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

SB 594: Neutral; need first to have federal law require that all states place all major party candidates for President on their ballots; suggested alternative approach.

Dear Committee:

The Oregon Progressive Party is neutral on SB 594, which would require major party candidates for President and Vice-President to provide their latest federal tax returns to the Secretary of State in order to appear on the Oregon primary or general election ballots. Unless there is first enacted a federal law requiring that all states place all major party candidates for President on their ballots, bills like SB 594 could result in a complete change in the method of electing Presidents that would ensure Republicans in that office for the foreseeable future.

SB 594 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 introduced in Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Ohio, Rhode Island, Tennessee, Vermont and Virginia). **None has been enacted.** The legislatures of New Jersey and California each passed such a bill, but their Governors (Christie and Brown) vetoed them.

Enacting SB 594 and similar bills in other states would 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 since this particular idea is already circulating among state legislatures, enacting SB 594 should not earn Oregon the blame for that.

Would SB 594 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 594 would be declared unconstitutional by the courts. We disagree with that prediction and explain why later in this testimony.

The effect of SB 594 (and similar bills) would be greatly increased, if the National Popular Vote (NPV) Compact is approved by sufficient states to control 271 electoral votes. The Oregon Senate voted to join the NPV Compact just last week in SB 870. Under the NPV Compact, the exclusion of a major party presidential candidate by SB 594 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 594 would likely have a large effect on the outcome of future Presidential elections. This idea would probably be copied by 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 8 states where the Presidential electorate is Blue or toss-up but the state legislature is Red:**

Florida	Iowa	Michigan	North Carolina
Ohio	Pennsylvania	Virginia	Wisconsin

Together, these states have 127 electoral votes. If the Red legislatures in these states can determine who is on the ballot for President, they can swing these 127 elector votes to the Republican candidate by excluding the Democratic candidate from the ballot. Taking away these 127 electoral votes would make it basically impossible for a Democrat to be elected President.

There would appear to be no reason why Red states would not also adopt laws similar to SB 594. The laws in these states would be similar to SB 594 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 of the party 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 31 state legislatures in states having 275 electoral votes (while Democrats control only 18 legislatures).

SB 594 and similar laws would have even greater effect, if the NPV Compact were enacted by sufficient states. In 2016, Hillary Clinton won the national popular vote (NPV) by 2.9 million votes. Keeping Hillary Clinton off the ballot in Florida or Texas or Pennsylvania alone (all Red legislatures) would have swung the NPV vote to Donald Trump. So would her exclusion from Ohio or Michigan plus any one of these states: North Carolina, Georgia, Wisconsin, Arizona, Missouri, Indiana, Tennessee, South Carolina, Louisiana, Alabama, or Iowa (all Red legislatures).

California could have reduced Trump's popular vote total by 4.5 million; New York could have reduced it by about 2.8 million; and so on. **But Red legislatures could reduce the popular vote of the Democratic candidate more than Blue legislatures could reduce the popular vote of the Republican candidate.**

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

Would SB 594 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 probably uphold laws like SB 594:

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 594 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 ***Bush v. Gore*** (2000) demonstrated. Upholding laws similar to SB 594 would ensure that Democrats are not elected President for the foreseeable future.

Laurence Tribe, noted Harvard University law professor such laws as a “neutral, even-handed way” to allow voters to assess the “financial and ethical history” of would-be candidates. He also viewed it as constitutional. “It’s not an interference with any federal prerogative, nor does it filter out in advance any set of presidential candidates who meet the Constitution’s age, residence, and other qualifications,” Tribe said. See https://newrepublic.com/article/147310/can-states-ban-trump-ballot-doesnt-release-tax-returns

