

No. 25-7510

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

CALIFORNIANS FOR EQUAL RIGHTS FOUNDATION,
Plaintiff – Appellant,

v.

MISTY HER, superintendent of the Fresno Unified School District; and
VALERIE F. DAVIS, President of the Fresno Unified School District
Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 1:25-cv-00250-BAM

The Honorable Barbara A. McAuliffe, United States Magistrate Judge

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

The Plaintiff-Appellant is a nonprofit organization, incorporated under the laws of the State of California, with a principal place of business in California, without parent corporations. No corporation or publicly held entity holds any stock in Plaintiff-Appellant Californians for Equal Rights Foundation.

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INTRODUCTION

This case involves whether a plaintiff has standing to challenge a discriminatory program at a public school, where the discrimination is in the promotion and design of the program.

Fresno Unified Schools spends millions each year on its African American Academic Acceleration Office (since this lawsuit was filed, renamed as the “Advancing Academic Acceleration & Achievement” office). As alleged in the Complaint, the “A4 Office” operates several student enrichment programs designed and marketed as being “for” African American students without indicating other students are welcome. Teachers and administrators seek out students based on their race to tell them about and push them into these programs. Students of the “wrong” race are directed into other programs or after school offerings.

Appellant Californians for Equal Rights (CFER) has several members who are parents of students in the Fresno Unified School District. These students are not African American, and accordingly, are not welcome in the A4 Office programs. CFER sued to vindicate those students’ equal protection rights and compel Fresno Unified to make its

public-school offerings equally available and equally promoted to all students, regardless of race.

The district court dismissed the Complaint, concluding that CFER lacked standing to bring its claims and that those claims were not ripe, largely because CFER did not allege that its members' children had been actively turned or rejected away from A4 Office programs.

In reaching this conclusion, the court below made three errors. First, it applied the wrong standard to CFER's claims. Students do not have to be turned away from a door saying "For African American Students" to know they are not welcome. Second, the court repeatedly failed to credit CFER's plain factual allegations, either disbelieving them or discarding them as "conclusory" if they were inconvenient. Finally, to support its conclusion that the program did not discriminate, the lower court looked beyond the briefing and improperly took judicial notice of facts in dispute.

The district court's ruling effectively green lights race-based public school programs so long as the discrimination is subtle enough: hidden in promotional language, confined to private teacher invitations, and masked by post-litigation website edits. That is not the law. The State

and Federal Constitutions both forbid government from sorting children by race—quietly or otherwise—and do not require a child to be formally rejected before the injury is cognizable. This Court should reverse.

JURISDICTIONAL STATEMENT

Appellant brought this lawsuit in the district court pursuant to 42 U.S.C. § 1983, and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. This appeal arises from the district court’s order dismissing Appellant’s Complaint pursuant to Fed. R. Civ. P. 12(b)(1). The district court entered its final judgment on October 7, 2025. Appellant filed a timely notice of appeal on November 26, 2025. The district court possessed jurisdiction over CFER’s federal claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and possessed supplemental jurisdiction over CFER’s state-law claim under 28 U.S.C. § 1367(a), because that claim is so related to the federal claims that it forms part of the same case or controversy. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Did the district court apply the wrong legal standard in determining that CFER lacked standing to challenge the legality of

Fresno Unified’s discriminatory African American Academic Acceleration Office programs?

Did the district court err when it failed to accept plain, non-conclusory allegations in the Complaint as true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(1)?

Did the district court abuse its discretion when it took judicial notice of disputed statistics and facts on Fresno Unified’s website?

STATEMENT OF THE CASE

CFER is a nonprofit organization dedicated to opposing race discrimination by public entities, including in public education. ER-130. CFER brought this action on behalf of members who live within the Fresno Unified School District (“Fresno Unified”) and have children enrolled in Fresno Unified schools. ER-130–31.

CFER alleges that Fresno Unified operates the “Office of African American Academic Acceleration” (“A4 Office”) and related programs in a manner that unlawfully treats students differently because of race—particularly through the programs’ design and promotion. ER-133–34.

I. CFER's Members and the Alleged Unequal Treatment

CFER alleges that its members' children are not African American; that they would benefit from (and would be interested in) the kinds of academic supports offered through the A4 Office; and that Fresno Unified's race-based promotion and design of the A4 programs denies them equal treatment and equal access. ER-131–34.

