

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTINA FUGAZI; ALEX
GONZALEZ; ANNETTE ZIMMER;
FRANCISCO MACIAS; JAMAR C.
BERRY; JO A. LAING; BENJAMIN R.
HERRERA; DIVINE JANE LEANOS;
ELIZABETH LAWRENCE WHITE;
MARC LAWRENCE WHITE;
KALANI MARSHALL BLACK;
TARKDEEP SINGH; TOOBA
NAVEED; VALDOMERO LOPEZ,

Plaintiffs,

v.

ALEX PADILLA, in his official capacity
as Secretary of State for the State of
California; MELINDA DUBROFF, in her
official capacity of the San Joaquin County
Registrar of Voters, and DOES 1 through
50,

Defendants.

No. 2:20-CV-00970-KJM-AC

ORDER

Plaintiffs move for a temporary restraining order seeking to enjoin the Secretary of State for the State of California and the San Joaquin County Registrar of Voters (collectively “defendants”), from completing the recount of votes for the March 3, 2020 Primary Election and finalizing the election results without including vote-by-mail ballots cast by plaintiff voters who

provided signature verifications to the Registrar by April 21, 2020. The court, having considered the arguments of counsel on May 19, 2020, and the papers submitted with this matter including defendants' surreply filed May 20, 2020, DENIES plaintiffs' motion, without prejudice to plaintiffs' filing a motion for preliminary injunction.

I. BACKGROUND

A. Factual Background and Allegations

1. March 3 Presidential Primary: Executive Order Modifies Original Deadlines

Plaintiffs are Christina Fugazi, a candidate to represent California Assembly District 13 in the Primary Election held on March 3, 2020, and thirteen persons registered to vote in San Joaquin County who seek to represent a class of similarly situated voters. The thirteen voter plaintiffs are Alex Gonzalez, Annette Zimmer, Francisco Macias, Jamar C. Berry, Jo A. Laing, Benjamin R. Herrera, Divine Jane Leanos, Elizabeth Lawrence White, Marc Lawrence White,¹ Kalani Marshall Black,² Tarakdeep Singh, Tooba Naveed and Valdomero Lopez (collectively "voter plaintiffs"). Compl. ¶¶ 22–23, ECF No. 1; Mot. TRO, Ex. 1 (Fugazi Decl.) ¶ 1, ECF No. 4-1.

On March 4, 2020, the day after the March 3 Presidential Primary Election, the Governor of California proclaimed a State of Emergency in the state due to the coronavirus (COVID-19) pandemic.³ Compl. ¶ 12. Slightly more than two weeks later, on March 20, 2020,

¹ The court notes named plaintiff Marc Lawrence White or Marc Lawrence is not identified on the Registrar's log entitled, "Voters Contacted Due to Initially Challenged Ballot for the Presidential Primary Election on March 3, 2020." Surreply, ECF No. 23, at 10 & n.4. Defendants confirm there is a "Marc Eugene Lawrence" registered in the County, and his mail ballot was counted. Dubroff Suppl. Decl. ¶ 12. The court does not reach the issue of name disparities for purposes of this motion.

² The court also notes named plaintiff Kalani Black, listed as Kalani Marshall Black in the caption, appears to be listed in the Registrar's voter log by the name Kalani Tyson Marshall. Reply, Ex. 1 (Voter Log), ECF No. 16-1, at 49.

³ The court notes and takes judicial notice sua sponte of Governor Newsom's March 19, 2020, shelter in place order, available at: <https://covid19.ca.gov/img/N-33-20.pdf>.

the Governor specifically addressed the effect of COVID-19 on the counting of votes cast in the March 3rd Primary by issuing Executive Order N-34-20. *Id.* This Executive Order “[extended] all deadlines associated with completing, auditing, and reporting on the official canvass” by 21 days, to provide relief to California’s 58 county elections officials who were in the middle of the official canvass for the March Primary. *Id.*; *see also* Req. for Judicial Not., Ex. 2 (Executive Order N-34-20 (“Governor’s Order”)) ¶ 2 at 8, ECF No. 5-1. In this Order, on the one hand, the Governor urged county elections officials “to complete activities related to the official canvass according to the deadlines ordinarily imposed by state law, to the extent possible.” Governor’s Order ¶ 4 at 9. At the same time, however, the Governor directed that “[e]lections officials shall provide maximum possible notice to voters about how to participate in each of these elections, paying particular attention to the needs of voters at high risk from COVID-19, individuals with disabilities, and other voters with particularized needs.” *Id.* ¶ 3 at 8–9.

Following the Governor’s issuance of the March 20 Executive Order, on March 23, 2020, the California Secretary of State issued Memorandum No. 20068, directed to county elections officials regarding compliance with the order, identifying which calendar entries in the Secretary of State’s March 3, 2020, Primary Election calendar were extended by the executive order. Padilla Opp’n, ECF No. 8, at 5; *see also id.*, Ex. C (Sec’y of State’s Mem. No. 20068), ECF No. 8, at 22–23 (referencing the Primary Election calendar).

