21-56061

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

ALEX PADILLA, California Secretary of State, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

No. 2:21-cv-00032
The Honorable Andre Birotte Jr., Judge

STATE DEFENDANTS' ANSWERING BRIEF

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INTRODUCTION

Public confidence in the integrity of our elections is of the utmost importance. This action—which began as a frivolous effort to overturn the legitimate results of the 2020 election and has since transformed into a broader attack on California's efforts to protect every eligible citizen's right to vote—is the latest in a line of troubling lawsuits peddling conspiracy theories that seek to undermine that public confidence. The district court dismissed Appellants' First Amended Complaint ("FAC"), just as numerous courts across the country have done with similarly frivolous attempts to undermine the democratic process. That decision should be affirmed.

Appellants are thirteen congressional candidates who lost in the 2020 general election, and the nonprofit Election Integrity Project California, Inc. ("EIPCa"). They raise their claims against three state officials, named in their official capacities—Secretary of State Dr. Shirley Weber, Governor Gavin Newsom, and Attorney General Rob Bonta (collectively, "State Defendants")—and thirteen County Registrars of Voters (collectively, "County Defendants"). Against both State and County Defendants, Appellants allege injuries under four provisions of the United States Constitution—the Equal Protection Clause, the Due Process Clause, the Elections Clause, and the Guarantee Clause. And they seek sweeping relief,

including an audit of the November 2020 election results, the appointment of special masters to oversee both this audit and the vote counting in California's upcoming elections, a declaratory judgment that numerous statutory and regulatory provisions of California election law are unconstitutional, and a preservation order covering twenty-four separate categories of electronic and vote-by-mail election equipment and materials.

The district court granted both State and County Defendants' motions to dismiss on the basis that Appellants lacked Article III standing for all of their claims. In particular, the district court held that Appellants failed to allege any injury in fact sufficient to establish standing. That decision was correct, and it should be affirmed.

Appellants' alleged injuries are abstract, impermissibly generalized, and wholly speculative. Moreover, Appellants cannot establish either causation or redressability, both of which are required for Article III standing. And even if they could, their claims against Governor Newsom are squarely barred by the Eleventh Amendment.

The district court granted Defendants' motions to dismiss the FAC with prejudice because Appellants previously had an opportunity to amend their initial Complaint, and the amendments they made were futile. The district court acted properly, within its discretion, in deciding that any further

amendment would be similarly futile. There is no basis for finding an abuse of discretion in that decision.

For all these reasons, Appellants' attack on our democratic process should not be countenanced. The district court's order should be affirmed.

STATEMENT OF JURISDICTION

The matter was brought before the district court pursuant to its federal question jurisdiction. 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. section 1291.

The district court entered its order granting Defendants' motions to dismiss on June 14, 2021, and entered its judgment on August 30, 2021. Appellants timely filed their notice of appeal on September 27, 2021. ER-2–15, 290–95; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Have Appellants alleged facts sufficient to establish Article III standing for any of their claims?

2. Are Appellants' claims against Governor Newsom barred by the Eleventh Amendment?

3. Did the district court abuse its discretion when it dismissed the First Amended Complaint with prejudice?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Appellants are thirteen former congressional candidates, each of whom lost their races in the November 2020 general election, and EIPCa, a California non-profit organization. ER-246–49. Relevant to State Defendants, Appellants allege that for three decades, California officials and legislators have made changes to election laws "under the guise of increasing voter participation," with the true goal of "allow[ing] widespread fraud and election interference to proceed unchecked." ER-252; *see also* AOB at 5 ("For the past three decades, California has passed a series of statutes that have the cumulative effect of unconstitutionally undermining election integrity."). According to Appellants, Californians' right to vote has been "intentionally eroded" by laws "designed to create an environment in which elections could be manipulated and eligible voters of all political viewpoints disenfranchised." ER-241.

These changes all constitute reforms ***expanding*** access to voting rights, for instance by implementing a permanent vote-by-mail option, allowing for online voter registration, and enacting a cure process for voters whose vote-by-mail ballots are flagged for rejection. ER-252–57; AOB at 5–7. Appellants challenge some, but not all, of these laws. ER-288–89.

Appellants also challenge as unconstitutional several executive orders and emergency regulations issued in 2020 by Governor Newsom and then-Secretary of State Alex Padilla. ER-257–62; AOB at 7–8. Executive Orders N-64-20 and N-67-20—which were superseded in June 2020 by legislation, and which were limited to an election that has since taken place—required that every registered voter in California be mailed a vote-by-mail ballot for the November 2020 general election. ER-257; SER-8–9, 27–29. Former Secretary Padilla issued emergency regulations relating to signature verification, ballot processing, and ballot counting in September 2020. ER-258–62; SER-11–25; AOB at 7–8; *see* Cal. Code Regs. tit. 2, §§ 20910, 20960-20962, 20980-20985, 20990-20993.

