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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEFFREY SHORT, et al.,
Plaintiffs,
v.
EDMUND G. BROWN, JR., et al.,
Defendants.

No. 2:18-cv-00421-TLN-KJN

ORDER

This matter is before the Court on Plaintiffs’ Motion for Preliminary Injunction. (ECF No. 3.) Defendants oppose the motion. (ECF No. 11.) Plaintiffs have filed a reply. (ECF No. 14.) On April 12, 2018, the Court held a hearing and heard oral argument on this motion (“the Motion Hearing”).¹ The Court has carefully considered the arguments raised by the parties. For the reasons set forth below, Plaintiffs’ motion is DENIED.

I. INTRODUCTION

This civil rights action challenges the constitutionality of California’s Voter’s Choice Act (“the VCA”). The complaint contains a single claim brought pursuant to 42 U.S.C. § 1983 — “Violation of Plaintiffs’ Rights Guaranteed Under the Fourteenth Amendment’s Equal Protection Clause Contained in the United States Constitution.” (Compl., ECF No. 1 at 8–10.) Although

¹ The Court has determined that delaying the issuance of this Order until the transcripts of the Motion Hearing are available will disserve the parties and the public interest. Rather, the Court will rely on its notes and recollection of the Motion Hearing for purposes of drafting this Order.

1 discussed in more detail below, the gist of this claim is that the VCA affords qualified California
2 voters, “depending on the county in which they reside,” “greater or lesser access to the franchise
3 of voting,” which Plaintiffs contend will “almost certainly result[] in dilution of their votes.”
4 (ECF No. 7 at 21.) Ultimately, Plaintiffs seek an order (i) declaring the VCA “unconstitutional
5 under the [Equal Protection Clause of the] Fourteenth Amendment to the United States
6 Constitution,” and (ii) a “permanent injunction enjoining each of . . . Defendants, their successors,
7 agents, and assigns from enforcing the [VCA].” (ECF No. 1 at 11.) The instant motion seeks a
8 preliminary injunction.

9 Plaintiffs are suing Defendants Edmund G. Brown, Jr., in his official capacity as Governor
10 of California, Alex Padilla, in his official capacity as Secretary of State of California, Jill Lavine,
11 in her official capacity as Registrar of Voters for the County of Sacramento, Rebecca Martinez, in
12 her official capacity as Registrar of Voters for the County of Madera, and Gregory Diaz, in his
13 official capacity as Registrar of Voters for the County of Nevada. Throughout this Order the
14 Court will refer to Brown, Padilla, Lavine, Martinez, and Diaz collectively as “Defendants.”

15 On the other hand, for the remainder of this Order, all references to “Plaintiffs” will be
16 solely to Jeffrey Short and Trina T.R. Heter. At the Motion Hearing, the Court questioned
17 whether Plaintiff Sacramento Valley Lincoln Club (“the Club”) has Article III standing. The
18 Club has described itself as a nonprofit entity “located in Sacramento County [that] has members
19 who both reside and vote in Sacramento County.” (ECF No. 1 at ¶ 10; ECF No. 7 at 12.) The
20 Court will discuss the operation of the VCA in more detail below. It is sufficient for now to
21 repeat the observation made by the Court at the Motion Hearing: if the VCA unconstitutionally
22 discriminates against some California counties (and the qualified voters living in those counties),
23 this discrimination seemingly redounds to the benefit of qualified voters living in Sacramento
24 County. After making this observation at the Motion Hearing, the Court squarely asked
25 Plaintiffs’ counsel why the Club had standing. Plaintiffs’ counsel’s on-the-spot response did not
26 resolve the Court’s doubts concerning the Club’s standing.²

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28 ² The Court wishes to emphasize that this is not meant as criticism of Plaintiffs’ counsel. The Court is
mindful that this issue had not been briefed in advance of the hearing.

1 “Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies
2 outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party
3 asserting jurisdiction.” *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir.
4 2017) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The Court
5 may not assume that a party has Article III standing in order to reach what it may suspect is an
6 “‘easy’ . . . question” on the other side of that jurisdictional hurdle. See *Steel Co. v. Citizens for a*
7 *Better Env’t*, 523 U.S. 83, 99 (1998). Ordinarily, the Court would request additional briefing on
8 this question and definitively resolve the issue. However, given the fast approach of the June 5,
9 2018 primary election, in the Court’s view, the better approach would be to assume for purposes
10 of this Order that the Club does not have standing. As a practical matter, the scope of the
11 requested injunction remains the same and this assumption does not necessitate additional
12 briefing to resolve the instant motion. The Court observes that the parties have stipulated that
13 Defendants will have 28 days after the Court enters this Order to file “an answer or otherwise
14 respond to the Complaint[.]” (ECF No. 10 at 2.) If Defendants’ response is a motion to dismiss,
15 the Court requests that they address the Club’s standing. Otherwise, the Court will order briefing
16 on this point sua sponte.

17 Before turning to the parties’ arguments in connection with the instant motion, the Court
18 will set out the standard of review. Additionally, the Court will address two preliminary matters
19 — the operation of the VCA and Plaintiffs’ overall theory of the case — to streamline the
20 remainder of the Court’s analysis.

