In the Supreme Court of the State of California

JESSICA MILLAN PATTERSON, CALIFORNIA REPUBLICAN PARTY, **Petitioners,** **v.** **ALEX PADILLA, California Secretary of State,** **Respondent.**	Case No. S257302

RESPONDENT CALIFORNIA SECRETARY OF STATE ALEX PADILLA'S PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE AND OTHER EXTRAORDINARY OR IMMEDIATE RELIEF

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INTRODUCTION

California has a vital interest in ensuring that its citizens are an "informed electorate [that] may intelligently elect" candidates for office. (*Salinger v. Jordan* (1964) 61 Cal.2d 824, 826; Elec. Code, § 6881.) A presidential candidate's financial status and honesty concerning financial matters is part of the information that voters can and should consider when evaluating a candidate. (*See, e.g.,* the Ethics in Government Act (EIGA), 5 U.S.C. Appen. 4 § 101, *et seq.*) Under EIGA, federal personnel (including presidential candidates) are required to disclose some income and debt information, but those filings are relatively limited to general, non-specific statements concerning income and liabilities. (5 U.S.C. Appen. 4 § 102.) As presidential candidates have now recognized for decades, tax returns provide much greater and more relevant information, showing: specific income-generating activities and the amounts earned; income-generating assets owned, how much is being saved; how much and to whom liabilities are owed; what expenses have been deducted and capital depreciation declared; how much has been paid in federal, state, and local taxes; and what, if any, charitable contributions have been made.

The Legislature has likewise recognized these interests, expressly finding that voters "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." (Elec. Code, § 6881.) California (and the nation) "has an interest in ensuring that any violations of the Foreign Emoluments Clause of the United States Constitution or statutory prohibitions on behavior such as insider trading are detected and punished." (*Ibid.*) Accordingly, consistent with the goal that California voters be an "informed electorate," the Legislature passed SB 27 and enacted Elections Code section 6883, requiring presidential and gubernatorial candidates to file copies of income tax returns from the five most recent taxable years with the Secretary of State. Copies of these returns—with unnecessary and personally private information redacted—are then posted to the Secretary's website. (Elec. Code, § 6884.)

Petitioners incorrectly argue that these laws "plainly conflict" with article II, section 5(c) of the California Constitution. They assert that the California Secretary of State alone has the "exclusive, delegated" authority to determine who should be on a presidential primary ballot, unfettered by any other requirements or law, including Elections Code sections 6880 *et seq.* (Petn. at p. 16.) But petitioners turn the constitutional mandate of section 5(c) on its head. Section 5(c) is a directive to the *Legislature* to pass laws that "provide for" primary elections. It imposes no mandatory

duty on the Secretary of State, but rather provides that the Secretary will "find" candidates that are "recognized … throughout the nation" and include them on California primary ballots. (Cal. Const., art. II, § 5(c).) Contrary to petitioners' argument, the Secretary is required to "see that … election laws are enforced" (Govt. Code, § 12172.5, subd. (a)) before exercising any alleged "exclusive, delegated authority" to place candidates on primary ballots. In that regard, the Secretary determines that candidates have complied with the criteria detailed in Elections Code section 6000.1, the statute that primarily defines a "recognized candidate" eligible for placement on any presidential primary ballot. Elections Code sections 6883 and 6884 are two additional state laws detailing—for all parties—how candidates may be placed on a presidential primary ballot. The Legislature fulfilled its constitutionally mandatory responsibilities under section 5(c) when it set these terms; the constitutional provision is not a directive to the Secretary. And, despite petitioners' concerns, Elections Code section 6883 does not provide a means by which the Secretary could avoid following these laws to instead identify a "favorite son" candidate.

There is no inconsistency between California's Constitution and Elections Code sections 6883 and 6884. And petitioners seek relief that this Court may not have jurisdiction to render, nor do petitioners have standing. Accordingly, the Court should deny the writ petition.

