ROB BONTA
Attorney General of California
R. MATTHEW WISE
Supervising Deputy Attorney General
WILL SETRAKIAN (SBN 335045)
ANNA FERRARI (SBN 261579)
MEGHAN STRONG (SBN 324503)
CAROLYN DOWNS (SBN 353455)
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6668
E-mail: William.Setrakian@doj.ca.gov
Attorneys for Defendants Shirley N. Weber, in her official capacity, and the State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUDICIAL WATCH, INC.; THE LIBERTARIAN PARTY OF CALIFORNIA, Plaintiffs, **v.** **SHIRLEY N. WEBER, in her official capacity as California Secretary of State; the STATE OF CALIFORNIA,** Defendants.	2:24-cv-03750-MCS-PVC **DEFENDANTS' NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Date: September 16, 2024 Time: 9:00 a.m. Judge: Hon. Mark C. Scarsi Action Filed: May 6, 2024

PLEASE TAKE NOTICE that on September 16, 2024, at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Mark C. Scarsi in Courtroom 7C of the First Street Courthouse, 350 W. 1st Street, Los Angeles, California 90012, the Court will hear Defendants' Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief, filed by Defendants Shirley N. Weber, in her official capacity, and the State of California.

Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) on the ground that the Court lacks subject-matter jurisdiction because Plaintiffs cannot demonstrate standing.

Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiffs did not provide the relevant statutory notice under the National Voter Registration Act, that Count II of Plaintiffs' Complaint is fatally unclear, and that sovereign immunity bars Plaintiffs' suit against Defendant State of California.

This motion is based on this filing, the concurrently filed memorandum of points and authorities, the papers and pleadings on file in this action, the declaration of Catherine J. Ingram-Kelly in Support of Defendants' Motion to Dismiss and its attachment, and such matters as may be presented to the Court at the time of the hearing.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on June 24, 2024. During that conference, counsel for Plaintiffs stated that they oppose this motion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

Secretary of State Shirley Weber works with 58 county election offices to oversee over 22 million registered voters. To help the nation's largest constituency exercise the franchise, the Secretary follows a detailed process laid out by state law, taking actions ranging from identifying district boundaries to training precinct workers. *Wilson v. Eu*, 817 P.2d 890, 891–92 (Cal. 1991). In addition to these state-law requirements, the National Voter Registration Act (NVRA) "erect[s] a complex superstructure of federal regulation atop state voter-registration systems." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018) (quotation omitted).

The "NVRA was intended as a shield to protect the right to vote, not as a sword to pierce it." *Am. Civ. Rts. Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 182 (3d Cir. 2017). As part of this protection, the NVRA aims "to ensure that accurate and current registration rolls are maintained." 52 U.S.C. § 20501(b)(4). This case concerns two NVRA provisions, section 8(a)(4) and section 8(i). Section 8(a)(4) requires states to "conduct a general program that makes a reasonable effort to" remove ineligible voters. 52 U.S.C. § 20507(a)(4). Section 8(i) requires states to "maintain" and "make available for public inspection" records concerning programs aimed at ensuring voter lists' accuracy and currency. 52 U.S.C. § 20507(i).

The Secretary implements these statutes, issuing detailed written guidance to California counties and conducting in-person and webinar trainings for county election officials. The Secretary also manages VoteCal, California's centralized voter registration database, updating its contents based on data from tens of thousands of daily individual registration determinations and reports from many state agencies.

Plaintiffs Judicial Watch and the Libertarian Party of California (LPCA) disagree as a matter of policy with how the Secretary implements the NVRA. Over the course of the nine months preceding this litigation, Plaintiffs sent letters to the

Secretary conveying their concerns, and the Secretary responded in detail, providing county-level information and documents and inviting Plaintiffs to engage in further discussion. Instead of accepting the Secretary's good-faith offer, Plaintiffs filed suit. Yet Plaintiffs' Complaint suffers from four defects, none of which can be cured.

First, Plaintiffs lack standing. Article III requires parties to show a concrete injury. Plaintiffs cannot satisfy this requirement. Judicial Watch cannot establish standing for its members because it does not identify a specific member that has suffered harm, nor does it allege a concrete injury any unnamed member has suffered. And Judicial Watch cannot secure standing for itself because it pleads only a diversion of resources to investigate and counteract the Secretary's alleged conduct—allegations that the Supreme Court's recent decision in *Food & Drug Administration v. Alliance for Hippocratic Medicine* clarified cannot confer organizational standing.

