PRIMARY LAW GROUP, P.C.
JOSHUA KROOT (State Bar No. 291371)
joshua.kroot@primarylawgroup.com
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
Telephone: (213) 677-0856
Facsimile: (213) 297-5771

Attorneys for Plaintiffs

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' FIRST AMENDED COMPLAINT (DOCKET NO. 84); AND

(2) STATE DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT (DOCKET NO. 85)

Date: May 14, 2021
Time: 10:00 A.M.
Courtroom: 7B
Judge: The Hon. André Birotte Jr.
Action Filed: January 4, 2021

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

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Los Angeles, CA 90071
(213) 677-0856

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(213) 677-0856

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(213) 677-0856

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Los Angeles, CA 90071
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Los Angeles, CA 90071
(213) 677-0856

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

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PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

INTRODUCTION

Plaintiffs' First Amended Complaint ("FAC") is well pled and Defendants can only attack it by misstating the allegations and the relief requested.

This is not a case that seeks to overturn the November 2020 election. However, Defendants' motions are premised on that mischaracterization, including their arguments that there is no "injury in fact," that the injury is not sufficiently "concrete and particularized," that the case is moot or barred by laches, and that the requested relief would not redress the injury.

In fact, this case seeks (and has always sought) to ensure the integrity of future elections in California, for all candidates and all eligible voters. The allegations regarding the conduct of the November 2020 election show that the statutes, orders, regulations and practices that governed the election gave rise to massive irregularities that are likely to be repeated in future elections absent a court order. The FAC seeks an audit for the same reason.

In this context, Plaintiffs meet all three prongs of standing, *i.e.* they: "(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."

With respect to injury in fact, the FAC details specific injury that is capable of repetition, yet evading review, including selections from hundreds of affidavits from citizen election observers showing irregularities in the voting process, differential treatment and diminishment of the value of the votes of the candidate Plaintiffs and their supporters. These practices have frustrated EIPCa's mission and diverted its resources. Defendants' argument that these injuries are not sufficiently particularized is contradicted by well settled law that diminishment of the value of votes constitutes a concrete and particularized injury (*e.g.*, *Baker v. Carr*, 369 U.S. 186, 204 (1962)) and that standing is not impeded merely because an injury is widely shared (*see F.E.C. v. Akins*, 524 U.S. 11, 24-25 (1998)).

With respect to traceability, the FAC alleges that Plaintiffs' injuries were caused by the election laws that Defendants are charged with enforcing, Defendant Newsom's exercise of his purported emergency powers, emergency regulations and guidance promulgated by former Secretary of State Padilla, and election practices implemented by the County Defendants that varied from county to county and caused differential treatment of votes.

Finally, with respect to redressability, it is self-evident that declaratory relief would redress the injury to plaintiffs by preventing the future disparate treatment of votes and other constitutional violations. An audit of the election process overseen by a special master is necessary to determine the extent of the irregularities so that the Court may fashion an appropriate declaratory remedy.

Plaintiffs also plead all of necessary elements of their Equal Protection, Due Process, Elections Clause and Guarantee Clause claims. Defendants assert that they did not violate the Elections Clause despite promulgating and implementing orders, regulations and practices that contravened the laws passed by the Legislature due to their purportedly unlimited emergency powers to override the Legislature in matters of election processes. The Legislature may not constitutionally delegate its powers to the executive in this manner, at either the State or local level. That they purportedly did so gives rise to additional grounds for Plaintiffs' Guarantee Clause claim. While Defendants assert that such a claim is a nonjusticiable political question, they admit at the same time that in certain circumstances, including where such legislative abdication has taken place or all power has been vested in the executive, a Guarantee Clause cause of action lies.

Finally, Defendants' assertions that Rule 9(b)'s heightened pleading standards apply are, like the rest of their arguments, premised on mischaracterization of the FAC. The FAC does not allege that Defendants committed fraud, only that their actions gave rise to irregularities, making potential for fraud more likely. Nor are Plaintiffs' vote dilution arguments dependent on showing fraud. Indeed, the alleged irregularities

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

themselves, absent fraud, are more than enough to dilute the votes of the Candidate Plaintiffs and their supporters, as the FAC alleges.

THE COMPLAINT ALLEGATIONS

The FAC alleges that California has passed into law a series of statutes that have the cumulative effect of unconstitutionally undermining election integrity. (FAC § III.) The effects of these statutes was exacerbated by emergency orders Defendant Newsom promulgated, which contravened certain statutes then existing by providing for universal VBM balloting without adequate safeguards with respect to the validity of VBM votes, the chain of custody of ballots and verification of signatures among other things. (*Id*. ¶¶ 76-77.) The legislature subsequently passed these requirements into law. (*Id*. ¶ 76.) The effects were further exacerbated by emergency regulations issued by former Secretary of State Padilla in further contravention of statutes passed by the Legislature. (*Id*. ¶¶ 78-79.) Under these regulations, signatures on VBM envelopes were presumed valid, virtually any piece of paper received in a VBM envelope could be counted as a ballot, multiple ballots could be stuffed into a single VBM envelope, the information provided by the voter(s) on a VBM ballot envelope no longer needed to be provided under penalty of perjury, and safeguards against VBM ballots being mailed after election day were removed. (*Id*. ¶¶ 81-94.)

The cumulative effect of these statutes, orders and regulations has been to:

A. Eliminate[] absentee ballots and massively expand[] VBM balloting through which even voters who could vote in person receive less-secure VBM ballots;

B. Legalize[] unrestrained and unrestricted ballot harvesting by removing mandates of "chain of custody", unleashing the exploitation of vulnerable populations such as non-citizens, college students and senior citizens;

C. Eviscerate[] protections on in-person voting;

D. Cause[] VBM and in-person voters to be treated differently,

causing disproportionate harm to in-person voters;

E. Implement[] laws and procedures that automatically add non-citizens to voter rolls and protect against detection and prosecution of non-citizen voting; and

F. Fail[] to comply with federal laws requiring maintaining accurate voter rolls, allowing deceased persons, non-citizens, non-residents, and other ineligible voters to remain on rolls and receive ballots. [FAC ¶ 6.]

Prior to the November 2020 election, Plaintiff EIPCa performed analysis of California's voter rolls, finding, among other things, hundreds of thousands of verifiably ineligible voters (likely out of many times more), and tens of thousands of voters who were registered two, three or four times. (FAC ¶¶ 98-101.) EIPCa reported these findings to then Secretary of State Padilla. (*Id.*) However, neither he nor the other State Defendants took any action to remedy the issues. (*Id.* ¶ 102.)

When the November 2020 election took place, the statutes, orders and regulations caused massive voter irregularities and opportunities for potential fraud. (FAC § VII.) These included citizen observers being denied access to ballot processing facilities and barred from observing the remaking of military, damaged or defective ballots; ineffective validation of signatures on VBM ballots; votes being changed; ballots being left unsecured; the insertion of a flash drive into a voting machine while it was tallying votes; inconsistencies between votes recorded by voting machines and later tabulation of those votes. (*Id.*) EIPCa has collected hundreds of sworn affidavits from citizen observers and witnesses across the state attesting to these and other irregularities. (*Id.* ¶¶ 119-120.)