LEGAL STANDARD

When considering the Legislature's acts, courts must presume that a statute is valid "unless its unconstitutionality clearly, positively, and unmistakably appears." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) This deference and the presumption of validity that is afforded to all legislative acts arises because the California Legislature "may exercise any and all legislative powers which are not expressly . . . denied to it by the [California] Constitution." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) "In other words, [courts] do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited." (*Ibid.*) Any "restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*Ibid.*) Thus, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*)

JURISDICTION

Petitioners urge the Court to exercise its original jurisdiction under article VI, section 10 of the Constitution and Elections Code section 13314. (Petn. at p. 11.) As a general rule, when issues presented by an action have been of "great importance and required immediate resolution," this Court has exercised its original jurisdiction to decide them. (*See, e.g., Cal.*

Redevelopment Ass'n v. Matosantos (2011) 53 Cal.4th 231 [assertion of original jurisdiction in action challenging dissolution of redevelopment agencies and allocation of property tax revenue].)

In the present matter, however, the Court's original jurisdiction is hardly certain. Elections Code section 13314 expressly provides that when (like here) a writ of mandate is sought to correct an alleged actual or imminent error or omission "in the placing of a name on, or in the printing of, a ballot, … [v]enue … shall be exclusively in Sacramento County" when the Secretary of State is a party. (Elec. Code, § 13314, subds. (a) & (b); *see also Cook v. Superior Court* (2008) 161 Cal.App.4th 569, 579.) In *Matosantos*, the Court determined that it could exercise original jurisdiction over the writ proceeding because the law at issue there—Government Code section 34168, subdivision (a), which requires that certain "actions" be filed in the superior court—was "read narrowly as applying only to, and designating a forum for, 'action[s]' [quoting Gov. Code, § 34168], over which [the Court] retain[s] appellate jurisdiction, while having no bearing on jurisdiction over 'special proceedings' such as petitions for writs of mandate." (*Matosantos, supra*, 53 Cal.4th at p. 253, comparing Code Civ. Proc., § 307 *et seq*. [regulating civil actions] with Code Civ. Proc., § 1063 *et seq.* [regulating special proceedings of a civil nature], citation omitted.) But here, the Legislature has determined that the "exclusive" venue for

mandamus petitions naming the Secretary and challenging alleged ballot errors is Sacramento County.

If, despite Elections Code section 13314's express venue provision, the Court is satisfied that it has jurisdiction and that the issues presented are of "sufficient public importance" justifying departure "from [its] usual course" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500), then no action under the statutes in question is imminent, and a stay is not needed. Instead, if the petition is not denied for improper venue or the reasons discussed below, respondent asks that the Court issue an order establishing briefing for this case so that a timely and final decision on the merits of the dispute can be rendered, given the date on which potential 2020 primary candidates must comply with SB 27—November 26, 2019.

ARGUMENT

I. ARTICLE II, SECTION 5(C) IMPOSES NO DUTY ON THE SECRETARY OF STATE JUSTIFYING A WRIT OF MANDATE.

Under article II, section 5(c) of California's Constitution, "the Legislature shall provide for partisan elections for presidential candidates." Thus, it is the *Legislature* that is required to pass laws providing for primary presidential elections. Section 5(c) imposes no similar mandatory duty on the Secretary of State. Rather, the Secretary places persons on primary ballots that he has "found … to be recognized candidates throughout the nation or throughout California for the office of President of

the United States." (Cal. Const., art. II, § 5(c).) Because this constitutional provision does not dictate any specific actions that the Secretary must take, mandamus cannot issue, and this petition should be denied.

A writ of mandate may issue to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085, subd. (a).) Mandamus may issue "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (*Id.*, § 1086.) To obtain writ relief, a party must establish: "(1) [a] clear, present and usually ministerial duty on the part of the respondent …; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty …." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868, citations omitted.) "A ministerial act is one that a public functionary is required to perform in a prescribed manner in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act." (*Coachella Valley Unified School Dist. v. State* (2009) 176 Cal.App.4th 93, 113, citations omitted.) When public officers undertake actions requiring independent discretion and judgment, those actions are not ministerial. (*Cal. High-Speed Rail Auth. v. Superior Court* (2014) 228 Cal.App.4th 676, 715.) An official's exercise of discretion is not susceptible to mandate except for the refusal to exercise it or an abuse of discretion. (*Hagopian v. State* (2014) 223 Cal.App.4th 349, 373.)