LPCA lacks standing for the same reasons as Judicial Watch and because LPCA has not inflicted on itself any injury that could confer standing. LPCA alleges, in particular, that it wasted money contacting inactive voters. But that is a problem of its own making. LPCA chose to request lists containing inactive voters who were marked as such, then allegedly contacted those individuals, knowing they were inactive and may not reside at the listed address. LPCA's alleged harm is thus self-inflicted.

Second, Plaintiffs did not give notice of the alleged section 8(i) violation alleged in their second claim for relief. Notice is a precondition to suing under the NVRA, providing states an opportunity to comply with the NVRA before facing litigation. Here, Plaintiffs did not give sufficient notice before filing this lawsuit. Although Plaintiffs sent a purported notice of violation in October 2023, that letter failed to identify any specific deficiencies with the Secretary's NVRA compliance. The Secretary later produced several categories of documents and offered to meet

and confer on additional categories. But Plaintiffs failed to notice an NVRA violation addressing the Secretary's response before suing the Secretary, leaving the notice requirement unfulfilled and Plaintiffs' objection unclear. And LPCA also failed to satisfy the NVRA's notice requirement because it improperly piggybacked off of Judicial Watch's notice.

Third, Plaintiffs' second claim for relief is also fatally unclear. As noted above, Plaintiffs requested a broad range of information in October 2023, and the Secretary provided a thorough response, including several requested categories of documents, and invited Plaintiffs to meet and confer about further compliance. Yet Count II does not specify how the Secretary's responses violate section 8(i). The Secretary thus lacks fair and adequate notice of the basis for that claim.

Finally, sovereign immunity bars Plaintiffs' claims against the State of California. The Eleventh Amendment immunizes states from suit in federal court, and none of sovereign immunity's narrow exceptions apply. The Court should dismiss the State of California as a defendant.

The Court should thus grant this motion and dismiss Plaintiffs' Complaint without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2023, Plaintiff Judicial Watch wrote to the Secretary requesting information concerning California's implementation of two NVRA sections. Compl. Ex. 1, at 20. The letter sought information regarding the Secretary's implementation of section 8(a)(4), which concerns the removal of ineligible voters from voter rolls, and requested seven records categories under section 8(i). *Id.* at 21–23.

Later that month, the Secretary's Constituent Affairs office responded to Judicial Watch. Compl. Ex. 2. Interpreting Judicial Watch's 8(a)(4) inquiries as records requests, the office explained that it had no responsive records. *Id.* at 25. Regarding the 8(i) requests, the office provided documents or explained that

documents would follow (requests 3 and 4); noted where Judicial Watch could seek documents (request 1); explained that a request lacked sufficient detail (request 5); and stated that it had no documents (requests 2, 6, and 7). *Id.* at 25–26.

In October 2023, Judicial Watch wrote to the Secretary again. Compl. Ex. 3. The letter, titled a "Notice of Violation" of the NVRA, purported to "serve[] as pre-suit notice pursuant to 52 U.S.C. [section] 20510(b)(1) & (2)." *Id.* at 28. The letter mostly repeated Judicial Watch's August 2023 claims, ending by expressing hope that the parties could "work together to come up with a realistic plan to address" California's alleged NVRA violations "to avoid costly litigation and to amicably resolve disputes." *Id.* at 32. The October 2023 letter, unlike the August 2023 letter, came from both Judicial Watch and LPCA. *Id.* at 28.

In March 2024, the Secretary responded to Plaintiffs. Compl. Ex. 4. Regarding the alleged section 8(a) violations, the Secretary discussed all 46 identified counties, explaining why each county had complied with section 8(a) by identifying and removing ineligible voters. *Id.* at 40–47. Regarding the alleged section 8(i) violations, the Secretary further responded to all seven records requests. The Secretary provided responses to requests 4, 5, and 7; explained how Plaintiffs could obtain a response to request 1; stated that the Secretary does not maintain responsive records for request 2; clarified that request 3 falls outside of section 8(i)'s scope; and offered to meet and confer to narrow request 6. *Id.* at 47–49.

Plaintiffs did not respond to the Secretary's March 2024 letter.

STATUTORY BACKGROUND

I. THE NVRA

Under the NVRA, states may remove registered voters from the voter rolls only (1) at the voter's request; (2) if a voter becomes ineligible under state law "by reason of criminal conviction or mental incapacity"; (3) if the voter died; or (4) if the voter changed residence. 52 U.S.C. § 20507(a)(3)–(4). Although states may remove registrants if one of these categories applies, the NVRA requires states only

"to conduct a general program that makes a reasonable effort to remove the names of voters who have become ineligible on account of death or change of address." *Bellitto v. Snipes*, 935 F.3d 1192, 1199 (11th Cir. 2019); 52 U.S.C. § 20507(a)(4).

