

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR COOS COUNTY

Pamela Elaine Lewis and Diane Elaine Rich

Plaintiffs,

vs.

Coos County Corporation, Diris D. Murphy,
Melissa Cribbins and John Sweet.

Defendants,

Case No. 22CV24082

**OPINION AND ORDER
RE: MOTION TO DISMISS**

This matter came before the Court for hearing on February 22, 2023 on Defendants' Motion To Dismiss. Plaintiffs, appeared through their attorney, Tyler D. Smith. Defendants appeared by through their attorney Jill O. Gibson. The Court took the matter under advisement. The Court now having considered the pleadings and arguments herein, now finds and rules as follows:

I. General Allegations in Third Amended Complaint:

The Third Amended Complaint focuses on wrongdoing that allegedly occurred leading up to and during the May 2022 primary and 2022 general elections. It contains 24 paragraphs entitled "general allegations." Those include that Plaintiff Pamela Elaine Lewis (hereafter Lewis) resides in Coos County, is a registered voter and was a candidate for Coos County public office in the May 2022 primary election and has associated herself with the Oregon Republican Party. Plaintiff Diane Elaine Rich (hereafter Rich) is similarly alleged to be a resident of Coos County, a registered voter and associated herself with the Oregon Republican Party and was a candidate for office.

Paragraphs 4-8 are specific to Defendants Smith and Cribbins. Those paragraphs include allegations that Smith and Cribbins were Coos County Commissioners who were also candidates for those offices in the 2022 primary. They, along with unnamed county commissioners allegedly violated public meeting laws by voting to appoint Murphy as Interim county clerk. Prior to that vote, Smith and Cribbins are alleged to have recruited Murphy, a known political ally of Smith and Cribbins, to apply for the position and to resign her position as Democrat Party Chair for the Coos County chapter of that party.

In March 2022, according to the Third Amended Complaint, Lewis was approved by Murphy as an authorized election observer pursuant to ORS 254.482. The Third Amended Complaint further alleges that during the primary election and general elections of 2022, Murphy unlawfully prevented and interfered with persons authorized to observe from doing so. The remainder of the

allegations, although variously asserting wrongdoing by “Defendants,” “Defendants Coos County and Murphy” or “Defendant Murphy,” all relate to alleged actions or inactions of Murphy or her election staff. Based on these allegations, Plaintiffs bring seven claims for relief seeking declaratory judgment and a permanent injunction “enjoining Defendant Coos County, and any of its agents, employees or future County Clerks from engaging in any of the illegal practices” along with costs and attorney fees.

On January 23, 2023, Defendants filed a Motion to Dismiss Plaintiffs’ Third Amended Complaint. By Affidavits attached to their Motion Defendants provide the Court with information subject to Judicial Notice gathered from information contained in documents officially filed with and by the county clerk relating to the elections at issue. Those additional facts include that Rich was seeking election to the county clerk position—a position Murphy did not seek— and Rich lost the election with 29.72 % of the vote. Additionally, Lewis was seeking election to the board of county commissioners, running against Sweet. Lewis’s candidate statement indicated that her party affiliation was “Nonpartisan.” Sweet’s candidate statement indicated that he affiliated with the Republican Party. Sweet received 51.58% of the vote and Lewis 39.14% of the vote.

II. MOTION TO DISMISS

As an initial matter, the Court notes that Defendants seek the dismissal of Sweet and Cribbins from the case because Plaintiffs have failed to allege any facts tying Sweet or Cribbins to any of the wrongdoing alleged in any of the claims for relief. The Court agrees. The allegation relating to actions of Cribbins and Sweet are contained in Paragraphs 4-8. They all relate to the alleged wrongful recruitment of Murphy, violation of public meeting laws, the alleged extension of the application deadline so Murphy could apply and the ultimate board of commissioner vote to appoint Murphy. Even if those allegations could form the basis for a claim for relief, which is unlikely, none of those allegations are tied to any of the seven claims for relief in the Third Amended Complaint. Those claims all relate to the conducting of the elections by Murphy and election staff under her direction. Therefore, Cribbins and Sweet are dismissed from the case.

A. Motion against the First Claim for Relief for declaratory judgment under ORS 28.010 and 28.020.

Plaintiffs assert that they are entitled to a declaration that Defendants’ “practices and actions alleged herein, including but not limited to those stated below in paragraphs 28 were in violation of state law and therefore should be permanently enjoined.” *Third Amended Complaint* paragraph 26. In paragraph 28 of their Third Amended Complaint, Plaintiffs assert 11 “counts” of election law violations and allege that in committing those violations “Defendant deliberately and materially violated multiple provisions of Oregon election law in connection with the May 2022 primary election and the November 2022 general election.”