Here, petitioners seek a writ of mandate "prohibiting" the Secretary from enforcing Elections Code sections 6883 and 6884. (Petn. at p. 22.) As a general matter, neither mislabeling nor a defective prayer will bar relief. (*Owens v. Superior Court of Los Angeles County* (1959) 52 Cal.2d 822, 827; 8 Witkin, *Cal. Procedure* (5th ed. 2008) Writs, § 232, p. 827.) But this result is conditioned on the existence of facts justifying the relief sought. (*Ibid.*) Here, there is no clear, present, and ministerial duty for the Secretary to fulfill under article II, section 5(c) that can be mandated. (*See, e.g., Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 659 [primary election statutes "do not impose a clear, present, or ministerial duty on the Secretary of State to determine whether the presidential candidate meets the eligibility criteria of the United States Constitution."].)[1] Petitioners assert that under article II, section 5(c), the Secretary has a ministerial duty "to determine and place on the Republican Presidential primary ballot nationally-and California-known Presidential candidates," and that the laws

[1] Petitioners' prayer might be better couched as a request for a declaration that SB 27 does not somehow comport with the U.S. Constitution. They assert that any such prayer for relief "is beyond the scope of the instant writ petition." (Petn. at pp. 8, 26.) Petitioner California Republican Party's complaint for declaratory and injunctive relief challenging SB 27's constitutionality is pending in federal court. (*Melendez v. Newsom* (E.D. Cal., Aug. 6, 2019, No. 2:19-cv-1506); *see also De La Fuente v. Padilla* (S.D. Cal., Jul. 30, 2019, No. 3:19-cv-1433); *Griffin v. Padilla* (E.D. Cal., Aug. 2, 2019, No. 2:19-cv-1477); *Trump v. Padilla* (E.D. Cal., Aug. 6, 2019, No. 2:19-cv-1501); *Koenig v. Newsom* (E.D. Cal., Aug. 6, 2019, No. 2:19-cv-1507).)

enacted under SB 27 somehow "thwart" that duty. (Petn. at p. 21.) Petitioners' argument in this regard is that the Secretary has no discretion "to determine" who should appear on the primary ballot. (*Ibid.*) But by petitioners' admission, the Secretary independently "exercises" his role in the election process with "constitutionally-delegated authority." (Petn. at p. 23.)

Moreover, petitioners' precise contention in this case is that article II, section 5(c) "requires the Secretary of State to identify all nationally-known candidates for President of the United States and to place their names on the primary election ballot." (Petn. at p. 6.) Petitioners allege that SB 27 is unconstitutional because it "prohibit[s] the Secretary of State from exercising his constitutionally delegated duty to place the name of all nationally recognized Presidential candidates … on the primary election ballot." (*Id*. at p. 8.) This framing of the issue reveals Petitioners' misreading of article II, section 5(c).

In relevant part, the actual text of article II, section 5(c) requires that the Legislature provide for partisan elections (i.e., "The Legislature shall provide for partisan elections for presidential candidates … including an open presidential primary …."). When an open presidential primary is held, section 5(c) requires that the candidates on the ballot be "recognized," as determined by the Secretary (i.e., "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."). The text of section 5(c) does not instruct, as Petitioners contend, that *all* "recognized" candidates must be on the ballot by virtue of the *sole* fact that they are "recognized." Indeed, the text of article II, section 5(c) allows for a circumstance where a "recognized" candidate is left off of the ballot, consistent with the neutral criteria that the Legislature "provide[s]"—such as SB 27.

Article II, section 5(c) is a directive to the Legislature to pass laws providing for specified elections. It does not impose on the Secretary any duty to print names on primary ballots as a mandatory or ministerial act, without reference to laws or criteria that might affect who can be a "recognized candidate." Therefore, a writ of mandamus cannot issue, and the petition must be denied.

II. CALIFORNIA'S CONSTITUTION DOES NOT AUTHORIZE THE SECRETARY OF STATE TO RECOGNIZE PRESIDENTIAL PRIMARY CANDIDATES WHO VIOLATE LEGAL REQUIREMENTS, AND THERE IS NO CONSTITUTIONAL CONFLICT.

Elections Code sections 6883 and 6884 do not conflict with California's Constitution, and do not illegally impair the Secretary's function in determining who may be a "recognized candidate" appearing on the presidential primary ballot. Rather, they further guide the Secretary in determining who to place on that ballot. Because these sections do not

"clearly, positively, and unmistakably" conflict with article II, section 5(c), the petition should be denied.

