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California's Unconstitutional Virtue Signaling

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KEY TAKEAWAYS

California Governor Gavin Newsom signed a new state law that requires a presidential primary candidate to provide five years of tax returns.

However, the U.S. Constitution already establishes the exclusive list of qualifications required to be President or a Member of Congress.

The law also interferes with the First Amendment rights of California voters to choose any constitutionally qualified candidates they want.

In his latest attack on President Donald Trump, the federal election process, and the right of free association of citizens and all political parties, California Governor Gavin Newsom signed a new state law, SB 27, that requires a presidential candidate to provide five years of tax returns 98 days before the primary election. Otherwise, the Secretary of State "shall not print the name" of the candidate on the primary election ballot.[1]

Governor Newsom claims the law is necessary to ensure that "voters make informed, educated choices in the voting booth."[2] Because California is one of the largest economies in the world with one-ninth the nation's population, Newsom says the state "has a special responsibility" to demand this information.[3] After all, he explained, "[t]hese are extraordinary times and states have a legal and moral duty to do everything in their power to ensure leaders seeking the highest offices meet *minimum standards*...."[4]

The problem for Governor Newsom and this new law, however, is that the U.S. Constitution already establishes the "minimum standards" or qualifications required to be President or a Member of Congress. The Supreme Court has ruled—in a long series of cases—that states cannot establish additional qualifications for candidates for national office. The Court has repeatedly held that only those requirements set forth in the Constitution are permissible.

Little surprise, then, that President Trump, the Trump campaign, the Republican National Committee, the California Republican Party, and multiple California voters have sued the governor and other relevant state officials to block the new law.[5] And they have already racked up a victory. After a preliminary hearing on September 9, 2019, United States District Judge Morrison England, Jr., issued an oral order temporarily forbidding California from enforcing the law.[6] Judge England said he would commit his ruling to writing by October 1. California has said that it will consider its next steps while it waits for that order.[7]

If California chooses to appeal that decision, the Ninth Circuit Court of Appeals and, if it gets that far, the Supreme Court, should affirm Judge England's decision. California's law violates the presidential Qualifications Clause and the First Amendment of the Constitution.

California's Law Violates the Qualifications Clause

The presidential Qualifications Clause in Article II, Section 1, sets out the sole requirements to be President of the United States. It requires only that the President be a "natural born Citizen," at least 35 years of age, and a resident "within" the U.S. for 14 years.[8]

U.S. Term Limits, Inc. v. Thornton. The key case on this issue is *U.S. Term Limits, Inc. v. Thornton* (1995).[9] In the late 1980s and early 1990s, there was a movement across the country to impose term limits on Members of Congress. This political movement ended, however, when the U.S. Supreme Court held in *Thornton* that an Arkansas law limiting the number of terms that a Member of Congress could serve was a violation of the Qualifications Clauses that apply to Members of Congress.[10]

The state law provided that if a congressional representative from Arkansas had served three terms and a Senator had served two terms, that Member of Congress could not have his name placed on the ballot for re-election to the U.S. House of Representatives or the U.S. Senate, respectively.[11] Arkansas thereby added an additional qualification to being a representative or a senator.

The Court struck down the law and held that states are powerless to add qualifications over and above what is already in the Constitution for three reasons.[12] First, the congressional Qualifications Clauses embody the "egalitarian ideal" that election to Congress "should be open to all people of merit."[13] Second, "the people should choose whom they please to govern them."[14] And finally, the right to choose representatives belongs to the people—not the states.[15] Accordingly, the states cannot set any additional qualifications for Members of Congress.

To hold otherwise, the Court explained, "would result in a patchwork of state qualifications, undermining the uniformity and national character that the Framers envisioned and sought to ensure."[16] That patchwork would also sever the direct link between the government and the people, allowing the states to interfere with the people's choice.[17]

The Court approvingly noted the decision of the Arkansas State Supreme Court, which had similarly held that the states have no authority "to change, add to, or diminish" the requirements for congressional representation outlined in the Qualifications Clauses.[18]

The Court also rejected Arkansas' argument that the term limit was not really a qualification, but merely a ballot access restriction. A ballot access restriction is a law that regulates "the time, place, and manner of elections" for the purpose of protecting "the integrity and reliability of the electoral process itself."[19] Although states are permitted to adopt election administration "procedures" that prevent "voter confusion, ballot overcrowding or the presence of frivolous candidacies," they are not permitted to disguise additional qualifications as ballot access restrictions.[20] The term limit was not a procedural tool that protected "the integrity and reliability of the electoral process itself,"[21] but instead was an additional qualification imposed on any candidate for office.[22]

The same goes for California's law, which will affect the presidential candidates of all political parties, not just Donald Trump. Although *Thornton* dealt with congressional elections, the same constitutional considerations apply to the presidential Qualifications Clause. After all, the same "egalitarian ideal" applies at least as strongly to the presidency as it does to Congress, and the people, not the states, hold the power to choose their elected officials.

