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9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
11 (Western Division)

12
13 ELECTION INTEGRITY PROJECT®
CALIFORNIA, INC; et al.,

No. 2:21-CV-00032-AB-MAA

14 Plaintiffs,

15 **COUNTY DEFENDANTS' NOTICE**
OF MOTION AND MOTION TO
DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT

16 v.

17 SHIRLEY WEBER, CALIFORNIA
SECRETARY OF STATE, et al.,

Date: May 12, 2023

Time: 10:00 a.m.

18 Ctrm: 7B

Judge: The Honorable André Birotte, Jr.

19 Defendants.

20 **PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

21 PLEASE TAKE NOTICE that on **May 12, 2023 at 10:00 a.m. in Courtroom**
22 **7B** of the United States District Court of the Central District of California, located at
23 First Street Court House, 350 West First Street, Los Angeles, California 90012,
24 Defendants Tim Dupuis, Registrar of Voters for the County of Alameda; Kristin
25 Connelly, Registrar of Voters for Contra Costa County; James A. Kus, County
26 Clerk/Registrar of Voters for the County of Fresno; Aimee Espinoza, Auditor-
27 Controller/County Clerk/Registrar of Voters for Kern County; Dean C. Logan, Los
28 Angeles County Registrar-Recorder/County Clerk; Gina Martinez, Registrar of Voters

1 for the County of Monterey; Bob Page, Registrar of Voters for the County of Orange;
2 Rebecca Spencer, Riverside County Registrar of Voters; Hang Nguyen, Sacramento
3 County Registrar of Voters; Francisco Diaz, San Benito County Clerk-Recorder-
4 Registrar of Voters; Stephenie Shea, Registrar of Voters for San Bernardino County;
5 Elaina Cano, Clerk-Recorder-Registrar of Voters for San Luis Obispo County;
6 Shannon Bushey, Registrar of Voters for the County of Santa Clara; Tricia Webber,
7 Santa Cruz County Registrar of Voters; and Michelle Ascencion, Ventura County
8 Registrar of Voters (“County Defendants”) will and hereby do move the Court
9 pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) for an order
10 dismissing Plaintiffs’ Second Amended Complaint in its entirety for lack of subject
11 matter jurisdiction and for failure to state a claim upon which relief can be granted.

12 This motion is based on this Notice of Motion and Motion, the Memorandum of
13 Points and Authorities below, Plaintiffs’ Second Amended Complaint and documents
14 incorporated by reference therein, the arguments that may be presented at the hearing
15 on this Motion, and any other matters the Court deems relevant. This motion is made
16 following the conference of counsel pursuant to Local Rule 7-3, which took place on
17 March 23, 2023.

18
19 Dated: March 30, 2023

Respectfully submitted,
JAMES R. WILLIAMS
County Counsel

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21 By: /s/ Mary E. Hanna-Weir
22 MARY E. HANNA-WEIR
23 Deputy County Counsel

24 Attorneys for Defendant
25 Shannon Bushey, Registrar of Voters
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1 Dated: March 30, 2023

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1 Dated: March 30, 2023

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1 Dated: March 30, 2023

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Dated: March 30, 2023

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Dated: March 30, 2023

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1 Dated: March 30, 2023

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9 Dated: March 30, 2023

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13 Assistant County Counsel

14 Attorneys for Defendant
15 Michelle Ascencion, Ventura County
16 Registrar of Voters

ATTESTATION

17 I, Mary E. Hanna-Weir, am the ECF user whose ID and password are being
18 used to file the above Notice of Motion and Motion to Dismiss Plaintiffs' Second
19 Amended Compliant. In compliance with Civil Local Rule 5-4.3.4(2)(I), I hereby
20 attest that each listed counsel above has concurred in this filing.

21 /s/ MARY E. HANNA-WEIR

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs—Election Integrity Project of California (EIPCa) and five individual
3 voters—continue to seek to cast doubt upon the integrity of California’s elections
4 because they have been recently unsuccessful in legislatively defeating efforts to
5 enable all voters to cast ballots in the safe, simple, and secure method of their
6 choosing. Nevertheless, Plaintiffs ask this Court to put California’s fair and accurate
7 election system into permanent receivership overseen by a special master, because
8 Plaintiffs fundamentally mistrust California’s civil servants and the public. In making
9 this request, Plaintiffs ask the Court to ignore the presumption that government
10 officials carry out their duties in regular order and in compliance with the law. The
11 Court may not *assume* bad faith by County Defendants, and Plaintiffs’ policy disputes
12 with the State are certainly no basis to do so.

13 Plaintiffs’ Second Amended Complaint (SAC) reformulates their two remaining
14 claims as solely grounded in vote dilution. But the voter Plaintiffs lack standing to
15 bring vote dilution claims, and the SAC fails to allege facts sufficient to suggest that
16 any group of voters was disadvantaged in any recent past election. Plaintiffs seek
17 extreme and wide-ranging relief—eliminating huge swaths of state law and installing a
18 third-party manager over all future elections—that bears no relation to their alleged
19 harm. Moreover, given the deliberate and unexplained delay in bringing this litigation
20 and in adding new County Defendants, Plaintiffs’ claims are barred by laches.

21 Further, Plaintiffs’ conclusory allegations reflect a misunderstanding of how
22 elections operate and fail to state a claim under either the Equal Protection or Due
23 Process Clauses. They speculate, and ask the Court to speculate, that ordinary
24 operational differences and layperson observations of limited aspects of the election
25 process demonstrate enough certainty of election fraud to undermine the entire
26 electoral system. But Plaintiffs’ allegations do not give rise to a reasonable inference
27 of vote dilution, much less constitutional injury. Plaintiffs’ SAC should be dismissed
28 in full with prejudice.

I. FACTUAL AND PROCEDURAL HISTORY

Since 1978, all California voters have had the choice to vote in person at a polling location or by mail. Since the November 2020 election, a vote-by-mail (VBM) ballot has been mailed to every registered active voter. Cal. Elec. Code § 3000.5.¹ When voting by mail, voters may drop their ballot in official VBM drop boxes or the U.S. mail, designate another person to mail or return their ballot, or return the ballot directly to the county elections official. *Id.* §§ 3003, 3015, 3017. Ballots from VBM drop boxes are collected by pairs of election workers, and mailed ballots are delivered directly to the county elections official by the U.S. Postal Service or other bona fide delivery companies. 2 Cal. Code Reg. §§ 20137, 20143 (chain of custody); Elec. Code § 3020 (mail delivery). Mailed ballots are counted if they are postmarked on or before Election Day and received within the statutory timeframe. Elec. Code § 3020(b), (d). When timely VBM ballots are received, the VBM envelope signature is verified using human review or a machine that auto-matches signatures or that projects images for human review. *Id.* § 3019. Challenged signatures receive additional review. *Id.* Voters may cure missing or mismatched signatures before their ballot is rejected. *Id.* Finally, verified VBM envelopes are opened and ballots counted. *Id.* §§ 15101, 15109.

Alternatively, any voter may choose to vote in person. *Id.* § 3015. Ballots cast in person are scanned at the voting location, a precinct office, or the county's central counting location. *Id.* §§ 15105, 15152, 15200-290. All polls, including VBM drop boxes, close by 8:00 p.m. on Election Day.² *Id.* § 14212; 2 Cal. Code Regs. § 20136(e). Voters may surrender their VBM ballot when voting in person, or the county elections official can otherwise verify that they have not already voted and that any subsequently returned ballot will not be counted. Elec. Code § 3015.

If any ballot—cast by VBM or in person—is damaged or otherwise unreadable

¹ All references to the Elections Code are to the California Elections Code.

