FILED: October 21, 2026

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Ka'ila Farrell-Smith, Rowena Jackson, Sarah Westover, and Rosemary Francis Eatherington,
Plaintiffs-Appellants,

and

Rogue Climate and 350Eug ("350 Eugene"),
Intervenor Plaintiffs-Appellants,

v.

Oregon Department of Justice; Dan Rayfield, in his official capacity as the Attorney General of the State of Oregon; and Michael Slauson, in his official capacity as Chief Counsel of the Criminal Justice Division of the Oregon Department of Justice,
Defendants-Respondents.

Marion County Circuit Court
21CV47809

A187251 (Control)
A187250

Lindsay R. Partridge, Judge.

Argued and submitted on June 30, 2026.

Tim Cunningham argued the cause for appellants. Also on the opening brief were Davis Wright Tremaine LLP; Marianne G. Dugan and Civil Liberties Defense Center; Barry Friedman, Aaron Scherzer, Carly Margolis, The Policing Project, and Washington Square Legal Services, Inc., New York; and Jeffrey Rosenthal, Patrick Swiber, and Cleary Gottlieb Steen & Hamilton LLP, New York. Also on the reply brief were Davis Wright Tremaine LLP; Marianne G. Dugan and Civil Liberties Defense Center; Barry Friedman, Nancy Glass, Carly Margolis, and Washington Square Legal Services, Inc., New York; and Jeffrey Rosenthal, Patrick Swiber, and Cleary Gottlieb Steen & Hamilton LLP, New York.

Christopher A. Perdue, Assistant Attorney General, argued the cause for respondents. Also on the brief were Dan Rayfield, Attorney General, and Paul L. Smith, Solicitor General.

Kelly Simon and ACLU Foundation of Oregon, Inc., and Colin Hunter and Bradley Bernstein Sands LLP, filed the brief *amici curiae* for the American Civil Liberties Union of Oregon and Brennan Center for Justice at New York University School of Law.

Timothy R. Volpert and Tim Volpert, P.C., filed the brief *amici curiae* for Legal Scholars Jessica Bulman-Pozen, Helen Hershkoff, Jonathan Marshfield, Jane Schacter, Miriam Seifter, Robert F. Williams, Robert Yablon, and Quinn Yeargain.

Edward A. Piper and Glenmorrie Law LLC, filed the brief *amicus curiae* for the Cato Institute.

Before Egan, Presiding Judge, Jacquot, Judge, and Armstrong, Senior Judge.

EGAN, P. J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

[ ] No costs allowed.
[X] Costs allowed, payable by Respondents.

EGAN, P. J.

In this consolidated appeal, four individual plaintiffs and two intervenor-plaintiffs (together, "plaintiffs") appeal a general judgment entered by the circuit court dismissing with prejudice their claims for injunctive relief and declaring that defendants--the Oregon Department of Justice (ODOJ), the Attorney General, and the Chief Counsel of ODOJ's Criminal Justice Division--have authority to operate a domestic intelligence unit called the Oregon TITAN Fusion Center ("the fusion center").

Since 2004, defendants have operated the Terrorism Information Threat Analysis Network (TITAN) program, which grew into what is now Oregon's fusion center--the Oregon TITAN Fusion Center--housed in the Criminal Intelligence Unit of ODOJ's Criminal Justice Division. The fusion center is one node in a network of state-operated domestic intelligence hubs across the country that were developed by the United States Department of Homeland Security to assist in assessing and anticipating terrorist threats in the years following the 9/11 terrorist attacks.

Plaintiffs' complaints allege that defendants operate the fusion center *ultra vires*--that is, exceeding the scope of ODOJ's legal authority. They allege that the fusion center surveils and investigates activists and political actors based on their political and social views and without any nexus to criminal activity, and that it does so absent statutory authority or executive mandate.

The circuit court granted defendants' motion for judgment on the pleadings, entered judgment in defendants' favor on all claims alleged by plaintiffs, and dismissed

the claims for injunctive relief with prejudice. Plaintiffs now appeal.

We conclude that the trial court erred by granting defendants' motion because, when properly construed, the complaint alleges that at least some of the fusion center's operations exceed the statutory authority that is granted to ODOJ, and the statutory authority cited by defendants does not conclusively demonstrate that plaintiffs cannot prevail on their claims. Accordingly, we reverse and remand for further proceedings.

I. BACKGROUND

We state the facts as set forth in the complaint, liberally construing the allegations in plaintiffs' favor. *Kramer v. Conatser*, 341 Or App 568, 571, 576 P3d 507 (2025).

