19-17000, 19-17002, 19-17004, 19-17007, 19-17009

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY GRIFFIN, et al., Plaintiffs-Appellees, **v.** **ALEX PADILLA,** Defendant-Appellant,
AND CONSOLIDATED APPEALS.

On Appeal from the United States District Court
for the Eastern District of California

Nos. 2:19-cv-01477-MCE-DB, 2:19-cv-01501-MCE-DB, 2:19-cv-01506-MCE-DB, 2:19-cv-01507-MCE-DB, 2:19-cv-01659-MCE-DB

The Honorable Morrison C. England, Jr., Judge

DEFENDANTS-APPELLANTS' CONSOLIDATED OPENING BRIEF

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General

JAY C. RUSSELL
PETER CHANG
KRISTIN A. LISKA
CHAD A. STEGEMAN
State Bar No. 225745
Deputy Attorneys General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3624
Fax: (415) 703-5480
Email: Chad.Stegeman@doj.ca.gov

Attorneys for Defendants-Appellants California Governor Gavin Newsom, in his Official Capacity, and California Secretary of State Alex Padilla, in his Official Capacity

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The Presidential Tax Transparency and Accountability Act (the "Act") requires presidential candidates to disclose five years of tax returns to the public in order to appear on the presidential primary ballot in California. The Act treats all candidates the same, regardless of party affiliation, and promotes California's important—indeed, compelling—interest in ensuring an informed electorate.

The district court abused its discretion by finding the Act is likely unconstitutional and enjoining its enforcement. Two errors of law, in particular, permeated the district court's order. First, it held that because candidates who refuse to disclose their tax returns may not appear on the presidential primary ballot, the Act imposes a "severe" burden on First Amendment rights and a significant "handicap" on non-complying candidates that rises to the level of an additional "qualification" to run for President. The proper focus under both the First Amendment and the Presidential Qualifications Clause, however, is not on the consequences of non-compliance with the Act, but on the character and the magnitude of the burdens attending *compliance* with the Act. Otherwise, virtually all ballot-access laws—which, by their nature, exclude non-complying candidates from appearing on the ballot—would be constitutionally suspect. But that is

not the law. Courts have upheld a variety of state-level ballot-access requirements. What matters here is that disclosing five years of tax returns—documents that the candidates already possess and that have been routinely disclosed to the public for nearly 50 years—is not burdensome, let alone a severe burden or handicap.

Second, the district court ignored the Act's stated purposes and operative terms, and speculated—based on snippets of legislative history taken out of context—that the Act "fundamentally targets" President Trump, when in fact it applies to *all* presidential primary candidates, as well as *all* gubernatorial primary candidates. This speculative inquiry into the Legislature's supposedly "true" motivation was improper. This Court and the Supreme Court have repeatedly instructed that, absent narrow circumstances not present here, courts must assume that the objectives articulated by the Legislature—here, educating the public about the candidates' financial interests and potential malfeasance in office—are the actual purposes of the statute. The district court not only ignored these directives, but also made a series of unwarranted inferences in finding that the State's justifications for the Act are "specious" and "disingenuous." As set forth in more detail below, the Act passes constitutional muster as a non-

discriminatory, politically neutral ballot-access measure designed to promote the integrity of the electoral process.

Because Plaintiffs are not likely to succeed on the merits of their claims, they cannot show irreparable harm, that the balance of equities tips in their favor, or that it is in the public interest to grant the preliminary injunction.

STATEMENT OF JURISDICTION

On October 2, 2019, the district court granted plaintiffs' motions for a preliminary injunction and enjoined enforcement of the Act, entering the same order in each of the five related cases. (*Griffin* CD 41, ER 1-24; *Trump* CD 34, ER 25-48; *Melendez* CD 41, ER 49-72; *Koenig* CD 37, ER 73-96; *Del La Fuente* CD 40, ER 97-120.)[1] Defendants filed timely notices of appeal in each case on October 8, 2019. (*Griffin* CD 42, ER 121-125; *Trump* CD 36, ER 126-130; *Melendez* CD 43, ER 131-135; *Koenig* CD 40, ER 136-140; *Del La Fuente* CD 42, ER 141-145); *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1).

[1] For clarity, the October 2, 2019 amended memorandum and order will be referred to as the "Order," with reference to the excerpts of record from the *Griffin* action, Court Docket ("CD") 41, Excerpts of Record ("ER") pages 1-24.

STATEMENT OF ISSUES

1. Did the district court err in concluding that the Act likely imposes an additional "qualification" on the presidency, in violation of the Presidential Qualifications Clause, U.S. Const., art. II, § 1, cl. 5?

2. Did the district court err in concluding that Plaintiffs were likely to prevail on their claim that the Act violates the First and Fourteenth Amendments as a "severe" restriction on speech, association, and ballot-access rights?

3. Did the district court err in concluding that Plaintiffs were likely to prevail on their claim that the Act violates the Equal Protection Clause by disadvantaging partisan candidates, who participate in the primary, relative to independent candidates, who do not (and therefore are differently situated from partisan candidates)?

4. Did the district court err in concluding that Plaintiffs were likely to prevail on their claim that the Act's regulation of the primary process is expressly preempted by the federal Ethics in Government Act ("EIGA")?

5. Did the district court abuse its discretion by determining that Plaintiffs satisfied the other factors needed to obtain a preliminary injunction?

STATEMENT OF THE CASE

I. THE PRESIDENTIAL TAX TRANSPARENCY AND ACCOUNTABILITY ACT.

In 1973, newspapers published information showing that President Richard Nixon had paid an inexplicably low amount of federal tax in 1969, given his income for that year. When called upon to release his tax returns, President Nixon responded: "I welcome this kind of examination because people have got to know whether or not their president is a crook. Well, I am not a crook."[2] Nixon eventually released his tax returns and underwent an Internal Revenue Service audit. The IRS ultimately determined that President Nixon had improperly deducted more than $500,000 for papers donated to the National Archives, and he paid nearly half of his net worth in back taxes.[3]

In the forty-six years since then, most presidential candidates have voluntarily released their federal tax returns as a matter of course.[4] Starting

---

[2] Alan Axelrod, Profiles on Folly 104 (Sterling Publishing 2008).

[3] William D. Samson, *President Nixon's Troublesome Tax Returns, The Tax History Project* (May. 1, 1974), https://bit.ly/1XazOkc (last visited Nov. 5, 2019).

[4] Zuckoff, Why We Ask to See Candidates' Tax Returns (Aug. 5, 2016) The New York Times https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html (last visited Nov. 5, 2019).

in 1976, every major-party presidential nominee except Gerald Ford released their tax returns—and Ford disclosed his returns in summary form. Voters—including voters in California primary elections—have relied on this information for decades. During his 2016 presidential campaign, Donald Trump broke with this longstanding tradition and refused to release his tax returns.[5] Prompted by this break in customary practice, the California Legislature enacted Senate Bill No. 27, the Presidential Tax Transparency and Accountability Act. *Id.*

In enacting the bill, the Legislature found that California "has a strong interest in ensuring that its voters make informed, educated choices in the voting booth," and that "a Presidential candidate's income tax returns provide voters with essential information regarding the candidate's potential conflicts of interest, business dealings, financial status, and charitable contributions." Cal. Elec. Code § 6881. California "has a special interest in the President refraining from corrupt or self-enriching behaviors while in office," and the people of California "can better estimate the risks of any given Presidential candidate engaging in corruption or the appearance of

[5] Sen. Floor Analysis to Senate Bill No. 27 (2019-2020 Reg. Sess.) July 10, 2019, at 5, available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB27 (last visited Nov. 5, 2019).

corruption if they have access to the candidates' tax returns." *Id.* "The information in tax returns therefore helps voters to make a more informed decision." *Id.* While EIGA requires presidential candidates to disclose detailed financial information, 5 U.S.C. App. 4, "the information contained in a tax return is broader and more specific." Sen. Floor Analysis to Senate Bill No. 27 (2019-2020 Reg. Sess.) Apr. 24, 2019, at 4.[6]

The Act requires presidential primary candidates to file two copies of their income tax returns from the five most recent tax years, one of which has the candidate's personal information redacted, as well as a form providing consent for the Secretary of State to publicly release the redacted copy on the Secretary's website. *See* Cal. Elec. Code § 6884(a).[7] After the official canvas for the presidential primary election is completed, the Secretary of State must remove the public versions of the tax returns from the website. *Id.* § 6884(b)(3). The Secretary of State must also destroy the

[6] Available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient xhtml?bill_id=201920200SB27 (last visited Nov. 5, 2019).

