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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 VOTING RIGHTS DEFENSE PROJECT,
 16 AMERICAN INDEPENDENCE PARTY,
 17 CLARA DAIMS, and SUZANNE
 BUSHNELL,

18 Plaintiffs,

19 vs.

20 ALEX PADILLA, in his official capacity as
 Secretary of State and an indispensable party,
 21 TIM DEPUIS, in his official capacity as chief
 of the Alameda County Registrar of Voters,
 22 JOHN ARNTZ, in his official capacity as
 Director of the San Francisco Board of
 23 Elections, and DOES I–X,

24 Defendants.

Case No. 16-cv-02739 WHA

**OPPOSITION OF SAN FRANCISCO
 DIRECTOR OF ELECTIONS JOHN ARNTZ
 TO PLAINTIFFS’ MOTION FOR
 PRELIMINARY INJUNCTION**

Hearing Date: June 1, 2016
 Time: 11:00 a.m.
 Judge: Hon. William H. Alsup
 Place: Ctrm. 8, 19th Floor

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1 Without any evidence or legal support, Plaintiffs charge that San Francisco's Department of
2 Elections ("Department") has violated the Constitution, the Voting Rights Act, and California law by
3 failing to adequately inform voters who have not expressed a party preference ("NPP" voters) that they
4 can vote in the Democratic, Libertarian, or American Independent presidential primaries on the June 7,
5 2016 election, and by failing to adequately inform voters who have expressed a party preference that
6 they can change that preference. This is hogwash. The Department has engaged in a massive public
7 outreach effort over the last four months to educate voters about these precise issues and provide them
8 with the means to select the presidential primary in which they'd like to vote. Among many other
9 efforts, the Department has sent a mailer to all NPP voters who have applied to vote by mail informing
10 them that they can vote in one of the presidential primaries by submitting an attached, postage paid
11 form. Similarly, all NPP voters who go to the Department's website to look up their registration status
12 or apply to vote by mail will see that, to vote in a presidential primary, they must fill out a form that
13 they can access by clicking on a link. The Department has also sent a Voter Information Pamphlet
14 ("VIP") to every registered San Francisco voter explaining how NPP voters can vote in a presidential
15 primary, and on the back of every VIP sent to an NPP voter is a form that the voter can submit to the
16 Department indicating the primary in which he or she would like to vote. In addition, the Department
17 trains poll workers to inform NPP voters at the polling place on Election Day that they may vote in a
18 presidential primary, and every polling place has a sign that contains this information. The
19 Department's efforts to inform voters who have selected a party preference how to change that
20 preference have been just as extensive.

21 Ignoring the Department's outreach campaign entirely, Plaintiffs assert a variety of baseless
22 legal claims. *First*, Plaintiffs assert that the Department has violated two provisions of the Voting
23 Rights Act, 52 U.S.C. § 10101(a)(2)(A) and 10101(a)(2)(B). But the first provision on which Plaintiffs
24 rely applies only to voter registration practices, and is inapplicable to this case. And the second
25 provision restricts registrars from omitting material information from voter materials, when the
26 Department did just the opposite here. *Second*, Plaintiffs argue that the Department has violated the
27 First Amendment and the Fourteenth Amendment's Equal Protection Clause by supposedly failing to
28 provide sufficient information to NPP voters about their right to vote in a presidential primary. This

1 claim fails because, far from burdening the voting rights of San Franciscans, the Department has gone
 2 to great lengths to help San Franciscans fulfill those rights. *Third*, Plaintiffs argue that the Department
 3 has violated a provision of the California Elections Code that requires the Department to inform NPP
 4 voters that they may vote in a presidential primary. As a legal matter, Plaintiffs' claim fails because
 5 the statute under which they are seeking relief—28 U.S.C. § 1361—applies exclusively to violations
 6 of law by federal officials, not state or local officials. And as a factual matter, Plaintiffs' claims fail
 7 because the Department went above and beyond its statutory duty to educate all voters about voting in
 8 the presidential primary and their right to change their party preference.

9 In addition to not establishing a likelihood of success on the merits, Plaintiffs have also fallen
 10 short on every other element of the test for a preliminary injunction. *See Winter v. Natural Resources*
 11 *Defense Council, Inc.*, 555 U.S. 7 (2008). There has been no irreparable injury—indeed, there has
 12 been no injury whatsoever—as the Department has provided Plaintiffs, like all San Francisco voters,
 13 with all required information regarding which presidential primaries they can vote in and how to
 14 change their party preference. Any alleged injury to Plaintiffs or any San Francisco voters is so
 15 speculative that even Plaintiffs are unable to articulate a concrete harm. In addition, the balance of
 16 hardships and the public interest weigh strongly against a preliminary injunction here. The remedies
 17 Plaintiffs seek are impossible, unnecessary, and/or unwarranted, and would sow confusion on the eve
 18 of Election Day. For these reasons, the Court should deny the motion for preliminary injunction.

19 **FACTUAL BACKGROUND**

20 **I. SAN FRANCISCO'S DEPARTMENT OF ELECTIONS.**

21 The Department conducts all federal, state and local elections in San Francisco. Declaration of
 22 John Arntz (“Arntz Dec.”) ¶ 2. Serving nearly 467,000 registered voters, the Department must ensure
 23 that the City meets all applicable legal deadlines, that it has adequate staff and equipment to provide
 24 election services, that the recording and tabulation of votes is accurate and secure, and that voting
 25 equipment and polling places are usable and accessible to voters. *See id.* For the presidential primary
 26 election on June 7, 2016, the Department has hired approximately 250 temporary employees,
 27 including more than 30 dedicated to voter services and outreach. *See id.* On Election Day, the
 28 Department will manage 576 polling places staffed by 2,500 volunteer poll workers. *See id.*

1 Federal, state and local law closely regulate and prescribe nearly every aspect of the
2 Department's operations to ensure that San Francisco's elections are fair and functional. *See id.* ¶ 3.
3 In compliance with these laws, the Department must adhere to a strict schedule to complete essential
4 tasks for each election, including: ordering ballot supplies; preparing and printing ballots; mailing
5 overseas and other vote-by-mail (formerly known as absentee) ballots; printing and distributing
6 information to the voters; training employees and poll workers; testing the accuracy of every voting
7 machine that will be used in the election; counting and tabulating votes; and conducting a mandatory
8 post-election hand count to verify election results. *See id.* ¶ 3.

9 **II. THE PRESIDENTIAL PRIMARY ELECTION ON JUNE 7, 2016.**

10 When registering to vote in California, a person has the option of selecting a political party
11 preference. *See id.* ¶ 4. Voters who register to vote without stating a party preference are known as
12 "No Party Preference" or NPP voters. *See id.* Each political party has the option of allowing NPP
13 voters to vote in its presidential primary. *See id.* For California's presidential primary election on
14 June 7, 2016, three political parties have chosen to allow NPP voters to vote on their presidential
15 primary ballot: the Democratic Party, the American Independent Party, and the Libertarian Party. *See*
16 *id.* ¶ 3.

17 State law establishes the procedures for voting by mail. *See* Cal. Elections Code § 3000, *et*
18 *seq.* To obtain a vote-by-mail ballot, a person must apply by filling out an application and transmitting
19 it to the Department by the seventh day prior to the election. Cal. Elections Code § 3001. For the
20 June 7 election, that deadline is May 31. *See id.* ¶ 5.

