To: Senate Government Operations Committee

Fr: Zaw Win

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Re: S.77. An act relating to requiring a presidential candidate to disclose federal tax returns in order to be placed on the presidential primary and general election ballots

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." -Louis Brandeis

Summary. The bill would require candidates for president and vice president to release five years of tax returns as an administrative requirement before their names could appear on the ballot in Vermont. As drafted, the bill would apply to the ballots for the presidential primaries and the general election.

Justification. Disclosure of detailed financial information is essential to ensuring that voters have the information necessary to effectively judge the candidates. Without such information, voters have no basis for evaluating a candidate's private financial interests for possible conflicts or the potential for undue influence.

Before the 2016 election, every major candidate for the past 40 years disclosed his or her tax returns. The scandals plaguing the current administration amply demonstrate the necessity for such disclosure: new details emerge daily about the administration's entanglements with the Russian government; the President has failed to explain why his "travel ban" excludes countries in which he has significant financial interests; litigation has already commenced as to whether the President is violating the Emoluments Clause of the constitution; and there are a host of unanswered questions about how the President's domestic policies are impacting his personal finances (e.g., how will his proposed infrastructure plan impact his real estate holdings?). The uncertainty created by Mr. Trump's failure to disclose has, undoubtedly, eroded the public's trust and confidence in his administration and contributed to his historic unpopularity.

These issues are not unique to Mr. Trump, nor are they likely to dissipate following his term in office. Now that disclosure is no longer a norm of our political process, we should expect that candidates of both major parties will resist disclosure and, if both major parties refuse disclosure, voters will have no recourse.

Constitutionality. It is not possible to reach a definitive conclusion as to whether the disclosure required by S.77 would survive a constitutional challenge because the United States Supreme Court (the "Court") has not directly addressed the issue. However, a careful reading of the

existing precedents suggests that states can require disclosure of financial information as a condition for placement on their printed ballots.

State laws that regulate federal elections are governed by the *Anderson-Burdick* Balancing Test, which, essentially, provides for a sliding scale where the applicable level of scrutiny provided to a particular law corresponds to the constitutional burden imposed by the law:

> the lighter the burden, the more forgiving the scrutiny; the heavier the burden, the more exacting the review. When a law imposes only reasonable, nondiscriminatory restrictions on individual rights, the burden is slight, and the State's regulatory interests are, in the normal course, sufficient to justify the constitutional restraint. However, if the restrictions are severe, the burden is great, and the law must be narrowly drawn to advance a state interest of compelling importance.

Moderate Party of Rhode Island v. Lynch, 764 F. Supp. 2d 373, 377 (D. R.I. 2011) (internal citations and quotations omitted).

S.77 is reasonable and non-discriminatory. Financial information is essential to candidate evaluation and S.77 applies equally to all candidates. Similarly, the burden that would be imposed on candidates by S.77 is extremely light—evidenced by the fact that every major candidate for the past 40 years, other than Mr. Trump, voluntarily disclosed his or her tax returns. In connection with such disclosures, well defined practices have been developed for redacting truly private information, and S.77 provides for the continuation of such practices. Furthermore, courts that have considered laws mandating financial disclosures for elected officials have generally found disclosure to be warranted and rejected contrary arguments based on privacy. *See, e.g. Plante v. Gonzalez*, 575 F.2d 1119, 1136 (5th Cir. 1978) ("Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure for elected officials is constitutional."); *Klaus v. Minn. State Ethics Comm'n*, 244 N.W. 2d 672, 676 (Minn. 1976) ("[O]ne who volunteers himself as a candidate for public office becomes thereby a public figure and is subject to greater scrutiny as he aspires for positions of higher responsibility. Even the most conscientious candidate is not well qualified to assess his own impartiality where potential conflicts of interest may emerge as are detached members of the public.").

Even if a court were to find that disclosure of tax returns imposes a significant burden on candidates, S.77 is narrowly drawn to advance a compelling state interest. *See Doe v. Reed*, 561 U.S. 186, 196 (2010) (upholding public records act that provided for the disclosure of signatories to a referendum petition). Vermont's principal interest advanced by S.77 is voter education. Requiring the disclosure of tax returns provides voters with the information required to evaluate a candidate's possible conflicts of interest and the potential for undue influence. Further, by

encouraging transparency, it should begin to rebuild the public's trust and confidence in the government. Voter education is a compelling state interest. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) ("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.").

In addition to furthering a compelling state interest, S.77 is narrowly drawn. Tax returns have, historically, been viewed as containing the information required for the public to evaluate a candidate's financial interests. This is evidenced by the fact that they have formed the basis for evaluating the financial interests of every candidate (other than Mr. Trump) for the past 40 years. Further, S.77 provides for the redaction of irrelevant private information so the risk that the required disclosure will be overly broad is limited.[1] Disclosure of tax returns is, therefore, the least burdensome means of achieving Vermont's compelling interest in voter education and, accordingly, it should withstand the exacting scrutiny that is applicable if a court finds that S.77 imposes a significant burden.

It is also worth noting that in all of the recent major election law cases, the Court has upheld disclosure requirements, even as it struck down many other laws purporting to govern elections. *See e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367-69 (2010); *Reed*, 561 U.S. at 506; *Buckley v. Valeo*, 424 U.S. 1, 84 (1976).

In *Anderson*, the Court suggested that state laws governing presidential elections may be subject to heightened scrutiny because they "have an impact beyond their own borders." *Anderson*, 460 U.S. at 794-95. It is, therefore, possible that a court would strike down S.77 because it places "a significant state-imposed restriction on a nationwide electoral process." *Id.* at 795. Such a result is improbable. Unlike the situation in *Anderson* which involved an unrealistically early filing deadline for minor party candidates, any feasible candidate can easily comply with S.77 by simply filing tax returns. Moreover, the disclosure required by S.77 is less burdensome than the requirements already mandated by Vermont and many other states—namely that the candidate file a petition signed by at least 1,000 voters and submit a filing fee of $2,000. *See American Party of Texas v. White*, 415 U.S. 767 (1974) (approving petition requirements); *Lubin v. Panish*, 415 U.S. 709 (1974) (finding that filing fees are permissible so long as indigent candidates have an alternative means of ballot access). Additionally, at least 19 other states are considering similar legislation so, by 2020, disclosure may be required by a large number, or even a majority of the states. Finally, in its most recent statement on the matter, the Court observed that state legislatures have expansive power to regulate presidential elections. *See Bush v. Gore*, 531 U.S. 98, 104 (2000).

[1] Additionally, Vermont can, and should, argue that S.77 is not a regulation of pure speech because it does not prohibit expression, nor does it alter the content of the speaker's message. *See Reed*, 561 U.S. at 216 (Stevens, J., concurring).

Suggested Changes.

There are a number of minor changes to S.77 that may be useful:

- Limit its application to the general election (this will mitigate disparate impact arguments).
- Condition effectiveness on the adoption of similar measures by 4 or 5 other states.
- Add a carve-out for people who are not legally required to file tax returns.