



August 5, 2020

The Honorable Alex Padilla
California Secretary of State
1500 11th Street, 5th Floor
Sacramento, CA 95814

Via email

C/o James Schwab and Steve Reyes

Re: Proposed Regulations

Dear Secretary Padilla:

On behalf of the American Civil Liberties Union of California, Asian Americans Advancing Justice - Asian Law Caucus, the Brennan Center for Justice, Disability Rights California, the League of Women Voters of California, and the California Voter Foundation, we thank you for the opportunity to review the draft regulations on the processing of vote-by-mail and provisional vote processing, for taking the time to discuss the regulations with us, and for the recommendations you have already incorporated. Please accept the following comments and proposed modifications to the draft emergency regulations relating to Title 2, Division 7, Chapter 8.3 of California Code of Regulations. Our comments and suggested modifications are limited to Article 6 and Article 9 of the draft regulations. We have also attached as Exhibit A our line edits to the regulations.

Article 6 - Section 20960

Explicitly state that exact matches are not necessary to confirm a valid signature.

California Elections Code section 3019 requires elections officials to *compare* a voter's signature on their ballot envelope to the signatures on file for the voter and decide if they compare. The statute does not use the word "match." In fact, forensic experts have suggested that a lack of training, proper equipment, the number of samples available, and the poor quality of signatures on file, all contribute to a challenging

environment to make signature comparisons, let alone matches.¹ Yet not all counties specifically instruct their staff that they are not seeking a match.²

Recently-issued guidance in Michigan addressed this challenge by stating that “it is not necessary for the voter’s signature to perfectly match the signature on file.”³ We suggest including explicit instructions like this in section 20960.

Clarify that similar characteristics between a signature being compared and any signature on file are sufficient to determine a signature is valid.

The proposed regulations do not currently include a standard for accepting a signature. We believe finding similar characteristics should be sufficient to accept a signature. This is consistent with section 3000 of the California Elections Code and section 20990 of the proposed regulations that require the examination of signatures to be liberally construed in favor of voters. It is also consistent with the practices in some counties that consider one matching characteristic sufficient for comparing signatures.⁴ The Michigan guidance similarly instructs elections officials that “[i]f there are any redeeming qualities in the [absentee voter] application or return envelope signature as compared to the signature on file, treat the signature as valid.”⁵

Instruct elections officials to seek to eliminate the visibility of identifying information.

Ballots of Black, Latinx, and Asian-American voters have been rejected at higher rates.⁶ We believe keeping identifying information from being visible during the review of signatures will add another layer to protect against bias, as well as help ensure confidence in the process.

Subdivision (c) should be clarified to remove ambiguity.

¹ See, e.g., Declaration of Linton Mohammed in Support of Plaintiffs’ Motion for Writ of Mandate at 7, *La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Jan. 19, 2018).

² See, e.g., Kim Alexander and Saskia Mills, *Improving California’s Vote-by-Mail Process: A Three-County Study*, California Voter Foundation, (August 2014), calvoter.org/sites/default/files/cvf_vbm_study.pdf.

³ *Absent Voter Ballot Application and Ballot Processing: Signature Verification and Voter Notification*, Michigan Bureau of Elections, available at bit.ly/2ZPTS2p (last visited Aug. 4, 2020).

⁴ See *Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity*, Stanford Law School Law and Policy Lab 26, (May 15, 2020), www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf.

⁵ *Supra* note 3, at 1.

⁶ See, e.g., Declaration of Paul Mitchell in Support of Plaintiffs’ Motion for Writ of Mandate at 3, *La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Jan. 19, 2018), www.rubenmajor.com/wp-content/uploads/2018/03/Mitchell-Declaration.pdf (finding higher rates of vote-by-mail ballots rejected for Latinx and Asian American voters); Joanna Lee and Deanna Kitamura, *Asian Americans Face Higher than Average Vote-by-Mail Ballot Rejection Rates in California*, Asian Americans Advancing Justice – California (Aug. 2017), www.advancingjustice-la.org/sites/default/files/issuebrief-vbm-FINAL-1.pdf (finding the vote-by-mail ballot rejection rate for Asian Americans in four populous counties was 15% higher than the overall rejection rate in those counties, and over half of rejected vote-by-mail ballots from Asian Americans had a mismatched signature, compared to 44% for all voters); Anna Baringer, Michael C. Herron, and Daniel A. Smith, *Vote by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus* (Apr. 25, 2020), https://electionscience.clas.ufl.edu/files/2020/04/Baringer_Herron_Smith_VBM_FL.pdf (finding vote-by-mail ballot rejections impact Black voters, voters with disabilities, and young voters at higher rates).

