAM LEWIS; SENATOR DENNIS LINTHICUM; individually and on behalf of all similarly situated,

Plaintiff,

v.

SHEMIA FAGAN, in her official capacity as Oregon Secretary of State; CLACKAMAS COUNTY; WASHINGTON COUNTY; MULTNOMAH COUNTY; LANE COUNTY; LINN COUNTY; MARION COUNTY; JACKSON COUNTY; DESCHUTES COUNTY; YAMHILL COUNTY; DOUGLAS COUNTY; KLAMATHA COUNTY; COOS COUNTY,

Defendants.

Case No. 3:22-cv-01516-SB

SECRETARY OF STATE'S MOTION TO DISMISS

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LOCAL RULE 7-1 CERTIFICATION

Counsel for the Secretary of State conferred by videoconference with counsel for Plaintiffs about the grounds for this motion, but they could not resolve the issues.

I. INTRODUCTION

Thirteen Oregon voters filed this putative class action seeking to enjoin vote-by-mail and ballot-counting using electronic tally machines. They claim these long-standing election practices violate the Fourteenth Amendment. Plaintiffs' principal allegations hinge on baseless internet posts propagating election conspiracies. Federal courts have routinely dismissed similar complaints alleging election fraud conspiracies over the past two years. *See, e.g.*, *Lake v. Hobbs*, No. CV-22-00677-PHX-JJT, 2022 WL 3700756, at *9 (D. Ariz. Aug. 26, 2022) ("[T]his Court joins many others that have held that speculative allegations that voting machines may be hackable are insufficient to establish an injury in fact under Article III.") (citing three federal dismissals); *Washington Election Integrity Coal. United v. Bradrick*, No. 2:21-CV-01386-LK, 2022 WL 4598504, at *4 (W.D. Wash. Sept. 30, 2022) (granting motion to dismiss and citing three other federal dismissals). Plaintiffs' suit also must be dismissed, for two reasons.

First, the case should be dismissed for lack of subject-matter jurisdiction. The claims are based on generalized grievances regarding alleged security risks of vote-by-mail and machine counting, unconnected to any cognizable, particularized injury to Plaintiffs. Consequently, under the case-or-controversy requirements of Article III, Plaintiffs lack standing, and this Court lacks jurisdiction.

Second, the Court must dismiss for failure to state a claim. Plaintiffs' conclusory allegations—that vote-by-mail and counting ballots using electronic tally machines facilitate election fraud in violation the Fourteenth Amendment and Due Process Clause—are not supported by factual allegations that give rise to a plausible claim for relief. Indeed, the Ninth Circuit has held that "garden-variety" election administration cannot give rise to federal constitutional claims. Thus, Plaintiffs' constitutional right-to-vote claims fail as a matter of law.

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Accordingly, this case should be dismissed. Because Plaintiffs cannot remedy these deficiencies in their pleadings, that dismissal should be with prejudice.

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 conduct elections by distributing, 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 only counting ballots with equipment certified by the Secretary of State based on federally certified testing. ORS 246.550(4); OAR 165-007-0350(1).[1] Currently, Oregon counties use certified equipment manufactured by ES&S, Clear Ballot, and HART.[2] 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).

[1] The Secretary of State only certifies systems which are either "certified by the Elections Assistance Commission (EAC) or … examined by a federally accredited voting systems testing laboratory (VSTL)." OAR 165-007-0350(1).

[2] *See* Patel Decl., Ex. 1 (Voting Tally Systems by County)

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B. The Complaint

1. Claims

a. Due process (Claim 1)

Plaintiffs claim that Oregon's vote-by-mail system infringes on their federal constitutional rights under the 14th Amendment by "deploying voting tabulation systems that are inherently unsecure and vulnerable to manipulation and intrusion." Compl. ¶ 123. They also allege that Defendants violate their fundamental right to vote under the Due Process Clause of the Fourteenth Amendment by "illegally resisting the production of public records seeking to investigate the accuracy of the vote." *Id.* ¶ 126.

b. Equal protection (Claims 2–3)

Plaintiffs also claim that Oregon's vote-by-mail system "severe[ly] burdens and [infringes]" on their Equal Protection rights under the 14th Amendment because it allegedly uses "computer tabulation of votes using methods and systems that [are] inherently vulnerable and unsecure to manipulation and intrusion [which] causes an unequal tabulation of votes treating Plaintiffs and Class members who vote differently than other, [and] similarly situated voters who cast ballots in the same election…." Compl. ¶¶ 130, 131.

2. Plaintiffs' injuries

a. Vote dilution (¶¶ 65, 66)

Plaintiffs appear to allege Defendants engaged in "one voter, one vote" vote dilution, because they claim that an Oregon voter's right to cast a legitimate vote has been "stripped away," and citizens "will understand that all of these excess ballots can be used by criminals to cast illegitimate votes thereby stealing their vote." Compl. ¶¶ 65–66. Plaintiffs also allege that the showing of "actual fraud disenfranchises Plaintiffs." *Id.* ¶ 111.

b. Emotional injuries (¶¶ 69–70)

Plaintiffs allege they have suffered emotional injuries resulting from their suspicions of election fraud. First, Plaintiffs allege to suffer from a "feeling of despair about the integrity of

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elections." Compl. ¶ 69. Next, they claim that voter fraud due to alleged criminal activity has undermined the "confidence" of Oregon voters. *See, e.g., id.* ¶ 70 (alleging "[a] lack of public confidence in the accuracy of Defendants' election process"). They allege therefore that "many Oregon citizens ... feel that ... there is no point in voting" causing "mass disenfranchisement." *Id.* ¶¶ 69–70.

3. Remedies

The complaint demands a declaration from this Court that vote-by-mail and electronic tabulating systems are unconstitutional, as well as an injunction preventing Defendants from using such systems in future elections. Compl. ¶¶ 133, 136, 138; *see also id.* at page 44.