21 **II. STANDARD OF REVIEW**

22 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*
23 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Rather, under *Winter*, the movants must
24 show four things to receive a preliminary injunction. *Id.* at 20. First, the movants must show that
25 they are likely to succeed on the merits. *Id.* Second, the movants must show that they are likely
26 to suffer irreparable harm in the absence of preliminary relief. *Id.* Third, the movants must show
27 that the balance of equities tips in their favor. *Id.* Finally, the movants must show that an
28 injunction is in the public interest. *Id.*

1 In the Ninth Circuit, courts apply a sliding-scale approach to Winter’s four-prong test.
2 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Under this
3 approach, a preliminary injunction may issue where the movants have raised “serious questions
4 on the merits”— rather than a more complete showing that it is likely to succeed on the merits —
5 so long as the balance of hardships tips sharply in the movants’ favor and they satisfy the other
6 two Winter prongs. Id. at 1135 Whether or not the sliding-scale approach is used, the movants
7 are required “to make a showing on all four prongs” of Winter to obtain a preliminary injunction.
8 Id. Ultimately, “[a] preliminary injunction . . . should not be granted unless the movant[s], by a
9 clear showing, carr[y] the burden of persuasion.” Lopez v. Brewer, 680 F.3d 1068, 1072 (9th
10 Cir. 2012) (emphasis in original) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per
11 curiam)).

12 III. PRELIMINARY MATTERS

13 A. Operation of the Voter’s Choice Act

14 Having carefully reviewed the parties’ submissions, along with their respective counsel’s
15 answers to the Court’s questions at the Motion Hearing, the Court understands the parties to be
16 largely in agreement as to the operation of the VCA. The Court will assume the description of the
17 VCA in this section is materially undisputed for purposes of this motion. Ultimately, as the
18 Court’s analysis will show, resolution of the instant motion does not turn on this assumption.
19 Moreover, if the Court is mistaken as to the parties’ agreement regarding some aspect of the
20 VCA’s operation, the Court emphasizes that neither the parties nor the Court will be bound by the
21 Court’s description. See University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (“[T]he
22 findings of fact and conclusions of law made by a court granting a preliminary injunction are not
23 binding at trial on the merits.”).

24 Before describing the operation of the VCA, the Court will make two definitional points.
25 In this Order, the Court will refer to the Counties of Calaveras, Inyo, Madera, Napa, Nevada,
26 Orange, Sacramento, San Luis Obispo, San Mateo, Santa Clara, Shasta, Sierra, Sutter, and
27 Tuolumne as the “Fourteen Counties.” Of these, the Court will refer to Madera, Napa, Nevada,
28 Sacramento, and San Mateo as the “Opted-In Counties.”

1 The VCA provides for California counties to conduct “all-mail ballot elections,” i.e.,
2 “elections in which every voter in a county is mailed a ballot” and “[i]n lieu of polling places
3 being open on election day, ‘vote centers’ and ‘ballot dropoff locations’ are available prior to and
4 on election day, where voters may deliver their completed ballots.” (ECF No. 7 at 14 (citing Cal.
5 Elec. Code § 3017(a)).) Under the VCA, in a county where an all-mail ballot election is
6 conducted, “all registered voters are automatically sent a vote-by-mail ballot beginning 29 days
7 before an election.” (ECF No. 11 at 10.) At the Motion Hearing, the parties agreed that it was a
8 fair assumption that the ordinary voter in such a county would receive his ballot three weeks (or
9 21 days) before election day. Voters in all-mail ballot elections “will have three options for
10 casting their ballots: (1) return the ballot by mail; (2) return the ballot to any designated ballot
11 dropoff location within the county; or (3) return, or vote and return, the ballot to a vote center.”
12 (ECF No. 11 at 10.) At the Motion Hearing, the parties agreed that these voters may mail their
13 ballots as soon as they receive them.

14 It is undisputed that the Fourteen Counties had the option of opting into the VCA
15 beginning on January 1, 2018. Likewise, it is not in dispute that California’s remaining 44
16 counties were not given the option to conduct all-mail ballot elections for the June 5, 2018
17 primary (“the 2018 Primary”) and the November 6, 2018 general election (“the 2018 General
18 Election”). Further, it is undisputed that only five counties — the Opted-In Counties — actually
19 opted into the VCA to conduct all-mail ballot elections for the 2018 Primary and the 2018
20 General Election. The Court will refer to the election options in the non-Opted-In Counties as the
21 “Standard Voting Options.” The parties agree that voters in each of California’s 58 counties — in
22 both the 2018 Primary and the 2018 General Election — will be voting for candidates whose
23 offices represent more than a single county (or parts thereof). Particularly, the parties agreed that
24 candidates for the United States Senate, California Governor, and California Attorney General
25 would be on the ballots in each county for both the 2018 Primary and the 2018 General Election.

26 The parties seem to agree that California had a “historically low” voter turnout in

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1 2014.³ Likewise, the Court understands the parties to agree that the purpose of the VCA's all-
2 mail ballot election option is to increase turnout in the counties in which it is employed. That is,
3 the parties agree that, if the VCA achieves its purpose and works as designed, the expectation is
4 more votes will be cast per 1,000 registered voters in a county conducting an all-mail ballot
5 election than otherwise would have been cast in that same county had the Standard Voting
6 Options been used.

