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Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure

Danielle Lang

ABSTRACT

For nearly a half century prior to the current administration, U.S. presidents and most serious candidates for the presidency have released their tax returns for public inspection. The practice of presidential tax disclosure serves several key functions. It provides the public with important insights into the president's or presidential candidate's potential conflicts of interest, particularly with respect to personal conflicts of interest related to reform of the tax system. It also instills public confidence in the honesty, integrity, and transparency of a presidential administration. Yet, despite repeated calls throughout the 2016 election cycle and since his election and inauguration, from advocates and ordinary citizens alike, and sustained public support for disclosure, President Donald Trump has not released his tax returns. President Trump's refusal to comply with this well-established norm has exposed a gap in our regulation of presidential elections.

Legislators in at least twenty-three states have released at least forty bills seeking to force presidential candidate tax return transparency. These laws would hinge access to the state presidential ballot on voluntary disclosure. Ballot access laws requiring presidential candidate disclosure, even in just a few states, would reinforce the disclosure norm and leave future candidates in the position of abandoning entire states (and thus harming their popular vote totals) in order to evade transparency.

This Essay addresses whether these state ballot access measures pass constitutional muster and concludes that they do. These ballot access measures are not unlawful additional substantive qualifications for the presidency but rather procedural requirements akin to other state laws requiring the filing of petition signatures or filing fees. The Essay further posits that several key drafting choices would strengthen their likelihood of success in the nearly inevitable court challenges they would face. While several academics and practitioners have opined recently about this issue in the public sphere, there has not yet been any robust legal analysis of these proposals, which raise novel questions at the intersection of disclosure and ballot access law. This Essay begins to fill that gap.

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INTRODUCTION

For nearly a half century prior to the current administration, U.S. presidents and most serious candidates for the presidency have released their tax returns for public inspection.[1] The practice of presidential tax disclosure serves several key functions. It provides the public with important insights into the president's or presidential candidate's potential conflicts of interest,[2] particularly with respect to personal conflicts of interest related to reform of the tax system.[3] It also instills public confidence in the honesty, integrity, and transparency of a presidential administration. While this type of disclosure could be valuable at many levels of government, the importance of financial and tax transparency is at its peak with respect to the Office of the President, given the amount of national policymaking power the president has as a single actor in our governmental structure. Thus, it is not surprising that a norm of voluntary disclosure has developed around this office in particular.

Yet, despite repeated calls throughout the 2016 election cycle and since his election and inauguration, from advocates and ordinary citizens alike, and sustained public support for disclosure,[4] President Donald Trump has not

1. *See Presidential Tax Returns*, TAX ANALYSTS, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns [https://perma.cc/HGK3-HNJ7].

2. *See, e.g.*, Conor Friedersdorf, *How Trump's Murky Foreign Business Interests Harm America*, THE ATLANTIC (Dec. 13, 2016), https://www.theatlantic.com/politics/archive/2016/12/how-trumps-murky-foreign-business-interests-harm-america/510407 [https://perma.cc/6BDR-ZDLW]; Derek Kravitz & Al Shaw, *Trump Lawyer Confirms President Can Pull Money From His Business Whenever He Wants*, PROPUBLICA (Apr. 4, 2017, 5:53 PM), https://www.propublica.org/article/trump-pull-money-his-businesses-whenever-he-wants-without-telling-us?utm_campaign=sprout&utm_medium=social&utm_source=twitter&utm_content=1491251228 [https://perma.cc/R6ZR-537A] ("The surest way to see what profits Trump is taking would be the release of his tax returns—which hasn't happened.").

3. *See generally* Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J. FORUM 62, 67 (2017) (noting that presidential tax transparency can "aid voters and their representatives in evaluating whether tax reforms proposed by the President serve his personal interest or the general interest"). Daniel Hemel notes: "For example, the leak of President Trump's 2005 federal income tax returns revealed that he would have paid no federal income taxes that year if not for the existence of the alternative minimum tax—a tax he has vowed to abolish." *Id.* Hemel also explains that presidential tax transparency serves to bolster tax morale, by demonstrating that all citizens including the president pay their fair share, and provides a "safeguard against presidential meddling with IRS audits." *Id.* at 69.

4. *See, e.g.*, *Negative Views of Trump's Transition Amid Concerns About Conflicts, Tax Returns*, PEW RES. CTR. (Jan. 10, 2017), http://www.people-press.org/2017/01/10/negative-views-of-trumps-transition-amid-concerns-about-conflicts-tax-returns [https://perma.cc/957A-9QDE] (publishing a poll conducted on January 4–9, 2017 and finding that 60 percent of respondents believed President Trump has a responsibility to release his personal tax returns); *see also, e.g.*, CNN

released his tax returns.[5] President Trump's refusal to comply with this well-established norm has exposed a gap in our regulation of presidential elections. Such an important norm at the highest level of our government—a norm that serves critical governmental interests in transparency and ethical governance—should arguably be codified rather than delegated to voluntary compliance.

