No.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

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

Petitioners,

v.

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

Respondents.

VERIFIED PETITION FOR WRIT OF MANDATE AND MEMORANDUM OF POINTS & AUTHORITIES

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rules 8.208(e) and 8.488 of the California Rules of Court, Petitioners certify that they know of no other person or entity that has a financial or other interest in the case.

PETITION FOR WRIT OF MANDATE

INTRODUCTION

The right to vote and have that vote counted is the cornerstone of democracy. Yet by statutory mandate, tens of thousands of California voters, including Petitioners, are disenfranchised each election without even knowing their fundamental right to vote has been usurped. A mandate from this Court is needed to stop this undemocratic practice.

California Elections Code Section 3019(c)(2) requires elections officials to reject vote-by-mail ballots if they think a signature on a ballot envelope does not match a signature on file for the voter. The Code does not prescribe how elections officials should make this determination or require officials to have training in handwriting identification or comparison. And elections officials need not, and generally do not, notify voters that their ballots were rejected. Nor does the Code permit voters to cure the perceived signature non-match so their votes can count.

As a result, tens of thousands of eligible voters' ballots are discarded each election cycle—with as many as 45,000 ballots discarded in the November 2016 election alone. Over half of California voters already participate in California's comprehensive vote-by-mail system; this number is set to increase substantially in forthcoming elections in light of the 2016 California Voter's Choice Act. This wholesale disenfranchisement of California voters without providing voters notice and an opportunity to show that their ballots are proper violates the guarantees of due process, equal protection, and the California constitutional right to have a properly cast vote counted.

First, the right to vote is fundamental and includes the right to have one's vote counted. Due process therefore requires that voters be afforded meaningful notice and opportunity to cure perceived signature mismatches before they can be deprived of these rights. Section 3019(c) instead requires elections officials to reject vote-by-mail ballots if they believe that the signatures do not "compare," without providing notice or an opportunity to cure. As a federal court found in invalidating a similar statute, because this ballot "rejection—erroneous or not—wholly deprive[s] an absentee voter of the right to vote" with no "way to remedy the loss of that vote in that election," it violates due process. *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at *7 (N.D. Ill. 2006), *vacated as moot sub. nom. Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008).

Second, Section 3019 violates equal protection because it treats signature-mismatch voters worse than it treats similarly situated voters. For one, under Section 3019(f), voters who fail to sign their envelopes altogether have until eight days after the election to cure their failure; if they do so, their votes will count. By failing to provide signature-mismatch voters this same opportunity to cure, Section 3019(c)(2) violates equal-protection guarantees. Section 3019(c)(2) also violates equal protection by requiring elections officials to count vote-by-mail ballots with envelope signatures they subjectively believe match those on file, but to reject vote-by-mail ballots with envelope signatures they erroneously believe do not match those on file, without providing voters an opportunity to show the latter are proper. Both groups of voters have properly cast ballots through California's vote-by-mail system, but only one is disenfranchised—and based only on officials' visual perception that the voters' signatures do not match. Simply put, disenfranchising thousands of voters based on

unwitting signature variations, without providing any opportunity to cure, does not satisfy rational basis review, let alone the strict scrutiny required. As another court recently wrote in invalidating a nearly identical statute, "categorically disenfranchis[ing] thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time" violates equal protection and is "illogical, irrational, and patently bizarre." *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016).

Third, Californians' right to have every lawful vote count is expressly enshrined in Article II, Section 2.5 of the California Constitution. Because the Elections Code does not require voters to sign their envelope in any particular manner, ballots with envelope signatures that innocuously mismatch those on file are lawful. Thus, under Section 2.5, these ballots may not be discarded without providing voters with an opportunity to show they are properly cast.

Petitioner Peter La Follette is an eligible voter who chose to participate in California's vote-by-mail system. He submitted his ballot in the November 2016 election in full compliance with the election laws—including signing his ballot envelope. He heard nothing and believed his vote counted when the election results were certified. But as he later learned, his vote was discarded and never counted. Mr. La Follette's constitutional rights were violated.

Petitioner American Civil Liberties Union of Northern California (ACLU-NC) is a nonprofit, nonpartisan civil liberties organization dedicated to the principles of liberty and equality embodied in both the United States and California Constitutions. Founded in 1934, the ACLU-NC works to protect the voting and due-process rights of its more than

150,000 members and other Californians through litigation and other advocacy.

Counsel has already notified the Secretary of State of the violations and asked him to remedy the situation. (*See* Declaration of Michael T. Risher ("Risher Decl."), Ex. A.) But bound by Article III § 3.5 of the California Constitution to obey the statute until an appellate court says otherwise, the Secretary has not agreed to any changes. (*See id.* ¶ 2.) Local elections officials will thus continue to discard, without notice or opportunity to cure, voters' ballots with envelope signatures they deem not to compare. As such, thousands of California voters are unknowingly poised to become disenfranchised in California's coming elections.

A decision from this Court is therefore needed to preserve California voters' fundamental right to vote and to ensure the integrity of California elections is sacrosanct. These issues are of great public importance and must be resolved promptly. California elections officials must stop discarding valid ballots cast by eligible voters without providing those voters notice and an opportunity to show that their votes should be counted.

Petitioners therefore ask this Court to grant this Petition and:

(i) hold that Section 3019(c)(2) is unconstitutional and that no ballot may be rejected based on a mismatched signature without providing the notice and opportunity to cure within eight days of the election, and

(ii) command Respondents to comply with that determination and perform the relief requested herein.

JURISDICTION IS PROPER & WRIT RELIEF IS WARRANTED

1. This Court has jurisdiction over this Petition for an original writ under Article VI, Section 10 of the California Constitution. The Court will exercise that jurisdiction over cases in which "the issues presented are of great public importance and must be resolved promptly." *Wenke v. Hitchcock*, 6 Cal. 3d 746, 750 (1972); *see Aden v. Younger*, 57 Cal. App. 3d 662, 670 (1976) (same).

2. Here, the issues presented are of great public importance statewide. Petitioners challenge the constitutionality of an Elections Code provision that affects Californians' right to vote. As the California Supreme Court has recognized, "[c]ases affecting the right to vote and the method of conducting elections are obviously of great public importance." *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570 n.1 (1971); *Wenke*, 6 Cal. 3d at 750.

3. Further, the constitutionality of the Elections Code provision at issue must be decided promptly. The next statewide election, a statewide primary, will occur on June 5, 2018. Vote-by-mail ballot requests must arrive by May 29, 2018. Cal. Elec. Code § 3001.[1] "It is highly unlikely that petitioners could secure a superior court decision and complete the inevitable appeals by either side from that decision in time" to afford Petitioners (and other California voters) adequate relief for that election. *Jolicoeur*, 5 Cal. 3d at 570 n.1.

4. A swift appellate decision is necessary because local elections officials implement Section 3019(c)(2) and generally must obey a statute until a court orders them to do otherwise or an appellate court holds the statute unconstitutional. *Lockyer v. v. City & Cty. of S.F.*, 33 Cal. 4th 1055,

[1] Statutory references are to the California Elections Code unless otherwise specified.

1104 (2004); *see* Cal. Const. art. III § 3.5. Although there are strong arguments that a superior-court judgment against the Secretary of State would bind local elections officials, counties foreseeably could take the position that they were not bound by a superior-court ruling and must instead continue to comply with the statute as written. Statewide elections should follow uniform statewide rules.

5. Prompt relief is also necessary to ensure that local elections officials have adequate time to implement any necessary changes. *See Young v. Gnoss*, 7 Cal. 3d 18, 28-29 (1972).

6. Furthermore, mandamus is "appropriate for challenging the constitutionality or validity of statutes or official acts." *Jolicoeur*, 5 Cal. 3d at 570 n.2. A petition for an original writ of mandate is thus the proper way to challenge the constitutionality of an Elections Code provision or interpretations thereof. *See Young*, 7 Cal. 3d at 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). Mandamus is also the proper way to compel the Secretary of State and county election administrators to conduct elections in conformity with the law. *See McPherson*, 145 Cal. App. 4th at 1475 (granting original writ and directing the Secretary of State to inform county clerks, superior court clerks, and registrars of voters as to the permissible administration of elections).

