

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

WASHINGTON ELECTION INTEGRITY
COALITION UNITED, a Washington State
nonprofit corporation; BRETT SIMPSON;
BONNIE GRIECO; JONETTE MOLYNEUX;
ROSS MERRITT; TAMARA SHAW;
HARLYN THOMPSON; KIMBERLEE
ELBON; ROBERT WARD; CONSTANCE
COOKE; DOREEN ROSE; SHIRLEY
MOZENA; JAMES MOZENA; MICHELLE
DAWSON; LINDSEY NICHOLS; JOSEPH
KENT; ROXANNE PEARCE; DAVID
MACHADO; JOSHUA BRADLEY;
BENNETT ESRAEL; JAKE PARMER; RICH
AUDETTE; MARIA BRUEMMER; JOSEPH
GIBSON; ERIC HARGRAVE; WENDY
KEELINE; PHILLIP HOGAN; MARILI
HAAS; IKE HAAS; FRANK GMELIN;
TRICIA SHOUP; JEN HOLBROOK;
STEPHEN CLEMENTS; KIMBERLY
ANDERSON; and SUSAN AUDETTE,

Plaintiffs,

v.

GREG KIMSEY, Clark County Auditor;
CLARK COUNTY; and DOES 1-30,
INCLUSIVE,

Defendants,

No. 3:21-cv-05746-RAJ

DEFENDANTS' MOTION TO DISMISS

NOTE ON CALENDAR:
November 26, 2021

1 WASHINGTON STATE DEMOCRATIC
2 CENTRAL COMMITTEE,

3 Applicant Intervenor Defendant.
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5 COMES NOW Defendants, Clark County and Greg Kimsey (hereinafter “Defendants”),
6 by and through their attorneys of record, ANTHONY GOLIK, Prosecuting Attorney, and
7 AMANDA M. MIGCHELBRINK, Deputy Prosecuting Attorney, and file this Memorandum
8 in support of their Motion to Dismiss Plaintiffs’ lawsuit, pursuant to Fed. R. Civ. P. 12(b).
9

10 **I. STATEMENT OF FACTS**

11 On September 16, 2021, a *pro se* suit against Clark County Auditor Greg Kimsey and
12 Clark County was filed by 35 Plaintiffs for “declaratory relief,” an “injunction,” and “damages
13 for violations of their civil rights.” Docket No. 2-4 at 2-3, 14-15. Plaintiffs claim the
14 Defendants violated their “fundamental rights of equal protection, due process, and/or free
15 speech under the Washington State Constitution and/or United States Constitution and
16 amendments” when they voted in the November 2020 General Election. Docket No. 2-4 at 11.
17 Specifically, the Plaintiffs claim “approximately 6,000 votes were flipped, over 400,000 votes
18 were added, and/or thousands of votes were removed in one or more state-wide races before,
19 during, and/or after the Election,” and apparently this happened because the Auditor recorded the
20 elector party preference to identify ballots. Docket No. 2-4 at 4, 6. The majority of the claims in
21 the Complaint are solely raised the by the 34 individually-named *pro se* Plaintiffs.
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25 The *pro se* Complaint also includes a claim brought on behalf of a nonprofit corporation,
26 Washington Election Integrity Coalition United (hereinafter “WEICU”), concerning its “records
27 request for ballots to confirm or deny the conduct” and for “a Court order compelling release of
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1 the public records, including a Court order unsealing ballots under RCW 29A.60.110, for a full
2 forensic audit conducted by Jovan Hutton Pulitzer.” Docket No. 2-4 at 3.

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4 Because personal jurisdiction is absent, process and service of process was insufficient,
5 and since the Complaint fails to state a claim upon which relief may be granted, Defendants,
6 Auditor Greg Kimsey and Clark County move to dismiss under FRCP 12 (b)(2) and 12 (b)(4-6).

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8 **II. ARGUMENT**

9 **A. Plaintiffs Failed to Properly Serve the Individually-Named Defendant, Auditor Greg Kimsey; Therefore, this Court Lacks Personal Jurisdiction Over Him.**

10 Dismissal of Auditor Kimsey is proper, under FRCP 12(b)(2), (b)(4) and (b)(5), for lack
11 of personal jurisdiction, insufficient process, and insufficient service, respectfully. *See, e.g.,*
12 *Cardenas v. City of Chicago*, 2010 WL 610621, at 2 (N.D. Ill., 2010) (“where there has been
13 insufficient service of process the Court does not have personal jurisdiction over the defendant”
14 and “motions pursuant to Rule 12(b)(5) and 12 (b)(2) (for lack of personal jurisdiction) are
15 interrelated and the standards for both motions are the same.”) “Before a federal court may
16 exercise personal jurisdiction over a defendant, service of summons must be satisfied” and in its
17 absence, a court may not exercise power over a party whom the complainant names a defendant.
18 *Omni Capital Intern, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). As a matter of
19 law, plaintiffs bear the burden of establishing personal jurisdiction over a defendant. *Behagen v.*
20 *Amateur Basketball Ass’n of the United States*, 744 F. 2d 731, 733 (10th Cir. 1984), *cert. denied*,
21 471 U.S. 1010 (1985).