Contributing to the irregularities were disparate practices as between counties, causing votes to be treated differently. (*Id.* ¶¶ 107-120.) In addition, in person voting was treated differently from VBM voting. (*Id.* ¶¶ 107-120.)

As a result, the value of votes legally cast by and for the individual Plaintiffs and

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(213) 677-0856

EIPCa's citizen observers were diminished; Defendants failed to ensure that only legally cast VBM ballots were included in the canvass; votes of some California citizens, including individual Plaintiffs and their supporters, and EIPCa's citizen observers, were treated differently from those of others; and differential treatment of VBM and in-person voters disproportionately burdened people who prefer to vote in person, including Black and other minority voters. (*Id*. ¶¶ 174-178, 189-190.)

The statutes and regulations remain in effect and will affect upcoming elections. The regulations are likely to be extended, and the legislature has already taken steps to codify some such regulations into law as described above. As such, the violations described in the FAC are capable of repetition. (*Id*. ¶ 162.)

APPLICABLE LEGAL STANDARD

I. Plaintiffs' Allegations Must Be Assumed to Be True Under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6)

A Fed. R Civ. P. 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)).

A Fed. R. Civ. P. 12(b)(6) motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pled in the complaint as true and draw all reasonable inferences in favor of the nonmoving party.

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Cahill v. Liberty Mut. Ins. Co.,80 F.3d 336, 337–38 (9th Cir. 1996). A complaint need not contain detailed factual allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Twombly*, 550 U.S. at 556).

II. The FAC Is Not Subject to Rule 9(b)'s Pleading Standard

Defendants' argument that Rule 9(b)'s heightened pleading requirements apply to the FAC forms a cornerstone of their motions. Their arguments are replete with assertions that the FAC lacks sufficient "specificity." (St. Mot. at 2:3-5, 11:1, 14:11-17:7; 17:10; Ct. Mot. at 5 n. 7, 18 n. 14).

Rule 9(b), however, applies only "in alleging fraud or mistake." Fed. R. Civ. P. 9(b). Yet, the FAC nowhere alleges "fraud or mistake," and even if it did so, such allegations would not be a basis to dismiss the action, which solely brings claims for violations of the Equal Protection, Due Process, Elections and Guarantee Clauses of the United States Constitution. As detailed below, none of the elements of these causes of action is fraud or mistake.

Defendants provide a laundry list of allegations that they assert are allegations of "fraud," (e.g. "refer[ing] to . . . emergency regulations facetiously," referring to their rationale as "pretext," alleging that Defendants actions are part of a "systematic attack" on election integrity, that their actions are "unlawful" and that they intend to "destroy evidence" (*see* St. Mot. at 14:18-27)). Defendants also argue that allegations of fraud can be read between the lines in allegations that Defendants "intentionally fail[ed] to ensure that only legally cast VBM ballots were included in the canvass for the 2020 [election]", that Defendants have "'usurp[ed]' the Legislature's authority, and have . . . implemented . . . laws 'so as to deny California and its citizens . . . a republican form of government' and 'protection against invasion' in a manner

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intentionally designed to enable voting fraud to "proceed unchecked." (St. Mot. 15:6-14.) They argue that these latter allegations "support" Plaintiffs causes of action.

Defendants' descriptions mischaracterize the allegations, but even if they did not, none of these is an allegation of fraud, which has specific elements that Defendants do not identify anywhere in the FAC.

Further, even if they were elements of fraud, which they 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).[1]

Defendants also engage in wild speculation that because the FAC alleges that "vote irregularities that are widespread enough that they could have changed the outcome of the November 2020 election," the FAC alleges widespread fraud. (St. Mot. at 15:20-16:19.) This is a red herring, based on yet another misrepresentation of the allegations of the FAC. Plaintiffs nowhere assert that the "vote irregularities" that could have changed outcomes consist of fraud. Indeed, the FAC clearly distinguishes between "irregularities" on the one hand, and "potential fraud" on the other. There are many potentially outcome-changing "irregularities" that do not amount to fraud, such as ballots being counted despite being mailed after the in-person voting deadline, ballots inadvertently counted multiple times, ballots lost or damaged, chain of custody not maintained, and more. The FAC gives a host of detailed examples of such irregularities. (FAC ¶¶ 110-132)

ARGUMENT

I. Plaintiffs Have Article III 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

[1] Even if FRCP 9b did apply, Plaintiffs' detailed 51-page FAC alleges each of the elements of Plaintiffs' causes of action with extraordinary specificity and would be compliant with Rule 9(b)'s heightened pleading standards.

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo Inc. v. Robins*, U.S. 330, 338 (2018).

A. Plaintiffs Have Alleged an Injury in Fact

"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. Here, Plaintiffs have adequately alleged that the value of Candidate Plaintiffs' votes, the votes of their supporters, and the votes of similarly situated voters have been diminished and there is a substantial risk their votes will continue to be diminished. Plaintiff EIPCa has alleged injury because the votes of their volunteers are similarly in danger of diminishment of value, and because EIPCa has had to divert and reallocate resources toward educating voters and training volunteers, frustrating EIPCa's mission.

1. The Plaintiffs' Voting Injuries Are Concrete and Particularized.

The Supreme Court has long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Here, Plaintiffs allege a concrete and particularized injury.

First, Plaintiffs have asserted that Defendants violated and continue to violate the Equal Protection and Due Process Clauses by failing to ensure only legally VBM ballots are counted and enforcing laws, statutes, orders, and practices that "diminish[] the value of votes legally cast by and for the individual plaintiffs and EIPCa's citizen

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

observers…." (FAC ¶¶ 174-75, 188-90). Plaintiffs' injury finds support in *Baker*, wherein the appellants challenged a state apportionment statute "on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee." *Baker*, 369 U.S. at 703. They asserted that a 1901 statute constituted arbitrary and capricious state action amounting to "gross disproportion of representation to voting population" and that "th[e] the classification disfavor[ed] the voters in the counties in which they reside[d], placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties." *Id.* at 207-08. The Court held the appellants had standing because they were asserting " 'a plain, direct, and adequate interest in maintaining the effectiveness of their vote'…." *Id*. at 208 (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

Like the apportionment statute challenged in *Baker*, the laws, statutes, orders, and practices challenged here diminish the value of Plaintiffs' and their supporters' votes. In *Baker* though, the plaintiffs' injury arose from only one apportionment statute. Here, Plaintiffs have suffered multiple injuries from a myriad of statutes, orders, and practices. As standing existed in *Baker*, it is found all the more so here.

