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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

SHIRLEY N. WEBER, et al.,

Defendants.

Case No. 2:24-cv-3750

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS (ECF 16)

Date: September 16, 2024
Time: 9:00 A.M.
Judge: Hon. Mark C. Scarsi
Action Filed: May 6, 2024

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Plaintiffs Judicial Watch, Inc. ("Judicial Watch") and the Libertarian Party of California ("LPCA") submit this memorandum of law in opposition to the motion to dismiss filed by Defendants Secretary of State Shirley N. Weber and the State of California. Doc. 16.

BACKGROUND

The National Voter Registration Act of 1993 ("NVRA" or the "Act") was enacted for two stated purposes: first, to "increase the number of eligible citizens who register to vote" and "enhance[]" their "participation … as voters in elections for Federal office"; and second, "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). The NVRA seeks to increase voter participation in several ways. It mandates, for example, that offices providing public assistance accept voter applications, and that applications for driver's licenses also serve as registration applications (giving the law its popular name, "Motor Voter"). 52 U.S.C. §§ 20504, 20506.

The NVRA's second goal, ensuring election integrity and accurate, current voter rolls, is embodied in Section 8, which is the subject of this lawsuit. 52 U.S.C. § 20507. It requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" a registrant's death or change in residence. *Id.* § 20507(a)(4). And it requires a state-designated "chief State election official to be responsible for coordination of State responsibilities" under the Act. *Id.* § 20509.

The NVRA provides that the registrations of those who have moved out of a jurisdiction may only be cancelled in two ways. First, those who confirm a change of address in writing are removed from the rolls. 52 U.S.C. § 20507(d)(1)(A). Second, registrants who are sent a "postage prepaid [] pre-addressed return card" by forwardable mail asking them to confirm their address (the "Confirmation Notice"), fail to respond to it, and then fail to "vote[] or appear[] to vote" for two general federal elections—basically, a period of from two to four years—are removed from the rolls. *Id.* § 20507(d)(1)(B) &

(d)(2). One who fails to respond to a notice is designated "inactive" for the duration of that statutory waiting period. 11 C.F.R. § 9428.2(d). Such a registrant may still vote during that period (52 U.S.C. § 20507(e)), which stops the NVRA removal process and returns the voter to "active" status. But unless that happens, states have no discretion about removing a registration once the inactive period is over. To the contrary, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 767 (2018) (citations omitted).

States are required to retain and provide "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." *Id*. § 20507(i). Although it does not list all the records this might include, the NVRA does set forth one specific example: "The records maintained . . . shall include lists of the names and addresses of all persons to whom [Confirmation Notices] are sent, and information concerning whether or not each such person has responded to the notice …" 52 U.S.C. § 20507(i)(2).

Depending on when a violation occurred, a person aggrieved by a violation of the NVRA may provide written notice to a state's chief election official either 90 or 20 days before bringing a civil suit. 52 U.S.C. § 20510(b)(1) & (2). No notice is necessary, however, if a violation occurs within 30 days prior to a federal election. *Id.* § 20510(b)(3).

As discussed below, the complaint alleges (1) that Defendants have failed to implement the NVRA's required "general program that makes a reasonable effort" to remove voters who have moved or died; (2) that Defendant Weber, who is California's chief State election official (*see* Cal. Elec. Code § 2402(a)) has failed in her duty to coordinate state responsibilities under the Act; and (3) that Defendants have failed to retain and provide to Plaintiffs NVRA-related records they are required to provide. The support for these allegations derives primarily from Defendants' own admissions in response to a survey conducted every two years by the federal Election Assistance Commission ("EAC") as it prepares a mandatory report to Congress; and in Defendants' correspondence with Plaintiffs. *See* Doc. 1 ¶¶ 13-14, 19-21, 23, 28, 46-76; 52 U.S.C. § 20508(a)(3); 11 C.F.R.

§ 9428.7. Defendants have moved to dismiss, arguing that Plaintiffs lack standing, that the Eleventh Amendment bars claims against Defendant State of California, and that Plaintiffs' claim concerning NVRA-related records was not preceded by proper notice and is unclear. Doc. 16. This motion should be denied.