We suggest deleting the reference to “matching” for consistency with California law. We also think the “obvious and predominantly matching” language used in subdivision (c) creates a standard for matching that is too strict and could lead to increased disenfranchisement. Instead, we suggest including the list in subdivision (c) as examples of the types of characteristics elections officials should observe in comparing signatures to meet the standard we discussed above of “similar characteristics.”

We also recommend removing the reference in subdivision (c)(14) to “any other noticeable discrepancy.” This reference is vague and creates an opportunity to flag arbitrary insignificant variations in signatures. Instead, we suggest just leaving the reference to misspelled names. If the Secretary believes a “catchall” is necessary for this section, we suggest referencing “Other significant and obvious similarities or differences in characteristics.”

Insert a new subdivision with examples of explanations for discrepancies in signatures.

There are many common reasons why a voter’s signature may appear dissimilar to their signatures on file. Several explanations for discrepancies are included in the Michigan guidance that we recommend adding, including trembling or shaking, use of diminutives, and a signature evolving over time.⁷ Additionally, we suggest including in this section that a return envelope signature or electronic signature on file may have been written in haste, that an electronic signature may have been written with a stylus pen, and that voters may use variations of their name, such as rearranging the order of first and last name. We also suggest moving subdivision (c)(13), the surface of the location where the signature was made, to this new subdivision, because it is better classified as an explanation for discrepancies.

Delete references to predominantly matching characteristics used in subdivisions (c) and (e).

These references appear to create a *matching* standard, even though Elections Code section 3019 does not require one. Instead we suggest a “multiple, significant and obvious standard” for signature rejection. This is the standard used in Michigan.⁸ We believe it will set clear guidance that slight variations are never enough to trigger rejections.

Clarify that three total reviewers of a signature, including two elections officials, must unanimously find a signature does not compare.

Subdivision (f) creates a standard that a signature subject to a second review has to be unanimously approved. We think this is an inappropriate standard that risks disenfranchising voters and being unworkable. Instead, we believe if any of the reviewers find that the signature should be accepted, the ballot must be accepted. We think this subdivision is also unworkable as drafted because it is not clear how to resolve a dispute between reviewers. Instead, California should follow Colorado’s practice of only rejecting a ballot if a team of three unanimously agree.⁹ If the reviewers do not agree, then a ballot must be accepted.

⁷ *Supra* note 3, at 1-2.

⁸ *Id.*

⁹ Colo. Rev. Stat. § 1-7.5-107.3(2)(b).

Create a “beyond a reasonable doubt” standard for rejecting a signature comparison.

We believe there should be an evidentiary standard for the rejection of a signature. We recommend following the evidentiary standard used in Florida of beyond a reasonable doubt for their canvas of vote-by-mail ballots.¹⁰ This standard fits the spirit of liberally construing this section in favor of voters.

Subdivision (g) is vague, limits the ability to successfully compare signatures, and should be deleted.

The cluster concept is undefined and vague and could lead to inconsistent implementation. We believe it inappropriately raises the bar to successfully compare a signature. This section should be deleted in favor of the “similar characteristics” standard for a successful comparison, and a “multiple, significant and obvious” standard for rejecting a signature.

Article 9, Section 20990

Delete the reference to signature matches in subdivision (d).

The code does not require voters to match a signature. Replace “match” with “compare.”

Include a space on cure notices for a voter to certify that they have a disability, condition, or illness preventing them from consistently signing their name.

Allowing voters to certify that they cannot sign their names consistently will help resolve persistent signature issues for voters with disabilities or health conditions, and has been recommended by national disability rights advocates.¹¹

Article 9, Section 20991

Clarify that elections officials should use multiple signatures on file to make a signature comparison.

Subdivision (b) appears to limit the signatures that could be used for comparisons by making reference to vote-by-mail applications as a source for signature comparisons. We suggest instead clarifying that a signature should be compared to at least 10 of the voter’s most recent signatures on file before it is rejected. This will help the reviewers see if a voter’s signature has evolved over time and is a practice recommended by forensic experts.¹²

Clarify that a vote-by-mail ballot missing a postmark on the envelope must be accepted if a voter dates the ballot envelope by Election Day.

The use of “indicates” in subdivision (b)(8) could be made more clear by clarifying that in the absence of a postmark, the date the voter writes on their ballot envelope is sufficient to demonstrate that a ballot is timely. This change is consistent with Elections Code section 3020.

