No. 22-16413

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kari Lake, *et al.*,

Plaintiffs/Appellants,

v.

Adrian Fontes, *et al.*,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-00677-JJT
John J. Tuchi
United States District Judge

DEFENDANT/APPELLEE ARIZONA SECRETARY OF STATE ADRIAN FONTES' ANSWERING BRIEF

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I. INTRODUCTION

Basic constitutional principles discourage using our judiciary as a blunt instrument against a state's election processes and procedures based on nothing more than generalized grievances and conjecture – especially on the eve of an election. But this is what Appellants Kari Lake and Mark Finchem (collectively, the "Challengers"), who were candidates for Arizona statewide offices in 2022, sought to do here. The district court rejected their attempt to reframe state election law and invite court oversight of state elections. This Court should do the same, and affirm.

In Arizona, voters cast their votes on paper ballots. Since 1966, Arizona has authorized the use of electronic voting systems to tabulate the votes cast on those paper ballots. The Challengers dislike this tabulation system. They filed a lawsuit before the 2022 primary election seeking an injunction to bar electronic voting systems, in an attempt to impose their preferred voting procedures on the electorate through judicial fiat, and empowering a federal court to oversee Arizona's elections for the foreseeable future.

The Challengers alleged that Arizona's Secretary of State (the "Secretary"), who is tasked with certifying Arizona's electronic voting systems, should not have certified those systems because they are "potentially" hackable, and thus, should not be used "unless" evaluated by "objective experts" (presumably of the

Challengers' choosing). These allegations purportedly justify both eliminating Arizona's decades-long use of electronic voting systems and federal courts' perpetual oversight of Arizona's elections.

The "facts" the Challengers alleged in support of their mission to micromanage Arizona elections is a pile of potentialities, possibilities, cans, coulds, maybes, and mights stitched together to reach the unsupported conclusion that a *possibility* for malfeasance will necessarily affect the outcome of Arizona's elections. The law requires more than possible malfeasance in order to state a plausible claim for relief, and the law compels this Court to affirm for two general reasons.

First, the Challengers' allegations are conclusory conjecture about possible susceptibilities to election malfeasance. But the Challengers fail to plead facts sufficient to actually state a claim, let alone establish the existence of the chain of contingencies necessary to state a redressable injury in fact. Having failed to plead facts plausibly stating a claim for relief (especially an injury in fact), this action fails.

Second, the Challengers' attempt to shoehorn general grievances with electronic voting machines into a lawsuit invoking federal law cannot supplant the reality that these are issues of state law protected by the Eleventh Amendment. For example, the Challengers allege that Arizona does not use paper ballots. Yet,

Arizona clearly does. Even so, the Challengers pretended to the contrary and insist upon judicial intervention in, and oversight of, Arizona's elections – which are matters guided by state law. In other words, the Challengers seek to compel state actors to take action under state law by having the district court rewrite and monitor election procedures prescribed by state law. But their allegations are at best state law claims thinly (and unpersuasively) disguised as federal claims. The Eleventh Amendment prohibits the Challengers from obtaining such relief in a federal court.

Accordingly, this Court should affirm.

II. JURISDICTION

The Secretary disagrees with the Challengers' jurisdictional statement in two respects.

First, the Challengers assert that the district court has subject matter jurisdiction. Opening Brief ("OB") at 1; Fed. R. App. P. 28(b)(1). This is wrong. The district court dismissed the Challengers' first Amended Complaint (the "FAC") because they lack Article III standing. Excerpt of Record ("ER") at 26. A lack of Article III standing entails a lack of subject matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986).

Second, the Challengers assert their claims are brought under federal law. OB at 1. Not so. The Challengers' claims turn on the application of Arizona state

law notwithstanding their efforts to cloak state law claims in federal garb. ER-22–24.

Additionally, the Challengers' Circuit Rule 28-2.2 Statement of Jurisdiction asserts that "[t]he statutory bas[e]s of subject matter jurisdiction" are U.S.C. §§ 1331 (federal question jurisdiction), and 1343(a)(3) ("civil action authorized by law" to redress violations of state or federal law"). OB at 5. But again, the district court lacked subject matter jurisdiction for want of standing and the Challengers' claims against the Secretary turn on the application of Arizona state law. ER-22–26.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Challengers' statement of the issues presented for review is wanting. *See* OB at 2-5. The issues presented for this Court's review are more accurately framed as follows:

A. Did the district court correctly dismiss the FAC for lack of subject matter jurisdiction because the Challengers' claims against the Secretary are speculative, conjectural, generalized, and hypothetical grievances that do not constitute an injury in fact for Article III standing? The answer is "yes".

The Secretary agrees with the Challengers' description of when the issue of their standing as candidates was raised below. OB at 4. The Secretary also agrees that the standard of review for dismissal of a complaint under Federal Rule of Civil

Procedure 12(b)(1) is *de novo*. *Id.* But the Challengers failed to mention other standards of review applicable to this issue that they must meet in order for this Court to overturn the decision below. "The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error." *Ass'n of Am. Med. Colls. v. U.S.*, 217 F.3d 770, 778 (9th Cir. 2000). A district court taking judicial notice of a document under Federal Rule of Evidence 201 is reviewed for abuse of discretion. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). And a district court's incorporation by reference to documents into a complaint is reviewed for an abuse of discretion. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). This Court may also affirm dismissal "on any ground supported by the record" even if the district court did not consider the issue. *U.S. v. Lemus*, 582 F.3d 958, 961 (9th Cir. 2009). These standards of review apply to the Challengers' assertions that dismissal of their complaint under Federal Rule of Civil Procedure 12(b)(1) was improper.

B. Did the district court correctly find that the Eleventh Amendment bars the Challengers' claims against the Secretary because those claims rest on alleged violations of Arizona state election law? The answer is "yes".

The Secretary agrees with the Challengers' description of when the Eleventh Amendment immunity defense was raised below, and that this Court's standard of review is *de novo*. OB at 2. In addition, the Secretary again notes that the taking

of judicial notice of a document is reviewed for abuse of discretion, and this Court may affirm dismissal on any ground supported by the record. *Lee*, 250 F.3d at 689; *Lemus*, 582 F.3d at 961.

C. Did the district court correctly interpret *Purcell v. Gonzalez*, 549 U.S. 1 (2006) to preclude injunctive relief that would alter Arizona's election rules on the eve of an election? The answer is "yes".

The Secretary agrees with the Challengers' description of when the *Purcell* doctrine was raised below. OB at 4. However, the standard of review for a district court's decision on preliminary injunctive relief is limited and deferential. *See Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). "A preliminary injunction should only be set aside if the district court 'abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Id.* (citation omitted). Moreover, again, the taking of judicial notice of a document is reviewed for abuse of discretion. *Lee*, 250 F.3d at 689.

IV. STATEMENT OF ADDENDUM

"Pertinent" constitutional provisions, statutes, and regulations are reproduced in the addendum to this brief pursuant to Ninth Circuit Rule 28-2.7.

V. STATEMENT OF THE CASE

A. HOW VOTES ARE CAST AND TABULATED IN ARIZONA ELECTIONS

Arizona voters cast their votes with paper ballots. ER-14; A.R.S. §§ 16-462, (primary ballots "shall be printed"), 16-468(2) ("Ballots shall be printed"), 16-502

(same). Since 1966, Arizona has authorized the use of electronic voting systems to tabulate votes. ER-12. Arizona law defines an "electronic voting system" as "a system in which votes are recorded *on a paper ballot* by means of marking, and such votes are subsequently counted and tabulated by vote tabulating equipment at one or more counting centers." A.R.S. § 16-444(A)(4) (emphasis added). "Vote tabulating equipment" includes any "apparatus necessary to automatically examine and count votes as designated on ballots and tabulate the results." A.R.S. § 16-444(A)(7).

