Good morning, Senator Hickman, Representative Supica, and members of the Veterans and Legal Affairs Committee.

My name is Jim Walker, and I live in Yarmouth, ME. I am testifying in support of LD 1578, "An Act to Adopt an Interstate Compact to Elect the President of the United States by National Popular Vote."

In 2016, Donald Trump lost the popular vote by 2.9 million votes but won the election through the Electoral College. That was not a representative result of the majority of voters.

Worse, in 2021, Donald Trump and his co-conspirators sought to force Vice President Pence to stop the Electoral count, a usually ceremonial process, and replace the duly certified Electoral College with 84 fake electors. In the most extreme action since the War of 1812, Donald Trump's followers almost stopped the Electoral College count with a violent attack on and inside our nation's capital on January 6th, 2021. We all watched it in horror on TV.

Concerns have now been raised in the press that a future Electoral College process could produce a tie, throwing the election to the House of Representatives, where each state gets just one vote, hardly a Democratic process of the will of the voters.

We need to support a more democratic process not subject to dirty tricks, violence, or questionable legal maneuvers.

The Electoral College does not represent the principle of one person, one vote, denying voters in Maine – Democratic and Republican – their voice in the selection of the President. In the National Popular Vote, all voters get an equal say in selecting the President without an intermediary Electoral College, subject to manipulation, filtering the direct vote of the people.

Please support LD 1578. Thank you for the opportunity to testify.

National Popular Election of the President

National Popular Vote!

www.NationalPopularVote.com

Answering 15 False Statements about Vote Counting under the National Popular Vote Bill in Maine (LD1578)

January 6, 2024

Save Our States (the leading group lobbying against adoption of the National Popular Vote Compact) has made numerous false statements about the vote-counting procedures under the Compact (LD1578) during recent testimony to state legislative committees in Michigan, Minnesota, Nevada, and Alaska and in other written public statements.

All of these false statements depend on inaccurate statements about what is actually in the National Popular Vote Compact, what is in existing federal law, or other easily verified facts.

Meanwhile, the opponents of the National Popular Vote Compact never address—and cannot address—the shortcomings of the current system of electing the President, namely that it does not

- guarantee the Presidency to the candidate who gets the most votes nationwide,
- make every vote equal throughout the country, and
- give candidates a reason to campaign in all 50 states in every election.

Here are the 15 false statements.

Clickable Table of Contents:

Myth #1: There is no such thing as an official national popular vote count.

In written testimony to the Michigan House Elections Committee on March 7, 2023, Sean Parnell, senior legislative director of Save Our States (a group lobbying against adoption of the National Popular Vote Compact) said:

> "The core defect of the compact, which is that **there is no official national vote count** that can be used for this compact."[1]

THE FACTS:

Contrary to Parnell's statement, there **is** an official national popular vote count.

Long-standing federal law requires that each state governor issue an official certified count of the popular votes cast in the state for each presidential-vice-presidential slate.

Specifically, current federal law requires that each state governor issue a "Certificate of Ascertainment" containing the number of popular votes received by each candidate no later than six days before the Electoral College meeting.

Current federal law (the Electoral Count Reform Act of 2022) requires:

> "Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of **each State shall issue a certificate of ascertainment.** ... **Each certificate of ascertainment of appointment of electors shall set forth** the names of the electors appointed and **the canvass** or other determination under the laws of such State **of the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast."[2] [Emphasis added]

This section is similar to the wording of the earlier Electoral Count Act of 1887 which was in effect between 1887 and 2022.[3] In fact, federal law has required the executive of each state to issue certificates reporting on the results of presidential elections since 1792.[4]

The 51 Certificates of Ascertainment showing each state's popular-vote count for President in 2020 may be viewed at https://www.archives.gov/electoral-college/2020.

Current federal law also requires that each state transmit its Certificate of Ascertainment to the National Archives

> "immediately after the issuance ... by the most expeditious method available."[5]

Federal law also requires that the National Archives, make the certificates "public" and "open to public inspection."

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[1] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact)*. March 7, 2023. Page 2. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[2] Section 5 of the Electoral Count Reform Act of 2022 https://uscode.house.gov/view.xhtml?path=/prelim@title3/chapter1&edition=prelim. This section is similar to the wording of the earlier Electoral Count Act of 1887 which was in effect between 1887 and 2022.

[3] The 1887 Electoral Count Act may be found (starting on page 6) of https://www.every-vote-equal.com/sites/default/files/eve-4th-ed-appendixa-hh-web-v1.pdf

[4] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

[5] Section 5 of the Electoral Count Reform Act of 2022 https://uscode.house.gov/view.xhtml?path=/prelim@title3/chapter1&edition=prelim..

To ensure the timely issuance and transmission of each state's Certificate of Ascertainment, the Electoral Count Reform Act of 2022 (passed in response to the tumultuous events of January 6, 2021) created a special three-judge federal court whose sole function is to enforce the federal requirement for the timely "issuance" and prompt "transmission" of each state's Certificate. This new court is open only to presidential candidates. It operates on a highly expedited basis, with expedited appeals. Specifically, all issues are required to be resolved by the new court and the U.S. Supreme Court before the Electoral College meeting.

There is an official legal definition of the "national popular vote total," and it is contained in the National Popular Vote Compact.

The Compact arrives at the national total by simple arithmetic—adding up the officially certified number of popular votes received by each presidential candidate in each state. The Compact states:

> "The chief election official of each member state shall determine the number of votes for each presidential slate in each state ... and **shall add such votes together to produce a "national popular vote total"** for each presidential slate."[6] [Emphasis added]

Parnell tries to characterize the simple arithmetic process of adding up the 51 numbers for each presidential candidate as some kind of perplexing and unresolvable mystery. He told the Minnesota House Elections Finance and Policy Committee on February 1, 2023:

> "There is no official national popular vote count. There are 51 official state vote counts that **national popular vote attempts to cobble together**."[7] [Emphasis added]

There is no mystery or ambiguity—much less cobbling—when it comes to adding up the official vote counts from the 50 states and the District of Columbia.

In fact, the National Popular Vote Compact arrives at the national popular vote total in the same way as the constitutional amendment passed by a bipartisan 338–70 vote in the U.S. House of Representatives in 1969—namely simple arithmetic. That amendment relied on adding up the official numbers certified by the states and simply said:

> "The pair of persons having **the greatest number of votes** for President and Vice President shall be elected..."[8] [Emphasis added]

Although defenders of the current state-by-state winner-take-all system deny the existence and accuracy of the official presidential vote counts certified by the states in connection with the National Popular Vote Compact, they nonetheless extol the reliability of the very same numbers when they have been used to decide the presidency (such as the 537-vote difference in Florida that made George W. Bush President in 2000, or the margins of 10,704 in Michigan, 22,748 in Wisconsin, or 44,292 in Pennsylvania that made Donald Trump President in 2016).