In their Motion to Dismiss, Defendants argue that the First Claim for Relief under ORS 28.010 and 28.020, should be dismissed because Plaintiffs have failed to meet the requirements necessary for establishing that a “justiciable controversy exists.” Defendants assert that under the Declaratory Judgment Act a plaintiff may seek relief only if the plaintiff shows that “(1) there is an injury beyond an abstract interest in the correct application of the law; (2) the injury is real

and present; and (3) the court’s decision will have a practical effect.” Citing *Doyle v City of Medford*, 356 Or 336, 372 (2014). Defendants argue that Plaintiffs’ Third Amended Complaint fails to meet these requirements.

As to the first requirement necessary for a justiciable controversy, Defendants urge that although Plaintiff Lewis alleges that she was an authorized observer she “had no legally protected right” to observe votes at any particular time because under the applicable statute and rule county clerks have “broad discretion regarding when to allow authorized observers to observe vote counting.” (citing ORS 254.478 and *Secretary of State’s Vote by Mail Procedures Manual*).

Defendants further assert that Plaintiffs have not alleged a present dispute between the parties. In fact, Defendants point out, Murphy, the person who allegedly made the very decisions Plaintiffs complain about, no longer holds the office of county clerk. The elections at issue are over. Relying on the Oregon Supreme Court’s holding in *Brown v Oregon State Bar*, 293 Or 445, 449 (1982), Defendants argue that because the controversy does not “involve present facts, rather than past acts or ‘future events of a hypothetical issue’ the allegations in Plaintiffs’ Third Amended Complaint are insufficient to meet the real and present injury requirement.” Finally, Defendants contend that because there is no ongoing legal dispute between the parties a declaration from the Court “would have no practical effect on the rights Plaintiffs are seeking to vindicate.”

Plaintiffs resist Defendants’ arguments and point to paragraph 28 of their Third Amended Complaint which lists out as “counts” each of the statutory rights they contend were violated. Plaintiffs assert that under the Declaratory Judgment Act, the Court should declare “Plaintiff’s rights with respect to these laws, rules and practices by Defendants” and to “declare that Coos County’s policies and election practices as alleged herein illegal” and enter a judgment permanently enjoining them from violating “these state election laws, and/or preventing Plaintiffs from exercising their own election rights.” Plaintiffs further assert that the fact that they have filed complaints with the secretary of state relating to the election practices Defendants allegedly engaged in during the May and November 2022 elections and that those practices “affected Plaintiff’s [sic] legal interests are sufficient for the Court to grant the requested declaratory relief.

Court’s Analysis.

“To maintain a declaratory judgment action, a plaintiff must establish at the outset that he or she satisfies the statutory requirements for standing to bring the action.” *Couey v. Atkins*, 357 Or 460, 469 (2015). In the context of an action for declaratory relief, “standing means the right to obtain an adjudication. It is thus logically considered prior to consideration of the merits of a claim. *City of Wheeler*, 141 Or App 166, at 171 (1996).

Some ten years ago the Oregon Supreme Court observed that under the Uniform Declaratory Judgment Act, determination of a plaintiff’s standing involves three “related but separate considerations.” *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or. 189, 195 (2013).

As to the first consideration, explained by the court, there must be

“some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law.” *League of Oregon Cities v. State of Oregon*, 334 Or. 645, 658, 56 P.3d 892 (2002). It is not sufficient that a party thinks an enactment or a decision of a government entity to be unlawful. The standing requirements of ORS 28.020 require that the challenged law must affect *that party's* rights, status, or legal relations.

Thus, for example, in *Eacret et ux. v. Holmes*, 215 Or. 121, 333 P.2d 741 (1958), the plaintiffs initiated an action under the Uniform Declaratory Judgments Act, requesting a declaration that the Governor lacked the constitutional authority to commute the sentence of death that had been imposed on the defendant, who had been convicted of murdering their son. This court affirmed the dismissal of the action for want of standing. The court explained that “[t]he wrong of which they complain—if there be a wrong—is public in character. The complaint discloses no special injury affecting the plaintiffs differently from other citizens.” *Id.* at 124, 333 P.2d 741. “There is no case for declaratory relief,” the court concluded, “where the plaintiff seeks merely to vindicate a public right to have the laws of the state properly enforced and administered.” *Id.* at 125, 333 P.2d 741 (internal quotation marks omitted). See also *League of Oregon Cities*, 334 Or. at 658, 56 P.3d 892 (plaintiff must show “ ‘some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law’ ”); *Cummings Constr. v. School District No. 9*, 242 Or. 106, 110, 408 P.2d 80 (1965) (construction contractors lacked standing to challenge school district construction bidding practices when they did not bid for school district construction work). *Id.* at 194-195.”

