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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUDICIAL WATCH, INC. and THE LIBERTARIAN PARTY OF CALIFORNIA, Plaintiffs, **v.** **SHIRLEY N. WEBER, in her official capacity as California Secretary of State; and the STATE OF CALIFORNIA,** Defendants.	2:24-cv-03750-MCS-PVC **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS** Date: September 16, 2024 Time: 9:00 A.M. Judge: Hon. Mark C. Scarsi Action Filed: 5/06/2024

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INTRODUCTION

Plaintiffs' Opposition fails meaningfully to contest Defendants' Motion to Dismiss. To salvage its standing, Plaintiff LPCA attempts an on-the-fly reworking of its claim, at odds with both its pre-suit notice and the language of the Complaint. Conceding the lack of redressability now, LPCA states that it will eventually present a redressable injury. Judicial Watch acknowledges an even greater uphill standing climb, relying on an out-of-circuit district-court decision that predates the Supreme Court's most recent and relevant standing guidance. Judicial Watch also tries to evade binding circuit precedent requiring it to name an affected member, eventually offering to amend its Complaint to address the issue. Plaintiffs' efforts fail—LPCA cannot identify a redressable injury, recent Supreme Court precedent establishes that Judicial Watch lacks standing, and Judicial Watch has not shown that California's conduct has affected any of its members.

On sovereign immunity, Plaintiffs claim that the plan-of-the-convention doctrine vitiates California's immunity. But that doctrine applies only if the federal government possesses complete authority in a legal area. The plan-of-the-convention doctrine thus has no place in the jointly governed field of election law.

On the merits, Plaintiffs concede one of Defendants' grounds in a footnote, narrowing their 8(i) claim to cover only two of the categories of documents that they requested. But even on those two categories the claim must fail because Judicial Watch did not give sufficient notice and LPCA improperly piggybacked off Judicial Watch's insufficient notice. The Court should dismiss Plaintiffs' Complaint.

ARGUMENT

I. LPCA LACKS STANDING.

LPCA cannot show an injury. LPCA repeatedly states that political parties can suffer injuries. ECF No. 17 at 10–13.[1] But Defendants' Motion argues that even if LPCA suffered an economic injury—which Defendants do not concede—that is irrelevant because LPCA inflicted such injury on itself by requesting registration records of California's inactive voters and then spending money trying to contact those voters even though their address records are more likely to be out-of-date. ECF No. 16 at 18.[2] LPCA responds that it actually disputes the contents of California's active voter file. ECF No. 17 at 14; ECF No. 17–1.

LPCA's argument that its Complaint addresses money spent contacting not inactive voters, but rather active registrants who should have been removed or listed as inactive, cannot be squared with the Complaint. LPCA's Complaint does, in places, allege failure to remove voters who become ineligible based on change of address, and does not qualify that allegation with the word "inactive." *See* ECF No. 1 ¶¶ 41, 44, 91, 92, 96. But the specifics of LPCA's claim undercuts this argument: LPCA's 8(a) claim and violation notice, and the parties' subsequent pre-litigation communications, were all premised on evidence about the alleged failure to remove registrants who received and failed to respond to NVRA section 8(d)(2) cards from the 2022 Election Administration and Voting Survey (EAVS) question A9e, which asked whether voters were removed for the "failure to respond to confirmation notice sent and failure to vote in the two most recent federal elections." Declaration of Robert William Setrakian in Support of Reply in Support of Motion to Dismiss

[1] All page citations reference ECF-generated page numbers.

[2] Similarly irrelevant is *Republican National Committee v. Wetzel*. ECF No. 18. Applying Fifth Circuit law, the Mississippi district court held that the Republican National Committee had standing to challenge a law regarding the receipt of mail-in ballots after Election Day because the party spent money challenging later-arriving absentee ballots. ECF No. 18–1 at 6. The injury was not self-inflicted, like LPCA's here.

("Setrakian Declaration"), Ex. A, at 13; *see* ECF No. 1 at 21 n.13, 29 n.13, 35, 40–47. People who received such cards and then failed to respond are necessarily inactive registrants. *See* ECF No. 1 at ¶¶ 11, 42; p. 21. LPCA's recharacterized claim thus focuses on an alleged failure to remove voters who already were inactive—but that makes no sense.