21 **III. THE DEPARTMENT HAS MADE EXTENSIVE EFFORTS TO INFORM NPP** 22 **VOTERS THAT THEY MAY VOTE IN A PRESIDENTIAL PRIMARY.**

23 The Department has made extensive efforts to inform NPP voters—both those who have
24 applied to vote by mail and those who will be voting in-person at a polling place—that they may vote
25 in one of the three presidential primaries. *See id.* ¶ 6.

26 *First*, the Department has sent mailers to all NPP voters who have already applied to vote by
27 mail informing them that they may request a "crossover ballot," i.e., a ballot that allows them to vote
28 in a presidential primary in the June election. *See id.* ¶ 7, Ex. A. The mailers state:

1 You did not indicate a preference for a qualified political party when you
 2 registered to vote. Each political party can allow voters with no party
 3 preference to vote in its presidential primary election. For the June 7
 4 Presidential Primary Election, the following political parties will allow voters
 5 with no party preference to vote in their primary election for President of the
 6 United States:

7 American Independent Party Democratic Party Libertarian Party

8 To request a ballot that includes the presidential primary contest of one of these
 9 parties, mark the name of the party on the attached postage paid postcard, and
 10 sign and return the postcard no later than April 18. If you do not request the
 11 ballot of one of these parties, your ballot will not include a contest for President.

12 Vote-by-mail ballots will be mailed in early May (April for military and
 13 overseas voters). For more information about the June 7 election, visit
 14 sfelections.org or call the Department of Elections at (415) 554-4375.
 15 Alternatively, you may call the Secretary of State at (800) 345-8683 or visit
 16 sos.ca.gov.

17 *See id.*, Ex. A. In addition, each mailer includes an application that allows NPP voters to request a
 18 vote-by-mail ballot for one of the three political parties. *Id.*

19 *Second*, the Department includes a detailed “Voting Instructions” guide with every vote-by-
 20 mail ballot sent to San Francisco voters. *See id.* ¶ 8, Ex. B. That guide states, in relevant part:

21 If you chose no party preference when you registered to vote, your ballot will
 22 not include a presidential primary contest. You may request a ballot that
 23 includes the presidential primary contest of one of the three parties that chose to
 24 allow voters with no party preference to participate: American Independent,
 25 Democratic, or Libertarian. Call (415) 554-4375 or visit [sfelections.org/
 26 vbmstatus](http://sfelections.org/vbmstatus). If you have already requested a ballot with the presidential primary
 27 contest, the enclosed ballot reflects your request.

28 *See id.* ¶ 8, Ex. B. An NPP voter may then request a replacement ballot that includes a presidential
 primary ballot. *See id.* ¶ 8. The guide includes a link to the Department’s website where the voter can
 request a replacement ballot. *See id.* ¶ 8, Ex. B. A copy of the replacement ballot form is attached as
 Exhibit C to Director Arntz’s declaration.

Third, in early May 2016, the Department provided a Voter Information Pamphlet (“VIP”) to
 every registered San Francisco voter.¹ *See id.* ¶ 9. Though the substance of the VIP is the same for all
 voters, the back cover varies depending on whether or not the voter has expressed a party preference.
See id. ¶ 9. All back covers contain a vote-by-mail application. *See id.* ¶ 9. However, for NPP
 voters, the application includes the option to select a party preference:

¹ In addition, the Department mails VIPS to people who register to vote after the VIPs have
 been mailed. Arntz Dec., ¶ 9. The VIP is also available online in multiple languages. *See id.*

1 According to our records, you did not indicate a preference for a qualified
 2 political party when you registered to vote. For this election, the following
 3 political parties will allow voters with no party preference to vote in their
 4 primary election for President of the United States: American Independent,
 5 Democratic, Libertarian.

6 Note: If you do not request the ballot of one of these parties, your ballot will not
 7 include a contest for President.

8 I have declined to disclose a preference for a qualified political party. However,
 9 for this primary election only, I request a vote-by-mail ballot of the _____
 10 party (choose one):

11 _____American Independent _____Democratic _____Libertarian

12 For more information, call 1-800-345-VOTE, or visit sos.ca.gov.

13 *See id.* ¶ 9, Ex. D.² A voter who submits this application will receive a crossover ballot for the
 14 presidential primary indicated on the application. *See id.* ¶ 9.

15 *Fourth*, the Department's website offers voters an online tool to look up their voter registration
 16 status. *See id.* ¶ 10, Ex. F, G. An NPP voter who looks up his status will be informed that he is an
 17 NPP voter. *See id.* ¶ 10, Ex. F, G. If the voter has not applied to vote by mail (i.e., will be voting in
 18 person at a polling place), the website states:

19 Our records indicate that you declined to disclose a preference for a qualified
 20 political party when you registered to vote. For this primary election only, you
 21 may request a ballot that includes the presidential primary contest of one of
 22 these parties: American Independent, Democratic, Libertarian.

23 When you vote on Election Day, please ask a poll worker for the ballot you
 24 prefer.

25 *See id.* ¶ 10, Ex. F. If the NPP voter has applied to vote by mail, the voter is provided the same
 26 statement, but is also informed that to vote in one of the presidential primaries, he must request a
 27 crossover ballot for one of the three political parties that have opened their presidential primaries to
 28 NPP voters. *See id.* ¶ 10, Ex. G.

Fifth, an NPP voter who signs up on the Department's website to vote by mail will be provided
 with similar information. The first step in the online application process is to enter the voter's house
 number, zip code, and date of birth. *See id.* ¶ 11, Ex. H. From this information, the Department can
 determine if the person is an NPP voter. *See id.* ¶ 11. If so, the voter is informed that he has the

² Exhibit E to Director Arntz's declaration is the back page of a VIP that a non-NPP voter would receive.

1 option of voting in one of the presidential primaries, and that to do so, he must fill out an application.
 2 *See id.* ¶ 11, Ex. I. The page contains a link to that application. *See id.*³

3 *Sixth*, the Department has trained all poll workers to inform NPP voters that they have the
 4 option of voting for one of the three designated parties. *See id.* ¶ 12, Ex. K. In addition, every polling
 5 place in San Francisco has a sign informing NPP voters that they may vote in one of these primaries.
 6 *See id.* ¶ 12, Ex. L.

7 *Seventh*, the VIP, which, as noted above, is sent to every registered San Francisco voter and is
 8 available on the Department’s website, provides answers to questions such as “What does party
 9 preference mean?”; “How can I find out my party preference?”; “How can I change my party
 10 preference?” and “I did not disclose a party preference when I registered to vote. What ballot will I
 11 receive?” *See id.* ¶ 9, Ex. D at 12-13. The answer provided to the latter question is:

12 All voters, regardless of party preference, can vote in contests for voter-
 13 nominated offices, nonpartisan offices, and ballot measures. For the June 7
 14 election, three parties will allow voters with no party preference to participate in
 15 their presidential primary elections: the American Independent Party, the
 16 Democratic Party, and the Libertarian Party. You can request to vote in one of
 17 these party primaries, or you will receive a ballot with no presidential contest.

18 If you vote by mail: you may request a party ballot by indicating your choice on
 19 the Vote-by-Mail Application on the back cover of this pamphlet. The
 20 Department of Elections must receive this application no later than 5 p.m. on
 21 May 31.

