HARMEET K. DHILLON (SBN: 207873)
harmeet@dhillonlaw.com
MARK P. MEUSER (SBN: 231335)
mmeuser@dhillonlaw.com
GREGORY R. MICHAEL (SBN: 306814)
gmichael@dhillonlaw.com
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700
Facsimile: (415) 520-6593
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MELISSA MELENDEZ, an individual; **BILAL ALI ESSAYLI**, an individual**; CHARLES MCDOUGALD**, an individual; **THE REPUBLICAN NATIONAL COMMITTEE;** and **THE CALIFORNIA REPUBLICAN PARTY**,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; and **ALEX PADILLA**, in his official capacity as Secretary of State of the State of California,

Defendants.

Case No.: 2:19-cv-01506-MCE-DB

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: September 19, 2019
Hearing Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

NOTICE

Notice is hereby given that Plaintiffs MELISSA MELENDEZ, BILAL ESSAYLI, CHARLES MCDOUGALD, THE REPUBLICAN NATIONAL COMMITTEE, and THE CALIFORNIA REPUBLICAN PARTY make the following motion, to be heard on September 19, 2019 at 2:00 p.m., 501 I Street, Sacramento, Courtroom 7.

MOTION

Plaintiffs hereby move for a preliminary injunction enjoining enforcement of the provisions of the Presidential Tax Transparency and Accountability Act, enacted through Senate Bill 27 ("SB27"), that require candidates for the presidency to disclose their tax returns as a condition of appearing on a primary ballot. *See* Cal. Elec. Code §§ 6880-6884. This motion is based on the memorandum, declarations, and exhibits filed herewith, and the pleadings on file. Plaintiffs do not desire to present oral testimony at the hearing. *See* Local Rule 231(d)(3). Plaintiffs estimate an hour will be required for the hearing. *Id.*

Respectfully submitted,

Dated: August 10, 2019

DHILLON LAW GROUP INC.

By: /s/ Harmeet K. Dhillon

Harmeet K. Dhillon, SBN 207873
Mark P. Meuser, SBN 231335
Gregory Michael, SBN 306814
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, California 94108

Attorneys for Plaintiffs

HARMEET K. DHILLON (SBN: 207873)
harmeet@dhillonlaw.com
MARK P. MEUSER (SBN: 231335)
mmeuser@dhillonlaw.com
GREGORY R. MICHAEL (SBN: 306814)
gmichael@dhillonlaw.com
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700
Facsimile: (415) 520-6593
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MELISSA MELENDEZ, an individual; **BILAL ALI ESSAYLI**, an individual**; CHARLES MCDOUGALD**, an individual; **THE REPUBLICAN NATIONAL COMMITTEE;** and **THE CALIFORNIA REPUBLICAN PARTY**,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; and **ALEX PADILLA**, in his official capacity as Secretary of State of the State of California,

Defendants.

Case No.: 2:19-cv-01506-MCE-DB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: September 19, 2019
Hearing Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Governor Newsom and the California State Legislature ("California Legislature") should know better. Two years ago, the California Office of Legislative Counsel ("COLC") and then-Governor Brown advised that legislation conditioning the ability to stand in California's presidential primary election on the disclosure of confidential personal tax returns was dangerous and would likely violate the United States Constitution. Ops. Legis. Counsel, *Presidential Qualification: Tax Return Disclosure* No. 1718407 (Sept. 7, 2017); Melendez Decl., ¶9, Ex. 1. Yet here we are. Apparently valuing the opportunity to score a cheap political hit against President Donald J. Trump ("President Trump") above fidelity to the Constitution, and with open disregard for the sound advice of both COLC and former Governor Brown, the California Legislature and Governor Newsom have passed and enacted the "Presidential Tax Transparency and Accountability Act of 2019," or California Senate Bill 27, now codified as California Elec. Code §§ 6880-84 (the "Act"). This piece of political theater, if allowed to play out, would have irreparable consequences to our polity.

The Act violates distinct Constitutional protections, running afoul of, *inter alia*: (I) the Qualifications Clause of Article II, Section 1 of the U.S. Constitution; (II) the First Amendment to the U.S. Constitution as incorporated by the Fourteenth Amendment; and (III) The Equal Protection Clause of the Fourteenth Amendment.

In order to ensure that the Act would have its desired political effect against President Trump and his party, the California Legislature has labeled the Act as an "urgency statute," declaring it "necessary for the immediate preservation of the public, peace, health or safety." The California Legislature has taken this extraordinary step even though California has been conducting presidential primary elections without a tax disclosure requirement since the early 20th Century. The Act will take effect immediately, and unless this Court takes immediate action to enjoin the Act's enforcement before November 26, 2019, President Trump will be forced to choose between bowing to the unconstitutional demands of the California Legislature and Governor Newsom or being left off the ballot in his own party's presidential primary election.

Plaintiffs – individual Republican voters, the Republican National Committee ("RNC"),

and the California Republican Party ("CAGOP") – face imminent harm if the Act remains in place. President Trump has indicated he will not publicly disclose his tax returns. Plaintiffs face the denial or abridgement of their personal and associational rights to associate for the advancement of their political beliefs and effectively cast a ballot for the constitutionally qualified candidate of their choosing and their organizational right to "select a standard bearer who best represents the party's ideologies and preferences." *Eu v. S.F. Democratic Comm.*, 489 U.S. 214, 224 (1989) (quotation marks omitted).