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[6] National Popular Vote Compact. Article III, Clause 1. The full text of the Compact is at https://www.nationalpopularvote.com/bill-text The Compact may also be found starting on page 4 of Alaska Senate Bill 61 at https://www.akleg.gov/PDF/33/Bills/SB0061A.PDF

[7] Parnell, Sean. 2023. *Testimony at Minnesota House Elections Finance and Policy Committee on HB642.* February 1, 2023. Timestamp 1:11:14. https://www.house.leg.state.mn.us/hjvid/93/896232

[8] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

Myth #2: The National Popular Vote Compact provides no way to resolve disputes

Sean Parnell wrote in 2021:

> "What if there was a problem with the election or vote counting in another state? **The National Popular Vote has no way to resolve disputes** or deal with even common challenges. ... Under the National Popular Vote, controversies in one or more states **could make it impossible to determine a winner**."[9] [Emphasis added]

Parnell's written testimony to the Minnesota Senate Elections Committee on January 31, 2023 said:

> **"NPV provides no mechanism for resolving** differences or **disputes**.... NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and similar issues, makes it **fatally flawed and dangerous to democracy**."[10] [Emphasis added]

THE FACTS:

The reason why the National Popular Vote Compact is silent as to how to adjudicate disputes is the same reason why almost all new federal or state laws (including other interstate compacts) are silent about this matter, namely the United States already has a fully operational judicial system throughout the country.

Litigation arising under state election laws and interstate compacts are handled under long-established *book-length* state and federal judicial codes that specify *general* procedures for adjudicating disputes.

A state's determination of its presidential vote count may be challenged under the National Popular Vote Compact in the **same** five ways that it can be challenged under the current system, namely

- state administrative proceedings (e.g., recounts, audits),
- lower state court proceedings,
- state supreme court proceedings,
- lower federal court proceedings, and
- U.S. Supreme Court proceedings.

Aggrieved presidential candidates used all five ways in both 2000 and 2020.

In 2000, for example, Florida's winner-take-all law for awarding the state's electoral votes provides no mechanism for resolving disputes. Nonetheless, when a dispute arose in 2000 involving Florida's presidential vote count, the dispute was adjudicated on a timely basis in accordance with pre-existing *general* procedures that enabled state and federal courts to adjudicate disputes. All of the administrative and judicial proceedings occurred during the period between Election Day (November 7, 2000) and the "safe harbor" date (December 12). The dispute was settled before the Electoral College met on December 18, 2000.

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[9] Parnell, Sean. 2021. Protect Florida's Electoral College power. *Herald Tribune*. May 17, 2021. https://www.heraldtribune.com/story/opinion/columns/guest/2021/05/17/opinion-protect-floridas-power-electoral-college/5109604001/

[10] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

In 2020, Donald Trump and his supporters filed 64 cases containing 187 counts in six battleground states and utilized recount procedures in two battleground states.[11,12]

Disputes about presidential vote counts are litigated in the period between Election Day and the federally established date (six days before the Electoral College meeting) for a state arriving at its "final determination" of its presidential vote count and issuing its Certificate of Ascertainment.

To guarantee enforcement of the federal requirement for timely issuance and prompt transmission of each state's Certificate of Ascertainment to the National Archives, the Electoral Count Reform Act of 2022 added a special three-judge federal court (open only to presidential candidates, operating on an expedited basis, and with expedited appeals).

Finality is required from all states before the Electoral College meets because the U.S. Constitution requires that all states cast their electoral votes on the same day.[13]

Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms the Compact. For example, while falsely claiming that there is no way to adjudicate disputes under the Compact, they simultaneously claim that litigation under the Compact will overwhelm the courts.

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[11] See The Ohio State University's Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

[12] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. www.lostnotstolen.org

[13] U.S. Constitution. Article II, section 1, clause 4. https://constitution.congress.gov/browse/article-2/section-1/clause-4/

Myth #3: The Compact allows a state to judge counts from other states

In written testimony submitted to the Minnesota Senate Elections Committee on January 31, 2023, Parnell said:

> **"NPV provides no guidance on which vote totals to use in calculating the national vote total.** The choice is left to the chief election official within each compact state. ... In a close election, this could **give a group of often obscure state officials the power to manipulate the national vote count based on which vote totals they use from other states.** ... This is too much power to vest in any official, and will lead to confusion, controversy, and chaos."[14] [Emphasis added]

In a video produced by Save Our States, Parnell said:

> "The chief election official in an NPV state [has] a pretty broad degree of latitude to, you know, essentially decide the election the way they want to, ... deciding which votes to count, ... and which they might reject, and which they might have to estimate. ... And that's a pretty scary scenario."[15]

Trent England, the Executive Director of Parnell's employer (Save Our States) wrote in 2021:

> "The NPV compact simply grants power to the top election official in each state to determine the national popular vote winner for that state. In other words, **officials in various states would just decide, on their own and with no legal guidance, which numbers to use.**"[16] [Emphasis added]

THE FACTS:

In fact, the National Popular Vote Compact does **not** give administrative officials in the states belonging to the Compact any power to judge, second-guess, or manipulate the election returns of other states.

Instead, the Compact explicitly states the opposite:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate."[17] [Emphasis added]

In short, the chief election officials of the states belonging to the National Popular Vote Compact perform a purely ministerial function, namely to use simple arithmetic to add up the official presidential-vote counts that have been finalized and certified by the state of origin.

Not only does the National Popular Vote Compact not give administrative officials of states belonging to the Compact any power to judge, second-guess, or manipulate the decisions made in the state-of-origin, it would almost certainly be unconstitutional if it did.

As discussed in connection with myth #2, there are five ways to litigate a state's presidential vote counts at the administrative and judicial level inside the state of origin. After this litigation,

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[14] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote.* January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[15] Save Our States. 2022. Six Questions. Video with Trent England and Sean Parnell. May 13, 2022. Timestamp 19:30. https://www.youtube.com/watch?v=TNk3VIoP8dU

[16] England, Trent, 2021. Failed Attempt to Reconcile NPV, RCV in Maine. Save Our States Blog. May 14, 2021.

[17] National Popular Vote Compact. Article III, Clause 5. The full text of the Compact may be at https://www.nationalpopularvote.com/bill-text

federal law requires finality. In particular, it requires that the state certify its final determination of its presidential vote counts no later than six days before the Electoral College meeting.

Thus, a questionable presidential vote count from a state will necessarily have been litigated in judicial and/or administrative proceedings in the state of origin *before* the "safe harbor" day—that is, *before* the officials of the states belonging to the National Popular Vote add up the vote counts from other states.

Under our federal system, once a dispute has been litigated in the state-of-origin, the Full Faith and Credit Clause of the U.S. Constitution prevents another state's officials (both administrative or judicial) from second-guessing that decision. The Constitution states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[18]

On December 7, 2020, Texas Attorney General Ken Paxton challenged that cornerstone of federalism by requesting that the U.S. Supreme Court allow the state of Texas to file a complaint against the state of Pennsylvania challenging Pennsylvania's presidential vote count.[19] The U.S. Constitution gives the Supreme Court exclusive jurisdiction over cases between states, and the Court usually gives states the chance to present their case.

Nonetheless, on December 11, 2020, the U.S. Supreme Court refused Texas's request, saying:

> "The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[20]

In short, the Compact does not put any state official in the position of judging the election returns from another state. Instead, the Compact—like the current system of electing the President—is based on this country's principles of federalism.

The reader should note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms of the Compact. For example, while falsely claiming that the Compact allows its member states to judge the election returns of other states, they simultaneously claim that member states are forced to accept other state's election returns (as discussed in the next section). The fact that opponents of the National Popular Vote Compact simultaneously raise contradictory criticisms suggests how much credence should be given to their criticisms.