22
23 Plaintiffs failed to personally serve Clark County Auditor Greg Kimsey; therefore,
24 personal jurisdiction is absent, and process and service were insufficient. Pursuant to FRCP (4)
25 (e) (1), service on an individual defendant must either follow state law for serving a summons,
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1 by delivery to the individual personally, or to an agent authorized to receive summons. Here,
2 Auditor Kimsey was not personally served with the summons and complaint. *Declaration of*
3 *Greg Kimsey* at 1. Furthermore, the summons and complaint were left with an employee who
4 was not authorized to receive the summons on Mr. Kimsey's behalf. *Id.* Instead, the documents
5 were left with a deputy employee in the Auditor's Election Office. *Id.*

7 The suit against Auditor Greg Kimsey, in a personal capacity, should be dismissed,
8 pursuant to Rule 12(b)(2), (b)(4), and (b)(5). *See, Murphy Bros. Inc., v. Michetti Pipe Stringing,*
9 *Inc.*, 526 U.S. 344, 350 (1999) ("one becomes a party officially, and is required to take action in
10 that capacity, only upon service of a summons or other authority-asserting measure stating the
11 time within which the party served must appear and defend"). The Plaintiffs have failed to
12 personally serve Auditor Kimsey; therefore, this Court lacks personal jurisdiction over him and
13 he should be dismissed from this matter.

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16 **B. Plaintiffs Lack Standing to Assert Their Claims.**

17 The Plaintiffs have failed to articulate any injury in fact that they experienced as a result
18 of the alleged irregularities they claim occurred during the 2020 General Election; therefore, they
19 lack standing to bring those claims. Plaintiffs state they are "informed and believe and thereon
20 allege, based on official electronic tallies recorded and electronically reported and captured in
21 real time, that approximately 6,000 votes were flipped, over 400,000 votes were added, and/or
22 thousands of votes were removed in one or more state-wide races before, during, and/or after the
23 Election. Plaintiffs are informed and believe and thereon allege, that a portion of the state-wide
24 vote flipping, additions and/or deletions occurred in the County's Election overseen by Auditor";
25 however, they fail to provide any factual context or content as to how Plaintiffs were informed or
26 why they believe any of the allegations are true. *See* Docket No. 2-4 at 4, 6. They certainly do
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1 not offer any allegations or factual statements that they cast votes in the November 2020 general
2 election that were “flipped” or “removed”. *Id.*

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4 To demonstrate standing, a plaintiff must plead plausible facts to establish: 1) that he
5 suffered an “injury in fact”; 2) that there is “a causal connection between the injury and the
6 conduct complained of”; and 3) that it is “likely, as opposed to merely speculative, that the injury
7 will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).
8 The Supreme Court “consistently held that a plaintiff raising only a generally available grievance
9 about government – claiming only harm to his and every citizen’s interest in proper application
10 of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him
11 than it does the public at large – does not state an Article III case or controversy.” *Lance v.*
12 *Coffman*, 549 U.S. 437, 439 (2007) (per curium) (quoting, *Lujan*, at 560-561). To have standing,
13 a plaintiff must have more than “a general interest common to all members of the public.” *Id.*
14 (citing, *Ex parte Levitt*, 302 U.S. 633 (1937)). The Supreme Court has considered these
15 principles in other voter action cases and has held that plaintiffs have to first demonstrate they
16 have standing to raise the claims, including alleging a personal stake in the outcome that is
17 different from “a generally available grievance about government.” *Gill v. Whitford*, 138 S. Ct.
18 1916, 1923 (2018) (citing, *Lance v. Coffman*, 549 U.S. 437 (2007)). The threshold standing
19 requirements ensures judges do not engage in policymaking that has been left to elected
20 representatives, and the Courts do not have power to resolve claims absent a showing the
21 plaintiffs have met those requirements. *Id.*

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26 A generalized grievance is not sufficient to show an injury in fact under the first prong of
27 the standing analysis because the alleged injury is not particularized. *Wood v. Raffensperger*,
28 981 F. 3d 1307, 1314 (11th Cir. 2020). The plaintiff must show an injury that affects him in a
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1 personal and individual way. *Id.* Injuries to the right “to require that the government be
2 administered according to the law” is a generalized grievance that does not confer standing. *Id.*
3 The fact that other voters could bring an identical suit is an indication that the allegations are
4 generalized grievances not amenable to suit. *Id.* Allegations of improper vote counting or vote
5 dilution is a generalized grievance that cannot support standing. *Id.* at 1314-1315.
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7 Here, none of the Plaintiffs have alleged anything more than generalized grievances
8 about the 2020 General Election. Docket No. 2-4. None of them claim their specific vote was
9 “flipped” or “deleted,” or that they were otherwise disenfranchised. *Id.* They have failed to
10 show they have suffered any injury in fact. Furthermore, because Plaintiffs have failed to allege
11 anything more than “information and belief” that there was vote “flipping” or “deletion” in the
12 2020 election, they failed to show any actual facts or basis for their beliefs and cannot show that
13 the perceived injury would be redressed by a favorable decision. The Plaintiffs lack standing to
14 bring their claims; therefore, the Complaint should be dismissed with prejudice.
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17 **C. Plaintiffs Fail to State a Damage Claim Against Clark County or Its Auditor.**