Defendants misconstrue Plaintiffs' injury by conflating a widespread injury with a lack of a personal injury. (St. Mot. at 7:9-8:15; Ct. Mot. at 7:3-8:19.) In doing so, they rely on *Lance v. Coffman*, 549 U.S. 437 (2007), a distinguishable case. In *Lance*, four private citizens challenged a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because [t]he only injury plaintiffs allege[d] [was] that the law—specifically the Elections Clause—ha[d] not been followed." *Id.* at 442. In other words, the

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

plaintiffs asserted no particularized stake in the litigation. *Id.*

On the other hand, here, Plaintiffs are not merely claiming the Defendants did not follow the law, but that their application of the voting laws impaired the effectiveness of their votes. *See Baker*, 369 U.S. at 207-08. The fact that Plaintiffs' injuries are widely shared does not impede standing. *See F.E.C. v. Akins*, 524 U.S. 11, 24-25 (1998) ("[T]he informational injury at issue here, directly relating to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in federal courts.")

Second, Plaintiffs' equal protection claim is predicated on the theory that Defendants have applied disparate practices in different counties, "causing the votes of some California citizens, including individual Plaintiffs and their supporters, and EIPCa's citizen observers, to be treated differently from those of others." (FAC ¶ 176). Courts confer standing when states apply voting laws unevenly. *See Common Cause S. Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F.Supp.2d 1106, 1108-10 (C.D. Cal. 2001) (finding the alleged county to county variations in the reliability of voting systems were sufficient to state an equal protection claim); *Black v. McGuffage*, 209 F.Supp.2d 889 (N.D. Ill. 2020) (same); *League of Women Voters v. Fields*, 352 F.Supp. 1053 (E.D. Ill. 1972) ("[t]he administration of valid state election laws in an uneven or unlawful manner could amount to such arbitrary administration that citizens would be denied federal rights to vote, to have their vote counted equally, and to have substantially fair elections.")

Here, the FAC alleges that the Defendant county registrars implemented different election rules and practices which led to disparate results. (FAC ¶ 120). The incident reports occurred in counties where Plaintiffs reside, diminishing the value of votes legally cast by and for the Plaintiffs. (*Id.* ¶¶ 23-35, 110-18, 120, 123-32).

Third, Plaintiffs allege "Defendants have violated, and are engaged in the continued violation of, the Equal Protection Clause by treating VBM voters differently

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

from in-person voters, disproportionately burdening people who prefer to vote in person, including Black and other minority voters, including individual Plaintiffs and their supporters, and EIPCa's citizen observers." (*Id.* ¶ 177). Multiple recent election law challenges have found standing on this basis. *see League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (2014); *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (2016). In *League of Women Voters* and *McCrory*, plaintiffs successfully argued that curtailing in-person voting disproportionately burdens minority voters. 769 F.3d at 245-46; 831 F.3d at 216-17.

Under California law, voters can only vote in person if they are in line at the time the polls close. (*Id.* ¶ 154). However, under Former Secretary of State Padilla's guidance, "VBM voters could legally vote by dropping off ballots in mail boxes until 11:59 p.m. and still have their ballots postmarked in such boxes." (*Id.* ¶ 155). Further, "because ballots were not picked up from drop boxes until well into the day after the election and because the drop boxes were unmonitored, nothing prevented VBM voters from voting the day after election day by dropping ballots in such boxes." (*Id.* ¶ 156). The difference in timing allots VBM voters at least four additional hours to vote. (*Id.* ¶ 157). The unequal treatment disproportionately impacts in-person voters and vulnerable communities who historically rely on in-person voting to a greater degree than other groups. (*Id.*); *McCrory*, 831 F.3d at 216-17.

2. California's Election Laws and Procedures Create a Substantial Risk that Candidate Plaintiffs' Votes, and Those of Their Supporters, will Be Diluted Absent Court Intervention.

The Defendants claim that Plaintiffs do not have standing because the FAC does not identify specific ballots whose value was diminished. (St. Mot. at 7:9-22; Ct. Mot. at 9:3-5). As an initial matter, this is not true. The FAC alleges diminishment of the Candidate Plaintiffs' votes and those of their supporters. (FAC ¶¶ 174-75, 188-90.)

However, even if it did not, the November 2020 election results are not the basis for standing, the election process itself confers standing. As the FAC alleges, this

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

process will be substantially similar in upcoming elections to the process in November 2020 absent Court intervention. (FAC ¶¶ 21; 63; 108; 160) Following *Baker*, the Supreme Court has consistently upheld the standing of voters to challenge the constitutionality of election processes which cause dilution or debasement of their votes without first proving that their particular votes have been actually miscounted, diluted, or debased. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (Virginia residents have standing to seek a declaration that Virginia's poll tax violated the equal protection clause); *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (Hawaii voter has standing to challenge as unconstitutional the state's ban on write-in candidates); *Dunn v. Blumstein*, 405 U.S. 330, 333, n.2 (1972) (voter has standing to challenge Tennessee's durational residence requirement); *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (voters residing in racially gerrymandered districts have standing to sue); *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 as a basis for counting votes, holding that "appellee, like any person whose right to vote is impaired, has standing to sue" (citations omitted)). *See also Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (upholding the district court's determination of standing even though no specific voter had been identified as having been wronged, finding "by their nature, [such wrongs] cannot be specifically identified in advance" but rather are "inevitable," "real and imminent").

Further, despite Defendants' assertion to the contrary, the Supreme Court does not require that a plaintiff demonstrate "that it is literally certain that the harms they identify will come about." (St. Mot. at 7:12-17; Ct. Mot. 9:3-5); *Clapper v. Amnesty Intern, USA*, 568 U.S. 398, 1150 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. City of San Jose*, 485 U.S. 1,8 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1000-1001 (1982); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). In the voting context, courts have found

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

standing based on an increased risk that votes would be improperly discounted. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (per curiam); *Black v. McGuffage*, 209 F.Supp.2d 899 (N.D. Ill 2002). As the Eleventh Circuit explained: "[i]immediacy 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." *Florida State Conf. of The NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

Black is instructive. There, plaintiffs alleged that minority voters in Chicago suffered injury during the 2000 presidential election because the challenged voting system created a higher probability that their vote would not be counted. *Id*. at 894-85. The court noted 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. If standing in cases like this one required more, then no one would have standing to challenge a system with, for example, a 20% or 30" or 60% residual vote rate, or a policy under which every tenth ballot was systematically discarded instead of counted." *Id.* at 895. Therefore, the court concluded plaintiffs had standing to raise their due process and equal protection claims. *Id.*

Plaintiffs' allegations of a substantial risk of harm are sufficient to establish a cognizable injury at the pleading stage of litigation.

3. Candidate Plaintiffs Have Also Alleged an Injury in Fact Because the Election Laws and Procedures Affect Their Chances of Winning.