STANDARDS GOVERNING THIS MOTION

In determining a motion to dismiss under Rule 12(b)(6), "courts must accept as true all 'well-pleaded factual allegations' … [and] draw all reasonable inferences in the light most favorable to the non-moving party." *Kingi v. Sag-Aftra*, No. 2:24-cv-1996-JLS-JC, 2024 U.S. Dist. LEXIS 126331, at *3 (C.D. Cal. July 17, 2024) (citations omitted). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at *4 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility means "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

Likewise, when a Rule 12(b)(1) motion "attacks subject-matter jurisdiction on the face of the complaint, the court assumes the factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor." *Aguilar v. Coast to Coast Comput. Prods.*, No. 2:23-cv-3996-MCS-E, 2024 U.S. Dist. LEXIS 56605, at *3 (C.D. Cal. Mar. 26, 2024) (citation omitted). The standard of facial plausibility "appl[ies] with equal force to Article III standing when it is being challenged on the face of the complaint." *Id.* (citations omitted). However, "in a factual attack," where a movant "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction … the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations omitted). In that case, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (citation and internal quotations omitted).

"[T]he Court may not dismiss a complaint without leave to amend unless 'it is

absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Kingi*, 2024 U.S. Dist. LEXIS 126331, at *4 (citation omitted).

I. PLAINTIFFS ALLEGE STANDING TO BRING THE CLAIMS IN THIS LAWSUIT UNDER SEVERAL DIFFERENT THEORIES.

To have standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). At the pleading stage, "the plaintiff must 'clearly … allege facts demonstrating' each element." *Id*. (citation omitted). An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (citing *Lujan*, 504 U.S. at 560). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist[,]" meaning that is "'real,' and not 'abstract.'" *Spokeo*, 578 U.S. at 340 (citations omitted). "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. An injury may be "fairly traceable" even if it is not the "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

In this case, Plaintiffs have alleged concrete and particularized injuries that are directly traceable to Defendants' alleged failures remove ineligible registrations from the rolls.

A. Plaintiff LPCA has pleaded traditional economic injuries due to Defendants' failure to comply with Section 8(a)(4) of the NVRA.

"[C]ertain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as … monetary harms." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (citing *Spokeo*); *Mack v. Resurgent Cap. Servs., L.P.*, 70 F.4th 395, 406 (7th Cir. 2023) ("money damages are almost always found to be concrete harm" (citation omitted)); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("economic injury is a quintessential injury upon which to base standing" (citations omitted)). "The injury may be minimal," as even "an identifiable trifle is sufficient to establish standing." *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (cleaned up)

(citing, *inter alia*, *U.S. v. Students Challenging Reg. Agency Proc's*, 412 U.S. 669, 689 n.14 (1973)); *see Jackson Mun. Airport Auth. v. Harkins*, 98 F.4th 144, 149 (5th Cir. 2024) (en banc) (Ho, J., concurring) ("there's no *de minimis* exception to economic injury under Article III") (citations omitted); *Mack*, 70 F.4th at 406 (standing under the Fair Debt Collection Practices Act based on a $3.95 postage fee).

Federal courts in this and other circuits have held that political candidates and parties can base Article III injuries on economic burdens. *See De La Fuente v. Padilla*, 930 F.3d 1101, 1104 (9th Cir. 2019) (likely cost to independent candidate of collecting signatures of 1% of voters conferred standing to challenge law); *Benkiser*, 459 F.3d at 586 (party had "direct standing" to challenge opposing candidate's late removal from the ballot that "would cause it economic loss"); *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 522-23 (7th Cir. 2017) (party had standing to challenge a "full slate" requirement that "raise[d] the cost of ballot access" to a minor party).

Plaintiff LPCA "is a registered political party in California and a state affiliate of the national Libertarian Party." Doc. 1 ¶ 5. It is devoted to "recruiting and maintaining [its] members and to electing candidates who espouse its principles." *Id*. LPCA "organize[s], select[s], and promote[s] the election of party standard bearers and others who promote its beliefs." *Id*. ¶ 89. To do this, "LPCA relies on California's voter rolls to identify in-state voters and to contact them and encourage them to assist the candidates it supports by learning about the party … volunteering, organizing, contributing, and voting." *Id*. ¶ 90. But its ability to contact voters "is made more difficult because California's voter rolls contain many outdated and ineligible registrations." *Id*. ¶ 91. Specifically, "Defendants' failure to timely remove ineligible registrants from California's voter rolls causes LPCA to waste significant time, effort, and money trying to contact voters … who no longer live at the registered address." *Id*. ¶ 92. Simply put, when LPCA tries to use Defendants' inaccurate registration list to contact voters, it ends up sending mail to addresses where voters no longer live and knocking on doors to reach voters who are no longer there. These allegations describe concrete, out-of-pocket, ongoing, monetary and resource costs,

particular to (paid by) LPCA, that are fairly traceable to Defendants' failure to perform voter list maintenance required by the NVRA. No more is needed to plead LPCA's organizational standing.

