



## Thielman et al v. Kotek et al

2024 | Cited 0 times | D. Oregon | May 24, 2024

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARC THIELMAN, SENATOR DENNIS LINTHICUM, SENATOR KIM THATCHER, JEFF KROPF, MARK ANDERSON, CHUCK WIESE, JANICE DYSINGER, STEVEN MCGUIRE, RICK RILEY, GABRIEL BUEHLER, DON POWERS, BEN EDTL, and JOHN SMALL, Plaintiffs, v. TINA KOTEK, in her official and personal capacities as Governor of Oregon; LAVONNE GRIFFIN-VALADE, in her official and personal capacities as Oregon Secretary of State; and MOLLY WOON, in her official and personal capacities as Elections Director, Defendants.

No. 3:23-cv-01639-HZ OPINION & ORDER Stephen J. Joncus Joncus Law P.C. 13202 SE 172nd Ave Ste 166 #344 Happy Valley, OR 97086 Attorney for Plaintiffs Ellen Rosenbloom Attorney General Thomas H. Castelli Brian S. Marshall Senior Assistant Attorneys General Oregon Department of Justice 100 SW Market Street Portland, OR 97201 Attorneys for Defendants HERNÁNDEZ, District Judge: Plaintiffs Marc Thielman, Senator Dennis Linthicum, Senator Kim Thatcher, Jeff Kropf, Mark Anderson, Chuck Wiese, Janice Dysinger, Steven McGuire, Rick Riley, Gabriel Buehler, Don Powers, Ben Edtl, and John Small bring this civil rights action against Defendants Tina Vonne Griffin- in their official and personal capacities violated their First Amendment right of free speech in developing a system to monitor harmful information about elections. 1

Defendants move to dismiss this case, arguing that Plaintiffs do not have standing and have failed to state a claim. 2

Because Plaintiffs lack standing, the Court grant to dismiss for lack of subject matter jurisdiction. ///

1 In their Amended Complaint, Plaintiffs also brought an Ultra Vires claim. In their Opposition to the Motion to Dismiss, Plaintiffs have agreed to dismiss , ECF 35. 2 Plaintiffs also address standing in their motion for a preliminary injunction, and the parties cross-reference evidence filed in support of that motion in their briefing. Accordingly, the Court has considered it in resolving this motion.

BACKGROUND This case involves the Oregon Secretary of State

information online as it relates to elections (mis-, dis-, and mal-information, or DM). 3



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Am. , ECF 29. According to the RFP, elections officials and voters are being targeted by MDM on the dark web and social media uncertainty around elections. Id. at 4; Am. Compl. Ex. 2 at 1. To on

2023 RFP at 4. Specifically, it seeks a se, and methods to com including:

Media monitoring and threat detection services to offer a comprehensive view

of the landscape; Providing early notification systems to identify MDM and target MDM

activity; and Guidance on effective measures to ensure the most effective possible

promotion of accurate information. Id. long with tracking solutions for the

Id. -time information regarding threats to ed according to SOS-defined Id.

3 The parties do not dispute that the RFP which is attached to the Complaint is properly incorporated by reference. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) online media so that it can promptly respond to misinformation and to any possible threats to life or property. The Secretary of State has identified Logically AI as a suitable vendor for the project and is pursuing a final contract with it for the 2023 RFP. Belant Decl. ¶ 15, ECF 24. The Secretary previously awarded Logically AI the contract for the 2022 iteration of the RFP. Am. Compl. ¶ 38.

silence its critics by quashing speech it decides is not true or is misleading. Am. Compl. ¶ 1. Plaintiffs emphasize in their complaint that -

ompl. ¶¶ 30 as war-time enemies for exercising their fundamental right to Plaintiffs also allege that the Secretary does not need surveillance to promote accurate

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Plaintiffs who are current and former elected officials, members of the media, and Oregon residents allege that the RFP violates their First Amendment right to free speech because of its chilling effect. Am. Compl. ¶ 53 targeted for exercising their First Amendment right to free speech by Defendants with their new Compl. ¶¶ 42, 43. Plaintiffs also alle

case. Am. Compl. ¶ 47. In supporting declarations, Plaintiffs offer more specific fears related to the RFP. Most declarations express concern that the public may fear retaliation by the Oregon government for speaking out on election issues . Litihicum Decl. ¶ 7, ECF 7; Riley Decl. ¶ 7, ECF 8; Powers Decl. ¶¶ 6 7, ECF 10; Kropf Decl. ¶ 10, ECF 11; Dysinger Decl. ¶ 15, ECF 12; Thielman Decl. ¶ 5, ECF 13; Anderson Decl. ¶ 7, ECF 14; Thatcher Decl. ¶ 5, ECF 15; Edtl. Decl. ¶ 5, ECF 17; Buehler Decl. ¶ 7, ECF 18. Others suggest that the State will use the RFP to censor speech it disagrees with.



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Powers Decl. ¶¶ 6 7; Dysinger Decl. ¶ 9; McGuire ¶ 2, ECF 16; Edtl. Decl. ¶ 5. Only a few Plaintiffs express concern that they will be targeted specifically. For example, Janice Dysinger capabilities under RFP 7470 to target [her] due to [her] work to expose election fraud in

Jeff Kropf a talk show radio host believes his show and social media will be monitored Kropf Decl. ¶¶ 8 9. Don and ideas. Powers Decl. ¶ 7; see also Wiese Decl. ¶¶ 4 5 (explaining that he regularly voices concerns over Oregon elections and is concerned about having to defend himself against the state , ECF 9.