7 B. Plaintiffs' Theory of the Case

8 At the Motion Hearing, the Court attempted to summarize Plaintiffs' theory of the case.
9 The Court stated as follows:

10 The ordinary voter in an Opted-In County can effectively cast his
11 vote for a period of at least three weeks. The ordinary voter in
12 other counties has some options for obtaining a ballot besides
13 voting in person on election day. However, the ordinary voter, i.e.,
14 one who has done nothing besides register to vote, in the other 53
15 counties will have to vote in person on election day. For those
16 counties that were not permitted to opt-in, the ordinary voter will
17 have less time to cast his vote, including in races for statewide
18 offices (and offices representing more than a single county). Thus,
19 if the VCA achieves its purpose and works as designed, the votes of
20 residents of the counties not permitted to opt-in for the 2018 cycle
21 are diluted. That is, by design, one should expect more votes from
22 Opted-In Counties than otherwise would have been cast under
23 Standard Voting Options thus making votes from the Opted-In
24 Counties a greater percentage of the total votes cast than . . .
25 otherwise would have been cast. It is Plaintiffs' position that: (1)
26 this is a cognizable Equal Protection/voter dilution claim to which
27 strict scrutiny applies, and (2) Defendants cannot satisfy strict
28 scrutiny.⁴

20 Plaintiffs agreed this was an accurate summary. Further, Plaintiffs did not identify any
21 misstatements. Having re-reviewed the parties' submissions, the Court will make one
22 clarification. Neither Plaintiffs nor Defendants clearly addressed the options available to a voter
23 in a non-Opted-In County who has done nothing besides register to vote. The Court assumed
24 without correction that such voters would only be able to vote in person on election day. Whether
25 that assumption is true is immaterial to resolving this motion. As previously noted, the parties

27 ³ At a minimum, they agree that the Assembly Committee on Elections and Redistricting Report, dated June
29, 2016, said as much. (Compare ECF No. 7 at 22 with ECF No. 11 at 17.)

28 ⁴ This language is taken from the Court's notes.

1 agree that if the VCA achieves its purpose and works as designed, the expectation is more votes
2 will be cast per 1,000 registered voters in a county conducting an all-mail ballot election than
3 otherwise would have been cast in that same county had the Standard Voting Options been used.
4 In other words, the VCA can only be rationally understood as supposing its “all-mail ballot
5 election” option makes voting easier than the Standard Voting Options.

6 **IV. ANALYSIS**

7 Even where a district court grants a preliminary injunction, it is unnecessary to
8 definitively resolve the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415,
9 1422 (9th Cir. 1984) (“A preliminary injunction, of course, is not a preliminary adjudication on
10 the merits but rather a device for preserving the status quo and preventing the irreparable loss of
11 rights before judgment.”) As detailed below, the Court finds that Plaintiffs have not met their
12 burden to show that granting them a preliminary injunction is in the public interest. As Plaintiffs
13 are required to make an adequate showing on all four Winter prongs, the Court need not analyze
14 the others. *Alliance for the Wild Rockies*, 632 F.3d at 1135.

15 That being said, the Court asked Defendants a series of pointed questions on the first
16 Winter prong at the Motion Hearing. No practical purpose will be served by being coy about the
17 Court’s conclusion that Plaintiffs have, at a minimum, raised serious questions on the merits.
18 Two practical purposes will be served by briefly discussing this conclusion. First, it will facilitate
19 this Court’s discussion of the “public interest” prong. Second, as the Court observed at the
20 Motion Hearing, the opposition apparently misapprehended the gravamen of Plaintiffs’ legal
21 theory. Instead, Defendants misperceived what seems to be a question of first impression (that
22 raises serious questions) as an utterly unmeritorious one.

23 The questions and answers at the Motion Hearing presumably went a long way in
24 dispelling that notion. However, it is well settled that this Court has the inherent power to
25 “control the disposition of the causes on its docket with economy of time and effort for itself, for
26 counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The Court is
27 persuaded that judicial economy will be served by briefly setting out two points as declarative
28 statements that the Court was attempting to draw out in the form of questions. The Court will not

1 go beyond that. To be clear, the Court’s discussion of the merits is to facilitate drafting the
2 remainder of this Order and future briefing in this case. The parties should not view this
3 discussion as foreclosing them from making any argument they see fit on the merits of the case in
4 subsequent briefing. The Court will remain open to being persuaded, will consider these
5 arguments de novo, and is not bound by its discussion of the merits in this Order. See *Camenisch*,
6 451 U.S. at 395.

7 A. Winter Prong 1: Serious Questions on the Merits

8 As discussed above, the Court will make two points. Defendants’ discussion of Plaintiffs’
9 voter dilution claim proceeds from a misunderstanding of the gravamen of that claim, and it is
10 clear that Plaintiffs have raised serious questions on the merits, once that misunderstanding is
11 corrected.

12 Defendants acknowledge that voter dilution is a recognized category of voting claim. In
13 relevant part the opposition provides as follows:

14 [R]egulations that contravene the principle of ‘one person, one
15 vote’ by diluting the voting power of some qualified voters within
16 the electoral unit’ . . . are subject to strict scrutiny Examples
17 include laws that weigh votes from rural counties more heavily than
18 votes from urban counties. [*Lemons v. Bradbury*, 538 F.3d 1098,
1104 (9th Cir. 2008) (quoting *Green v. City of Tucson*, 340 F.3d
891, 900 (9th Cir. 2003))].

(ECF No. 11 at 14 (internal quotation marks removed).)