2. San Joaquin Voter Registrar’s Original Election Certification

Prior to the Governor’s Order extending the dates by which to complete voter canvasses, the San Joaquin County Registrar of Voters, Melinda Dubroff (“the Registrar”), would have been required to certify her county’s election results by April 2, 2020, the 30-day deadline in effect on the primary election date. Mot. TRO, ECF No. 4, at 5. After the Governor’s Order took effect, the Registrar certified the election on April 5, 2020, as detailed below.

The Registrar’s Office, located at 44 N. San Joaquin Street, Ste. 350, in Stockton, California, was closed to the public at some point in light of the statewide state of emergency. Ms. Fugazi says the Registrar told her the office was closed starting March 23, 2020. Fugazi Decl. ¶ 2. The Registrar avers the building in which her office is located closed to the public

1 “[e]ffective April 1.” Dubroff Suppl. Decl. ¶ 10; *see also id.*, Ex. B (Public Notice), ECF No. 24-
 2 2, at 2 (“Effective April, 2020, the County Administration Building is closed to the public until
 3 further notice”). The Registrar says that after her office was closed, her staff remained available
 4 to answer incoming calls, including to the phone number, (209) 468-2890, listed in the cure
 5 notices sent to voters described below. Dubroff Suppl. Decl. ¶ 10.

6 At one point the Registrar planned to certify the election results one day later than
 7 the original deadline, on Friday, April 3, 2020, but ultimately certified them on Sunday, April 5,
 8 2020. Dubroff Suppl. Decl. ¶ 11. Plaintiffs allege the Registrar did not provide voters a
 9 minimum eight days’ notice prior to this certification date, to allow them to cure mismatched
 10 signatures or the absence of signatures on ballot envelopes, as required by the California
 11 Elections Code. Mot. TRO at 6; *see also* Cal. Elec. Code § 3019(d)(1). Eight days prior to April
 12 5 was Thursday March 26, 2020. Dubroff Decl. ¶ 12.

13 3. Recount Occasioned By Plaintiff Fugazi’s Recount Request; Plaintiff
 14 Voters Attempt to Cure Signatures During Recount Period

15 On April 14, 2020, Ms. Fugazi requested a recount of the ballots cast for
 16 candidates for Assembly District 13.⁴ Fugazi Decl. ¶ 4. During the course of the recount, on
 17 April 21, 2020, approximately, thirty-five vote-by-mail voters submitted⁵ their signature

18
 19 ⁴ Under the recount rules prescribed by the state Elections Code, the requestor of a recount
 20 is responsible for the costs associated with carrying the recount out. Fugazi Decl. ¶ 4. To date
 21 Ms. Fugazi avers she has incurred approximately \$115,902 in costs for daily reviews of elections
 22 materials. *Id.* ¶ 7. The court notes that, while Ms. Fugazi complains that the Registrar has
 23 arbitrarily overstated the deposit amounts required, neither the complaint nor the application for a
 24 TRO make a legal claim for relief on these grounds. As of the date of hearing on May 19, 2020,
 25 the recount was continuing, meaning Ms. Fugazi had made the required deposits through that
 date. While counsel represented the recount currently is anticipated to continue through June 9, if
 Ms. Fugazi does not make a deposit as required, the recount will cease and the TRO motion may
 become moot. At hearing the parties agreed to a stipulation based on defense counsel’s
 representation, that the recount would under no circumstances be completed before next Monday,
 May 25, 2020.

26
 27 ⁵ The complaint pleads that the proposed class “consists of thirty-six (36) voters registered
 28 to vote in the San Joaquin County” March 3 election. Compl. ¶ 36. Ms. Fugazi’s declaration also
 states, “we have identified thirty-six voters.” Fugazi Decl. ¶ 1. Plaintiffs’ motion for a TRO
 represents that “approximately, 35 Vote-by-Mail voters submitted their signature verifications to

verifications to the Registrar. Mot. TRO at 7. Plaintiffs do not expressly identify which of the voter plaintiffs attempted to cure by April 21, 2020. To date, the Registrar has declined to count the votes of those persons who submitted cure documents, on grounds their verification statements were untimely. Dubroff Opp’n, ECF No. 10, at 12 (citing Elections Code § 3019(e)(C)(1) (“If timely submitted, the elections official shall accept any completed unsigned ballot statement.”)).

