

Court of Appeal No. 21-56061

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Plaintiffs-Appellants,

vs.

SHIRLEY WEBER, *et al.*,

Defendants-Appellees

*Appeal from the Order of the United States District Court for the Central District
of California,*

Case No. 2:21-cv-00032-AB-MAA

The Honorable André Birotte Jr., District Judge

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant, Election Integrity Project California, Inc., certifies that it is not publicly held and has no corporate parents, subsidiaries, or affiliates that are publicly held which own 10% or more of its stock.

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I. INTRODUCTION

The rights to vote and seek national office are among the most fundamental rights guaranteed to United States citizens. This is a nonpartisan case that was brought because three decades of California laws, regulations, and practices have eroded these rights in California by implementing near-universal vote-by-mail (“VBM”) balloting, eliminating chain of custody and signature verification protections, treating in-person voters differently from VBM voters, sending ballots to large numbers of ineligible voters, and legalizing unrestrained and unrestricted ballot harvesting. California’s voting process endangers many of California’s most vulnerable populations, including the young, the elderly, minorities, and non-citizens.

Plaintiff-Appellants (“Appellants”) include thirteen candidates who ran for election to the United States Congress in 2020 and intend to run in future elections (the “Candidate Appellants”) and Election Integrity Project California, Inc. (“EIPCa”), a nonpartisan non-profit public benefit corporation 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. Appellants bring claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and the Elections Clause and Guarantee Clause of the United States Constitution.

The lower court improperly dismissed Appellants' Equal Protection, Due Process, and Election Clause claims on standing grounds, holding Appellants failed to allege an injury in fact. ER 8-15. The decision should be dismissed for several reasons.

First, the Supreme Court has long recognized that the 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, Appellants allege concrete and particularized voting injuries because, as the decision discusses, they allege “differential treatment between voters in different counties, as well as between VBM and in-person voters.” ER 8. Appellants also allege California’s voting laws, orders, and practices disproportionately impact the young, elderly, non-citizens, and Black and minority voters. ER 280. Because the voting process will be substantially similar in upcoming elections, the voting injuries will repeat themselves and are therefore actual and imminent.

Second, Appellant Candidates allege an injury in fact as candidates because California’s election laws and procedures affect their chance of winning their upcoming elections. Courts have consistently found standing to challenges to election laws and procedures that threaten a candidate’s election prospect.

Third, Appellant EIPCa alleges organizational standing. EIPCa educates Californians on California's voting laws and investigates defects and illegalities in California's elections. It has expended additional resources to train and prepare observers and will continue to expend resources for future elections.

Even on the basis of one of these, this Court should dismiss the lower court's decision on standing grounds. *See Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (holding the Court "need not address standing of each plaintiff if it concludes that one plaintiff has standing.")

Furthermore, this Court should reverse the dismissal of Appellants' Guarantee Clause claim as the decision fails to acknowledge that Appellants have alleged that the California executive branch has acted unilaterally and in disregard of the other branches of government.

For all of these reasons, the district court's decision should be reversed and remanded for further proceedings.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the Appellants' claims arise under the United States Constitution, and pursuant to 28 U.S.C. § 1343 because relief is sought under 42 U.S.C. § 1983. On September 22, 2021, Appellants filed a timely Notice of Appeal (ER 290-95) of the district court's August 30, 2021 Judgment (ER 2) and June 14, 2021 Order Granting

Defendants' Motions to Dismiss. ER 3-13. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. ISSUES PRESENTED

1. Whether Appellants have adequately alleged an injury in fact sufficient to confer standing where they have pleaded facts showing the failure to ensure that only legally cast VBM ballots are recorded diminishes the votes of Appellants and similarly situated voters.

2. Whether Appellants have adequately alleged an injury in fact sufficient to confer standing where they have pleaded facts showing the disparate practices in different California counties caused irregularities in counties where Appellants reside, diminishing the value of votes legally cast by and for the Appellants.

3. Whether Appellants have adequately alleged an injury in fact sufficient to confer standing where they have pleaded facts showing that the disparate treatment of VBM voters in comparison to in-person voters disproportionately impacts Black and minority voters and vulnerable communities, including Appellants and their supporters, and EIPCa citizen observers.

4. Whether invidious discrimination with regard to race, sex, economic status, or place of residence or immutable characteristics are required for Appellants to adequately allege an injury in fact sufficient to confer standing.

5. Whether Appellants have adequately alleged an injury that is actual and imminent where they have pleaded facts showing that the voting process in California is largely governed by laws of indefinite duration, that those laws have led to harm in multiple elections, and the COVID-19 policies have generally been passed into laws of indefinite duration.

6. Whether Candidate Appellants separately have standing as candidates where they have alleged that the challenged voting laws and practices threaten their election prospects.

7. Whether EIPCa has alleged organizational standing where it has alleged an injury that is actual and imminent.

IV. STATEMENT OF THE CASE

A. Background

1. **The Integrity Of California's Elections Have Been Systemically Undermined Through Decades Of Unconstitutional Laws And Regulations.**

For the past three decades, California has passed a series of statutes that have the cumulative effect of unconstitutionally undermining election integrity. ER 252.

