

Testimony of Sean Parnell

to the

Veterans and Legal Affairs Committee of the Maine Legislature

January 8, 2024

Re: LD 1578 (The National Popular Vote interstate compact)

Chairman Hickman, Chairwoman Supica, Members of the Committee, thank you for accepting my testimony. I am Sean Parnell and I represent Save Our States Action, an organization focused on defending the Electoral College and opposing the National Popular Vote interstate compact (NPV). I am here today to urge you to vote against this dangerous and defective compact.

My testimony today focuses largely on the numerous technical defects in this compact that will, in the words of one of the law professors who originally developed the concept of NPV, lead to “electoral crises” and an “historic debacle” if the compact is implemented as it is currently written.

I’ll address these defects in a minute, but first I’d like to point out the biggest problem with this compact – if it were ever to go into effect, it would silence the voice of Maine in the presidential process and cause the concerns of its people to be sidelined in favor of major metropolitan areas and large voting blocs.

This isn’t just my opinion – this outcome has actually been described very well by a pair of lobbyists for NPV in recent years. In one case, an NPV lobbyist complained that because the president wanted to win an electoral vote in Maine, he had made changes to a federal program that benefited the state’s lobster industry that was struggling as a result of Chinese tariffs.¹

¹ Comments of NPV lobbyist Patrick Rosenstiel, “Perspectives on the Electoral College: Is 2020 a Turning Point?” July 2020, R Street Institute. Available at: <https://www.youtube.com/watch?v=hYxH65EWWkw&t=1s> (relevant comments at approximately 0:29:00)

More recently, another NPV lobbyist explained that once the compact is in effect, presidential candidates will only focus on “issues on a national level” rather than what she termed “specialized interests” that only affect smaller groups of Americans.²

I think it is a strength of the Electoral College that candidates for president cannot simply ignore all but the largest voting blocs and biggest metropolitan areas. I think it’s a good thing the Electoral College caused the president to recognize and address the fact that Maine’s lobster industry, as well as the seafood industries in several other states that are not so-called “battleground states,” had been left out of a program designed to offset the harms of Chinese tariffs. NPV’s lobbyists and advocates clearly disagree, and are trying to move the country to a system in which the president doesn’t need to care how federal policy affects “specialized interests” like Maine’s lobster industry and are instead just able to focus on the largest metropolitan areas and biggest voting blocs. I think it would be a mistake to give up on a system that gives smaller groups a chance to be heard and have their concerns taken seriously.

As for the technical defects in this compact, they are numerous and serious. In most cases, these defects stem from the same basic problem: there is no official, timely, accurate, and conclusive national vote count that can be used for this compact. No federal agency, commission, or official will prepare an official vote total for every candidate that will then be used by member states to determine the outcome, nor does the compact create or empower such an agency, commission, or official.

Instead, the chief election official of each member state is responsible, independently from one another, for obtaining vote totals from other states and aggregating them in order to produce national vote totals that are only applicable in their own state. Lobbyists for NPV insist this is an uncomplicated task – as one said last year in a hearing, “We can all do the math.” This simplistic hand-waving ignores the fact that votes in every state are cast, counted, recounted, and reported in different ways, some of which cause serious problems for National Popular Vote and will lead to confusion, controversy, chaos, crisis, and a lack of a conclusive determination of the winner if the national vote is close, as four of the last sixteen presidential elections have been.

Some of the most significant problems and defects in the compact include:

- NPV requires member states to accept vote totals from other states if they are on an “official statement,” which would include either a Certificate of Ascertainment or a

² Brett Forrest, “Nevada may join interstate compact to elect president through national popular vote,” April 2023, 3 News. Available at: <https://news3lv.com/news/local/nevada-may-join-interstate-compact-to-nominate-president-through-national-popular-vote>

statewide canvas. But these documents can contain significant errors. For example, New York has left tens or hundreds of thousands of votes off of its Certificate of Ascertainment as well as its statewide canvas. In 2008 New York left 131,418 votes off, in 2012 it was missing 424,775 votes, in 2016 there were 101,762 votes missing, and in 2020 it left 28,881 votes off of its “official statements.”³

- Ranked choice voting, which Alaska and Maine will use for president in 2024, poses a challenge because “official statements” from those two states will include both the initial and final vote totals,⁴ with no guidance in the compact on which vote totals are to be used in tabulating the national vote. Because initial and final vote totals can differ by tens or even hundreds of thousands of votes, the choice of which totals to use could determine the outcome under NPV in a close election.
- Another major problem ranked choice voting creates for NPV is a situation where a third-party or independent candidate finishes ahead of the Democratic or Republican candidate in a state using ranked choice voting. In this instance, the final vote total from that state for that third-place Democrat or Republican will be zero, meaning hundreds of thousands or even millions of votes erased from the national vote count for the third-place Democrat or Republican if the final-round totals are used for calculating the national vote count.

