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' CORRECTED REPLY IN SUPPORT OF OPENING BRIEF

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I. INTRODUCTION

This case is a civil rights lawsuit seeking to protect the rights to vote and seek national office. No right is more sacred than the right to vote, as it involves "matters close to the core of our constitutional system." *Carrington v. Rash,* 380 U.S. 89, 96 (1965). Over the years, California has passed laws, orders, and regulations under the guise of increasing voter participation. Although a laudable goal, these laws and regulations have systemically undermined election integrity by legalizing unrestrained and unrestricted ballot harvesting, eliminating chain of custody, solidifying universal vote-by-mail ("VBM") and gutting signature verification requirements.

The State and County Appellees claim Appellants lack standing because their allegations amount to generalized, speculative claims of vote fraud. They even impugn Appellants' motives for bringing this case. Appellants bring this case to ensure the integrity of future elections, and ensuring all votes are counted equally protects democracy, for "(f)ree and honest elections are the very foundation of our republican form of government." *MacDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting). Appellants' constitutional causes of action turn on the State and County Appellees' disparate treatment of specific groups of voters and failure to ensure votes carry the same weight. Appellants' allegations are supported by hundreds of declarations signed under of penalty of perjury documenting irregularities in counties where Appellants vote and reside. Further, Appellants' allegations derive from the State's laws and the application of those laws. Even though Appellants allege three theories of standing, they need only prevail on one

theory. *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.")

First, Appellants allege concrete and particularized voting injuries. Appellants allege California's laws, regulations, orders, and procedures dilute the votes of in-person voters like the individual Appellants and vulnerable communities who historically vote in-person. Appellants also allege California's lack of uniform and secure voting procedures disadvantage voters in certain counties, including the counties where Appellants reside and vote. The Supreme Court has held that a lack of uniform vote-counting procedures across counties violates the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000). The voting injuries will repeat themselves because they result from decades of laws, regulations, practices, and other COVID-19 orders that the legislature ratified into law.

Second, Appellants bring this case on behalf of congressional candidates ("Candidate-Appellants") who allege that California's election laws and procedures affect their chance of winning their upcoming elections. The Appellant Candidates plan to run in districts that have experienced widespread irregularities. Courts have consistently found standing to challenges to election laws and procedures that threaten a candidate's election prospects.

Third, Appellant Election Integrity Project California, Inc. ("EIPCa") alleges organizational standing under a diversion-of-resources theory. EIPCa educates and trains citizen observers and investigates defects and illegalities in California's elections. Since California massively expanded VBM and gutted signature

verification requirements, it has expended additional resources to train and prepare observers and document irregularities. Because the emergency COVID-19 orders are now a permanent part of California's elections, EIPCa will have to continue to expend resources to train observers and document irregularities.

Accordingly, this Court should reverse the district court's decision and remand for further proceedings.

II. ARGUMENT

A. Appellants Adequately Alleged Article III Standing As Voters.

To establish Article III standing, a plaintiff must show 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 lower court'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.[1]

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. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[1] Although the County and State Appellees improperly discussed prongs two and three in their answering briefs, as a matter of caution, Appellants address these prongs below. *See Supra*, at 17-19.

Appellants have alleged several ways in which California's voting laws, regulations, orders, and procedures have disadvantaged them as voters and other specific groups such as in-person voters and voters in certain counties. Appellants also allege that because California's voting process results from decades of laws, practices, and COVID-19 orders that the legislature ratified into law, the voting injuries will repeat themselves in future elections.

1. Appellants Have Alleged Concrete and Particularized Voting Injuries.

Contrary to the State and County Appellees assertions, the Appellants' allegations do not amount to speculative, general allegations of election fraud. State Br. at 14; County Br. at 13-14. The irregularities Appellants cite to do not injure all voters equally. Rather, Appellants allege that California's laws, regulations, orders, and practices that have led to the proliferation of invalid ballots being cast and counted, directly disadvantage *certain* groups of voters, including Appellants (i.e., vote dilution). ER 252, 264-65, 269-73. These allegations are not speculative but backed by hundreds of declarations signed under penalty of perjury that recount specific instances of voting irregularities, which this court *must* accept as true at the pleading stage. ER 265.