Among other things, in 1998, California eliminated absentee ballots, “converting what at the time was a one-time VBM ballot that had to be applied for prior to each election to a permanent VBM ballot that would be sent to voters prior to every election, without further action on their part, and without verification that the voters were eligible to vote, still residents of California, or even still living.” ER

253. Approximately 75% of voters regularly receive permanent VBM ballots, many of whom do not request VBM ballots. *Id.* Then, in 2002, after Congress passed the Help America Vote Act (HAVA) to require statewide voter databases, California was one of the last states to come in compliance in 2016, and even then, EIPCa reported serious and potentially disqualifying defects in the database. *Id.*

In 2012, California passed SB 397 (Stats. 2011, Chap. 561), “allowing online voter registration without effective controls against ineligible registrations. In its first month, 6,080 duplicate registrations were recorded.” ER 254. In 2014, California passed AB 1461, which allowed pre-registration of 16 and 17-year-olds. ER 255. “EIPCa analysis indicates that minors are showing up on the active voter rolls.” *Id.*

In 2016, California passed the “Voter’s Choice Act,” which eliminated neighborhood precinct voting, sent VBM ballots to every registered voter, and eliminated the requirement that in-person voters who received a VBM ballot surrender the ballot and clearly mark it as surrendered. *Id.* That same year, California passed AB 1921, “allowing an unlimited number of VBM ballots to be turned in by anyone, regardless of relationship to the voter.” ER 256. This bill also eliminated chain of custody and legalized wholesale ballot harvesting/ballot trafficking. *Id.* Ballot harvesting was further enabled by AB 306, which prohibited disqualification of a ballot even if the person returning it does not identify their name, relationship

to the voter, or signature. ER 257. Ballot harvesting exploits vulnerable populations like non-citizens, college students, senior citizens, and minority voters. ER 242.

In 2017, California passed SB 286, “under which voters are no longer required to state their name and address aloud and have it repeated when voting in person as was previously required under California Elections Code § 14216, further facilitating voter impersonation.” *Id.* In 2018, California passed SB 759, which required counties to contact VBM voters so they could “cure” their signature. *Id.* Because verification is done by downloading an online form or sending a form in the mail, “a voter may therefore never see the original ballot envelope and may ‘verify’ a fraudulent signature.” *Id.*

In 2019, California passed four new voting bills. ER 257. SB 523 extended the “curing” process from missing or challenged VBM ballot envelope signatures from eight days after election day to two days before certification, “which, in conjunction with the processing of VBM and provisional ballots, could cause fraudulent ballots to be counted while the voters’ responses are pending.” *Id.*

In the run-up to the 2020 election, Governor Newsom issued executive orders that required every eligible voter be sent a ballot by mail, without adequate safeguards with respect to the validity of VBM votes, the chain of custody of ballots, and verification of signatures, among other things. ER 257-58. These executive orders were passed into law through AB 860. ER 257. Millions of ballots were thus

sent to every active voter for the 2020 election with no chain of custody. ER 258. For instance, “EIPCa data research shows that hundreds of thousands of ballots were sent to the last known address of individuals showing no electoral activity for 12-40 years, some never, and who are therefore likely deceased or moved out of state.” *Id.*

On September 28, 2020, former Secretary of State Alex Padilla adopted new “emergency” regulations which gutted the signature verification process. *Id.* For instance, the comparison of signatures was to begin with the presumption that the signature on the petition or ballot envelope is the voter’s signature. *Id.* The election official could accept virtually any signature on the theory that “the voter’s signature style might have changed over time.” ER 258-59. The emergency regulations also promote fraud by allowing multiple ballots to be stuffed into a single VBM return envelope, provided there is an equal number of signatures on that envelope. ER 259. The regulations also eliminate the protection provided by the barcode on the envelope, “which is used to track whether a particular voter has submitted a VBM ballot”, and “creates intractable practicable problems for determining which votes have been legally cast.” ER 260. The California legislature recently enacted portions of these regulations into law. *See* Mot. for Judicial Notice, Exh. A & B.

2. California’s Voting Laws And Procedures Cause Numerous Irregularities.

Leading up to the 2020 elections, EIPCa notified former Secretary of State Alex Padilla several times of potential irregularities including thousands of

registrants receiving duplicate ballots and hundreds of thousands of ineligible registrants receiving mail ballots. ER 263. California officials never addressed EIPCa's concerns. ER 264.

In relation to the November 2020 election, EIPCa received hundreds of Incident Reports signed under penalty of perjury establishing that EIPCa observers were obstructed from observing the counting of votes. ER 265. Some observers were relegated to remote video access which precluded their ability to determine whether procedures were being followed. *Id.*

Despite the obstacles imposed by Appellee County Registrars on citizen observers, there are hundreds of sworn affidavits collected by EIPCa that report numerous irregularities. ER 268-69. The affidavits reveal, among other things, that signature verifications for VBM ballots were not adequately conducted. ER 269. "As massive numbers of VBM ballots flooded vote counting centers, their signatures were visually checked at the rate of one signature pair every one to four seconds. In some cases, four signature comparisons were conducted simultaneously using images projected on computer monitors, at the rate of one to four seconds per screen." *Id.* As a result, this cursory review was inadequate to properly vet legal votes. *Id.*

Observers also noted additional irregularities across many counties. *Id.* For instance, in Contra Costa County, poll data tapes from voting machines showed

inconsistencies between votes recorded by the machines and later tabulated. ER 269-70. In this same county, a voter had his ballot envelope signed by another person with a different name and the county accepted the signature without conducting signature matching. ER 270. In Los Angeles County, one observer witnessed a machine change a voter's vote, and another observer witnessed two different women drop off multiple ballots without voter signatures. ER 270-71. The ballots were still counted by election officials. *Id.* In Sacramento County, an observer saw an "x" drawn for one candidate but the ballot being counted for the other candidate. ER 272-73. In Orange County, signatures were displayed four at a time on the computer screen, making it impossible to perform meaningful signature matching of signatures on VBM ballot envelopes. ER 271.