Plaintiffs are thus forced to seek preliminary injunctive relief. As Plaintiffs will demonstrate, a preliminary injunction is warranted in this case because (I) the Act is facially unconstitutional; (II) Plaintiffs will suffer imminent irreparable harm unless the Court grants the requested relief; (III) the balance of the equities favor protecting Plaintiffs' rights; and (IV) injunctive relief is in the public interest. Accordingly, this Court should grant Plaintiffs' motion for a preliminary injunction, and enter an order immediately enjoining Defendants from enforcing the Act for the duration of this case.

BACKGROUND

In 1913, the Sixteenth Amendment to the U.S. Constitution authorized a national income tax and the Internal Revenue Bureau created the "U.S. Individual Income Tax Return" known as "Form 1040." U.S. Const. amend. XVI; Ellen Terrell, *History of the US Income Tax*, BUSINESS REFERENCE SERVICES, https://www.loc.gov/rr/business/hottopic/irs_history.html. Since that time, no candidate for federal office has ever been required to publicly disclose their confidential personal tax returns until the passage of this extraordinary Act. No President voluntarily disclosed his personal tax returns until 1973, when President Nixon released his confidential personal tax returns after portions of them were illegally leaked. Jill Disis, *Presidential tax returns: It started with Nixon. Will it end with Trump?,* CNN BUSINESS, Jan. 26, 2017, https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html. President Ford did not release his confidential personal tax returns, providing only a summary. *Id.*

Many presidential candidates choose not to disclose their confidential personal tax returns. For example, in 1992, former Governor of California Jerry Brown, then a candidate for the

Democratic nomination for President, elected not to release his tax returns. Douglas Jehl, *Clinton Tax Attack on Brown Boomerangs*, LA TIMES, Mar. 29, 1992, https://www.latimes.com/archives/la-xpm-1992-03-29-mn-483-story.html. In that same year, Ross Perot elected not to disclose his tax returns. Leigh Ann Caldwell, *Outrage Over Tax Returns a Replay of Past Campaigns*, CBS NEWS, July 17, 2012, https://www.cbsnews.com/news/outrage-over-tax-returns-a-replay-of-past-campaigns/. In 2000, Ralph Nader elected not to disclose his tax returns. *Nader Reports Big Portfolio In Technology*, THE NEW YORK TIMES, A16, Jun. 19, 2000, https://www.nytimes.com/2000/06/19/us/nader-reports-big-portfolio-in-technology.html.

During his 2016 presidential campaign, then-candidate Donald J. Trump chose not to disclose his confidential personal tax returns. In the course of that campaign, President Trump won the California Republican presidential primary election, receiving all of California's 172 delegates to the 2016 Republican National Convention. Then, as the Republican nominee, President Trump proceeded to win the November 8, 2016 general election and was elected President. Plaintiffs Melissa Melendez, Bilal Ali "Bill" Essayli, and Charles McDougald (collectively, the "California Voter Plaintiffs"), all voted for President Trump in the 2016 California Republican presidential primary election and the 2016 general election. Melendez Decl. ¶4; Essayli Decl. ¶4; McDougald Decl. ¶4. Each of the California Voter Plaintiffs intends to vote for President Trump in both the 2020 California Republican presidential primary and general elections. *Id*.

In response to President Trump's victory and his decision not to disclose his tax returns, Democrat-controlled state legislatures targeted President Trump by drafting legislation to try and force him to disclose his confidential personal tax returns ("Trump Tax Return Legislation").

A. Trump Tax Return Legislation

The New Jersey Legislature was the first to pass Trump Tax Return Legislation, Senate Bill No. 3048 ("S3048"), in March of 2017. Governor Christie vetoed S3048 on May 1, 2017. *Id.* In his veto statement, Governor Christie declared, "[t]his transparent political stunt masquerading as a bill is politics at its worst" and is unconstitutional because "the United States Constitution sets the rules in this regard to prevent politics like this bill." Governor Christie, *Governor's Veto*

Message, S3048, https://www.njleg.state.nj.us/2016/Bills/S3500/3048_V1.PDF. Governor Christie further observed that the legislature had passed "this unconstitutional bill as a form of therapy to deal with their disbelief at the 2016 election results, and to play politics to their base. Any claim to the contrary is belied by the press releases its supporters issued immediately upon its final passage and the plain language of the bill." *Id.*

California initially passed its own constitutionally suspect Trump Tax Return Legislation, SB149, in September of 2017. *See* SB149 Presidential Primary Elections: Ballot Access, California Legislative Information, "Text" Tab, https://bit.ly/2YQCXdf ("SB149 Legislative History"). SB149 was substantively identical to Section 1 of the Act. When asked to assess SB149, COLC—a nonpartisan agency—concluded that it would be unconstitutional if enacted. California Committee on the Judiciary Report (Senate), March 11, 2019, at 5 (citing Ops. Cal. Legis. Counsel, No. 1718407 (Sept. 7, 2017)), *available at* https://bit.ly/2YuMG93 ("Judiciary Report"); Melendez Decl., ¶9, Ex. 1. COLC explained that, if enacted, SB149 "would violate the qualifications clause of the United States Constitution." *Id.* (citing *Cook v. Gralike*, 531 U.S. 510 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)).

