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Senator Hannah-Beth Jackson, Chair
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SB 27 (McGuire)
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TSG

SUBJECT

Presidential primary elections: ballot access: tax returns

DIGEST

This bill requires candidates for President of the United States to submit copies of their federal income tax returns for the five most recent taxable years to the California Secretary of State's Office (SOS) as a precondition for having their names appear on a California primary election ballot. After redacting the returns for privacy purposes, the SOS would then make the returns available to the public through its website.

EXECUTIVE SUMMARY

Although the custom has been observed by every major candidate for U.S. President in the last 40 years except one, there is actually no legal requirement that presidential candidates release their federal tax returns to the public. As a result, the public currently relies on the candidates to voluntarily disclose what may be revealing information about the candidates' sources of income, wealth, business dealings, and charitable giving, as well as how much the candidates do or do not pay in taxes. This bill would integrate disclosure of federal tax returns into the method by which California determines which candidates' names appear on the presidential primary ballot. Under this bill, candidates would have to submit copies of their federal income tax returns for the five most recent taxable years to the California Secretary of State's Office (SOS) in addition to meeting all other ballot access requirements. After redacting the returns for privacy purposes, the SOS would make the returns available to the public through its website. Candidates could refuse to submit their tax returns but would then have to proceed on a write-in basis.

The bill is author-sponsored. It contains an urgency clause. Support is from several statewide organized labor unions, California Secretary of State Alex Padilla, and local groups affiliated with the Democratic Party. Opponents to the bill primarily contend that it is unconstitutional. The bill passed out of the Senate Committee on Elections and Constitutional Amendments by a vote of 3-1.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides that: "[n]o person except a natural born citizen, or a citizen of the United States, at the time of adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States." (U.S. Const., art. II, § 1, par. 5.)

2) States that: "[t]he executive Power shall be vested in a President of the United States of America. He [sic] shall… be elected, as follows… 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…"(U.S. Const., art. II, § 1, para. 1-2.)

3) Provides that: "[n]o Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." (U.S. Const., art. I, § 9, par. 8.)

4) Makes federal tax returns confidential, with specified exceptions. (26 U.S.C. § 6103(a).)

5) Allows taxpayers to consent to the release of their federal tax returns to designated third parties. (26 U.S.C. § 6103(c).)

Existing state law:

1) Establishes that political parties may certify a list of nominees for presidential elector to the SOS, who shall then place the names of that political party's candidates for U.S. President and Vice President on the ballot. (Elec. Code § 6901.)

2) Provides that when a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the SOS shall place the names of those presidential and vice presidential candidates on the ballot. (Elec. Code § 8304.)

3) Permits a group of candidates for presidential electors to be certified as write-in candidates, in which case the candidates must declare the names of the presidential and vice presidential candidates they pledge to support. (Elec. Code § 8651.)

This bill:

1) Creates the Presidential Tax Transparency and Accountability Act.

2) Finds and declares all of the following:
   a) the State of California has a strong interest in ensuring that its voters make informed, educated choices in the voting booth, and to this end, the state has mandated that extensive amounts of information be provided to voters, including county and state voter information guides;
   b) a presidential candidate's income tax returns provide voters with essential information regarding the candidate's potential conflicts of interest, business dealings, financial status, and charitable donations; therefore, the information in tax returns helps voters to make a more informed decision;
   c) as one of the largest centers of economic activity in the world, the State of California has a special interest in the President refraining from corrupt or self-enriching behaviors while in office and the people of California 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;
   d) the State of California has an interest in ensuring that any violations of the Foreign Emoluments Clause of the U. S. Constitution or statutory prohibitions on behavior such as insider trading are detected and punished and mandated disclosure of Presidential candidates' tax returns will enable enforcement of the laws against whichever candidate is elected President; and
   e) compliance costs with this requirement will be trivial.

3) Defines "income tax return" for purposes of this bill as any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of the Internal Revenue Code, and that is filed on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists that are supplemental to, or part of, the filed return.

4) Provides that the SOS shall not print the name of a candidate for President of the United States on a primary election ballot unless the candidate, within a reasonable timeframe established by the SOS, files with the SOS a copy of every income tax return the candidate filed with the Internal Revenue Service (IRS) in the five most recent taxable years. If the candidate has not filed an income tax return with the IRS for the tax year immediately preceding the primary election, the candidate shall submit a copy of the income tax return to the SOS within five days of filing the return with the IRS.

5) Provides that the aforementioned requirement does not apply to any year in which the candidate was not required to file an income tax return with the IRS.

6) Requires the SOS to redact the Social Security number, address, or telephone number of any individual in a submitted income tax return and shall make any other redactions necessary to protect individual privacy. After redacting an income tax return, the SOS shall make it available to the public on the SOS's website.

7) Requires the SOS to adopt implementing regulations.

