



February 6, 2018

## Oregon Progressive Party Position on Bill at 2018 Session of Oregon Legislature:

### SB 1512: Support, with reservations and suggested change

Dear Committee:

The Oregon Progressive Party (OPP) supports this bill, which would enact the Interstate Compact for Agreement Among the States to Elect the President by National Popular Vote (NPV).

The President of the United States should be chosen in an election in which every vote is equal. That is obviously not the case now. The ideal solution would be to amend the U.S. Constitution to abolish the Electoral College and choose the President by means of national popular vote. But the structure of the U.S. Senate (which parallels the Electoral College) makes that probably impossible.

A potential problem with the NPV needs to be addressed. In the past, some states have kept major party candidates off of their general election ballots, for whatever reason or excuse. Alabama excluded Harry Truman from its ballot in 1948 and Lyndon Johnson from its ballot in 1968. If any state were to do so, after implementation of the NPV Compact, the outcome of the national popular vote could be changed so that it does not accurately reflect the will of the voters.

The NPV Compact (as set forth in SB 1512), Article III, is written to allow each state to determine the number of popular votes for each candidate within that state and within each of the other states as well:

Prior to the time set by law for the meeting and voting by the presidential electors, **the chief election official of each member state shall determine the number of votes for each presidential slate in each State** of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate.

If a state kept a major candidate off the ballot, there would apparently be no basis

for any state election official to put more than zero in that candidate's column for that state. If Texas had kept Hillary Clinton off the 2016 ballot, she would not have received most or all of her 3.88 million votes there (depending on whether write-in votes for her would be tallied). That alone would have eliminated her national popular vote margin of 2.86 million votes.

I believe that the NPV Compact needs to be amended to add this:

If a State fails to place all nationally-recognized major candidates for President on the general election ballot or fails to tally and report the votes cast for any such candidate, the national popular vote total, for the purposes of this Compact, shall exclude all votes from that State.

So, if Texas were to exclude Hillary Clinton from the ballot (or not count her votes), then also none of the votes in Texas for Donald Trump would be counted in determining the national popular vote winner. This would deter any state from excluding a major candidate from its ballot.

Excluding major candidates from the general election ballot is not impossible, as Alabama has demonstrated. Further, the Oregon Legislature is considering SB 1511, which would exclude from the Oregon primary ballot and general election ballot any candidate for President or Vice-President who has not (1) publicly disclosed his or her income tax return for the most recent year or (2) filled out the statement of economic interest required of Oregon candidates under ORS 244.060. Under the NPV Compact, such an Oregon exclusion would reduce the national popular vote total for the affected major candidate by about 1%. **And, if Oregon can impose that exclusion, why can't Texas exclude any candidate who is not a lifetime member of the National Rifle Association or who has ever been a member of a labor union? In national power politics, the potential for skulduggery cannot be disregarded.** One need only examine the congressional and legislative districting maps adopted by some state legislatures to see that politics trumps principle. We will be testifying on SB 1511, if it is called for hearing in this session. Our written testimony on SB 1511 is attached.

Note: The substance of this testimony is much the same as our testimony on SB 888 in the 2017 session of the Oregon Legislature.

## Oregon Progressive Party

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**Oregon Progressive Party  
Position on Bill at 2018  
Session of Oregon Legislature:**

**SB 1511: Support**

Dear Committee:

The Oregon Progressive Party supports SB 1511, which would require major party candidates for President and Vice-President to provide their latest federal tax returns to the Secretary of State, or to complete a statement of economic interest, to appear on the Oregon primary or general election ballots.

This seems well intentioned to encourage candidates to provide information about their financial dealings that voters should definitely be able to know and evaluate.

Similar bills requiring disclosure of tax returns have been filed in New York, California, Ohio, Rhode Island, New Jersey, Virginia, and Massachusetts. None has been enacted. The New Jersey legislature passed the bill, but the Governor vetoed it.