LPCA could have drafted its Complaint to allege that active voters were not listed as inactive. If LPCA was concerned about formerly active voters languishing on the active list by reason of delay in mailing of 8(d)(2) cards, it could have focused instead on California's response to EAVS question A8a, which asks about the total number of confirmation notices sent. Setrakian Decl., Ex. A at 12. It did not. Instead, it focused on the failure to remove inactive registrants. LPCA wants to reinterpret its Complaint to avoid dismissal, but the Complaint cannot fairly be read that way.[3]

LPCA also cannot establish redressability. It seeks inactive voters' removal, but as Defendants explained, California's voter roll already identifies individuals slated for removal. ECF No. 16 at 18–19 (citing Cal. Elec. Code § 2226(a)(2)). And because the NVRA requires two federal election cycles to pass before a voter can be removed, some voters will be removed if they do not vote in future federal elections, but the Court cannot prematurely order their removal now. *Id.* at 19 (citing 52 U.S.C. § 20507(d)).

LPCA does not necessarily dispute this. It instead calls the argument irrelevant because relief need not be immediate to be redressable. ECF No. 17 at 15. But that misapprehends Defendants' argument. Defendants do not argue that LPCA's relief will come only at the end of a future chain of events. *Id.* Instead, as Defendant Weber's March 2024 letter explains, LPCA's claims lack redressability

[3]Even if the complaint could be read in that way, LPCA's newly articulated theory of injury still fails because expenditures promoting a political party are not within the "zone of interests" the NVRA was designed to protected. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

because counties have identified voters for removal, and either are already in the process of removing those voters or cannot yet remove them. ECF No. 1 at 38–47. The Court cannot lawfully order the removal of these voters prior to the expiration of the two election cycles period because that would violate the NVRA. ECF No. 16 at 18. And once that period runs, the voters will be removed. ECF No. 1 at 40–47. Moreover, to the extent LPCA assumes that such voters will not in fact be removed, such argument is not yet ripe. Thus, no court action will redress LPCA's alleged injury.

II. JUDICIAL WATCH LACKS ORGANIZATIONAL STANDING.

Judicial Watch's standing argument occupies a pre-*Alliance for Hippocratic Medicine* (*AHM*) world. Judicial Watch cites a pre-*AHM* out-of-circuit district-court decision to try to secure standing based on its work "monitor[ing]" events, "compil[ing] statistics," and conducting "visits" and "discussions." ECF No. 17 at 18 (quotation omitted). But *AHM* explained that an organization "cannot spend its way into standing simply by expending money to gather information and advocate against [a] defendant's action." *Food & Drug Admin.* (*FDA*) *v. AHM*, 602 U.S. 367, 394 (2024). Instead, organizational plaintiffs must show a true stake in a dispute's outcome. *Washington v. FDA*, — F.4th —, 2024 WL 3515765, at *5 (9th Cir. July 24, 2024).

These precedents foreclose Judicial Watch's standing. Judicial Watch claims that *AHM* does not apply because it "litigates where necessary to enforce the NVRA." ECF No. 17 at 18. This distinction fails twice-over. First, whether an organization litigates is not the relevant inquiry under *AHM*. Instead, an organization has standing if the action affects its "core business activities"—in *Havens*, housing counseling "perceptibly impaired" by discriminatory action. *AHM*, 602 U.S. at 395 (quotation omitted). Second, the attempt to distinguish between AHM and Judicial Watch based on whether the organization litigates is inapt—AHM litigated against the FDA action at issue in *AHM*. *AHM v. FDA*, 78

F.4th 210, 222 (5th Cir. 2023), *rev'd*, 602 U.S. 367.

Finally, nothing in *AHM* changed the longstanding principle that litigation expenses cannot generate standing. *Sabra v. Maricopa Cnty. Cmt. Coll. Dist.*, 44 F.4th 867, 879–80 (9th Cir. 2022). Judicial Watch thus cannot secure standing for itself.

III. JUDICIAL WATCH LACKS ASSOCIATIONAL STANDING.

Judicial Watch also fails to demonstrate standing for its members. An organization suing on its members' behalf must identify at least one named member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194–95 (9th Cir. 2013).

Judicial Watch pushes back on this precedent, but the concurrence on which it bases its argument recognizes these authorities. *Cal. Rest. Ass'n v. Berkeley*, 89 F.4th 1094, 1114 (9th Cir. 2024) (Baker, J., concurring). And although that opinion considers whether later circuit precedent cabined *Summers* and its progeny, *id.* at 1114–15, it recognized that even-more-recent circuit authority bolsters the member-identification requirement, requiring that a plaintiff "allege sufficient facts that, taken as true, 'demonstrat[e] each element' of Article III standing." *Id.* at 1115 (quoting *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1057 (9th Cir. 2023)).