A. *Factual Allegations*

Plaintiffs are environmental, political, indigenous rights, and social justice advocates, and environmental advocacy organizations, all of whom were involved in a campaign against the development of the Jordan Cove Liquified Natural Gas Pipeline.[1]

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[1] According to the complaint, Plaintiffs Ka'ila Farrell-Smith--"an environmental and indigenous rights activist"--and Rowena Jackson--an "*ambo* ('water') protector"--are both "member[s] of the Klamath Tribes." Plaintiff Sarah Westover "is a community organizer" and was an elected member of the Phoenix City Council in Phoenix, Oregon, from 2016 to 2020. Plaintiff Rosemary Francis Eatherington "is an environmental activist" and president of a nonprofit dedicated to ecological preservation and providing women access to nature.

Intervenor-plaintiffs are Rogue Climate and 350 Eugene, both 501(c)(3) nonprofit organizations working toward environmental and climate justice.

The individual plaintiffs, as detailed below, initiated these proceedings by filing a complaint seeking declaratory and injunctive relief; intervenor-plaintiffs later filed a complaint adopting the individual plaintiffs' complaint in its entirety and likewise seeking declaratory and injunctive relief.

Plaintiffs allege that fusion centers nationwide, including Oregon's, collect, analyze, retain, and distribute data and threat-related information culled and gathered from myriad sources, including social media, public records, commercial databases, and reports from the public. Many such fusion centers, including Oregon's--in the words of an ODOJ official--now serve an increased role in the "apprehension and prosecution of criminals engaged in common crimes," having adopted an "all crimes" and "all threats" approach to their intelligence operations.

A core function of Oregon's fusion center (and other fusion centers nationwide) is to issue reports or bulletins--based on its intelligence operations--about actors and activities it deems to be threatening, including suspicious activity reports (SARs) that indicate a perceived risk of future terrorist or other criminal activity; threat assessments that report on potentially threatening incidents or people; and safety bulletins, which are widely-distributed notifications of potential safety concerns. Those reports are shared with federal, state, local, and tribal agencies, as well as with other public and private-sector entities, identifying individuals and organizations as potential terrorist or criminal threats. In their answer and on appeal, defendants do not dispute that

Oregon's fusion center collects and disseminates information in that general manner.[2]

However, plaintiffs allege that Oregon's fusion center has "for years surveilled Plaintiffs based on their political and social views, in violation of Plaintiffs' rights as codified by ORS 181A.250."[3] They allege that fusion center personnel monitored their political advocacy activity; coordinated surveillance of them; gathered and retained information about their advocacy efforts in opposition to the pipeline; and included their names in SARs, threat assessment reports, safety bulletins, and other intelligence products, characterizing the protestors as potential terrorist or criminal threats. They did so, the complaint alleges, without identifying any evidence of criminal wrongdoing or even a nexus to criminal activity.

More specifically, the complaint alleges that the fusion center worked

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[2] In their answer, defendants explained that the fusion center "collect[s], analyz[es], and shar[es] information to assist in law enforcement," and on appeal defendants similarly maintain that the fusion center "collect[s] information that is already publicly available or in government files" and transmits such "important information about suspicious activities or public safety" to other law-enforcement agencies. As we discuss more fully below, defendants argue that such information collection and dissemination functions "are well within the broad express and implied statutory duties and powers given to the Oregon Department of Justice in ORS Chapter 180."

[3] That statute provides:

> "No law enforcement agency * * * may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct."

closely with the Coos County Sheriff's Office and Teneo, a public relations firm hired by the pipeline developers, Pembina Pipeline Corporation, to monitor and counter the activities of the advocates who opposed the development of the pipeline. The complaint alleges that the fusion center facilitated the creation of a Jordan Cove task force that monitored plaintiffs' political advocacy activities and that the task force included a dedicated unit within the Coos County Sheriff's Office that was funded by the pipeline company. The complaint points to an email sent by a Coos County Sheriff Deputy to an analyst at the fusion center, indicating that "as promised," he was tracking the attendance at a "Rally and Public Hearing to Stop [the] Jordan Cove [Liquified Natural Gas Pipeline]," despite an acknowledged "lack of a criminal nexus." The email named Rogue Climate, one of the intervenor-plaintiffs, and also stated that "most of the names" of individuals who indicated that they planned to attend the event on social media "were recognized." Similarly, after advocates interrupted a Medford Chamber of Commerce meeting to denounce the Chamber's political action committee's receipt of a donation from Pembina, the fusion center indicated that it would put the activity into an SAR, a type of document intended to identify terrorist threats or other criminal activity. Finally, the complaint alleges that Teneo, the public relations firm, encouraged the Pembina-funded Coos County Sheriff's unit to funnel all information about plaintiffs' advocacy activities through the fusion center analysts copied on the email to avoid Freedom of Information Act (FOIA) and public records requirements.[4]