Courts recognize that candidates have Article III standing to challenge election processes that affect the chances of winning an election. *See, e.g., Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 360-68 (3rd Cir. 2014) (independent candidates had standing to challenge the constitutionality of the Election Code's cost assessment provisions for nomination challenges); *Krislov v. Rednour*, 226 F.3d 851, 857 (7th Cir. 2000) (candidates had Article III standing to challenge state's signature requirement

even though they acquired enough signatures to be placed on ballot); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (the additional expense of campaigning against candidates who should not be on the ballot provides candidate with Article III standing); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626-27 (2d Cir. 1989) (independent presidential candidate had standing to challenge League of Women Voter's decision to deny her the right to participate in the Democratic and Republican primary debates); *Common Cause v. Bolger*, 512 F.Supp. 26, 30-31 (D. D.C. 1980) (candidates and campaign participants had standing to challenge franking statute which allegedly conferred unlawful benefit on incumbents seeking reelection, on grounds that granting subsidy to incumbents taints the political process and renders it unfair).

The FAC alleges that the expansion of VBM ballots and changes in law and election procedures not only impact the effectiveness of Plaintiffs' votes, but Plaintiffs chances of winning their individual elections in 2022. (*Id.* ¶ 59). During the 2020 election, the failure to ensure only legal ballots were cast diminished "the value of votes legally cast…for the individual Plaintiffs…." (*Id.* ¶ 174). Further, the Plaintiffs ran in counties that received an unprecedented number of complaints regarding obstruction of citizen observers, the cancellation of votes, and inconsistencies in the vote tabulations. (*Id.* ¶¶ 23-35, 110-18, 120, 123-32). "Because the same or substantially similar laws, regulations, orders, and practices are governing and will govern upcoming elections, the same situation will repeat in [the Plaintiffs] elections absent Court intervention." (*Id.* ¶ 108).

State Defendants argue that because the candidate filing period for the June 2020 primary election has not yet opened, "any claim of specialized basis for standing is accordingly not ripe at this time." (St. Mot. at 7-8, n.2) This tactic is aimed at denying Plaintiffs any remedy. The candidate filing period opens up roughly 4 months before the June 2022 election, which means roughly 3 months before VBM ballots are mailed and early voting begins. However, as discussed below concerning mootness, 3

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355 South Grand Avenue, Suite 2450
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(213) 677-0856

or 4 months is clearly not enough time to litigate election procedures, file pleadings and motions, obtain discovery, and get a favorable ruling, early enough before the election. Moreover, under *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam), Federal courts are reluctant to intervene shortly before the election, when any change in procedures might confuse voters.

Defendants appear to seek impunity behind a Catch-22 doctrine under which election-related lawsuits are always either unripe for purposes of standing, moot (addressed below), or else too near to the election. Such effective impunity is antithetical to a republican form of Government.

4. EIPCa Has Organizational Standing for the Additional Reason that It Was and Will Be Forced to Expend Additional Resources to Accomplish Its Mission.

The test of whether an organizational plaintiff has standing is identical to the three-part test outlined above normally applied in the context of an individual plaintiff. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). An organization establishes the requisite injury upon a showing of "both a diversion of its resources and a frustration of its mission." *Id.* That is so even if the "added cost has not been estimated and may be slight," because standing "requires only a minimal showing of injury." *Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000)).

Since California dramatically changed their election procedures, EIPCa has had to expend additional resources to educate voters and observers. (*Id.* ¶ 108). The Defendants' obstruction of citizen observers during the 2020 election was unprecedented, and EIPCa will have to expend additional resources to train and prepare observers for future elections absent court intervention. (*Id.*) Moreover, EIPCa's mission is subject to a substantial risk that its observations will again be obstructed in upcoming elections.

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

The Supreme Court and the Ninth Circuit have held that an organization alleges an injury in fact where it "expended additional resources that they would not otherwise have expended" in order to accomplish its mission. *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."). Thus, EIPCa has established that it has and will suffer an injury in facts as a result of California's election laws, regulations and practices by being forced to divert and reallocate resources. *See National Council of La Raza*, 800 F.3d at 1040-41.

B. Plaintiffs Have Adequately Alleged Traceability

The Ninth Circuit finds a requisite traceable connection for purposes of standing where a law that causes injury to plaintiff specifically grants the defendant enforcement authority, *Association 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 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. Regarding the State Defendants, 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.* California Code of Regulations §§ 20910, 20960, 20961 and California Elections Code § 3020. The California Attorney General is the chief law officer of the state and in charge of enforcing the challenged California election laws that undermined the integrity of California

elections. *See* Cal. Const. art. V, § 13; (FAC ¶¶ 58-75). California law provides Governor Newsom authority to issue and enforce executive orders altering election procedures and law. California Government Code § 8627. Thus, even though the State Defendants were perhaps not the "last step in the chain of causation," they opened the door to massive voting irregularities impacting the effectiveness of Plaintiffs' votes. *Bennet*, 520 U.S. at 169; State's Br. at 10.

Regarding the Defendant County Registrars, they are empowered to administer elections, and widespread evidence of irregularities, potential fraud and differential treatment occurred at their voting locations, which is likely to recur. (FAC ¶¶ 109-132). Indeed, State Defendants acknowledge the County Defendants' central role in enforcing and carrying out key aspects of election law. St. Mot. at 10:3-4 (explaining "signature verification" and "vote tabulation" are "the tasks of local officials…"). County Defendants' contention that they were not the "primary cause" of the Plaintiffs' injuries is inapposite—state law and the Secretary of State's orders confer on them the authority and discretion to enforce election procedures, as the County Defendants acknowledge in their briefing. (Ct. Mot. at 11:3-6); *Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018) (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.)

C. Plaintiffs Have Adequately Alleged Redressability.

The third component of standing, redressability, examines whether the relief sought, if granted by the court, is likely to alleviate the particularized injury alleged by the plaintiff. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Here, the Relief Plaintiffs seek is a determination of the constitutionality of the challenged laws, and audit to show extent of impact of those laws and effects on Plaintiffs. (FAC ¶¶ 50-51). Such a declaration and audit would alleviate the injuries alleged by Plaintiffs.

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

1. **Nature of Requested Relief Has No Bearing at Pleading Stage**

As an initial matter, a motion to dismiss for failure to state a claim may not be based on a complainant's request for relief, even if the relief requested is improper. *Southern Cal. Water Co. v. Aerojet-General Corp.*, 2003 U.S. Dist. LEXIS 26534, * 12 (C.D. Cal. 2003) ("A Rule 12(b)(6) motion will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled."); *see also Massey v. Banning Unified Sch. Dist.*, 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003). A Rule 12(b)(6) motion will not be granted merely because plaintiff requests a remedy to which he or she is not entitled. "It need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." *Doe v. United States Dep't of Justice*, 753 F2d 1092, 1104 (D.C. Cir.1985); *Asher v. Reliance Ins. Co.*, 308 F.Supp. 847, 850 (N.D. Cal. 1970).

