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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELECTION INTEGRITY PROJECT CALIFORNIA, INC., et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:21-cv-32-AB-MAA

PLAINTIFFS' COMBINED OPPOSITION TO:

(1) COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT (DOCKET NO. 162); AND

(2) STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT (DOCKET NO. 163)

Date: May 12, 2023
Time: 10:00 A.M.
Courtroom: 7B
Judge: Honorable André Birotte Jr.

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I. INTRODUCTION

This case is a civil rights lawsuit seeking to protect the right to vote. No right is more sacred than the right to vote, as it involves "matters close to the core of our constitutional system." *Carrington v. Rash,* 380 U.S. 89, 96 (1965). Over the years, California has passed laws, orders, and regulations under the guise of increasing voter participation. Although a laudable goal, these laws and regulations have systemically undermined election integrity by eliminating chain of custody, solidifying universal vote-by-mail ("VBM"), and gutting signature verification requirements.

Plaintiffs bring this case to ensure the integrity of future elections, and to ensure all votes are counted equally, for "(f)ree and honest elections are the very foundation of our republican form of government." *MacDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting). Plaintiffs' constitutional causes of action turn on the State Defendants'[1] and County Defendants'[2] disparate treatment of specific groups of voters and failure to ensure votes carry the same weight. Plaintiffs' allegations are supported by hundreds of declarations signed under penalty of perjury documenting irregularities in counties where the individual Plaintiffs vote and reside. Courts have consistently found equal protection and due process violations when state law enables uneven and precarious vote counting procedures. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000).

Nevertheless, the Defendants attempt to dismiss this case for a second time. Their motions include far-fetched and outdated arguments. This Court should deny their motions for the following reasons.

First, Plaintiffs' constitutional claims are not subject to Rule 9(b)'s pleading standard. Plaintiffs do not allege specific elements of fraud.

Second, laches does not apply here because voting rights' cases require a showing that plaintiffs deliberately delayed bringing a lawsuit. Plaintiffs brought this lawsuit soon after they gathered the necessary facts and witness testimony that supported their claims. And their injuries are ongoing and the result of a permanent state-sanctioned system.

[1] The State Defendants hereinafter refer to Secretary of State Shirley Weber and Attorney General Rob Bonta.

[2] The County Defendants hereinafter refer to the Defendant County Registrars.

Third, the Ninth Circuit has already found Plaintiff Election Integrity Project California (EIPCa) has standing, rendering a finding of individual standing superfluous. *Election Integrity Project California, Inc. v. Weber*, No. 21-56061, 2022 WL 16647768, at *2 (9th Cir. Nov. 3, 2022) ("Because EIPCa has standing, we do not need to reach the question whether any other plaintiff has standing to reverse the district court's judgment.") (citing *Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022)).

Fourth, Plaintiffs' claims are supported by Supreme Court precedent. Indeed, if this Court were to find Plaintiffs' equal protection or due process claims are not viable, it would render *Bush* a dead letter. *Bush* clearly establishes that vote dilution is not limited to malapportionment or state reapportionment cases but occurs any time a state-sanctioned system increases the chances that a portion of the electorate will have their votes diluted. 531 U.S. at 109, 125.

Accordingly, this Court should deny the Defendants' Motions to Dismiss the Second Amended Complaint (SAC).

II. APPLICABLE LEGAL STANDARD

A Federal Rules of Civil Procedure 12(b)(1) motion challenges a court's subject matter jurisdiction either facially, claiming that the facts accepted as true do not establish jurisdiction, or factually, claiming that the facts establishing jurisdiction are not true. *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In determining a facial attack, a court must accept the allegations in the complaint as true. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Likewise, in determining a factual attack, "when the issue of subject-matter jurisdiction is intertwined with an element of the merits of the plaintiff's claim" (*id*. at 1122 n.3), the court "must 'assume [ ] the truth of the allegations in a complaint ... unless controverted by undisputed facts in the record.'" *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)).

