
Fall 11-1-2020

Alternatives to California's SB 27: Incentivizing the Release of Tax Returns Without Restricting Ballot Access

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Cover Page Footnote

J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.S.E., Electrical Engineering, Princeton University, June 2009. Many thanks to Professor Justin Levitt, whose advice and feedback have been invaluable to the writing of this Note, and to the members of the Loyola of Los Angeles Law Review, whose diligent work has made publication of this Note possible.

ALTERNATIVES TO CALIFORNIA'S SB 27: INCENTIVIZING THE RELEASE OF TAX RETURNS WITHOUT RESTRICTING BALLOT ACCESS

*Matthew Tang**

Donald Trump is the first President since 1977, and the first major-party nominee since 1980, to refuse to release any of his federal income tax returns. This break in tradition has led lawmakers in at least twenty-five states to propose legislation requiring presidential candidates to disclose their tax returns in order to appear on state ballots. California is one of those states. On July 30, 2017, California Governor Gavin Newsom signed SB 27 into law, effectively barring presidential candidates who have not made available for public inspection the last five years of their income tax returns from appearing on the state's primary ballots. However, on October 2, 2019, a federal district court issued a preliminary injunction against SB 27 on the theory that it violated the Presidential Qualifications Clause as well as the First and Fourteenth Amendments. And on November 21, 2019, the California Supreme Court struck down SB 27 for violating article II of the California Constitution. This Note proposes two alternative approaches to incentivizing the release of tax returns that avoid the California and Federal Constitutional challenges faced by SB 27. The first involves fining or otherwise penalizing presidential candidates who fail to release their tax returns without denying them ballot access. The second involves taking note of a candidate's failure to release his or her tax returns either on the ballots themselves or on the informational material that typically accompanies them.

* J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.S.E., Electrical Engineering, Princeton University, June 2009. Many thanks to Professor Justin Levitt, whose advice and feedback have been invaluable to the writing of this Note, and to the members of the *Loyola of Los Angeles Law Review*, whose diligent work has made publication of this Note possible.

TABLE OF CONTENTS

| | |
|--|-----|
| I. INTRODUCTION..... | 319 |
| II. CONSTITUTIONAL CHALLENGES TO SB 27 | 321 |
| A. California’s Presidential Primary Clause Challenge | 322 |
| B. Qualifications Clause Challenge..... | 323 |
| C. First and Fourteenth Amendment Challenges | 326 |
| III. IMPOSING CIVIL OR CRIMINAL SANCTIONS ON CANDIDATES | |
| WHO FAIL TO RELEASE THEIR TAX RETURNS | 328 |
| A. Qualifications Clause Challenge | 329 |
| B. First and Fourteenth Amendment Challenges | 330 |
| 1. Campaign Finance Laws..... | 331 |
| a. <i>Buckley v. Valeo</i> | 332 |
| b. Defining the limits of <i>Buckley</i> | 334 |
| 2. More Comprehensive Financial Disclosure Laws | 338 |
| a. <i>Plante v. Gonzalez</i> | 339 |
| b. State and lower federal court decisions on financial disclosure..... | 342 |
| 3. Applying the <i>Anderson-Burdick</i> Test..... | 346 |
| a. Standard of review | 347 |
| b. Applying intermediate scrutiny | 350 |
| c. Distinguishing from other unconstitutional disclosure laws | 353 |
| IV. INFORMING VOTERS ABOUT TAX RETURN DISCLOSURE | |
| THROUGH BALLOT DESIGNATIONS..... | 356 |
| A. Qualifications Clause Challenge | 358 |
| 1. Discriminatory Purpose and Discriminatory Effect .. | 359 |
| 2. Ballot Designations as a Form of Voter Education... | 362 |
| B. First and Fourteenth Amendment Challenges | 363 |
| V. CONCLUSION | 365 |

I. INTRODUCTION

“If I decide to run for office, I’ll produce my tax returns, absolutely.”¹ Six years after making this initial commitment—three after assuming office—President Trump has yet to produce a single page of the promised documents.² It seems that a forty-year tradition of Presidents releasing their tax returns has come to an end.³

Perhaps in response to President Trump’s refusal to release his tax returns, California recently enacted Senate Bill 27 (SB 27) requiring that presidential candidates make available for public inspection the last five years of their income tax returns in order to appear on the state’s primary ballots.⁴ California is not alone. In at least twenty-five states, lawmakers have introduced bills requiring presidential candidates to make similar disclosures.⁵ By mandating a practice that was once voluntary, these bills codify a custom that has long served the twin goals of voter education and candidate accountability.⁶

Proponents of the bills argue that a candidate’s tax returns afford voters invaluable insight into a candidate’s values in ways that campaign ads and ballot biographies cannot.⁷ The business dealings

1. Ireland AM, *Colette Fitzpatrick Meets Donald Trump!*, YOUTUBE (May 20, 2014), <https://www.youtube.com/watch?v=Hg-5KEt1Abg>.

2. Katie Rogers, *Trump on Releasing His Tax Returns: From ‘Absolutely’ to ‘Political Prosecution’*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/politics/trump-taxes.html> (updated Sept. 27, 2020).

3. See Joseph J. Thorndike, *Tax History: From Nixon to Trump: A Short History of Voluntary Tax Disclosure*, TAX NOTES (Feb. 11, 2019), <https://www.taxnotes.com/tax-notes-today-federal/return-preparation/tax-history-nixon-trump-short-history-voluntary-tax-disclosure/2019/02/11/29409>.

4. S.B. 27, 2019–2020 Reg. Sess. (Cal. 2019) (“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 Within five days of receipt of the candidate’s tax returns, the Secretary of State shall make redacted versions of the tax returns available to the public on the Secretary of State’s internet website.”).

5. Alexi McCammond, *The Big Picture: The State Efforts to Keep Trump Off the 2020 Ballot*, AXIOS (June 24, 2018), <https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html/>.

6. See S.B. 27 (“The information in tax returns . . . helps voters to make a more informed decision. . . . The people of California 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.”).

7. See *id.* (“[I]ncome tax returns provide voters with essential information regarding the candidate’s potential conflicts of interest, business dealings, financial status, and charitable donations.”).

and charitable donations revealed by a candidate's tax returns, for example, give voters a raw glimpse into a candidate's activities separate from the carefully curated image he or she might present on the campaign trail. Moreover, tax returns provide states with an invaluable tool to ferret out conflicts of interest, corruption, or violations of law.⁸ States have an indisputable interest in exposing the unscrupulous—and perhaps criminal—activity of anyone who might appear on their ballots, and that interest reaches its apex when the ballots list candidates for the highest office in the land.⁹

On the other hand, the principles undergirding laws like SB 27 can in theory support less palatable disclosure requirements. When vetoing a similar bill two years ago,¹⁰ then California Governor Jerry Brown wrote: “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?”¹¹ But more importantly, laws that make ballot access contingent on the production of tax returns may not pass constitutional muster. A mere four months after California Governor Gavin Newsom signed SB 27 into law, the California Supreme Court struck it down for violating the California Constitution.¹² Although similar statutes in other states are not subject to the California

8. *See id.*

9. Even if a presidential candidate is not a citizen of a state requiring the production of his or her tax returns, such a state nevertheless maintains an interest in ensuring compliance with federal law on behalf of its citizens. For example, SB 27 cites California's interest in making sure that “statutory prohibitions on behavior such as insider trading are detected and punished.” *Id.* Insider trading affects shareholders not just in California, but in all fifty states. Moreover, states may have an interest in exposing violations of the Emoluments Clauses of the United States Constitution. *See Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 138–39, 142 (2d Cir. 2019) (finding that owners of hotels, restaurants, and event spaces had standing to sue President Trump for accepting government patronage of Trump properties because such patronage diverted business away from their establishments). *But see Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020) (finding that Congress's “loss of political power” related to President Trump's alleged violations of the Emoluments Clauses was insufficient to support standing); *In re Trump*, 928 F.3d 360, 379 (4th Cir. 2019) (finding that Maryland and the District of Columbia's interest in enforcing the Emoluments Clauses was too “attenuated and abstract” to support standing), *reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019).

10. *See* S.B. 149, 2017–2018 Reg. Sess. (Cal. 2017).

11. SB 149 Veto Message from Governor Edmund G. Brown, Jr. (Oct. 15, 2017), https://web.archive.org/web/20171219002118/https://www.gov.ca.gov/docs/SB_149_Veto_Message_2017.pdf.

12. *See Patterson v. Padilla*, 451 P.3d 1171, 1191 (Cal. 2019) (finding on Nov. 21, 2019 that SB 27 violated article II, section 5(c) of the California Constitution). SB 27 was signed into law on July 30, 2019. *See* CAL. ELEC. CODE § 6883 (Deering 2020), *invalidated by Patterson v. Padilla*, 451 P.3d 1171 (Cal. 2019).

Constitution, opponents of SB 27 have additionally argued that the law, and presumably others like it, run afoul of the Federal Constitution.¹³ In particular, they assert that because Article II of the Federal Constitution establishes the substantive qualifications for the presidency,¹⁴ requiring the production of tax returns constitutes an impermissible addition to these qualifications.¹⁵ They further contend that such a requirement infringes upon the First and Fourteenth Amendment rights of candidates and voters.¹⁶

Part II of this Note briefly surveys the constitutional challenges brought against SB 27, one of which has already proven fatal to the law.¹⁷ The remainder of the Note explores two potential alternatives to SB 27 that accomplish substantially the same goals while sidestepping many of the constitutional issues that plagued it. In particular, Part III examines the potential for California and other states to fine or otherwise penalize presidential candidates who fail to release their tax returns without denying them ballot access. And Part IV examines the viability of laws that do not require candidates to produce their tax returns, but instead allow ballots or informational material accompanying them to take note of a candidate's failure to do so.

II. CONSTITUTIONAL CHALLENGES TO SB 27

The following contains a brief overview of the three main constitutional challenges to SB 27—the first, based on the California Constitution, applies only to California laws, but the latter two apply with equal force to similar regulations in other states. This is helpful both to understand the weight of the arguments against SB 27 and its peers and to appreciate the hurdles that this Note's two proposed alternatives seek to overcome.

13. See *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1173 (E.D. Cal. 2019), *vacated*, No. 2:19-cv-01477-MCE-DB, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

14. U.S. CONST. art. II, § 1, cl. 5.

15. See, e.g., Jackson C. Smith, Thornton & *the Pursuit of the American Presidency*, 43 OHIO N.U. L. REV. 39, 48 (2017) (“As with members of Congress, the Constitution is the exclusive source of the qualifications to serve as President of the United States, and states are divested of power to add qualifications to those already fixed within the Constitution.”); see also *Griffin*, 408 F. Supp. 3d at 1177–81 (concluding that SB 27 likely violated the Article II Qualifications Clause).

16. See *Griffin*, 408 F. Supp. 3d at 1181–85.

17. See *Patterson*, 451 P.3d at 1191 (decisively nullifying SB 27).

A. California's Presidential Primary Clause Challenge

Article II, section 5(c) of the California Constitution states:

The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, *including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States*, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.¹⁸

In *Patterson v. Padilla*,¹⁹ the California Supreme Court interpreted this clause as establishing national or state recognition of presidential candidacy as a sufficient, rather than necessary, condition for ballot access.²⁰ In other words, the California State Legislature may not direct the Secretary of State to exclude from the ballot someone who is “recognized . . . throughout the nation or throughout California” as a candidate “for the office of President of the United States.”²¹ Such a person *must* appear on the primary ballot unless he or she files an affidavit of noncandidacy.²² Because SB 27 purported to exclude even nationally recognized presidential candidates from the California primary ballot if they failed to release the last five years of their income tax returns, its conflict with the California Constitution rendered it invalid.²³

The California Supreme Court noted that its ruling in *Patterson* did not address any federal claims.²⁴ However, one month before the California Supreme Court invalidated SB 27 on California constitutional grounds, a federal district court in *Griffin v. Padilla*²⁵ issued a preliminary injunction against SB 27 on federal constitutional

18. CAL. CONST. art. II, § 5(c) (emphasis added).

19. 451 P.3d 1171 (Cal. 2019).

20. *See id.* at 1179 (finding that the clause “is most naturally read as conveying a rule of inclusivity for presidential primary elections that the Legislature cannot contravene”).

21. *See id.* (quoting CAL. CONST. art. II, § 5(c)).

22. *See id.* at 1173.

23. *See id.* at 1179–80.

24. *Id.* at 1173 n.1.

25. 408 F. Supp. 3d 1169 (E.D. Cal. 2019), *vacated*, No. 2:19-cv-01477-MCE-DB, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

grounds.²⁶ In doing so, the district court determined that SB 27 likely violated the Article II Qualifications Clause as well as the First and Fourteenth Amendments.²⁷ If its reasoning reflects the way the U.S. Supreme Court would analyze the matter, laws like SB 27 in other states may very well be unconstitutional. Therefore, the primary goal of this Note is to examine alternatives to SB 27 that address not only the California Presidential Primary Clause challenge, but the Federal Qualifications Clause and First and Fourteenth Amendment challenges as well.