18 A complaint must allege against each named defendant “enough facts to state a claim to
19 relief that is plausible on its face” so as to “raise a right to relief above the speculative level . . .”.
20 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 561-63, 578 (2007). A claim has “facial
21 plausibility” when the party seeking relief “pleads *factual content* that allows the court to draw
22 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*, (*emphasis*
23 *added*). It “requires more than labels and conclusions, and a formulaic recitation of the elements
24 of a cause of action will not do.” *Id.* at 555. The “plausibility standard . . . asks for more than a
25 *sheer possibility* that a defendant has acted unlawfully” so that “[w]here a complaint pleads facts
26 that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between
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1 possibility and plausibility of ‘entitlement to relief.’” *See, Iqbal*, 556 U.S. at 678 (*quoting*,
2 *Twombly*, 550 U.S. at 557) (*emphasis added*). This is “a context-specific task that requires the
3 reviewing court to draw on its judicial experience and common sense,” so that “where the well-
4 pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the
5 complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at
6 679.
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9 Accordingly, the idea “that a court must accept a complaint’s allegations as true is
10 inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory
11 statements.” *See, Id.* at 678. *See also, Twombly*, 550 U.S. at 55 & 557 (holding that “a
12 conclusory allegation . . . does not supply facts adequate to show illegality,” and that Courts are
13 not “bound to accept as true a legal conclusion couched as a factual allegation”). In short,
14 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
15 dismiss.” *Adams v. Johnson*, 355 F. 3d 1179, 1183 (9th Cir. 2004) (*internal quotation marks and*
16 *citation omitted*); *see also, Iqbal*, 556 U.S. at 679-80; *Vasquez v. L.A. Cnty.*, 487 F. 3d 1246,
17 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001).
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20 The Complaint, instead, must provide “factual content” that shows the Auditor and the
21 County caused or personally participated in causing the harm alleged therein and did so in
22 violation of the Plaintiffs’ civil rights. *See, Arnold v. IBM*, 637 F. 2d 1350, 1355 (9th Cir. 1981);
23 *Jenkins v. Wood*, 81 F. 3d 988, 994 (10th Cir. 1996); *Mitchell v. Maynard*, 80 F. 3d 1433, 1441
24 (10th Cir. 1996); *Bennett v. Passic*, 545 F. 2d 1260, 1262-63 (10th Cir. 1976) (under FRCP
25 12(b)(6), a motion to dismiss may be based on either the absence of sufficient factual allegations
26 or the lack of cognizable legal theory); *Balistreri v. Pacifica Police Department*, 901 F. 2d 696,
27 699 (9th Cir. 1990)(same), *overruled on other grounds, by Twombly*, 550 U.S. at 562-63.
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1 Here, Plaintiffs filed a complaint that lacks both the alleged facts necessary to allege a
2 conceivable claim, as well as any cognizable legal theory; therefore, the Complaint should be
3 dismissed.
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5 **1. Plaintiffs present no factual basis for their claims the Auditor allowed or**
6 **facilitated vote manipulation or the results of the 2020 General Election.**

7 Plaintiffs' claims appear to be entirely based on speculative "facts." Specifically, they
8 state ". . . Plaintiffs are *informed and believe* and thereon allege, that Auditor engaged in
9 wrongful acts, errors and/or neglect of duty by allowing and/or facilitating electronic
10 manipulation of the voting results from the Election." Docket No. 2-4 at 4 (*emphasis added*).
11 They then allege "Plaintiffs are *informed and believe*, based on official electronic tallies recorded
12 and electronically reported and captured in real time, that approximately 6,000 votes were
13 flipped, over 400,000 votes were added, and/or thousands of votes were removed in one or more
14 state-wide races before, during, and/or after the Election. Plaintiffs are *informed and believe* and
15 thereon allege, that a portion of the state-wide vote flipping, additions, and/or deletions occurred
16 in the County's Election overseen by Auditor." *Id.* (*emphasis added*). Plaintiffs fail to provide
17 any basis for that "information and belief" of the allegations. Allegations based on "information
18 and belief" are a way of stating the Plaintiffs do "not know that something is a fact but just
19 suspects it or has hear it" and are insufficient, unless supported by factual allegations. *See,*
20 *Donald J. Trump for President, Inc., v. Sec'y of Pennsylvania*, 830 Fed. Appx. 377, 386-87 (3rd
21 Cir. 2020) (*citing, Iqbal*, 556 U.S. at 679). Because the allegations are conclusory and do not
22 supply any facts to support them, this Court is not bound to accept those allegations as true.
23 *Twombly*, 550 U.S. at 555, 557. Allegations of voter manipulation are impermissible conclusory
24 allegations, without any support from identified facts, and should be dismissed as a matter of
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1 law. See, *Donald J. Trump for President, Inc.*, 830 Fed. Appx. At 386-87; *King v. Whitmer*, 505
2 F. Supp. 3d 720, 738 (E.D. Mich. 2020).

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4 Plaintiffs' claims of vote manipulation, vote switching, deletions, or additions are
5 unsupported by any facts. The Complaint is devoid of any statements of how they were
6 "informed" of any of the manipulation or why they "believe" the events occurred in Clark
7 County. Instead, they make conclusory statements that are not sufficient to properly state a
8 claim for relief; therefore, the Complaint should be dismissed.

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10 **2. Plaintiffs failed to present any factual basis for their claims that the Auditor**
11 **maintained or used Plaintiffs' party preferences.**

12 Plaintiffs' next stated claim of relief is, ". . . Plaintiffs are *informed and believe* and
13 thereon allege, that Auditor engaged in wrongful acts, errors and/or neglect of duty by allowing
14 and/or facilitating: 1) maintaining a record of County elector party preference in violation of
15 RCW 29A.08.166; and/or 2) identifying ballots cast by County electors in the Election by party
16 preference. (RCW 29A.08.166)." Docket No. 2-4 at 6 (*emphasis added*). Again, the Plaintiffs
17 fail to provide any basis for their "belief" or how they were "informed" of Auditor Kimsey
18 maintaining any information of party preference for any of the named Plaintiffs or other voters.
19 *Id.* Absent such a showing, their claims should be dismissed as a matter of law.

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21 Furthermore, the statutes Plaintiffs cite do not support their claim that they suffered some
22 alleged injury when Auditor Kimsey supposedly acted "in violation of RCW 29A.08.166." The
23 statute cited states, "Under no circumstances may an individual be required to affiliate with, join,
24 adhere to, express faith in, or declare a preference for, a political party or organization upon
25 registering to vote." RCW 29A.08.166. Plaintiffs fail to make any statements in their Complaint
26 that they were required, by Auditor Kimsey, to declare a preference for any political party upon
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1 registering to vote or at any other time; therefore, their claims should be dismissed. *See* Docket
2 No. 2-4.