8) Contains an urgency clause.

COMMENTS

1. Background on disclosure of presidential tax returns

In 1973, the Providence Journal-Bulletin obtained and published data showing that President Richard Nixon had paid an astonishingly low amount in taxes in 1969 given his income for that year. Nixon faced mounting public suspicion and famously responded "I welcome this kind of examination because people have got to know whether or not their president is a crook. Well, I am not a crook." After initially resisting calls for him to do so, Nixon eventually released his taxes and underwent an Internal Revenue Service (IRS) audit. It turned out he had improperly claimed an exemption of $500,000 for papers he donated to the National Archives. Nixon wound up paying nearly half of his net worth in back taxes.[1]

For over four decades after this incident, it was customary – though never required by law – for U.S. presidential candidates to release their tax returns. Only one candidate, President Gerald Ford in 1976, did not do so. Ford released a summary of his return instead.

Then, during the 2016 campaign for U.S. President, Donald Trump broke with this longstanding tradition and refused to release his tax returns. Prior to declaring his candidacy formally, Trump said he would release his tax returns if he ran for president.[2] In February 2014, he said he would release his tax returns in the next three to four months.[3] Later, he stated that he could not release his tax returns because he was being audited by the IRS.[4] Trump asserted that he would release his returns when the

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[1] Zuckoff, *Why We Ask to See Candidates' Tax Returns* (Aug. 5, 2016) The New York Times https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html?_r=0 (as of Mar. 24, 2019).
[2] *Hugh Hewitt Show* (Feb. 15, 2015) https://www.youtube.com/watch?v=SIMDkxoS1as (as of Mar. 24, 2019).
[3] *Face the Nation Transcripts* (Feb. 14, 2016) http://www.cbsnews.com/news/face-the-nation-transcripts-february-14-2016-donald-trump-marco-rubio/ (as of Mar. 24, 2019).
[4] *The CNN-Telemundo Republican Debate Transcript, Annotated* (Feb. 25, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/02/25/the-cnntelemundo-republican-debate-transcript-annotated/?utm_term=.558ae4eb9cb9 (as of Mar. 24, 2019).

audit was over.[5] After he was inaugurated, Trump's former campaign manager appeared to state that Trump was not going to release his tax returns at all.[6]

Though prompted by Trump's break with the customary practice, this bill is not retroactive and would apply even-handedly to all future presidential candidates, regardless of party or viewpoint. According to the author, the bill would function to increase transparency, expose potential conflicts of interest, discourage corruption, and provide voters with a more complete basis on which to evaluate those who would seek the nation's highest office.

Tax returns provide key financial information about the filer. A tax return indicates the filer's income, what income-generating assets the filer owns, how much the filer is saving, how much the filer has paid in taxes, and what, if any, charitable contributions the filer has made.[7] While some of this information is partially captured in a candidate's mandatory Federal Elections Commission (FEC) filing, the information contained in a tax return is broader and more specific.[8] All of this information is potentially relevant to the voters' determination of who is best fit to lead the country.

This bill would enable voters in California to have full access to that information prior to casting their votes.

2. Analysis of federal constitutional issues raised

SB 27 presents fascinating and, in some aspects, novel constitutional issues. It is perhaps not surprising, then, that legal authorities, scholars, and practitioners reviewing legislation similar to SB 27 have come to varying conclusions about whether such measures would withstand constitutional scrutiny in court. In response to a request from Assemblymember Chad Mayes regarding SB 149 (McGuire, 2017), which was nearly identical to this bill, California's Office of the Legislative Counsel concluded that it would be unconstitutional if enacted.[9] Reviewing a very similar bill working through the legislature in Washington, that state's attorney general concluded just the opposite:

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[5] @realDonaldTrump, *In Interview I Told @AP That My Taxes Are Under Routine Audit And I Would Release My Tax Returns When Audit Is Complete, Not After Election!* (Mar. 11, 2016) Twitter https://twitter.com/realdonaldtrump/status/730500562022760448?lang=en (as of Mar. 24, 2019).
[6] Bradner, *Conway: Trump Will Not Release Tax Returns* (Jan. 22, 2017) CNN <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-trump-tax-returns/> (as of Mar. 8, 2017).
[7] Maurer, *What You Can – And Can't – Learn From a Tax Return* (Jan. 11, 2017) CNBC http://www.cnbc.com/2016/11/01/what-you-can--and-cant--learn-from-a-tax-return.html (as of Mar. 24, 2019).
[8] *See* Comment 6 of this Analysis, below.
[9] Ops. Cal. Legis. Counsel, No. 1718407 (Sept. 7, 2017) Presidential Qualifications: Tax Return Disclosure.

that the bill likely *would* be found constitutional.[10] Similarly, legal scholars have come out on both sides.[11]

The primary constitutional question raised by SB 27 is whether it is compatible with, or in violation of, the Presidential Qualifications Clause. In addition, however, the bill also implicates the Presidential Election Clause, the constitutional right to privacy, the Supremacy Clause, and voters' First and Fourteenth Amendment rights to free expression and free association.