The Complaint identifies members and their children, including:

- **Member A.** Member A has two children, neither of whom is African American, including a child at Robinson Elementary School. ER-131 ¶ 11. CFER alleges Member A and his children were never informed of the A4 programs and that the A4 programs discriminate against his children based on race in promotion and design. *Id.*
- **Member B.** Member B has four children, including children attending Fresno High School, Bullard Talent K–8, and Hamilton K–8. ER-131 ¶ 12. CFER alleges neither Member B nor her children were ever informed of the A4 programs and that the programs discriminate against her children based on race in promotion and design. *Id.*
- **Member C.** Member C has two children attending Bullard High School and Tenaya Middle School. ER-131 ¶ 13. CFER alleges neither Member C nor her children were ever informed of the A4 programs and that the programs discriminate against her children based on race in promotion and design. *Id.*

II. Fresno Unified and the A4 Office Programs

CFER alleges Fresno Unified created the A4 Office to address statistical racial disparities in academic performance and allocated substantial public funding to the A4 Office and its associated programs. ER-132–33. For the 2024 budget, the Complaint alleges Fresno Unified allocated upwards of \$12 million to the A4 Office and its programs. ER-133 ¶ 21.

CFER alleges that the A4 Office oversees a suite of “race-focused” programs, including offerings described as “for African American students” and programs “targeted and marketed” to black students. ER-133 ¶ 22. CFER’s central factual allegations are that Fresno Unified discriminates in four connected ways:

1. The programs are advertised as being “for African Americans,” without indicating that non-African American students are welcome. ER-133 ¶ 23.
2. Teachers—at administrators’ direction—invite African American students to participate but do not encourage or inform similarly situated non-black students. ER-133 ¶ 24.
3. Non-black students who learn about A4 programs are directed to other offerings because of race. ER-133 ¶ 25
4. The programs are designed and intended only for students of a particular race, and their content and structure seeks to exclude non-black students. ER-133 ¶ 26.

CFER further alleges the programs are designed and intended to benefit students of a particular race and to create, to the extent possible, racially segregated environments and preferential treatment based on race. ER-133–34 ¶¶ 27–29.

III. Claims for Relief

CFER asserted claims under the Equal Protection Clause (via 42 U.S.C. § 1983), Title VI, and California Constitution article I, section 31 (Proposition 209). ER-134–36. CFER seeks declaratory and injunctive relief prohibiting Fresno Unified and its officials from using race in operating, funding, advertising, or administering A4 Office programs, along with attorneys’ fees and costs. ER-136.

PROCEDURAL HISTORY

CFER filed its Complaint on February 27, 2025. ER-129–36. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) on April 21, 2025. ER-004; ER-118–28. CFER filed its opposition on May 19, 2025. ER-104–17.

On August 12, 2025, the district court granted the motion to dismiss, concluding that CFER had not established standing and that its claims were not ripe, and it granted leave to amend. ER-066–88. In that

order, the court considered Fresno Unified’s A4 website and stated that it would take judicial notice of the statistics on the website and statistics cited from the website in Defendants’ reply brief. ER-072.

On August 26, 2025, CFER moved for reconsideration under Rule 59(e). ER-006. On October 2, 2025, the district court denied reconsideration. ER-006–13. In doing so, the court stated that its dismissal ruling was not “dependent on” the statistical information from the A4 website. ER-012.

CFER then filed a Notice of Intent to Rest on the Complaint. ER-004. On October 27, 2025, the district court ordered dismissal of the action and entered judgment. ER-004–05; ER-003. CFER timely filed its notice of appeal on November 26, 2025. ER-137–39.

STANDARD OF REVIEW

A district court’s determination whether a party has standing is reviewed de novo. *See Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021). In establishing Article III standing, “First, the plaintiff must have suffered an ‘injury in fact’ ... Second, there must be a causal connection between the injury and the conduct complained of[,] ... [and] Third, it must be ‘likely’ ... that the injury will be redressed by a favorable

decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotation marks and citations omitted). “The basic inquiry is whether the ‘conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.’” *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945)).

On a motion to dismiss under Fed. R. Civ. P. 12, courts must take all facts in the complaint as true, make all reasonable inferences in favor of the plaintiffs, and determine whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The plausibility standard requires courts to assume that all the alleged facts are true, even when their truth is doubtful, and to make all reasonable inferences in favor of the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). The complaint “does not need detailed factual allegations,” nor is there a “probability requirement” at the pleading stage. *Id.*; see also *Erickson v. Pardus*, 551

U.S. 89, 93 (2007) (“[s]pecific facts are not necessary”). The complaint needs only enough facts to suggest that discovery may reveal evidence of illegality, even if the likelihood of finding such evidence is remote. *Twombly*, 550 U.S. at 556. “The border ... lies between the factually neutral and the factually suggestive.” *Id.* at 557 n.5. Finding this border is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

Standing is assessed at the “outset of the litigation.” See *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005), *abrogated on other grounds by Levin v. Com. Energy, Inc.*, 560 U.S. 413 (2010). “[P]ost-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.” *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010).

A district court’s decision to take judicial notice under Rule 201 is reviewed for abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995).

