No. 22-16413

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kari Lake; Mark Finchem,

Plaintiffs-Appellants,

v.

Kathleen Hobbs, as Arizona Secretary of State; Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and Steve Gallardo, in their capacity as members of the Maricopa Board of Supervisors; Rex Scott, Matt Heinz, Sharon Bronson, Steve Christy, Adelita Grijalva, as Members of the Pima County Board of Supervisors,

Defendants-Appellees.

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

APPELLANTS' BRIEF

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I. FED. R. APP. P. 28(a)(4) JURISDICTIONAL STATEMENT

The District Court has jurisdiction over the claims in the Amended Complaint ("Am. Compl.") because the claims are brought under federal law, seeking to enforce Appellants' rights under the United States Constitution to vote and have their votes counted accurately in conjunction only with other legally cast votes. 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 1983; *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Saylor*, 322 U.S. 385, 386 (1944); *United States v. Classic*, 313 U.S. 299, 315 (1941); *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020). Appellants are residents of Arizona, registered voters, and were candidates in the 2022 general election. ER-80-83.

(A) The Court of Appeals has jurisdiction over this appeal because Appellants timely filed a Notice of Appeal from the final judgment entered by the United States District Court for the District of Arizona. 28 U.S.C. § 1291; Fed. R. App. P. 3(a)(1); Fed. R. App. P. 4(a)(1)(A); Judgment of Dismissal in a Civil Case, ER-152.

(B) The final judgment was entered by the Clerk of the District Court on August 26, 2022. ER-152. Appellants filed their Notice of Appeal in the District Court on September 14, 2022. ER-3.

(C) The District Court's August 26, 2022, judgment disposes of all parties' claims. The District Court entered an order on August 26, 2022, that the Amended Complaint "is dismissed in its entirety" and directing the Clerk of Court "to enter judgment accordingly and close this case." ER-27 ("Order").

II. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by holding that Eleventh Amendment immunity bars Appellants' claims against county and state officials for prospective injunctive relief to vindicate constitutional rights.

- This issue was raised in the Arizona Secretary of State's Motion to Dismiss Amended Complaint, doc. 45 at 9-12,[1] and Appellants' Opposition to the Arizona Secretary of State's Motion, doc. 58 at 9-11. The District Court's Order granted the Appellees' Motions to Dismiss based on this issue. ER-22-24.
- Review is *de novo*. *See Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002).

2. Whether the District Court erred by making findings of fact contrary to the

[1] References to "doc" are to the District Court docket entry number.

factual allegations in the Amended Complaint and relying on these findings of fact as the basis to dismiss the Amended Complaint under Fed. R. Civ. P. 12.

- This issue was raised in Appellants' Opposition to the Arizona Secretary of State's Motion to Dismiss Amended Complaint, doc. 58 at 2-3, and Appellants' Opposition to Maricopa Defendants' Motion, doc. 56 at 2. The District Court's Order granting Appellees' Motions to Dismiss stated that the District Court could "consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary" and could "weigh the evidence to determine whether it has jurisdiction," and the District Court's legal analysis relied upon factual findings contrary to the allegations in the Amended Complaint. ER-17, 20-21 & nn.13-14.
- Review is *de novo*. *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021) (dismissal for lack of standing under Fed. R. Civ. P. 12(b)(1)); *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (dismissal under Fed. R. Civ. P. 12(b)(6)).

3. Whether Appellants have standing as candidates for office to challenge Appellees' reliance on unreliable methods to count votes and determine election

outcomes.

- This issue was raised in the Arizona Secretary of State's Motion to Dismiss Amended Complaint, doc. 45 at 5-9, and Appellants' Opposition to the Arizona Secretary of State's Motion, doc. 58 at 3-9. The District Court's Order granted Appellees' Motions to Dismiss based on this issue. ER-19-22.
- Review is *de novo*. *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021).

4. Whether the doctrine of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that courts should not ordinarily alter election rules on the eve of an election provides a basis to dismiss claims for injunctive relief that extend to more-distant elections.

- This issue was raised in the Maricopa County Defendants' Motion to Dismiss Plaintiffs Amended Complaint, doc. 27 at 8-9, and the Appellants' Opposition to Maricopa Defendants' Motion, doc. 56 at 8-10. The District Court's Order granting Appellees' Motions to Dismiss appears to have relied upon *Purcell* as a basis for dismissal. ER-8, 17, 26.
- Review is *de novo*. *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021) (dismissal for lack of standing under Fed. R. Civ. P. 12(b)(1)); *Taylor*

v. Yee, 780 F.3d 928, 935 (9th Cir. 2015) (dismissal under Fed. R. Civ. P. 12(b)(6)).

III. CIRCUIT RULE 28-2.2 STATEMENT OF JURISDICTION

(A) The statutory basis of subject matter jurisdiction of the District Court is 28 U.S.C. §§ 1331 and 1343(a)(3).

(B) The order and judgment appealed from are final because the order grants Appellees' motions to dismiss and directs the Clerk of Court to enter judgment and close the case, and the judgment dismisses the action "in its entirety." ER-26. The statutory basis for this Court's jurisdiction to hear this appeal is 28 U.S.C. § 1291.

(C) The order and judgment appealed from were entered by the District Court on August 26, 2022. ER-27; ER-152. The Notice of Appeal was filed September 14, 2022. ER-3. The Notice of Appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

IV. STATEMENT OF THE CASE

Appellants Kari Lake and Mark Finchem (hereafter, the "Candidates") were candidates for office in Arizona's November 2022 general election. ER-53. The Candidates filed a Complaint, ER-97, and shortly thereafter the Amended

Complaint, ER-46, alleging that Arizona will use electronic voting systems to administer future elections, and that use of these systems violates the Candidates' federal constitutional rights because the electronic voting systems are subject to intrusion and can be manipulated without detection to cause false reports of vote tallies—deficiencies which are enabled by a systemic lack of transparency and accountability to voters. ER-48, 51-52, 56, 59, 61, 63, 68-69, 78, 89, 91-92, 94-95.[2]

The Amended Complaint contains voluminous, detailed allegations showing that electronic voting systems are subject to intrusion and manipulation and cannot be relied upon to provide secure, correct vote tallies in public elections. Public officials across the political spectrum have publicized glaring failures by these systems for two decades. ER-47, 51, 56, 59, 61, 69-71. Computer scientists at prominent universities have warned of and even demonstrated techniques to manipulate the results reported by electronic voting machines. ER-61-62, 80-81. Experts across the spectrum, cited in support of the Plaintiff's Motion for a Preliminary Injunction, have asserted that malicious conduct can be introduced into

[2] The Candidates also filed a Motion for Preliminary Injunction, asking the District Court to enjoin use of electronic voting systems in Arizona. Doc. 33.

these computerized systems without detection and have provided numerous examples of hardened systems being breached. Importantly, processes billed as guarding against security breaches, such as certification inspections, testing, and risk limiting audits, are inadequate and can be defeated. ER-47, 51-52, 61, 66, 74, 81-82. This lawsuit is not about, nor does it seek to affect, any election held in the past. Rather, it is brought to remedy the constitutionally infirm problem of using electronic voting machines in elections going forward. ER-48.

Appellees are the Arizona Secretary of State ("Hobbs"), who serves as Arizona's chief election official, and the members of the county Boards of Supervisors for two of the largest counties in Arizona (the "Maricopa Defendants" and the "Pima Defendants"). ER-53-54. Appellees are responsible for approving and selecting election equipment to be used in Arizona, with Hobbs having authority over all equipment in the state and the Maricopa Defendants and Pima Defendants having authority over the equipment used in their respective counties. *Id*. The Maricopa Defendants filed a Motion to Dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6). Doc. 27. The Pima Defendants joined the motion filed by the Maricopa Defendants. Doc. 31. Hobbs filed a Motion to Dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and joined the Maricopa Defendants' Motion to Dismiss. Doc. 45.

