No. 23-16022

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kari Lake; Mark Finchem, *Plaintiffs*,

and

Andrew D. Parker; Parker Daniels Kibort, LLC; Kurt B. Olsen; Olsen Law, PC, Counsel for Plaintiffs, *Appellants*,

v.

Bill Gates, et al., *Defendants – Appellees*,

and

Adrian Fontes, et al., *Defendants.*

On Appeal from the United States District Court
for the District of Arizona
No. 22-cv-00677-JJT
Hon. John J. Tuchi

APPELLANTS' REPLY BRIEF

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Rules

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Attorneys are not sanctioned for bringing claims that have support in law and fact, even unsuccessful claims. That is the decisive consideration in this appeal. Appellant Attorneys did not persuade the District Court on the merits or the Ninth Circuit regarding the issue it decided, standing, but they based the claims in the Amended Complaint on ample legal precedent and extensive factual material. Appellant Attorneys' filings do not come close to sanctionable conduct under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927.

The brief of the Maricopa County Defendants ("Maricopa") ignores the difference between the standard for a pleading to survive a Fed. R. Civ. P. 12 motion and the different standard for a pleading to be sanctioned under Fed. R. Civ. P. 11. Rule 11 simply requires counsel to have legal and factual support for the assertions in a filing. Rule 11 sanctions have been reversed where counsel "had *some* plausible basis, albeit quite a weak one." *Strom v. United States*, 641 F.3d 1051, 1059 (9th Cir. 2010) (quoting *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1117 (9th Cir. 2001)). *See also Lozano v. Cabrera*, No. 22-55273, 2023 U.S. App. LEXIS 5394, at *4 (9th Cir. Mar. 7, 2023) (reversing Rule 11 sanctions for allegedly "baseless" lawsuit where party "raised colorable arguments" even though they were rejected); *Lee v. POW Ent.*, No. 20-55928, 2021 U.S. App. LEXIS 35881, at *4 (9th Cir. Dec. 6, 2021) (reversing Rule 11 sanction where complaint "suggest[ed] an

attempt to establish a claim" that was not barred by res judicata, though it was "not pleaded distinctly enough to establish a plausible claim").

Here, the claims in the sanctioned filings – the Amended Complaint and the Motion for Preliminary Injunction ("MPI") – were amply supported by existing law, and certainly by a natural extension of existing law. They were supported by specific evidence, including extensive expert testimony. Notwithstanding the District Court's ultimate conclusion dismissing the claims under Rule 12 and the Ninth Circuit's affirmance limited to the issue of standing, the claims had ample support in law and fact and were not sanctionable under Rule 11 or 28 U.S.C. § 1927.

Maricopa's brief confirms that Maricopa agrees with the District Court's Sanctions Orders but offers little or no substantive defense of the reasoning and conclusions in the Sanctions Orders. Appellant Attorneys, in their opening brief, identified numerous ways in which the District Court based the Sanctions Orders on erroneous views of the law and evidence. In response, Maricopa merely reiterates and quotes the District Court's analyses already demonstrated to be faulty. Maricopa's failure to offer any substantive response to the issues raised in the appeal should be understood as a concession that Maricopa has no answer to these points.

I. THE AMENDED COMPLAINT SATISFIED RULE 11.

To meet the standard of Rule 11, a pleading must (1) not have an improper purpose, (2) be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," and (3) have "evidentiary support" for its factual contentions. Fed. R. Civ. P. 11. The "improper purpose" element is not at issue here. *See* Maricopa Br. 3. Appellant Attorneys' opening brief showed that the Amended Complaint satisfied the other two elements. App. Br. 17-29. Maricopa's brief addresses only the legal support element, Maricopa Br. 23-26, and fails to show the claims in the Amended Complaint lacked a legal basis.