SUMMARY OF ARGUMENT

The district court erred in dismissing this case for lack of standing and ripeness. The Complaint alleges specific facts showing that Fresno Unified is operating and promoting A4 programs in a race-based manner that denies non-black students equal treatment. Under settled Supreme Court and Ninth Circuit precedent, the injury in an equal protection case is the denial of equal treatment itself, not the ultimate denial of a program benefit, and it does not depend on the existence of a competitive application process. The law has never required a plaintiff to walk into the hiring office under a “Whites Only” sign to become a victim of discrimination. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977). The same principle applies here: discriminatory promotion and design can inflict an Article III injury even if the government later insists that, in theory, the program would have been open—if the excluded children had been able to find it.

The district court compounded its legal errors with pleading-stage errors. On a facial Rule 12(b)(1) motion, the court was required to accept well-pleaded factual allegations as true and draw reasonable inferences in Plaintiff’s favor. Instead, it discounted the Complaint’s specific factual

allegations about CFER's members and about how the District advertises, invites, and steers students with respect to A4 programs, and treated them as conjectural or conclusory.

Finally, the court's handling of judicial notice further undermines the dismissal. In granting the motion to dismiss, the court took judicial notice of "statistics" that were added to the A4 website after the Complaint was filed and that were cited in Defendants' reply brief. It then relied on those materials for their truth in discussing participation rates and inferences about whether and to what extent non-black students participate in the A4 programs. However, contested factual assertions introduced through judicial notice can never be used to resolve disputed facts or draw inferences against the plaintiff on a facial jurisdictional challenge.

This Court should reverse and remand so that the parties may develop the facts in discovery and CFER's members may have the opportunity to prove the discriminatory treatment they have plausibly alleged. If the district court's decision is affirmed, it would insulate a wide range of discriminatory government programs from judicial review.

ARGUMENT

I. The District Court Applied the Wrong Legal Standard in Determining that CFER Had Failed to Plead Standing and Ripeness

An organization may assert standing in place of its members. To invoke this organizational standing, an organization must demonstrate that “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023). The district court correctly focused on the question of whether CFER’s members would have standing to sue in their own right.¹

However, the district court made several major errors in evaluating those members’ alleged injuries. First and foremost, the district court failed to properly apply the Supreme Court’s precedents on injury in equal protection cases. Those cases repeatedly put the emphasis on the

¹ No party challenges whether CFER meets the other elements of organizational standing, and these elements have been properly pled in the Complaint.

denial of equal treatment, rather than the loss of some sort of specific government benefit. Second, the district court erred by misunderstanding the requirement that the injury be “particularized.” Third, the district court failed to appreciate the ongoing nature of the injury, undermining its analysis with respect to imminence and ripeness.²

Each of these errors requires reversal.

A. Denial of equal treatment creates a concrete injury-in-fact

The district court emphasized that CFER did not allege that its “members’ non-African American children were actually denied access to an A4 Office program on the basis of race” or that they “were actually directed to non-A4 programs on the basis of race, [or] were made to feel

² Fresno Unified has made changes to its A4 website and may have made changes to some A4 programs since CFER filed its Complaint. However, no party has argued that these post-filing developments moot this action, and in any event they do not. Article III standing is assessed “at the outset of the litigation,” and “post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.” *United Steel*, 602 F.3d at 1091–92. Nor could voluntary, litigation-driven changes moot claims for declaratory and injunctive relief. “A defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice” unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth*, 528 U.S. at 189 (quotation marks omitted).

unwelcome due to any specific acts because of their race.” ER-075. It asserted that “plaintiff[s] ... must do more than simply plead that there was exposure to unequal treatment” and must allege either “a competitive program” or that a member’s child “was exposed to unequal treatment at any stage of the admissions process.” ER-083 (cleaned up). The court also faulted CFER for not pleading “hardship” resulting from nonparticipation. ER-088.

The Supreme Court has explained that, when government “erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” the “injury in fact” is “the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). For that reason, a plaintiff “need not allege that he would have obtained the benefit but for the barrier.” *Id.* This Court has applied the same principle in evaluating standing in equal protection cases, holding that the injury is the denial of equal treatment caused by the challenged policy and that the plaintiff need not prove entitlement to, or

loss of, some ultimate benefit as a prerequisite to suit. *Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995).

The district court misunderstood the nature of the “denial of equal treatment” that CFER alleges. The Supreme Court’s concern has never been whether the process has the potential to exclude the plaintiff. It is true that most of the cases arise in settings such as university admissions or government contracting. But in all cases, the Court expressly conditions standing merely on whether a plaintiff is being disadvantaged and “personally subjected to a racial classification.” *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (citation modified). It is that “personal subjection” of an individual to the racial classification that injures them—by seeing them through a racial lens and subjecting them to a disadvantage simply because of the color of their skin. Accordingly, the Supreme Court has repeatedly stated that racial classifications and racial disadvantage—regardless of whether an individual could overcome or persevere through it—is enough to give rise to injury sufficient for Article III standing.