² Voters still in line at a polling location or at a VBM drop box when polls close may cast their ballot after 8:00 p.m. Elec. Code § 14401; 2 Cal. Code Regs. § 20136(e).

1 by the tabulator, it is carefully duplicated so that it can be counted. Elec. Code
 2 §§ 15208, 15210. If there is a question of voter intent for any vote, the ballot is
 3 adjudicated. *See* 2 Cal. Code Regs. § 20982. Both duplication and adjudication are
 4 governed by California’s uniform vote count standard. *See id.* Finally, after all
 5 eligible ballots are counted, counties audit results with a manual tally of at least 1% of
 6 the precincts. Elec. Code §§ 15360.³ Then, results are certified and announced.

7 **A. The 2020 Presidential Election**

8 Over 17 million Californians cast their votes in the 2020 Presidential General
 9 Election.⁴ Over the next 30 days, county elections officials completed their official
 10 canvass, processed and adjudicated ballots, and completed state-mandated post-
 11 election audits of the tallied results. *See* Elec. Code §§ 15300-376. By December 3,
 12 2020, all county elections officials certified the election results. *Id.* § 15372.

13 Under California law, recount requests by voters must be made within five days
 14 after certification—for the 2020 Election, by December 8, 2020. Elec. Code
 15 § 15620(a). No Plaintiff requested a recount. Election contests involving presidential
 16 electors must be filed within 10 days of the results being certified and resolved “at least
 17 six days before the first Monday after the second Wednesday in December.” *Id.*
 18 §§ 16003, 16401(c). For the 2020 Election, that meant that election contests involving
 19 electors had to be filed by December 8, 2020. No Plaintiff filed an election contest.

20 **B. The 2021 and 2022 Elections**

21 For the first time in their SAC, Plaintiffs contest elections subsequent to the
 22 2020 Election, all of which were similarly conducted in an orderly, secure, and
 23 effective manner. In the 2021 Gubernatorial Recall Election, 12.8 million Californians
 24 voted.⁵ Recount requests were due by October 19, 2021, and election contests,
 25 including constitutional challenges, by November 13, 2021. Elec. Code §§ 15620(a),
 26

27 ³ Counties may also perform a risk-limiting audit. Elec. Code § 15365-67.

28 ⁴ *See* State Defs.’ RJN ISO Motion to Dismiss FAC, Ex. 6 (2020 Stmt. of Vote).

⁵ County Defendants’ Request for Judicial Notice (filed concurrently) (RJN), Ex. 6.

1 16401(d). Plaintiffs filed neither. In the 2022 General Election, 11.1 million
2 Californians voted.⁶ Recount requests were due by December 13, 2022, and election
3 contests by January 7, 2023. Elec. Code §§ 15620(a), 16401(d). Again, Plaintiffs filed
4 neither.

5 **C. Procedural History**

6 Plaintiffs filed this case on January 4, 2021—weeks after the deadlines for
7 lawfully challenging the 2020 Election had passed. At the time, Plaintiff EIPCa was
8 joined by 10 unsuccessful Republican congressional candidates. Plaintiffs sought a
9 temporary restraining order, seeking a private audit of highly sensitive election
10 infrastructure, records, security access tokens, passwords, and other materials. Dkt. 21
11 at 3-7; Dkt. 68, Prayer, ¶ C. The Court denied Plaintiffs’ application. Dkt. 35.

12 State and County Defendants⁷ filed motions to dismiss. Dkts. 43, 45. Plaintiffs
13 then filed a First Amended Complaint (FAC), adding additional candidate Plaintiffs
14 and factual assertions, expanding upon legal claims, and amending their prayer for
15 relief. They argued that California’s election system intentionally allows for elections
16 to be marred by repeated mistakes and fraud. Dkt. 68 at 3-6, 14-26. Plaintiffs also
17 alleged widespread fraud and irregularities during the 2020 Election, which, they
18 claimed, necessitated a private audit by Plaintiffs’ expert of all ballots cast in 2020 and
19 all of County Defendants’ voting equipment. *Id.* at 6-7, 19-24, 25-35, 43-44.

20 State and County Defendants moved to dismiss the FAC. Dkts. 84, 85. The
21 Court granted the motions. First, the Court held Plaintiffs lacked standing for Equal
22 Protection and Due Process Clause claims because they failed to allege a vote dilution
23 injury, as they had not alleged any particular Plaintiff or member of EIPCa to be part of
24 any disadvantaged group or that any group’s votes were weighted differently than
25 another’s. Dkt. 111 at 8-10. It also held that the candidate Plaintiffs failed to allege

26

27 ⁶ RJN Ex. 7.

28 ⁷ Except Kern County and San Luis Obispo County, whose election officials were not named as Defendants in either the initial complaint or First Amended Complaint.

1 the outcome of their elections would have changed absent the alleged irregularities,
2 and that Plaintiff EIPCa failed to demonstrate organizational standing. *Id.* at 10-11.
3 Second, the Court held that the individual Plaintiffs, as private citizens, lack the
4 “particularized stake in the litigation” required for standing to assert an Elections
5 Clause claim. *Id.* at 11-12 (citing *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). And
6 third, the Court dismissed Plaintiffs’ Guarantee Clause claims as nonjusticiable
7 political questions. *Id.* at 12-13. The Court did not address mootness or laches, or
8 their argument that Plaintiffs failed to state any claim for relief under Rule 12(b)(6).
9 *See* Dkt. 84 at 13-22.

10 Plaintiffs appealed. On November 3, 2022, the Ninth Circuit held that Plaintiff
11 EIPCa had sufficiently alleged organizational standing and affirmed the dismissal of
12 Plaintiffs’ Guarantee Clause claims. 9th Circ. Order⁸ at 3, 6. The Ninth Circuit
13 expressly did not address individual Plaintiff standing. *Id.* at 6. In addition, while
14 noting that EIPCa’s alleged organizational harm would be redressed if the challenged
15 laws were enjoined, *id.* at 5, the Ninth Circuit did not address the appropriateness of
16 any other requested form of relief. Mandate issued on November 25, 2022.

17 Pursuant to a joint stipulation, Plaintiffs filed a SAC. Dkt. 132. The SAC
18 removes several candidate Plaintiffs, with five remaining on as individual voter, non-
19 candidate Plaintiffs, removes the Governor as a defendant, adds two additional County
20 Defendants, and deletes the Elections and Guarantee Clause claims. Plaintiffs
21 reformulated their Equal Protection and Due Process Clause claims to now rely solely
22 on vote dilution harms. *Compare* FAC ¶¶ 174-78, 189-90 *with* SAC ¶¶ 151-53, 163-
23 65. And—months, if not years, after the deadlines for challenging the 2021 and 2022
24 Elections—Plaintiffs have belatedly added brand new allegations regarding those
25 elections. *See* SAC ¶¶ 7, 96-7, 102, 115-18, 122, 125-27, 129, 138, 147.

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28 ⁸ RJN Ex. 1.

II. LEGAL STANDARD

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2 Under Rule 12(b)(1), a court must dismiss a case if it lacks subject matter
3 jurisdiction. Rule 12(b)(1) attacks can be facial or factual. *White v. Lee*, 227 F.3d
4 1214, 1242 (9th Cir. 2000). Facial attacks require the defendants to show that the
5 allegations in a complaint are “insufficient on their face to invoke federal jurisdiction.”
6 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Factual attacks
7 require the defendants to challenge “the truth of the allegations that, by themselves,
8 would otherwise invoke federal jurisdiction.” *Id.* A factual attack allows a court to
9 “look beyond the complaint to matters of public record,” and it “need not presume the
10 truthfulness of the plaintiffs’ allegations.” *Lee*, 227 F.3d at 1242. The plaintiffs bear
11 the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life*
12 *Ins. Co.*, 511 U.S. 375, 377 (1994).