The defendants argue in surreply that the record on the TRO motion should be narrowed to eight plaintiffs to whom the Registrar sent notices on March 11 or March 16, eight and three days, respectively. These dates are after the Governor’s executive order declaring a state of emergency and before the Governor’s March 19, 2020, shelter in place order took effect, and so fall within the period of time when disruption to the vote-counting process was most likely. Surreply at 9. For purposes of this motion, given the record before, the court accepts this argument and considers the motion as based on the facts with respect to the following voters:

Voter Plaintiff Name	Date Registrar Mailed Notice
Valdomero Lopez	3/11/2020
Alex Gonzalez	3/11/2020
Jamar Ceasar Berry	3/11/2020
Divine Jane Leanos	3/11/2020
Francisco Daniel Macias	3/16/2020
Elizabeth Lawrence White	3/16/2020
Kalani Marshall Black	3/16/2020
Tooba Naveed	3/16/2020

Id. at 9–10.

the Registrar by . . . April 21, 2020[.]” Mot. TRO at 7. None of these documents clarifies whether the number 35 or 36 voters includes all the named voter plaintiffs.

1 The only voter on this list to have submitted a declaration in support of the TRO⁶
 2 is Valdomero Lopez, who says he “did not receive notice by mail that there was a deficiency in
 3 [his] signature” and “never received a phone call from the San Joaquin County Registrar’s Office
 4 advising [him] of any extension of time granted by the Governor of California to cure [his] vote.”
 5 Reply, Ex. 7 (Lopez Decl.) ¶¶ 5, 7, ECF No. 16-7. Moreover, Mr. Lopez explains with the
 6 backdrop of COVID-19 he “would not have gone to the Registrar’s office because of potential
 7 exposure” and he wanted to prevent “bringing it home to his wife who is [suffering from
 8 cancer.]” *Id.* ¶ 6.

9 During the recount, on April 23, 2020, Ms. Fugazi spoke with the Registrar.
 10 While Ms. Fugazi does not quote the Registrar directly, she says the Registrar told her that her
 11 “staff [had] identified issues with signature sheets for vote by mail ballots” but “it was now too
 12 late to send out mail curing notices and affidavits to voters, so staff made calls.” Fugazi Decl.
 13 ¶ 1. Fugazi says the Registrar said she was “not sure” if logs were kept of staff calls to voters in
 14 an attempt to cure vote by mail signature issues. *Id.* In their declarations, two other recount
 15 observers also paraphrase a conversation in which they assert the Registrar said, in substance,
 16 “there was not enough time to write all voters that needed to cure deficiency in vote by mail
 17 signatures and in some instances . . . the Registrar’s staff phoned said voters instead.” Reply, Ex.
 18 2 (Reiman-Estes Decl.) ¶¶ 4–8, ECF No. 16–2; *id.*, Ex. 3 (Estes Decl.) ¶¶ 4–5, ECF No. 16-3. In
 19 surreply, the Registrar states she does not recall making such a comment and counters “to the
 20 extent that such a statement was in fact made, it was off-the-cuff and inaccurate as it relates to
 21 sending Cure Letters to voters.” Dubroff Suppl. Decl. ¶ 13.

22 On May 15, 2020, while the recount continued, the Registrar discovered that 21
 23 voted ballots had been placed in boxes for unused ballots after the polls had closed on election
 24 day. Reply at 8. On May 18, 2020, six weeks after certification, the Registrar decided to accept
 25 and tabulate these 21 newly discovered ballots. *Id.* Registrar does not explain why she opted to
 26 count these ballots.

27 ⁶ To be clear, only one other voter submitted a declaration that does not affect the court’s
 28 decision here, for additional reasons described below. See note 8 *infra*.

1 B. Procedural History⁷

2 On May 12, 2020, plaintiffs filed their complaint against defendants Alex Padilla,
3 Secretary of State for the State of California, and Melinda Dubroff, San Joaquin County Registrar
4 of Voters. Both are sued in their official capacity only. Compl. ¶¶ 6, 8. The court has granted
5 Kathy Miller’s request to be joined as a defendant under Federal Rule of Civil Procedure
6 19(a)(2). *See* Order, ECF No. 22.

7 Plaintiffs make the following claims: (1) violations of the First and Fourteenth
8 Amendments of the U.S. Constitution; (2) violation of the Voting Rights Act; (3) violation of
9 procedural and substantive due process; and (4) violation of the Americans with Disabilities Act.
10 *See generally* Compl. Plaintiffs ask the court to order the San Joaquin County Registrar of Voters
11 to immediately count the thirty-five voters in California Assembly District 13 of San Joaquin
12 County that voted “before 5:00 p.m. on April 21, 2020,” Compl. at 25 (prayer for relief), and to
13 order fair, reasonable and constitutionally sufficient procedures in future 2020 elections to allow
14 plaintiffs and others to safely participate in those elections without concerns over COVID-19. *Id.*

15 On May 13, 2020, citing urgent circumstances, plaintiffs moved the court to
16 temporarily restrain the Registrar from completing the recount requested by Ms. Fugazi without
17 counting the vote-by-mail voter verifications and signatures that plaintiffs and all other voters
18 submitted by April 21, 2020. *See generally* Mot. TRO. Defendants opposed the motion, ECF
19 Nos. 8–10, and plaintiffs replied, ECF No. 16. On May 19, 2020, the court held a telephonic
20 hearing on the motion, ECF No. 21. As allowed by the court, Melinda Dubroff filed a surreply,
21 ECF No. 23.

