

March 15, 2023

To: Sen. Erin Murphy, Chair, State and Local Government and Veterans  
Sen. Bruce Anderson, Ranking Member  
Sen. Kelly Morrison, Chief Author (SF 2270)

From: Mark Bohnhorst, Senate District 61

Re: SF 2270, Morrison, Mohamed, Port, Hauschild (Protect and Defend Democracy Act, comprehensive ranked choice voting bill)

**Statement of support for an amendment authorizing the task force to consider approval voting for presidential elections and consider recommending implementation of approval voting for the 2024 presidential election.**

I am writing as an independent researcher/author.<sup>1</sup> This written testimony supplements testimony I submitted previously in support of SF 2270 (with suggested amendments) to the Senate Elections Committee.

[https://www.senate.mn/committees/20232024/3121\\_Committee\\_on\\_Elections/SF%202270%20-%20Bohnhorst%20Testimony.pdf](https://www.senate.mn/committees/20232024/3121_Committee_on_Elections/SF%202270%20-%20Bohnhorst%20Testimony.pdf)

My support for SF 2270 is unwavering. The proposed legislation will extend the benefits of RCV to any unit of local government that independently determines to use that system, and it will lay the foundation for implementation of the system state-wide in later years.

My particular interest, and point of concern, is presidential elections. Fundamental reform, which would institute or allow for a national popular vote for president, is years in the future. For the near term, implementation of majoritarian voting for presidential electors in each state—particularly in actual or potential battleground states—is the single most important, achievable reform of the electoral college. Edward B. Foley, Presidential Elections and Majority Rule (2020).

These comments and the suggested amendment are narrower and more focused than the testimony I submitted to the Senate Elections Committee. It appears that a rigorous, publication quality study, which was at the center of that testimony, will not be feasible. This testimony is directed to the near term. Quite simply, if the delay—and possibly lengthy delay—in implementation of majoritarian voting in

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<sup>1</sup> I am a retired public sector attorney (16 years, So. Minn. Regional Legal Services; 24 years, U. of Minnesota Office of the General Counsel). I am lead author of two recent law review articles having to do with presidential elections and coauthor (with St. Olaf History Professor Michael W. Fitzgerald) of an article, under peer review at a history journal, about racial violence and the electoral college during Reconstruction. Addendum 3 is a list of select publications and presentations.

presidential elections required under SF 2270 can be avoided, it should be. That is, the most important near term reform of presidential elections should be implemented as soon as reasonably feasible.

SF 2270 contemplates use of RCV in presidential elections; however, it calls for a delay of at least four years. As introduced, Ranked Choice Voting would not apply to presidential elections until 2028, but pursuant to amendment there is now no date certain for implementation. The need for delay appears to be occasioned by the relative complexity of RCV and a perceived need to educate the public and train officials state-wide before RCV is implemented state-wide.

In contrast, approval voting is extraordinarily simple and requires almost no changes. On the ballot, merely change “vote for one” to “vote for one or more.” Add two words, six letters. Sum up all the votes, and the candidate with the most votes wins.

### **Key Points:**

1. Approval voting and RCV are equally effective for addressing spoiler candidates and assuring majority winners (when there is one).
2. Approval voting is easier than RCV for voters to understand, and implementation for the 2024 election might be feasible.
3. Approval voting for president is grounded in constitutional history. It was discussed favorably at the Constitutional Convention as a way to allow voters to vote both for a non-viable local candidate and for a viable candidate of nation-wide reputation. Limited approval voting was actually implemented in the first four presidential elections.

### **By design, approval voting and RCV are equally effective for addressing spoiler candidates and assuring majority winners in presidential elections.**

Minnesota’s embrace of Ranked Choice Voting (RCV) has been grounded in part on an excellent 2004 study by the League of Women Voters Minnesota of alternative voting methods.<sup>2</sup> Prominent methods discussed included RCV and approval voting. The study concluded that no voting system is perfect, and it analyzed strengths and weaknesses of each.<sup>3</sup> Yet, the 2004 study did not consider how alternative voting systems—either RCV or approval voting—work in presidential elections. Before the legislature adopts a new method for presidential elections, it should consider both of these leading alternatives. The task force created under SF 2270 should study both.

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<sup>2</sup>LWV MN 2004 Study.

<https://drive.google.com/file/d/1lVMbF1jDVZ0qiB7EuqoEMBrEV1sOrqsw/view>

<sup>3</sup> Since the LWV MN study, RCV has been implemented in a number of jurisdictions. Recently, approval voting has been adopted in Fargo and St. Louis.