Finally, Appellants also allege, without any specificity, differential treatment of voters based upon their county of residence and voting method (vote-by-mail versus in-person). ER-280–81; AOB at 9–11.

II. PROCEDURAL HISTORY

The action was initiated on January 4, 2021. ER-305 (ECF No. 1). The district court denied Appellants' application for TRO on January 11, 2021, without a hearing. ER-308 (ECF No. 35). Both State and County Defendants filed motions to dismiss the Complaint on February 12, 2021. ER-309 (ECF Nos. 43, 45); SER-108–81. Rather than oppose the motions,

Appellants filed the now-operative FAC on March 8, 2021, and a Notice of Errata on March 29, 2021. ER-236–89.

The FAC raised four causes of action under the United States Constitution and against all Defendants, for violations of: (1) the Equal Protection Clause; (2) the Due Process Clause; (3) the Elections Clause; and (4) the Guarantee Clause. ER-282–87. Under both the Equal Protection Clause and the Due Process Clause, Appellants alleged an injury of vote dilution. ER-283–84, 286. Under the Equal Protection Clause, they alleged differential treatment between voters in different counties, as well as between vote-by-mail and in-person voters. ER-284. Under the Elections Clause, they alleged that Defendants "usurp[ed] the California State Legislature's constitutional authority to set the manner of elections." ER-282. And under the Guarantee Clause, Appellants alleged actions "so as to deny California and its citizens, including Plaintiffs, a republican form of government," and further "denying California and its citizens, including Plaintiffs, from protection against invasion." ER-287.

Appellants sought sweeping declaratory and injunctive relief, including: (1) orders directing the preservation of various election equipment and materials used to conduct the November 2020 general election; (2) an audit of the preserved equipment and materials; (3) the appointment of

special masters to oversee the preservation and audit efforts; (4) the appointment of special masters to oversee and monitor vote counting in upcoming California elections; and (5) a declaratory judgment finding unconstitutional a wide swath of California election laws, executive orders, and emergency regulations. ER-287–89.

On April 5, 2021, State and County Defendants each filed motions to dismiss the FAC. ER-155–235. In their motion, State Defendants argued for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and raised an argument concerning the sufficiency of the pleadings under Rule 9(b). ER-159. Specifically, State Defendants argued that: (1) all of Appellants' claims failed for lack of standing; (2) several of Appellants' claims were moot; (3) Appellants' Guarantee Clause claim was nonjusticiable; (4) Appellants failed to meet the pleading requirements of Rule 9(b); (5) the Eleventh Amendment barred Appellants' claims against Governor Newsom; and (6) Appellants otherwise failed to state a claim on any of their causes of action. ER-158–89.

The district court heard oral argument on the motions, and on June 14, 2021, issued an order granting both State and County Defendants' motions to dismiss, with prejudice. ER-3–15. In its order, the district court found that "[t]his case begins and ends with Article III standing." ER-7.

Specifically, the district court held that Appellants "have not alleged a concrete and particularized injury that is both actual and imminent, and thus, have not adequately alleged an injury-in-fact sufficient for standing." ER-12. On the issue of particularity, the district court "agree[d] with Defendants that at base, Plaintiffs' allegations amount to an incremental undermining of confidence in the election results, past and future." ER-11. The court continued:

> Ultimately, and as our sister courts have found, a vote cast by fraud, mailed in by the wrong person, or otherwise compromised during the elections process has an impact on the final tally and thus on the proportional effect of *every* vote, but no single voter is specifically disadvantaged.

ER-11 (citing *Martel v. Condos*, 487 F. Supp. 3d 247, 252 (D. Vt. 2020)) (emphasis in original).

The district court also considered "whether the separate plaintiff groups have a specialized basis for standing," and concluded that they did not. ER-12–13 (rejecting standing for the "Candidate Plaintiffs" and for EIPCa as an organization). The district court then addressed Appellants' Elections Clause and Guarantee Clause claims, dismissing the former as "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance" (quoting *Lance v.*

Coffman, 549 U.S. 437, 442 (2007) (per curiam)), and the latter as not justiciable. ER-13–15.

STANDARD OF REVIEW

This Court reviews "de novo a district court's decision to dismiss for lack of subject matter jurisdiction." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019). An appellate court's review of a district court's dismissal of a complaint is limited to the allegations raised in the complaint. *Hansen v. Dep't of Treasury*, 528 F.3d 597, 599 (9th Cir. 2007). In reviewing a district court's decision, the Court may "affirm the district court on any basis supported by the record." *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012).

