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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

SHIRLEY WEBER, California Secretary of State, et al.,

Defendants.

2:21-cv-00032

REPLY IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Date: May 12, 2023
Time: 10:00 A.M.
Courtroom: 7B
Judge: The Hon. André Birotte Jr.
Action Filed: January 4, 2021

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INTRODUCTION

Plaintiffs—five individual California registered voters and the nonprofit Election Integrity Project California, Inc. ("EIPCa")—seek the invalidation of a decade of voting reforms that have had the effect of increasing participation in the democratic process and ensuring the safe and secure processing of millions of ballots amidst a once-in-a-lifetime global pandemic. They bring equal protection and due process claims against two state officials, named in their official capacities—Secretary of State Dr. Shirley Weber and Attorney General Rob Bonta (collectively, "State Defendants")—and fifteen County Registrars of Voters (collectively, "County Defendants"). Plaintiffs allege that votes of certain voters have been diluted, based on their belief that the State's laws and regulations have created an environment in which the administration of elections by County officials allows some unspecified number of vote-by-mail ballots to be improperly cast and counted.

Plaintiffs' claims are entirely without merit. First, the individual Plaintiffs in this case lack standing because they have not allegedly suffered any cognizable injury-in-fact, as this Court previously and correctly held. Second, Plaintiffs' claims also fail as a matter of law because the challenged laws and regulations in no way impose a restriction on Plaintiffs' Fourteenth Amendment rights or their right to vote. Rather, California's election laws and regulations have *protected* the right of every eligible Californian to access the ballot, cast a vote, and have that vote counted—an especially vital function, given the increasing polarization around voting rights in this country. This Court should not permit Plaintiffs to undermine the public's confidence in the security of California's elections by giving credence to specious allegations challenging "election integrity" where no basis for such allegations exists.

Both claims against the State Defendants should be dismissed with prejudice.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS SHOULD BE DISMISSED BECAUSE THEY FAIL TO ALLEGE A SUFFICIENT INJURY-IN-FACT

As a preliminary matter, the five individual Plaintiffs should be dismissed from this case because none of them have the requisite Article III standing to sue on their alleged claims. Plaintiffs argue that "this Court should disregard Defendants' arguments regarding standing" because the Ninth Circuit has already found that EIPCa has organizational standing. *See* ECF No. 167 ("Opp'n Br.") at 10.[1] But the case that Plaintiffs cite in support, *Townley v. Miller*, stands for the proposition that *on appeal*, the Court of Appeals need not consider each individual plaintiff's standing before ruling on the merits of a claim for injunctive relief, where that court has determined that at least one plaintiff has standing. *See* 722 F.3d 1128, 1133 (9th Cir. 2013) (citing *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 522 (9th Cir. 2009)); *Challenge v. Moniz*, 218 F. Supp. 3d 1171, 1179 (E.D. Wash. 2016) ("It is also conceivable that the 'standing for one is standing for all' approach may be limited to appellate review."). Here, the Ninth Circuit expressly did not rule on any of the individual Plaintiffs' standing claims, *see* ECF No. 121 at 5–6, and in any case they now bring this suit as *voters*, rather than as *candidates* (as initially pled). While the Ninth Circuit did not need to assess the standing of the individual Plaintiffs to resolve the prior appeal, this Court need not simply accept that the individual Plaintiffs have standing; rather, this Court should determine whether in fact such Plaintiffs have standing to sue. *See Challenge*, 218 F. Supp. at 1179 ("The 'standing for one is standing for all' approach does not prohibit a district court from analyzing a plaintiff's standing even if it finds that another plaintiff has sufficient standing."). An assessment of the individual Plaintiffs' standing is especially warranted here, where Plaintiffs'

[1] Citations to Plaintiffs' Opposition Brief, and all other papers filed in this case, refer to the blue ECF page numbers.

constitutional claims rest on the degree of burden on their right to vote. *See infra* at Section II. The individual Plaintiffs do not have standing to sue in their own right.

