

1 ROB BONTA  
Attorney General of California  
2 MARK R. BECKINGTON  
Supervising Deputy Attorney General  
3 JANE E. REILLEY  
Deputy Attorney General  
4 NICHOLAS R. GREEN  
Deputy Attorney General  
5 State Bar No. 323959  
455 Golden Gate Avenue, Suite 11000  
6 San Francisco, CA 94102-7004  
Telephone: (415) 510-4400  
7 Fax: (415) 703-5480  
E-mail: Nicholas.Green@doj.ca.gov  
8 *Attorneys for Defendant*  
*California Secretary of State*  
9 *Shirley N. Weber, Ph.D.*

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 **CALIFORNIA COUNCIL OF THE**  
15 **BLIND, ET AL.,**

16 Plaintiffs,

17 v.

18 **SHIRLEY N. WEBER, PH.D.,**

19 Defendant.  
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Case No. 3:24-cv-01447-SK

**DEFENDANT'S NOTICE OF MOTION &  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT PURSUANT  
TO FED. R. CIV. P. 12(b)(1)**

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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**NOTICE OF MOTION & MOTION****TO THE COURT, THE PARTIES, AND ALL COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that at 9:30 a.m. on October 21, 2024, at the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Courtroom C, 15th Floor, Defendant California Secretary of State Shirley N. Weber, Ph.D. (the “Secretary”), will and hereby does move to dismiss Plaintiffs’ First Amended Complaint under Federal Rule of Civil Procedure 12(b)(1).

The Secretary makes this motion on the ground that the Court lacks jurisdiction because Plaintiffs lack Article III standing. Specifically, the Court cannot redress Plaintiffs’ claimed injuries through any order in this action.

This Motion is based on this Notice of Motion and Motion to Dismiss; the accompanying Memorandum of Points and Authorities; all pleadings and papers on file in this action; any evidence or materials that may be presented at the hearing; the oral argument of counsel; and upon such additional matters as the Court may deem appropriate.

Dated: September 13, 2024

Respectfully submitted,

ROB BONTA  
Attorney General of California  
MARK R. BECKINGTON  
Supervising Deputy Attorney General  
JANE E. REILLEY  
Deputy Attorney General

/s/ Nicholas R. Green  
NICHOLAS R. GREEN  
Deputy Attorney General  
Attorneys for Defendant  
California Secretary of State  
Shirley N. Weber, Ph.D.

## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION

After Defendant, California Secretary of State Shirley N. Weber, Ph.D. (the “Secretary”), moved to dismiss the original complaint in this action, Plaintiffs California Council of the Blind, National Federation of the Blind of California, Christopher Gray, Russell Rawlings, and Vita Zavoli (collectively, “Plaintiffs”) amended their pleadings. Apparently recognizing the strength of the Secretary’s initial motion, Plaintiffs seek to cure their standing deficiencies through a limited set of new allegations in the First Amended Complaint (“FAC”). Fundamentally, however, Plaintiffs’ FAC presents nothing new beyond a sweepingly expanded request for injunctive relief that Plaintiffs now appear to acknowledge is at odds with carefully calibrated existing state law.

But asking the Court to micromanage the State’s mail-ballot processes through a significantly more disruptive injunction does not change the fact that the parties Plaintiffs really seek to bind—California’s fifty-eight counties—remain absent from this litigation. Plaintiffs cannot remedy that basic problem through artful pleading and, if anything, the FAC shows in several ways that Plaintiffs cannot establish redressability without including the counties as parties.

**First**, Plaintiffs persist in contending that the Secretary has authority to certify or otherwise make available some form of electronic ballot return for voters with print disabilities, but merely asserting that the Secretary has such power doesn’t make it true. None of Plaintiffs’ new allegations change the fact that the Secretary simply lacks authority under the Elections Code to act on their requested relief—as this Court previously held when it denied Plaintiffs’ motion for preliminary injunction. **Second**, Plaintiffs allege that the Secretary has regulatory power to “ensure the uniform application and administration of state election laws[,]” Cal. Gov’t Code § 12172.5(d), ignoring the fact that the Secretary’s regulatory power goes only as far as “state election laws” permit, and that this Court already held that section 12172.5 does not give the Secretary authority to provide the relief Plaintiffs are seeking. **Third**, Plaintiffs suggest that the Secretary could issue guidance directing the counties to make some form of electronic return

1 available, but Plaintiffs’ new allegations do nothing to improve the likelihood that the counties  
2 would comply with any court order directed *to the Secretary*.