The NVRA governs removal of ineligible voters. If a registrant leaves the jurisdiction, a state official sends a notice to the registrant. 52 U.S.C. § 20507(d)(1)(B), (d)(2). Only if the registrant does not respond to the notice and does not appear to vote in the next two federal general elections can the official remove the registrant's name. 52 U.S.C. § 20507(d)(1)(B).

The NVRA also requires states to make available for public inspection records of their general programs to remove ineligible voters for at least two years. 52 U.S.C. § 20507 (i).

II. CALIFORNIA LAW

California law implements the NVRA's mandates. In particular, California provides that address confirmation notices be sent in response to information that an individual has moved. Cal. Elec. Code §§ 2155, 2225, 2227. California elections officials also place the registration records of voters whose residence-based eligibility cannot be determined on "inactive" status, meaning that the voter is ineligible to vote unless and until they re-establish their eligibility, where appropriate. *Id.* §§ 2221, 2225. Election officials cancel those voter registrations when all relevant NVRA requirements are satisfied. *Id.* §§ 2225, 2226.

Prior to 2018, the California Legislature treated the NVRA's provisions for removal of registrations based on a change of residence as permissive, as then-current law allowed. After the Supreme Court ruled cancellation mandatory under federal law, *Husted*, 584 U.S. at 767, the Legislature amended section 2226, effective January 1, 2020, to require the cancellation of registrations once all NVRA requirements have been satisfied. Cal. Elec. Code § 2226. Due to the law's 2020 revision, in many counties inactive voters were not immediately contacted

such that two federal elections have now passed since the law's revision, and those voters thus cannot be removed until after the 2024 election. Compl. Ex. 4, at 39.

LEGAL STANDARD

Lack of Article III standing mandates dismissal under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "A jurisdictional challenge under Rule 12(b)(1) may be made . . . by presenting extrinsic evidence." *Warren v. Fox Fam. Worldwide*, 328 F.3d 1136, 1139 (9th Cir. 2003).

A defendant is entitled to dismissal under Federal Rule of Civil Procedure 12(b)(6) if a complaint fails to state a cognizable legal theory or alleges insufficient facts under a cognizable legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

ARGUMENT

I. PLAINTIFFS LACK STANDING

Judicial Watch and LPCA lack standing. The Court should thus dismiss their Complaint.

Standing to sue, "a doctrine rooted in the traditional understanding of a case or controversy," "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish standing, a plaintiff must show (1) an injury in fact, that (2) is fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Failure to establish all three standing components deprives the court of jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109–10 (1998).

Organizational plaintiffs, like individuals, must establish these "irreducible constitutional minimum[s]." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citing *Havens Realty Corp. v.*

Coleman, 455 U.S. 363, 378 (1982)). An organization can secure standing either on its members' behalf, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), or "in its own right," *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

A. Plaintiff Judicial Watch Lacks Standing

Judicial Watch lacks standing for two reasons: (1) it cannot establish standing on its members' behalf because it identifies no injured member on whose behalf it sues; and (2) it cannot establish organizational standing because it identifies no qualifying injury.

1. Judicial Watch Does Not Have Standing on Its Members' Behalf

Judicial Watch first tries to secure standing on its members' behalf. Compl. ¶¶ 81–82. An association has standing on behalf of its members if (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343.

Judicial Watch cannot establish standing via its members because it does not identify any member that has suffered harm. An association has standing to represent its members' interests only if the association "establish[es] that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Competent evidence can include member declarations. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 (9th Cir. 2011). Absent evidence "attesting to harm [specific members] have suffered or will suffer," organizations cannot seek standing on their members' behalf. *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194–95 (9th Cir. 2013). Because Judicial Watch has produced no evidence of even a single specific member suffering harm due to Defendants' actions, it cannot seek standing via its members.

Nor can Judicial Watch remedy this issue simply by amending its Complaint to name a specific member because the harm it alleges currently unnamed members have suffered is too speculative to secure standing. Judicial Watch claims that its members "have become increasingly concerned" about voter fraud and that the Secretary's alleged misconduct sparks "concern[]" among its members regarding "the integrity of elections." Compl. ¶¶ 79–80. But this purported harm is insufficient to secure standing because it is dependent on a "speculative chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). Although Plaintiffs "seek to enjoin Government [] officials," their theories depend on the actions of third parties—voters who have moved and are no longer properly registered theoretically casting a fraudulent vote. *Murthy v. Missouri*, 603 U.S. __, 2024 WL 3165801, at *7 (U.S. June 26, 2024). Plaintiffs' "one-step-removed, anticipatory" alleged injuries both improperly "require guesswork" as to future parties' conduct, and could succeed only if they showed "a real and immediate threat of repeated injury." *Id.* at *8 (quotations omitted). Indeed, Plaintiffs do not identify even a single instance of voting fraud that they allege is traceable to an NVRA violation. Plaintiffs' allegation that they are injured by "potentially unlawful voting practices" is thus "entirely speculative." *Am. Civ. Rts. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 803 (W.D. Tex. 2015).