On October 15, 2017, then-Governor Jerry Brown, a Democrat, vetoed SB149, echoing COLC's concerns regarding its constitutionality. Governor Brown wrote in his veto message:

> While I recognize the political attractiveness – even the merits – of getting President Trump's tax returns, I worry about the political perils of individual states seeking to regulate presidential elections in this manner. First, it may not be constitutional. Second, it sets a "slippery slope" precedent. Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards? And will these requirements vary depending on which political party is in power? A qualified candidate's ability to appear on the ballot is fundamental to our democratic system. For that reason, I hesitate to start down a road that well might lead to an ever escalating set of differing state requirements for presidential candidates.
>
> SB 149 Legislative History, "Status" Tab.

In large part due to their encroachment on constitutional rights, efforts to enact Trump Tax Return Legislation have "floundered." Kathleen Ronayne and Adam Beam, *In Move Aimed at Trump, California Governor Signs Bill Requiring Presidential Candidates Release Tax Returns*, TIME, Jul. 30, 2019, https://time.com/5639293/california-presidential-tax-return-bill/; *see also* IL

S145, RI S342 and WA S5078.

Undaunted by these warnings, Democrats in the California State Legislature simply waited until a new governor, Gavin Newsom, was in office, then reintroduced substantially identical legislation to SB149 – the Act – in December 2018. *See* SB27 Primary Elections: Ballot Access, California Legislative Information, "History" Tab, https://bit.ly/2yU5QLr ("SB27 Legislative History"). The Act was given the same name as its vetoed predecessor and, for purposes of this matter, all of the relevant provisions are the same. *See* SB27 Legislative History, "Text" Tab.

B. The Act

On July 11, 2019, Governor Newsom signed the Act into law and it is codified as Chapter 7 to Part 1 of Division 6 of the California Elections Code. The Act provides, in relevant part:

> 6883. (a) Notwithstanding any other law, the Secretary of State shall not print the name of a candidate for President of the United States on a primary election ballot, unless the candidate, at least 98 days before the presidential primary election, files with the Secretary of State copies of every income tax return the candidate filed with the Internal Revenue Service in the five most recent taxable years . . . .
>
> Cal. Elec. Code § 6883(a).

The Secretary of State is then required to publish a copy of the candidate's personal tax returns on his publicly available website. Cal. Elec. Code § 6884(c).

The Act includes a purpose statement which states:

> [The] State of California has a strong interest in ensuring that its voters make informed, educated choices in the voting booth. To this end, the state has mandated that extensive amounts of information be provided to voters, including county and state voter information guides. The Legislature also finds and declares 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 donations.
>
> Cal. Elec. Code § 6881.

However, the Act's legislative history and statements made by California state legislators, conclusively demonstrate that the Act is really a political attack motivated by personal animus towards President Trump. State Senator Mike McGuire, one of the Act's co-sponsors in the California Senate, has repeatedly confirmed that the Act was primarily intended as a political attack against President Trump. He recently stated, "We believe that President Trump, if he truly

doesn't have anything to hide, should step up and release his tax returns." Julio Rosas, *California Democrats threaten to keep Trump off primary ballot if he doesn't hand over tax returns*, WASHINGTON EXAMINER, May 3, 2019, https://www.washingtonexaminer.com/news/california-democrats-threaten-to-keep-trump-off-primary-ballot-if-he-doesnt-hand-over-tax-returns. State Senator McGuire further confirmed the narrow political intent of the Act when he stated it "will make presidential tax returns public in CA *just in time* for the 2020 election." *Id.* (emphasis added). Governor Newsom is also seeking the President's tax returns for political gain, stating, "Folks think [President Trump] is avoiding tax release because he pays a very low rate, I think it's because his finances are a house of cards." John Meyers, *Trump's tax returns required under new California election law*, LOS ANGELES TIMES, Jul. 30, 2019, https://www.latimes.com/california/story/2019-07-30/trump-tax-returns-california-ballot-gavin-newsom-law. On June 18, 2019, President Trump announced his candidacy for the 2020 Republican nomination for President. President Trump has declined to disclose his confidential personal tax returns and has indicated that he will not disclose his confidential personal tax returns prior to the 2020 primary or general election. Jill Disis, *Presidential tax returns: It started with Nixon. Will it end with Trump?,* CNN BUSINESS, Jan. 26, 2017, https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html.

C. The Republican Presidential Nominating Process

A Republican candidate for President is nominated through a majority vote of the delegates to the Republican National Convention, estimated to be 1,272 out of a total 2,542 delegates in 2020. Riemer Decl., ¶¶4-5, 7-8. Rule 16(a)(1) of the Rules of the Republican Party ("RNC Rules") requires that when there is a statewide presidential preference vote, the results must be used to allocate and bind the state's delegation to the Republican National Convention and Rule 40(d) of the RNC Rules requires delegates to cast votes in accord with state party rules and state law. *Id.*, ¶¶4-6, Ex. 1. California, the nation's most populous state, has the most delegates and most votes toward the Republican nomination for President—currently expected to be 172 delegates, constituting 14% of the 1,272 delegates currently needed to secure the nomination. *Id.*, ¶9-11; *see also* RNC Rule 14. The RNC represents over 30 million registered Republicans in all 50 states,

the District of Columbia, and the U.S. territories. *Id.*, ¶2-3. It is comprised of 168 voting members representing Republican Party organizations in all states, the District of Columbia, and U.S. territories. *Id.*