Yes, SB 1511 would open the door to similar bills in other states, which could completely change the way that Presidents of the United States are elected, so that all Presidents for the foreseeable future would be Republicans (as explained below). But this particular idea is already circulating among state legislatures, so enacting SB 1511 should not earn Oregon any blame for the oncoming constitutional crisis.

**Would SB 1511 Have Any Effect?**

Some might say that Oregon adopting this requirement would have no effect. If this law had been in place last year, Donald Trump would not have released his tax returns anyway, because he knew that it was close to impossible for him to win Oregon's electoral votes. But that may not be the case in future Presidential elections in Oregon involving other candidates.

Some might say that SB 1511 would be declared unconstitutional by the courts. We disagree with that prediction and explain why later in this testimony.

SB 1511 alone could change the outcome of the general election for President, if the National Popular Vote (NPV) Compact is approved by sufficient states to control 271 electoral votes. Under the NPV Compact, the exclusion of a major party presidential candidate by SB 1511 from the Oregon general election ballot would reduce the national popular vote total for the excluded major candidate by about 1%, which could make the difference between winning or losing the Presidency, under the NPV Compact.

Even without the NPV Compact, adoption of bills like SB 1511 would likely have a large effect on the outcome of future Presidential elections. This idea would probably be copied by many other states--particularly states where Democratic presidential candidates usually win but where state legislatures are controlled by Republicans. The first attached map shows a pretty accurate rendition of the recent history of Blue v. Red v. toss-up states in Presidential races. The second attached map shows where Republicans control the state legislatures. **There are at least 10 states where the Presidential electorate is Blue or toss-up but the state legislature is Red:**

Florida	Iowa	Michigan
Minnesota	New Hampshire	North Carolina
Ohio	Pennsylvania	Virginia
Wisconsin		

There would appear to be no reason why deep Red states would not also adopt laws similar to SB 888.

The laws in other states would be similar to SB 1511 in that they would disqualify major national Presidential candidates from the state ballots for a stated reason, but the stated reason could be just about anything, such as:

- > failure to maintain lifetime membership in the National Rifle Association
- > failure to have run a successful business for a specified number of years
- > current or past membership in a labor union
- > under investigation for misuse of government email

The reason could be tailored by the state legislature to match the characteristics of the most prominent Presidential candidate disfavored by that legislature. The obvious result would be that the Democratic candidate for President would likely be kept off sufficient ballots in every election as to make winning impossible, because Republicans control 32 state legislatures (while Democrats control only 13).

SB 1511 and similar laws would effectively nullify the NPV Compact, if it were to go into effect. Keeping Hillary Clinton off the Florida ballot would have cost her about 7% of her national popular vote total; off in Texas would have cost her another 6%; off in

Ohio about 4%; off in Michigan about 3.5%; off in North Carolina about 3%; off in Wisconsin about 2%; and so on in states with Red legislatures. Yes, California could reduce Trump's popular vote total by about 7%; New York could reduce it by about 4.5%; and so on. **But Red legislatures could reduce the popular vote of the Democratic candidate far more than Blue legislatures could reduce the popular vote of the Republican candidate, since Red legislatures control 32 states v. 13 states for Blue legislatures.**

The obvious result would be that the Democratic candidate for President could be kept off sufficient ballots as to make winning impossible.

### **Would SB 1511 and Similar Laws Survive Constitutional Challenge?**

The U.S. Supreme Court has struck down state laws that attempt to create additional mandatory qualifications for candidates for Congress, as in **Cook v. Gralike**, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001). But that decision was based on the Elections Clause in the U.S. Constitution (Article I, § 4), which applies only to congressional elections.