With respect to the second consideration, the Supreme Court, explained that the “injury must be real or probable, not hypothetical or speculative.” Relying on its prior holdings the court emphasized that “courts cannot issue declaratory judgments in a vacuum; they must resolve an actual or justiciable controversy. To be justiciable, a controversy must involve a dispute based on present facts rather than on contingent or hypothetical events.” *Id.* at 196.

The third consideration, said the court, “must have a practical effect on the rights that the plaintiff is seeking to vindicate.” *Id.* This means that “there must be a real and substantial controversy admitting of specific relief through a decree of conclusive character. Otherwise, the court's decision will amount to no more than an advisory opinion.” *Id.*

Finally, the court in *Morgan* also addressed the question of standing when a party is seeking injunctive relief, explaining that although “no statute governs the issue of standing to seek injunctive relief,” the Supreme Court “has long applied essentially the same standing requirements that ordinarily apply in declaratory judgment actions.” *Id.* at 201.

In the case at bar, Plaintiffs complain that Defendants engaged in a variety of election violations, specifically pointing to violations alleged in paragraph 28 of their Third Amended Complaint. That paragraph alleges 11 “counts.” Counts 1-7 are violations of ORS 260.260, 260.645, 260.695(3), 260.295(11), 254.482, 254.415, and 254.074. Count 8 alleges violation by “[f]ailing to utilize law enforcement or two-person ballot transportation (Elections Manual).” Counts 9-11 allege violations of ORS 247.124, 260.695 and 254.485 respectively.

The question here is, have Plaintiff's established the requisite standing to obtain declaratory relief? As discussed, determination of this question requires the Court to address three considerations.

First, has there been some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law that affects Plaintiffs rights, status or legal relations? The Court notes that Plaintiffs do not allege that either of them was denied the right to vote. They do not allege that anyone who intended to vote for either of them, was denied the opportunity to do so. They do not allege that, but for the alleged voting violations, the outcome in of the elections would have been different or that they would have been elected. They do not seek to have the elections set aside. What they allege is that Murphy and her staff violated various election laws relating to election process and procedures.

None of the alleged counts in paragraph 28 are specific to Plaintiffs, except possibly count 5, relating to violation of ORS 254.482 concerning authorized election observers. That statute provides in toto:

After the date that ballots are mailed as provided in ORS 254.470, the county clerk, if requested, shall permit authorized persons to be at the office of the county clerk to watch the receiving and counting of votes. The authorization shall be in writing, shall be signed by an officer or its county affiliate of a political party, a candidate or the county clerk and shall be filed with the county clerk. The county clerk shall permit only so many persons as watchers under this section as will not interfere with an orderly procedure at the office of the county clerk.

According to the Third Amended Complaint, Lewis was authorized by Murphy to be an observer. The Third Amended Complaint contains many allegations relating to specific ways that Murphy allegedly violated legal requirements related to authorized observers and essentially contends that Murphy disallowed "people" who were authorized observers from observing all occasions when ballots were received and counted, or otherwise interfered with people being able to effectively observe that process. There are no allegations that Lewis was specifically denied the opportunity to watch on a particular date or time. What is more, as Defendants point out, the statute does not prescribe any of the details that Plaintiffs have apparently written into it regarding notice, distance, vantage point, timing etc. Neither does the *Vote By Mail Procedures Manual* Promulgated by the Secretary of State.

More fundamentally, neither the statute nor the procedure manual confers a unilateral or unlimited right on any one person to observe at any specific time but instead allows the clerk to determine the number of observers based on a variety of considerations. In other words, the clerk is vested with discretion when it comes to how, when and how many observers will be admitted to observe. Indeed, the manual specially directs "the clerk to "permit only so many persons as watchers...as will not interfere with an orderly procedure at the office of the county clerk."

Additionally, considering the general allegations and those specific to Plaintiffs' claims for relief, it appears that Plaintiffs are not complaining about injuries personal to themselves at all.

Instead, it appears that the purpose of each of their claims is to vindicate a public interest. Indeed, Plaintiffs themselves assert exactly that in paragraph 24 stating:

“On all claims for relief, plaintiffs are entitled to a declaring that Coos County’s policies and election practices alleged herein are illegal and a judgment permanently enjoining and prohibiting the Coos County Clerk and Coos County from violating these state election laws. Plaintiffs are entitled to recover their reasonable attorney fees, costs and disbursements from Defendants because *Plaintiffs are seeking to vindicate important stator and constitutional rights applying to all citizens and not vindicating individualized and different interests or any pecuniary or other special interest of their own except those which are shared with the public at large, other residents, citizens or electors.*” (emphasis supplied).