4. Theories of election fraud

Plaintiffs' complaint alleges two theories of election fraud: (a) that ballots are being cast illegally, and (b) that election officials are counting ballots incorrectly.

a. Illegal ballots

Plaintiffs' first theory of election fraud is that "excess ballots can be used by criminals to cast illegitimate votes…." Compl. ¶ 66.

i. 2000 Mules (¶¶ 42–45)

Plaintiffs allege that the film *2000 Mules* shows that people "stuff[ed] ballot boxes with multiple ballots in five states, Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin" in the 2020 election. Compl. ¶ 42. The film claims that cell phone data shows that some people were near drop box locations in those five states multiple times in the weeks before the 2020 election. *See* Patel Decl., Ex. 2 at 22–25 (Transcript of *2000 Mules*), Ex. 18 (*2000 Mules*). The film provides no baseline for the typical number of people who visit those locations during other time periods, or for how often people visited other high-traffic locations that did not have drop-boxes. *Id., passim*.

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ii. Seth Keshel (¶¶ 46–48)

The complaint cites a blog written by Seth Keshel, which claims to have "identified 74 major mule or harvesting rings from the 2020 'election.'" *See* Patel Decl., Ex. 3 (74 Harvesting Mule Rings) *cited in* Compl. ¶ 47 & n. 5. Mr. Keshel concluded that there is fraud in "counties in the western half of" Oregon. Compl. ¶ 46. But Mr. Keshel cites no direct evidence of fraud in Oregon. Rather, Mr. Keshel's claim is based on the fact that Joe Biden received more votes than Hillary Clinton did in 2016 in counties that did not "align[] with the expected trends" in Mr. Keshel's view. Patel Decl., Ex. 4 (*Oregon Election Analysis*) *cited in* Compl. ¶ 46 & nn. 3–4.

iii. House Bill 3291 (¶¶ 67–68)

The complaint finds fault with Oregon HB 3291 (2021), which gave Oregon voters more time to mail their ballots. Before HB 3291, elections officials were required to reject ballots received after 8 p.m. on Election Day. Now, election officials must count ballots that arrive by mail with a postal indicator showing that the ballot was mailed by Election Day and received by the county clerk within seven days of Election Day. ORS 254.470(6)(e)(B)(i). Even though the law requires election officials to reject ballots postmarked after Election Day, Plaintiffs allege that allowing an extra seven days for a ballot to reach elections officials "allows those who want to cheat more time to turn in illegitimate ballots." Compl. ¶ 68.

b. Tally Machines

The complaint's second theory of election fraud is that "the vote tallies reported by electronic voting machines cannot be trusted to accurately show which candidates actually received the most votes." Compl. ¶ 87.

i. Mesa County, Colorado (¶¶ 55–57)

The complaint alleges an "[a]nalysis of" "forensic backups of the election machines" used in "Mesa County, Colorado" shows "vote totals were altered…." Compl. ¶ 56. Plaintiffs previously submitted the "Mesa 3" report, which claims that Dominion Voting Systems

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machines used to count ballots in Mesa County were so manipulated. *See* ECF 6-1. Dominion machines are not used in Oregon. *See* Patel Decl., Ex. 1 (Voting Tally Systems by County).

ii. Direct-Recording Electronic Voting Machine (¶¶ 81–93)

The complaint alleges that machines used to count votes in Oregon are "unverifi[able]" "black box computers" that are susceptible to fraud. Compl. ¶ 5. In particular, Plaintiffs cite others' claims that certain direct recording electronic voting machines ("DRE") are "unreliable." Compl. ¶ 87. In elections conducted on DREs, "votes are recorded directly onto computer memory devices." Congressional Research Service, *The Direct Recording Electronic Voting Machine (DRE) Controversy: FAQs and Misperceptions*, at 2, https://crsreports.congress.gov/product/pdf/RL/RL33190/6. Plaintiffs focus on the Diebold Accuvote-TS voting machine that uses GEM software (Compl. ¶¶ 90–91) and the Advanced Voting Solution WINVOTE machine and Sequoia AVC Advantage (Compl. ¶ 93). No DRE machines, including those models, are used in Oregon. *See* Patel Decl., Ex. 1 (Voting Tally Systems by County).

iii. Foreign hacking threats (¶¶ 94–106)

Plaintiffs allege that there is significant potential for foreign hacking in Oregon elections. Compl. ¶ 94. To support their allegations, Plaintiffs rely on an article in *The Guardian* newspaper regarding foreign hacking before and after the 2016 presidential election. *Id.* The two voting machine companies identified in *The Guardian* article are PCC and Dominion. *See* Patel Decl., Ex. 5 *cited in* Compl. ¶ 94. Neither of those companies' machines are used in Oregon. *See* Patel Decl., Ex. 1 (Voting Systems by County).

The complaint cites the documentary "Kill Chain: The Cyber War on America's Elections," which features Harri Hursti, a purported election security expert who hacks voting machines. *See* Patel Decl., Ex. 6 *cited in* Compl. ¶ 98. Again, the machines targeted in the documentary are not used in Oregon's elections. *See* Patel Decl., Ex. 1 (Voting Tally Systems by County).

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iv. Proprietary software (¶¶ 107–111)

Plaintiffs allege that Oregon voters have been disenfranchised because the electronic voting systems used in Oregon employ proprietary rather than open-source software. Plaintiffs allege that use of open-source software would promote "security and transparency." Compl. ¶¶ 107, 111. Plaintiffs claim that "[t]his lack of transparency has created a 'black box' system of voting which lacks credibility and transparency." *Id.* ¶ 110. Plaintiffs cite various federal reports advocating the use of open-source software. *Id.* ¶¶ 108–09. None of these government documents concern the use of open-source software for elections.