A. Maricopa Does Not Respond to Appellants' Showing of Evidentiary Support for the Claims in the Amended Complaint.

Appellant Attorneys' opening brief identified in detail evidentiary support for the claims brought by the Amended Complaint. App. Br. 20-29. This support included testimony from five qualified expert witnesses. *Id*. at 25-28. Maricopa does not offer any argument to dispute that these items, taken together, provide an evidentiary basis for the Amended Complaint's allegations that use of electronic voting systems (EVS) in Arizona creates a constitutionally unacceptable risk of manipulated vote tallies. Rather, Maricopa erroneously assumes that dismissal of claims under Rule 12 automatically makes the claims sanctionable. Maricopa Br.

18-19. But the threshold of "evidentiary support" to satisfy Rule 11 is not the same as the threshold to survive a Rule 12 motion to dismiss. The Amended Complaint satisfied the requirement of Rule 11 that a pleading must have support for its factual contentions.

B. Maricopa Fails to Show That the Claims in the Amended Complaint Lacked a Legal Basis.

Appellant Attorneys' opening brief described the basis for the legal theory behind the claims brought in the Amended Complaint. App. Br. 17-19. This theory is supported by United States Supreme Court decisions describing the existence and scope of the fundamental Constitutional right to vote, a recent Eighth Circuit decision concerning candidate standing, and a federal district court decision permitting plaintiffs to sue Georgia in an attempt to bar the state from using electronic voting machines, based on the alleged vulnerability of the machines to vote manipulation. *Id*. These authorities demonstrate that there is a basis for the claims in Amended Complaint under existing law or at minimum a non-frivolous argument for extension of it, sufficient to meet the standard of Rule 11.

In response, Maricopa asserts that the "'fundamental right' to vote claim had no legal basis," and relies on the District Court's rejection of the legal claims in the Amended Complaint and the Ninth Circuit's affirmance limited to the standing issue. Maricopa Br. 23-24. Maricopa fails to show that the legal theory of the Amended

Complaint was not warranted by existing law or by a nonfrivolous argument for extension of it.

Maricopa's assertion that the fundamental right to vote claim is devoid of any legal basis is surprising. In Maricopa's motion to dismiss the Amended Complaint, Maricopa implicitly accepted the basic concept of such a claim, merely arguing that the District Court should dismiss the claim by applying the "*Anderson/Burdick* framework" (in reference to *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). SER-52-54. If the Amended Complaint's claim for violation of the fundamental right to vote is so devoid of legal basis as to be sanctionable, Maricopa's motion to dismiss the claim does not reflect this.

Maricopa cites language from the District Court as ostensibly showing that the legal theory of the Amended Complaint was sanctionable, Maricopa Br. 23-24, but the quoted language does not support Maricopa's argument. The language does not address whether the core legal theory of the Amended Complaint states a viable claim. The core of the Amended Complaint is the theory that a candidate in an election can seek a judicial order barring the state from using a means of counting votes (and thereby determining the outcome of the election) if the candidate can show that the state's means of counting votes produces tallies that can be

surreptitiously manipulated. *See* Am. Compl. ¶¶ 179-180, 183 (2-ER-303-304); ¶¶ 191-193 (2-ER-305); ¶ 198 (2-ER-307), ¶¶ 210-211 (2-ER-308). Maricopa's quotation from the District Court addresses different matters – whether a candidate can demand a particular means of vote counting, and whether the Amended Complaint "appeared to assume the very thing [it] had the burden to allege and ultimately to prove." *Id*. at 23-24. The District Court's views on these different matters do not support the conclusion that the core legal theory of the Amended Complaint was so far beyond the pale that appellant Attorneys lacked a nonfrivolous argument to support it.

Maricopa's reliance on a quotation from the Ninth Circuit's standing opinion concerning the dismissal of the Amended Complaint, *id*. at 24, is also misplaced. A complaint is not sanctionable under Rule 11 merely because it is dismissed. The authorities cited by appellant Attorneys provided a basis to bring the claims that satisfied Rule 11, even if the claims were ultimately unsuccessful.

