

**Testimony of Sean Parnell**

**to the**

**Maine Legislature Committee on Veterans and Legal Affairs Committee**

**April 14, 2025**

**Re: LD 252 and LD 1373 (Repeal of the National Popular Vote interstate compact)**

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Chairman Hickman, Chairwoman Supica, Members of the Committee, thank you for allowing me to testify. I am Sean Parnell and I represent Save Our States Action, an organization focused on defending the Electoral College and educating legislators and the public on the dangers of the National Popular Vote interstate compact (NPV).

I am here today to testify in favor of LD 252 and LD 1373, bills that would repeal Maine's membership in NPV. Maine joined the compact just last year, and if this compact were to ever go into effect, your state would appoint presidential electors pledged to the candidate determined to have received the most popular votes nationally, even if Maine's voters overwhelmingly favored a different candidate. In 2024, this would have meant all four of Maine's electoral votes going to Donald Trump, even though a majority of voters in the First Congressional District as well as statewide favored Kamala Harris.

My testimony 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.

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 and its people – a voice that even the lobbyists for NPV concede has benefited the Pine Tree State when they complain about the president taking action on behalf of the lobster industry in an effort to win support in your state. Under NPV, candidates would no longer have to care about or even know about issues important to Mainers in order to win the state's electoral votes – instead, catering to enough voters in major metropolitan areas would be enough to get those four votes.

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 a few years ago in a hearing, “We can all do the math.” But election controversies do not usually come from an inability to do math, instead they come from disputes over which ballots should and should not be counted and similar issues.

The simplistic sloganeering by NPV’s lobbyists ignores the fact that votes in every state are cast, counted, possibly recounted, and reported in different ways, some of which cause serious problems for NPV and will lead to confusion, controversy, chaos, crisis, and failure to make a conclusive determination of the winner if the national vote is close, as three of the last seventeen presidential elections have been.

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

- NPV requires member states to accept at face value vote totals from other states if they are on an “official statement,” which would primarily be either a Certificate of Ascertainment or a statewide canvas. But these documents can contain significant errors. For example, in recent elections New York has left tens or hundreds of thousands of votes off its Certificate of Ascertainment as well as its statewide canvas – it simply had not completed counting all the votes by the time it submitted these “official statements.” 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.”<sup>1</sup> Iowa and Virginia have both also left thousands of votes off of their “official statements” in recent elections.<sup>2</sup> If any other state were to submit an

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<sup>1</sup> Final, certified state totals for New York in four recent 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.

<sup>2</sup> “Dallas County failed to report 5,842 votes cast in 2016 election,” *Des Moines Register*, Feb. 8, 2017. Available at: <https://www.desmoinesregister.com/story/news/politics/2017/02/08/dallas-county-failed-report-5842-votes-cast->

“official statement” that was in error by tens or hundreds of thousands of votes, your Secretary of State must accept those totals with no opportunity to challenge or correct them.

- Ranked choice voting (RCV), which both Alaska, Maine, and Washington DC use, creates a problem because the compact assumes only a single vote total from each state for every candidate, but states using RCV produce at least two different vote totals - an initial and a final total. The compact specifies vote totals are to be obtained from an “official statement” produced by a state, but some of these documents will include only the initial totals, others include both initial and final, and others will include only final totals. For example, in Alaska the practice is to only report the initial, pre-RCV vote totals on the statewide canvas<sup>3</sup> while both initial and final round totals will be reported on a separate document. In Maine the Secretary of State is responsible for submitting a post-election report to the governor that includes both initial and final round vote totals,<sup>4</sup> while both Maine and Washington, DC specify that only the final vote totals are to appear on the state’s Certificate of Ascertainment.<sup>5</sup> The compact does not specify which of these states’ “official statements” is to be used to obtain vote totals, nor does it specify which vote totals should be used on documents that contain more than a single vote total. Because the first-round and final-round counts can differ by tens or even hundreds of thousands votes,<sup>6</sup> the choice of which “official statement” and vote totals to use could determine the outcome of a close national election. And because each member state will make its own determination of which “official statement” and vote totals to use, there is no guarantee that every member state will make the same choice, potentially leading to a split among member states in which candidate is determined to have won.

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[2016-election/97665238/](https://www.washingtonpost.com/elections/2016-election/97665238/) and “Virginia county admits election tally in 2020 shorted Joe Biden,” Associated Press, Jan. 12, 2024, available at: <https://apnews.com/article/virginia-election-errors-biden-trump-6555f052332d06c83ef797852f81fa72>

<sup>3</sup> “State of Alaska 2024 General Election Summary Report, November 5, 2024: Official Results” available at: <https://www.elections.alaska.gov/results/24GENR/ElectionSummaryReport.pdf>. Also attached to this testimony.