5. Voter registration and turnout

Although the complaint makes several allegations about Oregon's voter registration requirements, it does not seek to enjoin any provision of Oregon law relating to voter registration.

a. Statewide statistics (¶ 58)

The complaint alleges that "more people are registered to vote than are eligible to vote." Complaint ¶ 58. Plaintiffs cite no source for this allegation. Based on data from the Center for Population Research and Census, the U.S. Census American Community Survey, the Oregon Department of Corrections, and the Federal Bureau of Prisons, the Oregon Secretary of State estimates that there are 3,190,451 eligible voters in Oregon, of whom 2,985,820 were registered to vote for the 2022 General Election. *See* Patel Decl., Ex. 7 (Oregon Secretary of State, Statistical Summary: November 8, 2022, General Election).

b. House Bill 2681 (¶¶ 61–66)

The complaint alleges that HB 2681 (2001) is "a law designed to make election cheating easier." Compl. ¶ 63. HB 2681 prevents a voter from being labeled as inactive due to a voter not voting (or updating their registration). HB 2681 requires county clerks to mail all inactive voters for whom they have an address with information about how to reactivate their registration before each primary or general election. The law left in place other aspects of registration list

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maintenance and the requirement that clerks verify voters' signatures on every ballot. Plaintiffs allege that because the bill allows voters to remain registered, there is a risk that "phantom votes" will be cast. Compl. ¶¶ 64–66.

c. Lane County canvassing (¶¶ 59–60)

The complaint alleges that canvassing in Lane County identified 307 invalid registrations. Compl. ¶ 59. The complaint does not allege when any of the voters registered at those addresses last voted, or even whether those registrations are active.

d. Doug Frank (¶¶ 49–54)

The complaint cites the calculations of an electrochemist, Douglas Frank, that purport to find that turnout is relatively consistent across Oregon counties and across precincts in Washington County. Academic political scientists have rejected Dr. Frank's methodology as the product of elementary mathematical errors and not indicative of fraud. *See* Justin Grimmer & Matthew Tyler, *High Correlations Between Predicted and Actual Ballots Do Not Imply Fraud* (June 2021), available at https://www.dropbox.com/s/jibv67zh9lwdlwq/FrankMemo.pdf?dl=0.

6. Public records requests (¶¶ 71–80)

Plaintiffs allude to requests made under the Oregon Public Records Law, ORS 192.314, contending that the Secretary of State's intervention in a separate case about a citizen's public records request indicates that Defendants are "working hard to conceal and hide the process by which votes are tallied." Compl. ¶¶ 74–75, 80. Plaintiffs, however, do not assert a claim under the Oregon Public Records Act. In the case that Plaintiffs cite, the Washington County Circuit Court found that the requestor was not entitled to the computer file he sought. *See* Patel Decl., Ex. 8 (*Washington County v. Sippel*, No. 22CV07782 (Washington Cty. Cir. Ct. Oct. 14, 2022)) *cited in* Compl. ¶ 75.

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III. ARGUMENT

A. Plaintiffs Lack Standing

1. Legal standard under Rule 12(b)(1)

"[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). A plaintiff has the burden of establishing that they "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*, 578 U.S. 330, 338 (2016)). "[P]laintiffs 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).

An "injury in fact" is the violation of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff cannot establish standing by asserting an abstract 'general interest common to all members of the public,' 'no matter how sincere' or 'deeply committed' a plaintiff is to vindicating that general interest on behalf of the public." *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 706–707 (2013)). In addition, "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).

Plaintiffs must individually have standing even though they seek to represent a class. "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [themselves] or any other member of the class." *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). If plaintiffs themselves "lack[] Article III standing to pursue [prospective] relief, [they] cannot represent a plaintiff class seeking

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such relief." *Villa v. Maricopa County*, 865 F.3d 1224, 1229 (9th Cir. 2017) (citing *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir. 1999) (en banc)); *see also* 1 Newberg on Class Actions § 2:11 (5th ed.) ("it is not disputed that the named plaintiff must have a live claim when the class complaint is first filed").

A plaintiff bears the burden of persuasion to establish subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court may consider evidence outside the pleadings to resolve factual disputes on a 12(b)(1) motion. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *see also Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996) (a challenge to the court's subject matter jurisdiction under Rule 12(b)(1) may rely on affidavits or any other evidence properly before the court).

2. Plaintiffs cannot plausibly allege that they were injured in fact.

a. Plaintiffs' claimed injuries are speculative.

Plaintiffs' speculative claims of election fraud are not enough to allege an injury-in-fact sufficient for standing. Plaintiffs' claims that election fraud will be attempted, and that these safeguards will fail, are speculative. The speculative risk of an injury is not sufficient for standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). Plaintiffs speculate injuries to Oregon voters based on their posited theories of election fraud. Compl. ¶ 111 ("many such voters will not exercise their right to vote due to what seems to be a hopelessly corrupt system"). To find injury, this Court would have to hypothesize a chain of events that would injure Oregon voters, precisely what the Supreme Court has held a federal court cannot do. *Clapper*, 568 U.S. at 414. Plaintiffs have not alleged that they will personally suffer a cognizable injury because they do not allege that their votes were not counted, nor that they could not vote or will be unable to vote in the future. Therefore, they lack Article III standing and the complaint must be dismissed for lack of subject matter jurisdiction.

Plaintiffs' allegations cite reports of fraud in other states, many using other election machines and processes, to contend that there is widespread election fraud in Oregon. *See*

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Compl. ¶¶ 85 (*2000* Mules), 88 (Black Box Voting), 89 (Clint Curtis YouTube), 90 (Princeton Research on DieBold Accuvote-TS voting machine), 91 (Harper's Magazine; John Hopkins and Rice University's findings on GEMS Software), 92 (Brennan Center), 93 (Ben Wofford), 94 (Jordan Wilke; excerpt from Mueller Report), 96 (VoterGA), 97 (Kim Zetter), 98 (*Kill Chain*). Even if these claims were credible, no injury to Plaintiffs, who are Oregon voters, can result from voting machines that are not even used in Oregon. Those few allegations that even relate to Oregon elections are conclusory and lack any factual allegations sufficient to make their claims plausible. *See* § III.B.2.a, below.