Despite widespread bipartisan support for presidential tax transparency,[6] the U.S. Congress does not appear likely to take any action on this matter, at least in the short term.[7] But states may have their own legislative levers to force disclosure. Legislators in at least twenty-three states have released at least forty bills seeking to force presidential candidate tax return transparency. These laws would hinge access to the state presidential ballot on voluntary disclosure.[8] Critics have suggested that these bills may be most likely to pass in states that President Trump may not need or expect to win in 2020 to win the Electoral College vote, thus making them ineffective because President Trump could choose not to file in those states and avoid disclosure.[9] But it would be a major political cost for President Trump to refuse to follow the law in these states and forego competition in them. Moreover, these laws seek not only to solve the short-term problem of President Trump's failure to disclose, but also to provide a long-term resolution for the compliance gap exposed by President Trump's outlier behavior.[10] Ballot access laws requiring presidential candidate

& ORC INT'L, POLL 10 (2017), http://www.documentcloud.org/documents/3409610-Congress-ACA.html [https://perma.cc/4Y3Y-DPNN] (polling in January 2017 and finding that 74 percent of respondents believe President Trump should release his tax returns); Jennifer De Pinto, *Poll – Do Americans Think Their Tax System Is Fair?*, CBS NEWS (Apr. 14, 2017, 6:00 AM), https://www.cbsnews.com/news/poll-do-americans-think-their-tax-system-is-fair/?ftag=CNM-00-10aab7e&linkId=36511841 [https://perma.cc/KLR4-WUFA] (reporting a poll conducted in February 2017 concluding that 56 percent of Americans "think it's necessary for President Trump to publicly release his tax returns").

5. *See* Kravitz & Shaw, *supra* note 2.
6. *See supra* note 4.
7. *See* Cristina Marcos, *GOP Rejects Dem Effort to Demand Trump's Tax Returns*, HILL, (May 24, 2017, 1:44 PM), http://thehill.com/blogs/floor-action/house/334957-gop-rejects-dem-effort-to-demand-trumps-tax-returns [https://perma.cc/7RTK-FW5H].
8. Jennifer McLoughlin, *Tussle Over Trump Tax Returns Prompts States to Act*, BLOOMBERG BNA (Mar. 28, 2017), https://www.bna.com/tussle-trump-tax-n57982085809 [http://perma.cc/6FED-AANP].
9. Hemel, *supra* note 3, at 65.
10. In a recent essay, University of Chicago Law School tax professor Daniel Hemel advocates for a New York law that would publish the state tax returns on file for all statewide elected offices, including president, vice president, governor, attorney general, and senator. *See generally* Hemel, *supra* note 3. He argues that this proposal is preferable to the state ballot access model described above because the New York bill will more likely and immediately lead to the disclosure of President Trump's returns. *Id.* at 65. If the only goal is the immediate release of President Trump's returns in particular, Hemel is correct that the New York bill, if it can pass, is likely

disclosure, even in just a few states, would reinforce the disclosure norm and leave future candidates in the position of abandoning entire states (and thus harming their popular vote totals) in order to evade transparency.

This Essay addresses whether these state ballot access measures pass constitutional muster and concludes that they do. It further posits that several key drafting choices would strengthen their likelihood of success in the nearly inevitable court challenges they would face. While several academics and practitioners have opined recently about this issue in the public sphere,[11] there has not yet been any robust legal analysis of these proposals, which raise novel questions at the intersection of disclosure and ballot access law. This Essay begins to fill that gap.

Part I discusses the implications, if any, of *U.S. Term Limits, Inc. v. Thornton*,[12] a U.S. Supreme Court case banning states from adding qualifications for congressional candidates. Concluding that *U.S. Term Limits* should not apply because the disclosure requirement cannot be reasonably viewed as an additional substantive qualification, Part II explores how these measures would be viewed under the Supreme Court's procedural ballot access jurisprudence. Part III discusses drafting choices that could improve a law's chances of survival in court if challenged.

I. U.S. TERM LIMITS, INC. V. THORNTON

As discussed above, there are at least forty current ballot access disclosure bills pending in state legislatures.[13] While the specifics of the bills differ—sometimes in meaningful ways[14]—they all follow a similar model of requiring

superior. However, the New York bill does not solve the lack of transparency problem for any future presidential candidates who do not file their taxes in New York. Therefore, the New York bill is unlikely to resolve this problem should it arise again with respect to another candidate. This is particularly important since the likelihood of another failure to disclose is almost certainly higher now that President Trump has campaigned successfully without disclosure.