In presidential elections, to prevent so-called spoilers from determining the outcome of elections (Ralph Nader in 2000, possibly Ross Perot in 1992, the goal of George Wallace in 1968), it is of utmost importance to measure the full range of support for the two major contestants in each state. By design, RCV and approval voting work equally well in assuring that all the votes for each of the major contenders are counted. Under RCV, the major contenders generally are the last two candidates standing, and all votes for them are counted at the end. Under approval voting, all the votes for all the candidates are counted at the beginning.

**Approval voting may be easier than RCV for voters to understand. For this reason, implementation of approval voting for the 2024 presidential election might be feasible, even if implementation of RCV by 2024 is not.**

SF 2270 calls for the task force to report on two important subjects: (i) educational needs for public awareness and training; and (ii) the status of election equipment and recommendations for upgrades. Art. 1, Sec. 1, Sub. 5(3) & (4) (as introduced). As between the two, the 2004 LWV study (p. 12) suggests that the education component is the more important. The study reported that almost all current and former election officials interviewed agreed that, “The task of educating voters about a fundamental change in voting method appeared difficult but not impossible. . .” One official said this function was “absolutely critical.” In contrast, software or equipment upgrades “would not be a problem” and “would not necessarily be a significant cost burden” (p. 13). Elections software can be programmed to count the votes regardless of election system.

On the critical factor of voter education, it appears from the LWV study that approval voting has a decided edge. The LWV study (p. 14) summarized approval voting as follows:

**“Approval Voting System** (Voters select as many candidates as they wish candidate with most votes wins)  
--Is easy for voters to understand.”

Approval voting’s most prominent feature is ease of understanding.

Since approval voting is simple in concept, and since it uses the same ballot as ordinary plurality voting, on the face of it, there would not appear to be any reason to delay implementation for presidential elections. The task force should consider and report on this possibility.<sup>4</sup> The revised, suggested amendment is in Addendum No. 1.

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<sup>4</sup> The task force would of course consider and report on the legal issues discussed in the prior testimony (pp. 3-4).

**Approval voting has an eminent constitutional pedigree—it was the Founders’ own “alternative voting system” for presidential elections.**

Approval voting was discussed favorably at the Constitutional Convention. On July 25, 1787, James Madison and two other leading members of the Constitutional Convention<sup>5</sup> discussed using approval voting in a national popular vote for president. These same Framers later incorporated limited approval voting into the electoral college. It bears repeating: approval voting in presidential elections was part of the Constitution’s original design. (The first four presidential elections used limited approval voting: one elector, two votes.) For presidential elections in particular, it was important to the Founders that the election system be designed to choose a consensus figure—elected under the principle of majority rule—who could govern a diverse nation.

Over the years, in presidential elections, both major parties have been adversely affected by third party candidacies. Either major party might be affected in the 2024 presidential election in Minnesota. It is sincerely hoped members of all parties as well as independents may embrace the principle of majority rule in the election of presidential electors and support the proposal that the task force consider approval voting, for possible implementation in 2024.

Respectfully submitted,

Mark Bohnhorst  
Minneapolis  
Senate District 61

**Addendum No. 1:**

Suggested amendments to SF 2270, as introduced, specifying task force duties regarding presidential elections

line 3.21: Insert new subsections (2).

Renumber former subsection (2) as subsection (3) and revise.

All as follows:

(2) recommendations regarding the voting method to be used for election of presidential electors, including ranked choice voting and approval voting, and recommendations on standards and rules to implement the recommended method for voting for presidential electors; and, if the recommended voting method is

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<sup>5</sup> The three (including Gouverneur Morris and Hugh Williamson) were on the committee that produced the first draft of the electoral college. (Madison is said to have written it). Madison and Morris were on the committee that wrote the final draft of the Constitution. (Madison said Morris wrote most of it.) Addendum No. 2 sets out the July 25 discussion.

approval voting, a recommendation in the February 15, 2024 report regarding the feasibility of implementing that method for the 2024 presidential election;

~~(2)~~ (3) draft legislation to implement statewide ranked choice voting, and to implement the method for election of presidential electors recommended under subsection (3);

Lines 3.22 - 3.28, renumber subsections (3) – (5) as subsections (4) – (6).

### **Addendum No. 2:**

Discussion in the Constitutional Convention Regarding use of Approval Voting in a Popular Election of the President:

Hugh Williamson of North Carolina “was sensible that strong objections lay agst. an election of the Executive by the [National] Legislature, and that it opened a door for foreign influence. The principal objection agst. an election by the people seemed to be, the disadvantage under which it would place the smaller States.” He [Hugh Williamson] suggested as a cure for this difficulty that each voter should vote for three candidates. One of these, he observed, would be probably of his own state, the other two of some other states, and as probably of a small state as a large one. Gouverneur Morris “liked the idea, suggesting as an amendment that each man should vote for two persons one of whom at least should not be of his own state.” . . .