- It is not reasonably disputable that a plaintiff can bring a claim for violation of the federal constitutional fundamental right to vote. Appellants' opening brief cited six U.S. Supreme Court decisions affirming the existence of a federal constitutional right to vote, App. Br. at 18, and that list could have been longer.

- *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) provides a reasonable basis to argue that a candidate has standing to challenge election procedures to ensure "the final vote tally accurately reflects the legally valid votes cast."
- The Supreme Court's statement that the fundamental constitutional right to vote applies to "alteration of ballots . . . dilut[ion] by ballot-box stuffing," and "obviously" includes the right of voters "to cast their ballots and have them counted," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (citing *United States v. Classic,* 313 U.S. 299, 315 (1941), *United States v. Saylor,* 322 U.S. 385 (1944), and *Ex parte Siebold,* 100 U.S. 371 (1880)), provides a reasonable basis to argue that a candidate has standing to challenge election procedures that permit electronic alteration of ballots or dilution by electronic ballot-box stuffing.
- The district court in *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1316 (N.D. Ga. 2018) held that "plausibly alleg[ing] a threat of a future hacking event that would jeopardize their votes and the voting system at large" was the "sort[] of alleged harm[]" that permitted a plaintiff to bring an action. In *Curling*, the court permitted a lawsuit to proceed against a state's use of electronic voting systems, where the lawsuit was based

on the risk of illegal manipulation of votes on ballot marking devices. Maricopa, following the District Court, argues that the allegations in *Curling* are factually distinguishable. Maricopa Br. 25. But Maricopa does not deny that *Curling* permitted claims to proceed seeking to bar the use of electronic voting equipment based on the threat of a future hacking event to affect votes, when a component of the system can be compromised. An attempt to distinguish the facts of *Curling* from the facts alleged in the Amended Complaint does not undermine the Attorneys' reliance on *Curling* as an authority for the legal principles for which the Attorneys cited it. In *Curling*, the plaintiffs primarily attacked security failures in the Georgia's ballot marking devices; here, the Attorneys primarily attacked security failures in Arizona's optical ballot scanners and central election management system. While not identical, the cases are closely analogous. Moreover, when the Attorneys relied on *Curling*, they cited it in support of specific propositions for which the citations were well-founded. App. Br. 53-54. Maricopa does not show any instance in which the Amended Complaint or the MPI cited *Curling* for a proposition that was not supported.

Though the District Court was not ultimately persuaded by appellant Attorneys' legal arguments, it cannot reasonably be said that the Attorneys' arguments were not supported by existing law or at minimum a nonfrivolous argument for extending existing law or for establishing new law. *E.g. Reynolds*, 377 U.S. at 554-55; *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Burdick*, 504 U.S. at 433; *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Saylor*, 322 U.S. at 386-88; *Classic*, 313 U.S. at 315; *Carson*, 978 F.3d at 1058; *Curling*, 334 F. Supp. 3d at 1316. The claims in the Amended Complaint met the standard of Rule 11, regardless of whether they were ultimately successful.

Maricopa finally asserts that appellant Attorneys "fail to cite to a single applicable constitutional provision, statute, or case to support" the belief that a plaintiff can challenge the use of electronic voting systems on the basis of the likelihood of vote manipulation. Maricopa Br. 24. In light of the above and App. Br. 17-19, this is plainly incorrect. It is true that none of the cases relied upon by appellant Attorneys presented precisely the same facts as this case. But Rule 11 does not require an identical case to exist before an attorney can file a complaint. The legal principles in the authorities relied upon by appellant Attorneys were appropriately applied to support the claims in the Amended Complaint.

Because the Amended Complaint satisfied the requirements of Rule 11, it was not sanctionable under Rule 11, irrespective of whether it was dismissed.

