ELLEN F. ROSENBLUM
Attorney General
BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
BIJAL C. PATEL #224694
Assistant Attorney General
Department of Justice
100 SW Market Street
Portland, OR 97201
Telephone: (971) 673-1880
Fax: (971) 673-5000
Email: Brian.S.Marshall@doj.state.or.us
Bijal.C.Patel@doj.state.or.us

Attorneys for Defendant Shemia Fagan

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 others similarly situated;

Plaintiffs,

v.

SHEMIA FAGAN, in her official capacity as Oregon Secretary of State; BAKER COUNTY; BENTON COUNTY; CLACKAMAS COUNTY; CLATSOP COUNTY; COLUMBIA COUNTY; COOS COUNTY; CROOK COUNTY; CURRY COUNTY; DESCHUTES COUNTY; DOUGLAS COUNTY; GILLIAM COUNTY; GRANT COUNTY; HARNEY COUNTY; HOOD RIVER COUNTY; JACKSON COUNTY; JEFFERSON COUNTY; JOSEPHINE COUNTY; KLAMATH COUNTY;LAKE COUNTY; LANE COUNTY; LINCOLN COUNTY; LINN COUNTY; MALHEUR COUNTY; MARION COUNTY; MORROW COUNTY;

Case No. 3:22-cv-1516-SB

SECRETARY OF STATE'S REPLY IN SUPPORT OF THE MOTION TO DISMISS

MULTNOMAH COUNTY; POLK COUNTY; SHERMAN COUNTY; TILLAMOOK COUNTY; UMATILLA COUNTY; UNION COUNTY; WALLOWA COUNTY; WASCO COUNTY; WASHINGTON COUNTY; WHEELER COUNTY; YAMHILL COUNTY,

Defendants.

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Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

I. INTRODUCTION

The Amended Complaint should be dismissed for lack of jurisdiction and failure to state a claim. To establish standing, and thus this Court's subject-matter jurisdiction, Plaintiffs must demonstrate a "concrete and particularized" injury that the Court can remedy. A lack of confidence in Oregon's election system, which is the only injury identified in Plaintiffs' Response, cannot establish standing. A voter's claim that is no more specific to that voter than to any other citizen cannot constitute an injury-in-fact. Even if allegations of criminal activity and election mismanagement were plausible, Plaintiffs fail to articulate how they have any greater stake than any other citizen. Moreover, an abstract "harm" like a loss of confidence in elections does not suffice for injury-in-fact. Plaintiffs confuse their own disapproval of the manner in which elections are conducted with a cognizable injury. Claiming that Plaintiffs' distrust amounts to disenfranchisement does not make it so.

Plaintiffs also fail to state a claim. They disclaim that they allege actual fraud in Oregon's elections. Thus, none of their objections to Oregon's election administration practices plausibly allege that Plaintiffs' right to vote is burdened, as the *Anderson-Burdick* standard requires for their constitutional claims. Additionally, their claims fail to satisfy the plausibility requirements set forth in *Twombly* and *Iqbal*. Most of their allegations stem from a misapplication of others' assertions, while the remaining allegations lack any connection to the vote-by-mail and machine counting practices they seek to enjoin throughout Oregon. Thus, the facts they allege do not state a claim.

Accordingly, the Amended Complaint should be dismissed for lack of jurisdiction and failure to state a claim.

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II. POINTS AND AUTHORITIES

A. Plaintiffs lack standing.

1. Plaintiffs fail to allege a concrete injury sufficient for standing.

Plaintiffs acknowledge that they must allege a "concrete and particularized" injury-in-fact that the Court can remedy. Resp. at 4 (ECF 78 at 8) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). At the same time, they argue their "lack of confidence in the integrity of Oregon's election system" suffices for standing. *Id.* at 5; *see also id.* at 27 ("Plaintiffs' injuries stem from their distrust of Oregon's election system—no sequence of events required.").