This principle dates back at least to *Bakke* itself. In *Bakke*, the Court considered whether an applicant to a medical school, challenging

an affirmative action program, had standing, even though he could not prove he would have been admitted, and could not even prove that he was “disadvantaged” (within the meaning of the program), such that he would be eligible for the program even if it were stripped of its racial component. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978). As the Court explained, it mattered not at all if Bakke could not win a place in the medical school—the injury arose as soon as the University decided “not to permit Bakke to compete for all 100 places in the class.” *Id.*

Jacksonville explained this as well: there, the court found standing regardless of whether the plaintiff—an association of contractors who were disadvantaged by a racial set-aside program—had alleged that its members would have been awarded a contract but for the illegal program. 508 U.S. at 666. The plaintiff’s injury in racial discrimination cases comes from “the denial of equal treatment resulting from the imposition of the barrier,” not the loss of access to any benefit. *Id.* In the context of a set-aside program, that injury attaches when the contractor loses the ability to bid on “equal footing,” not when they lose out on a contract. *Id.* But the Court did not limit standing to competitive or bidding contexts. *Id.*; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551

U.S. 701, 719 (2007) (students have standing to challenge busing program even though no child was imminently going to be denied participation in any program because they were being forced to “compete in a race-based system that may prejudice” them); *Bras*, 59 F.3d at 873–74 (“[P]laintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit. Rather, they need only show that they are forced to compete on an unequal basis.”).

None of these cases tie the injury to the presence of a competitive process. They are explicit that the injury comes from “denial of equal treatment.” This Court has expressly confirmed the view that the injury is denial of “equal treatment under the law” *regardless* of whether any “tangible benefit” is at stake. In *Harrison v. Kernan*, the Ninth Circuit held that a prisoner had standing to challenge a sex-based prison policy governing access to vendor-catalog purchases even though the state argued he had not sought or been denied any particular item. 971 F.3d 1069, 1074–75 (9th Cir. 2020). The court rejected the notion that the prisoner had to attempt a futile transaction first. *Id.* Rather, as the court explained, the injury was being subjected to a discriminatory rule that

governed access on unequal terms. *Id. Harrison* is particularly instructive here because it involves no admissions process, no competition, and no scarcity problem in the way the district court assumed was necessary. Yet this Court still acknowledged that differential treatment in the governing system itself was sufficient injury in fact. *Id.*

The same logic appears in the racial districting cases, where the Supreme Court has recognized standing based on being personally subjected to race-based governmental structuring, not on the loss of a discrete benefit. *See Shaw v. Reno*, 509 U.S. 630, 642–44 (1993). The harm in such cases is that government has used race to organize a basic public system and thereby treated individuals differently on that basis. *Id.* The Supreme Court, by contrast, has never required a “competitive process” harm; nor has it looked for actual rejection from some kind of admissions process. It is enough to give rise to injury to place someone in a race-based governmental framework which puts them at some kind of disadvantage.

The Supreme Court stated in *Students for Fair Admissions* that the “core purpose” of the Equal Protection Clause is to “do[] away with all

governmentally imposed discrimination based on race.” 600 U.S. 181, 206 (2023) (citation omitted). As the Court has repeatedly made clear, “[e]liminating racial discrimination means eliminating all of it.” *Id.* The District Court’s rule would undermine this “core purpose” and make it impossible to challenge programs which, although not actively competitive, nonetheless impose disadvantages and burdens on people on the basis of their race. *See Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of Health & Human Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020) (“If Planned Parenthood did not have standing, then the instant agency action would be insulated from judicial review.”). The challenged A4 programs treat students differently based on their skin color. The school district should not be allowed to hide behind the empty promise that, if students of the “wrong” skin color eventually find out about the program, they might not be excluded.

B. The Complaint alleges sufficiently “particularized” injuries

The district court’s second legal error was its conclusion that CFER’s allegations are “generic to any non-African American student in Fresno Unified,” and therefore amount to a “generalized grievance” rather than a “personal stake” in the controversy. ER-075–76 (quoting

Warth v. Seldin, 422 U.S. 490, 499 (1975), and citing *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024); *Loffman v. Cal. Dep’t of Educ.*, 119 F.4th 1147, 1158 (9th Cir. 2024)). That misunderstands what “particularized” means in Article III standing.

An injury is “particularized” when it “affect[s] the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. The particularization requirement does not demand that the injury be unique, rare, or suffered by only a handful of people. To the contrary, an injury may be widely shared and still be particularized, so long as the plaintiff is among those personally affected by the challenged conduct. The bar on “generalized grievances” is aimed at plaintiffs who allege only an undifferentiated interest in lawful government—such as “a citizen” seeking to challenge government action “simply because the plaintiff believes that the government is acting illegally.” *All. for Hippocratic Med.*, 602 U.S. at 381. It is not a license to dismiss equal protection claims whenever a discriminatory practice affects many people within the relevant class.