II. MARICOPA FAILS TO OFFER A DEFENSE OF THE DISTRICT COURT'S ERRONEOUS ANALYSES.

The District Court's Sanctions Orders asserted that the Amended Complaint was sanctionable under Rule 11 for four reasons. 1-ER-35-41, 1-ER-42, 1-ER-48-51, 1-ER-51-53. In the opening brief, appellant Attorneys showed that each of these four reasons were based on an erroneous view of the law, a clearly erroneous factual finding, or both. App. Br. 29-60. Maricopa's brief provides no meaningful response to these points other than repeating the District Court's analysis already shown to be erroneous. By failing to provide any substantive answer to the issues raised in the appeal, Maricopa implicitly concedes their validity, though Maricopa nevertheless urges the Court to affirm the District Court's erroneous conclusions.

A. The Pre-Filing Inquiry Issue Does Not Support a Sanction.

Appellant Attorneys' opening brief showed that the District Court's inference that they failed to conduct an adequate pre-filing inquiry was unsupportable. The volume of information included in the Amended Complaint clearly showed extensive pre-filing inquiry, and the District Court based its conclusion on improper considerations – an order sanctioning a different law firm in a different lawsuit, the "political atmosphere," and generalized "concern" about "unfounded claims about

election-related misconduct." App. Br. 29-31. Maricopa's brief does not address any of these points. Maricopa Br. 21-22. Instead, Maricopa argues that the District Court and Maricopa disagreed with the Attorneys' allegations, and therefore the Attorneys must not have conducted an adequate pre-filing investigation. *Id*.

Maricopa again confuses the standard for dismissal under Rule 12 with the standard for imposing sanctions under Rule 11. While the District Court and Maricopa disagreed with the allegations in the Amended Complaint, the Amended Complaint evinces a lengthy investigation of Arizona's EVS, statutes, and the history of EVS. App. Br. 29-30. The extensive expert declarations and testimony provided by the Attorneys in connection with the MPI, *see* App. Br. 26-28, further indicate an investigation of significant depth. The evidence overwhelmingly shows that appellant Attorneys conducted an extensive, more-than-adequate pre-filing investigation.

In substance, Maricopa argues that appellant Attorneys were obligated to accept Maricopa's litigation position and factual assertions as unimpeachably true, without regard to any evidence gathered by the Attorneys to dispute these matters. Maricopa Br. 22-23. Therefore, Maricopa argues, the Attorneys must have failed to conduct an adequate pre-filing investigation. But Rule 11 permits an adverse party to rely on its own factual investigation rather than accepting an opposing party or

the government at its word. The Attorneys showed that the District Court wrongly assessed the facts and applied the wrong legal standard. Maricopa fails to controvert this showing.

B. The "Speculation and Conjecture" Issue Does Not Support a Sanction.

Appellant Attorneys' opening brief showed that the District Court's "speculation and conjecture" conclusion is not a basis to impose Rule 11 sanctions, because the District Court ignored the Rule 11 standard, imagined "yawning gaps" that did not exist, wrongly sanctioned appellant Attorneys for the relief sought in the Amended Complaint, and mischaracterized the Amended Complaint as improperly speculative or conjectural. App. Br. 31-43. Maricopa's response is simply to quote the Ninth Circuit's standing decision concerning the Rule 12 dismissal order. Maricopa Br. 18-19. Maricopa again fails to recognize that a pleading is not sanctionable merely because it is dismissed, even if the dismissal is affirmed on appeal.

The "gaps" aspect of the "speculation and conjecture" issue is particularly telling. The District Court emphasized its "gaps" conclusion as a basis for imposing sanctions, yet cited no authority that seeking prospective relief for anticipated future harm is sanctionable under Rule 11 if the trial court believes the future harm is not sufficiently likely. 1-ER-47-51. Appellant Attorneys showed, at length, that the District Court's "gaps" analysis failed to apply the correct standard for determining

whether a claim is frivolous, App. Br. 34-36; relied on facts that do not exist, *id.* 36-38; and impermissibly sanctioned the Attorneys for the relief sought, *id*. 38-41. Yet neither the word "gap" nor the word "gaps" appears in Maricopa's brief. Maricopa's silence concedes that the District Court's analysis is not defensible.