<sup>4</sup> Section 6, subsection 4, “Rules Governing the Administration of Elections Determined by Ranked Choice Voting.” Available at <https://www.maine.gov/sos/cec/elec/upcoming/pdf/250c535-2018-230-complete.pdf>.

<sup>5</sup> 21-A MRSA §803 of the Maine and Sec. 1-1001.08a(l) of the DC code

<sup>6</sup> The better third-party and independent candidates do in states using RCV, the greater the difference between initial and final-round vote totals. If a third-party or independent candidate finished in second place in a state using RCV, the third-place Democratic or Republican candidate would have zero reported votes in the final round. If Maine had used RCV in 1992, third-place finisher George H.W. Bush would have had roughly 207,000 votes erased from his national vote totals while Bill Clinton and Ross Perot would have increased both of their final-round vote totals from Maine.

- Vote totals can be estimated by the chief election officials of member states in the national vote count if for some reason there is not an “official statement” available from a state by the time the compact needs them. For example, in 2024 West Virginia had not certified its vote totals by the date the compact would have needed them (six days before the Electoral College meets), and the state’s Certificate of Ascertainment had been submitted to the Archivist of the United States but not yet made public. In this situation, according to the testimony of two NPV lobbyists in North Dakota in 2021, the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate.<sup>7</sup> Some of the suggestions made by those lobbyists for how vote totals could be estimated would have been in error by tens or even hundreds of thousands of votes. And because there is no coordination required between member states to ensure that all member states’ chief election officials use the exact same methodology to estimate vote totals, in a close election the different methods chosen could cause 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 three of the last seventeen have been. Every state would decide for itself, based on its own laws that were written and based on 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 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 and assuring the public that the rightful winner has been determined, only a partial, inconsistent recount in some but not all states could be conducted, sowing further chaos and public 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

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<sup>7</sup> 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>

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 popular votes are reported on the state’s Certificate of Ascertainment for the Republican slate of electors and another 4,483,810 popular votes are reported separately for the American Independent slate, both pledged to the Trump/Pence ticket, and because the compact simply requires member states to accept whatever vote totals are reported on an “official statement,” the Trump/Pence ticket would have been credited under NPV 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.<sup>8</sup>

- The compact stipulates that member states are only to include popular vote from those states where people vote for presidential electors *according to National Popular Vote’s definition of a “statewide popular vote.”*<sup>9</sup> 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. It is only since 1988 that every state in the union has held its popular election in a way that complies with NPV’s requirements, and states continue to consider alternatives to the current “winner take all” method that would not comply. For

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<sup>8</sup> 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>

<sup>9</sup> 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.”

example, a few years ago legislation was introduced in Arizona that would adopt a congressional method system like Maine and Nebraska have, in which voters would pick presidential electors by congressional districts, but the legislature would chose the last two electors.<sup>10</sup> Even though under this system millions popular votes would be cast, NPV would reject them because the system wouldn't meet the compact's definition of a "statewide popular election." Virginia and Rhode Island have also considered legislation in recent years that would include popular votes for electors but would not constitute a "statewide popular election" and would therefore have their popular votes excluded from the national vote count.<sup>11</sup> An election in which NPV is in effect and millions of popular votes are excluded would, if the exclusion affected the outcome, trigger significant controversy and cause many to reject the legitimacy of the outcome.

- The compact can be easily gamed or manipulated. One fairly simple way for a state to increase its influence over 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 eligible voters simply by allowing 16- and 17-year-olds to vote, while Utah could add nearly as many potential votes by giving parents the power to cast a ballot on behalf of their minor children. Another option would be for a state to report on its "official statement" each voter as having cast as many votes as the state has presidential electors, which was once the common understanding of how votes were cast.<sup>12</sup> If Wyoming reported each voter as casting three votes, 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 of a favored candidate. The chief election officials in NPV member states would be required to accept these inflated vote totals.

I'd note that it is not only opponents of NPV finding these defects in the compact. Others who have identified problems with the compact including Professor Robert Bennet of Northwestern

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<sup>10</sup> HB 2476, available at: <https://apps.azleg.gov/BillStatus/BillOverview/76974>

<sup>11</sup> HB 490 in the 2024 Virginia House of Delegates would have allocated one elector to the popular vote winner in each Congressional district with the governor selecting the final two, available at <https://legacylis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB490>; H 5520 in the 2025 Rhode Island House of Representatives would have created as many elector districts as the state has presidential electors, and the people of each district would elect one presidential elector, available at <https://webserver.rilegislature.gov/BillText/BillText25/HouseText25/H5520.pdf>

<sup>12</sup> The late Tennessee Senator Estes Kefauver wrote in a 1962 paper "...each citizen has as many votes in presidential elections as his state has electors. A New Yorker voted in 1960 for all of his state's forty-five electors, but the Nevadan only voted for three." Estes Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 *Law and Contemporary Problems* 188-212 (Spring 1962). New York's 1984 Certificate of Ascertainment reflected this understanding, with the document stating "The whole number of votes given for the office of ELECTOR OF PRESIDENT AND VICE PRESIDENT was 331,590,904..." which were cast by around seven million voters. Available upon request.