The District Court held argument on the Appellees' Motions to Dismiss and an evidentiary hearing on the Candidates' Motion for Preliminary Injunction, on July 21, 2022.[3] ER-28-45. On August 26, 2022, the District Court entered an Order granting Appellees' Motions to Dismiss and instructing the Clerk to enter judgment dismissing all claims and closing the case. ER-7-27. Part I.A of the Order comprises about four pages of text describing the allegations in the Amended Complaint. ER-8-12. Part I.B of the District Court's Order, titled "Elections in Arizona," comprises about four pages of text stating a "brief overview of Arizona's current practices surrounding elections." ER-12-16. Part I.B states what appear to be factual findings, citing among other sources documents filed by the Maricopa Defendants in connection with a "Motion for Judicial Notice," ER-13 at n.5, ER-15 at n.9 ER-16; the testimony of Maricopa County employee Scott Jarrett, ER-13-14 at n.8; and a document from the Maricopa County website titled "*Maricopa County Election*

[3] The District Court limited the Candidates' evidentiary presentation at the hearing to a total of two hours. Doc. 68. While not at issue in this appeal, the Candidates introduced an abundance of expert and fact witness testimony during the limited time allowed by the Court to hear evidence on the Candidates Preliminary Injunction Motion. This evidence supported the allegations in the Amended Complaint. The standard for a motion to dismiss requires the allegations in the Amended Complaint to be taken as true in any event.

Facts | Voting Equipment & Accuracy." ER-13-14. In a footnote, the Order states that it "only refers to these facts [from the Motion for Judicial Notice] for the purpose of providing background for its later analysis, not to establish the truth of any disputed fact." ER-13 at n.5. Later, the Order cites the factual assertions stated in Part I.B as a basis to reject factual allegations in the Amended Complaint. ER-20-21 at nn.13-14.

On September 14, 2022, the Candidates filed a Notice of Appeal of the District Court's Order and the Judgment. ER-3-6.[4]

V. SUMMARY OF THE ARGUMENT

The District Court's Order dismissing the Candidates' claims rests upon a series of errors of law.

Regarding Eleventh Amendment state sovereign immunity:

- The District Court erroneously relied upon Eleventh Amendment immunity as a basis to dismiss the Candidates' claims against the

[4] On December 1, 2022, the District Court entered an order stating its intent to issue sanctions against the Candidates' counsel under Fed. R. Civ. P. 11 and 28 U.S.C § 1927. Doc. 106. The District Court has not yet determined the sanctions amount. Once the District Court enters a final order, the Candidates intend to appeal that order to this Court.

Maricopa Defendants and the Pima Defendants. ER-22-24. Eleventh Amendment state sovereign immunity does not shield counties or county officials. *Ray v. Cty. of L.A.*, 935 F.3d 703, 708 (9th Cir. 2019).

- The District Court erroneously held that Eleventh Amendment immunity bars the Candidates from bringing claims against Hobbs in her official capacity as Arizona Secretary of State for prospective injunctive relief to prevent violations of the federal constitutional right to vote. ER-22-24.The *Ex parte Young* doctrine permits such claims. *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022); *Ex parte Young*, 209 U.S. 123, 157 (1908)).
- The District Court erroneously held that the federal Constitution imposes no limits on a state's administration of its elections, and therefore concluded that Appellants failed to state any claim to vindicate rights under federal law. ER-22-24. The federal Constitution requires states, in the use of their authority to administer elections, to refrain from violating constitutional rights of voters. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Regarding standing:

- The District Court erroneously held that Appellants failed to articulate a concrete and particularized injury. ER-19-22. Appellants, as candidates for public office, suffer concrete and particularized injury when state officers permit inaccurate vote tallies to affect the outcome of their elections. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).
- The District Court erroneously held that Appellants failed to articulate an actual or imminent injury. ER-19-22. Appellants showed certainty of harm as well as a substantial risk of harm, either of which is sufficient to demonstrate standing. The District Court also erred by relying upon a misstatement of the applicable law of standing, ignoring that a plaintiff may satisfy the actual or imminent injury element of standing by showing a "substantial risk" of harm and instead requiring Appellants to show injury is "certainly impending." ER-19, 21; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). It is, however, well-settled that Appellants need only allege a "credible threat" of future harm to satisfy standing requirements at the motion to dismiss stage. *Election Integrity Project Cal., Inc. v. Weber*, No. 21-56061,

2022 U.S. App. LEXIS 30549, at *5 (9th Cir. Nov. 3, 2022) (citing *Krottner v. Starbucks Corp*., 628 F.3d 1139, 1143 (9th Cir. 2010)).[5]

- The District Court ignored the fundamental legal standard applied on a motion to dismiss, and instead relied upon factual findings contrary to the allegations in the Amended Complaint as the basis to reject Appellants' standing to bring their claims. ER-12-16. Fed. R. Civ. P. 12(b)(1) and 12(b)(6) prohibit the District Court from dismissing a complaint by contradicting its well-pleaded factual allegations and by refusing to draw inferences in favor of the Plaintiffs. *Mecinas*, 30 F.4th at 895-96 ("When 'deciding standing at the pleading stage, and for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" (quoting *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000))).

[5] All unpublished opinions not readily available through public means are included in the Excerpt of the Record beginning at page ER-153.

Regarding *Purcell v. Gonzalez*:

- The District Court erroneously relied upon *Purcell v. Gonzalez*, 549 U.S. 1 (2006), to dismiss the Candidates' claims. ER-24-26. *Purcell* does not authorize a court to dismiss claims that extend beyond an impending election, as Appellants' claims do.

VI. ARGUMENT

This is an appeal from a Rule 12(b)(1) dismissal of the Candidates' claims. ER-17.[6] The District Court provided three justifications for its dismissal order: Article III standing, Eleventh Amendment immunity, and timing of the requested relief relative to the 2022 election, per *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). ER-17, 19-26. The District Court found that "each of these arguments is dispositive on its own." ER-17.

[6] The Court also referenced in passing Rule 12(b)(6), dismissal for failure to state a claim. ER-17. The Court did not, however, further analyze or discuss dismissal related to Rule 12(b)(6). To the extent that Rule 12(b)(6) was a basis for dismissal, it is as flawed as the Rule 12(b)(1) analysis due to the Court making separate factual findings beyond the allegations in the Amended Complaint. *United States v. LSL Biotechnologies*, 379 F.3d 672, 700 (9th Cir. 2004) (noting a district court "may not make fact findings of a controverted matter when ruling on a Rule 12(b)(6) motion." (citing *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987))).

The District Court's Order rests upon errors of law concerning each of these three points. Eleventh Amendment jurisprudence does not bar the Candidates' claims for prospective injunctive relief against the county defendants and Secretary of State Hobbs. The Candidates have standing to pursue claims that Appellees permit inaccurate vote tallies in their elections, and the District Court may not for purposes of dismissal simply controvert the Candidates' factual allegations that electronic voting machines are unsecure and susceptible to improper vote manipulation. *Purcell* is a doctrine concerning the availability of immediate injunctive relief, not a basis to dismiss claims in the Amended Complaint.

On a Rule 12 motion to dismiss, a district court is required to accept the substantive factual allegations stated in the Amended Complaint as true and draw all reasonable inference from those allegations. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) ("Whether we construe Defendants' motion as one under Rule 12(b)(6) or as a facial attack on subject matter jurisdiction under Rule 12(b)(1), all factual allegations in Pride's complaint are taken as true and all reasonable inferences are drawn in his favor."); *Mecinas v. Hobbs*, 30 F.4th 890, 895-96 (9th Cir. 2022) ("When 'deciding standing at the pleading stage, and for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and

must construe the complaint in favor of the complaining party.'" (quoting *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000))). The Candidates' Complaint states claims for which a federal court can grant relief and alleges facts to support those claims. Therefore, the Amended Complaint cannot be dismissed under Fed. R. Civ. P. 12.

