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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2
3 COUNTY OF SAN FRANCISCO

4 PETER LA FOLLETTE; and THE
5 AMERICAN CIVIL LIBERTIES UNION OF
6 NORTHERN CALIFORNIA,

7 Plaintiffs,

8 v.

9 ALEX PADILLA, in his official capacity as
10 Secretary of State of the State of California;
11 and WILLIAM F. ROUSSEAU, in his official
12 capacity as Clerk-Recorder-Assessor-
13 Registrar of Voters for the County of Sonoma,

14 Defendants.

No. CPF 17-515931

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR WRIT
OF MANDATE**

Date: March 5, 2018
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Harold Kahn
RES ID: 01040305-03

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1 **I. INTRODUCTION**

2 California Elections Code Section 3019(c)(2) requires elections officials to reject vote-by-
3 mail ballots if they subjectively decide that the signature on a ballot envelope does not match a
4 signature on file for the voter. Elections officials need not, and generally do not, notify voters that
5 their ballots were rejected. Nor does the Code permit voters to cure the perceived signature
6 mismatch so that their votes can count. As a result, tens of thousands of eligible voters' ballots are
7 rejected and left uncounted each election cycle—a number set to increase substantially in light of
8 the 2016 California Voter's Choice Act's authorization of widespread all-mailed-ballot elections.

9 This wholesale disenfranchisement of California voters, without providing voters notice
10 and an opportunity to show that their ballots are proper, violates due process, equal protection, and
11 the California constitutional right to have a properly cast vote counted. *See Fla. Democratic Party*
12 *v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *Zessar v.*
13 *Helander*, No. 05-C-1917, 2006 WL 642646 (N.D. Ill. 2006), *vacated as moot sub. nom. Zessar v.*
14 *Keith*, 536 F.3d 788 (7th Cir. 2008); *Raetzl v. Parks/Bellefont Absentee Elec. Bd.*, 762 F. Supp.
15 1354 (D. Ariz. 1990) (all invalidating similar statutes).

16 Plaintiffs therefore ask this Court to (1) hold that Section 3019(c)(2) is facially
17 unconstitutional and that no ballot may be rejected based on a mismatched signature without
18 providing the voter with notice and an opportunity to cure within eight days after the election, (2)
19 issue a writ of mandate prohibiting Defendants and their agents from rejecting vote-by-mail ballots
20 for purportedly mismatched signatures without providing the voter with this notice and an
21 opportunity to show that the ballot is proper, and (3) direct the Secretary of State to inform elections
22 officials of this ruling.

23 **II. LEGAL AND FACTUAL BACKGROUND¹**

24 More than half of California voters cast their ballots by mail. (RJN Ex. C at 28.) Any
25 properly registered voter may use this process, either permanently or on a one-time basis. Cal.

26 //

27 _____

28 ¹ These facts are further detailed in Plaintiffs' Verified Petition for Writ of Mandate.

1 Elec. Code §§ 3001, 3003, 3200-3206.² In either case, elections officials send voters ballots and
2 supplies for returning these ballots, including identification envelopes. §§ 3010, 3011. Voters must
3 sign the identification envelopes in their own handwriting, but need not sign in any particular
4 manner. § 3011(a)(2), (7). They must then mail their ballots by election day, and the ballots must
5 arrive at the elections official's office within three days after the election. § 3020(b). Officials can
6 begin the process of counting vote-by-mail ballots 29 days before election day and have 30 days
7 after the election to count the ballots and certify the results. §§ 15101, 15372.

8 When elections officials receive the ballots, they must compare the signatures on the
9 identification envelopes with the voters' signatures on their affidavits of registration or other
10 official forms in their registration records. § 3019(a), (b). The only statutory guidance for this
11 process is that officials (i) must not invalidate ballots when voters substitute their initials for their
12 first or middle names, and (ii) cannot reject a ballot without visually examining it. § 3019(d), (e).

13 This signature comparison results in one of two outcomes: If the elections official
14 determines that the signatures match, the ballot will be counted. § 3019(c)(1). However,

15 [i]f upon conducting the comparison of signatures pursuant to subdivision (a) the
16 elections official determines that the signatures do not compare, the identification
envelope shall not be opened and the ballot shall not be counted.