2. **Declaratory Relief Will Redress Plaintiffs' Injury**

The chronic failure of state and local officials to remedy well-known and longstanding violations of fundamental constitutional rights gives rise to a claim for prospective injunctive and declaratory relief against those officials. *See Penick v. Columbus Bd. of Educ.*, 519 F.Supp. 925, 928, 941-42 (S.D. Ohio 1981) ("studied indifference" and willful blindness of state education officials to continuing equal protection violations supported 1983 injunctive relief); *Penick v. Columbus Bd. of Educ.*, 663 F.2d 24, 27 (6th Cir. 1981) ("hands off" policy of state officials and failure to remedy known constitutional violations contrary to their legal duties subject to 1983 injunctive relief).

Defendants' contention that declaratory relief would not redress Plaintiffs' injuries is puzzling. (Ct. Mot. at 11:24). Plaintiffs allege California's current election process is the cause of their injuries. The invalidation of this scheme on constitutional grounds would remove the unconstitutional aspects from the process, preventing such injuries from occurring in the future. The elimination of unconstitutional laws, by way

of declaratory relief, is the prima facie purpose of a constitutional challenge and the primary vehicle for a Plaintiff to restore their constitutional rights. *Isaacson v. Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013) (Where Plaintiffs injury "is traceable to the challenged statute" there was "not any doubt" enjoining enforcement of the law would redress the injury).

3. An Audit Will Redress Plaintiffs' Injury and a Special Master Is Needed

In general, district courts have broad discretion in shaping equitable remedies. *Labor/ Cmty. Strategy Ctr. v. Los Angeles County Metro. Transit Auth*., 263 F.3d 1041, 1048 (9th Cir. 2001); *Kenney v. United States*, 458 F.3d 1025, 1032 (9th Cir. 2006). In formulating the appropriate remedy, "a court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." *Trump v. International Refugee Assistance Project*, 137 U.S. 2080, 2087 (2017) (citation omitted); *Kansas v. Nebraska*, 574 U.S. 445, 456, (2015) (noting that a court of equity may "'mold each decree to the necessities of the particular case' and 'accord full justice' to all parties"). And the Supreme Court has repeatedly advised, "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) and *Virginian R. Co. v. Railway Emp.*, 300 U.S. 515, 552 (1937)).

Defendants incorrectly argue that an audit is "disproportionate" to the harm plaintiffs have suffered. (Ct. Mot. at 22:15-16). First, the audit is not an extreme remedy – it is only what is necessary to show the extent of the harm and unconstitutionality of the laws and regulations Plaintiffs' challenge. An audit is the *only means by which* the extent of disparate impact of laws and regulations can be assessed and documented, and an appropriate order crafted by the Court. Defendants control all aspects of the election process and have exclusive access to all the ballots,

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

voting machines, and other direct evidence which can only be examined and uncovered by the review of this court. The audit will be at Plaintiffs' expense, so the relief requested will not cause a burden on the state treasury. And the audit can be conducted such that it will not tie up voting machines, alter them, or otherwise burden the administration of future elections. Second, transparency is a cornerstone of fair elections. Defendants should not be afraid of transparency if there is nothing to hide, and the stark resistance only undermines their contentions. If, as the Defendants contend, a transparency-enhancing audit will "cast[] doubt upon the results of the past election", what irregularities do they expect to be revealed? (Ct. Mot. at 1:10-11). To the contrary, transparency should increase the public's trust in an election. Finally, even taking the Defendants' contention as true that an audit were an extreme measure, denial and diminution of voting rights is an extreme deprivation requiring the utmost remedy. *See, e.g. Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (the right to vote was "a fundamental political right because it is preservative of all rights" (quoting *Yick v. Hopkins*, 118 U.S. 356, 370 (1886)).

Where deprivation of rights has occurred where evidence is entirely or mostly controlled by the defendants, Courts will order an audit, with supervision by a Special Master as required by the circumstances. *E.g., Contractors, Laborers, Teamsters, v. Hroch*, 757 F.2d 184 (8th Cir. 1985) ("We agree with the appellants that it was not necessary for them to prove an exact amount of damages in order to obtain an order compelling the Company to specifically perform its obligation to make contributions…The exact amount of contributions due could then have been determined by the court through a court-ordered audit at the Company's expense."); See *International Ass'n of Machinists Nat'l Pension Fund v. Estate of Dickey*, 808 F.2d 483 (6th Cir. 1987); *International Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp*., 380 F.3d 1084 (8th Cir. 2004); *Coleman v. Brown*, 2018 WL 2865626 (E.D. Cal. 2018) (audit and supervision of a prison by a special master, including evaluations by experts, after prisoners sufficiently allege constitutional

deprivations); *Madrid v. Tilton*, 2008 WL 2200057 (N.D. Cal. 2008) (same).

Defendants also incorrectly contend that a showing of "exceptional condition" is required for appointment of a special master pursuant to Rule 53 and that Plaintiffs have failed to make such a showing. (Ct. Mot. at 24:17). However, Defendants ignore the December 2003 amendments to Rule 53. As a result of those amendments, appointment of a special master for pretrial purposes no longer requires a showing of "exceptional" circumstances or "complicated" questions. Fed. R. Civ. P. 53(a)(1)(C); Schwarzer, Tashima, and Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, 16:236.10 (2006) (no requirement of an exceptional condition under Rule 53(a)(1)(C)).

Even if Rule 53 required a showing of "exceptional" circumstances or "complicated" questions, the Plaintiffs have satisfied that requirement. The parties have been unable to resolve their disputes concerning electronic discovery (or any discovery) without Court intervention, despite numerous lengthy calls and letters. (*See* FAC ¶ 18). Resolution of these disputes will likely require a substantial investment of resources on the part of the decisionmaker, as well as considerable technical expertise. Under these circumstances, appointment of a special master is justified. *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (The Court may determine that appointment of a Special Master is appropriate based on considerations such as "the complexity of [the] litigation" or "problems associated with compliance" with court orders.); *see also Perez v. Southwest Fuel Mgmt., Inc.*, No. CV164547FMOAGRX, 2017 WL 10574066, at *1 (C.D. Cal. Feb. 13, 2017) (denying application for reconsideration of order appointing special master where "discovery thus far has been extensive, complicated and contentious"); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550 (W.D. Tenn. 2003) (granting the motion for appointment of a special master to oversee electronic discovery issues "[g]iven the amount of electronic data at issue.")

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

D. Defendants' Mootness and Ripeness Arguments Fail

The County Defendants assert that "Plaintiffs seek a backdoor means of reversing the 2020 Presidential Election results." (Ct. Mot. at 13:5). In so asserting, County Defendants fundamentally mischaracterize Plaintiffs' FAC. The FAC does not seek to overturn the 2020 election for any candidate. It seeks to ensure the integrity of future elections for all eligible voters, regardless of viewpoint or party.

A case is rendered moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. *Rubin v. City of Santa Monica*, 308 F. 3d 1008, 1013 (9th Cir. 2002) (quoting *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000). The burden of establishing mootness is a heavy one. *County of Los Angeles v. Davis*, 440 U. S. 625, 631 (1979). Thus, the court will not find a case or controversy moot if the underlying dispute between parties is capable of repetition, yet evading review. *Rubin*, 308 F.3d at 1013. *See also Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911).