Moreover, this Court reviews a district court's denial of leave to amend a complaint for abuse of discretion. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). "The district court's discretion to deny leave to amend is particularly broad where," as here, "plaintiff has previously amended the complaint." *Id.* (internal quotation marks omitted). "Absent a definite and firm conviction that the district court committed a clear error of judgment, [the Ninth Circuit] will not disturb the district court's decision." *Id.*

SUMMARY OF ARGUMENT

1. The district court correctly concluded that all of Appellants' claims fail for lack of standing. Appellants fail to allege any injury in fact that is sufficiently concrete, particularized, and actual or imminent, as required to establish standing under Article III. Moreover, Appellants cannot meet the causation or redressability prongs of the standing inquiry. Nor do any specialized bases for standing apply on these facts—the candidate Appellants ceased to be candidates at the time they filed the Complaint, and moreover fail to allege any concrete injury to their election prospects or campaign coffers, and EIPCa has not established organizational standing.

2. The Eleventh Amendment provides an additional basis for affirming the district court's order dismissing all claims against Governor Newsom. Sovereign immunity bars Appellants' claims against the Governor, and the *Ex Parte Young* exception does not apply because Governor Newsom's only connection to the challenged statutes is his general duty to enforce California law.

3. The district court did not abuse its discretion when it granted Defendants' motions to dismiss with prejudice. Appellants already had an opportunity to amend their initial Complaint subsequent to the State and

County Defendants' filing of their first motions to dismiss, and the futility of those amendments provided a reasonable basis for the district court to conclude that further amendment would be similarly futile.

ARGUMENT

I. APPELLANTS LACK ARTICLE III STANDING FOR ALL OF THEIR CLAIMS

Article III of the United States Constitution confines the jurisdiction of the federal courts "to the resolution of cases and controversies." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). One of the "landmarks" used by courts to identify cases "that are of the justiciable sort referred to in Article III . . . is the doctrine of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This "irreducible constitutional minimum of standing" requires that a plaintiff demonstrate three elements: (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) "a causal connection between the injury" and the defendant's conduct; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Id.* at 560–61 (quotation marks omitted).

As stated by the district court, "[t]his case begins and ends with Article III standing." ER-7. Because Appellants are unable to satisfy any—let

alone all three—of the requirements needed to establish Article III standing, the decision below should be affirmed.

A. As the District Court Correctly Held, Appellants Have Not Sufficiently Alleged an Injury in Fact

Both the district court's decision and Appellants' Opening Brief focus exclusively on the first prong of the standing inquiry—injury in fact. In order for an alleged injury to be sufficient to establish standing, it must be both "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61. "When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). To establish a "particularized" injury, "the injury must affect the plaintiff in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting *Lujan*, 504 U.S. at 560–61 & n.1) (internal quotation marks omitted). Lastly, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Appellants do *not* allege that they or their supporters were prohibited from voting, were denied the ability to vote in the manner in which they

chose (e.g., by mail or in-person), or that their votes were not counted. Rather, Appellants put forth three theories of their injury in fact. *First*, and relevant to both their Equal Protection and Due Process claims, Appellants allege an unusual and unsupported theory of vote dilution, by which the value of their votes (and their supporters' votes) was diminished by Defendants' actions enforcing California's election laws and allegedly "intentionally failing to ensure that only legally cast vote-by-mail ballots were included in the canvass for the 2020 general election in California." ER-283–84 (¶¶ 174–75), 286 (¶¶ 188–90); AOB at 12–13. *Second*, in their Equal Protection claim, Appellants allege differential treatment between voters in different counties, as well as between vote-by-mail and in-person voters. ER-284 (¶¶ 176–78); AOB at 12. *Third*, in both their Elections Clause and Guarantee Clause claims, Appellants raise allegations of generalized grievances relating to government conduct allegedly in violation of federal law. ER-282–83 (¶¶ 167–68), 287 (¶¶ 196–98); AOB at 12–13.

These alleged injuries are all insufficient to meet the requirements for Article III standing because they are impermissibly generalized and wholly speculative. *See, e.g.*, *Schmier v. U.S. Ct. of Appeals for Ninth Cir.*, 279 F.3d 817, 821 (9th Cir. 2002).

