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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA COUNCIL OF THE BLIND, ET AL., Plaintiffs, **v.** **SHIRLEY N. WEBER, PH.D.,** Defendant.	Case No. 3:24-cv-01447-SK **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: October 21, 2024 Time: 9:30 a.m. Judge: Hon. Sallie Kim Trial Date: Not Yet Set Action Filed: March 6, 2024

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I. INTRODUCTION

Plaintiffs finally admit that the Secretary has no authority under existing law to implement the relief they seek. Moreover, Plaintiffs' focus on their requests for declaratory relief is misguided because, even if the Court were to conclude that certain provisions of the Elections Code are preempted by federal disabilities laws (which they are not), the Code would *still* lack an affirmative grant of authority for the Secretary to provide the relief Plaintiffs seek. Put simply, the Secretary has no specific power to authorize any particular means of ballot return—her authority is limited to "certification" of certain systems. Instead, the Legislature has chosen to retain, for itself, the plenary power to determine the acceptable means of mail ballot return.

Relatedly, Plaintiffs appear to recognize that California's fifty-eight counties—and not the Secretary—are ultimately responsible for distributing, collecting, and counting vote-by-mail ballots. And although Plaintiffs dispute that they are asking the Court to micromanage county administrative functions through an order directed to the Secretary, nothing in their opposition changes the fact that Plaintiffs continue to attempt a litigation shortcut by failing to include necessary county defendants who actually administer the vote-by-mail system. The Supreme Court's constitutional standing rules, not to mention the Federal Rules of Civil Procedure, preclude that effort and Plaintiffs' proffered authority to the contrary fails to persuade. The Court should dismiss the FAC for lack of redressability. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

II. ARGUMENT

Plaintiffs contend that they have established redressability through their requests for declaratory relief. *See* Plfs.' Opp'n to Mot. to Dismiss, ECF No. 73 ("Opp'n"), at 6–8. In particular, they assert that "an order finding preemption of [Elections Code §§ 3017(a), 303.3, and 19295(a)][1] would lift current state statutory restrictions on [the Secretary's] authority to provide the injunctive relief Plaintiffs have requested." *Id.* at 7. In other words, Plaintiffs claim that, if the Court views their requests for declaratory and injunctive relief as a series of links in a

[1] Unless otherwise noted, all statutory citations are to the California Elections Code.

chain, they have ultimately shown an increased likelihood of obtaining relief from their claimed injuries at the end of this litigation.

That is incorrect for at least two reasons. ***First***, Plaintiffs have still failed to identify any source of authority that permits the Secretary to create a new method of mail-ballot return on her own initiative. ***Second***, Plaintiffs' requests for declaratory relief do not make redress of their injuries substantially more likely because a meaningful remedy still depends on the uncertain conduct of third parties who are not before the Court.

A. The Elections Code does not authorize the Secretary to create new methods of mail-ballot return.

A declaration that federal disability laws preempt the provisions of the Elections Code prohibiting electronic ballot return would not alter the final redressability calculus. Even if the current statutory bars to their requested relief—which Plaintiffs now finally acknowledge after months of contrary assertions—were deemed preempted, the Elections Code would still lack any grant of authority to the Secretary to implement the core component of their requested *injunctive* relief. *See Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) ("The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries"). Plaintiffs continue to fail to address this basic problem of redressability: the Secretary is "unable to grant the relief that relates to the harm[.]" *Gonzalez v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982).

Instead, Plaintiffs spend several pages of their opposition on a largely irrelevant exegesis of basic federal preemption doctrine under the disability laws. *See* Opp'n at 8–12. As they acknowledge in their opposition, "[t]he jurisdictional question of standing precedes, and does not require, analysis of the merits." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (internal quotation marks omitted)); *see also* Opp'n at 6 (quoting *Maya*, 658 F.3d at 1068). Following this detour, Plaintiffs baldly declare that the Secretary is "the proper defendant" because she is "in charge of administering and enforcing the Elections Code and certifying or conditionally approving the RAVBM systems that counties may use[.]" Opp'n at 12. But that is simply beside the point.