13 A court must grant a motion to dismiss under Rule 12(b)(6) if a plaintiff fails to
14 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*
15 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plaintiff must sufficiently plead
16 each required element of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 675-77
17 (2009). Although courts considering a motion to dismiss must draw reasonable
18 inferences in the plaintiff’s favor, “pleadings that, because they are no more than
19 conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679.
20 “[L]abels and conclusions” are insufficient, and “a formulaic recitation of the elements
21 of a cause of action will not do.” *Twombly*, 550 U.S. at 555. A court must disregard
22 conclusory allegations and “draw on its judicial experience and common sense” to
23 make a context-specific determination as to whether a complaint states a plausible
24 claim. *Iqbal*, 556 U.S. at 679. Courts may also consider matters of judicial notice.
25 *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

III. LEGAL ARGUMENT

A. Voter Plaintiffs Lack Standing to Assert Any of Their Claims.

28 The individual Plaintiffs should be dismissed because they lack Article III

1 standing to pursue either of the claims they now assert. Article III limits federal court
 2 jurisdiction to “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. To
 3 establish standing, a plaintiff must demonstrate (1) that they suffered an injury in fact;
 4 (2) that there is a causal connection between the injury and the alleged conduct, such
 5 that the injury is fairly traceable to the challenged action of the defendant; and (3) that
 6 the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of*
 7 *Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of demonstrating
 8 Article III standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

9 **1. Voter Plaintiffs Fail to Demonstrate Injury in Fact.**

10 To demonstrate “injury in fact,” the injury must be “particularized,” such that it
 11 “affect[s] the plaintiff in a personal and individual way” *Spokeo, Inc. v. Robins*, 136
 12 S. Ct. 1540, 1548 (2016) (citations omitted). The injury also must be “concrete,” that
 13 is, “real” and not “abstract.” *Id.* A plaintiff cannot show a particularized and concrete
 14 injury by showing “that he has merely a general interest common to all members of
 15 the public.” *Ex parte Levitt*, 302 U.S. 633, 634 (1937). A plaintiff also may not use a
 16 “federal court as a forum in which to air his generalized grievances about the conduct
 17 of government.” *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting
 18 *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). But once again—even despite their partial
 19 victory in the Ninth Circuit—that is precisely what Plaintiffs have done.

20 **a. *Voter Plaintiffs Fail to Plead Injury at all; Speculative***
 21 ***Allegations are Insufficient to Show Particularized Injury.***

22 As an initial matter, the SAC manifestly fails to allege injury to *any* individual
 23 Plaintiff; there is not a single allegation of individual harm clearly tied to these voters.
 24 Four of the five individual Plaintiffs are listed in the “Plaintiffs” section and never
 25 mentioned again. The SAC alleges that Plaintiff Kennedy is African American, SAC
 26 ¶ 142, but there is no allegation that she was disenfranchised or harmed on that basis.⁹

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 28 ⁹ No Ventura County allegations concern race-based harms, *see* SAC ¶ 104, and the SAC does not allege that Plaintiff Kennedy’s vote was diluted.

1 For this reason alone, the individual Plaintiffs lack standing to bring either of
 2 Plaintiffs' claims and should be dismissed. *Spokeo*, 136 S. Ct. at 1548.

3 In addition, in their third effort, Plaintiffs still fail to allege “‘concrete and
 4 particularized’ and ‘actual or imminent, not conjectural or hypothetical’” vote dilution
 5 injury to any individual Plaintiff or identified person. *Spokeo*, 136 S. Ct. at 1548
 6 (quoting *Lujan*, 504 U.S. at 560). Moreover, to be “‘facially plausible,” the SAC must
 7 contain “‘factual content that allows the court to draw the reasonable inference that the
 8 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. But Plaintiffs’
 9 speculative injury allegations do not allow for even that.

10 First, even assuming—although there is no basis to do so—that any of the
 11 individual Plaintiffs were the EIPCa observers subject to allegedly improper treatment
 12 in their respective counties (*see* SAC ¶¶ 100, 104, 120),¹⁰ many of Plaintiffs’ observer-
 13 related allegations are facially speculative and demonstrate no injury to anyone, much
 14 less individual Plaintiffs. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013)
 15 (finding a “speculative chain of possibilities does not establish [an] injury ... is
 16 certainly impending or is fairly traceable”). In two examples of many, Plaintiffs allege
 17 that Los Angeles County observers saw “open bags, big purses, and other stuff around
 18 desks” at voting centers and felt that “ballots could easily have been taken,” and that a
 19 Santa Clara County observer saw some doors that were briefly unlocked and did not
 20 know why. SAC ¶¶ 118, 125. No reasonable inference can bridge the gap between
 21 “open bags” and ballot theft, or unlocked doors and dilution of an unspecified group of
 22 voters’ votes. *See Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004) (noting
 23 “unwarranted inferences are insufficient to defeat a motion to dismiss”).

24 Second, as this Court has already found, Plaintiffs’ allegations amount to an
 25 alleged incremental undermining of confidence in the election results, past and
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 28 ¹⁰ Plaintiff Mark Reed is a resident of Madera County, which is not a defendant in this
 litigation and against which there are no allegations. *See* SAC ¶ 19.

1 future.¹¹ Dkt. 111 at 9. Plaintiffs attack the overall structure and content of
 2 California’s Elections Code, arguing that VBM and other measures have or will
 3 inevitably lead to voter fraud and untrustworthy election results. Their conclusion is
 4 based on a series of disconnected incidents where county staff allegedly *violated* state
 5 laws (e.g., SAC ¶¶ 95, 96, 115), followed state laws (e.g., SAC ¶¶ 119, 122, 124), or
 6 took idiosyncratic individual actions (e.g., an election worker “display[ing] hostility”
 7 (SAC ¶ 97)). None of these alleged injuries are tied to any specific vote, voter, or
 8 protected group of voters, much less to the individual Plaintiffs. Such a “generalized
 9 grievance” is insufficient for Article III standing. *DaimlerChrysler Corp. v. Cuno*, 547
 10 U.S. 332, 344 (2006) (standing lacking where plaintiff “suffers in some indefinite way
 11 in common with people generally”); *see, e.g., Paher v. Cegavske*, 457 F. Supp. 3d 919,
 12 926 (D. Nev. 2020) (voters’ speculation that all-mail election would increase fraud,
 13 diluting their votes, was a generalized grievance, insufficient to confer standing); *Stein*
 14 *v. Cortes*, 223 F. Supp. 3d 423, 432-33 (E.D. Pa. 2016) (candidate’s speculation that
 15 election’s integrity was compromised was too generalized to support standing); *Lance*,
 16 549 U.S. at 441-42 (claims that are “plainly undifferentiated and common to all
 17 members of the public” are generalized grievances that do not confer standing). The
 18 individual Plaintiffs cannot resuscitate their standing based on the unreasonable
 19 assumption that the alleged scattershot of observer mistreatment will be replicated in
 20 every future California election. Speculative allegations unmoored from any particular
 21 Plaintiff are entirely insufficient to confer Article III standing. *Gill v. Whitford*, 138 S.
 22 Ct. 1916, 1931 (2018) (distinguishing individualized harm for voters challenging vote
 23 dilution in their districts from generalized harm of alleged statewide vote dilution).