22 If you vote in person: you may request the ballot of your choice from a poll
 23 worker when you sign the roster.

24 *See id.* The VIP also provides an easy-to-understand flow chart explaining that NPP voters may vote
 25 in any of the three designated presidential primaries, whereas voters registered for a political party
 26 may only vote in the party’s presidential primary. *See id.* ¶ 9, Ex. D at 13.⁴ In addition, a letter from
 27

28 ³ Plaintiffs allege that the portion of the Department’s website that allows voters to sign up to
 receive a vote-by-mail ballot “failed to provide the mandatory notice to all voters of their right to state
 no party preference, and further, that a no party preference voter shall be provided with a Democratic,
 American Independent Party or a Libertarian Party Presidential primary ballot.” (Docket No. 29 at 15;
 see also Dec. of James Roguski, ¶ 8.) This is wrong. As noted above, after a voter enters his house
 number, zip code, and date of birth, the website will indicate whether or not he has expressed a party
 preference. Arntz Dec., ¶ 11, Ex. I. If he is an NPP voter, the website informs him that he may
 request a ballot to vote in one of three presidential primaries, and includes a link to request such a
 ballot. *See id.* ¶ 11, Ex. I.

⁴ Plaintiffs allege that the VIP did not properly inform “voters that were members of political
 parties” of their “right to state no party preference.” (Docket No. 29 at 15.) This is false, as the VIP

1 Director Arntz at the front of the VIP explains that “the party preference that voters selected when
2 registering to vote determines which candidates will appear on their ballots for these contests,” but that
3 three parties have allowed NPP voters to vote in their primaries.⁵ *See id.*, Ex. D at 4.

4 *Eighth*, on April 5, 2016, the Department sent a mailer to every household in San Francisco—
5 over 362,000 in all—reminding them to vote and stating: “To learn what’s on the ballot and why your
6 political party preference makes a difference in the Presidential Primary, go to [sfelections.org/
7 June2016](http://sfelections.org/June2016).” *See id.* ¶ 14, Ex. M. That link, among other things, informs NPP voters that they can vote
8 in the presidential primary for any of the three designated parties. *See id.* ¶ 14, Ex. N.⁶

9 *Ninth*, the Department has issued five press releases advising that, “Voters who did not select a
10 party preference when registering to vote, will receive a ballot that does not include a presidential
11 contest unless they request a ballot of one of the parties allowing voters with no party preference to
12 participate in their presidential primaries.” *See id.* ¶ 15, Ex. O. Those press releases explain how NPP
13 voters can select a presidential primary ballot.

14 *Tenth*, the Department maintains an active social medial presence, regularly issuing tweets and
15 Facebook updates informing NPP voters that they can vote in one of the primaries. *See id.* ¶ 16, Ex. P.
16 For example, on April 8, the Department issued a Tweet and Facebook post to its more than 1,500
17 combined followers stating: “June 7 no party preference voting for president?” and attached a
18 flowchart informing NPP voters the presidential primaries in which they are entitled to vote. *See id.*
19 Similarly, on May 10, 2016, the Department posted: “Registered ‘no party’? Check your vote-by-mail
20 ballot. You can request Al, Dem, or Lib party ballot.” *See id.* And on May 2, 2016, the Department

21
22 informs all voters that they may change their party preference and explains how to do so. Arntz Dec. ¶
23 21, Ex D.

24 ⁵ Plaintiffs urge the Court to disregard the VIP because, “A substantial portion of the
25 population struggles with functional illiteracy and cannot be expected to drink from a firehose of
26 information.” (Docket No. 29 at 23-24.) But the VIP is written for people at an eighth grade reading
27 level and is remarkably easy to understand. Arntz Dec. ¶ 9. In any event, even if one disregards the
28 VIP, many of the Department’s other outreach efforts focus exclusively on the NPP issue and are a far
cry from a “firehose of information.”

⁶ Many of the documents, websites, and ballots referenced above are available in English,
Spanish, Chinese, and Filipino. Arntz Dec., ¶ 19. The Department provides voters with multiple
opportunities to select their preferred language, and once the voter has expressed a preference, all
materials sent to that voter will be in English and that language. *See id.*

1 posted: “Party Matters in a Presidential Primary! Confirm your political party preference.” *See id.*
2 That post provided links to the Department’s website further explaining this issue and providing tools
3 for vote-by-mail voters to request a presidential primary ballot. *See id.*

4 *Eleventh*, the Department maintains a voter outreach desk that is staffed by people who are
5 knowledgeable about how to change party preference and how to request crossover ballots, among
6 other issues. *See id.* ¶ 17. Any person with questions can call the help desk number, which the
7 Department publishes in numerous locations, or come into the Department and speak with voter
8 outreach personnel. *See id.* ¶ 17, Ex. A-C, E-I, K-R, T.

9 *Finally*, the Department has conducted an extensive outreach campaign to educate voters about
10 a host of issues, including the implications of being an NPP voter and how to obtain a crossover ballot.
11 *See id.* ¶ 18. In all, the Department has provided informational materials to over 700 civic partners
12 through a variety of means. *See id.* For example, Department representatives distribute materials and
13 provide presentations at events, fairs, and festivals across the City. *See id.* ¶ 18, Ex. Q, R. The
14 Department pays to post informational materials on the interior of 1,000 Muni vehicles, the exterior of
15 100 Muni vehicles, and inside 22 Muni and BART stations. *See id.* ¶ 19, Ex. S. The Department also
16 delivers and mails the materials to community-based organizations, such as Chinese for Affirmative
17 Action, LGBT Community Center, and the Mission Economic Development Agency, as well as to
18 schools, City departments, and libraries. *See id.* ¶ 19, Ex. Q. Finally, the Department has placed ads
19 in local newspapers such as San Francisco Examiner, SF Weekly, Bay Area Reporter, 14 San
20 Francisco neighborhood newspapers, the Asian Journal, Philippine News, Vietnam Daily News, Sing
21 Tao, World Journal, La Opinion de la Bahia, El Tecolote, Nichi Bei Weekly, and the Korean Times.
22 *See id.* ¶ 18, Ex. T.

23 **IV. THE DEPARTMENT HAS ALSO MADE EXTENSIVE EFFORTS TO INFORM**
24 **VOTERS WHO HAVE EXPRESSED A PARTY PREFERENCE THAT THEY MAY**
25 **CHANGE THAT PREFERENCE.**

26 Although Plaintiffs’ claims focus primarily on the information provided to NPP voters,
27 Plaintiffs also accuse the Department of failing to notify voters with a party preference that they have
28 the ability to switch parties. (See, e.g., Docket No. 29 at 15.) To the contrary, the Department’s

1 efforts to inform voters who have expressed a political preference that they may re-register for a
2 different political party have also been extensive. *See id.* ¶ 20.

3 *First*, the VIP, which contains a discussion of “Voting in the June 2016 Presidential Primary
4 Election” states:

5 **How can I change my party preference?**

6 If you want to change your political party preference, you must reregister to
7 vote. The registration deadline for the June 7 election is May 23.

8 Reregister at registertovote.ca.gov, or call the Department of Elections at (415)
9 554-4375 to request that a voter registration card be mailed to you. You may
10 also fill out a voter registration card in person at the Department of Elections in
11 City Hall.

12 *See id.* ¶ 21, Ex. D at 12-13.