[7] The Act requires candidates to redact social security numbers, home addresses, telephone numbers, email addresses, and medical information (Cal. Elec. Code § 6884(a)(1)(B)), and permits candidates to redact the names of dependent minors, employer identification numbers, business addresses, and paid tax return preparers' tax identification numbers, addresses, telephone numbers, and email addresses. *Id.* § 6884(a)(1)(C).

paper copies of the submitted returns after the official canvas of the ensuing general election. *Id.* § 6884(b)(4).

While not challenged in this case, the Act also applies to all candidates participating in California's gubernatorial primaries. *See* Cal. Elec. Code § 8900.

The Legislature passed the Act as an "urgency statute," *i.e.*, one "necessary for immediate preservation of the public peace, health, or safety," so it would take effect in time for the March 3, 2020 primary. Cal. Const., art. IV, § 8(d). Under the Act, presidential candidates must submit their tax returns to the Secretary of State no later than 98 days before the March 3, 2020 primary (by November 26, 2019) to appear on the ballot.[8]

II. PROCEDURAL HISTORY.

Five lawsuits challenging the Act were brought by two prospective presidential candidates (De La Fuente and Trump); a reelection campaign principal committee (Donald J. Trump for President, Inc.); national and state

[8] Six political parties are qualified to participate in California's upcoming presidential primary. *See* California Secretary of State, *Qualified Political Parties*, https://www.sos.ca.gov/elections/political-parties/qualified-political-parties/ (last visited Nov. 5, 2019). The Act applies to candidates from all six qualified parties.

political parties (the Republican National Committee and the California Republican Party); and eight registered voters (Griffin, Bolotin, Sienkiewicz, Oerding, Koenig, Melendez, Essayli, and McDougald).[9] (Order, ER 2.)

The five complaints raised a variety of challenges to the Act. (*See generally* ER 278-372.) First, all Plaintiffs asserted that the Act violates the Presidential Qualifications Clause by imposing an additional "qualification" on the Office of the President. (Order, ER 2.) Second, all Plaintiffs (except De La Fuente) asserted that the Act violates the First Amendment by either burdening their ability to access the ballot or to associate with, vote for, or select the candidate of their or their party's choice. (*Id.*, ER 15.) Third, the Plaintiffs in *Griffin* and *Melendez* asserted that the Act violates the Equal Protection Clause by requiring partisan presidential primary candidates to disclose their tax returns but not independent candidates. (*Id.*, ER 19.)

[9] One of the Plaintiffs in these consolidated appeals, the California Republican Party, also brought an emergency writ petition in the California Supreme Court challenging the Act under article II, section 5(c) of the California Constitution. *See* Emergency Petition for Writ of Mandate, etc., *Jessica Millan Patterson et al. v. Alex Padilla*, *Secretary of State*, California Supreme Court, Case No. S257302. The California Supreme Court issued an order to show cause, and scheduled a hearing on the petition for November 6, 2019.

Finally, the Plaintiffs in *Donald J. Trump for President, Inc*. asserted that EIGA expressly preempts the Act. (*Id.*, ER 20.)[10]

Plaintiffs subsequently moved for a preliminary injunction barring enforcement of the Act. The five separate cases were related before a single district judge in the Eastern District of California, who heard the five motions together on September 19, 2019. (Order, ER 2.) On October 1, 2019, the district court granted Plaintiffs' motions for a preliminary injunction, and then issued an amended order the next day to eliminate a typographical error. (*Id.*, ER 1.) The Order enjoined enforcement of the Act "to the extent [it] require[s] candidates for the presidency to disclose their tax returns as a condition of appearing on California's presidential primary ballot." (*Id.*, ER 24.) The State Defendants timely appealed in each case. (*See* ER 121-145.) This Court consolidated the five appeals on October 23, 2019. (Consolidation Order at 2-3, ECF No. 13.)[11]

---

[10] Certain Plaintiffs raised other claims in their complaints that are not relevant to this appeal because they were either not asserted in the motions for a preliminary injunction or do not form the basis of the challenged Order.

[11] The answering briefs in these consolidated appeals are due December 3, 2019—after the November 26, 2019 deadline for candidates to submit their tax returns to the Secretary of State, but before the December 26 deadline for the Secretary of State to certify the list of candidates who will appear on the presidential primary ballot. Cal. Elec. Code § 8120.

SUMMARY OF ARGUMENT

In its Presidential Qualifications Clause analysis, the district court misapplied this Court's jurisprudence concerning what constitutes an additional "qualification" and what does not. Specifically, it ruled that the Act "handicaps" candidates who refuse to disclose their tax returns by keeping them off the ballot. It should have analyzed the burden associated with *complying* with the Act, not the consequences of non-compliance. That burden is *de minimis*, and does not rise to the level of a new "qualification" for office.

The district court compounded its error by holding that the Act exceeds the State's authority to adopt "time, place, or manner" regulations in federal elections. That grant of authority applies under the Elections Clause, U.S. Const., art. I, § 4, cl. 1, whereas this case involves the State's authority to legislate under a different constitutional provision, the Electors Clause, *id*., art. II, § 1, cl. 2. In so holding, the district court ignored the fact that State authority under the Electors Clause is plenary and imposed limitations on State authority that do not apply.

Even viewed through the lens of the Elections Clause, the Act survives review. It is a non-discriminatory, politically-neutral ballot-access measure that promotes the integrity of the election process by ensuring voters have

essential information about candidates' finances—information they have relied on for nearly five decades. The district court abused its discretion by casting aside the stated justifications for the law and speculating that the Legislature's "true" motivation was to punish President Trump.

Regarding the First Amendment claims, the district court erred by applying strict scrutiny, instead of balancing under the familiar *Anderson-Burdick* test. The district court should have weighed the burden of complying with the Act, which is insubstantial, against the State's important interest in educating voters and protecting the integrity of the election process. Under this test, the Act complies with the First Amendment. The district court, however, held that the Act imposes a "severe" burden on First Amendment rights, triggering strict scrutiny. It did so by (1) wrongly focusing, again, on the fact that non-complying candidates are excluded from the ballot, instead of on the nature and extent of the burden of complying with the Act, and (2) declaring, again, that the Legislature's stated justifications were "specious" and "disingenuous."

The court further erred by finding that Plaintiffs are likely to succeed on their equal-protection claim. To prevail, Plaintiffs must establish that partisan and independent candidates are similarly situated with respect to the routes they must take to get on the general election ballot. They cannot do

so because, unlike partisan presidential candidates, independent presidential candidates do not compete in primary elections. This Court has already held that partisan and independent candidates are not similarly situated for that reason.

Finally, EIGA does not expressly preempt the Act. The Electors Clause grants state legislatures plenary authority to determine the methods of selecting their presidential electors. Thus, legislation governing presidential primaries is an area of traditional state concern, and the presumption against preemption applies. EIGA's preemption clause does not mention state laws, and it can and should be read to preempt only federal financial disclosure laws, particularly considering EIGA's legislative history.

Because their various challenges to the Act are likely to fail, Plaintiffs cannot show irreparable harm, that the balance of equities tips in their favor, or that it is in the public interest to grant the preliminary injunction. Accordingly, the district court's injunction should be vacated.

STANDARD OF REVIEW

To obtain a preliminary injunction, the party seeking such relief must establish that it is likely to succeed on the merits, that it will suffer irreparable harm absent an injunction, that the equities tip in its favor, and

that the public interest is served by an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Court reviews the grant of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). It reviews the district court's legal conclusions de novo, and a district court necessarily abuses its discretion when it makes a legal error. *Id.*

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Act does not violate the Presidential Qualifications Clause.