[4] Notably, on the merits, defendants do not seem to dispute those allegations but

The complaint alleges that surveillance and the issuance of threat reports regarding lawful political advocacy are part of a broader pattern of the fusion center's operations. The complaint also alleges that it is difficult to get information regarding the fusion center's activity. Plaintiffs allege that, being originally intended for national security intelligence gathering, much of the activity of such centers is exempt from public records requests. Plaintiffs obtained the information contained in the complaint following a related records request fulfilled by the Coos County Sheriff's Office. The complaint alleges that ODOJ refused to comply with a records request regarding the fusion center's pipeline-related surveillance activity. According to plaintiffs, such difficulty obtaining information about the fusion center's operations is not unique to plaintiffs. The complaint alleges that, in response to records requests by journalists seeking information on the fusion center's reports concerning other political advocacy activity, including the Women's March and protests against federal executive orders on immigration, ODOJ responded that the fusion center "had located responsive records," but it declined to disclose the reports, citing an exemption for "criminal intelligence information." In addition to operations related to the pipeline, the Women's March, and other protests, the complaint alleges that the fusion center used digital surveillance software to physically locate and track the movements of social media users posting the

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explain that the conduct was traceable to a single analyst, who was investigated following the 2019 publication of an article about the fusion center in *The Guardian*, was placed on administrative leave, and resigned.

Black Lives Matter hashtag.

Plaintiffs allege that no statute expressly gives ODOJ the authority to create and operate the fusion center; the operation has not been mandated by an executive order or other executive directive; and no regulations have been promulgated in relation to the fusion center. The complaint further alleges that, as a result of this lack of authorization, the fusion center freely targets constitutionally and statutorily protected activities in its intelligence operations--including those protections provided by ORS 181A.250--without meaningful guardrails or public scrutiny.

B. *Plaintiffs' Claims for Relief*

Plaintiffs' complaint seeks declaratory and injunctive relief, asking the court to declare that ODOJ operates the fusion center *ultra vires* because it exceeds the scope of authority granted to ODOJ by the Oregon Legislative Assembly and "[a]ny action by Defendant agency or officers exceeding the power conferred upon it by the legislature is *per se* unlawful." Plaintiffs requested (1) a declaration that ODOJ is operating the fusion center *ultra vires*; (2) an order enjoining ODOJ from their *ultra vires* operation of the fusion center; (3) an order compelling the fusion center to destroy and expunge all records related to plaintiffs that were collected and retained in the course of *ultra vires* activities; (4) an award of costs and attorney fees; and (5) such other relief as the court deemed just and equitable.

In addition, intervenors requested that the trial court enjoin ODOJ from "collecting and maintaining information about the political, religious or social views,

associations or activities of any individual group, association, organization, corporation, business or partnership" unless it "directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct."

C. *The Trial Court's Ruling*

The trial court entered a general judgment in favor of defendants on all claims alleged by plaintiffs, declaring that plaintiffs were not entitled to the declaratory relief that they sought and that, "[f]or the reasons set forth in [an opinion letter], the Oregon Department of Justice is authorized by law to operate the Oregon * * * Fusion Center."

In its opinion letter, the trial court interpreted plaintiffs' complaint to "seek[] a declaration * * * that the operation of the [fusion center] is unlawful--not that specific actions of the [fusion center] are unlawful." The court understood the central determination it needed to make as "whether a legal basis exists to declare that the entire operation of [the fusion center] is unauthorized and illegal" and ultimately concluded that "both the legislature and the governor have authorized the [fusion center] to operate."