STANDARDS A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1) addresses the court's subject matter jurisdiction. The party asserting jurisdiction bears the burden of proving that the court has subject matter jurisdiction over his or her claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A challenge to Article III standing is appropriately raised pursuant to Rule 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) standing requires dismissal for lack of subject matter *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) standing and

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In evaluating a facial attack under Rule 12(b)(1), the court accepts all factual allegations in the complaint as true and determines whether they are sufficient to invoke federal jurisdiction. *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014). The court does not accept *Id.* (internal quotations omitted).

A Rule 12(b)(1) motion may also attack the substance of the complaints jurisdictional allegations even though the allegations are formally sufficient. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979-80 (9th Cir. 2007) (court treats motion attacking substance of complaint's jurisdictional allegations as a Rule 12(b)(1) motion); *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996)

quotation omitted). Additionally, the court may consider evidence outside the pleadings to resolve factual disputes. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); see also *Dreier*, 106 F.3d at 847 (a challenge to the court's subject matter jurisdiction under Rule 12(b)(1) may rely on affidavits or any other evidence properly before the court). ///

DISCUSSION Defendants move to dismiss this case, arguing Plaintiffs lack standing under Article III. Defs. Mot. Dismiss 6 10, ECF 32 speculative to support standing. *Id.* at 7. Second, Defendants contend Plaintiffs cannot manufacture injury to support standing. *Id.* The Court agrees.

Article III of the Constitution limits the subject matter jurisdiction of federal courts to [S]tanding is an essential and unchanging part of the case-or- *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must show three elements to establish standing. and particularized, and (b) *Id.* at



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(quotation marks and

Id. likely, as opposed to merely speculative, that the injury will be redressed by a favorable

Id. at 561 the burden of establishing these elements. Id. (citations omitted).

In arguing Plaintiffs have failed to establish injury in fact from the proposed MDM contract, Defendants rely heavily on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). In *Clapper*, the respondents attorneys and human rights, labor, legal, and media organizations brought a constitutional challenge to Section 702 of the Foreign Intelligence Id. at 401, 406. Section 702 authorizes the surveillance of individuals who are not United States persons to acquire foreign intelligence. Id. at 401. The respondents alleged that their work req international communications with Id. at 401, 406. The Supreme Court, however, determined that the respondents lacked Article III standing, finding the likelihood that their communications will be acquired under [Section 702] . . . [was] too speculative to satisfy the well- Id. at 401. The Court further rejected the argument that they had a present injury because

of their international communica cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not Id. at 402.

The Supreme Court also addressed standing in a challenge to a government surveillance program in *Laird v. Tatum*, 408 U.S. 1 (1972). There, the plaintiffs claimed being by the data-gathering system, which collected information about public

activities with potential for civil disorder. Id. at 2, 6. They obtained this information from news media and publications of general circulation, intelligence agents in the field attending public meetings, and civilian law enforcement agencies. Id. at 6. The Supreme Court determined that the plaintiffs could not establish standing. The Court recognized that a First Amendment violation can arise from the chilling effect of government action. But it found that the chilling effect was insufficient for standing purposes where it

concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other additional Id. at 11 (comparing the other cases regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challen

Id. at 13 14 (quoting *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)). Similarly here, Plaintiffs allege a broad, subjective chilling of their speech. As in *Laird*,

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gathering publicly-available information in order to respond to what it deems is election mis-, mal-, and disinformation. - n the RFP and make broad allegations that they worry they will be targeted or censored. But they do not allege or demonstrate that any of them have been individually targeted, that any action has been taken against them by the Secretary, that their speech has been censored by the State, or that the system developed by the RFP is capable of such actions. Indeed, most merely allege that some Oregonians might self-censor because of the MDM program. Litihicum Decl. ¶ 7; Riley Decl. ¶ 7; Powers Decl. ¶¶ 6 7; Kropf Decl. ¶ 10; Dysinger Decl. ¶ 15; Thielman Decl. ¶ 5; Anderson Decl. ¶ 7; Thatcher Decl. ¶ 5; Edtl. Decl. ¶ 5; Buehler Decl. ¶ 7. And only a few individual Plaintiffs claim to have actually censored themselves. Dysinger Decl. ¶ 14; Kropf Decl. ¶ 8; Powers Decl. ¶ 7; Wiese Decl. ¶¶ 4 5. In other words, Plaintiffs have not demonstrated how the -gathering program amounts to censorship or otherwise chills their speech other than their subjective worry about the existence of the program. Plaintiffs cannot manufacture standing by inflicting harm on themselves. See Loc. 503, 48 F.4th 1112, 1119 (9th Cir. 2022).

Further, Plaintiffs assertion that they may be prosecuted under Or. Rev. Stat. § through information gathered from the program fares no better. See Powers simply because something I said is misrepresented or is not

Thielman Decl. ¶ 5 (stating that O.R.S. targeted by . This alleged future injury is too speculative to constitute injury for standing purposes. See Clapper, 568 U.S. at 414 possibilities does not establish that injury based on potential future surveillance is certainly

Article III standing.

Because Plaintiffs lack Article III standing, the Court will not address whether Plaintiffs have stated a claim for relief. See Tunac v. United States, 897 F.3d 1197, 1201 (9th Cir. 2018) the Court lacks subject matter jurisdiction over this case, it must be dismissed.

CONCLUSION miss [32] and dismisses this case for lack of jurisdiction. IT IS SO ORDERED.  
DATED:\_\_\_\_\_.

\_\_\_\_\_  
2024 MARCO A. HERNÁNDEZ United States District Judge May 24,