Plaintiff the California Republican Party (the "CAGOP") is a political party in California with its principal place of business located at 1001 K Street, 4th Floor, Sacramento, CA 95814. Bryant Decl., ¶1. The Republican State Central Committee (the "RSCC") is the CAGOP's governing body. Bryant Decl., ¶3. The RSCC and the CAGOP exercise their "federal and state constitutional rights, as set forth in the First and Fourteenth Amendments to the U.S. Constitution, and Article IV, Section 5 . . . to represent and speak for [their] members [and] to endorse and to nominate candidates for all partisan elective offices…." Section 1.04.01 of the CAGOP Bylaws. *Id.*, ¶8. The CAGOP represents over 4.7 million registered Republican voters in the State of California as of February 10, 2019. *Id.*, ¶4. Nearly 2.2 million votes were cast in the 2016 California Republican presidential primary election. *Id.*, ¶5.

Section 6.01 of the CAGOP Bylaws governs the selection of delegates to the Republican National Convention for the purpose of nominating a Republican candidate for President. *Id.*, ¶8. Currently, the rules specify that the CAGOP's delegates to the 2020 Republican National Convention will be chosen by the presidential candidate who obtained the plurality of votes in the California Republican presidential primary election. *Id.*

Defendant Gavin Newsom signed the Act into law as Governor and is charged with the "executive power" of California, including the responsibility to "see that the law is faithfully executed." Cal. Const. art. V, § 1. Defendant Alex Padilla is the official charged with enforcing the Act as the California Secretary of State. Cal. Elec. Code § 6883(a).

If the Act is allowed to stand, it will prevent qualified voters in California from effectively casting a ballot for President Trump. However, the impact of the political stunt will extend well beyond its intended target by depressing voter turnout, preventing millions of voters from effectively voting for an otherwise qualified candidate of their choice if that candidate maintains the confidentiality of his or her confidential personal tax returns, and hindering the ability of political parties to associate with or support such qualified candidates.

LEGAL STANDARD

This court may grant the requested preliminary injunction if Plaintiffs demonstrate the following: "(1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm absent a preliminary injunction; (3) that the balance of the equities tips in the plaintiff[s'] favor; and (4) that injunctive relief is in the public interest." *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)). The Ninth Circuit considers these factors "on a sliding scale" allowing district courts to weigh any competing considerations to provide the appropriate relief. *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018).

Where the moving party alleges constitutional violations, including violations of rights secured by the First Amendment, they must make a "colorable claim" that their rights have been infringed or threatened with infringement, but upon this showing "the burden shifts to the government to justify the restriction." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) (citing *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009)).

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits

Plaintiffs are likely to succeed on the merits because the Act, on its face, violates (A) the Qualifications Clause of Article II, § 1, cl. 5 of the U.S. Constitution; (B) the First Amendment to the U.S. Constitution, as incorporated against the State of California by the Fourteenth Amendment to the U.S. Constitution; and (C) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

A. The Act violates the Qualifications Clause of Article II, Section 1, Clause 5 of the U.S. Constitution.

The Qualifications Clause of Article II of the U.S. Constitution sets forth the exclusive eligibility requirements for an individual seeking the Office of President of the United States, which are that the individual must be: (a) a natural born citizen; (b) thirty-five years of age; and (c) fourteen years a resident of the United States. U.S. Const. art. II, § 1, cl. 5. States do not have the power to supplement these qualifications through legislation. *See Thornton*, 514 U.S. at 783, 803-04. In the related context of Article I, Section 2 and Article I, Section 3, the Supreme Court has held that States cannot indirectly create new eligibility requirements by "dressing eligibility to

stand for [public office] in ballot access clothing," *Thornton*, 514 U.S. at 831. The Act is an attempt to create a new qualification for the office of President masquerading as a ballot access measure and is therefore unconstitutional.

In *Thornton* the Supreme Court invalidated an amendment to the state constitution of Arkansas which would have prohibited any candidate who had already served more than three terms in the U.S. House of Representatives or two terms in the U.S. Senate from appearing on the ballot in a congressional election. The Court determined that this was an attempt to alter eligibility to stand for federal office and found the amendment unconstitutional. *Id.* at 783, 831. Although *Thornton* dealt directly with qualifications for congressional office under Article I, the Supreme Court strongly suggested that its rationale would apply equally, if not even more strongly, to the Qualifications Clause of Article II, writing that States "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president." *Id.* at 803-04 (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 627 (3d ed. 1858)). Even the dissenters in *Thornton* accepted as a "fact that a State has no reserved power to establish qualifications for the office of President." *Id.* at 861 (Thomas, J., dissenting).

The Supreme Court has cautioned that "allowing States to evade the Qualifications Clauses by 'dressing eligibility standards for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses." *Id*. at 831. In *Thornton*, the Supreme Court established a baseline to determine when purported ballot access measures cross the line into the unconstitutional creation of a new qualification for federal office. A statute certainly crosses this line if it "has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836. The Ninth Circuit has developed this standard further, explaining that a statute creates a new, unconstitutional qualification for federal office if it either "create[s] an absolute bar to candidates who would otherwise qualify," ***or*** "ha[s] the likely effect of handicapping an otherwise qualified class of candidates." *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000).