James Madison now weighed in, saying that something valuable might be made of Williamson’s suggestion with Morris’ amendment. A person from a small state would likely vote for from his state, as his first choice, and a more generally known person from another state as his second. Aggregating the votes from all the states would probably result in “the second best man” being the “first in fact.”<sup>6</sup>

### **Addendum No. 3:**

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<sup>6</sup> Alan E. Johnson, The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote (Pittsburgh, Philosophia: 2018) 193-194 (emphasis supplied)(from a useful, detailed chronology of the debates in the Constitutional Convention regarding the presidency, at 161-232); Max Farrand, ed., The Records of the Federal Convention of 1787, vol. 2, 113-114, on-line at, Library of Congress, “A Century of Lawmaking for a New Nation,” <https://memory.loc.gov/cgi-bin/ampage>.

## Select Publications and Presentations: Presidential Election Reform

Work in progress: “Last Federalist Standing: Rufus King and the Right of the People to Elect their President”

Work in planning: The Minnesota Constitution of 1858 and its relevance (or lack of relevance) to presidential elections

Michael W. Fitzgerald and Mark Bohnhorst, “Golden Opportunity Lost: The Electoral College, Racial Terror and Reconstruction,” manuscript on file with authors, under submission to a journal of history (2023)

February 2, 2023: Mark Bohnhorst, Michael W. Fitzgerald and Aviam Soifer, “Gaping Gaps in the Independent State Legislature Doctrine History,” 49 Mitchell Hamline Law Review 257 (2023)

<https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1314&context=mhlr>

January 24, 2023: “What Should we do About the Electoral College?” Tuesdays with a scholar series, Ramsey County Library/University of Minnesota Osher Lifelong Learning Institute,

<https://my.nicheacademy.com/rcladult/course/57835/lesson/165761>

Sept. 22, 2022: Mitchell Hamline Law Review Election Law Forum

[https://www.youtube.com/watch?v=sNDUCimvZbA&ab\\_channel=Mitchell-HamlineLawReview](https://www.youtube.com/watch?v=sNDUCimvZbA&ab_channel=Mitchell-HamlineLawReview) (featuring Alexander Keyssar, Jesse Wegman, John Koza), co-organizer and presenter

August 18, 2022: Minneapolis Star Tribune, Counterpoint: The Electoral Count Act's poison pill. <https://www.startribune.com/counterpoint-the-electoral-count-acts-poison-pill/600198867> Language within an earlier draft of the Act implied a legislature might have the power to take away the right of the people to vote for president.

July 2022: Mark Bohnhorst, Reed Hundt, Kate E. Morrow and Aviam Soifer, “Presidential Election Reform: A Current National Imperative,” 46 Lewis & Clark Law Review 437 (2022), <https://law.lclark.edu/live/files/33589-2625-bohnerst-hundt-morrow-soifer>

December 19, 2021: Mark Bohnhorst and Aviam Soifer, “Look to the 14<sup>th</sup> Amendment to check GOP efforts to subvert popular vote,” The Hill.

May 2021: Mark Bohnhorst, Reed Hundt, Kate E. Morrow and Aviam Soifer, “Presidential Election Reform: A National Imperative,” <https://www.aals.org/wp-content/uploads/2021/06/Presidential-Election-Reform-.pdf>, invited paper, Mid-year Meeting of the American Association of Law Schools, Conference on Rebuilding Democracy and the Rule of Law

October 20, 2020: Mark Bohnhorst, “Links to Resources on Race and the Electoral College,” <https://www.makeeveryvotecount.com/research-whitepapers-library/2020/10/20/links-to-resources-on-race-and-the-electoral-college>

August 13, 2020: Making Every Vote Count, “Summary and Video Index of ‘Presidential Election Reform: 2020 and Beyond’ August 13, 2020 Conference,” (first session, “Race and the Electoral College” with Alexander Keyssar and Jesse Wegman, also featuring Walter Mondale, Steve Simon and John Koza), co-organizer and presenter, <https://www.makeeveryvotecount.com/research-whitepapers-library/2020/8/13/summary-and-video-index-of-presidential-election-reform-2020-and-beyond-august-13-2020-conference>

August 13, 2020: Mark Bohnhorst, “Race and the Electoral College: Brief Chronology,” <https://www.makeeveryvotecount.com/research-whitepapers-library/2020/8/13/race-and-the-electoral-college-brief-chronology>

April 17, 2019: Minneapolis Star Tribune, Counterpoint: Star Tribune columnist gets history and today's political scene wrong on Electoral College: <https://www.startribune.com/counterpoint-star-tribune-columnist-gets-history-and-today-s-political-scene-wrong-on-electoral-college/508723972/> Should we keep a tool of racial injustice that devalues the votes of millions? Or have a system that feels like democracy?