11. *See, e.g.*, Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO MAG. (Mar. 30, 2017), http://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950 [https://perma.cc/DJ3Q-ZZ3C]; Laurence H. Tribe et al., Opinion, *Candidates Who Won't Disclose Taxes Shouldn't Be on the Ballot*, CNN (Apr. 14, 2017, 5:21 PM), http://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-legal-tribe-painter-eisen/index.html [http://perma.cc/ER8T-GTJ2]. Hemel's essay in *Yale Law Journal Forum* discusses the legal implications of the New York bill that would release state tax returns of all statewide elected officials. Hemel, *supra* note 3. While some of the constitutional considerations overlap, the New York bill is not a ballot access law and therefore raises distinct questions from those addressed here.
12. 514 U.S. 779, 800–01 (1995).
13. *See* McLoughlin, *supra* note 8.
14. *See infra* Part III.

presidential candidates to disclose tax returns or other financial information in order to appear on the ballot in that state. Thus, likely the first argument that a challenger would make to any of the pending ballot access disclosure bills, if enacted, is that the law unconstitutionally imposes an additional qualification on the presidency in violation of the Qualifications Clause in Article II of the U.S. Constitution.[15]

In *U.S. Term Limits, Inc. v. Thornton*,[16] the Supreme Court held that "the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications."[17] Therefore, the Supreme Court struck down a state law restricting access to the ballot for congressional candidates that had served three or more terms in Congress. The Court rejected the argument that the law did not add a qualification simply because it was framed as a ballot access measure rather than outright disqualification.[18] Relying on this authority, President Trump or any other challenger may argue that the Constitution similarly bars states from imposing new qualifications for presidential candidates and that the disclosure law functions as the equivalent of an unconstitutional qualification.

This raises two distinct questions. The first is whether *U.S. Term Limits*'s bar on additional qualifications applies to Article II presidential elections in the same manner as to Article I congressional elections. If *U.S. Term Limits* does apply, the second question is whether a financial disclosure requirement is a procedural ballot access measure, which would ordinarily subject to a constitutional balancing test, or an additional substantive qualification, which would be flatly prohibited. While it is possible that *U.S. Term Limits* does not apply to Article II candidates, that line of argument is dangerous and would lead us further away from democratic principles in our presidential elections. The better and more persuasive argument is that these laws cannot be

15. *See, e.g.*, Kyle Sammin, *No, States Don't Get to Make Presidential Candidates Release Tax Returns*, FEDERALIST (Mar. 10, 2017), http://thefederalist.com/2017/03/10/no-states-dont-get-make-presidential-candidates-release-tax-returns [https://perma.cc/DK6M-WCTT].
16. 514 U.S. 779 (1995).
17. *Id.* at 800–01.
18. The Court stated:

> In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an "effort to dress eligibility to stand for Congress in ballot access clothing," because the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.".

Id. at 829 (quoting U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (1994)).

properly defined as new substantive qualifications of the type *U.S. Term Limits* prohibits.

A. Does *U.S. Term Limits* Apply to Article II? Maybe.

There are strong structural and policy arguments that the States should be prohibited from adding substantive qualifications for presidential candidates. First, both Article I and Article II set minimum qualifications for their respective offices.[19] In the case of Congress, the Court held that these qualifications should be considered "fixed" and exclusive of any other qualifications.[20] Arguably, the corresponding qualifications for president listed in Article II should also be fixed.

The Court in *U.S. Term Limits* also expressed its decision in terms of broad democratic principles, including the "egalitarian ideal—that election to the National Legislature should be open to all people of merit."[21] That "egalitarian ideal," in principle, applies equally to the modern presidency. The opinion in *U.S. Term Limits* also discussed the potential for a problematic "patchwork of state qualifications."[22] This concern would apply with greater force in the presidential context, since it could affect a nationwide election, whereas state restrictions on congressional elections would not reach beyond state borders.

There may, however, be an overriding textual and structural argument against application of *U.S. Term Limits* in the presidential context. While the "egalitarian ideal" may apply in theory to both the Congress and the modern presidency, the U.S. Constitution explicitly protects the direct election of congressional members by the voters of the state, but does not require direct election of the president by the voters.[23] The importance of voter rather than state control over congressional elections was a matter of import in the Court's reasoning in *U.S. Term Limits*. The Court discussed at length the historical backdrop of the Framers' decision to delegate House elections to the voters themselves and their desire to ensure that states did not interfere with the National Legislature.[24] The Court also reasoned that the Constitution's delegation of "Times, Places, and Manner" regulations of congressional elections to the states, with the potential of

19. U.S. CONST. art. I, §§ 2, cl. 2, 3, cl. 3; *id.* art. II, § 1, cl. 5.
20. *U.S. Term Limits*, 514 U.S. at 811.
21. *Id.* at 819.
22. *Id.* at 822.
23. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.
24. *See U.S. Term Limits*, 514 U.S. at 820–22.

congressional override, implied that the states did not otherwise have broad power to regulate congressional elections.[25]

Contrary to its treatment of congressional elections, the "Constitution expressly delegates authority to the States to regulate the selection of Presidential electors."[26] The Court has made clear that this does not insulate presidential ballot access restrictions from ordinary First and Fourteenth Amendment analysis.[27] Nonetheless, the Constitution's broad delegation of power to the states with respect to presidential electors suggests that the historical and textual analysis of *U.S. Term Limits* may not apply to presidential elections. After all, the Supreme Court has held that states are not required to hold elections for the presidency whatsoever.[28]