17 § 3019(c)(2). The use of "shall" means that these ballots must be rejected and not counted. *See*
18 § 354. There is no requirement that voters receive individualized notice that their votes will be
19 rejected for signature mismatch, let alone that they will receive any notice before the election results
20 are certified and it is too late to count their votes. *See* § 3019.

21 The State's automatic invalidation of mismatch-signature ballots contrasts with its
22 treatment of ballots that lack a signature altogether; these voters have until eight days after the
23 election to cure that violation. §§ 3019(f), 4006; *see* § IV(D)(IV.D.2), below. Data from 4
24 California counties show that 62% of voters given a chance to cure a signature on a vote-by-mail
25 ballot in the 2016 general election cured the problem. (Declaration of Kim Alexander ("Alexander
26 Decl.") ¶ 21.) Voters who vote in person, meanwhile, are not subject to any sort of signature
27 _____

28 ² Statutory references are to the California Elections Code unless otherwise specified.

1 comparison. §§ 14216, 14278.

2 Plaintiff La Follette properly cast a vote-by-mail ballot—and properly signed the ballot
3 envelope—in Sonoma County in the 2016 general election, but elections officials rejected his ballot
4 for purported signature mismatch without giving him any notice or opportunity to cure.
5 (Declaration of Peter La Follette (“La Follette Decl.”) ¶¶ 4-7 & Exs. A, C.) He only learned of this
6 rejection long after the election results were certified, when he looked up the status of his ballot
7 online. (*Id.* ¶ 5.) Had he been given a chance to show that he had properly cast his ballot so that
8 his vote would have been counted, he would have done so. (*Id.* ¶ 8.)

9 Plaintiff American Civil Liberties Union of Northern California (“ACLU-NC”) is a
10 nonpartisan organization dedicated to the principles of liberty and equality embodied in both the
11 United States and California Constitutions, with nearly 137,000 members who live in Northern
12 California. (Declaration of Beverly Tucker (“Tucker Decl.”) ¶ 6.) Ms. Tucker has been an ACLU-
13 NC member since 1988 and was the chair of the board from 2015 through 2016. (*Id.* ¶ 2.) She
14 resides and owns real property in California and has paid taxes on that property, as well as other
15 state and local taxes, for several years. (*Id.* ¶¶ 3-5.) Undoubtedly, at least some of the nearly
16 137,000 other ACLU-NC members also pay California state and local taxes, including income and
17 property taxes, and are among the more-than half of California voters who cast their ballots by mail
18 and are therefore directly subject to the disenfranchising provisions of § 3019. (*See* RJN, Ex. C at
19 28.) The ACLU-NC thus has taxpayer, citizen, and direct standing to bring this action. *See*
20 *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 215 Cal. App. 4th
21 1013, 1031-33 (2013), and cases cited.

22 Defendant Secretary of State Padilla is the State’s chief elections official with the authority
23 to see that the elections laws are properly enforced. Cal. Gov. Code § 12172.5(a) (Secretary’s
24 duties and authority to see that elections laws are enforced); *see* Cal. Elec. Code § 3026 (Secretary
25 “shall promulgate regulations establishing guidelines for county elections officials relating to the
26 processing of vote by mail ballots”); (*see also* RJN, Exs. A-B (Advisories to County Elections
27 Officials (“CCROVs”) and California Uniform Vote Counting Standards published by the
28 Secretary of State)). He is the proper defendant in a lawsuit challenging the constitutionality of a

1 provision of the Election Code. *Young*, 7 Cal. 3d at 21 n.5. An order against him will bind local
2 elections officials. *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*,
3 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001); *see Ross v. Superior Court*, 19 Cal. 3d 899, 905-09
4 (1977). Defendant Registrar Rousseau is responsible for conducting all elections in Sonoma
5 County and is also a proper defendant. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570 (1971).