State Defendants reassert all the arguments against standing raised in their Motion to Dismiss. *See* ECF No. 163–1 at 11–16. Here, however, we focus our discussion on the first prong of standing, injury-in-fact. It is well-established that to satisfy Article III's requirements for standing, the injury alleged must be both *concrete and particularized* and *actual and imminent*. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (describing "concrete" to mean "real, and not abstract"); *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (finding that to be "particularized," an injury "must affect the plaintiff in a personal and individual way"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (noting that "imminence" acts "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending" (emphasis in original)).

The individual Plaintiffs' allegations do not satisfy these requirements. As the County Defendants note in their Reply Brief, see ECF No. 168 at 8, there is not a single allegation in the SAC that any of the individual Plaintiffs *even voted in any of the elections at issue*. Such a deficiency alone would be enough to support a finding that these Plaintiffs lack Article III standing. Without any allegations before the Court that any of the individual Plaintiffs voted—let alone voted in-person, rather than by mail—none of them can claim a "concrete and particularized" injury. *See, e.g.*, *Sinkfield v. Kelley*, 531 U.S. 28, 29–30 (2000) (no standing to challenge allegedly discriminatory practice to which plaintiffs had not been subjected). Rather, what the individual Plaintiffs allege is merely a generalized grievance that is insufficient for establishing Article III standing.

Moreover, even putting this deficiency aside—dispositive as it is—the individual Plaintiffs lack standing because their alleged injuries lack actuality and imminence. Again, the allegations of the SAC are largely speculative—Plaintiffs allege primarily that invalid votes *could* have been counted and that election

outcomes *could* have changed. *See, e.g.*, SAC ¶¶ 50, 57, 145. Plaintiffs attempt to side-step this issue by citing to cases that, in their view, stand for the general proposition that "[c]ourts have conferred standing to plaintiffs who challenge election processes which cause dilution or debasement without proving that their votes have been discounted, diluted, or debased." Opp'n Br. at 14. The irony that Plaintiffs—in seeking to *restrict* the right of all Californians to vote—rely on voting rights cases that *protected* the right to vote is not lost on State Defendants. In any event, the cited cases are distinguishable and inapposite here.

For instance, in *Gray v. Sanders*, at issue was a county unit system that literally weighted votes differently based on county of residence, to the benefit of those in smaller, more rural counties. 372 U.S. 368, 370–74 (1963). There, the plaintiff-appellee's right to vote was "impaired" because while residents of Fulton County (where plaintiff resided) comprised 14.11% of the state's population, their "unit votes" only comprised 1.46% of the total unit votes. *Id.* at 371. Plaintiffs do not contend (nor could they) that any such system exists here in California. Where the system at issue in *Gray* quite literally and facially resulted in the dilution of votes by weighting votes differently to the detriment of specific voters, standing existed. Nothing similar is present in this case.

Sandusky County Democratic Party v. Blackwell was a pre-election challenge that concerned *associational* standing, not individual standing, as is at issue here. 387 F.3d 565, 573–74 (6th Cir. 2004). This non-binding, out-of-circuit case challenged a state directive regarding provisional balloting that plaintiff-appellees alleged was in direct violation of the federal Help America Vote Act's ("HAVA") mandate that individuals shall be permitted to cast provisional ballots upon written affirmation that they are registered to vote in the given jurisdiction. *Id.* at 569–71. In holding that plaintiffs had established associational standing "to assert, at least, the rights of their members who will vote in the November 2004 election," the court found it "inevitable" that on Election Day, some individual voters would be