24 ***b. Voter Plaintiffs Lack Standing for Vote Dilution Claims.***

25 Moreover—as with their previous complaints—Plaintiffs’ allegations are
 26 insufficient to support either of the individual Plaintiffs’ voting rights claims, which

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 28 ¹¹ The Ninth Circuit’s order did not disturb this holding as to the individual Plaintiffs
 or Plaintiffs’ general theory of the case.

1 both which solely on vote dilution harm.¹² SAC ¶¶ 153, 165 (“Plaintiffs have suffered
 2 damages *through the diminution in value of their votes* by reason of Defendants’
 3 violation of the [Equal Protection Clause/Due Process Clause].” (emphasis added)); *see*
 4 Dkt. 111 at 6. Previously, this Court correctly held that “[a]ssuming all allegations to
 5 be true, the Court is still left to speculate whether the present voting system will lead to
 6 concrete and particularized vote dilution which results in a specific group having their
 7 votes weighted differently.” Dkt. 111 at 9. The Ninth Circuit did not disturb this
 8 holding, and the SAC fails to address this flaw.

9 **2. Causation and Redressability.**

10 While the SAC narrows and clarifies Plaintiffs’ claims (although not their
 11 remedies), there is still a significant mismatch between the alleged injuries
 12 undergirding Plaintiffs’ two claims and the relief Plaintiffs seek. The sole harm
 13 alleged in both claims is a generalized concern about vote dilution. Plaintiffs worry
 14 that fraudulent or invalid ballots could be counted in California elections and therefore
 15 want to inspect and audit at least three past statewide elections and eliminate huge
 16 swaths of California’s Elections Code and implementing regulations, including those
 17 very regulations that guide signature verification and vote counting.

18 Neither Plaintiffs’ allegations nor their chosen claims support their wide-ranging
 19 requested relief. To the extent Plaintiffs allege county elections officials failed to
 20 follow the law resulting in vote dilution, the remedy of *eliminating* the laws is illogical.
 21 To the extent they allege Defendants did follow the laws, but the laws themselves

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 23 ¹² Courts consistently hold that individual voters lack standing to bring an Equal
 24 Protection or Due Process Clause claim for vote dilution due to unlawful or invalid
 25 ballots. *See Wood v. Raffensperger*, 501 F.Supp.3d 1310, 1322-23 (N.D. Ga. 2020)
 26 (collecting cases); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (“‘[V]ote
 27 dilution’ in the one-person, one-vote cases refers to the idea that each vote must carry
 28 equal weight.”). Vote dilution is a general grievance that cannot support a finding of
 particularized injury. *See Donald Trump for President, Inc. v. Cegavske*, 488 F. Supp.
 3d 993, 1000 (D. Nev. 2020) (“[P]laintiffs’ claims of a substantial risk of vote dilution
 ‘amount to general grievances.’”); *Bowyer v. Ducey*, 506 F.Supp.3d, 699, 711-12 (D.
 Ariz. 2020) (similar); *Martel v. Condos*, 487 F.Supp.3d 247, 253 (D. Vt. 2020)
 (similar); *Paher*, 457 F. Supp. 3d at 926-27 (similar); *Nolles v. State Comm. for*
Reorg. of Sch. Dists., 524 F.3d 892, 900 (8th Cir. 2008) (similar).

1 caused or may cause vote dilution, then the massive scope of the requested relief is
2 inappropriate and any retrospective relief, such as audits, is inapplicable. And, to the
3 extent Plaintiffs allege instances of past behavior that they cannot plausibly allege will
4 be repeated and that have no apparent connection to vote dilution—unlocked doors,
5 Plexiglass barriers used in 2020 for COVID-19 safety, and rude staff—*none* of
6 Plaintiffs’ requested relief addresses those alleged harms.

7 As an initial matter, because there are no specific allegations of injury as to the
8 individual Plaintiffs, Plaintiffs have failed to demonstrate causation or redressability,
9 as well. And Plaintiffs have never explained, including in the SAC, how engaging in a
10 duplicative, private audit of any past election—accompanied, presumably, by the
11 possibility of decertification—would undilute their votes. Yet they seek such an audit
12 once again, not only for the 2020 Election but all elections since. SAC at 39 (¶¶ 1, 2).

13 Assuming, *arguendo*, Plaintiffs have sufficiently pled mission or resources harm
14 to EIPCa (9th Circ. Order at 3-4), they still must show that EIPCa or the individual
15 Plaintiffs have standing for “each form of relief sought.” *DaimlerChrysler*, 547 U.S. at
16 352. Plaintiffs offer no explanation for how their harm would be remedied by the
17 inspection and audit of *past* elections, when they are, at base, seeking *forward*-looking
18 relief (declaratory relief and changes in law). There is no need for an audit years after
19 the fact unless one is trying to undo a past election, which Plaintiffs have disclaimed.

20 Finally, County Defendants have absolutely no authority related to “all ...
21 future bills that ... will expand VBM and all regulations that ... will not provide
22 uniform requirements regarding observation, signature verification, ballot remaking,
23 and voter rolls.” SAC at 40 n.3. County Defendants cannot be held accountable for
24 the hypothetical future actions of unknown voters, Legislatures, Governors, and
25 Secretaries of State in perpetuity. That is true notwithstanding the disproportionate and
26 speculative nature of Plaintiffs’ request, which ultimately aims to place California’s
27 election system into an unending, ill-conceived receivership based on allegations of a
28 handful of possibly mishandled ballots.

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3. All Plaintiffs Lack Standing Against San Benito and Santa Cruz Counties, Against Which There are No Allegations.

This is Plaintiffs’ third complaint without a *single* allegation against two named Defendants. Despite three filings and a meet and confer calling Plaintiffs’ attention to this omission, Plaintiffs have refused to either drop San Benito and Santa Cruz Counties or put those Defendants on notice of the allegations against them. *See* Dkt. 43 at 20 n.11; Dkt. 84 at 5 n.7; County Defs.’ Ans. Br. at 30 n.16.¹³ No plaintiff has standing to bring any claim against a defendant against which no wrong is alleged. *Iqbal*, 556 U.S. at 678 (complaint must contain allegations that allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged”).

B. Plaintiffs’ Claims Are Barred by Laches.

All of Plaintiffs’ claims in the SAC are barred by the doctrine of laches. To establish laches, Defendants must show that Plaintiffs unreasonably delayed in filing suit, causing prejudice to Defendants or the administration of justice. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 951-52 (9th Cir. 2001). Courts strongly disfavor delays in bringing lawsuits during an election cycle, much less after one. *Perry v. Judd*, 840 F. Supp. 2d 945, 950 (E.D. Va.), *aff’d*, 471 F. App’x 219, 227 (4th Cir. 2012) (“The Supreme Court has repeatedly expressed its disapproval of such disruptions.”); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (“In the context of elections, ... any claim against a state electoral procedure must be expressed expeditiously.”).

First, Plaintiffs have failed to seek timely state court remedies for any election at issue. Plaintiffs sat on their 2020 Election-related claims for weeks, if not months, for no legitimate reason, missing every state law deadline to challenge that election. By their own admission, Plaintiffs knew of their 2020 claims by the close of voting on November 3, 2020 at the latest. *E.g.*, SAC ¶¶ 96, 98, 100, 115-16, 118, 121. Yet they failed to file an election contest, which could have included their constitutional claims

¹³ RJN Ex. 2.

1 and would have received expedited review.¹⁴ Elec. Code § 16100; Cal. Code Civ.
 2 Proc. § 35. Nor did they seek a writ of mandate challenging how county elections
 3 officials were carrying out their mandatory duty to allow election observation and
 4 verify signatures to address these alleged harms. *See* Cal. Code Civ. Proc. § 1085.