As to the legislative authorization, the trial court concluded that, although no Oregon statutes specifically reference the fusion center, "viewed collectively," the statutes defendants cited "grant ODOJ the power to create and maintain a department like the [fusion center.]" Specifically, the trial court was persuaded by the statutes that defendants pointed to "where the legislature has granted ODOJ authority to investigate

crimes and collect data." Additionally, the court concluded that Oregon's fusion center "is a program known to the legislature and partially funded by general fund dollars," indicating that the legislature would not choose to fund a program it had not authorized. Finally, the trial court determined that the fusion center "has operated with the awareness and permission of the executive branch," citing a 2011 letter sent by then-governor Kitzhaber to the U.S. Attorney General and the Secretary of the Department of Homeland Security acknowledging that the fusion center "is the designated fusion center in Oregon" and "has been operational since May 2006."

As to intervenors' claim, the trial court dismissed the claim because "as a practical matter there [was] no relief the Court [could] offer" because ORS 181A.250 "already prohibits Defendants from taking the actions for which Intervenors seek an injunction."

The trial court also denied plaintiffs' oral motion to amend the complaint because any additional facts would not alter the court's conclusion that ODOJ had authority to create and operate the fusion center as a matter of law.[5]

D. *Arguments on Appeal*

On appeal, plaintiffs argue that the trial court ignored the complaint's factual allegations and improperly recharacterized their complaint as arguing that the fusion center was not authorized to "even exist." Plaintiffs argue that their complaint

[5] In their second assignment of error, plaintiffs challenge that ruling. We do not reach that assignment because we conclude that the trial court erred in granting judgment on the pleadings.

does not make such an argument, that ODOJ is free to create a subdivision called the "Oregon TITAN Fusion Center," but that the fusion center *operates* in excess of the authority granted to ODOJ. Given the actual nature of their request, plaintiffs argue that the trial court should have considered what the complaint alleges that the fusion center does as compared with what ODOJ is statutorily authorized to do. In plaintiffs' view, if the fusion center's activities, as alleged, fall beyond ODOJ's authorized powers, then the complaint has stated a cause of action sufficient to survive a motion for judgment on the pleadings.

As to those authorized powers, plaintiffs argue that the legislature has conferred on ODOJ the power to conduct investigations in three narrowly defined areas: organized crime, public corruption, and the investment of funds generated through criminal activity. ORS 180.610(2) - (6). Outside of those three areas, relying in part on *Oregon ex rel Thornton v. Williams*, 215 Or 639, 336 P2d 68 (1959), plaintiffs argue that ODOJ may conduct investigations only "when directed to do so by the Governor." ORS 180.070(1).

Defendants argue that the trial court properly construed plaintiffs' complaint to seek a declaration that ODOJ lacks authority to operate the fusion center and that it was correct in deciding that a collection of statutes, read together, grant ODOJ broad authority to create the fusion center and to carry out its activities. Defendants also argue that the governor's letter indicates executive approval of the program and that the legislature's appropriation of funds to the fusion center is evidence of statutory

authorization for the program.

II. ANALYSIS

We review a trial court's grant of a motion for judgment on the pleadings for legal error. *Kramer*, 341 Or App at 571. "We will affirm only if the allegations in the pleadings affirmatively show that the plaintiffs cannot prevail as a matter of law." *Id.* (internal quotation marks omitted).

In deciding the motion, the trial court cannot go outside the pleadings, must "accept the well-pleaded allegations of fact in [the] plaintiffs' complaint as true," and must "liberally construe the pleadings in [the] plaintiffs' favor." *Id.* at 570-71 (internal quotation marks omitted). The trial court should grant the motion "only when the pleadings, taken together, affirmatively show that the plaintiff has no cause of action against the defendant or when [the] defendant affirmatively alleges a complete defense which is admitted or not denied by a reply." *Id.* at 570 (internal quotation marks omitted). "Motions under ORCP 21 B should be allowed *only* when the allegations in the pleadings are clear enough to enable a court to recognize and analyze the dispositive legal issues." *Beason v. Harcleroad*, 105 Or App 376, 383-84, 805 P2d 700 (1991) (emphasis in original). "Because pleadings rarely provide that clarity, particularly in complex cases * * * where the law is not fully developed, motions for judgment on the pleadings are not favored." *Id.* at 384. "The strict requirements for granting motions on the pleadings reflect their disfavor[,]" with a strong preference for matters to be developed and decided through the process of litigation. *Kramer*, 341 Or App at 571 (citing *Thompson v.*

Telephone & Data Systems Inc., 130 Or App 302, 309, 881 P2d 819, *adh'd to as modified on recons*, 132 Or App 103, 888 P2d 16 (1994) ("Motions for judgment on the pleadings are not generally well-regarded by the courts, because hasty or imprudent use of the procedure can conflict with the policy of ensuring litigants a full and fair opportunity to try their claim or defense.")).