3 Ultimately, the parties agree that if the Court were to order Plaintiffs’ requested alterations  
4 to California’s vote-by-mail program, the Secretary would “play an essential role[.]” FAC, ECF  
5 No. 71, ¶ 32. But the presence of only one necessary party does not mean that Plaintiffs’ FAC  
6 sufficiently establishes redressability. For reasons known only to Plaintiffs, they have chosen to  
7 omit the fifty-eight other parties that *actually administer* California’s vote-by-mail program. That  
8 defect remains fatal; only an order from this Court requiring *each county* to implement Plaintiffs’  
9 proposed alteration would provide Plaintiffs with the relief they seek.

10 Plaintiffs’ revised prayer for relief is revealing: they ask the Court to order the Secretary to  
11 “[i]nstruct county elections officials” and then to issue “any other necessary guidance” and then  
12 to “[m]onitor individual counties” for compliance. FAC, Prayer ¶ 113. In effect, Plaintiffs seek to  
13 shortcut their litigation by asking the Court to supervise county elections officials *through* the  
14 Secretary of State. The constitutional standing doctrines do not permit this kind of maneuvering,  
15 and the Court should dismiss this action for lack of standing. *See* Fed. R. Civ. P. 12(h)(3) (“If the  
16 court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the  
17 action.”).

## 18 **II. STATEMENT OF THE ISSUES PRESENTED**

19 1. Whether Plaintiffs have adequately alleged their standing to sue under Article III of  
20 the United States Constitution, where the Court cannot redress their claimed injuries through any  
21 order in this action?

## 22 **III. FACTUAL BACKGROUND**

### 23 **A. California’s Elections System**

24 Three separate sources of authority establish and regulate California’s elections system: the  
25 Legislature, the State’s fifty-eight counties, and the Secretary of State.

#### 26 **1. The Legislature’s plenary power.**

27 Broadly speaking, the California Constitution vests the Legislature with plenary power to  
28 issue uniform rules for the conduct of elections. *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.”). The Legislature’s state-wide policy choices and the rules that flow from them are reflected in the Elections Code, which provides a comprehensive set of generally applicable provisions governing elections in California. *See generally* Cal. Elec. Code § 1.<sup>1</sup>

## 2. The counties’ responsibility for administering elections.

When it comes to administering elections, however, California’s system is at its heart a local one. The Elections Code defines an “[e]lections official” as a “clerk or any person who is charged with the duty of conducting an election,” including “[a] county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state.” § 320. “Elections officials”—*i.e.*, local and county officials—are responsible for, among other things: processing voter registrations (§ 2102(a)); maintaining a roster of registered voters (§ 2183); dividing their jurisdiction into precincts (§ 12220); designating polling places (§ 12280); mailing ballots to every registered voter in advance of elections (§ 3000.5); receiving mail ballots (§ 3017); verifying signatures on mail ballots (§ 3019); counting both in-person and mail ballots (§ 15150); and reporting final results to the Secretary of State (§ 15375).

## 3. The Secretary’s role.

As the state’s chief elections officer, the Secretary of State is charged with “administer[ing] the provisions of the Elections Code[,]” as well as seeing that “elections are efficiently conducted and that state election laws are enforced.” Cal. Gov’t Code § 12172.5(a); *see also* FAC ¶¶ 25–27. Likewise, the Secretary has the authority to “adopt regulations to ensure the uniform application and administration of state election laws.” *Id.* § 12172.5(d); *see also* FAC ¶ 29. The Secretary may assist local county elections officials in carrying out their duties under the Elections Code, and she does this in various ways, including by issuing guidance documents known as CCROVs, *see* FAC ¶¶ 30–31, but it is ultimately up to the counties to comply with the statutory rules applicable to them. When the Secretary believes a local elections official is not in compliance

<sup>1</sup> Except as otherwise indicated, all statutory citations are to the California Elections Code.



1 with the Legislature’s requirements as reflected in the Code, she is encouraged to “assist the  
 2 county elections officer in discharging the officer’s duties.” § 12172.5(b); *see also* FAC ¶ 28. If  
 3 “the Secretary of State concludes that state election laws are not being enforced, the Secretary of  
 4 State shall call the violation to the attention of the district attorney of the county or to the  
 5 Attorney General.” *See id.*; *see also* FAC ¶ 28.