Standard of Review. "[A] district court's determination that a suit against a state official is barred by the state's Eleventh Amendment immunity" is reviewed *de novo*. *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002). *See also Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 846 (9th Cir. 2002). An order granting a motion to dismiss for lack of standing under Fed. R. Civ. P. 12(b)(1) is reviewed *de novo*, and this Court construes "'all material allegations of fact in the complaint in favor of the plaintiff.'" *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021) (quoting *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 416-17 (9th Cir. 2020). Dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) is also reviewed *de novo*. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015)).

A. The Eleventh Amendment Permits the Candidates' Claims.

The District Court misapplied basic principles of Eleventh Amendment law to hold that state sovereign immunity required dismissal of the Candidates' claims

against the Maricopa and Pima Defendants, and against Arizona Secretary of State Hobbs. *See* ER-22.

1. The Eleventh Amendment Does Not Shield Counties.

The District Court's conclusion that Eleventh Amendment immunity precludes the Candidates' claims against the county official defendants was erroneous because Eleventh Amendment immunity does not shield county officials. "Federal courts have long declined to extend Eleventh Amendment immunity to counties." *Ray v. Cty. Of L.A.*, 935 F.3d 703, 708 (9th Cir. 2019). Absent an argument that the county acted as an "arm of the state" – a theory neither argued by Maricopa County and Pima County nor analyzed by the District Court in its decision – it was manifestly erroneous for the District Court to hold that Eleventh Amendment immunity precludes Appellants from bringing their claims against the Maricopa Defendants and Pima Defendants. *See id*. at 713; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). This aspect of Eleventh Amendment law is so clearly established that the Maricopa Defendants did not even attempt to assert Eleventh Amendment defenses in their motion to dismiss. *See* doc. 27. The District Court's *sue sponte* invocation of Eleventh Amendment immunity to dismiss the Candidates' claims against the Maricopa Defendants and the Pima Defendants was error.

2. The Eleventh Amendment Does Not Shield Hobbs Against a Claim for Injunctive Relief to Vindicate Federal Rights.

The District Court's conclusion that Eleventh Amendment immunity precludes the Candidates' claims against defendant Hobbs was erroneous because the Eleventh Amendment does not bar an action against a state official in her official capacity seeking injunctive relief to vindicate federal rights. Under *Ex parte Young* the Eleventh Amendment does not prevent "'actions for prospective declaratory or injunctive relief against state officers in their official capacities for alleged violations of federal law'" so long as the state officer has "'some connection with enforcement of the act.'" *Mecinas*, 30 F.4th at 903 (quoting *Coal. To Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012); *Ex parte Young*, 209 U.S. 123, 157 (1908)).

The Amended Complaint alleges that the Candidates' federal constitutional rights to vote are violated by Hobbs's approval for Arizona to use voting equipment that unauthorized persons can cause to change vote totals. ER-53-54, 89-92. Hobbs did not argue, and the District Court did not find, that Hobbs lacked a connection with enforcement of the acts complained of in the Amended Complaint. *See* Doc. No. 45; ER-7.

"[V]oting" is "the most basic of political rights." *FEC v. Akins*, 524 U.S. 11,

25 (1998). Citizens possess a fundamental right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). A state may not by arbitrary action or other unreasonable impairment burden the right to vote. *Baker v. Carr*, 369 U.S. 186, 208 (1962). The right to vote includes the right to have the vote counted, *United States v. Classic*, 313 U.S. 299, 315 (1941), "correctly counted and reported," *Gray v. Sanders*, 372 U.S. 368, 380 (1963), and not debased or diluted by the introduction of fraudulent votes, *Reynolds v. Sims*, 377 U.S. 533, 556 (1964). "[T]he free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States" entails "the right and privilege . . . to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified." *United States v. Saylor*, 322 U.S. 385, 386 (1944). "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562.

The Amended Complaint pleads that Arizona's electronic election systems are so unsecure that vote tallies they report cannot be relied upon as accurate tallies unimpaired by fictitious, fraudulent, or manipulated votes. ER-48 ("Given the

limitations and flaws of existing technology, electronic voting machines cannot legally be used to administer elections today and for the foreseeable future, unless and until their current electronic voting system is objectively validated."), ER-52 ("Expert testimony demonstrates that all safety measures intended to secure electronic voting machines against manipulation of votes, such as risk limiting audits and logic and accuracy tests, can be defeated."), *id*. ("Arizona's electronic election infrastructure is potentially susceptible to malicious manipulation that can cause incorrect counting of votes. Despite a nationwide bipartisan consensus on this risk, election officials in Arizona continue to administer elections dependent upon unreliable, insecure electronic voting systems. These officials, including Appellees in Maricopa County, refuse to take necessary action to address known and currently unknown election security vulnerabilities, and in some cases have obstructed court authorized inspections of their electronic voting systems."), ER-59 ("With each passing election the unreliability of electronic voting machines has become more apparent. In light of this experience, the vote tallies reported by electronic voting machines cannot, without objective evaluation, be trusted to accurately show which candidates actually received the most votes."); ER-77 ("This lack of transparency has created a 'black box' system of voting which lacks credibility and integrity."). *See also* ER-51, 63, 68-69, 78, 89-92. Accordingly, the Amended Complaint

adequately pled that Arizona's use of electronic voting machines violates the Candidates' constitutional right to vote. ER-89-92. The Candidates seek prospective declaratory and injunctive relief against Hobbs, a state officer in her official capacity, for these violations of federal constitutional law caused by her actions. ER-90-94. Hobbs, as Secretary of State, is Arizona's "chief state election officer" and responsible for approval of election equipment. A.R.S. §§ 16-142(A)(1), 16-441; ER-85-86. The Amended Complaint's claims against Hobbs cannot be summarily dismissed on the basis of Eleventh Amendment state sovereign immunity.

3. The District Court Erred in Its Analysis of the Eleventh Amendment by Disregarding Constitutional Limitations on State Election Administration.

The District Court wrongly concluded that the Candidates failed to plausibly allege a violation of federal law, stating, that "[b]ecause the Constitution charges states with administering elections, Plaintiffs' claims can only stem from an argument that Defendants are violating state law by using what Plaintiffs allege are insecure or inaccurate voting systems." ER-23. The District Court's conclusion contradicts well-established law in which federal courts apply constitutional limitations to state administration of elections. Federal courts have long recognized that the Constitution both grants power to states to regulate elections *and* forbids

states from infringing their citizens' federal rights when regulating elections. *E.g. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (state's "power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote"); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). The District Court's disregard of this fundamental principle of election law was erroneous. The law is unmistakably clear that federal constitutional limitations on state discretion apply in the realm of election administration as in any other realm. *E.g.*, *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008) ("The Supreme Court has held that when an election law is challenged, its validity depends on the severity of the burden it imposes on the exercise of constitutional rights and the strength of the state interests it serves."); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020) ("[W]e can decide whether their interpretation of state law violated a provision of the federal Constitution"). "The States possess a broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices .

. . . This power is not absolute, but is subject to the limitation that [it] may not be exercised in a way that violates . . . specific provisions of the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (quotations and citations omitted)).

The District Court's holding that the federal Constitution does not in any way limit Arizona's discretion to select a balloting system, ER-22-23, is plainly incorrect. The principles of one-person, one-vote and the right to a correct count of the votes discussed above impose clear constitutional limitations on Arizona's discretion to structure its voting system. Arizona could not constitutionally adopt a system that allows voters to cast as many ballots as they chose, or that permits one voter to remove another voter's ballot from the ballot box. Similarly, Arizona cannot constitutionally use electronic voting machines to count votes in elections if the machines do not yield reliable vote tallies. To be constitutional, election regulations must produce a count of the legal votes known to be reliable. The Amended Complaint pleads that the system Arizona has adopted exceeds the discretion permitted to Arizona by the Constitution. ER-89-92 (alleging violations of due process and fundamental right to vote). This is a proper constitutional claim that has

been adequately pled.[7]

The District Court erred in concluding that the Eleventh Amendment bars Plaintiffs' claims against Maricopa County, Pima County, and against Hobbs.