Each of these issues is discussed in turn, below.

a. The Presidential Elections Clause

The U.S. Constitution sets forth the states' role in the election of a president through the appointment of "electors" to the Electoral College:

> [t]he executive Power shall be vested in a President of the United States of America. He [sic] shall… be elected, as follows… 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…"(U.S. Const., art. II, § 1, para. 1-2. Emphasis added.)

By its plain language, this provision would seem to give states enormous latitude to design the process for choosing electors. As then Justice Rehnquist wrote about the Presidential Elections Clause:

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[10] *Washington State Attorney General Opinion No. 2* (Mar. 12, 2019) https://www.atg.wa.gov/ago-opinions/constitutionality-possible-legislation-requiring-candidates-president-and-vice (as of Mar. 24, 2019).

[11] Through the author's office, this Committee received a joint statement from constitutional law professor Laurence Tribe of Harvard Law School, corporate law professor Richard Painter of University of Minnesota Law School, and retired Ambassador Norman Eisen of the Brookings Institution, asserting their belief that SB 27 *is* constitutional. Similarly, the author presented the Committee with separate memoranda by law professors Gowri Ramachandran of Southwestern Law School and Abby Wood of University of Southern California Law School rebutting the California Legislative Counsel's memorandum, questioning its reasoning, and stating their belief that SB 27 is constitutionally sound. These documents are on file with the Committee. In a law review article addressing the subject, law professor Danielle Lang of UCLA Law School also reached the conclusion that legislation like SB 27 would be constitutional. *See* Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure, 65 UCLA L. Rev. Disc. 46. On the other hand, other law professors, like Michael McConnell of Stanford and Derek Muller of Pepperdine have expressed the belief that bills like SB 27 are unconstitutional. (*See* Bussewitz, *Running for President? Some States Want Tax Returns Public* (Mar. 17, 2017) Associated Press https://www.apnews.com/732e876c30f045209b1c91aa0f8b8019; Muller, *Don't Use the Ballot to Get Trump's Tax Returns* (Apr. 3, 2017) New York Times https://www.nytimes.com/2017/04/03/opinion/dont-use-the-ballot-to-get-trumps-tax-returns.html (both as of Mar. 24, 2019).

> [t]his provision, one of few in the Constitution that grants an express plenary power to the States, conveys the broadest power of determination and it recognizes that in the election of a President the people act through their representatives in the legislature, and leaves it to the legislature *exclusively* to define the method of effecting the object. (*Anderson v. Celebrezze*, 460 U.S. 780, 806-807 (Rehnquist, J. dissenting.) Internal citations omitted. Emphasis added.)

In fact, the U.S. Supreme Court has stated that there is no federal constitutional right to vote for electors for the President of the United States. (*Bush v. Gore* (2008) 531 U.S. 98, 104.) A state legislature need not even hold a popular vote to determine presidential electors; it may appoint the state's electors itself if it so chooses. (*Ibid*.) Indeed, several states did exactly that for many years after the Constitution was ratified. (*Ibid*.) Thus, reading the plain text of the Presidential Elections Clause in its historical context – the method favored by the constitutional originalists holding sway on the U.S. Supreme Court today -- state legislatures would appear to have quite broad authority to set the rules for how the state chooses its presidential electors.

Within the context of this broad state authority, however, the courts have indicated that there are some limitations. In particular, a state's system for choosing its presidential electors cannot violate any *other* aspects of the U.S. Constitution. (*Williams v. Rhodes* (1968) 393 U.S. 23, 29.)[12] Thus, the constitutional analysis must continue to the other potential federal constitutional issues that SB 27 raises. However, the overarching principle of sweeping state authority under the Presidential Elections Clause should be born in mind throughout.

b. The Presidential Qualifications Clause

Most debate over the constitutionality of SB 27 and similar state legislation has centered around application of the Presidential Qualifications Clause. Under that Clause, to be eligible to be President, candidates must be natural born citizens, they must be over 35 years of age, and they have to have resided in the country for at least fourteen years. (U.S. Const., Art. II, § 1, para. 5.) There is a different clause in the U.S. Constitution that addresses qualifications for serving in Congress.

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[12] Where, as in California, the state Legislature has provided for appointment of presidential electors through popular vote, the U.S. Supreme Court has also said that such voting must take place on equal terms for each voter. (*Bush v. Gore*, *supra*, 531 U.S. 98, 105.) Since SB 27's tax return disclosure requirement would apply equally to all candidates and their supporters, it would not seem to run afoul of this requirement. *See* Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?* (Dec. 30, 2016) Verdict https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot (as of Mar. 24, 2019) ("as long as states were not treating votes from different parts of the state or for different candidates in a disuniform way (and a tax-return-disclosure requirement would apply equally to all candidates and their supporters), states continue to have broad latitude.")