But this line of argument is a slippery slope toward a less democratic system for electing our president. By relying on state plenary authority over presidential electors to justify the disclosure law, advocates would be opening a "Pandora's box,"[29] in which states could interfere with the democratic process by choosing how the state's presidential electors will be selected based on something altogether different than the popular vote in the state.[30] For those hoping to improve our democratic system through transparency, the risks of this approach are not worth the reward. Moreover, because the Constitution expressly delegates presidential elector selection to the Legislatures, a bill relying on this theory for constitutional support would be strongest if it regulated the presidential electors directly, rather than ballot access. Legislators could accomplish this by prohibiting electors from casting their Electoral College vote for a candidate that has not complied with the disclosure requirements even if he or she wins the popular vote in that state. But hinging a disclosure law on this type of after-the-fact enforcement is problematic at best. If a candidate is deprived of a state's

25. *Id.* at 832–33.
26. Anderson v. Celebrezze, 460 U.S. 780, 794 n.18 (1983) (citing McPherson v. Blacker, 146 U.S. 1, 35 (1892)); *see also* U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors.").
27. *See Anderson*, 460 U.S. at 794 n.18.
28. *See* 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.").
29. Hasen, *supra* note 11.
30. *Id.* ("Will solidly Republican states allow electors to vote only for Republican candidates for president?").

electoral votes *after* an election takes place and voters cast their ballots, the measure would undermine the democratic legitimacy that it is aiming to bolster.

B. Are Financial Disclosure Requirements "Qualifications" Under *U.S. Term Limits*? No.

Advocates for state disclosure ballot access laws need not open the "Pandora's box" discussed above because these laws do not impose new "qualifications" that would raise constitutional concerns under *U.S. Term Limits*.

U.S. Term Limits is unequivocal that it does not invalidate all state regulation of federal candidates. The critical distinction is between those laws that add substantive qualifications for office and those that impose procedural requirements on candidates.[31] The difficulty, of course, is that the distinction between those two categories is far from obvious at the margins. Yet, in this case, the weight of authority and logic heavily favors categorizing disclosure requirements as procedural.

Courts have by and large treated ballot access laws as procedural,[32] with the exception of *U.S. Term Limits* and *Cook v. Gralike*.[33] Candidates are required to follow a number of state-specific procedures in order to appear on the ballot in each state including, most commonly, filing fees and petition signature requirements.[34] The most meaningful thread that can be gleaned from reading

31. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995) ("The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position.").

32. *See infra* notes 37–42 and accompanying text.

33. 531 U.S. 510 (2001). The law challenged in *Cook v. Gralike* was different in kind than other ballot measure laws and thus not particularly apt here. In the wake of *U.S. Term Limits*, Missouri passed a law that informed voters of whether a congressional candidate on the ballot supported term limits legislation in Congress. *Id.* at 513–15. The law would pejoratively include next to unsupportive candidates the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *Id.* at 514–15. The Court struck down the law because it was "plainly designed to favor candidates who are willing to support the particular form of term limits amendment" and sought to "dictate electoral outcomes" by handicapping candidates "at the most crucial stage in the election process—the instant before the vote is cast." *Id.* at 524–26 (quoting *U.S. Term Limits*, 514 U.S. at 833–34; and then quoting *Anderson*, 375 U.S. at 402). Thus, the takeaway from *Cook* should be that any ballot access law should be designed to facilitate the provision of information to the voters, not to handicap a particular candidate or policy position. Indeed, states placing a thumb on the scale with respect to policy positions or discriminating against candidates based on viewpoint treads on fundamental democratic principles of voter choice and First Amendment values. Thus, it is unsurprising that the Court struck down this law. Therefore, it is important the law apply evenly to candidates regardless of political affiliation or other characteristics.

34. *See infra* notes 37–42 and accompanying text.

the ballot access cases and *U.S. Term Limits* together is a distinction between laws that exclude classes of candidates based on personal characteristics—things that cannot be changed, at least not at the point of election, such as age, residency, education, land ownership, and, in *U.S. Term Limits*, past congressional service—and laws that ask candidates to do something any candidate could do in order to gain ballot access, such as paying filing fees, gathering signatures, or resigning another public office.

Indeed, *U.S. Term Limits* repeatedly characterizes its holding as a prohibition on barring or handicapping "a class of candidates."[35] A properly drafted personal financial disclosure law should be considered a procedural requirement, since all candidates have the choice to fulfill the obligation and thereby access the ballot, and the law would not exclude any "class" of candidates from *access* to the ballot. Indeed, these financial disclosure requirements would be far easier to fulfill than some of the onerous signature requirements that have been upheld by the Supreme Court.[36]

Along these lines, in *Storer v. Brown*,[37] the Court upheld a ballot access requirement that prevented congressional or presidential candidates from appearing on the ballot as Independents if they had had any registered affiliation with a qualified political party at any time within one year prior to the primary. The Court rejected the claim that this was an impermissible qualification, saying the argument was "wholly without merit."[38] The qualification in *Storer* did not exclude any class of candidates, but instead forced candidates to choose whether to affiliate with a political party or seek to run as an Independent.