22
23
24 ⁷ On April 27, 2020, Ms. Fugazi alone filed a verified petition for writ of mandate and
25 application for temporary restraining order against the same defendants in the San Joaquin
26 County Superior Court, alleging state election law violations. Miller Req. for Judicial Not., Exs.
27 A–B (San Joaquin Superior Court Docs.), ECF No. 12, at 4–39. That court denied plaintiffs’
28 TRO application. *Id.*, Ex. D (May 6, 2020 Sup. Ct. Min. Order) at 46. The voter plaintiffs are not
a party to the ongoing state case. Reply at 11. The California Secretary of State also is not a
party to the state court filing. *Id.*

1 Plaintiffs' TRO application, on its face, is not a model of clarity in identifying the
2 federal basis on which the motion is brought. As discussed further below, defendant Dubroff
3 fairly questions in her surreply whether the motion is based on more than alleged violations of
4 state law not cognizable in this federal court. Although plaintiffs assert at one point the "mere
5 fact that the Registrar chose to mail some individuals notice of her rejection of ballots and their
6 right to cure, and to contact others by telephone, claiming she did not have time to mail them their
7 notices prior to the rushed certification date, constitutes unequal protection," they do so under a
8 heading referencing the "State Constitution." Mot. TRO at 15. By their reply, plaintiffs bring a
9 bit more focus to the federal nature of their request here, referencing the federal claims made in
10 their complaint and arguing that this action is "about failed processes that the San Joaquin County
11 Registrar utilized in giving voter plaintiffs an opportunity to cure their votes that were cast in the
12 Presidential Primary Election." Reply at 2. Argument at hearing clarified the motion is best
13 construed as based on the third claim in the complaint, and specifically alleged violations of
14 procedural due process rights.

15 II. LEGAL STANDARD

16 A temporary restraining order may be issued upon a showing "that immediate and
17 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
18 in opposition." Fed. R. Civ. P. 65(b)(1)(A). The analysis for temporary restraining orders and
19 preliminary injunctions is "substantially identical." *Stuhlberg Int'l. Sales Co. v. John D. Brush &*
20 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "A preliminary injunction is an extraordinary
21 remedy, never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22
22 (2008). In determining whether to issue a preliminary injunction, courts must consider whether
23 the moving party (1) "is likely to succeed on the merits," (2) is "likely to suffer irreparable harm
24 in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor, and (4) "an
25 injunction is in the public interest." *Id.* at 20. The moving party has the burden of proving this
26 extraordinary remedy is warranted by clear and convincing evidence. *See Mazurek v. Armstrong*,
27 520 U.S. 958, 972 (1997) ("And what is at issue here is not even a defendant's motion for
28 summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the

1 requirement for substantial proof is much higher.”); *see also* *Granny Goose Foods, Inc. v.*
 2 *Teamsters*, 415 U.S. 423, 442 (1974). Although these “shorthand formulations” regarding
 3 plaintiff’s burden of persuasion “aptly express the courts’ general reluctance to impose an interim
 4 restraint on defendant before the parties’ rights have been adjudicated, they do not take the place
 5 of a sound evaluation of the factors relevant to granting relief under Rule 65(a).” 11A Charles
 6 Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948 (2d
 7 ed. 1995) (footnotes omitted).

8 The Ninth Circuit sometimes employs an alternate formulation of the *Winter* test,
 9 referred to as the “serious questions” test. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir.
 10 2012). “A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious
 11 questions going to the merits were raised and the balance of hardships tips strongly in the
 12 plaintiff’s favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir.
 13 2011) (internal quotations omitted) (quoting *Lands Council v. McNair*, 537 F.3d 981, 986–87 (9th
 14 Cir. 2008)). Under the “serious questions” approach to a preliminary injunction, the court may
 15 use a “sliding scale” where “[t]he elements of the preliminary injunction test must be balanced, so
 16 that a stronger showing of one element may offset a weaker showing of another.” *Lopez v.*
 17 *Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). *Winter* was decided after the initial articulation of
 18 the “serious questions” test but does not overrule it. *Cottrell*, 632 F.3d at 1135. The “serious
 19 questions” test must be applied in conjunction with review of the other two *Winter* factors,
 20 likelihood of irreparable injury and whether the injunction is in the public interest. *Id.*

21 III. LIKELIHOOD OF SUCCESS ON THE MERITS

22 “The first factor under *Winter* is the most important . . . [b]ecause . . . when a
 23 plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider
 24 the remaining three [*Winter* elements].” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir.
 25 2015) (last alteration in original) (quotations marks and citations omitted). As explained below,
 26 the court finds plaintiffs have not satisfied their burden under the first prong of the *Winter* test,
 27 including by raising serious questions, so as to warrant the extraordinary relief of a temporary
 28 restraining order; the court thus does not reach the three other prongs of the *Winter* test.

