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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Western Division)

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

Plaintiffs,

v.

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

Defendants.

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

COUNTY DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: May 12, 2023
Time: 10:00 a.m.
Ctrm: 7B
Judge: The Honorable André Birotte, Jr.

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I. INTRODUCTION

Plaintiffs' Opposition cannot remedy the manifest insufficiencies of their Second Amended Complaint (SAC). None of the voter Plaintiffs have standing for either of Plaintiffs' vote dilution claims or for any of Plaintiffs' requested forms of relief. The voter Plaintiffs must be dismissed. In fact, *no* Plaintiff has standing to seek many of the wide-ranging and extreme forms of relief pled in the SAC. At a minimum, those forms of relief must be struck from the SAC. And no Plaintiff has standing against San Benito and Santa Cruz Counties, against whom no allegations are pled, and so those two Defendants should be dismissed. Plaintiffs' claims are also barred by laches, as is their late addition of Defendants Kern and San Luis Obispo Counties, who should also be dismissed. As for Plaintiffs' fraud allegations—at least ten of which appear throughout the SAC—they must be struck for failure to comply with Rule 9(b). Most importantly, Plaintiffs have failed to allege facts—as opposed to conclusion, speculation, or misunderstanding—sufficient to state a vote dilution claim under either the Equal Protection or Due Process Clauses. This shortcoming is fatal to the entire SAC, which should therefore be dismissed in its entirety.

Plaintiffs' Opposition, like their SAC, is characterized by conclusory arguments, failure to engage with Defendants' arguments, and silence on several key issues. At core, Plaintiffs take issue with California's legitimate policy choices, and seek to use the court to overturn swaths of state law that they could not prevent or modify through legislative advocacy.[1] In doing so, they want this Court to: 1) order the drastic remedy of placing California's elections into permanent receivership; and 2) subject the County Defendants to belated, onerous, and redundant audits untethered from their legal claims, thrusting County Defendants into an uncertain legal landscape on the cusp of the 2024 Presidential Election. For the reasons explained here and in County Defendants' Motion, the Court should dismiss Plaintiffs' SAC in full, with prejudice.

[1] *See* County Defendants' Request for Judicial Notice ISO Reply (RJN), Exs. A-D.

II. ARGUMENT

A. The SAC Suffers from Multiple Standing Infirmities.

Plaintiffs include five individual voter Plaintiffs who reside in four counties (one of which is not among the counties sued), none of whom have pled an injury-in-fact that is caused by County Defendants or redressable by the relief sought. The Ninth Circuit did not determine individual plaintiff standing, much less the standing of "voter" Plaintiffs who were not parties to the First Amended Complaint (FAC).[2] Because the Ninth Circuit did not need to reach voter Plaintiff standing to reverse the District Court, it did not. *See INS. v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."). This Court, however, should dismiss the voter Plaintiffs. None have standing to bring Plaintiffs' two vote dilution claims, and none have standing for any of the forms of relief Plaintiffs seek. And no Plaintiff, including EIPCa, has alleged facts to support standing for many of the forms of requested relief.

1. The Voter Plaintiffs Plead No Injury-in-Fact.

Plaintiffs cite to case law where individual plaintiffs had established standing, but do not point to any *allegations* in their actual complaint supporting individual standing here. Opp'n at 6-12. The SAC contains no allegations that *any* of the voter Plaintiffs were harmed directly or that there is a substantial risk of future harm. In fact, the SAC contains no relevant facts about the voter Plaintiffs at all. But if voter Plaintiffs do not sue "on behalf of all California voters because not all voters are harmed in a similar fashion" (Opp'n at 7), then they must be suing on behalf of themselves and must have standing.

Plaintiffs argue that the voter Plaintiffs have standing because they "vote and reside in the counties where the irregularities have occurred." Opp'n at 6. Setting

[2] The current individual plaintiffs were "candidate" plaintiffs in the FAC.