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[18] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4/

[19] *Texas vs. Pennsylvania*. Motion for Leave to File Bill of Complaint. https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf

[20] *Texas v. Pennsylvania*. December 11, 2020. Order 155-ORIG. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

Myth #4: The Compact forces acceptance of vote counts from other states

Recall that in myth #3 above, Sean Parnell and Trent England of Save Our States claimed that the National Popular Vote Compact is flawed because it allows a state to judge another state's election returns.

Nonetheless, Parnell and England simultaneously complain that the Compact is flawed because it does not allow a state to judge the election returns of other states.

Parnell wrote in an op-ed:

> "The NPV compact also risks causing an electoral crisis due to its poor design. ... **States that join the compact are supposed to accept vote totals from every other state even if they are disputed, inaccurate, incomplete, or the result of fraud or vote suppression.**"[21] [Emphasis added]

Trent England testified before a Missouri Senate committee in 2016 saying:

> "In a National Popular Vote world, the state of **Missouri would, essentially, have to accept—without the ability to investigate or verify**—the results of ... the 49 [other] states and the District of Columbia."[22] [Emphasis added]

THE FACTS:

Parnell and England are correct in saying that the National Popular Vote Compact requires its member states "to accept vote totals from every other state."

However, they are wrong in suggesting that the National Popular Vote Compact somehow exempts questionable state vote counts from challenge, oversight, and review.

A state's final determination of its presidential vote count may be challenged under the National Popular Vote Compact in the same five ways that they can be under the current system, namely

- state administrative proceedings (e.g., recounts, audits),
- lower state court proceedings,
- state supreme court proceedings,
- lower federal court proceedings, and
- U.S. Supreme Court proceedings.

The Compact and the current system are identical in that challenges must be conducted through the administrative and judicial system of the state of origin and/or in the federal court system starting in the state of origin. Indeed, the state of origin is the place where the questionable events took place, where the records exist, where the witnesses (if any) are located, and where the administrative officials and judges are most knowledgeable about the applicable local laws and procedures.

Then, once a dispute has been litigated in the state-of-origin, the National Popular Vote Compact treats the result as conclusive. It is at this moment that the administrative officials of the states belonging to the Compact perform the purely ministerial arithmetic function of adding up the vote counts for each presidential candidate from each state.

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[21] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. Charlottesville Virginia *Daily Progress.* August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[22] Watson, Bob. 2016. Missouri Senate panel weighs popular vote for president. *Fulton Sun.* March 31, 2016. https://www.fultonsun.com/news/2016/mar/31/senate-panel-weighs-popular-vote-president/

Note that the National Popular Vote Compact is consistent with the Full Faith and Credit Clause of the Constitution and the principles of federalism on which the Constitution is based. Given that any state's questionable presidential vote count will necessarily have been litigated in judicial and/or administrative proceedings inside the state of origin before it finalized its vote count, the U.S. Constitution requires that

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[23]

Myth #5: States, like New York, can't be trusted to produce an accurate vote total

Parnell told the Michigan House Elections Committee on March 7, 2023:

> "New York cannot accurately count its votes to save its life."[24]

Parnell told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are **not necessarily going to produce an accurate vote total**. ... There's about 425,000 votes that New York was missing off of its 2012 Certificate of Ascertainment."[25] [Emphasis added]

He repeated this claim in testimony to the Alaska Senate State Affairs Committee on April 25, 2023[26] and the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[27]

THE FACTS:

In 2012, Hurricane Sandy resulted in the temporary relocation of hundreds of thousands of New Yorkers just before Election Day in 2012.

Some 425,000 displaced New York voters cast provisional ballots away from their home precinct—four times the usual number. Moreover, displaced voters were allowed to vote *anywhere* in the state—meaning that their provisional ballot may have contained some district and local offices for which they were not entitled to vote. Thus, each provisional ballot had to be individually analyzed to determine for which particular offices each out-of-precinct voter was entitled to vote.

After Election Day, it was apparent to everyone that the result of processing the 425,000 provisional ballots could not possibly have reversed Obama's statewide win in New York (almost two million votes)—or, for that matter, Obama's nationwide lead.

Under New York's existing winner-take-all law, Obama was entitled to receive all of New York's electoral votes—even if he received none of the 425,000 provisional votes.

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[23] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4

[24] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:02:20. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[25] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[26] Parnell, Sean. 2023. Testimony of Sean Parnell, Senior Director, Save Our States Action to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact). April 25, 2023. Page 2. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238

[27] Parnell, Sean. 2023. Testimony before Nevada Senate Legislative Operations and Elections Committee. May 2, 2023. Timestamp 4:33:14. https://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/?fk=12298&viewmode=1&autoPlay=false

In this "no harm–no foul" situation, the bipartisan New York State Board of Elections unanimously decided against diverting personnel engaged in hurricane relief to the task of counting these provisional ballots prior to the Electoral College meeting.

Instead, the Board issued a temporary count of all the regular ballots prior to the Electoral College meeting (which showed that Obama carried the state by 1,986,439 votes) and, shortly thereafter, issued a final official count that included all of the valid provisional ballots.

If these provisional ballots had had any chance of changing the winner of the presidential election, Douglas Kellner, Co-Chair of the New York State Board of Elections, has stated that the Board would have deployed whatever personnel were needed to validate and count all of the provisional ballots for President prior to the Electoral College meeting.

In any case, if any presidential campaign had felt that the delay in counting the provisional ballots adversely affected its interests, it could have sought (and undoubtedly would immediately have received) a court order requiring completion of the counting prior to the Electoral College meeting.

There have been other instances in other years when New York did not complete its final count of some provisional ballots until after the Electoral College met (albeit a much smaller number than resulted from Hurricane Sandy).

In each of these cases, the bipartisan New York State Board of Elections acted with unanimous consent. No presidential candidate or political party was adversely affected. The outcome of no election was affected. The allocation of no electoral votes was affected. And, every voter ultimately had his or her vote accurately counted and included in the final total.

Historical examples of New York being late in previous "no harm–no foul" situations do not mean that the state of New York would not comply with all state and federal deadlines in an election when a timely vote count actually mattered.

No reasonable person would suggest that there could be a delay in counting provisional ballots in a **future** election based on the nationwide vote count.

Nonetheless, Parnell falsely claimed that previous "no harm–no foul" counting delays that received unanimous bipartisan acceptance under the current winner-take-all method of awarding electoral votes "would be used" in a **future** election based on the nationwide vote count. Specifically, he told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are not necessarily going to produce an accurate vote total. In the last 4 presidential elections, New York has provided vote totals, **that would be used under the compact**, that have been missing tens or even hundreds of thousands of votes."[28][Emphasis added]

In any case, the Electoral Count Reform Act of 2022 established a special three-judge federal court—open only to presidential candidates and operating on a highly expedited schedule—to enforce the timely "issuance" of each state's Certificate of Ascertainment and its immediate "transmission" to the National Archives.

New York's previous delays in counting provisional ballots should serve as a reminder as to why a national popular vote for President is needed. Under the winner-take-all law that was in effect in 2012 (and today), the choices of the 425,000 voters displaced by the hurricane were not politically relevant. Under a national popular vote, those 425,000 votes would have been politically

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[28] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

relevant. Indeed, in a nationwide vote, every voter in every state would be politically relevant in every presidential election.

