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STATE OF OREGON
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May 12, 2017

Senator Elizabeth Steiner Hayward
900 Court Street NE S215
Salem OR 97301

NOTE: Highlighting and italic notes belong to Quinn Reilly

Re: Whether National Popular Vote Interstate Compact may be referred to voters

Dear Senator Steiner Hayward:

Article II, section 1, of the United States Constitution, vests in each state's "[l]egislature" the power to direct the manner of choosing presidential electors. You asked whether the Legislative Assembly may exercise that power by referring the National Popular Vote Interstate Compact (NPVC) to voters for their approval or rejection at an election. We believe that the answer is yes.

A legislative referral of the NPVC, however, would likely face scrutiny under Article II, section 1. Specifically, the referral would likely be challenged on the basis that the term "legislature" under Article II, section 1, is limited to the representative lawmaking body of a state—i.e., the Legislative Assembly of Oregon. The United States Supreme Court has not yet interpreted the term "legislature" under Article II, section 1. Nevertheless, the Court's case law interpreting that term under other provisions of the Constitution indicates that, when "legislature" is used to refer to the lawmaking function of a state, that term encompasses a state's entire legislative process. If a court were to follow that precedent in interpreting the term "legislature" under Article II, section 1, a legislative referral of the NPVC would likely be held constitutional. The meaning of the term "legislature" has sparked considerable disagreement among judges and legal scholars, however, and it therefore remains far from certain how a court would interpret that term under Article II, section 1.

*Although Oregon's LC believes a referral of the NPV bill *should* be legal, he emphasizes that it would "likely be challenged" because "the meaning of the term 'legislature' has sparked considerable disagreement among judges" and therefore "it remains fair from certain how a court would interpret that term."*

Background

The National Popular Vote Interstate Compact (NPVC) is an interstate compact, originally designed and promoted by some of the nation's leading constitutional law professors, that would guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia. The NPVC has been enacted into law by 11 jurisdictions that collectively possess 165 electoral college votes.[1] By its terms, the NPVC will take effect only once it has been enacted into law by jurisdictions that cumulatively possess 270 or more electoral college votes.[2]

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[1] Status of National Popular Vote Bill in Each State, http://www.nationalpopularvote.com/state-status (visited May 8, 2017).
[2] Article IV of the National Popular Vote Interstate Compact.

All of the jurisdictions that have so far enacted the NPVC have done so through an act of that jurisdiction's lawmaking body.[3] No jurisdiction has yet enacted the NPVC by means of direct legislation—i.e., by initiative, referendum or legislative referral. If a jurisdiction were to enact the NPVC via direct legislation, the enactment would likely be challenged under Article II, section 1.

Relevant Case Law

Article II, section 1, provides, in part:

> Each State shall appoint, in such Manner as the [l]egislature 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[.]

Whether Oregon has the authority, under Article II, section 1, to refer the NPVC to the voters for approval depends on the meaning of the term "legislature." Interpreted narrowly, "legislature" may refer only to a state's representative lawmaking body. Interpreted more broadly, however, "legislature" may refer to a state's entire legislative process, including—when authorized by a state's constitution—the power of the people to legislate via initiative, referendum or legislative referral.

The term "legislature" in Article II, section 1 of the Constitution, has NEVER been interpreted by the Supreme Court.

The United States Supreme Court has discussed Article II, section 1, in depth in three cases, none of which involved an interpretation of the term "legislature."[4] To determine how the Court would interpret the term "legislature" under Article II, section 1, we therefore examine how the Court has interpreted that term under other provisions of the Constitution. The Court has taken a functional approach, distinguishing when the term "legislature" refers to the exercise of a state's traditional lawmaking function from when the term refers to the exercise of a nonlawmaking function. The Court has held, for example, that a state legislature's role of ratifying a proposed constitutional amendment under Article V of the United States Constitution is a nonlegislative function that may be performed only by a state's representative legislative body. In contrast, the Court has held that a state legislature's role of setting the rules for holding congressional elections under Article I, section 4, of the United States Constitution, is a legislative function that may be performed in accordance with the state's prescriptions for lawmaking, which may include an initiative or referendum.

In Hawke v. Smith, SOTU blocked Ohio from allowing ratification of the 18th Amendment via referral.

In *Hawke v. Smith*,[5] the Ohio legislature had ratified the Eighteenth Amendment to the United States Constitution, and the issue on appeal was whether Ohio could submit that ratification to the people by referendum. The Court held that it could not. Under Article V, amendments to the United States Constitution must be ratified by "the [l]egislatures of three fourths of the several States." The Court concluded that the term "legislature," as used in Article V, did not include the people's power to legislate by referendum. The Court reasoned that

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[3] *See* Status of National Popular Vote Bill in Each State, http://www.nationalpopularvote.com/state-status (visited May 8, 2017) (NPVC enacted into law by District of Columbia Council and by state legislatures of California, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New York, Rhode Island, Vermont and Washington).