Voters with visual disabilities may vote with an "accessible voting device" or ballot marking device (a "BMD"). ER-14. BMDs must produce paper ballots and a verifiable paper trail that voters can review to verify their choices were correctly marked.[1] A.R.S. §§ 16-442.01 (accessible voting technology recommendation and certification), 16-446(B)(7) (electronic voting system "must provide a durable paper document that visually indicates the voter's selections," and that paper "shall be used in manual audits and recounts."); State of Arizona 2019 Elections Procedures Manual ("2019 EPM") at 80 (standards for accessible

[1] The Challengers' vague FAC does not allege precisely how many voters use BMDs. *See, e.g.*, ER-50, ¶ 16 ("some" use BMDs); ER-56, ¶ 57 (same); ER-58, ¶ 68 ("many" use BMDs); ER-88, ¶ 167 (same). During the 2020 General Election, 2,089,563 ballots were cast in Maricopa County. ER-23 n.15. Only 453 of those ballots (*i.e.*, 0.02%) were cast via BMD. *Id.* The district court properly found this fact as it is undisputed. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (federal courts only "assume [the] veracity" of "well-pleaded factual allegations").

voting equipment), *available at* https://tinyurl.com/mu9nbmk3.

The Secretary promulgates the EPM, which details requirements for testing, certifying, and auditing electronic voting systems, tabulating equipment, and BMDs.[2] A.R.S. § 16-452; *see also, e.g.*, 2019 EPM at Ch. 4 ("Voting Equipment"), Ch. 8(III) ("Designation of Political Party and other Observers"), Ch. 8(V) ("Preparation of Ballots"), Ch. 10 ("Central Counting Place Procedures"), Ch. 11 ("Hand Count Audit"), Ch. 12(II) ("Conducting Post-Election Logic & Accuracy Test"). The EPM's provisions related to voting and tabulating are designed to "achieve and maintain the maximum degree of correctness, impartiality, uniformity, and efficiency" in elections. A.R.S. § 16-452(A).[3] The Secretary is also required to "provide personnel who are experts in electronic voting systems and procedures and in electronic voting system security to field check and review electronic voting systems and recommend needed statutory and procedural changes." A.R.S. § 16-452(D).

Before and after elections, all electronic voting machines are tested,

[2] The 2019 EPM is the operative manual at all times relevant to the district court proceedings and this appeal. ER-14. It has the force and effect of law. *Gonzalez v. Arizona*, 677 F.3d 383, 397 (9th Cir. 2012).

[3] Arizona law makes violations of the Elections Procedures Manual a class 2 misdemeanor. A.R.S. § 16-452(c). Its application and enforcement are governed by Arizona state law. *See id.; Chavez v. Brewer*, 214 P.3d 397, 406, ¶ 28 (Ariz. Ct. App. 2009) (recognizing private right of action under Arizona state law to challenge the Secretary's use of electronic voting machines).

certified, and audited. ER-12–15; A.R.S. §§ 16-442 (adoption, certification, and decertification of vote tabulating equipment), 16-442.01 (as amended on September 23, 2022) (certification process for BMDs), 16-446 (specifications for electronic voting systems), 16-449 (required testing procedures include any set forth in EPM), 16-602 (required hand count audit of paper ballots before canvass is certified). Each of Arizona's fifteen counties perform logic and accuracy testing on vote tabulating equipment before and after an election. 2019 EPM at 86. The Secretary performs logic and accuracy testing on each county's equipment used for early voting before an election that involves a race for federal, statewide, or legislative office. A.R.S. § 16-602. During an election, electronic voting systems "[p]rovide for voting in secrecy when used with voting booths." A.R.S. § 16-446(B)(1). The counties also conduct such testing on all election equipment before and after each election. ER-12–13.

In addition, electronic voting machines must comply with the Help America Vote Act of 2022 ("HAVA") and be approved by a Voting System Test Laboratory (a "VSTL"). A.R.S. § 16-442(B); 2019 EPM at Ch. 4. HAVA requires the United States Elections Assistance Commission (the "EAC") to provide for accreditation and revocation of accreditation of independent non-federal laboratories that test electronic voting equipment under the federal standards. 2019 EPM at 25; 42 U.S.C. § 15371(b). "[A]ccreditation of voting system test laboratories accredited

by the [EAC] 'may not be revoked unless the revocation is approved by a vote of the Commission.'" *Gunter v. Fagan*, No. 3:22-CV-01252-MO, 2023 WL 1816551, at *3 (D. Or. Feb. 6, 2023) (citation omitted)).

B. ALL ELECTRONIC VOTING SYSTEMS, TABULATION EQUIPMENT, AND BMDS FOR THE 2022 ELECTIONS WERE TESTED AND CERTIFIED

The EAC and a VSTL certified Maricopa County's Dominion Voting Systems Democracy Suite 5.5-B.[4] ER-12–15. In Arizona, only Maricopa County uses Dominion. ER-14–15 (taking judicial notice of Ariz. Sec'y of State, *Voting Equipment*, https://azsos.gov/elections/votingelection/), Supplemental Excerpt of Record ("SER") at 1, Tr. at 228:22–24 (Plaintiffs' Counsel: "Well, the largest counties and, in particular, in a large stretch, Maricopa, it covers Dominion; Pima covers ES&S. The other counties also use ES&S.")); SER-23 at 15:11–20. Thirteen counties use Elections Systems & Software ("ES&S") machines, all of which the EAC and VSTL certified. ER-14–15; SER-23 at 15:11–20; *cf.* ER-57, ¶ 64 (alleging most counties "have contracted with Dominion or ES&S"). Only Yavapai County uses Unisyn machines, which the EAC and a VSTL certified. SER-23 at 15:11–20.

Each of machines have been approved for use after evaluation by the Election Equipment Certification Committee, which makes recommendations to the Secretary regarding whether particular voting systems, even after certification

[4] That VSTL is named Pro V&V.

by a VSTL and the EAC, should be used for voting in Arizona. A.R.S. § 16-442(A); ER-12–13; 2019 EPM at Ch. 4.

C. THE CHALLENGERS SUE TO IMPOSE THEIR PREFERRED ELECTION PROCEDURES ON ARIZONA VOTERS THROUGH JUDICIAL FIAT

On April 22, 2022, the Challengers, candidates in primary elections for Arizona statewide offices, filed their Complaint (Doc. 1), and later their FAC (Doc. 3). ER-46–96. The FAC named as defendants the Secretary in his official capacity,[5] and members of the Maricopa County and Pima County Boards of Supervisors in their official capacities (collectively, the "Boards"). ER-46; ER-53–54. Strangely, none of Arizona's thirteen other counties' election officials were named even though they all use electronic voting machines. ER-46.

The Challengers requested a court order (1) declaring it is "unconstitutional for any public election to be conducted using any model of electronic voting system to cast or tabulate votes[;]" (2) providing injunctive relief which would prohibit "[the Secretary and Boards] from requiring or permitting voters to have votes cast or tabulated using any electronic voting system[;]" and (3) directing "[the Secretary and Boards] to conduct the Midterm Election consistent with the summary of procedures" that Challengers created and prefer. ER-94–95.

[5] On January 2, 2023, Adrian Fontes became the Arizona Secretary of State and was "automatically substituted as a party" in this action. Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

D. THE SECRETARY AND BOARDS MOVE TO DISMISS THE FAC

The Boards moved to dismiss the FAC for failure to state a claim under Rule 12(b)(6) (Doc. 27). The Boards argued that the FAC's claims were barred because of (1) the statutes of limitations, (2) laches, (3) the *Purcell* doctrine, (4) the lack of any well-pled factual allegations supporting any plausible claim for relief, and (5) the lack of a cognizable legal theory entitling the Challengers to any relief. ER-17. The Boards also asked the district court to take judicial notice of various government documents and public records central to the Challengers' claims (Doc. 29). ER-7; ER-13 n.5; ER-26.

The Secretary also moved to dismiss the FAC under Rules 12(b)(1) and 12(b)(6) because (1) the Challengers lacked Article III standing, (2) the Eleventh Amendment barred the Challengers' claims against the Secretary, (3) the FAC failed to state a constitutional claim, and (4) the district court should abstain from deciding the Challengers' claims under the *Pullman* doctrine (Doc. 45). ER-17.