1. The Act is not an additional qualification under this Court's jurisprudence.

The Act is a generally applicable, even-handed ballot-access measure that merely calls for the disclosure of financial information. *See* Cal. Elec. Code § 6880, *et seq.* It does not impose an additional qualification to run for or serve as President.

In a case decided shortly after the preliminary injunction issued, the D.C. Circuit squarely rejected any suggestion that EIGA or other financial disclosure laws applicable to presidential candidates violate the Qualifications Clause. *Trump v. Mazars USA, LLP*, No. 19-5142, 2019 WL 5089748, at *17 (D.C. Cir. Oct. 11, 2019) ("*Mazars*"). The D.C. Circuit's

reasoning applies with equal force to the Act, and compels the conclusion that the district court abused its discretion.

At issue in *Mazars* was a subpoena issued by the House Committee on Oversight and Reform to President Trump's accounting firm seeking "*[a]ll statements of financial condition*, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars … or its predecessor," as well as "[a]ll underlying, supporting, or source documents and records," from 2011 to 2018, including President Trump's tax returns. 2019 WL 5089748, at *3 (emphasis added). President Trump and several of his business entities sued to invalidate the subpoena, and the district court granted summary judgment to the Committee. *Id*.

In affirming the lower court, the D.C. Circuit started from the proposition that the subpoena "seeks information related to a class of statutes," *i.e*., financial disclosure laws, that "impose far fewer burdens than laws requiring Presidents to change their behavior based on their financial holdings," *i.e*., conflict-of-interest laws. *Mazars,* 2019 WL 5089748, at *15. "This less burdensome species of law would require the President to do nothing more than *disclose* financial information." *Id*. (emphasis in original). The court noted that extensive constitutional, legislative, and

historical precedent supports the imposition of financial disclosure requirements on presidential candidates and presidents. *Id*. at *15-16.

It then went on to consider—and reject—President Trump's suggestion that existing financial disclosure laws, such as EIGA, as well as new ones being considered by Congress, such as requiring presidential candidates to disclose their tax returns,[12] would "impermissibly change or expand the qualifications for serving as president." *Mazars,* 2019 WL 5089748, at *17 (internal quotation marks and citation omitted).

> [T]he Trump Plaintiffs offer no reason to suspect that a statute requiring nothing more than disclosure of such [financial] conflicts might also "'establish a qualification for ... serving as President.'" . . . Financial disclosure laws would not, as in *Powell* [*v. McCormack*], prevent a "duly elected" official from assuming office, 395 U.S. [486,] 550 [(1969)], 89 S.Ct. 1944, nor, as in *U.S. Term Limits* [*v. Thornton*, 514 U.S. 779 (1995)], add a term limit to "the exclusive qualifications set forth in the text of the Constitution," 514 U.S. at 827, 115 S.Ct. 1842[.] . . . In the end, *laws requiring disclosure exclude precisely zero individuals from running for or serving as President; regardless of their financial holdings, all constitutionally eligible candidates may apply.*

Id. (emphasis added).

---

[12] *See Mazars,* 2019 WL 5089748, at *10, 13, 21 (noting that Congress is currently considering a bill that would require presidential candidates and presidents to disclose ten years of tax returns to the Federal Election Commission); *see* H.R. 706, 116th Cong. § 222 (2019).

Like existing financial disclosure laws, the Act "exclude[s] precisely zero individuals from running for or serving as President"; all constitutionally eligible candidates may do so, regardless of what their tax returns may disclose. *Cf. Mazars,* 2019 WL 5089748, at *17.

This Court's own jurisprudence is consistent with *Mazars* and compels reversal of the district court. Under *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), this Court conducts a two-part inquiry to determine whether a ballot-access measure constitutes a prohibited "qualification": (1) whether the state law "create[s] an absolute bar to candidates who would otherwise qualify under the Qualifications Clause"; and (2), if it does not, whether the state law has the "likely effect of handicapping an otherwise qualified class of candidates." *Schaefer*, 215 F.3d at 1035 (citing *Term Limits*, 514 U.S. at 828).[13] "[I]n determining whether the statutes handicap a class of candidates, we simultaneously determine whether the statutes have the sole purpose of creating an additional qualification." *Id.* at 1035 n. 4. Under this test, the Act does not violate the Presidential Qualifications Clause.

[13] Although *Schaefer* specifically addressed the Representatives Qualifications Clause, 215 F.3d at 1034, the State Defendants assume that, for purposes of this appeal only, the same analytical framework applies in cases involving the Presidential Qualifications clause.

First, the Act's financial disclosure requirement is not an "absolute bar" to presidential candidates who would otherwise meet the terms of the Qualifications Clause. In *Schaefer*, this Court did not question the district court's finding that an in-state residency requirement for Congressional candidates did not erect an "absolute bar" to participation, because the candidates could comply by moving to California. *Schaefer*, 215 F.3d at 1036. So, too, here. Candidates can comply by simply authorizing the Secretary of State to release their tax returns (with appropriate redactions). The district court here agreed and did not belabor this point. (Order, ER 11.)

Second, the Act does not have the "likely effect of handicapping an otherwise qualified class of candidates." *Schaefer*, 215 F.3d at 1035. Nor does it have "the sole purpose of creating additional qualifications indirectly." *Id.* at 1035 n. 4; *see also Term Limits*, 514 U.S. at 836. In making this inquiry, courts examine whether the purported class of candidates is a "class of Constitutional concern," as well as the effect on the handicapped class, taking into account the law's purpose. *Schaefer*, 215 F.3d at 1035. For example, in *Schaefer*, this Court struck down a requirement that congressional candidates had to reside in the state in which they were running at the time nomination papers had to be filed. The *Schaefer* court held that nonresident candidates were a class of constitutional

concern because the Framers considered and explicitly rejected any requirement of in-state residency before the election. 215 F.3d at 1036-1037. Therefore, the challenged law "imposed the very requirement that the Framers purposefully excluded." *Id.* at 1036-37. The Court further held that the law significantly hampered nonresident candidates "with homes, families, and jobs in another state" from running for Congress. *Id.* at 1037.

The Act here does not impose a "handicap" on candidates as this Court has applied the term. Unlike the state law in *Schaefer*, which required candidates for the House of Representatives to uproot themselves and their families in order to run, the Act only requires presidential primary candidates to provide copies and consent to publication of documents they already possess.[14] And the Act does not have the sole purpose of creating additional qualifications indirectly because every candidate can comply. Like having to pay a filing fee, this is an insubstantial burden. Indeed, none of the Plaintiffs, including Trump and De La Fuente, have suggested any

[14] The Act does not apply to any candidate for any year in which the candidate was not required to file a tax return. Cal. Elec. Code § 6883(c). If a candidate has not yet filed a tax return for a particular year, the Act requires the candidate to submit a copy of the return within five days of filing with the IRS. *Id.* § 6883(b).

reason why it might be particularly burdensome for them or other presidential candidates to disclose five years of tax returns.

In holding to the contrary, the lower court misapplied *Schaefer*. It focused not on the difficulty or disruption associated with complying with the Act, but on the *consequences of non-compliance*. (*See* Order, ER 11 (stating that the Act "prevents a number of candidates from appearing on the primary ballot absent disclosure of their tax returns, and in so doing impairs their ability to win California's Republican presidential primary").) That is not the correct analysis. The unconstitutional burden or "handicap" that *Schaefer* identified was having to "maintain in-state residence for a period of several weeks to months" before the election, which significantly "hampered nonresident candidates with homes, families and jobs in another state." *Schaefer*, 215 F.3d at 1037. It was not, as the district court suggested, the consequences of failing to comply with the residency requirement.