The capable of repetition but evading review doctrine is applied in those cases where the plaintiff can reasonably show that he will again undergo the same injury. *Hancock v. Symington*, 1995 U.S. App. LEXIS 4579, *6 (9th Cir. 1995) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). This exception applies when two conditions are met: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinsten v. Bradford*, 423 U.S. 147, 149 (1975).

Courts consistently apply this doctrine to election-law cases. As the Ninth Circuit recently stated in *Porter v. Jones*, 01-56480 2003 U.S. App. LEXIS 2058 (9th Cir. Decided February 7, 2003), constitutional challenges involving procedures surrounding elections fall outside of the normal mootness standards because the inherently brief duration of an election is almost invariably too short to enable full litigations on the merits. (Citing *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765,

774 (1978).) The *Porter* Court noted:

Election cases like the present one, come within the type of controversy that is 'capable of repetition yet evading review.' Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws - including the one under consideration here - could never reach appellate review. *Porter v. Jones*, 01-56480 2003 U.S. App. LEXIS 2058 at *12 (9th Cir. Decided February 7, 2003.

Meyer, Colorado Sec'y of State v. Grant, 486 U.S. 414 (1988) is instructive. In *Meyer*, a state statute prohibited the use of paid circulators to obtain signatures for petition drives. When Appellees realized they would need the assistance of paid personnel to procure the required number of signatures within the mandated time period, they brought suit to challenge the statute. The Court held that even though the November 1984 election had long since passed, the action was not moot since there was the reasonable expectation that the same complaining party would once again be prosecuted under the statute, and the challenged action is too short in duration to be fully litigated before it concludes. *Id*. at 417.

Moreover, numerous circuit cases have adopted similar holdings. In *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), the Riverside County Registrar of Voters denied Schaefer, a nonresident of California who wished to file as a candidate in the 44th Congressional District of California, the required nomination papers because he was not registered to vote in California as required by state law. When Plaintiff filed an appeal, Defendants argued that the case was moot because the contended seat had been filled. *Id*. at 1032. The Court disagreed, holding that even though the election had passed, Schaefer's claim was capable of repetition yet evading review. This is because California could deny him or any other nonresident the right to file a declaration of candidacy, and the short time span between filing for election and the election made such a challenge difficult to review. *Id*. at 1033.

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

In *Rubin v. City of Santa Monica*, 308 F.3d 1008, (9th Cir. 2002), the city would not permit Jerry Rubin to designate peace activist as his occupation on the city election ballot in his run for City Council in the 2000 election. *Id*. at 1011. Upon appeal, the city contended that since the November 7, 2000 election had 'long since come and gone,' the issues were moot. *Id*. at 1013. The Court rejected this argument, holding that Rubin's claims are capable of repetition because the city could once again deny him the use of his appellation on the ballot, and the short duration between filing for election and the election, itself, made such a challenge difficult to review. *Id*.

In *Taxpayers for Vincent v. Members of the City Council of the City of Los Angeles*, 682 F.2d 847 (9th Cir. 1982) Taxpayers for Vincent and Candidates' Outdoor Graphics Service (COGS) contested the constitutionality of a municipal code prohibiting the posting of signs on numerous types of public property. *Id*. at 848. While the Court noted Vincent's disinterest in future public office, it maintained that COGS was in the business of printing and posting campaign signs for candidates and could very well expect further employment in future elections. Therefore, because the City showed no sign of curtailing its enforcement of the ordinance, coupled with the frequency and brevity of local political campaigns compared to the length of time of judicial proceedings, the issue is one of capable or repetition, yet evading review, thus making the appeal not moot. *Id*. at 849.

In *Acosta v. Pacific Enterprises*, 1992 U.S. App. LEXIS 639 (9th Cir. 1992) Pacific Enterprises denied Acosta, an employee, a list of all participants in employee benefit plans which Plaintiff required to solicit votes in favor of a candidate seeking election to the company's board of directors. *Id*. at *3. Plaintiff brought an action under ERISA to compel the defendants to provide the list. The Court denied his motion and approximately two months later, plaintiff's candidate lost the election. When plaintiff subsequently appealed the District Court's decision, Defendants contended that plaintiff's claim was moot because the election had passed. *Id*. at *7. The Court disagreed. It held that even though Pacific Enterprises already held its

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355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856

election and plaintiff's candidate was unsuccessful, the case was not moot because plaintiff intended to support future candidates and would thus require the list of plan participants. Because there was a strong likelihood that defendants would once again deny plaintiff the list, the Court found the controversy sufficiently capable of repetition. Also, because the annual elections typically lasted two to three months, the issue would most certainly evade review since litigation can consume years.

Like *Meyer*, *Schaefer*, *Taxpayers for Vincent*, and *Acosta* -- here too because of the purported unconstitutionality of the statutes, coupled with the frequency and brevity of local political elections compared to the length of time of judicial proceedings, the issue is one of capable of repetition, yet evading review. Therefore, this case is not moot.

E. Defendants' Laches Argument Is Improper on a Motion to Dismiss, and Fails to Meet the High Barred Required in Voting Rights Cases

County Defendants wrongly assert that Plaintiffs' claims are barred by laches. (Ct. Mot. 15:12-17:15). To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. *See, e.g.*, *Lingenfelter v. Keystone Consol. 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). Therefore, the laches defense in the election context requires a higher showing

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(a point that County Defendants' fail to mention in their moving papers).

Moreover, as opposed to the cases cited by County Defendants, here all of the conduct occurred during the course of the election and in the post-election vote counting. Plaintiffs could not have known the basis of these claims, or presented evidence substantiating their claim, until after the election. Indeed, Plaintiffs filed the initial complaint and TRO motion expeditiously and did not *"deliberately" delay* in filing the initial Complaint and TRO motion. Defendants cannot now assert the equitable affirmative defense of laches or equity, with no unreasonable deliberate delay. Further, Defendants suffer no genuine prejudice, as evidenced by their own request for additional time to file a Motion to Dismiss in this case. (Dkt. No. 77.)

Finally, Plaintiffs' request for relief seeks a bar to future conduct, a situation in which laches is generally unavailable. *See, e.g., Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959–60 (9th Cir. 2001) ("Often the defendant will not be prejudiced by a bar on future conduct. As we recently explained, '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.').