1. Equal Protection and Due Process Claims

Appellants' claims of vote dilution are based wholly on speculation that fraudulent ballots *may* have been counted. *See, e.g.*, ER-244 (¶ 13) ("These election workers *could* have entered any candidates that they wished on these remade ballots while purposefully unobserved like this.") (emphasis added). There are no specific allegations regarding the number of fraudulent ballots cast, whether those ballots were in fact counted for or against Appellants, or where exactly those ballots were cast—the sort of details that could go toward particularizing Appellants' claims. Accordingly, any hypothetical injuries inflicted on Appellants as a result of this purported vote dilution "are nothing more than generalized grievances that any one of the [17.5 million Californians] who voted could make if they were so allowed." *Bowyer v. Ducey*, 506 F. Supp.3d 699, 711 (D. Ariz. 2020).

"As courts have routinely explained, vote dilution is a very specific claim that involves votes being weighed differently and cannot be used generally to allege voter fraud." *Id.* Appellants contend that "[t]he lower court's decision is erroneously premised on the notion that vote dilution only protects groups with immutable characteristics." *See* AOB at 19–26. This contention misconstrues the district court's order; it says no such thing. Rather, the district court relied on Supreme Court precedent to correctly

conclude that "in order to show standing, injuries of vote dilution require that certain votes actually be *weighed differently* and that one group's votes be impermissibly granted less value." ER-9 (emphasis in original) (citing *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964)). In discussing *Reynolds*, the district court wrote that "the Court found key considerations in *this* vote dilution theory to be whether there was invidious discrimination with 'regard to race, sex, economic status, or place of residence,' as well as whether 'the rights allegedly impaired are individual and personal in nature.'" ER-9 (emphasis added) (quoting *Reynolds*, 377 U.S. at 561). The district court did *not* hold that "vote dilution only protects groups with immutable characteristics," as Appellants contend and rely upon throughout their opening brief; it simply explained that a demonstration of invidious discrimination can be—and has been—one factor that goes toward establishing a sufficient injury in fact in cases of alleged vote dilution, and held that Appellants have failed to make such a showing. ER-9–11.

The import of *Baker* and *Reynolds* is that they stand for the proposition that vote dilution occurs "[where a] favored group has full voting strength . . . [and t]he groups not in favor have their votes diluted." *Reynolds*, 377 U.S. at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279

(1950) (Douglas, J., dissenting)). Both *Baker* and *Reynolds* involved state reapportionment statutes. In *Baker*, the challenged Tennessee statute allocated legislative representation amongst the state's counties based on "the total number of qualified voters resident in the respective counties[.]" *Baker*, 369 U.S. at 189. The heart of the issue was that for more than sixty years, from 1901 until the Court's decision in 1962, all reapportionment proposals had failed to pass. *Id.* at 191–92. In that time, the number of eligible voters in Tennessee had more than quadrupled. *Id.* at 192. As a result, voters suffered a "debasement of their votes" because the allocation of legislative representation remained tied to the 1901 population figures. *Id.* at 194. In other words, residents' votes were actually *weighed differently* based upon their county of residence. This is the traditional conception of vote dilution, and it is why the *Baker* plaintiffs succeeded. *Reynolds* is a civil rights era case in which Chief Justice Warren authored the opinion holding that Alabama's proposed apportionment plans violated the Equal Protection Clause. *See* 377 U.S. 533. As in *Baker*, Alabama had failed to reapportion seats in the state legislature for over sixty years, and the Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.* at 570, 577.

Neither *Baker* nor *Reynolds* offers support for Appellants' claims because Appellants fail to sufficiently allege how any group of California voters' ballots have been *weighed differently*. ER-10–11. The crux of their argument is that California has allegedly intentionally failed to ensure that only legally cast vote-by-mail ballots were counted in the 2020 election. This failure, Appellants contend, "diminishes the votes of Appellants and similarly situated voters, amounting to what is a widespread but concrete and particularized injury." AOB at 24. Moreover, they argue that "the Appellee county registrars implemented different election rules and practices, diluting the votes of Appellants." AOB at 25. These allegations are demonstrably different from the apportionment statutes underlying the disputes in *Baker* and *Reynolds*. And Appellants never explain how these challenged practices have caused them any particularized injury. Again, they make no allegations that their ballots were not counted while others' were. They make no allegations that their ballots were in fact counted or weighed differently from county to county. And they make no allegations that meaningfully distinguish this alleged, widespread, State-condoned voter fraud from the generalized grievances that have been consistently rejected by the district courts in the wake of the 2020 election. *See, e.g.*, *Bowyer*,

506 F. Supp.3d 699; *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp.3d 993 (D. Nev. 2020).

Here, as in those recent district court cases, "[e]ven if accepted as true, plaintiffs' pleadings allude to vote dilution that is impermissibly generalized." *Cegavske*, 488 F. Supp.3d at 1000. The laws and regulations that Appellants challenge apply to *all* voters, and Appellants do not sufficiently allege "how their member voters will be harmed by vote dilution where other voters will not." *Id.* "Plaintiffs' claims of a substantial risk of vote dilution 'amount to general grievances that cannot support a finding of particularized injury as to [p]laintiffs.'" *Id.* (quoting *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020)); *see also Bowyer*, 506 F. Supp.3d at 712 (collecting cases).