It is not, and cannot be, the law that a ballot-access measure necessarily violates the Qualifications Clause any time non-compliance precludes a candidate from appearing on the ballot. In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court upheld a California disaffiliation law barring an individual from running as an independent candidate for public office if she had voted in the immediately preceding partisan primary or had

a registered affiliation with a qualified party within one year prior to the immediately preceding primary. *Id.* at 726. In doing so, it held that arguments that the disaffiliation requirement established an "additional qualification" for federal office were "wholly without merit," notwithstanding that non-compliance resulted in exclusion from the ballot. *Id*. at 756 n.16. The petitioners in the case "would not have been disqualified [from the general election ballot] had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election." *Id.* at 746 n. 16; *see also Term Limits*, 514 U.S. at 828. The challenged requirement "no more establishe[d] an additional qualification for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Storer*, 415 U.S. at 746 n. 16.

Unlike the district court, other federal court decisions have followed *Storer* in recognizing that precluding non-compliant candidates from appearing on the ballot does not automatically violate the Qualifications Clause. Courts have upheld a variety of ballot-access laws, including filing fee requirements, *e.g.*, *Biener v. Calio*, 361 F.3d 206, 212 (3d Cir. 2004); "resign to run" laws forcing a prospective candidate to resign from

government service in order to run for office, *e.g.*, *Merle v. United States*, 351 F.3d 92, 97 (3d Cir. 2003); laws requiring political parties to submit a certain number of signatures before their candidate can appear on the ballot, *Cartwright v. Barnes*, 304 F.3d 1138, 1144 (11th Cir. 2002); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997); and "sore loser" laws preventing a losing candidate in a partisan primary from running as an independent in the subsequent general election, *De la Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1253-1255 (M.D. Ala. 2016).

Rather, to violate the Qualifications Clause, the law must handicap a class of candidates that is defined by a characteristic that is inherent in or intrinsic to the candidate, such as residency status, having a prior felony conviction, or having already served in office for a prescribed time. *See Biener*, 361 F.3d at 212 (citing *Term Limits*, 514 U.S. at 800). There is nothing "inherent in the candidate," *id*., about failing to comply with a financial disclosure requirement. All candidates have tax returns (unless they did not file returns for a given year, in which case the Act itself excuses compliance). No candidate is singled out, no party is singled out, and no

class of candidates is singled out based on an inherent or immutable quality or characteristic.[15]

For all of these reasons, the district court erred in concluding that the Act likely violates the Qualifications Clause.

2. Although the *Electors* Clause gives states plenary power to determine the manner of appointing their presidential electors, the district court improperly imposed limitations on state authority under the *Elections* clause.

The district court compounded its error by relying heavily on cases under the Article I Elections Clause, which permits States to enact "time, place, or manner" regulations of Congressional elections. U.S. Const., art. I, § 4, cl. 1. According to the district court, the Act exceeds California's authority under the Elections Clause for a variety of reasons, including: (1) the Act is "substantive" and not "procedural"; (2) it "has nothing to do with the extent of support a candidate may enjoy and plays no role in ensuring that [sic] procedural integrity of the election"; (3) its provisions "do not

[15] In concluding to the contrary, the district court found that the Act "has the likely effect of 'handicapping' non-disclosing candidates." (Order, ER 11.) It held this was akin to the problem in *Schaefer*, where the law "plainly handicapped those candidates who did not comply and had the effect of deterring them from running." (*Id.*) But the class of candidates at issue in *Schaefer* was not "non-compliant candidates," it was *non-resident* candidates. *See Schaefer*, 215 F.3d at 1036. Residency status is a trait intrinsic to a candidate; refusing to disclose one's tax returns is not.

pertain to the administration of an election"; (4) it "draws undue attention to that class of candidates electing not to disclose their returns, and by so doing operates to brand them as inferior"; and (5) instead of being "even-handed," the Legislature's true motive was to "punish a class of candidates who elect not to comply with disclosing their tax returns . . . ." (Order, ER 11-13 (citing, *inter alia*, *Cook v. Gralicke*, 531 U.S. 510 (2001)).) This analysis is fundamentally flawed.

As an initial matter, this case does not involve the Elections Clause at all, because it does not involve Congressional elections. Rather, it is governed by the Electors Clause in Article II, U.S. Const., art. II, § 1, cl. 2, which gives the states "plenary" power to determine the manner of appointing their presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). This includes the power to establish ballot-access laws in presidential primaries. *Ray v. Blair*, 343 U.S. 214, 227 (1952) (primary elections, no less than general elections, are "a part of the state-controlled elective process"; as such, they are "an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose"); *accord Storer*, 415 U.S. at 735 ("The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial

stage in a two-stage process by which the people choose their public officers.").

By invoking *Cook v. Gralicke*, 531 U.S. 510, which involved the extent of state authority under the Elections Clause of Article I, the district court imposed limitations on California's authority to regulate presidential primary elections that do not apply here. (Order, ER 11-13.) Moreover, *Cook* did not analyze a claim under the Representative Qualifications Clause, let alone the Presidential Qualifications Clause, which is the relevant provision here, and which must be harmonized with the "plenary" authority that States possess under the Electors Clause. The Order's heavy reliance on *Cook* thus highlights the district court's failure to apply the correct analytical framework.

Similarly, the district court relied heavily on the Supreme Court's decision in *Term Limits*, 514 U.S. at 834-36, apparently for the proposition that any state ballot-access measure necessarily violates the Presidential Qualifications Clause if it "cannot be characterized as procedural." (Order, ER 12.) While that may be the law in the context of congressional elections, in which "the right to choose representatives belongs not to the States, but to the People," *Term Limits*, 514 U.S. at 820-21, the Act operates in a different sphere—one in which the States have plenary power to choose the manner

of appointing their presidential electors. As noted above, this power is limited only by "express constitutional commands that specifically bar States from passing certain kinds of laws." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). The Elections Clause of Article I—which, by its terms, does not apply to presidential elections at all—is not such an "express" command.

Moreover, even assuming *arguendo* that the Elections Clause limits State authority to regulate presidential primaries, the Act would still pass constitutional muster. Contrary to the district court's conclusion (Order, ER 11-12), the Act, as discussed above, does not impose a "substantive qualification rendering a class of potential candidates ineligible for ballot position." *Term Limits*, 514 U.S. at 835. It simply requires presidential candidates to make financial disclosures, and excludes no one based on their finances. *Cf. Mazars*, 2019 WL 5089748, at *17.

Nor does it "dictate electoral outcomes" by treating candidates appearing on the ballot differently based on their political views, like the challenged law in *Cook*, 531 U.S. at 523, which was not a ballot-access measure at all. Unlike Missouri's attempt to use the ballot itself to highlight the fact that particular candidates supported or opposed Congressional term limits, the Act treats all partisan primary candidates the same. Moreover, it does not brand non-complying candidates as "inferior," (Order, ER 13), any

more than a law requiring primary candidates to pay a filing fee to appear on the ballot would brand non-complying candidates as inferior.

The district court sought to avoid that conclusion by declaring, contrary to the express terms of the Act itself and the Legislature's findings and statements of purpose, that the Act "fundamentally targets a Republican presidential candidate . . . ." (Order, ER 14; *see also id*., ER 12 (contending that if California "truly" wanted to protect the integrity of the electoral process, it would have "passed some version of the Act in 1992, when former California Governor Jerry Brown elected not to release his tax returns while running for the Democratic nomination").) As discussed in more detail below, *see infra* Part I.C.1.b, this was not only totally unsupported by the "evidence" considered by the district court, but also completely contrary to this Court's admonition that "absent narrow circumstances, a court may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019).

Finally, the Act does in fact protect the "integrity and reliability of the electoral process itself," *Term Limits*, 514 U.S. at 834, by ensuring that California voters have access to information they have relied on for decades, and can make informed decisions regarding the candidates' potential

conflicts of interest, fraud, and corruption. *See Democratic Party of U.S. v. Wis*., 450 U.S. 107, 126 n.28 (1981) ("Obviously, States have important interests in regulating primary elections, [citation]. A state, for example, has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.") (internal quotations and citation omitted); *Storer*, 415 U.S. at 733 (same, quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972), and citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

For the foregoing reasons, the district court erred by holding that Plaintiffs were likely to prevail on their claims under the Qualifications Clause.