As the Secretary has repeatedly explained, the California Legislature has plenary authority over the conduct of state elections, which it exercises through the Elections Code. *Libertarian Party v. Eu*, 28 Cal. 3d 535, 540 (1980) (observing that "Article II of the California Constitution vests the Legislature with plenary power over the conduct of elections in this state."); *see also* Def.'s Mot. to Dismiss FAC ("Mot."), ECF No. 72, at 3–4. Plaintiffs themselves now concede that the Code prohibits the Secretary from authorizing counties to accept ballots through an electronic return method. *See* Opp'n at 10 ("Plaintiffs do not contest that these Elections Code sections currently prevent voters with print disabilities from returning their ballots electronically"). Importantly, the Secretary also lacks authority to implement any particular method of mail-ballot return that is not already permitted by the Code itself. Instead, as Plaintiffs appear to appreciate, the Secretary has authority to *certify* systems that are presented to her office for review and which themselves comport with relevant statutory requirements. *See* §§ 19202(a) (voting systems); 2550(b) (electronic poll books); 19281(a) (RAVBM systems).

The Elections Code plainly contemplates that other entities—like the counties themselves—will present proposed systems to the Secretary for review and certification, not that the Secretary will create systems herself. For example, Elections Code section 19006(f) explains that it is the intent of the Legislature that "[a] local jurisdiction may use available public funds to research and develop a nonproprietary voting system that uses disclosed source codes, including the manufacture of a limited number of voting system units, for use in a pilot program or for submission to the Secretary of State for certification." Likewise, the regulations governing voting systems certification explain that "[a]ny person, corporation, or public agency owning or having an interest in the sale or acquisition of a voting system or part of a voting system may apply to the Secretary of State for certification of such system." 2 Cal. Code Reg. § 20701(a). In other words, the law assumes that local jurisdictions and private companies will present voting systems to the Secretary through an application for certification, not that the Secretary will create an entirely new system or sponsor the certification of an existing system herself.

Moreover, a mere stand-alone certification order of an RAVBM system that includes electronic return, like the one Plaintiffs identify in their opposition, *see* Opp'n at 13–14, would do

nothing to redress Plaintiffs' injuries for all the reasons the Secretary identified in her original motion to dismiss. The Code does not require any jurisdiction to adopt any *particular* certified system. And in the case of electronic poll books (another type of certified system), jurisdictions are not required to use them at all; they may use an alternative like an election management system to comply with relevant Code requirements. *See* §§ 2500; 4005(a)(4)(E). So, California counties could simply choose not to implement the system.

But more importantly, Plaintiffs do not really ask for certification in the sense contemplated by the Elections Code. Instead, they seek an order "requiring [the Secretary] to take . . . specific actions[,]" including "[m]ak[ing] available to voters with print disabilities accessible electronic ballot return procedures[.]" FAC, Prayer ¶ 113. After more than six months of litigation, a preliminary injunction proceeding, and two motions to dismiss, Plaintiffs have yet to identify any source of authority that permits the Secretary to *create* mail-ballot return methods from whole cloth. It follows that there is no statutory basis for the Secretary to make "regulations" implementing a method of mail-ballot return that is not permitted by the Elections Code, as Plaintiffs propose. *See, e.g.*, Opp'n at 15. Plaintiffs do not even attempt to rebut the Secretary's authority for this proposition. *See Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal. 3d 384, 391 (1985); *see also Physicians & Surgeons Lab'ys, Inc. v. Dep't of Health Servs.*, 6 Cal. App. 4th 968, 982 (1992) ("regulations that alter or amend the statute or enlarge or impair its scope are void.").