The timing of this erasure is important - final RCV results typically take much longer to be determined than plurality voting. In 2022, the winner of Maine’s 2nd Congressional district wasn’t known until November 16, more than a week after the November 8 election,⁵ and Alaska’s results weren’t announced until November 23 for the state’s U.S. House race.⁶ In both races, however, most of the first-round vote totals were public on

³ Final, certified state totals for New York in each of the last four presidential elections are available on the web site of the New York State Board of Elections, <https://www.elections.ny.gov/>. The Certificate of Ascertainment are available online for 2016 (<https://www.archives.gov/files/electoral-college/2016/ascertainment-new-york.pdf>) and 2020 (<https://www.archives.gov/files/electoral-college/2020/ascertainment-new-york.pdf>) and the certificates for 2008 and 2012 are available upon request.

⁴ See: RCV Detailed Report, U.S. House of Representatives, Alaska Division of Elections, 2022, available at: <https://www.elections.alaska.gov/results/22GENR/US%20REP.pdf>

⁵ “Golden holds on to U.S. House seat via ranked choice voting,” November 16, 2016, WABI5. Available online at: <https://www.wabi.tv/2022/11/16/ranked-choice-tabulation-results-congressional-district-2-expected-wednesday-night/>

⁶ “Democrat Mary Peltola defeats Sarah Palin in race for Alaska's at-large House seat,” November 23, NBC News. Available online at: <https://www.nbcnews.com/politics/2022-election/democrat-mary-peltola-defeats-sarah-palin-race-alaskas-large-house-sea-rcna58207>

election night or shortly after.⁷ Assuming this timeline is repeated for presidential election results, the initial votes will be publicly available on or shortly after election night and will be incorporated into media and other counts of the national popular vote. These early tabulations will include hundreds of thousands and perhaps millions of votes that, within the next few weeks, will be removed from the national tally for at least one of the two major party candidates, which could easily change the outcome in a close national election. It is not difficult to predict the chaos, confusion, and crisis that would ensue if a candidate initially thought to have won under NPV is suddenly determined to have lost weeks later after having hundreds of thousands of votes erased from their national totals.

- If for some reason there is not an “official statement” available to obtain vote totals by the time the compact needs them – for example, if there is a recount still underway or court challenges to results, or if a state submitted its Certificate of Ascertainment to the National Archives shortly before or on the deadline – then the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate. Several of the methods that could be used to estimate vote totals that NPV’s own lobbyists described in a 2021 North Dakota hearing would have been off by tens or hundreds of thousands of votes.⁸ And it is unlikely that every state’s chief election official would use the exact same methodology to estimate vote totals, and in a close election the different methods chosen could cause a compact member states to split in which candidate is declared the winner.
- There could not be a national recount if the national vote is relatively close, as four of the last sixteen have been. Every state would decide for itself, based on its own laws that were written to assume a close in-state margin, whether a close national margin triggers a recount or allows for one to be requested. Those states that decide to conduct a recount will then have to decide (likely through litigation) whether to only recount the same ballots that were initially counted or whether new ballots, such as absentee ballots or provisional ballots that were initially excluded, should be added in. States

⁷ See: “Peltola leads in Alaska’s U.S. House race, while U.S. Senate race tightens,” November 9, 2022, Alaska Public Media. Available at: <https://alaskapublic.org/2022/11/09/early-alaska-elections-results-show-tshibaka-peltola-leading-in-congressional-races/> and “Golden declares victory in House race ahead of ranked choice runoff,” November 10, 2022, Spectrum News. Available at: <https://spectrumlocalnews.com/me/maine/politics/2022/11/10/golden-declares-victory-ahead-of-ranked-choice-instant-runoff>

⁸ See: “Missed it by that much, Part I,” March 2021, Save Our States blog. Available at: <https://saveourstates.com/blog/missed-it-by-that-much-part-1>

conducting recounts will also come to different conclusions regarding the standards for determining “voter intent” – essentially, a repeat of the “hanging chads” vs. “pregnant chads” issue from Florida 2000.