2. Judicial Watch Does Not Have Standing on Its Own Behalf

Judicial Watch next tries to establish standing on its own behalf. Recent Supreme Court precedent forecloses its claim. In *Food & Drug Administration v. Alliance for Hippocratic Medicine*, the Supreme Court considered a physician organization's challenge to FDA approval of an abortion medication that allegedly had "impaired" the organization's "ability to provide services and achieve [its] organizational missions." 144 S. Ct. 1540, 1563 (2024) (*AHM*). The organization sought standing "based on [its] incurring costs to oppose FDA's actions," arguing that FDA "forced" it "to expend considerable time, energy, and resources drafting

citizen petitions to FDA, as well as engag[e] in public advocacy and public education," which led it "to spend considerable resources to the detriment of other spending priorities." *Id.* (internal quotations omitted).

The Supreme Court unanimously rejected this theory of standing for failing to demonstrate a concrete injury. *Id.* at 1563–64. The Court explained that an organization "cannot spend its way into standing simply by expending money to gather information and advocate against [a] defendant's action." *Id.* The Court further clarified that an organization cannot secure standing just because a defendant has "impaired" its "ability to provide services and achieve [its] organizational missions." *Id.* at 1563. And the Court observed that it is "incorrect" to assert that "standing exists when an organization diverts its resources in response to a defendant's actions." *Id.* Instead, an organization must show something similar to a direct interference with "core business activities," the harm presented in *Havens Realty Corp. v. Coleman*—an "unusual case" that the Court has been "careful not to extend." *Id.* at 1564.

Judicial Watch lacks standing under this clarified doctrine. Judicial Watch alleges that it has spent money "to investigate, address, research, and counteract" the alleged NVRA violations. Compl. ¶ 86. This tracks the "drafting" and "engaging" that AHM allegedly undertook, and that the Supreme Court dismissed as an insufficient attempt to obtain "standing [] by expending money to gather information and advocate." *AHM*, 144 S. Ct. at 1563. Because Judicial Watch lacks any concrete injury aside from this insufficient diversion of resources, it lacks Article III standing, and the Court should dismiss its claims.

Even under pre-*AHM* precedent, Judicial Watch's allegations would be insufficient to establish standing. The diversion of resources Judicial Watch alleges relates to activities that Judicial Watch would have undertaken regardless of whether California was complying with the NVRA. Compl. ¶ 77 (Judicial Watch "fulfills its mission through public records requests and litigation."). And Judicial

Watch cannot establish that its "mission [] to promote transparency, integrity, and accountability in government and fidelity to the rule of law," *id.*, was somehow hindered by the Secretary's fulsome responses to its letters. Ultimately, the only action Judicial Watch can claim that it might not have taken were it not for the Secretary's alleged violations is the filing of this lawsuit—but litigation expenses cannot generate standing. *Sabra v. Maricopa Cnty. Cmt. Coll. Dist.*, 44 F.4th 867, 879–80 (9th Cir. 2022).

B. Plaintiff LPCA Lacks Standing

LPCA sues for only itself, not its members. Thus, LPCA must show that it has done more than "divert[] its resources in response to a defendant's actions," and that the Secretary's actions have imposed an impediment similar to a direct interference with core business activities. *AHM*, 144 S. Ct. at 1564.

LPCA identifies its mission as organizing, selecting, and promoting the election of party standard bearers and like-minded individuals. Compl. ¶ 89. It alleges that the presence of outdated and ineligible registrations on the California voter rolls frustrates this mission by making it more difficult to contact voters and encourage them to support LPCA's candidates. *Id.* at ¶ 90–91. That, in turn, causes LPCA to "waste" money trying to contact ineligible individuals. *Id.* at ¶ 92.

This standing theory fails for the same reason as Judicial Watch's theory. LPCA alleges only a resources diversion, identifying no concrete injury. The Secretary has not "imped[ed]" LPCA's "advocacy businesses." *AHM*, 144 S. Ct. at 1564. LPCA can still contact all registered California voters, with its only possible harm being a non-qualifying diversion of resources. *Id.*

Even if LPCA's alleged expenditures to contact inactive voters could qualify as a concrete injury, LPCA's standing theory fails because it is based on the false premise that California's "voter rolls contain many outdated and ineligible registrations." Compl. ¶ 91. LPCA misunderstands California election law. When a state elections official receives data indicating that a registrant has moved outside

California, the official designates that registrant as "inactive." Cal. Elec. Code § 2226(a)(2). The voter remains listed on the roll but is marked as inactive. *Id.* §§ 2226(a)(2) and (d). This tracks the NVRA's structure—the statute does not require real-time updating of voter rolls, but instead prohibits removal based just on change of address, instead requiring multiple federal election cycles to pass. 52 U.S.C. § 20507(d)(2)(A).