6 Experts estimate that between 33,000 and 45,000 ballots were rejected in the 2016 general
7 election alone for alleged mismatched signatures.³ In about one third of California counties, this is
8 the most common cause of ballot rejection. (Declaration of Mindy Romero (“Romero Decl.”) ¶
9 23.) There is no evidence to suggest that a significant number of rejected vote-by-mail ballots
10 result from attempted voter fraud. (Mitchell Decl. ¶ 14.) Rather, ballots generally are rejected
11 because an official subjectively determines that a voter’s envelope signature did not compare to a
12 signature on file for the same voter. (RJN, Ex. G at 59 & Ex. H at 62; Romero Decl. ¶¶ 30-31;
13 Alexander Decl. ¶¶ 12-13.) Many circumstances can cause a voter’s signature to appear different.
14 For example, physical disabilities, injuries, primary languages that do not use Roman characters,
15 or simply the passage of time are some of the many reasons signatures may change. (Declaration
16 of Linton A. Mohammed (“Mohammed Decl.”) ¶¶ 21, 30-31; Alexander Decl. ¶ 13.) Californians
17 may also sign on a touchpad when registering to vote, resulting in a signature on file that looks
18 different from one they put on the ballot envelope by hand. (RJN Ex. G at 59; Mohammed Decl. ¶
19 39; Alexander Decl. ¶ 12.)

20 For these and other reasons, people with no handwriting-identification training are likely to
21 erroneously conclude that two signatures from the same voter do not match. Indeed, one study in
22 which untrained participants compared sets of signatures found that laypersons incorrectly
23 determined that at least one signature made by the same person did not match in 26.1% of the cases.

24
25 ³ A leading voter-file company found that 0.54% of vote-by-mail ballots were rejected for signature
26 mismatch in 29 counties in the November 2016 election (Declaration of Paul Mitchell (“Mitchell
27 Decl.”) ¶ 13), while Asian Americans Advancing Justice found that 0.39% of ballots were rejected
28 for signature mismatch in 4 counties in the same election (Declaration of Michael T. Risher
29 (“Risher Decl.”), Ex. A at 4, 6 (showing that 0.89% of all vote-by-mail ballots were rejected, and
30 44% of these were rejected for signature mismatch)). The exact number of rejected ballots,
undisputedly in the tens of thousands, is irrelevant to Plaintiffs’ facial challenge.

1 (Mohammed Decl. ¶ 33.) And laypersons are much more likely to wrongly believe that a genuine
2 signature does not match than to believe that a forged signature is genuine. (*Id.* ¶¶ 20, 34.)

3 Rejection rates also differ widely based on the county and demographics of the voter. Data
4 from 29 California counties show that in the 2016 general election the percentage of vote-by-mail
5 ballots rejected for signature mismatch ranged from a low of 0.15% in Mariposa County to a high
6 of 1.67% in Yuba County, with an average rate of 0.54%. (Mitchell Decl., Ex. A.) Latino and
7 Asian-American voters' ballots were rejected for signature mismatch at rates higher than for other
8 voters: 0.88% for Latino voters and 0.61% for Asian-American voters, versus the 0.45% for non-
9 Latino, non-Asian votes statewide. (*Id.*; see also Romero Decl. ¶¶ 26-29, 32-38 (discussing other
10 disparities); Alexander Decl. ¶¶ 8-10 (discussing disparities between counties); Risher Decl., Ex.
11 A (*Issue Brief: Asian American Face Higher than Average Vote-by-Mail Rejection Rates in*
12 *California* (Asian American Advancing Justice 2017)). These percentages can be greater than the
13 margin of victory in close races. (*E.g.*, RJN, Ex. E at 37 (showing that Rep. Darrell Issa won U.S.
14 Representative District 49 by 0.6%); Risher Decl., Ex. B (*Editorial: Bay Area races where one vote*
15 *made a difference*, San Jose Mercury News, Dec. 31, 2017) (describing several elections in which
16 “one or just a few votes made the difference”).)

17 Overall, California has the third highest mail-ballot rejection rate in the United States.
18 (Romero Decl. ¶ 20.) This is significant given that over half of California voters already vote by
19 mail. (RJN, Ex. C at 28 (51.16% to 69.40% of California voters voted by mail in the 2012 to 2016
20 elections).) The net result is that tens of thousands of vote-by-mail ballots are discarded every
21 election cycle, as noted above. And the percentage of vote-by-mail voters—and the number of
22 rejected vote-by-mail ballots—will likely increase in the coming elections, in part because many
23 Californians will be required to vote by mail under the 2016 Voter's Choice Act. §§ 4005(a), 4007;
24 (*see* RJN, Ex. F; Romero Decl. ¶¶ 46-50.)

25 **III. LEGAL STANDARD**

26 A writ of mandate is the proper remedy to “challeng[e] the constitutionality or validity of
27 statutes or official acts.” *Jolicoeur*, 5 Cal. 3d at 570 n.2; *see, e.g., Young v. Gnos*, 7 Cal. 3d 18,

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20-21 & nn. 1-2 (1972) (constitutionality of California elections statute); *League of Women Voters of Cal. v. McPherson*, 145 Cal. App. 4th 1469, 1475 (2006) (constitutionality of Secretary of State’s interpretation of a California elections provision).