We must determine if the complaint, properly construed, "affirmatively show[s] that the plaintiffs cannot prevail as a matter of law." *Kramer*, 341 Or App at 571 (internal quotation marks omitted). Given the arguments below, we must first determine whether plaintiffs' complaint alleges only that ODOJ acted *ultra vires* by *creating* the fusion center or if it may also be fairly read to allege that the fusion center's *operations* exceed ODOJ's authority. That also requires at least a preliminary assessment of whether the statutory authority cited by defendants is sufficient to defeat plaintiffs' claims as a matter of law.

A. *Construction of Plaintiffs' Complaint*

As noted, when deciding a motion for judgment on the pleadings, the court cannot go outside the pleadings, must "accept the well-pleaded allegations of fact in [the] plaintiffs' complaint as true," and must "liberally construe the pleadings in [the] plaintiffs' favor." *Kramer*, 341 Or App at 570-71 (internal quotation marks omitted). Reading the complaint in light of that standard, we conclude that plaintiffs alleged facts that, if true, would show that the fusion center continues to engage in intelligence-gathering and information-disseminating activities and that those specific activities are not authorized

by statute.

The complaint alleges that "[ODOJ] currently operates the Oregon * * * Fusion Center [ ]--an opaque and pervasive domestic intelligence program that is authorized by no statute. In short, [the fusion center] is *ultra vires*--beyond [ODOJ]'s legal power." The complaint makes specific allegations that the fusion center's "surveillance operations regularly target law-abiding members of the Oregon public" and that its "analysts routinely surveil, and facilitate the surveillance of, individuals engaged in innocuous and constitutionally protected activity, including peaceful assemblies." The complaint alleges that journalists have filed public records requests seeking information on the fusion center's activities concerning other political demonstrations, including the Women's March and protests against immigration-related executive orders, and that the fusion center "located responsive records" but declined to disclose the reports on the grounds that "criminal intelligence information is exempt from disclosure." Plaintiffs also allege that the fusion center engages in a "pattern of collecting, disseminating, and retaining intelligence without any criminal nexus or legitimate public safety concern," and that those activities "continue[ ] unabated."

As we explain below, those factual allegations support plaintiffs' contention that ODOJ continues to operate the fusion center in a manner that exceeds its legal authority. The court's stated understanding of the issue presented--that what was at issue was not "whether the [fusion center] has exceeded its authority" but only that "Plaintiffs' claims are centered on the authority of [the fusion center] to even exist"--therefore did

not liberally construe the pleadings in plaintiffs' favor.

The complaint's allegations go beyond a recounting of the fusion center's past activities in relation to the Jordan Cove protests specifically, alleging not only that the fusion center has exceeded its authority in the past but also that it continues to do so. And while it may be true that the allegations in the complaint can be read as challenging "the authority of [the fusion center] to even exist," the complaint may also be fairly construed to challenge particular activities of the fusion center, including--but not limited to--its collection and dissemination of information related to political protests without a nexus to criminal activity.

That understanding of the allegations in the complaint is bolstered by the plaintiffs' prayers for relief, which can be fairly construed not only as a challenge to the existence of the fusion center but also to its continuing operations and activities. *Finch v. Miller*, 271 Or 271, 275, 531 P2d 892 (1975) (explaining that prayers for relief are relevant when they tend to explain or qualify other parts of a pleading). For example, plaintiffs' first prayer for relief specifically requests a declaration that the fusion center "is operating" outside the statutory authority of the ODOJ, and the third prayer for relief requests, among other things, the destruction of records that have been "retained" by the fusion center in the course of its *ultra vires* "activities." And, intervenors' requested relief would, if granted, constrain the fusion center's operations, but it would not eliminate the fusion center entirely.

Construing the complaint liberally in favor of plaintiffs, as we must, we

conclude that the complaint may be fairly read to allege that specific identified activities the fusion center continues to undertake exceed ODOJ's statutory authority. To the extent that plaintiffs' complaint may be read to make an ambiguous claim about the fusion center's "operation"--that is, that it may be read as a challenge to its existence or to its specific activities--that ambiguity must be construed in favor of plaintiffs. The trial court therefore misconstrued plaintiffs' complaint when it understood plaintiffs to be alleging only "that the operation of the [fusion center] is unlawful--not that specific actions of the [fusion center] are unlawful."