As discussed above, our appellate courts teach that there is no case for declaratory relief when the plaintiff is only seeking to vindicate a public right to have laws of the state properly enforced and administered.

The second consideration necessary for determining whether Plaintiffs have standing to seek declaratory relief also weighs against Plaintiffs. As discussed, to be justiciable, a controversy must involve a dispute based on present facts rather than on contingent or hypothetical events. Put another way, the Declaratory Judgment Act “is not a mechanism for determining liability for past actions.” *Beason v. Harclerod*, 105 Or App 376, 380 (1991).

In this case, all the actions Plaintiffs complain of took place during the 2022 election cycle. Those elections are over. Plaintiffs plead that the alleged violations are part of “Defendants’ policies and practices” and that they intend to vote in the future, in an apparent attempt to avoid the consequence of the requirement that there be a present dispute. However, these allegations are not sufficient to meet the present controversy requirements. As Defendants repeatedly argue, after the election a new county clerk was elected to office and Murphy no longer holds the position. The Court notes that ORS 246.200 directs:

“Except as otherwise provided by law, the county clerk is the only elections officer who may conduct an election in this state. For purposes of this section, the conduct of an election includes, but is not limited to, establishing precincts, preparing ballots and sample ballots, and receiving and processing votes.”

This statute is clear. Nobody but the county clerk has authority to conduct county elections. Thus, although the county clerk is nominally an agent and employee of Coos County, the clerk has independent authority when it comes to conducting elections. The wrongful behaviors, “policies and practices” that Plaintiffs attribute to “Defendants” all involve responsibilities that rested in the sole authority of the county clerk-Murphy who no longer holds the position.

Nothing in the Third Amended Complaint alleges that the current clerk has done anything that violates any election law. Nothing in the allegations demonstrate facts from which the Court could conclude that there is a present controversy rather than a hypothetical prediction regarding what policies and practices the current county clerk will engage at some point in the future. Even

the worry that “Defendants plan” on using the allegedly unsuitable voting machine is not a present controversy but instead is couched in terms of expected future event.

Plaintiffs’ claim is also infirm with respect to the third consideration. As discussed, there must be a practical effect on the rights Plaintiffs seek to vindicate. Here, Plaintiffs seek “declaratory judgment ruling upon and permanently enjoining Defendant Coos County, and any of its agents, employees or future County Clerks from engaging in any of the illegal practices.” *Third Amended Complaint* paragraph 46. The Court takes this to mean that Plaintiffs are asking the Court to declare that the past practices of a prior clerk were “illegal” and to enjoin the current clerk and future clerk from engaging in those practices in the future. The Court has no authority to enjoin a non-party from anything. And the only person who has authority to administer elections is the county clerk, not any other person or entity within Coos County. Moreover, the request that the Court declare the past violations unlawful and to direct future clerks to refrain from engaging in those practices is akin to an advisory opinion to the current and future clerks. Such an order has no practical effect on the dispute at issue.

B. Second Claim For Relief, violation of ORS 260.695

Plaintiffs reallege the general allegations and then assert “The Oregon Secretary of State and Attorney General have refused to prosecute or investigate these violations as criminal or civil offenses pursuant to ORS 260.995, therefore Defendants should be enjoined from further violation of ORS 260.695, or alternatively the Secretary of State should be compelled by court order to follow the law.” *Third Amended Complaint* paragraph 31.

In their Motion to Dismiss Defendants make several arguments justifying dismissal. One is that ORS 260.695 “is a lengthy statute that prohibits various action related to ballots.” Plaintiffs have failed to state a claim for relief under this statute because they have failed to allege material facts supporting the claim because they do not identify the provisions of the statute that Defendants allegedly violated.

In their Response to the Motion to Dismiss, Plaintiffs assert:

“Plaintiffs’ Second Claim or Relief asks this court to declare that pursuant to ORS 260.665 Defendants—the very officials supposed to be conducting the elections—cannot ‘use force, violence, restraint or the threat of it, inflicting injury, damage, harms, loss of employment or other loss or the threat of it’, ‘to refrain from challenging a person offering to vote.’ ORS 260.655(1) and (2) g respectively. Coos County elections, and the clerk appear to believe they can refuse to accept SEL 535 forms, that they can use police to exclude duly authorized election observers from the clerk’s office and outright block entry to the clerk’s office while voting, receiving [sic] and counting is taking place. See Complaint 9,10,11, 18 (Observers were threatened by Defendant Murphy and her county elections staff, including by threat of arrest and removal, so those observers could not observe, gather evidence of legal violations, or assert their rights) and (Observers were threatened by Defendant Murphy and her county elections staff, including by threat of arrest and removal, so those observers could not observe, gather evidence of legal violations, or assert their rights) and (The County’s policies and practices have proven to be

continuous and repeat violation of law and capable of repetition yet evading review as they did in the May 2022 primary election and the November 2022 General election. The County Clerk refused to accept or process SEL 535 forms that are issued by the Secretary of State so that observers can challenge the ballots of voters attempting to vote that may not be eligible voters.”).