required to vote via provisional ballot (or else not at all), and that some number of these voters would find themselves "subject to a human error by an election worker who mistakenly believes the voter is at the wrong voting place." *Id.* at 574. These voters would then be directly subject to the challenged state directive—which required poll workers to confirm the voter's eligibility *before* allowing them to cast a provisional ballot (in direct contravention of HAVA's mandates)—and thus prevented from even casting a provisional ballot. Accordingly, the alleged injury—violation of the provisional balloting rights created by HAVA—was not unduly speculative. *Id.* Aside from the fact that *Sandusky* concerned associational standing, and is thus inapposite to the discussion at hand here, it does not offer individual Plaintiffs the support they cite it for because this is not a pre-election challenge to statewide guidance that directly conflicts with federal election law and will necessarily result in some voters being prevented wholesale from casting any vote at all. Rather, it is a post-election challenge alleging that state laws and regulations diluted Plaintiffs' votes by permitting ineligible ballots to be cast and counted—and still, all Plaintiffs can do is speculate as to what *may* have occurred or what *may* occur in the future.[2]

Plaintiffs also rely heavily on another non-binding decision in arguing the actuality and imminence of their injuries. In *Black v. McGuffage*, a coalition of Black and Latino voters challenged their counties' usage of a punch card voting system akin to what was used in Florida in the 2000 presidential election. 209 F. Supp. 2d 889, 891–93 (N.D. Ill. 2002). The injury at issue was "the higher probability of [plaintiffs'] vote[s] not being counted as a result of the voting systems used, *i.e.*, vote dilution." *Id.* at 895. To support their claim, plaintiffs

[2] The court in *Sandusky* also discussed the "responsibility and authority of the States" in the field of election law, elaborating on the limits of such authority. *Sandusky*, 387 F.3d at 569. None of those limits is violated in this case. *See id.* Moreover, *Sandusky* was ultimately a matter of statutory interpretation, and accordingly, the type of injury implicated is inapposite here. *Id.* at 568, 570–72, 578.

presented robust statistics that are wholly absent in this case. For instance, the court noted that in the 2000 presidential election, "the probability of an uncounted vote was 22 times greater in Chicago, which used one of the challenged voting systems," than in a separate county that did not. *Id.* Moreover, the challenged voting system was known to have specific, identifiable deficiencies relating to the system's inability to detect overvotes or undervotes under certain conditions. *See id.* at 893. There was also case authority to support that such probabilistic injury was sufficient to establish standing. *See id.* at 894–95 (citing cases). All of this, taken together, was enough to establish that plaintiffs' alleged injuries were sufficiently concrete, actual, and imminent. But the individual Plaintiffs here do not provide the Court with similarly particularized, statistically based evidence to allow the Court to conclude that there is any probabilistic injury that would support standing.

This Court has already ruled directly on the issue of individual standing once before. *See* ECF No. 111 at 5–10. Although the Ninth Circuit has determined that EIPCa does have organizational standing to sue, no such decision has been made regarding the individual voter Plaintiffs. And the SAC has not provided any additional allegations that should have any bearing on the Court's prior decision that "at base, Plaintiffs' allegations amount to an incremental undermining of confidence in the election results, past and future," or that "an actual and imminent injury is not shown because [Plaintiffs] rely on conjecture that this injury will continue to inflict harm." *Id.* at 9–10. Accordingly, the Court should dismiss the individual Plaintiffs from this case for lack of Article III standing.

II. PLAINTIFFS FAIL TO ALLEGE A SEVERE RESTRICTION ON THEIR FOURTEENTH AMENDMENT RIGHTS UNDER *ANDERSON-BURDICK*

Plaintiffs do not contest that the framework articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), applies here to their equal protection and due process claims. *See* Opp'n Br. at

18–19. And they have wholly failed to establish that any of the challenged statutes or regulations create any restriction—let alone a severe restriction—upon their Fourteenth Amendment rights. As such, State Defendants need only show that the challenged statutes and regulations are sufficiently justified by the State's important regulatory interests, which they are. *See Burdick*, 504. U.S. at 434; *Anderson*, 460 U.S. at 789. Accordingly, Plaintiffs' claims fail as a matter of law.