B. *Statutory Authority for the Fusion Center's Activities*

Turning to the legal analysis underpinning the trial court's conclusion, we further conclude that the trial court erred in dismissing the complaint on the pleadings because the collection of statutes cited by defendants do not conclusively establish that the fusion center is legally authorized to conduct the information-gathering and disseminating activities alleged in the complaint. An agency, such as ODOJ, is "a creature of statute" and "has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation." *Ochoco Const. v. DLCD*, 295 Or 422, 426, 667 P2d 499 (1983). That includes expressly conferred powers and "such implied power as is necessary to carry out the power expressly granted." *Id.* When power is statutorily granted, "actions outside the scope of that power are 'extra statutory' and therefore *ultra vires*." *West Linn Corporate Park v. City of West Linn*, 349 Or 58, 96, 240 P3d 29 (2010) (distinguishing between actions outside of the scope of granted

authority, which are *ultra vires*, and actions that are authorized but fail to conform to procedural limitations, which are not necessarily *ultra vires*).

Relying on *Thornton*, plaintiffs argue that ODOJ does not have plenary investigatory powers, even over criminal activity. In that case, the Supreme Court determined "the extent of the power of the attorney general to initiate investigations of alleged violation of the criminal statutes * * *." *Thornton*, 215 Or at 642. Recognizing that the office is "a product of statute," *id.* at 643, the court considered the statutory scheme creating ODOJ, including ORS 180.240, *id.* at 649-51, and concluded that "the attorney general has no power or duty to initiate an investigation of alleged violations of our criminal statutes nor to undertake any criminal prosecutions unless he is fortified with a gubernatorial mandate to so act[.]" *Id.* at 652.

Here, the trial court acknowledged, as did defendants, that no statute expressly confers on defendants the authority to create the fusion center and carry out its operations. Rather, the trial court agreed that the statutes cited by defendants, when read collectively, confer implied authority "to investigate crimes and collect data" and "to perform a myriad of specific tasks and as such provided ODOJ with broad authority to operate the [fusion center]." The trial court therefore held that there is "a reasonable basis for the implication that ODOJ has the authority to create and operate the [fusion center]."

Ordinarily, we would review a trial court's interpretation of a statute for errors of law. *See ACLU of Oregon v. City of Portland*, 338 Or App 750, 757, 567 P3d

1067, *rev allowed*, 374 Or 372 (2025) (reviewing the trial court's construction of ORS 180A.250 for legal error). However, in this case the trial court concluded that "the [fusion center]'s operation is not *ultra vires*" without analyzing any particular statute. Nevertheless, a review of the specific statutes cited by defendants demonstrates that--even when taken together--they do not obviously permit ODOJ to engage in the information-gathering and dissemination activities alleged in the complaint, especially as to political activities.

Defendants cite numerous statutes that, they argue, when read together, confer upon them implied authority to operate the fusion center: ORS 180.210 and ORS 180.060(7), declaring the Oregon Attorney General as "the chief law officer for the state and all its departments"; ORS 180.240, giving the Attorney General "the same powers and prerogatives" as district attorneys; ORS 8.630, giving district attorneys the powers of prosecuting attorneys; ORS 131.605(5) and ORS 133.005(3)(d), defining "peace officer" to include ODOJ investigators; and ORS 131.615 and ORS 133.033, authorizing peace officers to make stops and reasonable inquiries and carry out community caretaking functions, respectively. Additionally, defendants cite ORS 181A.265, authorizing the Department of State Police or designated criminal justice agency, including the Attorney General, to operate a "Criminal Justice Information Standards" program to coordinate information among state criminal justice agencies for the purpose of "criminal justice planning and programs." Defendants also point to ORS 181A.250--which the complaint alleges that the fusion center routinely violates--to indicate that the legislature acted

under the presumption that ODOJ possesses the power to collect and maintain information when it limited the scope of such activities.

But those statutes, even read collectively, do not bear the weight of the alleged activities. ORS 181A.250 bars law enforcement agencies from "collecting or maintaining information about the political, religious or social views, associations or activities" of individuals and groups "unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct." That statute does not confer any additional authority to law enforcement agencies that they do not already possess by some other statute. Similarly, while ORS 181A.265 allows for information sharing between criminal justice agencies for the purpose of coordinated responses, it does not say anything about what information those criminal justice agencies may gather, and thus it, too, does not grant those agencies any additional authority to investigate or take actions not otherwise authorized by separate statutes. ORS 180.240, which gives ODOJ the same "powers and prerogatives * * * as the district attorneys have in their respective counties," was considered by the Supreme Court when it decided *Thornton*, and the court concluded that "at no time since the office of attorney general came into being in 1891 has that officer been empowered to initiate on his own motion any criminal investigations or prosecutions except when so directed by the governor[.]" 215 Or at 651. Moreover, it is not obvious that the "powers and prerogatives" of district attorneys reach so far as to encompass the surveillance operations alleged in the complaint.