Appellants' allegations find support in *Baker* and *Reynolds*. In *Baker*, the Court held the appellants had standing because they were asserting "'a plain, direct, and adequate interest in maintaining the effectiveness of their vote'…." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (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)). *Reynolds* affirmed *Baker*, holding that vote dilution was defined as where a certain group of votes are weighted differently. *Reynolds v. Sims*, 377 U.S. 533, 555-56 (1964). Even though *Baker* and *Reynolds* involved state reapportionment statutes, they hold that vote dilution occurs any time a "favored group has full voting strength…[and t]he groups not in favor have their votes diluted." *Id.* at 555 n. 29 (quoting *South v. Peters*, 399 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

Indeed, before *Baker* and *Reynolds*, the Supreme Court has recognized dilution by false tally, *United States v. Classic*, 313 U.S. 299 (1941), and ballot-box stuffing, *United States v. Saylor*, 322 U.S. 385 (1944). Following *Baker* and *Reynolds*, courts have conferred standing and found equal protection violations when individuals have improperly cast and counted votes, leading to the dilution of properly cast votes, *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985), and when states lack uniform and secure voting-counting procedures, diluting the votes of citizens in certain counties, *Bush,* 531 U.S at 106-07.

First, 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, including Appellants. ER 280. Second, Appellants 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. Thus, Appellants do not allege an injury common to all members of the public, but rather a particularized injury that specific groups of voters fall victim to, including Appellants.

(a) Appellants have alleged that in-person voters are treated differently than VBM voters, devaluing the votes of in-person voters and vulnerable communities who historically vote in-person.

Appellees claim Appellants cannot assert a vote dilution theory based upon disparate treatment of VBM voters in comparison to in-person voters because Appellants do not allege that they are more likely to vote in person. State Br. at 17; County Br. at 19. But Appellants specifically allege the Appellees violated the Equal Protection Clause by disproportionately burdening people who vote in person, including Appellants. ER 284. Further, Appellants causes of action are not predicated on the County Appellees failure to prevent the obstruction of election observers under the law as County Appellees suggest. County's Br. at 15. Although Appellants cite to many instances of observer obstruction, Appellants' causes of action turn on the Appellees' *application* of California's voting laws, regulations, orders, and practices.

California has passed several laws, orders and regulations that have "massively expanded VBM…." ER 252. On May 8 and June 3, 2020, Governor Newsom issued executive orders requiring that every eligible voter in California receive a VBM. ER 257. California ratified these orders into law. *Id.*; *see also* Cal. Elec. Code § 3000.5. In September 2020, former Secretary of State Alex Padilla issued emergency regulations gutting signature verification requirements. ER 258.

Particularly egregious is that the regulation allows two election workers to justify finding a match of two distinct signatures by claiming "the voter's signature style might have changed over time." ER 258-59. Portions of Padilla's regulations were passed into law. *See* Mot. for Judicial Notice, Exhs A & B.

During the 2020 election, EIPCa received hundreds of affidavits that show that signature verifications for VBM ballots were not meaningfully conducted. ER 269. Because massive numbers of VBM ballots flooded voting centers, elections workers were visually checking signatures at the rate of one signature pair every one to four seconds. *Id.* "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.* Some counties where Appellants reside, and vote did not conduct signature matching. ER 270-71. The failure to ensure that VBM ballots are valid diminishes the votes of Appellants and similarly situated in-person voters, amounting to a 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 lead to "unconstitutional disenfranchisement of a both direct and dilutive nature.")