“[Appellee] county registrars implemented different election rules and practices, thereby causing voters in one county to be treated differently from those in another, disadvantaging voters and diminishing the value of votes legally cast by and for the [Candidate Appellants] in certain counties in comparison to those legally cast in other counties.” Most of the Congressional districts in which the Candidate Appellants ran crossed county lines, “causing them to be disadvantaged in certain counties over others.” ER 265.

In addition to irregularities across counties, in-person voters were subject to unequal treatment compared to VBM voters. ER 280. Despite California law

requiring in-person voters to vote before 8 p.m. on election day, former Secretary of State Padilla's guidance allowed voters to drop off ballots in drop boxes until 11:59 p.m. and still have their ballots postmarked on election day and therefore counted. *Id.* The guidance allots VBM voters four additional hours to vote. *Id.* Such unequal treatment disproportionately affects in-person voters, including Black voters, who other cases acknowledge have a higher preference for in-person voting than the population as a whole. *Id.*

B. Procedural History

On March 8, 2021, Appellants filed a First Amended Complaint (FAC) for declaratory and injunctive relief. ER 239. This lawsuit is brought on behalf of thirteen congressional candidates who are registered California voters, ran for United States Congress in various congressional districts in California, and intend to run for office again in future California elections, including in 2022. ER 247-49. This lawsuit is also brought on behalf of Appellant EIPCa, "a California non-profit public benefit corporation 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." ER 246-47. EIPCa believes the electoral process is the cornerstone of self-governance and therefore focuses on the integrity of the voting process, "so that every lawfully cast vote is accurately counted." ER 246. It educates

voters and candidates on election procedures and investigates defects and illegalities in elections. *Id.*

The Appellants allege that Appellees violated the Elections Clause by “usurping the California State Legislature’s constitutional authority to set the manner of elections.” ER 282.

Appellants also allege Appellees violated the Equal Protection Clause by (1) “diminishing the value of votes legally cast by and for the individual [Appellants] and EIPCa’s citizen observers by the application and enforcement of the laws, statutes, regulations, orders and practices described herein”; (2) “failing to ensure that only legally cast VBM ballots were included in the canvas for the 2020 general election in California”; (3) “applying disparate rules in different counties, causing the votes of some California citizens, including individual [Appellants] and their supporters, and EIPCa’s citizen observers, to be treated differently from those of others”; and (4) “treating VBM voters differently from in-person voters, disproportionately burdening people who prefer to vote in person, including Black and other minority voters, including individual [Appellants] and their supporters, and EIPCa’s citizen observers.” ER 283-84.

The Appellants also allege Appellees violated the Due Process Clause by (1) “diminishing the value of votes legally cast by and for the individual [Appellants] and EIPCa’s citizen observers by the application and enforcement of the laws,

statutes, regulations, orders and practices”; and (2) “failing to ensure that only legally cast VBM ballots were included....” ER 286.

Finally, Appellants allege Appellees have violated the Guarantee Clause “by implementing laws, regulations, orders and voting practices, and conducting elections, so as to deny California and its citizens, including [Appellants], a republican form of government.” ER 287.

On April 5, 2021, Appellees filed motions to dismiss the FAC. ER 158-235. On June 14, 2021, the lower court dismissed Appellants’ FAC with prejudice, finding Appellants did not have standing and therefore no subject matter jurisdiction existed pursuant to Rule 12(b)(1). ER 15.

V. SUMMARY OF THE ARGUMENT

The dismissal of Appellants’ claims on standing grounds is premised on fundamental errors of law.

First, with respect to Appellants’ Equal Protection and Due Process claims, the lower court’s decision held Appellants lacked standing because they have not alleged an injury in fact. ER 8-13. The decision applies an incorrect standard in which “invidious discrimination with regard to ‘race, sex, economic status, or place of residence’” are the “key considerations” in determining whether Appellants have a concrete and particularized injury. ER 9. This has no basis in law. Appellants need only show that California’s voting practices “disfavor[ed]” certain voters by

“placing them in a position of constitutionally unjustifiable inequality vis-à-vis [favored] voters....” *Baker*, 369 U.S. at 207-08.

Nevertheless, this incorrect standard is the central premise upon which the decision rests. Indeed, the decision goes on to conclude that Appellants lack standing because they do not bring the case on behalf of “groups with a shared immutable characteristic traditionally protected by law.” ER 10. This is a made up standard unsupported by caselaw.

Further, even if this were the correct standard, it is met. Appellants have pleaded that California’s voting laws and practices have harmed groups with immutable characteristics with regard to “race, sex, economic status, or place of residence,” including:

- Unequal treatment of the individual Appellants and their supporters, depending on the county of residence;
- Unequal treatment of minority voters, including several Candidate Appellants and supporters of Candidate Appellants; and
- Unequal treatment of in-person voters, including supporters of the Candidate Appellants, in comparison to VBM voters, disproportionately affecting Black voters.