aside that the alleged irregularities do not amount to constitutional violations, *infra* Section III.B., Plaintiff Reed, for example, is a resident of a county *not named in this lawsuit* (Madera) and against which there are no allegations. Mot. at 8 n.10. Further, despite conclusory allegations of a lack of "meaningful" signature review (SAC ¶ 120), the SAC fails to allege that votes in Orange County were diluted such that Plaintiff Bradley's vote was (or was more likely to be, or that there is a substantial risk in the future it may be) weighed less than any other voter's, much less voters in another identifiable group. Plaintiff Cargile suffers from similar weaknesses. Despite conclusory allegations regarding error rates (*id.* ¶ 109) and the possibility of ballot theft using large purses, and facially speculative allegations that specific curbside ballots were counted (*id.* ¶ 118; *see* Mot. at 16), the SAC fails to allege that votes in Los Angeles County were actually diluted, that Plaintiff Cargile's vote was not counted, or that his vote was weighted differently than any other voter's (or that there is a substantial risk of this happening in the future). And as to Plaintiffs Patterson and Kennedy, the alleged Ventura County "irregularities" *exclusively* concern observer access, not mishandling of ballots (SAC ¶ 104).[3] Moreover, *no Plaintiff is alleged to be an in-person voter*—the very group that Plaintiffs claim has had its votes diluted by the challenged laws and regulations. *E.g.*, SAC ¶¶ 2(c), 130-42, 151, 163; Opp'n at 6, 8 ("the votes of in-person voters in the listed counties were diluted"). In fact, there are no allegations that any voter Plaintiff even cast a ballot in any of the elections at issue.

On top of these fatal flaws, much of the SAC is facially speculative and conclusory and thus cannot form the basis of Article III standing. *See* Mot. at 8-9; *see e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *Adams v. Johnson*, 355

[3] Again, while the SAC alleges that Plaintiff Kennedy is African American (SAC ¶ 142), there is no allegation that she was disenfranchised or harmed on that basis. Plaintiffs' attempt to logic their way into a race-based injury for this individual Plaintiff falls short. *See* Opp'n at 8. The SAC does not allege that Plaintiff Kennedy was or will be an in-person voter, Plaintiffs' conclusory assertions about African American voters notwithstanding. And the SAC alleges no facts about Plaintiff Kennedy *or Ventura County* supporting the inference that Plaintiff Kennedy's vote was weighted differently than any other voter's, by virtue of her race or otherwise, or ever will be.

F.3d 1179, 1183 (9th Cir. 2004); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). The SAC "fall[s] short of even [the 'substantial risk'] standard, in light of the attenuated chain of inferences necessary to find harm here." *Clapper*, 568 U.S. at 414; Mot. at 7-9. Plaintiffs fail to address any of the above-discussed shortcomings and have failed to plead any injury sufficient to confer Article III standing on the voter Plaintiffs.[4]

2. The SAC Seeks Relief Beyond Redressing Alleged Harms.

Plaintiffs explain that a declaratory judgment and injunction barring enforcement of California election laws "will remedy Plaintiffs' injuries." Opp'n at 12. However sweeping of a remedy that would be, *that is not the only relief Plaintiffs are seeking*. Far from it. Plaintiffs also seek an audit of at least three past elections, including the 2020 presidential election (SAC at 39 ¶¶ 1, 2);[5] the appointment of a special master to oversee that audit (*id.* ¶ 3); the appointment of a (second) special master to oversee all future California elections (*id.* ¶ 4); and damages (*id.* ¶¶ 8, 9). If this litigation continues long enough, Plaintiffs' request is styled such that the *2024 Presidential Primary* will be encompassed by the massive scope of their requested

[4] None of Plaintiffs' authority helps them on this point. *See* Opp'n at 8-9; *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245-46 (4th Cir. 2014) (noting, in vote *denial* case under Section 2 of the Voting Rights Act, that North Carolina African American voters "disproportionately" use same-day registration and out-of-precinct voting); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216-17 (4th Cir. 2016) (reciting factual findings on North Carolina demographics; no standing analysis); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (noting that vote dilution can be an injury); *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (holding appellee, "whose right to vote [was] impaired" had standing where, as a statistical certainty, apportionment led to rural voters having "two to ten times the voting power" of other voters); *Bush v. Gore*, 531 U.S. 98, 106-08 (2000) (no standing analysis); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (finding standing for an *association* based on the inevitability of voter registration mistakes for an undetermined set of their members); *Black v. McGuffage*, 209 F. Supp. 2d 889, 895 (N.D. Ill.) (holding statistical data alleged actual probabilistic harm of vote dilution for voters required to use certain voting systems).