In *United States Term Limits v. Thornton* (1995) 514 U.S. 779 (hereafter "*Term Limits*"), the U.S. Supreme Court delved exhaustively into the history both of the Constitution's Qualifications Clauses. Regarding eligibility to serve in Congress, the Court concluded that the constitutional qualifications are fixed and that states have no authority to alter or add to the terms contained in them. [13] (*Id.* at 827.)

At the same time, if every interested and eligible candidate for a federal elective office were entitled to appear on the ballot without restriction, the ballot could quickly become so lengthy as to be unwieldy. People might run on a lark or as a joke. Recognizing this, the Court has upheld state laws that impose requirements for appearing on the ballot, even though those requirements are not contained in the relevant constitutional Qualifications Clause:

> [a] State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections… Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. (*Storer v. Brown* (1974) 415 U.S. 724, 732-733, hereafter "*Storer*," internal citations omitted.)

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[13] Much about the Congressional Qualifications Clause is similar and analogous to the presidential context and for that reason, *Term Limits* is likely to be the guiding decision for any ruling on a challenge to the ballot access restriction proposed by this bill. As the one federal court decision to address the matter concluded, the rationale behind *Term Limits'* holding about the Congressional Qualifications Clause "applies with equal force to the Presidential Qualifications Clause…" (*De La Fuente v. Merrill* (M.D.Ala. 2016) 214 F. Supp. 3d 1241, 1253 at fn. 11.).

In spite of the similarities, however, there are at least two reasons to think that the courts might distinguish ballot access restrictions in the congressional context from those in the presidential context. The first distinction between the two circumstances is that congressional elections take place on a state-by-state basis, whereas the presidential election takes place on the national scale. Therefore, one state's congressional ballot access laws control only that state's congressional election. They do not affect how people in other states vote or who their elected representative will be. In a presidential election, by contrast, the ballot access laws in one state could easily alter the outcome of the election overall, thereby imposing, to some degree, the will of one state on the others.

The second distinction between the congressional and presidential contexts is in the Constitution itself. While the Presidential and Congressional Qualifications Clauses of the U.S. Constitution are nearly identical in structure, the respective constitutional clauses regarding how the elections are to be conducted are quite different. Unlike the Presidential Elections Clause, discussed supra, which grants sweeping authority to the states to determine how to appoint their presidential electors, the congressional clause only allows states to set up the "time, place and manner" by which congressional elections are to take place. (U.S. Const., art. II, § 4, par. 1.) It also permits the U.S. Congress to override the states should Congress wish to.

Thus, *Term Limits* stands for the proposition that states cannot use ballot access provisions to add or alter the qualifications for federal elective office, while *Storer* affirms that provisions that merely regulate access to the ballot are constitutionally permissible. But where is the line between the two and on which side does a ballot access requirement to release tax returns fall?

In *Schaefer v. Townsend* (9th Cir. 2000) 215 F.3d 1031 (hereafter "*Schaefer*"), the Ninth Circuit considered a California statute that required congressional candidates to be residents of the state in order to qualify to get on the ballot. In contrast, the Congressional Qualifications Clause merely requires a member of the House of Representatives to inhabit the state "when elected." (U.S. Const. art. I, § 2, par. 2). Drawing from *Term Limits,* the Ninth Circuit devised a two part test for distinguishing between a constitutionally sound ballot access law, and laws that impermissibly interfere with the Qualifications Clause:

> First, we must ask whether the… statutes create an absolute bar to candidates who would otherwise qualify under the Qualifications Clause. If they do not, we next ask whether they have the likely effect of handicapping an otherwise qualified class of candidates. (*Schaefer*, *supra*, 215 F.3d 1031, 1035.)

The Ninth Circuit concluded that since California's statute handicapped candidates residing outside of the state from getting on the ballot, it impermissibly hindered otherwise qualified candidates from running.

Since California is in its jurisdiction, the Ninth Circuit would initially hear any challenge to SB 27 and Ninth Circuit case law would apply. Presumably, therefore, the Ninth Circuit would examine SB 27 under the two part *Schaefer* test.

SB 27 does not create an absolute bar to candidates who are otherwise qualified under the Presidential Qualifications Clause. If the bill precluded people from appearing on the ballot if they had no tax returns to disclose or did not yet have their most recent year's tax return available, then SB 27 might create an absolute bar as to those individuals, but SB 27 accounts for both of these scenarios. Thus, anyone who meets the other constitutional requirements to be president can also meet SB 27's requirements. SB 27 therefore appears to pass the first element of the *Schaefer* test.