B. *Qualifications Clause Challenge*

The Article II Qualifications Clause of the Federal Constitution states:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.²⁸

The Qualifications Clause challenge to SB 27 centered around the contention that the clause enumerates an *exclusive* set of requirements for the presidency, and that SB 27 unconstitutionally expanded this set of requirements by mandating that presidential candidates release their tax returns.²⁹ Although the Supreme Court has never explicitly held

26. *See id.* at 1173.

27. *Id.* at 1177–85.

28. U.S. CONST. art. II, § 1, cl. 5.

29. *See Griffin*, 408 F. Supp. 3d at 1180. SB 27 had the added wrinkle in that it applied to primary elections rather than general elections. The U.S. Constitution makes no mention of primary elections, and constitutional limitations on a state's authority to regulate the general election arguably do not apply to presidential primaries, especially when political parties are in many instances free to ignore the results of such primaries. *See Cousins v. Wigoda*, 419 U.S. 477, 486–91 (1975) (finding that a state court's injunction refusing to seat party-selected delegates in favor of elected delegates violated "the Party's right to determine the composition of its National Convention in accordance with Party standards"); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (holding that Wisconsin "cannot require . . . delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules"). But the Supreme Court has held that the right to participate in primaries "is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery." *United States v. Classic*, 313 U.S. 299, 318 (1941); *see also Smith v. Allwright*, 321 U.S. 649, 661–62 (1944) ("[T]he right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."). In fact, the Court has specifically applied the

the Article II requirements to be exclusive, the Court in *U.S. Term Limits, Inc. v. Thornton*³⁰ found the Article I requirements for congressional office³¹ to be exclusive,³² and much of the reasoning in *U.S. Term Limits* applies to presidential elections as well.³³

However, while the States likely cannot impose additional substantive qualifications to the presidency, the Court has upheld “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.”³⁴ The constitutionality of SB 27 under Article II therefore hinges on whether the tax return requirement constitutes a *substantive* qualification for which Article II already provides an exhaustive list, or merely a *procedural* rule necessary to facilitate the choosing of the President.³⁵ For example, the Court has allowed states to impose filing deadlines,³⁶ minimum signature requirements,³⁷ and primary election requirements³⁸ as preconditions for ballot access. Because these types of regulations prevent “voter confusion, ballot overcrowding, or the

Article I Qualifications Clause to primary election law. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986) (“[W]e hold that the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections.”). It is therefore unlikely that SB 27’s application only to primary elections would have made a meaningful difference under federal constitutional analysis.

30. 514 U.S. 779 (1995).

31. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”).

32. *U.S. Term Limits, Inc.*, 514 U.S. at 827.

33. The *U.S. Term Limits* Court noted in dicta that the 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 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF CONSTITUTION 434–35 (3d ed. 1858)).

34. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

35. See *U.S. Term Limits, Inc.*, 514 U.S. at 826–38 (stating that the Framers “intended to grant States authority to protect the integrity and regularity of the election process by regulating election procedures, . . . not to provide them with license to impose *substantive* qualifications”).

36. See *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (finding that Georgia’s early filing deadline “for candidates not endorsed by established parties” was reasonable).

37. See *id.* at 442 (upholding a Georgia law requiring that presidential candidates from minor-parties obtain signatures from 5 percent of eligible voters); *Am. Party of Tex. v. White*, 415 U.S. 767, 787 (1974) (upholding a similar Texas law).

38. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 190–91 (1986) (upholding a Washington law requiring that a minor-party candidate receive at least 1 percent of the votes cast in the primary election).

presence of frivolous candidacies,”³⁹ they serve as procedural requirements necessary for the administration of elections rather than restrictions on candidacy.

Some do not view a tax return requirement as fundamentally different from any other procedural requirement.⁴⁰ A tax return requirement attempts to prevent voter confusion by providing voters with information relevant to their choice for president.⁴¹ And it prevents the presence of frivolous candidates by ensuring that candidates commit to a minimum level of transparency.⁴² Moreover, a tax return requirement can be viewed as a procedural step that does not exclude any particular class of candidates—anyone can in theory release his or her tax returns as a step towards candidacy.⁴³

However, others find the relationship between requiring the release of tax returns and the mechanics of running an election to be much more tenuous.⁴⁴ The 2016 election involved a nonfrivolous major-party candidate who deliberately refused to release his tax returns, and it is unclear how the release of his tax returns would have benefitted any election procedure. Additionally, the Court in *U.S. Term Limits* had invalidated a ballot access restriction for having “the likely effect of handicapping a class of candidates and [having] the sole purpose of creating additional qualifications indirectly.”⁴⁵ Some point out that laws like SB 27 clearly disadvantage President Trump, and that the purpose of such laws seems to be less about providing voters with relevant information and more about adding a qualification that Trump has yet to satisfy.⁴⁶ Because SB 27 did not appear to be

39. *Id.* at 195.

40. See Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISCOURSE 46, 46 (2017).

41. See *id.* at 60.

42. See *id.* at 48 (“[M]ost serious candidates for the presidency have released their tax returns for public inspection.”).

43. See *id.* at 56.

44. See, e.g., Derek T. Muller, *Weaponizing the Ballot*, FLA. STATE U. L. REV. (forthcoming) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649.

45. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 836 (1995).

46. A California bill similar to SB 27 and introduced in 2017 explicitly referenced Donald Trump. S.B. 149, 2017–2018 Reg. Sess. (Cal. 2017) (as introduced Jan. 18, 2017) (“Donald Trump’s refusal to release his income tax returns departed from decades of established political tradition . . .”). Ballot access legislation introduced in New York was titled the Tax Returns Uniformly Made Public Act, or “TRUMP” Act. S.B. 26, 2017–2018 Legis. Sess. (N.Y. 2017). Similar legislation in Minnesota adopted the same title. S.B. 199, 2019–2020 Reg. Sess. (Minn. 2019).

procedural in either nature or intent, they conclude that California exceeded its constitutional authority by enacting it.⁴⁷

C. First and Fourteenth Amendment Challenges

Analysis into the federal constitutionality of SB 27 does not end with Article II. Even if SB 27 fell within the ambit of a state's power to regulate elections, it may nevertheless have infringed upon the First and Fourteenth Amendment rights of candidates and voters. First and Fourteenth Amendment challenges to election laws generally involve the alleged infringement of three categories of rights: the First Amendment right to speech,⁴⁸ the First Amendment right to association and belief,⁴⁹ and the Fourteenth Amendment right to equal protection.⁵⁰ For example, the Supreme Court has held restrictions on campaign expenditures to infringe upon a candidate's First Amendment right to speech because they limit a candidate's means for political communication.⁵¹ Additionally, the Court has found the disclosure of campaign contributions to overly burden voters' First Amendment right to association when such disclosure results in actual harassment against voters over their support for unpopular campaigns.⁵² Finally, the Court has struck down election laws that disadvantage a class of candidates—by imposing discriminatory ballot

47. See Muller, *supra* note 44, at 68–69.

48. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). The First Amendment right to speech was subsequently incorporated against the states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

49. Although the right to association and belief is not explicitly mentioned in the First Amendment, the Court referenced such a right and applied it to the states in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958).

50. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

51. See *Buckley v. Valeo*, 424 U.S. 1, 17–18 (1976) (striking down portions of the Federal Elections Campaign Act that placed dollar limits on campaign expenditures); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365–66 (2010) (invalidating portions of the Bipartisan Campaign Reform Act that limited independent corporate expenditures for electioneering communications).

52. See *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101–02 (1982) (finding that the disclosure of the names and addresses of donors to the Socialist Workers party violated those donors’ associational rights in light of the well-documented instances of harassment against supporters of the Party); see also *Anderson v. Celebrezze*, 460 U.S. 780, 792–93 (1983) (holding that Ohio’s early filing deadline for independent candidates unconstitutionally burdened the First Amendment right of voters to associate with the candidate of their choice); *Patterson*, 357 U.S. at 462–63 (finding that Alabama’s attempt to compel the disclosure of the National Association for the Advancement of Colored People’s (NAACP) membership list unconstitutionally burdened the associational rights of NAACP members).

designations,⁵³ filing deadlines,⁵⁴ signature requirements,⁵⁵ and filing fees⁵⁶—for violating that class of candidates’ Fourteenth Amendment right to equal protection.

However, “not every limitation or incidental burden on [these rights] is subject to a stringent standard of review.”⁵⁷ *Anderson v. Celebrezze*⁵⁸ articulated a balancing test for courts to use when subjecting ballot access restrictions to First and Fourteenth Amendment scrutiny.⁵⁹ Under this test, courts must weigh the “character and magnitude” of the First and Fourteenth Amendment burdens imposed by the law against the “legitimacy and strength” of the state’s interest in having it.⁶⁰ The Court later reframed the same test in *Burdick v. Takushi*,⁶¹ holding that “when [First and Fourteenth Amendment] rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’”⁶² “Lesser burdens, however, trigger less exacting review”⁶³

Ample disagreement exists as to how SB 27 would have fared under the *Anderson-Burdick* test. Some argue that any burden its disclosure requirements place on candidates would be minimal, since candidates have been disclosing tax returns for the better part of a century.⁶⁴ Others note that some candidates have unique privacy interests that cannot be properly weighed by the courts.⁶⁵ And it is not

53. See *Anderson v. Martin*, 375 U.S. 399, 403–04 (1964) (invalidating a Louisiana law requiring the designation of a candidate’s race on the ballot).

54. See *Celebrezze*, 460 U.S. at 805–06 (invalidating Ohio’s early filing deadline for independent candidates).

55. See *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87 (1979) (striking down an Illinois law requiring that independent and new party candidates for statewide offices obtain signatures totaling 5 percent of the votes cast in the prior election); *Norman v. Reed*, 502 U.S. 279, 288–94 (1992) (striking down portions of a similar Illinois law); *Williams v. Rhodes*, 393 U.S. 23, 24–25 (1968) (striking down an Ohio law requirement that a new party’s presidential nominee obtain signatures totaling 15 percent of the votes cast in the last gubernatorial election).

56. See *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (striking down a Texas statutory scheme requiring candidates to pay fees as high as \$8,900).

57. *Id.* at 143.

58. 460 U.S. 780 (1983).

59. See *id.* at 789.

60. See *id.*

61. 504 U.S. 428 (1992).

62. *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

63. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick*, 504 U.S. at 434).

64. See Lang, *supra* note 40, at 60.

65. See Muller, *supra* note 44, at 9 n.33.

difficult to imagine disagreements about the “legitimacy and strength” of the state’s interest in releasing a candidate’s tax returns. On the one hand, laws like SB 27 allow voters to make more intelligent decisions when choosing the next leader of the country.⁶⁶ On the other hand, most serious candidates are already subject to intense media scrutiny, and voters are in any case free to draw inferences from a candidate’s refusal to release his or her tax returns.⁶⁷ Some have additionally noted that disclosure may not provide the educational benefits touted by lawmakers—few voters may bother to educate themselves about candidate tax returns, and the information contained in candidate tax returns may distract voters from more important substantive issues.⁶⁸

Although the arguments enumerated above are far from comprehensive, they demonstrate that the constitutionality of laws like SB 27 remains uncertain absent a more definitive ruling by the Supreme Court.

III. IMPOSING CIVIL OR CRIMINAL SANCTIONS ON CANDIDATES WHO FAIL TO RELEASE THEIR TAX RETURNS

SB 27 attempted to motivate the disclosure of tax returns by restricting access to the ballot.⁶⁹ Although the California Supreme Court has since struck down SB 27,⁷⁰ California can still incentivize disclosure by imposing civil or criminal penalties on those presidential candidates who fail to produce their tax returns. By avoiding the ballot, such an approach will not only sidestep challenges based on the California Constitution, it will likely bypass challenges based on the Qualifications Clause and withstand First and Fourteenth Amendment scrutiny as well. The remainder of this Part addresses each of the federal constitutional challenges in turn.

66. See S.B. 27, 2019–2020 Reg. Sess. (Cal. 2019).

67. See *Anderson v. Celebrezze*, 460 U.S. 780, 797–98 (1983) (“Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues. . . . This reasoning applies with even greater force to a Presidential election, which receives more intense publicity.”).