The decision is also premised on the erroneous conclusion that Appellants’ allegations amount to a “generalized injury” and that allowing the case to go forward

would be to “engage in policymaking properly left to elected representatives.” ER 7, 10. However, an injury is not a “generalized grievance” simply because the harm is widespread. *See Fec v. Akins*, 524 U.S. 11, 24-25 (1998). Further, court decisions protecting the integrity of the election process cannot be said to “engage in policymaking properly left to elected representatives,” as it is the very process of electing those representatives that requires protection.

Second, the decision incorrectly denies that Appellants have demonstrated a voting injury that is “actual or imminent,” stating that “the Court is still left to speculate” as to whether the injury to Appellants in the 2020 election will recur in future elections because it is unclear whether the “emergency policies [will] remain in place once the COVID-19 pandemic subsides,” and if they do, whether they will lead to harm. ER 11-12. However, the decision ignores that Appellants have pleaded that the voting process in California is largely governed by laws of indefinite duration, rather than emergency policies, that those laws have led to harm in multiple elections, and that even where “COVID-19” policies have caused irregularities, those policies generally have now been passed into law, thereby becoming as permanent as the other voting practices that form the basis of Appellants’ FAC. In short, taking Appellants’ allegations as true, no speculation is required as to whether future harm to Appellants is “actual and imminent.”

Third, the decision concludes the Candidate Appellants lack standing as candidates to assert Fourteenth Amendment claims because “they failed to assert that the outcome of their individual contests would have changed absent the alleged voting irregularities or errors.” ER 12. However, Candidate Appellants need only allege, as they do in the FAC, that the challenged voting laws and practices “threaten [their] election prospects and campaign coffers.” *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006).

Fourth, the decision incorrectly finds that EIPCa lacks organizational standing to assert Fourteenth Amendment claims, again on the basis that Appellants failed to plead an “actual or imminent” injury due to the “speculative” nature of the “emergency policies” surrounding “the COVID-19” pandemic. ER 13. For the reasons noted herein, this is error.

Fifth, the decision summarily dismisses Appellants’ Elections Clause claim on the basis that they fail for the same reason as Appellants’ Equal Protection and Due Process claims, without further analysis. ER 13-14. For the same reasons that it was error to dismiss the Equal Protection and Due Process claims, it was also error to dismiss Appellants’ Elections Clause claim.

Sixth, the decision’s dismissal of Appellant’s Guarantee Clause claim is equally conclusory and fails to acknowledge that Appellants have alleged that the

California executive branch has acted unilaterally and in disregard of the other branches of government.

For all of these reasons, the decision is erroneous and should be reversed.

VI. STANDARD OF REVIEW

A dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is reviewed de novo. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) 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 factual, 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)).

VII. ARGUMENT

A. Appellants Have Alleged An Injury In Fact As Voters To Assert Fourteenth Amendment Violations, And The Lower Court's Finding To The Contrary Is Reversible Error.

To establish Article III standing, a plaintiff must demonstrate that he or she has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo Inc. v. Robins*, U.S. 330, 338 (2018).

The decision's dismissal of Appellants' Equal Protection, Due Process, and Elections Clause claims is based on an erroneous application of the first prong, “injury in fact.” ER 8-15.

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 v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Appellants satisfy these requirements. Indeed, Appellants have alleged numerous ways they, the Candidate Appellants' supporters, and EIPCa's citizen observers were specifically disadvantaged by California's laws, orders, and practices. Appellants allege that in-person voters were subject to unequal treatment compared to VBM voters, and this unequal treatment disproportionately burdens Black and minority voters and “vulnerable populations, who prefer to vote in person.” ER 280. Appellants also

allege “[Appellee] county registrars implemented different election rules and practices, thereby causing voters in one county to be treated differently from those in another, disadvantaging voters and diminishing the value of votes legally cast by and for the [Appellants] in certain counties beyond those legally cast in other counties.” ER 265.

Further, Appellants’ injuries are actual and imminent because the voting irregularities are the result of decades of legislation and therefore ingrained into California’s voting system. “Because the same or substantially similar laws, regulations, orders and practices are governing and will govern upcoming elections, the same situation will repeat in these elections absent Court intervention.” ER 269.

1. Appellants Have Alleged Voting Injuries That Are Concrete and Particularized.

(a) Fourteenth Amendment Violations Are Actionable By A Wide Range Of Individuals And Groups, Not Just Groups With Immutable Characteristics.

The lower court’s decision is erroneously premised on the notion that vote dilution only protects groups with immutable characteristics. ER 9 (“[K]ey considerations . . . [are] whether there was invidious discrimination with ‘regard to race, sex, economic status, or place of residence’ ” . . . “Voters who prefer to vote by mail are nothing like the groups with a shared immutable characteristic traditionally protected by law.”) In reaching its decision, the court relies on *Baker* and *Reynolds*. However, these cases support Appellants’ position.