In considering a motion to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). This is a very liberal standard. "In order for a complaint to survive a 12(b)(6)

motion, it must state a claim for relief that is plausible on its face." *In re Med. Cap. Sec. Litig.*, 842 F. Supp. 2d 1208, 1210 (C.D. Cal. 2012). "A claim for relief is facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct." *Id.*

The standard for motions to dismiss is especially liberal when applied to constitutional claims, which are governed by Rule 8 of the Federal Rules of Civil Procedure. Rule 8's burden is "minimal," and requires only that the plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 955 (C.D. Cal. 2001) (quotations omitted). "It is the burden of the party bringing a motion to dismiss for failure to state a claim to demonstrate that the requirements of Rule 8(a)(2) have not been met." *Id.*

III. ARGUMENT

A. The SAC Is Not Subject To Rule 9(b)'s Pleading Standard

The County Defendants improperly suggest Plaintiffs' claims are subject to Rule 9(b)'s heightened pleading standard. County Defendants' Motion to Dismiss Plaintiffs' SAC ("County Defendants' Br.") at 15-16, ECF No. 162. They claim the allegations about unexplained unlocked doors and ballots open for the public to take "invite the Court to conclude that bad actors, including actors *other than Defendants*, took steps to undermine election integrity without pleading the specific allegations necessary to draw that inference." *Id.* at 16 (emphasis in original).

The County Defendants misconstrue Plaintiffs' claims. Plaintiffs include these allegations to demonstrate the lack of chain of custody inherent in the state-sanctioned election procedures. The thrust of Plaintiffs' claims is that the laws, regulations, and procedures enable unsecure and disparate practices.

Rule 9(b) applies only "in alleging fraud or mistake." Fed. R. Civ. P. 9(b). The SAC does not allege "fraud or mistake." Fraud includes specific elements that are not identified in the SAC.[3] Plaintiffs bring claims for violations of the Equal Protection Clause and Due Process Clause. Plaintiffs

[3] Further, even if there were elements of fraud, which there are not, they would fall under the Rule 9(b) exception for allegations of "[m]alice, intent, knowledge, and other conditions of a person's mind," which "may be alleged *generally*." Fed. R. Civ. P. 9(b) (emphasis added).

identify election irregularities but do not indicate that they consist of the specific elements of fraud. These potentially outcome-changing irregularities such as individuals inadvertently counting improper and ineligible ballots do not necessarily amount to fraud. Thus, Plaintiffs' claims are subject to Rule 8.

B. Defendants' Laches Argument Is Improper On A Motion To Dismiss And Fails To Meet The High Bar Required In Voting Rights Cases

The County Defendants erroneously assert that Plaintiffs' claims are barred by laches. County Defendants' Br. at 12-14. To establish laches, a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. *See, e.g.*, *Lingenfelter v. Keystone Consolidated Indus., Inc*., 691 F.2d 339, 340 (7th Cir.1982). As an initial matter, "ordinarily a motion to dismiss is not the appropriate vehicle to address the defense of laches," *American Commercial Barge Lines, LLC v. Reserve FTL, Inc*., 2002 WL 31749171 (N.D. Ill. Dec. 3, 2002) (citing *Farries v. Stanadyne/Chicago Div*., 832 F.2d 374, 376 (7th Cir. 1987)), because "the defense of laches … involves more than the mere lapse of time and depends largely on questions of fact." *Id*. Accordingly, most courts have found the defense "unsuitable for resolution at the pleading stage." *Id*.

The bar for laches is even higher in the voting rights or election context, where defendants asserting the equitable defense must show that the delay was due to a "*deliberate*" choice to bypass judicial remedies, and they must do so "by clear and convincing" evidence. *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973) (emphasis added). The Defendants fail to address this high bar.

The County Defendants assume that Plaintiffs "knew of their 2020 claims by the close of voting on November 3, 2020…." County Defendants' Br. at 12. Plaintiffs could not have known the basis of these claims or presented evidence substantiating their claims until after the election. Plaintiffs needed additional time after the election to gather facts and witness testimony presented in the original complaint. Plaintiffs filed within two months of the November 2020 election.

Further, Plaintiffs' lawsuit includes claims related to the 2021 and 2022 elections. SAC ¶¶ 105-29. Plaintiffs seek declaratory relief and injunctive relief, enjoining enforcement of California's laws, regulations, and procedures. *Id.* at 40:1-13; *See, e.g.*, *Danjaq LLC v. Sony Corp*., 263 F.3d 942, 959–60 (9th Cir. 2001) ("Laches stems from prejudice to the defendant occasioned by the plaintiff's

past delay, but almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm.") (internal citation omitted).