Anderson v. Celebrezze. In fact, another U.S. Supreme Court opinion, *Anderson v. Celebrezze*,[23] suggests that *Thornton* applies with even *greater* force to presidential elections because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."[24] So when a state regulates a presidential election, it "has an impact beyond its own borders."[25]

Anderson is relevant for another reason: It sets limits on permissible ballot access restrictions. In opposition to the lawsuits challenging the law, California made the same argument that Arkansas did in *Thornton*: that it is not imposing a qualification, but only a ballot access restriction. That argument is as weak here as it was in the Arkansas case. Simply put, there is nothing remotely procedural about California's law. Instead, it imposes a qualification on presidential candidates, albeit at the primary stage, that they release their tax returns. That qualification is not included in the Constitution, and so California cannot lawfully impose it.

But even if California's law was considered a ballot access restriction and not a qualification, it would still go too far. The *Anderson* case involved an Ohio law that required any independent candidate for the presidency (John Anderson) to file paperwork by March to appear on the November general election ballot. The Court held that the deadline, which the state claimed promoted "political stability" and "voter education," violated the First Amendment voting and associational rights of supporters of a candidate, placing "a significant state-imposed restriction on a nationwide electoral process."[26] The Court held that ballot access restrictions "limit the field of candidates from which voters might choose" and implicate "basic constitutional rights."[27]

Cook v. Gralike. Similarly, the Supreme Court said in *Cook v. Gralike* (2001)[28] that acceptable ballot access restrictions are those necessary to impose "some sort of order, rather than chaos" on the "democratic process" as well as to protect the integrity of elections.[29] In *Cook,* Missouri passed a law requiring that if congressional candidates refused to endorse term limits, that fact must appear on the ballot next to their name. The Court held that the law unconstitutionally handicapped candidates who did not endorse term limits.[30]

The same goes for California's law—it handicaps *any* candidate of *any* political party who does not disclose confidential tax information, which is protected under federal law,[31] by excluding him from the primary ballot. The law says its purpose is to "provide voters with essential information regarding the candidate's potential conflicts of interest, business dealings, financial status, and charitable donations" so they can "make a more informed decision."[32] That has nothing to do with regulating the "reliability of the electoral process itself" and ensuring orderly voting procedures. It amounts to California substituting its judgment for that of the voting public about what information is most important when picking a candidate.

Schaefer v. Townsend. The Ninth Circuit Court of Appeals threw out another California ballot access restriction in 2000 in *Schaefer v. Townsend*.[33] A Nevada resident, Michael Schaefer, was prohibited from filing as a candidate for an open congressional seat because California

only allowed registered California voters to file, which required Schaefer to establish residency in California. But because the Qualifications Clause for representatives only requires residency "when elected," a three-judge panel threw out the registration requirement as unconstitutional since it did not regulate "the procedural aspects" of the election or demonstrate that the candidate had "some initial showing of support."[34]

"Minimal Standards" or Political Preferences?

Governor Newsom said in his signing statement that states "have a legal and moral duty to do everything in their power to ensure that leaders seeking higher office meet *minimal standards*, and to restore public confidence."[35] Newsom's statement shows that the law is not about protecting the voting and electoral process but imposing California's (or at least Governor Newsom's) sense of what ought to be minimum qualifications on anyone who wants to be President. But as the Supreme Court has made clear time and time again, the people—not the State of California—are free to choose whomever they want as President, so long as the candidates meet the minimum qualifications set out *in the Constitution* for that office. And in so doing, the people are free to consider whatever information they wish, including a candidate's refusal to release his tax returns.

California passed a similar bill two years ago. When then-Governor Jerry Brown vetoed the bill, he not only acknowledged that it might not be constitutional, but he expressed his concern "about the political perils of individual states seeking to regulate presidential elections in this manner." He called it a "slippery slope."[36] Today, it is tax returns, but what else might states demand tomorrow, Brown asked. Health records? High school report cards? Certified birth certificates?[37] All of that might depend, as Brown warned, "on which political party is in power" and it could "lead to an ever escalating set of differing state requirements for presidential candidates."[38]

The Constitution does not allow that, and neither California, nor any other state, has the right to impose these types of additional requirements for presidential candidates, whether they categorize them as "qualifications" or as ballot access restrictions.