6 The Legislature has also charged the Secretary with certifying certain components of the  
 7 State’s electoral machinery, including (among others) voting systems,<sup>2</sup> electronic poll books, and  
 8 Remote Accessible Vote-by-Mail (“RAVBM”) systems. *See* §§ 19202(a) (voting systems);  
 9 2550(b) (electronic poll books); 19281(a) (RAVBM systems); *see also* FAC ¶ 42 (citing  
 10 Elections Code provisions governing RAVBM certification). Importantly, although the Secretary  
 11 has authority to *certify* these features of the election system, the Elections Code does not provide  
 12 the Secretary with the authority to order a county to *implement* any given system. Instead,  
 13 individual counties are free to choose among certified systems and, so long as their choice  
 14 complies with the Elections Code, they may choose not to offer a particular certified system.

#### 15 **B. California’s Vote-by-Mail System**

16 California is a leader in ballot access and, unlike other jurisdictions, permits any registered  
 17 voter to submit their ballot by mail; the law imposes no limitation on the categories of voters who  
 18 may use the program and voters need not submit an application. *See* FAC ¶ 41; *see also* § 3003.  
 19 Indeed, California law requires local county elections officials to automatically mail a ballot to  
 20 every active registered voter in advance of each election. *See id.* ¶ 42; *see also* § 3000.5.

21 The Elections Code sets out three ways most voters may return a mail ballot to their local  
 22 county elections office: (1) in person; (2) using a mail ballot drop box location; or (3) by placing  
 23 the ballot in the U.S. Mail. *See id.*; *see also* § 3017(a)(1). The Elections Code generally requires  
 24 that the voter place the completed ballot in an “identification envelope,” which the voter must  
 25 then “sign . . . in the voter’s own handwriting[.]” § 3011(a). When a local county elections

26 <sup>2</sup> A “voting system” is defined in the Elections Code as “a mechanical, electromechanical, or  
 27 electronic system and its software, or any combination of these used for casting a ballot,  
 28 tabulating votes, or both.” § 362. In other words, voting systems are the systems used at polling  
 places and mail-ballot counting centers to record voter choices and count votes.

1 official receives a mail ballot identification envelope, the official must compare the signature on  
2 the envelope with a signature on file for the voter to confirm the mail ballot's authenticity. *See*  
3 *generally* § 3019. When a voter's signature does not compare to the signature on file, or when the  
4 voter simply forgets to sign the identification envelope, the Elections Code provides a mechanism  
5 for the voter to "cure" the deficiency by submitting a separate signature to their elections official.  
6 *See* § 3019(d)–(e).

7 California has also embraced RAVBM systems, which increase accessibility for voters. *See*  
8 FAC ¶ 42. In contrast to a "voting system" used by county elections offices at polling places and  
9 vote counting centers for casting and tabulating votes, California law defines an RAVBM as a  
10 "mechanical, electromechanical, or electronic system and its software that is used *for the sole*  
11 *purpose of marking an electronic vote by mail ballot* for a voter who shall print the paper cast  
12 vote record to be submitted to the elections official." § 303.3 (emphasis added); *see also* FAC  
13 ¶ 35. Using an RAVBM system, voters may "receive, read, and mark their ballot electronically on  
14 their own device, such as a personal computer," and may utilize "assistive technology, allowing  
15 voters with disabilities to use, for example, a screen reader or a sip-and-puff device to read and/or  
16 mark their ballot." FAC ¶ 42. Any California voter may use their county's certified RAVBM  
17 system to receive and mark a blank ballot. *See id.*; *see also* § 3016.7. Voters who choose to use an  
18 RAVBM system must submit their paper cast vote record to their local county elections office in  
19 one of the three ways authorized for all mail ballots. *See id.* The Secretary has statutory authority  
20 to "adopt and publish standards and regulations governing the use of remote accessible vote by  
21 mail systems," and must ensure that RAVBM systems are, among other things, "safe from fraud  
22 or manipulation." §§ 19283(a), (b)(3); *see also* FAC ¶ 33.

23 The Elections Code provides a narrow carve-out from the normal mail ballot procedure for  
24 certain voters in the military or residing overseas. *See* FAC ¶ 42. Those voters may receive their  
25 blank ballots electronically, including by using the RAVBM system, *see* § 3105, and may also  
26  
27  
28

1 return their ballots by traditional facsimile transmission. *See* § 3106. The Elections Code does not  
 2 authorize any other category of voters to return their ballots by facsimile.<sup>3</sup>

### 3 **C. The Elections Code Forbids Internet Voting**

4 The Elections Code reflects the California Legislature’s bright-line policy choice to forbid  
 5 all forms of Internet voting. As the Court has already recognized, the Code does not authorize *any*  
 6 category of voters (including overseas and military voters) to return marked ballots by electronic  
 7 facsimile (“e-fax”) or by any other means connected to the Internet. *See* Order Denying Plfs.’  
 8 Mot. for Prelim. Inj. (“PI Order”), ECF No. 60, at 13 (“the Court cannot find that the California  
 9 Elections Code presently allows qualified military and overseas voters to return their ballots  
 10 through electronic facsimiles”). Indeed, California law explicitly prohibits any voting system—  
 11 the systems used for casting and tabulating votes—from connecting to the Internet or having any  
 12 wireless capabilities. *See* § 19205.