C. The Individual Plaintiffs Have Article III Standing

The Ninth Circuit has already held that EIPCa has organizational standing. *Weber*, No. 21-56061, 2022 WL 16647768, at *2-3. For this reason alone, this Court should disregard Defendants' arguments regarding standing. *See Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (holding the Court "need not address standing of each plaintiff if it concludes that one plaintiff has standing").

Even if this Court entertains the standing of the individual Plaintiffs, they, too, sufficiently allege standing. To establish Article III standing, a plaintiff must demonstrate that he or she has "(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*, U.S. 330, 338 (2018).

1. The individual Plaintiffs have alleged "concrete and particularized" injuries that are "actual and imminent"

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss '[courts] presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). To establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized," "affect[s] the plaintiff in a personal and individual way," and is "actual or imminent…." *Lujan*, 504 U.S. at 560.

Plaintiffs' allegations find support in *Baker* and *Reynolds*. In *Baker*, the Court held the appellants had standing because they were asserting "'a plain, direct, and adequate interest in maintaining the effectiveness of their vote'…." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939)), "not merely a claim of 'the right possessed by every citizen to require that the government be administered according to the law.'" *Id.* (citing *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)). *Reynolds* affirmed *Baker*, holding that vote dilution was defined as where a certain group of votes are weighted differently. *Reynolds v. Sims*, 377 U.S. 533, 555-56

(1964). Even though *Baker* and *Reynolds* involved state reapportionment statutes, they hold that vote dilution occurs any time a "favored group has full voting strength…[and t]he groups not in favor have their votes diluted." *Id.* at 555 n.29 (quoting *South v. Peters*, 399 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

Indeed, before *Baker* and *Reynolds*, the Supreme Court has recognized dilution by false tally, *United States v. Classic*, 313 U.S. 299 (1941), and ballot-box stuffing, *United States v. Saylor*, 322 U.S. 385 (1944). Following *Baker* and *Reynolds*, courts have conferred standing and found equal protection violations when individuals have improperly cast and counted votes, leading to the dilution of properly cast votes, *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985), and when states lack uniform and secure election procedures, diluting the votes of citizens in certain counties, *Bush*, 531 U.S. at 106-07.

First, Plaintiffs allege the county registrars implemented different election rules and practices, thereby disadvantaging voters in certain counties. Second, and as a corollary to the first argument, Plaintiffs allege that in-person voters were subject to unequal treatment compared to VBM voters, and this unequal treatment disproportionately burdens Black and minority voters, including at least one Plaintiff. These injuries are actual and imminent because Plaintiffs allege that they vote and reside in the counties where the irregularities have occurred during the past elections, and the injuries are the result of a state-authorized system.

(a) *Plaintiffs have alleged that the state lacks uniform and secure voting laws, diluting the votes of citizens in certain counties, including Plaintiffs*

Defendants misconstrue the nature of Plaintiffs' claims and try to shoehorn them into the post-2020 election cases. County Defendants' Br. at 7; State Defendants' Motion to Dismiss Plaintiffs' SAC (State Defendants' Br.) at 9, ECF No. 163.1. In the cited cases, the plaintiffs alleged violations of state law that enabled widespread fraud and manipulation but did not explain how specific voters were disadvantaged. *See, e.g., Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz.2020) (holding this theory of vote dilution was inadequate because the plaintiffs did not allege "what 'class' of voters were treated disparately."); *Wood v. Raffensperger*, No. 1:20-cv-5155, 2020 WL 7706833, at *3 (N.D. Ga. Dec.28, 2020) (same); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) (same).

The County Defendants' reliance on *Stein v. Cortes*, 223 F. Supp. 3d 423, 432-33 (E.D. Pa. 2016) is also misplaced. County Defendants' Br. at 9. There, plaintiffs alleged the vote machines were vulnerable and hackable and questioned whether the votes were counted correctly. *Stein*, 223 F. Supp. 3d at 432. Because the plaintiffs sought to bring the case on behalf of all Pennsylvania voters and could not show how they were specifically disadvantaged, the court did not confer standing. *Id.* at 433.

The individual Plaintiffs do not bring this case on behalf of all California voters because not all voters are harmed in a similar fashion. Plaintiffs' claims are akin to the claims raised in *Bush*, where the record revealed that the counties applied different standards in defining a legal vote in Florida during the presidential recount. 531 U.S. at 106. For instance, "Broward County used a more forgiving standard than Palm Beach County…." *Id.* at 107. The Court held the recount could not proceed because "it [was] obvious that the recount [could not] be conduct[ed] with the requirements of equal protection and due process without substantial additional work." *Id.* at 110.