Nearly *two months after filing their initial complaint*, the Challengers moved for a preliminary injunction (Doc. 50). ER-8; ER-25. They requested an Order barring the Secretary and Boards from using any computerized equipment to administer the collection, storage, counting, and tabulation of votes in any election until such time that the propriety of a permanent injunction is determined. (Doc. 50, at 2).

The district court set a hearing on the pending motions to dismiss and the Challengers' motion for a preliminary injunction (Doc. 68). ER-163–64. At that hearing, the district court heard argument and witness testimony. ER-8.

On August 26, 2022, the district court granted both motions to dismiss and denied the Challengers' motion for a preliminary injunction as moot. ER-26–27.[6] The district court held that (1) the Challengers failed to demonstrate standing, (2) the Eleventh Amendment barred their claims, and (3) the *Purcell* doctrine barred injunctive relief. ER-26.

Regarding standing, the district court found that "even upon drawing all reasonable inferences in [the Challengers'] favor . . . their claimed injuries are indeed too speculative to establish an injury in fact." ER-20. The district court found that a long chain of hypothetical contingencies would have to take place for any harm to occur and that the Challengers failed to plausibly show that Arizona's voting equipment even has security failures, let alone that they are "certainly impending". ER-21 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). The district court concluded that speculative allegations that voting machines *may be* hackable were insufficient to establish an injury in fact. ER-22.

[6] The district court denied the Challengers' expeditated motion to supplement the record "in light of recently obtained information." ER-8; ER-27 n.17. This motion was filed in August 2022 after the hearing. ER-8. They do not appeal the district court's denial of this motion, so the issue has been waived on appeal. *See generally* OB; Fed. R. App. P. 28(a)(8); Ninth Cir. R. 28(a)(8).

As for Eleventh Amendment immunity, the district court agreed with the Secretary that "because the Constitution charges states with administering elections, [the Challengers'] claims can only stem from an argument that [the Secretary and Boards] are violating *state law* by using what [the Challengers] allege are insecure or inaccurate voting systems." ER-23. The district court noted that Arizona law prescribes detailed requirements concerning how ballots are counted and voting systems are used. ER-24. The district court further concluded that, absent a constitutional right to a particular method of voting, the Challengers' claim that Arizona's voting systems are flawed can *only* arise under state law, and thus are barred notwithstanding the attempt to cloak them in federal garb. *Id.*

Last, in finding that the *Purcell* doctrine bars the Challengers' requested injunctive relief, the district court agreed with the Secretary and Boards that the relief requested would completely overhaul Arizona's election procedures on the eve of the 2022 Midterm Elections. ER-26–27. Indeed, at the time of the hearing (July 21, 2022) the August primary elections were only weeks away and the November election was already less than four months away. And "[the Challengers'] position is a far cry from "entirely clearcut."' ER-25. Thus, the district court found that the injunctive relief sought "would not just be challenging for Arizona's election officials to implement; it likely would be impossible under the extant time constraints." ER-26.

The Challengers timely appealed the district court's ruling. ER-3.

VI. SUMMARY OF THE ARGUMENT

The district court correctly dismissed this action because (1) the Challengers lack standing to sue, (2) the Eleventh Amendment bars their claims against the Secretary, and (3) the *Purcell* doctrine barred injunctive relief. ER-26–27. This Court should affirm the district court. We will summarize why.

First, the Challengers lack Article III standing to sue because they failed to demonstrate an "injury in fact." Their alleged injury is too speculative to be concrete, too generalized to be particularized, and neither actual nor imminent.

Second, the Eleventh Amendment bars the Challengers' claims against the Secretary. The Eleventh Amendment protects state officials from lawsuits in federal court where the alleged injury rests on prospective violations of state law. And the *Ex parte Young* exception to Eleventh Amendment immunity does not apply where a plaintiff nominally pleads federal claims that rest on alleged violations of state law. Here, that is exactly what the Challengers did. Hence, the district court correctly found that the *Ex parte Young* exception to Eleventh Amendment immunity does not apply to the Challengers' claims against the Secretary.

Third, the *Purcell* doctrine precluded injunctive relief, because the relief the Challengers sought would have effectively eradicated Arizona election law and

replaced it with a new court-supervised regime shortly before the 2022 elections. *Purcell* instructs federal courts not to grant such relief, especially given the timing of the Challengers' requests. The district court correctly followed *Purcell* by finding the Challengers' requested relief was unavailable.

VII. ARGUMENT

This Court may affirm the district court's dismissal "on any ground supported by the record."[7] *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). Although Rules 12(b)(1) and 12(b)(6) apply different standards, those standards overlap when a district court decides whether a complaint on its face establishes standing to sue. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (motion under 12(b)(6) or a facial attack on subject matter jurisdiction under Rule 12(b)(1) applies same analysis of only accepting as true well-pled factual allegations and disregarding legal conclusions). And this Court may also affirm dismissal of a complaint under the Eleventh Amendment under either Rule 12(b)(1) or 12(b)(6). *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017).

[7] The Challengers waived any argument for leave to amend the FAC on appeal. *See, e.g.*, OB at 56 (merely seeking reversal of the district court's Order and remand). This is because they failed to "'argue[] specifically and distinctly' that [this Court] should remand this case with instructions to grant leave to amend, even as relief in the alternative." *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1208 (9th Cir. 2022) (citation omitted). Therefore, the Challengers "have waived the argument on appeal that they are entitled to such relief from this court." *Id.*

A. THE CHALLENGERS LACK ARTICLE III STANDING

The United States Constitution limits federal courts' subject matter jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. There is no case or controversy where a plaintiff lacks standing to sue. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). And lack of standing to sue "requires dismissal for lack of subject matter jurisdiction[.]" *Naiman v. Alle Processing Corp.*, No. CV20-0963-PHX-DGC, 2020 WL 6869412, at *5 (D. Ariz. Nov. 23, 2020) (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011)).

Assessing standing involves "both constitutional limitations on federal-court jurisdiction and prudential limitations." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (citation omitted). A plaintiff has standing *only if* the complaint alleges well-pled facts that demonstrate an "injury in fact," a causal relationship between the injury and the challenged conduct, and that the injury in fact is not speculative and likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560 (internal quotation marks omitted)). The Challengers bear "the burden of establishing these elements" and

"must '*clearly* … allege facts demonstrating' each element."[8] *Id.* at 338 (emphasis added, citation omitted).

"Because standing affects a federal court's subject matter jurisdiction, it is properly raised in a Rule 12(b)(1) motion to dismiss[.]" *Naiman v. Alle Processing Corp.*, No. CV20-0963-PHX-DGC, 2020 WL 6869412, at *5 (D. Ariz. Nov. 23, 2020); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1123 (9th Cir. 2010); ER-17 (Secretary moved to dismiss under Rule 12(b)(1)). Standing may be attacked under Rule 12(b)(1) in two ways. One is "[a] 'facial' attack [that] accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted). Another is a factual attack that "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id.*

[8] The Challengers proffered two theories of standing below: their status as (1) voters and (2) candidates. ER-21; ER-53, ¶¶ 39, 41. On appeal, however, the Challengers defend only one theory of standing: their status as candidates in the 2022 Midterm Election. *See* OB at 3 (issue on appeal is "[w]hether Appellants have standing *as candidates for office*" (emphasis added)); *see also, e.g.*, *id.* at 23-24 (arguing standing as candidates), 54 (arguing cases should be distinguished because they do not involve candidates); ER-53, ¶¶ 39, 41. Therefore, the Challengers have waived any argument that they have standing based on their status as voters. *See* Fed. R. App. P. 28(a)(8). Additionally, Mark Finchem alleged he had standing in his capacity as a member of the Arizona House of Representatives. ER-53, ¶ 40. This theory of standing was never developed below, and the Challengers make no attempt to defend it on appeal. So this theory of standing is also waived. Fed. R. App. P. 28(a)(8).

The district court found that the Challengers lacked standing because the FAC *facially* failed to demonstrate an injury in fact. ER-20 ("Ultimately, even upon drawing all reasonable inferences in [the Challengers'] favor, the Court finds that their claimed injuries are indeed too speculative to establish an injury in fact, and therefore standing."). This Court should affirm that holding for four reasons.