Defendants argue that the recent Supreme Court decision in *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024) weighs against LPCA's standing here. In that case, the Court rejected a claim of standing by medical associations who asserted that the FDA's rule on the abortion pill mifepristone caused them to use resources "drafting citizen petitions to FDA … engaging in public advocacy and public education," and "conduct[ing] their own studies" to "better inform their members and the public" about the drug's risks. *Id*. at 370. In the course of its ruling, the Court discussed the "diversion of resources" analysis originating in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), where a Virginia nonprofit was held to have standing to challenge discriminatory housing practices on the ground that they "frustrated … its efforts to assist equal access to housing" and made it "devote significant resources to identify and counteract" them. (*See* discussion in point I.B *infra*.) The Court noted that the plaintiff in *Havens*—unlike the medical associations in the case before it—was not just "an issue-advocacy organization," but "also operated a housing counseling service," and that the defendant's "actions directly affected and interfered with [the *Havens* plaintiff's] core business activities." *All. for Hippocratic Med*, 602 U.S. at 395; *see* Doc. 16 at 15-16.[1]

Seeking to apply that decision to the facts here, Defendants argue that LPCA "alleges only a resources diversion," and not one that impedes "LPCA's 'advocacy businesses.'" Doc. 16 at 17. They maintain that "LPCA can still contact all registered California voters, with its only possible harm being a non-qualifying diversion of resources." *Id*. By "non-qualifying," Defendants appear to mean a use of resources that does *not* constitute a "core business activit[y]" referred to in *All. For Hippocratic Med.*, 602 U.S. at 395.

This argument is fundamentally flawed in at least two ways. First, Defendants are mistaken that LPCA's economic loss can *only* be framed as a "diversion of resources"

[1] All citations to filed documents are to page numbers assigned by ECF, not to internal page numbers.

under *Havens*. Its injury is more traditional and straightforward. LPCA is a political party that spends money to reach voters, get out the vote on election day, and raise campaign funds. Because Defendants neglected their statutory duty to maintain California's voter rolls, and because LPCA relies on these rolls, the cost of performing these activities is substantially more expensive than if the rolls were accurate and current under the NVRA. The resulting economic injury is enough on its own to confer standing. There is no reason why Plaintiffs must *also* allege that the loss forced them to divert funds from other activities. Neither the Ninth Circuit in *De La Fuente*, nor the Fifth Circuit in *Benkiser*, nor the Seventh Circuit in *Libertarian Party of Ill*. (discussed *supra* at 5) cite *Havens* or discuss any "diversion of resources." In each case, the cost to the candidate or party was itself a sufficient basis for standing.

Second, Defendants badly mischaracterize LPCA's core activities as the "advocacy business[]." Doc. 16 at 17. To repeat, LPCA is a political party. Its objectives differ in crucial ways from those of issue advocacy organizations. As the Fifth Circuit observed, "a political party's interest in a candidate's success is not merely an ideological interest. Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests." *Benkiser*, 459 F.3d at 587 (citation omitted). LPCA seeks political success, and above all to have its candidates win elections. The well-known path to this goal involves contacting voters, convincing them to go the polls and vote for party candidates, and persuading supporters to contribute money and volunteer time for this work. These election-related tasks *are* LPCA's "core activities." *See*, *e.g.*, 52 U.S.C. § 30101(16) (campaign finance law defining "political party" as "an association, committee, or organization which nominates a candidate for election … whose name appears on the election ballot as [their] candidate"). Thus, even if LPCA were *required* to plead *Havens*-type standing based on a "diversion of resources" from its core activities, it has done so.[2]

Defendants next argument proceeds by misinterpreting Plaintiffs' allegation that

[2] *See* point I.B *infra*.

"LPCA's ability to contact California voters is made more difficult because California's voter rolls contain many outdated and ineligible registrations." Doc. 1 ¶ 91; *see* Doc. 16 at 17. Without any basis for doing so, Defendants contend that LPCA is confusing "outdated and ineligible" registrations with "inactive" registrations, supposedly because it "misunderstands California election law." *Id*. Defendants then assume that Plaintiffs' losses arose from their attempts to contact *inactive* voters. Doc. 16 at 18 ("Having chosen to request lists containing inactive voters and then spend money trying to contact those voters, LPCA cannot attribute its alleged 'waste' of resources to Defendants.").