Inactive status in turn affects the process of requesting and receiving voter information. A party can receive voter registration information pursuant to an application made under California Elections Code section 2188. Declaration of Catherine J. Ingram-Kelly in Support of Defendants' Motion to Dismiss (Ingram-Kelly Decl.) ¶ 5 & Ex. A. By default, the information provided displays active voter registration records only. *Id.* If requested, the voter registration information may include inactive voter registration records. *Id.* In that circumstance, the voter registration information lists each voter as either "active" or "inactive." *Id.*

When LPCA requests copies of a voter roll, it thus chooses whether to receive information on inactive voters. Since the beginning of 2020, LPCA has submitted 17 requests that did not request inactive voter registration records. Ingram-Kelly Decl. ¶ 7. Only in its two most recent filings, requested and received in 2023, did LPCA request inactive voter registration records. *Id.* 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.

LPCA's theory of standing also fails for lack of redressability. To secure standing, plaintiffs "must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

LPCA cannot establish redressability for substantially the same reasons it cannot establish a sufficient injury. To begin with, LPCA cannot show that the relief it seeks will redress its injuries because California's current voter roll already

indicates individuals slated for NVRA removal. Cal. Elec. Code § 2226(a)(2). And with respect to many of these inactive voters, the Court cannot order the Secretary to purge them from the voter roll until certain requirements are met. The NVRA, as described above, requires that two federal elections pass between the sending of an NVRA notice to an individual and their removal from the voter roll. 52 U.S.C. § 20507(d). In California, partly because the Supreme Court only recently clarified that the NVRA has mandatory effect, *Husted*, 584 U.S. at 767, many counties have identified individuals who will be removed if they do not vote in the 2024 election in November. Compl. Ex. 4, at 40–47. Because the Court could not order these voters' removal before the 2024 election, LPCA's premature request for relief is not redressable.

II. PLAINTIFFS FAILED TO PROVIDE STATUTORILY REQUIRED NOTICE FOR THEIR SECOND CLAIM FOR RELIEF

A. The NVRA Requires Pre-Filing Notice to Encourage Out-of-Court Resolutions

Before a potential plaintiff may sue for an alleged NVRA violation, it must "provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1); *Pub. Int. Legal Found. v. Boockvar*, 370 F. Supp. 3d 449, 456 (M.D. Pa. 2019). The timing of the next federal election determines the length of this notice period. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1035 (9th Cir. 2015). If, as here, the alleged violation occurs more than 120 days before a federal election, a would-be plaintiff must give notice at least 90 days before filing suit. *Id.* (citing 52 U.S.C. § 20510(b)(1)–(2)).

This notice requirement allows states to "attempt compliance before facing litigation." *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d 399, 409 (M.D. Pa. 2021) (quoting *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014)). It also encourages parties "to engage in discussions that might [] resolve[] their dispute or narrow[] the issues." *Jud. Watch, Inc. v. North Carolina*, 2021 WL 7366792, at *10 (W.D.N.C. Aug. 20, 2021).

"District courts applying Section 20510 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. Int. Legal Found.*, 370 F. Supp. 3d at 457 (citing cases). The NVRA's notice requirement is "violation specific," and "a potential NVRA defendant must have notice of exactly what violation or violations have been alleged in order to have a meaningful opportunity to attempt complete compliance before facing litigation." *Bellitto v. Snipes*, 268 F. Supp. 3d 1328, 1334 (S.D. Fla. 2017).

B. Plaintiffs Failed to Provide Sufficient Notice of Their Claimed Section 8(i) Violation

Judicial Watch has not satisfied the NVRA's notice requirement as to its second claim for relief, which alleges a violation of section 8(i). Alleged section 8(i) violations require at least two letters or other communications be sent by a potential plaintiff to the Secretary: first, a plaintiff must request records pursuant to section 8(i); and second, if those records are not provided, a plaintiff must send the Secretary a letter providing notice of the alleged violation of section 8(i) pursuant to 52 U.S.C. section 20510. *See, e.g.*, *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d at 409–10; *Bellitto*, 268 F. Supp. 3d at 1334–36. A single letter requesting records alone, without a follow-up notice of violation, is insufficient because "no disclosure violation ha[s] yet occurred at the time of" the initial request. *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. at 409. Indeed, Judicial Watch has seen its lawsuits dismissed for this very reason. *Id.* at 409–10; *Jud. Watch, Inc. v. North Carolina*, 2021 WL 7366792, at *9–10.