First, the Challengers' alleged injuries were too speculative.

Second, the Challengers' alleged injuries were too generalized.

Third, the Challengers' alleged injuries were neither actual nor imminent.

Fourth, the district court justifiably took judicial notice of certain facts incapable of sincere dispute when deciding whether the Challengers had the standing necessary to state a claim for relief.

1. THE CHALLENGERS' ALLEGED INJURIES ARE TOO SPECULATIVE TO BE CONCRETE

To be "concrete and particularized," an alleged injury must be "real" and not "abstract", and "must affect the plaintiff in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citation omitted). The district court found that the Challengers failed to allege such an injury. ER-19 (noting most allegations about electronic voting machines are not related to systems in Arizona). The Challengers disagree, but their arguments for reversal are unavailing.

The Challengers assert that they pled facts sufficient to support their allegation that "unreliable electronic voting equipment" in Maricopa and Pima

counties are unconstitutional. OB at 24, 26. But the Challengers' string citations to various pages of the FAC do not support the Challengers' position. *See, e.g.*, ER-48 (many legal conclusions and assertions that this lawsuit is not about the 2020 election); ER-53–54 (legal conclusions and parties' background); ER-86–87 (legal conclusions and conclusory assertion that the Secretary certified "deficient electronic voting systems"), ER-94 (legal conclusions and beginning of Prayer for Relief). Instead of facts, the Challengers hang their arguments on legal conclusions. But federal courts must disregard conclusory allegations when deciding whether a Plaintiff has standing. *See Lujan*, 504 U.S. 555, 561 (holding "each element [of standing] must be support in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.").

The Challengers also highlight their allegation regarding "[a]n inaccurate vote tally" as an example of a concrete injury sufficient to meet the injury-in-fact requirement. OB at 27 (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)). But this allegation is just another example of the type of conclusory, hypothetical allegations riddled in the FAC. Nowhere in the FAC do the Challengers plausibly allege how or why Arizona's electronic voting systems will yield inaccurate vote tallies (nor can the Challengers do so). ER-19–20. Their cry of a hypothetical "inaccurate vote tally" has no support beyond merely concluding

as such, and then attempting to link that conclusion to other speculative generalized grievances. *See, e.g.*, ER-50, ¶ 16 (vague reference to unspecified "significant security risks" in BMDs), ER-51, ¶¶ 23 ("systems are potentially unsecure"), 24 (systems "can be manipulated"), 25 (alleging "[s]pecific vulnerabilities" were "explicitly identified and publicized in analyses by cybersecurity experts" without stating what those vulnerabilities were or who identified them), 28 (voting machines are "vulnerable"), ER-57, ¶ 61 (one voting company's voting machines may be hackable); ER-58 (alleging Dominion voting machines "call into question the integrity and reliability of all election results" while insinuating votes are only cast electronically rather than with paper ballots); ER-58–59, ¶ 70 (cherrypicked citation to audit report of Arizona's 2020 General Election results that in fact did not find a difference in election outcome after hand count of paper ballots).

Worse, the FAC contains numerous speculative and conclusory allegations *unrelated* to Arizona. *See, e.g.*, ER-50, ¶ 32 (alleging France and Taiwan limit electronic voting machines "due to the security risks" without more elaboration); ER-59–60, ¶ 73 (alleged issues in Alabama, North Carolina, Nebraska, and Texas); ER-77 (alleging "irregularities" in Colorado and Michigan). None of this is remotely particularized enough to plead a concrete injury to the Challengers.

The case law the Challengers invoke in support of their position does them

no favors. Their reliance on *Carson* is misplaced. OB at 27. *Carson* involved allegations that a state official planned to count votes received after election day. 978 F.3d at 1058. That court held that the plaintiff in *Carson*, as a candidate, had a concrete injury because counting votes after election day is illegal and because the official *planned* to do it. *Id.* (emphasis added).

The Challengers, on the other hand, never alleged that illegal votes would be counted. ER-20–21. Indeed, the FAC is mostly filled with demands that electronic ballot tabulation be "subjected to scientific analysis by objective experts *to determine whether it is secure* from manipulation or intrusion." ER-46, ¶ 1 (emphasis added); ER-48, ¶ 8 (asking rhetorical question "can government avoid its obligation of democratic transparency and accountability by delegating a critic governmental function to private companies?"). Such speculative fears are not well-pled facts plausibly showing Arizona's electronic vote tabulation systems yield inaccurate results. *Gunter v. Fagan*, No. 3:22-CV-01252-MO, 2023 WL 1816551, at *2 (D. Or. Feb. 6, 2023) (alleging electronic voting machines not tested by accredited laboratory had "vulnerabilities that could be exploited" did not show an injury in fact because allegations were too conjectural and hypothetical).

The Challengers' reliance on *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022), and *Jones v. Bates*, 127 F.3d 839, 847 n.8 (9th Cir. 1997), is also misplaced because these cases are factually inapposite. OB at 27. In *Mecinas*, organizations

challenged the constitutionality of a statute forcing their candidates to be listed lower on a ballot than their opponents. 30 F.4th at 894–95. In *Jones*, the candidate had standing by challenging the constitutionality of a statute that set a lifetime limit on the number of terms he hold a state office. 127 F.3d at 844. These are concrete harms to candidates that this Court found showed standing because those individuals were forced "to compete under the weight of a state-imposed disadvantage." *Mecinas*, 30 F.4th at 899; *Jones*, 127 F.3d at 844. There is no state-imposed disadvantage here to the Challengers, so these cases are distinguishable.

Similarly, the Challengers' attempt to distinguish our case from *Shelby County Advocates for Valid Elections v. Hargett*, 2019 WL 4394754 (W.D. Tenn. Sept. 13, 2019), *aff'd Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 981 (6th Cir. 2020), is unavailing. If anything, *Shelby*'s analyses and holdings are on point and instructive. In *Shelby* the plaintiffs alleged that their county's electronic voting equipment was "vulnerable to undetectable hacking and malicious manipulation." 2019 WL 4394754 at *2. Finding that the plaintiffs failed to show a concrete injury, the district court reasoned that the allegations were "based only on speculation, conjecture and [the plaintiffs'] seemingly sincere desire for their 'own value preferences' in having voting machines with a paper trail[.]" *Id.* at *7. Sound familiar? It should, because the Challengers' conclusory allegations here

are similar, except that unlike in *Shelby*, the paper trail lacking there actually exists in Arizona – a key detail rendering the Challengers' allegations here even less compelling than those rejected in *Shelby*. *See id.* at *2; ER-14; *see also, e.g.*, A.R.S. § 16-468(2) (ballots must be printed). The Sixth Circuit affirmed dismissal of the complaint in *Shelby*, and this Court should do the same here. 947 F.3d at 983.

The Challengers nonetheless argue *Shelby* and *Jones* are distinguishable because they did not involve candidates.[9] OB at 54. First, this is factually wrong. *Shelby*, 2019 WL 4394754 at *10 (some plaintiffs were potential future candidates); *Jones*, 127 F.3d at 847 n8 (potential future candidates may have standing as candidates provided there is an injury in fact). Second, it does not matter if the plaintiffs in *Shelby* were not candidates because the court found that:

> Even construing the allegations in the light most favorable to them, Plaintiffs offer no proof showing that Shelby County's voting system is any more likely to miscount votes than any other system used in Tennessee. At the same time, they have no proof that the [specific voting machines used in Shelby County] are more likely to be hacked or manipulated than other Tennessee voting machines.

Id.[10] And just as the court in *Shelby* correctly found that those plaintiffs did not

[9] The Challengers makes this same argument at the end of their Opening Brief in an attempt to distinguish any and all cases against them. *Id.* at 53–54. These attempts fail for the same reason: courts around the country find allegations based on the potential hackability of electronic voting machines too speculative to show standing. ER-22 (collecting cases). A candidacy does not cure conjecture.