Myth #6: California accidentally gave Trump an extra 4.5 million votes in 2016

Sean Parnell testified before the Minnesota Senate Elections Committee on January 31, 2023, saying:

> "States ... are **not necessarily going to produce an accurate vote total**. ..."[29]
>
> "**California accidentally gave every Trump voter 2 votes in 2016 through a bad ballot design**, Donald Trump under the counting mechanism of the compact would have won, because they **gave him an extra 4.5 million votes**. That seems kind of outrageous to me."[30] [Emphasis added]

In his written testimony to the Michigan House Elections Committee on March 7, 2023, Parnell added:

> "States can sometimes just do strange things that would pose a serious problem for the compact. Because of an odd ballot design in 2016, **California wound up doubling the vote total for Donald Trump on its Certificate of Ascertainment, crediting him with an extra 4,483,810 votes**."[31] [Emphasis added]

Parnell has made similar statements about California giving Trump an extra 4.5 million votes to the Alaska Senate State Affairs Committee on April 25, 2023,[32] and to the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[33]

THE FACTS:

Despite what Parnell says, California's 2016 Certificate of Ascertainment was not inaccurate, and California did not give Trump an extra 4,483,810 votes—accidentally or otherwise.

If the National Popular Vote Compact had been in effect in 2016 and California had issued the same Certificate of Ascertainment that it issued in 2016, the states belonging to the National

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[29] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[30] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:33. https://www.youtube.com/watch?v=ZioPI__L-BM

[31] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact), March 7, 2023.* Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[32] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact), April 25, 2023.* Page 3. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238. Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[33] Parnell, Sean. 2023. *Testimony of Sean Parnell Senior Director, Save Our States Action to the Legislative Operations and Elections Committee, Nevada Senate, Re: AJR6 (The National Popular Vote interstate compact), May 2, 2023.* Page 3. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=68316&fileDownloadName=SenLOE_AJR6Testimony_SeanParnell_SeniorDirector_SaveOurStatesAction.pdf

Popular Vote Compact would have **uneventfully** credited the Trump-Pence ticket with the correct total number of votes from California—namely 4,483,810.

Here are the facts.

California's 2016 Certificate of Ascertainment unambiguously states that the Clinton-Kaine ticket's 8,753,788 vote total was "higher" than the vote total of any other ticket listed in the Certificate—including the 4,483,810 votes cast for the Trump-Pence ticket. The Certificate says:

> "I, Edmond G. Brown, Governor of the State of California, herby certify ... the following persons **received the highest number of votes** for Electors of the President and Vice President of the United States for the State of California ... **California Democratic Party Electors Pledged to Hillary Clinton for President** of the United States and Tim Kaine for Vice President of the United States ... **Number of Votes—8,753,788**."[34] [Emphasis added]

The only number appearing anywhere in California's 2016 Certificate of Ascertainment in connection with the Trump-Pence ticket is 4,483,810. Click here to see California's 2016 Certificate of Ascertainment.

If there were any truth to Parnell's claim that California accidentally gave Trump an extra 4,483,810 votes, then Trump would have received considerably more votes than Clinton's 8,753,788. In that case, Trump would have won California, and the Certificate of Ascertainment would have (1) identified the Trump-Pence ticket as having "received the highest number of votes" and (2) certified the appointment of 55 Trump-Pence presidential electors, instead of the 55 Democratic electors.

In falsely claiming that California "accidentally" gave Trump an extra 4,483,810 votes, Parnell neglected to mention that a presidential-vice-presidential ticket can be nominated by more than one political party under California's "fusion" voting law. In 2016, the Republican Party and American Independent Party both nominated the Trump-Pence ticket. Trump's **combined** support from Republican and American Independent voters was 4,483,810.

After National Popular Vote pointed out the egregious inaccuracy of Parnell's testimony to Michigan and Minnesota state legislators, Parnell doubled down on his false claim in his written testimony to the Alaska Senate State Affairs Committee on April 25, 2023, and accused National Popular Vote of "errors" and "deception."

> "Lobbyists for National Popular Vote have attempted to dismiss as 'myths' these and other problems when they have been raised in other hearings, but their responses are riddled with errors, false statements, and outright deception. They have claimed, for example, that California's 2016 Certificate of Ascertainment does not include an extra 4,483,810 votes for Trump, and the whole issue is a misunderstanding related to California's use of fusion voting. **But California does not have fusion voting**."[35] [Emphasis added]

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[34] California's 2016 Certificate of Ascertainment is at https://www.archives.gov/files/electoral-college/2016/ascertainment-california.pdf

[35] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact) April 25, 2023*. Page 4. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238 . Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

However, despite Parnell's assertion to the Alaska Committee on April 25, the fact is that California **does** have fusion voting (and, of course, California did not give Trump an undeserved 4,483,810 votes).

As *Ballot Access News* reported in 2016:

> "On August 13, the American Independent Party held its state convention in Sacramento, and nominated Donald Trump for President and Michael Pence for Vice-President. **The California election code, section 13105(c), permits two qualified parties to jointly nominate the same presidential and vice-presidential candidates.** The November ballot will list Trump and Pence, followed by 'Republican, American Independent.' ... **This will be the first time since 1940 that two parties in California jointly nominated the same presidential candidate.**"[36,37] [Emphasis added]

The reader is invited to check out California election code, section 13105(c) to verify that California does indeed have fusion voting.

If the National Popular Vote Compact had been in effect in 2016 and California had issued the same Certificate of Ascertainment that it issued in 2016, the states belonging to the National Popular Vote Compact would have uneventfully credited the Trump-Pence ticket with its correct total number of votes from California—namely 4,483,810.

However, for sake of argument, suppose administrative officials in some state ever reported an undeserved 4,483,810 votes on a Certificate of Ascertainment. Regardless of whether an election is being conducted under the current system or the National Popular Vote Compact, the opposing presidential campaign would immediately have gone to court in the state involved, and the court would have ordered a corrected Certificate of Ascertainment.

Myth #7: NPV assumes every state will always use simple plurality voting

Parnell told the Minnesota Senate Elections Committee on January 31, 2023:

> "The NPV compact was drafted at a time when RCV was not used in any states in presidential elections. Since then, Alaska and Maine have adopted RCV and other states are considering it. **NPV assumes every state will use simple plurality voting** that produces a single vote count for each presidential candidate."[38] [Emphasis added]

THE FACTS:

The National Popular Vote Compact was specifically written to accommodate the future adoption of different voting procedures—specifically including Ranked Choice Voting (RCV). In fact, the president of FairVote (the leading national organization advocating in favor of RCV) was

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[36] Winger, Richard. 2016. American Independent Party Formally Nominates Donald Trump and Michael Pence. Ballot Access News. August 13, 2016. https://ballot-access.org/2016/08/13/american-independent-party-formally-nominates-donald-trump-and-michael-pence/

[37] A listing of all the states currently using fusion voting can be found in Loepp, Eric and Melusky, Benjamin. 2022. Why Is This Candidate Listed Twice? The Behavioral and Electoral Consequences of Fusion Voting. *Election Law Journal.* June 6, 2022. https://www.liebertpub.com/doi/10.1089/elj.2021.0037

[38] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote.* January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

a co-author of the Compact, and FairVote was the first organization to endorse the Compact when it was publicly released in 2006.

The National Popular Vote Compact does not assume that every state will always use simple plurality voting, and the Compact and Ranked Choice Voting are compatible, as discussed in the next section.