Plaintiffs suggest a purported *risk* to election security must be "presumed" to violate their due process rights. Compl. ¶¶ 48, 127. "But there is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable … , and (ii) a mere risk of future harm." *TransUnion*, 141 S. Ct. at 2211. In *TransUnion*, the Supreme Court found that class members who could not show that a "risk of future harm [had actually] materialized" and who did not present evidence that the class members were independently harmed by their exposure to the risk itself lacked standing. *Id.* Plaintiffs' suspicion that their ballots may not be weighted fairly is insufficient for standing because "'threatened injury must be *certainly impending* to constitute injury in fact'[;] '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)) (emphasis added). For standing, Plaintiffs must allege facts sufficient to create a plausible claim of actual fraud, not a risk of fraud.

Plaintiffs' conjectures that their votes may be diluted do not suffice. *See, e.g.*, Compl. ¶ 111 ("many such voters will not exercise their right to vote [because] their vote will not count because it will be overwhelmed by [illegal votes].") A "speculative chain of possibilities does not establish … 'certainly impending'" injury of vote dilution. *See Clapper*, 568 U.S. at 414.

One district court analyzed how this standard applies to allegations of election fraud:

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> [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.

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).

Similarly, for Plaintiffs to allege injury in fact here, this Court would need to find they have adequately alleged each step necessary for that harm to occur: (1) others must attempt to cast "phantom votes" in Oregon; (2) manipulation must actually happen; (3) Oregon's election safeguards must fail to prevent or detect the manipulation; and (4) Plaintiffs' legitimate votes must be diluted by such actors to change the outcome of an election.[3] The safeguards of Oregon law to protect against any such injury are plentiful. To ensure that only eligible voters cast ballots, ballots are sent only to registered voters, every voter signature is checked against a known voter signature, and any elector may challenge any ballot.[4] To ensure those ballots are counted accurately, county election officials use only certified systems to count ballots, maintain those systems under security plans submitted to the Secretary of State, test the accuracy of ballot

[3] Other courts faced with the same issue—the susceptibility of voting machines to illegal activity—have held that such allegations are insufficient to plead injury in fact. *See Samuel v. Virgin Islands Joint Bd. of Elections*, No. 2012-0094, 2013 WL 842946, at *5 (D.V.I. Mar. 7, 2013) (finding no standing because plaintiffs' "conjectural" allegations "that the election process 'may have been' left open to compromise" by using certain voting machines were "amorphous due process claims, without requisite concreteness"); *Schulz v. Kellner*, No. 1:07-CV-0943-LEK-DRH, 2011 WL 2669456, at *7 (N.D.N.Y. July 7, 2011) (allegations that "votes will allegedly not be counted accurately" because of "machine error and human fraud resulting from Defendants' voting procedures" were "merely conjectural and hypothetical" and insufficient to establish standing); *Landes v. Tartaglione*, No. Civ.A. 04-3163, 2004 WL 2415074, at *3 (E.D. Pa. Oct. 28, 2004), *aff'd*, 153 F. App'x 131 (3d Cir. 2005) (finding no standing because the plaintiff's claim "that voting machines are vulnerable to manipulation or technical failure" was "conjectural or hypothetical").

[4] ORS 254.415(1) (challenges), 254.431(1) (signature verification), 254.470(2)(a)(mailing to registered voters). *See also* Patel Decl., Ex. 9 (Vote By Mail Procedures Manual, adopted as a rule by OAR 165-007-0030).

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counting systems before each election, audit election results by comparing machine counts to hand counts of the ballots after each election, and conduct mandatory recounts in close elections or on the demand of a candidate or party.[5] The public is allowed opportunities to observe throughout the election process.[6] A candidate may contest the results of an election in state court.[7]

Plaintiffs do not—and cannot—allege that these safeguards failed. Thus, for the Court to find any injury based on Plaintiffs' allegations, it would need to engage in exactly the type of conjecture that the Supreme Court has declared insufficient to establish standing.

b. Plaintiffs cannot show a particularized injury.

Second, to allege a cognizable injury, Plaintiffs must plead sufficient facts and proof that they have actually suffered an "invasion of a legally protected interest" that is "concrete and particularized," i.e., which "affect[s] the plaintiff in a personal and individual way." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). A voter asserting the violation of their constitutional rights must establish that they have "a personal stake in the outcome, distinct from a generally available grievance about government." *Id.* at 1923.

Plaintiffs' generalized grievance that Oregon's election system has inadequate protections against fraud cannot meet this test. Plaintiffs claim no personal stake in the outcome because they present no facts that their own voting rights have been injured. Instead, Plaintiffs' claims are general concerns about the integrity of elections. The Supreme 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,

[5] ORS 246.550(4) (tally machine certification); OAR 165-007-0350(1) (same); ORS 254.525 (logic and accuracy testing); ORS 254.532 (audits); ORS 258.280–290 (automatic recounts); by any candidate or political party, regardless of a contest's vote count (ORS 258.161 (recounts on demand).

[6] ORS 254.415–254.426, 254.482, 258.211(2)(a).

[7] ORS 258.016, 258.036.

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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." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573–74). Thus, only "voters who allege facts showing *disadvantage to themselves as individuals* have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206 (1962) (emphasis added); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 610–611 (1973) ("[C]onstitutional rights are personal and may not be asserted vicariously…. Constitutional judgments ... are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.").

Plaintiffs fail to show how they have been personally disadvantaged by Oregon's election system. Although they express grievances about vote-by-mail and electronic tabulation, even if those grievances were well-founded, any injury Plaintiffs suffer from those practices would be shared with other voters. *See, e.g.*, Compl. ¶ 65 ("Oregon voters ... have their precious right to take part in choosing their leaders stripped away from them illegally and surreptitiously by criminals casting phantom votes."). Plaintiffs do not allege that their individual votes were not counted or have been uniquely impacted in any way.