Additionally, Judicial Watch cannot fall back on its allegedly large California membership to skirt the member-naming requirement, ECF No. 17 at 19–20, for two reasons. First, California's size does not remove jurisdictional requirements: "even if California has a large population, it does not follow that every [group] that operates in California has a large number of [members], let alone ones who engage in a specific behavior." *Licea v. Caraway Home Inc.*, 655 F. Supp. 3d 954, 967 (C.D. Cal. 2023). Second, Judicial Watch does not claim to represent its members broadly, but rather focuses on the specific concern that California's voter-roll maintenance "undermin[es] [members'] confidence in the integrity of the electoral

process, discourage[es] their participation in the democratic process, and instill[s] in them the fear that their legitimate votes will be nullified or diluted." ECF No. 1 at 14. Even if some cases exist in which a group's large membership nullifies the member-identification requirement, the specific views that this hypothetical member-plaintiff holds counsel against applying that reasoning here. *See Or. Moms Union v. Brown*, 540 F. Supp. 3d 1008, 1014 (D. Or. 2021) (finding a lack of standing because member declarations did not track allegations).

Judicial Watch offers to amend its Complaint to name an affected member. ECF No. 17 at 20. But, as explained in the Secretary's Motion, such an effort would be futile because any harm to individual members of Judicial Watch is too speculative to support standing, ECF No. 16 at 8, as recent Supreme Court precedent confirms. A plaintiff cannot "enjoin Government [] officials" based on the actions of third parties and cannot secure standing via "one-step-removed, anticipatory" alleged injuries that improperly "require guesswork" as to future parties' conduct. *Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) (emphasis removed and quotation omitted).

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

Plaintiffs contend that the plan-of-the-convention doctrine lets them pierce sovereign immunity. But the Supreme Court's most recent opinion applying this doctrine shows that it does not extend to election-law disputes.

The plan-of-the-convention doctrine abrogates sovereign immunity if the Constitution's structure in a legal domain shows that 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. v. New Jersey*, 594 U.S. 482, 508 (2021)). In such cases, because states "implicitly agreed that their sovereignty 'would yield to that of the Federal Government,'" they "'ha[d] no immunity left to

waive or abrogate'" in those specific domains. *Id.* (quoting *PennEast*, 594 U.S. at 508).

But this doctrine applies in only certain cases. *Torres* gave three guideposts to explain what makes federal power "complete" sufficient to vitiate sovereign immunity. First, it clarified that "the fact that an area of law 'is under the exclusive control of the Federal Government' is not alone sufficient to do away with sovereign immunity." *Torres*, 597 U.S. at 595 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996)).

Second, *Torres* catalogued how the power at issue—control over the armed forces—belongs exclusively to the federal government. That power is vested in the national government "not in a single, simple phrase, but in many broad, interrelated provisions." *Torres*, 597 U.S. at 590. "An unbroken line" of Court precedent and government action confirms this. *Id.* at 591–94.

Third, *Torres* cabined the plan-of-the-convention doctrine by defining "complete" federal power. Discussing the federal power to regulate commerce—an area in which the plan-of-the-convention doctrine does not apply—the Court observed that "federal regulation of commerce . . . involves . . . regulation by a sovereign other than the Federal Government . . . arguably mak[ing] the federal regulatory power less than 'complete.'" *Torres*, 597 U.S. at 596.

The plan-of-the-convention doctrine thus does not obliterate state sovereign immunity in the election-law context. The Elections Clause expressly envisions a system of dual regulation: states "prescribe the time, place, and manner of electing" federal representatives, and Congress can "alter those regulations or supplant them." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *see also Ex parte Siebold*, 100 U.S. 371, 384 (1879) (describing the "concurrent authority of the two sovereignties, State and National"). This "makes the federal regulatory power less than 'complete,'" placing this case outside of the plan-of-the-

convention doctrine. *Torres*, 597 U.S. at 596. No "unbroken line" of precedent and conduct suggests otherwise. *Id.* at 591–94.