[5] Plaintiffs could have disclaimed an interest in undermining past election results but did not. The only reason to seek an audit three-plus years after the fact is to re-examine past election results *that cannot legally be changed*.

relief.[6] If Plaintiffs are disclaiming those forms of relief, they should say so and amend their complaint. If they are not, their failure to explain how *any* Plaintiff[7] has standing for these forms of relief speaks volumes. *See* Mot. at 10-11, 20.

In fact, Plaintiffs fail to address the significant mismatch between their requested relief and the alleged harms, as explained in County Defendants' Motion. *See* Mot. at 10-11. "[S]tanding is not dispensed in gross: A plaintiff's remedy must be tailored to redress [their] particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quotation omitted). Those forms of relief for which Plaintiffs have no standing should be struck. *DaimlerChrysler*, 547 U.S. at 352 (requiring plaintiffs to "demonstrate standing separately for each form of relief sought," rejecting theory that standing is "commutative"); *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint.").

B. The SAC Still Fails to Plead *Any* Allegations Against Two Counties.

San Benito and Santa Cruz Counties must be dismissed as Defendants. After three complaints, Plaintiffs cannot muster a single allegation against these Defendants, and manifestly fail to offer any in their Opposition. Plaintiffs' throwaway argument that their claims against San Benito and Santa Cruz Counties are "similar" to their claims against the other Defendants (Opp'n at 10 n.4) is insufficient. What are San Benito and Santa Cruz Counties accused of doing? What defenses can or should they raise? The SAC provides no basis for even a "reasonable inference that [these]

[6] Through this suit, Plaintiffs seek to enjoin "all bills *and future bills* that have *or will* expand VBM and all regulations that have *or will* not provide uniform requirements regarding observation, signature verification, ballot remaking, and voter rolls," SAC at 40 n.3 (emphasis added), thereby asking this Court to *permanently* oversee California elections. This relief is wholly improper and based on speculation that future statutory and regulatory changes will be constitutionally infirm.

[7] The Ninth Circuit held that EIPCa had demonstrated standing for declaratory and injunctive relief, barring enforcement of the challenged law and regulations. 9th Circ. Order at 5 ("EIPCa can obtain relief from those injuries if the court enjoins those responsible for enforcing these policies."). It did not address EIPCa's standing for any other form of relief, and so this Court should do so.

defendant[s] [are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For the reasons explained above, this Court should dismiss the voter Plaintiffs, dismiss Defendants San Benito and Santa Cruz Counties, and strike the forms of relief for which Plaintiffs have demonstrated no standing.

C. Plaintiffs' SAC, and Particularly the Addition of Kern and San Luis Obispo Counties, is Barred by Laches.

Plaintiffs do not contend with County Defendants' laches arguments. In any event, the laches is plain from the factual allegations in Plaintiffs' SAC, and the Court can resolve laches on the pleadings. *See Kourtis v. Cameron*, 419 F.3d 989, 1000 (9th Cir. 2005) *abrogated on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008).

First, Plaintiffs' delay was unreasonable. Plaintiffs suggest that they "brought this lawsuit soon after they gathered the necessary facts and witness testimony that supported their claims." Opp'n at 1. However, Plaintiffs' own filings demonstrate that they knew of their alleged 2020 "irregularities" by or well before that election was certified (*e.g.*, SAC ¶¶ 96, 98, 100, 115-16, 118, 121). They knew of their concerns regarding voter roll maintenance by at least early 2020. SAC ¶¶ 85-90. And many of the laws and regulations Plaintiffs challenge have been in place for years, if not decades. In the election context, even a delay of weeks or months may be unreasonable, because errors impacting election outcomes must be remedied urgently, or not at all. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1181-82 (9th Cir. 1988) (finding two months after election too long in case alleging equal protection and due process violations in special election). State law is designed with just this truth in mind and allows for expedited review, including of constitutional arguments. *See* Cal. Elec. Code § 16100; Cal. Code Civ. Proc. §§ 35, 1085.

Moreover, as to the 2021 and 2022 Elections, Plaintiffs fail to explain why they did not seek *preelection* relief from the laws and regulations they now challenge,

which they could have done in state court or in a separate action. *See* Mot. at 21. For example, Plaintiffs double down on the argument that County Defendants' failures to maintain voter rolls led to vote dilution. Opp'n at 8; *e.g.*, SAC ¶ 138. But they inexplicably never brought list maintenance claims against any Defendant under the National Voter Registration Act (NVRA), even though the SAC makes clear that Plaintiffs had the facts and started the NVRA claim notice process in *early 2020*.[8] Instead, Plaintiffs sat on their rights, *bypassing multiple avenues of relief*, while year after year Californians voted, Defendants expended significant resources to administer elections under current laws, and officials began to serve their terms of office. Plaintiffs cannot explain why, if they truly believed that invalid votes had been or may be counted, they did not act expeditiously to resolve those issues—something that cannot happen in this litigation. Plaintiffs' delay in filing was unreasonable and, to date, entirely unexplained.

