

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA COUNCIL OF THE BLIND,  
et al.,

Plaintiffs,

v.

SHIRLEY N. WEBER,

Defendant.

Case No. [24-cv-01447-SK](#)

**ORDER ON MOTION TO DISMISS**

Regarding Docket No. 72, 74

This matter comes before the Court upon consideration of the motion to dismiss for lack of subject matter jurisdiction filed by Defendant California Secretary of State Shirley N. Weber (“Secretary” or “Defendant”). Having carefully considered the parties’ papers, relevant legal authority, the record in the case, and having had the benefit of oral argument, the Court hereby DENIES the Secretary’s motion for the reasons set forth below.

The Court DENIES Plaintiffs’ request for judicial notice because the Court did not need to consider these documents to address the motion to dismiss. (Dkt. No. 74.)

**BACKGROUND**

Plaintiffs Christopher Gray, Vita Zavoli, Russell Rawlings, California Council of the Blind, and National Federation of the Blind of California (collectively, “Plaintiffs”) are individuals with “print disabilities” and an organization that represents individuals with print disabilities. Print disabilities are “disabilities that prevent a voter from reading, marking, holding, handling, and/or manipulating a paper ballot privately and independently. (Dkt. No. 71 (First Amended Compl. (“FAC”), ¶ 2.) Currently, in California, all registered voters may vote by mail. See Cal. Elec. Code § 3003 (“The vote by mail ballot shall be available to any registered voter.”) Individuals with print disabilities may receive, review, and mark their vote-by-mail ballots electronically on their own devices, such as a personal computer, using a remote accessible vote-

1 by-mail (“RAVBM”) system that has been certified or conditionally approved by the Secretary.  
2 (*Id.* at ¶ 7.) However, they are not currently authorized to sign and return those ballots  
3 electronically. (*Id.*)

4 The Court previously denied Plaintiff’s motion for preliminary injunction. In their motion,  
5 Plaintiffs sought temporary relief to enable them to return their ballots remotely through electronic  
6 facsimiles in the upcoming November 2024 election by using a method currently available only to  
7 certain military and overseas voters. Qualified military or overseas voters are authorized to return  
8 their ballots by facsimile transmission under California Elections Code section 3106(a) and  
9 Plaintiffs sought a preliminary injunction requiring the Secretary to allow them to also be able to  
10 return their ballots by electronic facsimile.<sup>1</sup> The Court denied the motion for preliminary  
11 injunction on the grounds that the Secretary lacks the authority to require California counties to  
12 accept ballots returned by electronic facsimile, that Plaintiffs failed to show a likelihood of success  
13 on the merits with respect to whether their requested relief was a reasonable accommodation or  
14 would fundamentally alter the nature of the voting program under the Americans with Disabilities  
15 Act (“ADA”), and that the balance of equities and public interest did not support issuing a  
16 preliminary injunction with respect to the upcoming election. (Dkt. No. 60.)

17 In their FAC, Plaintiffs seek broader relief with respect to their ability to return their  
18 ballots but no longer seek to implement any changes with respect to an upcoming election.  
19 Additionally, while Plaintiffs still seek the ability to return their ballots electronically, they no  
20 longer seek to be included in the system specifically established for certain military and overseas  
21 voters under California Elections Code section 3106(a). Instead, Plaintiffs now seek to require the  
22 Secretary to make the Vote-by-Mail Program accessible to voters with print disabilities. The  
23 Secretary now moves to dismiss on the grounds that Plaintiffs lack standing.

24 In the Order denying the motion for preliminary injunction filed by Plaintiffs, the Court  
25 described the current remote voting systems in California, the provisions of California law  
26 relevant to voting remotely, the Secretary’s role and authority with respect to elections. There is

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiffs argued, and the Secretary disputed, that the statute allowed for *electronic*  
facsimile returns.

1 no need to repeat that summary here, except as where necessary as part of the analysis below.