The Act violates the Qualifications Clause because it has the likely effect of handicapping the otherwise qualified class of candidates who elect not to disclose their tax returns. Here, as in

Thornton, Defendants attempt to dress an unconstitutional new eligibility requirement in ballot-access clothing. The Act creates two classes of otherwise qualified candidates: those who elect to disclose their tax returns; and those who do not. *See Gralike v. Cook*, 191 F.3d 911, 923 (8th Cir. 1999) (recognizing that candidates who "oppose term limits" were cognizable as a "distinct class of candidates" when subjected to disparate treatment on the ballot). The Act then bars the class of candidates who elect not to disclose their tax returns from appearing on the ballot. Cal. Elec. Code § 6883(a). As the Supreme Court recognized in *Thornton*, denial of access to the ballot is a severe handicap. 514 U.S. at 831. "[T]here is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election." *Id*. The U.S. Supreme Court has also held that constitutional requirements apply just as much to primaries as general elections. *Cf. Tashjian v. Republican Party*, 479 U.S. 208, 227 (holding, in the context of voter qualifications under U.S. Const., Art. I, that qualifications clauses "are applicable to primary elections in precisely the same fashion that they apply to general [] elections."). By handicapping the ability of an otherwise qualified class of candidates to win California's Republican presidential primary election, the Act impairs their ability to secure the support of California's delegates to the Republican National Convention, secure the nomination for President, appear on the 2020 general election ballot in all 50 states, and eventually win the general election. *See* Riemer Decl., ¶¶5-11.

Accordingly, Plaintiffs have a high likelihood of success on their claim that the Act is an unconstitutional attempt to create a new qualification for the office of President in violation of Article II, Section 1 of the U.S. Constitution.

B. The Act violates the First and Fourteenth Amendments of the U.S. Constitution.

The Act violates the free speech rights of Plaintiffs and millions of voters throughout California, including (1) the individual and associational First and Fourteenth Amendment rights of the California Voter Plaintiffs, the RNC, and the CAGOP and (2) the organizational First and Fourteenth Amendment rights of the RNC and the CAGOP.

1. The Act infringes upon Plaintiffs' right to associate for political advancement and the right to vote.

The First Amendment, as incorporated against California by the Fourteenth Amendment,

guarantees, *inter alia*, "the right[s] of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). By barring candidates who decline to release their tax returns from running in the California Republican presidential primary election, the Act violates these rights, and inflicts a severe, unreasonable, and discriminatory burden on the California Voter Plaintiffs and millions of other registered Republican voters in California. The Act will further prevent the California Voter Plaintiffs from exercising their First Amendment rights by serving as delegates for President Trump at the 2020 Republican National Convention. Melendez Decl., ¶4; McDougald Decl., ¶3.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the U.S. Supreme Court established the standard to evaluate the constitutionality of burdens on voting rights such as the Act. When a plaintiff's First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The Supreme Court has stated that the rights of individual voters to associate with, and vote for, the candidate of their choosing "rank among our most precious freedoms." *Williams*, 393 U.S. at 30-31 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). "[N]o right is more precious in a free county than that of having a voice in the election of those who make the laws" and "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Id.*

If this Court declines to apply strict scrutiny, the *Anderson-Burdick* test requires it to determine the Act's validity by weighing: (1) the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments; (2) the precise interests and justifications put forward by the state for the imposed ballot restriction; and (3) the extent to which the state's interests make it necessary to burden the plaintiffs' rights. *Anderson*, 460 U.S. at 789. Those "restrictions that impose a lesser burden" are subject to a lower burden; they must "be reasonably related to achieving the state's 'important regulatory interests.'" *Chamness v. Bowen,*

722 F.3d 1110, 1116 (9th Cir. 2013). The states' interest in regulating presidential elections, however, is always weaker than elections for state offices. *Anderson*, 460 U.S. at 795. The Act violates the First Amendment under either standard.

The Act fails the *Anderson-Burdick* test in the same way as the burdensome filing deadline challenged in *Anderson*. The Act imposes a substantial burden on the voting and associational rights of the California Voter Plaintiffs and other registered Republican voters in California by prohibiting them from voting for the constitutionally eligible candidate of their choice for the Republican nomination for President. The Act creates a functional bar against casting an effective ballot for a candidate who elects not to disclose his or her confidential personal tax returns. *See, e.g.*, *Anderson*, 460 U.S. at 799 n.26 ("We have previously noted that [a write-in] opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot."); *Thornton*, 514 U.S. at 830-31 ("[E]ven if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election."); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) ("The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.").

The Act is neither narrowly drawn nor does it advance any compelling state interest. The Act includes a purpose statement alleging that it is necessary to "educate" voters. Cal. Elec. Code § 6881. While states are entitled to educate voters as to the "procedural mechanisms" for federal elections, States may not "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" under the guise of voter education. *Cook*, 531 U.S. at 531. In *Cook*, the Supreme Court struck down a Missouri constitutional amendment directing the Secretary of State to clearly identify candidates who did not pledge to support federal term limits on the state's ballot. *Id.* at 514-15. Similar to *Cook*, this case also involves a "voluntary" act—in *Cook* a candidate could sign the pledge or not, here candidates can release confidential personal tax returns or not. *Id.* However, the Act goes even further than the unconstitutional amendment at issue in *Cook*, keeping candidates who elect not to release their tax returns off the primary ballot

entirely. Rather than legitimately seeking to educate voters, the Act is an attempt by the California State Legislature to foist its political assessment that candidates who do not disclose their personal tax returns should not serve as President onto voters. This judgment is for the voters to make. *See Id.* at 525-26.