Turning to second aspect of the test, SB 27 also does not have the likely effect of handicapping an otherwise qualified class of candidates. SB 27 makes no distinction and would have no disparate impact on candidates in relation to their age, place of birth, or number of years residing in the country – all the things that might encroach on an otherwise qualified candidate's ability to run. SB 27 only requires candidates to disclose their tax return to the Secretary of State. This is something that all prospective candidates are equally capable of doing. Some may choose not to comply, some may be

deterred from running by the awareness that they will have to comply, but that cannot mean, logically, that they have been handicapped or discriminated against as a class in the sense that the *Schaefer* test intends. If it did, no ballot access requirement could ever be upheld since all of them present prospective candidates with a choice of whether or not to comply and all of them will deter some number of prospective candidates from going forward. In fact, ballot access restrictions that require candidates to choose to do something, such as gather signatures or pay a fee *have* been upheld by courts as legitimate exercises of the state's interest in a manageable ballot. (*See*, *e.g.*, *Biener v. Calio* (3rd Cir. 2004) 361 F.3d 206.)

In sum, under existing Ninth Circuit precedent, SB 27 appears to be a constitutional ballot access restriction rather than an unconstitutional attempt to impose additional qualifications on the office of the presidency.[14]

c. First Amendment freedom of expression and association

The First Amendment to the U.S. Constitution safeguards, among others, the rights to freedom of expression and association. These rights are applicable to the states through the Fourteenth Amendment. (*Gitlow v. New York* (1925) 268 U.S. 652.). The courts have ruled that ballot access implicates voters' right to free expression because it impacts their ability to express their views by casting a vote for the candidate of their choice. (*Anderson v. Celebrezze (1983)* 460 U.S. 780, 787. Hereafter "*Celebrezze*.") Similarly, voters' freedom of association is impacted, according to the courts, because candidates are rallying points for groups of people that share the same views. (*Id*. at 788.)

[14] As a side note, SB 27 would appear to pass the tests that other federal appellate courts have designed for drawing the distinction between unconstitutional qualifications and constitutional ballot access restrictions. In *Biener v. Calio* (3rd Cir. 2004) 351 F.3d 206, the Third Circuit examined a Delaware law that imposed a $3,000 filing fee on primary election candidates while exempting indigent candidates. In upholding the fee, the Appellate Court focused on the fact that the ballot access restriction in question did not relate to an inherent characteristic of the candidate and therefore did not exclude a class of potential candidates. In *Cartwright v. Barnes* (11th Cir. 2002) 304 F.3d 1138, the Eleventh Circuit passed judgment on a Georgia law requiring that congressional candidates obtain signatures from 5 percent of registered voters in order to get on the ballot. In upholding the requirement, the Eleventh Circuit declined to adopt the test formulated by the Ninth Circuit, and instead set forth a procedural versus substantive distinction: procedural regulations on eligibility are constitutional; substantive ones are not. In the Eleventh Circuit's view, Georgia's 5 percent requirement was constitutionally sound because it was part of the state's election procedures and did not make any substantive change to the qualifications for office. SB 27 is likely constitutional under the Third and Eleventh Circuit tests. Nothing about releasing tax returns involves an inherent characteristic of a potential candidate, at least not where an exception is made for those who, for whatever reason, do not have a tax return. Similarly, the requirement to release tax returns seems entirely procedural, rather than substantive in nature. If SB 27 authorized the Secretary of State to reject a candidate based on the *content* of the tax return submitted, such a requirement would surely enter into the realm of a substantive qualification. But merely requiring the submission of a complete tax return does not. Like submitting signatures, a filing fee, fee waiver, or any other ballot access paperwork, submitting a tax return would simply be a bureaucratic step. Thus, under any of the existing constitutional tests for ballot access restrictions, SB 27 would seem to pass muster.

In *Celebrezze*, the U.S. Supreme Court took up the question of what ballot access restrictions a state can impose without interfering with its citizen's First Amendment rights. Ohio had enacted ballot access rules requiring all independent presidential candidates to file by a deadline set earlier than that for major party candidates. A would-be independent candidate missed the deadline and sued. The Court determined that despite the fundamental nature of the rights to expression and association involved, "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens." (*Celebrezze*, *supra*, 460 U.S. 780, 788.) In general, the Court ruled, ballot access restrictions that severely restrict voters rights to association and expression are subject to strict scrutiny. *(Id*. at 789.) Reasonable and nondiscriminatory ballot access restrictions, by contrast, need only be justified by important state regulatory interests (*Id*. at 788) Using these principles, the Court in *Celebrezze* struck down Ohio's law. It found that the early filing deadline for independents was both highly burdensome to candidates and discriminatory against voters of an independent mindset. (*Id*. at 792-793.)