IV. DISCUSSION

A. Rejecting Ballots Without Notice And Opportunity To Cure Violates Voters’ Due Process Rights.

Section 3019(c)(2)’s failure to provide notice and an opportunity to cure deprives California voters whose signatures are deemed not to “compare” of due process under both the federal and state Constitutions. U.S. CONST., amend. XIV, § 1; CAL. CONST., art. 1, § 7.

1. Federal Due Process.

The “right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.” *United States v. State of Tex.*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff’d sub nom. Texas v. United States*, 384 U.S. 155 (1966); *Peterson v. City of San Diego*, 34 Cal. 3d 225, 229 (1983) (“The right to vote is, of course, fundamental.”). And the right to vote includes the right to have one’s vote counted. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *Detzner*, 2016 WL 6090943, at *1.

Although a state need not create vote-by-mail procedures, once it does so it must administer them in a way that affords voters due process. *Zessar*, 2006 WL 642646, at *6; *Raetzel*, 762 F. Supp. at 1358 (“the state ... cannot disqualify [absentee] ballots, and thus disenfranchise voters, without affording the individual appropriate due process”). By creating vote-by-mail procedures, “the state has enabled a qualified individual to exercise her fundamental right to vote” through those procedures, and cannot “alter the rights of those electors who participate.” *Zessar*, 2006 WL 642646, at *6; *see also Action NC v. Strach*, 216 F. Supp. 3d 597, 648 (M.D.N.C. 2016) (“Voter enfranchisement cannot be sacrificed when a citizen provides the state the necessary information to register to vote but the state turns its own procedures into a vehicle to burden that right.”).

Due process requires that before depriving a person of a protected interest, such as the right to vote, the government must provide notice and opportunity to contest the deprivation. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). These two essentials are

1 “elementary and fundamental”—the absolute minimum that due process requires. *Id.* at 314-15;
2 *see Today’s Fresh Start, Inc. v. L.A. Cty. Office of Educ.*, 57 Cal. 4th 197, 212 (2013).

3 Courts have therefore held that due process prohibits elections officials from rejecting vote-
4 by-mail ballots without providing timely notice and opportunity to cure. For example, in *Zessar*, a
5 voter challenged Illinois laws that permitted state elections officials to reject mail-in ballots if the
6 signature on the ballot application did not match the signature on other records. 2006 WL 642646,
7 at *2. Although the law required notice to be sent to voters whose ballots were rejected, it did not
8 require that this happen before the vote was rejected or provide a way for voters to challenge the
9 rejection. *Id.* at *2-3. The court held that the scheme violated federal due process by failing to
10 provide absentee voters with an opportunity “to remedy the loss of [their] vote in that election.” *Id.*
11 at *6-7, *10.

12 Likewise, in *Raetzel*, absentee voters challenged Arizona’s procedures for processing
13 absentee ballots because they permitted elections officials to reject absentee ballots in response to
14 ballot challenges without providing notice to the voters. 762 F. Supp. at 1357. The court held that
15 Arizona’s procedures denied absentee voters due process because they failed to provide “notice ...
16 so that any defect ... can be cured and the individual is not continually and repeatedly denied so
17 fundamental a right.”⁴ *Id.* at 1358.

18 California law suffers from the same constitutional defects. Section 3019(c)(2) deprives
19 California voters of due process by requiring or even allowing officials to reject vote-by-mail
20 ballots without providing notice or opportunity to cure. California was not obligated to create a
21 vote-by-mail scheme; but because it did, it may not disenfranchise those who avail themselves of
22 the scheme without due process. As *Raetzel* warned, without proper notice, California voters may
23 never be apprised of the deprivation, which may repeat *ad infinitum*.

24 2. California Due Process.

25 “[P]rocedural due process under the California Constitution is much more inclusive and
26

27 ⁴ In *Raetzel*, the ballot rejections were in response to ballot challenges *after* the votes were counted,
28 when it was too late to allow voters to cure for the same election. 762 F. Supp. at 1357-58.