## 2 ANALYSIS

### 3 A. Legal Standards on Motion to Dismiss.

4 When a defendant moves to dismiss for lack of subject matter jurisdiction pursuant to  
 5 Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of proving that the court  
 6 has jurisdiction to decide the claim. *Thornhill Publ'n Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d  
 7 730, 733 (9th Cir. 1979). A Rule 12(b)(1) motion can be either “facial” or “factual.” *Safe Air for*  
 8 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where an attack on jurisdiction is a  
 9 “facial” attack on the allegations of the complaint, the factual allegations of the complaint are  
 10 taken as true and the non-moving party is entitled to have those facts construed in the light most  
 11 favorable to him or her. *Federation of African Am. Contractors v. City of Oakland*, 96 F.3d 1204,  
 12 1207 (9th Cir. 1996).

### 13 B. The Secretary’s Motion to Dismiss.

14 Standing under Article III requires a plaintiff to have an injury in fact that is (1) concrete  
 15 and particularized, (2) traceable to the defendant, and (3) redressable by judicial order. *Lujan v.*  
 16 *Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also M.S. v. Brown*, 902 F.3d 1076, 1083 (9th  
 17 Cir. 2018) (“[E]ven where a plaintiff requests relief that would redress her claimed injury, there  
 18 is no redressability if a federal court lacks the power to issue such relief.”); *Nat’l. Fed. of the Blind*  
 19 *of Ala. v. Allen*, 661 F. Supp. 3d 1114, 1122-23 (N.D. Ala. 2023) (finding no standing where  
 20 Secretary’s statutorily defined authority did not include providing the relief sought). The  
 21 Secretary argues that the relief Plaintiffs seek would not redress their injury.

22 The Secretary argues Plaintiffs lack standing because California law prohibits the relief  
 23 Plaintiffs seek – to return their ballots electronically – and that any injunctive relief issued by the  
 24 Court to Plaintiffs would not be enforceable against California’s counties who are absent from this  
 25 litigation. According to the Secretary, due to the prohibition against using the internet to vote and  
 26 the counties’ role in administering elections, the Secretary argues that she does not have the  
 27 authority to provide Plaintiffs with their requested relief or to implement the relief if granted by  
 28 the Court.

1 Because the Secretary relies, in part, on this Court's order denying Plaintiffs' motion for a  
2 preliminary injunction, the Court finds that it would be beneficial to discuss that Order and how  
3 the motions to dismiss and for a preliminary injunction differ.

4 **1. The Court's Order on the Motion for a Preliminary Injunction.**

5 The Court determined that the Secretary lacked authority to remedy Plaintiff's injury in the  
6 Order denying the motion for preliminary injunction. However, both the relief Plaintiffs sought in  
7 that motion and the procedural posture of their preliminary injunction motion differ in significant  
8 respects from consideration of Plaintiffs' allegations on a motion to dismiss. In their motion for a  
9 preliminary injunction, Plaintiffs sought to be allowed to participate in the system they argued that  
10 certain military and overseas voters used to return their ballots— electronic facsimiles. However,  
11 it was not clear that military and overseas voters were actually authorized under the election codes  
12 to return their ballots electronically, as opposed through only traditional facsimiles. Moreover, the  
13 statutory provision that authorizes qualified military and overseas voters to return their ballots  
14 through facsimile is a separate statute that applies uniquely to qualified military and overseas  
15 voters. It was not clear that the Secretary had the authority to simply extend that authorization to  
16 domestic civilian voters with print disabilities. In contrast, in their FAC and in opposition to the  
17 motion to dismiss, Plaintiffs argue that the Secretary has the authority to issue guidance and  
18 regulations on the state's voting systems, including the RAVBM, to include an electronic return  
19 method for voters with print disabilities.