Likewise, in *U.S. Term Limits*, the Court distinguished the law at issue imposing term limits on congressional candidates from resign-to-run laws, which require public officials to resign from their current post in order to run for a different position. The Court suggested that such resign-to-run laws are permissible as applied to congressional candidates because "[t]he burden on candidacy . . . is indirect and attributable to a desire to regulate state officeholders

35. *U.S. Term Limits*, 514 U.S. at 831, 832, 834, 835, 836.

36. *See, e.g.*, Norman v. Reed, 502 U.S. 279, 295 (1992) (upholding a 25,000 signature requirement), Am. Party of Tex. v. White, 415 U.S. 767 (1974) (upholding law requiring signatures equivalent to 1 percent of the last gubernatorial vote); Jenness v. Forson, 403 U.S. 431 (1971) (upholding law requiring signatures equivalent to 5 percent of registered voters). *But see, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (striking down signature requirement equivalent to 15 percent of the voting public).

37. 415 U.S. 724 (1974).

38. *Id.* at 746 n.16 ("The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.").

and not to impose additional qualifications to serving in Congress."[39] The Court has also approved the Hatch Act's prohibition on certain federal employees running for partisan election, thus giving candidates the choice of running for office (including for president or Congress) or holding their existing federal positions.[40] Once again, these laws do not exclude anyone from running, but rather allow the candidate to decide whether to comply with the requirement or not run.[41]

The Court has also approved reasonable signature petition requirements for ballot access for federal candidates, sanctioned reasonable filing deadlines, and allowed states to limit voters' options to those candidates that meet all ballot access obligations by eliminating the write-in option.[42] All of these requirements are procedural in that they do not exclude any class of candidates from eligibility but only require all candidates to comply with the same set of rules.

As the Court stated in *U.S. Term Limits*, the restrictions in *Storer* and other cases were permissible because they did not "impose any substantive qualification *rendering a class of potential candidates ineligible for ballot position*."[43] Likewise, a financial disclosure requirement, whether fashioned as a ballot access measure or as a requirement with a civil penalty,[44] does not render any class of candidates ineligible for the position. Therefore, financial disclosure requirements should be scrutinized under the balancing test the court has devised for ballot access laws,[45] rather than flatly prohibited under *U.S. Term Limits.*[46]

39. *U.S. Term Limits*, 514 U.S. at 835 n.48 (quoting Joyner v. Mofford, 706 F.2d 1523, 1528 (1983)) (citing Signorelli v. Evans, 637 F.2d 853, 859 (2d Cir. 1980)).
40. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).
41. It is worth noting, however, that these cases also stress that they are not ballot access requirements per se, but instead regulations of the officeholders as current officeholders rather than as candidates. *See, e.g.*, Joyner v. Mofford, 706 F2d 1523, 1528 (9th Cir. 1983) ("The burden on candidacy, imposed by laws of the latter category, is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress."). This is a distinction that could be used to undermine any reliance on these cases. However, in upholding a resign-to-run law in Texas in *Clements v. Fashing*, 457 U.S. 957 (1982) (plurality opinion), the U.S. Supreme Court analyzed the issue under the rubric of its ballot access cases. Further, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), refers to resign-to-run laws, such as the one approved in *Clements*, as one type of acceptable ballot access measure. *Anderson*, 460 U.S. at 788.n. 9.
42. *See* Burdick v. Takushi, 504 U.S. 428, 441–42 (1992) (upholding Hawaii's prohibition on write-in voting); Am. Party of Tex. v. White, 415 U.S. 767, 787 n.18, 788–89 (1974) (upholding filing deadlines); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (upholding signature requirements).
43. *U.S. Term Limits*, 514 U.S. at 835 (emphasis added).
44. *See infra* Part III.
45. *See infra* Part II.
46. In considering how the Supreme Court might resolve this issue, it is important to remember that *U.S. Term Limits* was itself a five-four decision wherein the conservative Justices favored greater latitude to the states. *See U.S. Term Limits*, 514 U.S. 779. Justice Thomas's dissenting opinion argued that states have the power to add qualifications. *Id.* at 845 (Thomas, J., dissenting). In the

II. THE *ANDERSON-BURDICK* TEST

Determining that tax disclosure laws clear the "qualifications" hurdle does not end the matter, as any restriction on access to the ballot must also withstand First and Fourteenth Amendment scrutiny. While the Court has held that there is no fundamental right to candidacy, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[47] Therefore, the Court subjects ballot access regulations and other burdens on candidacy to a balancing test, which is often referred to as the *Anderson-Burdick* test.