5 Plaintiffs offer no explanation, much less a “legitimate excuse,” for their delay
 6 in filing this action. *See Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th
 7 Cir. 2006). Such a significant delay caused prejudice to County Defendants and the
 8 administration of justice. While Plaintiffs slept on their rights, millions of Californians
 9 cast their votes in the 2020 Election. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d
 10 925, 939 (7th Cir. 1984) (Posner, J., concurring) (“[O]ne who seeks the help of a court
 11 of equity must not sleep on his rights.”). California counties, including County
 12 Defendants, tabulated and certified votes, the Secretary of State certified the election
 13 results, newly elected officials took office, and the Electoral College tabulated votes
 14 for the next President—all while Plaintiffs failed to challenge the election and held
 15 back this lawsuit based on *facts and laws already well known to Plaintiffs*. Plaintiffs’
 16 2021 and 2022 Election-based allegations suffer from the same flaw. Plaintiffs filed
 17 no election contests or writ petitions, yet added allegations about those elections in the
 18 SAC, more than a year after the 2021 Election and months after the 2022 Election were
 19 certified—long after any harms could be remedied.

20 In light of these strategic and unexplained delays, the relief Plaintiffs continue to
 21 seek via elimination of California’s election law and an audit of long-passed elections
 22 “would be extreme, and entirely unprecedented.” *Bowyer*, 506 F.Supp.3d at 719; *see*
 23 *also, SW Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)
 24 (“Interference with impending elections is extraordinary, ... and interference with an
 25

26 ¹⁴ In such a challenge, Plaintiffs could have alleged, as they suggest now, that “illegal
 27 votes were cast,” that eligible voters “were denied their right to vote,” and that “there
 28 was an error in the vote-counting.” Elec. Code § 16100(d), (e), (g). However, to do
 so, they would have had to “prov[e] a defect in the election by clear and convincing
 evidence.” *Clark v. McCann*, 243 Cal. App. 4th 910, 915 (2015).

1 election after voting has begun is unprecedented.”); *see also King v. Whitmer*, 505
 2 F.Supp.3d 720, 732 (E.D. Mich. 2020) (barring, in part based on laches, an “after the
 3 fact” lawsuit alleging similar claims of widespread voter irregularities and fraud).
 4 Moreover, interfering with election results months—or for the 2020 Election, over two
 5 years—after their closure would grievously “harm the public in countless ways.”
 6 *Raffensperger*, 501 F.Supp.3d at 1331.

7 Second, more than two years after this case was filed, the SAC adds the
 8 elections officials in San Luis Obispo and Kern Counties, alleging 2020 Election
 9 irregularities based on evidence allegedly collected during or immediately after that
 10 election. SAC ¶¶ 124, 137. There is no legitimate reason why Plaintiffs should be
 11 allowed to bring election-related claims against these two Defendants *over two years*
 12 after the close of the relevant election.¹⁵ This late addition harms these Defendants,
 13 who have long since destroyed records that would be used to defend against Plaintiffs’
 14 claims.¹⁶ *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 839 (9th
 15 Cir. 2002) (laches will apply where defendant “will suffer prejudice from [plaintiffs’]
 16 delay”). Minimally, all claims against these two Defendants should be dismissed.

17 **C. Despite Three Pleadings, Plaintiffs Once Again Fail to State a Claim.**

18 Plaintiffs allege Equal Protection and Due Process Clause claims pursuant to 42
 19 U.S.C. § 1983. To state such a claim, Plaintiffs must allege that they were deprived of
 20 a right secured by the U.S. Constitution or the laws of the United States by someone
 21 acting under the color of state law. *League of Women Voters of Ohio v. Brunner*, 548
 22 F.3d 463, 475 (6th Cir. 2008). But “[i]t is hornbook law that Section 1983 does not
 23 provide a right of action for ‘garden variety election irregularities.’” *Soules v.*
 24 *Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988) (citation

25 _____
 26 ¹⁵ Although the SAC alleges 2021 irregularities in Kern County (SAC ¶¶ 97, 117), as
 explained above, those allegations are also barred by laches because Plaintiffs failed
 to seek any state court remedies for that election.

27 ¹⁶ Elections officials must destroy ballots 22 months after elections for President, Elec.
 Code § 17301, and 6 months after elections for state or local offices, *id.* § 17302.
 28 Other required destruction dates apply to other materials. *See id.* § 17300 *et seq.*

1 omitted). “Only a pervasive error which undermines the ‘organic processes’ of the
2 ballot is sufficient to trigger constitutional scrutiny.” *Id.* (citation omitted).

3 Plaintiffs do not sufficiently plead that County Defendants deprived Plaintiffs of
4 any right, privilege, or immunity granted them under the Constitution or federal law.
5 Rather, Plaintiffs allege scattershot complaints about election observer access and
6 signature verification processes, and irrelevant other incidents, that do not contain
7 specific, nonconclusory allegations that any votes were incorrectly tabulated or
8 otherwise mishandled. Instead, the SAC alleges conduct that left unidentified
9 individual observers (who are neither elections officials nor election experts) without
10 sufficient subjective assurance that some ballots in some counties were not validly cast.
11 None of Plaintiffs’ allegations support a reasonable inference that unlawful votes were
12 cast or lawful votes not counted—much less that California’s entire election law
13 scheme has or will result in fraudulent or inaccurate election results. Such a chain of
14 improbable events, even after two amendments, is not sufficient to make out an equal
15 protection or due process violation. And, to the extent Plaintiffs’ claims are based on
16 fraud, they entirely fail to meet the Rule 9 pleading standard.

17 **1. The SAC Does Not Comply with Rule 8 or Rule 9(b).**

18 Plaintiffs allege they have thousands of affidavits from election observers from
19 elections since November 2020 noting various irregularities. SAC ¶¶ 6, 126, 127. But,
20 despite a reasonable inference that the allegations in the SAC are Plaintiffs’ strongest
21 examples of malfeasance and constitutional violations, the SAC fails to pass muster
22 under Federal Rule of Civil Procedure 8(a)(2). *Iqbal*, 556 U.S. at 679 (“[W]here the
23 well-pleaded facts do not permit the court to infer more than the mere possibility of
24 misconduct, the complaint ... has not shown that the pleader is entitled to relief. Fed.
25 Rule Civ. Proc. 8(a)(2).”) (cleaned up).

26 Reading the allegations in the SAC together, Plaintiffs’ theory of the case seems
27 to be that County Defendants’ procedures allow for the possibility of invalid or
28 fraudulent ballots being counted. Such speculative assertions are insufficient to state a

1 claim that County Defendants’ actions or omissions infringed on Plaintiffs’
 2 constitutional right to vote in violation of the Equal Protection or Due Process Clauses.
 3 Even the few allegations that allegedly invalid ballots were counted are clearly
 4 conclusory and based on speculation or assumptions. For example, Plaintiffs allege
 5 that Los Angeles County observers witnessed “two different women drop off multiple
 6 ballots without voter signatures. Nevertheless, the ballots were counted by election
 7 officials for the 2020 general election.” SAC ¶ 118. It is inconceivable that these
 8 observers were able to track those specific ballots from drop off through the entire
 9 process and *know* they were counted. In other instances, the number of ballots at issue
 10 is entirely unclear, such as with broad allegations that “ballots” were mishandled or
 11 counted that should not have been counted, leaving Defendants and the Court without
 12 any guide as to the scope of harm. SAC ¶¶ 110, 120. Allegations about alleged
 13 insecurities such as purses in locations where ballots “could easily have been taken,”
 14 SAC ¶ 118, or unexplained unlocked doors, SAC ¶ 125, invite the Court to conclude
 15 that bad actors, including actors *other than Defendants*, took steps to undermine the
 16 election security without pleading the specific allegations necessary to draw that
 17 inference. Such allegations are insufficient to support a plausible inference that
 18 Plaintiffs have stated a claim that they are entitled to relief. *See Iqbal*, 556 U.S. at 678.