7. As a result, California appellate courts have repeatedly exercised original mandamus jurisdiction to decide questions involving the constitutionality of elections laws and procedures. *See, e.g.*, *Young*, 7 Cal. 3d at 20-21 (constitutionality of voter residency requirements and early

closure of registration); *Wenke*, 6 Cal. 3d at 751 (constitutionality of registrar's refusal to issue nomination papers); *Jolicoeur*, 5 Cal. 3d at 569-70 (constitutionality of minors' deemed place of residency for voting); *Legal Servs. for Prisoners with Children v. Bowen*, 170 Cal. App. 4th 447, 452 (2009) (constitutionality of disenfranchisement of persons convicted of certain crimes); *McPherson*, 145 Cal. App. 4th at 1473 (constitutionality of disenfranchisement of certain incarcerated persons).

8. Finally, the Petition involves only the purely legal question of whether the procedure mandated by the Elections Code for processing ballots with signatures that do not "compare" violates the state and federal Constitutions. Proceedings in the trial court, therefore, will not narrow the issues or produce a factual record. *See Lockyer*, 33 Cal. 4th at 1115 (original writ of mandate proper where validity of California law was a pure legal question); 2 Witkin California Evidence Judicial Notice § 6(2) (5th ed. 2016) ("Under the Evidence Code . . . courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law.") (citations omitted).

VENUE

9. Venue in this Court is appropriate for two reasons. First, Petitioner La Follette resides and votes in Sonoma County and sues the Sonoma County Clerk-Recorder-Assessor-Registrar of Voters for acts he performs as part of his public duties in that County. *See* Cal. Code Civ. Proc. §§ 393(b), 395(a). Second, an action against the Secretary of State is properly brought in San Francisco County, because the Attorney General maintains an office there. *See id.* § 401(a); *State Bd. of Equalization v.*

Superior Court, 138 Cal. App. 4th 951, 957 (2006). Both San Francisco and Sonoma Counties are in this District. Cal. Gov. Code § 69100(a).

PARTIES

10. Petitioner Peter La Follette is a California citizen who applied online to vote by mail and cast a vote-by-mail ballot in the November 2016 election in compliance with all elections laws, but his vote was not counted. Mr. La Follette was not notified that his signature was deemed mismatched or given an opportunity to cure before vote counting closed.

11. Mr. La Follette is an eligible, registered voter who resides in Sonoma County. (Declaration of Peter La Follette ("La Follette Decl.") ¶ 4.) Mr. La Follette studied chemistry at the University of California, Davis and is 25 years old. (*Id.* ¶ 2.)

12. Mr. La Follette has voted in every presidential election since he turned 18. (*Id.* ¶ 3.) Voting is important to him because he appreciates that his vote can have a real effect on local elections and is a way to be involved in the political process. (*Id.*)

13. Mr. La Follette voted by mail in the November 2016 election, as he has done in the past. (*Id.* ¶ 4.) In casting his vote, Mr. La Follette signed the ballot envelope and otherwise complied with all requirements to have his vote counted. (*See id.* ¶ 4.) He was never notified that his vote was not, in fact, counted. (*Id.* ¶ 5.)

14. In 2017, Mr. La Follette learned from the Secretary of State's website that his vote had been discarded. (*Id.*) A screenshot of that webpage is attached as Exhibit A to Mr. La Follette's declaration submitted herewith. (*Id.*, Ex. A.)

15. In July 2017, Mr. La Follette sent an email to his county's chief elections official, Respondent Rousseau, asking why his vote was discarded. (*See id.*, Ex. B.)

16. On July 26, 2017, the Chief Deputy Registrar of Voters for Sonoma County sent a response stating that "[b]y law, we must compare a voter's signature on file with the signature on the vote by mail ballot envelope"; and for Mr. La Follette's ballot, "the signature on the envelope is significantly different from what we have on file," "[t]herefore, we were unable to count your ballot." (*See id.*, Ex. C.)

17. If Mr. La Follette had been notified before the 2016 election results were certified that his vote was rejected and given an opportunity to cure the signature mismatch—by mail or by going to an elections office in person—he would have done so. (*Id.* ¶ 8.)

18. Petitioner La Follette has a beneficial interest in this proceeding because he has had a ballot rejected in the past, without notice or an opportunity to show that the ballot was proper, and wants to ensure that this does not happen again. In addition, Mr. La Follette has standing as a citizen to petition for mandamus to require elections officials to comply with the law. *See Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 439 (1989).

19. Petitioner ACLU-NC is a nonpartisan civil-liberties organization, incorporated as a nonprofit under § 501(c)(4) of the Internal Revenue Code, and dedicated to the principles of liberty and equality embodied in both the United States and California Constitutions. Founded in 1934 and based in San Francisco, the ACLU-NC has more than 150,000 members from Tulare County north to the Oregon border.

20. The ACLU-NC has a beneficial interest in protecting the voting rights of its members and in advancing its organizational mission of protecting the voting rights of all Californians. The ACLU-NC brings this suit to further those interests and also to "procure the enforcement of a public duty." *See Common Cause*, 49 Cal. 3d at 439.

21. Respondents are responsible for the administration of California elections laws, including in Sonoma County.

22. Respondent Alex Padilla is sued in his official capacity as Secretary of State of the State of California. The Secretary of State is a proper party respondent to a petition for an original writ that challenges the constitutionality of a state voting statute. *Young*, 7 Cal. 3d at 21 n.5. As the State's chief elections official, the Secretary is responsible for administering California's election laws. Cal. Gov. Code § 12172.5(a); *Burton v. Shelley*, No. S117834, 2003 WL 21962000, at *1 (Cal. Aug. 7, 2003). The Secretary is further responsible for "promulgat[ing] regulations establishing guidelines for county elections officials relating to the processing of vote by mail ballots." § 3026.

23. In addition, the Secretary of State provides written advisories to county elections officials via "CCROVs" (named as such because they are delivered to County Clerks & Registrars of Voters). (*See* Request for Judicial Notice ("RJN"), Ex. A.) The Secretary also issues the California Uniform Vote Counting Standards, which includes standards for counting vote-by-mail ballots, including comparing signatures. (RJN, Ex. B at 13-14.)

24. Respondent William Rousseau is sued in his official capacity as Clerk-Recorder-Assessor-Registrar of Voters for the County of Sonoma. He is responsible for conducting all federal, state, and local elections in

Sonoma County, and for administering California's election laws, including Section 3019(c)(2). §§ 320, 3019.

FACTUAL AND LEGAL BACKGROUND

A. MORE THAN HALF OF CALIFORNIA VOTERS VOTE BY MAIL, BY CHOICE OR NECESSITY.

25. California permits any qualified voter to vote by mail—either on a permanent or one-time basis. §§ 3001, 3003, 3200-3206.

26. Well over half of California voters avail themselves of this process. For example, in 2016, 58.92% of California voters voted by mail in the primary election and 57.79% in the general election. (RJN, Ex. C at 19.) Thus in the November 2016 general election, over 8.4 million Californians voted by mail. (*Id.*)

27. In some precincts, voters have no other option. For example, counties may require all votes to be cast by mail when there are 250 or fewer registered voters. § 3005. California counties such as Alpine, Sierra, and Plumas Counties offer voting exclusively by mail under § 3005. (Declaration of Mindy Romero ("Romero Decl.") at ¶ 9.) California law also permits counties to require voting by mail in a number of other circumstances. *See id*. §§ 4000-4002.

28. Voting by mail is set to increase substantially in the coming elections in light of the California Voter's Choice Act, which was passed in 2016 to authorize widespread all-mailed-ballot elections. (RJN, Ex. G; Romero Decl. ¶¶ 46-48.) As a result, fourteen counties may conduct all-mailed elections in 2018; and all counties may do so in 2020. §§ 4005(a), 4007; (*see* Romero Decl. ¶ 46). At least four counties are indeed planning to conduct all-mailed elections in 2018, including Sacramento, San Mateo, Napa, and Nevada Counties. (Romero Decl. at ¶ 47.)