In *Baker*, 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.” 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] 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)), not merely a claim of ‘the right possessed by every citizen to require that the government be administered according to the law.’ ” *Id.* (citing *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

In *Reynolds*, the court heard a vote dilution case premised again on unequal legislative districts. The decision mischaracterizes *Reynolds* as holding that the “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’ ” ER 9. But the court never held that invidious discrimination with regard to immutable characteristics was a pre-requisite to a successful vote dilution case. ER 9-10. Rather, *Reynolds* stated that a “fundamental principle of representative

government” is one of “equal representation for equal numbers of people” without respect to these categories. 377 U.S. at 561. In other words, discrimination based on “race, sex, economic status or place of residence” is not required to succeed on a vote dilution theory. ER 9. To suggest otherwise is to invent a standard where none exists. *Reynolds* affirmed *Baker*, holding that vote dilution was defined as where a certain group of voters’ votes are weighted differently. 377 U.S. at 555-56.

Like the apportionment statutes challenged in *Baker* and *Reynolds*, the laws, statutes, orders, and practices challenged here dilute the votes of Appellants and similarly situated voters. In *Baker* and *Reynolds*, though, the plaintiffs’ injury arose from only one apportionment statute. Here, Appellants have suffered multiple injuries from a myriad of statutes, orders, and practices and have alleged several theories of vote dilution, as discussed below. *See Supra*, at 23-26. As standing existed in *Baker* and *Reynolds*, it is found all the more so here.

The decision also conflates a widespread injury with a “generally available grievance about government.” ER 7-10. However, an injury is not a “generalized grievance” simply because the harm is widespread, as the Supreme Court has found. *See Akins*, 524 U.S. at 24-25.¹ In *Akins*, a group of voters filed a complaint against

¹ Even if the case otherwise amounted to a “generally available grievance about government,” the lower court’s reasoning that allowing such a case to go forward would be to “engage in policymaking properly left to elected representatives” does not hold where the issue is the protection of the election process itself, as it is the very process of electing those representatives that requires protection. ER 7.

the Federal Election Commission (FEC) for their failure to make public information relating to candidates running for public office, an omission that interfered with their ability to evaluate candidates running for office. *Id.* at 21. The FEC argued the voters did not have standing because the asserted harm was one which was shared equally by all or a large class of citizens. *Id.* at 23. The Supreme Court disagreed, noting the case at hand differed from other cases where the plaintiffs failed to show a concrete and particularized injury instead of a generalized grievance, such as an interest in seeing that the law is obeyed. *Id.* at 23-24. The Supreme Court concluded that the respondents' informational injury was sufficiently concrete and specific, even though it was widely shared. *Id.* at 25-26.

The lower court made the same mistake as the FEC in holding Appellants' voting injuries were generalized because they were shared equally by all or a large class of citizens. ER 9. As the Supreme Court astutely observed, a harm can be widespread but personal. *Akins*, 524 U.S. at 25-26. Like the respondents in *Akins*, Appellants are not merely claiming the Appellees did not follow the law, but that their application of the voting laws impaired the effectiveness of their votes (i.e., vote dilution). *See Supra*, at 23-26.

(a) Appellants Have Alleged Multiple Voting Injuries That Are Concrete And Particularized.

The decision concludes that Appellants do not allege to be a part of any disadvantaged group because “they purport to be representing the rights of all eligible voters....” ER 10. However, Appellants do not allege this case is brought on behalf of all eligible voters. Appellants allege in the introduction of the FAC that California has passed laws which, “taken together, are designed to create an environment in which elections could be manipulated and eligible voters of all political viewpoints disenfranchised.” ER 241. Appellants have alleged they were disadvantaged and identified specific groups of voters. ER 269, 280.

First, Appellants have asserted that Appellees violated and continue to violate the Equal Protection Clause and Due Process Clause by failing to ensure only legally cast VBM ballots are counted and enforcing laws, statutes, orders, and practices that “diminish[] the value of votes legally cast by and for the individual [Appellants] and EIPCa’s citizen observers....” ER 283. California has passed several laws and regulations that have “massively expanded VBM, legalized unrestrained and unrestricted ballot harvesting/ballot trafficking and exploitation of vulnerable populations and undermined protections on in-person voting.” ER 252. As the 2020 election and past elections have shown, “deceased persons, non-citizens and non-residents are often recorded as having voted in elections....” *Id.* During the 2020 election, observers were also unable to monitor and challenge whether election

workers were properly verifying VBM ballot signatures due to the massive number of VBM ballots flooding the election facilities. ER 269. The failure to ensure that only legally cast VBM ballots are recorded diminishes the votes of Appellants and similarly situated voters, amounting to what is a widespread but concrete and particularized injury. *See Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 828, 834 (D. Mont. Sept. 30, 2020) (finding standing to challenge the Montana Governor’s directive permitting mail ballots that could result in “unconstitutional disenfranchisement of a both direct and dilutive nature.”)

The decision concludes this vote dilution theory is inadequate because “[v]oters who prefer to vote by mail are nothing like the groups with a shared immutable characteristic traditionally protected by law.” ER 10. Again, this is a made up standard. Appellants need not allege they shared immutable characteristics. Appellants need only allege they were specifically disadvantaged, which they have. *See Baker*, 369 U.S. at 204.