Even if vote dilution required identification of a disfavored group with immutable characteristics (which it does not), Appellants have identified groups with immutable traits. *See Baker*, 369 U.S. at 204. Specifically, Appellants allege VBM disproportionately burdens people who prefer to vote by in person, "including Black and other minority voters, including individual [Appellants] and their

supporters, and EIPCa's citizen observers." ER 284 (emphasis added). 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, 245-46 (4th Cir. 2014); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216-17 (4th Cir. 2016). Although these cases involved the curtailment of in-person voting, courts have widely recognized equal protection violations through vote dilution. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.") Thus, it would follow that voting laws and practices that dilute the votes of in-person voters would inherently disadvantage minority voters.

California law also disfavors minorities and other in-person voters by granting VBM voters more time to vote. Under California law, voters can only vote in person when the polls close, which is 8 p.m. on election day. ER 280. Under Padilla's guidance, "VBM voters could legally vote by dropping off ballots in mailboxes until 11:59 p.m. and still have their ballots postmarked on election day and therefore counted." ER 238. The difference in timing allots VBM voters at least four additional hours to vote. ER 280. Moreover, pursuant to California Elections Code § 3020, even if an election official cannot reliably determine whether a VBM ballot was cast on or before election day, it must be accepted up to 17 days after election day. ER 261-62.

The County Appellees claim California law creates no disparity between VBM voters and in-person voters because VBM ballots must be deposited in drop boxes by the same time the polls close for in-person voters. County Br. at 24.

However, Appellees fail to address Padilla's recent guidance or California Elections Code § 3020, which grants VBM voters more time to vote. Appellants also allege that late voting and ballot pickups occurred during the 2020 election, irrespective of Padilla's earlier guidance. ER 280. Considering the factual allegations this Court must accept as true, and the reasonable inferences that support Appellants' claims, the Appellants have alleged disparate treatment between VBM and in-person voters.

(b) Appellants have alleged that the state lacks uniform and secure voting laws, diluting the votes of citizens in certain counties, including Appellants.

Appellants' causes of action also include the theory that Appellees have applied disparate practices in several counties, diluting the votes of Appellants and EIPCa's citizen observers. ER 284. The County Appellees claim this vote dilution theory is inadequate because Appellants do not allege how the "county signature verification practices resulted in different likelihoods of ballots being incorrectly handled." County Br. at 20. The State Appellees also claim this theory is inadequate because Appellants' allegations are different from the state reapportionment cases, and Appellants make no allegations that their ballots were in fact counted or weighted differently. State Br. at 17.

First, the County Appellees' contention presupposes that the varying practices across counties will lead to identical irregularities. In other words, each county will experience identical amounts of fraud. But such an outcome is statistically impossible. As the Court in *Bush* astutely observed, a lack of uniform vote-counting procedures inherently leads to disparate treatment of ballots (or voters). 531 U.S. at 106-07.

Second, the State's argument is myopic. Although vote dilution originated through state reapportionment cases in the civil rights era, vote dilution occurs whenever any votes are weighted differently. For instance, in *Gray v. Sanders*, the Supreme Court found that Georgia's county unit system weighted rural votes more heavily than urban votes and weighted some rural counties more heavily than other larger rural counties. 372 U.S. 368, 379 (1963). The disparate treatment of voters in various counties violated the Equal Protection Clause. *Id.* at 381.

Similarly, in *Moore v. Ogilvie*, the Supreme Court found that Illinois's county-based procedure for nominating presidential candidates diluted the votes of citizens in larger counties, leading to due process and equal protection violations. 394 U.S. 814, 819 (1969). The Court observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.*

Although *Gray* and *Moore* dealt with vote aggregation, and voting fraud involves vote cancellation or negation, that is a distinction without a difference. Whether marred by fraud, gerrymandering or malapportionment, votes will carry less weight depending on one's geographical location. For instance, the Supreme Court relied on the principles outlined in *Gray* and *Moore* when determining Florida's recount system for the 2020 presidential election did not pass constitutional muster. *Bush*, 531 U.S. at 107. In *Bush*, the record revealed that the counties applied different standards in defining a legal vote. *Id.* at 106. Even though the dissent noted that the Supreme Court had not addressed the constitutionality of disparate vote-counting procedures, the majority found that this distinction did not preclude a

finding of an equal protection violation. *Id.* at 109, 125 (Stevens, J., dissenting) ("[W]e have never before called into question the substantive standard by which a State determines that a vote has been legally cast.")