B. CALIFORNIA LAW PROVIDES PROCEDURES FOR VOTING BY MAIL AND PROCESSING VOTE-BY-MAIL APPLICATIONS AND BALLOTS.

29. To vote by mail in a single elections, voters must submit applications in hard-copy, electronically, or by telephone. §§ 3006-3008. The applications request, among other things, the voter's name and address as listed on the affidavit of registration, as well as the voter's current mailing address. §§ 3006(a)(2), 3007.5(b)(2). For hard-copy applications, elections officials compare the application signature to the affidavit-of-registration signature. § 3009(a), (c). If the application is approved, the elections official will send the voter a ballot. § 3009(b). If, on the other hand, the official determines the application is defective and "is able to ascertain the voter's address," the official must, within one working day, mail the applicant a notice of defect along with the vote-by-mail ballot. § 3009(c). This "notice shall specifically inform the voter of . . . the reason for the defects in the application, and shall state the procedure necessary to remedy the defective application." *Id.* "If the voter substantially complies with the requirements contained in the elections official's notice, the voter's ballot shall be counted." *Id.*

30. California also permits voters to become permanent vote-by-mail voters. § 3200. In fact, California requires voter registration cards to include an option to apply for permanent vote-by-mail status. § 2150(e). And California also offers a process for military voters to vote by mail. § 3102.

31. Vote-by-mail ballots are processed and counted in a similar manner. § 3205. First, elections officials send voters ballots and supplies for returning the ballots, including identification envelopes. §§ 3010, 3011. Before returning their ballots, voters must sign the identification envelopes

in their own handwriting, but need not sign in any particular manner. § 3011(a)(2), (7). Voters must then mail their ballots by the close of election day, and the ballots must arrive at the elections official's office within three days after election day. § 3020(b).

32. When the elections officials receive the ballots, they must compare the signatures on the identification envelopes with the voters' signatures on their affidavits of registration or other official forms in their registration records. § 3019(a), (b). Elections officials begin this process twenty-nine days before election day. *See* § 15101. The only statutory guidance for this process is that officials must not invalidate ballots when voters substitute their initials for their first or middle names. § 3019(d).

33. As the director of the California Civic Engagement Project at U.C. Davis explains, while elections officials may use automated signature-verification technology to determine whether the signatures compare, most do not. § 3019(e). (Romero Decl. ¶ 27.) Instead, they rely solely on subjective visual assessments by elections officials. Sonoma County, where Petitioner La Follette casts ballots, does not use signature-verification technology. (*Id*. ¶ 28 n.4.) In any event, an elections official must always visually examine the signatures before rejecting the ballot. § 3019(e). Elections officials are not, however, required to have handwriting-analysis education or training. (*See* Declaration of Linton A. Mohammed ("Mohammed Decl.") ¶¶ 12, 19, 27.) The automated systems that elections officials use are purchased from different vendors and use different software, which results in varying threshold settings for signature-verification match and prohibits threshold standardization. (Romero Decl. ¶ 28.)

34. This signature comparison results in one of two outcomes:

(i) If the official determines that the signatures match, the ballot, still in the identification envelope, is placed in a container to be counted. § 3019(c)(1).

(ii) If, however, "the elections official determines that the signatures do not compare, the identification envelope shall not be opened and *the ballot shall not be counted*." § 3019(c)(2) (emphasis added). The Elections Code does not provide for notice to the voter or any opportunity to cure the perceived mismatch. *See id*. To the contrary, the use of "shall" requires that these ballots be discarded. *See* § 354 ("shall" is mandatory).[2]

35. The State's automatic invalidation of mismatch-signature ballots contrasts with its treatment of ballots that lack a signature altogether. Voters who completely fail to sign the ballot envelope are not automatically disenfranchised; instead, they have until eight days after the election to cure the violation. § 3019(f). Unsigned ballots must be accepted and counted if the voter (i) signs the envelope at the official's office within eight days of the election, (ii) submits an "unsigned ballot statement" affidavit within eight days of the election, (iii) submits an affidavit to a polling place or ballot dropoff box on election day, or (iv) otherwise provides a signature. § 3019(f)(1)(A), (C). Similarly, in counties that conduct all-mailed elections pursuant to the Voter's Choice Act, elections officials are required to "make a reasonable effort to inform a

[2] It appears that, despite § 3019(c)(2)'s mandatory language, elections officials in some counties do try to provide notice and permit voters to cure their signature mismatch. (Alexander Decl. ¶¶ 15, 17, 20; Mitchell Decl. ¶ 12.) However, any such notice and opportunity to cure is the exception and is arbitrary both across counties and in its application within the county, as there are no standards for when voters are afforded notice and opportunity to cure. (Alexander Decl. ¶ 17; Mitchell Decl. ¶ 12; Romero Decl. ¶ 49.)

voter of either . . . if the voter's vote by mail ballot envelope is missing a signature [and h]ow the voter can correct the missing signature." § 4006.

36. The automatic rejection of mismatch-signature ballots also contrasts with the State's treatment of ballots cast at the polls on election day. Those ballots generally are not subject to a signature comparison at all; the voters simply go to their assigned polling site and say and write their name and address, and once elections officials confirm the voters are on the voter index for that polling site, they are given a ballot to vote. *See* §§ 14216, 14278. Voters return the voted ballots to the elections officials, who place the ballots in a ballot container for counting. §§ 14277, 14293.

37. County elections officials have thirty days after the election to count and certify the election results. § 15372.

38. After all votes—including vote-by-mail votes—have been tallied, local elections officials and the Secretary of State make it possible for vote-by-mail voters to find out on the Internet whether their ballots were rejected. *See* § 3019.5; (*see* RJN, Ex. D). There is no requirement, however, that voters whose ballots were rejected for mismatched signatures receive individualized notice.

C. VOTING OFFICIALS ERRONEOUSLY REJECT TENS OF THOUSANDS OF PROPERLY CAST BALLOTS EACH ELECTION BASED ON SUPPOSEDLY MISMATCHED SIGNATURES.

39. Tens of thousands of ballots are rejected at each statewide election because officials determine the ballot-envelope signatures do not match those on file. For example, a statewide survey found that in the 2012 general election, approximately 23% of rejected vote-by-mail ballots, or some 15,870 ballots, were uncounted due to signature mismatch. (Romero Decl. ¶¶ 20, 22 (approximately 69,000 vote-by-mail ballots rejected).) The

author of a 2013 bill seeking to address the problem (described below) estimated the total to be higher, finding approximately 20,000 ballots rejected in the 2012 election due to mismatched signatures. (RJN, Ex. I at 205.)

40. In 2013, as the number of Californians who vote by mail continued to increase, the Legislature recognized that wide swaths of vote-by-mail ballots were being wrongly rejected due to signature mismatch, and revised Section 3019 to "permit"—but not require—local elections officials to compare signatures to those on file beyond the current affidavit of registration. (*Id*. at 206; *see* RJN, Ex. H.)

41. In any event, the problem has not diminished. To the contrary, the data suggest that as many as 45,000 ballots—or 0.54% of all ballots cast—were rejected in the 2016 general election due to perceived signature mismatch. (Declaration of Paul Mitchell ("Mitchell Decl.") ¶ 13.)

42. A leading voter-file company that manages a system to track California voter data on behalf of clients that include both the state Republican and Democratic Parties analyzed data from the 2016 general election in 29 California counties that use the necessary data platform. (*Id*. ¶¶ 1, 4, 8.) These 29 counties span the range of urban and rural, coastal and inland, big and small, and provide enough quality data to allow for detailed evaluation of ballots rejected for signature non-match. (*Id*. ¶ 8.)

43. The analysis of this data showed that officials in those counties rejected 0.54% of vote-by-mail ballots for signature mismatch in the November 2016 election. (*Id*. ¶ 13 & Ex. A.) The Secretary of State reports that there were 8,511,992 ballots cast by mail in that election. (*Id*. ¶ 13.) Applying that rate statewide suggests that California elections officials

rejected some 45,590 vote-by-mail ballots in the 2016 general election for signature mismatch. (*Id*.)