California's Law Also Violates the First Amendment

California's choice to ban candidates from the primary ballot, instead of the general election ballot, was likely an attempt to tip-toe[39] around the Supreme Court's concerns about states interfering with national elections. But in so doing, California ran afoul of the First Amendment.

The First Amendment protects, among other things, freedom of speech, the right to peaceably assemble, and the right to petition the government.[40] The Supreme Court has interpreted these clauses as protecting two fundamental rights: (1) "the right of individuals to associate for the advancement of political beliefs" and (2) "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[41] Ballot access restrictions, which might otherwise be permissible under the Qualifications Clauses, may yet infringe these rights because "voters can assert their preferences only through candidates or parties or both."[42] Thus, "[b]y limiting the choices available to voters, the State impairs the voters' ability to express their political preferences."[43]

State Elections and the First Amendment: *Anderson* and *Burdick v. Takushi*

In *Anderson* and *Burdick v. Takushi*,[44] the Supreme Court laid out a framework for analyzing First Amendment challenges to state election laws. It held that courts should weigh three factors: (1) the character and magnitude of the asserted injury to the rights at stake, (2) the state's interests proffered as justifications for the burden the law imposes, and (3) the extent to which the state's interests make it necessary to burden the rights at stake.[45]

As to the first factor, California's law causes significant harm to its citizens' First Amendment rights because it denies members of a political party the opportunity to vote for a constitutionally qualified candidate of their choice. The law prevents California Republicans from casting "effective"[46] votes for President Trump in their own primary. But it also prevents other voters from being able to cast an effective vote for the candidates of any political parties (or independents) who do not want to be forced to disclose confidential financial information that—if government officials released it—would be a federal crime.

Write-In Votes. It is no salve to that constitutional injury that Republican primary voters could write in President Trump's name on the ballot. The Supreme Court has repeatedly held that a write-in "is not an adequate substitute for having the candidate's name appear on the printed ballot."[47]

State Interests. As to the second factor, California's proffered interest—"ensuring that its voters make informed, educated choices"[48]—is, at best, not a legitimate state interest and, at worst, pretext for animus against President Trump. From the premise that the right to choose elected representatives belongs exclusively to the people,[49] it follows that the people, and not the states, should be free to educate themselves about their candidates however they see fit.

When a state like California chooses which of a candidate's characteristics to educate the people about, it impermissibly substitutes its judgment for the people's judgment. The Supreme Court has said that its opinions "reflect a greater faith in the ability of individual voters to inform themselves about campaign issues" and that that "reasoning applied with even greater force to a Presidential election, which receives more intense publicity."[50]

Necessary Burden? As to the final factor, even assuming that the state had a legitimate interest, the law is an unnecessary burden on the public's First Amendment rights. The law does not educate voters: It punishes candidates who refuse to comply. If the state truly wished to educate voters in a way that did not impermissibly substitute its judgment for their own, it could do so in ways that do not interfere with their First Amendment rights. For example, California could publicize that President Trump, unlike other candidates, has not released his tax returns, and then allow the people to do with that information what they wish.

But what California may *not* do is to deprive some of its citizens of their right to cast effective votes for the candidate of their choice simply because the state has decided that the candidate's tax filings are more important than other information about him. In essence, as the lawsuit filed by multiple California voters states, the California law takes away the opportunity of voters to cast a ballot for a "constitutionally eligible candidate of their choice for the Republican nomination for president."[51]

For these reasons, California's law violates the First Amendment.

Conclusion

California's law requiring presidential candidates to provide five years of tax returns before they can appear on the primary ballot was rightly struck down by Judge England, and that ruling should be affirmed on appeal. The law is an attempt to impose extra-constitutional qualifications and ballot access restrictions on candidates for the presidency, and it violates the First Amendment associational rights of California voters.

One is left to wonder why California Governor Gavin Newsom decided to sign a bill that even his Democratic predecessor would not. Unfortunately, the answer seems to be that in this climate of #resistance, the greatest good is to signal one's progressive virtues—even if it means violating the Constitution.