Defendants Reply to Plaintiffs’ Response, making several arguments:

First, on the face of it, the Third Amended Complaint says nothing about violation of ORS 260.665 and should be dismissed for that reason. Second, the claim seeks declaratory relief and for the reasons previously argued, that claim fails. Third, even if the claim were transformed to alleged violations of ORS 260.665 (1) and (2)g, the claim does not establish sufficient facts to show that Defendants exerted “undue influence” as that term is defined by the statute.

Court’s Analysis

Paragraph 31 of the Third Amended Complaint asks the Court to compel the Secretary of State to act. The Secretary of State is not a party to this lawsuit and the Court lacks authority to order a nonparty to do anything. Secondly, the Second Claim for Relief is insufficient to allege a violation of ORS 260.695. It is inappropriate to expect the Defendants, or the Court, to scour Plaintiffs’ general allegations of fact to determine if there might be, somewhere in those 24 paragraphs, allegations that amount to violation of some other statute and to then discern that the Second Claim for Relief relates to that statute instead of to the statute the claim alleges was violated- that is, ORS 260.695.

Additionally, the Court agrees with the Defendants that even if the claim related to violation of ORS 260.665 (1) (2)g, Plaintiffs have failed to allege facts sufficient to establish it. There are no allegations that either Plaintiff was subjected to undue influence as that term is defined by the statute. It also bears repeating as discussed in the foregoing, there is no rule or statute giving any one person authorized as an observer the right to engage in that observation process at any particular time or even at all. The statute and the voters manual both grant the county clerk discretion to determine the number of observers to admit. It follows that a particular person who was granted “authorized observer” status does not have a personal right to be in the clerk’s office observing the receiving and counting of ballots at a particular time.

More fundamentally, for all the reasons explained above, there is no justiciable controversy here supporting a claim for the declaratory and injunctive relief sought. Those reasons include that the 2022 election has completed. Defendant Murphy no longer holds the county clerk position. The county clerk is the only Coos County official charged with administering elections and therefore, there is no current controversy to be remediated.

C. Third Claim For Relief, violation of ORS 254.482.

Plaintiffs allege that “Defendants unlawfully and illegally denied Plaintiffs and their supporters, their chosen candidates, their associates and the witnesses named herein their statutory right to observe the receiving and counting of votes guaranteed by ORS 254.482.” Third Amended Complaint paragraph 33. Plaintiffs ask the court to enjoin Defendants “from denying Plaintiffs

and other voters from performing their lawful right to observe all phases of the receiving and counting of ballots as stated in ORS 254.482 except for the confidential processes that take place after a ballot has been challenged.”

Defendants reprise the arguments made previously, including that Plaintiffs do not allege that Defendants are currently preventing them from observing the counting of ballots and as a result, “there is simply nothing to enjoin.”

Plaintiffs respond that the facts alleged in their Third Amended Complaint demonstrate that observers were denied the ability to observe the receiving and counting of ballots and that they are entitled to the relief sought.

Court’s Analysis

As explained above, the statute relating to election observers does not grant any single person the right to observe at any specific time. The 2022 election is complete. Defendant Murphy is no longer county clerk. There are no allegations that the current clerk, even if the clerk were a party, is currently preventing anyone authorized from observing the receiving and counting of ballots from doing so. In sum there is no justiciable controversy justifying declaratory or injunction relief.

D. Fourth Claim For Relief ORS 246.910; Appeal of County Clerk

Here Plaintiffs allege that the under both “ORS 246.910 and Chapter 183.484” the alleged violations “may be addressed in this county and this circuit court when the clerk and agencies will not comply with the law. Plaintiffs assert they are entitled to a “declaratory ruling on the above alleged election law violations” and “pray for and[sic]order that Defendants must comply with the aforementioned elections laws, administrative rules, in the conduct of future elections and that this court retain jurisdiction over this case in the coming County elections. *Third Amended Complaint* paragraph 36. Plaintiffs further allege that they are “entitled to a declaratory ruling on the above alleged election law violations...” They “pray for and order [sic] that Defendants must comply with the aforementioned elections laws, administrative rules, in the conduct of future elections and this court retain jurisdiction over this case in the coming County elections.” Paragraph 37.

