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The Version of the National Popular Vote Bill Passed by the House 4 Times Should be Passed by Senate—Not SB 1512 (Referral)

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Oregon's Normal Legislative Procedure—Not Referral—Should Be Followed in Changing Oregon's Existing Law for Awarding Electoral Votes

Article II, section 1 of the U.S. Constitution assigns responsibility for selecting the method of choosing a state's presidential electors to the state "Legislature."

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of [presidential] Electors."

In *McPherson v. Blacker* (146 U.S. 1), the leading case concerning the manner of choosing presidential electors, the U.S. Supreme Court characterized state legislature's power concerning the choice of manner of choosing presidential electors as "exclusive."

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.**"

For the entire history of the United States, ***every*** law in ***every*** state specifying the state's method for choosing its presidential electors has been enacted and amended by action of the state legislature. The referral contemplated by SB 1512 has no historical precedent anywhere.

All 11 states that have enacted the National Popular Vote interstate compact did so through their legislature—the same way that they enacted their current winner-take-all law in the first place.

Oregon's existing winner-take-all law (which awards all of Oregon's presidential electors to the candidate receiving the most votes inside Oregon) was enacted by the Oregon legislature using the power granted to the Oregon legislature by Article II.

There is No Reason Why Changing Oregon's Existing Winner-Take-All Law Should Require an Expensive Statewide Media Campaign

The practical effect of the referral bill would be an expensive war of sound bites financed by billionaires who like electing Presidents not winning the most popular votes throughout the country. Good government organizations simply do not have resources to combat the infusion of money from vested interests supporting the current system of electing the President.

With political polarization at an all-time high in this country, a referral could easily become a political football that will only increase the level of polarization.

Unresolved Legal Question as to Whether a State Legislature Can Refer the Choice of Method of Choosing Presidential Electors

Neither the U.S. Supreme Court nor any other federal court has ever issued a written opinion deciding whether the word "legislature" in Article II allows use of the initiative, referendum, or referral processes to enact a law for choosing a state's presidential electors.

As the Oregon Legislative Counsel Dexter A. Johnson said in his May 12, 2017 letter:

> "The United States Supreme Court has not yet interpreted the term "legislature" under Article II, section 1. … **It therefore remains far from certain how a court would interpret that term under Article II, section 1**."[1]

Tellingly, the U.S. Supreme Court has interpreted the word "legislature" **differently** in two other parts of the Constitution, namely Article V (concerning federal constitutional amendments) and Article I (concerning congressional districting).

In *Hawke v. Smith* (253 U.S. 221), the U.S. Supreme Court interpreted the word "legislature" in Article V to **prevent** the use of the initiative, referendum, or referral processes in connection with ratification of a federal constitutional amendment. The Court ruled unconstitutional the provision of the Ohio Constitution allowing the use of the referendum process to review the state legislature's ratification of a federal constitutional amendment.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (135 S. Ct. 2652), the U.S. Supreme Court interpreted the word "legislature" in Article I to **allow** the use of the initiative process in connection with congressional redistricting. The Court's decision in this recent case was heavily based on the existence of a federal law (Title 2, U. S. Code, §2a(c)) that Congress passed to specifically recognize the right of a state to enact a redistricting law through the initiative and referendum process.

In *McPherson v. Blacker* (146 U.S. 1), the U.S. Supreme Court characterized state legislature's power concerning the choice of manner of choosing presidential electors as "plenary. The Court ruled:

> "From the formation of the government until now, the practical construction of the clause has conceded **plenary power to the state legislatures** in the matter of the appointment of electors."

The Legislature Should Pass the Version of the National Popular Vote Bill that the House Has Passed Four Times (HB 2927 of 2017)

The National Popular Vote bill (HB 2927 of 2017) would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states (and the District of Columbia).

The National Popular Vote bill would guarantee that ***every*** voter in ***every*** state will be politically relevant in ***every*** presidential election.

[1] https://olis.leg.state.or.us/liz/2018R1/Downloads/CommitteeMeetingDocument/139960