Even if Appellants had alleged any particularized injuries, they have not sufficiently pled that those injures are "actual or imminent." Appellants attempt to support their argument for actuality and imminence by citing numerous cases that they contend serve "to emphasize the well-established precedent regarding challenges to voting processes." *See* AOB at 30–31. Again, however, Appellants misconstrue the district court's order and its holding concerning imminence in making this argument.

The cases cited at the district court and repeated here in Appellants' opening brief "dealt with issues such as poll-taxes, a ban on write-in candidates, a durational residency requirement on voters, racially gerrymandered districts, a primary system which counted votes differently depending on county, and whether to count provisional ballots cast in the wrong precinct." ER-11; *see also* AOB at 30–31. Appellants attempt to dismiss the district court's reasoning by arguing that it "finds that the aforementioned cases do not support Appellants because they involve different voting issues," and that "[t]here is no rule that only certain categories of voting issues can invoke standing." AOB at 31.

The district court never stated or applied any such rule. Rather, the district court reasoned—rightfully—that "the concerns in these cases were either actual or imminent; they were certainly not conjectural," and that they "are significantly dissimilar from the present allegations of future, potential fraud." ER-11. In these cases, the plaintiffs were able to establish an actual or imminent injury because the very restrictions at issue—poll taxes, durational residency requirements, and the like—inherently involved weighting votes differently. By contrast, there is nothing inherent in the statutes or regulations that Appellants challenge that would suggest vote dilution. Rather, Appellants make only generalized allegations that "the

current voting system has created a high probability that Candidate Appellants' votes, those of their supporters, and similarly situated Californians, will be diluted." AOB at 32. Unlike in the cases that Appellants cite for support, here, "[a]ssuming all allegations to be true, the Court is still left to speculate whether the present voting system will lead to concrete and particularized vote dilution which results in a specific group having their votes weighted differently." ER-11. Such speculative injury is not sufficient to confer Article III standing.

Because Appellants' alleged injuries supporting their Equal Protection and Due Process claims are impermissibly generalized and wholly speculative, the district court's decision should be affirmed.

2. Elections Clause and Guarantee Clause Claims

If this Court concludes that Appellants have failed to state an injury in fact for their Equal Protection and Due Process claims, then it follows that their Elections Clause claim must also fail. *See, e.g.*, ER-14 ("Plaintiffs' vote dilution claims underlying their Elections Clause claim are the same generalized grievances underlying their Equal Protection and Due Process claims."); AOB at 38 (admitting as such and premising argument solely on contention that "Appellants have pleaded concrete and particularized injuries

sufficient to confer standing on their Equal Protection and Due Process claims").

On both their Elections Clause and Guarantee Clause claims, Appellants allege only generalized grievances relating to Defendants' alleged violations of the law. Such injuries are insufficient to confer standing. "The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see also Bowyer*, 506 F. Supp.3d at 709–11 (rejecting plaintiffs' Elections Clause claim on standing grounds).

Finally, Appellants allege that Defendants have violated the Guarantee Clause because "the executive branch 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." AOB at 39. But it is well-established, and as recently as 2019 the Supreme Court reiterated, "that the Guarantee Clause does not provide the basis for a justiciable claim." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019); *see also Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001) ("A challenge based on the Guarantee Clause, however, is a

nonjusticiable political question."). The district court was well within its authority in finding that "[w]hile Plaintiffs appear to hold concerns regarding California's system of democracy, the Court is not convinced nor do Plaintiffs adequately allege that the emergency policies at issue break from a republican form of government." ER-15.

Accordingly, the district court's decision to dismiss Appellants' Elections Clause and Guarantee Clause claims for lack of standing should also be affirmed.

B. Lack of Causation and Redressability

Even if Appellants had alleged a sufficient injury in fact, their claims against State Defendants fail to meet either the causation or redressability prongs of the standing inquiry.[1] Appellants have failed to show how their alleged injuries are fairly traceable to State Defendants' conduct, and their requested relief would do absolutely nothing to actually redress any injuries Appellants have alleged. *See, e.g.*, *Lujan*, 504 U.S. at 560–61.