None of this is accurate. Paragraph 91 of the complaint did not say (and Plaintiffs did not mean) "inactive" registrations. Doc. 1 ¶ 91. The "outdated and ineligible registrations" referred to in the complaint can be found in California's *active* voter file. The complaint emphasizes this by listing failures related to the sending of Confirmation Notices (Doc. 1 ¶¶ 68, 69), which necessarily go to registrations that are not yet on the inactive list; and by referring to counties with high *overall* registration rates, which include *active* registrations that are no longer eligible due to death or change of address (*id*. ¶ 40). There is simply no support in the complaint or the record for the contention that LPCA relied on inactive registrations when it tried to contact voters. In particular, this claim is *not* supported by the declaration Defendants submitted with their motion, which merely asserts that Plaintiffs acquired both active and inactive registration data in their last two data requests. *See* Doc. 16-1 ¶ 7.

Because Defendants' declaration does not actually "dispute[] the truth" of Plaintiffs' jurisdictional allegations, Plaintiffs do not believe it amounts to a "factual attack" to which they must respond with their own declarations. *See Safe Air For Everyone*, 373 F.3d at 1039. In the event the Court determines otherwise, however, Plaintiffs have submitted the Declaration of Adrian Malagon, Chair of the LPCA, as Exhibit 1. He confirms that bad registrations are common on California's *active* voter file, and that they cost the party money and resources. *Id*. ¶ 11. He also confirms that LPCA's candidates know not to rely on the inactive voter list to contact voters. *Id*. ¶ 10. And he makes clear that, even where

both active and inactive voter data are provided, it is easy to sort and segregate the data on that basis. *Id*. ¶ 8.

Finally, Defendants argue that LPCA's injury from inaccurate rolls cannot be redressed because the NVRA necessitates keeping registrants on the rolls "until certain requirements are met," *viz*., "that two federal elections pass between the sending of an NVRA notice to an individual and their removal." Doc. 16 at 19. "Because the Court could not order these voters' removal before the 2024 election," they argue, "LPCA's premature request for relief is not redressable." *Id*. This argument is ambiguous. If Defendants mean to say that relief must be immediate to be considered "redressable," there is no such requirement. "[E]ven an attenuated causal chain of events initiated by a favorable ruling suffices for redressability purposes, so long as the chain is likely to end in relieving the plaintiff's harm." *Vegan Outreach, Inc. v. Chapa*, 454 Fed. Appx. 598, 601 (9th Cir. 2011) (citing *Renee v. Duncan*, 623 F.3d 787, 797-98 (9th Cir. 2010) (describing plaintiffs' modest burden to show redressability)). And in any case Plaintiffs *can* be afforded short term relief. Voters who confirm a move and deceased and incapacitated voters can be removed immediately. 52 U.S.C. § 20507(c)(2)(B). After this November, a new tranche of registrations that will have been inactive for two federal elections can be removed. Greater information sharing between California's state and county election officials—who, it seems, are not always aware of what the other is doing (Doc. 1 ¶¶ 28, 60-62, 70, 71)—can lead to immediate increases in voter list accuracy. And LPCA's costs of contacting voters can be lowered immediately if Defendants provide an accurate list of Confirmation Notice recipients, which LPCA can use to identify voters the *State* believes have moved.

If, on the other hand, Defendants mean to argue that *there are no ineligible registrants who are overdue* for processing and removal—so that the removals "the Court could not order" (Doc. 16 at 19) simply refers to registrations subject to the ordinary workings of the NVRA—they are assuming facts in their favor, contrary to the standards governing a motion to dismiss. The implicit factual claim that there has been no failure to remove registrations is not only unsupported, it is abundantly contradicted by Plaintiffs'

allegations. The complaint alleges that 21 California counties, containing 22% of the State's population and almost 6 million registered voters, admitted removing a combined total of *11 registrations* under the NVRA's notice-and-waiting-period procedure in a two-year period; and that 16 of these counties admitted removing *zero* registrations in that time. Doc. 1 ¶¶ 50-53. It provides context for these numbers, alleging that they should not be that low (and should never be zero) and noting that 11.6% of Californians move each year, that 818,000 residents moved out of state in the most recent data year, and that Mariposa County, "with a comparatively miniscule" voter roll, "removed 294 registrations" under the notice-and-waiting-period procedure in the same two years, which "is, literally, an exponentially greater number than were removed" by all 21 identified counties. *Id*. ¶¶ 25-27, 55. It alleges that 16 counties, containing 28% of the State's population, admitted they did not know how many registrations were removed under the relevant procedure in those two years. *Id*. ¶¶ 60-61. It alleges that 21 counties had more registrations than voting-age citizens. *Id*. ¶ 40. It alleges a number of other problems. *Id*. ¶¶ 42-43, 57-59, 68-71.