Applying this standard to SB 27, it seems likely that a reviewing court would find the bill's precondition for appearing on the ballot imposes only a minimal burden on candidates and is not at all discriminatory. Submitting a copy of a federal tax return, a document that candidates are obligated to create based on other laws, represents far less of a burden than the early filing deadline struck down in *Celebrezze*. It also seems far less a burden than gathering signatures, a ballot access requirement that courts have routinely upheld. And, unlike the ballot deadline in *Celebrezze*, which applied only to independent candidates, SB 27's requirement to submit tax returns would apply universally, irrespective of the prospective candidate's party or viewpoint.

Two further aspects of the *Celebrezze* ruling are worth noting. On the one hand, the Court's decision to strike down the Ohio law does seem to have been influenced, in part, by the fact that the ballot restriction in question related to presidential candidates in particular. In considering the state's interest and ultimately striking down the Ohio statute, the Court wrote:

> [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 vote's case 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 will largely be determined by voters outside the State's boundaries. (*Celebrezze*, *supra*, 460 U.S. 780, 794-795.)

A court reviewing SB 27 might have similar concerns. Notably, it was a related "slippery slope" policy concern that led then Governor Jerry Brown to veto SB 149 in 2017. (*See* Comment 3, below, for further discussion about this policy issue.)

On the other hand, *Celebrezze* was decided by a slim 5-4 majority, and the dissent explicitly made reference to states' broad powers to set the rules for appointing presidential electors discussed earlier in this Comment.

d. Constitutional Right to Privacy

Although not expressly mentioned in the U.S. Constitution, the U.S. Supreme Court has ruled that a right to privacy emanates from a series of other constitutional provisions. (*Griswold v. Connecticut* (1965) 381 U.S. 479.)[15] This right to privacy is implicated by election-related laws that mandate disclosure of information. (*Buckley v. Valeo* (1976) 424 U.S. 1, 64.) Requiring that candidates for public office disclose information about their finances is quite common, however, and courts have generally upheld them on the grounds that the public's interest in revealing potential or actual conflicts of interest outweighs the privacy interest at stake. (*Plante v. Gonzalez* (5th Cir. 1978) 575 F.2d 1119, 1125-26 and 1136 n. 26.)

As the Washington Attorney General's analysis of that state's equivalent legislation pointed out, however, "the disclosures involved in releasing tax returns seem to implicate greater privacy concerns than most financial disclosure laws currently in effect (and previously considered by the courts)."[16] It cited dicta from a Fifth Circuit case in which the court wrote that:

> a substantial constitutional issue might be raised by disclosure of one's income tax returns. Such disclosure could be troublesome if it were to reveal the nature of various contributions made by the official or candidate, such as contributions to a church, a political party, or a charity. (*Plante, supra,* 575 F.2d 1119, 1133, fn. 20.)

The court did not rule on that matter, though, deferring it to another time. Moreover, the court intimated that its concerns could be mitigated if regulatory protections were in place that would prevent the disclosure of particularly sensitive details. (*Ibid*.)

SB 27 contains just such a regulatory scheme. Under SB 27, upon receipt of a prospective candidate's tax return, the SOS is to make any redactions "necessary to protect individual privacy." While the privacy redaction provision helps to ensure that

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[15] It should be noted that California's state Constitution contains an express right to privacy. (Cal. Const., art. I, § 1.) It is generally construed to protect privacy even more strongly than its federal counterpart.
[16] Washington State Attorney General Opinion No. 2 (Mar. 12, 2019) https://www.atg.wa.gov/ago-opinions/constitutionality-possible-legislation-requiring-candidates-president-and-vice (as of Mar. 24, 2019) original p. 12.

the candidate's privacy rights would be respected under this bill, its open-ended nature leaves significant discretion to the SOS. As the bill moves forward, the author may wish to consider providing a more detailed set of instructions regarding what privacy redactions would and would not be appropriate.

e. Supremacy Clause

Whenever federal and state laws conflict, the federal law governs. (U.S. Const., art. VI.) "Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (*Gade v. National Solid Waste Management Association* (1992) 505 U.S. 88, 108.) U.S. Supreme Court precedent identifies three types of pre-emption: express, field, and conflict. (Chemerinsky, Constitutional Law Principles and Policy, Fifth Edition, p. 414.)

Express pre-emption applies where Congress explicitly states that a federal statute is intended to pre-empt state legislation. There is no federal statute expressly stating that California cannot require disclosure of tax returns to gain access to the ballot.

Field pre-emption occurs when federal legislation is so pervasive in an area of law that Congress has left no room for the states to supplement it. There are federal financial disclosure requirements for presidential candidates, but they require candidates to report different information than what is found in a tax return. Moreover, election procedures, including ballot access, are a field of law very much occupied by the state. As discussed earlier, with regard to the appointment of presidential electors, this area of the law may in fact be the exclusive province of states based on the Presidential Elections Clause of the U.S. Constitution.