University's law school, who has characterized the compact's inability to deal with the need for a nationwide recount as its "most glaring defect."<sup>13</sup> Bennet also dings NPV's lobbyists 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.<sup>14</sup>

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."<sup>15</sup> 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.'"<sup>16</sup>

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.

Akhil Amar's brother is Professor Vikram Amar at the University California – Davis law school, and he is the third of the law professors who initially developed the NPV concept. He has concluded that this compact has "dangerous gaps" that could lead to "electoral crises"<sup>17</sup> and an "historic debacle." He specifically pointed to the compact's problems with states expanding voter eligibility to minors as well as the impossibility of conducting a needed recount if the national margin was close.<sup>18</sup> He urges states considering adopting NPV to include a 10-year

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

<sup>14</sup> Ibid, p. 184

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

<sup>16</sup> Ibid

<sup>17</sup> <sup>17</sup> 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>

<sup>18</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936374)

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, former president of the Center for Election Science and an advocate of Range Voting warns that there will be a “train wreck” if NPV and RCV are used together, adding “Different kinds of voting systems in different states simply were not designed to be agglomerated to yield one overall popular vote winner.”<sup>19</sup>

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 [plurality voting],” and that the compact would need to be “adapted for Approval Voting”<sup>20</sup> 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...”<sup>21</sup>

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 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.”<sup>22</sup>

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-summable method like [RCV].”<sup>23</sup> In order to address this defect, the Equal Vote Coalition promotes on its web site a proposed “Alternative Voting Interstate Compact” designed to allow

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

<sup>20</sup> 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/>

<sup>21</sup> “The NPVIC and Approval Voting,” available at: <https://unsplitthevote.org/the-npvic-and-approval-voting/>

<sup>22</sup> “How Would STAR Voting work with the National Popular Vote Interstate Compact?” [https://www.starvoting.org/presidential\\_elections](https://www.starvoting.org/presidential_elections)

<sup>23</sup> Google Groups message, February 2018. Available at: <https://groups.google.com/g/electionscience/c/OLkt-G2iITo/m/Rw5gHTk6AgAJ>



vote totals from states using alternatives to plurality voting to be “consistently and accurately” reported for use with NPV.<sup>24</sup>

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.”<sup>25</sup> He has also shared that some backers of NPV see the compact’s defects and 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.<sup>26</sup>

Advocates and lobbyists for NPV argue that many of these problems can be resolved through litigation. In the document submitted to this committee last year by lobbyists for NPV “Answering 15 False Statements about Vote Counting under the National Popular Vote Bill in Maine (LD1578)” (which contains numerous errors and fabrications), nine of the fifteen responses include the claim that voters or the candidates themselves can go to court to fix any issue that might arise.

For example the document claims that if a state’s certified vote totals aren’t available by the day NPV requires them (six days before the Electoral College meets), a special three-judge panel created under the Electoral Count Reform Act would be able to “...enforce the ‘issuance’ of each state’s Certificate of Ascertainment and its ‘transmission’ to the National Archives,”<sup>27</sup> thereby resolving the problem.

Among other problems with this claim, it ignores that such an enforcement action by the panel cannot be requested until *after* the deadline for NPV (and every other state) has passed. Member states need those certified vote totals the *Wednesday* before the Electoral College, while NPV suggests here that litigation that cannot be filed until *Thursday* before the Electoral College meets will produce the needed vote totals.

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<sup>24</sup> “Alternative Voting Interstate Compact,” available at: [https://www.equal.vote/interstate\\_compact](https://www.equal.vote/interstate_compact)

<sup>25</sup> Chris Maisano, interview with Professor Alexander 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>

<sup>26</sup> 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>

<sup>27</sup> ““Answering 15 False Statements about Vote Counting under the National Popular Vote Bill in Maine (LD1578),” January 8, 2024. Available upon request

This is not the first occasion on which NPV's lobbyists have suggested that any defects in the compact can be dealt with by the court system. 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, identified two procedural flaws in the compact. He explained in his testimony that "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."<sup>28</sup>

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." <sup>29</sup>

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."<sup>30</sup> I believe he was correct then, and NPV lobbyists continued arguments today that the courts will have to resolve the compact's defects is enough reason to withdraw Maine from NPV.

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 its numerous defects, as even many of those inclined to favor it have admitted. I urge you to support these bills to withdraw from the compact and ensure that Maine will continue to be heard in presidential elections.

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<sup>28</sup> Brian Becker, "Statement of Brian S. Becker, State Representative for the 19<sup>th</sup> 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. Available upon request.