Myth #8: NPV is incompatible with RCV

Parnell told the Minnesota Senate Elections Committee on January 31, 2023:

> "There is a fundamental incompatibility between the National Popular Vote interstate compact (NPV) and an election process used by some states called Ranked Choice Voting (RCV). NPV anticipates that every state will produce a single vote total for each candidate, but **RCV produces at least two: an initial vote count, before the RCV process of transferring votes, and the final vote count** at the conclusion of the RCV process. **This would produce uncertainty**, litigation, and opportunities for manipulation if NPV took effect."[39] [Emphasis added]

THE FACTS:

Note Parnell's careful choice of wording here—He says that RCV "produces" a first-round vote count and a final vote count.

However, there is no legitimate uncertainty as to whether to use the first-round count or the final-round count in computing the national popular vote.

Indeed, it would be preposterous to interpret RCV to mean that a state is going to hand voters a ballot allowing them to rank presidential candidates according to their first, second, etc. preferences—but that the state is then going to ignore every ranking on the voter's ballot except the voter's first choice.

Using only the first-choice count would negate the main purpose of adopting an RCV law, namely to give voters the opportunity to rank candidates and have their rankings matter.

Note also that the outcome of *every* election in *every* state and *every* local jurisdiction that uses RCV (including Maine and Alaska) is based on the final-round count—not just the first-choice votes in the first round.

In short, there is no good-faith legal argument in favor of using anything other than the final-round count produced by RCV.

In any case, in 2021, Maine exhibited an abundance of caution and eliminated any room for doubt by explicitly requiring that the state's Certificate of Ascertainment report the final-round RCV count.[40]

Jeanne Massey, Executive Director of FairVote Minnesota, submitted written testimony to the Minnesota House Elections Finance and Policy Committee on February 1, 2023, affirming this point:

> "I have read the opposing testimony related to RCV and National Popular Vote compatibility, and it is misleading and incorrect. **The testimony comes from an organization opposed to both RCV and NPV [that is, Save Our States] and has**

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[39] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[40] Maine Revised Statutes. Title 21-A, §803. https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html

> **a clear motive—to hurt both reforms**. Like Maine, which uses RCV for presidential elections and has clarified its state laws to ensure compatibility with electing presidential electors under NPV, Minnesota will do the same. I urge you to disregard the unproven, misleading argument that RCV and NPV are incompatible and support the NPV legislation before you."[41] [Emphasis added]

If this question of statutory interpretation is not clear in Alaska before the time when the National Popular Vote Compact is used, RCV supporters in Alaska and other Alaska voters would need to know whether their rankings will matter, because that would affect how many voters would vote. If the state failed to provide a definitive answer, supporters of RCV in Alaska would undoubtedly seek a declaratory judgement from Alaska courts before voting begins. Courts necessarily answer such questions before the election, because the doctrine of *laches* requires them to reject challenges in which the plaintiff was aware of the issue before the election, but waited to see the election results before raising the issue.

In any case, this question of statutory interpretation would be litigated in courts in Alaska. Alaska's Certificate of Ascertainment will then reflect the state's final determination of its presidential vote count in accordance with that statutory interpretation. Whatever that decision, the National Popular Vote Compact requires that the states belonging to the Compact to treat Alaska's "final determination" as "conclusive." Thus, no state election official in states belonging to the Compact will have any discretion as to what votes to count from Alaska.

While the FairVote organization and the National Popular Vote organization believe that the correct interpretation is that the final-round RCV count be used for purposes of the National Popular Vote Compact, the alternative interpretation would present no operational difficulty for the Compact.

It should be noted that this issue of statutory interpretation in Alaska is unlikely to have any practical effect. Alaska's RCV law (and RCV laws in general) provide that the counting process stops at the first round whenever a candidate wins a majority of the first-choice rankings—that is, the first-round RCV count *is* the final-round RCV count. The Republican presidential nominee has won a majority in Alaska in every election in the last 50 years (except 1992, when the Republican presidential nominee received only 40% of the popular vote in the state while Ross Perot received 28%).

In November 2024, Nevada and Oregon voters will be deciding whether to their states will use RCV in future elections. Nevada's proposed RCV law does apply to presidential elections. Oregon's proposed RCV law explicitly states that the final-round RCV count will be the state's final determination of its presidential election results in the state's Certificate of Ascertainment. RCV initiative petitions may possibly be circulated in the District of Columbia for the November 2024 ballot. That petition explicitly states that the final-round RCV count will be the final determination of its presidential election results in the District's Certificate of Ascertainment.

Myth #9: The NPV Compact allows vote totals to be estimated

There are three inaccuracies in the sentence below from Parnell's testimony to the Michigan House Elections Committee on March 7, 2023.

In this section, we consider Parnell's claim about estimating votes.

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[41] Massey, Jeanne. 2023. Testimony before Minnesota House Elections Finance and Policy Committee. February 1, 2023. https://www.house.mn.gov/comm/docs/TYRWZhxR-kCyJCxmXC5Z1Q.pdf

"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 is simply refusing to cooperate with the compact, 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.**"[42] [Emphasis added]

Parnell's written statement to the North Dakota Government and Veterans Affairs Committee on March 18, 2021, said:

"The language of the compact requires member states to 'determine the number of votes' in each state, **which may leave the door open for them to concoct estimated vote totals** to use."

"This means that some compact member states **might use estimated vote totals** for North Dakota."[43]

THE FACTS:

There is nothing in the National Popular Vote Compact that gives anyone the authority to estimate vote counts.

The reader is invited to search the 888 words of the National Popular Vote Compact for anything about estimating.

As previously mentioned, the Compact requires:

"The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate."[44] [Emphasis added]

Myth #10: Unfinished recounts and litigation could thwart the Compact

A second inaccuracy in this same sentence from Parnell's testimony to the Michigan House Elections Committee on March 7, 2023 relates to recounts and litigation.

"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 is simply refusing to cooperate with the compact, 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."[45] [Emphasis added]

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[42] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[43] Parnell, Sean. 2021. Testimony of Sean Parnell, Senior Legislative Director, Save Our States to the Government and Veterans Affairs Committee of the North Dakota House of Representatives. March 18, 2021. Committee Testimony for SB 2271. Document 9573.

[44] National Popular Vote Compact. Article III, Clause 5. The full text of the Compact is at https://www.nationalpopularvote.com/bill-text The Compact may also be found starting on page 4 of Alaska Senate Bill 61 at https://www.akleg.gov/PDF/33/Bills/SB0061A.PDF

[45] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page

THE FACTS:

The response to this myth applies equally to both the current system and the National Popular Vote Compact.

The U.S. Constitution explicitly requires that the Electoral College meet in each state on the same day throughout the United States.[46]

Administrators and courts have generally conducted post-election presidential recounts and litigation so as to reach a final determination of the state's vote count by six days before the Electoral College meeting (the so-called "safe harbor" day and federal deadline for issuing the state's Certificate of Ascertainment).

Such scheduling has historically been based on the presumption that each state wants to enjoy the benefit of the safe harbor provisions of the Electoral Count Act of 1887 (and the similar benefit in the 2022 Act).

Thus, disputes about presidential vote counts have historically been litigated inside the brief period (currently 36 days) between Election Day and the "safe harbor" day.[47]

The Electoral Count Reform Act of 2022 increased the importance of the "safe harbor" day by also making it the statutory deadline for a state to issue its Certificate of Ascertainment.

Nonetheless, despite best efforts at scheduling, it is conceivable that a presidential recount might not be finished prior to the federal statutory deadline.