Plaintiffs' efforts to distinguish *National Federation of the Blind of Alabama v. Allen* are no more persuasive. *See* Opp'n at 15–16. They note that Alabama uses "Absentee Election Managers," or "AEMs" and claim that this position "has no parallel in California." Opp'n at 16. As an initial matter, Plaintiffs overstate any potential distinction. *Allen* explains that AEMs are Alabama "county" officials who, just as in California, "handle[] the applications and ballots." 661 F. Supp. 3d 1114, 1118 (N.D. Ala. 2023). More importantly, Plaintiffs don't explain why the distinction between AEMs and California's county registrars—if it is one at all—makes any difference when it comes to redressability. The key holding in *Allen* was that the Alabama Secretary of State lacked "the authority to promulgate rules to provide an electronic voting option

to *any* domestic voters" because his rulemaking authority was "limited by legislative directives." *Id.* at 1122. *Allen* is crystal clear: the Alabama "Legislature has not given the Secretary the authority to create rules—much less provide actual electronic ballots—to Plaintiffs." *Id.* at 1121–22. This meant not only that the *Allen* plaintiffs' injuries were not traceable to the Alabama Secretary of State, but also that the Secretary could not redress them: "whatever persuasive effect this court's order and the Secretary's rules might have on the AEMs cannot suffice to establish redressability." *Id*. at 1123 (internal quotation marks and citation omitted). That is exactly the case here, even if Plaintiffs succeed in obtaining their requested declaratory relief.

B. Plaintiffs' requested relief depends on the uncertain conduct of third parties.

Plaintiffs also assert that "it is unnecessary to include all 58 counties in this lawsuit, and, in fact, doing so would be a waste of county and judicial resources." Opp'n at 17. At bottom, Plaintiffs prefer the convenience of litigating against a single defendant, but that doesn't change the reality that it is California's counties who administer the aspects of the vote-by-mail system that Plaintiffs want to change.

It bears repeating: county elections officials are responsible for distributing, collecting, and counting vote-by-mail ballots. *See* §§ 3000.5; 3017; 15150. Plaintiffs' assertion that "it is the Secretary of State—as the entity in charge of administering and enforcing the Elections Code and certifying or conditionally approving the RAVBM systems that counties may use—whose actions and failures to act have hurt Plaintiffs," Opp'n at 12, is contradicted by their own allegations: "[a]ll RAVBM ballots are submitted to *county* elections officials." FAC, ¶ 49 (emphasis added). In other words, when a voter returns their completed mail-ballot, the voter returns it to the *county* registrar. *County* officials are responsible for accepting mail-ballots through the methods authorized by the Legislature, not the Secretary of State. Because any meaningful relief in this case depends on county officials complying with instructions from the Secretary which, Plaintiffs now admit, would run contrary to existing state statutory law—not to mention implicate significant implementation and security concerns—redress for their injuries through this litigation remains speculative at best. *See Juliana*, 947 F.3d at 1170 ("Redress need not be guaranteed, but

it must be more than 'merely speculative.'" (quoting *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)).

Plaintiffs cite a number of unpersuasive cases in an effort to work around necessary county participation in this litigation. *Department of Commerce v. New York*, for example, is a traceability case, not a redressability case. *See* 588 U.S. 752, 767–68 (2019). The two doctrines, though related, are distinct. Traceability is, in effect, a proximate causation analysis. Redressability, in contrast, asks whether the Court can effectively mitigate the plaintiff's harm. In *New York*, the issue was whether a question about respondents' citizenship on the decennial federal census would have the "predictable effect" of causing non-citizens to avoid responding to the census altogether. *See id.* at 768. Several States alleged that they suffered injuries from the resulting under-counting through decreases in federal funding linked to state population. *See id.* at 767–768. That kind of causation analysis, tied to a plaintiff's injury, is separate from the question of whether a ruling directed to one party will make it substantially more likely that absent third parties will change their behavior such that the plaintiff's injuries will be remedied.

Plaintiffs' citation to *Massachusetts v. EPA* for the proposition that the Court's order need not provide "resolution of every possible injury" is similarly unavailing. *See* Opp'n at 16. In that case, the Commonwealth of Massachusetts, among other plaintiffs, challenged the EPA's denial of a rulemaking petition related to greenhouse gas emissions. *See* 549 U.S. 497, 505–516 (2007). In concluding that Massachusetts had standing, the Supreme Court emphasized that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518. Subsequent Ninth Circuit authority is clear that where "Plaintiffs are not sovereign states[,]" the "standing analysis" from *Massachusetts* "does not apply." *Wash. Env. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013).