20 Additionally, on the motion for a preliminary injunction the Court was required to consider  
21 the merits of Plaintiffs' claims. Plaintiffs argued that the ADA preempts the California Elections  
22 Code provisions that prohibit electronic ballot returns because those California provisions infringe  
23 upon a voter's ability to vote privately and independently. The Secretary responded that requiring  
24 her to authorize electronic ballot returns would constitute a fundamental alteration of California's  
25 voting system as opposed to a reasonable accommodation under the ADA – an affirmative defense  
26 under the ADA on which the Secretary bears the burden of proof. Both of these arguments relate  
27 to the merits of Plaintiffs' claims. However, on a motion to dismiss, the Court may not consider  
28 the likelihood of success on the merits. Instead, the Court will assume, for purposes of the motion

1 to dismiss, that Plaintiffs' factual allegations are correct and that the factual allegations support the  
2 proposition that the ADA preempts any provisions that prohibit electronic ballot returns. If true  
3 and if the Court declares that those provisions are invalid, then California law would no longer  
4 prohibit Plaintiffs' requested relief. Finally, on the motion for preliminary injunction, the Court  
5 was concerned with additional issues regarding the merits of Plaintiffs' claims, including concerns  
6 about the security relating to voting electronically and the very short time before the upcoming  
7 election in November 2024. Again, these are not matters that the Court may consider on the  
8 Secretary's motion to dismiss. Thus, Court's denial of the requested injunction on the motion for  
9 a preliminary injunction does not dictate the outcome of this pending motion.

## 10 2. The Secretary's Authority.

11 The Secretary argues that any order issued by the Court would not be enforceable against  
12 the counties and, thus, that any order on Plaintiffs' claims would not redress their injuries. The  
13 Secretary highlights the role that California's counties play in administering elections: bearing  
14 responsible for processing voter registrations, maintaining a roster of registered voters, dividing  
15 jurisdictions into precincts, designating polling places, mailing, receiving, and counting ballots,  
16 verifying signatures on mail ballots, and reporting final results to the Secretary. (Dkt. No. 72. at p.  
17 4 (citing Cal. Elections Code §§ 2102(a), 2183, 3000.5, 3017, 3019, 5150, 12220, 12280, and  
18 15375).)

19 However, the Secretary concedes that she is responsible for administering the provisions of  
20 the Elections Code and enforcing California's election laws and that she has the authority to adopt  
21 regulations to ensure the uniform application and administration of state election laws. (Dkt. No.  
22 72 at pp. 2-4 (citing Cal. Gov't Code § 12172.5).) Additionally, the Secretary may issue guidance  
23 documents to assist the counties in carrying out their duties under the Elections Code. (*Id.*)  
24 Moreover, if counties violate California's Elections Code, the Secretary is required to call the  
25 violation to the attention of the district attorney of the county or to the California Attorney  
26 General. (*Id.* at p. 5 (citing Cal. Gov't Code §§ 12172.5).) Lastly, the Secretary has the authority  
27 to certify voting systems and RAVBM systems. (*Id.* (citing Cal. Elec. Code §§ 19202(a),  
28 19281(a)).)

1 The Secretary does not dispute that she has this significant authority with respect to  
2 election laws. Instead, she makes two arguments. The first is that the Secretary does not have the  
3 authority to issue regulations and guidance that is contrary to state law and that California law  
4 does not permit electronic ballot returns. However, as discussed above, Plaintiffs allege that the  
5 ADA preempts the prohibition on electronic returns. If the Court were to issue a declaration in  
6 favor of Plaintiffs on this legal issue, then California law would not prohibit Plaintiffs' requested  
7 relief or the Secretary's related authority to issue such relief.

8 Second, relatedly, the Secretary argues that she could not require county election officials,  
9 who are not before the Court, to comply with guidance documents that are contrary to California  
10 statutory law. However, again, the Court assumes for purposes of this motion to dismiss that  
11 Plaintiffs are correct and that the ADA preempts California law prohibiting electronic ballot  
12 returns. The Secretary cites to *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015), for  
13 the proposition that "[t]here is no standing if, following a favorable decision, whether the injury  
14 would be redressed would still depend on 'the unfettered choices made by independent actors not  
15 before the courts.'" (Dkt. No. 76 at p.7.) However, again, if California law, as preempted by the  
16 ADA, does not prohibit electronic ballot returns, then the Secretary would have the authority to  
17 issue guidance and regulations that the counties would not have unfettered discretion to disregard.