1 protects a broader range of interests than under the federal Constitution.” *Gresher v. Anderson*,
2 127 Cal. App. 4th 88, 104-05 (2005) (quotations omitted); *see People v. Ramirez*, 25 Cal. 3d 260,
3 266-70 (1979). This broader approach means that Californians are entitled to due process whenever
4 the government moves to deprive them of a fundamental right *or* a right, interest, or benefit
5 protected by a statutory or constitutional provision. *See Ramirez*, 25 Cal. 3d at 264, 267-68; *see*
6 *also Gresher*, 127 Cal. App. 4th at 105 (“when an individual is subjected to deprivatory
7 governmental action, he always has a due process liberty interest” under the state Constitution).

8 Here, the rights to vote and to have that vote counted are both fundamental (as discussed
9 above) and protected by specific statutory and constitutional provisions. The right to vote and the
10 right to have a properly cast vote counted are expressly protected by the California Constitution.
11 *See* CAL. CONST., art. 2, §§ 2, 2.5. And the Elections Code specifically gives all eligible voters the
12 right to cast their ballots by mail: “The vote by mail ballot shall be available to any registered
13 voter.” § 3003; *see, e.g.*, §§ 3006(b)(3), 3010, 3017, 3200, 3203, 3206. Indeed, some voters have
14 no other option. *See* §§ 3005, 4000-4002, 4005(a), 4007 (mandatory vote-by-mail). California due
15 process therefore protects the right to vote by mail and the right to have that vote counted.

16 The irreducible minimum of due process under the state Constitution, as under the federal
17 charter, is pre-deprivation notice and an opportunity to cure. *Today’s Fresh Start*, 57 Cal. 4th at
18 212; *In re Large*, 41 Cal. 4th 538, 551-52 (2007); *Gresher*, 127 Cal. App. 4th at 106. Section
19 3019(c)(2) is therefore unconstitutional under the California due process clause, because it deprives
20 voters of their right to have their votes counted, without providing them with notice or an
21 opportunity to show their ballots were properly cast.

22 **B. Rejecting Ballots Without Notice And Opportunity To Cure Violates Equal**
23 **Protection.**

24 Because the right to vote is a fundamental right, strict scrutiny applies to laws that impose
25 a severe burden on it. *Gould v. Grubb*, 14 Cal. 3d 661, 669-70 (1975); *see, e.g., Burdick v. Takushi*,
26 504 U.S. 428, 434 (1992); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Field v. Bowen*, 199 Cal.
27 App. 4th 346, 356 (2011); *Collier v. Menzel*, 176 Cal. App. 3d 24, 32 (1985). Here, Section
28 3019(c)(2) imposes a severe burden on voting: it completely disenfranchises tens of thousands of

1 Californians in a single election without providing notice or an opportunity to cure, based on
2 elections officials' subjective determinations that voters' signatures do not match (even though
3 nothing in the law requires voters to sign their name in any specific way). As one federal court
4 stated in overturning a nearly identical statute: "If disenfranchising thousands of eligible voters
5 does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."
6 *Detzner*, 2016 WL 6090943, at *6 (Florida's statute, although subject to strict scrutiny, failed even
7 rational basis review). Strict scrutiny therefore applies.

8 Under strict scrutiny, § 3019(c)(2)'s restriction on the right to vote is unconstitutional unless
9 the government can show it is "necessary to achieve a compelling state interest." *Gould*, 14 Cal.
10 3d at 672; *see Dunn*, 405 U.S. at 336-37, 360 (state law prohibiting new residents from voting was
11 not "necessary to promote a compelling governmental interest"). As discussed below,
12 disenfranchising signature-mismatch voters without notice or opportunity to cure is not narrowly
13 tailored to any legitimate government interest.

14 **1. The Government Cannot Treat Ballots With Supposedly Mismatched**
15 **Signatures Worse Than It Treats Unsigned Ballots.**

16 Section 3019(c)(2) violates federal and state equal protection guarantees because it
17 disenfranchises voters who have properly signed their ballots—but whose signatures officials deem
18 not to match—while providing voters who have failed to sign their ballots an opportunity to cure
19 that problem. U.S. CONST., amend. XIV, § 1; CAL. CONST., art. 1, § 7. As discussed above, while
20 § 3019 requires vote-by-mail ballots with signatures deemed not to match to be flatly rejected, vote-
21 by-mail ballots that lack a signature altogether are not automatically rejected, but may be cured
22 until eight days after the election. §§ 3019(f), 4006; *see* § IV(D)(2), below. This differential
23 treatment violates federal and state equal protection.