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4 **D. Plaintiffs Fail to Allege a Cognizable Claim Under the Washington State
5 Constitution.**

6 Plaintiffs raise a number of claims under the Washington State Constitution Articles I and
7 VI. Docket No. 2-4 at 10-12. “Washington Courts have consistently rejected invitations to
8 establish a cause of action for damages based upon constitutional violations ‘without the aid of
9 augmentative legislation’.” *Blinka v. Washington State Bar Ass’n*, 109 Wn. App. 575, 591 (Div.
10 1, 2001) (citing, *Sys. Amusement, Inc., v. State*, 7 Wn. App. 516, 517 (1972)). Absent any
11 legislative guidance, courts do not recognize a cause of action in tort for constitutional violations.
12 *Id.* The Washington Supreme Court has held “that the right to contest an election ‘rests solely
13 upon, and is limited by, the provisions of the statute relative thereto.’” *Becker v. County of
14 Pierce*, 126 Wn.2d 11, 18 (1995) (citing, *Quigley v. Phelps*, 74 Wn. 73, 75 (1913)). When the
15 legislature has enacted statutes governing elections, including the process for challenging an
16 election, a separate cause of constitutional cause of action does not exist. *Id.* at 19. Because
17 there are statutes available to challenge an election, Plaintiffs’ claims under the Washington State
18 Constitution should be dismissed as a matter of law.

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21 **E. Plaintiffs Fail to Allege Cognizable Causes of Action Under 42 U.S.C. §1983.**

22 In order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must
23 prove that the particular defendant has caused or personally participated in causing the
24 deprivation of a particular protected constitutional right. *Arnold v. International Business
25 Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Sherman v. Yakahi*, 549 F.2d 1287, 1290
26 (9th Cir. 1977). To be liable for “causing” the deprivation of a constitutional right, the particular
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1 defendant must commit an affirmative act, or omit to perform an act, that he or she is legally
2 required to do, and which causes the plaintiff's deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743
3 (9th Cir. 1978).
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5 Additionally, defendants in a 42 U.S.C. § 1983 action cannot be held liable, based on a
6 respondeat superior theory of liability. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403
7 (1997); *City of Canton, Ohio, v. Harris*, 489 U.S. 378, 385 (1989). "Because vicarious liability
8 is inapplicable to . . . § 1983 suits, a plaintiff must plead that each government-official defendant,
9 through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*,
10 556 U.S. 662, 676 (2009). "Vague and conclusory allegations of official participation in civil
11 rights violations are not sufficient to withstand a motion to dismiss." *Pena v. Gardner*, 976 F.2d
12 469, 471 (9th Cir. 1992).
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15 Plaintiffs allege their conclusory allegations, based solely on "information and belief,"
16 were a violation of their federal rights under "the First and/or Fourteenth Amendments to the
17 United States Constitution," specifically, that "Plaintiffs' fundamental rights of equal protection,
18 due process/and/or free speech" under the United States Constitution. Docket No. 2-4 at 11, 13.
19 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the defendant
20 must be a person acting under color of state law; (2) and the conduct must have deprived the
21 plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United
22 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Implicit, in the second element, is a third
23 element of causation. *See, Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 286-87 (1977);
24 *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*, 449 U.S. 975 (1980).
25
26 When a plaintiff fails to allege or establish one of the three elements, the complaint must be
27 dismissed.
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1 Additionally, although the court should liberally construe a plaintiff's complaint, a civil
2 rights complaint must supply the essential elements for each claim pled in the complaint.

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4 Otherwise, a complaint with only vague and conclusory allegations of official participation in
5 civil rights violations is not sufficient to withstand a motion to dismiss. *Peña v. Gardner*, 976
6 F.2d 469, 471 (9th Cir. 1992).

7 As argued above, the Plaintiffs have failed to articulate any form of injury they have
8 personally suffered, but have, instead, made allegations of generalized grievances that are not
9 specific to any one Plaintiff. The Complaint fails to state a cognizable legal theory; therefore, it
10 should be dismissed.

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12 **1. Equal Protection.**

13 Plaintiffs allege “the principles of equal protection require that Auditor abide by the
14 process created by the Legislature to ensure uniform treatment of ballots regardless of who cast
15 them, the manner in which they are cast, and/or who or what was voted for upon those ballots.”¹
16 Docket No. 2-4 at 11. They then conclude, without stating any basis or statement of fact, “that
17 ballots from County electors, including Plaintiffs herein, were not treated equally nor given equal
18 levels of protection under the law.” *Id.* To prevail on their equal protection claim, the Plaintiffs
19 must show they that they have been treated disparately from others similarly situated. *Gallinger*
20 *v. Becerra*, 898 F. 3d 1012, 1016, (2018). They must identify the classification of groups, and
21 then courts look for a control group of individuals who are similarly situated. *Id.* The Complaint
22 is devoid of any identification of a class of individuals who are similarly situated, but treated
23 disparately, or any classification of groups at all. Plaintiffs fail to even allege that their own
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28 ¹ Plaintiffs similarly raise state equal protection claims as well, pursuant to the Washington Constitution Article 1,
29 sections 3 and 12; however, “Washington courts use the same analysis for alleged violations of both the state and
federal equal protection clauses.” *In re Personal Restraint Petition of Silas*, 135 Wn. App. 564, 570 (Div. I, 2006)
(internal citations omitted).

