SENATE BILL 1512 – TESTIMONY OF JIM WESTWOOD

TO THE OREGON STATE SENATE RULES COMMITTEE

FEBRUARY 6, 2018

Ladies and Gentlemen of the Committee:

My name is Jim Westwood; I live at 1927 NE Hancock Street in Portland. I present this testimony with no selfish or partisan interest, but rather as a citizen of Oregon and the United States who is dedicated to the Constitution and the rule of law.

For over 40 years I've practiced appellate law in state and federal courts. Many of those appeals have involved constitutional issues. I'm a serious student of the history and application of the Oregon and United States constitutions, and of the early 20th century Populist Era in Oregon and the United States.

I'd like to be heard about SB 1512, the National Popular Vote Compact.

Nothing is new. In 1912 Theodore Roosevelt and populists in Oregon advocated nullification of court decisions by popular vote, which thankfully did not succeed. In 1922 an initiative closed religious parochial schools in Oregon until the Oregon and United States Supreme Courts stepped in. In 1990 Oregon voters enacted

property tax limits that have centralized K-12 education in the state and relegated us to third-class status with chronically inadequate funding. The ill-advised Measure 11 followed in 1994. Since ancient Athens, popular majority decisions have been capturing popular passions of the moment and freezing them in amber, often for later generations to regret.

In my opinion, Senate Bill 1512 is at least as unwise as any of those measures. It's understandable for people to want a numerical majority of voters to make all political decisions, and to look for the "more democracy" solution, immediately, when a consitutional result isn't satisfactory to them. Understandable, but wrong as a simple matter of constitutional and representative government, especially when it commits us to such a fundamental long-range change.

You don't have to take my word for it. The Father of the Constitution, James Madison, wrote in 1833 that a constitutional majority and a numerical majority often differ from one another. The way to challenge decisions of a constitutional majority is by constitutional amendment. The temptation to challenge it by subversion of the constitutional process, said Madison, is as dangerous as scrapping the Constitution in favor of autocracy.

Abraham Lincoln saw the same dangerous subversion of the Constitution when slave states pressed for state nullification of federal law. Amend the Constitution if you can, Lincoln told the South in his 1861 inaugural address, but don't think you can get around the Constitution by making your own different law. Even a Civil War was preferable, in Lincoln's mind, to subversion of the constitutional rule of law.

Plain as the noses on our faces, SB 1512 and the compact to which it would tie Oregon is a subversion of the United States Constitution. Article II section 1 and the Twelfth Amendment specify that electors chosen by each *individual* state shall cast their ballots for President and Vice-President.

Proponents of SB 1512 respond, "The Constitution gives that choice to each state's legislature, we're just following that, and Oregon electors will still be casting ballots." They miss the point. The National Popular Vote Compact may or may not be unconstitutional. I'm not here to argue that. SB 1512 is dangerously bad as a matter of policy.

Here's my question to supporters of SB 1512: Did the Framers of the Constitution, or any of the 50 state conventions that ratified it

over 170 years, understand that presidents would be elected by a nationwide popular vote? The answer plainly has to be "No." That understanding of the Constitution, which is fundamental and higher law by the will of The People, controls. And here's my followup question: Does an interstate compact have the same higher law dignity as the Constitution? The answer again: No. A compact is statutory law. It's not a constitution. It cannot and should not change the Constitution.

It's not nice to fool Mother Nature, nor to mess with the Constitution except by amendment. United States Supreme Court interpretations of the Constitution establish what the "constitutional majority" is on a particular subject. The Court did it, for example, in its 1973 *Roe v. Wade* decision recognizing women's right to reproductive choice. The ongoing attempts of popular majorities in various states to curtail that right, are plain and simple subversions of the United States Constitution. Remember what I just said about SB 1512? The principle is the same.

I could go on about how the constitutional way of electing presidents contains ingenious safety valves and has worked to unify the states in ways that SB 1512 and the compact would eliminate.

After serious study and thought, I'm convinced the constitutional process is not only required, it works better in a national electoral emergency. I can have that discussion with you if you like, but we don't need to go that far.

With all respect for Senate President Courtney and his willingness to support SB 1512 if it's referred to the voters, I say (1) that is an evasion in its own right, of legislative responsibility; and (2) it's probably a nullity. Dealing with state electors under Article II section 1 is a power of the representative state legislatures alone – no mention of plebiscites. Once you enact SB 1512, that's the end. The Constitution makes no provision for its popular repeal or rescission. Referring it is probably a useless and unbecoming abrogation of your constitutional duty.

In more than 50 years of observing, studying, and taking part in Oregon government, I've never before been moved on my own to come testify on a piece of legislation. Please make no mistake – we are talking about first principles here. Senate Bill 1512 undermines constitutional government, and does it blatantly. I am intellectually, morally, and passionately opposed to SB 1512. Please reject it.