Second, Plaintiffs' strategic delay has, and will continue to, prejudice Defendants. Many of the alleged harms can no longer be remedied. And undermining past election results would be unprecedented and would "harm the public in countless ways." *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020); *see* Mot. at 13-14. Plaintiffs had the opportunity to disclaim wanting to undermine or overturn election results months or years after the fact, including on basis of long-delayed audits. They did not. Anything in service of this goal must be barred by laches.

Moreover, Plaintiffs offer *no* explanation for their extraordinarily delayed addition of two Defendants, against whom they levy allegations based on the *2020 and 2021* Elections. SAC ¶¶ 97, 117, 124, 137. The delayed addition of Kern and San Luis Obispo Counties severely prejudices those counties, who have *already, and lawfully, destroyed evidence potentially critical for their defense of Plaintiffs' claims*.

[8] *See* 52 U.S.C. 20510(b) (creating private right of action); SAC ¶¶ 85-89 (alleging multiple notices under the NVRA sent to Secretary of State in 2020), 90 (alleging inadequate responses from Secretary of State).

Destruction of election materials is required by state law after a mandatory retention period. Cal. Elec. Code §§ 17301, 17302. Plaintiffs' silence alone is sufficient to find laches as to Kern and San Luis Obispo Counties.

D. Plaintiffs' SAC Is Insufficiently Pled and Should be Dismissed in Full.

1. Rule 9(b) Applies to All Fraud Allegations in the SAC.

Plaintiffs incorrectly suggest that they are not subject to Rule 9(b) because they do not bring fraud *causes of action*. *See* Opp'n at 3-4. That is not the rule. Plaintiffs' *allegations* of fraud (*see* SAC ¶¶ 53, 58, 60, 75, 82, 143, 158, 160) are subject to Rule 9(b). *See* Mot. at 15-16, n.17. Even where a plaintiff does not "allege a unified course of fraudulent conduct" or bring a fraud claim, but only "allege[s] some fraudulent and some non-fraudulent conduct. . . . the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). "Any averments which do not meet that standard should be 'disregarded,' or 'stripped' from the claim for failure to satisfy Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citing *Vess*, 317 F.3d at 1105). Plaintiffs should not be allowed to accuse County Defendants of "promot[ing] fraud," "create[ing] massive opportunities for . . . fraud," and allowing fraudulent votes to be cast without being required to comply with Rule 9(b).

E. Plaintiffs Fail to State a Claim Under Either the Equal Protection or Due Process Clauses.

Plaintiffs' allegations are not well-pled. The SAC is a mixture of speculation, conclusion, garden variety election irregularities, and allegations of perceived problems that actually demonstrated that County Defendants were following the law. *See* Mot. at 24-25. Such allegations "do not permit the court to infer more than the mere possibility of misconduct," and are therefore insufficient under Rule 8. *Iqbal*, 556 U.S. at 679. While Plaintiffs double down on conclusory arguments and rhetorical flourish, they do not meaningfully address the fundamental flaws with their constitutional claims that County Defendants have repeatedly identified.

In short, Plaintiffs do not plead either their Equal Protection or Due Process claim with sufficient plausibility to demonstrate a claim upon which relief can be granted. *See Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The SAC therefore fails to allege facts sufficient to show—or even infer—a violation of either of these Clauses.

1. Plaintiffs Fail to State an Equal Protection Claim.

In the voting context, the Equal Protection Clause prohibits a state from "diluti[ng] . . . the weight of the votes of certain . . . voters merely because of where they reside[]." *Reynolds*, 377 U.S. at 557.[9] As an initial matter, Plaintiffs continue to insist that County Defendants' actions dilute the votes of *in person voters* (SAC ¶¶ 130-42, 151; Opp'n at 6-8), but their authorities, arguments, and allegations are grounded in a theory of *county-by-county* discrepancies. The logic of Plaintiffs' in-person-vote-dilution simply does not hold—to the extent any invalid ballots are counted, the harm affects all voters similarly. And Plaintiffs' inter-county disparity allegations fall far short of supporting an Equal Protection Claim.