The thrust of Plaintiffs' case is that the County Defendants' disparate practices regarding voter signature verification, ballot remaking, and maintenance of voter rolls inherently lead to uneven results across counties, including the counties where Plaintiffs reside. SAC ¶¶ 18-22, 105-28, 136-40, 151, 163. Plaintiffs also emphasize that specific counties not listed in the lawsuit implemented more robust procedures with regards to signature verification and ballot remaking and therefore did not report issues. *Id.* ¶¶ 107, 112, 151, 163. Thus, the cases filed after the 2020 election are not instructive.

(b) *Plaintiffs have alleged that the Defendants' lack of uniform and secure practices treat VBM voters different than in-person voters, devaluing the votes of in-person voters, including Plaintiffs*

California's election laws and procedures not only enable uneven practices across counties, but the dilution of in-person votes in the counties where irregularities have occurred. California has passed laws and orders massively expanding VBM with no meaningful chain of custody. SAC ¶¶ 63-64. In 2020, the Secretary of State also issued regulations that were not uniform, meaningful, or robust, and they remain effective today. *Id.* ¶¶ 65-67. For instance, California's law and regulations

give election workers discretion with regards to signature verification and ballot remaking. *Id.* ¶¶ 69, 106-12. The laws and regulations require that the comparison of signatures begin with the basic presumption that the signature on the petition or envelope is the voter's signature and nullify rejections based on computer signature recognition technology. *Id.* ¶¶ 67, 74. The inadequate procedures implemented by County Defendants "resulted in elections workers in [those] counties approving VBM ballots that did not match the signature samples on record. Some election workers even counted ballots with no signatures or signatures that did not match the identity of the voter." *Id.* ¶ 110.

Moreover, in 2020, EIPCA collected information revealing that around 596 Nevadans voted in the counties listed in this lawsuit. *Id.* ¶ 136. Almost 124,000 ineligible votes were counted in the 2020 election, and "Kern County, Riverside County, Orange County, and Los Angeles County recorded higher discrepancies by percentage between VBM votes and VBM registrants with voting histories than non-defendant counties like Butte County and Glenn County." *Id.* ¶ 137. The discrepancies were due to universal VBM, and the Defendant County Registrars failing to update and maintain voter rolls. *Id.* ¶ 138. As a result of the lack of uniformity with respect to signature verification, ballot remaking, and the maintenance of voter rolls, the votes of in-person voters in the listed counties were diluted by inaccurate VBM ballots, including the counties where Plaintiffs reside. *Id.* ¶¶ 18-22, 105-128, 136-140, 151, 163.

Finally, Plaintiffs have alleged that the challenged election procedures disproportionately burden people who prefer to vote in person, including "African American voters like Plaintiff Ronda Kennedy." SAC ¶ 142. Multiple recent election law challenges have found standing on this basis. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245-46 (4th Cir. 2014); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216-17 (4th Cir. 2016). Although these cases involved the curtailment of in-person voting, courts have widely recognized equal protection violations through vote dilution. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.") Thus, it would follow that voting laws and practices that dilute the votes of in-person voters would inherently disadvantage minority voters.

(c) *The Plaintiffs have alleged actual and imminent voting injuries*

The Defendants also err in arguing Plaintiffs' voting injuries fail for lack of actuality or imminence. County Defendants' Br. at 6-7; State Defendants' Br. at 7-9. Courts have conferred standing to plaintiffs who challenge election processes which cause dilution or debasement without first proving that their votes have been miscounted, diluted, or debased. *See, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (a voter in Georgia may sue to enjoin that state's allegedly unconstitutional county unit system to count votes, holding that "appellee, like any person whose right to vote is impaired, has standing to sue."); *Bush*, 531 U.S. at 106-08 (voters in Florida had standing to challenge the recount system that caused disparate treatment to voters in different counties); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) ("[A] voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct….It is inevitable, however, that there will be such mistakes."); *Black v. McGuffage*, 209 F. Supp. 2d 889, 995 (N.D. Ill. 2002) ("[T]he ballot machinery used in the jurisdictions in which Plaintiffs vote increases the likelihood that their votes will not be counted.").