[1] The State Defendants raised this argument before the district court in their motion to dismiss, as well as arguments going to the merits of Appellants' claims. *See* ER-173–75, 181–89. While the district court did not find it necessary to address these issues, this Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

Turning first to causation, Appellants present no theory showing how the Attorney General caused either a diminution in the value of Appellants' votes, or the differential treatment alleged under their Equal Protection claim. Regarding Governor Newsom, Appellants below relied on the fact that the Governor issued Executive Orders N-64-20 and N-67-20 to mandate that all registered voters be mailed a vote-by-mail ballot (ignoring the fact that these executive orders were later superseded by legislation enacting the same requirement). *See* ER-257 (¶ 76); SER-8–9, 27–29. And for the Secretary of State, Appellants allege that the emergency regulations adopted on September 28, 2020, allowed for fraud that allegedly diluted Appellants' votes and contributed to the differential treatment between vote-by-mail and in-person voters. ER-258–62 (¶¶ 78–94).

The crux of Appellants' argument against State Defendants is that the expansion of vote-by-mail preceding the 2020 general election created the conditions for widespread voter fraud, and that State Defendants' actions were simply the latest in a decades-long scheme to intentionally allow voter fraud at a massive scale. *See* ER-252, 257 (¶¶ 58, 76); AOB at 5–11. By Appellants' own admission, even prior to the emergency orders, "approximately 75% of voters in California regularly received permanent [vote-by-mail] ballots . . . ." AOB at 6. And none of the State Defendants

carried out the election activities where Appellants allege much of this fraud occurred (e.g., signature verification, vote tabulation)—those are the tasks of local officials, and were also the focus of Appellants' most concrete allegations below. There are no allegations, for example, that the State Defendants somehow manipulated vote tallies, submitted fraudulent votes, or allowed drop boxes to be compromised at any point during the voting period.

In fact, the Secretary of State's emergency regulations were issued explicitly to "provide clear and uniform practices" to counties regarding election administration, and to "ensure uniform practices" in relevant aspects across the state. SER-11. Such uniformity helps ensure that no votes are "diluted," and that every valid vote is counted accurately and equally, regardless of what county in which a voter resides or what voting method they use. In the absence of any specific allegations of fraud on the part of State Defendants, Appellants have advanced a conspiracy theory of a massive, long-running scheme to compromise the election results. *See, e.g.*, AOB at 5–11.

Appellants thus go to great lengths to raise this specter of a state-sponsored fraud operation because without such allegations, many of their claims would also fail the redressability requirement. In their prayer for

relief below, Appellants request orders mandating the preservation of certain election equipment and materials, as well as the appointment of special masters to oversee an audit of the 2020 election results and the accuracy of vote counting in future California elections. ER-288 (¶¶ A–D). The only way that these requests could redress any of Appellants' alleged injuries is if Appellants are accurate in suggesting the existence of a massive and ongoing fraud scheme. Absent such a scheme, the relief that Appellants request would do nothing to change the results of the election, rectify Appellants' alleged vote dilution, or correct for the alleged disparities between voting methods.

Finally, Appellants request declaratory relief finding numerous election provisions to be unconstitutional. ER-288–89 (¶ E). Appellants do not explain how such declaratory relief would redress their alleged injuries—and to the extent that their alleged injuries turn on supposed "irregularities" in the local administration of an election that has already occurred, it clearly would not. Likewise, Appellants' challenges to AB 860 (which applied only to the November 2020 election) and Executive Orders N-64-20 and N-67-20 (which, upon the enactment of AB 860, had no further force or effect) cannot possibly provide redress for any alleged injury they might suffer in the future. And Appellants do not and cannot explain how any remaining

challenges to California's election laws (for example, Elections Code section 3020) would redress any alleged injury, either.[2]

Failing to meet any of the three prongs for Article III standing is fatal to a claim for relief. Here, Appellants have failed to meet even one. For this reason, the district court's decision should be affirmed.

C. Appellants Do Not Have Any Specialized Basis for Standing

Appellants argue in the alternative that the district court should have found standing through either one of two specialized bases for standing. First, Appellants argue that they have standing as candidates. AOB at 32–35. Second, they argue that EIPCa has organizational standing. AOB at 36–38. The district court considered and rejected both of these arguments, and its decision should be affirmed.

Appellants' status as former congressional candidates does not provide them with a basis for standing. This action was commenced on January 4, 2021. At that time, California's election results had already been certified, and the members of the 117th Congress had been sworn in. SER-31–32,

[2] Additionally, Appellants' challenge to numerous elections statutes duly enacted by the California Legislature stands in deep (and seemingly irreconcilable) tension with any theory of injury they might seek to advance under the Elections Clause, which is the source of the Legislature's power to enact laws concerning elections procedures. *See* ER 282–83 (¶¶ 164–71).