68. See Lear Jiang, Note, *Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 501–06 (2019).

69. S.B. 27.

70. See *Patterson v. Padilla*, 451 P.3d 1171, 1191 (Cal. 2019).

A. *Qualifications Clause Challenge*

If laws like SB 27 violate the Presidential Qualifications Clause, it is because their denial of ballot access constitutes a disqualification of candidates for reasons other than those permitted by Article II.⁷¹ However, California and other states can sidestep the Qualifications Clause issue altogether by civilly or criminally sanctioning the nondisclosure of tax returns instead of conditioning ballot access on their production. Although the Constitution fixes the qualifications for President and members of Congress,⁷² it permits states to punish behavior it neither spells out nor anticipates.⁷³ In fact, the government has on a few occasions imprisoned those it could not otherwise disqualify from candidacy. In 1798, Representative Matthew Lyon was convicted for violating the Alien and Sedition Acts.⁷⁴ Despite being sentenced to prison, Lyon was re-elected to Congress in a landslide vote while sitting inside his jail cell.⁷⁵ Over a century later, in 1919, the Supreme Court upheld Eugene Debs's conviction under the Espionage Act.⁷⁶ Debs nevertheless ran for President while serving his ten-year prison sentence and received close to one million votes in the 1920 election.⁷⁷

The upshot is that even a law criminalizing a candidate's refusal to release his or her tax returns will almost certainly withstand Article II scrutiny. The penalties imposed by such a law do not disqualify a candidate from the presidency—as history has demonstrated, one can still mount a successful campaign from prison. But more importantly, the Framers never intended the Presidential and Congressional Qualifications Clauses to serve as limitations to state police power. If the impediment of being in prison amounted to a disqualification from office in violation of the Qualifications Clauses, the constitutionality of every criminal code would be called into question.

71. *See supra* Part II.B.

72. *See supra* Part II.B.

73. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

74. J. FAIRFAX MCLAUGHLIN, MATTHEW LYON: THE HAMPDEN OF CONGRESS, A BIOGRAPHY 357–58 (1900).

75. Lyon received 4,576 votes; his challenger received 2,444. *Id.* at 374–75.

76. *Debs v. United States*, 249 U.S. 211, 216 (1919).

77. Debs received 913,693 votes, the highest ever for a socialist candidate. RHODRI JEFFREYS-JONES, THE AMERICAN LEFT: ITS IMPACT ON POLITICS AND SOCIETY SINCE 1900, at 35 (2013).

It might be argued that a better reading of the Qualifications Clauses would limit only those laws that single out political candidates for sanction while leaving untouched laws of general applicability that happen to ensnare those running for office. However, the Court has thus far refused to recognize such a distinction. For example, the Court has generally upheld the civil and criminal penalties imposed by the disclosure provisions of federal campaign finance laws—applicable only to candidates for federal office—without so much as a single mention of the Qualifications Clauses.⁷⁸ And if the targeted imposition of civil or criminal penalties by Congress does not implicate the Qualifications Clauses, neither should the same by the states.⁷⁹

B. First and Fourteenth Amendment Challenges

Although a law that substitutes SB 27's ballot removal with civil or criminal sanctions may avoid Qualifications Clause scrutiny, it remains susceptible to the same First and Fourteenth Amendment challenges. Because such a law still requires the disclosure of candidate tax returns, it may discourage charitable contributions and other associational activity revealed by the returns, or even deter candidates from running for office altogether. It therefore implicates what the Supreme Court has sometimes referred to as the First Amendment right to "privacy of association and belief."⁸⁰ Nevertheless, the Court's decisions upholding the mandatory disclosure of election-related information suggest that both SB 27 and its potential replacement would likely survive First and Fourteenth Amendment scrutiny.⁸¹

78. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 60–68 (1976) (upholding the disclosure provisions of the Federal Election Campaign Act); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–71 (2010) (upholding the disclosure provisions of the Bipartisan Campaign Reform Act); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 230–31 (2003) (upholding earlier disclosure provisions of the Bipartisan Campaign Reform Act), *overruled in part on other grounds* by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Of course, the Supreme Court's lack of commentary about the constitutionality of federal campaign finance laws under the Qualifications Clauses is not conclusive. Nevertheless, it suggests that even the attorneys seeking to overturn the statutes did not find the Qualifications Clause arguments persuasive enough to include in their briefs, and that the Court did not find the laws so obviously violative of the Qualifications Clauses as to raise the issue *sua sponte*.

79. See U.S. CONST. amend. X.

80. *Buckley*, 424 U.S. at 64.

81. This Note takes a different position than at least one federal district court, which found that SB 27 would likely have violated the First and Fourteenth Amendments. See *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1181–85 (E.D. Cal. 2019), *vacated*, No. 2:19-cv-01477-MCE-DB, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

1. Campaign Finance Laws

In analyzing the constitutionality of a law compelling the disclosure of candidate income tax returns, it is instructive to look at how the Supreme Court has considered, and ultimately upheld, the disclosure provisions of federal campaign finance laws.⁸² The most notable of these laws is the Federal Election Campaign Act (FECA). First enacted in 1972, it currently stands as the primary source of federal law regulating campaign spending and fundraising.⁸³ Among other things, it requires candidates to report independent expenditures if they exceed \$250 in a calendar year,⁸⁴ and to disclose the names, addresses, and occupations of donors who contribute more than \$200.⁸⁵ These reports are subsequently made available to the public on a website.⁸⁶ The FECA also established the Federal Election Commission (FEC)⁸⁷ and gave it the authority to institute civil actions against those who fail to make the requisite disclosures.⁸⁸ In addition to seeking injunctive relief, the FEC can impose civil penalties not exceeding “the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation.”⁸⁹ In the case of a knowing or willful violation, the ceiling increases to “the greater of \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.”⁹⁰ In some instances, the FEC can even petition the court to impose criminal sanctions.⁹¹

The Federal Election Campaign Act Amendments of 1974 included a provision that allowed the disqualification of candidates for campaign finance violations.⁹² Tellingly, Congress repealed this

82. See, e.g., *Buckley*, 424 U.S. at 60–68 (upholding the disclosure provisions of the Federal Election Campaign Act); *Citizens United*, 558 U.S. at 366–71 (upholding the disclosure provisions of the Bipartisan Campaign Reform Act); *McConnell*, 540 U.S. at 230–31 (upholding earlier disclosure provisions of the Bipartisan Campaign Reform Act).

83. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–46).

84. 52 U.S.C. § 30104(c)(1) (2018).

85. *Id.* § 30104(c)(2).

86. *Id.* § 30104(i)(4).

87. *Id.* § 30106.

88. *Id.* § 30109(a)(6)(A).

89. *Id.* § 30109(a)(6)(B).

90. *Id.* § 30109(a)(6)(C).

91. *Id.* § 30109(a)(11).

92. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 407, 88 Stat. 1263, 1290 (repealed by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 111, 90 Stat. 475, 486).

provision in 1976⁹³ before the Supreme Court had an opportunity to consider it, likely because of its dubious constitutionality.⁹⁴ However, the Court has since affirmed the constitutionality of the remaining enforcement provisions of the FECA, including the authority of the FEC to impose civil and criminal sanctions for a candidate's failure to file the requisite campaign finance disclosures.⁹⁵

a. Buckley v. Valeo

The Supreme Court first considered the constitutionality of the FECA in *Buckley v. Valeo*.⁹⁶ Although it struck down portions of the FECA that imposed hard limits on election-related expenditures made by candidates and their campaigns,⁹⁷ the Court broadly upheld the FECA's reporting requirements.⁹⁸ The Court reasoned that expenditure ceilings impose a far greater burden on First Amendment political expression and associational rights than reporting requirements do.⁹⁹ The former "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁰⁰ To the extent the latter does so, it does so indirectly.¹⁰¹ The Court therefore subjected the FECA's expenditure limits to strict scrutiny¹⁰² while taking a more lenient approach to its reporting requirements.¹⁰³

This does not mean, however, that compelled disclosure is not subject to any scrutiny. Although mandating the disclosure of contributions and expenditures does not prohibit political expression or association in an absolute sense, it "can seriously infringe on

93. Federal Election Campaign Act Amendments of 1976 § 111.

94. See *Buckley v. Valeo*, 424 U.S. 1, 115 n.157, 137 n.175 (1976) (noting that candidate disqualification powers pose "very serious constitutional questions," but that "[c]onsiderations of ripeness prevent us from deciding . . . whether such an agency could . . . disqualify a candidate for federal election consistently with Art. I, § 5, cl. 1").

95. *Id.* at 76–82.

96. 424 U.S. 1 (1976).

97. *Id.* at 51–59.

98. *Id.* at 143.

99. *Id.* at 44.

100. *Id.* at 19.

101. *Id.* at 64.

102. The *Buckley* Court used the words "exacting scrutiny." *Id.* at 16. The Court later clarified that "exacting scrutiny" in the context of expenditure limits meant strict scrutiny. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014) ("Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.").

103. *Buckley*, 424 U.S. at 64.

privacy of association and belief guaranteed by the First Amendment.”¹⁰⁴ Because campaign contributions “can reveal much about a person’s activities, associations, and beliefs,”¹⁰⁵ their disclosure—although not an outright ban on the contributions themselves—may nevertheless deter some individuals from making contributions, thereby indirectly interfering with their First Amendment right to associate with the campaign of their choice.¹⁰⁶

Accordingly, the *Buckley* Court reaffirmed a form of intermediate scrutiny for mandatory disclosure laws, which “cannot be justified by a mere showing of some legitimate governmental interest” and for which there must “be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”¹⁰⁷ With respect to the FECA, the Court found three categories of government interest that justified its disclosure requirements.¹⁰⁸ First, the disclosure requirements aid voters in their selection of a candidate by giving them insight into the source and uses of campaign money.¹⁰⁹ Second, the disclosure requirements discourage corruption and the appearance of corruption by subjecting campaign finances to public scrutiny.¹¹⁰ Finally, the disclosure requirements are necessary for the government to be able to enforce the other provisions of the FECA.¹¹¹

In closing out its analysis of the FECA, the Court asserted that the disclosure provisions were not only substantially related to the government interests enumerated above, they were “in most applications . . . the least restrictive means of curbing the evils of campaign ignorance and corruption.”¹¹² Although opponents of the FECA had proposed a rule requiring post-election disclosure by successful candidates as a less restrictive alternative, the Court dismissed the proposal as being ineffective at educating voters prior to the election when “public interest in sources of campaign funds is

104. *Id.*

105. *Id.* at 66 (quoting *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)).

106. *Id.* at 68.

107. *Id.* at 64.

108. *Id.* at 66.

109. *Id.* at 67 (“It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”).

110. *Id.*

111. *Id.* at 67–68.

112. *Id.* at 68.

likely to be at its peak.”¹¹³ Because the Court concluded that the FECA reporting requirements served important government interests, not least of which was the electorate’s interest in knowing “where political campaign money comes from and how it is spent by the candidate,”¹¹⁴ the Court found them constitutional.¹¹⁵

However, the Court was careful to note that its decision in *Buckley* did not mean that the FECA reporting requirements were necessarily constitutional in all their applications.¹¹⁶ For example, compelling disclosure from a minor-party candidate when such disclosure would subject minor-party contributors to “threats, harassment, or reprisals” may more directly abridge the contributors’ First Amendment associational rights.¹¹⁷ In such instances, disclosure might serve as a practical bar to the contributors’ ability to donate to the party of their choice.¹¹⁸ Nevertheless, the Court found these concerns sufficiently remote so as not to facially invalidate compelled disclosure laws that failed to carve out exceptions for minor-party candidates and was satisfied that the lower courts could adequately address the constitutional issues in such cases as they arose.¹¹⁹

b. Defining the Limits of Buckley

The *Buckley* decision upholding the FECA’s disclosure provisions relied on two important findings. First, that the disclosure provisions, unlike the FECA’s expenditure limits, only indirectly burdened the First Amendment rights of candidates and their donors and therefore triggered a more lenient form of scrutiny.¹²⁰ And second, that the disclosure provisions satisfied scrutiny by being substantially related to serving important government interests.¹²¹ Even as the Supreme Court has reaffirmed its decision in *Buckley*,¹²² it has

113. *Id.* at 68 n.82.

114. *Id.* at 66 (citation omitted).

115. *Id.* at 61.

116. *See id.* at 74.

117. *Id.*

118. *Id.* at 73–74.

119. *Id.*

120. *Id.* at 64.

121. *Id.* at 68 (“The disclosure requirements, as a general matter, directly serve substantial governmental interests.”).

122. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366–71 (2010) (upholding the disclosure provisions of the Bipartisan Campaign Reform Act); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 230–31 (2003) (upholding earlier disclosure provisions of the

subsequently invalidated some disclosure laws as lacking in one or the other of these justifications.¹²³

The *Buckley* Court opened the door to the invalidation of mandatory disclosure laws that encroach too far on protected First Amendment interests,¹²⁴ and the Court subsequently walked through that door in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*.¹²⁵ There, an Ohio law required political parties to report the names and addresses of every campaign contributor and every recipient of a campaign disbursement.¹²⁶ As such, it did not differ materially from the FECA.¹²⁷ Nevertheless, the Court held the reporting requirements unconstitutional *as applied* to the Socialist Workers Party (SWP).¹²⁸ Evidence presented at trial documented a long history of both private and government hostility towards the SWP.¹²⁹ The former involved numerous instances of threatening phone calls, hate mail, and the firing of SWP members because of their party affiliation.¹³⁰ The latter involved pervasive surveillance of SWP members by various government agencies, and the disclosure of embarrassing information about SWP members to the press.¹³¹ Relying primarily on its reasoning in *Buckley*, the Court held that because there existed a “reasonable probability” that disclosure would subject SWP contributors and recipients to “threats, harassment, or reprisals,” Ohio’s disclosure laws could not be constitutionally applied to the SWP.¹³²

Even when there is no reason to believe that disclosure would lead to “threats, harassment, or reprisals,” the Court has found legislation unconstitutional for lacking a substantial relation to its stated

Bipartisan Campaign Reform Act), *overruled in part on other grounds by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010).

123. *See* *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), discussed *infra*; *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182 (1999), discussed *infra*.

124. *See* *Buckley*, 424 U.S. at 74.

125. 459 U.S. 87 (1982).

126. *Id.* at 88.

127. It was argued that the Ohio statute’s lack of a monetary threshold, in contrast to the FECA, should render the statute facially invalid. However, the district court punted on the issue. *Id.* at 91 n.6.

128. *Id.* at 88.

129. *Id.* at 99.

130. *Id.*

131. *Id.*

132. *Id.* at 101–02.

government interests.¹³³ In Colorado, citizens can enact laws through ballot measures that have garnered a minimum number of supporting signatures.¹³⁴ It is therefore common for proponents of ballot measures to hire petition circulators to solicit signatures.¹³⁵ In an attempt to regulate signature solicitation activities, Colorado passed a law requiring the disclosure of the names, addresses, and salaries of paid petition circulators.¹³⁶ But in *Buckley v. American Constitutional Law Foundation, Inc.*,¹³⁷ the Court ruled the law unconstitutional, not because it could reasonably lead to the harassment of petition circulators,¹³⁸ but because it failed scrutiny.¹³⁹

The Court acknowledged that disclosure generally serves important government interests, observing that “informed public opinion is the most potent of all restraints upon misgovernment.”¹⁴⁰ However, the Court found Colorado’s interest in disclosure to be adequately served by existing law requiring proponents of ballot measures—rather than the petition circulators they hire—to report their names and the amount of money they spent to gather signatures.¹⁴¹ After all, “[w]hat is of interest is the payor, not the payees.”¹⁴² The Court further dismissed concerns that paid petition circulators may accept false signatures, reasoning that they would have less incentive to do so than non-paid petition circulators who were not subject to the disclosure requirement.¹⁴³ Because the sweep of the Colorado provision was simultaneously too broad—unnecessarily including paid petition circulators when the inclusion of ballot measure proponents would suffice—and too narrow—failing to

133. See *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 204 (1999), discussed *infra*.

134. *Id.* at 186.

135. See *id.* at 194.

136. See *id.* at 186.

137. 525 U.S. 182 (1999).

138. The disclosure of the names, addresses, and salaries of petition circulators “are not instantly accessible” and therefore “does not expose the circulator to the risk of ‘heat of the moment’ harassment.” *Id.* at 199.

139. *Id.* at 204.

140. *Id.* at 202 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

141. *Id.* at 202–03.

142. *Id.* at 203 (quoting *Am. Const. L. Found., Inc. v. Meyer*, 870 F. Supp. 995, 1003 (D. Colo. 1994), *aff’d in part and rev’d in part*, 120 F.3d 1092 (10th Cir. 1997)).

143. “[W]e are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.” *Id.* at 203–04 (quoting *Meyer v. Grant*, 486 U.S. 414, 426 (1988)).

include non-paid petition circulators who might have more incentive to obtain false signatures—the Court struck it down for being too “tenuously related to the substantial interests disclosure serves.”¹⁴⁴

In *McIntyre v. Ohio Elections Commission*,¹⁴⁵ the Court struck down a disclosure law both because it overly burdened the First Amendment rights of ordinary citizens and because it failed to serve important state interests.¹⁴⁶ There, Margaret McIntyre was fined for distributing anonymous leaflets protesting a proposed school tax¹⁴⁷ in contravention of an Ohio statute prohibiting the distribution of “unsigned documents designed to influence voters in an election.”¹⁴⁸ The Court took several steps to distinguish this case from *Buckley*.¹⁴⁹

First, whereas the disclosure law in *Buckley* required the attachment of names to campaign contributions, the Ohio law required the attachment of names to *all* election-related documents, including, in this instance, “a personally crafted statement of a political viewpoint.”¹⁵⁰ While “money may ‘talk,’” the speech communicated by a campaign contribution is “less specific, less personal, and less provocative than a handbill.”¹⁵¹ There is therefore less of a risk that campaign donation attributions will significantly impact donors.¹⁵² On the other hand, because leaflets like the ones passed out by McIntyre may express unpopular viewpoints and are therefore much more likely to “precipitate retaliation,” the Ohio law infringed upon McIntyre’s free speech rights to an impermissible degree.¹⁵³

Second, while disclosure of campaign contributions lessens the risk that the contributions will be used to solicit special treatment after a candidate assumes office,¹⁵⁴ disclosure of campaign literature

144. *Id.* at 204.

145. 514 U.S. 334 (1995).

146. *See id.* at 357.

147. *Id.* at 337–38.

148. *Id.* at 344.

149. *Id.* at 355–56.

150. *Id.* at 355.

151. *Id.*

152. *See id.*

153. *See id.* Presumably, the Court was also sympathetic to the fact that McIntyre had only “modest resources” at her disposal. *See id.* at 350. The Court has since upheld a provision of the Bipartisan Campaign Reform Act requiring anyone funding televised electioneering communications to include the disclaimer “_____ is responsible for the content of this advertising.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366–67 (2010) (quoting 2 U.S.C. § 441d(d)(2) (2000) (transferred to 52 U.S.C. § 30120(d)(2) (2012))).

154. *McIntyre*, 514 U.S. at 356.

authorship serves no similar government interest.¹⁵⁵ Although the Court acknowledged Ohio's stated interest in preventing fraud and libel, it noted that Ohio's Election Code already penalized the dissemination of false statements during political campaigns.¹⁵⁶ Accordingly, the law in question only provided the ancillary benefits of further deterring fraud and aiding the enforcement of the Election Code.¹⁵⁷ These benefits, while "assuredly legitimate," were not sufficiently important to justify the law's burden on political speech.¹⁵⁸

Taken as a whole, these cases suggest that the government may generally compel the disclosure of election-related information unless doing so would subject individuals to a more than hypothetical possibility of retaliation, or if such disclosure does not substantially relate to the accomplishment of important government interests—typically voter education and the deterrence of corruption or its appearance.¹⁵⁹

2. More Comprehensive Financial Disclosure Laws

The cases discussed above establish a framework for analyzing reporting requirements as applied to election-related activity, but they fail to address the constitutionality of laws requiring the disclosure of personal financial information that predates a candidate's decision to run for office. Indeed, the Court has thus far eschewed ruling on laws requiring public officials to disclose a broader range of non-campaign-related finances.

The most prominent of these more comprehensive disclosure laws is the Ethics in Government Act of 1978 (EGA).¹⁶⁰ Among other things, the EGA requires the President and Vice President to publicly report their sources of income, gifts they have received, property they hold, the value of their total liabilities, and their sale and exchange of real property or securities.¹⁶¹ These reports must be filed within thirty

155. *Id.* at 357.

156. *Id.* at 349.

157. *Id.* at 350–51.

158. *Id.* at 351.

159. *See supra* Part III.B.1.a.

160. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 5 U.S.C. app. 4).

161. 5 U.S.C. app. 4 §§ 101(f), 102(a), 103(d) (2018).

days of assuming office¹⁶² and on an annual basis thereafter.¹⁶³ Although the constitutionality of these particular provisions has yet to be seriously challenged in federal court, the Fifth Circuit in *Duplantier v. United States*¹⁶⁴ upheld other EGA provisions requiring federal judges, their spouses, and their dependent children to file and make public similar financial reports.¹⁶⁵ The Fifth Circuit based its reasoning primarily on its prior decision in *Plante v. Gonzalez*.¹⁶⁶

a. *Plante v. Gonzalez*

In *Plante v. Gonzalez*, the Fifth Circuit upheld the “Sunshine Amendment” to the Florida Constitution.¹⁶⁷ The amendment states in relevant part:

All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests. . . . Full and public disclosure of financial interests shall mean filing with the custodian of state records by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of \$1,000 and its value together with one of the following:

- a. A copy of the person’s most recent federal income tax return; or
- b. A sworn statement which identifies each separate source and amount of income which exceeds \$1,000.¹⁶⁸

In its analysis, the Fifth Circuit first declined to find that the Florida amendment’s compelled financial disclosure infringed on any “fundamental” right.¹⁶⁹ It noted that the rights the Supreme Court has traditionally classified as “fundamental” have all involved interests in important and intimate decision-making.¹⁷⁰ Although financial disclosure may indirectly affect some of the decisions one might

162. *Id.* § 101(a).

163. *Id.* § 101(d).

164. 606 F.2d 654 (5th Cir. 1979).

165. *Id.* at 657.

166. 575 F.2d 1119 (5th Cir. 1978); see *Duplantier*, 606 F.2d at 669–71.

167. *Plante*, 575 F.2d at 1121–22.

168. FLA. CONST. art. II, § 8.

169. *Plante*, 575 F.2d at 1132.

170. See *id.* at 1128.

make, the Fifth Circuit reasoned that the impacted decisions are typically not as important or intimate as the ones the Supreme Court has protected¹⁷¹—for example, the decision to use contraceptives,¹⁷² to terminate a pregnancy,¹⁷³ to marry,¹⁷⁴ to live with family,¹⁷⁵ or to control the upbringing of one's children.¹⁷⁶ Moreover, even when disclosure does affect important and intimate decision-making, the Fifth Circuit declared its influence too incidental to pose a constitutional problem.¹⁷⁷

The Supreme Court had considered the secondary effects of disclosure in two prior cases. In *Planned Parenthood of Central Missouri v. Danforth*,¹⁷⁸ the Court upheld abortion-related reporting requirements over objections that it discouraged women from exercising their right to terminate their pregnancies.¹⁷⁹ And in *Whalen v. Roe*,¹⁸⁰ the Court upheld a drug prescription recordkeeping system over objections that it would dissuade some from making decisions important to their medical care.¹⁸¹ The Fifth Circuit concluded that because the Sunshine Amendment did little more to deter the exercise of a fundamental right than the provisions in *Danforth* or *Whalen*, it did not demand strict scrutiny.¹⁸²

However, the Fifth Circuit recognized a constitutionally protected interest in “avoiding disclosure of personal matters” apart from the ancillary effects such disclosure might have on decision-making.¹⁸³ Although the Supreme Court in *Whalen* seemed to disclaim a generalized interest in privacy by permitting the recording of the names and addresses of patients in a state-controlled computer

171. *See id.*

172. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

173. *See* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

174. *See* *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 567 U.S. 644 (2015).

175. *See* *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

176. *See* *Meyer v. Nebraska*, 262 U.S. 390 (1923).

177. *Plante v. Gonzalez*, 575 F.2d 1119, 1131 (5th Cir. 1978).

178. 428 U.S. 52 (1976).

179. *Id.* at 79.

180. 429 U.S. 589 (1977).

181. *Id.* at 602–04.

182. *Plante*, 575 F.2d at 1131–32. The Sunshine Amendment has an arguably greater deterrent effect than the laws in *Danforth* and *Whalen* because unlike those laws, it requires the relevant disclosures be made accessible to the *public*. Nevertheless, the Fifth Circuit is likely correct in finding that any increased deterrence resulting from public disclosure is unlikely to trigger strict scrutiny under the Supreme Court's due process jurisprudence.

183. *Id.* at 1132–34.

database without applying any form of heightened scrutiny,¹⁸⁴ the Fifth Circuit distinguished *Whalen* from the circumstances in *Plante*.¹⁸⁵ The Court in *Whalen* had dismissed concerns over privacy in large part because public disclosure of the information stored in the database was prohibited¹⁸⁶ and the possibility of unauthorized access was unlikely.¹⁸⁷ But when, as in *Plante*, a case involves the disclosure of personal information to the *public*—as opposed to *state employees*—the Fifth Circuit determined that the larger intrusion to privacy demanded some form of scrutiny.¹⁸⁸ The court feared that any other interpretation of privacy rights would result in the unwelcome potential for Florida's public disclosure requirements to be “extended to anyone, in any situation.”¹⁸⁹

The Fifth Circuit eventually decided that the constitutionality of the Sunshine Amendment was best determined by “comparing the interests it serves with those it hinders.”¹⁹⁰ In assessing the government's interests, the court pointed to four important goals similar to the ones laid out in *Buckley*: “the public's ‘right to know’ an official's interests, deterrence of corruption and conflicting interests, creation of public confidence in Florida's officials, and assistance in detecting and prosecuting officials who have violated the law.”¹⁹¹ The court subsequently found the Florida amendment to sufficiently promote the first three of these goals.¹⁹²

In addressing the interests of candidates and public officials, the court acknowledged that in some situations financial disclosure may lead to “the threat of kidnapping, the irritation of solicitations, [or] the embarrassment of poverty.”¹⁹³ Presumably, a showing of a legitimate threat of kidnapping would result in a successful as-applied challenge. But as a general matter, the court held these concerns insufficient to overcome the government's interests in enacting the amendment, in part because public officials and those running for public office have

184. *Whalen*, 429 U.S. at 598 (“[T]he legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers.”).