[4] *See McPherson v. Blacker*, 146 U.S. 1 (1892) (state legislatures have plenary power under Article II, section 1, to prescribe the method of choosing presidential electors); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (declining to address issue whether decision of Florida Supreme Court, by effectively changing manner in which Florida's presidential electors were to be selected, had violated Article II, section 1); *Bush v. Gore*, 531 U.S. 98 (2000) (under Article II, section 1, individual state citizen has no federal constitutional right to vote for presidential electors, unless state legislature chooses statewide election as means to implement legislature's power to appoint members of electoral college).

[5] *Hawke v. Smith*, 253 U.S. 221 (1920).

"ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word" and that the ratifying function may be exercised only by a state's representative body.[6]

The Court took the opposite view in its line of cases involving Article I, section 4. In *Ohio ex rel. Davis v. Hildebrant*,[7] the Ohio legislature had passed a redistricting Act for congressional elections, but voters had rejected the Act in a referendum. The Court upheld the validity of the referendum under Article I, section 4, of the United States Constitution, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the [l]egislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Court held that the referendum, which was permitted under the Ohio Constitution, was "part of the legislative power" of Ohio and that that power had been legitimately exercised by the people to disapprove the redistricting Act.[8]

In *Smiley v. Holm*,[9] the issue was whether a Minnesota Act redistricting the state for congressional elections was subject to the Governor's veto. The Court concluded that redistricting "involves lawmaking in its essential features and most important aspect," and that lawmaking "must be in accordance with the method which the State has prescribed for legislative enactments."[10] Thus, similar to its holding in *Hildebrant*, the Court held that, for purposes of redistricting, the term "legislature" under Article I, section 4, referred to Minnesota's entire legislative process—i.e., not just the two houses of the legislature, but also the gubernatorial veto. The Court noted that "[w]herever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view."[11] The Court then contrasted the legislative function exercised by the "legislature" under Article I, section 4, from other, nonlegislative functions exercised under other provisions of the Constitution.[12]

Most recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[13] the Court upheld a voter initiative that amended the Arizona Constitution to remove congressional redistricting authority from the state legislature and vest that authority, instead, in an independent redistricting commission. In a 5-4 decision by Justice Ginsburg, the Court held that Article I, section 4, allowed the people of Arizona to regulate congressional elections by initiative.[14] The Court noted that dictionaries in use at the time of the Constitution's framing defined the word "legislature" broadly as "[t]he power that makes laws."[15] The Court further noted that the Arizona Constitution defines the state's lawmaking power to include the initiative and referendum processes. Thus, under the Arizona Constitution, the people are "a coordinate source of legislation on equal footing with the representative legislative body."[16] In addition, the Court noted that the meaning of the word "legislature" throughout the Constitution "'differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body

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[6] *Id.* at 229.
[7] *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).
[8] *Id.* at 568-570.
[9] *Smiley v. Holm*, 285 U.S. 355 (1932).
[10] *Id.* at 366, 367.
[11] *Id.* at 366.
[12] *See id.* at 365-366 (contrasting legislative function from "electoral" function in choosing U.S. Senators under Article I, section 3, before Seventeenth Amendment was adopted; "ratifying" function for proposed constitutional amendments under Article V; and "consenting" function in acquisition of federal lands under Article I, section 8, paragraph 17).
[13] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).
[14] *Id.* at 2659.
[15] *Id.* at 2671 (quoting Samuel Johnson, 2 *A Dictionary of the English Language* (1st ed. 1755)).
[16] *Id.* at 2660 (internal quotation marks omitted).

in each instance is called upon to exercise.'"[17] With regard to redistricting, the Court had previously held in *Hildebrant* and *Smiley* that setting congressional districts is a legislative function, "to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."[18] The Court then went on to hold that the legislative function of redistricting could also be performed by initiative.

The Court concluded that the dominant purpose of Article I, section 4, was to empower Congress to override state election rules, not to restrict the ways in which states enact legislation.[19] The Court noted, moreover, that states in our federal system generally "retain autonomy to establish their own governmental processes."[20] To respect that autonomy, the Court concluded that Article I, section 4, should not be read to "single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."[21] The Court further concluded that, although the initiative process had been invented after the framing of the Constitution, that process "was in full harmony with the Constitution's conception of the people as the font of governmental power."[22] Thus, relying on principles of both popular and state sovereignty, the Court upheld Arizona's use of the initiative as a valid means of regulating congressional elections under Article I, section 4.[23]

Writing for the four dissenting justices, Chief Justice Roberts concluded that the "unambiguous meaning of 'the Legislature'" under Article I, section 4, was the representative body of a state.[24] He noted that the word "legislature" was understood during the Founding Era to mean an institutional body of representatives, not the people at large. In addition, he noted that the Constitution contains 17 provisions referring to a state's "legislature." In his view, "[e]very one of those references is consistent with the understanding of a legislature as a representative body," and many of those references are "flatly incompatible" with an interpretation that would include the people as a whole.[25] Chief Justice Roberts, therefore, would give the term "legislature" a consistent meaning throughout the Constitution as a representative lawmaking body. He disagreed with the majority's approach of giving that term different meanings depending on the function being exercised, accusing the majority of "leap[ing] from the premise that 'the Legislature' performs different *functions* under different provisions to the conclusion that 'the Legislature' assumes different *identities* under different provisions."[26]

Although a referral may be legal, he emphasizes that it is impossible to predict the Court's interpretation, especially in today's "highly political environment".