In sum, the complaint alleges that Defendants have failed to comply with the list maintenance provisions of the NVRA. Plaintiff LPCA has alleged redressable, economic injuries arising from Defendants' failure. Accordingly, this Court has jurisdiction over the list maintenance claims in the complaint (Doc. 1, Count I). *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." (citations omitted)).

B. Both Plaintiffs have pleaded standing based on a diversion of resources to counteract Defendants' failure to comply with the NVRA.

As set forth above, LPCA has pleaded traditional standing based on the fact that it has endured tangible economic injuries due to Defendants' noncompliance with the NVRA, *viz*., an increase in the costs of LPCA's nuts-and-bolts electoral activities. But LPCA can also refer on the same increased costs to allege standing based on a diversion of its resources.

The Ninth Circuit has "recognized that an organization has 'direct standing to sue

where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose.'" *Nielsen v. Thornell*, No. 22-15302, 2024 U.S. App. LEXIS 16550, at *8 (9th Cir. July 8, 2024) (citation omitted). This "frustration must amount to a 'concrete and demonstrable injury to the organization's activities,' not 'simply a setback to [its] abstract social interests.'" *Id*. (citing *Havens*, 455 U.S. at 379).

As explained in the previous section, LPCA's core activities as a political party include identifying and contacting voters to "encourage them to assist" its candidates by "volunteering, organizing, contributing, and voting." Doc. 1 ¶ 90. Because LPCA uses Defendants' voter rolls to do this, and because those rolls are inaccurate due to Defendants' neglect, LPCA ends up wasting money. *Id.* ¶¶ 91-92. Thus, LPCA can claim standing under the doctrine of a diversion of resources, because Defendants' failure to properly maintain the State's voter rolls has "directly affected and interfered with" LPCA's "core business activities." *All. For Hippocratic Med.*, 602 U.S. at 395.

For its part, Judicial Watch alleges that its "concerns with California's list maintenance practices led it" to contact the State about these practices, to request documents concerning the State's compliance, "to analyze the State's responses," to "send its Notice Letter indicating" the intent to file a lawsuit, to "research and analyze" Defendants' responses, and to "conduct analyses of California's registration rates, removal rates, Confirmation Notice statistics, and inactive rates." Doc. 1 ¶ 84. The "substantial resources" expended as a result were for "staff time, investigating Defendants' failure" to comply with the NVRA, "communicating with California officials" and others about this failure, and "researching statements made by Defendants in their correspondence." *Id*. ¶ 85. These resource costs are alleged to be "distinct from and above and beyond Judicial Watch's regular, programmatic efforts to monitor" NVRA compliance. *Id*. ¶ 86. "Were it not for Defendants' failure to comply" with the NVRA, "Judicial Watch would have expended these same resources on its regular, programmatic activities or would not have expended them at all." *Id*. ¶ 87. These allegations state an injury due to a diversion of

resources. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789-790 (W.D. Tex. 2015) ("monitor[ing]" events, "compil[ing] statistics," "visits," and "discussions" before filing suit to address a failure to comply with the NVRA's list maintenance provisions supported organizational standing). Finally, like the plaintiffs in *Havens*—and unlike the plaintiffs in *All. For Hippocratic Med.*—Judicial Watch does more than public advocacy and education, as it litigates where necessary to enforce the NVRA. *See* Doc. 1 ¶¶ 77, 81, 84.

C. Plaintiff Judicial Watch alleged associational standing to represent its members who are California voters.

"[T]o have so-called associational standing" to sue on behalf of its own members, an organization must show "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to [its] purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Home Care Ass'n of Am. v. Bonta*, No. 21-15617, 2022 U.S. App. LEXIS 3954, at *3-4 (9th Cir. Feb. 14, 2022) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The complaint here alleges that "individual members of Judicial Watch who are lawfully registered to vote in California" are injured by Defendants' noncompliance with the NVRA, which "undermin[es] their confidence in the integrity of the electoral process, discouraging their participation in the democratic process, and instilling in them the fear that their legitimate votes will be nullified or diluted." Doc. 1 ¶ 80. This allegation states an injury that would allow Judicial Watch's members "standing to sue in their own right." *Hunt*, 432 U.S. at 343. This injury is based on the Supreme Court's observation that

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006); *see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (while "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent

significance, because it encourages citizen participation in the democratic process").