185. *Plante*, 575 F.2d at 1133.

186. *Id.* (citing *Whalen*, 429 U.S. at 593–95).

187. *Id.* (citing *Whalen*, 429 U.S. at 602).

188. *Id.* at 1134.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1134–35.

193. *Id.* at 1135 (citing *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225, 233 (Cal. 1970)).

less of an expectation of privacy,¹⁹⁴ and in part because “regulations might allow exemptions in sensitive situations.”¹⁹⁵ Because the Fifth Circuit found the balancing test to tilt in Florida’s favor, it deemed the Sunshine Amendment constitutional.¹⁹⁶

b. State and lower federal court decisions on financial disclosure

Financial disclosure laws similar to the EGA and Florida’s Sunshine Amendment have worked their way through various state and lower federal courts.¹⁹⁷ The majority of these cases have upheld financial disclosure laws as applied to public officials,¹⁹⁸ but not all of them have arrived at their conclusions in the same way.

In *Hunter v. City of New York*,¹⁹⁹ a New York state court found that because a city financial disclosure ordinance²⁰⁰ did not implicate a constitutional right, “the test is whether the means employed . . . are ‘reasonable and appropriate’ to accomplish its legitimate purposes.”²⁰¹ Unsurprisingly, the court held the ordinance constitutional under this lenient form of review even in “the absence of administrative machinery to review the propriety of public disclosure in individual cases.”²⁰² However, while the state appellate court agreed that the law did not infringe on any constitutional right to privacy, it held that the law violated the Due Process Clause by not considering “claims of irrelevancy.”²⁰³ Although the law in most cases served legitimate government purposes, its flaw was in its failure to provide state employees the opportunity to argue that, as applied to them, the law’s disclosure requirement bore no relationship to these purposes.²⁰⁴

194. For example, “[t]he salaries of most officials, including federal judges, are matters of public record.” *Id.* at 1136.

195. *Id.* at 1137.

196. *Id.* at 1138.

197. *See id.* at 1124 n.8 (listing the rulings on disclosure laws in fourteen states).

198. *See id.* at 1136 n.26 (listing cases from a “majority of courts” holding that “mandatory financial disclosure for elected officials is constitutional”).

199. 391 N.Y.S.2d 289 (N.Y. Special Term 1976), *aff’d as modified*, 396 N.Y.S.2d 186 (N.Y. App. Div. 1977), *aff’d*, 376 N.E.2d 928 (N.Y. 1978) (mem.).

200. *Id.* at 297. The ordinance required officials and their spouses to report any income from a single source exceeding \$1,000, any gifts exceeding \$500, any debts exceeding \$5,000 over a ninety-day period, and any investment whose value exceeded \$20,000. *Id.* at 294.

201. *Id.* at 297.

202. *Id.* at 301.

203. *See Hunter v. City of New York*, 396 N.Y.S.2d 186, 189–90 (N.Y. App. Div. 1977), *aff’d*, 376 N.E.2d 928 (N.Y. 1978) (mem.).

204. *See id.* at 189 (“The State must provide appropriate procedures to avoid arbitrary or discriminatory results, even where it asserts a legitimate governmental interest.”).

In *Slevin v. City of New York*,²⁰⁵ a district court enjoined enforcement of a newer version of the same financial disclosure law, but for different reasons.²⁰⁶ It found the law to implicate “fundamental interests,” including “the right to privacy, in its many facets, financial, marital, familial . . . and freedom of association, of belief, and of speech.”²⁰⁷ The court reasoned that such interests “should be justified by at least substantial and perhaps compelling state interests” and should be “narrowly drawn to deal only with the legitimate state interests at stake.”²⁰⁸ The court additionally took issue with the fact that the law still “provide[d] no mechanism by which reporting employees may be spared from reporting any item arguably required to be disclosed.”²⁰⁹

Slevin's description of privacy rights as “fundamental” and its use of language typically associated with strict scrutiny is somewhat of an anomaly. By and large, courts have refrained from applying strict scrutiny to financial disclosure laws.²¹⁰ Nevertheless, courts seem to be more willing to find such laws constitutional when they provide a means by which some portions of financial disclosures can be redacted.²¹¹ Although *Slevin* was not explicitly overturned, the Second Circuit later upheld a third version of the same law that permitted individuals to withhold items from their financial disclosure reports when “public inspection would constitute an unwarranted invasion of privacy.”²¹² The court acknowledged that “public disclosure of financial information may be personally embarrassing and highly intrusive,” but determined that “the statute’s privacy mechanism adequately protects plaintiffs’ constitutional privacy interests.”²¹³

Courts have also been sensitive to the scope of financial disclosure laws. In *City of Carmel-By-The-Sea v. Young*,²¹⁴ the

205. 477 F. Supp. 1051 (S.D.N.Y. 1979).

206. *See id.* at 1052–53.

207. *Id.* at 1055.

208. *Id.*

209. *Id.* at 1054.

210. *See* Louis Bernard Jack, *Constitutional Aspects of Financial Disclosure Under the Ethics in Government Act*, 30 CATH. U. L. REV. 583, 586 (1981).

211. *See Slevin*, 477 F. Supp. at 1054.

212. *Barry v. City of New York*, 712 F.2d 1554, 1557 (2d Cir. 1983).

213. *Id.* at 1561. Beyond stating that the statute’s privacy mechanism was sufficient to ensure the law’s constitutionality, the Second Circuit did not indicate whether it would have upheld the statute’s original formulation in *Slevin*, or what the appropriate level of scrutiny should be.

214. 466 P.2d 225 (Cal. 1970).

California Supreme Court found a financial disclosure law²¹⁵ to be overly broad because it applied to *every* public officer and candidate for state or local office, as well as their spouses and minor children.²¹⁶ The court decried the fact that “[n]o effort [was] made to relate the disclosure to financial dealings or assets which might be expected to give rise to a conflict of interest.”²¹⁷ In a subsequent case, the California Supreme Court upheld a disclosure law²¹⁸ because it contained “sufficient assurances that unnecessary intrusions into personal privacy will not occur.”²¹⁹ In particular, the law was “applicable only to certain designated officials” and exempted from disclosure any interest that could not be materially affected by an official’s actions while in office.²²⁰

It is unclear how the U.S. Supreme Court would rule on similar financial disclosure laws today. The majority of the state and lower court cases considering these laws rely on a general interest in informational privacy that the Court has yet to fully acknowledge or disclaim.²²¹ Moreover, *Nixon v. Administrator of General Services*,²²² the last Supreme Court case to directly address the “individual interest in avoiding disclosure of personal matters,”²²³ was, like many of the aforementioned cases, decided over forty years ago.²²⁴ However, if *Nixon* can serve as a guide, the Court is likely to be sensitive to the same issues discussed above. In *Nixon*, the Court considered the constitutionality of the Presidential Recordings and Materials Preservation Act, which directed the government to take custody of presidential materials accumulated during the Nixon presidency in order to preserve documents that had historical value and to make

215. The law required the disclosure of all investments valued in excess of \$10,000. *Id.* at 232.

216. *See id.* at 232–33.

217. *Id.* at 232.

218. The law required the disclosure of investments worth more than \$1,000, real property worth more than \$1,000, each source of income or gift worth more than \$250, and employment in the prior year. *County of Nevada v. MacMillen*, 522 P.2d 1345, 1348 (Cal. 1974).

219. *Id.* at 1350.

220. *Id.* at 1348.

221. *See Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 146–47 (2011) (acknowledging the dearth of case law on the matter, but nevertheless declining to rule on the existence of a general right to informational privacy).

222. 433 U.S. 425 (1977).

223. *Id.* at 457 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

224. *See Nelson*, 562 U.S. at 146 (“The Court announced the decision in *Nixon* in the waning days of October Term 1976. Since then, the Court has said little else on the subject of an ‘individual interest in avoiding disclosure of personal matters.’ . . . [And] no other decision has squarely addressed a constitutional right to informational privacy.” (quoting *Whalen*, 429 U.S. at 599)).

other records available for use in judicial proceedings.²²⁵ The Court acknowledged that some of the materials in question might be personal in nature, and that “public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.”²²⁶ Nevertheless, the Court found the Act constitutional in part because it set clear limits on disclosure.²²⁷ In particular, the Act required government archivists with “an unblemished record for discretion”²²⁸ to prescreen the presidential materials and immediately return any documents they flagged as “purely private.”²²⁹

While the boundary between laws that are too broad and those that are sufficiently tailored is hardly clear and sometimes inconsistent, a few themes stand out. First, courts have been more amenable to laws that place some limits on disclosure. This might take the form of administrative processes that allow affected persons to withhold sensitive information²³⁰ or information bearing no connection to their official duties.²³¹ Many courts, however, set an even lower bar, finding adequate “minimum dollar limits on revelation of some of the assets and liabilities.”²³² Second, courts are more likely to uphold disclosure laws that extend only to a well-defined and reasonable set of persons. In particular, courts prefer statutes that apply only to higher public offices where the risk and consequence of corruption is greater and the government interest is correspondingly higher.²³³ Finally, courts have for the most part acknowledged that it

225. *See Nixon*, 433 U.S. at 433–36.

226. *Id.* at 457.

227. *Id.* at 454.

228. *Id.* at 462 (quoting *Nixon v. Adm’r of Gen. Servs.*, 406 F. Supp. 321, 365 (D.D.C. 1976), *aff’d*, 433 U.S. 425 (1977)).

229. *Id.* at 458–59.

230. *See* S.B. 27, 2019–2020 Reg. Sess. (Cal. 2019) (requiring the redaction of social security numbers, home addresses, telephone numbers, and medical information on submitted tax returns).

231. *See Nixon*, 433 U.S. at 458–59 (stating that the Presidential Recordings and Materials Preservation Act required the government to return to President Nixon all “purely private papers and recordings”).

232. *Lehrhaupt v. Flynn*, 356 A.2d 35, 43 (N.J. Super. Ct. App. Div. 1976), *aff’d*, 383 A.2d 428 (N.J. 1978) (mem.).

233. *See, e.g., Gideon v. Ala. State Ethics Comm’n*, 379 So. 2d 570, 575 (Ala. 1980) (upholding a disclosure requirement for officials who make more than \$15,000 annually); *Hunter v. City of New York*, 391 N.Y.S.2d 289, 302–03 (N.Y. Special Term 1976) (upholding a disclosure requirement for officials earning more than \$25,000 annually), *aff’d as modified*, 396 N.Y.S.2d 186 (N.Y. App. Div. 1977), *aff’d*, 376 N.E.2d 928 (N.Y. 1978) (mem.); 5 U.S.C. app. 4 § 101(f) (2018) (requiring disclosure from a defined set of officials, including those in a position classified as GS-15 or above). *But see Comer v. City of Mobile*, 337 So. 2d 742, 752–53 (Ala. 1976) (finding a

would be “an insurmountable legislative task to tailor disclosures to each of literally a myriad of public posts, and an anomaly to require each individual to make a personal determination as to what items of his financial affairs would be relevant.”²³⁴ Therefore, the consensus among the courts has been that disclosure laws need not use the least restrictive means for achieving compelling government interests.²³⁵

3. Applying the *Anderson-Burdick* Test

Although the Supreme Court established the *Anderson-Burdick* test as a means for evaluating ballot access legislation rather than disclosure laws, the test in many ways epitomizes the reasoning in both *Plante* and *Buckley*. The initial formulation in *Anderson* resembles the balancing test put forward by the Fifth Circuit in *Plante*, requiring courts to weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”²³⁶ More recent formulations based on *Burdick* parallel the logic in *Buckley*, where “[r]egulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest,” and “[l]esser burdens . . . trigger less exacting review.”²³⁷ In *Buckley*, the Court applied strict scrutiny to hard limits on campaign expenditures because they severely burdened candidates’ First Amendment right to speech.²³⁸ But the Court only applied intermediate scrutiny to campaign finance disclosure requirements because they imposed a lesser burden on donors’ First Amendment right to association.²³⁹

And even though the Fifth Circuit in *Plante* arrived at a balancing test based on an ostensible constitutional interest in informational privacy, the path it took to get there nevertheless bears a striking resemblance to the approach taken in *Buckley* and formalized in *Burdick*. The Fifth Circuit acknowledged that the submission of financial records to the *government* generally imposes so little of a

disclosure ordinance that applied only to officials in cities with populations greater than 15,000 (“arbitrary and capricious”).