Even taken at face value, the Act's claimed interest in voter education is woefully inadequate to justify its sweepingly overbroad bar against otherwise constitutionally qualified candidates appearing on the ballot in California's presidential preference primary. The severe burdens described above are wholly unnecessary to promote California's stated interests in transparency and voter education. California's alleged concerns about a candidate's "potential conflicts of interest, business dealings, [and] financial status" are already addressed by the Ethics in Government Act of 1978 ("EIGA"), which imposes a monetary civil penalty on federal officials and candidates for federal office who fail to file required annual financial disclosures. 5 U.S.C. Appx. 4 §§ 101-11. The EIGA applies to President Trump and he has fully complied. UNITED STATES OFFICE OF GOVERNMENT ETHICS, *Presidential Fin. Disclosure Rpts. (2017-19)*, *available at* https://extapps2.oge.gov/201/Presiden.nsf/President%20and%20Vice%20President%20Index. Section 102 of the EIGA, which sets the required contents of financial disclosures for federal officials and candidates, is extensive. *Id*, § 102. The EIGA requires, among much more, disclosure of (1) the "source, type and amount or value of income . . . from any source," including all "dividends, rents, interest and capital gains"; (2) the identification, description and value of all gifts received; (3) the identity and value of any interest in property; (4) the identity and value of any liabilities owed; (5) a description of the sale or purchase of real property or investments; and (6) the identification of any positions held in a business enterprise. *Id.*

The Act broadly deprives the California Voter Plaintiffs and other registered Republican voters wishing to cast a ballot for an otherwise qualified candidate who elects not to disclose his or her tax returns of their fundamental rights to associate for the advancement of political beliefs and cast their votes for the constitutionally qualified candidate of their choice. The Act will keep President Trump off California's 2020 Republican presidential primary ballot and prevent the California Voter Plaintiffs and every other registered Republican voter in California from

effectively casting their ballots for President Trump in California's 2020 Republican presidential primary. Their interest in those fundamental rights far outweighs the Act's spurious assertion of California's interests in transparency and voter education. The Act is therefore unconstitutional and must be enjoined.

2. The Act infringes upon the RNC and the CAGOP's right to freely associate and select a standard bearer.

The First Amendment, as incorporated against California by the Fourteenth Amendment, guarantees freedom of speech and association. U.S. Const. amend. I, XIV. These provisions guarantee political parties and their members the fundamental right to "select a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224 (quotation marks omitted). The Supreme Court has recognized that a party primary is the "critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216 (1986). Accordingly, the First Amendment prohibits states and courts from intruding into political parties' presidential nomination processes. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (affirming "the special place the First Amendment reserves for, and the special protection it affords, the process by which a political party nominates candidates"); *see also, O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972).

By barring candidates who elect not to disclose their tax returns from appearing on the ballot in California's 2020 Republican presidential primary, effectively preventing them from winning any of California's delegates to the 2020 Republican National Convention, the Act directly interferes with the RNC and CAGOP's right to identify and select the individual presidential candidate of their choice to act as the "standard bearer who best represents [their] ideologies and preferences." *Eu*, 489 U.S. at 224 (citation omitted).

The Act is even more egregious than the laws in *Eu* and *Jones* because it not only prevents a political party from endorsing candidates who refuse to disclose their tax returns, but bars those candidates from the primary altogether. Under the existing rules of the CAGOP and the RNC, this exclusion precludes the candidate from winning the CAGOP's delegates to the 2020 Republican National Convention and makes it more difficult for the RNC and the CAGOP to select that candidate as its "standard bearer." Riemer Decl., ¶¶4-11. The Act also directly impairs the ability

of the CAGOP and its members to use the California Republican presidential primary to ensure that California's delegates to the Republican National Convention support the otherwise qualified candidate for the Republican nomination for President who enjoys the support of a plurality of Republican voters in California and is therefore the candidate most likely to succeed in California's general election for President. Bryant Decl., ¶¶8-9.

The RNC and CAGOP will also suffer down-ballot harm in other races if President Trump is barred from appearing on California's 2020 Republican presidential primary ballot. The Act will likely depress Republican voter turnout at California's 2020 primary election if it bars President Trump from appearing on the ballot. *See also* Steven G. Calabresi, James Lindgren, *The President: Lightning Rod or King?* (2006) 115 YALE L.J. 2611, 2612 (describing the "coattail effect" of the presidential candidate on down-ballot races). California includes congressional primaries on its presidential primary ballot. Under California's voter-nominated "Top Two Primary" system – in which the two candidates receiving the highest vote totals, regardless of party, proceed to the general election for congressional and state-level elections – depressed Republican voter turnout at the primary election will substantially impair the ability of Republican candidates to qualify for the general election ballot. This would effectively disqualify Republicans from running for these offices, resulting in fewer Republican officeholders, directly impairing the interests of the RNC and the GOP. Bryant Decl., ¶¶11-13.

