



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 24, 2017

Senator Ted Ferrioli
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Constitutionality of Senate Bill 888 (Mandated Disclosure of Presidential Candidate Tax Returns)

Dear Senator Ferrioli:

Senate Bill 888 (2017) requires a candidate for the office of President or Vice President of the United States either to release a copy of the candidate's most recent federal income tax return or to file a statement of economic interest in order to appear on the primary and general election ballots. You asked whether this bill is constitutional. The short answer is that this bill raises serious constitutional questions that do not have clear answers. We therefore agree with leading constitutional law experts who have opined that the constitutionality of bills like Senate Bill 888 is an "open question."

Senate Bill 888 was not drafted in a vacuum. To the contrary, on March 2, 2017, the National Conference of State Legislatures published a report indicating that similar bills have now been introduced in 23 states.¹ And on March 16, 2017, New Jersey garnered significant media attention after it became the first state to pass such a bill out of the state legislature.²

Due to the ubiquity of these bills, numerous attorneys, including some of the nation's leading constitutional law scholars, have opined on the constitutionality of bills similar to Senate Bill 888. Some, such as Laurence Tribe, have argued that these bills will withstand constitutional scrutiny.³ Other attorneys, like Kyle Sammin, have argued that bills like Senate Bill 888 are clearly unconstitutional.⁴ Finally, several leading constitutional scholars like Vikram David Amar and Richard L. Hasen have opined that while these bills may ultimately be upheld as constitutional, they raise complicated issues of constitutional law, and previous United States Supreme Court cases suggest multiple ways in which a court may in fact hold that the bills

¹ National Conference of State Legislatures, "Presidential Tax Returns and Candidate Qualifications," <http://src.bna.com/mYa> (visited March 20, 2017).

² The Associated Press, "New Jersey Lawmakers Pass Bill Requiring Presidential Candidates to Release Tax Returns," *Fortune*, March 16, 2017, <http://fortune.com/2017/03/17/donald-trump-taxes-new-jersey/> (visited March 20, 2017).

³ *The New York Times* Editorial Board, "An Antidote to Donald Trump's Secrecy on Taxes," *The New York Times*, December 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/an-antidote-to-donald-trumps-secrecy-on-taxes.html> (visited March 20, 2017).

⁴ Kyle Sammin, "No, States Don't Get to Make Presidential Candidates Release Tax Returns," *The Federalist*, March 10, 2017, <https://thefederalist.com/2017/03/10/no-states-dont-get-make-presidential-candidates-release-tax-returns/> (visited March 20, 2017).

violate the United States Constitution.⁵ Our independent review suggests that the constitutional questions raised by scholars like Amar and Hasen are valid. We therefore believe that it is unclear whether Senate Bill 888 would be able to survive a constitutional challenge.

There are two highly related types of constitutional challenge that could be made towards Senate Bill 888. One challenge stems from the United States Supreme Court case of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In that case, the Court held that an Arkansas law prohibiting otherwise eligible congressional candidates from appearing on the general election ballot if they had already served two Senate terms or three House terms was an impermissible attempt to add qualifications to congressional office, rather than a permissible exercise of the state's Elections Clause power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives."⁶

As noted in your request, it is possible that a court could use the rationale from *Thornton* to argue that Senate Bill 888 is similarly invalid as it amounts to the state imposing an additional requirement for holding the federal office of President or Vice President of the United States. However, this is not a definitive outcome, as the United States Constitution explicitly requires the holding of popular elections for members of Congress:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.⁷

As the United States Constitution establishes the qualifications needed to serve as a member of Congress as well as the requirement that members of Congress be selected at an election held by the states, it was relatively straightforward for the *Thornton* court to hold that states may not add qualifications to congressional office.

The situation is somewhat different with respect to presidential elections, as the United States Constitution does not expressly require that states hold elections to select the electors who make up the electoral college:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.⁸

⁵ Vikram David Amar, "Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?", *Verdict*, December 30, 2016, <https://verdict.iustia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot> (visited March 20, 2017). See also Richard L. Hasen, "Blue-state lawmakers want to keep Trump off 2020 ballot unless he releases tax returns," *Election Law Blog*, January 3, 2017 <http://electionlawblog.org/?p=90238> (visited March 20, 2017) (concluding that the constitutionality of these laws "is an open question").

⁶ Article I, section 4, clause 1, United States Constitution.

⁷ *Id.*

⁸ Article II, section 1, clause 2, United States Constitution.

It is possible that a court deciding on the constitutionality of Senate Bill 888 would use the differences between Article I, section 4, clause 1, and Article II, section 1, clause 2, to conclude that states' ability to regulate the selection of presidential electors is significantly greater than their ability to regulate the election of members of Congress. In reaching this conclusion, the court could rely on the United States Supreme Court case of *Bush v. Gore*, which found, *inter alia*, that there is no requirement for states to even hold an election to appoint presidential electors.⁹ If states have the right to select from a wide range of methods for appointing their presidential electors, only one of which is a statewide election, they arguably have significant leeway in determining what criteria they will use to make this selection.

A related challenge could be made to the state's ability to enact Senate Bill 888 due to the nationwide impact of presidential nominations. In general, the United States Supreme Court has been deferential with respect to state rules for ballot access.¹⁰ However, it could be argued that states are entitled to significantly less deference in the context of presidential elections, where a state's actions have the potential to influence the outcome on a national scale. For example, in *Anderson v. Celebrezze*, the United States Supreme Court struck down an early filing deadline in Ohio, stating:

[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.¹¹

It is possible that a court would use a similar rationale to that in *Anderson* to hold that the state does not have a sufficient interest in knowing the finances of a candidate for President or Vice President to justify interfering in the national presidential election by requiring the disclosure of this information. However, this, too, is not a definitive outcome. In addition to stating that elections for the appointment of presidential electors are not required, *Bush v. Gore* suggested that states may have significantly more authority to determine the rules for administering presidential elections than was suggested in *Anderson*, provided that the state treats voters and different candidates from different parts of the state in a uniform manner.¹² It is possible that a court would therefore conclude that the requirement that candidates for President and Vice President either release copies of their tax returns or file a statement of economic interest (which would apply equally to all candidates for these offices) would be seen as a legitimate ballot access restriction, particularly given the current

⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.").

¹⁰ See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992) (rejecting challenge to Hawaii's ban on write-in voting, alleged to infringe on rights of association and voting choice).

¹¹ 460 U.S. 780, 794-795 (1983).

¹² *Bush v. Gore*, 104-105.

requirement under Oregon law that many elected and non-elected officials file annual statements of economic interest.

Given the unresolved issues regarding the interpretation of relevant provisions of the United States Constitution, we therefore agree with the constitutional law scholars who have opined that the constitutionality of bills like Senate Bill 888 is an open question.

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Very truly yours,

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