19 In the very next paragraph, Defendants explain:

20 [T]he VCA — and California election law generally — affords all
21 voters “in a geographically defined governmental unit” (i.e., a
22 county) the same voting options. That the Act permits different
23 counties to employ different voting procedures does not alter this
24 fact

25 [T]he Supreme Court has “never applied strict scrutiny” to a voting
26 regulation that “discriminates between different electoral units . . . ,
27 rather than between voters in any single electoral unit.” *Green*, 340
28 F.3d at 900.

(ECF No. 11 at 15.) Ultimately, after a curt discussion, Defendants conclude the VCA does not
present a voter dilution claim.

This conclusion rests on a fundamental misunderstanding. It is undisputed that — for

1 both the 2018 Primary and the 2018 General Election — votes will be cast for offices
2 representing the entire state (e.g., one of California’s United States Senators, California Governor,
3 and California Attorney General). As the Court observed at the Motion Hearing, it seems obvious
4 that, for purposes of these statewide races, the electoral unit in question is the state rather than the
5 individual county.⁵ As the Ninth Circuit intimated in *Green*, in evaluating a voter dilution claim,
6 it is crucial to correctly identify the “relevant electoral unit.” *Green*, 340 F.3d at 900.

7 This takes the Court to its second point. The pin-cited portion of *Green* discussing voter
8 dilution claims identifies three Supreme Court opinions: *Gray v. Sanders*, 372 U.S. 368 (1963),
9 *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Moore v. Ogilvie*, 394 U.S. 814 (1969). See *id.*
10 Plaintiffs identify these same cases in their opening brief. Having carefully reviewed these cases,
11 it is apparent that the election regimes challenged in those cases are factually dissimilar from the
12 VCA.⁶ That being said, each contains statements about what the Equal Protection Clause
13 demands that, on their face, seem to have broader application. The Court quoted six of these
14 statements at the Motion hearing. The Court will repeat them here (with one minor addition).

15 Gray states: “Once the geographical unit for which a representative is to be chosen is
16 designated, all who participate in the election are to have an equal vote . . . wherever their home
17 may be in that geographical unit.” *Gray*, 372 U.S. at 379. Gray also states: “[T]here is no
18 indication in the Constitution that homesite . . . affords a permissible basis for distinguishing
19 between qualified voters within the State.” *Id.* at 380. *Reynolds* states that Gray “established the
20 basic principle of equality among voters within a State, and held that voters cannot be classified,
21 constitutionally, on the basis of where they live, at least with respect to voting in statewide
22 elections.” *Reynolds*, 377 U.S. at 560. *Reynolds* also states: “Weighting the votes of citizens

23 ⁵ At the Motion Hearing, Plaintiffs suggested that at least some races for United States Congress were
24 implicated by this action. The Court declines to discuss this further in this Order, as doing so will not facilitate
resolution of the instant motion.

25 ⁶ It will serve no practical purpose at this point to describe the regimes at issue in *Gray*, *Reynolds*, or *Moore*
26 in detail here. However, for the sake of completeness, the Court will include the parenthetical descriptions of those
27 three cases supplied by the Ninth Circuit in *Green*. *Green* described (i) *Gray* as dealing with a “county unit system
28 that weighted rural votes more heavily than urban votes,” (ii) *Reynolds* as dealing with an “apportionment plan for
the state legislature that weighted votes from rural counties more heavily [than] votes from urban counties,” and (iii)
Moore as dealing with a “state statute that made it more difficult for residents of populous counties to nominate
candidates for the electoral college.” *Green*, 340 F.3d at 900.

1 differently, by any method or means, merely because of where they happen to reside, hardly
2 seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as
3 simpleminded modes of discrimination.”⁷ Id. at 563 (internal quotation marks omitted).
4 Additionally, Reynolds further stated: “Diluting the weight of votes because of place of residence
5 impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious
6 discriminations based upon factors such as race,” citing *Brown v. Board of Education*, 347 U.S.
7 483 (1954). Id. at 566. Moore says: “The idea that one group can be granted greater voting
8 strength than another is hostile to the one man, one vote basis of our representative government.”
9 Moore, 394 U.S. at 819.

10 Defendants’ misapprehension of the thrust of Plaintiffs’ Equal Protection claim has
11 resulted in inadequate briefing of the merits of this claim. It is enough for now to say Plaintiffs
12 have clearly raised serious questions on the merits of their Equal Protection Claim.

13 B. Winter Prong 2: Irreparable Harm

14 In their opening brief, Plaintiff states that “the Ninth Circuit has long recognized that
15 constitutional violations in general constitute irreparable harm.” (ECF No. 7 at 25–26 (citing,
16 *Stormans, Inc. v. Stelecky*, 586 F.3d 1109, 1138 (9th Cir. 2009), and *Goldie’s Bookstore, Inc. v.*
17 *Super. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)).) In essence, Plaintiffs contend that if they show a
18 likelihood of success on a constitutional claim generally (or, perhaps, presumptively) this
19 constitutes an adequate showing of irreparable harm. The opposition has not meaningfully
20 addressed this argument. It is unnecessary to decide this issue in order to resolve the instant
21 motion. Accordingly, the Court declines to do so. Instead, for the remainder of this Order, the
22 Court will assume the following for the sake of argument: (i) Plaintiffs have shown a likelihood
23 of success on the merits of their Equal Protection claim, and (ii) this, without more, is a showing
24 of irreparable harm sufficient to satisfy the second Winter prong.

25 C. Winter Prong 3: Balance of the Equities

26 In Plaintiffs’ opening brief, they contend: “The balance of the equities and public interest
27 preliminary injunction factors ‘merge when the Government is the opposing party.’” (ECF No. 7

28 ⁷ The second sentence was not quoted in the Motion Hearing.