1 ballots were not given equal treatment under the law as any other similarly situated voter. A
 2 plaintiff's "belief" that his or her vote may have been diluted is not sufficient on its own to
 3 confer standing or an injury. *Election Integrity Project Cal., Inc., v. Weber*, 2:21-CV-00032-AB-
 4 MAA, 2021 WL 4501998 at 3 (C.D. Cal., June 14, 2021). Instead, the Plaintiffs must show that
 5 "certain votes actually be *weighted differently* and that one group's votes be impermissibly
 6 granted less value." *Id.*, (*emphasis in original*). Absent any showing of being part of a
 7 disadvantaged group, or that there was a group of voters whose votes were weighted differently
 8 than other groups as a result of the Defendants' actions, Plaintiffs have failed to allege their
 9 equal protection rights have been violated and those claims should be dismissed.
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12 2. Due Process.

13 Plaintiffs also allege the "Auditor failed to follow state and federal law, qualified electors
 14 were denied their fundamental right of suffrage without due process of law. Qualified electors
 15 who voted similarly had the value of their votes diluted, and the will of said voters denied,
 16 without due process of law."² Docket No. 2-4 at 11. The Complaint fails to show how
 17 Defendants failed to follow state or federal law, or how Plaintiffs "had the value of their votes
 18 diluted." Instead, the Plaintiffs make claims of vote dilution which require a showing, as a
 19 matter of law, that "certain votes actually be weighted differently and one group's votes be
 20 impermissibly granted less value." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Absent such a
 21 showing, the Plaintiffs have only alleged a constitutional harm that is really just a generalized
 22 grievance "shared in substantially equal measure by all or a large class of citizens, [and] that
 23 harm alone normally does not warrant exercise of jurisdiction." *Id.* See also, *Wood* 981 F.3d at
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28 ² As with Plaintiffs' equal protection claims, Washington courts do not interpret the Washington State Constitutional
 29 article regarding due process any broader than that given by the Fourteenth Amendment and the analysis is the same.
Carlson v. San Juan County, 183 Wn. App. 354, 376 (Div. I, 2014).

1 1314 (“no single voter is specifically disadvantaged” if a vote is “counted improperly, even if
2 the error might have a ‘mathematical impact on the final tally and thus on the proportional effect
3 of every vote.’”).
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5 Because of this, Plaintiffs’ due process claims fail. *See, e.g., Election Integrity Project*
6 *Cal., Inc.*, 2021 WL 4501998 at 4 (dismissing due process and equal protection claims because
7 the “Supreme Court continues to decline to extend standing to plaintiffs asserting objections to
8 state election laws on generalized vote dilution theories”) (*citing, Sinkfield v. Kelley*, 531 U.S. 28
9 (2000) (majority white voters lacked standing to complain of unlawful racial practices to which
10 they had not been subjected). As is true for equal protection claims, generalized grievances will
11 not support standing for a due process claim. *Norton v. Columbus Cty. Bd. Of Elections*, 493
12 F.Supp.3d 450, 457 (E.D.N.C. 2020) (dismissing voter’s § 1983 due process and § 1985 claims
13 because it “essentially alleges that the state defendants have not followed North Carolina law
14 governing the process for conducting the Columbus County Sheriff’s election” and such
15 generalized grievances about the conduct of government is not a sufficient allegation to meet the
16 requirements of an injury under § 1983). The Plaintiffs’ due process claims should be dismissed
17 with prejudice.
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21 3. First Amendment.

22 Plaintiffs again make conclusory and vague assertions regarding their First Amendment
23 rights in the Complaint. They only state: “[e]lections establish the citizenry’s and the
24 individual’s right to FREE SPEECH as depicted by the First Amendment of the Constitution of
25 the United States of America” and they “demand of the . . . Court that the state and federal
26 Constitutions be followed so that free and fair elections may be held in the County consistent
27 with the free speech will of the people.” Docket No. 2-4 at 10. Plaintiffs, however, fail to
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1 provide any facts showing how the debunked alleged “wrongful acts as alleged herein,
2 supposedly allowing or facilitating vote flipping, additions, and/or deletions . . . allowing or
3 facilitating party preference tracking and/or ballot identification” somehow violate their free
4 speech rights or caused them individualized harm. Docket No. 2-4 at 3. As a matter of law, a
5 voter making broad claims of “‘subver[sion]’ of ‘free speech and debate’, the undermining of
6 ‘free and fair elections’ and ‘irreparable harm to the legislative processes,’ are textbook
7 generalized grievances that are not actionable.” *Sweigert v. Perez*, 334 F.Supp.3d 36, 43
8 (D.D.C., 2018). Claims of hacking or other actions do not sufficiently reflect an injury in fact
9 individual to any plaintiff, and subsequently, they have not stated a sufficient claim for damages
10 under the First Amendment and those claims should be dismissed as a matter of law. *Id.*

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13 **F. Plaintiffs Have no Right to Declaratory or Injunctive Relief.**

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15 The Plaintiffs seek declaratory and injunctive relief with their unsupported claims for
16 damages. They are apparently seeking this relief to “immediately and permanently” restrain the
17 Clark County Auditor from “taking any further actions in violation of Plaintiff’s [sic]
18 Constitutional rights.” Docket No. 2-4 at 12. They have failed to show they are entitled to either
19 form of relief.
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21 **1. Plaintiffs have failed to show they are entitled to injunctive relief under**
22 **federal or state law.**

23 Persons seeking to invoke the power of the federal courts must allege an actual case or
24 controversy in order for them to have standing. The plaintiff must allege some threatened or
25 actual injury before a federal court may assume jurisdiction. U.S.C.A. Constitution, Article III,
26 §1. Past exposure to [alleged] illegal conduct does not, in itself, show a present case or
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1 controversy regarding injunctive relief, however, if unaccompanied by any continuing present
2 adverse effects. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

3
4 The Ninth Circuit has held that past exposure to alleged harm is largely irrelevant when
5 analyzing claims of standing for injunctive relief that predicated upon threats of future harm.
6 *Nelson v. King County*, 895 F. 2d 1248 (9th Cir. 1990). The burden of showing a likelihood of
7 reoccurrence is firmly placed on the plaintiff. *Id.* at 1251. The Ninth Circuit specifically noted
8 the Supreme Court holdings in *Los Angeles v. Lyons*, 461 U.S. 95 (1981) and *O'Shea* do not
9 allow for a plaintiff to speculate or rely on conjecture to establish standing. *Nelson* at 1252-53.
10 Indeed, the basic prerequisite for standing, when a person seeks equitable relief, is the real and
11 immediate danger of irreparable injury and a lack of an adequate remedy at law. *Lyons*, 461 U.S.
12 at 103.