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." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). The requirement that the injury be "particularized" is a requirement that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

In their Response, Plaintiffs rely only on their own lack of confidence in Oregon's election system to show they have alleged an injury-in-fact. *See* Resp. at 26 (ECF 78 at 30) (conceding that Plaintiffs' claims are not based on actual election fraud but that they are "damage[d]" by a lack of confidence in the integrity of elections). A voter's claim that is "no more specific to him than any other citizen" does not constitute an injury in fact. *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (holding that the plaintiff's status as a voter did not give him standing to challenge President Obama's candidacy on grounds that this was a "generalized interest of all citizens in constitutional governance" and "even as a voter, [plaintiff] has no greater stake in this lawsuit than any other United States citizen."). Here, Plaintiffs challenge mail in voting on the grounds that it is inherently insecure due to various broad allegations of criminal activity and election mismanagement. Even if these allegations were plausible, Plaintiffs fail to articulate how they have any "greater stake" than "any other" citizen in these allegations to have suffered an injury-in-fact. *Id.* "[A]n asserted right to have the

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Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984); *accord Lujan*, 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."). This principle applies equally in the context of elections. *See also Drake*, 664 F.3d at 782; *Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020) (holding that even if there were irregularities in the tabulation of election results, they "do not affect [a plaintiff] differently from any other person" and thus does not confer standing).

Plaintiffs' "lack of confidence in the fairness of elections" is not enough to constitute injury because a "general emotional 'harm' … 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); *see also* MTD at 16–18 (ECF 73 at 25–27). Plaintiffs' complaint expresses their general disenchantment with the elections process and Defendants. *See* Resp. at 6 (ECF 78 at 10) ("Plaintiffs are disenfranchised because, due to the public's lack of confidence in the fairness of elections, they no longer have self–governance."). Claiming to be disenfranchised does not make it so. The Amended Complaint does not allege that any Plaintiff did not or will not vote or alleged any concrete fact demonstrating that any Defendant failed to count their vote. Plaintiffs have not alleged that the elections laws and practices they challenge in fact burden voters in any cognizable way.

The only harm Plaintiffs allege is that a lack of confidence in the elections process "'drives honest citizens out of the democratic process.'" Resp. at 26 (ECF 78 at 30) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). Plaintiffs' reliance on *Purcell* to argue that a negative feeling constitutes an injury-in-fact is inapposite. Resp. at 5 (ECF 78 at 9 n.10) (quoting *Purcell*, 549 U.S. at 4 (2006)). *Purcell* did not concern standing. Rather, it dissolved an

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injunction pending appeal on the ground that "the balance of the harms and the public interest counseled in favor of denying the injunction" of election procedures in the weeks right before an election. *Id.* The Court reasoned, when exercising *equitable* discretion to issue an injunction, a court must consider that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. What is now known as the *Purcell* principle—"that federal courts ordinarily should not enjoin a state's election laws in the period close to an election"[1]—is unrelated to standing.

Plaintiffs' reliance on *Brown v. Board of Education* is also misplaced. Resp. at 25 (ECF 78 at 29). In *Brown*, the U.S. Supreme Court held that racial segregation in public schools "has a detrimental effect" on black students' educational opportunities and "this finding is amply supported" by "modern authority." *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493–94 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955). Standing was not at issue in *Brown*: the plaintiffs' personalized injury was clear because they were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 495. A plaintiff who alleges unequal treatment meets the Article III standing requirements because a deprivation of "equal treatment under law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it." *Davis v. Guam*, 785 F.3d 1311, 1314–15 (9th Cir. 2015) (applying *Heckler v. Mathews*, 465 U.S. 728, 738 (1984)). But Plaintiffs here do not allege that they are treated differently than any other voter.

In their Amended Complaint and their Response, Plaintiffs recite their disagreements with elections law and practices. Even taking these allegations as true, they amount to nothing more than a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens" and does not confer standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Plaintiffs specifically disclaim that the Amended Complaint alleges fraud, the only mechanism for the

[1] *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

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theory that Plaintiffs' votes had been "diluted." Resp. at 27 (ECF 78 at 31) ("Plaintiffs are not alleging fraud."). Plaintiffs instead allege that their trust in elections has diminished, but that is not a concrete and particularized harm that affected them in a sufficiently tangible way. Nor do Plaintiffs allege that *their* personal votes were implicated in any way by any of the alleged unlawful activity. Plaintiffs assert that "the people no longer control elections on [sic] Oregon, and they no longer govern themselves." Resp. at 29 (ECF 78 at 33). Plaintiffs appear to accept that their grievances are shared by the collective "people," rather than a specific subset of the general public sufficient to "warrant exercise of jurisdiction," *Warth*, 422 U.S. at 499.