24 First, it is "illogical, irrational, and patently bizarre" for the government to "withhold the
25 opportunity to cure from mismatched-signature voters while providing that same opportunity to no-
26 signature voters" and thus "categorically disenfranchise[] thousands of voters arguably for no
27 reason other than they have poor handwriting or their handwriting has changed over time."
28 *Detzner*, 2016 WL 6090943 at *7; (*see* Mohammed Decl. ¶¶ 19-41 (discussing reasons that officials

1 may erroneously determine that signatures do not match); RJN, Ex. G at 59 & Ex. H at 62
2 (discussing the same in legislative reports on AB 1135, a 2013 bill amending the signature
3 verification process for vote-by-mail ballots)). Indeed, rejecting a ballot because of errors not
4 attributable to the voter constitutes an equal-protection violation. *See Ne. Ohio Coal. for Homeless*
5 *v. Husted*, 696 F.3d 580, 593-94 (6th Cir. 2012) (rejecting ballot due to poll worker error likely an
6 equal protection violation).

7 Second, disqualifying signature-mismatch ballots without an opportunity to cure is not
8 necessary to prevent voter fraud. To the contrary, doing so “has no rational relationship (let alone
9 narrow tailoring) to” preventing fraud. *Detzner*, 2016 WL 6090943, at *7; *see also Dunn*, 405 U.S.
10 at 349-51 (durational residency statute that reflected an “administratively useful presumption” of
11 fraud created a crude classification that improperly excluded eligible voters). There is no reason to
12 believe that mismatched ballots are even the result of attempted voter fraud. (Mitchell Decl. ¶ 14;
13 RJN, Ex. G at 59; Ex. H at 62); *see Detzner*, 2016 WL 6090943, at *7. But even if there were, that
14 would not matter because Plaintiffs do not argue that elections officials should just accept
15 mismatched ballots, but that voters must have an opportunity to show the ballot-envelope signatures
16 are theirs. *See Detzner*, 2016 WL 6090943, at *7 (discarding ballots without opportunity to cure
17 would be unconstitutional even if, contrary to the evidence, “voter fraud ran rampant”).

18 There is a simple less-restrictive alternative—which the state already employs in another
19 context—to advance any purported interest in preventing fraud: allowing mismatched-signature
20 voters an opportunity to show their ballots are proper before their votes are denied, as is already
21 done with no-signature ballots. This in itself shows that the current system of simply rejecting the
22 ballots is unnecessary and fails strict scrutiny. *See Dunn*, 405 U.S. at 347-53 (residency
23 requirements were not necessary to prevent voter fraud when less restrictive means were adequate,
24 as evidenced by the three-month in-county residency requirement versus the one-year in-state
25 residency requirement); *Charfauros v. Bd. of Elections*, 249 F.3d 941, 945, 950-53 (9th Cir. 2001)
26 (hearing one party’s voter-qualification challenges pre-election and another party’s challenges
27 post-election violated federal equal protection because separate treatment was not necessary to
28

1 ensure voters were qualified); *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008) (availability of
2 alternatives to challenged distinction is “fatal” under strict scrutiny).

3 Finally, that providing mismatch-signature voters with notice and an opportunity to cure
4 may impose some costs on local elections officials does not matter under strict scrutiny: “avoidance
5 or recoupment of administrative costs ... cannot justify imposition of an otherwise improper
6 classification” affecting voting rights. *Castro v. State of Cal.*, 2 Cal. 3d 223, 242 (1970) (state
7 provision conditioning right to vote upon ability to read English violated federal equal protection);
8 *see Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (“administrative convenience” cannot justify
9 deprivation of a constitutional right); *Woods*, 167 Cal. App. 4th at 675; *Detzner*, 2016 WL 6090943,
10 at *7. Other states are able to provide notice and an opportunity to cure. *See* Pet. ¶¶ 53-58; (RJN,
11 Exs. I-N (Washington, Oregon, Montana, Massachusetts, and Arizona laws providing notice and
12 an opportunity to cure mismatch for mailed-in ballots)). California should be able to do the same.
13 Section 3019 therefore violates equal protection. *Detzner*, 2016 WL 6090943, at *6 n.10 & *7
14 (invalidating parallel provision).