1 A. Parties' Arguments

2 Plaintiffs effectively contend, as clarified by their factual arguments at hearing,
3 that they are likely to succeed on the merits of their procedural due process claim on the grounds
4 that the Registrar failed to provide voters with adequate notice of the need to cure their ballots,
5 under the circumstances arising from the COVID-19 pandemic, before she certified the election
6 as required by the California Elections Code. Mot. TRO at 9–10; Reply at 2. Plaintiffs' counsel
7 concedes Executive Order N-34-20 does not require county elections officials to extend their
8 “canvass-related deadlines” by the full 21 days allowed, but rather is permissive. Counsel,
9 however, argued at hearing that the Secretary of State’s Memorandum providing the actual dates
10 of the new deadlines is mandatory. But the plain language of the Memorandum undermines this
11 argument; the Memorandum itself simply extends all deadlines associated with the official
12 canvass for “elections officials and the Secretary of State.” See Sec’y of State’s Mem. No. 20068
13 at 22–23. Rather, the true gist of plaintiffs’ argument appears to be that the disruption caused by
14 the onset of the COVID-19 pandemic by early March 2020 impaired the voter plaintiffs’ ability to
15 review and follow through on any notice the Registrar provided of their right to cure signature
16 problems with their ballots, such that they should have been given more time to cure. See Reply
17 at 4–5. Moreover, for those voters who were able to review the notice, plaintiffs argue the notice
18 itself was deficient because it did not provide the actual date the Registrar planned to certify the
19 election results; rather it only instructed “[t]he signature verification statement must be received
20 by the elections official of the county where you are registered to vote no later than 5 p.m. two
21 days prior to certification of the election.” Cal. Elec. Code § 3019(d)(2); see also Dubroff Decl.,
22 Ex. 1 (Unsigned Ballot Envelope Letter & Signature Verification Letter), ECF No. 11-1, at 1–4.
23 Voters who went to the Registrar’s website could not have found additional information to clarify
24 the date by which they had to cure, as the website did not post the date for certification; rather it
25 displayed only an old notice to cure for a past election in 2018. Compl. ¶ 20. Finally, plaintiffs
26 suggest that the experience of one voter in particular, Valdomero Lopez, signals the potential for
27 broader systemic problems with the Registrar’s provision of notice during the relevant time
28

1 period: Mr. Lopez avers he did not receive a mailed notice nor did he receive a phone call from
 2 the Registrar. Lopez Decl. ¶¶ 5, 7.⁸

3 Defendants argue plaintiffs are unlikely to succeed on the merits because from
 4 February 15, 2020, through March 18, 2020, Registrar Dubroff's office provided 1,585 voters
 5 with notice of the opportunity to cure defects in their signatures in accordance with California
 6 Elections Code section 3019(d)(1). Dubroff Opp'n at 9; *see* Dubroff Decl. ¶ 10; Dubroff Suppl.
 7 Decl. ¶¶ 5, 6 (correcting previous figures regarding number of voters); *see also* Notice of Errata
 8 to Dubroff Suppl. Decl., ECF No. 26 (further corrections). Defendant Dubroff argues "San
 9 Joaquin County had 31 days to cure their absentee ballots." Surreply at 11–12. Defendants also
 10 contend the language of the notice itself complied with state law and provided recipients with all
 11 of the information they needed to cure the signature issues with their ballots in a timely manner.
 12 Specifically, the notice provided the correct number to call, which was answered at regular hours
 13 even after the Registrar's office closed to the public in light of COVID-19. Dubroff Suppl. Decl.
 14 ¶ 10. If a voter attempted to return documents in person, the Registrar had set up drop-boxes at
 15 the entrances to the building in which her office was located. *See* Surreply at 6. The last date
 16 notices were mailed was March 18, 2020, fifteen days after the election, supporting a conclusion
 17 voters received the notices within 3 days, by March 21, 2020. *See* Dubroff Decl. ¶¶ 11–12;
 18 Surreply at 5 (court can presume Postal Service generally delivers mail within three days). In
 19 sum, the Registrar posits that with certification on April 5, the last voters to be sent notices had
 20 ten days to cure, more than the eight required.

21 Defendant Dubroff also argues in her surreply that plaintiffs have not identified a
 22 federal claim as the basis of their motion for a TRO. Surreply at 10. The court addresses this
 23 argument as a threshold matter below, to clarify the basis for its issuance of this order.