Suppose that, for sake of argument, a presidential recount is not finished prior to the federal statutory deadline.

As the name implies, a "recount" occurs after the completion of the state's initial official count. That is, a certified count necessarily already exists prior to the start of a recount.

In the unlikely event that a recount remained unfinished by the federal statutory deadline, the state involved would nonetheless be obligated to comply with the requirements of the Electoral Count Reform Act of 2022 to issue a Certificate of Ascertainment by the federal deadline. Thus, this certificate would necessarily contain the already completed and certified initial count.

The Electoral Count Reform Act of 2022 recognized the possibility that Certificates of Ascertainment might need revision during the six-day period between the "safe harbor" day and the Electoral College meeting. Therefore, section 5(c)(1)(B) of the 2022 Act provides:

> " Certificates issued pursuant to court orders—Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section."

If the unfinished recount is completed in the six days between the federal deadline and the Electoral College meeting, a special three-judge federal court established by the Electoral Count Act of 2022 has the power to revise already issued Certificates of Ascertainment.

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3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[46] U.S. Constitution. Article II. Section 1. Clause 4. https://constitution.congress.gov/browse/article-2/section-1/clause-4

[47] In 2020, the case of *Texas v. Pennsylvania* was filed on December 7, 2020—a day before the "safe harbor" day. The Supreme Court refused to hear the case on December 11, 2020 (three days before the Electoral College meeting). Order 155-ORIG. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

The 2022 Act created a special three-judge federal court—open only to aggrieved presidential candidates—with jurisdiction over the "issuance" of the Certificates of Ascertainment and the "transmission" of the Certificates to the National Archives.

This special court is required to operate on a highly expedited schedule, and there is an expedited appeal to the U.S. Supreme Court. Given that the Constitution provides that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court (and possible Supreme Court review) are to be scheduled

> "so that a final order ... may occur on or before the day before the time fixed for the meeting of electors."

In addition, State law in at least one state (Michigan) empowers the state supreme court to order the issuance of a superseding certificate of ascertainment if a recount changes the previously certified results before the meeting of the Electoral College.[48]

If the recount is not completed before the Electoral College meeting, the clock would have run out for both federal and state courts—as it did in Florida in 2000. The U.S. Constitution specifically requires that all presidential electors cast their votes on the same day.

As a practical matter, it is important to realize that recounts are rare; recounts change very few votes; and recounts rarely reverse the result of the original count.

Data compiled by FairVote shows that there were 36 recounts among the 6,929 statewide general elections in the 24-year period between 2000 and 2023.

- The probability of a statewide general-election recount is 1-in-192.
- An average of only 526 votes are changed in a statewide recount.
- Only one in 12 recounts changed the outcome.

Given that so few recounts change the state-level outcome, one should not expect any change in the allocation of a state's electoral votes as a result of a recount under the current state-by-state winner-take-all method of awarding electoral votes.

Given that the 526 votes changed in the average recount is a miniscule fraction of the more than 158,000,000 votes cast nationally in the 2020 presidential election, one should not expect any change in the winner of the national popular vote as a result of a recount.

A state recount would (slightly) change the national popular vote total that each state belonging to the Compact reported on its Certificates of Ascertainment that it each issued by the "safe harbor" day.

However, for the sake of argument, let's consider the extremely remote possibility that the recount from one state actually changed the winner of the national popular vote.

In that event, the special three-judge court created by the Electoral Count Reform Act of 2022 provides the newly identified victor with a speedy mechanism for revising all the affected Certificates in states belonging to the National Popular Vote Compact.

Myth #11: A rogue governor can refuse to issue the Certificate of Ascertainment

There is a third inaccuracy in the sentence from Parnell's testimony to the Michigan House Elections Committee on March 7, 2023.

> "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

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[48] Michigan Public Act 269 of 2023 at https://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0269.pdf

> or court challenges to results, or **if a state is simply refusing to cooperate with the compact**, 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."[49] [Emphasis added]

Parnell has advanced the theory for many years that a rogue state governor has the power—at this one person's sole discretion—to cancel the votes of all of the state's voters by simply refusing (or even forgetting) to issue the Certificate of Ascertainment required by federal law. In his testimony to the Connecticut Government Administration and Elections Committee on February 24, 2014, Sean Parnell said:

> **"A very simple way for any non-member state to thwart the Compact, either intentionally or unintentionally,** would simply be to not submit their Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos.**" [Emphasis added]
>
> "**There is nothing in federal law that requires the governor to submit it prior to the meeting of the Electoral College.**"[50] [Emphasis added]

THE FACTS:

In fact, the federal law in effect in 2014 (namely the Electoral Count Act of 1887) did explicitly require that the governor submit the state's Certificate of Ascertainment prior to the Electoral College meeting. The 2022 federal law added the requirement that the Certificate be issued by six days before the Electoral College meeting.

In any case, governors do not have any other discretionary power concerning the presidential vote count—much less the unilateral power to keep the votes of the state's voters from being counted. A state governor's role in signing the state's Certificate of Ascertainment is an entirely ministerial function governed by federal law.

Furthermore, in 2022, Congress passed legislation double-locking the already-closed door on Parnell's rogue governor scenario. Specifically, section 5 of the Electoral Count Reform Act of 2022 requires each state to issue a Certificate of Ascertainment no later than six days before the Electoral College meeting. (The 1887 Electoral Count Act merely required the Certificate to be submitted prior to the Electoral College meeting, while conferring "safe harbor" status on the Certificate if it was issued six or more days before the Electoral College meeting.

The 2022 federal law requires that each state transmit its Certificate of Ascertainment "immediately after the issuance ... by the most expeditious method available" to the National Archives which, in turn, is required to make them "public" and "open to public inspection."

The 2022 Act also established a special three-judge federal court—open only to presidential candidates and operating on a highly expedited schedule—to enforce the "issuance" of each state's Certificate of Ascertainment and its "transmission" to the National Archives.

The National Popular Vote Compact does not rely on the gracious willingness of state officials to certify the choices made by their state's voters before the Electoral College meets. It does,

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[49] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[50] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

however, rely on their compliance with federal law, as required by the Supremacy Clause of the U.S. Constitution.

Note that if it were true that state governors have the personal unilateral power to deny the state's electoral votes to any presidential candidate they personally dislike, then that same governor could also unilaterally do the same thing under the current system.

Myth #12: Differences in state laws prevent determining the winning candidate

Parnell told the Michigan House Elections Committee on March 7, 2023:

> "**It simply will not be possible to conclusively determine which candidate has received the most votes because every state runs its own election**, and will continue to do so under the compact. They run their own election according to their own codes, standards, policies, practices, and procedures. And **those don't always line up well with what the compact requires.**"[51] [Emphasis added]

THE FACTS:

"What the compact requires" is simply a popular vote count for each presidential candidate from each state.

Although there are differences in election procedures among the states, all states currently provide these numbers (and, indeed, federal law requires them).