Instead of a national recount capable of producing an accurate national vote total, only a partial, inconsistent recount in some but not all states could be conducted, sowing further chaos and distrust in the outcome.

- State laws and election processes can sometimes operate in ways that do not affect the outcome under the current system but would lead to odd results and pose a serious problem for the compact. For example, California permits what is known as “dual labeling” for presidential elections, meaning that more than a single party can endorse the same candidate. This happened in 2016 when the American Independent Party endorsed the Trump/Pence ticket. That ticket appeared on the ballot on a single line with both the Republican and American Independent designations, although the American Independent Party nominated a different slate of presidential electors than the Republican Party. Because there was no way for California election officials to differentiate between a voter supporting the Republican slate or the American Independent slate, they treated and reported every Trump/Pence voter as having cast two votes, one for the Republican slate and a second vote for the American Independent slate.

This did not change the outcome in California, where electors for the Clinton/Kaine ticket received 8,753,788 votes while the Republican and American Independent slates tied for second place with 4,483,810 votes each. But because 4,483,810 votes are reported on the state’s Certificate of Ascertainment for the Republican slate of electors and another 4,483,810 votes are reported separately for the American Independent slate, both pledged to the Trump/Pence ticket, for NPV’s purposes California effectively doubles the vote totals for the Trump/Pence ticket, crediting it with an extra 4,483,810 votes. These extra votes on California’s 2016 certificate of Ascertainment would have been enough to overcome the Clinton/Kaine ticket’s real-world national margin of roughly 2.8 million votes and meant naming the Trump/Pence ticket the winner of the National Popular Vote if the compact had been in effect.⁹

⁹ See: “2016 ‘National Popular Vote’ winner – Donald Trump?” November 2022, Save Our States blog. Available at: <https://saveourstates.com/blog/2016-national-popular-vote-winner-donald-trump>

- The compact stipulates that votes will only be included from states that hold a “statewide popular election.” As explained in the book *Every Vote Equal*, published by National Popular Vote, this doesn’t actually mean every state where people vote for presidential electors, it means every state where people vote for presidential electors according to National Popular Vote’s definition of a “statewide popular vote.”¹⁰

There is a very real possibility that some states may in the future adopt alternatives to the “winner take all” system currently used by most states, but that these reforms would cause their popular votes to be ignored under NPV. For example, a few years ago legislation was introduced in Arizona that would adopt a congressional method system like Maine has, in which voters would pick presidential electors by congressional districts, but the legislature would chose the last two electors.¹¹ Even though under this system millions of Arizonans would be going to the polls to cast their votes, NPV would reject them because the system wouldn’t meet the compact’s definition of a “statewide popular election,” which would surely cause national outrage and cast doubt on the legitimacy of the election.

- The compact can be easily gamed or manipulated. One fairly simple way for a state to increase its influence in the final outcome would be to expand voting rights to those under 18, or allowing parents to cast votes on behalf of their minor children. California could add an additional million voters to the national tally simply by allowing 16- and 17-year-olds to vote. Another option would be for the chief election official of a state to report on its “official statement” each voter as having cast as many votes as the state has presidential electors. Based on 2020 results, if Wyoming’s Secretary of State – an individual currently characterized as an “election denier” by some¹² – were to do so, it would add nearly a quarter-million net votes to the Republican’s national vote totals, and more populous states that tend to vote strongly for one party’s candidate can easily add millions of net votes to the national vote count. The chief election officials in NPV member states would be required to accept these inflated vote totals.

¹⁰ Article III, Section 1 of NPV stipulates that votes will be included in the national vote count if they have been cast in a “statewide popular election” and defines that term in Article V, Section 8 in such a way to exclude elections in which, for example, voters can vote for individual presidential electors or votes are not tabulated “on a statewide basis.”