As a preliminary matter, California's rules for all-mail elections—which are at the crux of Plaintiffs' allegations—provide for *more opportunities* to vote, for *all* voters.[3] The option to vote by mail is made available to all registered voters, and the standards promulgated by the Secretary of State provide uniform guidelines for administering elections involving ballots cast both by mail and in person. There is simply *no burden on any Plaintiff's right to vote*. Instead, what Plaintiffs challenge are "generally applicable, evenhanded, politically neutral" rules that seek to expand the franchise and "protect the reliability and integrity of the election process," which the Ninth Circuit has "repeatedly upheld as 'not severe' restrictions" under the *Anderson-Burdick* framework. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc) (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)); *see also Clark v. Weber*, 54 F.4th 590, 593 (9th Cir. 2022) (holding that recall procedure did not severely burden the right to vote because it "imposes a neutral restriction on voting that applies across the lines of political affiliation, race, religion, and gender"); *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (upholding lifetime term limits where the restriction "makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender").

[3] It is also worth noting that California is not alone in adopting all-mail elections; currently, eight states—California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington—have adopted electoral rules in which ballots are mailed to all registered voters to be cast by mail or in person. *See* Nat'l Conf. of State Legislatures, Elections and Campaigns tbl. 18, *available at* https://tinyurl.com/4cmj2ksx (last visited Apr. 28, 2023).

Here, Plaintiffs have failed to allege with sufficient particularity that any sub-groups of voters are burdened by California's all-mail elections system. *See* ECF No. 111 at 8–9; *see also Short v. Brown*, 893 F.3d 671, 678 (9th Cir. 2018) (holding that because state law "does not allocate representation differently among voters . . . its distinction along county lines does not trigger heightened scrutiny"); *Feldman v. Ariz. Sec'y of State*, 843 F.3d 366, 395 (9th Cir. 2016) (Thomas, C.J., dissenting) (vote by mail is "one of the most popular and effective methods by which minority voters cast their ballots"); *id.* at 370 (granting preliminary injunction "essentially for the reasons set forth in the dissent" of then-Chief Judge Thomas). The same reasons why this Court previously determined that Plaintiffs failed to allege any cognizable injury to them as voters, see ECF No. 111 at 5–10, are equally applicable to this Court's assessment of the absence of any burden on their right to vote under *Anderson-Burdick*.

Plaintiffs call State Defendants' argument that the challenged statutes and regulations are uniform, neutral rules of general applicability that protect, rather than burden, the right to vote a "red herring." Opp'n Br. at 18. It is not immediately apparent what Plaintiffs mean by that, but if their intent is to minimize the importance of this fact, it misses the mark. That the challenged statutes and regulations protect voting rights and are "generally applicable, evenhanded, politically neutral" rules gets at the very heart of the *Anderson-Burdick* analysis. Plaintiffs complain that the challenged regulations do not require that "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." *Id.* at 18–19. In sum, they seem discontent that the regulations promulgated by the Secretary of State do not do exactly what Plaintiffs have decided is what should be done. But that says absolutely nothing about whether the laws and regulations that *do* exist are sufficient. And they are. Contrary to Plaintiffs' arguments, California's electoral framework provides consistent, politically neutral, statewide

standards for administering elections and counting ballots, as discussed at length in State Defendants' Motion to Dismiss. *See* ECF No. 163-1 at 18–23.

Plaintiffs' frequent reliance on *Bush v. Gore* confirms that they have failed to plead a cognizable claim. In that case, the Court made clear that it was not setting precedent to apply to all electoral regimes in all circumstances. That case was expressly "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. 98, 109 (2000). *Bush* concerned the unique situation in which "a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards" in a closely contested presidential election. *Id.* The Court clarified that the question before it was "*not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* (emphasis added). And yet, that is the precise question Plaintiffs raise in the present case.

