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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JENNIFER RAE GUNTER, an Oregon  
Elector; and CHRISTINA LYNN  
MILCAREK, an Oregon Elector; And  
CHELSEA ANNE WEBER, an Oregon  
Elector,

Plaintiffs,

v.

SHEMIA FAGAN, in her individual capacity  
and as Secretary of State for the State of  
Oregon,

Defendant.

Case No. 3:22-cv-01252-MO

REPLY IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS FIRST AMENDED  
COMPLAINT

The plaintiffs' response to the motion to dismiss focuses on their claim that the Secretary of State unlawfully certified tally machines. That claim fails for three reasons.

First, the plaintiffs' theory that the nation's two federally certified test laboratories for election equipment were both uncertified for several years fails as a matter of law. By statute, a

lab's accreditation can be revoked only by a vote of the U.S. Election Assistance Commission (EAC). That never happened, and the plaintiffs do not allege that it did. Rather, the plaintiffs contend that an EAC "policy manual" required the EAC to issue a certificate every two years to maintain a test labs' accreditation. The plaintiffs' argument ignores the statutory constraint on revoking accreditation and relies solely on an EAC "policy manual" that does not have the force of law and cannot trump a statute. The EAC has rejected the plaintiffs' interpretation of its manual, and the Court owes deference to the EAC's interpretation of its own policy documents. *See* MTD [24] § IV.B.1.b.

Second, there is no basis for federal jurisdiction. Certification requirements are established by state law, not federal law. *See* ORS 246.550(4). That state law, in turn, relies on federal certifications of voting machines and accreditations of test laboratories, but any constraint on the Secretary's authority to certify tally machines is a matter of state, not federal, law. If the plaintiffs are attempting to bootstrap their state-law claim into a federal constitutional violation, that too fails as a matter of law. *See Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998), *as amended on denial of reh'g and reh'g en banc* (June 23, 1998); *see also Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("a claim for violation of the Illinois Election Code ... is a state law claim for a violation of state law, not a federal claim for a violation of constitutional rights."). *See also* MTD [24] § IV.B.1.a.

Without a federal claim, there is no basis for supplemental jurisdiction, and in any event, suit against a state officer in her official on state-law grounds is barred by sovereign immunity. *See* MTD [24] § IV.C; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)) ("a federal court could not entertain a suit brought by a citizen against his own State"). *See also* MTD [24] § IV.C.

Finally, the plaintiffs' claim that the Secretary has unlawfully certified tally machines is a generalized grievance that is not sufficient for standing. The plaintiffs' only interest in this case

is “an abstract and generalized ... interest in the proper application of the law,” *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). District courts around the country have routinely held that these types of claims are generalized grievances and therefore insufficient for standing. *See Washington Election Integrity Coal. United v. Bradrick*, No. 2:21-CV-01386-LK, 2022 WL 4598504, at \*4 (W.D. Wash. Sept. 30, 2022) (collecting cases). The plaintiffs do not and cannot allege that their votes will not be counted due to the purported violation of the machine certification requirements. In any event, whatever facts they allege do not show that a future injury is “certainly impending” given the numerous safeguards to ensure votes are properly counted. They therefore lack Article III standing. *See* MTD [24] § IV.A.

For each of these reasons, the motion should be granted and the First Amended Complaint should be dismissed.

DATED October 28, 2022.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 28, 2022, I served the foregoing REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT upon the parties hereto by the method indicated below, and addressed to the following:

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