Plaintiffs allege that different county practices and policies lead County Defendants to treat voters differently than in some non-defendant counties. SAC ¶¶ 105-29. But the SAC does not plausibly allege that these differences are anything

[9] County Defendants have not focused on the level of scrutiny needed to justify any alleged different treatment because the SAC fails to sufficiently allege adverse different treatment of any identifiable groups. But they agree with State Defendants that to the extent Plaintiffs allege different treatment, the proper analysis of election regulations is the *Anderson-Burdick* framework. *See Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (explaining *Anderson-Burdick* framework); *Mecinas v. Hobbs*, 30 F.4th 890, 902 (9th Cir. 2022) (reiterating application of the *Anderson-Burdick* framework in election disputes). Statutes and regulations designed to expand the right to vote should not be subject to the same heightened scrutiny as invidious discrimination that impairs the right to vote since the framework evaluates the "character and magnitude of the asserted injury" and weighs it against the government's interests asserted "as justifications for the burden imposed by its rule." *Mecinas*, 30 F.4th at 902 (quotation omitted). But even if heightened scrutiny applied, the SAC fails to allege cognizable different treatment *at all*, so the inquiry ends there.

other than permissibly "different systems for implementing elections" developed by counties "in the exercise of their expertise." *Bush*, 531 U.S. at 109. Nor do *Reynolds*, *Baker*, or *Gray* support Plaintiffs' equal protection theory. Taken together, those cases hold that an equal protection claim may lie where procedures or systems result in individual votes being *weighed* systematically differently based on county residence. *See Reynolds*, 377 U.S. at 575 (holding that a per-county apportionment of legislative seats is unconstitutional and violates the equal-population principle underlying one person, one vote); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that a state reapportionment scheme allocating representation on a per-county basis may violate the Equal Protection Clause); *Gray*, 372 U.S. at 381 (holding that a primary system awarding votes on a per-county basis to the winner of the county's popular vote violates the Equal Protection Clause). But County Defendants do not employ entirely different systems of signature verification or vote tabulation, and the SAC does not allege as much. Apart from confirming that vote dilution can be a constitutional injury, these cases do not support the claim that scattershot irregularities—or even a few miscounted ballots—result in the probable dilution of any cognizable group of voters' votes.

Plaintiffs' continued insistence that their claims are "akin" to those in *Bush v. Gore* is similarly unavailing. First, the Supreme Court made clear that *Bush* was confined to its facts. *Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). Second, even a cursory read of *Bush* reveals it is not analogous to the allegations here. *Bush* found a *total* "absence of specific standards" to implement the Florida Supreme Court's broad command to "consider the intent of the voter," and held that "want of those rules," which led to varying ad hoc standards even within single counties, created an Equal Protection problem. *Id.* at 105-06 (quotation omitted). Here, the SAC attacks not the absence of any standard (it could not, since California has detailed standards for signature verification and vote

tabulation)[10] but the very type of standards that *Bush* demanded. *See id.* at 110 (holding that a constitutionally adequate system requires "the adoption . . . of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them"); SAC ¶¶ 128-9, 151-2. That Plaintiffs do not believe those standards are sufficient does not make their existence a constitutional problem. *See, e.g.*, Mot. at 24-25 (Plaintiffs' misunderstanding of lawful standard-following); *accord State of N.M. ex rel. League of Woman Voters v. Herrera*, 203 P.3d 94, 98 (N.M. 2009) (holding *Bush* inapplicable where Florida had "no guidelines" for determining voter intent, but "the Secretary's guidelines in New Mexico provide clear context and guidance for local election officials" and "all counties in New Mexico are subject to one uniform standard.") (quoting *Bush*, 531 U.S. at 106.)

And third, the *Bush* progeny cases cited by Plaintiffs, that find an equal protection or due process claim when different counting procedures are used, all concern a scale of disparity of a wholly different magnitude than the allegations in the SAC. The SAC does not allege that votes were actually counted differently (*e.g.*, that similar marks were tallied differently in different counties), or that machines or processes implemented in different counties have or will generate different results. It alleges instead that there *may* have been opportunities for invalid ballots to be tallied or for vote tallies to be changed, due to a scattering of alleged irregularities. SAC ¶¶ 91-129.

Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002), is illustrative of the scale required to plead a constitutional injury—and its facts are distinguishable. At the motion to dismiss stage, the *Black* plaintiffs presented statistical data that the voting machines in certain counties were *22 times more likely* to undercount a vote than in other counties. *Id.* at 895. There was no speculation to the allegations; as a matter of statistics and given the "significantly different probabilities of having their

[10] *See* Cal. Elec. Code § 3019 and 2 Cal. Code R. § 20960 (signature verification); Cal. Elec. Code §§ 13204, 14284-87, 15154, 15210, 15340-42.5 and 2 Cal. Code R. §§ 20980-83 (vote counting).

votes counted," *id.* at 889, voters in the counties using the allegedly faulty machines stated a claim under the Equal Protection Clause. *Id.* Here, Plaintiffs fail to allege *any* detail concerning the scope of "ineligible" votes that they allege were counted (or that could in the future be counted) at a county or state level—not the order of magnitude, statistical probability, or even the specific number of instances where Plaintiffs' observers allegedly witnessed a ballot counted that they are confident should not have been. Rather, Plaintiffs plead a mere *possibility* that ineligible voters were able to cast a ballot.[11] Despite deploying thousands of election observers (SAC at ¶¶ 7, 93, 105), some of whom allegedly witnessed numerous irregularities (*e.g.*, *id.* at ¶ 105), Plaintiffs do not allege that voters in Defendant counties were *statistically more likely* than voters in other counties to have their votes diluted due to the volume of ineligible votes counted in Defendant counties. Allegations that a small number of ballots across fifteen (of 58) counties processing millions of ballots were counted with mismatched signatures (*e.g.*, SAC ¶¶ 115, 117, 118, 120) do not amount to well-pled allegations that County Defendants were statistically significantly more likely to count invalid ballots, thereby diluting the votes in those counties.

Similarly, Plaintiffs incorrectly cast *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001), as a case about different voting *procedures*. In fact, like *Black*, *Common Cause* was about statistically less reliable voting machines being used in counties with higher racial minority populations. *Id.* at 1107-08; *see* Opp'n at 16. Similar to *Black*, the court found that allegations of a statistical likelihood that votes would be counted differently

[11] Plaintiffs' allegation that some County Defendants had a higher discrepancy of "VBM votes counted and VBM registrants with voting histories" (SAC ¶ 137) is vague and unclear. First, *all* voters receive a vote-by-mail ballot—any previous registration as a VBM voter is no longer relevant. Second, voting history is updated throughout the canvass, and individuals can register to vote at the same time as casting their ballots, meaning that the completeness of any voter's voting history depends on the point in time. But the allegation is vague as to whether Plaintiffs are comparing data from the same point in time. And most importantly, "higher discrepancies by percentage" is not sufficient detail about the *scope* of difference to allege harm that rises to the level of constitutional injury. *Id.*

was sufficient to state a claim under the Equal Protection Clause. *Id.* at 1107-09. By contrast, the SAC does not allege a statistically significant disparity in the treatment of votes between counties. Absent *plausible* allegations that the likelihood of County Defendants tabulating invalid ballots is of a magnitude, compared to other counties, that offends the Constitution, the SAC merely illustrates the obvious: fewer irregularities is a logical consequence of a smaller number of ballots to process. *See* Mot. at 23-24 (explaining that Plaintiffs compare County Defendants to much smaller counties).

Plaintiffs also fail to address County Defendants' argument that an Equal Protection claim cannot lie when the two alleged groups—in-person and vote-by-mail voters—are indistinct and where *any harm alleged would propound to both alleged groups equally*. *See* Mot. at 18-19. The SAC and Plaintiffs' Opposition repeat the conclusion that in-person votes are diluted due to a combination of statutes, regulations, and county practices that, together, are insufficient to stop invalid vote-by-mail ballots from being counted. *See* SAC ¶¶ 139, 140, 142, 151-3, 163-5; Opp'n at 7-8, 11-12. But Plaintiffs never explain how counting allegedly invalid ballots of any kind harms in-person voters specifically, as opposed to *all* California voters who cast valid ballots. *See Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) ("A vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged."). An alleged "dilution" suffered equally by all voters is not sufficient to support a claim of different treatment under the Equal Protection Clause.