13 Similarly, the use of any RAVBM system that could transmit voter choices over the  
 14 Internet is prohibited. § 19295(a). RAVBMs also cannot be used for returning a voter’s choices  
 15 to county election officials and may not connect to a system that actually casts or tabulates votes  
 16 (*i.e.*, a voting system). § 303.3 (“[a] [RAVBM] system shall not be connected to a voting system  
 17 at any time.”).

### 18 **D. Plaintiffs’ Allegations and Requested Relief**

19 Plaintiffs include three individual California voters with print disabilities, *see* FAC ¶¶ 19–  
 20 21, which Plaintiffs define as “disabilities that prevent a voter from reading, marking, holding,  
 21 handling, and/or manipulating a paper ballot privately and independently.” *Id.* ¶ 2. As an  
 22 example, Plaintiffs assert that “[b]lindness is one type of print disability.” *Id.* Plaintiffs further  
 23 allege that “[p]rint disabilities also include certain visual impairments and certain disabilities that  
 24 cause dexterity impairments where the nature and degree of those impairments prevent the  
 25 aforementioned actions.” *Id.* Organizational Plaintiffs California Council of the Blind and the

26  
 27 <sup>3</sup> Plaintiffs plead a variety of *legal conclusions* related to the facsimile return option for military  
 28 and overseas voters, *see, e.g.*, FAC ¶¶ 43–44, but those statements are not factual allegations and  
 are, in any event, directly contrary to the Court’s findings in its order denying Plaintiffs’ motion  
 for a preliminary injunction. *See* Order Denying Plfs.’ Mot. for Prelim. Inj., ECF No. 60, at 13.

1 National Federation of the Blind of California allege that their membership consists of “blind and  
2 visually impaired individuals[.]” *Id.* ¶¶ 22–23.

3 Although Plaintiffs concede that California’s vote-by-mail program provides them the  
4 ability to receive, review, and mark their vote-by-mail ballots completely privately and  
5 independently, FAC ¶¶ 7, 42, 55, they nevertheless assert that the program “excludes and  
6 discriminates against individuals with print disabilities.” *Id.* ¶ 6. Specifically, Plaintiffs allege that  
7 “they require sighted and/or other physical assistance to perform one or more of the required  
8 paper-based steps” after completing their ballot electronically, like placing the ballot in an  
9 envelope and affixing their signature to the outside. *Id.* ¶ 54. Each Plaintiff asserts that these  
10 aspects of the vote-by-mail program cause them irreparable harm, *id.* ¶¶ 71–75, and violate the  
11 Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act, and California  
12 Government Code § 11135. *Id.* ¶¶ 76–110.

13 In addition to declaratory relief and attorneys’ fees, *see* FAC, Prayer ¶¶ 111–112, 114, the  
14 FAC seeks an expansive, multi-part injunction. First, Plaintiffs ask the Court to order the  
15 Secretary to “instruct *county elections officials* that *they* must allow voters with print disabilities  
16 to return their vote-by-mail ballots via an accessible electronic method[.]” *Id.* Prayer ¶ 113  
17 (emphasis added). Plaintiffs, somewhat contradictorily, also appear to ask the Court to order the  
18 *Secretary* to “[m]ake available to voters with print disabilities accessible electronic ballot return  
19 procedures[.]” *Id.* Plaintiffs further ask the Court to require the Secretary to “[n]otify county  
20 elections officials of the injunctive relief order[.]” “[i]ssue any other necessary guidance to  
21 county elections officials[.]” and “[m]onitor individual counties’ provision of electronic vote-by-  
22 mail ballot return methods” (despite their request that the *Secretary* make such methods  
23 available). *Id.*

#### 24 **IV. LEGAL STANDARDS**

25 Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of  
26 constitutional standing. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (“lack of  
27 Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of  
28 Civil Procedure 12(b)(1).” (emphasis omitted)).

As “[t]he party invoking federal jurisdiction[,]” Plaintiffs bear the burden of establishing their standing under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). “A plaintiff has standing only if he can ‘allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.’” *California v. Texas*, 593 U.S. 659, 668–69 (2021) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Plaintiffs must support each of these “irreducible minimum” requirements “in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 560–561. At the motion to dismiss stage, the court accepts the material allegations in the FAC as true and construes them in favor of the party asserting jurisdiction. *Maya*, 658 F.3d at 1068.