The general crime prevention authorities cited by defendants add little to defendants' arguments. Although ORS 131.605(5) and ORS 133.005(3)(d) define "peace officer" to include ODOJ investigators, and ORS 131.615 and ORS 133.033 authorize peace officers to make stops and reasonable inquiries and carry out community caretaking functions, respectively, those crime prevention statutes do not obviously authorize law enforcement to conduct sweeping surveillance in the absence of any connection to crimes or criminal activity, as alleged in the complaint. That view is consistent with our recent decision in *ACLU of Oregon*, in which we concluded that "a livestream by law enforcement of a lawful protest" was prohibited by ORS 181A.250 because it "collects information about protesters' political views and activities" and makes it accessible to third parties. 338 Or App at 763. We explained that it is of no moment that the livestream is only temporarily stored, because "the statute prohibits law enforcement from creating [a digital reproduction of an individual's lawful protest] in the first place." *Id.* at 764.

Furthermore, in circumstances where the legislature intends to grant ODOJ investigative authority, it has done so explicitly. For example, in the context of organized crime investigations, ORS 180.610 specifically directs ODOJ to "[e]stablish a coordinated system of collecting, storing and disseminating information relating to organized crime," to assist local, state, and federal law enforcement agencies in "the investigation and suppression of organized criminal activity," and to "[i]nvestigate investment of funds in Oregon suspected to have been generated by criminal activities."

Investigators employed pursuant to that statutory authorization are granted "all statutory powers of peace officers and police officers," ORS 180.620, and ODOJ is specifically authorized to seek and expend federal grant money for those purposes, ORS 180.630. And, the legislature authorized the Attorney General to "take full charge of an investigation or prosecution in which the circuit court has jurisdiction," but only "when directed to do so by the governor"; when acting pursuant to that authority, the legislature has granted the Attorney General "all the powers of a district attorney." ORS 180.070(1), (2).

In short, the collection of statutes referred to by the trial court does not obviously grant ODOJ the authority to perform the broad-sweeping surveillance of law-abiding Oregonians that the complaint alleges. The trial court therefore erred in concluding that such powers were clearly implied by statute.

C. *Legislative or Gubernatorial Authority for the Fusion Center's Activities*

The trial court cited to two additional factors in concluding that plaintiffs' claims were "misplaced." First, the trial court noted that ODOJ has sought and received funds from the legislature to operate the fusion center and that "[c]learly, the [fusion center] is a program known to the legislature and partially funded by general fund dollars. It does not make sense that the legislature would fund a program if the legislature did not believe it had authorized the program to exist in the first place." But that reliance on legislative appropriation of funds to the fusion center as evidence of conferred statutory authority is misplaced. Appropriations occur in an omnibus format, and the process does

not involve the type of robust debate and consideration of competing concerns and appropriate limitations that characterize legislation that confers authority. *Cf. Tenn. Valley Auth. v. Hill*, 437 US 153, 190, 98 S Ct 2279, 57 L Ed 2d 117 (1978) (explaining that "when voting on appropriation measures, legislators are entitled to operate under the assumption that funds will be devoted to purposes which are lawful" to better facilitate efficient voting on appropriations and avoid unintended alterations to substantive legislation); *ACLU v. Clapper*, 785 F3d 787, 824-25 (2d Cir 2015) (observing that the constitutional issues raised by the National Security Agency's bulk telephone metadata collection program "remind us of the primary role that should be played by our elected representatives in deciding, explicitly and after full debate, whether such programs are appropriate and necessary."). The legislature's recognition that ODOJ operates the fusion center--by appropriating funds to it--does not necessarily imply that the legislature has provided ODOJ with statutory authority to do so or, further, to engage in the specific activities alleged in plaintiffs' complaint.