Plaintiffs' claims are similar to those dismissed by other courts across the nation for lack of standing because the plaintiffs' generalized grievances failed to allege a particularized injury in fact. For example, one federal district court held that a voter lacked standing because even if DRE electronic voting machines were susceptible to hacking, the voter failed to allege "his vote" was affected in the final count. *Stein v. Cortés*, 223 F. Supp. 3d 423, 432–33 (E.D. Pa. 2016) ("Plaintiffs' allegation that voting machines may be 'hackable,' and the seemingly rhetorical question they pose respecting the accuracy of the vote count, simply do not constitute injury-in-fact." (citing *Clapper*, 133 S. Ct. at 1148)). Another district court held that the plaintiffs' allegations of "concerted action to interfere with the 2020 presidential election" that included "use [of] unreliable voting machines, alter[ed] votes through an illegitimate adjudication process, provid[ing] illegal methods of voting, count[ing] illegal votes, suppress[ing] the speech of

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opposing voices" were generalized grievances because the claimed injury impacted "160 million voters in the same way." *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *1, *5 (D. Colo. Apr. 28, 2021), *aff'd*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022), *cert. denied sub nom. O'Rourke v. Dominion Voting Sys.*, No. 22-305, 2022 WL 17408191 (U.S. Dec. 5, 2022). The Tenth Circuit affirmed the dismissal for lack of standing because "no matter how strongly Plaintiffs believe that Defendants violated voters' rights in the 2020 election, they lack standing to pursue this litigation unless they identify an injury to themselves that is distinct or different from the alleged injury to other registered voters." *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161, 2022 WL 1699425, at *2 (10th Cir. May 27, 2022).

Similarly, the Eleventh Circuit affirmed a district court's motion to dismiss for lack of standing when the plaintiff alleged "unlawfully processed absentee ballots [that] diluted the weight of his vote" because the plaintiff failed to "explain how his particular in-person vote, as opposed to all in-person votes more generally, was diluted" and failed to show how his vote was "specifically disadvantaged" in proportion to every vote. *Wood v. Raffensperger*, No. 20-14813, 2021 WL 3440690, at *2 (11th Cir. Aug. 6, 2021), *cert. denied*, 212 L. Ed. 2d 218, 142 S. Ct. 1211 (2022). Other district courts have dismissed other election cases for similar reasons. *See Grey v. Jacobsen*, No. CV-22-82-M-BMM, 2022 WL 9991648, at *4 (D. Mont. Oct. 17, 2022) (dismissing a complaint for lack of standing because plaintiff asserted injury solely to "generic 'voters'" and failed to state any "specific allegation" that he "personally has been injured" by the alleged election fraud conspiracy); *Washington Election Integrity Coal. United v. Anderson*, No. 3:21-cv-05726-LK, 2022 WL 4598503, at *5 (W.D. Wash. Sept. 30, 2022) (dismissing complaint for lack of standing because the complaint "appears to be based on general allegations of election irregularities that affected the votes of all 'qualified electors' in the County.").

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Like this case, the plaintiffs in each of these cases could not show that their individual votes were uniquely affected by the practices that they complained of. Plaintiffs' complaint should be dismissed for the same reason.

c. Plaintiffs' claimed emotional harms cannot establish an injury-in-fact.

Perhaps attempting to show a personal injury, Plaintiffs allege that Oregonians have suffered emotional injury from their subjective despair fueled by their own misperceptions about the integrity of Oregon elections. *See* Compl. ¶ 69 ("There are many Oregon citizens who feel that because the election outcome is predetermined, there is no point voting."). But negative feelings about the elections process—or any other government action—do not establish injury in fact. Emotional injuries are sufficient for standing in only a few circumstances, none of which apply to these claims.

One of those rare cases when a severe emotional injury is sufficient for Article III standing occurs when a plaintiff suffers from "generalized anxiety and stress" due to the defendant's targeted action. *See Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (citing *Doe v. Chao*, 540 U.S. 614, 617–18 (2004)) (suggesting that a plaintiff who allegedly "was 'torn ... all to pieces' and 'was greatly concerned and worried' because of the disclosure of his Social Security number and its potentially 'devastating' consequences'" had standing under Article III (ellipsis in original) (internal quotation marks omitted)). But in *Krottner*, the plaintiff had also "alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data"; "[w]ere Plaintiffs–Appellants' allegations more conjectural or hypothetical—for example, if no laptop had been stolen, and plaintiffs had sued based on the *risk* that it would be stolen at some point in the future—we would find the threat far less credible." *Id.* at 1143 (emphasis added).

Unlike *Krottner*, Plaintiffs' negative feelings about the elections are not supported by any allegation of real or immediate harm. Plaintiffs have not pleaded facts that demonstrate more than a speculative risk from fraudulent activity. Nor have they alleged that their votes are more

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likely to be compromised by illegal activity than the votes of every other voter. In contrast, in *Krottner*, *individual* information was stolen. *See* 628 F.3d at 1143 (finding that the alleged harm was credible because the theft was of "*their* unencrypted personal data." (emphasis added)).