Here, the Appellants allege the County Appellees implemented different election practices, diluting the votes of Appellants. ER 269. Several counties did not properly vet votes and implemented inconsistent signature matching processes. ER 271-72. For instance, Orange County's instructions on signature verification essentially allowed election workers to consider all ballots as valid unless there was substantial proof otherwise. ER 272. In Los Angeles County, an election observer witnessed election officials count ballots arriving in envelopes without voter signatures. *Id.* at 270-71. Even when election workers conducted signature comparisons, they spent five seconds or less per each set of four. ER 271. In Contra Costa County, observers reported inconsistencies between votes as recorded and later tabulated. ER 269-70. The incident reports occurred in counties where Appellants reside and vote. ER 265.

Contrary to the State's contention, Appellants need not allege that the dilution of votes disfavored the candidate of their choice. State's Br. at 17. Appellants' allegation that they reside and vote in the counties where irregularities occurred is enough to confer standing. For instance, in *Bush*, the Supreme Court did not hold that former President George Bush failed to state a claim because he did not allege that the recount system would dilute the votes cast for him. 531 U.S. at 106-07. Instead, the Court held the recount system violated the Equal Protection Clause because it was not uniform and led to disparate results across counties. *Id.*

(c) Appellants' vote dilution theories differ from the cases where courts found generalized claims of vote fraud.

Appellees try to shoehorn this case into the cases filed during and after the 2020 election where courts found generalized theories of vote fraud. County Br. at 16-17; State Br. at 17-18; *see, e.g.*, *Bowyer v. Ducey,* 506 F. Supp. 3d 699 (D. Ariz. 2020); *Wood v. Raffensperger,* No. 1:20-cv-5155, 2020 WL 7706833 (N.D. Ga. Dec. 28, 2020); *Martel v. Condos*, 487 F. Supp. 3d 247 (D. Vt. 2020). Appellants' case is distinguishable from these district court cases because they allege that California's laws, orders, regulations, and practices dilute the votes of specific groups of voters, unlike the district court cases, in which the allegations were found to be "generalized" across all voters. Thus, the Appellees cannot rely on these cases.

In *Bowyer* and *Wood*, the plaintiffs alleged violations of state law by permitting illegal votes, which enabled widespread voting fraud and manipulation. *Bowyer*, 506 F. Supp. 3d at 711; *Wood*, 2020 WL 7706833, at *3. The court in *Bowyer* 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." 506 F. Supp. 3d at 711.[2] In *Wood*, the court similarly held the plaintiff did not allege how he was specifically disadvantaged. 2020 WL 7706833, at *3. The court noted that "unlawful or invalid ballots dilute the lawful vote of every Georgia

[2] Even though this case is distinguishable, the court incorrectly suggested appellants needed to be part of a class of "protected voters." Voters need not 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.

citizen." *Id.* At *4; *see also Martel*, 487 F. Supp. 3d at 253 (the court found the plaintiffs' allegations of voting fraud were generalized because the plaintiffs shared an injury common to all registered voters).

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." *FEC v. Akins*, 524 U.S. 11, 24 (1998). Further, Appellants specifically allege how California's voting laws and practices disadvantage them, and they identify specific groups of voters. Appellants allege the expansion of VBM ballots and failure to ensure only legal VBM ballots were counted diminished the votes of Appellants and other in-person voters, and the disparate treatment of in-person voters disadvantages minorities, including some Appellants. ER 265, 280, 284. The lack of secure and uniform rules regarding signature verification also disadvantages voters in counties where Appellants reside and vote. ER 265. Thus, the cases filed during and after the 2020 election are not instructive.