B. The Candidates Have Standing.

The Candidates have standing to bring their constitutional claims because the Appellees' use of electronic voting systems to determine the persons elected as public officials when the results reported by those electronic voting systems cannot reasonably be relied upon as accurate. The Amended Complaint alleges this system lacks integrity, lacks transparency, and undermines confidence in the selection of the winning candidate. ER-46-48, 58, 77. This injures the Candidates by infringing their constitutional right to have votes accurately and reliably counted.

[7] The District Court's conclusion that the Candidates' claims depend upon showing "Defendants are violating state law," ER-23, mischaracterized the Amended Complaint. Even if Appellees' use of electronic election equipment complies with Arizona state law, the Candidates allege that the equipment is unsecure and therefore violates the Candidates' federal constitutional rights. ER-47-48, 51-52, 59. Failure by Appellees to comply with state law might serve as evidence that Arizona's election systems are not secure against manipulation, but state law violations are not necessary to the Candidates' claims.

1. The Candidates Satisfy the Elements for Standing.

To sue in federal court, a plaintiff must have standing. Standing requires that a complaint plead three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). When "a case is at the pleading stage" the plaintiff must "'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

The Amended Complaint alleges that Candidates sustained an (1) infringement of their constitutional right to vote (2) by the conduct of the Appellees, as public officials, in causing Arizona, Maricopa County, and Pima County to use unreliable electronic voting equipment to determine winners of public elections, which is (3) an injury that can be redressed by a judicial order enjoining Appellees from continuing this unconstitutional behavior. ER-48, 51-52, 59, 63, 68-69, 78, 89-92; ER-53-54, 86-87; ER-94. Accordingly, the Candidates have standing to bring their claims. *See, e.g.*, *Election Integrity Project Cal., Inc. v. Webe*r, No. 21-56061, 2022 U.S. App. LEXIS 30549, at *6 (9th Cir. Nov. 3, 2022) (noting organizational plaintiff's "alleged injury stems from California's vote-by-mail and signature verification policies, and from the procedures for sending out ballots to the current

voter rolls, it is traceable to the election officials implementing those policies. By the same token, [the plaintiff] can obtain relief from those injuries if the court enjoins those responsible for enforcing these policies." (citations omitted)).

The only element of the Candidates' standing that was contested before the District Court is the first element, injury in fact. To establish injury in fact, a plaintiff must allege the "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Meland*, 2 F.4th at 844.

a. The Amended Complaint Alleges an Injury in Fact.

As set forth in Section A.2 above, the federal Constitution guarantees citizens the right to vote as "the most basic of political rights," *FEC*, 524 U.S. at 25, and a fundamental constitutional right, *Burdick*, 504 U.S. at 433. The right to vote includes the right to have the vote counted, *Classic*, 313 U.S. at 315, "correctly counted and reported," *Gray*, 372 U.S. at 380, and not debased or diluted by the introduction of fraudulent votes, *Reynolds*, 377 U.S. at 556. Federal constitutional rights ensure voters "the right and privilege . . . to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified." *Saylor*, 322 U.S. at 386. A state may not, by arbitrary action or other

unreasonable impairment, burden the right to vote. *Baker*, 369 U.S. at 208.

With respect to candidates for office, the right to vote includes "a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) (footnote omitted); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020). As this Court recently noted in *Mecinas*, 30 F.4th 890 (9th Cir. 2022), a plaintiff alleging "the burden of being forced to compete under the weight of a state-imposed disadvantage" has sufficiently articulated an injury in fact for the purposes of a motion to dismiss. 30 F.4th at 899; *Jones v. Bates*, 127 F.3d 839, 847 n.8 (9th Cir. 1997) (holding that potential future candidates for state legislature, challenging legislation imposing term limits, had demonstrated an adequate likelihood of future injury for justiciability purposes merely by alleging their desire to run in a future election).

The Amended Complaint alleges that Appellees conduct causing the use of electronic voting machines to administer public elections unconstitutionally invades the Candidates' legally protected right to vote because the machines permit and are open to inaccurate counting of votes and the debasement and dilution of votes by the introduction of fraudulent or fictitious votes which can go undetected. ER-48, 51-52, 59, 63, 68-69, 78, 89-92. The Amended Complaint satisfies the first element of

injury in fact.

b. The Amended Complaint Alleges a Legally Protected Interest That Is Concrete and Particularized.

The Candidates' legally protected interest in voting is concrete and particularized, for purposes of standing because it is a specific individual constitutional right. Intangible injuries can be "concrete," and infringement of a constitutional right is an example of concrete intangible injury. *Spokeo*, 578 U.S. at 340.

An injury is "[p]articularized" if it affects a plaintiff "in a personal and individual way." *Id*. at 339. "An inaccurate vote tally is a concrete and particularized injury to candidates" sufficient to meet the injury-in-fact requirement. *Carson*, 978 F.3d at 1058. Courts have long recognized that violation of the right to vote by government action improperly affecting vote tallies confers standing to seek relief in a federal court. *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 1st Cir. 2001); *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978). This Court recently observed that "[i]f an allegedly unlawful election regulation makes the competitive landscape worse for a candidate or that candidate's party than it would otherwise be if the regulation were declared

unlawful, those injured parties have the requisite concrete, non-generalized harm to confer standing." *Mecinas*, 30 F.4th at 898.

By articulating facts showing that Appellees' conduct permits the dilution and debasement of the Candidates' votes by fictitious or manipulated votes, the Amended Complaint identifies a concrete, intangible federal right infringed by Appellees' conduct and identifies how Appellees' infringement of that right specifically harms the Candidates. The Amended Complaint alleges a concrete and particularized injury. ER-48, 51-52, 59, 63, 68-69, 78, 89-92; *Mecinas*, 30 F.4th at 898.

The fact that Appellees' wrongful conduct also inflicts the same concrete and particularized injury on other voters does not prevent the Candidates from having standing to pursue relief concerning their own injuries. "[W]here a harm is concrete, though widely shared, the [Supreme] Court has found 'injury in fact.'" *FEC*, 524 U.S. at 24. "This conclusion seems particularly obvious . . . where large numbers of voters suffer interference with voting rights conferred by law." *Id*. In *FEC*, the Supreme Court held that a claim "directly related to voting, the most basic of political rights," was "sufficiently concrete" to establish standing. *Id*. at 24-25. In *Brakebill v. Jaeger*, the Eighth Circuit held that the plaintiff had standing to challenge a voter identification law notwithstanding that the burden of the law would

fall on any person who had a residential street address. 932 F.3d 671, 677 (8th Cir. 2019). In *Common Cause/Georgia v. Billups* the Eleventh Circuit held that the plaintiffs had standing to challenge a voter identification statute and that the statute could be challenged even by persons who possessed an acceptable form of identification. 554 F.3d 1340, 1351-52 (11th Cir. 2009). That court noted that the "inability of a voter to pay a poll tax" would not be required to challenge a statute imposing a tax on voting. *Id*. at 1352. A claim challenging a poll tax would assert an injury applicable to all voters, but the requirement of standing would nevertheless be met. The same is true here. *See also Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 828 (D. Mont. 2020) ("Because the alleged injuries to the members' voting rights at issue in this case could conceivably be asserted by any Montanan does not eradicate the standing necessary to assert these claims. On the contrary, the Supreme Court has repeatedly enumerated the principle that claims alleging a violation of the right to vote can constitute an injury in fact despite the widespread reach of the conduct at issue.").