¹¹ HB 2476, available at: <https://apps.azleg.gov/BillStatus/BillOverview/76974>

¹² “Meet the First Election Denier Poised to Win for Secretary of State This Year,” August 2022, Bolts. Available online at: <https://boltsmag.org/wyoming-first-election-denier-secretary-of-state/>

Finally, I want to address a claim NPV's lobbyists have advanced in other states and that may have been made here as well, which is that only the opponents of NPV have identified any alleged defects in this "perfect" compact, and that we are doing so because we don't want to talk about the "one person, one vote" issue.

For the record, I am happy to discuss the issue of "one person, one vote." The main point I will make here is that "one person, one vote" is an important democratic principle, but it is not the only important democratic principle. It exists alongside other important values including representation for a broad range of interests and communities, protection for minorities, and federalism. The Electoral College embraces all of these values, including "one person, one vote" at the state level.

And it is not only opponents of NPV able to find many of these same faults in the compact.

For example, Professor Robert Bennet of Northwestern University's law school has characterized the compact's inability to deal with the need for a nationwide recount as its "most glaring defect."¹³ Bennet also dings NPV for "blithely" claiming that existing state laws are sufficient to handle any recount issues and he further argues that a "real solution" to this problem is needed rather than the "bravado" offered by the compact's backers.¹⁴

Professor Bennet is one of the three law-professors who initially developed the idea in 2001 of an interstate compact along the lines of NPV.

Another law professor in the past few years has referred to NPV as "a bit of a harebrained scheme" that "has some problems."¹⁵ Regarding the issue of states inflating their share of the national vote count, he wrote: "...California could say: 'Now that we have the National Popular Vote Interstate Compact and we're going to look at the national popular vote, we're going to let seventeen-year olds vote.' Texas might then say: 'Ah, that's very interesting, now California is going to play a little bigger role because more Californians are going to vote, so we're going to let sixteen-year olds vote.' Then Arkansas comes along and says: 'Well, actually, we're going to let dogs vote.'"¹⁶

Those are the comments of Professor Akhil Amar at Yale's law school, the second of the three professors who initially developed the NPV concept back in 2001.

¹³ Robert W. Bennett, "Possibilities and Problems in the National Popular Vote Movement," p. 183-184, *Election Law Journal* 7, No. 3. Sep. 2008

¹⁴ *Ibid*, p. 184

¹⁵ Akhil Amar, "Remarks by Akhil Reed Amar," *Fordham Law Review* 89, no. 1, October 2020, pp. 9-12

¹⁶ *Ibid*

Akhil Amar's brother is Professor Vikram Amar at the University of Illinois law school, and he is the third of the three law professors who initially developed the NPV concept. He has concluded that this compact has "dangerous gaps" that could lead to "electoral crises"¹⁷ and a "historic debacle."¹⁸ He urges states considering adopting NPV to include a 10-year delay in its effective date, which he hopes will give Congress time to pass legislation fixing the many defects in this compact.

The law professors who first dreamed this compact up are not the only people who are supportive of the concept but highly critical of this particular compact and its defects. Several experts in the alternative voting community, which includes not just ranked choice voting but also things like approval voting, range voting, and STAR voting, have concluded that NPV can only work with traditional plurality voting.

For example, Dr. Warren D. Smith of the Center for Range Voting warns that there will be a "train wreck" if NPV and RCV are used together and says that "Different kinds of voting systems in different states simply were not designed to be agglomerated to yield one overall popular vote winner."¹⁹

Aaron Hamlin, president of the Center for Election Science which advocates for approval voting, explained in a 2013 interview that NPV "would still just be [p]lurality [voting]," and that the compact would need to be "adapted for Approval Voting"²⁰ while Steve Cobb of Unsplit the Vote observed that "...[NPV] was unfortunately written assuming the current [plurality voting] method, with no regard for alternative voting methods..."²¹

The website for the organization promoting STAR Voting explained that "When the National Popular Vote Interstate Compact (NPVIC) was drafted, no provisions were made and no clause was included which specifies how the popular vote would be counted in states which use

¹⁷ Vikram Amar, "Overcoming Partisan Objections to Electoral College Reform: How Red States Could (and Should) Adopt the National Popular Vote Interstate Compact But Defer Implementation Until 2032," April 2019 at Justia.com. Available at: <https://verdict.justia.com/2019/04/18/overcoming-partisan-objections-to-electoral-college-reform>