These restrictions also violate the rights of the California Voter Plaintiffs and other voters throughout the state because "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

The State may believe that a candidate should disclose his or her tax returns to run for President, but "a State, or a court, may not constitutionally substitute its own judgment for that of the party." *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). The Supreme Court has repeatedly emphasized that States "have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Cousins*, 419 U.S. at 489-90.

C. The Act violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Plaintiffs are also likely to succeed on their claim that the Act violates the Fourteenth Amendment's Equal Protection Clause by unconstitutionally discriminating between presidential candidates affiliated with a political party and their supporters, on the one hand, and independent candidates and their supporters on the other. The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Act distinguishes among constitutionally eligible candidates for President by requiring a candidate seeking a political party's nomination to disclose his or her tax returns, while exempting independent candidates from doing so. This discrimination imposes unconstitutionally greater burdens on the voting and associational rights of Californians who support major party candidates than those who support independent candidates. *See Lubin*, 415 U.S. at 716 ("The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."); *Matsumoto v. Pua*, 775 F.2d 1393, 1396 (9th Cir. 1985).

In *Anderson*, 460 U.S. at 793-94, the Court held that courts must carefully scrutinize laws imposing "burden[s] that fall unequally" on major-party and independent candidates; *see, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 446 (9th Cir. 2018) (recognizing plaintiff had stated valid claim where state law imposes an "unequal burden" on independent candidates and party-affiliated candidates). States may treat candidates backed by political parties differently from independent candidates only when the distinctions exist between them are constitutionally relevant. *Jenness v. Fortson*, 403 U.S. 431, 441 (1971). In *Jenness*, for example, the Court recognized that "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Id.* Accordingly, the state may exempt "new political organization[s]" from having to "establish all of the elaborate statewide, county-by-county, organizational paraphernalia of a 'political party' as a condition for conducting a primary election." *Id*.

The Ninth Circuit has recognized, however, that independent candidates seeking to run in

a general election are "essentially similar" to partisan candidates seeking to run in a party primary. *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003). Accordingly, the State generally lacks a substantial interest in subjecting constitutionally eligible candidates to different burdens. *Cf. Lindsay v. Brown*, 750 F.3d 1061, 1064 (9th Cir. 2014) (holding a state's election laws may distinguish "[t]hose who can't legally assume office, even if elected . . . from those who can").

The State's asserted interests in promoting transparency and voter education should apply equally to all candidates in an election. A state lacks a valid interest in providing voters with more information about party-backed candidates than independent candidates, particularly when such requirements can lead to the exclusion of only major-party candidates from the ballot. Moreover, this is not a situation where the burdens that a state's requirements impose on party-backed candidates cannot meaningfully be measured against the requirements for independent candidates. *Cf. Jenness*, 403 U.S. at 440-41 (upholding ballot access requirements for independent candidates because they could not "be assumed to be inherently more burdensome" than the requirements for party-backed candidates); *see also Nader v. Cronin*, 620 F.3d 1214, 1218 (9th Cir. 2010). To the contrary, the Act's requirement that only candidates seeking party nominations disclose their tax returns is a substantial burden from which independent candidates are exempt. Plaintiffs are likely to succeed in demonstrating such discriminatory burdens are unconstitutional.

II. Plaintiffs will Suffer Irreparable Harm

As explained in detail above, unless this Court grants the requested injunctive relief, Plaintiffs will suffer significant irreparable harm, impacting this nation's most precious constitutional rights.

The rights of individual voters to associate for the advancement of political beliefs and effectively cast a vote for their preferred candidate both "rank among our most precious freedoms." *Williams*, 393 U.S. at 30-31. Of all constitutional rights, the right to vote for our nation's leader is perhaps the most fundamental to our Republic. All other rights are "illusory" if the right to have a voice in the election of those who make our laws is undermined. *Id.* at 31 (quoting *Wesberry*, 376 U.S. at 17). California Voter Plaintiffs, and millions of other voters in California, have a right

to have a voice by voting in the 2020 presidential election, and this Act directly undermines this right.

The Ninth Circuit has emphasized that there is a long line of precedent establishing that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein,* 584 F.3d at 1208 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as 'timing is of the essence in politics' and '[a] delay of even a day or two may be intolerable.'" *Id.* (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008)). *See also Thalheimer*, 645 F.3d at 1128 (recognizing that "special party-related harms" weigh against constitutionality) (citation omitted). After all, if a candidate cannot "gain placement on the ballot in this year's election, this infringement on their rights [and the rights of the candidate's supporters and political party] cannot be alleviated after the election." *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997). Violations of First Amendment rights, such as the extraordinary violations resulting from the Act, are "per se irreparable injury." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

President Trump has announced his candidacy for the 2020 Republican nomination for President of the United States and has indicated that he will not disclose his confidential personal tax returns. McCarthy Decl., ¶4, *Donald J. Trump for President, Inc., et al. v. Alex Padilla, et al.*, No. 2:19-cv-01501-MCE-DB (No. 10-02). Absent the requested injunctive relief, the Act will deprive the RNC, the CAGOP, the California Voter Plaintiffs, and other registered Republican voters wishing to cast a ballot for President Trump – or any other qualified candidate who elects not to disclose his or her tax returns – of the fundamental rights described above. Because of the paramount rights at stake in this Action and Plaintiffs' established likelihood of success, this Court must enter an injunction. *See Matsumoto,* 775 F.2d at 1396 ("[I]f the plaintiffs established that they will probably succeed on the merits, then it would have been an abuse of discretion for the district court to have denied the preliminary injunction.").