Second, the trial court concluded that "[t]he head of the executive branch granted authority to the Attorney General and ODOJ to operate the [fusion center] and accordingly the [fusion center]'s operation is not *ultra vires*," based on a 2011 letter, provided by defendants during the litigation, that then-Governor Kitzhaber sent to federal authorities identifying the "Oregon TITAN Fusion Center" as Oregon's fusion center and acknowledging that it had been operating in Oregon since May 2006. Under *Thornton*, the Attorney General and ODOJ may conduct investigations "when so directed by the

governor." 215 Or at 651. But that letter does not represent a grant of authority to the fusion center. It does not direct ODOJ to create the fusion center, cites no authority to form the basis of the fusion center's legality, and was drafted several years after the fusion center began to operate. In short, it does not grant the fusion center the power to engage in the activities that are alleged in the complaint.

III. CONCLUSION

We therefore conclude that the trial court erred by granting judgment on the pleadings, because the pleadings do not "affirmatively show that plaintiffs cannot prevail as a matter of law." *Kramer*, 341 Or App at 571 (internal quotation marks omitted). Specifically, as explained above, contrary to the trial court's reading, the complaint, construed liberally in favor of plaintiffs, alleges that at least some of the fusion center's activities, which it continues to undertake, exceed ODOJ's statutory authority. Further, as a legal matter, the trial court erred when it concluded that the statutes identified by defendants demonstrate that the legislature granted broad investigatory authority to ODOJ that would support the information-gathering and dissemination activities that are alleged in the complaint. Legislatures do not "hide elephants in mouseholes," *Whitman v. American Trucking Associations*, 531 US 457, 468, 121 S Ct 903, 149 L Ed 2d 1 (2001); the fusion center's operations, as alleged, seem elephantine in comparison to the authorities cited by defendants.

The factual and legal context for plaintiffs' claims is complex, and, as detailed above, the factual allegations underlying those claims are unsettling. The

question is not whether the national network of fusion centers or Oregon's own fusion center is important, useful, or supported by federal policy. The question is whether the activities of Oregon's fusion center, as alleged in the complaint, are permitted by Oregon law, that is, whether the Oregon legislature has actually conferred to ODOJ the necessary authority to undertake those activities. As we have explained, on the pleadings before us, the exercise of the asserted power appears substantially broader than the statutes defendants identify as the source of authority. The federal government may encourage information sharing, provide funding and technical assistance, make federal information available to state and local authorities, and establish standards for participation in a national information-sharing environment. But federal encouragement does not enlarge the powers conferred on a state agency by state law. Whether Oregon officials may exercise a particular governmental power remains a question of Oregon law.

Furthermore, the complaint alleges that because ODOJ has declined to disclose information in response to public records requests on the grounds that "criminal intelligence information" is exempt from disclosure, the extent of the fusion center's regular operations is largely unknown. It also alleges that private entities associated with the Jordan Cove project encouraged local law enforcement to use the fusion center to avoid Freedom of Information Act and public records requirements.[6] The conduct of the

[6] Those two characteristics of the Oregon fusion center--information-sharing with the private sector and the opacity of its activities resulting from its collaborative operations--appear to be a feature, not a bug. *See, e.g.*, Priscilla M. Regan, Torin Monahan & Krista Craven, *Constructing the Suspicious: Data Production, Circulation, and Interpretation by DHS Fusion Centers*, 47 Admin & Soc'y 740, 743-44, 743 n4

government as alleged in the complaint--operating a secretive law enforcement program in excess of statutory authority in a manner that chills political participation and the exercise of constitutionally-protected rights--would surely test the expectations that Oregonians set for the conduct of our government. *See State v. De Witt Simons*, 375 Or 70, 80, 587 P3d 311 (2026) (Article I, section 9, of the Oregon Constitution "does not focus on the expectation of privacy of the individual; rather, it focuses on the expectations that society sets for the conduct of our government.").

Because of its narrow reading of the complaint and the lack of direct statutory authority for the activities alleged in the complaint, we conclude that the trial court erred in granting defendants' motion for judgment on the pleadings.

Reversed and remanded.

(2013) (describing outreach and cooperation between fusion centers and the private sector); Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 Hastings L J 1441, 1449, 1453, 1454, 1464-65, 1483 (2011) (describing private firms co-locating with fusion centers, private employees working at fusion centers, information-sharing agreements between fusion centers and private entities, and transparency concerns related to complex structures involving both federal and state sunshine law exemptions and dispersed authority to operate). *See generally* Bridget A. Fahey, *Data Federalism*, 135 Harv L Rev 1007 (2022) (describing the rapidly expanding governmental market in individual data, the contrast between the cross-governmental administrative institutions that manage data flows and oversee data pools and conventional cooperative federalism programs, and how such data programs are shielded from public view and scholarly critique).