Defendants assert that Plaintiffs are “simply re-packaging of the alleged violations contained in previous claims. ORS 246.910 provides for judicial review of official government determinations made under election laws but does not give circuit courts jurisdiction over election law violations. When an official election-related determination has been issued, ORS 246.910 allows for an “appeal proceeding in the circuit court.” However, in the present case, Defendants made no election-related determinations from which to appeal. ORS 246.910(3). “

Plaintiffs respond that their claim under ORS 246.910 is an alternative claim for relief as allowed by law. They argue out that under the Declaratory Relief Act, ORS 28.010, the fact that “other relief is available does not stop this court from issuing a declaratory relief declaration prospectively.”

Defendants agree that “ORS 246.910, expressly allows ‘appeals’ to circuit court.” However, Defendants argue that there is a distinction at play between hearing an appeal and hearing a complaint. They point out that the statute allows only appeals and that in this case plaintiffs are “not appealing any action [Murphy] took. Rather Plaintiffs are filing original complaints, which are not authorized by ORS 246.910 to be filed in circuit courts.”

Finally, Defendants repeat what they have said before. There is no justiciable controversy here and cite *Masters v Sec’y of State* 88 Or App 221, 225 (1987)(where the court concluded that the plaintiff’s claim under ORS 246.910 was moot because the “election was over”).

Court’s Analysis

The Court does not reach the argument that ORS 260.345 is the exclusive remedy for complaints relating to election violations under chapters 246 to 260. Nor does it reach the argument that under the facts of this case, Plaintiffs’ Third Amended Complaint qualifies as an “appeal” under ORS 246.910. That is because in any event, the Court finds that there is no justiciable controversy here.

E. Fifth Claim For Relief under 42 USC section 1983-Due Process.

Plaintiffs allege “Defendants’ denial of Plaintiffs [sic] voting rights...deprived Plaintiffs of their civil rights guaranteed by the 14th Amendment to the United States Constitution.

Defendants argue that Plaintiffs have failed to state a claim for violation of the constitutional right to due process because they have not identified a constitutional right that was violated.

Plaintiffs assert that “election rights are squarely at issue” and point to paragraph 14 which alleges that Murphy “or other election workers altered the voter registration cards, and changed the party affiliation of voters, specifically republicans who were supporters of Plaintiffs, without their consent, prior to a primary election.” They argue that “the denial of a person of the right to vote in a partisan primary, and the changing of their party affiliation without consent constitutes a deprivation of their civil rights. Those persons were not given their ballot or allowed to vote in those races. The facts are squarely alleged in the Complaint, and if proven true would be a civil rights violation because it is a deprivation of a civil right without due process.”

Defendants reply to Plaintiffs’ argument by asserting that the Third Amended Complaint does allege that Defendants failed to “give Plaintiffs-or anyone else-their ballots or disallowed Plaintiffs-or anyone else-the right to vote.”

Court’s Analysis

To establish a procedural due process violation, Plaintiff must first show that it was deprived of a constitutionally protected liberty or property interest. *Bd. of Regents v. Roth*, 408 US 564, 569 (1972). The Court agrees that the constitutional right to vote is a liberty interest. Plaintiffs contend that paragraph 14 of their Third Amended Complaint alleges violation of their right to vote. The Court has reviewed those allegations and contrary to Plaintiffs’ arguments does not

find any allegation that Plaintiffs or anybody else was denied the right to vote. The Court has also reviewed the rest of the Third Amended Complaint and finds no allegation that Plaintiffs or any other person was denied the right to cast a ballot in either the 2022 primary or the general elections.

Thus, even if this controversy were justiciable, which it is not, there is no allegation that anybody's due process rights to vote were denied.

F. Sixth Claim For Relief under 42 USC section 1983 -Equal Protection.

Plaintiffs assert that “Defendants’ printing of party identifiable information on the outside of the election envelopes subjected Republican voters to more intense and detailed scrutiny on signature verification and other ballot challenge processes that [sic]Plaintiffs were excluded from observing, prevented from making ballot challenges and blocked from personally participating as observers and having their team observers observe. *Third Amended Complaint*, paragraph 42

They further allege that “Defendants’ denial of Plaintiffs voting rights, as well as statutory rights as described above ensuring a free and fair election and treating Plaintiffs as Republicans vastly different than Defendants’ own political party members in who is allowed to observe deprived Plaintiffs of equal protection and equal application of the law as guaranteed by the 14th Amendment to the United States Constitution.” *Id.*

Defendants remonstrate that “being a Republican is not protected class.” Furthermore, there is nothing in the Third Amended Complaint that alleges that they were accorded fewer rights privileges or immunities allegedly accorded someone else. They only state that they were not given the same rights as Democrats, but do not specify what rights. Also, Defendant Sweet is affiliated with the Republican Party.