III. The Equities Weigh in Favor of Plaintiffs

As explained above in the application of the *Anderson-Burdick* test, the equities weigh strongly in favor of Plaintiffs. Additionally, the Ninth Circuit has held that a showing of "a serious First Amendment question[] compels a finding … that the balance of hardships tips sharply in Plaintiffs' favor." *Am. Beverage Ass'n v. City & Cty. of S. F.*, 916 F.3d 749, 758 (9th Cir. 2019).

The interests asserted by California in the Act are minor, especially compared to the rights and freedoms impacted by the Act. The Act's stated concerns regarding "potential conflicts of interest, business dealings, [and] financial status" of presidential candidates are already addressed by President Trump's full compliance with the EIGA. Any other constitutionally qualified candidates who wish to run in California's 2020 Republican presidential preference primary will likewise have to comply with the EIGA.

Further, California has conducted presidential primary elections for many decades without requiring the disclosure of confidential personal tax returns. The Act represents a change from that status quo. A change which would cause extraordinary harm – the infringement of the Plaintiffs' rights to associate for the advancement of political beliefs, vote, and nominate the constitutionally qualified standard bearer of their choosing. Accordingly, the equities weight strongly in favor of granting the injunctive relief sought here.

IV. An Injunction is Necessary in the Public Interest

The Ninth Circuit has consistently "recognized the significant public interests in upholding First Amendment principles" when considering preliminary injunctions such as this. *Thalheimer*, 645 F.3d at 1129 (affirming a district court's determination that the public interest in upholding free speech and association rights outweighed the interest in enforcement of campaign finance laws) (citation omitted).

The public interest in ensuring that individual voters may associate for the advancement of political beliefs and effectively cast a vote for their preferred candidate for President is extraordinary. *Williams*, 393 U.S. at 30-31. In *Thalheimer*, various plaintiffs, including a city council candidate, a political action committee, the Republican Party and a local voter challenged the City of San Diego's "Municipal Election Campaign Control Ordinance" ("ECCO").

Thalheimer, 645 F.3d at 1113. The ECCO restricted fundraising and spending by political committees, prohibited contributions by "non-individual entities" and imposed a $500 limit on contributions. *Id*. at 1113-14. Unlike this case, in *Thalheimer*, there was no dispute that the City had a good faith even-handed interest in "preventing the circumvention of individual contribution limits." *Id.* at 1124. Still, the Ninth Circuit made it clear that "the public interest in upholding free speech and association rights outweighed the interest in continued enforcement of these campaign finance provisions." *Id*. at 1129.

In this case, the public interest proffered is tenuous at best, and the fundamental right to vote even greater than the free speech rights associated with campaign contributions in *Thalheimer*. The Act directly undermines these rights, and the public interest weighs heavily in favor of a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, this Court should grant the requested preliminary injunction and enjoin Defendants from enforcing the Act and depriving Plaintiffs – and millions of other voters – of their constitutional rights. Plaintiffs are likely to succeed on the merits of their claims asserted in the Complaint because the Act violates, *inter alia*, (A) the Qualifications Clause of Article II, § 1, cl. 5 of the U.S. Constitution; (B) the First Amendment to the U.S. Constitution, as incorporated against the State of California by the Fourteenth Amendment to the U.S. Constitution; and (C) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted,

Dated: August 10, 2019

DHILLON LAW GROUP INC.

By: /s/ Harmeet K. Dhillon

Harmeet K. Dhillon, SBN 207873
Mark P. Meuser, SBN 231335
Gregory Michael, SBN 306814
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, California 94108

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

MELISSA MELENDEZ, an individual; **BILAL ALI ESSAYLI**, an individual**; CHARLES MCDOUGALD**, an individual; **THE REPUBLICAN NATIONAL COMMITTEE;** and **THE CALIFORNIA REPUBLICAN PARTY**,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; and **ALEX PADILLA**, in his official capacity as Secretary of State of the State of California,

Defendants.

Case No.: 2:19-cv-01506-MCE-DB

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: September 19, 2019
Hearing Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction. Having considered the motion, the memorandum of law and evidence in support of the motion, and Defendants' opposition thereto, and having further considered: (1) the likelihood that the Plaintiffs will succeed on the merits of their claims; (2) the likelihood that the Plaintiffs will suffer irreparable injury absent an injunction; (3) the balance of the equities; and (4) whether the public interest would be furthered by an injunction, this Court concludes that Plaintiffs are entitled to preliminary injunctive relief.

THEREFORE, pursuant to Federal Rule of Civil Procedure 65, Plaintiffs' motion is GRANTED. Defendants are hereby ENJOINED from enforcing the provisions of the Presidential Tax Transparency and Accountability Act that require candidates for the presidency to disclose their tax returns as a condition of appearing on the presidential primary ballot. *See* Cal. Elec. Code §§ 6883-6884.

IT IS SO ORDERED this __ day of ___, 2019

Hon._____
UNITED STATES DISTRICT JUDGE