[10] Challengers also argue *Shelby Cnty.* is inconsistent with *Carson*, 978 F.3d at

show a concrete injury, so too did the district court here. *Id.*; ER-19–21. The Challengers did not plead a plausible concrete injury.

2. THE CHALLENGERS' ALLEGED INJURIES ARE TOO GENERALIZED TO BE PARTICULARIZED

The district court correctly found that the FAC rested on generalized grievances, and thus failed to plead a particularized injury. ER-21–22. The Challengers argue their alleged injury is particularized because it "is concrete," and "widely shared[.]" OB at 28. But as explained above, their alleged injury is not concrete. *See supra*, at 19–24. Indeed, an injury alleged to be "widely shared" must still affect the Challengers in order to be "particularized". *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Brakebill v. Jaeger*, 932 F.3d 671, 677 (8th Cir. 2019) (particularized injury where challenged statute required plaintiffs to obtain qualifying identification or supplemental documents to vote); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009) (same); *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 828 (D.

1058 and *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020). Again, *Carson* involved allegations that a public official planned to count illegal votes after election day. *See* 978 F.3d at 1058. And *Trump* involved a failed effort to overturn the 2020 General Election. 983 F.3d at 927. In *Trump*, the Seventh Circuit found standing for a claim under the United States Constitution's Electors' Clause based on allegations that Wisconsin officials' (1) expanded which voters could vote absentee without photo identification, (2) permitted use of unstaffed ballot drop boxes, and (3) allowed municipal clerks to mistakenly use their powers to complete or correct absentee voters' address information. *Id.* at 923. Such allegations, which are not discussed in detail by the Seventh Circuit, are much more concrete than the speculation littering the FAC. *See id.*; ER-86–87.

Mont. 2020) (particularized injury where state action permitting counties to use mail-in ballots affects each voter's right to vote). Speculative injuries about electronic voting machines do not show an injury that *affects the Challengers*, let alone an injury that is "widely shared." *See supra*, at 19–24.

The district court also found that the Challengers, as candidates, failed to show the election playing field was tilted against them. ER-21–22. Curiously, the Challengers argue the district court improperly applied this standard. OB at 29. But it was *the Challengers who advocated for this standard* during oral argument and used cases which apply this standard as a comparison to the facts in this case. ER-21 (the Challengers' Counsel: "Anytime … the playing field is an election is tilted in any way, standing is – exists for the candidates."); SER-6–7; *cf. Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) (competitive standing requires a plaintiff to show tilted playing field).

Accordingly, the district court correctly found that the Challengers did not show an injury (or a tilted playing field) affecting them or anyone else (and a generalized distaste for electronic voting machines does not do so). *See, e.g.*, OB at 30; ER-89–92 (conclusory statements that the Secretary and Boards did not follow state and federal law); ER-56, ¶¶ 58–60 (expressing concern that Arizona and others allegedly moved "from paper-based voting systems to electronic,

computer-based systems.").

3. THE CHALLENGERS' ALLEGED INJURIES ARE TOO CONJECTURAL AND HYPOTHETICAL TO BE ACTUAL OR IMMINENT

The district court correctly held that the Challengers' alleged injuries were too conjectural and hypothetical to be "actual" or "imminent" and that the Challengers' alleged injury was not "certainly impending". ER-20–21. The Challengers proffer this Court many of the same arguments they made to the district court. We will address each argument, and why this Court should likewise reject them, in turn.

i. THE CHALLENGERS FAILED TO ALLEGE A CERTAIN HARM

The Challengers argue that the FAC pled (1) "certain harm" because vote tallies from electronic voting systems are unreliable, OB at 31, and (2) "substantial risk of harm" because using electronic voting systems in an election can be manipulated. *Id.* at 35. Both arguments are wrong and mainly repeat the FAC's speculative, generalized grievances with electronic voting machines. *Id.* at 31 (familiar string citation to the FAC); *supra*, at 20–21.

In reality, and as the district court found, the FAC did not plead "certain harm" because the Challengers' alleged injury requires a lengthy chain of conjectural and hypothetical contingencies *to occur* before there is arguably harm:

> [A] long chain of hypothetical contingencies must take place for any

> harm to occur – (1) the specific voting equipment used in Arizona must have "security failures" that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must change the outcome of the election.

ER-20. Such a "speculative chain of contingencies" fails to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).[11]

The Challengers try to manufacture certain harm by asserting that the FAC alleges "certification, logic and accuracy testing is entirely ineffective and reliance on it is meaningless." OB at 33 (citing ER-52; ER-81). But this at most merely recasts the Challengers' own pleading, because such allegations were not made. ER-52, ¶¶ 30 (vague reference to *unspecified* "manipulation"), 31 (merely alleging that *unspecified* "[e]xpert testimony" shows that "safety measures" and accuracy testing "*can* be" (as opposed to was or will be) "defeated" (emphasis added)), 32 (invoking France and Taiwan's unspecified policies), 33 ("Arizona's electronic election infrastructure is *potentially susceptible*" to issues (emphasis added)); ER-

[11] The Challengers argue that Arizona's electronic voting machines are analogous to a voting procedure where there is a booth that voters enter to cast votes by chalk on a single chalkboard, and there is no oversight for tabulating votes. OB at 32 ("Such systems would violate the constitutional right to vote *without regard to whether actual manipulation of the totals could be proved* …."). This is a poor analogy to Arizona's voting procedures. As explained above, all electronic voting systems are tested, certified, and audited. *See supra*, at 7–10; ER-12–16. Arizona elections are subjected to comprehensive and detailed statutory and regulatory requirements. ER-12–16; 2019 EPM at Chs. 4, 8, 10–12. Ours is not a system consisting of one chalkboard in a room.

81, ¶ 145 (audits "*can* be" (as opposed to were or will be) "defeated by sophisticated manipulation" (emphasis added)). Recasting what was actually plead as somehow reflecting certain (as opposed to speculative) harm is, frankly, politely characterized as a stretch.

Moreover, the FAC's conclusory allegations that tests and audits "can be defeated[]" or "cannot eliminate all problems" does not plausibly give rise to certain harm. *Shelby Cnty.*, 2019 WL 4394754 at *7, 10. For example, the FAC does *not* allege electronic voting machines have not been "objectively validated" by an audit. Rather, the Challengers claim an objective validation should occur – which is *different* than actually pleading an objective validation has never happened. *See* ER-46 (seeking relief "unless and until" system "subjected to scientific analysis by objective experts to determine whether it is secure from manipulation and intrusion"); ER-48 (systems should not be used "unless and until" they are "objectively validated"); ER-50 (Secretary acted improperly "absent objective evaluation"); ER-51 (using systems, "without objective validation," is unlawful); ER-59 (systems cannot be trued "without objective validation").

Pleading that objective validation should occur otherwise a machine *could* be subject to manipulation, as opposed to that it did not occur and thus votes were manipulated, is not certain harm as to confer standing. *Schulz v. Kellner*, 2011 WL 2669456, at *7 (N.D.N.Y. July 7, 2011) (alleging "votes will allegedly not be

counted accurately" because of "machine error and human fraud resulting from Defendants' voting procedures . . . merely conjectural and hypothetical"); *Landes v. Tartaglione*, 2004 WL 2415074, at *3 (E.D. Pa. Oct. 28, 2004), *aff'd,* 153 F. App'x 131 (3d Cir. 2005) (no standing because allegation "that voting machines are vulnerable to manipulation or technical failure" was "conjectural or hypothetical").

ii. THE CHALLENGERS FAILED TO ALLEGE A SUBSTANTIAL RISK OF CERTAIN HARM

The FAC also does not plead a "substantial risk of harm" (nor could it), because the Challengers' alleged injury is entirely hypothetical. The Challengers proffer the same arguments here as they did in the district court; mainly, the FAC *did* plead substantial risk of harm because it alleged (1) "opportunity, means, and motivated actors" who could potentially manipulate vote totals and (2) a generalized risk of vote tabulation manipulation because "[e]vidence" – albeit almost none of which connects to Arizona specifically – "has been found of illegal vote manipulation on electronic voting machines during the 2020 election." OB at 35, 39; ER-10; ER-77, ¶ 125; *but see* ER-48, ¶ 8 (asserting the Challengers' lawsuit is not about the 2020[12] General Election). But as the district court aptly

[12] After the 2020 General Election, the Arizona Senate paid a private company called the "Cyber Ninjas" to "audit" the election results from Maricopa County. *See* ER-78, ¶ 132. The Challengers allege this so-called "audit" offers the Secretary "a proof-of-concept and a superior alternative to relying on corruptible

noted, the Challengers' hypothetical, conclusory allegations of interference "in U.S. elections in the past[]" or allegations about unnamed "components" of electronic voting systems made in foreign states *do not* show a substantial risk that such harm will happen *to them in Arizona*. *Landes v. Tartaglione*, 2004 WL 2415074, at *3 (E.D. Pa. Oct. 28, 2004), *aff'd,* 153 F. App'x 131 (3d Cir. 2005) (no standing for plaintiffs alleging "that voting machines are vulnerable to manipulation or technical failure" because purported harm was "conjectural or hypothetical").