II. Plaintiffs Have Adequately Pled All Causes of Action

A. Violations of the Equal Protection and Due Process Clauses

An equal protection challenge in an election case, as in any other, requires a showing of purposeful discrimination. *Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 n. 11 (9th Cir. 2001). Strict scrutiny applies in an equal protection analysis whenever the classification "impinge[s] on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr.*, 473 U S 432, 440, 105 S. Ct. 3249, 3254 (1985). In addition, there is no requirement that the fundamental right be destroyed, or even seriously damaged, before strict scrutiny is invoked. Examples of impermissible impingement on fundamental rights include the imposition of a poll tax upon the right to vote, thus establishing a voter qualification that had no relation to the

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ability to vote and that discriminated against the poor, *Harper v. Virginia Bd. of Elections*, 86 S. Ct. at 1083, a municipal ordinance which required that nonresidents consent to annexation as a condition of receiving a subsidy for mandated sewer connections, *Hussey v Portland*, 64 F.3d 1260,1265 (9th Cir 1995), and aesthetic limits placed on nude dancing. *BSA Inc. v. King County*, 804 F 2d 1104, 1110 (9th Cir. 1986). In none of these cases did the classification destroy the fundamental right or foreclose the exercise of the right. Voters could still vote. The classifications merely impinged on the rights.

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, 86 S.Ct. 1079 (1966). The right to vote includes the right to have one's vote counted on equal terms with others. *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[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, 92 S.Ct. 995, 31 L.Ed.2d 274 (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, 84 S.Ct. 1362 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Gray v. Sanders*, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) ("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."); *United States v. Classic*, 313 U.S. 299, 315 (1941).

The Supreme Court recently reaffirmed these principles:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, *value one person's vote over that of another*. It must be remembered that the right of suffrage *can be*

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> *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*. [*Bush*, 531 U.S. at 104–05 (emphasis added).]

Bush arose out of the 2000 presidential election. The Supreme Court of Florida ordered a manual recount of ballots cast in Miami–Dade County as well as certain other Florida counties. *Bush*, 531 U.S. at 102. The Supreme Court reversed, holding that "the use of standardless manual recounts" violates the Equal Protection Clause. *Id*. at 103. The Court reasoned that the lack of statewide standards effectively denied voters the fundamental right to vote. *Id*. at 105. At a minimum, the Court held, equal protection requires "nonarbitrary treatment of voters." *Id.*

District courts have found *Bush*'s analysis applicable in challenges to voting systems. *See, e.g., Black v. McGuffage*, 209 F.Supp.2d 889 (N.D. Ill. 2002) (holding that plaintiffs had stated an equal protection claim where 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 Los Angeles v. Jones*, 213 F.Supp.2d 1106, 1108–10 (C.D. Cal. 2001) (holding that defendants were not entitled to judgment on the pleadings where plaintiffs alleged that some counties adopted more reliable voting procedures than others in violation of equal protection).

Here, as in *Bush*, Plaintiffs have alleged sufficient facts at the pleading stage. Specifically, that Defendants actions have . This conduct violated Equal Protection and Due Process rights of Plaintiffs and other similarly situated voters, as well rights under the California election laws. *See Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 343 (7th Cir. 1987) (state officials "casting (or approving) of fictitious votes can violate the Constitution and other federal laws.").

1. **There is No Requirement for a Class, Let Alone a Protected Class for an Equal Protection Vote Disenfranchisement Claim**

Vote dilution requires no class, let alone a protected class for vote dilution. In fact, individual voters have standing to bring a vote-dilution disenfranchisement claim.

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See Donald J. Trump for President v. Bullock, 2020 WL 5810556, *7 & n.4 (D. Mont. Sept. 30, 2020). ("[T]he Supreme Court has repeatedly enumerated the principle that claims alleging a violation of the right to vote can constitute an injury in fact despite the widespread reach of the conduct at issue."); *See also Orloski v. Davis*, 564 F.Supp. 526, 530 (W.D. Pa. 1983) (voter standing to challenge right-to-vote burden); *Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684, 693-93 (W.D. Pa. 2003) (voter standing to challenge right-to-vote burden). Moreover, "The right to vote is individual and personal in nature, and voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018).

2. Vote Disenfranchisement is a Personal and Distinct Injury Because Plaintiffs are Political Candidates

Defendants cite the Eleventh Circuit's decision in *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). However, the Eleventh Circuit's decision in *Wood* actually *supports* Plaintiffs' Equal Protection and Due Process argument. In fact, *Wood* is instructive here. There, the court dismissed plaintiff Wood's claim. The court did so because he was not a candidate. "[I]f Wood were a political candidate," like the Plaintiffs here, "he would satisfy the standing requirement for Equal Protection and Due Process because he could assert a personal, distinct injury. *Id*. at 1314. Thus, as stated by the *Wood* court, here the vote dilution harm is personal or distinct because the Plaintiffs are political candidates.

3. Plaintiffs Have Standing for Equal Protection and Due Process Claims as Registered Voter on Their Own Behalf and on Behalf of Similarly Situated Voters for Candidates

Moreover, Plaintiffs, on behalf of themselves and other similarly situated voters allege, first, and with great particularity, that Defendants have both violated California law and applied California law, in an arbitrary and disparate manner, to disenfranchise the votes of similarly situated voters with illegal, ineligible, duplicate or fictitious

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votes. Numerous allegations in the FAC support and collaborate this position. (*See e.g.* FAC ¶¶ 23-35, 110-18, 120, 123-32). Thus, the vote disenfranchisement resulting from this systemic and illegal conduct *did not affect all California voters equally; it had the intent and effect of inflating the number of votes for* one candidate over another, and thereby reducing the number of votes for Plaintiffs.

In addition, Plaintiffs have presented evidence that, not only did Defendants disenfranchise the votes of Plaintiffs and similarly situated voters, but also sought to actively disenfranchise such voters to reduce their voting power, in clear violation of "one person, one vote." *See generally Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); (FAC ¶¶ 154-57). Indeed, the Constitution protects *"the right of all qualified citizens to vote in state and federal elections … and [ ] the right to have votes counted without dilution as compared to the votes of others*." *Bodine v. Elkhart Cnty. Election Bd*, 788 F.2d 1270, 1271 (7th Cir. 1986) (emphasis added).

Finally, Defendants' Equal Protection and Due Process standing arguments conflict with the United States Supreme Court Decisions in *Bush v. Gore*, 531 U.S. 98, 104 (2000). In *Bush*, "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive" in that case. *Hawkins v. Wayne Twp. Bd. of Marion Cty., IN*, 183 F.Supp.2d 1099, 1103 (S.D. Ind. 2002). In so ruling, the *Bush* Court stated that the 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*." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added).

Similarly here, the FAC alleges that Defendants the value of votes legally cast by and for the individual Plaintiffs and EIPCa's citizen observers were diminished; Defendants failed to ensure that only legally cast VBM ballots were included in the canvass; votes of some California citizens, including individual Plaintiffs and their supporters, and EIPCa's citizen observers, were treated differently from those of others; and differential treatment of VBM and in-person voters disproportionately

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burdened people who prefer to vote in person, including Black and other minority voters. (*Id*. ¶¶ 174-178, 189-190.) This is more than sufficient to state claims for violation of the Equal Protection and Due Process Clauses.