A lack of confidence is not an injury that suffices for standing. *See, e.g.*, *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 874 (10th Cir. 2020) (holding that a plaintiff's "lack of confidence" in a school's exercise of a religious exemption, without evidence of any imminent injury, was insufficient to support standing). Similarly, Plaintiffs allege no imminent harm except that they do not trust the elections process. *See, e.g.*, Resp. at 25 (ECF 78 at 29) ("Oregon's vote–by–mail, count by computer, election system is designed and operated in a way that shuts out the public and generates suspicion and distrust in our government.").

Plaintiffs have alleged only abstract, not concrete, harm. Those harms are also not personal to them. For each of those reasons, their allegations are insufficient for standing.

2. Plaintiffs' alleged injuries are not fairly traceable to most of the County Defendants.

Plaintiffs also fail to show they have standing to sue each defendant they named in the Amended Complaint. Plaintiffs' Response does not point to any allegations of the conduct of 20 counties named in this action. *See* MTD at 20 n.10 (ECF 73 at 29 n.10) (listing counties). Standing requires that a plaintiff fairly trace their injury to the conduct of a defendant. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). But Plaintiffs' Response makes no attempt to show "a causal connection between the injury and the conduct complained of" in relation to those

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counties. *Lujan*, 504 U.S. at 560. Therefore, 20 counties[2] must be dismissed from the case for lack of standing.

Plaintiffs also fail to show that they suffered any personal injury by the alleged conduct of the remaining 7 out of 16 counties. *See* MTD at 20 n.11 (ECF 73 at 29 n.11) (listing counties). Plaintiffs cannot do so, because even if their allegations were true, this is only a generalized interest in proper application of the law. Therefore, these 7 counties[3] must be dismissed because Plaintiffs have failed to allege a cognizable injury traceable to their conduct.

B. Plaintiffs fail to state a claim.

Plaintiffs attempt to state a claim based on a "lack of confidence that is justly felt due to the myriad of facts pleaded." Resp. at 28 (ECF 78 at 32). The bulk of Plaintiffs' allegations merely restate and misapply others' assertions found on the internet and elsewhere. The remaining allegations—although often colorful—have no connection to the practices in Oregon that they seek to enjoin. For those reasons, Plaintiffs fail to allege the facts necessary to support their claims of insidious conduct.

1. Plaintiffs fail to state a claim under the *Anderson-Burdick* standard.

Plaintiffs' response appears to recognize that the *Anderson-Burdick* standard applies to their equal protection and due process claims. Resp. at 28–29 (ECF 78 at 32–33).[4] The allegations in the Amended Complaint fall short of establishing a plausible right to relief under this standard, which requires the court to "weigh 'the character and magnitude of the asserted

[2] Benton County, Columbia County, Crook County, Curry County, Deschutes County, Gilliam County, Grant County, Harney County, Hood River County, Jefferson County, Klamath County, Lake County, Linn County, Morrow County, Sherman County, Tillamook County, Umatilla County, Wallowa County, Wasco County, and Wheeler County.

[3] Baker County, Coos County, Josephine County, Malheur County, Polk County, Union County, and Yamhill County.

[4] Plaintiffs' Response does not rebut the Motion's explanation that Section 1983 and the Declaratory Judgment Act create remedies rather than claims. *See* MTD at 27–28 n.13 (ECF 73 at 36–37 n.13). Thus, a plaintiff cannot bring standalone Section 1983 or declaratory judgment claims. *Id.*

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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.'" *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1187, 1195–96 (9th Cir. 2021) (quoting *Burdick*, 504 U.S. at 434).

As the Motion details, there are weighty state interests in the efficiency of a machine count and promoting access to the franchise through automatic voter registration and the vote-by-mail system. MTD at 29 (ECF 73 at 38). Unless Plaintiffs have plausibly alleged burdens that outweigh those interests, their claims should be dismissed for failure to state a claim. *See Tedards v. Ducey*, 951 F.3d 1041, 1068 (9th Cir. 2020). Their allegations do not plead such a burden for two reasons.

To begin with, Plaintiffs' allegations do not articulate an actual burden on their right to vote. Instead, they argue, in essence, that it is too easy to vote in Oregon. That is not a burden on the right to vote at all. Plaintiffs' response that "there is no possible justification for the State to have taken away Plaintiffs' right to self-governance" is a textbook conclusory allegation, hinging on their unsupported (and now disclaimed) position that Oregon's election administration is plagued by fraud. As with injury-in-fact, Plaintiffs fail to plead any facts that show that any of their allegations affect their own votes.