In *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012), Judicial Watch alleged that its members were injured by "Indiana's failure to comply with the NVRA list maintenance requirements because that failure 'undermin[es] their confidence in the legitimacy of the elections … and thereby burden[s] their right to vote.'" In denying a motion to dismiss for lack of standing, the court cited *Crawford* and reasoned that "[i]f the state has a legitimate interest in preventing" the undermining of voters' confidence, "surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm." *Id.* & 924 n.6 (finding that Judicial Watch had associational standing to represent members registered to vote in Indiana). Other courts have reached the same conclusion. *See Green v. Bell*, No. 3:21-cv-00493, 2023 U.S. Dist. LEXIS 45989, at *10 (W.D.N.C. Mar. 19, 2023) (claims that "North Carolina's 'inaccurate rolls' undermine [the plaintiffs'] confidence in the state's elections, which further 'burdens their right to vote[] … qualify as injuries in fact"); *Judicial Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1104 (D. Colo. 2021) ("undermined confidence and discouraged participation are [not] 'common to all members of the public.' … Nor are these fears speculative or hypothetical. … plaintiffs are not worried that their confidence *could* be undermined at some point in the future; their confidence is undermined now.") (citation omitted). *But see Am. Civ. Rights Union*, 166 F. Supp. 3d at 799-800, 803 (accepting standing based on diverted resources but rejecting standing based on a loss of voter confidence, noting disagreement with *King*).

Defendants argue that "Judicial Watch cannot establish standing via its members because it does not identify any member that has suffered harm." Doc. 16 at 14. But this has not been held to be a pleading requirement in this circuit. *See Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1116 & n.5 (9th Cir. 2024) (O'Scannlain, C.J., concurring) ("whether an organizational plaintiff asserting associational standing need specifically identify an injured member at the pleading stage is unsettled and at the center of a circuit split"). Given that Judicial Watch is a large organization with a large California

membership, moreover, Plaintiffs respectfully submit that the skepticism expressed on this issue in *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015), is convincing:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured.

In any case, if naming such an individual is determined to be required, a court should "grant[] leave to amend." *Id*.

Finally, Defendants argue that Plaintiffs' "theories depend on the actions of third parties—voters who have moved and are no longer properly registered theoretically casting a fraudulent vote," and that "Plaintiffs do not identify even a single instance of voting fraud that they allege is traceable to an NVRA violation." Doc. 16 at 15. Defendants have misconstrued the grounds for standing set forth in the complaint at ¶¶ 80-82. Plaintiffs *do not* allege that there has been, or imminently will be, any voter fraud or other actions by third parties, nor do they need to. Plaintiffs only allege that Judicial Watch's individual members have had their confidence in the integrity of the electoral process undermined, so as to discourage their willingness to vote and make them fear that any vote would be wasted. Doc. 1 ¶ 80. This was the basis for standing in *King*, *Green*, and *Griswold*.

II. SOVEREIGN IMMUNITY DOES NOT BAR NVRA CLAIMS AGAINST THE STATE OF CALIFORNIA.

Defendants maintain that claims against the State of California are barred by the doctrine of sovereign immunity. Doc. 16 at 26.[3] They cite three exceptions to that doctrine and argue that none applies in this case. *Id*.

But Defendants overlook a fourth exception. Sovereign immunity does not extend to circumstances "where there has been a 'surrender of this immunity in the plan of the convention.'" *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting Federalist No. 81 (Alexander Hamilton)). This "structural" waiver of sovereign immunity

[3] Defendants rightly did not move to dismiss claims against Defendant Weber on this ground, as she can be sued in her official capacity for injunctive relief. *See Ex parte Young*, 209 U.S. 123 (1908).

occurs where "the federal power at issue is complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention.'" *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 589 (2022) (quoting *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 508 (2021) (alteration in original)). In such cases, "no congressional abrogation [is] needed." *PennEast*, 594 U.S. at 501 (citation omitted) (alteration in original).

The Elections Clause of the U.S. Constitution is one example of such a structural waiver. It "invests the States with responsibility for the mechanics of congressional elections … but only so far as Congress declines to pre-empt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citations omitted); *see U.S. Term Limits v. Thornton*, 514 U.S. 779, 800-05 (1995) (applying the plan of the convention doctrine to the Elections and Electors Clauses); *Harkless v. Brunner*, 545 F.3d 445, 454–55 (6th Cir. 2008) ("In ratifying Article I, Section 4, the states … gave Congress plenary authority over federal elections."). Thus, when Congress exercised this "plenary authority" to pass the NVRA, the State of California already had waived sovereign immunity under the plan of the Convention.

Two rulings have considered whether sovereign immunity was waived under the plan of the Convention in the context of an NVRA claim. Both determined there was such a waiver. *See Ill. Conservative Union v. Ill.*, No. 20-cv-5542 (N.D. Ill. Sept. 28, 2021), Order, ECF 29;[4] *Public Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932 (C.D. Ill. 2022).