Further, the Court should disregard Plaintiffs' allegation that some type of guidance from the Secretary of State stated that vote-by-mail ballots may be validly deposited after 8 p.m. on Election Day, because Plaintiffs have not countered the judicially noticeable fact that no such guidance is contained in the official repository of guidance from the Secretary of State. *See* Mot. at 19; *Stichting Pensioenfonds ABP*

v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (failure to respond in opposition to an argument in the moving brief constitutes waiver or abandonment of the uncontested issue); *accord Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (plaintiff abandoned claims by not raising them in opposition). Despite County Defendants identifying similar deficiencies in their earlier complaints, the SAC still does not sufficiently plead an Equal Protection claim.

2. Plaintiffs Fail to State a Due Process Claim.

A Due Process claim only lies when there is "willful conduct which undermines the organic processes by which candidates are elected." *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986). Plaintiffs' Opposition cannot remedy the shortcomings of their Due Process claim. At most, Plaintiffs' allegations amount to "garden variety election irregularities" that courts do not entertain as constitutional violations. *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). Those types of claims, to the extent they rise to the level of a justiciable controversy at all, are to be dealt with through state courts. *See Bodine*, 788 F.2d at 1272 ("The Constitution is not an election fraud statute. . . . [Plaintiffs' claims] could have been adequately dealt with through the procedures set forth in [state] law."). Of course, Plaintiffs failed to take steps to resolve the alleged irregularities, for unexplained reasons.

Plaintiffs fail to allege a scope of irregularities or infirmities in the electoral system that courts have found sufficient to state a claim under the Due Process Clause. Again, Plaintiffs rely on *Black*, but there are no allegations in the SAC that County Defendants' allegedly different signature verification processes allowed invalid ballots to be counted at a constitutionally significant order of magnitude higher than in comparison counties, much less that any differences are analogous to the 22 times higher error rate in *Black*. *See Black*, 209 F. Supp. 2d at 895.

Plaintiffs also fail to address County Defendants' arguments that many of the allegations of "wrongdoing" are actually Plaintiffs' misunderstanding of the lawful

and secure processing of ballots. *See* Mot. at 24-25. In assessing the SAC, the Court must only rely upon well-pled allegations that demonstrate the chain of events that Plaintiffs allege infringed their constitutional rights. Those well-pled allegations cannot include the paragraphs of the SAC where Plaintiffs simply misunderstand the election process. For example, there is no constitutional harm arising from counting ballots validly cast by inactive voters (*see* SAC ¶¶ 64, 117); or by ballot duplication to ensure that a damaged or unreadable ballot is properly tabulated (*see* SAC ¶ 114); or by voters having another person return their ballot (*see* SAC ¶¶ 118, 124); or by application of uniform vote count standards designed to consistently ascertain voter intent (*see* SAC ¶ 122). None of those allegations are coupled with well-pled allegations that fraudulent ballots were *in fact* or *probably* cast, or that any other malfeasance *actually occurred or is substantially likely to occur in the future*. Instead, these allegations, based on Plaintiffs' misunderstandings, are included to cast doubt on the integrity of California's election processes and past election results. Importantly, Plaintiffs did not contest this issue in their opposition to County Defendants' Motion, thus abandoning it. *See Stichting Pensioenfonds*, 802 F. Supp. 2d at 1132; *see also* C.D. Cal. L.R. 7-9 (requiring opposition to include a "complete memorandum which shall contain a statement of all the reasons in opposition thereto").

F. Plaintiffs' SAC Should Be Dismissed Without Leave to Amend.

Leave to amend is not appropriate when Plaintiffs have repeatedly failed to address the insufficiencies in their complaint that County Defendants have identified. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. CONCLUSION

Plaintiffs do not, and cannot, plead a constitutional cause of action because Plaintiffs' disagreement with Defendants is a policy dispute about how to ensure fair and secure elections for all California voters. After three inadequate complaints, this action should, once again, be dismissed in full without leave to amend.

Respectfully submitted,

Dated: April 26, 2023

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ATTESTATION

I, Mary E. Hanna-Weir, am the ECF user whose ID and password are being used to file the above Reply in Support of 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.

/s/ Mary E. Hanna-Weir

CERTIFICATION OF COMPLIANCE

The undersigned, counsel of record for Defendant Shannon Bushey, Registrar of Voters for the County of Santa Clara, certify that this reply brief contains 15 pages, which complies with the page limit of Judge André Birotte Jr.'s Standing Order.

Respectfully submitted,

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