¹⁰ Fl. Rev. Stat. §101.68(1)(c).

¹¹ *Voting by Mail is Essential for Voters with Disabilities, but It’s Not Enough*, ACLU (July 7, 2020), www.aclu.org/news/votingrights/voting-by-mail-is-essential-for-voters-with-disabilities-but-its-not-enough/.

¹² *Supra* note 1, at 14.

Facilitate counting of ballots when a voter uses the wrong identification envelope.

Voters residing in the same household, such as spouses, may switch their identification envelopes by accident. Some counties report that they already make efforts to count the ballots of spouses or household members who accidentally switch envelopes.¹³ This practice of “marrying up” ballots should be standardized across all counties. We suggest adding an additional subsection (12) that a voter’s ballot shall be considered a valid vote in cases where the voter returns their ballot in the vote-by-mail identification envelope of a different voter, but the elections official is able to identify the correct voter and the voter’s signature compares.

Article 9, Section 20992

Conform the outreach provisions in the provisional ballot processing section to the vote-by-mail provisions.

We recommend adding requirements in section 20990 of the draft regulations for the protections for provisional voters, including notification within 24 hours of a determination that there is a signature mismatch or a missing a signature, that the notice be in the voter’s preferred language, that the voter receive notice that the signature used to cure will be added to their voter registration record, and that the notice include a postage-paid return envelope.

Additionally, we recommend a provision for notice to voters if a voter’s ballot is being rejected for eligibility issues. Voters should have an opportunity to know why their ballot is being rejected and have an opportunity to fix that issue. We also suggest voters be given the opportunity to certify in that notice that they have a disability, condition, or illness preventing them from consistently signing their name.

Article 9, Section 20993

Correct the evidentiary standard for the processing of provisional ballots.

The draft regulations flip the presumption that ballots are valid. Instead of requiring clear and convincing evidence of *ineligibility* before rejecting a ballot, the draft regulations require clear and convincing evidence to *accept* the ballot. This could cause elections officials to mistakenly think that more than attestation is required to “clearly and convincingly” show that a voter is eligible. We recommend clarifying that a ballot will only be rejected if there is clear and convincing evidence of ineligibility.

New Sections

Create a new section with additional notice requirements to help increase the response rate.

A recent study of notice methods in California found that many, but not all counties, are already using phone calls and emails to get voters to cure signature issues.¹⁴ Michigan’s guidance similarly requires elections offices to contact voters by email and phone, if available.¹⁵ The California study found that

¹³ *Supra* note 2, at 35.

¹⁴ *Supra* note 4, at 43.

¹⁵ *Supra* note 3, at 3.

counties that mailed a second notice to voters “[is] the single most effective tool for improving cure rates,” and that counties that used them had cure rates nearly twice as high as counties that did not send a second notice.¹⁶

We also suggest encouraging elections officials to proactively request signature samples from voters as a practice they can use to continually update voter records and get the latest versions of signatures.

Create a new section banning the challenge of voters’ ballots by election observers.

We suggest an additional section clarifying that observers of the processing of vote-by-mail and provisional ballots may not challenge any individual ballots. This will protect the privacy of voters’ signatures, and avoid partisan and other bad actors from attempting to challenge voters for political or discriminatory reasons.

Create a new section with standards for training.

The recent California study demonstrated that training practices are inconsistent throughout the state, and do not all rely on guidance from experts in the field. For example, “counties under 100,000 are more likely to use informal ‘on the job’ training. . . [and] some larger counties, with populations of a million, rely on informal training processes.”¹⁷ They also found that “internal materials can vary widely, ranging from a short PowerPoint deck citing general best practices to lengthy, county-specific, step-by-step manuals describing each stage of the verification process.”

We recommend all volunteers, temporary staff, and elections office staff receive training by an independent expert on signature comparisons at least annually. We further recommend that permanent staff who are making ultimate decisions about the counting of a ballot must receive training on implicit bias.

Create a new section with reporting requirements.

We recommend additional procedures to mandate reporting of the notice and cure, and rejections of vote-by-mail and provisional ballots. The data currently available on the Secretary of State’s website does not include details as to why ballots are rejected, which makes it challenging to understand the trends. There also is no provisional ballot data currently available on the Secretary’s website, and the data reported to the Elections Assistance Commission on provisional ballots is limited.

¹⁶ *Supra* note 4, at 39, 51.

¹⁷ *Supra* note 4, at 31.

We appreciate the opportunity to meet with you and discuss these regulations and look forward to discussing this with you further.

Sincerely,

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Exhibit A