44. The civil rights group Asian Americans Advancing Justice recently issued a report that also shows that tens of thousands of vote-by-mail ballots were rejected for signature mismatch in the last election. (*See* Risher Decl., Ex. B.) The organization examined data from four counties: Contra Costa, Los Angeles, San Francisco, and Santa Clara. (*Id*. at 3.) It found that elections officials rejected 0.89% of all vote-by-mail ballots, and that 44% of those rejections were for allegedly mismatched signatures. (*Id*. at 4, 6.) This means that elections officials in these four counties rejected 0.39% of mailed-in ballots for signature mismatch. If these figures reflect the statewide rate, this suggests that California elections officials rejected approximately 33,330 vote-by-mail ballots in the 2016 general election for signature mismatch, out of the total of 8,511,992 ballots cast.

45. It is likely that this report significantly understates the number of ballots rejected for signature mismatch because two of the four counties it studied have rejection rates that are significantly lower than the 29-county average of 0.54% discussed above: Contra Costa County rejected only 0.19% of vote-by-mail ballots for signature mismatch, and Santa Clara County rejected only 0.46% on those grounds. (*See* Mitchell Decl., Ex. A.) The Asian Americans Advancing Justice report nevertheless confirms that tens of thousands of ballots were rejected in the 2016 general election for alleged signature mismatch.

46. As discussed below, in some counties the percentage of ballots discarded due to signature mismatch is much higher, for example: 1.67% in Yuba County, 1.18% in Fresno County, and 1.15% in Riverside County. *See infra* at Section D. These percentages are greater than the

margin of victory in some close races. For example, in November 2016, a widely watched race between Congressman Darrell Issa and Doug Applegate in U.S. Representative District 49 was decided by just 0.6%, while the 29th State Senate District race was decided by a margin of 0.8%. (RJN, Ex. F at 109; *see also* Declaration of Kim Alexander ("Alexander Decl.") ¶ 18.)

47. There is no evidence to suggest that a significant number of rejected vote-by-mail ballots are the result of attempted voter fraud. (Mitchell Decl. ¶ 14.) Rather, ballots generally are rejected because an official erroneously determined a voter's envelope signature did not compare to the signature on file.[3] (Alexander Decl. ¶¶ 12-13; Romero ¶¶ 30-31; RJN, Ex. I at 206 & Ex. J at 209; *see* Mohammed Decl. ¶¶ 19-41.)

48. Indeed, individuals with no handwriting-identification training are likely to make mistakes when trying to determine whether a signature is genuine. (Mohammed Decl., ¶¶ 19-22, 25-36.) Laypersons wrongly determine that authentic signatures are not genuine at much higher rates than trained examiners, likely because they perceive variations in a single individual's signatures to be differences between multiple individuals' signatures. (*Id*. ¶¶ 21, 26.) In fact, a 2001 study in which participants compared six genuine signatures with six non-genuine signatures found that laypersons incorrectly determined that signatures made by the same person did not match in 26.1% of the cases. (*Id*. ¶ 33.) And they are much more likely to wrongly believe that a genuine signature

[3] Some county elections officials, however, will count ballots if they are received in two envelopes from the same household with signatures that have been switched. (Alexander Decl. ¶ 14.)

does not match than they are to wrongly believe that a forged signature is in fact genuine. (*Id*. ¶¶ 20, 34.)

49. Before experts can even be trained in handwriting identification, they must pass a form-blindness test, which assesses individuals' ability to see minute differences in form, including shapes, curves, angles, and size (*id*. ¶ 32); but the Elections Code does not require that elections officials undertake this test, let alone obtain subsequent training. *See* § 3019. And even a trained analyst cannot promise complete accuracy by comparing one handwriting sample to one other sample: only when compared to at least 10 samples can a completely accurate assessment be made. (Mohammed Decl. ¶ 38.) Moreover, comparing individuals' signatures is even more vulnerable to error, as signatures can be "stylized," or inherently unidentifiable and variable. (*Id*. ¶¶ 20, 28.)

50. Elections officials may also mistake signatures as mismatched for a number of reasons related to the signatures.[4] For example, a voter's signature may simply have changed since signing the document on file. (*Id*. ¶ 45; Alexander Decl. ¶ 13; Romero Decl. ¶ 30; RJN, Ex. I at 206 & Ex. J at 209.) This is particularly likely when the comparison signature is from a document signed many years prior, perhaps when the voter was still a teenager, such as driver's licenses and old voter registration affidavits. (Mohammed Decl. ¶ 40; Alexander Decl. ¶ 13; Romero Decl. ¶ 31; RJN, Ex. I at 206.) In some instances, particularly with DMV documents, the signatures on file are low-quality scans. (Romero Decl. ¶¶ 30-31, 50; RJN,

[4] Although signatures deemed mismatched by signature verification technology are always subject to ultimate visual verification by elections officials, § 3019(e), such technology is unregulated, uncertified, and can use different standards with variable levels of reliability. (Romero Decl. ¶ 28.)

Ex. I at 206.) Signatures also may differ based on the medium on which the voter signed. For example, voters who register online or at the DMV usually sign on an electronic touch-screen, rather than on paper. (Mohammed Decl. ¶ 39; Alexander Decl. ¶ 12; Romero Decl. ¶ 31.) A signature made on a touch-screen device may be quite different than one made on paper. (Mohammed Decl. ¶ 39; Alexander Decl. ¶ 12.)

51. Additionally, a voter's condition or background may lead to signature mismatch. (Mohammed Decl. ¶¶ 21, 30-31.) For example, physical disabilities, injuries, or medication may result in changed signatures, while the signatures of individuals whose primary languages do not use Roman characters may vary signature-to-signature. (*Id.*) Furthermore, voters who are less educated and/or infrequently write tend to have variable signatures. (*Id.* ¶ 31.) Even the type of pen used may cause a signature discrepancy. (*Id.* ¶ 30.)

52. The California Senate Committee on Elections and Constitutional Amendments has found that signature mismatch is most commonly due to signatures changing over time or technology rendering signatures unreadable. (RJN, Ex. I at 206; RJN, Ex. J at 209.) Young voters who have not yet developed permanent signatures and older voters whose signatures have changed with age are particularly affected. (RJN, Ex. I at 206; RJN, Ex. J at 209.) In addition, the technologies used for online registration may, for example, truncate a signature; while registering online may mean the signature on file is not updated, but instead incorporates the DMV signature on file as the registration signature. (*Id.*)

53. In most instances, voters do not have access to their registration signature and will not know that their signatures have changed from those on file. (*Id.*) Accordingly, without notice the ballots were

rejected based on discrepant signatures, voters generally have no idea their ballots were rejected or that they must take steps to prevent future rejection. (*Id.*)

D. REJECTION RATES VARY WIDELY FROM COUNTY TO COUNTY AND BY VOTER DEMOGRAPHICS.

54. The percentage of ballots discarded for perceived mismatched signatures varies widely from county to county. Exhibit A to the Mitchell Declaration summarizes data from the 2016 general election for 29 counties that together comprise approximately one third of California voters. In that election, the percentage of vote-by-mail ballots rejected ranged from a low of 0.15% in Mariposa County to a high of 1.67% in Yuba County. (Mitchell Decl., Ex. A.) Other counties with high rejection rates include Fresno County (1.18%), Sutter County (1.08%), and Riverside County (1.15%). (*Id.*) Sonoma County, where Petitioner La Follette resides, had a rejection rate of 0.34%. (*Id.*) The average among the 29 counties was 0.54%. (*Id.*)

55. In addition, Latino and Asian voters' ballots are consistently rejected for signature mismatch at rates higher than those cast by other voters. In the 2016 general election, the statewide average rejection rates were 0.88% for Latino voters and 0.61% for Asian-American voters, versus the 0.45% statewide rejection rate for non-Latino, non-Asian votes. (*Id.*) And again, these numbers varied widely across counties. Thus, for example, Latino voters' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 11 of the 29 counties, while Asian-Americans' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 6 counties. (*Id.*)

56. A recent issue brief by the Asian Americans Advancing Justice-California concluded that (i) Asian Americans' ballot rejection rate is 15% higher than the rate for all voters and (ii) signature-mismatch rejection is both higher than the rate for all voters and the most common reason for rejection of Asian Americans' ballots. (Risher Decl., Ex. B at 1.) These numbers are even worse for foreign-born Asian Americans. (*Id.*)

57. Non-English-language ballots also face higher rejection rates of ballots generally. In the 2012 general election, non-English-language ballots comprised just over 2.5% of votes cast, but accounted for 3.3% of all rejected ballots. (Romero Decl. ¶ 37.) And 25% of rejected non-English-language ballots were rejected due to mismatched signatures. (*Id.*)

58. Finally, 2016 data from four California counties—Santa Cruz, Sacramento, Orange, and Shasta—"suggest that a substantial percentage of voters who are notified of a ballot signature deficiency and given the opportunity to cure the deficiency will do so to have their ballot counted." (Alexander Decl. ¶ 21.) In fact, as many as 64% of voters (in the Orange County 2016 general election) who were contacted because they have completely failed to sign their ballot envelopes cured the deficiency. (*Id.* ¶ 21.)