B. The Act does not violate plaintiffs' First Amendment rights of association or ballot access.

In considering Plaintiffs' First Amendment claims, the district court erred by applying strict scrutiny to the Act, instead of the balancing test under *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The district court concluded the Act imposes a "severe" burden on First Amendment rights, triggering strict scrutiny. It reached this result by, again, improperly focusing on the consequences of non-compliance (loss of access to the ballot), instead of the practical burdens attending compliance with the Act (simply disclosing tax

returns, which nearly all presidential candidates have done for nearly 50 years). The district court also supported its conclusion by, again, ascribing an improper motive to the Legislature based on a chain of unwarranted inferences.

As set forth in more detail below, the Act is a "reasonable, nondiscriminatory," and even-handed ballot-access measure that promotes important state interests, including ensuring that presidential primary voters have access to information about the candidates that they have relied on for more than four decades. *Burdick*, 504 U.S. at 434. The burden of disclosure, if any, is minimal and is amply justified by the State's express justifications for the law.

1. The court erred by holding that strict scrutiny applies.

In examining First Amendment challenges to state election laws, "the Supreme Court [has] developed a balancing test to resolve the tension between a candidate's First Amendment rights and the state's interest in preserving the fairness and integrity of the voting process." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). Specifically, a court must weigh "the character and magnitude" of the asserted burden against the "interests put forward by the State as justifications," taking into

consideration the extent to which the State's interests make the burden necessary. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted) (citing *Anderson*, 460 U.S. at 789); *see also Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) (reaffirming application of the *Anderson-Burdick* analysis); *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024-25 (9th Cir. 2016) (en banc) (same).

The test is a "sliding scale test, where the more severe the burden, the more compelling the state's interest must be, such that 'a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests.'" *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016) (quoting *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 729-30 (9th Cir. 2015)); *see also Soltysik*, 910 F.3d at 444. At the far end of the scale, a regulation imposing "severe" restrictions is subject to strict scrutiny. *See Burdick*, 504 U.S. at 434. But when a state election law imposes only "'reasonable, non-discriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788); *see also Public Integrity Alliance*, 836 F.3d at 1025. Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the

effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986)).

a. The District Court improperly found a "severe" burden by focusing on the consequences of choosing not to comply with the Act.

Here, no Plaintiff met their burden of establishing that compliance with the Act severely restricts the "availability of political opportunity." *Ariz. Libertarian Party*, 798 F.3d at 731 (citation omitted). Instead, they argued, and the district court agreed, that the Act imposes "severe" burdens on First Amendment rights because non-compliance results in exclusion from the ballot. As explained above, however, that is not the correct focus. The proper focus is on the burdens resulting from *compliance with,* not *defiance of*, the Act. If the district court were correct, every ballot-access measure would be presumptively unconstitutional, but that is not the law. To the contrary, this Court has "noted that 'voting regulations are rarely subject to strict scrutiny.'" *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013). By concluding that strict scrutiny applies without even considering the character and magnitude of the burdens attending compliance with the Act, the district court abused its discretion.

b. The District Court's second-guessing of the Legislature's "true" motivation was an abuse of discretion.

The district court further erred by holding that strict scrutiny applies because the Act "target[s]" President Trump and the Legislature's stated justifications for the Act are "specious." (Order, ER 14; *see also id*., ER 4 ("[T]he State's argument that the California Legislature passed the Act to codify a custom followed by presidential candidates in the past decades is disingenuous."), 12, 18.) In so holding, the district court ignored the Act's operative terms, as well as the Legislature's stated aims in passing the Act; it simply batted aside "any attempt to couch the Act as an informational device to be applied equally to all candidates." (Order, ER 3.) This second-guessing of the Legislature's motives permeates the district court's Order and was error.

On its face, the Act is non-discriminatory and politically neutral; it treats all presidential primary candidates (as well as all candidates in the gubernatorial primary) the same, regardless of their party. (*But cf.* Order, ER 14 (contending that the Act was passed by a "Democratic majority" in the Legislature to "target[]" a Republican presidential candidate).) As the Act itself states, its purpose is to "ensure[] that California voters make informed, educated choices in the voting booth." Cal. Elec. Code § 6881. It

is based on the Legislature's determination that a "candidate's income tax returns provide voters with essential information" and helps them "better estimate the risks of any given Presidential candidate engaging in corruption or the appearance of corruption." *Id*. The legislative history echoes these unambiguous statements of purpose.[16]

While President Trump's refusal to release his tax returns in 2016 was indeed the catalyst for the Act, nothing in the text or legislative history evinces an intent to punish or sanction President Trump or any other candidate, or to dictate a particular outcome. With a few exceptions, presidential candidates have been disclosing their tax returns for public inspection for nearly 50 years, and—until now—no sitting president has categorically refused to do so. California acted to prevent President Trump's refusal to disclose his tax returns from becoming the new normal.

The district court, however, assumed that if voter education were "truly" the State's objective, it would have passed legislation in 1992, when former Governor Brown declined to release his tax returns. In the same vein, the district court found proof of improper motive in the Legislature's

[16] *See generally* Sen. Floor Analysis to Senate Bill No. 27 (2019-2020 Reg. Sess.) April 24, 2019, available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB27 (last visited Nov. 5, 2019).

decision to pass the Act as an urgency statute so it would take effect in time for the 2020 primary. (Order, ER 4, 6, 12.) These are unwarranted leaps. The California Legislature of today is free to view things differently than it did 27 years ago.[17] Among other things, in 1992, both the incumbent President George H.W. Bush and the President-elect Bill Clinton disclosed their tax returns, so non-disclosure by a particular candidate(s) may not have set off alarm bells the way it does now. Meanwhile, "the sitting President possesses financial holdings that are arguably more complex than past Presidents held, has elected while in office to handle his finances differently than past Presidents did, and has declined to voluntarily release the sorts of tax-return information that past Presidents disclosed." *Mazars*, 2019 WL 5089748, at *21.

Similarly, while the district court saw significance in State Sen. McGuire's statements (*see* Order, ER 4), nothing he said compels the conclusion that the Act's stated purposes are "specious" or "disingenuous." He said only that the Act will be in place in time for the 2020 primary, which was a true, factual statement, and that President Trump should "step

[17] The fact that the Legislature took no action in 1992 is a particularly weak indicator of legislative intent, then or now. *Pedroza v. BRB*, 624 F.3d 926, 933 (9th Cir. 2010) (holding that legislative inaction "is not a reliable guide to determine legislative intent").

up and release his tax returns"—like every other presidential primary candidate must do in order to appear on the ballot. There is nothing nefarious in any of that, or in the fact that President Trump's break with tradition prompted the Legislature to act. *Cf. Mazars*, 2019 WL 5089748, at *12 (holding that a Congressional investigation "may properly focus on one individual if that individual's conduct offers a valid point of departure for remedial legislation . . . . That the Committee began its inquiry at a logical starting point betrays no hidden law-enforcement purpose").

The district court took a dim view of the Legislature's policy choice (*see* Order, ER 13-14), but that does not justify its wildly speculative inquiry into the Legislature's supposed, subjective motivations. The Supreme Court has repeatedly recognized "that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). Such inquiries "are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1982), fraught with "evidentiary difficulty," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384.

Even where an inquiry into legislative motive or purpose is called for, "the Supreme Court has consistently held that statutory construction must begin with the language employed by [the legislature] and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 401 (9th Cir. 2015); *accord HomeAway.com, Inc.*, 918 F.3d at 685. Courts must "assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances *forces* us to conclude that they '*could not* have been *a* goal of the legislature.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)) (emphasis added).

The district court ignored these directives. It acknowledged that requiring disclosure of tax returns "could shed light on" important matters, and that this information is "important to a voter's ability to evaluate how a candidate's financial interests might affect future decision making," (Order, ER 8), but nonetheless refused to accept that those were the Legislature's actual goals. This, too, was an abuse of discretion warranting reversal.

2. The Act is likely to pass constitutional muster under the *Anderson-Burdick* Balancing Test.

a. The Act imposes only a slight, if any, burden on Plaintiffs' asserted rights.