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

The Appellees also err in arguing Appellants' voting injuries fail for lack of actuality and imminence. State Br. at 19-20; County Br. at 13. The lower court's decision presumes that Appellants must show with certainty that their votes will not be counted to confer standing. ER 11. But requiring Appellants to show with certainty that their votes will be impaired conflicts with voting rights and standing

law. The Appellants' voting injuries result from election laws, orders and procedures that cause vote dilution, not the curtailment of their voting rights.

Courts have conferred standing to plaintiffs who challenge election processes which cause dilution or debasement without first proving that their votes have been miscounted, diluted, or debased. *See, e.g.*, G*ray v. Sanders,* 372 U.S. 368, 375 (1963) (a voter in Georgia may sue to enjoin that state's allegedly unconstitutional county unit system to count votes, holding that "appellee, like any person whose right to vote is impaired, has standing to sue."); *Bush,* 531 U.S. at 106-08 (voters in Florida had standing to challenge the recount system that caused disparate treatment to voters in different counties); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) ("[A] voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct….It is inevitable, however, that there will be such mistakes.") ; *Black v. McGuffage*, 209 F. Supp. 2d 889, 995 (N.D. Ill. 2002) ("[T]he ballot machinery used in the jurisdictions in which Plaintiffs vote increases the likelihood that their votes will not be counted.")

The court in *Black* foresaw the problem that would arise if standing in vote dilution cases required voters show, with certainty, that their intended votes were not counted. 209 F. Supp. 2d at 895. The court emphasized that "[b]ecause the voting process is anonymous, it is impossible for any one voter to know with more certainty that their intended votes were not counted." *Id.* Thus, the court held that the substantial risk of dilution was enough to confer standing. *Id.*

The State Appellees suggest that California's election process is different because it does not "inherently involve[] weighting votes differently." State Br. at

19. However, as established above, Appellants allege the election process causes the dilution of in-person voters and disadvantages voters in counties where Appellants reside and vote. The election process will be similar in upcoming elections because it results from decades of laws, practices and COVID-19 orders ratified into law. ER 252-57. The Appellants, therefore, have alleged that the current voting process creates a substantial risk that their votes will be diluted.

3. Appellants Have Adequately Alleged Causation and Redressability

The County and State Appellees erroneously claim the Appellants do not allege causation or redressability. County Br. at 27-30; State Br. at 22-26. For one, the lower court never addressed causation or redressability in its decision. ER 7-15. Appellate review is limited to the issues raised and *decided* in the trial court. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Thus, it would be improper for this Court to consider causation and redressability when the lower court did not decide these issues. County Br. at 27-33; State Br. at 23-26. That said, Appellants easily satisfy these elements.

The Ninth Circuit finds a requisite traceable connection for standing where a law that causes injury to a plaintiff specifically grants the defendant enforcement authority, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), or when there is a sufficient connection between the official's responsibilities and plaintiffs' injury, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919-20 (9th Cir. 2004). Further, "[a]n injury may be 'fairly traceable' to a defendant for causation purposes even when that defendant's actions are not 'the very last step in the chain of causation.'" *Wieland v. U.S. Dep't of Health*

& Human Servs., 783 F.3d 949, 954 (8th Cir. 2005) (quoting *Bennet v. Spear*, 520 U.S. 154, 168-69 (1997)).

The Appellees meet these criteria. As to the State Appellees, the Secretary of State "is a state official subject to suit in [her] official capacity because [her] office 'imbues [her] with the responsibility to enforce the [election laws].'" *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011); *See* Cal. Gov't. Code § 12172.5. The California Attorney General is the chief law officer of the state and enforces the challenged California election laws. *See* Cal. Const. art. V, § 13; ER 252-57. Governor Newsom issued executive orders that enabled universal VBM. ER 257-58.[3] Thus, even though the State Appellees did not conduct the signature verifications or vote tabulations, they acted in their official capacities to pass and/or enforce laws, orders and practices that enabled widespread voting irregularities. *See* State Br. at 24.