The standard for imposing Rule 11 sanctions is Rule 11, not Rule 12. The Amended Complaint relied on a broad array of factual matters that, as a whole, pleaded the means, motive, opportunity, and likelihood of unauthorized manipulation of Arizona's EVS in the future, as well as evidence of past manipulation of electronic voting machines. *See* App. Br. 20-29, 2-ER-288, 2-ER-184. These facts constituted evidentiary support sufficient to meet the standard of Rule 11, even if the District Court was persuaded to dismiss the claims under Rule 12 and the Ninth Circuit affirmed on the standing issue. Rule 11 requires that a party have evidentiary support for its claims, not that the evidentiary support must be sufficient to prevail in the eyes of the court.

C. The Paper Ballot Issue Does Not Support a Sanction.

Appellant Attorneys' opening brief explained in detail the reasons that the District Court unreasonably misread the Amended Complaint to allege that Arizona does not use paper ballots. App. Br. 43-57. Among others, these reasons included the logical requirement of the Amended Complaint that Arizona uses paper ballots, the lack of any actual statement in the Amended Complaint denying that Arizona

uses paper ballots, the improper interpretations imposed upon the Amended Complaint by the District Court, and the express acknowledgement in the MPI that Arizona does use paper ballots. *Id*. Maricopa does not provide a substantive response to any of these points. Instead, Maricopa merely repeats and quotes the District Court's erroneous assertions and inferences. Maricopa Br. 20-23, 27-30. By relying on the District Court's discussion already shown to be erroneous, Maricopa concedes that it has no defense for the District Court's analysis.

Maricopa does cite paragraph 153 of the Amended Complaint ("Plaintiffs seek for the Court to Order, an election conducted by paper ballots, as an alternative to the current framework") as purportedly dispositive of the paper ballot issue. Maricopa Br. 26. Paragraph 153 was addressed in the Attorneys' brief. *See* App. Br. 50. The paragraph does not assert that Arizona doesn't use paper ballots. Even the District Court acknowledged that the Amended Complaint lacks any express statement that Arizona does not use paper ballots. 1-ER-36. Read fairly, Paragraph 153 proposes an "alternative" vote counting framework that, as a whole, meaningfully differs from Arizona's existing system; the paragraph does not claim that Arizona's current system lacks all proposed features or all constitutionally necessary characteristics. *See* App. Br. 50. While paragraph 153 could perhaps have been phrased more artfully, the paragraph does not make a false allegation –

particularly when it is read, as it must be, in the context of the rest of the Amended Complaint, which assumes and relies upon Arizona's use of paper ballots in optical ballot scanners. *See* App. Br. 47-49; *see also* 2-ER-194 (MPI) ("[Arizona] already requires the creation of paper ballots").

Concerning Arizona's use of paper ballots, Maricopa and the District Court read into the Amended Complaint an assertion that appellant Attorneys did not make and never intended to make. The law requires construing individual allegations in a complaint in the context of the pleading as a whole and drawing reasonable inferences in favor of the plaintiff. *See* App. Br. 44-47. Instead, Maricopa and the District Court took individual allegations in the Amended Complaint out of context and drew unreasonable inferences against the plaintiffs, resulting in a sanction against appellant Attorneys for making a purportedly false assertion they did not make and never intended to make. That is exceedingly unfair and outside the bounds of Rule 11.

D. <u>The Objective, Neutral, and Expert Evaluation Issue Does Not Support a Sanction.</u>

Appellant Attorneys' opening brief explained in detail the reasons that the District Court wrongly read the Amended Complaint to contain a false allegation concerning whether Arizona's EVS is subject to objective, neutral, and expert evaluation. App. Br. 57-60. In response, Maricopa simply quotes the District Court's

erroneous analysis and argues that the District Court was permitted to take judicial notice of Arizona statutes and the Arizona Secretary of State's Elections Procedures Manual. Maricopa Br. 31.