## V. ARGUMENT

“Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury.” *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). “To establish redressability, a plaintiff must show that it is ‘likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan*, 504 U.S. at 561); *see also Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (“Redress need not be guaranteed, but it must be more than merely speculative.” (internal quotation marks omitted)). Here, Plaintiffs’ claimed injuries flow from the provisions of the Elections Code that require them to sign their identification envelopes and return their mail ballots in paper form. *See, e.g.*, FAC ¶¶ 54, 71–75. For relief, Plaintiffs appear to request that the Court order the Secretary to provide an electronic return mechanism and that she instruct the counties to accept ballots voters submit using this method.

Despite the fact that they have asserted a number of legal conclusions in the FAC and dramatically expanded the scope of their proposed injunction, at bottom Plaintiffs still seek relief that the Secretary (1) has no authority to provide and (2) no power to implement in practice. *See* PI Order at 11–16. For that reason, the Court cannot redress Plaintiffs’ injuries through this lawsuit and should dismiss the FAC.

**A. The Secretary does not have authority to “make available” the system Plaintiffs seek.**

Because an order directed to a party that is powerless to implement it does nothing to resolve a plaintiff’s injury, “if the wrong parties are before the court . . . the plaintiff lacks standing.” *Gonzales*, 688 F.2d at 1267. Here, Plaintiffs request, among other things, that the Court order the Secretary to “make available to voters with print disabilities accessible electronic ballot return procedures[.]” FAC, Prayer ¶ 113. But the Secretary—on her own—cannot provide the relief Plaintiffs seek in their FAC because the Elections Code is clear that the Secretary *cannot* simply make an electronic return system available.

To the extent Plaintiffs seek—as the plain language of their FAC appears to suggest—an order directing the Secretary to actually develop and implement an electronic return method on her own, that is beyond her power. Indeed, even Plaintiffs acknowledge that the Secretary’s powers are limited to *certification* of elections infrastructure. *See, e.g.*, FAC ¶¶ 32–33, 42, 63. Plaintiffs likewise admit that “county elections officials must choose a system that the California Secretary of State has certified or conditionally approved.” *Id.* ¶ 34. The Elections Code does not contemplate that the Secretary herself will develop and implement ballot return methods, and then order the counties to adopt them. Plaintiffs’ original complaint acknowledged this reality when it asked the Court to order the Secretary to “certify” a system of electronic ballot return. *See* Compl, ECF No. 1, Prayer ¶ 79.

To the extent that, despite their rewritten prayer for relief, Plaintiffs still really seek the Secretary’s *certification* of an electronic ballot return method, the FAC provides no new basis for concluding that the Secretary has the authority to do so. Most of Plaintiffs’ new “allegations” are, in fact, simply attorney argument that this Court has already rejected. *See* PI Order at 11–13. Instead, as the Secretary has explained numerous times, and the Court has found, the Elections Code itself limits the ways voters like Plaintiffs may return mail ballots to three: (1) in person delivery; (2) ballot drop boxes; and (3) the U.S. Mail.<sup>4</sup> *See* § 3017(a)(1). In other words, the

<sup>4</sup> Plaintiffs allege that they reside in California and do not assert that they are temporarily located outside the county in which they reside or that they serve on active duty in the military. *See* FAC

(continued...)

Code’s exclusion of electronic return from the list of acceptable means of mail ballot return makes clear that electronic return is *not* an authorized method. *See, e.g., Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (noting there is “a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.” (internal quotation marks omitted)); *see also Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993) (“The expression of some things in a statute necessarily means the exclusion of other things not expressed.”). Plaintiffs’ allegation that it is the *Secretary* who has “denied Plaintiffs and other voters with print disabilities one of the methods of ballot return—an online portal—that would give them full and equal access” to the vote-by-mail program thus misses the mark; it is the Elections Code itself that provides the rules governing the vote-by-mail program’s ballot return methods. *See* FAC ¶ 36.