19 Further, Plaintiffs allege that state laws “promote fraud” and “create[] massive
 20 opportunities for ... fraud,” and suggest that fraudulent votes have or will be cast.
 21 SAC ¶¶ 53, 58, 60, 75, 82, 143, 158, 160. But to the extent that Plaintiffs allege fraud
 22 or mistake on the part of County Defendants, they fail to plead with particularity the
 23 circumstances to support such an allegation. Fed. R. Civ. P. 9(b).¹⁷

24 _____
 25 ¹⁷ Plaintiffs’ constitutional claims are based on allegations that County Defendants’
 26 actions or omissions increased the possibility of undetected election fraud. Yet the
 27 SAC lacks allegations that fraudulent ballots were in fact *cast and counted*. Plaintiffs
 28 speculate that *if* such ballots were cast, there is a *chance* that Defendants *might* have
 validated and counted the ballots and suggest that due to observer access issues, there
 is the *possibility* that County Defendants themselves could have engaged in fraud or
 mistake in duplication or tabulation. This fails to meet the *Twombly/Iqbal* pleading
 standard, and these allegations are insufficient under Rule 9(b), which requires

1 **2. Plaintiffs Fail to State a Claim for Relief.**

2 Plaintiffs’ allegations are insufficient to state a claim against County Defendants
3 under either the Equal Protection or Due Process Clauses. Instead, Plaintiffs’
4 allegations amount to speculation that County Defendants’ processes and protocols
5 create irregularities that could incrementally increase the potential for election fraud to
6 go unnoticed. But the “Constitution is not an election fraud statute.” *Bodine v. Elkhart*
7 *County Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). “It is not every election
8 irregularity ... which will give rise to a constitutional claim.” *Id.* Rather, “garden
9 variety election irregularities that could have been adequately dealt with through the
10 procedures set forth in [state] law” do not support constitutional due process claims.
11 *Id.*; see also *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (“[G]arden
12 variety election irregularities do not violate the Due Process Clause, even if they
13 control the outcome of the vote or election.”). For a due process violation based on a
14 theory of vote dilution, Plaintiffs must allege that voters in different counties were
15 subject to statistically significant inaccuracies in vote tabulation without a rational
16 basis. See, e.g., *Black v. McGuffage*, 209 F. Supp. 2d 889, 901 (N.D. Ill. 2002) (“The
17 crux of the matter ... [is] that a law that allows significantly inaccurate systems of vote
18 counting to be imposed upon some portions of the electorate and not others without
19 any rational basis runs afoul of the due process clause of the U.S. Constitution.”) And
20 in order to plead an equal protection violation, Plaintiffs must plead allegations that an
21 identifiable class of voters to which Plaintiffs belong or represent—such as groups
22 based on “race, sex, economic status, or place of residence within a State,” *Reynolds v.*
23 *Sims*, 377 U.S. 533, 561 (1964)—is disfavored, where the “favored group has full
24 voting strength and the groups not in favor have their votes discounted,” *id.* at 555
25 n.29. The allegations in the SAC are insufficient to support either theory of relief.

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28 pleading of the time, place, and content of the alleged fraud. *Stack v. Lobo*, 903 F.
Supp. 1361, 1367 (N.D. Cal. 1995) (“Merely making general conclusory allegations
of fraud, and then reciting a list of neutral facts, is not sufficient.”) (citation omitted).

1 To the contrary, Plaintiffs point to scattershot instances where observers were
 2 dissatisfied with the level of access allegedly provided to them and to alleged election
 3 security deficiencies, without making *any* assertions that those irregularities rise to the
 4 level of a constitutional violation that impeded the right to vote. SAC ¶¶ 91-104.
 5 Although Plaintiffs allege to have additional incident reports, their actual allegations
 6 fail to give rise to a reasonable inference that the 2020, 2021, or 2022 Elections were
 7 inherently flawed or that vote dilution occurred or will occur in the future. Similarly,
 8 Plaintiffs' allegations of deficient signature verification are often conclusory and
 9 speculate that invalid ballots may have (or may one day be) counted. The SAC's
 10 continued reliance on the alleged increased "possibility" for invalid votes to be
 11 counted, especially without sufficient allegations that such ballots *were* actually
 12 counted on a scale that calls into question the integrity of any election, fundamentally
 13 undermines the claim that County Defendants' conduct infringed Plaintiffs'
 14 constitutional rights. *See* SAC ¶¶ 58, 60, 75, 82, 143; *see also Iqbal*, 556 U.S. at 678.

15 **a. Plaintiffs Allege a Generalized Grievance Rather Than**
 16 **Unconstitutional Vote Dilution or Different Treatment.**

17 Courts have recognized narrow circumstances in which alleged vote dilution
 18 states a claim that a voter's constitutional rights have been infringed, tending to leave
 19 to the political process and state courts resolution of most election related claims. This
 20 judicial restraint is based on a recognition that "garden variety election irregularities"
 21 do not rise to the level of constitutional violations. *Bennett*, 140 F.3d at 1226.

22 To plead a violation of the Equal Protection Clause, Plaintiffs must allege that 1)
 23 they belong to or represent a distinct group of voters that 2) experiences unfavorable
 24 different treatment in 3) the weighing of their votes. *See Reynolds*, 377 U.S. at 555
 25 n.29; *Baker v. Carr*, 369 U.S. 186, 206 (1962). Plaintiffs allege that in-person and
 26 VBM voters are treated differently because VBM voters have more time to vote and
 27 VBM ballots are allegedly less scrutinized, SAC ¶¶ 130-42, a claim that fails in three
 28 respects. First, those are not distinct groups of voters as *all* registered, active voters in

1 California are mailed a VBM ballot and *any* voter can, of their own volition, be an in-
 2 person or VBM voter. Second, allegations regarding additional time for VBM voters
 3 to vote are not well-pled. Plaintiffs allege the Secretary of State offered guidance
 4 stating that ballots could be deposited in drop boxes after the close of voting at 8 p.m.
 5 on Election Day. SAC ¶¶ 131-4. This misstates the legal requirements for accepting
 6 ballots arriving by mail, and Plaintiffs have not cited to any such guidance despite the
 7 fact that all guidance from the Secretary is publicly available.¹⁸ Plaintiffs fail to
 8 identify when or where this guidance was offered or can be found; without this, the
 9 mere assertion that it exists is not well-pled. *Sprewell v. Golden State Warriors*, 266
 10 F.3d 979, 988 (9th Cir. 2001) (the court need not accept as true allegations that are
 11 conclusory or “that contradict matters properly subject to judicial notice”). And a
 12 conclusory allegation that EIPCa has recorded late voting and pickups of ballots from
 13 mailboxes, SAC ¶ 133, does not support the inference that those late ballots were
 14 *counted* in violation of the law. Third, to the extent that any invalid or fraudulent
 15 VBM ballots were counted, the harm of those invalid votes does not tend to propound
 16 to lawful in-person voters as compared to lawful VBM voters. *See Raffensperger*, 501
 17 F.Supp.3d at 1322-23 (collecting cases); *see also supra* Section III.A. Plaintiffs simply
 18 fail to plead any meaningful different treatment between these alleged two groups of
 19 voters.