Further, the Supreme Court does not require that a plaintiff demonstrate "that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 n.5 (2013). The Supreme Court has continued to find "standing based on a 'substantial risk' that the harm will occur…." *Id.*; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *see also Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1000-01 (1982); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). In the voting context, courts have found standing based on an increased risk that votes would be improperly discounted. *See Bush*, 531 U.S. at 104-05; *Blackwell,* 387 F.3d at 574; *Black*, 209 F. Supp. 2d at 895. As the Eleventh Circuit explained: "[i]mmediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

The court in *Black* foresaw the problem that would arise if standing in vote dilution cases required voters show, with certainty, that their intended votes were not counted. 209 F. Supp. 2d at 895. The court emphasized that "[b]ecause the voting process is anonymous, it is impossible for any

one voter to know with more certainty that their intended votes were not counted." *Id.* Thus, the court held that the substantial risk of dilution was enough to confer standing. *Id.*

Plaintiffs' allegations that they reside and vote in the counties where irregularities have occurred during the past elections is enough to confer standing. For instance, in *Bush*, the Supreme Court did not hold that former President George Bush failed to state a claim because he did not allege that the recount system would dilute the votes cast for him. 531 U.S. at 106-07. Instead, the Court held that the recount system violated the Equal Protection Clause because it was not uniform and led to disparate results across counties. *Id.*[4]

2. Plaintiffs have alleged their injuries are traceable to Defendants

As a threshold matter, the Ninth Circuit has already found EIPCa alleged standing, including traceability and redressability. *Weber*, No. 21-56061, 2022 WL 16647768, at *2. Specifically, the court held that "[b]ecause EIPCA'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." *Id.* (citation omitted). Therefore, this Court need not address causation.

The County Defendants also improperly rely on *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) to suggest Plaintiffs have not demonstrated standing for "each form of relief." County Defendants' Br. at 11. The Ninth Circuit found Plaintiff EIPCa had standing to pursue claims under the Equal Protection Clause and Due Process Clause. *Weber*, No. 21-56061, 2022 WL 16647768, at *1. Even if this Court finds it necessary to address these elements for the individual Plaintiffs, they still prevail.

The Ninth Circuit finds a requisite traceable connection for purposes of standing where a law that causes injury to a plaintiff specifically grants the defendant enforcement authority, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), or when there is a sufficient connection between the official's responsibilities and plaintiffs' injury, *Planned*

[4] Plaintiffs' claims against San Benito County and Santa Cruz County are similar to the claims raised against the other County Defendants. *See* County Defendants Br. at 12. For instance, Plaintiffs allege that all Defendant County Registrars implemented inadequate procedures in comparison non-defendant counties, such as Solano County, Placer County. SAC ¶¶ 106-07, 112.

Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 919-20 (9th Cir. 2004). Further, "[a]n injury may be 'fairly traceable' to a defendant for causation purposes even when that defendant's actions are not 'the very last step in the chain of causation.'" *Wieland v. U.S. Dep't of Health & Human Servs.,* 783 F.3d 949, 954 (8th Cir. 2005) (quoting *Bennet v. Spear*, 520 U.S. 154, 168-69 (1997)). Each Defendant meets these criteria.

The State Defendants gaslight this Court by claiming they are not at fault because they did not manipulate vote tallies or submit fraudulent votes and the Secretary of State's emergency regulations were issued "to ensure uniform application and practices for signature verification" of VBM ballots. State Defendants' Br. at 9. The State Defendants clearly misapprehend the claims raised against them, as well as the case law that holds a defendant need not be "the very last step in the chain of causation." *Bennet*, 520 U.S. at 168-69. Plaintiffs challenge, on their face and as applied, state laws and regulations regarding the processing of ballots, which led to uneven results across counties. SAC ¶¶ 151-52, 163. And while the Secretary of State may have attempted to enforce some uniform standards, Plaintiffs allege numerous accounts of the County Defendants applying uneven practices because the state regulations and laws allow for discretion regarding signature verification, ballot remaking, and the maintenance of ballots. *Id.* ¶¶ 91, 126-27, 136-40, 151-52, 163. The irregularities are the result of 2 CCR §§ 20910, 20960-20962, 20980-20985, SB 503, and California Elections Code § 3019. *Id.* ¶ 128. California Elections Code § 3020 also allows counties to accept VBM ballots after election day that cannot readily be determined to have been cast on or before election day, disproportionately affecting people who prefer to vote in person. *Id.*, ¶ 135.