III. DEFENDANTS RECEIVED THE REQUIRED PRE-SUIT NOTICE OF VIOLATIONS OF THE NVRA'S PUBLIC RECORDS PROVISIONS.

"District courts applying Section 20510," the NVRA's statutory notice provision, "have found notice sufficient when it (1) sets forth the reasons that a defendant purportedly failed to comply with the NVRA, and (2) clearly communicates that a person is asserting a violation of the NVRA and intends to commence litigation if the violation is not timely addressed." *Pub. Interest Legal Found., Inc. v. Dahlstrom*, 673 F. Supp. 3d 1004, 1010 &

[4] The decision is currently unavailable on Lexis. The relevant order is attached as Exhibit 2.

n.46 (D. Alaska 2023) (collecting cases) (internal quotations omitted); *see King*, 993 F. Supp. 2d at 922 (letter "satisfied the pre-suit notice requirement" because, "when read as a whole, [it] makes it clear that Judicial Watch is asserting a violation of the NVRA and plans to initiate litigation if its concerns are not addressed in a timely manner"). "When courts have found notice to be insufficient, it typically is because the plaintiff failed to provide any notice at all." *Dahlstrom*, 673 F. Supp. 3d at 1010; *see id*. at 1011 (court found no case "in which a plaintiff sent a pre-litigation notice letter that a reviewing court found to be inadequate notice").

The written correspondence between Plaintiffs and Defendants in this case consists of four communications, all of which are attached to the complaint. On August 4, 2023, Plaintiff Judicial Watch sent Defendants an inquiry letter which, among other things, requested seven categories of documents pursuant to the NVRA's public records provision, 52 U.S.C. § 20507(i) ("Section 8(i)"). Doc. 1 ¶¶ 31-33 & at 20, 22-23. Request no. 2 of that letter sought records concerning Confirmation Notices that the NVRA specifically requires Defendants to maintain and provide. *Id*. ¶ 32 & at 22; *see* 52 U.S.C. § 20507(i)(2). Request no. 3 sought "[c]ommunications concerning the EAC's 2022 Election Administration and Voting Survey." Doc. 1 ¶ 33 & at 22.

On August 29, 2023, Secretary Weber's office responded by email. *Id*. at 25-26. It stated, regarding request no. 2: "We have no records responsive to your request." *Id*. ¶ 36 & at 25. Regarding request no. 3, it stated: "We will provide all non-privileged and non-exempt records relating to this request, however, these records are currently still under legal review." *Id*. ¶ 37 & at 25.

On October 30, 2023, Plaintiff Judicial Watch and LPCA sent a letter to Secretary Weber stating that it constituted statutory notice under 52 U.S.C. § 20510 of NVRA violations, including the failure to disclose the requested documents. *Id*. at 28-33. It pointed out, with respect to request no. 2, that it referred to "a category of documents that the NVRA specifically requires states to provide on request. Accordingly, your response effectively concedes a violation of the public records provisions of the NVRA." *Id*. at 31.

Regarding request no. 3, it simply stated: "Until responsive documents have been provided, this request has not been complied with." *Id*. at 32.

On March 11, 2024, California's Attorney General responded by letter on behalf of Secretary Weber. *Id*. at 35-49. Concerning request no. 2, he stated: "Without conceding that this information is encompassed by Section 8(i), the Secretary does not maintain the requested list." *Id*. at 48. For request no. 3, Defendants refused to provide responsive records, arguing that the "EAVS survey is not a program or activity undertaken by State or county election officials within the meaning of Section 8(i)." *Id*. In sum, Defendants' position was that they *could not* respond to request no. 2 and *would not* respond to request no. 3.

Plaintiffs clearly have met the statutory requirements for providing notice of a violation of Section 8(i) regarding their record requests 2 and 3.[5] Their notice letter "sets forth the reasons that [Defendants] purportedly failed to comply with the NVRA," namely, that they are not turning over records covered under Section 8(i), and it "clearly communicates that [Plaintiffs are] asserting a violation" and will sue. *Dahlstrom*, 673 F. Supp. 3d at 1010. Indeed, Plaintiffs pointed out to Defendants, both in the August 2023 request for records and in the October 2023 notice of violation letter, that keeping and providing a list of Confirmation Notice recipients and their responses was an explicit NVRA requirement. Doc. 1 at 22 & n.16; 29 & n.9; 31.