13 *Second*, every envelope containing a vote-by-mail ballot sent to San Francisco voters includes
14 a “Voting Instructions” guide that states: “If you chose a party preference when you registered to vote,
15 the enclosed ballot includes, among other contests, all contests specific to that party. If you want to
16 change your political party preference, you must reregister to vote by May 23.” *See id.* ¶ 22, Ex. B.
17 This guide is also available on the Department’s website, on a portion of the site devoted to “Voting in
18 the June 7, 2016, Election.” *See id.*

19 *Third*, every voter who uses the Department’s voter registration tool to determine if he is
20 registered to vote, the political party for which he is registered, and his polling place, is informed that
21 he may change his party preference:

22 If you want to change your party preference, name, or home address in time for
23 this election, you must reregister by May 23 at registertovote.ca.gov.
24 Alternatively, you may call (415) 554-4375 for a registration form to be mailed
25 to you.

26 To make changes to your voter registration, or to register to vote, please go to
27 the Secretary of State website for a registration form or more information. You
28 can also obtain a voter registration card from the Department of Motor Vehicles
(DMV), public libraries, or post offices.

See id. ¶ 23, Ex. F-G.

Fourth, as noted above, the Department sent a mailer to every household in San Francisco—
over 362,000. *See id.* ¶ 24, Ex. M. That mailer, among other things, informed voters they could

1 change their party preference: “Voting June 7: To register to vote—or update your registration to
2 change your political party, home address, or name—go to registertovote.ca.gov by May 23.” *See id.*

3 *Fifth*, the Department’s outreach materials, which, as noted above, have been provided to over
4 700 civic partners and distributed at events throughout San Francisco leading up to Election Day,
5 inform voters that they may change their party preference and how to do so. *See id.* ¶ 25, Ex. M-O, R-
6 T.

7 *Finally*, the Department has provided information about how voters can change party
8 preference via its social media posts, its help desk, and its press releases, all of which are described
9 above.

10 **V. PROCEDURES FOR VOTING BY MAIL IN SAN FRANCISCO.**

11 **A. The Use of April 18 on the Department’s Mailers Informing NPP Voters Who 12 Have Already Applied to Vote by Mail that They May Request a Crossover Ballot.**

13 As noted above, the Department sent mailers to all NPP voters *who have already applied to*
14 *vote by mail* informing them that they may request a crossover ballot. *See id.* ¶ 31, Ex. A. Those
15 forms state, among other things: “To request a ballot that includes the presidential primary contest of
16 one of these parties, mark the name of the party on the attached postage-paid postcard, and sign and
17 return the postcard *no later than April 18*. If you do not request the ballot of one of these parties, your
18 ballot will not include a contest for President.” *See id.* (emphasis added).

19 The Department’s goal is for voters to receive their vote-by-mail ballots three to four weeks
20 before Election Day. *See id.* ¶ 32. The use of the April 18 date on the mailers is not legally mandated
21 but it is based on the operational requirements of the Department and the third-party vendor with
22 which the Department contracts to print and assemble vote-by-mail ballots. *See id.* 255,000 of San
23 Francisco’s 467,000 registered voters have applied to vote by mail. *See id.* Given that substantial
24 number, the vendor, which also contracts with numerous other counties in California and other states,
25 requested two weeks to print and assemble the ballots, then have them driven from Washington to a
26 United States Post Office facility in Richmond, where they were placed in the mail. *See id.* Shortly
27 after April 18, the Department sent the vendor an “extract” containing the information regarding which
28 San Francisco voters had applied to receive vote-by-mail ballots and the ballots those voters should

1 receive. *See id.* The batch of ballots generated from that extract was placed in the mail in San
2 Francisco on May 4 and 5, 2016, *See id.*, such that voters likely received them three to four weeks
3 before Election Day.

4 After sending the initial extract to the vendor, the Department sends supplemental extracts on a
5 regular basis. *See id.* ¶ 33. Once an NPP voter who has applied to vote by mail submits a request for a
6 crossover ballot, the minimum amount of time that the vendor can process that request is
7 approximately 72 hours, plus mailing time. *See id.* Larger extracts can take the vendor up to two
8 weeks to process. *See id.* The vendor mails vote-by-mail ballots generated from supplemental
9 extracts from Washington, not San Francisco; as such, mailing times are longer. *See id.*

10 The Department promptly transmits to the vendor all requests for crossover ballots from NPP
11 voters, including requests received after April 18. *See id.* ¶ 34. Thus, NPP voters who have applied to
12 vote by mail and who have submitted their request for a crossover ballot will receive one, even if they
13 submitted that request after April 18 (so long as the Department receives the request with enough time
14 to provide the voter with a replacement ballot by Election Day).⁷ *See id.*

15 Plaintiffs take issue with this statement on the Department's mailers: "To request a ballot that
16 includes the presidential primary contest of one of these parties, mark the name of the party on the
17 attached postage-paid postcard, and sign and return the postcard *no later than April 18*. If you do not
18 request the ballot of one of these parties, your ballot will not include a contest for President."
19 However, this statement is accurate: NPP voters who did not submit the form by April 18 received
20 ballots that did not include a contest for President. *See id.* ¶ 35. This is because, immediately after
21 April 18, the Department sent the extract to the vendor, which printed and assembled the ballots and
22 drove them to Richmond, where they were mailed on May 4 and 5. *See id.* Such voters, however,
23 were also informed—through the numerous ways explained above, including the Voting Instructions
24 guide included in every vote-by-mail ballot envelope—that they could still vote in a presidential

25 ⁷ The declaration of Tanya Mena (Docket No. 14-1) supports this aspect of Director Arntz's
26 testimony. As explained in greater detail in Section VI, the reason Ms. Mena received her Democratic
27 primary ballot is because she returned her mailer to the Department after April 18, not because she re-
28 registered to vote as a Democrat. *See Arntz Dec.* ¶¶ 39-40. Indeed, she is still registered as an NPP
voter. *See id.* ¶ 40.

1 primary by requesting a replacement ballot. *See id.* A link to that ballot replacement request form is
2 included on the Voting Instructions guide. *See id.*, Ex. B.

3 Plaintiffs have argued that the Department's mailers should not have used April 18, but
4 instead, a much later date given that NPP voters who have applied to vote by mail can technically
5 request a crossover ballot much closer to Election Day. However, a later date would be infeasible
6 from an operational standpoint. *See id.* ¶ 36. If, for example, the Department used May 31 as the
7 deadline, voters who submitted their request on that date would not receive their vote-by-mail ballot in
8 time to cast it. *See id.* A large extract would take the vendor two weeks to process, plus the time it
9 would take to mail the ballots from Washington, which can be 10 days or more. *See id.*

10 **B. The June 1 Deadline for Receiving Requests for Replacement Vote-by-Mail**
11 **Ballots By Voters Who Have Already Applied to Vote by Mail.**

12 Plaintiffs have also taken issue with the fact that the Department's ballot replacement request
13 form states that the Department must receive the request by June 1. In Plaintiffs' view, June 1 is
14 inaccurate, because the deadline to apply to vote-by-mail is May 31. (*See* Docket No. 12, ¶ 11;
15 Docket No. 27, ¶ 5.) Plaintiffs, however, misunderstand the purpose of the ballot replacement request
16 form.