In an attempt to remedy its past failings, Judicial Watch now attempts technical compliance, yet falls short of actual compliance. Judicial Watch sent two letters to the Secretary instead of one, but its second letter, which purports to be a "pre-suit notice," Compl. Ex. 3, fails to satisfy the fundamental purpose of the

NVRA's notice provision: giving the Secretary notice of the specific violation alleged and the "reasons" the Secretary "purportedly failed to comply" with section 8(i). *Pub. Int. Legal Found.*, 370 F. Supp. 3d at 457.

A brief summary of Judicial Watch's section 8(i) requests and purported "notice" underscores the point. On August 4, 2023, Judicial Watch sent the Secretary a letter requesting seven categories of documents it contended it was entitled to under section 8(i) of the NVRA. Compl. ¶¶ 30–31 & Ex. 1. On August 29, 2023, the Secretary responded, providing certain responsive documents and identifying where it possessed no responsive records. *Id.* ¶¶ 34–36 & Ex. 2.

On October 30, 2023, Judicial Watch sent the Secretary another letter which purported to give pre-suit notice under 52 U.S.C. section 20510. Compl. ¶ 38 & Ex. 3. That letter contained a section titled "Facts Showing Violations of the Public Records Provisions of the NVRA." Compl. Ex. 3, at 31–32. But that section merely restated Judicial Watch's second, third, and sixth requests and the Secretary's response, then claimed the requests "ha[d] not been complied with," without providing any further detail about why Judicial Watch believed the responses were non-compliant. *Id.*[1]

On March 11, 2024, the Secretary wrote back again, providing further information in response to each of Judicial Watch's records requests, even those Judicial Watch had not raised in its prior letter. Compl. Ex. 4. In particular, in response to Judicial Watch's sixth request, the Secretary explained that Judicial Watch's request was overbroad as drafted because the Secretary could not produce "all" records, but the Secretary invited Judicial Watch to meet and confer with the Secretary about "an appropriately narrowed request." *Id.* at 48–49. Judicial Watch did not respond to this offer.

[1]Judicial Watch's October 30 letter did not mention its first, fourth, fifth, and seventh requests, presumably because it deemed those requests satisfied. *Id.*

Judicial Watch's October 30, 2023 letter cannot satisfy the NVRA's notice requirement to the extent Judicial Watch seeks relief on its first, fourth, fifth, or seventh requests, because its "notice" letter does not mention those requests. As to Judicial Watch's second, third, and sixth requests, the October 30 letter fails to satisfy the notice requirement for two reasons.

First, Judicial Watch's October 30, 2023 letter did not provide sufficient detail on how the Secretary's original responses violated section 8(i). It simply restated the requests and responses and concluded that a violation occurred, providing the Secretary no "opportunity to attempt compliance before facing litigation." *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d at 409. That is inadequate notice. *See Jud. Watch, Inc. v. North Carolina*, 2021 WL 7366792, at *10 (notice insufficient if it is "too vague to provide [defendants] an opportunity to attempt compliance"); *Scott*, 771 F.3d at 836 (notice letter too vague if it "alleged NVRA violations only in broad terms" without mentioning individual plaintiff or specific form at issue).

Second, Judicial Watch failed to acknowledge or respond to the Secretary's March 11, 2024 letter, which sought to respond to and resolve any alleged violations. The notice requirement provides states the opportunity to comply with the NVRA before litigation begins; it would be a nullity if a plaintiff were permitted to merely give notice and then ignore a state's subsequent compliant activities and file suit anyway. But that is exactly what Judicial Watch did here.

Because Judicial Watch failed to identify the reasons it believed the Secretary violated section 8(i) and failed to respond to the Secretary's supplemental, compliant response on March 11, it cannot satisfy the first prong of the analysis of whether the notice provided was sufficient: the requirement to set "forth the reasons that a defendant purportedly failed to comply with the NVRA." *Pub. Int. Legal Found.*, 370 F. Supp. 3d at 457.

Judicial Watch's failure to attempt in good faith to resolve or narrow the issues via pre-suit notice is similar to the events of *Judicial Watch, Inc. v. North*

Carolina, in which the court held Judicial Watch's pre-suit notice insufficient. 2021 WL 7366792, at *9–10. There, the defendant contacted Judicial Watch "explaining Defendants' position, and expressing concern about the data relied upon by Plaintiff" and "invited Plaintiff to contact the State Board office" if it had further information about noncompliance. *Id.* at *10. "[I]nstead of engaging in any further communication clarifying alleged violations of the NVRA, or providing a notice of specific violation—that Defendants might attempt to resolve—8 days later, Plaintiff filed the instant lawsuit." *Id.* The court criticized Judicial Watch's "failure to communicate" or attempt to resolve or narrow the issues and concluded that its notice was insufficient. *Id.* So too here.