As to the County Appellees, they are empowered to administer elections, and widespread evidence of irregularities occurred at their voting locations. ER 265-73. State law grants the County Appellees the authority to enforce election procedures. Cal. Gov. Code § 26802. Suits against county employees named in their official capacity are proper where state law assigns the county employees the power and

[3] Even if sovereign immunity was at issue on appeal (which it is not), Governor Newsom is not immune from suit. *See* State Br. at 31-33. Though the Eleventh Amendment immunizes a state from damages, it does not bar actions for prospective declaratory or injunctive relief against state officers in their official capacities. *Ex Parte Young*, 209 U.S. 123, 155–56 (1908). Here, Governor Newsom is sued in his official capacity and properly named because he issued Executive Orders N-64-20 and N-67-20, which created universal vote by mail in California. ER 257.

duty to execute and enforce state law. *See Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018).

The third component of standing (i.e., redressability) examines whether the relief sought, if granted by the court, will likely alleviate the particularized injury alleged by the plaintiff. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). In other words, standing exists when "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472. Here, the Appellants seek a determination that the challenged laws and orders giving rise to Appellants' claims are unconstitutional. ER 288. Appellants also seek an audit directing the Appellees to preserve all voting machines, computers, reports, etc., that will reveal the scope and extent of Appellees' constitutional violations. The requested relief will redress Appellants' constitutional claims and will instill confidence in future elections.

B. Appellants Have Also Alleged Standing 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 election prospects. The Appellees advance the wrong standard for vote dilution cases, claiming that the Candidate Appellants lack standing because there is no evidence the invalid ballots tended to disfavor Appellants. County Br. at 25-26; State Br. at 28. Candidate Appellants do not seek decertification, though, so they need not show

they would have won their respective races but for the voting irregularities. The Appellees conflate the standard for decertification with the standard applicable here. *Id.*

Candidate Appellants need only allege 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) (emphasis added). Appellants need not allege that they would have won their respective contests absent the voting irregularities. Such a finding is impossible to reconcile with *Bush*.

In *Bush*, the Supreme Court found Florida's recount system violated the Equal Protection Clause even though former President George Bush did not allege the system would disfavor him. 531 U.S. at 106-08. Indeed, in the application for stay presented to Justice Kennedy, Justice Scalia emphasized the irreparable harm that would befall President Bush if a stay were not granted. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) ("The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.")

In this same vein, California's election laws and procedures injure Appellant Candidates. Even if the allegations of widespread voting irregularities will favor them during the 2022 election cycle, the lack of secure and uniform voting laws could cast a "cloud" upon the "legitimacy" of their election and subject them to a recount. Appellant Candidates allege the voting irregularities occurred in their districts, and the same voting laws and practices will govern future elections. ER 266-73. In Justice Scalia's words, proceeding with the current system "is not a recipe

for producing election results that have the public acceptance democratic stability requires." *Bush*, 531 U.S. at 1047.

C. EIPCa Has Sufficiently Alleged Organizational Standing.

Appellees claim the Appellants' diversion-of-resources theory is inadequate to confer standing because such expenditures are intended to counteract generalized allegations of vote dilution. County Br. at 27; State Br. at 30. Even if this were true, the Appellees confuse organizational standing. Organizational standing requires Appellants allege the voting irregularities cause EIPCa to expend additional resources, not that EIPCa's expenditures will counteract the irregularities. EIPCa easily satisfies this low bar because it alleges it will expend additional resources to train citizen observers and document widespread irregularities. ER 265.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) ("Havens"), the Supreme Court ruled that an entity will establish organizational standing provided it can show a diversion of resources. The Ninth Circuit has interpreted *Havens* to mean that an organization establishes an "injury in fact" if it shows: "(1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [injurious behavior] in question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). The additional expenditures "may be slight," because standing "requires only a minimal showing of injury." *Crawford v. Marion Cty. 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)).

Importantly, the Supreme Court has "made clear that a diversion of resources injury is sufficient to establish organizational standing at the pleading stage even when it is 'broadly alleged.'" *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (citing *Havens*, 455 U.S. at 379). Thus, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (citing *Lujan*, 504 U.S. at 561).