Plaintiffs' two out-of-circuit district-court cases predate *Torres*' doctrinal clarification, so the Court should ignore them. And Plaintiffs' cited Supreme Court case is irrelevant: it concerned a state law imposing extra-Constitutional qualifications on congressional representatives. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995). In that context, the Court explained that because "electing representatives to the National Legislature was a new right, arising from the Constitution itself," the states had no "reserved power" to set additional qualifications. *Id.* at 805. That has no bearing here—as explained above, states regulate elections alongside the federal government, and have done so since before the Constitution's ratification. *See Moore v. Harper*, 600 U.S. 1, 32–33 (2023); ECF No. 16 at 12–13 (describing California's statutory scheme governing voter list maintenance); ECF No. 1 at 36–38 (same). The Court should accordingly decline to vitiate sovereign immunity in the jointly governed field of election law.

V. JUDICIAL WATCH DID NOT GIVE SUFFICIENT NOTICE OF ITS 8(I) CLAIM.

Judicial Watch asserts that it "clearly" gave statutory notice of its 8(i) claim. ECF No. 17 at 23. Judicial Watch states that it requested documents, Defendants did not provide them, and nothing more is required. *Id.* at 24.

Judicial Watch is wrong. The NVRA's notice provision requires letting the government "attempt compliance before facing litigation." *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d 399, 409 (M.D. Pa. 2021); *see Jud. Watch, Inc. v. North Carolina*, 2021 WL 7366792, at *10 (W.D.N.C. Aug. 20, 2021) (notice insufficient if "too vague to provide [defendants] an opportunity to attempt compliance"); *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014) (notice letter too vague if it "allege[s] NVRA violations only in broad terms" without mentioning specific plaintiff or form at issue). These courts did not "insist on more" than the

statute requires. *See* ECF No. 17 at 24. Instead, they recognized that the statute calls for notice of the specific violation alleged and the "reasons" the Secretary "purportedly failed to comply" with section 8(i). *Pub. Int. Legal Found. v. Boockvar*, 370 F. Supp. 3d 449, 457 (M.D. Pa. 2019).

Here, Plaintiffs received a detailed letter responding to their seven requests for information, promising responsive documents, and offering to meet and confer to clarify or narrow a small number of confusingly worded requests. ECF No. 1 at 47–49. Because Plaintiffs provided no "reasons" Secretary Weber's office "purportedly failed to comply" with the NVRA, *Boockvar*, 370 F. Supp. 3d at 457, they did not give sufficient notice under section 8(i).[4]

VI. LPCA IMPROPERLY PIGGYBACKED OFF JUDICIAL WATCH'S NOTICE.

A party cannot satisfy the NVRA's notice requirement as to a section 8(i) claim if it does not request the records at issue before sending a letter noticing its intent to sue. *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d at 409–10. Because LPCA never requested documents from the Secretary, it cannot satisfy this requirement. LPCA did not join Judicial Watch's August 2023 letter requesting documents, and it therefore could not join in Judicial Watch's later letter that sought to provide pre-suit notice of a section 8(i) violation. ECF No. 16 at 24.

Plaintiffs' opposition offers a distinction without a difference. True, *Scott v. Schedler*, cited in Defendants' Motion, concerned another type of piggybacking: a plaintiff that the notice letter did not name. 771 F.3d at 835. But the same principles apply. Here, just as in *Scott*, a plaintiff did not follow section 8(i)'s protocols—request documents, send notice of violation, and then sue—and cited no "textual support in the statute" to explain its failure. *Id.* And just like in *Scott*, LPCA's "notice letter was too vague to provide" Defendants with an opportunity to

[4]Plaintiffs limit their section 8(i) cause of action to concern only requests 2 and 3. ECF No. 17 at 23 n.5. That this limitation comes for the first time in their Opposition underscores the Complaint's failure to make this clear. The Court should order Plaintiffs to amend to state as much in their Complaint or, in ruling on this Motion, bar Plaintiffs from proceeding on any other requests.

attempt compliance as to the late-arriving noticer. *Id.* When Secretary Weber received a letter from LPCA, a new interested party, it was unclear what documents they sought, and on what grounds they sought them. Because no section 8(i) violation could exist as to LPCA as of October 30, 2023, that letter did not provide sufficient notice of a violation as to LPCA.

CONCLUSION

The Court should grant Defendants' Motion to Dismiss.

Dated: August 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this brief contains 2,983 words, which:

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

_X_ complies with the word limit set by Judge Scarsi's Civil Standing Order section 9(d).

Dated: August 9, 2024

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CERTIFICATE OF SERVICE

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

I hereby certify that on August 9, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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

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D. Serzo
Declarant

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Signature

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