15 2. The Government Cannot Selectively Disenfranchise Voters Whose 16 Signatures It Does Not Recognize.

17 Section 3019(c)(2) violates equal protection for another, more basic reason: it causes
18 elections officials to accept ballots when they subjectively believe the identification-envelope
19 signatures match those on file, but to reject ballots (without an opportunity to show they are proper)
20 when the officials subjectively believe the envelope signatures do not match those on file. The two
21 groups are virtually identical: both have cast vote-by-mail ballots and have personally signed their
22 envelopes. The only difference is that for one group, elections officials possess and consult a
23 signature on file that they believe resembles the one on the envelope; for the other, the officials
24 either do not have or do not consult a signature on file that they believe matches. § 3019; (*see*
25 *Mohammed Decl.* ¶¶ 21, 30-31 (describing reasons officials may make erroneous determinations).)

26 This subjective distinction by elections officials fails strict scrutiny, because the
27 disenfranchisement of mismatched-signature voters is neither necessary nor narrowly tailored.
28

1 *Supra* at § I.A. Rather than simply discarding the ballots, the government can provide notice and
2 an opportunity to cure, as discussed above.

3 **C. Rejecting Ballots Without Notice And Opportunity To Cure Violates Voters’**
4 **Rights Under Article II, Section 2.5 Of The California Constitution.**

5 California voters have a constitutional right to have their votes counted: “A voter who casts
6 a vote in an election in accordance with the laws of this State *shall have that vote counted.*” CAL.
7 CONST., art. II, § 2.5 (emphasis added). Section 2.5 was adopted by California voters in 2002 via
8 Proposition 43, and is unambiguous on its face. Every vote lawfully cast in California must count.

9 Because the Constitution’s language is “clear and unambiguous, the plain meaning
10 governs.” *Silicon Valley Taxpayers Ass’n, Inc. v. Santa Clara Cty. Open Space Auth.*, 44 Cal. 4th
11 431, 444 (2008). But even if there were some ambiguity, the ballot materials confirm this meaning.
12 *See People v. Arroyo*, 62 Cal. 4th 589, 593 (2016) (“the analyses and arguments contained in the
13 official ballot pamphlet” are particular indicia of the voters’ intent). Both the Legislative Analyst
14 and proponents of Proposition 43 emphasized that the new provision would ensure that “*every*
15 *legally cast vote is counted.*” (RJN, Ex. D at 31-34.) The proponents further stated that Proposition
16 43 would mean that “you have a constitutional right to have your vote counted” because “[e]lections
17 shouldn’t be decided by courts or government officials” but “by the citizens who vote.” (*Id.* at 33.)

18 California law requires vote-by-mail voters to sign their ballot envelope in their own
19 handwriting, but does not require them to sign in any particular way, much less to ensure the
20 signature matches those on record. § 3011(2), (7). Voters who sign their envelopes and otherwise
21 comply with the legal requirements for submitting ballots thus have a constitutional right to have
22 their votes counted, regardless of whether elections officials believe that the signatures do not
23 match those on file or whether they appear similar. But tens of thousands of Californians’ votes
24 did not count in November 2016 alone because elections officials discarded these lawful votes
25 under § 3019(c)(2) without providing notice or an opportunity to cure, based on a belief that the
26 signatures did not match. This is exactly what Section 2.5 prohibits. The government must provide
27 notice and an opportunity to show the ballots are proper before rejecting a vote.
28

1 **D. Voters Must Be Given Individualized Notice And An Opportunity To Cure.**

2 Although the Secretary of State and local elections officials have discretion as to how to
3 remedy these constitutional violations, the Court should order that they comply with the following
4 minimal requirements for a constitutional system of providing notice and an opportunity to cure.

5 **1. Due Process Requires Individualized Pre-Deprivation Notice.**

6 Due process generally requires that the government provide individualized notice prior to
7 an action that will adversely affect an individual's protected interests. *See Mennonite Bd. of*
8 *Missions v. Adams*, 462 U.S. 791, 798-800 (1983); *Today's Fresh Start*, 57 Cal. 4th at 212 (state
9 and federal due process). This means that when the affected person's "name and address are
10 reasonably ascertainable" or actually known, due process requires the government to provide notice
11 by mail or by personal service; publication or other "constructive notice" is not enough. *Id.* at 798-
12 800. "Only when the address is unknown and cannot be ascertained with reasonable diligence will
13 a publication in lieu of mailing satisfy the constitutional requirements." *Johnson v. Alma Inv. Co.*,
14 47 Cal. App. 3d 155, 162 (1975). Although mail has traditionally referred to physical letters, notice
15 by email is also sufficient. *See McCluskey v. Belford High Sch.*, No. 2:09-14345, 2010 WL
16 2696599, at *3, *5 (E.D. Mich. June 24, 2010).