B. Violation of the Elections Clause

The Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof." U.S. CONST. Art. I, § 4, cl. 1. The Defendants, by the issuance of emergency orders which substantially altered the time, manner, and place of the election, violate this constitutional requirement. (FAC at ¶ 167). Defendants attempt to sidestep this violation by arguing the electoral changes were made pursuant to California law, and that somehow this obviates the constitutional violation. (St. Mot. at 18:16-19:13). The California Legislature cannot delegate their constitutional duty to the executive branch, and where such a delegation occurs, it is invalid. U.S. CONST. Art. VI, cl. 2; *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (In a conflict between state law and the Elections Clause, the state law must give way).

The Defendants correctly argue that under *Arizona State Legislature* the term "Legislature" within the Elections Clause was interpreted to mean "not the representative body alone" but that this authority could be delegated to the people, in that case to an independent board. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015); (St. Mot. at 19:9-12). However, *Arizona State Legislature* does not stand for the contention that the legislative function could be delegated to the executive branch, even if done pursuant to state law. Substantial analogous authority militates against this contention. *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch."). In the same way, the California State legislature cannot be understood to have the power to delegate its election clause authority to the executive branch. *See* Derek Muller, *Legislative Delegations and the Elections Clause* 43 FL St. L. Rev. 718, 738 (2016) (The "Elections Clause itself offers a similar structural reason

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to incorporate a non-delegation principle" in that Congress may alter any regulation made by the state legislature and Congress cannot delegate this authority. Accordingly, "it would seem incongruous for state legislatures to have more power than Congress to allocate their authority" to another body).

Defendants also argue that Defendant Newsom's emergency orders and Defendant Padilla's emergency regulations were not in conflict with state law, despite failing to address multiple of the conflicts raised in the FAC. (St. Mot. at 14-15; FAC § IV). Defendants' motion fails to dispute these allegations because they cannot be disputed; the emergency orders and regulations conflict with state law, as explained in detail in the FAC. (*Id.*) Further, Defendants' motion fails to address these alleged conflicts between the emergency regulations and existing election law. As such, this Court should accept the allegations in the complaint at this stage. The plain meaning of the Elections Clause is clear, the state legislature must establish election procedures. Here, the challenged California statutes violate this constitutional guarantee by delegating this responsibility to the Governor and Secretary of State, and cannot stand.[2] As Defendants state, the executive branch has been granted "broad authority" to alter election laws at any time. (St. Mot. at 18:6). Defendants' executive orders changed the time for the ballot, the manner of the ballot, and the places where voting took place, violating the Elections Clause.

C. Violation of the Guarantee Clause

Article IV, Section 4 of the United States Constitution states:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive

[2] Defendants point out the State Legislature later adopted the changes embodied in Defendant Newsom's executive orders. (St. Mot. at 18:13-15). This is a red herring. California law still delegates to him the power to change election law at will, and this delegation is constitutionally impermissible. Cal. Gov't Code § 8567(a); § 8627.

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(when the Legislature cannot be convened) against domestic Violence."

Defendants argue that the Guarantee Clause is a nonjusticiable political question. Yet even County Defendants admit that this is not true in all situations. As they note in their Motion:

> Courts have held that even if the Guarantee Clause claims are justiciable, the Clause could "only [be] offended in highly limited circumstances," such as those involving the "aboli[tion] [of] the legislature" or the "establishment of a monarchy by a state." *See, e.g., Largess v. Supreme Judicial Court for Mass.*, 373 F.3d at 220. [Ct. Mot. at 19:17-24.][3]

Here, Defendants themselves admit the truth of the FAC's allegations that the executive branch (and specifically the Governor and the Secretary of State) has been acting with essentially unlimited power, via its general emergency powers, to make orders or regulations contrary to the laws passed by the legislature regarding elections. (St. Mot. at 16-23; FAC ¶¶ 7, 8, 76-94). In other words, the executive is acting wholly independently of the legislature in this sphere. This is akin to "aboli[tion] [of] the legislature" with respect to election law, and also akin to the "establishment of a monarchy" in so far as the executive exercises absolute power over elections.

III. Sovereign Immunity Does Not Bar Plaintiffs' Claims Against Governor Newsom

Though the Eleventh Amendment erects a general bar against federal lawsuits brought against a state, it does not bar actions for prospective declaratory or injunctive

[3] *See also, Democratic Party of Wisconsin v. Vos*, 966 F.3d 581, 589 (7th Cir. 2020) ("We do not interpret *Rucho* or any other decision by the Supreme Court as having categorically foreclosed all Guarantee Clause claims as nonjusticiable, even though no such claim has yet survived Supreme Court review."); *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 163 (4th Cir. 2018) ("'[N]ot all' claims under the Guarantee Clause are nonjusticiable."); *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty.*, 712 F.3d 761, 774 (2d Cir. 2013) ("[W]e have recognized that 'perhaps not all claims under the Guarantee Clause present nonjusticiable political questions . . .'").

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relief against state officers in their official capacities. *Ex Parte Young*, 209 U.S. 123, 155–56 (1908); *Alden v. Maine*, 527 U.S. 706, 747 (1999).[4] The proper Defendant is a state official who has "some connection" that is "fairly direct" with the enforcement of the allegedly unconstitutional statute. *Ex Parte Young* at 157; *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992). And importantly, the "inquiry…does not include an analysis of the merits of the claim." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'CONNOR, J., joined by SCALIA and THOMAS, JJ., concurring in part and concurring in judgment).

The Ninth Circuit finds a requisite connection for purposes of both standing and application of *Ex Parte Young* where a law specifically grants the defendant enforcement authority, *Association 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 Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919-20 (9th Cir. 2004). Here, Defendant Newsom is properly named because within his responsibility as Governor he issued Executive Orders N-64-20 and N-67-20, which created universal vote by mail in California, and under his authority, former Secretary of State Padilla issued the emergency regulations and guidance to the County Defendants. (FAC ¶ 76). Each order was issued pursuant to the Governor's statutory authority under California Government Code § 8627 to "promulgate, issue, and *enforce* such orders and regulations as he deems necessary." [emphasis added]; California Government Code § 8627 explicitly grants Governor Newsom the power to not only promulgate, but also to enforce his orders, meaning he is properly named as a defendant. *Harris*, 729 F.3d at 943; *Cf. In re Abbot*, 956 F.3d 696, 703 (5th Cir. 2020) (Governor of Texas was

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[4] *Ex parte Young* ensures "that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law" by "render[ing] the Amendment wholly inapplicable to a certain class of suits. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

improperly named as defendant where state statute only provided authority to issue, amend, or rescind executive orders but not to enforce them.)

Accordingly, Governor Newsom is properly named as a Defendant.

IV. Although the Motions to Dismiss Should Be Denied, Leave to Amend Should Be Granted If They Are Not

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). The United States Supreme Court and the Ninth Circuit have repeatedly reaffirmed that leave to amend is to be granted with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *see, e.g., Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (leave to amend should be freely given).

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied.

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Respectfully submitted,

PRIMARY LAW GROUP, P.C.

/s/ Joshua Kroot
By: Joshua Kroot
Attorneys for Plaintiffs

PRIMARY LAW GROUP, P.C.
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 677-0856