Second, Appellants’ equal protection claim is predicated on the theory that Appellees have applied disparate practices in different counties, “causing the votes of some California citizens, including individual [Appellants] and their supporters, and EIPCa’s citizen observers, to be treated differently from those of others.” ER 284. The Supreme Court confers standing when states apply voting laws unevenly. *See Bush v. Gore*, 531 U.S. 98 (2000) (finding Florida’s recount scheme violated the

Equal Protection Clause because the counties did not apply uniform rules). Indeed, *Baker* supports Appellants' second vote dilution theory as the challenged state-apportionment statute led to disparate results across counties. 369 U.S. at 207-08.

Here, the Appellants allege the Appellee county registrars implemented different election rules and practices, diluting the votes of Appellants. ER 269. For instance, witnesses at various county locations observed votes added to the tally for one candidate but not the other, ballots without voter signatures, an "x" through a candidate's name, and an unexplained increase in the number of registered voters after polls had closed. ER 269-70. Several witnesses also alleged that numerous election workers did not properly vet legal votes and check signatures. ER 271-72. The incident reports occurred in counties where Appellants reside, diminishing the value of votes legally cast by and for the individual Appellants. ER 265.

Third, even if vote dilution required identification of a disfavored group with immutable characteristics, Appellants have identified groups with immutable traits, including the young, elderly, non-citizens, and minorities. ER 280. Indeed, with respect to Black voters, Appellants allege that vote by mail disproportionately affects them. *Id.* Multiple recent election law challenges have found standing on this basis. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 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. ER 280 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 on election day and therefore counted." ER 238. 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." ER 280. The difference in timing allots VBM voters at least four additional hours to vote. ER 280. 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.*

(b) The Cases the Decision Relies Upon Are Distinguishable.

The decision cherry picks several cases to support its holding that Appellants' voting injuries are generalized. ER 9-10. However, none of the cases are on point.

For instance, in *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000), the appellees, who resided in majority-white districts, claimed they were entitled to a presumption of an injury-in-fact "because the bizarre shapes of their districts reveal that the districts were the product of an unconstitutional racial gerrymander." *Id.* at 30. The court held

that the shapes of appellees' districts were largely influenced by the shapes of the majority-minority districts upon which they border, and although there was evidence of an unconstitutional use of race in drawing the majority-minority districts, that evidence did not prove anything with respect to the neighboring majority-white districts. *Id.* at 30-31.

Unlike in *Sinkfield*, the evidence of vote dilution here is not attenuated. Appellants have alleged specific evidence that they were disadvantaged because of California's voting practices and laws. California's voting system caused disparate practices in different counties, leading to specific and numerous accounts of voting irregularities in the counties where Appellants reside. ER 269. Appellants also allege California's voting laws and practices disproportionately impacted in-person voters like Appellants due to the influx of VBM ballots. ER 280.

The district court opinions upon which the decision relies on are also distinguishable. ER 10. In *Bower v. Ducey*, the plaintiffs' equal protection claims were based on "Defendants' failure to comply with Arizona law by permitting illegal votes, allowing voting fraud and manipulation, and in preventing actual observation and access to the elector process, which allegedly resulted in the dilution of lawful votes...and the counting of unlawful votes." 506 F. Supp. 3d 699, 711 (D. Ariz. Dec. 9, 2020) (internal citations omitted). The court held this theory of vote dilution was inadequate because the plaintiffs did not allege "what 'class' of voters were

treated disparately. Nor do the Elector Plaintiffs cite to any authority that they, as ‘elector delegates,’ are a class of protected voters.” *Id.*²

Similarly, in *Wood v. Raffensperger*, the plaintiff alleged he suffered an injury from Defendants’ violations of Georgia law. No. 1:20-CV-5155-TCB, 2020 WL 7706833, at *4 (N.D. Ga. Dec. 28, 2020). Plaintiff claimed he had a particularized injury because voters have a legally cognizable interest in preventing the dilution of their votes through improper means. *Id.* The court dismissed plaintiff’s theory because he did not allege how he had been specifically disadvantaged. *Id.*

Here, Appellants do not allege a general violation of voting laws. Rather, Appellants allege the Appellees’ application of the voting laws impaired the effectiveness of their votes (i.e., vote dilution). ER 265, 280. In other words, Appellants’ voting injuries were “conferred by law.” *Akins*, 524 U.S. at 24. Further, the Appellees’ application of the voting laws did not affect all registered voters equally. Appellants allege California’s laws, procedures, and practices that massively expanded VBM ballots and failed to ensure only legal VBM ballots were cast diminished the votes of Appellants and other in-person voters. ER 265, 280. The laws and procedures also caused disparate results across different counties and

² Even though this case is distinguishable, the court incorrectly suggested appellants needed to be part of a class of “protected voters.” Voters do not need to allege they share immutable characteristics or are a class of protected voters to confer standing. Again, the standard is whether they have been specifically disadvantaged. *See Baker*, 369 U.S. at 204.

disadvantaged minority voters who tend to vote in-person and vulnerable communities like the elderly, young, and non-citizens. ER 241, 265.

Finally, *Martel v. Condos*, 487 F. Supp. 3d 247 (D. Vt. 2020) does not stand for the proposition that any fraudulent vote amounts to a generalized grievance. ER 10. In *Martel*, the plaintiffs alleged that the new processes in place for the general election in Vermont had an excessive error rate, leading to voting fraud. *Id.* at 253-54. The court held the plaintiffs' voting injuries were generalized because the five plaintiffs who sued alleged an injury common to all registered voters. *Id.* at 253. The key takeaway from this case is that alleging voting fraud, without alleging how the fraud specifically disadvantaged the plaintiff, is not enough to confer standing. Here, Appellants allege numerous ways they were disadvantaged by the voting laws, procedures, and practices that led to numerous voting irregularities.