234. *Fritz v. Gorton*, 517 P.2d 911, 926 (Wash. 1974).

235. *See* Jack, *supra* note 210, at 586.

236. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

237. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

238. *See supra* note 102 and accompanying text.

239. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

privacy burden that it warrants no more than rational basis review.²⁴⁰ But because the release of financial records to the *public* is particularly invasive, the court reasoned that public disclosure requires “[s]omething more than mere rationality.”²⁴¹ On the other hand, because the Supreme Court has not recognized a generalized fundamental right to privacy, and because the Florida amendment did not impose a severe burden to the types of “fundamental” personal decision-making the Supreme Court has recognized, the Fifth Circuit did not find the amendment to warrant the most exacting of scrutiny.²⁴² The resulting standard established by the Fifth Circuit therefore falls somewhere between rational basis review and strict scrutiny.²⁴³

a. Standard of review

The logic of *Anderson-Burdick* can similarly be applied to a law imposing civil or criminal sanctions on presidential candidates who fail to disclose their tax returns. Under *Anderson-Burdick*, an election law deserves strict scrutiny only if it severely burdens the rights of candidates or voters.²⁴⁴ Here, the disclosure of tax returns infringes no more on a candidate’s First Amendment right to speech than does the disclosure of campaign-related finances under the FECA. Neither requirement imposes a “ceiling on campaign-related activities”²⁴⁵ or “prevent[s] anyone from speaking.”²⁴⁶ To the extent that they affect First Amendment speech rights, they do so indirectly.²⁴⁷ Because disclosure generally does not limit association, belief, or important and intimate decision-making in an absolute sense, the burdens it

240. *See Plante v. Gonzalez*, 575 F.2d 1119, 1133 (5th Cir. 1978).

241. *Id.* at 1134.

242. *See id.* at 1131–32.

243. *See id.* at 1134 (describing a balancing test).

244. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . [W]hen those rights are subjected to ‘severe’ restrictions, ‘the regulation must be narrowly drawn to advance a state interest of compelling importance.’ . . . But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” (first quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992); and then quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))).

245. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

246. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201 (2003), *overruled in part on other grounds by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

247. *See supra* Part III.B.1.a.

imposes do not rise to a level “severe” enough to warrant strict scrutiny.

However, even if disclosure laws do not absolutely bar First Amendment activities, they nevertheless place *some burden* on the First Amendment right to “privacy of association and belief.”²⁴⁸ In *Buckley*, the Court applied intermediate scrutiny to the FECA’s reporting requirements after acknowledging that the disclosure of campaign contributions may in some instances deter associational activity—i.e., donations—that might otherwise have occurred if it could have been conducted in private.²⁴⁹ Here, disclosure places an analogous burden on candidates. Tax returns may reveal association through employment, belief through charitable donations, and other information that might burden a candidate’s First Amendment rights. For example, an individual who entertains the idea of running for office may think twice about donating to unpopular political or religious organizations. And even if a candidate’s tax returns reveal nothing political or religious in nature, the Court has made clear that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”²⁵⁰

Furthermore, the disclosure of tax returns may deter some from running for office. Although the Court has not “attached such fundamental status to candidacy as to invoke a rigorous standard of review,” it has recognized that “the rights of voters and the rights of candidates do not lend themselves to neat separation.”²⁵¹ The Court has therefore struck down laws that overly burden candidacy, including early filing deadlines,²⁵² minimum signature requirements,²⁵³ and exorbitant filing fees.²⁵⁴ Admittedly, the disclosure of tax returns does not interfere as directly with candidacy as a filing fee. But the burden it places on candidacy is of the same

248. *Buckley*, 424 U.S. at 64.

249. *Id.* at 68 (“[P]ublic disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”).

250. Nat’l Ass’n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

251. *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972).

252. *See Anderson v. Celebrezze*, 460 U.S. 780, 805–06 (1983).

253. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87 (1979); *Norman v. Reed*, 502 U.S. 279, 288–94 (1992); *Williams v. Rhodes*, 393 U.S. 23, 24–25 (1968).

254. *See Bullock*, 405 U.S. at 134–35.

kind and quality as the burden FECA campaign contribution reports place on donors. Both burden core political activity. The FECA does so by deterring individuals from contributing to campaigns, and the proposed law does so by deterring individuals from running for office. Consequently, under the Court's reasoning in *Buckley*, courts should apply intermediate scrutiny to a law compelling the disclosure of tax returns by presidential candidates.

Not all courts have utilized this line of reasoning to apply heightened scrutiny. The Fifth Circuit based its decision in *Plante* on a more expansive view of a constitutionally protected right to privacy.²⁵⁵ Although the court might have saved itself a lot of trouble by recognizing, in the vein of *Buckley*, that “financial disclosure laws [impinge upon the] freedom of association, of belief, and of speech,”²⁵⁶ it nevertheless arrived at the same result. Despite eventually settling on a balancing test, the court utilized language echoing intermediate scrutiny. Of Florida's interests, the court wrote that “[t]he importance of these goals cannot be denied.”²⁵⁷ And of the relation between the Florida amendment and these interests, the court stated that disclosure “should help,” and that “more effective methods are not obvious.”²⁵⁸

Although the Supreme Court has yet to adopt as broad a view of the right to privacy as the Fifth Circuit, it need not do so to find that the disclosure of tax returns burdens the “privacy of association and belief”²⁵⁹—a right it *has* recognized—to an extent warranting some scrutiny. As was the case with the FECA's reporting requirement and Florida's Sunshine Amendment, a law penalizing the failure of candidates to produce relevant financial information neither burdens a fundamental right so severely as to warrant strict scrutiny, nor imposes so little a burden on candidates—and by extension, the voters that support them—as to deserve only the simple courtesy of rational basis review. Indeed, the weight of the reasoning in *Buckley*, *Plante*, and other decisions by state and lower federal courts indicate that the appropriate standard with which to evaluate the compelled disclosure law is one of intermediate scrutiny.

255. See *supra* Part III.B.2.a.

256. *Slevin v. City of New York*, 477 F. Supp. 1051, 1055 (S.D.N.Y. 1979).

257. *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978).

258. *Id.* at 1135.

259. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

b. Applying intermediate scrutiny

To satisfy intermediate scrutiny, a law compelling the release of candidate tax returns must be substantially related to serving an important government interest.²⁶⁰ Both *Buckley* and *Plante* identified three important government interests: voter education, the deterrence of corruption or its appearance, and the detection of violations of the law.²⁶¹ The proposed law need only substantially relate to one of these interests.

The most obvious reason for requiring the release of candidate tax returns is voter education. The *Buckley* Court stated that disclosure of “[t]he sources of a candidate’s financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”²⁶² Income tax returns are similar to campaign contributions in this way. Because both reveal the sources of a candidate’s financial support, both identify sources of candidate interest and potential conflicts of interest. A President whose campaign is supported mostly by farmers may be inclined to support policies benefiting farmers; a President who derives most of his or her income from agricultural businesses would likely have the same inclinations.²⁶³ In fact, because candidates are likely to be more sensitive to issues impacting their own sources of income than they are to those affecting their donors, the disclosure of income tax returns arguably does a better job educating voters about the issues “to which a candidate is most likely to be responsive.”²⁶⁴

An equally if not more important government interest is the deterrence of corruption or its appearance. The *Buckley* Court upheld the FECA in part because its “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large

260. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (describing an “intermediate” level of scrutiny when analyzing the constitutionality of gender classifications).

261. See *Buckley*, 424 U.S. at 66–68; *Plante*, 575 F.2d at 1134.

262. *Buckley*, 424 U.S. at 67.

263. Although candidates typically relinquish control of their businesses and equitable holdings upon assuming office, mere possession of income-generating assets can influence a candidate’s decisions. For example, although President Trump claims to have resigned from his positions in 400 business entities, his ownership stake in many of these entities may still influence his policy decisions as President. Resignation Letter from Donald J. Trump, President of the U.S. (Jan. 19, 2017), <https://assets.documentcloud.org/documents/3404759/DJT-Resignation-Signature-Page-With-Exhibit-a.pdf>.

264. *Buckley*, 424 U.S. at 67.

contributions and expenditures to the light of publicity.”²⁶⁵ Of particular concern was the possibility that donors might support a candidate as a quid pro quo for special favors after the candidate assumes office.²⁶⁶ Public records not only expose these types of arrangements, they discourage them as well.²⁶⁷ But even in the absence of such arrangements, disclosure maintains the public’s confidence in the political process and the elected officials it produces.²⁶⁸

Here, income tax returns serve a similar purpose. Suspect agreements between candidates and those that seek to influence them may involve more than just campaign donations. They may include employment, gifts, loans, or other benefits. The Fifth Circuit in *Plante* considered the argument that “few [candidates] are likely to make a public disclosure of illegal income,” but concluded that it was enough for “the existence of the reporting requirement [to] discourage corruption.”²⁶⁹ Candidates are less apt to accept questionable gifts if they need to take additional steps to hide them. And now that the FECA has closed the door to large anonymous campaign contributions,²⁷⁰ the government has a greater interest in deterring those who may wish to circumvent the FECA’s reporting requirements by giving to candidates directly instead of contributing to their campaigns.

Moreover, quid pro quo arrangements often allow candidates to profit indirectly through their family members. Because income tax returns include information not just of the candidates themselves, but also of their spouses and dependents, the disclosure of such returns has the potential to expose flavors of corruption not easily discovered by an examination of campaign ledgers. For example, in 2004, Darleen Druyun pled guilty to improperly favoring Boeing in procurement

265. *Id.*

266. *Id.*

267. *Id.* (“[E]xposure may discourage those who would use money for improper purposes either before or after the election.”); *see also* *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (“[T]he existence of the reporting requirement will discourage corruption.”).

268. *See Buckley*, 424 U.S. at 27 (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse”); *see also Plante*, 575 F.2d at 1134–35 (discussing the government’s interest in the “creation of public confidence in Florida’s officials”).

269. *Plante*, 575 F.2d at 1135.

270. *See* 52 U.S.C. § 30104(c)(2) (2018) (requiring the disclosure of the names, addresses, and occupations of donors who contribute more than \$200 to a campaign).

decisions while serving as the Principal Deputy Undersecretary of the Air Force for Acquisition.²⁷¹ Boeing had not only offered Druyun a lucrative job to commence shortly after she retired from the Air Force,²⁷² it had also hired her daughter and her daughter's fiancé.²⁷³ Druyun later admitted that "Boeing's employment of her future son-in-law and her daughter . . . along with her own desire to be employed at Boeing, influenced her government decisions in matters affecting Boeing."²⁷⁴ Although Druyun was not an elected official, even if she were, the campaign finance disclosures she would have to make under the FECA would not have uncovered this type of under-the-table dealmaking. On the other hand, the disclosure of her income tax returns would have had a greater chance of revealing her conflict of interest with Boeing.

While one might argue that the Internal Revenue Service's possession of income tax returns obviates the need for public disclosure, the *Buckley* Court found the additional benefits of public scrutiny to warrant its costs.²⁷⁵ As better put by Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."²⁷⁶ Even if the government could be expected to uncover all the illegal activity revealed by candidate tax returns, the public's interest extends beyond the enforcement of laws. Not all unethical conduct is illegal, and not all evidence of illegal activity is sufficient for conviction. The public can do much with information suggestive of corruption but falling short of that which the government could act on. Finally, even supposing public disclosure uncovers no evidence of wrongdoing, it engenders "public confidence in [government] officials."²⁷⁷ It is not enough simply to deter corruption. "[A]voidance of the appearance of improper influence 'is

271. See *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 79 Fed. Cl. 453, 457–58 (2007).

272. Druyun's salary was to be \$250,000 a year and include a \$50,000 bonus. *Id.* at 457.

273. *Id.* at 454.

274. *Id.* at 458 (citation omitted).

275. See *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) ("[D]isclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.")

276. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (Nat'l Home Libr. Found. ed., 1933) (1914).

277. *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978).

also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”²⁷⁸

The final government interest in disclosure relates specifically to exposing illegal activity. Of the three, this interest bears the least relation to the proposed law. Perhaps that is why both *Buckley* and *Plante* put it last in their enumeration of legitimate government goals.²⁷⁹ While public scrutiny undoubtedly aids in the detection of unlawful conduct, the disclosure of tax returns to the government accomplishes substantially the same purposes. If this incremental aid to law enforcement justified disclosure to the public, little would prevent a state from requiring presidential candidates to publicly disclose all the documents they are required to submit to the government. Although the *Buckley* Court approved this interest, it did so with little discussion as to the necessity of public disclosure.²⁸⁰ The *Plante* court was more explicit in finding this interest wanting.²⁸¹ However, this Note need not resolve the issue, because the proposed law substantially relates to accomplishing the two other important government interests discussed above, i.e., voter education and the deterrence of corruption or its appearance.