20 For their Due Process Clause claim, Plaintiffs need to allege their fundamental
 21 right to vote was or is infringed by vote dilution that is particularized to identifiable
 22 voters, rather than generalized to all voters. But federal courts have uniformly found
 23 that greater election irregularities than those alleged by Plaintiffs do not rise to the
 24

25 ¹⁸ An unsupported allegation that such guidance was issued, when it would have been
 26 plainly contrary to law, need not be taken as true when publicly available facts suggest
 27 no such guidance exists. *White*, 227 F.3d at 1242 (The “court may look beyond the
 28 complaint to matters of public record” when ruling on a Rule 12(b)(1) motion.). All
 available guidance from the Secretary of State includes the 8 p.m. deadline and
 reiterates that ballot drop boxes should be locked and secured. *See, e.g.,* RJN Exs. 8,
 9, 10. An archive of the Secretary’s guidance to county elections officials is available
 at <https://www.sos.ca.gov/elections/advisories-county-elections-officials>.

1 level of Due Process violations. *See Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir.
2 1975) (malfunctioning voting machines); *Gold v. Feinberg*, 101 F.3d 796, 801-02 (2d
3 Cir. 1996) (human error in miscounting votes; delayed voting machine delivery);
4 *Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986) (inadequate response to illegal
5 cross-over voting); *Bodine*, 788 F.2d at 1272 (mechanical and human error in counting
6 votes); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (ballot
7 printing errors); *Powell v. Power*, 436 F.2d 84, 85-86 (2d Cir. 1970) (non-party
8 member votes in congressional primary); *Johnson v. Hood*, 430 F.2d 610, 612-13 (5th
9 Cir. 1970) (arbitrary rejection of ten ballots).

10 The Ninth Circuit held that Plaintiff EIPCa has organizational standing because
11 the FAC “adequately allege[d] that the defendant’s behavior has frustrated its mission”
12 of using observers to “advocate for greater election integrity,” and “caused it to divert
13 resources in response to that frustration of purpose.” 9th Circ. Order at 3 (quotations
14 omitted). But nowhere did the Ninth Circuit hold that EIPCa was harmed by the
15 dilution of the votes of any particular group or of its members, or that it represented
16 any such group. Yet, generalized concern about vote dilution harming hypothetical
17 voters due to the possibility of invalid ballots being counted is the *sole* injury
18 supporting both of Plaintiffs’ constitutional claims. *See* SAC ¶¶ 153, 165. Without
19 allegations of a particularized constitutional harm to a specific voter or group of voters,
20 Plaintiffs have failed to pair EIPCa’s alleged organizational harm with any claim.
21 Therefore, the SAC fails to state a claim for relief.

22 ***b. Inability to Observe Elections Processes Does Not Harm***
23 ***Plaintiffs’ Voting Rights.***

24 In their third bite at the apple, Plaintiffs continue to heavily rely on allegations
25 related to election observer access and ability to observe all portions of the election
26 process. While there is a qualified state statutory right for election observation, *see*

27 ///

28 ///

1 Elec. Code § 2300(a)(9),¹⁹ the inability to observe portions of the elections process
 2 does not injure Plaintiffs’ voting rights. *See, e.g., Republican Party of Pa. v. Cortes*,
 3 218 F. Supp. 3d 396, 407 (E.D. Pa. 2016). Plaintiffs did not avail themselves of state
 4 court remedies that could address any meritorious concerns regarding election
 5 observation policies while the elections were underway, despite Defendants repeatedly
 6 noting the availability of such avenues for relief throughout this litigation, including
 7 *before* the 2021 and 2022 Elections.²⁰ State courts give priority to election matters,
 8 including allegations of an “error, omission, or neglect [that] is in violation of [the
 9 California Elections] code or the Constitution.” Elec. Code § 13314(a)(2); *see also*
 10 Cal. Code Civ. Proc. § 35 (giving election matters priority).

11 At base, Plaintiffs’ observer-related allegations seek to create speculation that
 12 Californians’ right to vote is impaired, without well-pled allegations drawing a logical
 13 inference between obstruction of observation and vote dilution. Plaintiffs ask the
 14 Court to draw a straight line between (1) some observers allegedly experiencing
 15 barriers to observation (including during a public health emergency), (2) the likelihood
 16 that election irregularities will go unchecked, despite numerous controls and required
 17 post-election audits, and (3) the dilution of some group of voters’ votes (distinct from
 18 generalized, incremental harm to all voters). This is insufficient to state a claim of a
 19 constitutional violation. *See Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d
 20 331, 418 (W.D. Pa. 2020) (“While vote dilution is a recognized burden on the right to
 21 vote in certain contexts, such as when laws are crafted that structurally devalue one
 22

23 ¹⁹ The right to observe an election is not a right to unfettered access or questioning.
 24 Observers cannot interfere with the processing of VBM ballots, ask disruptive
 25 questions, or challenge ballots other than on identified statutory grounds. *See* Elec.
 26 Code §§ 2300(a)(9)(b), 14240, 15104(e), 15105.

27 ²⁰ Plaintiffs do not plead that differential treatment of observers or inability to observe
 28 violates the Equal Protection or Due Process Clauses. If they did, County Defendants
 would need to show only a rational basis for their policies. *See Cortes*, 218 F. Supp.
 3d at 408 (*Anderson-Burdick* framework does not apply where the right to vote is not
 implicated, such as with election observer policies that restrict observation to only
 county residents.); *see also Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018)
 (explaining *Anderson-Burdick* framework). Given huge disparities in the number of
 voters, and the ongoing public health emergency, that burden would be easily met.

1 community's or group of people's votes over another's, there is no authority to support
 2 a finding of burden based solely on a speculative, future possibility that election
 3 irregularities might occur.") (collecting cases).

4 **c. *The Signature Verification Allegations are Conclusory and***
 5 ***Reflect Lawful Actions and Statewide Standards.***

6 Plaintiffs allege that County Defendants' processes for signature verification
 7 violate the Equal Protection and Due Process Clauses because they fall short of
 8 statutory standards and are less reliable than processes used in other counties in
 9 California. Citing *Bush v. Gore*, Plaintiffs allege that these variations demonstrate that
 10 California lacks sufficient statewide standards in signature verification to ensure that
 11 county elections officials "avoid arbitrary and disparate treatment" of voters.
 12 SAC ¶¶ 106, 108, 126-27, 138, 150-51, 164; see *Bush v. Gore*, 531 U.S. 98, 105
 13 (2000). But Plaintiffs' allegations are conclusory, speculative, and are not equivalent
 14 to the nature and scale of harm at issue in *Bush v. Gore* and its progeny.

15 Courts have repeatedly held that counties may adopt different practices that
 16 serve those jurisdictions' "interests in efficiently allocating [their] election resources
 17 and administering elections in an orderly manner," when those administrative interests
 18 outweigh any minimal burden on Plaintiffs' rights. See *Mays v. LaRose*, 951 F.3d 775,
 19 783 (6th Cir. 2020); see also *Harlan v. Scholz*, 866 F.3d 754, 755-56 (7th Cir. 2017).
 20 Nothing about variations in County Defendants' practices or policies make County
 21 Defendants' practices or policies unlawful. These differences reflect the discretion
 22 afforded to counties as subdivisions of the State to operate effective and fair elections
 23 within the framework of state and federal election law. Far from showing—or even
 24 inferring—wrongdoing, Plaintiffs' highlight differences (*i.e.*, different numbers of
 25 reviewers, or number of signatures per screen) that merely represent the ordinary,
 26 practical variation among counties of different sizes. See RJN Exs. 3-5.