In examining challenges to ballot-access requirements, courts "focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Clements v. Fashing*, 457 U.S. 957, 964 (1982). Unless the requirement "seriously restrict[s] the availability of political opportunity," *Ariz. Green Party*, 838 F.3d at 989 (citation omitted); *De La Fuente v. Padilla*, 930 F.3d 1101, 1105 (9th Cir. 2019), in which case strict scrutiny applies, the requirement will usually be upheld. Here, the Act is a reasonable, nondiscriminatory, even-handed measure that imposes at most a slight burden on asserted First Amendment rights. *See, e.g., Mazars*, 2019 WL 5089748, at *15 (holding that laws requiring presidential candidates to do "nothing more than *disclose* financial information" are "less burdensome" than conflict-of-interest laws requiring them to divest or take other actions based on their finances) (emphasis in original); *El-Amin v. State Bd. of Elec.*, 717 F. Supp. 1138, 1141 (E.D. Va. 1989) (holding that the burden of meeting the State's filing deadline for financial disclosure statements was "small indeed, for candidates can avoid their unofficial fate simply by filing the form sometime

during the first six months of the election year"). The district court erred in holding that the Act imposes a "severe" burden.

Plaintiffs alleged, and the district court agreed, that the Act infringes on the First Amendment speech and associational rights of candidates, political parties, and voters. (*Melendez* CD 1 at 16-21, ER 309-314; *Griffin* CD 1 at 9-10, ER 350-351; *Koenig* CD 1 at 17-18, ER 338-339; *Trump* CD 1 at 13-14, ER 290-291.) Regardless of how the asserted rights may be characterized,[18] however, the alleged burden on them is slight. The Act does not "exclude" any class of candidates from the ballot, *Clements*, 457 U.S. at 964 —*all* candidates are capable of complying with the Act. *Mazars*, 2019 WL 5089748, at *17. Nor does the Act "limit the choices of any particular group of voters." *Plante v. Gonzalez*, 575 F.2d 1119, 1126-27 (5th Cir. 1978) (upholding the constitutionality of Florida's financial disclosure law, which required candidates for constitutional offices to submit the most recent copy of their federal tax return or a sworn statement that identified each separate source and amount of income that exceeded $1,000).

[18] While described variously as ballot-access rights, associational rights, or voting rights, these rights are interrelated, and the *Anderson-Burdick* balancing test applies the same way in each instance. *Burdick*, 504 U.S. at 438 (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation.")).

Contrary to the district court's analysis, if Plaintiffs Trump and De La Fuente or any other candidate were excluded from the ballot, that would result from their own decision-making, not the Act. Similarly, other Plaintiffs' alleged inability to associate with or vote for Trump or De La Fuente would not be caused by the Act, but by the candidates' refusal to disclose their tax returns.[19] For example, in *De La Fuente*, the plaintiff challenged California's requirement that independent presidential candidates collect signatures from one percent of the state's registered voters to appear on the general election ballot. 930 F.3d at 1103-04. The plaintiff argued that the law was a "cost prohibitive" obstacle that severely burdened his right to access the ballot under the First Amendment. *Id.* at 1103-04. This Court disagreed, holding that simply because an individual candidate might not be able to fulfill the requirement does not mean that California's overall scheme severely impairs ballot access. *Id.* at 1105 (citing *Ariz. Libertarian Party*, 798 F.3d at 730).

[19] Of course, aside from the Act, all candidates must comply with various other requirements to appear on the presidential primary ballot. *See* Cal. Elec. Code § 6000.1, *et seq.* They also must comply with the varying multitude of ballot-access restrictions in the other 49 states. *See* https://ballotpedia.org/Ballot_access_for_presidential_candidates (last viewed Nov. 5, 2019).

Similarly, California's election law permits all recognized presidential candidates, as defined in California Elections Code § 6000.1, to be listed on the primary election ballot if they submit the required paperwork, *id.* § 6000.2, and authorize the Secretary of State to release their tax returns, *id.* §§ 6883, 6884. Simply because two individual candidates choose not to disclose financial information that is readily available to them—as presidential candidates have done routinely for decades—does not mean the law severely burdens their ballot-access rights, or the rights of political parties to associate with them, or the rights of voters to vote for them.

Notably, it is decidedly *less* difficult and burdensome to disclose five years of tax returns than to comply with EIGA's disclosure requirements. *See* 5 U.S.C. App. 4 § 101(c); *Mazars*, 2019 WL 5089748, at *1, 16 (summarizing EIGA's disclosure requirements).[20] Yet, no Plaintiff suggests

[20] EIGA requires disclosure of some information that need not be reported to the IRS. For example, EIGA requires presidential candidates to disclose any interest in property exceeding a fair market value of $1,000, 5 U.S.C. App. 4 § 101(a)(3), and any liabilities owed to any creditor exceeding $10,000, *id.* § 101(a)(4). This information would generally not be disclosed in tax returns. Moreover, EIGA requires candidates to compile and report information from a multitude of other sources on forms prescribed by the government, whereas the Act only requires candidates to provide copies of documents they have already prepared.

that EIGA imposes any burden on their First Amendment rights, nor could they.

In sum, the burdens associated with compliance in this case, if there are any, are *de minimis*.

b. The Act furthers the State's compelling interests, which outweigh the slight burden on Plaintiffs' asserted rights.

Any slight burden imposed by the Act on Plaintiffs' asserted rights is justified by important—indeed compelling—state interests. California has a compelling interest in ensuring that its voters have fulsome and accurate information about the financial interests and business dealings of presidential primary candidates so that they may make informed decisions in the voting booth. "An informed public is essential to the nation's success, and a fundamental objective of the first amendment." *Barry v. City of New York*, 712 F.2d 1554, 1560 (2d Cir. 1983) (internal citation and quotation omitted); *see also Anderson*, 460 U.S. at 796 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election.").

Financial information about presidential candidates, in particular, is critically important to ensuring an informed electorate. Voters have come to rely on this information in the decades following President Nixon's decision

to turn over his tax returns. Congress recognized the importance of informing the public of financial conflicts and other information by requiring presidential candidates to provide extensive financial disclosures under EIGA, 5 U.S.C. App. 4 § 101, *et seq*., and is currently considering amendments to strengthen EIGA, as well as new statutes requiring presidents and presidential candidates to make additional disclosures. Courts have similarly recognized that financial disclosure laws "derive considerable strength from the benefits widely felt to be derived from openness and from an informed public." *Barry*, 712 F.2d at 1560; *see also Plante*, 575 F.2d at 1137 (holding that public disclosure of financial information about candidates "serves one of the most legitimate of state interests"). Indeed, financial disclosures further "[o]ne goal of the First Amendment," which "is to ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech." *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987).

To this end, the Second Circuit upheld a financial disclosure law enacted by New York City that required candidates for City offices to publicly disclose "extensive information about their personal finances," including sources of income (their own and their spouse's), sources of capital gains, sources of gifts or honoraria, indebtedness, and the nature of

their investments. *Barry*, 712 F.2d at 1556-1557, 1560. The court held that the disclosure law "plainly furthers a substantial, possibly even a compelling, state interest" in "deter[ring] corruption and conflicts of interest among City officers and employees, and [] enhanc[ing] public confidence in the integrity of its government." *Id.* at 1560.

Cases in the campaign-finance disclosure context have been particularly clear about the compelling state interest in providing the electorate information about candidates' finances and those of their campaigns. "Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam), *superseded on other grounds by McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93 (2003); *see id.* at 67-68 (holding that government has a substantial interest in requiring candidates to disclose the source of campaign contributions to provide the electorate with information about the "interests to which a candidate is most likely to be responsive," to "deter actual corruption and avoid the appearance of

corruption," and "to detect violations of the contributions limits"). The "vital provision of information [to the electorate] repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest." *Human Life*, 624 F.3d at 1005.