Note that the National Popular Vote Compact operates in the same way that the constitutional amendment passed by a bipartisan 338–70 vote in the U.S. House of Representatives in 1969 would have operated. Both are based on simply adding up the popular vote from each state for each presidential candidate.[52]

Myth #13: A major-party candidate might come in third in a state under RCV

In his written testimony to the Alaska Senate State Affairs Committee on April 25, 2023, Parnell said:

> "Another problem is what happens when 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 candidate will be zero votes."[53]

Parnell told the Maine Committee on Veterans and Legal Affairs in 2021:

> "Under Ranked Choice Voting, if a third party or an independent candidate were to finish ahead of either the Democratic or Republican candidate, … **the votes for that Democratic or Republican candidate gets completely erased** and will not be reported."[54] [Emphasis added]

THE FACTS:

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[51] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:01:52. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[52] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

[53] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact) April 25, 2023*. Page 2. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238

[54] Testimony of Sean Parnell. Maine Committee on Veterans and Legal Affairs. May 11, 2021

Parnell's concern over a major-party candidate failing to receive votes from a state if a third-party candidate wins the state is misplaced. Indeed, the same thing routinely happens today under the current state-by-state winner-take-all system defended by Parnell and Save Our States.

This fact is made clear by considering what would have happened in Alaska in 2000 if a third-party candidate had finished ahead of both the Democratic and Republican candidates.

George W. Bush received 271 electoral votes in 2000.

However, if a third-party candidate had finished ahead of both major parties in Alaska, the third-party candidate would have received Alaska's three electoral votes. That is, Alaska's electoral votes would not have been available to either of the two major-party candidates in their nationwide quest for 270 electoral votes. This is what Parnell calls "erasure."

Specifically, Bush would have failed to receive the 270 electoral votes required for election, and, as a result, the election for President would have been thrown into the U.S. House of Representatives.

Although Parnell tries to characterize these votes as being "erased," they are simply votes that did not go to one of the major parties—because the voters chose to support a third party.

In fact, whenever a third-party candidate finishes ahead of both the Democratic and Republican candidates in a particular state, that inherently means that the electoral votes of that state become unavailable to the Republican and Democratic nominees in their nationwide quest for 270 electoral votes.

In complaining that these votes are "erased," Parnell is really saying that the major parties are inherently entitled to receive Alaska's three votes simply because they might need them to reach the 270 votes required to be elected President. To put it another way, Parnell is arguing that it is somehow the obligation of each state's voting system (and presumably each state's voters) to protect the two major parties from the consequences of their own failure to earn the voters' support.

In reality, what Parnell disparagingly calls "erasing" is nothing more or less than the normal and intended operation of the current system defended by Parnell and Save Our States.

Similarly, Parnell's concern is misplaced in connection with Ranked Choice Voting (RCV). This becomes clear when we consider what would have happened if RCV had been in effect in Alaska in 2000—but National Popular Vote was not. If the third-party candidate had won in Alaska with RCV in 2000, that candidate would have received Alaska's three votes. That, in turn, would have meant that these three votes were unavailable to the Republican and Democratic nominees in their nationwide quest for 270 electoral votes. As a result, the election for President in 2000 would have been thrown into the U.S. House of Representatives. Again, what Parnell disparagingly calls "erasing" is nothing more or less than the normal and intended operation of RCV.

The above two cases also make clear that what Parnell disparagingly calls "erasing" arises independent of the National Popular Vote Compact.

Now let's consider what happens if a state (such as Alaska or Maine) were to use RCV in combination with National Popular Vote (NPV).

First, the frequency of what Parnell calls "erasing" is far more frequent under the current state-by-state winner-take-all system than it would be under the RCV-NPV combination. The current system routinely "erases" the popular votes cast for **every** second-place and every third-place candidate, in **every** state, in **every** election. In contrast, the last time a third-party presidential candidate came in ahead of the two major-party presidential candidates in a state was 1968 when segregationist Governor George Wallace of Alabama won five states. There have been 612 separate state-level races for President in the 12 presidential elections since 1968 (i.e., 12 times 51). The only time since 1968 when a third-party candidate came in second place was when Ross

Perot came in second place in Maine and Utah in 1992. That is, a major-party candidate came in first place in 612 of these 612 state-level races, and a major-party candidate came in first or second place in 610 of these 612 elections. In other words, in only 2 elections out of 612 did a third-party candidate finish ahead of both the Democratic and Republican candidates.

Second, the nature of what Parnell calls "erasing" is far more pernicious under the current system defended by him and Save Our States than under the RCV-NPV combination. If RCV and NPV had been in effect in 1992 when Bush came in third in Maine and Clinton came in third in Utah, every voter in Maine and Utah would have had their vote counted for a candidate **for whom that voter actually voted**. In contrast, the current system routinely treats the voter's vote as if they supported a candidate **for whom the voter did not vote**.

Finally, Parnell fails to acknowledge the simple fact that voters cast their votes with an awareness of the existing voting system. The voters who voted for Ross Perot in 1992 in Maine and Utah were aware that doing so could either (1) swing the state's popular-lead from one major-party candidate to the other, or (2) result in their state's electoral votes going to Perot—thereby potentially denying both major-party candidates of the 270 electoral votes required for election. Knowing this, these voters cast their ballots for Perot, notwithstanding the risk of what Parnell calls "erasure." This choice by these voters ought to be respected.

Myth #14: The Compact should allow legislature appointment of electors

Parnell told the Michigan House Elections Committee on March 7, 2023:

> "A couple of years ago **there was a bill in Arizona**[55] **proposing that ... [some of] electoral votes would be chosen by the legislature**. I don't really have an opinion one way or the other on whether this is a good idea or not. But **it's an interesting idea** that's out there. If Arizona were to do that, National Popular Vote would look at that and say 'there is no statewide popular election for electors.' ... That **seems like it's going to be a problem**."[56] [Emphasis added]

THE FACTS:

Every state today has laws saying that all of a state's presidential electors are to be chosen by the voters—not the state legislature. Historically, no state legislature has chosen any presidential electors since 1876.

The National Popular Vote Compact is based on the principle that the voters—not state legislatures—should choose the President.

We regard the enshrinement of this principle in the National Popular Vote Compact as a feature—not a bug.

When a state adopts the National Popular Vote Compact, it obligates itself to continue to conduct a "statewide popular election" for President. Article II of the Compact states:

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[55] Arizona House Bill HB2426 of 2021 may be found at https://apps.azleg.gov/BillStatus/BillOverview/74978. Arizona House Bill HB2426 of 2021 specified that two of the state's electoral votes were to be cast for the presidential-vice-presidential ticket which "received the highest number of votes from the aggregate vote of all the member of the legislature voting as a single body" and the remaining electoral votes would be allocated according to the popular vote in each of the state's congressional districts. The bill died without receiving a committee hearing.

[56] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:08:28. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

"Each member state shall conduct a statewide popular election for President and Vice President of the United States."[57]

Article V, Clause 8 of the Compact defines a "statewide popular election" as follows:

"'statewide popular election' shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis."

Thus, it is unequivocally true that the Compact would not accommodate the Arizona legislature if it were to decide, at some future time, to designate itself as the authority to choose some or all of the state's presidential electors.

The Arizona bill that Parnell refers to (HB2426 of 2021) died a richly deserved death in committee and has not been re-introduced since.[58]

Myth #15: The 1960 Alabama election reveals a flaw in the Compact

Parnell told the Michigan House Elections Committee on March 7, 2023:

"Historians still argue whether Richard Nixon or John Kennedy won the popular vote in 1960, owing largely to uncertainty over how to count votes from Alabama that year. It's an interesting bit of historical trivia because of course Kennedy won the Electoral College regardless of the Alabama issues, but **under National Popular Vote, not being able to conclusively determine a winner would be a national crisis.**"[59] [Emphasis added]

THE FACTS:

The reason it is arguable whether Kennedy or Nixon had more public support nationally in 1960 is that neither Kennedy's nor Nixon's names appeared on the ballot in Alabama in 1960. Hence, there were no popular votes available from Alabama for Kennedy or Nixon.