34–35. Thus, as of the commencement of this suit, those Appellants had ceased to be candidates for the 2020 general election. *See Drake v. Obama*, 664 F.3d 774, 783–84 (9th Cir. 2011) ("Once the 2008 election was over and the President sworn in, Keyes, Drake, and Lightfoot were no longer 'candidates' for the 2008 general election."). And because they were no longer candidates, they did not have any basis to claim harm based on their failed congressional campaigns.[3]

Because some Appellants allege that they intend to run again for election in 2022, they argue that they have standing because "the challenged voting laws and practices 'threaten [their] election prospects and campaign coffers.'" AOB at 33 (quoting *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006). As argued by Appellants, "a party may challenge the prospective operation of a statute that presents a realistic and impending threat of a direct injury." AOB at 34 (citing *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). But even so, this argument fails for the same reasons explained above—as stated by the district court, "alleging that the

[3] While Appellants *were* still candidates, they had the opportunity under California law to contest the results of their individual elections. *See* Cal. Elec. Code § 16000 *et seq.* Each of the individual Appellants had until December 21, 2020, to bring such challenge in the appropriate California superior court. *See id.* §§ 16003, 16400, 16401. There are no allegations that any of them did so.

Candidate Plaintiffs plan to be candidates for future congressional elections where they suspect a possibility of future vote dilution is not sufficiently concrete to support standing." ER-12. Indeed, mere "allegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409.

It is also worth reiterating that Appellants offer no allegations addressing for whom allegedly fraudulent votes were cast. Even taking all of Appellants' allegations as true, it is at least equally likely that all fraudulently cast ballots were counted *in favor* of Appellants. The very fact that, on the basis of Appellants' allegations, this possibility exists is demonstrative of why these allegations are nowhere near being sufficiently concrete to establish standing. The candidate Appellants have not established *any* injury to their election prospects or campaign coffers.[4]

Nor does EIPCa have organizational standing. To establish organizational standing, Appellants must demonstrate a "concrete and demonstrable injury to the organization's activities—with the consequent

[4] The candidate Appellants received vote shares that ranged from 23.2% to 46.5%. The closest margin, in Appellant Raths' defeat to Representative Katie Porter, was 28,747 votes. Even assuming the most favorable conditions for Appellants—that is, that every fraudulent vote took the form of a changed ballot that had initially been cast for the Appellant—more than 680,000 fraudulent votes would need to have been counted in order for the election outcome to have been changed for all Appellants. *See* ER-180; SER-46–47, 64–75.

drain on the organization's resources" that is "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). An organization can demonstrate injury where it has suffered "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citation omitted). An organization may not, however, "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 402; *see also City of Lake Forest*, 624 F.3d at 1088. "It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *City of Lake Forest*, 624 F.3d at 1088. Here, EIPCa alleges an organizational injury on the basis that "[s]ince California dramatically changed their election procedures, EIPCa has had to expend additional resources to educate voters and observers." AOB at 37.

It is not apparent how EIPCa has suffered a "frustration of its mission" by the passage of the statutes that Appellants challenge. EIPCa alleges to be "committed to defending, through education, research, and advocacy, the civil rights of U.S. citizens to fully participate in the election process under Federal and state law." AOB at 37. Appellants do not explain how laws

expanding access to voting rights—for instance, by implementing a permanent vote-by-mail option, allowing for online voter registration, and enacting a cure process for voters whose vote-by-mail ballots are flagged for rejection, *see* ER-252–57 (¶¶ 60–75)—frustrate the mission of an organization purportedly committed to ensuring full participation in the electoral process.

Moreover, the expenditures that EIPCa claims to have made are not directly related to the alleged injury of vote dilution. EIPCa claims to have made increased expenditures on educating "voters and observers." AOB at 37. But the alleged injury underlying this action is vote dilution effectuated by Defendants' alleged intentional failure to ensure that only valid vote-by-mail ballots were cast and counted. Appellants do not explain how increased spending on educating voters and poll observers would in any way counteract the widespread, longstanding, and intentional fraud that they allege has occurred.

Above all else, however, EIPCa fails to establish organizational standing because, yet again, "this alleged increased likelihood of fraud is speculative." ER-13. There is no actual, concrete injury at issue. EIPCa should not be permitted to "manufacture standing" by simply increasing its expenditures on training and education and basing such increases on

unfounded, generalized, purely speculative allegations of voter fraud. *See, e.g.*, *Clapper*, 568 U.S. at 402.

Once again, the district court's decision should be affirmed.