24
 25
 26 ⁸ The court notes plaintiffs also submitted a declaration by Vickie L. Milano. Reply, Ex.
 27 F (Milano Decl.), ECF No. 16-6; *see* Voter Log at 53. This declaration does not support
 28 plaintiff's motion in light of Ms. Milano's admitting she received cure notice sent by the
 Registrar, and says only vaguely that she did not have enough time to return it. *Id.* ¶ 5. Ms.
 Milano is not a named plaintiff in this action.

B. Claim Underlying TRO Request

Defendants’ argument that plaintiffs fail to make any argument or provide evidence of any federal claim in their TRO application impliedly invokes the party presentation principle addressed recently by the Supreme Court:

In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 (2008), ‘in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.’ *Id.*, at 243. In criminal cases, departures from the party presentation principle have usually occurred ‘to protect a *pro se* litigant’s rights.’ *Id.*, at 244; *see, e.g., Castro v. United States*, 540 U.S. 375, 381–383 (2003) (affirming courts’ authority to recast *pro se* litigants’ motions to ‘avoid an unnecessary dismissal’ or ‘inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro se* motion’s claim and its underlying legal basis’ (citation omitted)). But as a general rule, our system ‘is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.’ *Id.*, at 386 (Scalia, J., concurring in part and concurring in judgment).

In short: ‘[C]ourts are essentially passive instruments of government.’ *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh’g en banc)). They ‘do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.’ *Ibid.*

United States v. Sineneng-Smith, No. 19-67, slip op. at 3–4 (U.S. May 7, 2020).

In *Sineneng-Smith*, the criminal defendant argued in the trial court the case against her should be dismissed based on her First Amendment rights of free speech and petition. *Id.* at 3. On appeal, the Ninth Circuit solicited briefs from three amici on a First Amendment overbreadth argument not briefed in the trial court and ultimately adopted the amici’s arguments in concluding the federal statute at issue was unconstitutionally overbroad. *Id.* The Supreme Court held the appeals panel had committed an abuse of discretion, as the overbreadth argument on which the case was decided had not been presented by a party to the suit. *Id.*

Unlike in *Sineneng-Smith*, plaintiffs here put the defendants on notice of their federal claims in their complaint and have argued at least a colorable question of procedural due process in their moving papers as clarified in reply and at hearing. Although the court agrees with defendants that the elements of a federal constitutional violation are not spelled out as clearly in the moving papers as they could be, it does not require any particular deductive leap

1 from plaintiffs’ factual arguments and evidence to understand the federal due process claim on
 2 which they rely, however inartfully. “A court is not hide-bound by the precise arguments of
 3 counsel,” *id.* at 8, and the court finds the principle of party presentation is satisfied at least as to
 4 that claim.⁹ *Id.* (citing Cal. Elec. Code § 3019(d)(2)).

5 The court also notes that election cases of the type plaintiffs attempt to bring
 6 typically turn on substantive due process claims. *See, e.g., Bennett v. Yoshina*, 140 F.3d 1218,
 7 1224 (9th Cir. 1998) (analyzing substantive due process claim related to election procedure), *as*
 8 *amended on denial of reh’g and reh’g en banc* (June 23, 1998); *Wilkins v. Cty. of Alameda*, 571
 9 F. App’x 621, 623 n.1 (9th Cir. 2014) (characterizing plaintiffs potential substantive due process
 10 claim as “coextensive” with his “right-to-vote claim”). But plaintiffs’ pleading of their due
 11 process claim, while including the word “substantive” in the label, does not incorporate language
 12 to suggest a substantive due process claim is actually asserted. And plaintiffs have made no effort
 13 to argue, legally or factually, that the elements of a substantive due process claim are met here
 14 and so the court finds such a claim not fairly presented at this time.

15 C. Elements of Procedural Due Process Claim

16 Consistent with the observations made above, plaintiffs plead in their complaint
 17 that, “[u]nder the law of the Ninth Circuit, a 42 U.S. Code § 1983 claim alleging a procedural due
 18 process denial requires proof of three elements: (1) a deprivation of a constitutionally protected
 19 liberty interest; (2) a state action; and (3) constitutionally inadequate process.” Compl. ¶ 91; *see*
 20 *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (§ 1983 claim requires state
 21 action and procedural due process violation requires “(1) a protectible liberty or property interest
 22 . . . and (2) a denial of adequate procedural protections”).

23
 24
 25 ⁹ Plaintiffs do not challenge California Elections Code section 3019’s requirement that
 26 election officials notify voters of the right to cure “no later than 5 p.m. two days prior to
 27 certification of the election,” Cal. Elec. Code § 3019(d)(1), without a corresponding requirement
 28 to provide the actual date of anticipated certification, *see also id.* § 3019(d)(2) (prescribed form,
 which does not call for specific date to be plugged in, and which Registrar’s notice language
 tracks exactly). Because plaintiffs have not presented such a claim to the court, any remedy to a
 flaw in the statutory language is for the California Legislature to consider.