Maricopa's argument misses the point. The determinative question is not whether the District Court is permitted to take notice of Arizona statutes and election procedures. The determinative question is whether the District Court is permitted to *sanction* attorneys for alleging that Arizona's statutory processes and election procedures are not objective, neutral, and expert. The District Court's analysis, affirmed by Maricopa, penalizes an attorney who in a pleading denies the sufficiency or accuracy of government procedures, *simply because the government claims in an official document* that the procedures are adequate and are properly implemented. That is not the law. Attorneys are permitted to challenge the accuracy of the government's assertions – even assertions made in official documents.

In other, comparable contexts, it would be plain that an attorney should not be sanctioned for denying the adequacy of official state government procedures in a pleading. An attorney is entitled, in a complaint, to allege police brutality during an arrest, even if Arizona police procedures officially prohibit police brutality. An attorney is entitled, in a complaint, to allege racial discrimination by an Arizona government agency, even if the agency's policy manual officially prohibits

discrimination. An attorney is entitled, in a complaint, to allege that an Arizona school district is not providing students who have learning disabilities with an adequate education, even if the school's policy manual officially requires that students will receive an adequate education. In the same way, an attorney is entitled, in a complaint, to allege that Arizona's official policies and procedures for testing EVS are not objective, neutral, and expert, even if Arizona officially declares the policies and procedures to be all of those things.

A complaint does not make a false allegation by disputing the adequacy of state government processes and procedures. A plaintiff is entitled to assert that the defendant's purported security measures and policies are inadequate, if the plaintiff has an evidentiary basis for disputing the adequacy of the security measures and policies. Here, appellant Attorneys relied upon expert testimony as the basis to dispute the adequacy of Arizona's evaluation of its EVS. *See* 1-ER-43; 3-ER-435-438, 446-447. The Amended Complaint did not make a false allegation by disputing the Arizona government's official position concerning the security of Arizona's EVS.

Concerning the objectivity, neutrality, and expertise of the evaluation of Arizona's EVS, the District Court sanctioned appellant Attorneys for disputing the accuracy of the Arizona government's official, self-serving statements. That is

improper, contrary to the ordinary functioning of the legal system, dangerous for government accountability, and outside the bounds of Rule 11.

III. MARICOPA RELIES ON MATTERS IRRELEVANT AND INCORRECT.

While failing to respond to appellant Attorneys' arguments, Maricopa seeks to direct the Court's attention to matters that lack any bearing on the issues in this appeal and to baseless accusations that the Attorneys' opening brief contains misrepresentations.

A. The Amended Complaint's Lone Claim Under Arizona State Statutes Has No Significance to This Appeal.

Maricopa's brief begins by repeatedly citing numerous Arizona state statutes referenced in the Amended Complaint, Maricopa Br. 1, 5, but Maricopa never shows any relevance between the statutes and any issue in this appeal. The Amended Complaint initially included one count based on Arizona state law. *See* 2-ER-306-307. Appellant Attorneys agreed early in the litigation not to pursue that claim. SER-57. Appellants' memoranda in opposition to the defendants' motions to dismiss the Amended Complaint did not advance any claim under Arizona state law. *See* 2-ER-130-139 (Opp. to Ariz. Sec. of State's Motion to Dismiss) (Doc. 58); 2-ER-142-159 (Opp. to Maricopa Motion to Dismiss) (Doc. 56). The MPI did not advance any claim based on Arizona state law. *See* 2-ER-187-189. The Attorneys' opening

appellate brief cited one of these state statutes, once, to support the proposition that the Amended Complaint acknowledges Arizona uses paper ballots. App. Br. 47. Yet rather than taking "yes" for an answer and accepting that the Amended Complaint's claim based on Arizona state law was no longer at issue after June 6, 2022, Maricopa draws attention to the dropped claim without connecting it to any live issue.

For the avoidance of doubt, the plaintiffs and appellant Attorneys ceased pursuing any claim based on alleged violation of Arizona state statutes as of June 6, 2022; any such claim was not part of the District Court's basis for imposing sanctions; and any such claim is not part of this appeal or the previous appeal of the substantive merits of the dismissal.