The Challengers repeatedly cite *Election Integrity Project Cal., Inc. v. Weber*, No. 21-56061, 2022 WL 16647768 (9th Cir. Nov. 3, 2022) for support. OB at 24, 36, 42, 47. In *Election Integrity*, an organization alleged that California lacked procedures to ensure only eligible voters receive early mail-in ballots, and that state regulations stopped public officials from verifying signature affidavits on those ballots. *Id.* at *1. The defendants challenged the organization's standing.

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electronic voting systems." ER-84, ¶ 155. But the Challengers omitted a critical part of these Cyber Ninjas' final report:

> … there were no substantial differences between the hand count of the ballots provided and the official election canvass results for Maricopa County. This is an important finding because the paper ballots are the best evidence of voter intent and there is no reliable evidence that the paper ballots were altered to any material degree."

ER-10 n. 2. So one of the FAC's few references to Arizona is a report that failed to find electronic voting machines' purported vulnerabilities were even manipulated to change the vote tabulation totals. *Id.*

Id. This Court held the organization's alleged expense of "significant resources to counteract the defendants' practices[]" is "a concrete and demonstrable injury[]" for an organization and it had a "*credible* threat of harm" to its mission of ensuring all votes are accurately counted. *Id.* (emphasis added, citations omitted).

The Challengers, by contrast, are not organizations, did not devote significant resources in this matter other than bringing this action, and they only allege facts hinging on speculation (and which require a chain of contingencies before they could come to pass). *See supra*, at 27–28. Thus, *Election Integrity* is too factually inapposite to support the Challengers' position.

The Challengers cite another factually inapposite case, *Curling v. Kemp*, 334 F.Supp.3d 1303, 1316 (N.D. Ga. 2018). OB at 36. As the district court pointed out, "[t]his case is nothing like *Curling v. Kemp*. There, the plaintiffs alleged that specific voting machines used in Georgia had actually been accessed or hacked multiple times, and despite being notified about the problem repeatedly, Georgia officials failed to take action." ER-20 (citation omitted). In contrast, here the Challengers must rely on a chain of contingencies before any substantial risk of harm materializes. *See id.*

The Challengers also cite a law review article about criminal defendants' constitutional rights that discusses electronic voting machines. OB at 38 n.9 (arguing this shows there are "flaws" in *all* electronic voting machines). But that

article states a remedy for issues with electronic voting machines (especially the Challengers' grievances) is "a voting system that *employs paper ballots (marked by a voter)*" that is used for recounts and audits. Steven M. Bellovin *et al*., *Seeking the Source: Criminal Defendants' Constitutional Right to Source Code*, 17 Ohio St. Tech. L.J. 1, 37 (Dec. 2020) (emphasis). Critically, Arizona *employs just such a system with paper ballots* – the very system that article cites as a method to avoid vulnerabilities in electronic voting machines. *See, e.g.*, A.R.S. §§ 16-462, 16-446(B)(7) (votes cast with BMDs create paper ballots for audit purposes), 16-468(2) ("Ballots shall be printed"), 16-502 (same). Thus, this article does not compel reversal.

The Challengers also rely on *Curling v. Raffensperger*, 493 F.Supp.3d 1264 (N.D. Ga. 2020). OB at 41; *see also* ER-64-65, ¶¶ 81–85. But that case, too, is unhelpful to the Challengers' cause. They omit (again, as they did below) that the plaintiff's expert in *Curling*, Professor J. Alex Halderman, reported: "Georgia can eliminate or greatly mitigate [the risks of electronic ballot marking devices ("BMDs")] by adopting the same approach to voting that is practiced in most of the country: *using hand-marked paper ballots and reserving BMDs for voters who need or request them*." ER-14 n.8. Not only does *Raffensperger* have nothing to do with *Arizona's* electronic voting systems, it is another example of the Challengers ignoring Arizona law and reality: *we already use paper ballots*. *See*

A.R.S. §§ 16-444(A)(1), 16-446(B)(7), 16-502, 16-462, 16-468(2).

iii. THE CHALLENGERS FAILED TO SHOW A CERTAINLY IMPENDING HARM

The district court found that, "even if the allegations in [the Challengers'] complaint were plausible, their alleged injury is not 'certainly impending' as required by *Clapper*. 568 U.S. at 409." ER-21. The Challengers argue this finding must be overturned because the district court allegedly failed to draw all reasonable inferences in their favor. OB at 43. As support for their position, the Challengers cite *United Transportation Union v. BNSF Railroad Company*, 710 F.3d 915, 935 (9th Cir. 2013). In *BNSF*, the complaint alleged a specific railway representative at a specific meeting threatened a specific neutral arbitrator for the National Mediation Board unless he rendered a decision favorable to the railway. *Id.* at 923–24. The mediator acquiesced, so the court found a particularized, concrete harm. *Id.* at 924.

BNSF is not at all like our case. The complaint in *BSNF* pled a concrete, particularized, and *actual* harm to the person affected by the arbitration decision. *Id.* Here, the district court drew "all reasonable inferences in [the Challengers'] favor," and found they still failed to show an injury in fact. ER-20. This Court has no basis upon which to conclude differently.

4. THE DISTRICT COURT PROPERLY TOOK JUDICIAL NOTICE OF CRUCIAL FACTS WHEN DETERMINING WHETHER THE CHALLENGERS LACKED STANDING

The Challengers argue the district court's "standing analysis was grounded in findings of fact contrary" to the FAC's allegations, and thus, must be reversed. OB at 44. The Challengers are incorrect.

Generally, a district court ruling on Rule 12(b)(1) or Rule 12(b)(6) motion accepts "as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (Rule 12(b)(1)); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (Rule 12(b)(6)). But, as explained below, this general rule is subject to several exceptions.

For example, the district court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). And the district court need not accept as true allegations that are "conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* Likewise, the district court can consider "documents crucial to the plaintiff's claims, but not explicitly incorporated" in the compliant. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998), *superseded by statute on other grounds in Abrego v. Dow Chem. Co.*, 443 F.3d 676

(9th Cir. 2006). Thus, here, the district court had latitude to accept and consider facts subject to judicial notice, consider documents crucial to the Challengers' claims, and reject conclusory allegations, unwarranted factual deductions, and unreasonable inferences. *Sprewell*, 266 F.3d at 988.

But, even if this Court believes that the district court erred in resolving some factual disputes, that does not warrant reversal. *Before* the district court took judicial notice of certain facts, it held that the FAC failed *on its face* to show an injury in fact. *See* ER-20–21 at 14:28–15:1 n.13 (referencing evidence outside the pleadings only *after* concluding the Challengers' alleged injury could not get through a chain of contingencies). "In reviewing decisions of the district court, [this Court] may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning." *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019) (quoting *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998)). For the reasons discussed above, this Court should affirm based on the district court's findings (prior to taking judicial notice of facts outside the record) that the FAC failed *on its face* to show a particularized, concrete, injury in fact. ER-20–21 (concluding the FAC facially does not get through the chain of contingencies to show an injury in fact).