Analysis

Although the Court's most recent pronouncement on the meaning of the term "legislature" was decided by a closely divided Court, the Court has nevertheless applied a consistent framework for interpreting the term "legislature" under various provisions of the Constitution. When that term refers to a lawmaking function, such as redistricting under Article I, section 4, the Court has interpreted the term broadly to encompass a state's entire legislative process. When, on the other hand, the term "legislature" refers to some other function, such as ratifying proposed

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[17] *Id.* at 2668 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)).
[18] *Id.* at 2668.
[19] *Id.* at 2672.
[20] *Id.* at 2673.
[21] *Id.*
[22] *Id.* at 2674.
[23] The Court also held, in the alternative, that a federal statute, 2 U.S.C. 2a(c), allows Arizona to vest redistricting authority in an independent redistricting commission. 135 S. Ct. at 2668-2671. Because that statutory holding does not bear on the constitutional issues presented in this opinion, we do not discuss it further.
[24] 135 S. Ct. at 2680 (Roberts, C.J., dissenting).
[25] *Id.* at 2680.
[26] *Id.* at 2682 (emphasis in original).

constitutional amendments under Article V, the Court has construed the term narrowly to mean only the representative legislative body.

Applying that functional approach, we believe that a court would likely interpret the term "legislature" under Article II, section 1, to include a state's entire legislative process. The function exercised by the "legislature" under Article II, section 1, is a legislative one. Specifically, Article II, section 1, allows states to legislate the rules for choosing presidential electors. That function resembles the role that the legislature plays under Article I, section 4, of legislating the rules for holding congressional elections. Indeed, the legislature's role under Article II, section 1, seems far more analogous to the legislature's role under Article I, section 4, than it does to the legislature's ratifying role under Article V. Interpreting the term "legislature" under Article II, section 1, to mean a state's entire legislative process, therefore, would likely fit most comfortably within the Supreme Court's case law interpreting that term under Article I, section 4, and Article V.

It is perhaps worth noting that even the dissenting justices in *Arizona State Legislature* indicated a willingness to interpret "legislature" to include forms of direct legislation, such as a referendum, in which the state's legislative body still plays a role. Chief Justice Roberts, in his dissent, agreed with the majority that *Hildebrant* and *Smiley* stood for the proposition that a state could supplement the legislature's role in the legislative process by means of a referendum or gubernatorial veto. He disagreed, however, that those cases meant that the state could "supplant the legislature altogether" by means of an initiative.[27] In his view, "[n]othing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely."[28] It appears, therefore, that at least some of the justices perceive a distinction between an initiative, on the one hand, and a referendum or legislative referral, on the other. If a court were to recognize that distinction in interpreting the term "legislature" under Article II, section 1, a referendum or a legislative referral would have a stronger chance of withstanding scrutiny than would an initiative.

Conclusion

The United States Supreme Court has consistently applied a functional approach to interpreting the meaning of the term "legislature" under various provisions of the United States Constitution. Applying that approach to Article II, section 1, we conclude that a court would likely interpret "legislature" to include not only a state's representative lawmaking body, but also any method of direct legislation prescribed by the state's constitution. Thus, if Oregon were to enact the NPVC by means of a legislative referral—a method of legislation that is sanctioned by the Oregon Constitution[29]—we believe that the referral would likely withstand challenge under Article II, section 1.

Although we conclude that the approach used by the Supreme Court indicates that a court would uphold the constitutionality of a legislative referral of the NPVC, that outcome cannot be predicted with certainty. Several of the Supreme Court's current justices disagree with the functional approach that the Court has adopted. Those justices believe that the plain meaning of the term "legislature" in each of the 17 provisions of the Constitution in which that term appears is a representative legislative body. Given the level of disagreement that the interpretation of "legislature" has produced under other constitutional provisions, and the fact that any challenge

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[27] *Id.* at 2687.
[28] *Id.*
[29] *See* Article IV, section 1, Oregon Constitution (defining legislative power of Oregon to include initiative, referendum and referral).

to the NPVC would occur in a highly political environment, the resolution of this issue is difficult to predict.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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Summary:

1. The Supreme Court has never ruled on this section of the Constitution.

2. Therefore, no one can say for certain whether referring the NPVIC to voters is constitutional.

2. Given the mixed case law and today's highly politicized environment, a court challenge would be extremely likely and its outcome uncertain.

Conclusion:

The Oregon Legislature should avoid passing potentially unconstitutional legislation if at all possible. If lawmakers believe Oregonians should have the right to vote for President directly, the Legislature should simply join 10 other states and DC and pass the Compact though normal legislative means.