17 That form, which is entitled "Replacement Ballot Request for Voters with No Party
18 Preference" states, among other things: "To request a replacement ballot of one of these parties,
19 complete the form below and return it to the Department as soon as possible to ensure it reaches us by
20 Wednesday, June 1. A replacement ballot will be sent to you if the information on this form is
21 complete and accurate." *See id.*, ¶ 37, Ex. C. Critically, this form is *not* an application to vote by
22 mail. Rather, its purpose is to allow a person who has *already* applied to vote by mail to obtain a
23 replacement vote-by-mail ballot. *See id.* For this reason, the form does not state that the deadline to
24 apply to vote by mail is June 1; but rather, it says that a person who has already applied to vote by mail
25 may obtain a replacement ballot (that includes a crossover ballot) by submitting the form to the
26 Department by June 1. *See id.*

27 The Department must receive replacement requests by June 1 in order to ensure that voters
28 receive their replacement ballots in time to actually cast their votes. *See id.* ¶ 38. Before using this

1 June 1 date, the Department was informed by the United States Post Office that items mailed using
2 first class postage may require three to five days to be delivered to a voter in San Francisco. *See id.*
3 After ballot replacement requests are received, the Department must process them, compile a
4 replacement ballot, then mail it to the voter. *See id.* Requests received after June 1 run the risk of not
5 reaching the voter until after Election Day, after which point the vote could not be counted. *See Cal.*
6 *Elections Code* § 3020.

7 **VI. THE DECLARATIONS SUBMITTED BY PLAINTIFFS DO NOT SUPPORT THEIR**
8 **CASE.**

9 Plaintiffs include several declarations in support of their motion, few of which pertain to San
10 Francisco.⁸ Those that do are unhelpful to Plaintiffs' case.

11 Tanya Mena alleges that she "changed her registration to Democratic so I was certain I could
12 vote for a Democratic candidate in the Presidential primary." (Docket No. 14-1, ¶ 1; *see also* ¶ 3.)
13 This is not accurate. Ms. Mena registered to vote in San Francisco in 2014 as an NPP voter, and she
14 has not re-registered. Arntz Dec., ¶¶ 39-40. Because Ms. Mena has applied to vote-by-mail, the
15 Department sent a mailer, which she returned to the Department, requesting a ballot for the
16 Democratic presidential primary. *See id.* Upon receipt of Ms. Mena's request, the Department mailed
17 to Ms. Mena, on May 13, 2016, a ballot for the Democratic presidential primary. *See id.* In other
18 words, the reason she received her ballot is not because she re-registered, but because she submitted
19 the mailer. *See id.* This is consistent with Director Arntz's testimony that NPP voters who have
20 applied to vote by mail who submit their request for a crossover ballot will receive one, even if they
21 submitted that request after April 18. *See id.*

22 Plaintiffs also submit the Declaration of Claire Daims, who is an NPP voter. (Docket No. 14-
23 2.) Ms. Daims indicates that she is worried that there will not be sufficient Democratic ballots.
24 (Docket No. 14-2, ¶ 3.) This concern is unfounded (and lacks any basis in personal knowledge), as the
25 Department has ordered ballots for all parties far in excess of what will realistically be needed. Arntz
26 Dec., ¶ 41. Ms. Daims states that she has seen a "circular" stating "to request a ballot that includes the

27 ⁸ The declarations of Jeff Lewis (Docket No. 19), Gary Renner (Docket Nos. 13-3; 20-21),
28 Ashley Beck (Docket Nos. 22-23), Jennifer J. Abreu (Docket Nos. 24-25), and Gabrielle Dolphin
(Docket No. 14-3), do not mention the Department.

1 presidential primary contest of one of these parties, mark the name of the party on the attached
 2 postage-paid postcard. . . .” (Docket No. 14-2, ¶ 4.) Ms. Daims has not applied to vote by mail, and as
 3 such, these mailers would not have been sent to her. Arntz Dec., ¶ 41. If Ms. Daims votes in person,
 4 poll workers have been trained to inform her that she can vote in one of the three presidential
 5 primaries. *See id.*

6 The other declarations that pertain to San Francisco—those of Mr. Seidenberg and Mr.
 7 Roguski—offer inadmissible and inaccurate legal opinions. (Docket Nos. 12, 26.) Mr. Seidenberg
 8 claims that the Department violated California Elections Code § 3006 because the first page of the
 9 online vote-by-mail application does not include certain language from that Code. But Mr.
 10 Seidenberg, like Plaintiffs, ignores the fact that the application presents the required information as
 11 soon as the voter enters information identifying himself as an NPP voter. Arntz Dec., ¶ 11, Ex. I.

12 PROCEDURAL HISTORY

13 Plaintiffs’ conduct throughout this litigation and in the time leading up to it belies their claim
 14 that emergency relief is appropriate. Plaintiffs’ counsel first contacted the Department of Elections via
 15 email on Friday, May 13, 2016, stating:

16 Please take notice that on Monday, 5/16/16, I am filing in federal court to seek a
 17 TRO for injunctive/declaratory relief re: Election Code 3006 violations. The
 18 vote by mail applications provided to SF residents has incorrect information,
 19 including but not limited to not providing the info on how to provide Democrat,
 20 AIP and Libertarian ballots to “no party preference” voters. I will call on
 21 Monday about when and where in federal court the TRO will be heard.

22 Declaration of Joshua White (“White Dec.”), Ex. A. In response, the Department’s attorney, Joshua
 23 White, spoke by phone with Plaintiffs’ counsel, explained to him that the Department complies with
 24 its obligations under Elections Code § 3006, and further explained where the information required by
 25 that section can be found on the Department’s website and mailers. *Id.* ¶ 2. In addition, on Monday,
 26 May 16, 2016, the Department’s attorney emailed Plaintiffs’ counsel, informing him:

27 I’m going to do my best to respond to each of the concerns you raise. I’m
 28 hopeful and confident that we can avoid going to court. As you will see below,
 the Department’s website and mailers comply with all applicable provisions of
 the California and Municipal Elections.

Id., Ex. B. Regarding the claim that the Department does not provide NPP voters with the statement
 and application required by Elections Code § 3006(c), the Department’s attorney attached a screenshot

1 of what an NPP voter applying to vote by mail online would see, which includes the statement
2 required by Elections Code § 3006(c). *Id.*, Ex. B.

3 Plaintiffs' counsel did not reply to the email, *id.* ¶ 3, and filed his lawsuit on Friday, May 20,
4 2016. On Monday, May 23, 2016, the Department's attorney called Plaintiffs' counsel and inquired as
5 to whether he would be seeking pre-election relief, and if so, on what timeline. *Id.* ¶ 3. Plaintiffs'
6 counsel responded that his hope was to seek ex parte relief and to provide his motion to the
7 Department by the following day (i.e., Tuesday, May 24). There was no further communication from
8 Plaintiffs' counsel until Thursday, May 26 at 4:24 p.m., when Plaintiffs' counsel informed the
9 Department's attorney by email: "We will be filing our ex parte request - seeking to shorten time for
10 hearing on a preliminary injunction - and seeking to make this request to Judge Alsup himself at 3
11 pm." *Id.*, Ex. C. Before sending that email, Plaintiffs' counsel had made no effort to confer about a
12 schedule. *Id.* ¶ 5. Upon receiving this email, the Department's attorney asked Plaintiffs' counsel to
13 provide a proposed schedule as well as the statutory or other basis for Plaintiffs' motion to shorten
14 time. *Id.*, Ex. D. Despite this request and in violation of Civil Local Rule 6-3(a), Plaintiffs' counsel
15 never proposed a schedule and never provided the basis for his authority. *Id.* ¶ 5.