27 Unlike Florida's infirm recount standards in *Bush v. Gore*, California has robust
 28 signature verification standards in both Elections Code section 3019 and Title 2,

1 section 20960 of the California Code of Regulations. Under these standards, the
2 signature on a VBM envelope is presumed to be that of the voter and should only be
3 rejected if, on a second review, two election officials find “beyond a reasonable doubt”
4 that the signature does not match. Elec. Code § 3019(a)(2)(A), (c)(2). These standards
5 reflect the Legislature’s well-reasoned judgment, despite Plaintiffs’ view to the
6 contrary, that returned VBM ballots generally bear sufficient indicia of reliability.

7 Moreover, Plaintiffs fail to show that any of the alleged county variations have
8 or will harm Plaintiffs. They allege that “election workers even counted ballots with
9 no signatures or signatures that did not match the identity of the voter,” SAC ¶ 110, but
10 fail to allege when or where this happened, or how many such ballots were allegedly
11 counted among the *tens of millions* of ballots cast in 2020, 2021, and 2022. Plaintiffs
12 allege that review was too fast (SAC ¶¶ 118, 120, 122, 125), but these conclusory
13 statements by untrained laypeople cannot support a reasonable inference that review
14 was inadequate or likely to allow for the counting of invalid ballots. Instead, Plaintiffs
15 rely on speculation and unpled assumptions about the likelihood of election fraud.

16 At most, the SAC alleges that perhaps a handful of ballots without properly
17 verified signatures were mistakenly counted across the state. Statewide standards, like
18 California’s, cannot guard against all mistakes, and as *Bush v. Gore* and its progeny
19 make clear, allegations of a handful of mistakes are not sufficient to find the standards
20 unconstitutional. *See Bush v. Gore*, 531 U.S. at 109 (holding that minimal statewide
21 procedural safeguards are required in vote tabulation but recognizing variation within
22 those standards is permissible); *Democratic Cong. Campaign Comm. v. Kosinski*, 2022
23 WL 2712882, at *20 (S.D.N.Y. July 13, 2022) (“[State standards] simply cannot
24 guarantee against arbitrary mistakes, as no standard can do.”). Nothing in the SAC
25 suggests systematic errors on the part of *any* County Defendant.

26 Plaintiffs’ attempt to demonstrate an Equal Protection violation by comparing
27 County Defendants’ practices to those of non-defendant Placer, Solano, and Siskiyou
28 Counties falls flat. Plaintiffs claim those counties allow more time for signature

1 review and have additional layers of review. SAC ¶¶ 106, 107, 112. This lawful
 2 variation is expected since those counties are much smaller than County Defendants.
 3 In November 2020, these three comparators had 270,599, 259,161, and *just* 29,240
 4 registered voters. RJN Ex. 3. Only four County Defendants had fewer than 400,000
 5 registered voters,²¹ five had more than a million registered voters, and Los Angeles
 6 County had almost six million. *Id.* Common sense suggests that the process for and
 7 speed of signature review in counties with such dramatically different numbers of
 8 ballots may differ. And again, the SAC has scant (and vague) allegations of invalid
 9 ballots actually being counted, which is insufficient to raise a constitutional claim.

10 ***d. Allegations of “Irregularities” Reflect Plaintiffs’ Lack of***
 11 ***Understanding of Election Processes.***

12 The SAC includes numerous allegations that, on their face, are consistent with
 13 proper procedures and reveal that Plaintiffs or their observers misunderstand the
 14 election process, not that County Defendants are counting invalid votes or otherwise
 15 interfering with proper tabulation. These allegations are plainly insufficient to support
 16 a claim based on vote dilution when, if true, they demonstrate adherence to the
 17 principles of ensuring all valid votes are counted.

18 ***Ballot duplication.*** Plaintiffs’ ballot duplication allegations show observers
 19 witnessing that process as it was designed. Duplication requires election workers to
 20 ascertain the voter’s intent pursuant to the uniform vote count standards in 2 Cal. Code
 21 Reg. §§ 20980-85. Alameda County thus correctly duplicated ballots “without any
 22 input from the voter,” since voters are not present during the duplication process. SAC
 23 ¶ 114. Plaintiffs’ allegation that Riverside County lacked a “method of accountability”
 24 for duplication, SAC ¶ 101, fails to allege that any voter’s intent was not accurately
 25 reflected on remade ballots and to account for the presumption that government
 26 employees have regularly performed their official duties. Evid. Code § 664.

27 _____
 28 ²¹ Two of these “smaller” counties are San Benito and Santa Cruz Counties, against
 whom no allegations are pled at all. *See supra* § III.A.3.

1 **Signature verification.** Plaintiffs' signature verification allegations also
 2 demonstrate a lack of understanding of election processes. For example, inactive
 3 voters are legally entitled to vote pursuant to Elections Code sections 2000 and 2101.
 4 *But see* SAC ¶¶ 64, 117. Signature verification does not happen curbside at a ballot
 5 drop box because the process requires comparison with the voter's signature on file,
 6 *but see* SAC ¶ 121, and voters with signature issues may cure the defect. Elec. Code
 7 § 3019. Voters are also permitted to have someone else return their VBM ballot.
 8 While that individual is supposed to also sign the envelope, state law permits ballot
 9 verification without that individual's signature if the voter's signature matches (or is
 10 cured). *See id.* §§ 3017, 3019. Allegations of County Defendants following those
 11 procedures, without any allegation that persons returning VBM ballots were engaged
 12 in malfeasance, are insufficient to support a vote dilution claim. *See* SAC ¶¶ 118, 124.

13 **Uniform vote count standards.** The SAC also alleges, although framed as
 14 unlawful behavior, *proper* application of the uniform vote count standards when
 15 evaluating ballots. For example, these standards provide that elections officials should
 16 not count a vote that is crossed out by the voter when another vote is indicated, if that
 17 is a consistent practice of the voter. *See* 2 Cal. Code Regs. §§ 20982(c), 20983(c)(6).
 18 Plaintiffs' allegations regarding how Sacramento County tabulated votes when one
 19 mark was crossed out are *consistent* with those standards. SAC ¶ 122.

20 **D. Plaintiffs' Case Should Be Dismissed with Prejudice.**

21 Leave to amend is inappropriate where Plaintiffs have had several opportunities
 22 to provide additional allegations to cure the deficiencies in their complaint. Despite
 23 new and rearranged allegations, the gravamen of the complaint has not changed—and
 24 County Defendants' core arguments regarding pleading deficiencies remain
 25 fundamentally unchanged. Plaintiffs continue to plead speculative, conclusory
 26 allegations that fail to state a claim upon which relief may be granted.

27 **IV. CONCLUSION**

28 This action should, once again, be dismissed in full without leave to amend.

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Dated: March 30, 2023

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ATTESTATION

24

I, Mary E. Hanna-Weir, am the ECF user whose ID and password are being
used to file the above Notice of Motion and Motion to Dismiss Plaintiffs' Second
Amended Compliant. In compliance with Civil Local Rule 5-4.3.4(2)(I), I hereby
attest that each listed counsel above has concurred in this filing.

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/s/ MARY E. HANNA-WEIR

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CERTIFICATION OF COMPLIANCE

The undersigned, counsel of record for Defendant Shannon Bushey, Registrar of Voters for the County of Santa Clara, certify that this brief contains 25 pages, which complies with the page limit of Judge André Birotte Jr.’s Standing Order.

Respectfully submitted,

Dated: March 30, 2023

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