At the time, Alabama used a cumbersome voting system that has not been used by Alabama or any state for decades.

In any case, in the unlikely event that a state adopted Alabama's 1960 abandoned system while the National Popular Vote Compact is in effect, there would be no ambiguity or operational difficulty in terms of the Compact's ability to compute the national popular vote total and determine the winner—and certainly no "national crisis."

In the early days of the Republic, voters were required to vote for individual candidates for presidential elector—as opposed to voting for the actual candidates for President and Vice President. Thus, a voter in a state with, say, 11 electoral votes would have to vote for 11 separate candidates for the position of presidential elector.

By the middle of the 20th century, a majority of the states abandoned this complicated and inconvenient way of voting and adopted the so-called "short presidential ballot." The short ballot lists the names of the actual candidates for President and Vice President and enables voters to cast a single vote for their chosen presidential-vice-presidential ticket. In most states using the short presidential ballot, the names of the individual presidential electors were eliminated from the ballot. Today, in every state, a voter's vote for a presidential-vice-presidential ticket is "deemed"

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[57] The full text of the Compact is at https://www.nationalpopularvote.com/bill-text

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[59] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 4. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

to be a vote for all of the individual candidates for presidential electors nominated in association with that ticket in the voter's state. Three-quarters of the states adopted the short presidential ballot by the mid-1960s. Since 1980, all states have used it.

Back in 1960, neither Kennedy's name or Nixon's name appeared on the general-election ballot in Alabama. Moreover, each of the Democratic Party's 11 candidates for presidential elector were nominated separately in a primary election. Segregationists seized on this then-existing system as a way to nominate Democratic presidential electors in the primary who would not vote in the Electoral College for the Democratic Party's national nominee in the November election (that is, Kennedy).

The segregationists succeeded in nominating 6 of Alabama's 11 Democratic presidential electors in the 1960 Democratic primary. Then, in the November general election, the voters elected all 11 Democratic presidential electors (each of the 11 receiving a slightly different number of popular votes, but averaging about 58% of the statewide vote).

Meanwhile, no Republican presidential electors were chosen in November (with each of them receiving a slightly different number of popular votes, but averaging only about 42%). When the Electoral College met in mid-December, five of Alabama's presidential electors voted for Kennedy, and six voted for segregationist Harry Byrd. Nixon received no votes in the Electoral College from Alabama.

In the absence of any actual popular vote count for Kennedy and Nixon from Alabama in 1960, various almanac editors and political writers have bandied about different unofficial estimates of what is, in fact, unknowable voter sentiment. For example, a great many writers have (quite absurdly) credited Nixon with 6/11 of the state's popular vote on the grounds that Byrd got 6 out of 11 presidential electors in the Electoral College. In fact, Republican candidates for presidential elector only received an average of about 42% of the state's popular vote.

Today, no state uses Alabama's 1960 system. All states use the short presidential ballot. And, all states today conduct a "statewide popular vote" for President, as that term is defined in the National Popular Vote Compact.

If, after the National Popular Vote Compact comes into effect, any state decided to exclude the names of the actual presidential and vice-presidential candidates from the ballot (as Alabama did in 1960), that state would no longer be conducting a "statewide popular vote" for President and would, therefore, be voluntarily opting out of the Compact's national popular vote count (because there obviously would be no vote count for any presidential and vice-presidential candidate from that state). Such a maneuver would be a very poor policy decision for a state and its voters. Moreover, this hypothetical maneuver would, of course, be vigorously opposed by the political party that normally wins the state involved. However, if a state legislature decided to opt-out of the national popular vote count, that state's departure would present no operational difficulty in terms of the Compact's ability to compute the national popular vote total from the states that did conduct a "statewide popular election." There would be no "national crisis"—simply a lot of voters angry with the state legislature that disenfranchised them.

National Popular Election of the President

National Popular Vote!

www.NationalPopularVote.com

"Agreement among the States to Elect the President by National Popular Vote"

January 6, 2024

The National Popular Vote law will guarantee the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

It will apply the one-person-one-vote principle to presidential elections, and make every vote equal.

Why a National Popular Vote for President Is Needed

The shortcomings of the current system stem from "winner-take-all" laws that award all of a state's electoral votes to the candidate receiving the most popular votes in each separate state (or district).

Because of these winner-take-all laws, five of our 46 Presidents have come into office without winning the most popular votes nationwide. In 2004, if 59,393 voters in Ohio had changed their minds, President Bush would have lost, despite leading nationally by over 3 million votes.

Under the current system, a small number of votes in a small number of states regularly decides the Presidency. All-or-nothing payoffs at the state or district level fuel doubt, controversy, unrest over real or imagined irregularities, and hair-splitting post-election litigation. In 2020, if 21,461 voters had changed their minds, Joe Biden would have been defeated, despite leading by over 7 million votes nationally. Each of these 21,461 voters (5,229 in Arizona, 5,890 in Georgia, and 10,342 in Wisconsin) was 329 times more important than the 7 million voters elsewhere.

Presidential candidates only pay attention to the concerns of voters in closely divided battleground states (or districts). In 2020, almost all (96%) of the general-election campaign events were concentrated in 12 states where the race was within 46%–54%. In 2024, 80% of Americans will be ignored because they do not live in closely divided places. The politically irrelevant spectator states include almost all of the small states, rural states, agricultural states, Southern states, Western states, and Northeastern states.

How National Popular Vote Works

Winner-take-all is **not** in the U.S. Constitution, and not mentioned at the Constitutional Convention.

Instead, the U.S. Constitution (Article II) gives the states exclusive control over the choice of method of awarding their electoral votes—thereby giving the states a built-in way to reform the system.

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...."

The National Popular Vote law will take effect when enacted by states with a majority of the electoral votes (270 of 538). Then, the presidential candidate receiving the most popular votes in all 50 states and DC will get all the electoral votes from all of the enacting states. That is, the candidate receiving the most popular votes nationwide will be guaranteed enough electoral votes to become President.

Under the National Popular Vote law, no voter will have their vote cancelled out at the state-level because their choice differed from majority sentiment in their state. Instead, every voter's vote will be added directly into the national count for the candidate of their choice. This will ensure that ***every*** voter, in ***every*** state, will be politically relevant in ***every*** presidential election—regardless of where they live.

The National Popular Vote law is a constitutionally conservative, state-based approach that retains the power of the states to control how the President is elected and retains the Electoral College.

National Popular Vote has been enacted by 16 states and the District of Columbia, including 4 small states (DE, HI, RI, VT), 9 medium-sized states (CO, CT, MD, MA, MN, NJ, NM, OR, WA), and 3 big states (CA, IL, NY). These jurisdictions have 205 of the 270 electoral votes needed to activate the law.

In addition, National Popular Vote has passed one legislative chamber in 8 states with 78 electoral votes (AR, AZ, ME, MI, NC, NV, OK, VA), including the Republican-controlled Arizona House and Republican-controlled Oklahoma Senate. It has been endorsed by 3,705 state legislators.

More Information

Visit www.NationalPopularVote.com. Our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* is downloadable for free. Questions are answered at www.NationalPopularVote.com/answering-myths.