17 Here, elections officials have records showing the voters' mailing addresses (which they
18 use to mail ballots in the first place), and may have voters' email addresses and/or telephone
19 numbers. *See, e.g.*, §§ 3006(a)(2), 3007.5(b)(2), 3011(a)(3). Elections officials must therefore
20 notify voters whose ballots are rejected for signature mismatch by mail, email, or telephone.

21 However given, notice must inform the voters of the problem that will affect their rights
22 (i.e., the identification-envelope signature does not match one on file) and how the voters can cure
23 the problem. *See Minor v. Mun. Court*, 219 Cal. App. 3d 1541, 1549-50 (1990); *Ramirez*, 25 Cal.
24 3d at 275. In addition, the notice "must afford a reasonable time for those interested" to contest the
25 government action. *Mullane*, 339 U.S. at 314; *see Ramirez*, 25 Cal.3d at 276 (holding that three
26 days' notice of right to appeal exclusion from a civil rehabilitation program was inadequate).
27 Voters must therefore be notified in a way that provides them a reasonable amount of time to cure
28 the signature mismatch, either in person or otherwise. *See Zessar*, 2006 WL 642646, at *9.

1 **2. Equal Protection Requires That Voters Be Allowed To Cure Until Eight**
2 **Days After The Election, As Is Allowed For No-Signature Ballots.**

3 Finally, equal protection requires that signature-mismatch voters be given the same
4 opportunity to cure afforded to voters who completely failed to sign their ballot envelopes. *See,*
5 *e.g., Detzner*, 2016 WL 6090943, at *9 (ordering Florida to permit mismatched-signature ballots to
6 be cured in “the same fashion as currently provided for non-signature ballots”). California law
7 allows no-signature voters to cure their missing signatures by (1) signing the identification envelope
8 at an elections office within eight days of the election, (2) signing under penalty of perjury and
9 returning to an elections office a separate “unsigned ballot statement” form within eight days of the
10 election, or (3) submitting at the polls an “unsigned ballot statement” on election day. *See*
11 § 3019(f). Elections officials then compare the signatures on these new documents with those on
12 file for the voter and, if they match, count the vote. *See* § 3019(f)(1)(b). Mismatch-signature voters
13 should similarly be permitted to cure (1) in-person at the elections office within eight days of the
14 election, (2) by mail or in-person at the elections office within eight days of the election, or (3) at
15 the polls on election day—for example, by submitting an affidavit.

16 **V. CONCLUSION.**

17 The right to vote and have that vote counted lies at “the heart of representative government.”
18 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see Dunn*, 405 U.S. at 336 (right to vote is
19 “preservative of all rights”). For this reason, the California Supreme Court has long recognized
20 that “before the constitutional right to vote may be taken away from a citizen, he must be given an
21 opportunity to be heard in his own behalf.” *Communist Party of U.S. of Am. v. Peek*, 20 Cal. 2d
22 536, 555 (1942).

23 Plaintiffs therefore ask the Court to:

- 24 (i) hold that § 3019(c)(2) is facially unconstitutional, and that state and local elections officials
25 cannot reject a ballot on the ground that signatures do not “compare” without providing
26 timely notice and opportunity to cure within eight days after the election, or in any event
27 before the results are certified;

- 1 (ii) issue a peremptory writ of mandate prohibiting Defendants, and local elections officials as
2 agents of Defendant Secretary of State, from rejecting any vote-by-mail ballots on the
3 ground that signatures do not “compare” without providing this notice and opportunity to
4 cure within eight days after the election; and
- 5 (iii) direct the Secretary of State to inform elections officials of this ruling and that they are
6 bound by it; *see* CAL. GOV. CODE § 12172.5(a); *McPherson*, 145 Cal. App. 4th at 1475
7 (granting writ of mandate and directing the secretary to inform county clerks, superior court
8 clerks, and registrars as to the permissible administration of elections).

9
10 Dated: January 19, 2018

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