13
14 The court in *O'Shea* noted that abstract injury is not enough. *O'Shea*, 414 U.S. at 675.
15 The court found that in order to meet the case or controversy requirement for equitable relief “the
16 injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”
17 *Id.*, (citing, *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969); *Maryland Casualty Company v.*
18 *Pacific Coal and Oil Company*, 312 U.S. 270, 273 (1941); *United Public Works v. Mitchell*, 330
19 U.S. 75, 89-91 (1947)). As argued above, Plaintiffs have failed to make any showing that they
20 have standing to bring their damages claims. They also lack standing to bring any claims for
21 federal injunctive relief.

22
23 Under Washington law, Plaintiffs’ claims for injunctive relief similarly fail. To obtain
24 temporary or permanent injunctive relief, the Plaintiffs must show: “(1) that he has a clear legal
25 or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and
26 (3) that the acts complained of are either resulting in or will result in actual and substantial injury
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1 to him.” *Tyler Pipe Industries, Inc., v. State, Dept. of Revenue*, 96 Wn.2d 785, 792 (1982)
2 (*citing, Port of Seattle v. Int’l Longshoremen’s & Warehousemen’s Union*, 52 Wn. 2d 317, 319
3 (1958)). An injunction “will not issue in a doubtful case” and the party requesting the relief must
4 show a likelihood of prevailing on the merits of the claim. *Id.* Here, Plaintiffs have failed to
5 show they are entitled to injunctive relief. As argued above, they have not shown a clear legal
6 right, a *well-grounded* fear of immediate invasion of that right, or that they will actually suffer
7 some substantial injury. Their claims for injunctive relief should be dismissed.
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10 **2. Plaintiffs have failed to show they are entitled to federal or state declaratory**
11 **relief.**

12 Federal district courts have the discretion to deny declaratory relief and may not order
13 such relief if there is not a justiciable controversy. *Lebowich v. O’Connor*, 309 F.2d 111, 114
14 (2nd Cir. 1962). Additionally, “a dispute of a hypothetical, abstract, or academic nature is not a
15 justiciable controversy.” *Id.* “Injunctive and declaratory relief ‘cannot conceivably remedy any
16 past wrong’ plaintiffs seeking injunctive and declaratory relief can satisfy the redressability
17 requirement only by demonstrating a continuing injury or threatened future injury.” *Stringer v.*
18 *Whitley*, 942 F.3d 715, 720 (5th Cir. 2019). The injury must be imminent to “ensure that the
19 alleged injury is not too speculative for Article III purposes.” *Id. (citing, Clapper v. Amnesty*
20 *Int’l USA*, 568 U.S. 398, 409 (2013)).
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23 As argued above, Plaintiffs have failed to allege any “wrongful acts” attributed to the
24 County or the Auditor that actually occurred or have been wrongful. Simply, they have failed to
25 state any injury of fact that is personal to the Plaintiffs. *See* Docket No. 2-4; *See, argument,*
26 *supra*, at 6-15. *See also, Shelby Advocates for Valid Elections v. Hargett*, 947 F. 3d 977, 981
27 (6th Cir. 2020, *cert. denied*, 141 S. Ct. 257 (2020) (voters lacked standing to pursue declaratory
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1 relief because “they do not allege that this vote-flipping ever happened to any of them”). The
2 Complaint is devoid of any factual claims or allegations that there are any real and immediate
3 threats of future injury specifically for the named Plaintiffs. *See* Docket No. 2-4 at 4-6, 10-12.
4

5 Similarly, Washington’s law for declaratory judgment requires the plaintiff to allege a
6 justiciable controversy based on allegations of harm that are personal to the party and
7 substantial, rather than speculative or abstract. RCW 7.24.020, *Grant Cty, Fire Prot. Dist. No. 5*
8 *v. City of Moses Lake*, 150 Wn.2d 791, 802, *vacated on other grounds*, 150 Wn.2d 791 (2004)
9 (*citing, Walker v. Munro*, 124 Wn. 2d 402, 411 (1994)). In an elections matter, “[e]lection
10 statutes do not provide for a purely declaratory judgment rating the overall fairness of a certified
11 elections” therefore, absent any showing of standing, the court does not have a justiciable
12 controversy before it. *Reid v. Dalton*, 124 Wn. App. 113, 121-122 (Div. 3, 2004).
13
14

15 Plaintiffs’ request for federal and state declaratory relief fail for the same reason and must
16 be dismissed. They lack standing to obtain it.