E. OTHER STATES PROVIDE MISMATCH-SIGNATURE VOTE-BY-MAIL VOTERS WITH NOTICE AND AN OPPORTUNITY TO CURE.

59. Other states with signature-match requirements for mailed-in ballots provide voters notice and an opportunity to cure mismatch determinations. For example, in Washington State, elections officials must compare vote-by-mail voters' signatures on their ballot declarations to the signatures in their registration files. (RJN, Ex. K at 212 (RCW

29A.40.110(3)).) If an official determines the signatures do not match, the official must:

> notify the voter by first-class mail, enclosing a copy of the declaration, and advise the voter of the correct procedures for updating his or her signature on the voter registration file. If the ballot is received within three business days of the final meeting of the canvassing board, or the voter has been notified by first-class mail and has not responded at least three business days before the final meeting of the canvassing board, then the [official] shall attempt to notify the voter by telephone, using the voter registration record information.

(*Id*. at 214 (RCW 29A.60.165(2)(a)).)

60. In Oregon, an all vote-by-mail election state, elections officials must verify identification-envelope signatures on mailed-in ballots with the voters' registration-record signatures and only count ballots once verified. (RJN, Ex. L at 220 (ORS 254.470(8), (9)).) If the signatures are deemed not to match, however, the official "shall mail to the elector a notice that describes the nature of the challenge." (*Id*. at 216 (ORS 254.431(1)).) The voter then has until "the 14th calendar day after the date of the election" to "provide evidence sufficient to disprove" the mismatch determination. (*Id*. (ORS 254.431(2)(a)).)

61. Similarly, Montana law requires elections officials to compare absentee ballots' envelope signatures with signatures on the absentee ballot request or voter registration forms. (RJN, Ex. M at 222 (M.C.A. 13-13-241(1)(a)).) If there is a mismatch, the official must give notice "by the most expedient method available" of the mismatch and how the voter may cure. (*Id*. (M.C.A. 13-13-241(5); id. at 224 (M.C.A. 13-13-245).) Specifically, "prior to 8 p.m. on election day," voters may:

> (a) . . . verify the . . . signature . . . , after proof of identification, by affirming that the signature is in fact the elector's, by completing a new registration card containing the elector's current signature, or by providing a new agent designation form; or
>
> (b) if necessary, request and receive a replacement ballot . . . .

Id.

62. Massachusetts law also requires voting officials to compare voters' signatures on the inner envelopes of absentee ballots to the signatures on their absentee ballot applications, and to reject any ballots with mismatched signatures. (RJN, Ex. N at 226 (M.G.L.A. 54 § 94).) But Massachusetts law also provides that the officials "shall notify, as soon as possible, each voter whose ballot was rejected that such ballot was rejected," and "[u]nless the [official] determines that there is clearly insufficient time for the voter to return another ballot, the [official] shall then proceed as if the voter had requested a substitute ballot." (*Id*.) For ballots received by mail, this means sending the voter a substitute ballot (and other required papers). (*Id*.) If the substitute ballot is returned and deemed proper, the vote will count. (*Id*.)

63. In Arizona, elections officials also must compare mailed-in ballot signatures with those on the registration forms. (RJN, Ex. O at 229 (A.R.S. 16-550A).) Arizona elections procedures then require officials, if the signatures do not compare, to "make a reasonable and meaningful attempt to contact the voter" to "ascertain whether the voter actually voted the early ballot and any reasons why the signatures may not match"; and if the official "receives and accepts an explanation . . . why the signatures do not match," the vote may count. (RJN, Ex. P at 294, 401 (Arizona Elections Procedures Manual).)

64. These examples are representative only. Other states also provide notice and opportunity to cure to signature-mismatch voters, and there is no reason that California officials cannot do the same.

FIRST CAUSE OF ACTION

(Violation of Due Process, U.S. CONST., amend. XIV, § 1 and CAL. CONST., art. 1, § 7)

(All Respondents)

65. Petitioners herein incorporate by reference paragraphs 1 through 64 above, as if set forth in full.

66. Due process requires, at a minimum, that votes not be discarded without providing voters individualized notice of the alleged problem with the ballot and an opportunity to cure.

67. Respondents violate the rights of Petitioners—and tens of thousands of California voters—to due process under the federal and state Constitutions by discarding their ballots without providing them with individualized notice and a meaningful opportunity to cure the signature-mismatch determinations.

SECOND CAUSE OF ACTION

(Violation of Equal Protection, U.S. CONST., amend. XIV, § 1 and CAL. CONST., art. 1, § 7)

(All Respondents)

68. Petitioners herein incorporate by reference paragraphs 1 through 67 above, as if set forth in full.

69. Equal protection requires laws and policies that deny some eligible voters the right to vote and to have their vote counted to be

invalidated, unless the laws and policies are necessary to achieve a compelling government interest and are narrowly tailored to do so.

70. Respondents violate the rights of Petitioners—and tens of thousands of California voters—to equal protection under the federal and state Constitutions by depriving them of their rights to vote and to have their votes counted without providing meaningful notice and opportunity to cure, but by permitting similarly situated vote-by-mail voters who did not sign their identification envelopes with the opportunity to cure the missing signature prior to deprivation.

71. Respondents also violate equal protection by selectively disenfranchising voters whose signatures they deemed not to match the signatures they have on file, without notice or an opportunity to cure.

72. These deprivations of Petitioners' and other California voters' right to vote and to have their vote counted are not necessary to achieve a compelling government interest; nor are they narrowly tailored to any such interest.

THIRD CAUSE OF ACTION

(Violation of CAL. CONST., art. II, § 2.5)

(All Respondents)

73. Petitioners herein incorporate by reference paragraphs 1 through 72 above, as if set forth in full.

74. Article II, section 2.5 of the California Constitution states that "[a] voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted."

75. Respondents violate the rights of Petitioners—and tens of thousands of California voters—to have their votes count under Article II,

section 2.5 of the California Constitution by discarding properly cast votes without providing meaningful notice and opportunity to cure.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court:

76. Hold California Elections Code § 3019(c)(2) unconstitutional to the extent it permits or requires Respondents to reject voters' ballots based on perceived signature mismatches without providing voters with notice and opportunity to cure, in violation of state and federal due process and equal protection guarantees and Article II, section 2.5 of the California Constitution (*see Young*, 7 Cal. 3d at 27);

77. Hold that no ballot constitutionally may be rejected based on a perceived signature mismatch without providing the voter notice of the mismatch determination and opportunity to cure within eight days of the election (*see id*. at 27-28; § 3019(f));

78. Issue a writ of mandate commanding (a) respondent Secretary of State to inform county clerks and elections officials of the above findings (*see, e.g.*, *McPherson*, 145 Cal. App. 4th at 1486); and (b) all Respondents, their agents, employees, officers, representatives, and all other persons acting on their behalf, to, in the case of a perceived signature mismatch, provide voters notice of the mismatch determination and opportunity to cure within eight days of the election (*see Jolicoeur*, 5 Cal. 3d at 582);

79. Award Petitioners their costs, including attorneys' fees; and

80. For such other and further relief as the Court deems just and proper.

Dated: August 23, 2017

COOLEY LLP

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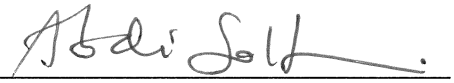
Attorneys for Petitioners

VERIFICATION OF
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

I, Abdi Soltani, am the Executive Director of the ACLU of Northern California. I have read the foregoing Petition for Writ of Mandate in *La Follette v. Padilla* and know its contents. The facts alleged in paragraphs 19-20 of this Petition are within my personal knowledge and I know these facts to be true. I have reviewed the remainder of the Petition and am informed, and do believe, it to be true. On those grounds, I allege that the matters stated herein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on August 23, 2017.