In response, Plaintiffs point to a long line of cases discussing the right to vote and the principle that every citizen has the right to “have one’s vote counted on equal terms with others.” Plaintiffs then point to paragraphs 12 relating to ballots in “piles based upon party affiliation” and 20 related to boxes of untabulated ballots that were counted when no observers were allowed.” They assert that such actions “are sufficient to state a claim and conduct discovery into more details of these covert activities that if proven true, would be a violation of equal protection of the law and different treatment of different classes of voters.” And further argue that “contrary to Defendants’ assertion, illegal discrimination does not require a protected class, that is merely one way that discrimination can be proven. Discrimination may be by arbitrary actions, or allocation of rights or scrutiny based on membership in certain classes.”

Defendants argue in reply that there are no alleged facts showing that Plaintiffs or any voters “were treated differently based on party affiliation. Rather Plaintiffs only state that this alleged system of handling ballots ‘enables’ disparate treatment and ballots could ‘potentially’ be treated differently. But Plaintiffs do not allege that any discrimination actually occurred.” Furthermore, they assert that Defendants have failed to allege that Plaintiff’s acted with the intent or purpose to discriminate. What is more, Plaintiffs are not in a protected class and they have not alleged that they were discriminated against as individuals.

Court's Analysis

The Court agrees with Plaintiffs, and Defendants do not dispute, that voting is a fundamental right subject to equal protection guarantees. The Court also agrees that a violation of equal protection can take place short of a wholesale deprivation of the right to vote. The Equal Protection Clause mandates “that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, (1985) (citation omitted). To prevail on an equal protection claim, Plaintiffs must show disparate treatment of a similarly situated class. *Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020).

The Court has reviewed 24 paragraphs constituting “general allegations” relating to alleged different treatment between people affiliated with the Republican Party and those affiliated with Democrat Party. Paragraph 11 of the *Third Amended Complaint* alleges that during the May primary “Defendant Murphy crossed out observer time slots to the sign-up sheets so that observers could not be slotted into those time slots to observe, but then proceeded to allow her peer another former Democrat party chairperson to be in the verification election worker room. Presumably she crossed out the names so that she would not even have to notify anyone that she was receiving and counting ballots.”

Third Amended Complaint Paragraph 12 includes allegations that “Defendants intentionally caused information identifying Coos County voter’s party affiliation to be printed on the outside of the voter envelop which unlawfully and discriminatorily enables disparate treatment of ballots of the Clerk’s same party affiliation, and more stringent treatment of ballots of the Clerk’s opposing political party.* * * Ballots and envelopes were piled in piles based upon party affiliation so that they could be tracked and potentially given extra examination and enhanced or rejected.”

In *Third Amended Complaint* paragraph 14 Plaintiffs allege that “[t]he County Clerk, or other election workers altered the voter registration cards, and changed the party affiliation of voters, specifically republicans who were supporters of Plaintiffs, without their consent, prior to a primary election.” And further alleges that Coos County electors had their voter’s registrations and party identification changed by Defendants prior to the May, 2022 primary elections.

As noted in paragraph 42, Plaintiffs allege that “Defendants’ denial of Plaintiffs voting rights, as well as statutory rights as described above ensuring a free and fair election and treating Plaintiffs as Republicans vastly different than Defendants’ own political party members in who is allowed to observe deprived Plaintiff of equal protection and equal application of the law as guaranteed by the 14th Amendment to the United States Constitution.”

These allegations fail to allege that Plaintiffs were denied equal protection of the laws because they were affiliated with the Republican Party. Plaintiffs do not allege that Murphy denied observations to any person based on that person’s membership in any class. They do not allege that the separation of ballots by party affiliation during the primary process resulted in any actual detriment to any class of voters (indeed it appears that republicans and democrats were treated

the same in this regard). The closest they come is to allege that the separation of ballots by party affiliation made it *possible* to scrutinize the ballots affiliated with the Republican Party more closely. But even then, they do not allege that the ballots were so scrutinized.

More to the point, Plaintiffs do not allege that they were discriminated against at all. Even if the opportunity to observe the receiving and counting of ballots was an individual right (and Plaintiffs have not cited and the Court is unaware of any authority stating that it is), there is no allegation that Lewis, the only Plaintiff alleged to have been authorized as an observer, was denied the opportunity to observe the receiving and counting of ballots and that she was denied that opportunity at the same time a comparator person associated with the Democratic Party was granted that opportunity. The conclusion that Defendants treated “Plaintiffs as Republicans vastly different than Defendants’ own political party members” is not born out by the factual allegations. There are no allegations that Plaintiffs were treated different from Defendants’ own political party members. Indeed, the Third Amended Complaint does not identify the party affiliation of Sweet or Cribbins, but, we know from the information subject to judicial notice submitted by Defendants that Sweet affiliated himself with the Republican Party in his candidate statement.