Under *Anderson-Burdick*, there is no "litmus test" for whether a ballot restriction is permissible. Rather, the relevant interests must be carefully balanced. The court should engage in a three-part analysis: (1) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (2) "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule" and "determine the legitimacy and strength of each of those interests"; and (3) "consider the extent to which those interests make it necessary to burden the plaintiff's rights."[48]

Under this test, the Court has held that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[49] In *Burdick v. Takushi*,[50] a case upholding a write-in prohibition, the Court further explained that voting rights are subject to strict scrutiny—requiring them to be "narrowly drawn to advance a state interest of compelling importance"—when the burden is either severe or discriminatory.[51] Thus, the inquiry is focused on "whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"[52] The Court has stressed that

early 1990s, Justice Gorsuch wrote a law review article arguing that a term limits requirement drafted as a ballot access measure should be deemed constitutional. *See generally* Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991). Meanwhile, the progressive-leaning Justices in *U.S. Term Limits* appeared occupied with the law's complete exclusion of some candidates. *See U.S. Term Limits*, 514 U.S. 779. They may view a disclosure requirement, evenly applied, very differently. Thus, some coalition of both progressive and conservative Justices might uphold the law, even for philosophically distinct reasons.

47. Bullock v. Carter, 405 U.S. 134, 142–43 (1972).
48. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
49. *Id.* at 788.
50. 504 U.S. 428 (1992).
51. *Id.* at 434 (citing Norman v. Reed, 502 U.S. 279, 289 (1992)).
52. *Anderson*, 460 U.S. at 793 (quoting Clements v. Fashing, 457 U.S. 957, 964 (1982) (plurality opinion)).

"as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[53]

Pursuant to this First and Fourteenth Amendment analysis, the Court has struck down excessive filing fees that limited the candidate pool to those with "personal wealth" or "affluent backers,"[54] petition signature requirements and other requirements that were so onerous that they made it "virtually impossible" for small parties to get on the ballot,[55] and filing deadlines that were so early that they seriously disadvantaged independent candidates.[56] Yet, as *Anderson v. Celebrezze*[57] itself noted, the Court has more often approved reasonable, nondiscriminatory ballot access measures, including reasonable signature requirements, resign-to-run requirements, reasonable filing deadlines, prohibitions on write-in candidates, and other restrictions.[58]

Thus, in analyzing any personal financial disclosure requirement, a court should weigh the burden imposed on the candidate against the state interests supporting the law. The Fifth Circuit conducted this analysis in *Plante v. Gonzalez*,[59] a case challenging Florida's personal financial disclosure law, which required candidates for state office to either disclose their tax returns or complete detailed financial disclosures.[60] While the Florida law did not restrict ballot access, the Fifth Circuit nonetheless analyzed it in a similar fashion to ballot access measures because of the burden it imposed on candidacy.[61] The Fifth Circuit upheld Florida's law. The court recognized that the law imposed a cognizable burden on candidates' financial privacy and confidentiality rights.[62]

53. Storer v. Brown, 415 U.S. 724, 730 (1974). Many voting rights advocates, including myself, have argued that this test should be much stronger when evaluating direct burdens on the right to vote. *See, e.g.*, Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471 (2016); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143 (2008). I continue to believe that the scrutiny for direct burdens on casting ballots should be heightened. However, this test represents the current Supreme Court analysis and, in my view, a more appropriate test for ballot access restrictions, which are indirect burdens on voters' rights.
54. Bullock v. Carter, 405 U.S. 134, 143 (1972).
55. Williams v. Rhodes, 393 U.S. 23, 25 (1968).
56. *Anderson*, 460 U.S. at 805–06.
57. 460 U.S. 780(1983).
58. *Id.* at 788–89.
59. 575 F.2d 1119 (5th Cir. 1978).
60. *Id.* at 1123.
61. *Id.* at 1126–27, 1127 n.11.
62. *Id.* at 1134 ("The balancing standard seems appropriate. . . . The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated.").

Nonetheless, the court recognized that the law did not impose a substantial bar on candidacy and was not discriminatory.[63]

The Fifth Circuit identified at least four important state interests that support this type of requirement: "the public's 'right to know' an official's interests, deterrence of corruption and conflicting interests, creation of public confidence in Florida's officials, and assistance in detecting and prosecuting officials who have violated the law."[64] The court held that "[t]he importance of these goals cannot be denied"[65] and that the public disclosure requirement was necessary to fulfill these goals. Therefore, it upheld the requirement: "This educational feature of the Amendment serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in *Buckley*, can be met in no other way. That goal justifies public publication of the senators' financial statements."[66]

The factors identified in *Plante*—both the privacy interest of public officials and the state interests in disclosure—apply equally here. In the ballot access cases, the Supreme Court has stressed: "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."[67] Personal financial disclosure, like campaign finance disclosure, provides vital information to the electorate about the scope and depth of any potential conflicts of interest and thus serves the goal of an informed and educated electorate.