Bush does not prohibit local election officials from implementing different procedures in ballot processing, vote counting, and signature verification, nor does it prohibit a state from passing laws or regulations that allow for such flexibility. Binding Ninth Circuit precedent has held that different standards can apply to different elections in the state, and that all-mail elections are not constitutionally infirm. *See Short*, 893 F.3d at 677–79. And even to the extent that *Bush* stands for the proposition, as Plaintiffs incorrectly suggest, that states must adopt standards that provide "some assurance that the rudimentary requirements of equal protection and fundamental fairness are satisfied," *Bush*, 531 U.S. at 109, the very laws and regulations that Plaintiffs seek to invalidate through this lawsuit *do precisely that*. The challenged provisions adopted uniform, statewide standards to allow for the equal treatment of all voters and all ballots, whether cast in person or by mail. Plaintiffs' repeated citation to *Bush* simply evidences the weakness of their claims.

Plaintiffs' attempt to distinguish *Short* is unavailing. *See* Opp'n Br. at 19. It is true that *Short* involved a constitutional challenge to a single statute, but the fact that Plaintiffs are challenging dozens of statutes and regulations here does not save their claims from dismissal. In fact, the breadth of Plaintiffs' challenge only offers support to State Defendants' position under the *Anderson-Burdick* framework. The Ninth Circuit has specified that, under that framework, courts generally defer to government decisions in running elections, and that this "respect" commands "particular force where . . . the challenge is to an electoral *system*, as opposed to a discrete election *rule*." *Pub. Integrity All., Inc.*, 836 F.3d at 1024–25 (emphasis in original). Here, Plaintiffs are not challenging a single electoral rule, but rather claim the facial invalidity of "an overall, generally applicable electoral system." *Id.* at 1024 n.2; *see also* SAC ¶¶ 2, 3, 48–84. Accordingly, the State's regulatory interests are even greater in this case than they were in *Short*.

Because Plaintiffs have not established that the laws and regulations they challenge in any way restrict their rights under the Fourteenth Amendment or burden their right to vote—let alone impose a *severe* burden upon such rights—the rules must be upheld under *Anderson-Burdick* if the State's important regulatory interests are sufficient (as they generally are under such circumstances). *Burdick*, 504 U.S. at 434, 439–40. Here, the State's interests in increasing voter turnout and voluntary participation in the democratic process, safeguarding public confidence in California's elections, modernizing election processes, and ensuring the consistent and efficient administration of elections are more than sufficient. *See, e.g.*, *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 192, 197 (2008); *Short*, 893 F.3d at 679; *Dudum*, 640 F.3d at 1115–117. Accordingly, Plaintiffs' equal protection and due process claims fail as a matter of law, and should be dismissed.

III. THE SAC SHOULD BE DISMISSED WITH PREJUDICE

When amendment of a complaint would be futile, dismissal may be ordered with prejudice. *See, e.g.*, *Dumas v. Kipp*, 90 F.3d 386, 393. (9th Cir. 1996). Here,

amendment would be futile. This is already the third complaint filed in this case, and Plaintiffs' repeated amendments have not cured any deficiencies relating to standing or the substantive merits of their claims. Nor have Plaintiffs identified any specific issues which might be cured by amendment or any factual allegations they could add to state a claim. *See* Opp'n Br. at 23. Previously, the Court dismissed the First Amended Complaint with prejudice, see ECF No. 111 at 13, and it should do so again.

CONCLUSION

For the foregoing reasons, and the reasons stated in their motion to dismiss, Secretary of State Weber and Attorney General Bonta respectfully request that all claims against them be dismissed with prejudice.

Dated: April 28, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for State Defendants Secretary of State Dr. Shirley Weber and Attorney General Rob Bonta, named in their official capacities, certifies that this brief contains 11 pages, which:

__ complies with the word limit of L.R. 11-6.1.

X complies with the page limit set by The Hon. André Birotte Jr.'s Standing Order, ¶ 6c.

Dated: April 28, 2023

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