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# STATE OF OREGON
Legislative Counsel Committee

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To: Representative Jennifer Williamson, Chair
House Committee on Rules

From: Daniel R. Gilbert, Deputy Legislative Counsel

Subject: Requiring disclosure of federal income tax returns for candidates for office of President and Vice President of United States

You asked us to use identified legislation from New York to draft a bill that would, among other things, require a candidate for the office of President or Vice President of the United States to release a copy of the candidate's federal income tax returns in order to appear on the general election ballot. This draft is enclosed as LC 3613.

Similar bills have garnered significant press after being introduced in other states, including New York, California, Hawaii and Massachusetts. Consequently, some of the nation's leading constitutional law scholars have opined on the constitutionality of these types of bills. Some of these scholars, such as Laurence Tribe, suggest that these bills will withstand constitutional scrutiny.[1] Others, like Vikram David Amar, 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 violate the United States Constitution.[2] Our independent review suggests that the constitutional issues raised by scholars like Amar are valid. As a result, we believe that it is extremely difficult to determine whether, if this bill is challenged in court, it will be upheld as constitutional.

In general, the United States Supreme Court has been deferential with respect to state rules for ballot access.[3] However, this deference may be significantly less 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 the case *Anderson v. Celebrezze*, the 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.

[1] *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 February 6, 2017).
[2] 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.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot (visited February 6, 2017).
[3] *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).

> 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.[4]

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 to justify interfering in the national presidential election in this manner. However, this is not a definitive outcome, as the later case of *Bush v. Gore*, 531 U.S. 98 (2000), left the decision of *Anderson* intact but suggested that states may have significantly more authority to administer presidential elections than was suggested in *Anderson*, provided that the states did not treat voters either for different candidates or from different parts of the state in a nonuniform manner.

A separate constitutional theory that may be used to strike down LC 3613 comes 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."[5]

It is possible that a court could use the rationale from *Thornton* to argue that LC 3613 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 too is not a definitive outcome, as the United States Constitution explicitly requires the holding of popular elections for members of Congress,[6] but not of the President or Vice President, who are chosen by specific electors who make up the electoral college.[7] As a result, it is possible that a court could conclude that states have a greater ability to regulate presidential elections than they do to regulate congressional elections.

Encl.

c. Erin Seiler, LPRO Analyst
House Committee on Rules

[4] 460 U.S. 780, 794-95 (1983).
[5] Article I, section 4, clause 1, United States Constitution.
[6] *Id*.
[7] Article II, section 1, clause 2, United States Constitution.