For the same reasons, the Supreme Court has repeatedly recognized the constitutionality of campaign finance disclosure. In *Citizens United v. FEC*,[68] Justice Kennedy explained that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[69] Indeed, as Justice Brandeis famously recognized nearly a century ago, "[s]unlight is . . . the best of disinfectants," and "electric light the most efficient policeman."[70] The Supreme Court has held that disclosure in the campaign finance context

63. *Id.* at 1126–27 ("Disclosure requirements may deter some people from seeking office. As the Supreme Court has made clear, however, mere deterrence is not sufficient for a successful constitutional attack. . . . [T]he disclosure requirements do not limit the choices of any particular group of voters. There is no reason to believe that those most sensitive to their privacy will be Republicans or Democrats, liberals or conservatives, blacks or whites." (citation omitted)).
64. *Id.* at 1134.
65. *Id.*
66. *Id.* at 1137.
67. Anderson v. Celebrezze, 460 U.S. 780, 796 (1983).
68. 558 U.S. 310 (2010).
69. *Id.* at 371.
70. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW TO USE IT 62 (Nat'l Home Library Found. ed. 1933).

serves several important state interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."[71] Further, it has held that the first of these, the public's "informational interest," is "alone . . . sufficient to justify" disclosure laws.[72]

The state interests in detailed personal financial disclosure are similarly important. Detailed financial information provides the electorate with relevant information regarding the breadth and scope of a candidate's potential conflicts of interest. For this reason, it also has the potential to deter actual corruption and avoid an appearance thereof. Thus, courts have repeatedly upheld personal financial disclosure requirements for public officials against challenges based on the officials' rights of privacy.[73] As a New Jersey court explained, while financial disclosure "may prove to be embarrassing to present officeholders or deterring to those aspiring to those offices in the future," those "objections have no legal significance when compared to the paramount right of the people to honest and impartial performance by their government employees."[74] The current lack of clarity and public concern surrounding President Trump's conflicts of interest arising from his financial dealings and businesses only provides further support for the state interest in such disclosure. Likewise, the longstanding tradition dating back at least forty years of presidential candidates disclosing their tax forms alone suggests the practice's relevance and importance to an informed electorate.[75]

One countervailing factor in this analysis is what may be termed "reverse federalism."[76] The Supreme Court has recognized that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest" because "in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an

71. McConnell v. FEC, 540 U.S. 93, 196 (2003).
72. *Citizens United*, 558 U.S. at 369.
73. *See, e.g.*, Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) (upholding personal financial disclosure requirements of Ethics in Governments Act of 1978 over privacy challenge of federal judges); Evans v. Carey, 385 N.Y.S.2d 965 (N.Y. App. Div.), *aff'd*, 359 N.E.2d 983 (N.Y. 1976); Snider v. Thornburgh, 436 A.2d 593, 598–99 (Pa. 1981).
74. Kenny v. Byrne, 365 A.2d 211, 217 (N.J. Super. Ct. App. Div. 1976).
75. *See* Jill Disis, *Presidential Tax Returns: It Started With Nixon. Will It End With Trump?*, CNN MONEY (Jan. 26, 2017, 2:06 PM), http://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html [https://perma.cc/87AA-5FE7].
76. Hemel, *supra* note 3 at 83 (defining the "reverse federalism" concern arising from the possibility that a state regulation of the presidential ballot would "intrude[] upon the national political process").

impact beyond its own borders."[77] Therefore, these restrictions as applied to the president will undoubtedly be subjected to some greater scrutiny because of the burden they impose on the national process. Nonetheless, the Court has reaffirmed that the proper standard of review is still a balancing test,[78] and the Court has approved substantial restrictions in the presidential context, such as the party affiliation restriction in *Storer v. Brown*.[79]

The courts have routinely recognized that the importance of personal financial disclosure of prominent public officials ordinarily means that those officials' privacy interests must give way. And a near-century-old tradition of voluntary disclosure suggests that the intrusion is not unduly burdensome. Courts are therefore likely to uphold this type of disclosure requirement under the *Anderson-Burdick* test.

III. DRAFTING CONSIDERATIONS

Bill drafters may want to include certain provisions while writing and amending these laws. By carefully drafting the law, legislators can greatly improve the chance of all or part of the law withstanding court scrutiny and achieving the law's disclosure goals.