1 at 26 (quoting *Feldman v. Ariz. Sec’y. of State’s Office* (“the non-citable Feldman panel
2 opinion”), 842 F.3d 613, 627 (9th Cir. 2016)).) In the Feldman litigation, the Ninth Circuit
3 granted rehearing en banc and ordered that “[t]he three-judge panel opinion shall not be cited as
4 precedent by or to any court of the Ninth Circuit.” *Feldman v. Arizona Sec’y of State’s Office*,
5 840 F.3d 1164 (9th Cir. 2016). Accordingly, Plaintiffs should not have cited this case. The case
6 cited for the proposition in the panel opinion, *Nken v. Holder*, 556 U.S. 418 (2009), did not
7 involve a preliminary injunction or an election. Defendants fail to mention the non-citable
8 Feldman panel opinion or *Nken* in their opposition. Rather, Defendants’ opposition, like
9 Plaintiffs’ opening brief, discusses the third and fourth prongs of *Winter* together. (Compare ECF
10 No. 11 at 21–24 with ECF No. 7 at 25–29.) Interestingly, Plaintiffs’ reply discusses these
11 separately. (See ECF No. 14 at 17–19.)

12 As the Court will explain in the following section of the Order, where a requested
13 preliminary injunction in advance of an election threatens to interfere with non-party voters’
14 ability to vote (or otherwise threatens to disenfranchise them), the Ninth Circuit has made clear
15 this implicates the public interest in a particularly acute way. The opposition raises serious
16 concerns about voter disenfranchisement that are not adequately addressed in Plaintiffs’ reply.
17 Rather than engaging in a how-many-angels-can-dance-on-the-head-of-a-pin-type of analysis
18 regarding the merger of *Winter* prongs without the benefit of briefing, the Court will explain in
19 the following section why Plaintiffs failed to meet their burden to show that a preliminary
20 injunction is in the public interest. In doing so, the Court will consider Plaintiffs’ arguments in its
21 reply under the headings “THE BALANCE OF THE EQUITIES TIPS DECIDEDLY IN
22 PLAINTIFFS’ FAVOR” and “GRANTING THE INJUNCTION IS IN THE PUBLIC
23 INTEREST.” (See ECF No. 14 at 17–19.)

24 D. Winter Prong 4: Public Interest

25 In the Court’s view, the most efficient way to address the public interest prong of *Winter*
26 is to set out Defendants’ arguments, followed by the applicable standard, and then explain why
27 Plaintiffs have failed to demonstrate a preliminary injunction is in the public interest.

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1 i. *Defendants' Arguments*

2 Defendants repeatedly observe the impact of the VCA is speculative and that Plaintiffs
3 have offered no evidence that voter turnout will actually increase in the Opted-In Counties, let
4 alone by how much, assuming there is an increase at all. (See, e.g., ECF No. 11 at 20 (“[E]ven
5 assuming arguendo that different turnout rates could support a voter ‘dilution’ claim, Plaintiffs
6 offer no evidence of actual harm to support their claim. Plaintiffs instead ask this Court to enjoin
7 a state election law on the eve of an election based solely on their speculation of the disparate
8 impact the law might have.”) (emphasis retained) (internal citations omitted).) This is coupled
9 with detailed arguments that the enforcement of the VCA for the 2018 Primary and the 2018
10 General Election may lead to disenfranchisement of a significant number of voters in the Opted-
11 In Counties represented in this action. The Court will summarize this second category of
12 arguments in some detail.

13 With respect to the 2018 Primary, Defendants argue that “[w]ere the Court to enjoin the
14 VCA’s operation for the June 5, 2018 election, Defendants would not be able to adequately
15 conduct the election.” (ECF No. 11 at 22.) In particular, Defendants observe that “it likely would
16 be impossible for Defendants to locate and secure the required number of polling place
17 locations.” (ECF No. 11 at 22 (indicating that Sacramento County would need to “secure
18 approximately 600 polling place locations,” while Madera County and Nevada County would
19 each require approximately 40 polling locations).) Even if this could be done, Defendants argue
20 “there is insufficient time to hire and train the significant number of additional poll workers —
21 approximately 300 in Nevada County, 350 in Madera County, and 3,000 in Sacramento County
22 — that would be required (or to retrain workers previously trained on the VCA’s new
23 procedures).” (ECF No. 11 at 22 (emphasis removed).) Further, Defendants indicate that “[i]n
24 preparation for their transition to the VCA model, Sacramento County and Madera County have
25 already replaced their antiquated voting systems.” (ECF No. 11 at 22.) Defendants argue that
26 “[i]f compelled to revert back to a polling place model, there simply is not enough to [sic] time
27 (or money) to obtain the hundreds of additional voting machines that would be required.” (ECF
28 No. 11 at 22.) Defendants cite sworn affidavits from relevant election officials in support of each

1 of their arguments. (See ECF No. 11 at 21–24.)

2 Defendants’ disenfranchisement arguments are not limited to “logistical hurdles.” (See,
3 e.g., ECF No. 11 at 22.) Defendants indicate that they have “already conducted substantial public
4 outreach to educate voters about the VCA’s new voting process.” (ECF No. 11 at 23.)

5 Defendants contend, “[g]iven the substantial work that has been done to educate voters on the
6 VCA model, a last minute switch in voting procedures is certain to confuse — and disenfranchise
7 — voters.” (ECF No. 11 at 23.)