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Endnotes

1. Cal. Elec. Code § 6883.
2. Gavin Newsom, *Governor Gavin Newsom Signs SB 27: Tax Transparency Bill*, Office of the Governor, Jul. 30, 2019, https://www.gov.ca.gov/2019/07/30/governor-gavin-newsom-signs-sb-27-tax-transparency-bill/.
3. *Id*.
4. *Id.* (emphasis added).
5. Bryan Anderson, *California Sued Over New Law Targeting Trump's Tax Returns Ahead of 2020 Election*, The Sacramento Bee, Aug. 5, 2019, https://www.sacbee.com/news/politics-government/capitol-alert/article233300902.html.
6. Augie Martin, *et al*., *Federal Judge Halts California Law Forcing Trump to Release Tax Reurns to Qualify for Ballot*, CNN, Sept., 19, 2019, https://www.cnn.com/2019/09/19/politics/california-federal-judge-trump-tax-returns/index.html.
7. *Id*.
8. U.S. Const. art. II, § 1; *see also The Heritage Guide to the Constitution*, The Heritage Foundation (Regnery Publishing, 2nd Ed., 2014) pp. 247–48, available at https://www.heritage.org/constitution/#!/articles/2/essays/82/presidential-eligibility.
9. 514 U.S. 779 (1995).
10. There is a Qualifications Clause for Members of the House and a separate Qualifications Clause for Members of the Senate. *See* U.S. Const. Art. I, § 2 (listing qualifications for Representatives); U.S. Const. Art. I, § 3 (listing qualifications for Senators).
11. Thornton, 514 U.S. at 784.
12. *Id*. at 806.
13. *Id*. at 819.
14. *Id*. (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).
15. *Id*. at 820.
16. *Id*. at 822.
17. *Id*.
18. *Id*. at 785 (citing U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349, 351 (1994)).
19. *Id*. at 834. In a word, ballot access restrictions must be procedural. For example, the Supreme Court has upheld a law requiring a candidate to receive at least 1 percent of primary votes before appearing on the general ballot*, Munro v. Socialist Workers Party*, 479 U.S. 189, 107 (1986), and a law prohibiting write-in voting, *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).
20. Thornton, 514 U.S. at 834.
21. *Id*.
22. *Id*.
23. 460 U.S. 780 (1983).
24. *Id*. at 795.
25. *Id*. ("[T]his national interest is greater than any interest of an individual State") (internal quotations omitted) (quoting Cousins v. Wigoda, 419 U.S. 477, 490 (1975)).
26. *Id*.
27. *Id*. at 786.
28. 531 U.S. 510 (2001).
29. *Id*. at 524.
30. *Id*. at 525.
31. *See* 26 U.S.C. §6103.
32. Cal. Elec. Code § 6881.
33. 215 F.3d 1031 (9th Cir. 2000).
34. *Id.* at 1038.
35. Newsom *supra* note 2 (emphasis added).

36. *See* California Legislative Information, *SB-149 Presidential Primary Elections: Ballot Access*, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB149 [hereinafter "Veto Message"].
37. No doubt Brown was thinking about the "birther" movement, which pressured President Barack Obama to release his original long-form birth certificate after accusing him of being born outside of the United States and, therefore, not a natural born citizen. *See* Alan Silverleib, *Obama Releases Original Long-Form Birth Certificate*, CNN, April 27, 2011, https://www.cnn.com/2011/POLITICS/04/27/obama.birth.certificate/index.html; *see also* Ben Smith, *Birther Bill Hits Congress*, Politico, March 13, 2009, https://www.politico.com/blogs/ben-smith/2009/03/birther-bill-hits-congress-016761.
38. Veto Message, *supra* note 34.
39. In steel-toed boots, as it turns out.
40. U.S. Const. amend. I.
41. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (internal quotations omitted) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).
42. *Id*. (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).
43. *Id*.
44. 504 U.S. 428 (1992).
45. *Id*. at 434 (citing Anderson, 460 U.S. at 788–89).
46. Recall that in *Illinois State Bd. of Elections*, 440 U.S. at 184, the Court interpreted the First Amendment's guarantees as protecting voters' ability to cast their votes "effectively."
47. *Anderson*, 460 U.S. at 799 n. 26; *Thornton* 514 U.S. at 831 ("But even 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, 415 U.S. at 719 n. 5 ("The realities of the electoral process, however, 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.").
48. Cal. Elec. Code § 6881.
49. Thornton, 514 U.S. at 819.
50. Anderson, 460 U.S. at 797.
51. Melendez v. Newsom, Case No. 2:19-00706, Complaint, p. 18.