ABDI SOLTANI

MEMORANDUM OF POINTS AND AUTHORITIES

I. Section 3019(c)(2) Violates California Voters' Constitutional Rights by Disenfranchising Voters Without Providing Notice Or Opportunity to Cure.

Section 3019(c)(2) provides:

> (a) Upon receipt of a vote by mail ballot, the elections official shall compare the signature on the identification envelope with [the voter's signatures on file] to determine if the signatures compare:
>
> . . .
>
> (c) . . . (2) If upon conducting the comparison of signatures pursuant to subdivision (a) the elections official determines that the signatures do not compare, the identification envelope shall not be opened and the ballot shall not be counted. The cause of the rejection shall be written on the face of the identification envelope

By failing to provide voters whose signatures are deemed not to compare notice and opportunity to cure, Section 3019(c)(2) violates voters' rights under due process, equal protection, and Article, II Section 2.5 of the California Constitution.

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); *see Harper v.*

Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("the right to vote is too precious, too fundamental to be so burdened or conditioned"); *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); *United States v. Classic*, 313 U.S. 299, 315 (1941); *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 v. Parks/Bellemont Absentee Elec. Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) ("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.").

In turn, 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) (citations omitted); *Today's Fresh Start, Inc. v. L.A. Cty. Office of Educ.*, 57 Cal. 4th 197, 212 (2013). These two essentials are "elementary and fundamental"—the absolute minimum that due process requires. *Mullane*, 339 U.S. at 314-15.

Courts therefore have held that rejecting vote-by-mail ballots without providing timely notice and opportunity to cure violates due process. For example, in *Zessar*, a voter challenged Illinois Elections Code provisions and regulations that permitted state elections officials to reject mail-in ballots if the signature on the absentee-ballot application did not match the signature on the verification record or certification envelope. 2006 WL 642646, at *2. Although state law required notice to be sent to voters whose mail-in ballots were rejected, nothing required this notice to be sent in time for voters' ballots to be counted or provided a mechanism for voters to challenge the rejection. *Id*. at *2-*3. The court found that, by failing to provide absentee voters an opportunity "to remedy the loss of [their] vote in that election," Illinois's scheme deprived voters of federal due process, along with their right to vote. *Id*. at *6-*7, *10.

Likewise, in *Raetzel*, absentee voters challenged Arizona's procedures for processing absentee ballots because they permitted elections officials to reject absentee ballots in response to ballot challenges without providing notice to the voters. 762 F. Supp. at 1357. The court held that Arizona's procedures denied absentee voters due process because they failed to provide "notice . . . so that any defect . . . can be cured and the individual is not continually and repeatedly denied so fundamental a right."[5] *Id*. at 1358.

[5] In *Raetzel*, only post-deprivation notice was required because the ballot rejections came in response to ballot challenges after the votes were counted. 762 F. Supp. at 1357-58 ("'[d]ue process is flexible'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976))). Rejection upon initial receipt of the ballots is distinguishable because opportunity to cure for the same election exists.

California law suffers from the same constitutional defects. By allowing officials to reject vote-by-mail ballots without providing notice or opportunity to cure, Section 3019(c)(2) deprives California voters of due process. California was not obligated to create a vote-by-mail scheme; but because it did it may not disenfranchise those who avail themselves of the scheme without providing them due process. Indeed, as *Raetzel* warned—and as Petitioners have learned—without due process, California voters may never be apprised of the deprivation, which may repeat *ad infinitum*. A fundamental right cannot be deprived so lightly.

2. California Due Process.

"[P]rocedural due process under the California Constitution is much more inclusive and protects a broader range of interests than under the federal Constitution." *Gresher v. Anderson*, 127 Cal. App. 4th 88, 104-05 (2005) (quotations omitted); *see People v. Ramirez*, 25 Cal. 3d 260, 266-70 (1979). This broader approach means that Californians are entitled to due process whenever the government moves to deprive them of a fundamental right or a right, interest, or benefit protected by a statutory or constitutional provision. *See Ramirez*, 25 Cal. 3d at 264, 267-68 (state due process provides "protection [for] an individual's statutory interests" and "statutorily conferred benefit[s]"); *see also Gresher*, 127 Cal. App. 4th at 105 ("when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest" under the state constitution).

Here, the right to vote and to have that vote counted is both fundamental (as discussed above) and protected by specific statutory and constitutional provisions. The Elections Code gives all eligible voters the right to cast their ballots by mail: "The vote by mail ballot shall be

available to any registered voter." § 3003; *see, e.g.*, §§ 3006(b)(3), 3010, 3017, 3200, 3203, 3206. Indeed, some voters have no other option. *See* Pet. ¶¶ 27-28 (mandatory vote-by-mail). And the right to vote and the right to have a properly cast vote counted are expressly protected by the California Constitution. *See* CAL. CONST., art. 2 §§ 2, 2.5. California due process therefore protects the right to vote by mail and the right to have that vote counted.

The irreducible minimum of due process under the state Constitution, as under the federal charter, is pre-deprivation notice and opportunity to cure. *Today's Fresh Start*, 57 Cal. 4th at 212 ("notice of the case against him and opportunity to meet it" (quotations omitted)); *Gresher*, 127 Cal. App. 4th at 106 ("right to be heard at a meaningful time and in a meaningful manner").

Section 3019(c)(2) is therefore unconstitutional under the California due process clause, because it deprives voters of their right to vote by mail and to have those votes counted, without providing them with notice or an opportunity to show that they ballots were properly cast.

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

1. The Government Cannot Treat Voters Who Sign Their Identification Envelopes Worse Than It Treats Those Who Fail To Do So.

Section 3019(c)(2) violates federal and state equal protection guarantees because it disenfranchises voters who have properly signed their ballots—but whose signatures elections officials deem not to match—while providing voters who have completely failed to sign their ballots with an

opportunity to cure.[6] §§ 3019(c), (f), 4006. U.S. CONST., amend. XIV, § 1; CAL. CONST., art. 1, § 7.

The first step in analyzing an equal protection claim under the state and federal Constitutions is determining the applicable standard of scrutiny. Gould v. Grubb, 14 Cal. 3d 661, 669-70 (1975). Because the right to vote is a fundamental right, strict scrutiny applies to laws that burden it in more than a "minimal" way. *Id.*; *see, e.g*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (voting is "'a fundamental political right, . . . preservative of all rights'"; "'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny'") (internal quotation marks and citations omitted); *Collier v. Menzel*, 176 Cal. App. 3d 24, 32 (1985) ("The right to vote on an equal basis with other citizens is a fundamental right in our democratic society and one of the basic civil rights of man which preserves all other rights. Classifications denying this right deserve the strictest scrutiny.") (internal citations omitted); *Hawn v. Cty. of Ventura*, 73 Cal. App. 3d 1009, 1019 (1977) ("strict standard of review has long been held to apply to voting legislation which excludes certain potential voters from participation") (collecting cases); *Field v. Bowen*, 199 Cal. App. 4th 346, 356 (2011) ("Regulations imposing severe burdens on plaintiffs' rights [to participate in elections] must be narrowly tailored and advance a compelling state interest."). Here, Section 3019(c)(2) imposes much more than a minimal burden on voting: it completely disenfranchises tens of

[6] Although the "[e]qual protection analysis under the federal and state constitutions is substantially similar[,]" *Garcia v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364, 382 (2010), California's clause has independent force and may provide broader rights. *Serrano v. Priest*, 18 Cal. 3d 728, 765, 775-76 (1976), *supplemented*, 20 Cal. 3d 25 (1977).

thousands of Californians every election without providing notice or an opportunity to cure based solely on elections officials' subjective determinations that voters' signatures do not match (even though nothing in the law requires voters to sign their name in any specific way).

As one federal court stated in applying strict scrutiny to overturn a near-identical statute: "If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."[7] *Detzner*, 2016 WL 6090943, at *6. Strict scrutiny therefore applies.