¹⁸ Vikram Amar, "The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, The National Popular Vote Compact, and Congressional Power," p. 11, October 2011, UC Davis Legal Studies Research Paper Series. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936374

¹⁹ "Warning! Voting reform trainwreck approaching – need to act now to avoid the problem," available at: <https://www.rangevoting.org/NPVtrainwreck.html>

²⁰ Adrian Tawfik, "Interview with the president of the Center for Election Science," March 2013, *Democracy Chronicles*, available at: <https://democracychronicles.org/interview-with-president-of-center-for-election-science/>

²¹ "The NPVIC and Approval Voting," available at: <https://unsplitthevote.org/the-npvc-and-approval-voting/>

alternative voting methods for the presidential general election. Because the NPVIC has already been signed by a number of states, it's too late to add this clause to the original compact."²²

Dr. Jameson Quinn, an elections scholar and board member of the Equal Vote Coalition, supports NPV but has also stated that "NPV is not, and will never be, compatible with a non-summmable method like [RCV]."²³ In order to address this defect, the Equal Vote Coalition promotes on its web site a proposed "Alternative Voting Interstate Compact" designed to allow vote totals from states using alternatives to plurality voting to be "consistently and accurately" reported for use with NPV.²⁴

Another fan of the compact who recognizes some of its flaws is Professor Alex Keyssar, a history professor at Harvard and author of the book *Why Do We Still Have the Electoral College?* He's described NPV as "inherently unstable."²⁵ He has also shared that at least some backers of NPV see the compact's instability as leverage to force Congress to push through a Constitutional amendment abolishing the Electoral College. "There is a political scenario here, which is talked about quietly, which is get the compact somewhere close to 270, which will threaten chaos and then compel Congress to turn its attention to an amendment," he explained in a 2020 interview.²⁶

Finally, and perhaps most tellingly, is the testimony of former Connecticut State Representative Brian Becker, a Democrat who seems to favor the idea of NPV but was concerned enough about its defects that he testified against it in a 2014 hearing, calling it "procedurally flawed." He continued: "The procedural flaws could create great uncertainty for the chief election officials of member states who are charged with certifying the results of the presidential election. Even more troubling, the bill's defects could disenfranchise the voters in those states who join the compact."²⁷

²² "How Would STAR Voting work with the National Popular Vote Interstate Compact?"

https://www.starvoting.org/presidential_elections

²³ Google Groups message, February 2018. Available at: <https://groups.google.com/g/electionscience/c/OLkt-G2ilTo/m/Rw5gHTk6AgAJ>

²⁴ "Alternative Voting Interstate Compact," available at: https://www.equal.vote/interstate_compact

²⁵ Chris Maisano, interview with Professor Alexandar Keyssar, "We Still Need to Abolish the Electoral College," October 2020, *Jacobin*. Available at: <https://jacobin.com/2020/10/electoral-college-abolish-keyssar-trump-election>

²⁶ Lily Fowler, "Electoral College is new target of BLM activists," November 2020, *Crosscut*. Available at: <https://crosscut.com/equity/2020/11/electoral-college-new-target-seattle-blm-activists>

²⁷ Brian Becker, "Statement of Brian S. Becker, State Representative for the 19th Assembly District before the Committee on Government Administration and Elections of the Connecticut General Assembly... in opposition to HB 5126, An Act Concerning An Agreement Among the States to Elect the President of the United States by National Popular Vote," February 2014.

Becker described the response off NPV's lobbyists when he shared his concerns with them and suggested changes that could correct the compact's defects: "Advocates for the National Popular Vote have told me that we cannot change the bill because 9 or 10 states have already passed it "as is" and it would be too hard to get them to change it... Those same advocates also have told me the courts would have to resolve the issues set forth herein." ²⁸

Becker concluded his testimony by declaring "I do not think we should pass legislation that we know in advance is defective in the hopes that a court will later be able to solve a problem that we could not."²⁹

The National Popular Vote compact would not only silence the voice of Maine's people in the presidential election process, it would lead the nation to "electoral crises" and "historic debacle" as a result of it's numerous defects, as even many of those inclined to favor it have admitted. I urge you to reject this legislation.

²⁸ Ibid

²⁹ Ibid