Ultimately, a law requiring presidential candidates to disclose their tax returns will likely survive any First and Fourteenth Amendment challenges because it satisfies the intermediate level of scrutiny required under the Supreme Court’s *Anderson-Burdick* test.

c. Distinguishing from other unconstitutional disclosure laws

It remains to distinguish the proposed law from others the courts have struck down. The *Buckley* Court made it clear that a disclosure law need not exempt information that might lead to harassment to be constitutional on its face.²⁸² However, the Court in *McIntyre v. Ohio Elections Commission* found that disclosure may become overly intrusive when it associates individuals with personal and potentially

278. *Buckley*, 424 U.S. at 27 (alteration in original) (quoting U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO, 413 U.S. 548, 565 (1973)).

279. *See id.* at 66–68; *Plante*, 575 F.2d at 1134.

280. *See Buckley*, 424 U.S. at 68.

281. *See Plante*, 575 F.2d at 1135 (“The [last] interest . . . , aiding detection and prosecution of violations, seems less affected by the [Florida] Amendment than the others. While misdeeds may be deterred by the need to file either honest or perjurious financial statements, once they have been committed, the statements may well be useless.”).

282. *See Buckley*, 424 U.S. at 74.

provocative statements that are inherently likely to “precipitate retaliation.”²⁸³ Here, the nature of the financial information contained in income tax returns is closer to that of the campaign contributions in *Buckley* than the leaflets opposing a tax proposal in *McIntyre*. Although both may “give[] away something about [a candidate’s] political views,” income tax returns remain a far cry from “a personally crafted statement of a political viewpoint.”²⁸⁴ The contents of income tax returns are much less likely to “precipitate retaliation”²⁸⁵ than political leaflets. Indeed, the *Plante* court found the possibility of kidnapping, solicitations, and embarrassment resulting from financial disclosure insufficient to warrant facial invalidation,²⁸⁶ likely because the potential for such occurrences is too remote or too inconsequential.

Nevertheless, because courts have expressed a greater willingness to accept disclosure laws that provide some sort of safeguard against harassment,²⁸⁷ California can head off potential challenges by providing a procedural mechanism for candidates to redact particularly sensitive information. SB 27 included a provision requiring submitted tax returns to omit social security numbers, home addresses, telephone numbers, and medical information.²⁸⁸ It also permitted the redaction of the names of dependent minors, employer identification numbers, business addresses, and similar information regarding paid tax return preparers.²⁸⁹ Any law requiring the production of tax returns would do well to adopt similar provisions.²⁹⁰

283. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355 (1995).

284. *Id.*

285. *Id.*

286. *See Plante*, 575 F.2d at 1135.

287. *See supra* Part III.B.2.b.

288. *See S.B. 27*, 2019–2020 Reg. Sess. (Cal. 2019).

289. *Id.*

290. While public disclosure of the *financial information* contained in income tax returns generally serves the government interests articulated in Part III.B.3.b, the same cannot be said of the non-financial *personal information* contained on the same returns. Perhaps the only government interest served by not allowing candidates to redact their addresses, telephone numbers, and other identifying information is the avoidance of the minor inconvenience of having to verify or otherwise accommodate such redactions. It is unlikely that courts would find this administrative interest important enough to support a disclosure statute that does not allow candidates to omit purely personal information. On the other hand, some financial information may be considered sensitive, and may serve only some of the government interests delineated in Part III.B.3.b. For example, a candidate may consider her charitable donations to be personal in nature, and their disclosure is unlikely to expose or deter corruption or violations of law. Nevertheless, because the disclosure of charitable donations promotes the important government interest of voter education, a tax return disclosure law likely does not have to provide for the redaction of such donations to survive constitutional scrutiny.

Alternatively, a financial disclosure law could adopt Florida's approach and allow candidates to submit "[a] sworn statement which identifies each separate source and amount of income which exceeds \$1,000" in lieu of their tax returns.²⁹¹

The other major reservation courts have expressed about financial disclosure laws concerns their scope. However, unlike *Buckley v. American Constitutional Law Foundation, Inc.*, this is not a case requiring disclosure from election workers when the real concern is with the motives of those hiring them.²⁹² The proposed law requires disclosure from the candidates themselves, the individuals whose motives and interests it is primarily concerned with. Nor is this a case requiring disclosure from low-ranking government officials or their spouses and children.²⁹³ The proposed law requires disclosure only from candidates for the highest-ranking office in the country. Moreover, unlike the anonymous leafleteer in *McIntyre* or the spouses and children of government officials, presidential candidates, more than anyone else, have voluntarily thrust themselves into the political arena.²⁹⁴ In fact, although the Supreme Court in *McIntyre* struck down an Ohio statute requiring source attribution on campaign literature because it "applie[d] not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources,"²⁹⁵ it has since upheld the "Stand by Your Ad" provisions of the Bipartisan Campaign Reform Act requiring candidates to appear in television advertisements they have authorized or paid for and state that they have approved the

291. FLA. CONST. art. II, § 8.

292. See *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999) (striking down a law requiring the disclosure of the names, addresses, and salaries of paid petition circulators when the primary interest of the state was in identifying those who hired the petition circulators, not the petition circulators themselves); see also *supra* Part III.B.1.b.

293. See, e.g., *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225, 232–33 (Cal. 1970) (invalidating a California disclosure statute in part because it applied to even the lowest of government officials, as well as their immediate family members). But see *County of Nevada v. MacMillen*, 522 P.2d 1345, 1353 (Cal. 1974) (upholding a statute requiring the disclosure of property owned by a government official's spouse or dependent children because "although an official may have no economic interest in such property, nevertheless he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property").

294. The Fifth Circuit noted that candidates for office have less of a reasonable expectation of privacy because they choose to subject themselves to public scrutiny. See *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). It also observed that the Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) provides candidates with less protection against libel and slander for this very reason. *Id.*

295. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351 (1995).

message contained in the advertisement.²⁹⁶ The Court has thus indicated a greater willingness to uphold disclosure statutes that apply only to candidates or their campaigns.

In sum, because the compelled disclosure law proposed by this Note is substantially related to important government interests that the Court itself has recognized, and because it avoids many of the issues that have proven fatal to other financial disclosure laws, it is likely to withstand First and Fourteenth Amendment scrutiny.

IV. INFORMING VOTERS ABOUT TAX RETURN DISCLOSURE THROUGH BALLOT DESIGNATIONS

Rather than compelling the production of tax returns with threats of civil or criminal sanctions, California might instead choose to inform voters of the fact that a candidate has failed to disclose his or her tax returns. Alternatively, California could provide candidates who have disclosed their tax returns the opportunity to directly communicate their disclosure to voters. These statements, made either by California or the candidates themselves, could be printed as a ballot designation or in the informational materials California sends to registered voters prior to elections.²⁹⁷ Because this method of incentivizing disclosure is less heavy-handed than the compelled disclosure laws described in Part III, it is the more likely of the two to pass constitutional muster. After all, statements indicating whether candidates have released their tax returns likely impose less of a First and Fourteenth Amendment burden on candidates than does a *requirement* that such tax returns be released. Under this approach, a candidate may decline to release his or her tax returns and still appear on the ballot²⁹⁸ without fear of civil or criminal liability.²⁹⁹

296. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 230–31 (2003), *overruled in part on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); 52 U.S.C. § 30120(d)(1)(B) (2018).

297. California mails voter information guides to registered voters prior to every presidential election. *See* CAL. ELEC. CODE § 9094 (Deering 2020).

298. SB 27 would have prevented such a candidate from appearing on the ballot altogether. S.B. 27, 2019–2020 Reg. Sess. (Cal. 2019) (“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 . . .”).

299. A compelled disclosure law would subject such a candidate to civil or criminal sanctions. *See supra* Part III.

Correspondingly, voters may cast ballots for a candidate irrespective of the candidate's decision to disclose his or her tax returns.

However, ballot designation laws resurrect the potential for invalidation under the Article II Qualifications Clause. Article II prohibits the addition of substantive qualifications to the presidency, and one of the primary objections to SB 27 was that it indirectly added a qualification by limiting ballot access to those who have disclosed their tax returns.³⁰⁰ Compelled disclosure laws avoid this issue by sanctioning candidates independently of the electoral process—a candidate's refusal to release his or her tax returns does not disadvantage or otherwise affect his or her candidacy.³⁰¹ But ballot designations, like ballot access restrictions, are intimately tied to elections. They influence voters “at the most crucial stage in the electoral process—the instant before the vote is cast.”³⁰² Moreover, by drawing a voter's attention to a single piece of information, they necessarily imply that the information is important to the voter's choice.³⁰³ Like SB 27, a ballot designation does not literally disqualify candidates who have failed to disclose their tax returns.³⁰⁴ But just as courts may consider SB 27 an impermissible attempt to disqualify candidates who have not disclosed their tax returns,³⁰⁵ courts may take a similar view of a ballot designation that disfavors the same class of candidates by highlighting their nondisclosure. So while a ballot designation law may effectively address the First and Fourteenth Amendment challenges faced by SB 27, it remains susceptible to the same Qualifications Clause challenge.

The remainder of this Note will examine both the Qualifications Clause and the First and Fourteenth Amendment challenges to a hypothetical ballot designation law that informs voters about the availability of candidate tax returns on the ballot itself. Although this Note will not discuss the constitutionality of a law providing the same information in a voter information guide, it suffices to say that a law that prints information in a voter information guide is even more likely

300. *See supra* Part II.B.

301. *See supra* Part III.A.

302. *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

303. *See id.*

304. Candidates who do not appear on the ballot can still run as write-in candidates in California. *See* CAL. ELEC. CODE § 8600 (Deering 2020).

305. *See supra* Part II.

to withstand constitutional scrutiny than one that appropriates space on the ballot.³⁰⁶

A. *Qualifications Clause Challenge*

It is important to note at the outset that if SB 27 satisfied the strictures of Article II, it follows a fortiori that the proposed ballot designation law must as well. In both cases, the claimed substantive qualification is the same: Presidents must have released their tax returns to hold office. But a ballot designation that merely informs voters of a candidate's failure to release his or her tax returns does no more to disqualify the candidate than SB 27's denial of ballot access.

This line of reasoning does not extend to the converse. A ballot designation law may survive a Qualifications Clause challenge even if SB 27 would not have. In fact, courts have indicated a willingness to uphold ballot designations that would likely violate Article II if the designations formed the basis for ballot access restrictions. For example, the Ninth Circuit has upheld California's election code allowing candidates not only to designate their occupation, but also to designate themselves as the "incumbent" if the word accurately describes them.³⁰⁷ And the Supreme Court has repeatedly upheld party membership and party preference designations.³⁰⁸ Nevertheless, the Court's precedents make clear that the Presidential and Congressional Qualifications Clauses would not tolerate the removal of candidates from the ballot on the basis of occupation, incumbency, or party affiliation.³⁰⁹

The disparity in the Court's treatment of ballot access restrictions and ballot designations should not be surprising, as removal from the ballot will invariably disadvantage a candidate more than a ballot designation would. But the difference between the ballot designations

306. Although both the ballot and the voter information guide bear the imprimatur of the state, a voter information guide will likely have less of a disqualifying effect because it does not influence voters "the instant before the vote is cast." *Anderson*, 375 U.S. at 402.

307. See *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1011 (9th Cir. 2002).

308. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding a Minnesota law allowing candidates to appear on the ballot as a nominee from a single political party); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding a Washington law allowing candidates to designate their party preference).

309. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (stating that the Qualifications Clauses do not allow states to "dress eligibility to stand for Congress in ballot access clothing" (quoting *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 357 (Ark. 1994), *aff'd sub nom.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995))).

the Court has upheld and those the Court has struck down cannot be explained solely by a lesser disqualifying impact. Despite being widely accepted, the aforementioned ballot designations have large and obvious discriminatory effects—the incumbency advantage has been widely documented,³¹⁰ and many citizens vote strictly on party lines.³¹¹ Rather, the hallmark of unconstitutional ballot designations is not merely their discriminatory *effect*, but their discriminatory *purpose*. The following cases highlight the Court's focus on discriminatory purpose as a central reason for invalidating ballot-related legislation.