In their FAC, Plaintiffs continue to rely on the Secretary’s authority to certify RAVBM systems, and her corresponding authority to promulgate related regulations, as a basis for her ability to certify an electronic ballot return method. *See* FAC ¶¶ 33–34, 63. But the system Plaintiffs ask the Court to impose is by definition *not* an RAVBM system under California law so these provisions cannot serve as a basis for the Secretary’s authority. RAVBM systems may be “used for the sole purpose of *marking* an electronic vote by mail ballot for a voter who shall *print the paper cast vote record* to be submitted to the elections official.” § 303.3 (emphasis added). The Secretary is in fact specifically prohibited from certifying any RAVBM system that *could* transmit voter choices over the Internet. § 19295. In the same way, the Secretary is forbidden from certifying any voting system that connects to the Internet or which has wireless capabilities. § 19205. Thus, to the extent Plaintiffs allege that there are products—which Plaintiffs label RAVBM systems—which provide for electronic ballot return, *see, e.g.,* FAC ¶ 63, those systems are definitionally *not* RAVBM systems in California and the Secretary remains powerless to certify their use.

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¶¶ 19–21. Based on the FAC’s allegations, Plaintiffs are accordingly ineligible to use the facsimile return option available to overseas and military voters. *See* § 3106.



1       The same is true of Plaintiffs’ other proposed means of compliance with their requested  
 2 injunction. They suggest that the Secretary could authorize “an email return option[,]” FAC ¶ 61,  
 3 but notably fail to identify *any* grant of legislative authority that permits the Secretary to authorize  
 4 that method of ballot return. Likewise, Plaintiffs propose a “fax return option” and baldly assert  
 5 that “California already has an e-return option for certain military and overseas voters, who are  
 6 permitted to return their ballots via fax, including e-fax.” *Id.* ¶ 62. But this allegation flatly  
 7 contradicts this Court’s express holding in its order denying Plaintiffs’ motion for a preliminary  
 8 injunction: “the Court cannot find that the California Elections Code presently allows qualified  
 9 military and overseas voters to return their ballots through electronic facsimiles.” PI Order at 13.

10       The Secretary is not free to ignore the Elections Code’s unambiguous limitations on the  
 11 acceptable methods of ballot return. Although Plaintiffs point to the Secretary’s statutory  
 12 authority to “adopt regulations to ensure the uniform application and administration of state  
 13 election laws,” FAC ¶ 29 (citing Cal. Gov’t Code § 12172.5(d)), that grant of authority is far from  
 14 a blank check permitting the Secretary to enact regulations that are directly contrary to self-  
 15 executing provisions of the Elections Code. Under black-letter California law, “[a]dministrative  
 16 action that is not authorized by, or is inconsistent with, acts of the Legislature is void.” *Ass’n for*  
 17 *Retarded Citizens v. Dep’t of Developmental Servs.*, 38 Cal. 3d 384, 391 (1985); *see also*  
 18 *Physicians & Surgeons Lab’ys, Inc. v. Dep’t of Health Servs.*, 6 Cal. App. 4th 968, 982 (1992)  
 19 (“regulations that alter or amend the statute or enlarge or impair its scope are void.”). Because the  
 20 Secretary simply lacks the authority to issue the kind of certification that Plaintiffs seek, the Court  
 21 is “unable to grant the relief that relates to the harm” and Plaintiffs lack standing. *Gonzales*, 688  
 22 F.2d at 1267.

23       *National Federation of the Blind of Alabama v. Allen* is instructive. There, a federal court  
 24 considered a very similar ADA challenge to Alabama’s absentee voting rules and concluded that  
 25 the plaintiffs lacked standing. *See* 661 F. Supp. 3d 1114, 1123 (N.D. Ala. 2023). The *Allen* court  
 26 emphasized that, under Alabama law, the Secretary of State lacked “the authority to promulgate  
 27 rules to provide an electronic voting option to *any* domestic voters[.]” *Id.* at 1121 (emphasis in  
 28 original). The Court further observed that the Alabama Secretary of State’s rulemaking authority



1 “is limited by legislative directives.” *Id.* at 1122. Just so here; the Secretary lacks authority to  
 2 certify an electronic return method and cannot, accordingly, provide Plaintiffs with that form of  
 3 relief.

4 **B. Any order the Court might issue in this case will not bind the counties.**

5 Even if the Secretary could “certify” an electronic ballot return option for voters with print  
 6 disabilities—and she cannot—Plaintiffs have still failed to demonstrate redressability because it is  
 7 speculative whether California’s fifty-eight distinct, independent county registrars of voters  
 8 would accept ballots submitted through such a certified system even if the Secretary instructed  
 9 them to do so.

10 Where “a favorable judicial decision would not require the defendant to redress the  
 11 plaintiff’s claimed injury, the plaintiff cannot demonstrate redressability, unless she adduces facts  
 12 to show that the defendant or a third party are nonetheless likely to provide redress as a result of  
 13 the decision.” *M.S.*, 902 F.3d at 1083 (internal citations omitted). In other words, “the ‘likely’  
 14 standard is altered somewhat when third parties not before the court must change their behavior in  
 15 order for any injury suffered to be redressed.” *Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir.  
 16 2009).