This case contrasts with *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320 (N.D. Ga. 2016), in which the plaintiff satisfied the notice requirement. There, the plaintiff gave notice under the NVRA and filed suit only after several substantive communications between the parties regarding the plaintiff's section 8(i) requests. *Id.* at 1328–32. The notice that the court ultimately deemed sufficient was sent over a year after the plaintiff's initial requests, and nearly a year before the action was ultimately filed. *Id.* at 1347. The notice "described the records Plaintiff requested on October 30, 2014, and sought to explain why Defendant's productions failed to satisfy those requests." *Id.* The plaintiff filed suit only after the parties' meet-and-confer efforts had broken down and the defendant stopped responding. *Id.* at 1331.

Here, the Secretary did more than just respond—her office thoroughly addressed Plaintiff's contentions in two sets of responses. Judicial Watch has not explained why these detailed responses failed to satisfy its requests. Despite professing to be "willing to compromise and work together," Compl. Ex. 3, at 32, Judicial Watch chose to cut off communication and file suit. But in doing so, it failed to give the Secretary the specific pre-suit notice the NVRA requires. Its section 8(i) claim must therefore be dismissed.

C. LPCA Cannot Piggyback on Judicial Watch's Notice

Even if the Court concludes that Judicial Watch's October 30, 2023 letter satisfied the NVRA's notice requirement, it should find that LPCA did not provide notice and dismiss the section 8(i) claim as to LPCA. Courts have made clear that one plaintiff cannot piggyback on another's notice; each party must provide his own notice. *Scott*, 771 F.3d at 836 (plaintiff Scott "cannot piggyback on the NAACP's notice" and his "failure to provide notice is fatal to his suit"); *see also Bellitto*, 268 F. Supp. 3d at 1334–35 (holding plaintiff could not "piggyback" one claim on another where letter noticed only one violation).

Here, the initial August 4, 2023 letter was sent on behalf of Judicial Watch only. Compl. Ex. 1. It does not mention LPCA and requests no records on LPCA's behalf. *Id.* In the October 30, 2023 letter, LPCA suddenly joined with Judicial Watch in purporting to provide pre-suit notice of a section 8(i) violation, despite having never requested records from the Secretary pursuant to section 8(i). Because no section 8(i) violation could exist as to LPCA as of October 30, 2023, that letter did not provide notice of a violation as to LPCA. The Court should reject LPCA's attempt to piggyback on Judicial Watch's earlier section 8(i) notice.

III. PLAINTIFFS' 8(i) CLAIM FOR RELIEF IS FATALLY UNCLEAR

Even if the Court finds that Judicial Watch met the NVRA's notice requirements with respect to the alleged section 8(i) violation, the Complaint fails to plead facts sufficient to "state a claim to relief that is plausible on its face" because it does not give Defendants "fair notice" of the claim and its grounds. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The Complaint alleges broadly that the Secretary has failed to fulfill her obligation under section 8(i) to produce "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." Compl. ¶ 101 (quoting 52 U.S.C. § 20507(i)). But the Complaint fails to allege an identifiable violation.

Recall the parties' communications leading up to the lawsuit. Judicial Watch requested seven records categories in August 2023. Compl. Ex. 1, at 22–23. The Secretary's March 2024 letter responded to each request, explaining, as applicable, that the Secretary (1) was concurrently producing responsive records; (2) was willing to produce responsive records pending further clarification or other action by Judicial Watch; (3) was unable to produce the requested records because they are maintained by elections officials in 46 separate counties, in accordance with state law, *see* Cal. Elec. Code §§ 2225, 2226; or (4) was not required to produce the requested records because they pertain to the responsibilities of the U.S. Election Assistance Commission to make recommendations to Congress about election administration, 52 U.S.C. § 20508(a)(3), and thus fall outside of section 8(i)'s purview. *See* Compl. Ex. 4, at 47–49.