First, legislators might consider building multiple enforcement mechanisms into the bill as safeguards in case one of them fails in the courts. For example, in addition to denying candidates ballot access for failure to disclose, the law could impose a civil penalty for candidates' failure to produce tax information. Courts may look more favorably on a requirement enforced by a civil penalty than one that bars ballot access because it would not necessarily impose the same significant barrier to election and thus would not burden voters as much. Indeed, there is a longstanding federal requirement that candidates for federal office file public financial disclosure forms, which has been upheld against a privacy challenge.[80] It does not appear that this law has ever been challenged as an unlawful additional qualification.[81] Willful and knowing failure to file the required federal disclosure is punishable by a civil penalty of up to $50,000.[82]

77. Anderson v. Celebrezze, 460 U.S. 780, 794–95 (1983) (footnote omitted).
78. *See id.* at 789 (applying the balancing test in a case about presidential ballot access restrictions).
79. 415 U.S. 724 (1974).
80. *See* 5 U.S.C. app. 4 § 104 (2012); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979).
81. The prohibition on adding qualifications applies to the federal as well as the state governments. Powell v. McCormack, 395 U.S. 486 (1969).
82. 5 U.S.C. app. 4 § 104. There is at least one published federal case enforcing this law in a case of failure to file (rather than false statements), but it was in the context of a default judgment. *See* United States v. Gant, 268 F. Supp. 2d 29, 33–34 (D.D.C. 2003).

Therefore, while a ballot access measure itself may not be deemed a qualification, a disclosure requirement enforced through a civil penalty and modeled on the federal law would be on even stronger constitutional footing with respect to *U.S. Term Limits v. Thornton*.[83]

Second, legislators might consider providing candidates with an alternative form of personal financial disclosure in lieu of federal tax returns. Federal tax returns are federally protected, confidential documents.[84] A challenger would certainly argue that a tax disclosure requirement imposes an unconstitutional condition on candidates by requiring them to release confidential documents in order to run for office. Therefore, it would be advisable to give candidates the option of filling out detailed disclosures of relevant financial information in lieu of disclosing the actual tax forms. This is the current structure of the pending bill in Oregon, S.B. 888.[85] Of course, the disclosure forms must be sworn to and formulated to provide voters with the same access to relevant information as the tax returns themselves. Alternatively, the bill could require both tax return disclosure and personal financial statements. This is the structure of one of the pending bills in Massachusetts, S.B. 365.[86] In that case, the latter half of the law should be upheld even if the tax return portion is not.

Third, some have argued that President Trump may challenge these laws as bills of attainder—"law[s] that legislatively determine[] guilt and inflict[] punishment upon an identifiable individual without provision of the protections of a judicial trial"[87]—alleging that the bills are directed at him.[88] For numerous reasons not fully recounted here, this argument is likely to fail.[89] The laws would

83. 514 U.S. 779 (1995).
84. 26 U.S.C. § 6103(a).
85. The bill requires presidential and vice-presidential candidates to provide: (requiring
    (a) With the Secretary of State:
        (A) A copy of the candidate's most recent federal income tax return; and (B) Written consent, on a form adopted by the secretary by rule, for the public disclosure of the candidate's federal income tax return subject to subsection (3) of this section; ***or***
    (b) With the Oregon Government Ethics Commission a statement of economic interest containing the information required under ORS 244.060.
    S.B. 888, 79th Legis. Assemb., Reg. Sess. (Or. 2017) (emphasis added).
86. S.B. 365, 190th Gen. Court of the Commonwealth of Mass., Reg. Sess. (Mass. 2017) (requiring presidential and vice-presidential candidates to "file with the state secretary a copy of his or her federal income tax returns, as defined in section 6103(b)(1) of the United States internal revenue code, for the five most recent available years, as well as written consent to the state secretary for public disclosure of such returns" *and* "a statement of financial interests for the preceding calendar year").
87. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).
88. *See* Hemel, *supra* note 3.
89. For a more thorough discussion on the flaws of this argument, see Hemel, *supra* note 3, at 73.

apply to all presidential and vice-presidential candidates and impose no immediate punishment on President Trump or any other individual.[90] Nonetheless, the laws should be drafted to cover at minimum the president *and* vice president, should not be limited in time to the upcoming 2020 election, and would ideally cover a broader swath of federal candidates. These drafting choices would make clear that the law is not intended to discriminate against President Trump but instead to resolve a vulnerability exposed in our last election cycle. While President Trump's refusal to release his tax returns during the 2016 election may have shone a light on the problem, the need to inform the public of high-level officials' potential conflicts and other relevant financial data is not limited to this administration.

Finally, all of these bills should include severability clauses. Thus, if any part or parts of the laws are held unconstitutional or otherwise unlawful, the remaining provisions should stay in force.

CONCLUSION

In response to a novel rejection of the strong norm supporting personal financial disclosure of presidential candidates, states have developed novel solutions intended to provide their voters with the necessary information to make informed choices about our president. These novel solutions raise unique legal questions about the limits of state power to restrict ballot access for presidential candidates. But these questions are answerable by looking to our well-established law regarding ballot access measures and financial disclosure. If states choose to enact these laws to provide voters with better access to candidates' financial information and conflicts of interest, they stand on strong constitutional footing to do so.

90. Therefore, the laws do not meet the two elements of bills of attainder: specificity and punishment. *Nixon*, 433 U.S. at 472–73.