There are 3 reasons why the U.S. Supreme Court would uphold laws like SB 1511:

1. Some believe that U.S. Supreme Court decisions reflect the political agendas or leanings of its justices. The Court is now evenly split between "liberals" and "conservatives," but the Court's membership is likely to trend to the right in the near future.
2. One tenet of conservatism is respect for "states rights," and SB 1511 surely asserts that states have rights to control their ballots.
3. It has also been important to Republican-appointed justices to ensure that Democrats do not win the Presidency, as in **Bush v. Gore** (2000). Upholding laws similar to SB 1511 would ensure that outcome.

### **What Would be the Ultimate Consequence of Adopting SB 1511 and Similar Laws?**

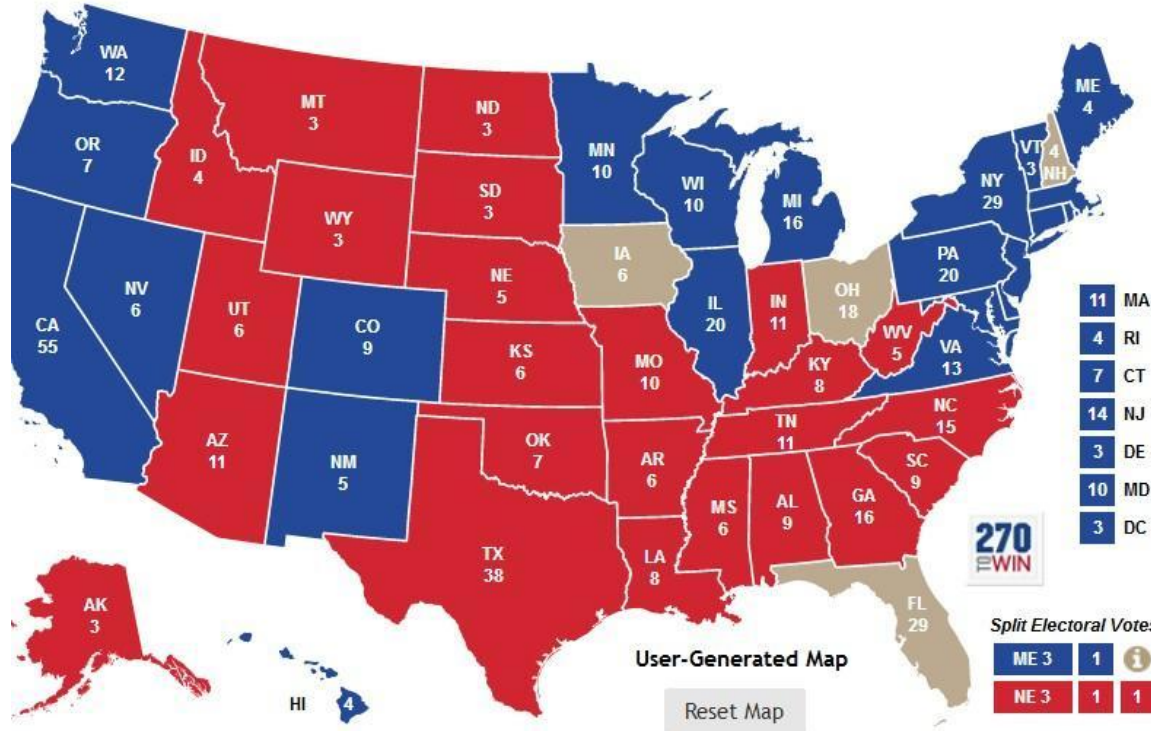
Adoption of SB 1511 and similar laws could effectively remove the choice of President from the voters. Instead, each state legislature could devise new disqualifications that would remove from its Presidential ballot the candidate disfavored by a majority of state legislators. The choice of President would devolve from the imperfect Electoral College system to the state legislatures.

There is nothing in the U.S. Constitution that requires that the President be elected, directly or indirectly, by voters.

For the foreseeable future, the result would be Republican wins in Presidential

elections, because Republicans control 32 state legislatures, while the Democrats control 13.

### Usual Presidential Electoral Votes 2000-2012



### State Legislatures After the 2016 Elections