8 Defendants observe that if the Court is persuaded not to enjoin the 2018 Primary for the
9 reasons just discussed, “many of the same logistical hurdles would prevent VCA counties from
10 reverting to the prior polling place model for the November 2018 election.” (ECF No. 11 at 24
11 n.10.) Moreover, Defendants further contend “changing the voting procedures for the second
12 time in a year — and in between primary and general elections — would only increase the risk of
13 voter confusion.” (ECF No. 11 at 24 n.10.)

14 ii. Public Interest in Election Cases

15 The concerns of the sort raised in Defendants’ opposition are at the heart of the public
16 interest analysis mandated in election cases like the instant action. See *Sw. Voter Registration*
17 *Educ. Project v. Shelley* (“SVREP”), 344 F.3d 914, 919–20 (9th Cir. 2003) (en banc). In SVREP,
18 the plaintiffs filed a “lawsuit alleging that the planned use of ‘punch-card’ balloting machines in
19 the election violates the Equal Protection Clause of the U.S. Constitution and Section 2 of the
20 Voting Rights Act[.]” *Id.* at 916. The plaintiffs claimed “that their right to equal protection is
21 violated because voters in counties that use punch-card machines will have a comparatively lesser
22 chance of having their votes counted than voters in counties that use other technologies.” *Id.* at
23 917. Further, they argued “the counties employing punch-card systems have greater minority
24 populations than counties using other voting systems, so that punch-card use denies the right to
25 vote on the basis of race, in violation of Section 2 of the Voting Rights Act.” *Id.* Pursuant to a
26 consent decree, the California Secretary of State had already decertified the use of these punch-
27 card machines in elections effective March 2004 (the next regularly scheduled election). *Id.* at
28 916–17. The election at issue in SVREP was not a regularly scheduled election. Rather, the

1 October 7, 2003 election was one in which “California voters [were] scheduled to decide whether
2 Governor Gray Davis should be recalled and, if so, who should replace him.”⁸ Id. at 916.

3 In SVREP, the Ninth Circuit, sitting en banc, observed that “[t]here is no doubt that the
4 right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state
5 election.” Id. at 918 (citing Reynolds, 377 U.S. at 585). It noted “[t]he decision to enjoin an
6 impending election is so serious that the Supreme Court has allowed elections to go forward even
7 in the face of an undisputed constitutional violation.” Id. The en banc court went on to say:

8 In this case, hardship falls not only upon the putative defendant, the
9 California Secretary of State, but on all the citizens of California,
10 because this case concerns a statewide election. The public interest
11 is significantly affected. For this reason our law recognizes that
12 election cases are different from ordinary injunction cases. See,
e.g., Reynolds[, 377 U.S. at 585]. Interference with impending
elections is extraordinary, id., and interference with an election
after voting has begun is unprecedented.

13 Id. at 919.

14 In the next paragraph of SVREP, the Ninth Circuit catalogued some of the public interest
15 concerns implicated in that case. These included “resources already invested in reliance” on the
16 election proceeding as planned, along with time and money spent on voter education, training poll
17 workers, and preparing ballots. Id. at 919. However, the Supreme Court has made clear these are
18 not the only concerns that should be considered where a requested injunction may interfere with
19 an upcoming election.

20 In Reynolds, upon which SVREP relies, the Supreme Court characterized the district court
21 in that case as having “acted in a most proper and commendable manner.” Reynolds, 377 U.S. at
22 586. As noted above, the landmark Reynolds decision dealt with an “apportionment plan for the
23 state legislature that weighted votes from rural counties more heavily [than] votes from urban
24 counties.” Green, 340 F.3d at 900. Nevertheless, the Supreme Court specifically indicated that
25 the Court had “initially acted wisely in declining to stay the impending primary election in

26
27 ⁸ The California Constitution set the period of time within which the recall election was required to be held
28 after the Secretary of State certified there were sufficient signatures to initiate a recall. SVREP, 344 F.3d at 916.
Additionally, the California Secretary of State scheduled an “initiative election to the same date as the recall
election.” Id.

1 Alabama,” and later added the district court “acted with proper judicial restraint . . . in ordering its
2 own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding
3 of elections pursuant to that plan without great difficulty.” Reynolds, 377 U.S. at 586.

4 Moreover, the Supreme Court has made clear that, when requested injunctive relief may
5 lead to disenfranchisement of non-party voters, the impact on such voters should be considered
6 before that injunctive relief is granted. See Williams v. Rhodes, 393 U.S. 23, 34–35 (1968);
7 Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006). Of course, this includes logistical concerns. See,
8 e.g., Williams, 393 U.S. at 35 (taking into account that “[c]ertainly at this late date it would be
9 extremely difficult, if not impossible, for Ohio to provide still another set of ballots”). But, it also
10 requires consideration that the injunction itself may cause voter confusion, which itself “risk[s] . .
11 . interference with the rights of other [non-party] citizens,” Williams, 393 U.S. at 35, as “[c]ourt
12 orders affecting elections . . . can themselves result in voter confusion and consequent incentive
13 to remain away from the polls.” Purcell, 549 U.S. at 4–5.