17 Counties are responsible for distributing, collecting, and counting mail ballots. *See*  
 18 §§ 3000.5; 3017; 3019; 15101; 15109; 15302. Importantly, nothing in the Elections Code  
 19 *requires* a county to adopt any particular certified system. So, California counties could simply  
 20 choose not to implement a “certified” e-return system, the Secretary’s “instructions” to the  
 21 contrary notwithstanding. Instead, they could require voters in their jurisdictions to use one of the  
 22 three methods that the Elections Code permits (in-person delivery, ballot drop boxes, and the  
 23 mail). And as explained in detail above, an electronic return option would run counter to clear  
 24 statutory limitations in the Elections Code.

25 Plaintiffs assert in the FAC that the Secretary may issue guidance memoranda to counties  
 26 and identify a recent memo related to RAVBM systems. *See, e.g.*, FAC ¶ 31. They contend that  
 27 the Secretary could “provide guidance” to the counties with respect to a judicially mandated  
 28 electronic return method. *See, e.g.*, FAC ¶ 62. But Plaintiffs do not allege any facts that suggest

all fifty-eight counties would heed the Secretary’s guidance, particularly when that guidance would direct the counties to violate clearly established statutory law. In other words, even on the face of the FAC, it is speculative whether the relief Plaintiffs seek would result in any meaningful amelioration of their claimed injuries. Where actual relief is contingent upon the uncertain conduct of third parties in response to an equitable order, courts conclude that Plaintiffs lack standing. Two district court decisions on elections issues in Arizona provide good examples.

In *Arizonans for Fair Elections v. Hobbs*, plaintiffs challenged Arizona’s requirement that electors must sign ballot initiative petitions in the physical presence of another person who in turn is required to submit an affidavit verifying the signatures on the petition. *See* 454 F. Supp. 3d 910, 913–14 (D. Ariz. 2020), *appeal dismissed* 2020 WL 4073195, at \*1 (9th Cir. May 19, 2020). Those requirements are present in the Arizona constitution, but the Arizona Legislature also codified them in corresponding statutory provisions. *See id.* Plaintiffs challenged only the statutory requirements and argued that, if the Court struck them down and ordered the use of an electronic signature gathering system, the Arizona courts would conclude that the electronic signature system was in substantial compliance with the constitution. *See id.* at 915, 917–18.

The district court, however, concluded that it was “entirely speculative” whether the Arizona courts would agree with the challenger’s view of the Arizona constitution, highlighting additional federalism concerns with resolving that issue in the context of a motion for injunctive relief in federal court. *See id.* at 919–920. Because of the uncertainty regarding the state courts’ resolution of the remaining constitutional question, and the corresponding uncertainty with respect to whether plaintiffs would be permitted to use the electronic signature gathering system at all, the Court dismissed the action for lack of redressability. *See id.* at 920.

In *Mi Familia Vota v. Hobbs*, plaintiffs sought to invalidate an Arizona law that permitted voters to cure mail ballots with missing signatures only up until 7:00 p.m. on election day.<sup>5</sup> 608 F. Supp. 3d 827, 830 (D. Ariz. 2022). The plaintiffs contended that, if the law were struck down,

<sup>5</sup> Plaintiffs also sought to invalidate a different law that required elections officials to purge voters from early voting lists if they failed to vote by mail in two consecutive election cycles. *Mi Familia Vota*, 608 F. Supp. 3d at 830. The *Mi Familia Vota* court’s redressability analysis did not consider this separate challenge. *See id.* at 858–862.

1 more Arizonans would have their votes counted through after-election curing. *Id.* at 856–58.  
 2 Examining Arizona law, however, the *Mi Familia Vota* court concluded that “no preexisting  
 3 statute requires county recorders to” permit voters to cure their ballots after election day. *See id.*  
 4 at 859. Because no law *required* Arizona counties to permit curing after election, invalidating the  
 5 law specifically prohibiting the practice would not “amount to a significant increase in the  
 6 likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.” *Id.*  
 7 (quoting *Mecinas v. Hobbs*, 30 F.4th 890, 900 (9th Cir. 2022)).