Furthermore, Secretary of State Weber "is a state official subject to suit in [her] official capacity because [her] office 'imbues [her] with the responsibility to enforce the [election laws].'" *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011); *see, e.g.*, CCR §§ 20992, 20993, Cal. Elec. Code §§ 3026, 12172.5. The California Attorney General is the chief law officer of the state and in charge of enforcing the challenged California election laws that enabled the county registrars to implement uneven and weak voting procedures. *See* Cal. Const. art. V, § 13; SAC ¶¶ 126-28, 135.

Regarding the County Defendants, they erroneously claim the sole harm alleged is a generalized concern about vote dilution. County Defendants' Br. at 10. Again, Plaintiffs' harm is the

result of uneven and precarious voting procedures that disadvantage in-person voters and voters in specific counties. SAC ¶¶ 41, 63-74, 80-82, 105-29, 136-40. The County Defendants are empowered to administer elections, and widespread evidence of irregularities has consistently transpired at their voting locations over the past few years. *Id.* ¶¶ 151-52, 163; *see also Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018) (finding that suits against county employees named in official capacity are proper where state law assigns the county employee the power and duty to execute and enforce state law) .

3. Plaintiffs have adequately alleged redressability

The third component of standing (i.e., redressability) examines whether the relief sought, if granted by the court, will likely alleviate the particularized injury alleged by the plaintiff. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). In other words, standing exists when "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

State Defendants, again, gaslight this Court by arguing Plaintiffs' requested relief will exacerbate the problem because the regulations provide uniform procedures. State Defendants' Br. at 10. Plaintiffs allege the Secretary of State did not enforce uniform regulations regarding signature verification and ballot remaking, SAC ¶¶ 91, 126-27, 151-52, 163, and California Elections Code Section 3019 does not require an exact match when comparing VBM signatures, nor does it require election workers verify a specific number of points of comparison. *Id.* ¶¶ 68-69. Plaintiffs also allege that the uneven practices are the result of 2 CCR §§ 20910, 20960-20962, 20980-20985, SB 503, and California Elections Code § 3019. *Id.* ¶ 128. Therefore, a declaratory judgment declaring these laws and regulations unconstitutional and an injunction enjoining their enforcement will remedy Plaintiffs' injuries.

D. Plaintiffs Have Adequately Pled Violations Of The Equal Protection Clause And Due Process Clause

1. The Defendants' laws, regulations, and procedures burden Plaintiffs' right to vote

The State Defendants mistakenly claim Plaintiffs do not satisfy the *Anderson-Burdick* test because they cannot demonstrate their right to vote was burdened. State Defendants' Br. at 11. In *Burdick v. Takushi*, the Court established that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. 428, 434 (1992). "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). However, strict scrutiny applies when state election laws "are subjected to 'severe' restrictions." *Id.* (citation omitted).

The State Defendants' contention that the challenged laws and regulations were uniform and intended to expand the right to vote is a red herring. State Defendants' Br. at 12-16. Similarly, the County Defendants' assertions that the challenged procedures are "robust" conflict with the alleged facts and therefore cannot be accepted as true at this stage. County Defendants' Br. at 23. Although the State may have intended to expand the right to vote through the ratification of universal VBM, the facts demonstrate that the challenged laws, regulations, and practices enabled widespread irregularities, as evidenced by thousands of sworn affidavits signed under penalty of perjury. SAC ¶¶ 41, 63-74, 80-82, 105-129, 136-40.

Furthermore, there are no "consistent means of assessing" signatures and the intent of a voter. State Defendants' Br. at 14; SAC ¶¶ 108, 128-29. For instance, neither California Elections Code § 3019, 2 CCR §§ 20960-20962, nor §§ 20980-20985 require election officials run ballots through a machine, calibrate their signature verification rate to a specific error rate, or apply a specific number of points of comparison. SAC ¶¶ 69-70, 106-09. California gives election workers wide discretion to determine the intent of the voter during the duplication process, *see* 2 CCR §§ 20980-20985, and past elections have shown that county registrars implemented varying practices regarding the maintenance

of voter rolls. SAC ¶¶ 136-40. Thus, the election laws and procedures were not uniform and generally applicable but rather permitted uneven practices across counties, diluting the votes of specific voters based upon where they reside and how they vote.