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The right to vote is a constitutionally protected right. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.”); *see also Duncan v. Poythress*, 657 F.2d 691, 705 (5th Cir. 1981) (holding that one substantive guarantee of due process clause is “the right to be free from the purposeful decision of state officials to deny the citizens of a state the right to vote in an election mandated by law”); *Samuel v. Virgin Islands Joint Bd. of Elections*, No. 2012-0094, 2013 WL 842946, at *5 n.2 (D.V.I. Mar. 7, 2013) (“[t]he right to vote—to the extent it exists and an individual has been deprived of it—is certainly a protected liberty interest” (citation omitted)).

Where “plaintiffs have alleged that they were deprived of a constitutionally-protected [liberty or] property interest as a result of state action, due process is implicated and the question becomes what process is due.” *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). To answer this question, the Supreme Court has directed courts to consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also* Compl. ¶ 93.

D. Analysis

The crux of plaintiffs’ procedural due process claim is that, “[h]aving created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection” before refusing to count an absentee ballot with a signature issue. Compl. ¶ 92. As explained below, plaintiffs have not met their burden of showing serious questions or a likelihood of success on the merits of this claim, because they have not shown they satisfy by clear and convincing evidence the second factor articulated in *Mathews*, namely the “risk of an erroneous

1 deprivation” of their interest in having their votes counted. Specifically here, plaintiffs have not
2 shown the Registrar provided constitutionally inadequate procedures to cure their ballot
3 signatures. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (rejecting plaintiffs’
4 procedural due process claim based on county’s rejection of unverifiable referendum signatures
5 without allowing an opportunity to cure signatures, finding “the state’s important interests justify
6 the minimal burden on plaintiffs’ right[]” to vote).

7 First, the court notes that plaintiffs’ allegations and arguments appear to raise some
8 fair questions regarding the clarity and adequacy of the notice provided to voters whose vote-by-
9 mail ballots raised signature issues that required curing. The letter the Registrar sent to these
10 voters to notify them of the need to cure instructs them to deliver a signature verification
11 statement in person to the Registrar’s office, or by mail, fax or email “no later than . . . two days
12 prior to the certification of the election,” without providing a date of certification for reference
13 anywhere on the letter. *See Unsigned Ballot Envelope Letter* at 1–4. This wording effectively
14 meant that, without additional investigation from the voter, no due date was obvious by which he
15 or she needed to send in the necessary information to cure a challenged ballot. Voters could not
16 necessarily visit the Registrar’s physical office, as it was closed to the public starting either
17 March 23 or April 1, 2020, due to the County’s shelter-in-place order during the coronavirus
18 pandemic. *See Fugazi Decl.* ¶ 1 (March 23, 2020); *Suppl. Dubroff Decl.* ¶ 10 (April 1, 2020).
19 Perhaps most troubling, if a voter were to have visited the Registrar’s website for clarification,
20 that voter would have found only a notice from a prior election, displaying the past date of
21 November 25, 2018, as the deadline by which voters could submit their cure forms. *Compl.* ¶ 20.
22 During an election cycle disrupted by pandemic, potentially heightening the importance of being
23 able to vote by mail where that option is available under state law, the lack of attention to the kind
24 of meaningful detail voters might be looking for could raise a red flag if supported by meaningful
25 evidentiary detail.

26 At the same time, however, on this record the court cannot find a likelihood that
27 the failure to provide a clear due date in writing or on the website deprived plaintiff voters of
28 procedural due process, as the Registrar here has submitted evidence showing voters were able to

1 phone the Registrar's office at the number provided on the cure notice during all times when the
2 office doors were closed to the public. Dubroff Suppl. Decl. ¶ 10 (Registrar's staff assigned to
3 answer telephone calls, emails and faxes after April 1, 2020); *id.*, Ex. B, ECF No. 24-2
4 (Registrar's notice explaining "essential services" available by phone during San Joaquin
5 County's pandemic-related shutdown). Plaintiffs provide no evidence to suggest voters tried to
6 call the Registrar's office and got no answer, or that voters called the office and received incorrect
7 information about the date by which they needed to return the necessary documents to cure their
8 ballots' signature issues. Moreover, plaintiffs have not submitted any evidence showing any of
9 the named plaintiffs were unable to cure their ballots by two days prior to certification as a result
10 of the lack of clarity in the notice, and if so why. Plaintiffs have not shown "the risk of an
11 erroneous deprivation of [plaintiffs'] interest through the procedures used," *Mathews*, 424 U.S. at
12 335, was high enough to warrant additional safeguards here. *Cf. Lemons*, 538 F.3d at 1104.