Conflict pre-emption takes place when it is physically impossible to comply with both federal and state regulations or in cases where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. There are two federal statutes that could arguably conflict with SB 27.

First, federal law makes federal tax returns confidential. (26 U.S.C. § 6103(a).) By requiring presidential candidates to disclose their tax returns, SB 27 could perhaps be said to conflict with the confidentiality of tax returns. Taxpayers are, however, allowed to consent to the release of their federal tax returns to designated third parties. (26 U.S.C. § 6103(c).) Consequently, the consent of the prospective presidential candidate makes it possible for the SOS to abide by both the federal statute and SB 27 simultaneously. To make this point clearer, the author may wish to consider adopting language from Washington State's similar proposed legislation, which requires prospective presidential candidates to submit a consent to disclosure alongside the tax return itself.

Second, Section 7 of the Federal Privacy Act prohibits a state agency from conditioning any right, benefit, or privilege provided by law on the submission of a Social Security number. (5 U.S.C. 552a (note).) SB 27 requires the SOS to redact the Social Security number from any tax return it receives. This complies with the spirit of the federal law, but since the Social Security number would presumably appear on the tax return when submitted, SB 27 might conflict with a technical reading of the federal law. As the bill moves forward, the author might wish to amend the bill to instruct candidates to remove their Social Security number from the return *before* submitting it.

f. Constitutional conclusions

In summary, there are strong arguments for why the judiciary, and its originalist wing in particular, should find SB 27 constitutional. At the same time, some legitimate counterarguments can be mounted. Perhaps the only thing that can be said with near certainty is that, if enacted, determining the constitutionality of SB 27 will wind up in the hands of the courts.

3. "Slippery slope" policy considerations

In his veto of SB 27's nearly identical precursor, SB 149 (McGuire, 2017), then Governor Jerry Brown raised the policy concern that the bill could lead other states to impose still other disclosure requirements on presidential candidates. Brown, who as a candidate for governor broke California tradition by declining to release his tax returns,[17] wrote:

> Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards? And will these requirements vary depending on which political party is in power? A qualified candidate's ability to appear on the ballot is fundamental to our democratic system. For that reason, I hesitate to start down a road that well might lead to an ever escalating set of differing state requirements for presidential candidates.

There is, in fact, some precedent for this. In 2011, for example, the Arizona legislature passed a bill that would have required presidential candidates to submit a birth certificate in order to appear on the state's election ballot. The bill was vetoed by Governor Jan Brewer. According to a senior fellow with the National Conference of State Legislatures, 14 other states considered similar legislation.[18]

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[17] Egelko, *Brown Vetoes Tax-Disclosure Bill for Presidential Candidates* (Oct. 16, 2017) SF Gate https://www.sfgate.com/news/article/Brown-vetoes-tax-disclosure-bill-for-presidential-12281231.php (as of Mar. 25, 2019).

[18] *'Birther Bill' Vetoed by Arizona Governor* (Apr. 11, 2011) CNN Politics http://www.cnn.com/2011/POLITICS/04/18/arizona.president.bill.veto/ (as of Mar. 25, 2019).

In response to this line of concern, the authors assert their belief that democratically elected legislatures are equipped to make reasoned assessments about what information is sufficiently important to their constituents to warrant a disclosure requirement and what information is not. If legislators go too far in demanding disclosures of presidential candidates, their fully informed constituents can always elect other representatives who will retract the requirement.

4. Differences between a tax return and existing financial disclosure requirements

Candidates for U.S. President and Vice President are already required to disclose certain financial information to the Federal Elections Commission (FEC) within 30 days of declaring their candidacy.[19] The content of an FEC candidacy filing differs in scope and specificity from that contained in a tax return.[20]

On an FEC filing, candidates report financial information in ranges, rather than in specific amounts. Moreover, certain financial information, such as a candidates' homes, cars, and federal retirement plan, is exempt from reporting. Thus, long before the controversy over Trump's tax returns, some journalists and transparency advocates were already criticizing the FEC filings for their limited utility.[21]

A tax return, by contrast, contains specific financial figures. It also provides some information that is not required in the FEC filing. While this information still falls short of providing exhaustive detail about an individual's finances, it provides far more information than an FEC filing alone.[22]

One observer notes the following differences between what can be learned about a candidate from a tax return as opposed to an FEC filing:

- How much a candidate paid in taxes. Financial disclosures do not include how much a candidate paid in taxes and, thus, what their effective tax rate was.

- What tax breaks a candidate claimed. Financial disclosures do not list what types of tax deductions a candidate has claimed. These could range from deducting interest paid on one's mortgage to putting a goat on a golf course to qualify for farmland tax credits.