Short v. Brown, F.3d 671 (9th Cir. 2018), does not support a different conclusion. *See* State Defendants' Br. at 15. In *Short*, the plaintiffs challenged California's Voter Choice Act passed in 2018 because it permitted voters in some counties to receive an automatic VBM ballot, while requiring voters in other counties to register before receiving a VBM ballot. *Id.* at 677. The Ninth Circuit found that having to register to receive a VBM ballot was an "extremely small" burden. *Id.*

This case is distinguishable because Plaintiffs challenge AB 860, a bill requiring county officials to send a ballot to every active-status registrant voter, in combination with regulations governing signature verification and ballot remaking and practices concerning the maintenance of voter rolls. SAC ¶¶ 41, 63-74, 80-82, 136-40. This distinction is critical because the challenged laws, regulations, and practices operating together enabled pervasive irregularities across counties, and Plaintiffs have documented harm to specific groups of voters, as explained below. Thus, the single challenge to one law brought in *Short* is distinguishable from this case.

2. The Defendants' laws, regulations, and procedures violate the Equal Protection Clause

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote…." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "The conception of political equality … can mean only one thing—one person, one vote…." — "[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.* at 558 (internal citations omitted).

The law does not require the actual curtailment of the right to vote to trigger strict scrutiny. "[T]he right to suffrage can be denied by the debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. The Equal Protection Clause prohibits government officials from implementing an electoral system that gives the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live. *See, e.g., Roman v. Sincock*, 377 U.S. 695, 707-12 (1964); *WMCA,*

Inc. v. Lomenzo, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

The County Defendants' and State Defendants' suggestion that vote dilution only applies in state reapportionment cases is myopic. County Defendants' Br. at 18; State Defendants' Br. at 17-18. Although vote dilution originated through state reapportionment cases in the civil rights era, vote dilution occurs whenever a state-authorized voting system favors specific groups of voters. For instance, in *Gray*, the Supreme Court found that Georgia's county unit system weighted rural votes more heavily than urban votes and weighted some rural counties more heavily than other larger rural counties. 372 U.S. at 379. The disparate treatment of voters in various counties violated the Equal Protection Clause. *Id.* at 381.

Similarly, in *Moore v. Ogilvie*, the Supreme Court found that Illinois's county-based procedure for nominating presidential candidates diluted the votes of citizens in larger counties, leading to due process and equal protection violations. 394 U.S. 814, 819 (1969). The Court observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.*

Although *Gray* and *Moore* dealt with vote aggregation, and voting fraud involves vote cancellation or negation, that is a distinction without a difference. Whether marred by fraud, gerrymandering, or malapportionment, votes will carry less weight depending on one's geographical location. For instance, the Supreme Court relied on the principles outlined in *Gray* and *Moore* when determining Florida's recount system for the 2000 presidential election did not pass constitutional muster. *Bush*, 531 U.S. at 107. In *Bush*, the record revealed that the counties applied different standards in defining a legal vote. *Id.* at 106. Even though the dissent noted that the Supreme Court had not addressed the constitutionality of disparate vote counting procedures, the majority found that this distinction did not preclude a finding of an equal protection violation. *Id.* at 109, 125 (Stevens, J., dissenting) ("[W]e have never before called into question the substantive standard by which a State determines that a vote has been legally cast.").

Short does not conflict with *Bush*. *See* State Defendants' Br. at 18-19. There, plaintiffs simply argued that California voters were treated differently based on their county of residence. *Short*, F.3d at 678. There was no evidence that the disparate treatment would increase the likelihood that certain votes would be discounted. *Id.*

District courts have applied *Bush*'s holding to uneven and substandard election systems harming specific groups of voters. *See, e.g.*, *Black v. McGuffage*, 209 F.Supp.2d 889, 898-99 (N.D. Ill. 2002) (holding that plaintiffs had stated an equal protection claim when they alleged that votes in some counties were statistically less likely to be counted than votes in other counties); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F.Supp.2d 1106, 1108–10 (C.D. Cal. 2001) (holding that defendants were not entitled to judgment on the pleadings when plaintiffs alleged that some counties adopted more reliable voting procedures than others in violation of equal protection).