That distinction is especially important in equal protection cases. As this Court and the Supreme Court have emphasized, a plaintiff has

standing when he is “personally subjected to a racial classification.” *Ala. Legis. Black Caucus*, 575 U.S. at 263 (citation modified). That is a personal injury, even though the challenged classification may apply to a broad group. Indeed, equal protection violations often operate at scale; if “widely shared” were enough to defeat particularization, core equal protection challenges would routinely be nonjusticiable.

Here, the Complaint alleges that CFER’s members are not strangers to the challenged conduct. CFER identifies specific members, alleges that they reside in Fresno Unified, and alleges that their children are enrolled in Fresno Unified schools. ER-130–31; ER-131 ¶¶ 11–13. It alleges that these particular children are not African American and are eligible for, interested in, or would benefit from the programs offered by the A4 Office. ER-131 ¶¶ 11–13. And it alleges that these members and their children are personally disadvantaged by Fresno Unified’s race-based promotion and design of the A4 programs; specifically, that they are not informed of the programs and are denied equal treatment in the programs’ promotion and design because of race. ER-131 ¶¶ 11–13; ER-133 ¶¶ 23–26.

Those allegations describe an injury to identified individuals in a defined relationship with Fresno Unified: parents with children in the District who are subject to a districtwide, race-based system for promoting and structuring educational programs. That is not the sort of “undifferentiated” interest in legality that *Warth* and *Alliance for Hippocratic Medicine* address. It is an allegation of personal exposure to discriminatory treatment in a public-school system in which the members’ children are enrolled.

C. The injury is ongoing, and the dispute is ripe

The district court also held that CFER’s members had not alleged an “actual or imminent” injury because it was “speculation” whether any member’s child would “have need for, be eligible for, or have the desire to participate” in an A4 program in the future. ER-078 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). First, this is mistaken as a factual matter—CFER alleges that its members’ children are both eligible for and have the desire to participate in current A4 programs. ER-131 ¶¶ 11–13; ER-134 ¶ 29. Second, the court’s analysis again mistakes the nature and timing of the injury. CFER does not allege a future injury contingent on a child’s later acceptance into a program.

Rather, CFER's Complaint sets forth a present and ongoing injury: Fresno Unified is operating public programs in a race-based manner that denies CFER's members' children equal treatment, through racially targeted promotion, steering, and program design. ER-133 ¶¶ 23–26. That is an ongoing injury as long as the District uses race to structure who is invited, informed, and encouraged, and how the programs are designed and held out to students. ER-133 ¶¶ 23–26; ER-133–34 ¶¶ 27–29.

The district court's focus on whether any child will eventually "need" or "desire" to participate in a future program is misplaced because it again assumes that the only cognizable injury is the eventual loss of access to a benefit. But as explained above, the injury in equal protection cases is the denial of equal treatment. That injury to CFER's members' children is not contingent on proving that they would ultimately receive the benefit; as in *Bakke*, *Jacksonville*, and other cases, it arises from being forced to navigate a government system that uses race to allocate opportunities or access pathways. The Complaint alleges that CFER's members' children are subject to precisely that kind of system now. ER-133 ¶¶ 23–26.

There is nothing conjectural about whether the members' children will be subject to a promotional and steering regime that operates throughout their enrollment in Fresno Unified schools. ER-131 ¶¶ 11–13; ER-133 ¶¶ 23–26. The challenged conduct is not an isolated or episodic event; it is a continuing structure of program design and outreach that, by allegation, operates each school year and affects students presently within the District. ER-133 ¶¶ 23–26; ER-133–34 ¶¶ 27–29.

For the same reasons, the dispute is ripe. A claim is unripe when it depends on contingent future events that may not occur as anticipated or may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1998). Here the challenged conduct is not contingent: the alleged unequal treatment is happening in the present, through the District's race-based branding, invitations, and steering in connection with publicly funded programs. ER-133 ¶¶ 23–25. The requested relief—an injunction requiring race-neutral promotion and administration—would redress that ongoing unequal treatment immediately. ER-136. This is a concrete, live controversy suitable for judicial resolution now. *Jacksonville*, 508 U.S. at 666.

II. The District Court Failed to Credit CFER's Allegations When Resolving a Facial Standing Challenge.

In addition to its repeated legal errors, the district court also erred in its consideration and description of CFER's Complaint and allegations. These errors also warrant reversal. Defendants challenged subject-matter jurisdiction through a *facial* Rule 12(b)(1) motion, not a factual one. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (distinguishing facial and factual challenges). That distinction is dispositive. In a facial attack, “the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction,” *id.*, and the court must therefore “[a]ccept[] the plaintiff’s allegations as true and draw[] all reasonable inferences in the plaintiff’s favor.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

What a court may *not* do in that posture is equally clear: it may not demand evidentiary detail, resolve factual uncertainty, test plausibility against defendant-supplied facts, or require the plaintiff to prove that alleged harms have already materialized. A facial Rule 12(b)(1) motion “mirrors” Rule 12(b)(6) review. *Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1143 n.7 (9th Cir. 2024). Yet the district court repeatedly

departed from that framework, treating unresolved factual questions as reasons to dismiss rather than as inferences to be drawn in CFER's favor.