13 Second, plaintiffs present evidence that at least one voter may not have received
14 any notice at all that his ballot required curing, at least not until the recount was underway.
15 Lopez Decl. ¶ 5 ("I did not receive notice by mail that there was a deficiency in my signature.").
16 The Registrar says her office did mail notices to every voter whose ballot was challenged,
17 providing her own declaration generally verifying that notices were mailed, and pointing to a log
18 of the 1,585 voters sent the notices. Suppl. Dubroff Decl. ¶ 13; Voter Log at 46. The Registrar
19 takes the position that the evidence she has provided raises the presumption that Mr. Lopez
20 received the mailing, and that it is fair to assume he received it three days after her mailing.
21 Surreply at 7. But the Registrar's evidence does not satisfy the requirements for the presumption
22 to kick in here. *See, e.g., Lynch v. N. Am. Co. for Life & Health Ins.*, 300 F. Supp. 3d 1158, 1165
23 (D. Idaho 2018) (finding testimony of organizational officer in charge of mailroom competent
24 evidence for mailroom's customary practice, but inadmissible to show specific piece of mail was
25 sent for lack of personal knowledge). The court thus considers Mr. Lopez's declaration as
26 evidence of his nonreceipt of the notice, absent the presumption of receipt.

27 The Registrar also says she arranged for staff in her office to make phone calls to
28 voters who were sent cure notices and did not return them, going beyond what state law requires

1 of her. Dubroff Decl. ¶ 11. Mr. Lopez says he also did not receive a call from anyone about an
2 opportunity to cure his ballot. Lopez Decl. ¶ 7. A Registrar's Office staff member who made
3 these phone calls has provided a declaration saying she made calls between March 16 and March
4 27, describing the statements she made on the calls, and noting that she "carefully maintained" a
5 handwritten record of her calls on her own copy of the log. Magathen Decl. ¶ 4, ECF No. 25.
6 Her copy of the report with her notes, however, "was not retained." *Id.* As noted above,
7 plaintiffs submit evidence suggesting the Registrar admitted in a discussion with Ms. Fugazi that
8 "it was now too late to send out mail curing notices and affidavits to voters, so staff made calls,"
9 Fugazi Decl. ¶ 1; *see also* Reply, Ex. 8 (Sawyer Decl.) ¶ 6; Reiman-Estes Decl., ¶¶ 4–8; Estes
10 Decl., ¶¶ 4–5. The Registrar's staff member who made the calls does not say she called only the
11 subset of voters who were mailed notices and had not returned those notices by the date of her
12 call; rather she says she placed calls to "the subset of voters that had returned vote-by-mail ballots
13 [] that had deficiencies related to the identification envelopes, such as no signature or a
14 mismatched signature, that resulted in their [] ballots being disqualified." Magathen Decl. ¶¶ 2–3.
15 Given that the Registrar's staff member made calls starting on March 16, before the Registrar
16 says the last notices were mailed on March 18, Dubroff Decl. ¶ 10, there may be something to
17 plaintiffs' suggestion that the Registrar said she was running out of time, although the Registrar
18 says she does not recall saying what plaintiff Fugazi heard. Dubroff Suppl. Decl. ¶ 13. The court
19 need not resolve any credibility contest raised by the declarations on this point at this stage,
20 however. Even if due process required phone calls under the circumstances, a proposition for
21 which plaintiff offers no supporting authority, plaintiffs provide only the single, unadorned Lopez
22 declaration saying he received neither a mailed notice nor a call. This lone declaration is not
23 sufficient to raise a serious question and, in the context of the current record, suggests only a
24 "garden variety" state election irregularity, the type of "mistake" that typically does not rise to the
25 level of a constitutional violation, as opposed to the kind of systemic flaw plaintiffs believe is
26 exposed by the Registrar's practices, constituting "a pervasive error that undermines the integrity
27 of the vote," *Bennett*, 140 F.3d 1226–27. Even if plaintiffs might ultimately be able to
28

1 demonstrate more widespread problems of a constitutional nature, they have not done so at this
2 time.

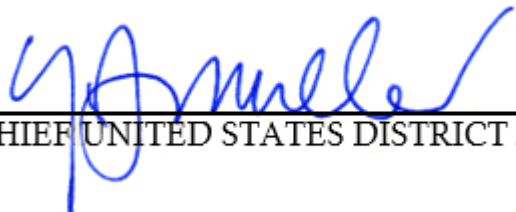
3 In sum, plaintiffs have not met their burden of showing by clear and convincing
4 evidence they are likely to succeed on their claim that Registrar Dubroff violated their procedural
5 due process rights by failing to provide voters with adequate notice prior to certifying the election
6 results. The first and most important prong of the *Winter* test is not satisfied, and the court need
7 not reach the other prongs.

8 IV. CONCLUSION

9 Plaintiffs' motion for a temporary restraining order, ECF No. 4, is DENIED
10 without prejudice to the filing of a motion for a preliminary injunction and seeking in connection
11 with any such motion expedited discovery.

12 IT IS SO ORDERED.

13 DATED: May 22, 2020.

14 
15 _____
16 CHIEF UNITED STATES DISTRICT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28