Below, Plaintiffs argued (and the district court held) that the Act is unnecessary to inform California voters about potential conflicts of interests or other improprieties, because presidential candidates must already provide extensive financial disclosures under EIGA. (Order, ER 18.) This ignores that EIGA does not require disclosure until May 15 of the election year—two months *after* California's primary election, which takes place in March. 5 U.S.C. App. 4 § 101(c). It also rings hollow, given Trump's contention in the D.C. Circuit—in a failed attempt to invalidate a subpoena issued by a Congressional Committee for his financial records—that EIGA somehow interferes with the Chief Executive's duties and constitutes a prohibited "Qualification" for office. EIGA, which contains some, but not all, of the information in tax returns, is not a substitute for the Act.

In sum, because the compelling and weighty state interests served by the Act far outweigh the slight burden on Plaintiffs' asserted rights, the district court abused its discretion by holding they are likely to prevail on their First Amendment claims.

C. The Act does not violate the Equal Protection Clause.

Contrary to the district court's cursory analysis, (Order, ER 20), Plaintiffs have no likelihood of success on claims that the Act violates the Equal Protection Clause. Partisan and independent presidential candidates are not "similarly situated," as this Court has previously recognized, and the Act does not unfairly disadvantage partisan presidential candidates and voters who support them in favor of independent presidential candidates and their supporters.

The Equal Protection Clause directs that all persons similarly situated shall be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Conversely, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* The "initial discretion to determine what is 'different' and what is 'the same' resides" in the State, which has "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Id.* For that reason, the classification at issue must bear only "some fair relationship to a legitimate public purpose." *Id.*

Here, for Plaintiffs to prevail, they must "establish that the two groups, partisan and independent candidates, are similarly situated with respect to the routes they must take to get on the general election ballot." *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003). They cannot make that showing because this Court has already rejected such a theory.

In *Van Susteren*, the plaintiff, a primary election candidate, challenged California's disaffiliation requirement, which required partisan primary candidates to have been disaffiliated from membership in other political parties for at least one year before filing to run. *Id.* at 1025. The plaintiff asserted this violated the Equal Protection Clause because it treated partisan and independent candidates differently. *Id.* at 1026. This Court, however, held that "[t]hese two groups are not similarly situated." *Id.* at 1027. "Party candidates must run in a primary election, which is integral to the election process because it serves the important function of winnowing out competing partisan candidates." *Id.* (citing *Storer*, 415 U.S. at 735). "By contrast, an independent candidate need not, and indeed may not, participate in a party primary in order to be on the general election ballot." *Id.* (citation omitted).

The same is true here. The Act applies only in primary elections, in which independent presidential candidates, unlike partisan presidential

candidates, do not run. Thus, as in *Van Susteren*, these two classes of candidates are not "similarly situated with respect to the routes they must take to get on the general election ballot." 331 F.3d at 1027.

The district court erroneously relied on dicta in *Van Susteren*, in which the Ninth Circuit observed that the *disaffiliation periods* that applied to independent and primary candidates were "essentially similar." (Order, ER 20 (citing *Van Susteren*, 331 F.3d at 1027).) Specifically, the Ninth Circuit noted that, because independent and partisan candidates take different paths to the general election ballot, it was not constitutionally relevant that partisan candidates had to be disaffiliated for a longer period of time before the general election than independent candidates; "the more appropriate comparison is . . . between the disaffiliation period before the primary election for partisan candidates and the disaffiliation period before the general election for independent candidates," and those periods were "essentially similar." *Van Susteren*, 331 F.3d at 1027. The same reasoning applies here. Even if independent and partisan candidates were similarly situated, and they are not, the Act does not disadvantage partisan candidates relative to independent candidates.

Plaintiffs' bare assertions to the contrary "cannot be uncritically accepted." *Nader v. Cronin*, 620 F.3d 1214, 1218 (9th Cir. 2010) (holding

that the "alternative means" that Hawaii created for independent candidates to access the presidential ballot is not "inherently more burdensome" than the one for partisan candidates, even though independent candidates had to submit ten times more signatures than a political party had to submit to qualify for the primary). There is no allegation here, or any basis for alleging, that a candidate who discloses his or her tax returns is at an inherent disadvantage. To accept such a premise, one would have to assume that every presidential candidate who voluntarily disclosed their tax returns in the past fifty years intentionally disadvantaged their own campaigns.

The district court's sweeping conclusion that the State "lacks any valid interest" in providing voters with more information about partisan candidates than independent candidates was also erroneous. (Order, ER 20.) As discussed above, independent candidates do not participate in the primary. And the State's interest in regulating primary elections to ensure an informed electorate and protect the integrity of the process is well-established. *See Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 126 n.28 (1981) ("Obviously, States have important interests in regulating primary elections, [citation]. A State, for example, has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.") (internal quotation marks and citation omitted);

Storer, 415 U.S. at 735 (holding that party primaries are an "integral part of the entire election process," functioning to "winnow out and finally reject all but the chosen candidates"). As this Court recognized in *De La Fuente*, the last time an independent presidential candidate appeared on California's general election ballot was 1992 (not including write-in candidates). 930 F.3d at 1105. Thus, it is highly likely that the presidential candidates appearing on the general election ballot will be partisan, party-affiliated candidates, not independents. Given that reality, it was perfectly reasonable for the Legislature to apply the Act's disclosure requirements in the primary, but not the general.

Plaintiffs' equal-protection claims are likely to fail as a matter of law, and the district court abused its discretion by holding to the contrary.

D. EIGA does not preempt the Act.

The district court also erred in concluding that Plaintiffs were likely to succeed on their claim that EIGA preempts the Act. (Order, ER 20-21.) It held that 5 U.S.C. App. 4 § 107(b), which provides that EIGA "shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes

of preventing conflicts of interest or apparent conflicts of interest," except for those in 5 U.S.C. § 7342, expressly preempts the Act.[21] It does not.

In determining the preemptive effect of a federal statute, "the purpose of Congress is the ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The Court "'start[s] with the basic assumption that Congress did not intend to displace state law,' and that federal law does not supersede 'the historic police powers of the States' unless 'that was the clear and manifest purpose of Congress.'" *Knox v. Brnovich*, 907 F.3d 1167, 1173-1174 (9th Cir. 2018) (citations omitted). And "when the text of a pre-emptive clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 43, 449 (2005)). Because the Constitution "delegates authority to the States to regulate the selection of Presidential electors" and the primary process, *Anderson*, 460 U.S. at 794 n.18, the presumption against preemption applies here.

[21] Plaintiffs did not argue, and the district court did not hold, that the Act is likely preempted under a theory of either conflict or field preemption, only express preemption. (*See generally* Order, ER 1-24.)

The district court, however, refused to apply the presumption against preemption, on the theory that States do not traditionally regulate federal office holders. Even if the federal government also plays a role in regulating congressional elections or candidate financial disclosures, that does not displace the presumption: it applies "when a state regulates in an area of historic state powers even if the law 'touche[s] on' an area of significant federal presence." *Knox*, 907 F.3d at 1174 (quoting *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 n.5 (9th Cir. 2016)) (alteration in original).

Contrary to the district court's conclusion, section 107(b) is not an express preemption clause. It does not unequivocally "recite an intent to preempt *state* laws." *Malabed v. North Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003) (emphasis added). Rather, section 107(b) is silent on the subject of State laws. Such silence does not reveal the "clear and manifest intent" on Congress's part necessary for preemption. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1143 (9th Cir. 2015) (holding that "[s]ilence, without more, does not preempt—'a clear and manifest purpose of pre-emption is always required.'") (quoting *P.R. Dep't of Consumer Affairs v. Isla Petrol. Corp.*, 485 U.S. 495, 501 (1988)).

In reaching the opposite conclusion, the district court found that section 107(b)'s "use of the expansive term 'any' with the phrase 'other

provisions of law or regulation'" was "unambiguous[]" in preempting the Act. (Order, ER 21.) But the district court erred by "confin[ing] itself to examining a particular provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). As courts have recognized, "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Brown & Williamson*, 529 U.S. at 132). Section 107(b)'s words instead "must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 2489 (2015) (quoting *Brown & Williamson*, 529 U.S. at 134).