1. Discriminatory Purpose and Discriminatory Effect

In *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court struck down an amendment to the Arkansas Constitution that excluded candidates who had already served three terms in the House of Representatives or two terms in the Senate from appearing on the general election ballot.³¹² The Court held that the Constitution neither sets term limits for members of Congress nor grants the States the authority to set such limits.³¹³ Furthermore, the Court rejected Arkansas's argument that the amendment did not actually set term limits because candidates who exceeded the specified number of terms could still run and win as write-in candidates, because “even if . . . 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.”³¹⁴ The fact that the Arkansas amendment offered candidates who did not meet its qualifications an alternative path to victory did not save it. In the Court's view, “an amendment with the *avowed purpose* and *obvious*

310. Analysis of election data shows in the 2018 congressional races, incumbency alone accounted for, on average, close to a 3 percent advantage in the popular vote. As recently as 1998, incumbency accounted for an 8 percent advantage. Nathaniel Rakich, *How Much Was Incumbency Worth in 2018?*, FIVETHIRTYEIGHT (Dec. 6, 2018, 5:58 AM), <https://fivethirtyeight.com/features/how-much-was-incumbency-worth-in-2018/>.

311. In fact, nine states allow straight-ticket voting, whereby a voter can “choose a party's entire slate of candidates with just a single ballot mark.” *Straight Ticket Voting States*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2020), <http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx>.

312. *U.S. Term Limits, Inc.*, 514 U.S. at 783.

313. *Id.* at 806.

314. *Id.* at 830–31.

effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand.”³¹⁵

A few years later, Missouri attempted to accomplish substantially the same goals with a ballot designation law.³¹⁶ An amendment to the Missouri Constitution required the state to print “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” by the names of incumbent candidates who did not support a “Congressional Term Limits Amendment” to the Federal Constitution, and “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” by the names of nonincumbent candidates who did not pledge support to the same federal amendment.³¹⁷ Although the Missouri amendment erected a much lower barrier to the candidacy of those who did not support term limits, the Court in *Cook v. Gralike*³¹⁸ nevertheless found it violative of the Congressional Qualifications Clause.³¹⁹ The Missouri amendment had the *purpose* of discriminating against a class of candidates, having been “plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal.”³²⁰ Furthermore, it had the intended *effect*, for “[w]hile the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office.”³²¹

The Court’s reasoning in *U.S. Term Limits* and *Cook* closely parallels its Fourteenth Amendment Equal Protection jurisprudence. When considering the constitutionality of laws under the Equal

315. *Id.* at 831 (emphasis added).

316. *See* *Cook v. Gralike*, 531 U.S. 510, 514 (2001).

317. *See id.* at 514–15.

318. 531 U.S. 510 (2001).

319. The district court held the Missouri amendment violated the Congressional Qualifications Clause because it had “the *sole purpose* of creating additional qualifications for Congress indirectly and [had] the *likely effect* of handicapping a class of candidates for Congress.” *Gralike v. Cook*, 996 F. Supp. 917, 920 (W.D. Mo. 1998) (emphasis added), *aff’d*, 191 F.3d 191 (8th Cir. 1999), *aff’d*, 531 U.S. 510 (2001). The Eighth Circuit affirmed, finding the amendment “seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other labeled candidates.” *Cook*, 191 F.3d at 924. The Supreme Court ultimately agreed. *Cook*, 531 U.S. at 527.

320. *Cook*, 531 U.S. at 524.

321. *Id.* at 525.

Protection Clause,³²² the Court has similarly emphasized their purpose and effect. In *Anderson v. Martin*,³²³ the Court invalidated the compulsory identification of a candidate's race on the ballot under the Equal Protection Clause.³²⁴ Considered "in the light of 'private attitudes and pressures' towards Negroes at the time of its enactment," the ballot designations not only had a discriminatory purpose of a "purely racial character," they "could only result in [a] 'repressive effect.'"³²⁵ Even outside the election context, the Court has suggested that heightened scrutiny should apply to laws that indirectly discriminate—i.e., have a discriminatory purpose and a discriminatory effect³²⁶—based on suspect classifications.³²⁷ The Court has thus far found classifications based on, inter alia, race,³²⁸ alienage,³²⁹ and gender,³³⁰ to be suspect.

However, in applying the Qualifications Clauses to prohibit ballot designations with both a discriminatory purpose and discriminatory effect, the Court makes no distinction among classes of candidates. Instead, the Court has simply held that the Constitution never granted states the authority "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."³³¹ Presumably, the only class of presidential candidates a state can purpose to discriminate against are those who are not natural born citizens, those who are under thirty-five years of age, or those who have not resided fourteen years within the United States.³³²

322. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

323. 375 U.S. 399 (1964).

324. *See id.* at 404.

325. *Id.* at 403 (first quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); and then quoting *Goss v. Bd. of Educ. of Knoxville*, 373 U.S. 683, 688 (1963)).

326. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of . . . discrimination forbidden by the Constitution.").

327. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

328. *See id.*

329. *See Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

330. *See Frontiero v. Richardson*, 411 U.S. 677, 682 (1973); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

331. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995).

332. *See U.S. CONST. art. II, § 1, cl. 5.* This is not to say states cannot enact reasonable ballot access laws. The purpose of such laws is generally to prevent "voter confusion, ballot overcrowding, or the presence of frivolous candidacies," not to discriminate against those

2. Ballot Designations as a Form of Voter Education

Assuming, *arguendo*, that SB 27 violated Article II as an indirect attempt to establish a substantive qualification, a ballot designation indicating whether a candidate has released his or her tax returns may nevertheless be constitutional as a procedural mechanism with a nondiscriminatory purpose. That purpose would be voter education. In fact, California's ballot designation regulations explicitly state that their primary purpose "is to ensure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates."³³³

Whether the Supreme Court would accept this stated purpose likely depends in large part on the language of the designation itself. In *Cook v. Gralike*, the Court relied on the lower courts' description of the ballot designations as "'pejorative,' 'negative,' 'derogatory,' 'intentionally intimidating,' 'particularly harmful,' 'politically damaging,' 'a serious sanction,' 'a penalty,' and 'official denunciation.'"³³⁴ Certainly, if the proposed ballot designation only applied to candidates who had failed to disclose their tax returns and consisted of the words "DECLINED TO RELEASE TAX RETURNS" similar to the "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" label in *Cook*,³³⁵ one might infer a discriminatory purpose. However, more impartial methods exist to convey the same information. For example, California could simply print either "Tax Returns Available" or "Tax Returns Unavailable" under the name of every candidate. This has the advantage of placing a neutral label under every candidate's name, instead of singling out only some for designation.

However, a "Tax Returns Available" or "Tax Returns Unavailable" designation provides voters with little useful information about a candidate, indicating only a willingness on the part of the candidate to be transparent with his or her finances. This undermines the State's claim that voter education motivates the

candidates who are unable to obtain a minimum number of signatures, for example. *See* *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

333. CAL. CODE REGS. tit. 2, § 20710(a) (2020).

334. *Cook v. Gralike*, 531 U.S. 510, 524 (2001) (first quoting *Cook v. Gralike*, 191 F.3d 911, 918, 919, 922, 925 (8th Cir. 1999), *aff'd*, 531 U.S. 510 (2001); and then quoting *Cook v. Gralike*, 996 F. Supp. 901, 908, 910, 916 (W.D. Mo. 1998), *aff'd*, 191 F.3d 911 (8th Cir. 1999), *aff'd*, 531 U.S. 510 (2001)).

335. *See id.*

designation. Although unorthodox, California could strengthen its case by instead printing “Tax Returns Available at:” followed by a link to the tax returns or a summary of the tax returns on a state-hosted website whenever they are available.³³⁶ For candidates who have not disclosed their tax returns, California could refrain from printing anything at all. This both reduces the appearance of a discriminatory purpose and reduces the discriminatory effect of such a ballot designation scheme. The absence of a label is far less likely to disadvantage a candidate than a label calling attention to the candidate’s failure to act in accordance with the State’s wishes. And when present, the label provides voters with more information, thus better serving the government’s stated goal of voter education.

B. First and Fourteenth Amendment Challenges

Even if the proposed ballot designation law overcomes the Qualifications Clause challenges discussed above, it must still contend with First and Fourteenth Amendment scrutiny. However, because ballot designations burden candidates’ rights to a far lesser extent than the denial of ballot access, the proposed law will likely survive claims that it violates either the First or Fourteenth Amendment.

Most First and Fourteenth Amendment challenges to ballot designation laws center around claims that they unconstitutionally burden a candidate or political party’s right to speech or association. For example, in *Rubin v. City of Santa Monica*,³³⁷ a candidate argued that a set of election regulations allowing him to specify his occupation on the ballot, but preventing him from designating himself as a “peace activist,” violated his First Amendment right to speech.³³⁸ The Ninth Circuit upheld this restriction on speech for being viewpoint neutral.³³⁹ And in *Washington State Grange v. Washington State Republican Party*,³⁴⁰ multiple political parties contended that a statute allowing candidates to designate their party preference on the ballot violated its

336. The designation “Tax Returns Available at:” would be much more inconspicuous in a voter information guide. For presidential elections, the voter information guides contain “a notice that refers voters to the Secretary of State’s internet website for information about candidates for the offices of President and Vice President of the United States.” See CAL. ELEC. CODE § 9084(k) (Deering 2020).

337. 308 F.3d 1008 (9th Cir. 2002).

338. *Id.* at 1012–13.

339. *Id.* at 1015.

340. 552 U.S. 442 (2008).

First Amendment associational rights by forcing them to associate with candidates they might not have endorsed.³⁴¹ The Supreme Court upheld the statute because it could be implemented in such a way so as to make clear that a party preference designation did not amount to a party endorsement.³⁴²

The proposed law does not implicate any of the concerns thus described. A ballot designation consisting of the words “Tax Returns Available,” “Tax Returns Unavailable,” or “Tax Returns Available at:” does not constitute candidate speech. Because the words are chosen by the state, they are better characterized as state speech. Although this raises separate constitutional issues—for example, they may constitute an indirect attempt by the state to establish candidate qualifications in violation of Article II³⁴³—they do not raise any First Amendment right to speech issues. The Court has never required states to allow candidates a forum for speech on the ballot.³⁴⁴ Rather, the Court has only required that when a state does provide such a forum, it does not restrict speech in unreasonable ways.³⁴⁵ Nor does the state’s speech imply associations that do not exist. The availability and location of candidate tax returns are neutral statements that do not imply candidate association with a political party or any other organization.

Finally, although a Fourteenth Amendment Equal Protection claim could be raised, it is unlikely to be successful. An Equal Protection challenge would compel a standard of review no higher than rational basis review for the simple reason that candidates who refuse to disclose their tax returns do not constitute a suspect class.³⁴⁶ But even if the Court were to apply the Equal Protection Clause to this context, its analysis would not differ significantly from the Qualifications Clause analysis detailed in Part IV.A.

341. *Id.* at 448.

342. *Id.* at 456.

343. *See supra* Part IV.A.

344. *See* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (“Ballots serve primarily to elect candidates, not as forums for political expression.”).

345. *See* *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that once the government creates a forum for speech, it “assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms”).

346. *See* *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) (dispensing with an Equal Protection challenge to a statute allowing candidates to designate their incumbency status or occupation on the ballot, because “[n]either ‘non-incumbents’ nor ‘peace activists’ is a suspect class”).

In sum, because the proposed ballot designation law is rationally related to the accomplishment of a legitimate government interest—that of voter education—it will likely survive First and Fourteenth Amendment scrutiny.

V. CONCLUSION

A California law hoping to incentivize the release of candidate tax returns must comply with article II, section 5(c) of the California Constitution, which prohibits the exclusion from the primary ballot those recognized nationally or state-wide as running “for the office of President of the United States.”³⁴⁷ Additionally, to comply with the Federal Constitution, such a law must prove first, that it does not add substantive qualifications to the presidency in contravention of the Article II Qualifications Clause,³⁴⁸ and second, that it does not violate the First and Fourteenth Amendment rights of candidates or voters.³⁴⁹

Although California’s first attempt at drafting such a law was struck down for precluding even nationally recognized candidates from appearing on the presidential primary ballot if they failed to produce their tax returns,³⁵⁰ California has non-ballot-access means at its disposal to motivate disclosure. First, California can civilly or criminally sanction the nondisclosure of tax returns instead of conditioning ballot access on their production. This approach would largely avoid Qualifications Clause issues,³⁵¹ while the penalties it imposes are unlikely to overly burden any First and Fourteenth Amendment rights.³⁵² Alternatively, California can allow ballot designations that direct voters to the tax returns of the candidates who have released them. Although this approach will likely be less effective at compelling the disclosure, it implicates fewer First and Fourteenth Amendment concerns and stands on much more solid constitutional footing.³⁵³

347. *See supra* Part II.A.

348. *See supra* Part II.B.

349. *See supra* Part II.C.

350. *See Patterson v. Padilla*, 451 P.3d 1171, 1191 (Cal. 2019).

351. *See supra* Part III.A.

352. *See supra* Part III.B.

353. *See supra* Part IV.B.