A. The district court mischaracterized factual allegations as “conclusory” and imposed an improper pleading burden.

The dismissal order repeatedly discredited CFER's factual allegations as “conclusory.” ER-075, 78, 83–84. But the allegations rejected by the court were not legal conclusions; they were concrete descriptions of how Fresno Unified operates the A4 programs in practice.

The Complaint alleges, among other things, that:

- CFER's members' children would be interested in the A4 programs but were never informed of them, ER-131, ¶¶ 11–13;
- The A4 programs are branded and described as being “for” African-American students, ER-133, ¶¶ 22–23;
- District employees promote and design the A4 programs in a race-based fashion intended to exclude non-African-American students, ER-130–31, ¶¶ 2–3, 10–13, ER-133–34, ¶¶ 26–27, 35; and
- Non-African-American students do not receive the same outreach, invitations, or guidance afforded to black students and are affirmatively steered away from the A4 programs ER-133–34, ¶¶ 23–24, 29.

The dismissal order labeled these allegations “conclusory,” but they describe concrete acts and omissions by District employees directed at

identifiable students and must be accepted as true at this stage. The allegations describe *who* is doing the steering (teachers, counselors, administrators); *what* they are doing (targeted outreach and race-based guidance); and *how* that unequal treatment operates (branding, invitations, and counseling pathways). That is sufficient to satisfy the Rule 8 pleading standard—and is all that Article III demands at the pleading stage. The district court erred by requiring more. CFER was not required to plead detailed facts about the precise impact of exclusion on each child. “General factual allegations of injury resulting from the defendant’s conduct may suffice” at the pleading stage. *Lujan*, 504 U.S. at 561.

The district court also erred by failing to draw reasonable inferences in CFER’s favor, and by repeatedly resolving uncertainty against the Plaintiff. The court emphasized that it “cannot be sure” whether CFER’s members’ children would be eligible or interested in A4 programs. ER-088. But uncertainty is precisely what the facial standard resolves *for* the plaintiff, not against it. At this stage, it is irrelevant whether the court can “be sure” of the truth of CFER’s allegations; it must presume them true. *Leite*, 749 F.3d at 1121.

B. The district court erroneously recast CFER’s injury as mere “deterrence”

The district court further erred by reframing CFER’s claim as one of mere “deterrence” from applying to A4 programs, then faulting CFER for failing to plead facts showing that particular students were “actually deterred.” ER-084. That framing is incorrect and materially narrows the injury alleged.

CFER does not allege a subjective chill or a perception-based reluctance to participate in a government-sponsored program. It alleges affirmative, race-based administration of public educational programs: selective outreach, race-targeted encouragement, and race-based steering by district employees. *See* ER-133 ¶¶ 22–29. The injury is not psychological deterrence; it is unequal treatment as to the access pathways themselves. That is a paradigmatic equal-protection injury. *See Jacksonville*, 508 U.S. at 666; *Teamsters*, 431 U.S. at 365 (discrimination occurs when opportunities are advertised and made available to some but not others).

For that reason, CFER was not required to plead that applying to an A4 program would have been a “futile gesture” for its members’ children. ER-084. The “futile gesture” doctrine applies when a plaintiff

challenges a formal application process but does not apply because rejection is certain. *See Teamsters*, 431 U.S. at 366. It concerns formal application regimes. Here, the allegation is more fundamental: Fresno Unified structures and administers A4 programs so that non-black students are never placed on equal footing before any application stage. Where the injury is unequal treatment itself, no attempt-and-rejection allegation is required.

III. The District Court Erroneously Took Judicial Notice of Disputed Facts, Skewing the Standing Analysis

Rule 201 permits judicial notice only of facts “not subject to reasonable dispute.” Fed. R. Evid. 201(b). The facts either must be “generally known within the ... territorial jurisdiction” or capable of being “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id.* Even when a document is publicly accessible, a court may not simply accept as true every factual assertion contained within it. This Court has repeatedly warned that judicial notice and incorporation by reference are improper vehicles for crediting contested factual narratives at the pleading stage. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–1003 (9th Cir. 2018); *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001); *see also LA All. for*

Hum. Rts. v. Cnty. of Los Angeles, 14 F.4th 947, 957 (9th Cir. 2021) (finding it an abuse of discretion to take notice of “facts contained in various publications for their truth,” where many “are subject to reasonable dispute”). Here, the district court nevertheless announced that it “will take judicial notice” of post-filing, Defendant-controlled website statistics as true facts and used them to undercut CFER’s standing allegations, then refused to change this element of its decision on reconsideration. ER-072; ER-010–13. That was legal error.