What is more, Plaintiffs do not allege that they were denied the right to vote (never mind denied the right to vote due to party affiliation). They do not allege that their vote was given less weight than other votes or that they were not given the same opportunity to cast a ballot.

In short Plaintiffs’ allegations do not establish a claim that they were deprived the right to vote in violation of the federal Equal Protection Clause.

G. Seventh Claim For Relief Equal Protection under Art 1, Section 20 of the Oregon Constitution

Argument

After incorporating all the paragraphs that precede it, Plaintiffs allege that the “printing of party identifiable information on the outside of the election envelopes subjected Republican voters to more intense and detailed scrutiny on signature verifications and other ballot challenge processes that Plaintiffs were excluded from observing, prevented from making ballot challenges and blocked from personally participating as observers and having their team of observers observe. Defendants’ denial of Plaintiffs voting rights, as well as statutory rights as described above ensuring a free and fair election and treating Plaintiffs as Republicans vastly different than Defendants’ own political party members in who [sic] is allowed to observe deprived Plaintiffs of equal protection and equal application of the law as guaranteed by the Oregon Constitution. *Third Amended Complaint* paragraph 45.

In their Motion to Dismiss Defendants assert that “Plaintiff’s have failed to state a claim under this provision of the Oregon Constitution because they have not identified any law that violates their rights.” Additionally, Plaintiffs have not provided allegations of material fact explaining how Defendants treated republicans differently than democrats.”

In their response Plaintiffs provide a brief outline of the analysis followed by Oregon courts in determining claims brought under Article I section 20 of the Oregon Constitution noting that there is some difference in the analytical approach depending on whether the type of class a plaintiff belongs to and ultimately asserts that “regardless of which class category applies here, the facts and the allegations on the face of the Complaint are sufficient to show the potential to prove arbitrariness in the treatment of voters. The claim is therefore entitled to move forward.” Plaintiffs further assert that it is not necessary for them to show they were discriminated against because they were members of a protected class. Instead, they say, it is sufficient to show that Defendants’ actions were arbitrary and capricious.

Defendants assert that Plaintiffs claim that Defendants violated the Oregon Constitution’s privileges and immunities clause fails for the same reason their equal protection claim fails: they have not alleged that Defendants intended to discriminate and they have not alleged that they are members of a protected class. Defendants also argue that Plaintiff’s have apparently “switched” their argument that they were discriminated because they were affiliated with the Republican Party to an argument that they were discriminated against as individuals. Defendants assert that there are no allegations supporting this second argument. Defendants cite *State v Goachr* 303 Or App 783, 790 (2020) for the proposition that to bring an “individual-based claim under Article I, section 20, were violated” Plaintiffs must “show that the government in fact denied [Plaintiffs] individually an equal privilege with other citizens of the state similarly situated.”

Defendants assert that “Plaintiffs cannot state an individual-based claim because they are similarly situated and were treated the same” as others. “There is no unequal treatment if “democratic ballots” and “republican ballots” were equally labeled and sorted. And there is no unequal treatment if, as alleged, Defendants denied all persons from observing the counting of ballots.”

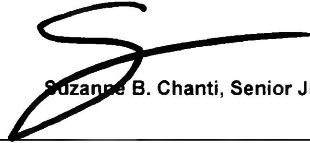
Court’s Analysis

Defendants have not asserted that Plaintiffs were treated less favorably than others, either as individuals or as members of the class called republicans. There is no allegation that Plaintiffs were denied a voting right. Even if the sorting of ballots by party affiliation somehow violated Plaintiffs’ right to vote, the sorting of ballots according to party affiliation does not allege a difference in treatment. It alleges that both major parties were treated the same. There are no allegations that the ballots were separated by party and then one party was treated less favorably than the other party. There are no allegations that Plaintiffs, as republicans ,were excluded from observing when democrats were allowed to observe (In fact, there is no allegation that Rich was an authorized observer). There is no allegation that Murphy took any action whatsoever that was specifically directed at either of the Plaintiffs. The allegations fail to establish a claim that Plaintiffs were denied equal privileges and immunities under Oregon law. Thus, the allegations fail to establish a claim.

III. Conclusion.

For the reasons stated in the foregoing, this Court hereby GRANTS Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint in its entirety. Defendants to submit the Judgment within 10 days.

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Suzanne B. Chanti, Senior Judge