Article II, section 5(c) requires the Legislature to provide for primary presidential elections with candidates who "are found by the Secretary of State to be recognized candidates throughout the nation or throughout California." That section continues by providing that candidates can also be placed on the ballot by petition, and that those who have filed "affidavits of noncandidacy" may be excluded. In short, section 5(c) describes the Legislature's authority to allow the State to conduct primary elections. It is similar to other article II sections authorizing the Legislature to ensure that actions necessary for well-functioning and fair elections are similarly employed, such as

- defining residences and providing for voter registration and free elections (art II, § 3);
- prohibiting improper practices affecting elections and disqualifying certain voters (art II, § 4);
- allowing ballot measure petitions to be circulated, presented, and certified, including the way in which measures are submitted to voters (art II, § 10, subd. (3));
- the means and procedures by which voters exercise initiative and referendum powers (art II, § 11, subd. (a));)
- circulation, filing, and certification of petitions to recall candidates and the recall election (art II, § 16); and
- the recall of local officers (art II, § 19).

The Legislature itself, of course, does not undertake each and every one of these actions, but rather enacts laws and regulations allowing state government officers to do so. It did so in passing SB 27 and enacting Elections Code sections 6883 and 6884.

Petitioners assert that under article II, section 5(c), the Secretary has "exclusive, delegated authority to determine the … recognized Presidential candidates on the Presidential primary ballot." (Petn. at p. 18.) They posit that the only exception to this "exclusive" authority is that a candidate the Secretary has "recognized" cannot be placed on the primary ballot when the candidate has formally withdrawn. (*Id.* at pp. 25-26.) Apart from this one exception, once the Secretary has "determined" that a candidate is "recognized throughout the nation or California for the office of President of the United States," petitioners contend that the Secretary can then only complete the "ministerial" act of placing that candidate on the primary ballot, without consideration of any other constitutional qualifications or legal considerations. (*Ibid.*) Relying on voter information materials published in 1972, when voters considered Proposition 4 (which included the relevant revisions to section 5(c)), petitioners contend that section 5(c) "gives just one man, the Secretary of State, the right to determine which names will be placed on the ballot." (Petn. at p. 27 & Exh. D.) Petitioners continue by arguing that any laws passed concerning candidates' eligibility are legislative "whims" that impermissibly interfere with the Secretary's

alleged mandatory duty to place candidates on the primary ballot. (*Id.* at p. 28.) Petitioners misinterpret the Constitution and the Secretary's duties under it.

Petitioners' argument ignores both constitutional qualifications and laws directing who may be placed on California's primary ballot. The United States Constitution provides that only "natural born citizen[s] … shall be eligible to the office of President." (U.S. Const., art. II, § 5.) To qualify, a candidate must also be at least 35 years old and must have been "a resident" in the United States for fourteen years. (*Ibid.*) These qualifications apply before, and regardless of whether, the California Secretary of State might consider a person to be a "recognized candidate." (*Lindsay v. Bowen* (9th Cir. 2014) 750 F.3d 1061, 1064; *see also Bullock v. Carter* (1972) 405 U.S. 134, 145 ["[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."].)

Further limiting the Secretary's purported "exclusive, delegated authority" to determine who may be placed on a primary ballot, California law expressly defines who may be a "recognized candidate" in a presidential primary election. Elections Code § 6000.1 defines a "recognized candidate" eligible for placement on any presidential primary ballot as one who has an authorized campaign registered with the Federal

Election Commission for the office of the President and who met at least one of the following criteria:

> (a) qualified for funding under the Federal Election Campaign Act of 1974 (52 U.S.C. § 30101 *et seq.*);
>
> (b) appeared in a national and publicized presidential debate with at least two participating candidates;
>
> (c) been placed on a primary ballot in at least one other state;
>
> (d) been in a caucus in at least one other state; OR
>
> (e) has:
>
> > (1) a website or webpage hosted by the candidate or party; AND
> >
> > (2) the party has requested in writing that the Secretary of State place the candidate on the presidential primary ballot.

(Elec. Code, § 6000.1.)

Thus, a potential candidate who has not, for instance, qualified for funding under the Federal Election Campaign Act because she or he has not disclosed expenditures of personal funds (*see* 52 U.S.C. § 30104, subd. (a)(6)(B)), cannot legally be placed on the presidential primary ballot even if the Secretary, exercising his "exclusive, delegated authority" believed the candidate was otherwise entitled to be on it.