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[19] 5 U.S.C. App. § 101(c); 5 C.F.R. 2634.201(d).
[20] Rubin, *What a Presidential Candidate's Financial Disclosures Do, and Do Not Reveal* (May 15, 2015) https://www.bloomberg.com/politics/articles/2015-05-15/what-a-presidential-candidate-s-financial-disclosures-do-and-do-not-reveal (as of Mar. 28, 2019).
[21] *Id*.
[22] *Id*.

- Whether a candidate has offshore accounts. Financial disclosures ask candidates to list assets but are not required to provide detailed information, so offshore accounts can be easily masked.

- Charitable giving. Financial disclosures do not include information on what, if anything, a candidate has given to charity.

- A more truthful picture. Financial disclosures are reviewed by the FEC for compliance with reporting requirements, but they are not audited for accuracy like tax returns which carry fines and possible jail time for fraud. Because of that, a tax return presents less of an opportunity to inflate claims of wealth.

- Numbers down to the cent. Financial disclosures report assets in broad ranges (e.g. $1,001 - $15,000; over $1,000,000), while tax returns focus on the exact dollar figure of an asset.[23]

5. Similar state and federal legislation

Numerous other states have considered or are currently considering legislation similar to SB 27, including, among others Washington State, Colorado, New York, North Carolina, and New Jersey. A federal bill, the For the People Act of 2019, would require presidential candidates to disclose their past 10 years' tax returns. (H.R. No. 1, 116th Cong., 1st Sess. (2019).)

6. Rational for urgency clause

This bill contains an urgency clause and therefore requires a two-thirds majority vote to pass. The author has chosen to include an urgency clause so that the bill would go into effect in time for the 2020 presidential primary election in California.

7. Arguments in support of the bill

According to the author:

> Transparency is a nonpartisan issue. The American public deserves to know that the individual they are selecting to be president will have their best interests at heart, free of conflict of interests no matter if it is business related or with a foreign government. There

[23] Horwitz, *What's Under the Hood: Tax Return vs. Financial Disclosure* (Sept. 28, 2016) Third Way http://www.thirdway.org/one-pager/whats-under-the-hood-tax-return-vs-financial-disclosure (as of Mar. 28, 2019) (internal citations omitted).

> are pressing questions for voters to have answers for before an election, because unlike members of Congress and federal appointees, presidents are largely exempt from conflict-of-interest laws. […] Voters not only deserve full disclosure of their future leader's tax returns, they should be entitled to them. SB 27 ensures that future presidential candidates be barred from appearing on the California ballot unless they release their tax returns to the voters.

In support, Americans for Tax Fairness writes:

> [A] presidential candidate's income tax returns provide voters with essential information regarding the candidate's potential conflicts of interest, sources of income, domestic and international business dealings, financial status, and charitable donations. These are critical questions that voters deserve to have answered before for before an election, because unlike members of Congress and federal appointees, presidents are largely exempt from conflict-of-interest laws.

8. Arguments in opposition to the bill

In opposition to the bill, Richard Winger, Editor of Ballot Access News, writes:

> I urge you to abandon SB 27, the presidential tax returns bill. I am just as desirous as anyone else that President Trump's tax returns be made public, but your bill will not achieve that objective because it will be held unconstitutional.
>
> Federal and state courts in California have long held that states cannot keep people off the ballot, if they meet the U.S. Constitutional requirements, and if they satisfy a procedural aspect of an election or require a candidate to show a minimum level of support before running.

SUPPORT

Americans for Tax Fairness
California Federation of Teachers, AFL-CIO
California Labor Federation
California Teachers Association
City of West Hollywood
Courage Campaign
Alex Padilla, California Secretary of State
Progressive Democracy for America – Marin

Service Employees International Union California

OPPOSITION

Libertarian Party of California
Richard Winger, Ballot Access News Editor
One individual

RELATED LEGISLATION

Pending Legislation: SB 505 (Umberg, 2019) clarifies the criteria that a candidate must meet in order to appear on the California presidential primary ballot. SB 505 is currently pending consideration before the Senate Committee on Elections and Constitutional Amendments.

Prior Legislation:

SB 149 (McGuire, 2017) was nearly identical to the bill under consideration. Then Governor Brown vetoed SB 149, writing: "[w]hile I recognize the political attractiveness – even the merits – of getting President Trump's tax returns, I worry about the political perils of individual states seeking to regulate presidential elections in this manner. First, it may not be constitutional. Second, it sets a "slippery slope" precedent. Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards? And will these requirements vary depending on which political party is in power? A qualified candidate's ability to appear on the ballot is fundamental to our democratic system. For that reason, I hesitate to start down a road that well might lead to an ever escalating set of differing state requirements for presidential candidates."

SR 23 (Wiener, 2017) urged President Trump to release his tax returns as part of its broader call for an independent investigation into connections between Russia and Trump's presidential campaign and administration.

PRIOR VOTES:

Senate Elections and Constitutional Amendments Committee (Ayes 3, Noes 1)

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