14 With this in mind the Court will now turn to Plaintiffs’ arguments.

15 iii. Plaintiffs Have Not Shown an Injunction is in the Public Interest

16 Plaintiffs’ argument in its opening brief was essentially a continuation of its argument on
17 the second Winter prong. Roughly speaking, Plaintiffs argue that in constitutional cases the
18 Winter prongs are like dominoes: According to Plaintiffs, if they can show they are likely to
19 succeed on the merits of their constitutional claim, this tips the first domino and the rest must
20 follow because parties with likely-to-succeed constitutional claims are generally irreparably
21 harmed, the State of California can “derive no legally cognizable benefit” from violating
22 Plaintiffs’ constitutional rights, and “the protection of constitutional rights is of the highest public
23 interest.” (ECF No. 7 at 26–29.) Additionally, the opening brief included two conclusory
24 statements that arguably touched on the specific concerns presented in cases where a requested
25 order will affect an election. First, citing the non-citable Feldman panel opinion, Plaintiffs assert
26 that “the State has not devoted ‘enormous resources’ to furthering the [VCA].” (ECF No. 7 at
27 27.) Second, Plaintiffs assert there is no reason to think the 2018 Primary would be disrupted as
28 ballots had not yet been cast and the motion was “filed well ahead of California’s primary

1 election.” (ECF No. 7 at 27.) Neither statement is supported by anything other than Plaintiffs’
2 counsel’s say-so.

3 The Court has already addressed the disenfranchisement concerns that Defendants raised,
4 which they supported with detailed sworn affidavits from relevant election officials. (See ECF
5 No. 11 at 21–24.) Plaintiffs’ response in their reply was wholly inadequate. As to Defendants
6 argument that Plaintiffs have no evidence that the VCA will actually increase voter turnout,
7 Plaintiffs respond coming forward with none. They simply assert in a conclusory way that this
8 result is “inevitabl[e].” (ECF No. 14 at 15.) It is worth noting, in their opening brief, Plaintiffs
9 more or less acknowledge that it is speculative whether the VCA will achieve its goal. (See ECF
10 No. 7 at 24 (“For example, if the Voter’s Choice Act permitted all counties to conduct all-mail
11 ballot elections within the same timeframe, voter turnout would increase in all counties —
12 *assuming the provisions of the Voter’s Choice Act will increase voter turnout at all — rather than*
13 *only increasing voter turnout in certain selected counties.*”) (emphasis added).)

14 The Court now turns to Plaintiffs response to Defendants’ arguments relating to the
15 disenfranchisement of non-party voters in the relevant Opted-In Counties. Defendants do not
16 argue that the possible disenfranchisement of these voters is not a relevant consideration.⁹
17 Accordingly, one would expect Plaintiffs to address the evidence introduced by Defendants on
18 this topic. Puzzlingly, Plaintiffs do not. Effectively, Plaintiffs remain silent in the face of
19 Defendants’ argument that, as a factual matter, it may be physically impossible to conduct an
20 election in the relevant Opted-In Counties due to inadequate numbers of polling stations, workers,
21 and voting machines if the requested injunction is granted. Similarly, Plaintiffs also remained
22 silent about Defendants’ concerns regarding voter confusion and its disenfranchising effect. It is
23 worth bearing in mind that Defendants raised these logistical and confusion concerns with respect
24 to both the 2018 Primary and the 2018 General Election.

25 It is well settled that Plaintiffs bear the burden to show the preliminary injunction they
26 seek is in the public interest. See, e.g., *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th
27 Cir. 2011). It is not this Court’s role to spin out arguments for why the public interest is served

28 ⁹ Such an argument could hardly be squared with Supreme Court and Ninth Circuit precedent.

1 by an injunction that Plaintiffs have not made. See *Greenlaw v. United States*, 554 U.S. 237,
2 243–44 (2008) (“In our adversary system, in both civil and criminal cases, in the first instance
3 and on appeal, we follow the principle of party presentation. That is, we rely on the parties to
4 frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties
5 present.”) It is no more appropriate for this Court to fill the unexplained silences of Plaintiffs’
6 reply briefs. This is particularly the case where the silence touches on an element where, as here,
7 Plaintiffs bear the burden of persuasion. Simply put, the Court can only conclude that Plaintiffs
8 have failed to meet their burden showing that a preliminary injunction is in the public interest.
9 Plaintiffs failed to address “considerations specific to election cases” that Defendants raised and
10 this Court is required to consider when deciding whether to issue an injunction that will affect an
11 election. *Purcell*, 549 U.S. at 4–5; see also *SVREP*, 344 F.3d at 919 (discussed supra).
12 Accordingly, the Court must deny Plaintiffs’ motion for failure to make the requisite showing on
13 all four Winter prongs.

14 For completeness’s sake, the Court will address one final point raised by Plaintiffs in their
15 reply and reiterated in the Motion Hearing. In short, Plaintiffs observed that “other courts have
16 granted preliminary injunctions in cases with similar and even less time prior to an election.”¹⁰
17 (ECF No. 14 at 17–18.) Plaintiffs cited the following three cases in support of this observation:
18 (i) *New York Progress & Prot. PAC v. Walsh* (“NYPPP”), 733 F.3d 483 (2d Cir. 2013), (ii)
19 *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and (iii) *Harris v.*
20 *McCrorry*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (three judge court). (ECF No. 14 at 17–18.)¹¹
21 Having carefully reviewed these three cases, the Court remains convinced that Plaintiffs have not
22 met their burden to show granting their motion is in the public interest.