16 On Friday, May 27, the Court ordered Plaintiffs to serve "[t]he summons, complaint, motion,
17 and all supporting declarations, as well as this order on defendants by **TOMORROW, MAY 28 at**
18 **4:00 P.M.**" (emphasis in original). Plaintiffs have failed to do any of these things—none of the
19 moving papers or supporting declarations have been provided to the Department,⁹ Arntz Dec. ¶ 42,
20 and although Plaintiffs e-filed their memorandum of points and authorities before 4:00 p.m. on May
21 28, the last line of that document stated that "plaintiffs will *fix the word processing errors* and ask
22 permission to file a modified brief at 5 pm, in one hour." (Docket No. 28 at 19) (emphasis added). To
23 the Department's knowledge, Plaintiffs never received permission, but nonetheless, more than an hour

24
25 ⁹ Indeed, Defendant Arntz has not even been properly served in this action. A suit against an
26 official in his official capacity is tantamount to a suit against the entity for which he is employed.
27 *Luke v. Abbott*, 954 F.Supp. 202, 203 (C.D. Cal., March 5, 1997) ("Official capacity suits are generally
28 another way of pleading an action against an entity of which the officer is an agent."). Here, as the
Department is not an independent legal entity, the actual defendant is the City and County of San
Francisco, which can only be served by delivering a summons and complaint to the Mayor's Office or
the Board of Supervisors. *See City and County of San Francisco, Charter (1996), Article XIII, Section*
13.104 (creating the Department of Elections). Plaintiffs have failed to do either.

1 later, filed a brief that contained *six additional pages*, including, for the first time, a discussion of the
 2 legal authorities that Plaintiffs believe entitle them to relief. (Docket No. 29.)

3 In short, Plaintiffs informed the Department that they planned to file a motion on May 16 but
 4 then failed to file or to communicate with counsel for the Department over the next ten days, finally
 5 filed their motion on the 11th day, and filed a memorandum of points and authorities (after the Court's
 6 deadline) on the 12th day. Plaintiffs' counsel alleges that they spent that time investigating potential
 7 violations of law, but their May 28 filing demonstrates no such thing.

8 ARGUMENT

9 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
 10 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance
 11 of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural*
 12 *Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs fall short on every element of the
 13 *Winter* test.

14 I. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

15 A. The Department Did Not Violate the Voting Rights Act.

16 Plaintiffs argue that the Department violated two provisions of the Voting Rights Act—52
 17 U.S.C. § 10101(a)(2)(A) and 52 U.S.C. § 10101(a)(2)(B). Neither of those provisions applies here.

18 Subsection (A) states:

19 No person acting under color of law shall in determining whether any individual
 20 is qualified under State law or laws to vote in any election, apply any standard,
 21 practice, or procedure different from the standards, practices, or procedures
 22 applied under such law or laws to other individuals within the same county,
 parish, or similar political subdivision who have been found by State officials to
 be qualified to vote....

23 That provision "was designed to eliminate practices that could encumber an individual's ability
 24 to register to vote." *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004) (citing *Schwier v.*
 25 *Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003). In *Friedman*, which Plaintiffs cite as "the best guidance in
 26 this situation," see Docket No. 29 at 20, the court rejected the plaintiff's Voting Rights Act claim
 27 because "[t]he error and omission alleged here did not pertain to determining eligibility to vote." 345
 28 F.Supp.2d at 1372. Like *Friedman*, this case has nothing to do with voter registration. Rather,

1 Plaintiffs claim that the Department provided insufficient information to people who have already
2 registered to vote. Section 10101(a)(2)(A) does not apply.

3 Even if subsection (A) applies to people who have already registered, Plaintiffs' claim still
4 fails. Plaintiffs' primary argument is that the Department was obligated to provide all voters,
5 including those who have disclosed a party preference, with the language required by Elections Code §
6 3006(c), which states that vote-by-mail applications

7 shall inform the voter that if he or she has declined to disclose a preference for a
8 political party, the voter may request a vote by mail ballot for a particular
9 political party for the partisan primary election, if that political party has
10 adopted a party rule, duly noticed to the Secretary of State, authorizing that
11 vote. The application shall contain a toll-free telephone number, established by
12 the Secretary of State, that the voter may call to access information regarding
13 which political parties have adopted such a rule. The application shall contain a
14 checkoff box with a conspicuously printed statement that reads substantially
15 similar to the following: "*I have declined to disclose a preference for a qualified
16 political party. However, for this primary election only, I request a vote by mail
17 ballot for the _____ Party.*" The name of the political party shall be
18 personally affixed by the voter.¹⁰

13 (emphasis added). But it makes no sense to provide that statement to party preference voters for the
14 precise reason that they have chosen to "disclose a preference for a qualified political party."

15 Subsection (A) does not require that every single voter be provided with identical information
16 at the identical moment. In *Gonzalez v. State of Arizona*, 2006 WL 3627297, at *8 (D. Ariz., Sept. 11,
17 2006), an Arizona law required different types of identification depending on whether an individual is
18 registering to vote or verifying identity on election day. *Id.* at *1. The Court upheld the law, noting:

19 "It is not a violation of subsection (A) for a state to apply different standards to two inherently
20 different procedures." *Id.* at *8. Similarly, it would make no sense to require the Department to
21 inform voters who have disclosed a party preference that they have not disclosed a party preference.

22 In any event, as a factual matter, the Department has provided abundant information to all San
23 Franciscans, both registered and unregistered, about how to vote in the presidential primary and how
24

25
26
27 ¹⁰ Elections Code § 3007.7(e) clarifies that Elections Code § 3006(c) applies to online vote-by-
28 mail applications: "Except as provided in Section 3007.5 and this section, all other sections of this
code pertaining to vote by mail voter applications, submissions, deadlines, and canvassing shall apply
to electronic vote by mail ballot applications and applicants."

1 to change party preference. *See* Arntz Dec. ¶¶ 2-27, Ex. A-T. Plaintiffs’ claim under Subsection (A)
2 fails.

3 Plaintiffs’ claim under Subsection (B)—sometimes referred to as the Voting Rights Act’s
4 “materiality provision”—is equally meritless. That provision states:

5 No person acting under color of law may deny the right of any individual to
6 vote in any election because of an error or omission on any record or paper
7 relating to any application, registration, or other act requisite to voting, if such
error or omission is not material in determining whether such individual is
qualified under State law to vote in such election.