18 Moreover, as Plaintiffs explained at the hearing, the Secretary is responsible for enforcing  
19 California's election law. If a county official ultimately ignored or violated valid guidelines and  
20 regulations issued by the Secretary, the Secretary has recourse. The Secretary could refer the  
21 county official to the district attorney of the county or to the California Attorney General for the  
22 violation or she could discharge the county official who refuses to comply.

23 Finally, the Secretary relies on *National Federation of the Blind of Alabama v. Allen*, 661  
24 F. Supp. 3d 1114, 1123 (M.D. Ala. 2023) to argue that Plaintiffs lack standing. However, the facts  
25 in *Allen* are materially different than those here. Significantly, in *Allen*, the state did not allow for  
26 all residents to vote remotely. Instead, absentee ballots were only provided to those who fell  
27 within certain categories and applied for an absentee ballot. *Allen*, 661 F. Supp. 3d at 1117.  
28 Moreover, voters with print disabilities in Alabama could only vote with electronic machines or

1 other auxiliary aids when they voted in person. There was no process for voters to use electronic  
2 machines or other auxiliary aids remotely. *Id.* The court noted that that the state legislature, not  
3 the Alabama Secretary of State, passed the laws that required domestic absentee voters to submit  
4 paper ballots and envelopes and provided the electronic voting option only for certain overseas  
5 voters pursuant to a Congressional mandate. *Id.* at 1121. Thus, the court found that the plaintiffs’  
6 “inability to cast electronic absentee ballots trace[d] to the Alabama Legislature, not the Secretary  
7 of State.” *Id.*

8 Additionally, the Alabama’s Secretary of State’s powers appear to differ significantly from  
9 the Secretary’s under California law. The court in *Allen* did not address whether the Alabama  
10 Secretary of State had any authority to issue guidance to the counties or play any roll in enforcing  
11 the state’s election laws. Moreover, with respect to issuing regulations, the court noted how  
12 limited the Alabama Secretary of State’s power was. After a legislative committee determined  
13 that overseas voting electronically was secure, the Alabama Secretary of State could only  
14 promulgate the rules already proposed by that legislative committee to ensure that such voting was  
15 secure. *Id.* at 1118, 1121-22 (“The Secretary can only act within the scope of his statutorily  
16 defined rulemaking authority. And the Legislature has not given the Secretary the authority to  
17 create rules – much less provide actual electronic ballots – to Plaintiffs.”). Furthermore, the court  
18 in *Allen* noted the significant role that the counties played in elections. The court observed that the  
19 Alabama legislature “kept responsibility for handling applications, ballots, and voter qualification  
20 in the [county absentee election managers] hands”, including verifying the identity of a voter,  
21 ensuring the security of the transmission, and accepting and recording the ballots. *Id.* at 1119.  
22 Lastly, and significantly, the court in *Allen* did not address the ADA, including what the impact  
23 would be if the court had determined that the state election laws prohibiting electronic voting by  
24 persons with print disabilities violated the ADA. Therefore, the Court finds that *Allen* does not  
25 assist the Secretary to show that Plaintiffs here lack standing.

26 Thus, while the Court may ultimately determine that California law prohibits the relief  
27 Plaintiffs seek or that, upon a further developed record, the Secretary cannot issue guidance or  
28 regulations to require that Plaintiffs be allowed to return their ballots electronically, at this




1 procedural stage the Court finds that Plaintiffs have alleged sufficient facts to show that they have  
2 standing.

3 **CONCLUSION**

4 For the foregoing reasons, the Court DENIES the Secretary's motion to dismiss.

5 **IT IS SO ORDERED.**

6 Dated: December 2, 2024

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8 SALLIE KIM  
9 United States Magistrate Judge

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