Under strict scrutiny, § 3019(c)(2)'s restriction on the right to vote is unconstitutional unless the government can show that it is "necessary to achieve a compelling state interest." *Gould*, 14 Cal. 3d at 672; *see, e.g.*, *Dunn*, 405 U.S. at 336-37, 360 (state law prohibiting new residents from voting violated equal protection because it was not "necessary to promote a compelling governmental interest"); *Collier*, 176 Cal. App. 3d at 32. The statute fails this test. Disenfranchising signature-mismatch voters without notice or opportunity to cure is not narrowly tailored to the government's interests in prevention of fraud or effective administration of an election for several reasons. To the contrary, this arbitrary disenfranchisement fails even rational basis review. *Detzner*, 2016 WL 6090943, at *6 n.10 & *7

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[7] The Florida scheme was nearly identical to Section 3019:

> [I]f a voter's signature on a vote-by-mail ballot does not match the signature on file . . . then the ballot is declared 'illegal' and their vote is not counted. Moreover, that voter only receives notice that their vote was not counted after the election has come and gone and, further, is provided no opportunity to cure that defect. On the other hand, if a vote-by-mail voter doesn't bother to sign the ballot in the first place, that voter is immediately notified and provided an opportunity to cure.

Detzner, 2016 WL 6090943, at *1.

(Florida's parallel signature provision, although subject to strict scrutiny, violated equal protection under rational basis review).

First, it is "illogical, irrational, and patently bizarre" that a compelling interest could justify "withhold[ing] the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters," and thus "categorically disenfranchise[] thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time." *Id*. at *7; (*see* Mohammed Decl. ¶¶ 19-41 (describing reasons for signature mismatch determinations); RJN, Ex. I at 206 & Ex. J at 209). Indeed, rejecting a ballot because of errors committed through no fault of the voter has been found in other contexts to constitute an equal-protection violation. *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593-94 (6th Cir. 2012) (rejecting ballot due to poll worker error likely an equal protection violation).

Second, disqualifying mismatch signature ballots without an opportunity to cure is not necessary to prevent voter fraud. To the contrary, doing so "has no rational relationship (let alone narrow tailoring) to" preventing fraud. *Detzner*, 2016 WL 6090943, at *7; *see also Dunn*, 405 U.S. at 349-51 (durational residency statute that reflected an "administratively useful presumption" of fraud created a crude classification that improperly excluded eligible voters). There is no evidence that mismatched ballots result from attempted voter fraud. (Mitchell Decl. ¶ 14; RJN, Ex. I at 206; Ex. J at 209); *see Detzner*, 2016 WL 6090943, at *7. But even if there were, that would not matter, because Petitioners do not request that elections officials just accept mismatched ballots; instead, Petitioners request an opportunity to show the signatures on the ballot envelopes are theirs. *See Detzner*, 2016 WL 6090943, at *7

(discarding ballots without opportunity to cure would be unconstitutional if even if, contrary to the evidence, "voter fraud ran rampant"). Such a showing would, if anything, discourage and detect fraud and subject mismatched ballots to additional scrutiny. *Id*.

Allowing mismatched-signature voters an opportunity to show qualification before their vote is denied—the same opportunity currently offered to no-signature voters—would be a more narrowly tailored process to prevent fraud. This in itself shows that the current system of simply discarding the ballots is not necessary and fails strict scrutiny. *See Dunn*, 405 U.S. at 347-53 (residency requirements were not necessary to prevent voter fraud when less restrictive means were adequate, as evidenced by the three-month in-county residency requirement versus the one-year in-state residency requirement, the ability to cross-check lists of new registrants with their former jurisdictions, the existence of a test for bona fide residence, and criminal laws to deter fraud); *Charfauros v. Bd. of Elections*, 249 F.3d 941, 945, 950-53 (9th Cir. 2001) (hearing one party's voter-qualification challenges pre-election and another party's challenges post-election violated federal equal protection because separate treatment was not necessary to ensure voters were qualified); *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008) (availability of alternatives to challenged distinction is "fatal" under strict scrutiny).

Finally, that providing notice and an opportunity to cure may impose some costs on local elections officials does not matter under strict scrutiny: "avoidance or recoupment of administrative costs, while a valid state concern cannot justify imposition of an otherwise improper classification, especially when, as here, it touches on 'matters close to the core of our constitutional system.'" *Castro v. State of Cal*., 2 Cal. 3d 223, 242 (1970)

(constitutional provision conditioning right to vote upon ability to read English violated federal equal protection) (internal quotation marks omitted); *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008); *see Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify deprivation of a constitutional right); *Detzner*, 2016 WL 6090943, at *7 (same). Other states are able to provide notice and an opportunity to cure. *See* Pet. ¶¶ 59-64. California should be able to do the same.

2. The Government Cannot Selectively Disenfranchise Voters Whose Signatures It Does Not Recognize Without Providing Them An Opportunity To Cure.

Section 3019(c)(2) violates equal protection for another, more basic reason: it causes elections officials to accept ballots when they subjectively believe the identification-envelope signatures match those on file, but to not accept ballots (without an opportunity to show they are proper) when the officials subjectively and erroneously believe the envelope signatures do not match those on file. The two groups are virtually identical: both have cast vote-by-mail ballots and have personally signed their envelopes. The only difference is that for one group, elections officials possess and consult a signature on file that they believe resembles the one on the envelope; for the other, the elections officials either do not have or do not consult a signature on file that they believe matches. *See* § 3019(a); *see also* Pet. ¶ 40 (California law permits but does not require officials to consult multiple file signatures). And this determination is made without standards and is inherently subject to erroneous determinations. Pet. ¶¶ 47-53 (a voter's signatures may appear different due to, for example, variance over time, different mediums and instruments used, physical disabilities, injuries,

medications, or low education). Because the distinction completely disenfranchises this second group, it is subject to strict scrutiny, as discussed above.

This subjective distinction by elections officials fails strict scrutiny, because the disenfranchisement of mismatched-signature voters is neither necessary nor narrowly tailored. Rather than simply discarding the ballots, the government can provide notice and an opportunity to cure, as discussed above.

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

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

Because the language is "clear and unambiguous, the plain meaning governs." *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth.*, 44 Cal. 4th 431, 444 (2008) (interpreting California constitutional provision adopted by proposition). But even if there were some ambiguity, the ballot materials confirm this meaning. *See People v. Arroyo*, 62 Cal. 4th 589, 593 (2016) ("the analyses and arguments contained in the official ballot pamphlet" are particular indicia of the voters' intent). Both the Legislative Analyst and proponents of Proposition 43 advised that the constitutional provision would ensure that "*every legally cast vote is counted*." (RJN, Ex. E at 46-49.) The proponents further stated

that Proposition 43 would secure "a constitutional right to have your vote counted, *regardless of problems that arise after you cast your vote*," because "[e]lections shouldn't be decided by courts or government officials—elections should be decided by the citizens who vote." (*Id*. at 20) (emphasis added). Thus the relevant questions are: (i) were Petitioners' ballots lawfully cast and (ii) were their votes counted? Yes, and no.

Petitioners cast their ballots in compliance with California law, which requires vote-by-mail voters to sign their ballot envelope in their own hand, but does not require them to sign in any particular way or to make sure the signature matches those on record. § 3011(2), (7). Petitioners and other voters who personally sign their envelopes and otherwise comply with the legal requirements for submitting ballots therefore have a constitutional right to have their votes counted, even if the signatures do not appear to match those on file.

And yet Petitioners' and the tens of thousands of similarly situated Californians' votes did not count in November 2016 alone because elections officials, acting under Section 3019(c)(2), discarded these lawful votes without notice or opportunity to cure upon belief that the signatures did not match. This is exactly what Section 2.5 was meant to prohibit: "government officials" discarding legally cast votes without notice or opportunity to cure problems that "arise after you cast your vote" (i.e., an elections official's flawed mismatch determination). While the government may prevent improper voting by confirming the validity of signatures, notice and opportunity to show the ballots are proper are required to ensure votes are not improperly discarded. Section 3019(c)(2) violates Section 2.5.

. . .

For these reasons, Section 3019(c)(2) is unconstitutional under due process, equal protection, and Section 2.5. The next section describes some of the minimal requirements for a constitutional system of providing notice and an opportunity to cure.