The District Court erroneously concluded that the Candidates' status as candidates did *not* make their injury sufficiently particularized. ER-21-22. To reach this conclusion, the District Court held that a candidate must allege "the field is 'tilted'" in order to have standing to pursue a claim concerning the accuracy of a

final vote tally. *Id*. No such requirement to allege "tilting" exists. Rather, "[a]n inaccurate vote tally is a concrete and particularized injury to candidates," without more. *See Carson*, 978 F.3d at 1058 (candidates had standing to challenge state's intent to count absentee ballots received after election day); *Trump*, 983 F.3d at 924-25 (candidate had standing to challenge slate of electors in a state in which he did not reside).

The Amended Complaint pleads facts that, accepted as true, show Appellees' use of electronic voting machines and the machines' susceptibility to manipulation and intrusion and lack of transparency violates the Candidates' individual constitutional rights. ER-89-92. The Amended Complaint pleads an injury concrete and particularized. It therefore satisfies the second element of injury in fact.

c. The Amended Complaint Alleges an Invasion of Interest That Is Actual or Imminent, Not Conjectural or Hypothetical.

The Amended Complaint alleges, in two separate ways, harm that is "actual or imminent" sufficient to satisfy the third element of "injury in fact." First, the Amended Complaint alleges *certain* harm, because Arizona's use of electronic voting machines to administer elections results in inherently uncertain vote tallies that infringe upon the Candidates' constitutional right to a reliable vote tally. Second, the Amended Complaint alleges *substantial risk* of harm by claiming facts that show

the opportunity, means, motive, and actors all exist to cause manipulation of votes on Arizona's electronic voting machines. The certain harm and the substantial risk of harm each, independently, satisfy the "actual or imminent" element of standing.

The Amended Complaint Pleads Certain Harm. The Amended Complaint pleads certain harm because, if the facts alleged in the Amended Complaint are true, vote tallies provided by electronic voting machines cannot be relied upon as accurate, meaning Arizona's method of administering elections appoints "winners" without regard to whether those persons received the most votes. ER-48, 51-52, 59, 63, 68-69, 77-78, 89-92. Reliance on an unreliable system to count votes inflicts a certain harm. Such a system necessarily violates the Candidates' constitutional right to vote.

Because voting is "the most basic of political rights," *FEC*, 524 U.S. at 25, and citizens possess a fundamental right to vote, *Burdick*, 504 U.S. at 433, states like Arizona must administer elections in such a way as to preserve the meaning and significance of each vote. Casting a ballot is a meaningless act unless the votes on the ballot are counted through a reliable process that produces an accurate tally of all legal, and *only* all legal, votes. A method of election administration violates the right to vote unless the method counts the votes, *Classic*, 313 U.S. at 315, correctly counts and reports the votes, *Gray*, 372 U.S. at 380, and excludes fraudulent and

fictitious votes, *Reynolds*, 377 U.S. at 556; *Saylor*, 322 U.S. at 386. Stated differently, election administrators may not count votes by procedures that leave an open door for manipulation *without regard* to whether actual manipulation is shown in any particular election. A candidate's right to vote encompasses the right to have a reliable method of counting used to determine the outcome. *See Marks*, 19 F.3d at 887; *Bonas*, 265 F.3d at 74; *Griffin*, 570 F.2d at 1078-79.

These constitutional principles obligate counties and states to use methods of counting votes that produce a reliable tally reasonably immune from manipulation. A county could not constitutionally conduct an election by erecting a booth with a chalkboard for passersby to mark their votes as chalk tallies next to the candidates' names on Election Day. Such a method would not adequately ensure vote totals at the end of the day reflected an accurate total of legal votes, for passersby might mark more than one vote, erase votes, or vote though ineligible. A county could not constitutionally conduct an election by permitting unsupervised lone volunteers to transport satchels of ballots from polling sites to a central counting center, for such a method would not adequately ensure that ballots received at the counting center represented all legal, and only legal, ballots cast at the polling sites. Such systems would violate the constitutional right to vote *without regard to whether actual manipulation of vote totals could be proved*, because the systems would not provide

vote totals reasonably known to be reliable. Those would constitute systems of election administration that by "arbitrary action or unreasonable impairment burden the right to vote." *Baker*, 369 U.S. at 208.

The allegations of the Amended Complaint, taken as true, plead a certain harm to the Candidates' constitutional right to vote: Appellees' use of the black box of electronic voting machines to count votes yields totals that are not reasonably reliable because the tallies are susceptible to manipulation, oftentimes undetectable. ER-48, 51-52, 59, 63, 68-69, 78, 89-92. The Amended Complaint alleges that the electronic voting systems Arizona uses have security failures that allow unauthorized persons to manipulate votes, and that similar manipulation has repeatedly occurred in the past. ER-51-52, 56-67. The Amended Complaint contains detailed allegations that existing procedures and certifications can be defeated, and that manipulation of votes can be performed without leaving a record of the changes. ER-52, 61, 70, 77-78, 80-81. The Amended Complaint further alleges that certification and logic and accuracy testing is entirely ineffective and reliance on it is meaningless. ER-52, 81.

Drawing reasonable inferences in Appellants' favor, as this Court must, these allegations plead that Appellants' rights as candidates, as well as voters' right to vote and have an accurate count of the vote are nullified because Appellees' conduct

elections in such a way that the reported vote tallies can be changed by undetected manipulation ER-61, 74, meaning no one could ever know whether reported winners actually won. Voting is meaningless unless the vote is fairly counted and the winner of the election is determined by a method that reliably counts the votes. *Griffin*, 570 F.2d at 1078-79 (affirming injunction requiring new election where the "integrity" of the initial election "was severely impugned" by voters using ballots quashed by the state supreme court, in part because "due process involves the appearance of fairness as well as actual fairness"). *See Marks*, 19 F.3d at 887 (affirming injunction against candidate taking office after election in which fraud may have changed the outcome when the "possibility is left open that some other candidate actually received more votes than the declared winner, which would mean that each of the votes cast for this other candidate was ignored"); *Bonas*, 265 F.3d at 74 (holding that where "organic failures in a state or local election process threaten to work patent and fundamental unfairness, a colorable claim lies for a violation of substantive due process (and, hence, federal jurisdiction attaches)").[8]

With respect to candidates for office, the right to vote includes "a cognizable

[8] The Amended Complaint alleges that post-election audits do not and cannot remediate the security problems inherent in electronic voting machines. ER-52, 81.

interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson*, 978 F.3d at 1058 (footnote omitted). A system of election administration that yields inherently uncertain vote tallies inflicts a certain, non-speculative harm on the Candidates, giving them standing to bring the claims asserted in the Amended Complaint.

The Amended Complaint Pleads Substantial Risk of Harm. Apart from the certain harm inflicted upon the Candidates by use of a system of election administration that yields inherently uncertain vote tallies, the Amended Complaint alleges "actual or imminent" harm by pleading a substantial risk of vote manipulation. The Amended Complaint pleads facts that, taken as true, show Arizona's electronic voting machines provide an opportunity for manipulation of vote tallies, attempts to breach the security of electronic election systems have occurred in the past, and persons with the desire and means to manipulate American elections exist. ER-47, 51, 56, 59, 61-62, 69-71, 80-81. Because the Amended Complaint pleads facts showing opportunity, means, and motivated actors seeking to manipulate vote tallies, the Amended Complaint pleads a non-speculative likelihood of harm that satisfies the constitutional requirements for standing.

"An allegation of future injury may suffice" to establish standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm

will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation omitted); *Spokeo*, 578 U.S. at 339 (observing that "standing requires that the plaintiff 'personally has suffered some actual **or threatened** injury'" (emphasis added) (quoting *Valley Forge Christian College v. Am. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 472 (1982))). An "increased probability of injury" as a result of the challenged act can provide standing. *Sierra Club v. United States EPA*, 774 F.3d 383, 392 (7th Cir. 2014). "This does not mean, however, that the **risk of real harm** cannot satisfy the requirement of concreteness." *Spokeo*, 578 U.S. at 341 (emphasis added). This Court, as it observed mere weeks ago, has "long held that a threatened injury may constitute an injury in fact where, as here, there is 'a credible threat of harm' in the future, rather than a speculative fear 'of hypothetical future harm.'" *Election Integrity Project Cal.*, 2022 U.S. App. LEXIS 30549, at *5 (citing *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Accordingly, the United States District Court for the Northern District of Georgia properly held that plaintiffs had standing to bring claims where they "plausibly allege[d] a threat of a future hacking event that would jeopardize their votes and the voting system at large." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1316 (N.D. Ga. 2018). This Court recently reached a similar conclusion, finding that an

"allegedly unlawful election regulation" impacting the "completive landscape" is sufficiently concrete to confer standing on a candidate. *Mecinas*, 30 F.4th at 898.