Similarly, even if Plaintiffs could plead facts to support an allegation that actual election fraud had occurred, emotional injury arising from mere knowledge of unlawful activity does not establish injury in fact. The courts have consistently held that an emotional injury from mere knowledge of harm is not sufficient. *Compare Fund for Animals v. Lujan*, 962 F.2d 1391, 1396–97 (9th Cir. 1992) (holding that plaintiffs' emotional distress resulting from *witnessing* the killing of bison established injury-in-fact) (emphasis added) *with Levine v. Johanns*, No. C 05-04764 MHP, No. C 05-05346 MHP, 2006 WL 8441742, at *9 (N.D. Cal Sept. 6, 2006) (citing *Animal Lovers Volunteer Ass'n v. Weinberger*, 765 F.2d 937, 938–39 (9th Cir. 1985)) (holding that plaintiffs' "*concern*" for the killing of goats, which they did not witness, was too abstract to establish injury-in-fact. (emphasis added)). The Supreme Court has also held that "the psychological consequence presumably produced by observation of conduct with which one disagrees" nonetheless "is not an injury sufficient to confer standing under Art. III." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (holding that plaintiffs lacked standing for an Establishment Clause claim based on transfer of property to a religious educational institution because they could not show a personal injury from the alleged violation). Under this rule, "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes." *Humane Soc. of the United States v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) (collecting cases). Plaintiffs' negative perception of Defendants' alleged action and inactions stems from the *feeling* that there is *potential* for criminal fraud in elections. *See, e.g.*, Compl. ¶¶ 69, 111 (alleging a "feeling of despair," and "Oregon voters feel a lack of confidence in the integrity of the voting system"). This general emotional harm is insufficient to confer standing.

* * *

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None of the Plaintiffs assert that they personally could not vote, nor do they allege sufficient facts to show that *their* votes were diluted because of the purported illegal activity. Therefore, Plaintiffs fail to establish that they have suffered the required "concrete and particularized" harm that is not "conjectural or hypothetical," and therefore fail to meet their burden to establish standing.

B. The Complaint Fails to State a Claim

1. Legal standards for failure to state a claim

a. A complaint must allege facts that plausibly entitle a plaintiff to relief.

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.*

In considering a motion to dismiss under Rule 12(b)(6), a court engages in a two-step analysis. First, the court must identify "mere conclusions" that are "not entitled to the assumption of truth." *Id.* at 664. Second, though "detailed factual allegations" are unnecessary, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plausibility standard articulated in *Twombly* and *Iqbal* asks for more than a sheer possibility that a defendant has acted unlawfully; if the facts pled by the plaintiff "do not permit the court to infer more than the mere possibility of misconduct," then the plaintiff has failed to state a claim. *Iqbal*, 556 U.S. at 679. Determining whether a claim is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

A court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Thus, if the court finds that well-pleaded factual allegations are sufficient, then the court must

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then "determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

b. A complaint must allege fraud with particularity.

"When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1107 (9th Cir. 2003). "In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements." *Id.* at 1104. "Rule 9(b) applies to the allegations of fraud here, even if they are directed at third parties." *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 13 CIV. 2107 AT, 2014 WL 2510809, at *5 (S.D.N.Y. May 28, 2014) (holding that allegations of fraud directed solely at third parties are subject to heightened pleading requirements).

Rule 9(b) requires "stat[ing]with particularity the circumstances constituting the fraud," including identifying the "who, what, when, where, and how of the misconduct charged." *U.S. ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 677 (9th Cir. 2018). This heightened pleading standard serves to "deter the filing of complaints as a pretext for the discovery of unknown wrongs," as well as to "protect defendants from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Id.* (internal brackets omitted).

c. On a motion to dismiss, the Court considers the entire content of undisputed documents, including those the complaint cites.

On a motion to dismiss for failure to state a claim, courts are limited to considering the complaint, materials incorporated in it by reference, and "matters of which the court has taken judicial notice." *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 762 (9th Cir. 2018).

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Courts are not required to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). The court has discretion to take judicial notice of matters in the public record at any stage of a proceeding. *Skilstaf, Inc. v. CVS Caremark Corp*., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012). The standard for judicial notice requires sufficient indicia of authenticity and that the matter not be subject to reasonable dispute. *Id*.

In addition, "[a] district court ruling on a motion to dismiss may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." *Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th Cir. 1998) (internal quotations and brackets omitted) (superseded by statute on other grounds as recognized in *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681–82 (9th Cir. 2006)). Under this incorporation by reference doctrine, these documents are treated as though they are part of the original complaint. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Id*. Thus, plaintiffs cannot survive a motion to dismiss by "deliberately omitting references to documents upon which their claims are based." *Parrino*, 146 F.3d at 706. A defendant may "seek to incorporate a document into the complaint 'if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.'" *Khoja*, 899 F.3d at 1002 (citing *U.S. v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003)). A court "may assume an incorporated document's contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Id.* at 1003 (internal quotations and brackets omitted).

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2. Plaintiffs fail to state a claim.

a. The facts Plaintiffs allege are not sufficient to support their claims of illegal voting and erroneous tabulation.

i. Plaintiffs fail to adequately allege election malfeasance in Oregon.

The complaint relies on conclusory claims of security vulnerabilities in other states, which have different election laws and which use different voting technology, to ask the Court to infer that criminal activity is in fact undermining Oregon elections. *See, e.g.*, Compl. ¶ 45 ("An Oregon voter seeing the facts disclosed in 2000 Mules will understand that an organized crime syndicate is intent on stealing the results of elections."). Conclusory allegations are not given the presumption of truth. *Iqbal*, 556 U.S. at 680–81. Allegations that demonstrate only a "mere possibility" of misconduct is not a sufficient basis to "nudge[ ] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570. Neither are "'naked assertion[s]' devoid of 'further factual enhancement'" sufficient to state a claim. *Iqbal*, 556 U.S. at 678 (citation omitted) (alteration in original). Plaintiffs' allegations require the Court to speculate based on "naked assertions" and opinions about fraud and criminal activity in Oregon, whether alleged directly or based on Plaintiffs' citations to websites and publications. A court is not required to reject "bald allegations on the ground that they are unrealistic or nonsensical," but it is "the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Iqbal*, 556 U.S. at 662, 681. Here, Plaintiffs allege no facts to plausibly infer that such fraud took place anywhere, much less in Oregon.