II. California Voters Must Be Given Individualized, Timely Notice and Opportunity to Cure.

A. Due Process Requires Individualized Pre-Deprivation Notice And Opportunity To Cure.

Due process generally requires that the government provide *individualized* notice prior to an action that will adversely affect an individual's protected interests. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983); *Today's Fresh Start*, 57 Cal. 4th at 212 (applying U.S. Supreme Court precedent as to notice and opportunity to cure under state and federal due process); *Minor v. Mun. Court*, 219 Cal. App. 3d 1541, 1550 (1990) (same); *Johnson v. Alma Inv. Co.*, 47 Cal. App. 3d 155, 162 (1975) ("Only when the address is unknown and cannot be ascertained with reasonable diligence will a publication in lieu of mailing satisfy the constitutional requirements"). Individualized notice means that when the affected person's "name and address are reasonably ascertainable" or actually known, the government must provide notice by mail or by personal service; publication or other "constructive notice" is not enough. *Mennonite Bd. of Missions*, 462 U.S. at 798-800. Although mail has traditionally referred to letters delivered by the postal service, notice by email is also sufficient. *See McCluskey v. Belford High Sch.*, No. 2:09-14345, 2010 WL 2696599, at *3, *5 (E.D. Mich. June 24, 2010). Here, elections officials have records showing the voters' mailing addresses (which they use to mail ballots in the first place), and may have voters'

email addresses and/or telephone numbers. *See, e.g.*, §§ 3006(a)(2), 3007.5(b)(2), 3011(a)(3). Elections officials must therefore provide voters whose ballots are rejected for signature mismatch notice of the rejection by mail, email, or telephone.

However given, notice must inform the voters of the problem that will affect their rights (i.e., the identification-envelope signature does not match one on file) as well as how the voters can cure the problem. *See Minor*, 219 Cal. App. 3d at 1549-50; *see also Ramirez*, 25 Cal. 3d at 275 (the government must provide "notice of the right to respond").

Due process additionally requires that notice be timely, so that the voter can "be heard at a meaningful time and in a meaningful manner." *Gresher*, 127 Cal. App. 4th at 106; *see Mullane*, 339 U.S. at 314 (opportunity to be cure "has little reality or worth" without adequate notice). The notice therefore "must afford a reasonable time for those interested to" to contest the government action. *Mullane*, 339 U.S. at 314. Cf. Ramirez, 25 Cal.3d at 276 (three days' notice of right to appeal letter of exclusion from a civil rehabilitation program was inadequate as it provided "very limited procedural protections"). Here, voters must be notified in a way that provides them a reasonable amount of time to cure the signature mismatch, either in person or otherwise. *See Zessar*, 2006 WL 642646, at *9 (pre-deprivation notice and opportunity to cure required for mismatched-signature voters).

B. Equal Protection Requires That Voters Be Afforded An Opportunity To Cure Within Eight Days Of The Election.

Finally, equal protection requires that signature-mismatch voters be given the same opportunity to cure afforded to voters whose ballot envelopes lack signatures. *See, e.g.*, *Detzner*, 2016 WL 6090943, at *9

(ordering Florida to permit mismatched-signature ballots to be cured in "the same fashion as currently provided for non-signature ballots").

California law allows no-signature voters to cure their missing signatures by (1) signing the identification envelope at the elections office within eight days of the election, (2) signing and returning to the elections office (by mail or in-person) a separate "unsigned ballot statement" form within eight days of the election, or (3) signing and submitting at the polls an "unsigned ballot statement" on election day. *See* § 3019(f) (setting forth cure procedures for no-signature voters).

Mismatch-signature voters should also, upon expedient and meaningful notice, be permitted to cure (1) in-person at the elections office within eight days of the election, (2) by mail or in-person at the elections office within eight days of the election, or (3) at the polls on election day.

The Secretary of State and local elections officials are best positioned to determine the precise means of cure. *See* § 3026 (Secretary "shall promulgate regulations establishing guidelines for county elections officials relating to the processing of vote by mail ballots"). However, the no-signature cure process and the experiences of other states prove there are administratively feasible means of cure. For example, a mismatch-signature voter could be permitted to:

- prove at the elections office that the ballot was properly cast within eight days of the election;
- submit an affidavit to the elections office by mail, email, or in-person delivery within eight days of the election; or
- submit an affidavit at the polls on election day.

III. Conclusion.

The right to vote and have that vote counted lies at "the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). For this reason, the California Supreme Court has long recognized that "before the constitutional right to vote may be taken away from a citizen, he *must* be given an opportunity to be heard in his own behalf." *Communist Party of U.S. of Am. v. Peek*, 20 Cal. 2d 536, 555 (1942) (emphasis added). This decree is sacrosanct—and is closely guarded by our state and federal Constitutions. The government therefore may not strip this right from the tens of thousands of Californians who exercise their right by mail without violating due process, equal protection, and the California Constitution's express guarantee that properly cast ballots will be counted.

Petitioners thus respectfully request that the Court hold that government officials cannot reject a ballot based on a signature mismatch without providing notice and opportunity to cure within eight days of the election, notwithstanding § 3019(c)(2). Petitioners further request that the Court direct the Secretary of State, as the State's chief elections official, to inform elections officials of this holding. *See, e.g.*, *McPherson*, 145 Cal. App. 4th at 1474-75 (directing the Secretary of State on writ of mandate to inform county clerks, superior court clerks, and registrars of voters as to the permissible administration of elections); *see also Detzner*, 2016 WL 6090943, at *9 (same on motion for preliminary injunction); CAL. GOV. CODE § 12172.5(a), 3026 (setting forth Secretary's duties and authority). The Court should also direct the Respondent Clerk-Recorder-Assessor-Registrar of Voters for the County of Sonoma to provide voters whose absentee ballots are rejected for mismatched signatures with notice and an

opportunity to cure within eight days of the election. *See, e.g.*, *Jolicoeur*, 5 Cal. 3d at 582 (directing voting registrars on writ of mandate to administer an Elections Code provision in the constitutional manner enunciated).

Dated: August 23, 2017

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CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), I, William P. Donovan, Jr., certify that the foregoing Petition for Writ of Mandate and Memorandum in Support thereof use proportionally spaced typeface of 13 points or more, and contain approximately 12,023 words (including footnotes and excluding tables, verification and this certificate), as counted by Microsoft Word word-processing software.

Dated: August 23, 2017

/s/ William P. Donovan, Jr.
William P. Donovan, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Cooley LLP, 1333 2nd Street, Suite 400, Santa Monica, California 90401.

On August 23, 2017, I served true copies of the documents described below on the interested parties in this action as set forth on the attached service list:

VERIFIED PETITION FOR WRIT OF MANDATE AND MEMORANDUM OF POINTS & AUTHORITIES

DECLARATION OF PETER LA FOLLETTE

DECLARATION OF MICHAEL T. RISHER

DECLARATION OF MINDY ROMERO

DECLARATION OF KIM ALEXANDER

DECLARATION OF PAUL MITCHELL

DECLARATION OF LINTON A. MOHAMMED

PETITIONERS' REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES

[PROPOSED] ORDER GRANTING PETITIONERS' REQUEST FOR JUDICIAL NOTICE

BY MESSENGER: By consigning the documents to an authorized courier and/or process server for hand delivery on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 23, 2017 at Santa Monica, California.

Susan Byrd
[PRINT NAME]

[SIGNATURE]

SERVICE LIST

ALEX PADILLA, in his official capacity as Secretary of State of the State of California 1500 11th Street, 6th Floor Sacramento, CA 95814 Telephone: (916) 653-6814	Respondent
WILLIAM F. ROUSSEAU, in his official capacity as Clerk-Recorder-Assessor Registrar of Voters for the County of Sonoma 585 Fiscal Drive, Room 103 Santa Rosa, CA 95403 Telephone: (707) 565-3800	Respondent
XAVIER BECERRA, in his official capacity as Secretary of State of the State of California 1300 "I" Street Sacramento, CA 95814-2919 Telephone: (916) 445-9555	Non-Party (Service required per Rule 8.29(c) of the California Rules of Court)