Plaintiffs rely heavily on *Renee v. Duncan*, a Ninth Circuit case involving the No Child Left Behind Act. *See* Opp'n at 12–13. But they are forced to acknowledge that even *Renee* requires Plaintiffs to demonstrate that any change in the "legal status" would "amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Utah v. Evans*, 536 U.S. 452, 464

(2002)). Indeed, subsequent Ninth Circuit decisions that have relied in part on *Renee* instruct that "[t]here is no standing if, following a favorable decision, whether the injury would be redressed would still depend on 'the unfettered choices made by independent actors not before the courts.'" *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

Plaintiffs' citation to *M.S. v. Brown* is particularly perplexing. *See* Opp'n at 17. In that case, the Ninth Circuit concluded that the plaintiff had *failed* to establish standing "because she seeks only remedies that would not be substantially likely to redress her claimed injury[.]" 902 F.3d at 1083. *M.S.* teaches that if "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability unless she adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision." *Id.* (internal citation omitted). That is exactly the problem Plaintiffs face here.

In sum, Plaintiffs' opposition fails to meaningfully addresses the Secretary's core argument in her motion to dismiss: even the declaratory and injunctive relief they seek in their amended complaint does nothing to fix their claimed injuries if the counties do not begin accepting mail-ballots electronically. Put another way, the declaratory relief upon which Plaintiffs principally rely in their opposition will be cold comfort if, in the end, they must still return their mail-ballots in hard copy to counties that refuse to accept an electronic return method. Indeed, Plaintiffs have never explained how they intend to enforce their proposed injunction if a county does not comply with the Secretary's hypothetical instructions, except to vaguely assert that county non-compliance "would be a separate suit." *See* Plfs.' Reply in Support of Mot. for Prelim. Inj., ECF No. 41, at 3; Prelim. Inj. Hr'g Tr., ECF No. 64, at 24:3–4 ("that would be separate suits"). Notably, even in their opposition, Plaintiffs have never argued that the counties are within the Court's equitable authority in this action; the unavoidable consequence is that, if a county refuses to comply with the Secretary's instructions, Plaintiffs cannot seek to enforce the Court's order through contempt proceedings against the counties themselves.

It is no answer to point to the Secretary's CC/ROV letters or other enforcement powers, which are limited to existing state law. *See* Opp'n at 17 & n.8. Plaintiffs bear the burden of establishing their standing at every stage of the litigation, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and Plaintiffs acknowledge that the Secretary has brought a facial redressability challenge to the FAC. *See* Opp'n at 5. Yet Plaintiffs fail to identify any facts alleged in their complaint that show counties are substantially likely to comply with instructions that are contrary to existing statutory provisions, raise significant security concerns, and could be costly to implement. The Court need not "assume that California is a scofflaw state," as Plaintiffs put it, Opp'n at 17, to find that there are real questions about the likelihood of uniform statewide relief through an injunction.

In other words, there is no escaping the fact that the counties are necessary parties in a case that seeks to work wholesale changes to a system *they* principally administer. *See* Fed. R. Civ. P. 19. An injunction in the absence of the counties would open the doors to additional litigation with potentially inconsistent results, as Plaintiffs own concession that county non-compliance "would be a separate suit" demonstrates. As a consequence, Plaintiffs have failed to establish that the declaratory and injunctive relief they seek will make it substantially more likely that their claimed injuries will be redressed. They accordingly lack standing, the Court lacks subject matter jurisdiction, and this case should be dismissed. *See Maya*, 658 F.3d at 1067 ("lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." (emphasis omitted)).

III. CONCLUSION

Plaintiffs attempted to amend their complaint to resolve the standing issues identified in the Secretary's first motion to dismiss. But those foundational redressability problems remain, and if anything, the FAC demonstrates that further amendment that does not include county participation would be futile. The Court should dismiss this case for lack of Article III standing.

Dated: October 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***California Council of the Blind, et al. v. Shirley N. Weber***
Case No. **3:24-cv-01447-SK**

I hereby certify that on October 4, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 4, 2024, at San Francisco, California.

G. Pang
Declarant

Signature

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