8 Subsection (B), in other words, “prohibits denying the right to vote based on errors or
9 omissions that are not material in determining voter eligibility.” *Florida State Conference of*
10 *N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Originally enacted as part of the Civil
11 Rights Act of 1964, Subsection (B) was part of the federal government’s effort to enforce voting rights
12 and “counteract state and local government tactics of using, among other things, burdensome
13 registration requirements to disenfranchise African–Americans.” *Id.*

14 In Plaintiffs’ view, the Department has denied the right of party preference voters to vote by
15 omitting the statement required by Elections Code § 3006 from both on the online vote-by-mail
16 application and the back cover of the VIP; and by failing to inform voters that they can hand deliver
17 their vote-by-mail applications to the Department. But there is no evidence or even any realistic
18 possibility that the Department has denied anyone the right to vote. To the contrary, the Department
19 has gone to great lengths to inform all party preference voters they can re-register, *see* Arntz Dec., ¶¶
20 20-30, and that they can drop off their vote-by-mail applications at the Department. *See id.* ¶ 29. It is
21 true that the vote-by-mail application on the back cover of the VIP provided to party preference voters
22 does not state: “I have declined to disclose a preference for a qualified political party.” The reason is
23 that, by definition, party preference voters *have* “disclose[d] a preference for a qualified political
24 party.” For the same reason, the Department does not post that statement on the first page of the
25 online vote-by-mail application—not all people who are applying to vote online have “declined to
26 disclose a preference for a qualified political party.” Quite rightly, the Department has opted to avoid
27 confusing voters.

B. The Department Did Not Violate the Constitution.

1
2 Plaintiffs claim that the Department violated the First Amendment and the Fourteenth
3 Amendment's Equal Protection Clause. To assess the constitutionality of election laws, courts apply a
4 "flexible standard" that weighs the burdens of such regulation against the government's interests in
5 enacting those laws. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Focusing on "the extent to which
6 a challenged regulation burdens First and Fourteenth Amendments rights," the Court has applied the
7 following test:

8 . . . when those rights are subjected to severe restrictions, the regulation must be
9 narrowly drawn to advance a state interest of compelling importance. But when
10 a state election law provision imposes only reasonable, nondiscriminatory
restrictions upon the First and Fourteenth Amendment rights of voters, the
State's important regulatory interests are generally sufficient to justify the
restrictions.

11 *Id.* at 434 (quotations and citations omitted). If the burden is severe, the regulation is subject to strict
12 scrutiny; if the challenged regulation is reasonable and nondiscriminatory, it may be justified by
13 important regulatory interests. The Supreme Court and the Ninth Circuit have consistently applied this
14 balancing approach in considering First Amendment, Due Process, and Equal Protection challenges to
15 election laws. *See Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011); *Lemons v. Bradbury*,
16 538 F.3d 1098, 1103 (9th Cir. 2008). Courts have occasionally described the test for reasonable,
17 nondiscriminatory regulations as a "rational basis" test, *Libertarian Party of Washington v. Munro*, 31
18 F.3d 759, 761 (9th Cir. 1994), under which a plaintiff must demonstrate that the challenged regulation
19 is "not rationally related to a legitimate state interest." *Arizona Libertarian Party v. Reagan*, 798 F.3d
20 723, 733-34 (9th Cir. 2015).

21 Applying this standard, the courts have upheld a myriad of election regulations as reasonable
22 and non-discriminatory, even where there is a significant possibility that they would burden voters.
23 *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 185, 202-03 (2008) (plurality
24 opinion) (voter identification); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (advance
25 enrollment requirement for party primary elections); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973)
26 (requirement that voters register at least 50 days prior to election); *Marston v. Lewis*, 410 U.S. 679,
27 680-81 (1973) (requirement that voters reside in jurisdiction for 50 days prior to registration); *see also*
28

1 *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 n.8 (1st Cir. 1994) (“It is, of course, well established
2 that states may restrict the voting privilege through residency and other requirements.”).

3 In the present case, Plaintiffs cannot meet their burden. Indeed, it is difficult to even evaluate
4 Plaintiffs’ constitutional claim since it is unclear what that claim actually entails. To the extent
5 Plaintiffs are claiming that it was unconstitutional for the Department not to provide the statement in
6 Elections Code § 3006(c) to both NPP and non-NPP voters, this argument fails. That statement is
7 designed specifically to provide information to NPP voters, and it would be unduly confusing for
8 voters who have disclosed a preference for a qualified political party to receive a statement stating: “I
9 have declined to disclose a preference for a qualified political party.” Rather than sow confusion, the
10 Department has, as described above, made extensive efforts to educate voters about the upcoming
11 presidential primary election and the implications of being an NPP voter or being a party-affiliated
12 voter. Far from burdening the voting rights of San Franciscans, the Department has gone to great
13 lengths to help San Franciscans realize those rights.

14 To the extent that Plaintiffs’ constitutional claim relies on the use of the April 18 deadline, that
15 claim is meritless as there is no evidence that the use of this deadline burdened voting rights of even
16 one person, and even if it did, that burden was minimal and justified by the Department’s operational
17 needs. To the extent that Plaintiffs’ constitutional claim relies on the supposedly erroneous use of the
18 June 1 deadline on the replacement ballot request form, that claim fails because it imposes no burden
19 on voters; and it is justified by the operational needs of the Department.

20 **C. Plaintiffs’ Request for a Writ of Mandamus for Alleged Violations of State Law Fails.**

21 **1. The Statute Under Which Plaintiffs Seek Mandamus Relief—28 U.S.C. §**
22 **1361—Does Not Authorize An Injunction Against a Local Official for**
23 **Violations of State Law.**

24 Plaintiffs seek a writ of mandamus under 28 U.S.C. § 1361. However, that statute does not
25 authorize federal courts to enjoin the conduct of state or local officials. The statute states: “The
26 district courts shall have original jurisdiction of any action in the nature of mandamus to compel *an*
27 *officer or employee of the United States* or any agency thereof to perform a duty owed to the plaintiff.”
28 (emphasis added). Because Director Arntz is not an officer or employee of the United States,

1 Plaintiffs cannot seek a writ of mandamus under 28 U.S.C. § 1361. *See Barber v. Beard*, 2015 WL
 2 506254, at *6 (S.D. Cal., Feb. 5, 2015) (“But under the plain language of [28 U.S.C. § 1361], federal
 3 district courts do not have mandamus jurisdiction over state officials.”); *Ciacchi v. Hawaii Government*,
 4 2012 WL 6697569, at *2 (D. Hawaii, Dec. 24, 2012) (“28 U.S.C. § 1361 provides district courts with
 5 jurisdiction in the nature of mandamus to compel officers or employees of the United States—not state
 6 agencies or actors like those named as Defendants in this action—to perform a duty owed to a
 7 plaintiff.”); *Newton v. Poindexter*, 578 F.Supp. 277, 279 (E.D. Cal., Jan. 18, 1984) (holding that
 8 federal courts cannot compel action by state officials under 28 U.S.C. § 1361). Thus, all of Plaintiffs’
 9 claims premised on alleged violations of state law fail.

10 **2. Even If This Court Had Jurisdiction Under 28 U.S.C. § 1361, the**
 11 **Department Did Not Violate the California Elections Code.**

12 Plaintiffs allege that the Department violated provisions of the California Elections Code.
 13 Each alleged violation is discussed in turn below.

14 *First*, according to Plaintiffs, the Department’s online vote-by-mail application feature violates
 15 Elections Code Sections 3006(c) and 3007.7(e). In Plaintiffs’ view, the tool does not “provide the
 16 mandatory notice to all voters of their right to state no party preference; and, further, that a no party
 17 preference voter shall be provided with a Democratic, American Independent Party or a Libertarian
 18 Party Presidential primary ballot.” (Docket No. 29 at 15.) In support of this argument, Plaintiffs cite a
 19 link to the first page of the Department’s voter registration tool—[http://sfelections.org/tools/vbmapp/
 20 index.php](http://sfelections.org/tools/vbmapp/index.php).