The Challengers also spend a significant amount of time arguing the district

court erred in resolving any factual disputes because the standing issue and their substantive claims are "intertwined." OB at 47–52. Where those two issues are intertwined, factual issues at the pleadings stage are generally considered "according to the standards applicable on summary judgment." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 922 (9th Cir. 2002). But even if this standard applies, judicial notice is still appropriate.

As an example of improper fact finding, the Challengers vaguely gesture to the district court's partial grant of the Boards' motion for judicial notice. OB at 45; ER-13 n.5 (granting motion "only as to the government documents referenced in" dismissal order).[13] A district court taking judicial notice of a document under Federal Rule of Evidence 201 is reviewed for abuse of discretion. *Lee,* F.3d at 689. But the Challengers do not argue that the district court abused its discretion in taking judicial notice of any specific document. *See* OB at 45–47. And a complaint's allegations that contradict matters properly subject to judicial notice can be disregarded. *Sprewell*, 266 F.3d at 988. So, simply asserting the district court should have accepted all allegations in the FAC as true, without explaining why judicial notice was inappropriate or an abuse of the court's discretion,

[13] The district court granted the motion as to the remainder of government documents in its order sanctioning the Challengers and their counsel (Doc. 106). This order is not on appeal, but the Secretary expects the Challengers to appeal the order once the district court rules on pending applications for attorneys' fees and costs.

effectively waives any argument to the contrary. *See* Fed. R. App. P. 28(a)(8). Simply put, the Challengers failed show the district court either erred in any factual findings or that such findings warrant reversal.

This Court should affirm the district court's holding that the Challengers lack Article III standing to sue. ER-26.

B. THE DISTRICT COURT CORRECTLY FOUND THAT THE ELEVENTH AMENDMENT BARS THE CHALLENGERS' CLAIMS AGAINST THE SECRETARY

Notwithstanding its finding that the Challengers lacked standing, the district court also correctly held that Eleventh Amendment immunity bars their claims against the Secretary. ER-22–24. This Court may affirm that finding under Rule 12(b)(1) or 12(b)(6). *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017) ("A sovereign immunity defense is 'quasi-jurisdictional' in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion."); ER-17 (Secretary moved to dismiss the FAC under both rules). The standard of review is *de novo*. *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1152 (9th Cir. 2018).

1. THE ELEVENTH AMENDMENT PROTECTS STATE OFFICIALS FROM CLAIMS IN FEDERAL COURT THAT REST ON VIOLATIONS OF STATE LAW

The Eleventh Amendment prohibits lawsuits against a State in federal court without the State's consent. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S.

89, 100 (1984). This immunity protects state officials where "the effect of the [requested] judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

There is an exception to this immunity. *See Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception to this immunity applies if, and only if, the lawsuit appropriately alleges violations of federal law and seeks to force "a state official to do *nothing more* than refrain from violating federal law." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (emphasis added). "Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997).

A complaint that nominally seeks relief under federal law while resting on alleged violations of state law does not meet *Ex parte Young*'s exception to immunity. *See Hale v. Ariz.*, 967 F.2d 1356, 1369 (9th Cir. 1992) (Eleventh Amendment immunity at apex where a plaintiff seeks federal court order that "state actors comply with state law."); *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020) (dismissal appropriate where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, [but] these constitutional claims are entirely based on the failure of defendants to conform to state law[.]" (citation omitted)); *S&M*

Brands, Inc. v. Ga. ex rel. Carr, 925 F.3d 1198, 1204-05 (11th Cir. 2019) (alleged federal constitutional claim that "relied on a determination that state officials had not complied with state law" barred by Eleventh Amendment); *DeKalb Cty. Sch. Dist. v. Schrenko*, 109 F.3d 680, 682 (11th Cir. 1997) ("gravamen" and "substance" of complaint was that the state improperly interpreted and applied a state statute thereby taking it outside *Young* exception); *Balsam v. Sec'y of N.J.*, 607 F. App'x 177, 183-84 (3d Cir. 2015) (rejecting plaintiff's "attempt to tie their state law claims into their federal claims"); *Democracy N.C. v. N.C. State Bd. of Elections*, 2020 WL 6383222, at *6 (M.D.N.C. Oct. 30, 2020) ("Federal courts are prohibited from directing state actors to implement state law in a particular fashion").

2. THE CHALLENGERS' CLAIMS AGAINST THE SECRETARY REST ON ALLEGED VIOLATIONS OF STATE LAW

The FAC purportedly brought claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 to remedy alleged violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses, and protect the federal right to vote.[14] OB at 20 (citing ER-89–92); *see also* ER-55, ¶ 48; ER-92–94, ¶¶ 196–199, 207–211. This is

[14] The FAC's Equal Protection claim was premised on the Challengers' capacity as voters rather than candidates. ER-90 (alleging that "[b]y requiring [the Challengers'] *to vote* using electronic voting systems . . . there will be an unequal voting tabulation"), ER-91 (alleging that "[r]equiring *voters* to be deprived of their constitutional right to equal protection" is unlawful). The Challengers no longer claim standing based on their status as voters, so they have waived this claim on appeal. Fed. R. App. P. 28(a)(8).

an attempt to cloak state law claims as federal claims.

The Challengers assert their federal right to vote as candidates was violated by the Secretary's "*approval for Arizona* to use voting equipment that unauthorized persons can cause to change vote totals." OB at 17 (emphasis added). But the Challengers give the game away by citing to the FAC's allegations concerning the Secretary's duties under *Arizona state law*. *Id.* (citing ER-53–54 (allegations related to the Secretary's duties under A.R.S. §§ 16-441, 16-446, 16-452), ER-89 (legal conclusions for the Challengers' due process claim), ER-90 ("By choosing to move forward in using an unsecure system, Defendants willfully and negligently abrogated their statutory duties and abused their discretion" (emphasis added)), ER-92 (alleging "Defendants have abrogated their statutory duties").[15]

Arizona law has a comprehensive set of requirements for how its elections are conducted. ER-12–15; 2019 EPM at Chs. 4, 8, 10–12. When the Secretary consults the counties to draft the Elections Procedures Manual, this must be done to "achieve and maintain the maximum degree of correctness, impartiality,

[15] The Challengers are unable to sue under HAVA because there is no private right of action under that statute. *Roberts v. Caskey*, No. 22-2366-DDC-ADM, 2022 WL 11089308, at *5 (D. Kan. Oct. 19, 2022) (collecting cases). There is a private right of action under Arizona state voting machine statutes. *Chavez v. Brewer*, 214 P.3d 397, 406, ¶ 28 (Ariz. Ct. App. 2009). Hence, the Challengers (unsuccessfully) tried to mask their state law voting machine statute claims as federal claims. *See id.*

uniformity, and efficiency" for all voting and tabulating procedures. A.R.S. § 16-452(A). This is what the FAC alleged the Secretary did not do. ER-48, ¶ 10 (alleging Secretary violated A.R.S. §§ 16-452(A), 16-446(B)(4); 2019 EPM at Ch. 4, § I(A)(2)(b)(i)(2)(b)). Thus, the FAC's requested relief turns on the application of Arizona state law that concerns the Secretary's testing and certification of electronic voting machines for use in the 2022 Election. *See, e.g.*, ER-85–86, ¶¶ 156-161 (legal conclusions that the Secretary violated A.R.S. §§ 16-442(B), 16-445, 16-446(B), 16-452), ER-89–90, ¶¶ 180 (alleging the Secretary violated the Challengers' rights because of noncompliance with Arizona statutory requirements for elections), 181 (legal conclusion that "Defendants willfully and negligently abrogated their *statutory* duties"), 182 (reference to Arizona state law), 183 (reference to Ariz. Const. art. 2, § 4), 194 (legal conclusion that there were violations of statutory duties). This removes the Challengers from the *Ex parte Young* exception. Therefore, the district court correctly found that the Eleventh Amendment bars the Challengers' claims against the Secretary.[16]

The Challengers also argue they have federal claims because the Secretary could comply with state law yet still not comply with federal law. OB at 23 n.7. But only the reverse could conceivably ever be true. The Secretary's compliance

[16] The Challengers failed to include any of the Arizona state constitutional provision, statutes, or regulations pertinent to their claims in their addendum. Ninth Cir. R. 28-2.7.

with Arizona law guarantees compliance with federal law. Arizona's comprehensive statutory and regulatory framework for testing, certifying, and auditing electronic voting machines extends beyond any protections afforded by the United States Constitution. *See supra*, at 7–8 (detailing Arizona state election law procedures for testing, certifying, and auditing machines); 2019 EPM; *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) (the Constitution does not forbid the use of touchscreen voting systems without paper ballots). For example, Arizona uses paper ballots both for casting votes and to ensure a paper trail exists for verification of vote totals. *Supra*, at 7–10.