Here, the Amended Complaint's allegations, accepted as true, allege a "substantial risk" that manipulation of votes on Appellees' electronic voting machines will occur and recur. The Amended Complaint pleads an abundance of facts to support the reasonable inference that Appellees' electronic voting machines have security failures that allow a malicious actor to manipulate vote totals. These facts are pleaded in summary, ER-51-52, and in detail. ER-72-73, 80-81, 87. The allegations include a detailed array of real-world events, over a period of two decades, showing that electronic voting machines and election management systems can be hacked to manipulate votes. ER-59-67.

- The Amended Complaint alleges that **all** electronic voting machines and election management systems, including those used in Arizona, are vulnerable to internal or external intrusion to alter votes. ER-51.
- The Amended Complaint alleges that malware can cause the changing of votes on electronic election equipment and delete itself after the election, "leaving no evidence that the voting machine was ever hijacked or any votes stolen." ER-61.

- The Amended Complaint alleges that experts for years have demonstrated the ability to hack election machines certified for use in elections. ER-61-62, 66-67.[9] It alleges a computer programmer testified that he had been hired to create a program to change the results of an election without leaving any trace of the change and had done so. ER-61. It alleges Princeton University computer scientists reported that a commonly used electronic voting system was vulnerable to software that stole votes with "little risk of detection." *Id.* It alleges Dominion and ES&S electronic voting machines "can be hacked or compromised with malware, as has been demonstrated by recognized computer science experts, including experts from the University of Michigan, Princeton University, Georgetown University, and other institutions." ER-56-57.

[9] *Cf.* Steven M. Bellovin et al., *Seeking the Source: Criminal Defendants' Constitutional Right to Source Code*, 17 Ohio St. Tech. L.J. 1, 35 (Dec. 2020) (Voting machines are the "best-documented example" of "adversarial testing" finding "flaws in software that had been certified by outside parties," and "outside auditors . . . have *always* found flaws" in voting machine software, so that "There is broad consensus among elections experts that modern software systems are, by virtue of their design, too complex and unreliable to be relied upon for determining the outcomes of civil elections.").

- The Amended Complaint alleges that the "optical scanners and ballot marking devices certified by Arizona, as well as the software on which they rely . . . deprive voters of the right to have their votes counted and reported in an accurate" way. ER-51. It alleges Dominion and ES&S electronic election equipment is intended to be used in Arizona. ER-50, 56. It alleges "Electronic voting machines and software manufactured by . . . Dominion and ES&S, are vulnerable to cyberattacks before, during, and after an election in a manner that could alter election outcomes." ER-52. It alleges the equipment used in Maricopa County, Arizona during the 2020 election exhibited data inconsistencies, missing information, and basic cybersecurity deficiencies. ER-58-59, 78.
- The Amended Complaint alleges that Dominion tabulators approved by the United States Election Assistance Commission were found to contain "erroneous code" that caused the equipment to exclude ballots from reported election results. ER-74. It alleges the federal government agency responsible for election security, CISA, announced on June 3, 2022, that nine security failures can be used "to steal votes" in

Dominion voting equipment. ER-47, 80-81.

These detailed allegations obligated the District Court, when considering a motion to dismiss, to infer that Arizona's election voting machines and election management systems have security failures that permit malicious actors to manipulate vote totals.

The Amended Complaint also pleads that capable actors have sought to manipulate U.S. election-related computer systems in the past:

- The Amended Complaint alleges foreign states have attempted to use electronic intrusion to interfere in United States elections in the past, and a former Obama administration official predicted that "the 2020 election will be hacked no matter what we do." ER-63, 68. It alleges that then-FBI Director James Comey testified to Congress after the 2016 election that he expected Russian attempts to hack United States elections to continue in the future. ER-68.
- The Amended Complaint alleges the Biden administration in 2021 announced sanctions against Russia for election interference in the 2020 election. ER-78.
- The Amended Complaint alleges the Arizona state voter registration database was breached in 2016. ER-63, 68.

- The Amended Complaint alleges that members of Congress have publicly warned about the risks of electronic voting machines being hacked since at least 2018. ER-69-71.

These detailed allegations obligated the District Court, when considering a motion to dismiss, to infer there is a credible threat that attempts may be made to exploit security vulnerabilities in United States electronic voting machines to manipulate vote totals in future elections. *See Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1342 (N.D. Ga. 2020) ("The Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually ever happen?' — but 'when it will happen.'").

Taken together and accepted as true, the allegations in the Amended Complaint show a real, likely risk that Arizona's computerized election equipment will be manipulated to misreport vote totals. In the face of an established and "credible threat," *Election Integrity Project Cal.*, 2022 U.S. App. LEXIS 30549, at *5, and a demonstrated means by which that threat can be carried out, the requirements of standing to seek injunctive relief to prevent the harm from occurring – a "substantial risk" that the harm will occur, *Susan B. Anthony List*, 573 U.S. at 158 – are met. If a lock on the bank vault can be opened with a skeleton key and the door to the vault room is open, there is a substantial risk that harm will occur. The

owners of the money in the vault need not wait until their money is burgled to seek injunctive relief to prevent a crime that is likely to occur.

The District Court's Order doubly erred in addressing the element of "actual or imminent" harm. First, the Order erred by misstating applicable law. The District Court stated Appellants must show injury is "certainly impending." ER-21. The applicable standard allows allegations of a future injury to suffice "if the threatened injury is certainly impending, **or there is a substantial risk that the harm will occur."** *Susan B. Anthony List*, 573 U.S. at 158 (emphasis added). Here, the Amended Complaint clears the standard by pleading facts that there is a substantial risk that the harm will occur. ER-47, 51, 56, 59, 61-62, 69-71, 80-81; *See, e.g.*, *Curling v. Kemp*, 334 F. Supp. 3d at 1316 (N.D. Ga. 2018) (denying in part a motion to dismiss where "Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large."); *Election Integrity Project Cal.*, 2022 U.S. App. LEXIS 30549, at *5-*6 (overturning district court's dismissal where plaintiffs' complaint alleged a "credible threat" of future harm arising from verification of vote-by-mail ballots that gave rise to "massive opportunities for both error and fraud.").

Second, the District Court's Order characterized the harm alleged by the Amended Complaint as dependent on a "long chain of hypothetical contingencies."

ER-20. This conclusion improperly failed to accept the allegations in the Amended Complaint as true and accept reasonable inferences necessitated by these facts. As set forth above, the Amended Complaint pleads that security deficiencies in Arizona's electronic election equipment are real and not hypothetical; that votes can certainly, not hypothetically, be manipulated in electronic voting machines; and that people who have the motive and means to manipulate United States elections certainly, not hypothetically, exist. The *only* inference necessary to connect these facts to an injury to a violation of the Candidates' constitutional voting rights is an inference that where opportunity, means, motive, and actors exist, the actors will exploit the opportunity. That is a reasonable inference, and Rule 12 requires a court to make that inference. *United Transp. Union v. BNSF Ry. Co.*, 710 F.3d 915, 935 (9th Cir. 2013) (holding that the district court improperly "failed to draw inferences in the light most favorable to" plaintiff's claim). *See also Pride*, 719 F.3d at 1133 (holding whether the appellate court construes a "motion as one under Rule 12(b)(6) or as a facial attack on subject matter jurisdiction under Rule 12(b)(1), all factual allegations in [appellant's] complaint are taken as true and all reasonable inferences are drawn in his favor.")