21 Plaintiffs’ argument ignores the fact that the Department’s online vote-by-mail application
 22 feature is two-step process, and though the cover page does not include the language from Section
 23 3006(c), the second page does. As described above, once a voter inputs his house number, zip code,
 24 and date of birth, the Department determines if that person is an NPP voter. Arntz Dec. ¶ 11, Ex. H, I.
 25 If so, the next page provides the voter with the information required by Section 3006(c) and includes a
 26 link to a vote-by-mail application that includes the language required by Section 3006(c). *See id.* ¶ 11,
 27 Ex. I-J. It would make no sense for the first page of the online vote-by-mail application feature to
 28 include the information required by Section 3006(c) since the *all* voters see the first page. Voters who

1 have registered for a political party would be confused if they went to register to vote by mail and saw
2 the statement, “I have declined to disclose a preference for a qualified political party” on the first page
3 of the application.

4 *Second*, Plaintiffs assert that the Department violated Elections Code § 3006 “by preparing the
5 Voter Information Pamphlet and Sample Ballot in a non-uniform manner.” (Docket No. 29 at 15.)
6 Plaintiffs rely on the fact that the back cover of the VIP sent to NPP voters includes the Section
7 3006(c) language but the back cover of the VIP sent to party preference voters does not. But again, it
8 is nonsensical to construe Section 3006(c) to mean that voters who have disclosed a preference for a
9 qualified political party must receive a statement saying: “I have declined to disclose a preference for a
10 qualified political party.” To be sure, other parts of the VIP as well as the Department’s outreach
11 efforts, inform voters who have selected a political party that how to change their party preference and
12 the implications of doing so for June 7 election.¹¹

13 *Third*, Plaintiffs argue that the Department has not properly notified people registering to vote
14 by mail that they may personally deliver their application to the Department in City Hall. (Docket No.
15 29 at 16.) But as noted above, when an NPP voter fills out an application to vote by mail on the
16 Department’s website, the website states: “You may mail, deliver or fax the form to the address or fax
17 number listed on the application.” Arntz Dec., ¶ 29, Ex I (emphasis added). In addition, the
18 application itself states, “Deliver, mail, or fax the completed application to the address or fax number
19 listed below.” *See id.*, Ex. J. (emphasis added). Though the Department’s mailers that included vote-
20 by-mail applications did not explicitly inform voters that they may hand deliver their applications to
21 the Department, the applications included the Department’s address and paid for the postage. And in
22

23 ¹¹ Plaintiffs also fault the Department for deviating from the California Secretary of State’s
24 uniform vote by mail application. (Docket No. 29 at 15.) This argument fails for two reasons. First,
25 the Department’s vote by mail application conforms in all material respects to the Secretary of State’s
26 application. *See* Arntz Dec., Ex. J, U. And even if it did not, Elections Code § 3007 does not require
27 the Department to follow the same format: “The Secretary of State shall prepare and distribute to
28 appropriate elections officials a uniform application format for a vote by mail voter’s ballot that
conforms to this chapter. This format shall be followed by all individuals, organizations, and groups
who distribute applications for a vote by mail voter’s ballot. *The uniform format need not be utilized by
elections officials in preparing a vote by mail voter’s ballot application to be included with the sample
ballot.*” (emphasis added).

1 any event, the Department’s website and the VIP inform voters that they may hand deliver
2 applications to the Department, and anyone who called the Department’s help desk would receive the
3 same information.

4 **II. PLAINTIFFS HAVE NOT SUFFERED AND WILL NOT SUFFER ANY INJURY,
5 MUCH LESS AN IRREPARABLE ONE.**

6 A preliminary injunction may only be granted when the moving party has demonstrated a real
7 likelihood of irreparable injury or harm. *Winter*, 555 U.S. at 21. “Speculative injury does not
8 constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must
9 do more than merely allege imminent harm sufficient to establish standing; a plaintiff must
10 *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.” *Caribbean*
11 *Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original; internal
12 citations omitted). A preliminary injunction cannot issue based only on the possibility of some remote
13 future injury because “injunctive relief [is] an extraordinary remedy that may only be awarded upon a
14 clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

15 Because interim injunctions “are generally granted under the theory that there is an urgent need
16 for speedy action to protect the plaintiffs’ rights,” a plaintiff’s delay “tends to indicate at least a
17 reduced need for such drastic, speedy action.” *Citibank v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).
18 “By sleeping on its rights a plaintiff demonstrates the lack of need” for preliminary relief. *Lydo*
19 *Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (cites and quotes omitted). A
20 “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.”
21 *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

22 Plaintiffs have failed to demonstrate that they or any San Francisco voter will suffer an injury,
23 much less an irreparable one. As described above, the Department has gone to great lengths to educate
24 NPP voters that they can vote in one of the presidential primaries and non-NPP voters that they re-
25 register. All NPP voters who vote at a polling place will be informed (both by poll workers and by a
26 sign) that they can vote in one of the primaries. All NPP voters who applied to vote by mail have been
27 informed on multiple occasions that they can vote in one of the primaries. Similarly, the Department’s
28 outreach efforts have informed all San Francisco residents that they can register and/or re-register to

1 vote. Finally, the fact that Plaintiffs’ waited 15 days to seek relief—from May 13 when their lawyer
2 first contacted the Department until May 28 when they filed the instant motion—undercuts the
3 credibility of their claims about the existence and magnitude of injury that would befall the San
4 Francisco electorate without emergency relief.

5 **III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY FAVOR**
6 **DENYING PLAINTIFFS’ MOTION.**

7 In “balanc[ing] the hardships of the public interest against a private interest, the public interest
8 should receive greater weight.” *Fed. Trade Comm’n v. Affordable Media, LLC*, 179 F.3d 1228, 1236
9 (9th Cir. 1999) (quoting *Fed. Trade Comm’n v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir.
10 1989)). In the elections context, the Court should act with particular caution because “[c]ourt orders
11 affecting elections, especially conflicting orders, can themselves result in voter confusion and
12 consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).
13 For these reasons, the Supreme Court has counseled caution in the type of relief to be granted in cases
14 affecting elections:

15 In awarding or withholding immediate relief, a court is entitled to and should consider the
16 proximity of a forthcoming election and the mechanics and complexities of state election laws,
17 and should act and rely upon general equitable principles. With respect to the timing of relief,
18 a court can reasonably endeavor to avoid a disruption of the election process which might
19 result from requiring precipitate changes that could make unreasonable or embarrassing
20 demands on a State in adjusting to the requirements of the court’s decree.

21 *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

22 These principles strongly counsel against an injunction in this case. All of the remedies sought
23 by Plaintiffs are unnecessary and some of them are impossible. One impossible remedy is to extend
24 the voter registration deadline to Election Day. As described in Director Arntz’s declaration, this
25 remedy would likely be fatal to the Department’s ability to conduct the election. Arntz Dec., ¶ 43.
26 There are currently about 397,000 San Franciscans who have not registered to vote and millions more
27 people throughout the state who have not registered. *See id.* Ordering Election Day registration
28 would be tantamount to requiring the Department to allow every single person who showed up at a
polling place on Election Day to cast a ballot. *See id.* If this happened, the election would be plunged
into chaos, as the Department has not prepared for such vast numbers of people, nor could the
Department prepare for such numbers in such a short time. *See id.*