Here, as in *Bush*, voters, such as Plaintiffs, have a significantly different likelihood of having their votes diluted based upon the counties in which they reside. Indeed, this case is not at the summary judgment stage, and the parties have not engaged in discovery. Yet, Plaintiffs have still demonstrated that in past elections, unlawful votes were counted. SAC ¶¶ 105-29, 136-40. For instance, some Defendant County Registrars applied procedures that enabled election officials to count ballots without signatures, mis-matching signatures, or ineligible ballots. *Id.* ¶¶ 115, 117-18, 120, 122, 136-39; *cf* County Defendants' Br. at 23 (claiming Plaintiffs' claims "cannot support a reasonable inference that review was inadequate or likely to allow for the counting of invalid ballots").

State Defendants allege that the irregularities did not "apply equally to *all* people who cast votes, regardless of how they cast votes." State Defendants' Br. at 18 (emphasis in original). This argument presupposes that each county will experience identical degrees of irregularities. Such an outcome is statistically impossible. As the Court in *Bush* astutely observed, a lack of robust and uniform election procedures inherently leads to an equal protection violation. 531 U.S. at 106-07. Plaintiffs' case is even stronger than *Bush* because there is evidence that counties did report varying degrees of irregularities. For instance, the SAC alleges that some non-defendant counties

implemented robust procedures and therefore citizens in those "counties did not report incidents of election workers approving ballots that did not match the signatures on file." SAC ¶¶ 106-12. Accordingly, at the pleading stage, Plaintiffs have pled a viable equal protection claim.

3. The Defendants' laws, regulations, and procedures violate the Due Process Clause

In terms of due process, the right to vote is a fundamental right, "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The right to vote includes the right to have one's vote counted on equal terms with others. *Bush*, 531 U.S. at 104 ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Reynolds*, 377 U.S. at 567–68; *Wesberry v. Sanders*, 376 U.S. 7, 84 (1964); *Gray*, 372 U.S. at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."); *Classic*, 313 U.S. at 315.

This case does not simply involve a temporary and accidental machine malfunction in violation of state law. *See* County Defendants' Br. at 20 (citing cases). The irregularities are *authorized* by state law, which allows election officials to impose varying degrees of flawed procedures on portions of the electorate. The alleged irregularities have occurred over the past three election cycles. SAC ¶¶ 128-29.

Griffin v. Burns is instructive here. 570 F.2d 1065 (1st Cir. 1978). There, the decertified winner sought to challenge the Rhode Island Supreme Court's decision to invalidate 123 absentee ballots. *Id.* at 1068. The district court affirmed that "there is an undoubted right, guaranteed by the Constitution, to vote in primary elections on an even-handed basis together with other qualified voters." 431 F. Supp. 1361, 1366 (D.R.I. 1977). Even though the First Circuit held jurisdiction lied under 28 U.S.C. § 1343(3), it noted that the state's retroactive invalidation of the absentee and shut-in ballots violated the voters' rights under the Fourteenth Amendment. 570 F.2d. at 1070.

The court in *Black* relied on *Griffin* to reject the defendants' attempt to dismiss a challenge to Illinois's election laws and procedures, which allowed county election officials to implement different voting systems with varying error rates and machine defects. *Black*, 209 F. Supp. 2d at 892, 901-02; *cf Hennings v. Grafton*, 523 F.2d 861, 863-64 (7th Cir. 1975) (finding no due process violation when a voting machine malfunctioned and did not allegedly meet state requirements). The court in *Black* found a due process violation because state law *allowed* "significantly inaccurate systems of vote counting to be imposed upon some portions of the electorate and not others without any rational basis…." *Id.* at 901-02.

Similar to *Black*, Plaintiffs challenge California's election laws, regulations, and procedures that allow county election officials to implement vote counting procedures with varying error rates. The challenged procedures, as in *Black*, disproportionately harm portions of the electorate depending on where they reside. For instance, some counties have not maintained accurate voter rolls and have applied signature verification systems that fail to adequately vet invalid signatures. SAC ¶¶ 105-29, 136-39. Thus, Plaintiffs also raise a viable claim under the Due Process Clause.

E. In The Alternative, Leave Should Be Granted

Plaintiffs' causes of action have been sufficiently pled. However, should the Court be inclined to sustain Defendants' motions to dismiss for any reason, leave to amend should be granted. *See, e.g.*, *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000) ("a district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts"); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (same).

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

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Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

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