B. Maricopa's Accusations of Misrepresentations in the Attorneys' Brief Are Wrong.

Maricopa accuses appellant Attorneys of misrepresenting the Sanctions Order, the evidence, and the claims in the Amended Complaint. Maricopa Br. at 9. These accusations are wrong.

Regarding alleged misrepresentation of the Sanctions Order, Maricopa attacks various statements made in the Attorneys' opening brief, clipping phrases out of context. *Id.* 15-17. Yet Maricopa does not provide any explanation of how these misrepresent anything. *Id.* Rather, in conclusory fashion Maricopa asserts that the District Court's conclusions were correct. *Id*. It is unexceptional that in an appeal

appellants would disagree with a district court's conclusions. Here, appellant Attorneys' opening brief drew the Court's attention to particular language in an order being appealed, and to the meaning and implications of that language. *See* App. Br. 13-14. Appellant Attorneys fairly characterized the District Court's statements, provided quotations in proper context, and advanced an argument in response to the letter and substance of the District Court's statements. *Id*. No misrepresentations were made. The District Court candidly stated its purpose behind imposing sanctions in this matter. 1-ER-58. Appellant Attorneys pointed out that the purpose stated by the District Court is not a proper basis for imposing Rule 11 sanctions, and the District Court's decision to sanction appellant Attorneys for disputing government claims about government activities is contrary to law and dangerous. App. Br. 13-14. Maricopa's only response is to agree with the District Court. Maricopa Br. 15-17.

Maricopa also accuses appellant Attorneys of making a "false" assertion concerning the legal requirement for standing. Maricopa Br. at 18. This issue concerns whether a plaintiff seeking prospective injunctive relief must plead a "certainly impending" injury (Maricopa's position) or whether pleading a "substantial risk that harm will occur" can suffice (appellant Attorneys' position). To support its accusation that appellant Attorneys lied, Maricopa quotes a sentence

from the Ninth Circuit's opinion on the appeal of the dismissal of the Amended Complaint, which states, "Article III requires a **'certainly impending'** injury or, at the very least, a 'substantial risk that the harm will occur.'" Maricopa Br. 18 (quoting *Lake v. Fontes*, 83 F.4th 1199, 1204 (9th Cir. 2023)). (The bold underlining in Maricopa's quotation is not included in the court's opinion.) Maricopa's own quotation proves Maricopa's accusation incorrect. The opinion stated that a showing of "substantial risk that the harm will occur" can be sufficient to satisfy the requirements of standing. This means a plaintiff is not always required to show "certainly impending" injury. *See, e.g.*, *Pavek v. Simon*, 467 F. Supp. 3d 718, 743, 748 (D. Minn. 2020) ("The Supreme Court has held that '[a]n allegation of future injury may suffice' to satisfy the imminence requirements of the injury-in-fact prong of Article III standing 'if the threatened injury is "certainly impending," *or* there is a "substantial risk that the harm will occur.""") (citation omitted). This issue boils down to a disagreement over the interpretation of judicial precedents. *See* App. Br. 32-34. Appellant Attorneys made an argument about the meaning of Supreme Court precedent based on the plain language of cases, not a "false" assertion.

Maricopa also accuses appellant Attorneys of misrepresenting the "evidence." Maricopa Br. at 9. It is not clear what Maricopa means by this accusation, for it does not specify. The accusation may be an oblique reference to Maricopa's argument

concerning whether the Amended Complaint was based on "speculation and conjecture." Maricopa Br. at 18-19. As noted above, regarding "speculation and conjecture" Maricopa's brief confirms that Maricopa agrees with the District Court, but Maricopa does not address any of the twelve pages in appellant Attorneys' opening brief that state in detail evidence that appellant Attorneys relied on, rather than "speculation and conjecture." App. Br. 31-43. The Attorneys' statements concerning the evidence were correct, not misrepresentations.