Ultimately, the district court disclaimed dispositive reliance on these statistics, but the noticed material appears repeatedly in the court’s orders—which the court declined to amend in response to a motion for reconsideration—and plainly influenced the court’s analysis, creating ambiguity where there was none before. ER-072; ER-083.

A. The district court improperly took judicial notice of Defendants’ website statistics for their truth

The Complaint cited the Fresno Unified/A4 website for program descriptions and branding—*i.e.*, to show what Defendants were telling the public about who the programs were “for.” ER-132–33 ¶¶ 20, 22–23. Because CFER had cited the website, the district court announced it would take judicial notice not only of the website’s existence, but also of

“statistics provided by the A4 website” and “statistics cited from the A4 website in Defendants’ Opposition.”³ ER-072. That move violated Rule 201—particularly because the cited “statistics” were added to the website by Defendants *after* the case was filed and are factually untested.

A court may take judicial notice that a government website said certain words on a certain date, or that Defendants published certain statements. But it may not notice—much less credit—the *truth* of disputed factual assertions embedded in the website, particularly where those assertions are offered to rebut well-pleaded allegations at the jurisdictional pleading stage. *Khoja* is explicit: “just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.” 899 F.3d at 999; *see also id.* at 1003 (“[I]t is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.”). And *Lee* draws the same distinction for public records: the court may notice the existence of

³ Although the district court referred to “Defendants’ Opposition,” the statistics were actually introduced in Defendants’ reply brief in support of the motion to dismiss. ER-092–93 (reply brief introducing website statistics and asking for judicial notice).

a document, but may not accept the truth of contested facts recited therein. 250 F.3d at 689–90.

That is exactly the principle the district court violated. It did not merely acknowledge the A4 website's existence or take notice of what it stated at a particular point in time. Instead, it credited the website's contested factual assertions—including participation numbers and racial breakdowns—offered by Defendants to rebut CFER's allegations that the A4 programs discriminate in branding, promotion, and access pathways. ER-072; ER-083. By taking judicial notice of those statistics for their truth, the court allowed Defendants to supplement the jurisdictional record with a self-serving factual narrative on a facial Rule 12(b)(1) motion.

That is doubly improper. In a facial jurisdictional attack, the court must accept CFER's factual allegations as true and draw reasonable inferences in its favor. *Leite*, 749 F.3d at 1121. CFER pleaded concrete facts about unequal promotion and steering, and the court was required to credit those allegations at this stage. It did the opposite, effectively resolving the central factual dispute—whether the A4 programs are

equally open to all—by accepting the truth of Defendants’ own post-filing website assertions. That exceeded permissible notice.

B. The relevant webpage content was at the time of filing; post-filing edits cannot defeat standing

The court’s judicial notice was flawed for a second, independent reason. The relevant moment for assessing standing is the “outset of the litigation.” *Friends of the Earth*, 528 U.S. at 180. Thus, “[s]tanding is determined as of the date of the filing of the complaint,” *Wilbur*, 423 F.3d at 1107, and “post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.” *United Steel*, 602 F.3d at 1091–92; *see also Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) (“The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.”).

Here, the Complaint’s citations to the Fresno Unified/A4 website were directed to program descriptions and public branding—evidence of how Defendants were holding these programs out to students and families, and whether an ordinary reader would understand them as race-restricted. ER-132–33, ¶¶ 20, 22–23. First, the Complaint quoted the original website’s statement that “[t]he stated goal of the A4 Office is to ‘ensure African American and Black students not only meet academic

goals but thrive in a nurturing and empowering environment.” ER-132–33 ¶ 20; *see also* ER-53 (website statement that the program “serves African American and black pre-K through 12th grade students throughout Fresno Unified School District”). Second, the Complaint described some of the race-focused programs that the A4 Office oversees, again quoting language from their descriptions on the website. ER-133, ¶ 22. Finally, the Complaint alleged that “[o]fficial descriptions, advertisements, and District communications brand these programs as being ‘for African Americans’—and do not indicate that non-African American students are welcome.” *Id.* ¶ 23. At the time the Complaint was filed, that A4 website made no mention that the programs were available to students of other races and contained no participation statistics that would suggest broad openness. *See* ER-53–54.