2. The Appellants Have Alleged Voting Injuries That Are Actual and Imminent.

The decision also errs in holding Appellants' voting injuries fail for lack of actuality and imminence. ER. 11. In reaching this decision, the lower court applies an incorrect standard by suggesting Appellants have to show their voting injuries are "certainly impending." *Id.* As an initial matter, even if "certainty" was the standard, the Appellants allege specific instances of vote dilution of the Candidate Appellants' votes and those of their supporters. ER 265. However, the November 2020 election results are not the basis for standing, the election process itself confers standing. As

the FAC alleges, this process will be substantially similar in upcoming elections. ER 269.

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 miscounted, diluted, or debased. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 375 (1963) (a voter in Georgia may sue to enjoin that state’s allegedly unconstitutional county unit system as a basis for counting votes, holding that “appellee, like any person whose right to vote is impaired, has standing to sue”) (citations omitted); *Harper v. Va. State 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); *Bush*, 531 U.S. at 104-05 (Florida voters had standing to challenge Florida’s recount system because the system did not afford the “equal dignity owed to each voter.”); *see also Sandusky Cnty 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.”)

The decision finds that the aforementioned cases do not support Appellants because they involve different voting issues. ER 11. This is a distinction without a difference. There is no rule that only certain categories of voting issues can invoke standing. The Appellants relied on these cases to emphasize the well-established precedent regarding challenges to voting processes.

Further, the Supreme Court does not require that a plaintiff demonstrate “that it is literally certain that the harms they identify will come about.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 415 n.5 (2013). The Supreme Court has continued to find “standing based on a ‘substantial risk’ that the harm will occur....” *Id.*; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *see also Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1000-01 (1982); *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298 (1979). In the voting context, courts have found standing based on an increased risk that votes would be improperly discounted. *See Bush*, 531 U.S. at 104-05; *Blackwell*, 387 F.3d at 574; *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). As the Eleventh Circuit explained: “[i]mmediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely

within a certain number of days, weeks, or months.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

Appellants’ allegations of a substantial risk of harm are sufficient to establish a cognizable injury at the pleading stage of litigation. The Appellants allege 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. ER 266-73. The Appellants further allege that sworn observer statements show such votes having been diluted in the 2020 election. *Id.*

As the court in *Black* emphasized, the anonymity of elections make it impossible to know with certainty the extent of unequal treatment and due process violations. *Black*, 209 F. Supp. 2d at 895. Considering the factual and expert testimony alleged in the FAC that this Court must accept as true and the reasonable inferences that support Appellants’ claims, the Appellants allege more than enough facts to confer standing at this stage.

B. The Injuries In Fact That Candidate Appellants' Have Alleged Extend Not Just To Voting Rights' Violations But Also To Their Chances Of Winning As Candidates.

Candidate Appellants have also alleged an injury in fact as candidates as they have alleged specific ways the election laws and procedures affect their chances of winning. The alleged irregularities occurred in counties where Candidate Appellants reside, “diminishing the value of votes legally cast by and for the [Candidate

Appellants]....Most of the Congressional districts in which [Candidate Appellants] ran crossed county lines, causing them to be disadvantaged in certain counties over others.” ER 265.

The decision holds that Candidate Appellants did not allege a personal stake because “they failed to assert that the outcome of their individual contests would have changed absent the alleged voting irregularities or errors.” ER 12. Candidate Appellants need not allege with certainty that the outcome would have been different absent the voting irregularities. This is a made up a standard, as evidenced by the fact that the decision cites to no supporting case law. *Id.*

Further, the Candidate Appellants are not seeking to overturn the prior election. They are challenging California’s election process and seek prospective relief. ER 282-88. Candidate Appellants need only allege the challenged voting laws and practices “threaten [their] election prospects and campaign coffers.” *Benkiser*, 459 F.3d at 587.

The decision further holds that Candidate Appellants did not allege standing because they merely “plan to be candidates in future congressional elections where they suspect a possibility of future vote dilution....” ER 12. The decision downplays allegations and evidence of harm during the 2020 election. It also dismisses the principle that the factual support needed “to establish standing depends considerably upon whether the plaintiff is himself an object of the action....If he is, there is

ordinarily no question that the action or inaction caused him injury.” *Lujan*, 504 U.S. at 561-62. *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983) (“Thus, when an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing.”)

The Supreme Court has instructed that “the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.” *Davis v. FEC*, 554 U.S. 724, 734 (2008). Stated another way, a party may challenge the prospective operation of a statute that presents a realistic and impending threat of a direct injury. *Babbitt*, 442 U.S. at 298.

Thus, courts recognize that candidates have Article III standing to challenge election processes that affect their chances of winning an election. *See, e.g., Constitution Party v. Aichele*, 757 F.3d 247, 360-68 (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 Appellants’ votes, but Candidate Appellants chances of winning their individual elections in 2022. ER 252. During the 2020 election, the failure to ensure only legal ballots were cast diminished “the value of votes legally cast...for the individual [Appellants]...” ER 283. Further, the Appellants’ districts were in counties that received numerous complaints regarding obstruction of citizen observers, the cancellation of votes, and inconsistencies in the vote tabulations. ER 247-49, ER 266-73. “Because the same or substantially similar laws, regulations, orders, and practices are governing and will govern upcoming elections, the same situation will repeat in [Candidate Appellants’] elections absent Court intervention.” ER 269. Candidate Appellants, therefore, allege an injury in fact.