Elections Code section 6883 is another law determining who can be on a presidential primary ballot. Under it, potential candidates submit original and redacted versions of completed federal tax returns to the Secretary. Just as candidates cannot be recognized without complying with Federal Election Campaign Act, unless and until they have complied with Elections Code section 6883 and provided the Secretary with tax returns

filed in the previous five years, they cannot be "recognized candidates," regardless of whether the Secretary otherwise believes they should be listed on the ballot.

Petitioners assert that the Secretary has a ministerial duty to place every person on the primary ballot who he has—under his "exclusive, delegated authority"—recognized as a candidate, regardless of whether such a candidate has fulfilled the requirement of Elections Code section 6000.1, or has provided tax returns under Elections Code section 6883. But a plain reading of article II, section 5(c), and Elections Code sections 6000.1, 6883, and 6884, shows that this assertion is wrong. There is no conflict between the California Constitution and Elections Code sections 6883 and 6884 or the Secretary's duty is "to see that state election laws are enforced." The petition must be denied.

III. PETITIONERS HAVE NOT SUFFERED AN ACTUAL OR IMMINENT "INJURY IN FACT."

Petitioner Patterson asserts standing under Elections Code section 13314, subdivision (a), by seeking a writ of mandate to remedy an error or omission that "has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter." (Petn. at p. 31; see also Elec. Code, § 13314, subd. (a)(1).) Petitioner California Republican Party asserts standing on the grounds that it is "the ballot qualified political party." (*Id.*

at p. 32.) Both petitioners allege that without a writ of mandate, they will incur irreparable injury by the "likely absence of national-known candidates from the ballot." (*Id.* at p. 20.) They further allege—without factual support—that the law's purpose "may have been to suppress" voting for Republican candidates, both for President and for "down ballot" offices. (*Ibid.*) But such claims rest "upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (*Texas v. United States* (1998) 523 U.S. 296, 300, citation omitted.) Petitioners describe at length the alleged harms that will occur if candidates fail to comply with Elections Code section 6883. (Petn. at pp. 20-21, 31-35.) These potential harms all rest on the speculation that some potentially recognizable candidates will not comply with Elections Code section 6883.[2] On the other hand, if most or all potentially recognizable candidates comply with the law, petitioners' feared harm will not occur.[3]

In addition, it is true that this Court has held that "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has

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[2] Petitioners offer no similar speculative scenarios if potentially recognizable candidates do not establish their compliance with the criteria in Elections Code section 6000.1.

[3] Two potential candidates are challenging SB 27 in federal court. (*De La Fuente v. Padilla* (S.D. Cal., Jul. 30, 2019, No. 3:19-cv-1433); *Trump v. Padilla* (E.D. Cal., Aug. 6, 2019, No. 2:19-cv-1501).) These candidates' compliance with SB 27 will likely depend on the outcome of those cases.

any legal or special interest in the result." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166, citation omitted.) But as shown above, there is no ministerial duty that this Court may force the Secretary to undertake. Reducing petitioners' argument to its essence, they seek to invalidate legislation, not "procure the enforcement of a legal duty." (*Ibid.*) Lacking the basic grounds either to seek enforcement of a public right or to assert third-party rights, petitioners lack standing to bring this petition. (*See, e.g., People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 499-503, as modified (Nov. 28, 2018), review denied (Feb. 27, 2019) [petitioners did not have standing to seek mandamus when district attorney was not under a mandatory duty to act].) Their petition should be denied.

CONCLUSION

For the foregoing reasons, petitioners' request for a temporary stay should be denied, and the Court should summarily deny the petition in its entirety.

Dated: August 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT CALIFORNIA SECRETARY OF STATE ALEX PADILLA'S PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE AND OTHER EXTRAORDINARY OR IMMEDIATE RELIEF** uses a 13 point Times New Roman font and contains **3,955** words.

Dated: August 14, 2019

XAVIER BECERRA
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/S/ *JAY C. RUSSELL*

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***Jessica Millan Patterson, et al v. Alex Padilla***
Case No.: **S257302**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 14, 2019, at San Francisco, California.

M. Mendiola	/s/ *M. Mendiola*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Department of Justice, Office of the Attorney General
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