17 **F. WEICU has Failed to State a Public Records Act Claim.**

18 WEICU submitted a Public Records Act (hereinafter “PRA”) request to the Clark County
19 Auditor for ballots and ballot images, among other things. Docket No. 2-4 at 8. The Clark
20 County Auditor’s Office denied WEICU’s access to any ballot images, pursuant to RCW
21 42.56.070(1), RCW 29A.60.110, and *White v. Clark County*, 199 Wn. App. 929 (Div. II, 2017).
22 WEICU contends this was error because it believes that case does not hold for the proposition
23 that Clark County can deny access to ballots *after* an election. Docket No. 2-4 at 8. It then
24 continues to say that this Court should enter an order permitting WEICU access to the ballots to
25 dispute the election. *Id.* at 9.
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1 The courts interpret the disclosure provisions of the Public Records Act liberally
2 and exemptions narrowly. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125
3 Wn.2d 243, 251, 884 P.2d 592 (1994) (*PAWS II*). The agency claiming the exemption
4 bears the burden of proving that the documents requested fall within the scope of the
5 exemption. RCW 42.56.550(1) ("The burden of proof shall be on the agency to establish
6 that refusal to permit public inspection and copying is in accordance with a statute that
7 exempts or prohibits disclosure in whole or in part of specific information or records");
8 *Cowles Publ'g Co. v. Spokane Police Dep't.* 139 Wn.2d 472, 476, 987 P.2d 620 (1999).

9 Judicial review of an agency's denial is governed by statute:

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12 Upon the motion of any person having been denied an opportunity to
13 inspect or copy a public record by an agency, the superior court in the
14 county in which a record is maintained may require the responsible
15 agency to show cause why it has refused to allow inspection or copying of
16 a specific public record or class of records. The burden of proof shall be on
17 the agency to establish that refusal to permit public inspection and copying
18 is in accordance with a statute that exempts or prohibits disclosure in
19 whole or in part of specific information or records.

20 RCW 42.56.550(1). The court's review is de novo and any hearing may be conducted
21 solely upon affidavits. RCW 42.56.550(3).

22 Once documents are determined to be within the scope of the PRA disclosure is
23 required. *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995, 1000 (1993). However, a
24 party may deny disclosure when a specific exemption bars production of the requested
25 records. RCW 42.56.070(1); *Seattle Times Co. v. Setko*, 170 Wn.2d 581, 591, 243
26 P.3d 919, 925 (2010). It is well-settled in Washington that "an agency has no duty to
27 create or produce a record that is nonexistent." *Bldg. Indus. Ass'n of Wash. v. McCarthy*
28 (*BJAW*), 152 Wn. App. 720, 734, 218 P.3d 196 (2009).

1 Instead of seeking a court order, pursuant to RCW 29A.60.170 to challenge the election,
 2 WEICU opted to submit a public records request for the ballots or ballot images and is now
 3 seeking a court order for their release under the PRA. The PRA, and the cases interpreting it, do
 4 not support WEICU's argument. In *White*, the court considered whether RCW 29A.60.110 and
 5 WAC 434-261-045 prohibit the release of *tabulated* ballots and held that those laws and rules did
 6 prohibit the release of tabulated ballots "even beyond 60 days after tabulation." *White*, 199 Wn.
 7 App. at 934. WEICU argues that this Court should order the release of the records because
 8 "numerous courts outside of Washington State have ruled that ballots are records and subject to
 9 inspection." Docket No. 2-4 at 9. It fails, however, to state any argument as to why this Court
 10 should ignore the Washington State cases that are interpreting Washington laws and the
 11 Constitution. *Id.* The Clark County Auditor's Office properly denied WEICU's public records
 12 request for the ballots from the 2020 General Election; therefore, its claims under the PRA
 13 should be dismissed with prejudice.

14 III. CONCLUSION

15 Plaintiffs have failed to obtain proper personal service or process over Clark County
 16 Auditor Greg Kimsey, and this Court lacks *in personam jurisdiction* over him. Furthermore,
 17 Plaintiffs have failed to state any sufficient basis for any of their claims and, instead, have only
 18 presented generalized grievances based on "information and belief" that do not convey standing
 19 for any of them to bring their claims. Finally, Plaintiffs have failed to state any claims against
 20 Auditor Kimsey or Clark County upon which this Court could grant the requested declaratory
 21 relief, injunctive relief, or damages for violations of their civil rights. Accordingly, Defendants
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1 Auditor Greg Kimsey and Clark County respectfully request the Court dismiss Plaintiffs'
2 complaint with prejudice.
3

4 Dated this 22nd day of October, 2021.
5

6 *s/ Amanda Migchelbrink*

7 Amanda M. Migchelbrink, WSBA #34223
8 Deputy Prosecuting Attorney
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15 *Attorney for Defendants, Auditor Greg Kimsey and*
16 *Clark County*
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2021, I electronically filed the foregoing *Defendants' Motion to Dismiss* and *[Proposed] Order Granting Defendants' Motion to Dismiss* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Attorney for Washington Election Integrity Coalition United, Plaintiff:

Virginia P. Shogren
 VIRGINIA P. SHOGREN, P.D.
 Email to: vshogren@gmail.com; WEICUattorney@protonmail.com

Attorney for Washington State Democratic Central Committee, Applicant Intervenor Defendant:

Kevin J. Hamilton
 Amanda J. Beane
 Reina A. Almon-Griffin
 Nitika Arora
 PERKINS COIE LLP
 Email to: KHamilton@perkinscoie.com; ABeane@perkinscoie.com;
RALmon-Griffin@perkinscoie.com; NArora@perkinscoie.com

And I hereby certify that I have mailed true and correct copies of *Defendants' Motion to Dismiss* and *[Proposed] Order Granting Defendants' Motion to Dismiss*, to the following non-CN/ECF participants, by U.S. mail, postage prepaid:

Plaintiffs, Pro Se:

Brett Simpson 19018 NE 127 th Circle Brush Prairie, WA 98606	Jonette Molyneux 12905 NE Salmon Creek Ave. Vancouver, WA 98686
Bonnie Grieco 222 S. 32 nd Place Ridgefield, WA 98642	Tamara Shaw 13705 NE 36 th St Vancouver, WA 98682
Ross Merritt 270 Stonegate Washougal, WA 98671	Kimberlee Elbon 613 E. 6 th Street La Center, WA 98629
Harlyn Thompson 1511 SW 13 th Ave, Apt 346 Battle Ground, WA 98604	Constance Cooke 33817 SE 27 th St Washougal, WA 98671

1 2 3	Doreen Rose 5606 NW 280 th St Ridgefield, WA 98642	Michelle Dawson 304 W. Cushman St. Yacolt, WA 98675
4 5 6	James Mozena 3816 SE 153 rd Ct Vancouver, WA 98683	Joseph Kent 37607 NE Eagle View Dr Yacolt, WA 98675
7 8 9	Lindsey Nichols 11405 NW 21 st Ave Vancouver, WA 98685	David Machado 2406 NE 139 th St #27 Vancouver, WA 98686
10 11 12	Roxanne Pearce 1051 – 4 th St Washougal, WA 98671	Bennett Esrael 25217 NE 142 nd Ave Battle Ground, WA 98604-2400
13 14 15	Joshua Bradley 62 – 34 th St Washougal, WA 98671	Rich Audette 603 NW 24 th Ave Battle Ground, WA 98604
16 17 18	Jake Parmer 725 E Vine Maple Ave La Center, WA 98629	Joseph Gibson 13023 NE Hwy 99, Suite 7-712 Vancouver, WA 98686
19 20 21	Maria Bruemmer 5105 NE 72 nd Ave, Apt 49F Vancouver, WA 98661	Wendy Keeline 23103 NE 134 th Circle Brush Prairie, WA 98606
22 23 24	Eric Hargrave 505 – 26 th St Washougal, WA 98671	Marili Haas 27408 NE 69 th Ave Battle Ground, WA 98604
25 26 27	Phillip Hogan 8314 NE 239 th St Battle Ground, WA 98604	Frank Gmelin 4001 NE Everett Ct Camas, WA 98607
28 29		

<p>Ike Haas 27408 NE 69th Ave Battle Ground, WA 98604</p>	<p>Jen Holbrook 27000 NE Bjur Rd Ridgefield, WA 98642</p>
<p>Tricia Shoup 17417 NE 200th Circle Battle Ground, WA 98604</p>	<p>Kimberly Anderson 9509 NE 135th Court Vancouver, WA 98682</p>
<p>Stephen Clements 812 Z St Vancouver, WA 98661</p>	<p>Tamborine Borrelli Washington Integrity Coalition United 13402 125th Ave NW Gig Harbor WA 98329-4215 <i>U.S. Mail and Email to:</i> weicu@protonmail.com</p>
<p>Susan Audette 603 NW 24th Ave Battle Ground, WA 98604-4566</p>	

DATED this 25th day of October, 2021.

s/ Thelma Kremer

 Thelma Kremer, Legal Secretary

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

WASHINGTON ELECTION INTEGRITY
COALITION UNITED, a Washington State
nonprofit corporation; BRETT SIMPSON;
BONNIE GRIECO; JONETTE MOLYNEUX;
ROSS MERRITT; TAMARA SHAW;
HARLYN THOMPSON; KIMBERLEE
ELBON; ROBERT WARD; CONSTANCE
COOKE; DOREEN ROSE; SHIRLEY
MOZENA; JAMES MOZENA; MICHELLE
DAWSON; LINDSEY NICHOLS; JOSEPH
KENT; ROXANNE PEARCE; DAVID
MACHADO; JOSHUA BRADLEY;
BENNETT ESRAEL; JAKE PARMER; RICH
AUDETTE; MARIA BRUEMMER; JOSEPH
GIBSON; ERIC HARGRAVE; WENDY
KEELINE; PHILLIP HOGAN; MARILI
HAAS; IKE HAAS; FRANK GMELIN;
TRICIA SHOUP; JEN HOLBROOK;
STEPHEN CLEMENTS; KIMBERLY
ANDERSON; and SUSAN AUDETTE,

Plaintiffs,

v.

GREG KIMSEY, Clark County Auditor;
CLARK COUNTY; and DOES 1-30,
INCLUSIVE,

Defendants,

No. 3:21-cv-05746-RAJ

[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS

NOTE ON CALENDAR:
November 26, 2021

1 WASHINGTON STATE DEMOCRATIC
2 CENTRAL COMMITTEE,

3 Applicant Intervenor Defendant.
4

5 THIS MATTER COMES BEFORE THE COURT, on Defendants, Clark County Auditor
6 Greg Kimsey and Clark County’s Motion to Dismiss. The Court, having considered the records
7 and files herein, including:
8

9 1. All documents filed in the Clark County Superior Court, Case No. 21-2-01775-06,
10 and remanded to this Court, pursuant to *County Defendants’ Notice of Removal of Action*
11 *Pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1441 and 1446;*

12 2. Defendants’ Motion to Dismiss;

13 3. Responses, if any; and

14 4. Reply, if any, now therefore,
15

16 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants, Clark
17 County Auditor Greg Kimsey and Clark County’s Motion to Dismiss is GRANTED. Plaintiff’s
18 Complaint is hereby DISMISSED with prejudice.
19

20 DATED this _____ day of _____, 20____.

21
22 _____
Honorable Richard A. Jones

23 Presented by:

24 *s/ Amanda Migchelbrink*

25 Amanda Migchelbrink
26 Deputy Prosecuting Attorney
27 Clark County Prosecutor’s Office
28 Civil Division
29 PO Box 5000
Vancouver WA 98666-5000
Email: amanda.migchelbrink@clark.wa.gov

[PROPOSED] ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS - 2

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