As this Court has recognized, even broad language seemingly reaching State laws (without expressly mentioning such laws) might not preempt State laws when properly interpreted in context. In *Ordlock v. CIR*, 533 F.3d 1136 (9th Cir. 2009), this Court held that the phrase "notwithstanding any other law or rule of law" did not encompass, and thereby did not preempt, state community property laws. *Id.* at 1145. While recognizing that the phrase was susceptible to such a broad reading when considered in isolation, the Court concluded that it was "unlikely Congress intended the . . . phrase to be a broad, catch-all preemption clause." *Id.* at 1143. When the phrase was read in context—including its reference to

specific federal laws it did not supersede—and in light of the "absence of any legislative history addressing this issue," the Court concluded that the clause did not reach state laws. *Id.* at 1143-45.

Such is the case with section 107(b) as well. When read in context, including its statutory history, it does not clearly or expressly preempt the Act. As an initial matter, the text of section 107(b) makes no express reference to State laws. Congress knows how to make its desire to preempt State laws clear and manifest, as reflected by the numerous preemption clauses in federal law. *See, e.g.*, 52 U.S.C. § 30143(a) (federal campaign finance laws "supersede and preempt any provision of State law" governing federal election finance). It also knows how to make its intent to supersede both State and other Federal laws—or neither—clear and manifest. *See, e.g.*, 12 U.S.C. § 5012 ("This chapter shall supersede any provision of Federal or State law . . . that is inconsistent with this chapter, but only to the extent of the inconsistency."); 47 U.S.C. § 325(e)(9)(B) ("The procedure for an appeal under this paragraph by the satellite carrier shall supersede any other appeal rights under Federal or State law."). But section 107(b) does not specify whether it is meant to specifically supersede State law, Federal law, or both. As such, it can—and should—be read to reach only federal laws.

This interpretation is even more apparent when section 107(b) is read in the greater context of EIGA and its statutory history. *See Wyeth*, 555 U.S. at 566; *Brown & Williamson*, 529 U.S. at 144. As originally passed, EIGA created three different financial disclosure regimes—one each for the federal legislative, executive, and judicial branches—that each contained a different clause addressing its impact on other laws. Former Title I, governing the legislative branch, contained a traditional express preemption clause providing that that title "shall supersede and preempt any State or local law with respect to financial disclosure by reason of candidacy for Federal office or employment by the United States Government." Ethics in Government Act of 1978, Pub. L. No. 95-521, § 108, 92 Stat. 1824, 1835. Former Title II, governing the executive branch (including presidential candidates, *see id.*, § 201(c), 92 Stat. at 1836), contained the language now in section 107(b). *Id.*, § 207(c), 92 Stat. at 1849. Former Title III, governing the judicial branch, contained a clause akin to that in Title II, providing that that title "shall not supersede the requirements of [5 U.S.C. § 7342]." *Id.*, § 307(c), 92 Stat. at 1860. In 1989, EIGA was amended to merge the three separate financial disclosure regimes into a single regime for all three branches. *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, tit. II, 103 Stat. 1716, 1724. In doing so, Congress elected to retain solely the provision now at

section 107(b), deleting the preemption clause in former section 108 and the provision in former section 307(c). *See id.*

This statutory history strongly suggests that Congress did not intend to preempt state laws in section 107(b). Section 108 was clearly an express preemption provision, and its scope would likely have reached a law such as the Act (if applied to those covered by former Title I). Courts "usually 'presume differences in language like this convey differences in meaning.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). That Congress knew precisely the words to use to preempt a law like the Act but elected not to use this "ready alternative" language in former Title II or current section 107(b) "indicates that Congress did not in fact want what the [plaintiffs] claim." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). It instead suggests that Congress meant section 107(b) to reach only federal, not state, laws. The legislative history confirms this, indicating that current section 107(b) was meant to supersede the then-existing patchwork of *federal* disclosure laws for executive branch officials, not to preempt state laws governing presidential primaries. *See* H.R. Rep. No. 95-642, pt. 1, at 51 (1977) (listing examples of preempted federal

laws).[22] Even if it is not clear that section 107(b) was intended to supersede only federal law, it is susceptible to such a non-preemptive reading and, accordingly, should be so construed.

Even if the Court were to conclude that section 107(b) sweeps in state as well as federal laws, the Act still does not fall within the scope of any preemptive effect. Section 107(b) only reaches disclosure laws governing "the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest." 5 U.S.C. App. 4 § 107(b). The Act is not such a law. Rather, it is a regulation of the state presidential primary election process. Its purpose extends beyond conflicts of interests, and instead is aimed at "prov[iding] voters with essential information" about presidential candidates, "help[ing] voters to make a more informed decision," and enforcing the Emoluments Clause. Cal. Elec. Code § 6881. Since the Act has a much different purpose and role than the financial disclosure regimes referenced by section 107(b), it is not preempted by EIGA on any theory. The district court abused its discretion in holding otherwise and should be reversed.

---

[22] H.R. Rep. No. 95-642 discussed H.R. 6954, which was the basis for Title II of the House version of EIGA, *see* H.R. Rep. No. 95-800, at 17 (1978), and contained essentially identical language, *see* H.R. Rep. No. 95-642, pt. 1, at 13.

II. PLAINTIFFS CANNOT ESTABLISH THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

Plaintiffs cannot show a likelihood of success on the merits. Moreover, "[b]ecause it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, [the Court] need not consider the remaining three *Winter* elements." *Garcia v. Google, Inc*., 786 F.3d 733, 740 (9th Cir. 2015).

Regardless, in the absence of any likely constitutional violation or preemption, Plaintiffs cannot show a likelihood of irreparable harm. For this reason, the district court's injunction could not be upheld on the theory that "there are at least serious questions on the merits here": even in the presence of serious questions on the merits, "plaintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is *likely* to result in the absence of the injunction." *All. For the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added).

Separately, the district court abused its discretion in analyzing the balance of the equities and determining where the public interest lies. In exercising sound discretion, a district court "must balance the competing claims of injury and consider the effect of granting or withholding the requested relief," paying "particular regard for the public consequences in

employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation marks and citation omitted). "The public interest analysis for the issuance of a preliminary injunction requires [the Court] to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Indep. Living Ctr., So. Cal. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012).

Plaintiffs cannot establish harm sufficient to outweigh the fact that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State") (citation omitted). Moreover, an injunction prohibiting the enforcement of the Act would be against the public interest because it would deprive voters of critical information about presidential candidates running in the primary. Cal. Elec. Code § 6881. The public "can better estimate the risks of any given Presidential candidate engaging in corruption or the appearance of corruption if they have access to candidates' tax returns." *Id*. For these reasons, the public interest would be harmed if enforcement of the Act were enjoined.

Balancing these compelling public interests against plaintiffs De La Fuente and Trump's claimed harm in not being placed on California's primary election ballot if they choose not to comply with the Act (and the other the derivative harms alleged by other Plaintiffs)—an alleged harm De La Fuente and Trump could cure by simply complying with the Act—the equities clearly favor of the State Defendants.

CONCLUSION

For the forgoing reasons, the State Defendants request that this Court vacate the Order and remand with instructions to deny the motions for preliminary injunction in *Griffin*, *Trump*, *Melendez*, *Koenig*, and *De La Fuente*.

Dated: November 5, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General
JAY C. RUSSELL
PETER CHANG
KRISTIN A. LISKA
Deputy Attorneys General

/s/ Chad A. Stegeman
CHAD A. STEGEMAN
Deputy Attorney General
Attorneys for Defendants-Appellants Governor Gavin Newsom and Secretary of State Alex Padilla, in their official capacities

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 27(d)(2)
FOR 19-17000, 19-17002, 19-17004, 19-17007, 19-17009

Pursuant to Federal Rules of Appellate Procedure 28 and 32, I certify that the attached Defendants-Appellants' Consolidated Opening Brief is proportionately spaced, has a typeface of 14 points, was produced on a computer and, according to the word count of the computer program used to prepare the Consolidated Opening Brief, contains 12,664 words, exclusive of those items set forth in Federal Rule of Appellate Procedure 32(f), within the above-stated limits applicable to said Brief.

November 5, 2019
Dated

/s/ Chad A. Stegeman
Chad A. Stegeman
Deputy Attorney General

SA2019104158