II. THE ELEVENTH AMENDMENT BARS APPELLANTS' CLAIMS AGAINST GOVERNOR NEWSOM

Even if Appellants were able to establish standing, this Court should affirm the district court's dismissal of Appellants' claims against Governor Newsom because they are barred by the Eleventh Amendment.[5]

Under the Eleventh Amendment, "a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1115–116 (9th Cir. 2000) (footnote omitted); *see also Holley v. CDCR*, 599 F.3d 1108, 1111 (9th Cir. 2010) (holding that, absent State waiver or Congressional abrogation, state agencies and officials are immune from claims seeking retrospective relief). Moreover, "[t]he Eleventh Amendment bars suit

[5] The State Defendants raised this argument before the district court in their motion to dismiss. *See* ER-188–89. While the district court did not find it necessary to address the issue, this Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

against state officials when the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

The Eleventh Amendment also bars claims for declaratory or injunctive relief against a State or its officials, unless the case falls within the narrow confines of the *Ex Parte Young* doctrine. This doctrine creates a limited exception to Eleventh Amendment immunity for suits against state officials seeking solely declaratory or injunctive relief to remedy an ongoing or imminent violation of federal law. *See, e.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (discussing *Ex Parte Young*, 209 U.S. 123 (1908)).

In the instant matter, the Eleventh Amendment bars Appellants' claims against Governor Newsom. Appellants do not allege (nor could they) that Congress has abrogated the State's immunity, or that the State has waived its sovereign immunity from suit under 42 U.S.C. § 1983. *See Dittman v. State of Cal.*, 191 F.3d 1020, 1025–26 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000). Nor does the *Ex Parte Young* exception to sovereign immunity apply here: that exception requires that "[t]he state official 'must have some connection with the enforcement of the [challenged] act.'" *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (quoting *Ex Parte Young*, 209 U.S. at 157). "That connection 'must be fairly direct; a

generalized duty to enforce state law or a general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.'" *Harris*, 729 F.3d at 943 (quoting *Brown*, 674 F.3d at 1134).

Appellants do not allege that Governor Newsom has any such direct connection to the enforcement of the laws they challenge. As already noted—and as Appellants admit in the FAC—Executive Orders N-64-20 and N-67-20 were superseded by AB 860 on June 18, 2020 (before the commencement of this suit), at which point they ceased to have any further force or effect. *See* ER-257 (¶ 76); SER-8–9, 27–29. While Governor Newsom has statutory authority to proclaim elections, he does not have the direct enforcement authority over them that *Ex Parte Young* requires. And the Secretary of State's emergency regulations were issued pursuant to sources of state authority, not any authority granted by the Governor. *See* SER-11–25 (noting authority cited).

Accordingly, Governor Newsom "is entitled to Eleventh Amendment immunity because his only connection to [the challenged state laws] is his general duty to enforce California law," which is insufficient to invoke *Ex Parte Young*. *Harris*, 729 F.3d at 943. The dismissal of Appellants' claims against him should be affirmed on this additional, independent basis.

III. THE DISTRICT COURT'S DECISION TO DISMISS WITH PREJUDICE WAS NOT AN ABUSE OF DISCRETION

Finally, Appellants argue that the district court erred in denying them leave to amend the FAC. This Court reviews a district court's denial of leave to amend a complaint for abuse of discretion. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Here, there was no abuse of discretion.

"The district court's discretion to deny leave to amend is particularly broad where," as here, "plaintiff has previously amended the complaint." *Id.* (internal quotation marks omitted). "Absent a definite and firm conviction that the district court committed a clear error of judgment, [the Ninth Circuit] will not disturb the district court's decision." *Id.*

In the action below, Appellants did have the opportunity to amend their Complaint. They did so after State and County Defendants filed their initial motions to dismiss. *See* SER-108–225. Subsequent to the filing of those motions, Appellants filed the FAC in lieu of an opposition. ER-313 (ECF Nos. 68, 69). Despite this opportunity to amend, the arguments in State Defendants' motion to dismiss the FAC were substantively unchanged from their first motion. *Compare* SER-109 *with* ER-159. In other words, the amendments that Appellants made between the Complaint and the FAC

were futile in overcoming any of State Defendants' arguments for dismissal. Accordingly, the district court acted within its discretion when it decided that allowing further amendment would again be futile and thus granted Defendants' motions to dismiss with prejudice.

Appellants have offered no basis for a finding of abuse of discretion. The district court order should be affirmed in its entirety.

CONCLUSION

For the foregoing reasons, and for the reasons otherwise apparent in the record, State Defendants respectfully request that this Court affirm the district court's decision.

Dated: February 25, 2022

Respectfully submitted,

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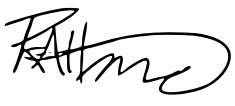

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21-56061

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs,

v.

ALEX PADILLA, California Secretary of State, et al.,

Defendants.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 25, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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