

Testimony of Andy Schatz of Westbrook, CT, in opposition to HB5205, HB5434, HB5435, HB5736, and SB9 (all relating to joining into the National Popular Vote Interstate Compact)

My name is Andy Schatz. I was born and raised in West Hartford, was a member of the West Hartford Town Council (Democrat) from 1987 through 1995, and was in private law practice for over 30 years until retiring from active law practice in 2008. I am currently a resident of Westbrook. I submit this testimony only for myself and not on behalf of any organization.

As has happened several times in U.S. history, the candidate who lost the electoral vote in 2016 received more total (popular) votes for president. As expected, there have been calls to change to a national popular vote for president, as there were the last time this occurred (2000) as well as following a previous close election (1968). In addition to calls to change the constitution directly, a movement to get around the constitution, the National Popular Vote Compact (NPV), has been reinvigorated.

The concept behind NPV is simple. States would agree to cast all their electoral votes for the candidate receiving the most popular votes nationwide. If states joining the compact have aggregate electoral votes exceeds 270 (a majority of all electoral votes – and the number needed to win the presidency), the candidate receiving the most popular vote would receive those states' electoral votes, and would thereby win the election.¹

Whether this “compact” among states is constitutional is debatable – and would doubtless be the subject of Supreme Court

¹ NPV has now been adopted by jurisdictions having 165 electoral votes, including California (55), Hawaii (4), Illinois (20), Maryland (10), Massachusetts (11), New Jersey (14), New York (29), Rhode Island (4), Vermont (3), Washington (12), and the District of Columbia (3).

review.² But, more importantly, is it wise policy?

NPV is misguided and should be abandoned. Most importantly, NPV runs a serious risk of leading to the election of fringe candidates with a small percentage of the total vote and destabilize government. In addition, NPV would open the door to mischievous uses of the interstate compact.

The Risk of Destabilizing American Government

NPV is dangerous, as it would encourage election of fringe candidates with a small percentage of the total vote and thereby tend to destabilize government. NPV does not require that the popular vote “winner” receive a majority – or even anything near a majority. Currently, voters (on the losing side) often question legitimacy when a president has less than 50% of the popular vote; what would happen if that number was 40% or even 30%, particularly if it the remaining 70% of the voters vigorously opposed that candidate? Such an election would do much more serious damage to democratic principles – and the view of legitimacy of an administration – than anything which has occurred or is likely to occur with the current Electoral College system.³

² A state that signed the compact, by its terms, could later reject the compact only (i) before July 20 of an election year (likely before the nomination of major party candidates and (ii) through another statute not only passed by both houses of the legislature but signed by the governor. If one party did not control the legislature and governor, voters could be stuck with a prior decision by the state government even if most voters and/or current state government disagreed with the decision and would – indeed did – vote differently now. NPV’s constitutionality would thereby rest, in part, on a right of the state to decide on its electors and bind the state and its voters and electors for future elections.

³ “Ranked Choice Voting” (sometimes called Instant Runoff Voting) would solve the minority election problem. Voters could express preferences among multiple candidates in a multi-candidate race, with the candidate(s) receiving the smallest numbers of votes being successively eliminated and their votes redistributed to the voters’ second choice, third choice, etc. This would eventually result in a two-person contest in which the higher vote total – a majority – would win. Although this system would be much easier to administer using computerized voting, current concerns over potential “hacking” and

The historic/current requirement to win a majority of electors state by state appears to be the single most important reason that there have been so few viable independent or third party candidacies. Commentators on both sides of the “popular vote” debate agree that the majority requirement has led almost necessarily (although perhaps not by design) to the rise of a strong two-party system.⁴

Our strong two-party system, for all its flaws, has resulted in remarkable stability and the tendency, most of the time, to suppress baser instincts – or at least prevent them from becoming part of articulated policy. The practical need under our system of government to control the Presidency has forced people to come together – to compromise views – in order to capture the support of a majority. This need for broad coalitions also better protects minority views and populations by avoiding the domination of factions, consistent with our Founders’ expressed intent. We should be very careful before abandoning rules that foster such stability and protection.

How likely is the plurality-only election? We should be very

manipulation would likely require use of a manual system at this time. In addition, this system would only solve the problem if used by all jurisdictions, presumably through a constitutional amendment. Nonetheless, Ranked Choice Voting should be studied and encouraged through a constitutional amendment to institute election by popular vote.

⁴ This impact of the majority requirement on the two-party system has been generally accepted by those whose views are quite diverse. Fair Vote, one of the organizations most actively supporting NPV, describes the Electoral College negatively on its website for this reason. See <http://www.fairvote.org/problems-with-the-electoral-college> (“The Electoral College inadvertently reinforces this two party system.”). Protection of the two-party system was cited as a major reason to oppose NPV by John J. Turner, emeritus professor at West Chester University, who argued that the two-party system protects against extreme views and discrimination becoming part of policy. See <http://www.historycooperative.org/journals/ht/40.3/turner.html>. And William C. Kimberling, Deputy Director of the FEC Office of Election Administration (and referenced as an authority on the Electoral College at the FairVote website cited above), in a May 1992 paper, *The Electoral College*, summarizes arguments on both sides but concludes that the Electoral College system enhances stability and protects against extremist policies. See <http://www.fec.gov/pdf/eleccoll.pdf>

careful with causality. Some argue that there is little reason for concern with NPV because election of a U.S. President by less than 40% has only occurred twice (John Quincy Adams in 1824 and Abraham Lincoln in 1860) and even by less than 45% has only occurred on three additional occasions (Woodrow Wilson in 1912, Richard Nixon in 1968 and William Clinton in 1992). However, it is far more likely that strong third parties and small plurality election has not happened because our requirement of a majority (of electoral votes) strongly discourages it, rather than because it is an unnatural event; indeed, human beings are not necessarily naturally inclined to compromise.

It is not hard to imagine individuals or groups with more extreme views taking a shot at winning the Presidency with 30-35% of the vote under an “any plurality” system such as NPV. Some states, including Connecticut, have had low plurality victories in state-wide races, and the incentive for more extreme groups seeking that result at the federal level is even greater given the more immense power of the presidency.⁵

The desire for popular election of our nation’s leader is a laudable goal, but the National Popular Vote compact is not the way to achieve that goal. These bills should not be passed.

⁵ Although the deeply entrenched two-party system probably deters third party candidacies even in state elections, where the peculiar majority requirement of the Electoral College does not apply, the low-plurality elections of governors provides additional support for the greater likelihood of such results for President (with its greater executive power) absent the Electoral College. Connecticut has had two such elections (Lowell Weicker with 40% in 1990 and John Rowland with 36% in 1994), and the 1998 election of Jesse Ventura in Minnesota (37%) and 2006 reelection of Governor Rick Perry in Texas (39%) are just two other notable examples.