8 Here, even if the Secretary were ordered to certify an electronic return system and instruct  
 9 counties to accept ballots submitted through that system, there is no preexisting law requiring  
 10 California counties to do so. Therefore, such an order would not “amount to a significant increase  
 11 in the likelihood” that Plaintiffs will obtain the relief they seek. The *Allen* court, considering  
 12 essentially the same case as the one Plaintiffs bring here, came to the same conclusion. That court  
 13 emphasized that in Alabama, county elections officials, “not the Secretary, are in charge of  
 14 administering absentee ballots[.]” 661 F. Supp. 3d at 1123. The court reasoned that “[n]othing  
 15 requires the [county officials] to disregard Alabama law” in favor of rules promulgated by the  
 16 Alabama Secretary of State in response to an injunction. *Id.* The *Allen* decision emphasized that  
 17 “only [the county officials] presence as parties would give this court the power to bind them.” *Id.*  
 18 But, as in *Allen*, Plaintiffs here have not named any county defendants. *See generally* FAC.

19 Plaintiffs have likewise failed to allege that the counties are the Secretary’s “agents,” or that  
 20 they are in “active concert” with the Secretary of State. *See generally id.* As such, the counties are  
 21 beyond the Court’s injunctive power in this case under Rule 65. *See* Fed. R. Civ. P. 65(d). Indeed,  
 22 Plaintiffs cannot plausibly plead facts that would draw the counties within the Court’s injunctive  
 23 power without naming them as defendants. The “active concert” exception requires a party  
 24 seeking to hold a third-party in contempt for violating an injunction to show that the third-party is  
 25 either (1) aiding or abetting *the defendant* in violating the order or (2) is “legally identified” with  
 26 the defendant. *See, e.g., Am. Semiconductor, Inc. v. Cal. Assignments LLC*, No. 12-CV-06138-  
 27 LHK, 2013 WL 5937968, at \* 4 (N.D. Cal. Oct. 30, 2013) (quoting *Peterson v. Highland Music,*  
 28 *Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998)). Here, if the Court orders the Secretary to certify an

1 electronic ballot return option and instruct the counties to accept ballots submitted through that  
2 system, and the Secretary complies, there is no violation of the order at all. If the counties then  
3 refuse to accept ballots submitted through the system the Secretary certifies, they are not aiding or  
4 abetting the *Secretary's* violation of the order—indeed the order is not *directed to them* at all. Nor  
5 can Plaintiffs show that the counties are legally identified with the Secretary—they are not legally  
6 entitled to act on the Secretary's behalf. *See id.* (collecting cases). Plaintiffs substantively  
7 conceded that the counties are beyond the Court's injunctive power in this case during the  
8 preliminary injunction proceedings, acknowledging both in their briefing and at oral argument  
9 that a county's refusal to use a certified electronic return system “would be a separate suit.” *See*  
10 *Plfs.' Reply in Support of Mot. for Prelim. Inj.*, ECF No. 41, at 3; *Prelim. Inj. Hr'g Tr.*, ECF No.  
11 64, at 24:3–4 (“that would be separate suits”).

12 Simply put, the Court could not hold the *counties* in contempt for violating an order  
13 directed to the *Secretary*, even if that order directed the Secretary to “instruct county elections  
14 officials” to accept ballots through some form of e-return. This means that Plaintiffs contemplate  
15 either seeking contempt against the Secretary for the conduct of third parties (which would not  
16 meaningfully redress their injuries as a factual matter) or filing a separate suit against non-  
17 compliant counties. In either case, Plaintiffs' prospects of obtaining relief through *this case*  
18 remain no more than “speculative” and they have therefore failed to sufficiently plead  
19 redressability.

## 20 VI. CONCLUSION

21 At bottom, Plaintiffs seek an order compelling the Secretary to issue a certification she is  
22 powerless to provide. And even if the Secretary could certify an electronic ballot return method,  
23 because the counties are responsible for collecting, verifying, and tabulating mail ballots, an  
24 injunction binding the Secretary would not redress Plaintiffs' alleged injuries. For both these  
25 reasons, Plaintiffs lack Article III standing. The Court should dismiss this case for lack of  
26 jurisdiction.

1 Dated: September 13, 2024

Respectfully submitted,

2 ROB BONTA  
3 Attorney General of California  
4 MARK R. BECKINGTON  
5 Supervising Deputy Attorney General  
6 JANE E. REILLEY  
7 Deputy Attorney General

8 /s/ Nicholas R. Green  
9 NICHOLAS R. GREEN  
10 Deputy Attorney General  
11 *Attorneys for Defendant*  
12 *California Secretary of State*  
13 *Shirley N. Weber, Ph.D.*

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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 September 13, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT'S NOTICE OF MOTION & MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)**
- **[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

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 September 13, 2024, at San Francisco, California.

G. Pang

Declarant

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Signature

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