In the end, because the United States Constitution permits states to use electronic voting machines, the Challengers' claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 fall out of the *Ex parte Young* exception to Eleventh Amendment immunity. *See Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 933 (9th Cir. 2017) ("violation of state law causing the deprivation of a federally protected right may form the basis of a § 1983 action[,] . . . [but] this rule does not apply where[] . . . the state-created protections reach beyond that guaranteed by federal law."); *Galen v. Cnty. of Los Angeles,* 477 F.3d 652, 662 (9th Cir. 2007) ("Section 1983 requires [plaintiffs] to demonstrate a violation of federal law, not state law."); *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981) ("Only federal rights, privileges, or immunities are protected by the section [1983]. Violations of state law alone are

insufficient.").

3. THE DISTRICT COURT'S ELEVENTH AMENDMENT ANALYSIS DOES NOT JUSTIFY REVERSAL

The Challengers assert the district court found that the United States Constitution "does not in any way limit Arizona's discretion to select a balloting system[.]" OB at 22. This misreads the district court's order, which found "there is no constitutional basis for federal courts to *oversee the administrative details of local elections*." ER-22–23 (emphasis added) (citing *Pettengill v. Putnam Cnty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973)); U.S. Const. art. I, § 4, cl. 1 (states control "times, places, and manner" of elections); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) ("[T]he framers of the Constitution intended the States to keep for themselves, as provided by the Tenth Amendment, the power to regulate elections.").

The FAC requested that a federal court "[r]etain jurisdiction to ensure Defendants' ongoing compliance" with (1) a declaration that no public election may use "any model of electronic voting system"; (2) preliminary and permanent injunctions that prohibit "Defendants from requiring or permitting voters to have votes cast or tabulated using any electronic voting system[]"; and (3) an order "directing Defendants to conduct the Midterm Election consistent with the summary of procedures set forth in" the FAC, ¶ 153. ER-94–95, Prayer for Relief, ¶¶ 1–4. That "summary of procedures" is a 9-point list of the Challengers' policy

preferences on Arizona state election procedures conducted under state law. ER-83–84, ¶ 153. The Challengers' requested relief calls for federal courts to oversee all administrative details of Arizona elections. *See id.* That is unlawful. *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) (elected state representatives may choose to use electronic voting machines or choose not to).

Here, the Challengers do not challenge the constitutionality of any Arizona statute or provision of the Elections Procedures Manual. *See* OB at 2–4 (not raising issue of whether any statute permitting use of electronic voting equipment is unconstitutional); *see also id.* (not arguing any federal or state statute is unconstitutional); Fed. R. App. P. 44 (requiring a party who questions the constitutionality of a federal or state statute to provide written notice to circuit clerk who certifies the question to the appropriate attorney general).[17] Hence, the Challengers' reliance on cases where plaintiffs sought to enjoin enforcement of state laws notwithstanding state power to control elections are inapposite. *See, e.g.*, OB at 17 (citing *Mecinas*, 30 F.4th at 903), 21 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (challenge to statute that imposed closed primary on candidate); *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960)

[17] Any attempt to challenge the constitutionality of these statutes would directly conflict with this Court's precedent. *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) (the Constitution does not forbid states from using touchscreen voting systems).

(challenge to state law redefining city boundaries); *Nader v. Brewer*, 531 F.3d 1028, 1030 32 (9th Cir. 2008) (challenges to statutes governing nomination petitions); *Trump*, 983 F.3d at 925 (challenge to election commission's promulgated guidance under the Electors' Clause of the United States Constitution).

In fact, if the Challengers' claims survive an Eleventh Amendment challenge, then the Elections Procedures Manual (and thus state law) will effectively be promulgated by the District Court for the District of Arizona. ER-94–95, Prayer for Relief, ¶¶ 1–4. The Eleventh Amendment, however, prevents federal courts from "unavoidably becom[ing] impermissibly 'entangled, as [an] overseer[] and micromanager[], in the minutiae of state election processes.'" ER-24 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016)). Allowing the contrary should be avoided, and thus, this Court should affirm.

C. THE DISTRICT COURT CORRECTLY HELD THAT THE *PURCELL* DOCTRINE BARRED THE CHALLENGERS' REQUESTED INJUNCTIVE RELIEF

"The [Supreme] Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Under the *Purcell* doctrine, a federal court deciding

whether to grant injunctive relief related to election procedures must weigh "considerations specific to election cases," such as voter confusion and the administrative burden on election officials. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020) ("And, as we rapidly approach the election, the public interest is well served by preserving Arizona's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour.").

The district court correctly found that the Challengers' requested relief was not available under the *Purcell* doctrine because that relief would alter Arizona's election rules on the eve of the 2022 Midterm Election. ER-18, ER-24–26. The Challengers argue the district court erred only "[t]o the extent the [d]istrict [c]ourt relied upon *Purcell* as a basis for dismissing" Challengers' claims. OB at 56. The Challengers assert that "*Purcell* merely guides courts deciding whether to grant injunctive relief affecting the conduct of *an* election, not whether *any* election-related claims should be dismissed." *Id.*

The Challengers' argument ignores the reality that they "seek *relief* that the [district court] cannot grant under the *Purcell* principle." ER-26 (emphasis added); ER-17 (district court noting it addressed "portions" of [the Challengers'] "arguments that pertain to the timing of [the Challengers'] suit[]"). Although the

Challengers argue *Purcell* is not a basis to dismiss a claim, they do not argue *Purcell* cannot be a basis to deny a specific form of relief. OB at 55–56.[18] And that is precisely what happened here – injunctive relief related to the 2022 Midterm Election was denied under *Purcell*. ER-24–26. And because the Challengers do not argue the district court erred in denying some *forms* of relief requested below, any such argument is waived on appeal. Fed. R. App. P. 28(a)(8).[19]

The district court correctly found that the Challengers' requested injunctive relief, both in the FAC and their motion for a preliminary injunction, was unavailable under the *Purcell* doctrine. ER- 25–26. Accordingly, this Court should affirm the district court's finding that the *Purcell* doctrine barred the Challengers' requested injunctive relief.

VIII. CONCLUSION

This Court should affirm the district court.

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[18] Although the FAC sought nominal and compensatory damages, the Challengers make no effort to argue such relief was available or that the district court's dismissal of the FAC was inappropriate because damages were an available form of relief. *See generally* OB; ER-55, ¶ 53; ER-93, ¶ 199; ER-95, ¶ 6. Accordingly, any argument in favor of such relief has been waived. Fed. R. App. P. 28(a)(8).

[19] The district court also denied Challengers' motion for a preliminary injunction as moot because it concluded the FAC must be dismissed for lack of standing. ER-26. Challengers did not appeal the denial of their motion and make no argument on appeal that the district court erred in dismissing their motion. *See* ER-55–56; Fed. R. App. P. 28(a)(8). Any argument on appeal in support of that motion, or challenging its denial, is thus waived.

IX. STATEMENT OF RELATED CASES

The Secretary certifies that he is unaware of any related cases. *See* Ninth Circuit Rule 28-2.6.

DATED: March 30, 2023.

SHERMAN & HOWARD L.L.C.

/s/*Craig A. Morgan*
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FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, I electronically filed the foregoing **DEFENDANT/APPELLEE ARIZONA SECRETARY OF STATE ADRIAN FONTES' ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/*Ella Meshke*
Ella Meshke, Practice Assistant