The Complaint does not adequately explain which of the Secretary's requests it finds deficient, nor why the Secretary's responses were deficient. It generally refers to the entire March 2024 letter without identifying particular defects in the Secretary's responses. Compl. ¶¶ 70, 73–74. And the second claim for relief itself offers no specifics, summarily stating that the Secretary has "failed to fulfill [her] obligations under Section 8(i)." *Id.* ¶¶ 101–02. Although Plaintiffs dispute the Secretary's responses to their request no. 2 and 3, Compl. ¶¶ 71–72, they leave the Secretary to speculate whether that is the extent of their claim or whether they silently object to other, unmentioned responses. The second claim thus does not give "fair notice" of the basis for Plaintiffs' section 8(i) claim, *Twombly*, 550 U.S. at 555–56, and should be dismissed.

IV. SOVEREIGN IMMUNITY BARS PLAINTIFFS' SUIT AGAINST THE STATE OF CALIFORNIA

Plaintiffs seek injunctive relief against the State of California, but sovereign immunity bars their suit. "The Eleventh Amendment bars suits which seek . . . injunctive relief against a state." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th

Cir. 1995). Accordingly, Plaintiffs' suit for injunctive relief cannot proceed against the State of California unless an exception to the doctrine applies. *Avila v. State of California*, 2021 WL 518710, at *3–4 (C.D. Cal. Jan. 4, 2021).

No exception to sovereign immunity applies here. "There are only three exceptions to" the general rule that states are immune from suits brought by citizens in federal court. *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 817 (9th Cir. 2001), *amended by* 271 F.3d 910 (9th Cir. 2001). "First, a state may waive its Eleventh Amendment defense." *Id.* "Second, Congress may abrogate the States' sovereign immunity by acting pursuant to a grant of constitutional authority." *Id.* "Third, under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar a 'suit against a state official when that suit seeks . . . prospective injunctive relief.'" *Id.* at 817–18 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996)).

Only one of these exceptions, congressional abrogation, merits serious discussion.[2] Plaintiffs' suit proceeds under the NVRA, 52 U.S.C. sections 20507 and 20510. Compl. ¶ 1. No evidence suggests that Congress abrogated sovereign immunity through these provisions.

The test for abrogation of sovereign immunity imposes a high bar. Courts conduct a two-part inquiry to determine whether Congress validly abrogated a state's sovereign immunity. *N. E. Med. Servs., Inc. v. Cal. Dep't of Health Care Servs., Health & Hum. Servs. Agency, Cal.*, 712 F.3d 461, 467 (9th Cir. 2013). First, the court asks whether "Congress unequivocally expressed its intent to abrogate the states' immunity in the legislation itself." *Id.* (quoting *Douglas*, 271 F.3d at 818). If Congress did, the court must determine whether Congress acted "pursuant to a valid grant of constitutional authority under [section] 5 of the

[2]The other two exceptions to sovereign immunity do not apply. The State of California has neither waived nor forfeited its sovereign-immunity defense because the State asserts it here, in its first responsive pleading. And the *Ex parte Young* exception cannot apply because Plaintiffs sue the State, not an individual officer. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002), *amended by* 312 F.3d 416 (9th Cir. 2002).

Fourteenth Amendment." *Id.* "[A] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 56 (quotation omitted).

The Court need consider only the first of these inquiries to find this exception does not apply. The NVRA does not contain the clear sovereign-immunity waiver that courts require of Congress to vitiate sovereign immunity. *See, e.g.*, 42 U.S.C. § 12202 (providing clear abrogation language). And although the NVRA creates a private right of action, a general authorization to sue does not suffice to abrogate sovereign immunity. *Seminole Tribe*, 517 U.S. at 56. For this reason, numerous courts have concluded that the NVRA does not abrogate sovereign immunity. *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1100 (D. Colo. 2021) (collecting cases).

The Eleventh Amendment immunizes the State of California from suit. The Court should dismiss the Complaint against the State of California.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint. Because the defects in the Complaint, particularly Plaintiffs' lack of Article III standing, are incurable, the Complaint should be dismissed with prejudice.

Dated: July 5, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California
R. MATTHEW WISE
Supervising Deputy Attorney General

/s/ Robert William Setrakian

WILL SETRAKIAN
Deputy Attorney General
Attorneys for Defendants Shirley N. Weber, in her official capacity, and the State of California

SA2024900189

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants Shirley N. Weber, in her official capacity, and the State of California, certifies that this brief contains 6,384 words, which:

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

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

Dated: July 5, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California

/s/ Robert William Setrakian

WILL SETRAKIAN
Deputy Attorney General
Attorneys for Defendants Shirley N. Weber, in her official capacity, and the State of California

CERTIFICATE OF SERVICE

Case Name: **Judicial Watch, Inc. et al v. Shirley N. Weber et al** No. **2:24-cv-03750-MCS-PVC**

I hereby certify that on July 5, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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 July 5, 2024, at Los Angeles, California.

D. Serzo
Declarant

D. Serzo
Signature

SA2024900189
66910609.docx