Plaintiffs' support for their allegations focus mainly on the elections' practices of other states. When a complaint cites to snippets of documents, these documents should be viewed in their entirety. *Khoja*, 899 F.3d 988 at 1002. Examined in full, Plaintiffs' sources undermine rather than support their allegations that Oregon elections are insecure. First, Plaintiffs rely on reports of election machine vulnerabilities in the wake of Russian attempts to preceding the 2016 presidential election to conclude that election machines in Oregon must also be vulnerable to

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attack. *See* Compl. ¶¶ 94–97. Plaintiffs cite an article by *The Guardian* newspaper that reports "Russian agents probed voting systems in all 50 states." Patel Decl. Exh 5. But that article also says only Arizona and Illinois's "voter registration systems" were "successfully breached" in 2016. *Id*. Because the article does not suggest that Oregon's voter registration was breached, and Plaintiffs' claims do not concern voter registration, it does nothing to support Plaintiffs' complaint. Plaintiffs' reliance on purported problems with a Colorado county's DieBold machines suffers a similar flaw: it does not concern a voting machine used in Oregon. Order and Opinion, ECF 58 (Nov. 2, 2022) ("Plaintiffs have submitted no credible evidence that the alleged voting irregularities in one Colorado county are also present in Oregon.").

Second, the complaint refers to Senator Ron Wyden's critique that certain voting machines have "serious security flaws." Compl. ¶ 100. In isolation, these comments might appear to corroborate Plaintiffs' concerns about tally machines. But read in context, Senator Wyden's claims are specifically targeted at electronic voting machines without a voter-verifiable paper audit trail. Patel Decl., Ex. 10 at 38 (arguing for federal election security standards for paperless voting machines). These machines are not used in Oregon's elections. Most fatally to Plaintiffs' contention, Senator Wyden specifically noted that Oregon's vote-by-mail system has been successful and secure for years. *Id.* ("Everybody gets a paper ballot. There is an audit trail. We've done it for decades. It's been supported by Democrats and Republicans."). Senator Wyden's concerns about electronic voting machines elsewhere do not support Plaintiffs' allegations of voter fraud in Oregon.

Third, Plaintiffs cite various documents that advocate for the use of open-source software. Compl. ¶¶ 108–09. None of these sources specifically concern elections. Patel Decl., Ex. 11–16 *cited in* Compl. ¶ 108a–f. For example, the Federal Source Code policy (Patel Decl., Ex. 11, *cited in* Compl. ¶¶ 108a, 109) does not mention elections at all over the course of fifteen pages; its goal is to "improv[e] the way Federal agencies buy, build, and deliver information technology (IT) and software solutions to better support cost efficiency, mission effectiveness,

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and the consumer experience with Government programs." *Id.* at 1. The policy's purpose is to allow for better collaboration and consistency across Federal agencies and departments, and to implement open-source software in pursuit of these goals. *Id.*, *passim*. Even given a generous reading, this policy does not implicate voting security. Read in context, none of these documents advocate for use of open-source software in elections and do not support Plaintiffs' claims.

Plaintiffs' remaining assertions are based on others' conclusory claims, mostly from conspiracy theories propagated on the internet. Allegations that regurgitate others' conclusory assertions and unsubstantiated commentary are not "substantive evidence of [d]efendants' wrongdoing." *See, e.g.*, *Donnenfeld v. Petro Home Serv.*, No. 16-882, 2017 WL 1250992, at *5 (D.N.J. Mar. 24, 2017) (granting a motion to dismiss because the court would not "allow Plaintiff to use these unconfirmed, cut-and-pasted, on-line complaints to support a plausibility finding" and granted the motion to dismiss).

Plaintiffs' conclusory allegations based on the assertions of Seth Keshel and Doug Frank should not be credited for that reason. Mr. Keshel's results hinge on the claim that Mr. Biden received an "unexpected" number of votes from certain counties, which he claims suggests fraud. Patel Decl., Ex. 3 (74 Harvesting Mule Rings). These facts are fully consistent with another, lawful explanation: voters in those counties chose to vote for Mr. Biden in 2020, including some who did not vote for Ms. Clinton in 2016. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

The facts Dr. Frank relies on are similarly not indicative of fraud. Dr. Frank claims that he has found implausibly high correlations in the turnout across precincts and counties in Oregon. Political scientists reviewing Dr. Frank's calculations have determined that this stems from a methodological error: using the number of voters in a given county on both sides of the correlation calculation, thereby artificially inflating the correlation calculation. *See* Justin

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Grimmer & Matthew Tyler, *High Correlations Between Predicted and Actual Ballots Do Not Imply Fraud* (June 2021), available at https://www.dropbox.com/s/jibv67zh9lwdlwq/FrankMemo.pdf?dl=0. Dr. Frank never shows that applying his calculations to any data set could produce a correlation that is not, in his view, "too high." Thus, the facts he cites are as consistent with a benign explanation as a nefarious one.

Stripped of implausible inferences and criticisms of elections in other states that do not apply to Oregon, the complaint is merely a series of "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). That is not enough to state a claim.

ii. Plaintiffs fail to allege election fraud with particularity.

Plaintiffs' burden at the pleading stage is even higher here because they allege election *fraud*. *See, e.g.*, Compl. ¶ 69 (alleging that Defendants "lack of transparency is a sign that they are hiding fraud"), ¶ 74 ("An Oregon voter learning these facts will wonder what Washington County, the Secretary of State, and/or the AG is trying to hide."), ¶ 126 ("these bureaucrats are hiding the fraud existing in Oregon's election system.").[8] Allegations of fraud are subject to a higher pleading standard under Rule 9(b). *See* § III.B.1.b, above. Plaintiffs do not meet this standard.

To survive a motion to dismiss, the circumstances constituting the fraud must be pled with particularity. *Silingo*, 904 F.3d at 679–80. Plaintiffs allege that there is "proven voter fraud in multiple jurisdictions across the United States at the hands of government agencies/officials," to allege certainty of fraud in Oregon; such claims are conclusory and vague. Compl. ¶ 2. These and other passages do not meet the requirement of Rule 9(b) to identify the "who, what, when,

[8] Even if Plaintiffs had not alleged that *Defendants* were part of the fraud, they would still be required to meet the heightened pleading standard. *See Homeward Residential, Inc.*, 2014 WL 2510809, at *5.