The Amended Complaint sufficiently pleads a likelihood of harm to satisfy constitutional standing requirements.

Federal courts are understandably reluctant to disturb the reported results of a completed election. *E.g.*, *Stein v. Cortés*, 223 F. Supp. 3d 423, 426 (E.D. Pa. 2016); *Samuel v. V.I. Joint Bd. of Elections*, No. 2012-0094, 2013 U.S. Dist. LEXIS 31538, at *1 (D.V.I. Mar. 7, 2013). *For that very reason*, the constitutional right to vote requires that the methods used to count votes that determine the winners of elections must not leave doubt whether reported tallies are accurate. Candidates and voters face a nearly impossible task when asking a federal court to overrule the reported results of the election after the fact. To adequately plead standing, a plaintiff need not wait until after an election to judicially challenge the constitutionality of a state's vote counting system credibly and broadly known to be deficient.

The Amended Complaint alleges actual or imminent injury, and thus satisfies the third element of standing.

2. In its Ruling on Standing, the District Court Improperly Made Findings Contrary to Allegations in the Amended Complaint in Order to Dismiss the Candidates' Claims on 12(b)(1) Grounds.

The District Court's standing analysis was grounded on findings of fact contrary to the facts alleged in the Amended Complaint. These improper factual findings denied the Candidates the opportunity to prove the factual bases of their claims. Such a basic error of law, on the posture of resolving Rule 12 motions to

dismiss, requires reversal.[10]

a. The District Court Improperly Relied on Factual Determinations Contrary to the Allegations in the Amended Complaint.

The District Court erroneously interjected factual determinations into its resolution of the Appellees' motions to dismiss. Part I.B of the District Court's Order contains rulings on factual assertions about Arizona elections. ER-12-16. The District Court relied on, among other things, the testimony of Maricopa employee Scott Jarrett, ER-13-14, documents submitted by Appellees in connection with a "Motion for Judicial Notice," ER-13, and a document published on the Internet by defendant Maricopa County titled *Maricopa County Election Facts | Voting Equipment & Accuracy*. ER-13-14.

[10] The Maricopa Defendants moved to dismiss the claims against them pursuant to Rule 12(b)(6). Maricopa Mot. at 1-2, doc. 27. Hobbs joined the Maricopa Defendants' motion and moved to dismiss the claims against her pursuant to Rule 12(b)(1) and Rule 12(b)(6). Hobbs Mot. at 1, doc. 45. The District Court's order acknowledges the Rule 12(b)(6) motions, ER-17, but does not otherwise mention Rule 12(b)(6). *See* ER-17-19. The Order does not state the standard for a Rule 12(b)(6) motion, and does not state that the District Court accepts the allegations pleaded in the Amended Complaint as true for purposes of the motions to dismiss. *See id*. Instead, as shown below, the District Court improperly relied on sources outside the Amended Complaint, submitted by the Appellees, to controvert and reject the allegations in the Amended Complaint.

While the District Court initially stated that its factual findings based on evidence and sources outside the Amended Complaint were provided "for the purpose of providing background for its later analysis, not to establish the truth of any disputed fact," ER-13 at n.6, this is simply incorrect. When addressing the allegations in the Amended Complaint, the District Court did not accept the allegations as true but instead ignored them and instead relied upon its prior, contrary factual descriptions as determinative of the Candidates' claims. *See* ER-12-13 (relying on Appellees' proffered evidence of "thorough testing by independent, neutral experts" and "logical and accuracy" testing before and after elections); ER-50-51 (alleging certification of Dominion Democracy Suite 5.5b and ES&S ElectionWare 6.0.40 voting systems was improper); ER-74 (alleging that "erroneous code" can be – and in fact has – gone undetected through the certification process and safety testing procedures); ER-52, 81-82 (alleging risk limiting audits and logic and accuracy tests can be defeated). Rather than accept that the Amended Complaint alleged in detail that Appellees' electronic voting machines have security failures, the District Court's Order based its legal conclusions on a factual finding that "Defendants have taken numerous steps to ensure such security failures do not exist or occur in Arizona or Maricopa County." ER-21 at n.13. Rather than accept that the Amended Complaint pleaded that electronic voting machines can be hacked without

detection and post-election audit procedures can be defeated, the District Court based its legal conclusions on a factual finding that "Defendants have extensive post-election audit procedures in place to detect and reconcile any problems with tabulation machine counts if an intrusion did occur." ER-21 at n.14.

The District Court's rejection of the Candidates' claims based on factual findings contrary to actual allegations in the Amended Complaint was an error of law. A federal court may not simply reject the factual allegations in a complaint or aggregate contradictory evidence as the basis to dismiss a complaint prior to discovery. *E.g. United Transp. Union v. BNSF Ry. Co.*, 710 F.3d 915, 934 (9th Cir. 2013) (defendant's contradiction of facts alleged in complaint cannot serve as basis for dismissal); *Election Integrity Project Cal.*, 2022 U.S. App. LEXIS 30549, at *5-6 ("Because '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice' to show standing, EIPCa's allegations of injury suffice for a motion to dismiss." (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992))).

b. Neither Rule 12(b)(1) nor Rule 12(b)(6) Permits the District Court's Decision to Reject the Facts Alleged in the Amended Complaint.

While the Order is not entirely clear on this point, the District Court's analysis finding facts contrary to the allegations in the Amended Complaint may have

resulted from a *sua sponte* decision to misapply law concerning Fed. R. Civ. P. 12(b)(1). If so, the District Court's analysis would still be erroneous because Rule 12(b)(1) does not allow a court to dismiss a complaint by finding facts contrary to the substantive allegations in the Amended Complaint.[11]

The Order quotes a decision from this Court concerning Rule 12(b)(1) providing that "[w]here the jurisdictional issue is separable from the merits of the case, the [court] may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." Order at 11 (quoting *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). However, this rule—by the very language quoted by the District Court—does *not* apply where the "merits" of the plaintiff's claim overlap the jurisdictional issue. A "jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th

[11] The District Court's analysis of the standing issue appears to be substantively equivalent to a Rule 12(b)(6) ruling that the Amended Complaint fails to state a claim upon which relief can be granted.

Cir. 2004) (quotations omitted).

Rule 12(b)(1) does not permit the District Court to make contested factual determinations regarding the substantive merits of the Candidates' claims.

The District Court's adoption of an approach permitting the resolution of factual disputes on a Rule 12(b)(1) motion was *sua sponte*, for both sets of Appellees in their motion papers cited only the familiar Rule 12(b)(6) standard that accepts the facts alleged in the Amended Complaint as true for purposes of the motion to dismiss. Doc. 27 at 1; doc. 45 at 13. The Candidates' Oppositions to Appellees' Motions to Dismiss accepted the Rule 12(b)(6) statement of the governing standard. Doc. 58 at 1; doc. 56 at 5, 13-14, 15.

The District Court's reliance on Rule 12(b)(1) authority for the proposition that disputed facts can be resolved when deciding a motion to dismiss was a misapplication of the law, for the cases it cited presented nothing like the procedural posture that confronted the District Court here. The primary case cited by the District Court, *Thornhill*, was an antitrust action decided on a summary judgment motion after discovery. *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 n.15 (9th Cir. 1979). *Thornhill* held that the acts complained of by the plaintiff were outside the jurisdictional reach of the Sherman Act because they did not substantially affect interstate commerce. *Id*. at 732. While the Ninth Circuit in that case did hold

that a trial court could resolve factual disputes related to the interstate commerce issue in ruling on a Rule 12(b)(1) "speaking motion to dismiss for lack of subject matter jurisdiction," the Ninth Circuit further specified that this holding only applies when "the jurisdictional issue and the substantive issues [are] separable." *Id*. at 735; *See also id.* at 733 (holding that a district court confronted with a Rule 12(b)(1) motion may not resolve factual disputes to decide the motion unless "the jurisdictional issue is separable from the merits of the case"). The paradigm for this principle is a situation where federal jurisdiction rests upon a factual showing separate from the substance of a plaintiff's claims, such as a showing that the defendant's commercial activities substantially affected interstate commerce, *Thornhill*, 594 F.2d at 733-34 (9th Cir. 1979), or that the defendant had notice of the existence of a federal claim, for purposes of a statute of limitations, *e.g.*, *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196-97 (9th Cir. 2008). Here, the facts used by the District Court for its "jurisdictional" analysis were facts central to the substantive claims advanced by the Amended Complaint—whether Appellees' electronic voting machines have security failures that allow for the manipulation of vote tallies in an election.