C. EIPCa Has Sufficiently Alleged Organizational Standing To Assert Fourteenth Amendment Violations.

Finally, Appellant EIPCa alleges organizational standing. The decision concludes EIPCa does not have organizational standing because it does not know “definitively whether the expanded VBM and other emergency procedures are a permanent part of California’s voting system or simply a temporary COVID-19 policy.” ER 13. The decision overlooks the fact that California’s voting practices have been the result of decades of legislation. ER 252-57. Further, portions of Secretary Padilla’s “emergency” regulations have recently been passed into law. *See* Mot. for Judicial Notice, Exh. A & B. Thus, the challenged laws and practices are well engrained into California’s voting system.

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 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 Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008) (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 180-84 (2000)).

The FAC alleges that EIPCa “is a California non-profit public benefit corporation 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.” ER 246-47. EIPCa educates voters and candidates on election procedures and investigates defects and illegalities in elections. *Id.* The organization also trains citizen observers on California’s elections. *Id.* Since California dramatically changed their election procedures, EIPCa has had to expend additional resources to educate voters and observers. ER 265. EIPCa will have to expend additional resources to train and prepare observers for future elections absent court intervention. *Id.*

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” to accomplish its mission. *Nat’l 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.”). The Supreme Court has unambiguously rejected the argument that such expenditure is merely an “abstract” injury. *Id.* Thus, EIPCa has established that it has and will suffer an injury in fact as a result of California’s election laws

and practices by being forced to divert and reallocate resources. *See Cegavske*, 800 F.3d at 1040-41.

D. The Dismissal Of Appellants’ Elections Clause Claim Is Based On The Same Faulty Premise As Its Dismissal Of Appellants’ Equal Protection And Due Process Clause Claims.

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 FAC alleges that Appellees, by the issuance of emergency orders which substantially altered the time, manner, and place of the election, violate this constitutional requirement. ER 282.

The decision dismisses Appellants’ Elections Clause cause of action solely on the basis that “[Appellants] vote dilution claims underlying their Elections Clause claim are the same generalized grievances underlying their Equal Protection and Due Process claims.” ER 14.

However, as detailed above, Appellants have pleaded concrete and particularized injuries sufficient to confer standing on their Equal Protection and Due Process claims. Give that the dismissal of Appellants’ Elections Clause cause of action is based solely on the faulty premise that Appellants failed to so plead, that dismissal must also be reversed.

E. The Dismissal Of The Appellants' Guarantee Clause Claim Is A Conclusory Misapplication Of The Law.

Article IV, Section 4 of the United States Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . .” The decision recognizes that there is authority that in certain circumstances, “the Guarantee Clause could become a vehicle to achieve standing.” ER 12; *citing Largess v. Supreme Jud. Ct. for State of Massachusetts*, 373 F.3d 219, 229 (1st Cir. 2004) (where a government acts as a monarchy in place of a republican form of government, individuals could utilize the federal courts to enforce the Guarantee Clause.)

Here, the FAC alleges that 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. ER 287.

The decision states, “the Court is not convinced nor do [Appellants] adequately allege that the emergency policies at issue break from a republican form of government.” ER 14. This is an inadequate basis on which to dismiss Appellants’ Guarantee Clause claim, as it ignores the facts Appellants have pleaded concerning the unlimited power wielded by the executive in California.

F. The District Court Improperly Dismissed The Case Without Leave To Amend.

Although the lower court's decision is erroneous, the court also failed to provide leave to amend, which is another reason this Court must reverse the decision. "Denial of leave to amend is reviewed for an abuse of discretion." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). A "district court does not err in denying leave to amend where the amendment would be futile." *Id.* (internal quotation marks omitted). An amendment is futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

Although the Appellants have alleged enough facts to confer standing, none of the impediments to standing the decision identifies, even if correct, would be impediments that are not curable. For instance, if it was unclear to the trial court that Appellants were bringing this case on behalf of specific groups of voters, the court should have allowed Appellants to amend their complaint, as the amendments would have cured a pleading defect. Thus, on this basis alone, the Court should reverse the district court's dismissal.

VIII. CONCLUSION

This Court should reverse or vacate the district court's dismissal and remand for further proceedings.

Date: December 27, 2021

Respectfully submitted,

/s/ Mariah Gondeiro

Mariah Gondeiro

*Counsel for Appellants Election Integrity
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STATEMENT OF RELATED CASES

Appellants certify, pursuant to Ninth Circuit Rule 28-2.6, that they are not aware of any related cases pending in this Court.

Date: December 27, 2021

Respectfully submitted,

/s/ Mariah Gondeiro

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by the Ninth Circuit Rule 32-1. The brief is 9,258 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Date: December 27, 2021

Respectfully submitted,

/s/ Mariah Gondeiro

Mariah Gondeiro

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CERTIFICATE OF SERVICE

I certify that on December 27, 2021, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Ninth Circuit. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Mariah Gondeiro
Mariah Gondeiro

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