After the Complaint was filed, District employees changed the A4 website—at least twice. First, the “serves African American and black students” language was revised to a more race-neutral description. *Compare* ER-53–54 *with* ER-61–65. Second, Defendants revised the website to add purported statistical data: e.g., that during 2023–2024 the A4 office “served 1,212 single-race African American and Black students”

and that “[i]n total ... A4 has served 7,950 students of all racial and ethnic backgrounds.” ER-062. The district court used those new statistics to conclude that “non-African American students are participating [in] the A4 Office program.” ER-083. But post-filing edits cannot be used to rewrite the standing inquiry.⁴

At minimum, the post-filing edits underscore why taking judicial notice for truth was improper. The website language is not only entirely within Defendants’ control, but it is inherently changeable, and the reasons for changes, the timing of those changes, and what they reflect are precisely the kind of fact questions that cannot be resolved on judicial notice at the motion-to-dismiss stage. The fact that Fresno Unified felt the need to alter its website after the Complaint was filed suggests that it recognized the unconstitutional nature of the original website and

⁴ If Defendants contend that the post-filing website edits “cure” CFER’s injury by now signaling that the programs are open to all, that is a mootness argument, not a standing argument. And on mootness, the government bears a “heavy burden” to show the challenged conduct cannot reasonably be expected to recur. *Friends of the Earth*, 528 U.S. at 170; see also *FBI v. Fikre*, 601 U.S. 234, 240–42 (2024) (reiterating the “formidable” nature of the voluntary-cessation standard).

program branding.⁵ If the district court believed factual development was necessary to evaluate the effect of the website changes, the proper course was limited jurisdictional discovery—not crediting Defendants’ preferred narrative under a Rule 201 judicial notice standard.

C. The noticed “statistics” are disputed and require discovery to interpret

Even setting aside the timing problem, the specific website statistics relied on and credited by the district court are disputed, ambiguous, and susceptible to reasonable disagreement.⁶ For example, the statement that A4 “has served 7,950 students of all racial and ethnic

⁵ Even as revised, the website’s suggestion that some non-African American students have participated in the A4 programs does not contradict CFER’s well-pleaded allegations regarding discriminatory promotion, steering, and access pathways. That some programs may include some students of other races does not establish that the A4 programs are equally open to all students, and the Complaint plausibly alleges they are not.

⁶ The dismissal order stated that “there is no dispute by Defendants that the website information matches what can currently be found on Fresno Unified’s website.” ER-072. That statement is beside the point: Defendants naturally do not dispute their own website content. And if the court meant to suggest that CFER did not dispute the truth or significance of those assertions, that suggestion is incorrect. CFER has consistently disputed Defendants’ factual claims regarding the scope and availability of the A4 programs, including implicitly in the Complaint, and maintains that the post-filing website revisions raise factual questions properly addressed through discovery.

backgrounds” is not self-defining and raises a host of unanswered questions. What does it mean to “serve” a student? Does it mean enrollment, attendance, outreach contact, participation in a single event, or receipt of some ancillary service? How does the district count and classify students by race? What proportion of students seeking to participate were permitted to participate, and did that vary by race? Does the fact that some non-black students were “served” establish that the programs are equally open to all, particularly where CFER’s theory concerns discriminatory promotion and access pathways rather than formal written denials? Were all A4 programs equally open, or were some racially selective while others were not? None of these questions can be answered by judicial notice of website statistics, and *Khoja* forbids using notice to “dispute facts stated in a well-pleaded complaint.” 899 F.3d at 1003.

In short, this is not a case where the court noticed an undisputed fact in a stable public record. It accepted for truth a set of contested, post-filing, Defendant-generated website assertions—precisely what Rule 201 and this Court’s precedent prohibit.

D. The error was material and skewed the standing analysis

The district court's error was not harmless. The judicially noticed assertions directly supported Defendants' contention that the programs are effectively open to all and do not involve unequal treatment. The dismissal order relied on those "facts" to discount CFER's discrimination theory, and the reconsideration order again recited them as part of the factual backdrop. ER-010–12; ER-072; ER-083. Once the court treated disputed, changeable website statistics as judicially noticeable truth, the standing analysis was necessarily tilted—particularly where CFER alleges discriminatory branding, recruitment, and steering that operate through informal channels rather than through formal rejections from the program.

Nor does the district court's denial of reconsideration insulate the error. Although the court asserted in denying reconsideration that its standing analysis was "not dependent" on the noticed material, ER-011, the orders themselves repeatedly discuss and invoke those noticed assertions to infer non-black participation in the A4 programs. ER-010–12; ER-072; ER-083. At minimum, the improper notice created ambiguity

about the factual basis for dismissal—an ambiguity that warrants vacatur at the jurisdictional pleading stage. *See Khoja*, 899 F.3d at 1003.

CONCLUSION

The district court decision and dismissal of the Complaint should be reversed.

DATE: February 6, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2026, I electronically filed the foregoing 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/ Wilson C. Freeman
Wilson C. Freeman

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 25-7510

I am the attorney or self-represented party.

This brief contains 7,793 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATE: February 6, 2026.

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