The other cases cited by the District Court are *Renteria v. United States*, 452 F. Supp. 2d 910 (D. Ariz. 2006) and *Autery v. United States*, 424 F.3d 944, 956 (9th

Cir. 2005). Neither is apposite. *Renteria* concerned claims for negligent processing of a loan application, most of which the magistrate judge recommended dismissing because it held that the defendant owed the plaintiffs no duties. 452 F. Supp. 2d at 921-23. In *Autery*, the plaintiffs brought tort claims against the United States for alleged negligence in not maintaining firebreaks before a wildfire broke out. *Autery*, 424 F.3d at 948 (9th Cir. 2005). The court applied the standard applicable to a motion for summary judgment, not a motion to dismiss. *Id*., at 956. None of the cases relied upon by the District Court stand for the proposition that a trial court addressing a pre-discovery motion to dismiss may make factual determinations contrary to the substantive allegations in the pleadings and dismiss the action based on those findings.

Moreover, law not cited by the District Court shows that its fact-finding approach was plainly wrong. In *Meland*, this Court stated that an order "granting a motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1)" is reviewed "*de novo*" with the appellate court "construing all material allegations of fact in the Amended Complaint in favor of the plaintiff." 2 F.4th 838, 843 (9th Cir. 2021). In *Southcentral Foundation*, this Court said the same. 983 F.3d at 416-17. In *Unified Data Services, LLC v. FTC*, this Court explained that on a Rule 12(b)(1) motion to dismiss for lack of standing, "general factual

allegations of injury . . . may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim," and "[a]ll of the facts alleged in the Amended Complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party." 39 F.4th 1200, 1209 (9th Cir. 2022) (quotation omitted). Where jurisdictional issues and substantive claims are intertwined, any factual issues must be 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). This would require *not* resolving disputes of fact. *See Johnson v. Ryan*, __ F.4th __, No. 20-15293, 2022 U.S. App. LEXIS 34637, at *20, 79 (9th Cir. Dec. 15, 2022). Further, "the Supreme Court has held that where a 12(b) motion to dismiss is based on lack of standing, the reviewing court must defer to the plaintiff's factual allegations, and must 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Young v. Crofts*, 64 F. App'x 24, 25 (9th Cir. 2003) (quoting *Lujan*, 504 U.S. at 561).

The jurisdictional issues argued by Defendant Hobbs in this action – an Eleventh Amendment argument and a standing argument – are closely intertwined with the merits of Appellants' claims in the Amended Complaint. The District Court erred by resolving factual disputes as the basis for its decision to dismiss the

Amended Complaint.

3. The District Court Relied Upon Inapposite Authority.

The District Court lastly supported its standing analysis by citing to a handful of other decisions, which it characterized as standing for the proposition that "speculative allegations that voting machines may be hackable are insufficient to establish an injury in fact under Article III." ER-22. These cases did not present comparable circumstances and do not support such a legal proposition here. In two of the cases, the plaintiffs sought to overturn the results of completed elections. *Stein*, 223 F. Supp. 3d at 426, 433 (candidate who received less than 1% of votes demanded recount of votes "during last month's election"); *Samuel*, No. 2012-0094, 2013 U.S. Dist. LEXIS 31538, at *1, *16 (plaintiffs sought "to decertify the November 6, 2012 general election in the Virgin Islands" but "do not claim that they have been deprived of something to which they personally are entitled – such as election to the various positions they sought." (internal quotation marks and citation omitted)). The Candidates do not rely on speculation about a completed election to reverse the outcome or attempt to change the results of an election at all. Rather, the Candidates seek to eliminate a continuing violation of their constitutional rights through the use of deficient and unsecure electronic voting machines in future elections.

In other cases cited by the District Court, *Schulz v. Kellner*, No. 1:07-CV-

0943 (LEK/DRH), 2011 U.S. Dist. LEXIS 73088 (N.D.N.Y. July 7, 2011), *Landes v. Tartaglione*, No. 04-3163, 2004 U.S. Dist. LEXIS 22458 (E.D. Pa. Oct. 28, 2004), and *Shelby Cnty. Advocs. for Valid Elections v. Hargett*, No. 2:18-cv-02706-TLP-dkv, 2019 U.S. Dist. LEXIS 156740 (W.D. Tenn. Sept. 13, 2019), *aff'd sub nom. Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020), none of the plaintiffs were candidates for office, unlike the Candidates here. These unpublished district court decisions are inconsistent with *Carson*, 978 F.3d at 1058, and *Trump*, 983 F.3d at 924, which properly held that candidates have standing to challenge improper election administration methods.

In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), also cited by the District Court, the plaintiff challenged California's use of an electronic voting system and was permitted discovery to gather facts related to her claims concerning the use of the voting system. Though the *Weber* plaintiff ultimately failed—after discovery and in a motion for summary judgment—to generate a genuine issue of material fact, *id.* at 1107, she was not improperly barred from discovery by the standing doctrine. Much has happened since 2003, and the Candidates fully expect the allegations of the Amended Complaint sufficiently claim Arizona's electronic voting systems are unconstitutionally unsecure. The law of standing permits them the opportunity to prove their claims. *See id.* at 1106-07.

The Candidates have standing to pursue their claims, and the District Court erred by concluding otherwise.

C. *Purcell* Provides No Basis to Dismiss the Candidates' Claims.

The District Court's Order finds that the principles set forth in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), prohibit the Candidates' claim for injunctive relief. ER-24-26. It is not clear from the Order whether this discussion served as a basis for the District Court to dismiss the Candidates' claims or whether it provided an explanation for the District Court's decision to deny the Candidates' motion for a preliminary injunction that was mooted by the dismissal of the Amended Complaint. The Order stated that it addressed "only the Defendants' arguments concerning standing, the Eleventh Amendment, and portions of Defendants' arguments that pertain to the timing of Plaintiffs' suit, because it finds that *each of these arguments is dispositive on its own*." ER-17 (emphasis added). The Order also concluded with the statement, "For the foregoing reasons, Plaintiffs' First Amended Complaint is dismissed in its entirety. . . . Plaintiffs lack standing because they have articulated only conjectural allegations of potential injuries that are in any event barred by the Eleventh Amendment, and seek relief that the Court cannot grant under the *Purcell* principle." ER-26.

Purcell does not provide a basis to dismiss the Amended Complaint because

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. The Supreme Court wrote in *Purcell*: "We underscore that we express no opinion here on . . . the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and [n]o bright line separates permissible election-related regulation from unconstitutional infringements. . . . Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." 549 U.S. at 5-6 (quotation and citation omitted). To the extent the District Court relied upon *Purcell* as a basis for dismissing the Candidates' claims, the District Court erred.

VII. CONCLUSION

The District Court's decision should be reversed and remanded. The Candidates have a right to challenge the Arizona vote counting system and assert and be given the opportunity to prove their factual allegations.

VIII. STATEMENT OF RELATED CASES

The Candidates are not aware of any related cases.

Respectfully submitted,

DATED: December 28, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on December 28, 2022, I filed the foregoing Appellants' Opening 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.

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