23 The reason for this is made clear by NYPPP. In NYPPP, the plaintiff, “an ‘unauthorized
24 political committee’ formed to advocate in favor of candidates in New York elections, brought

25 ¹⁰ Plaintiffs’ argument may have been prompted in part by Defendants contention that this motion was barred
26 by laches. It is unnecessary to resolve Defendants’ laches argument to resolve this motion. Accordingly, the Court
declines to do so.

27 ¹¹ *Harris* was cited in the Motion Hearing rather than in the briefs. The parties should be advised that it is not
28 this Court’s practice to consider authorities cited by the parties in motion hearings that they have not cited in their
briefs. The Court does not intend to depart from the practice going forward.

1 suit against election officials in the State and City of New York, as well as the Board of
2 Elections” to enjoin certain election provisions that had the effect of “prevent[ing the plaintiff]
3 from receiving more than \$150,000 from any individual contributor in any calendar year.”
4 NYPPP, 733 F.3d at 485. The plaintiff had “a donor waiting to contribute \$200,000 to its cause,
5 allege[d] that, as applied to [the plaintiff], the cap violate[d] its core First Amendment right to
6 advocate in favor of Joseph Lhota in the upcoming New York mayoral election, and [sought]
7 declaratory and injunctive relief.” *Id.* The district court denied the plaintiff’s motion for a
8 preliminary injunction. *Id.* at 486. The district court expressed concern that granting an
9 injunction as to a single committee may create confusion about the impact of that injunction on
10 other committees close to an election. *Id.* at 489. The Second Circuit reversed and instructed the
11 district court to enter the requested injunction. *Id.* at 489. In reaching this conclusion, the Second
12 Circuit did not disagree that a district court should refrain from granting an injunction that would
13 result in “sufficiently severe disruptions to the election process itself.” *Id.* (emphasis retained).
14 However, the Second Circuit distinguished Reynolds noting that Reynolds involved a
15 “complicated process” and there was no “showing [in NYPPP] of what burdens would be
16 imposed on the State” by granting the injunction at issue. *Id.*

17 Nothing in NYPPP suggests that this Court should issue an injunction affecting an
18 election, particularly one that affects “the election process itself,” by mechanically looking to see
19 how many days would separate the order issuing the preliminary injunction and the next election.
20 In the Motion Hearing, Defendants analogized enjoining the VCA to ordering a large ship to turn
21 around. Extending that analogy, the flaw in Plaintiffs’ position is quite glaring. In essence,
22 Plaintiffs have observed that over time there have been instances where people suspected other
23 ships could turn quickly, in a set amount of time, with little risk to others. This is unhelpful
24 where it is made in a response to a detailed argument why a particular ship is slow moving and
25 almost certainly unable to do so in that amount of time without substantial risk to others.
26 Plaintiffs’ citation to NYPPP does nothing to assure the Court that granting Plaintiffs’ motion will
27 not throw the elections in multiple counties into chaos, as Defendants have persuasively
28 suggested.

1 Neither League of Women Voters nor Harris warrant detailed discussion. In League of
2 Women Voters, the Pennsylvania Supreme Court held that the “Pennsylvania Congressional
3 Redistricting Act of 2011 . . . violate[d] Article I, Section 5 — the Free and Equal Elections
4 Clause — of the Pennsylvania Constitution.” League of Women Voters, 178 A.3d at 741. The
5 opinion Plaintiffs cite described itself as “setting forth a process assuring that a remedial
6 redistricting plan would be in place in time for the 2018 Primary Elections.” Id. at 825. Nothing
7 in the League of Women Voters suggests the majority of the Pennsylvania Supreme Court
8 perceived that this process would threaten to disenfranchise any voters. Consequently, the Court
9 concludes that Plaintiffs’ reliance on this case is misplaced.¹²

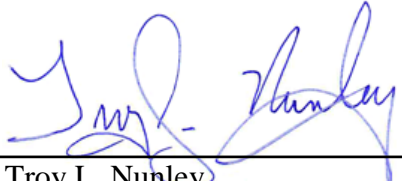
10 The same is true of Harris for precisely the same reason. The majority opinion in Harris
11 held that “the general assembly’s 2011 Congressional Redistricting Plan [was] unconstitutional as
12 violative of the Equal Protection Clause of the Fourteenth Amendment” and “require[d] that new
13 congressional districts be drawn forthwith to remedy the unconstitutional districts.” 159 F. Supp.
14 3d at 604. Nothing in Harris suggests the majority of the three judge court perceived that the
15 remedy it ordered would threaten to disenfranchise any voters.

16 **V. CONCLUSION**

17 For the foregoing reasons, Defendants’ motion for a preliminary injunction is (ECF No. 7)
18 is DENIED.

19 **IT IS SO ORDERED.**

20 Dated: April 24, 2018

21 
22 _____
23 Troy L. Nunley
24 United States District Judge

25 _____
26 ¹² Plaintiffs characterize the Pennsylvania Supreme Court’s order as a “significant disruption” and causing
27 “upheaval” weeks before “pertinent deadlines and an election.” (ECF No. 14 at 18.) Obviously, this Court does not
28 sit in review of the Pennsylvania Supreme Court. Putting that aside and accepting Plaintiffs’ characterization as
correct for the sake of argument, this is not an outcome the Court seeks to emulate. Even if arguably the
Pennsylvania Supreme Court actions did not accord with Ninth Circuit and United States Supreme Court precedent
relating to preliminary injunctions near elections, this would not give this Court license to follow suit.