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where, and how of the misconduct charged." *Silingo*, 904 F.3d at 677. Instead, they rest on assertions that fraud exists somewhere. Compl. ¶ 40 ("In view of the evidence pointing to actual fraud, the existence of substantial fraud is all but certain."). Rule 9(b) thus provides another basis to dismiss Plaintiffs' claims.

b. Plaintiffs' nonconclusory allegations fail to state a claim.[9]

i. Equal protection and right-to-vote (Claims 2-3)

Plaintiffs allege that vote-by-mail burdens and infringes their right to vote and thus violates the Equal Protection Clause and their fundamental right to vote. Compl. ¶¶ 130–33. The courts evaluate right-to-vote claims, including those claims under the Equal Protection Clause of the Fourteenth Amendment, under the *Anderson-Burdick*[10] test. *See Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1186, 1195–96 (9th Cir. 2021). Under that test, a court "'must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Burdick*, 504 U.S. at 434) (summarizing standard). "[T]he state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. Plaintiffs do not claim that they face unique voting procedures not required of other voters.

[9] Plaintiffs plead Section 1983 and declaratory judgment as separate causes of action, but neither provides a substantive cause of action. "One cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617 (1979). Rather, that statute "serve[s] only to ensure that an individual had a cause of action for violations of the Constitution…." *Id.* Similarly, a "declaratory judgment" is a "remed[y]"; it is "not [a] separate claim[] or cause[] of action." *Circle v. W. Conf. of Teamsters Pension Tr.*, No. 3:17-CV-00313-YY, 2017 WL 4102490, (D. Or. Aug. 31, 2017) (collecting cases), *report and recommendation adopted sub nom. Trina Circle v. W. Conf. of Teamsters Pension Tr.*, No. 3:17-CV-00313-YY, 2017 WL 4102584 (D. Or. Sept. 15, 2017). Thus, Plaintiffs' requests for those remedies fail along with their substantive constitutional claims.

[10] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

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See Arizona Democratic Party, 18 F.4th at 1190 ("Laws that 'place[] a particular burden on an identifiable segment' of voters are more likely to raise constitutional concerns." (quoting *Anderson*, 460 U.S. at 792)). Rather, they allege that vote-by-mail and counting ballots by machine violate the right to vote because, they argue, those processes leave elections vulnerable to fraud. Compl. ¶¶ 130–131.

Plaintiffs' claims fail the *Anderson-Burdick* test for two reasons.[11] First, for the reasons detailed above (§ III.B.2.a), Plaintiffs have not made non-conclusory factual allegations sufficient to infer that their claims of election fraud are plausible. Their allegations either concern claims of vulnerabilities in election systems that are not used in Oregon or rely on sources that provide no plausible factual basis for their reckless assertions about fraud in Oregon. In either case, Plaintiffs have failed to plead facts showing fraudulent activity in Oregon, or any impact at all on their own votes.

Second, even if Plaintiffs had properly pleaded such a harm, they have still not alleged a claim under the *Anderson-Burdick* standard. The complaint does not allege that voting by mail or counting with machines makes it harder for Plaintiffs to cast their ballots. *See Arizona Democratic Party*, 18 F.4th at 1189 (concluding that the "relevant burden for constitutional purposes is the small burden of" complying with the requirements to cast a ballot by mail). On the other hand, both practices that Plaintiffs challenge—vote-by-mail and counting ballots by machine—are tied to strong state interests. Oregon's long-standing vote-by-mail system allows voters to reflect on their vote choices in their own homes over a multi-week period. Vote-by-mail allows voters to make considered choices on the large number of candidates and ballot measures that appear on their ballots and facilitates Oregon's success in having among the highest voter turnout rates in the nation. *See* Patel Decl., Ex. 17 (Summary of Voter Turnout History for General Elections). There is a clear state interest in those positive outcomes. In addition, the

[11] In addition, this is a generalized grievance with no specific connection to Plaintiffs' votes in particular. *See* § III.A.2, above.

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State has an obvious interest in the accuracy and efficiency that machine counts, rather than hand counts, provide. *Anderson-Burdick* requires the Court to weigh these important state interests against the burden Plaintiffs have alleged. The balance inescapably tilts in favor of dismissing Plaintiffs' claims. *See Tedards v. Ducey*, 951 F.3d 1041, 1068 (9th Cir. 2020) (affirming dismissal for failure to state a claim when plaintiffs "failed to plausibly allege that the timing of the [challenged] election [law] is not justified by 'important' state interests").

ii. Due process claim (Claim 1)

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 has held *Anderson-Burdick* constitutes a "'single analytical framework' that applies to most constitutional challenges to voting restrictions." *Arizona Democratic Party*, 18 F.4th at 1194 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011)) (applying *Anderson-Burdick* to procedural due process claims). Accordingly, Plaintiffs due process claims should be dismissed for the same reasons as their other right-to-vote claims. *See* § III.B.2.b.i. above.

Even if the due process claims are evaluated outside the *Anderson-Burdick* framework, 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 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" under federal law. *Id.* at 1226.

The complaint does not allege a constitutional violation under this test. The complaint does not allege that Plaintiffs will detrimentally rely on Oregon's election law in the exercise of

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their right to vote. Nor does it plausibly allege that the use of ballot tally machines will result in widespread disenfranchisement. Rather, the complaint contends that Oregon's election laws have inadequate safeguards against fraud. This sort of "garden-variety" dispute over election administration is governed by state law, not federal constitutional law.

IV. CONCLUSION

The complaint should be dismissed with prejudice.

DATED January 6, 2023.

Respectfully submitted,

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