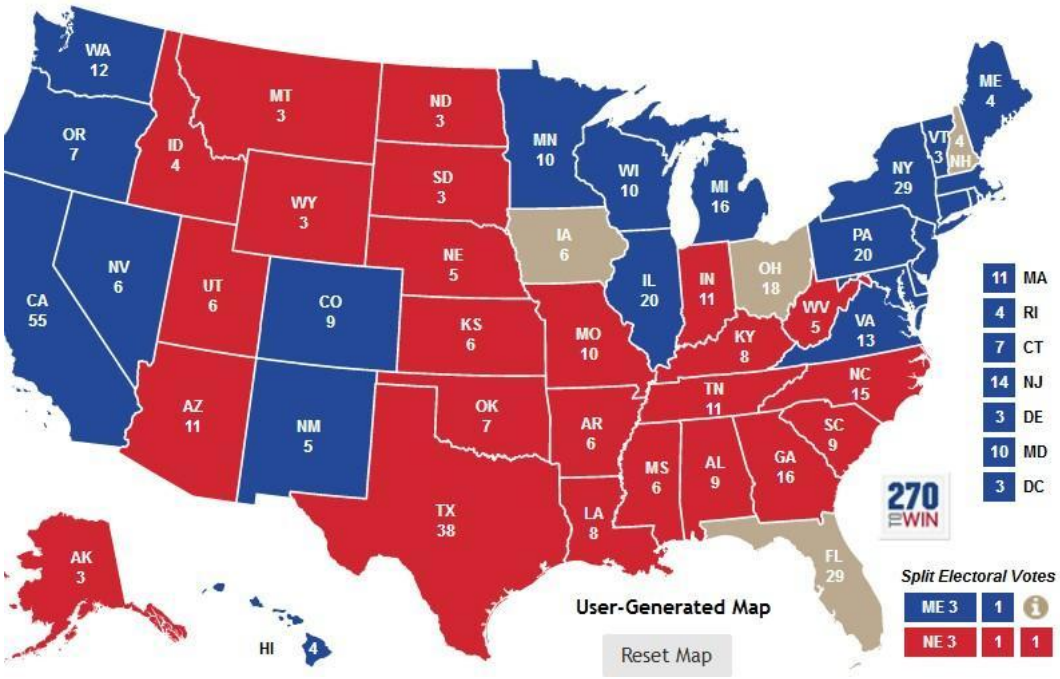
What Would be the Ultimate Consequence of Adopting SB 594 and Similar Laws?

Adoption of SB 594 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 that state's legislators. The choice of President would devolve from the imperfect Electoral College system to decisions made by the state legislatures, not by the voters.

There is nothing in the U.S. Constitution that requires that the President be elected, directly or indirectly, by voters. There is no federal law requiring that a major party Presidential candidate appear on any state's ballot. Alabama excluded Harry Truman from its ballot in 1948 and Lyndon Johnson from its ballot in 1964.

For the foreseeable future, enactment of laws like SB 594 in many states would be Republican wins in Presidential elections, because Republicans control 31 state legislatures in states with 275 electoral votes (including the nominally nonpartisan Nebraska legislature), while the Democrats control 18 legislatures in states with 253 electoral votes. Only Minnesota (10 electoral votes) has split control of its legislature.

Usual Presidential Electoral Votes 2000-2012



Could SB 594 be Amended to Avoid the Effects Outlined Above?

Oregon may not wish to be the first state to enact a law that excludes a major party Presidential candidate from its general election ballot, for the reasons stated above. Still, it seems unfair to deprive voters of knowledge about the tax returns of Presidential candidates. SB 594 could be amended to encourage Presidential candidates to release their tax returns, without excluding them from the ballot. For example, the penalty for not disclosing could be the addition of these words next to the candidate's name on the ballot: "Refused to Release Tax Returns". That would likely depress the vote total for the non-disclosing candidate.

This approach, if copied by Red legislatures, would not enable them to ensure that future Presidents are Republicans. They could add taglines next to the name of Democratic candidates for President, such as "Favors Abortion" or "Wants to Confiscate Guns." But these taglines would not have nearly the power of excluding the Democratic candidate from the ballot in a Blue or toss-up Presidential vote state. Tagging Democratic candidates with Democratic policies in those states might even help them win more votes.

This sort of ballot tagging was ruled in violation of the Elections Clause of the U.S. Constitution in ***Cook v. Gralike***, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001). But the law struck down involved only elections to Congress, and the Elections Clause applies only to congressional elections, not to Presidential elections. Further, as noted above, states are thought to have plenary power over Presidential elections under Article II

of the United States Constitution, which provides:

> 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.

The U.S. Constitution does not require that any state allow anyone to cast a vote for President at all. Nor does any federal law. In *Bush v. Gore* (2000), the Supreme Court stated that the Article II power given to state legislatures was “plenary” and that states need to allow anyone to vote for President. There would be no barrier to requiring a "Refused to Release Tax Returns" tagline on the Presidential ballot.