Defendants argue that Plaintiffs' did not give "notice of the specific violation and the 'reasons'" for a failure to comply with Section 8(i) (Doc. 16 at 21); that the notice letter "merely restated" the record requests at issue without providing either "further detail about why Judicial Watch believed the responses were non-compliant" or an "opportunity to attempt compliance" (*id*.); and that Plaintiffs did not "identify[] particular defects" in Defendants responses and "offer[ed] no specifics" (*id*. at 25). In short, they argue that

[5] Although the October 30, 2023 letter also alleged a violation based on Defendants' response to request no. 6 (Doc. 1 at 32), this allegation was not pursued in the complaint. Accordingly, Plaintiffs' allegations of Section 8(i) violations *only* concern Defendants' inadequate responses to request nos. 2 and 3. Defendants' discussion of request nos. 1, 4, 5, 6, and 7 are irrelevant. *See* Doc. 16 at 21, 25.

Plaintiffs' notice of violations of Section 8(i) was defective in that it did not provide sufficient detail.

Defendants' arguments are misguided. Plaintiffs demanded two sets of documents. Defendants said they were unable to provide one and unwilling to provide the other. The "specific violation" Plaintiffs identify is the failure to provide these documents. It is unclear what else there is to "specify," what words Defendants want to hear, or what further opportunity they seek. *Cf. Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (additional notice from individual plaintiffs was "unnecessary" and "futile" since the state "clearly indicate[d] that [it] would continue to refuse to comply with the Act until forced to do so by judicial intervention"). In fact, it seems that what Defendants actually want is the opportunity to argue with Plaintiffs about what is covered by Section 8(i), and perhaps to persuade them to accept less than they asked for, or to forgo their requests altogether. The NVRA does not mandate this opportunity.

In a similar vein, Defendants argue that Judicial Watch should have communicated further with them to in order to "resolve or narrow the issues." Doc. 16 at 22-23.[6] The NVRA simply does not require multiple communications. (Indeed, in some circumstances it requires no notice at all. *See* 52 U.S.C. § 20510(b)(3).) Nor does it require any explicit attempt to resolve or narrow issues. In the instant case, the NVRA required a notice of violation, which Plaintiffs provided. Courts should not insist on more. *See Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 774 (2018) (courts have "no authority to dismiss the considered judgment of Congress" expressed in the NVRA) (citing *Ariz. v. Inter Tribal Council of Arizona*, 570 U.S. 1, 16-17 (2013)); *see generally Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (where "the statute's language is plain, the sole function of the courts … is to enforce it according to its terms") (citation omitted).

[6] In support of this proposition Defendants rely on *Judicial Watch, Inc. v. North Carolina*, No. 20-cv-211-RJC-DCK, 2021 U.S. Dist. LEXIS 254725, 2021 WL 7366792 (W.D.N.C. Aug. 20, 2021). Doc. 16 at 23. Their relance is misplaced. This was a magistrate judge's memorandum and recommendation, which was never adopted by the district court because the case settled. *See Judicial Watch, Inc. v. N.C. State Bd. of Elections*, No. 20-cv-211-RJC-DCK, 2022 U.S. Dist. LEXIS 40041 (W.D.N.C. Mar. 7, 2022) ("The Court declines to adopt the Magistrate Judge's M&R (Doc. No. 61) because the motions considered by the M&R are moot[.]").

Finally, Defendants argue that Plaintiff LPCA cannot assert a Section 8(i) claim because, while the October 30, 2023 notice letter did mention LPCA, the initial August 4, 2023 letter requesting records did not. Doc. 16 at 24. However, in *Scott v. Schedler*, 771 F.3d 831, 835 (5th Cir. 2014), which Defendants cite in support, the would-be plaintiff was not even mentioned *in the notice letter*. LPCA *was* mentioned in the notice letter of October 30, 2023, so its absence from the initial request should not matter. In any event, as Defendants grudgingly admit (Doc. 16 at 20), Plaintiff Judicial Watch was identified in *both* letters, so the Section 8(i) claim can proceed even under Defendants' interpretation of the law.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: July 26, 2024

Respectfully submitted,

By: */s/ Eric W. Lee*
Eric W. Lee
Robert Patrick Sticht

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs Judicial Watch and Libertarian Party of California, certifies that this brief contains 6,938 words, which:

x_ complies with the word limit of L.R. 11-6.1.

__ complies with the word limit set by court order dated.

Dated: July 26, 2024

By: */s/ Eric W. Lee*
Eric W. Lee

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Plaintiffs' Memorandum and Points of Authorities in Opposition to Defendants' Motion to Dismiss** through this Court's CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 26, 2024

By: */s/ Eric W. Lee*
Eric W. Lee