Plaintiffs cite *Degraffenreid* to argue that a lack of confidence in the elections process is sufficient to show a burden under *Anderson-Burdick*. Resp. at 28 n.92 (ECF 78 at 32 n.92) (citing *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting)). But *Degraffenreid* is a single justice's dissenting opinion of denial of certiorari; it is not controlling law. In any event, *Degraffenfried* came to the Supreme Court seeking review of a Pennsylvania Supreme Court decision extending the term for counting mail-in ballots close to the 2020 election. The issue in that case concerned whether "the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the

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legislature.'" *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting) (quoting *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C. J., concurring)). Whether the U.S. Constitution limits a state judiciary's application of its state constitution to federal elections has nothing to do with the Fourteenth Amendment claims that Plaintiffs assert here.

Furthermore, Plaintiffs' underlying allegations that invalid votes are counted or that valid votes are miscounted lack the necessary supporting factual allegations to establish a plausible right to relief. 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Conclusory allegations are not given the presumption of truth. *Id.* at 680–81. Plaintiffs fail to make anything but conclusory allegations to support their claims of vote-dilution or disenfranchisement. *See, e.g.*, Resp. at 27 (ECF 78 at 31) (claiming a "distrust that has been justly earned" by the way that elections are conducted); *see also id.* at 28 (ECF 78 at 32) ("Defendants have taken away [self-governance] from all of Oregon's citizens."). In short, their allegations fail to meet the pleading threshold set by *Twombly* and *Iqbal*. Considering these shortcomings, Plaintiffs' claims should be dismissed for failure to state a Fourteenth Amendment claim upon which relief can be granted under *Anderson-Burdick*.

2. Plaintiffs' objections to particular practices do not allege a burden under *Anderson-Burdick*.

Plaintiffs' Response identifies ten factual bases for their claims. Resp. at 8–20 (ECF 78 at 12–24).[5] The facts alleged for each basis identified are not enough to establish that their right to vote is burdened under *Anderson-Burdick*. Accordingly, the Amended Complaint should be dismissed.

[5] This section of the Reply refers by number to each subsection of Section II. C of Plaintiffs' Response.

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a. Voter registration issues (#1, #3)

Plaintiffs argue that their allegations about Oregon's voter registration practices are sufficient to state a constitutional claim. But nothing in the Amended Complaint suggests that Oregon's registration rules burden the right to vote of any Plaintiff. In fact, the Amended Complaint alleges that each Plaintiff is registered to vote. FAC (ECF 71) ¶¶ 10–22.

Moreover, the voter registration list issues they raise are distant from the claims they assert and the relief they seek: that vote-by-mail and machine counts are unconstitutional and therefore should be enjoined. And while Plaintiffs suggest that Oregon's voter registration list maintenance practices violate the National Voter Registration Act (NVRA), Resp. at 4–5 (ECF 78 at 8–9), their Amended Complaint does not assert any statutory NVRA claims. Had it done so, those NVRA claims would be barred by Plaintiffs' failure to provide the prior notice required by 52 U.S.C. § 20510, among other issues.

b. The integrity of vote-by-mail elections (#2, #3, #4, #7, #10)

Plaintiffs contend that Oregon election officials are violating their constitutional right to vote by accepting and counting illegal ballots. These allegations do not state a viable claim under *Anderson-Burdick*.

First, none of Plaintiffs' allegations demonstrate how or even that their right to vote has been actually burdened by the alleged wrongdoing. Plaintiffs' response disavows any allegation of actual fraud in Oregon's elections. Resp. at 27 (ECF 78 at 31). Instead, they rely on their own doubts about the integrity of Oregon's elections. This admission alone dooms Plaintiffs' vote dilution claims because, even if such claims were valid (which they are not, as many district courts have held), they would at least require that illegal ballots have actually been counted to dilute Plaintiffs' voting strength.

Second, Plaintiffs' allegations that illegal votes are being cast and accepted for counting are conclusory and lack supporting factual allegations necessary to allow a plausible inference of actual harm. As explained in the motion to dismiss, Plaintiffs mainly rely on a small handful of online posts to support their claims of widespread malfeasance. However, examining these

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materials in their entirety shows that the posters' conclusions are based on a series of implausible inferences that need not be accepted by the Court. *See* MTD at 24–26 (ECF 73 at 33–35). To state a plausible claim for relief, Plaintiffs must provide specific factual allegations that support their claims, rather than rely on third-parties' speculation or conjecture. *See 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"). The Amended Complaint does not meet this standard.