It is not disputed that the District Court ruled against appellant Attorneys. The Attorneys have explained *why* the District Court's "speculation and conjecture" conclusion was wrong. Maricopa does not attempt to rebut these reasons. The defensibility of the District Court's conclusion is what is at issue in this appeal – and Maricopa has nothing to say in support of the District Court's reasoning. In any event, none of these matters show that appellant Attorneys misrepresented any evidence.

Maricopa also accuses appellant Attorneys of misrepresenting the claims in the Amended Complaint. Maricopa Br. 9. Maricopa does not elucidate the reasons for this accusation, but the accusation may refer to the issues of purported false allegations in the Amended Complaint. Those were addressed in Part II above.

IV. THE MOTION FOR PRELIMINARY INJUNCTION WAS NOT SANCTIONABLE UNDER 28 U.S. C. § 1927.

Appellant Attorneys' opening brief explained the errors in the District Court's resolution of Maricopa's motion for sanctions under 28 U.S.C. § 1927. App. Br. 60-63. In response, Maricopa argues that "false allegations and misrepresentations of evidence" and "continued pursuit of baseless claims" support entry of a sanction under § 1927. Maricopa Br. 32. The District Court's § 1927 sanction was based upon the MPI, 1-ER-55-56, but Maricopa does not identify any purported false allegation or misrepresentation in the MPI. Maricopa Br. 32. Presumably Maricopa refers to the same purported false allegations or misrepresentations that Maricopa contends were part of the Amended Complaint. As explained in appellant Attorneys' opening brief, the MPI did not make false allegations or misrepresent evidence. App. Br. 43-60. The arguments advanced in the MPI were colorable, not baseless.

Maricopa also argues that appellant Attorneys should be sanctioned for bringing the MPI based on "improper conduct" of "inexplicable years-long delay in seeking injunctive relief," arguing that the Plaintiffs "should have brought their lawsuit years earlier." Maricopa Br. 32-33. Maricopa cites no authority for the proposition that an attorney commits a sanctionable act by bringing a lawsuit seeking injunctive relief that could theoretically have been brought earlier. *Id*. Maricopa does not offer any explanation for its assertion that appellant Attorneys should have told

their clients that the clients were forever barred from bringing claims challenging the *future* use of EVS by Arizona, merely because the clients did not bring such a claim previously. Maricopa does not offer any evidence that the plaintiffs were *aware*, prior to 2022, of the possibility of bringing claims in litigation concerning EVS.

The implications of Maricopa's argument are breathtaking. In effect, Maricopa argues that state and local governments can gain immunity from judicial review of potentially unconstitutional practices, if they can get away with the practice long enough. This is not the law. State and local governments do not escape Constitutional limitations on their future behavior by arguing, "We've done it the illegal way for a long time already, and no one sued us before."

At bottom, Maricopa simply relies on the District Court's explanation for its decision to impose sanctions under § 1927. Maricopa Br. 34. Appellant Attorneys already explained the reasons that the District Court's decision was an abuse of discretion. App. Br. 60-63. Maricopa's failure to respond to any of these reasons concedes that Maricopa has no defense of the District Court's analysis.

V. CONCLUSION

Appellant Attorneys showed that the District Court abused its discretion in entering the Sanctions Order because its purpose for entering the order was

improper, its factual findings were plainly incorrect, and its legal conclusions misapplied standards and applied wrong standards. Further, the District Court misconstrued allegations in the Amended Complaint and discerned misrepresentations of fact that did not exist. “A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

In response, Maricopa has failed to substantively rebut any of these points, and indeed has not even attempted to rebut most of them. Rather, Maricopa reflexively points back to the District Court’s analyses, already shown to be flawed, and appears to assume that Rule 11 sanctions can be imposed merely because the Amended Complaint was dismissed under Rule 12. The District Court abused its discretion when it sanctioned appellant Attorneys, and the sanctions should be reversed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respectfully submitted,

DATED: January 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024 I filed the foregoing Appellants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Andrew D. Parker
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