In *Bullock*, a district court in Montana found organizational standing when the national and state Republican party committees alleged the organization had to expend additional resources to inform their members of how the expansion of VBM impacted in-person voting opportunities. 491 F. Supp. 3d at 829. A district court in Florida recently found the League of Women Voters of Florida and Black Voters Matter alleged organizational standing because they had to divert personnel and time from other activities to educating volunteers and voters on compliance with the challenged VBM laws. *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21CV186-MW/MAF, 2021 WL 7209350, at *2 (N.D. Fla. Dec. 17, 2021).

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. The organization trains and educates citizen observers on how to observe California's election process at polling locations and vote centers and investigates defects and irregularities in elections. *Id.* Since California massively expanded VBM and gutted

signature verification requirements, EIPCa has had to expend additional resources to facilitate observation of voting practices and document voting irregularities across counties. ER 257-62, 269. Although EIPCa has investigated defects in past elections, the irregularities that occurred in 2020 because of expanded VBM were far greater, causing it to divert resources from other causes, such as ensuring voters can fully participate in the election process. ER 269.

The lower court concludes the additional future expenditures are speculative because "EIPCa 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. However, VBM is now a permanent part of California's voting system. ER 257; *see also* Cal. Elec. Code § 3000.5. California recently ratified into law Padilla's emergency regulations on signature verification. *See* Mot. for Judicial Notice, Exhs. A & B. Thus, EIPCa will have to continue to expend additional resources to facilitate observation of voting practices and document irregularities. ER 265.

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

The Appellees contend the lower court did not abuse its discretion when it dismissed this case with prejudice because Appellants could have cured any pleading defect in a first amended complaint (notwithstanding that the lower court never ruled on a motion to dismiss the original complaint, and thus never identified a pleading defect for Appellants to remedy). County Br. at 35-37; State Br. at 34-35. The Appellees cite no authority in this Court that supports their position because no such

authority exists. *Id.* Instead, the County Appellees rely on a distinguishable case in the Seventh Circuit called *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445 (7th Cir. 1977).

In *Coates*, the Seventh Circuit found that the lower court did not improperly dismiss the case with prejudice because before the instant complaint was filed, the plaintiffs filed a similar case in the same district court. *Id.* at 451 n. 13. The former complaint was dismissed for improper venue, and rather than appealing the case, the plaintiffs chose to refile the action and name additional defendants. *Id. Coates* is distinguishable to this case because Appellants' lawsuit is the first of its kind.

This Court holds that "[d]ismissal 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 simple denial of leave to amend without any explanation by the district court is subject to reversal." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Indeed, this Court has reversed a denial of leave to amend when the plaintiffs already had three bites at the apple. *Id.* at 1053.

Here, the lower court dismissed the case with prejudice on standing grounds. ER 2-15. The lower court did not explain why an amendment would be futile. The court's finding was erroneous because even if Appellants did not allege enough facts to confer standing, none of the impediments to standing the lower court cites are uncurable. Thus, on this basis alone, the Court should reverse the district court's dismissal.

III. CONCLUSION

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

Date: April 19, 2022

Respectfully submitted,

/s/ Mariah Gondeiro
Mariah Gondeiro

Counsel for Appellants Election Integrity Project California, Inc. et al.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by the Ninth Circuit Rule 32-1. The brief is 6,090 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: April 19, 2022

Respectfully submitted,

/s/ Mariah Gondeiro
Mariah Gondeiro

CERTIFICATE OF SERVICE

I certify that on April 19, 2022, 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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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My name is Mariah Gondeiro

I certify that this brief is identical to the version submitted electronically on *(date)*:

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Signature s/ Mariah Gondeiro **Date** April 27, 2022

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CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I transmitted via Overnight Mail to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit at 95 Seventh Street, San Francisco, California 94103-1526, on May 2, 2022, the following vello bound documents:

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Susan Y. Kenney