Plaintiffs' allegations focusing on particular election administration practices—counting ballots that are postmarked by election day (#3), not restricting the method voters use to return their ballot (#10), verifying voter signatures (#4), and the methods to maintain the security of submitted ballots (#7)—fare no better. For one thing, these allegations are also disconnected from their complaint's much broader claim: that vote-by-mail and machine counting must be enjoined entirely. Beyond that disconnect, Plaintiffs' allegations articulate no burden on their right to vote. Counting ballots postmarked by election has no burden on Plaintiffs; they can still vote well before election day if they choose to do so. Similarly, the fact that other voters choose to entrust the return of their ballot to another person, such as a family member, does nothing to burden the rights of voters who choose to return their ballot themselves or by mail. Plaintiffs also cannot show they are burdened because elections officials verify voters' signatures. The Amended Complaint provides no factual allegations suggesting Plaintiffs' ballots are likely to be rejected in the signature verification process, nor any reason that if their ballots were rejected in a future election that they could not cure the ballot within the 21 days allowed under ORS 254.431(2)(a). Finally, Plaintiffs' allegations do not give rise to a plausible inference that their votes were not counted due to lapses in the security of their ballot. Again, Plaintiffs' concession that they are not alleging actual fraud forecloses such an inference.

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c. Computer tally machines (#8)

Plaintiffs' arguments that "[c]omputerized systems present an inherent and undeniable security risk" largely abandon reliance on the materials cited in the Amended Complaint. Rightly so: as the Motion explains, those materials concerned machines used in other states, with no reason to link them to Oregon voting equipment. MTD 15–16 (ECF 73 at 24–25).

Plaintiffs' attempts to point to a few other particulars also fail. This Court recently rejected identical claims that the certification of Oregon's tally machines was invalid, concluding on a motion to dismiss that the plaintiffs' claim that federal test labs lost accreditation is inconsistent with federal statutes. *See Gunter v. Fagan*, 3:22-CV-01252-MO, 2023 WL 1816551, at *3 (D. Or. Feb 6, 2023) (holding that 52 U.S.C. § 20971(c)(2) precluded claims that lab accreditation "expires"). Plaintiffs' allegations that errors in one county's election night reporting suggest that machine counts are unreliable also fall short. Under *Twombly*, allegations must "plausibly suggest[] (not merely [be] consistent with)" unlawful conduct. 550 U.S. at 545. Here, Plaintiffs' observations are equally consistent with a benign—if unfortunate—explanation: that there was a human error in posting unofficial results online that was quickly corrected and not reflected in the certified returns.

d. Observation (#5), post-election procedures (#6), and public records responses (#9)

Plaintiffs' Response (#5) recounts complaints about the manner in which a few counties allow public observation of the ballot count as required by Oregon law, ORS 254.482. However, none of Plaintiffs' claims concern the observation of elections, but rather their right to vote. To the extent that Plaintiffs are disputing Defendants' interpretation and implementation of state election law, that is not enough to state a federal constitutional claim. *See Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020).

Plaintiffs' objections (#6) to post-election verification procedures that ensure machine counts match paper ballots are similarly ill-targeted. Oregon law allows county clerks to choose between a hand count of ballots compared to vote tally system results or a risk-limiting audit,

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either of which is sufficient to confirm the accuracy of the machine count. *See* ORS 254.532(2). Moreover, Plaintiffs do not allege that the counties' choice of a hand count burdens their right to vote.

Finally, it is unclear what claim Plaintiffs are attempting to support by criticizing of the timing and cost of public records requests relating to elections (#9). They do not assert a claim under the Oregon Public Records Act, and the processing of Plaintiffs' public records requests is distinct from Plaintiffs' exercise of the right to vote. While the Oregon Public Records Act has detailed dispute resolution procedures that any requester may invoke (*see* ORS 192.407–192.431), a federal Fourteenth Amendment claim is not one of them.

III. CONCLUSION

This case should be dismissed without leave to amend.

DATED April 14, 2023.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Brian Simmonds Marshall
BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
BIJAL C. PATEL #224694
Assistant Attorney General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
Brian.S.Marshall@doj.state.or.us
Bijal.C.Patel@doj.state.or.us
Of Attorneys for Defendant Shemia Fagan

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000