<sup>29</sup> Ibid

<sup>30</sup> Ibid

# Debunking National Popular Vote's 19 "False Statements" Claims

*Sean Parnell*

## Introduction

During the 2023 legislative session, National Popular Vote, Inc. (the organization behind the National Popular Vote interstate compact) released a document titled "Answering 15 False Statements About the National Popular Vote Bill in Michigan (HB4156 / SB 126)". It purports to correct statements made by me in testimony in Alaska, Michigan, and Minnesota. They subsequently submitted similar documents to legislators in Alaska, Nevada and Maine. These documents are available on the web site of Save Our States.<sup>1</sup>

A review of these NPV documents shows that they are riddled with factual errors, unwarranted or dubious assumptions, mischaracterizations, and even outright deception. This memo sets the record straight – including on one clear and one possible error in my own testimony, both ultimately inconsequential but that nevertheless should be corrected and addressed.

## Responses to NPV, Inc.'s "False Statements" documents

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

There is no national entity responsible for aggregating votes from the states and Washington DC, certifying totals, and then making those results available to NPV member states. The Federal Election Commission does compile an official national vote count, but only well after the Electoral College meets. The FEC's purpose is only to determine which political parties qualify for federal funds in the next presidential election cycle.<sup>2</sup>

Instead, under NPV each member state would produce its own national vote count, which may (for reasons explained later) not be identical to national vote counts in other member states, and may not even have the same winner. Using circular logic, NPV, Inc. claims that vote totals produced by each member state constitute the "official national popular vote count," but refuses to address or even acknowledge that because each compacting states will compile its own "official national popular vote

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<sup>1</sup> See: <https://bit.ly/15-Myths-NPV-response-to-SDP-testimony>, <https://bit.ly/NPV-memo-to-ME-legislature>, <https://bit.ly/15-myths-NV-version>

<sup>2</sup> See: <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>

count" independently, there is not a single, official, national vote count.

SUMMARY: No national agency, commission, or official will aggregate vote totals from all 50 states (plus Washington DC) to be used to determine the winner under NPV. Instead each state will independently produce its own national vote count and declared winner, which may not match the vote counts of other states as a result of discretion and ambiguities in how to aggregate the votes.

**"Myth #2. The Compact allows one state to judge another state's election returns"**

NPV, Inc. claims nothing in the 888 words of the compact gives the chief election official (CEO) in compacting states the power to make any decisions regarding another state's election results. But in some circumstances, this would be necessary, as in the following examples.

- If any states used ranked choice voting, it would be necessary to decide whether to use initial or final vote totals when adding those states' results to the national totals (discussed further in item 7, below)
- If no "official statement" is available from a state, the CEO would decide whether and how to estimate vote totals for that state in the national vote count (discussed further in item 8, below)

Both of these decisions, even made in good faith, give a member state's CEO considerable discretion and could change the outcome if the national vote is close. There also could be intense pressure on a CEO to "correct" results from a state with questionable vote totals (see item 5, below) or to allow votes to be counted even if a state didn't run its election according to NPV's definition of a "statewide popular vote" (see items 13 and 14, below).

SUMMARY: The chief election official in each NPV state will, under certain circumstances, be required to make judgements about the vote totals from other states, such as deciding which "official statement" to use, which vote totals to use from states with ranked choice voting, and how and whether to estimate vote totals in certain circumstances.

**"Myth #3. There is no mechanism for resolving disputes under NPV"**

The problem here is that *the compact itself does not provide any mechanism for resolving disputes, nor does it provide guidance or a process for resolving disputes*. Instead of creating a process for resolving disputes or differences in how member states tabulate votes, or establishing any sort of coordinating body, the matter is left to the courts. This creates the risk that different state and federal courts will arrive at conflicting decisions, leading to different vote counts and winners among NPV member states.

Most interstate compacts – nearly every one not involving mere boundary disputes or similar issues – create an agency or commission to execute the compact's mission and resolve disputes between member states. NPV is unusual in not establishing any entity to do so.

SUMMARY: Unlike nearly all other compacts (aside from boundary disputes and the like), NPV does not establish an entity to administer the compact or resolve disputes. Instead, it relies entirely on state and federal courts. This does not ensure that every NPV state will arrive at the same decision regarding the national vote count and which candidate won.

**"Myth #4. New York can't be trusted to produce an accurate vote count"**

Attempting to refute concerns about New York's recent incomplete vote totals, NPV Inc. addresses only the missing 424,775 votes from the state's 2012 Certificate of Ascertainment. They explain it away as the result of Hurricane Sandy, which is correct but unhelpful (unless NPV can prevent future hurricanes). And they ignore completely New York's 131,418\* missing votes in 2008, 101,762 missing votes in 2016, and 28,881 missing votes in 2020.

NPV, Inc. labels my statement a "myth" because a New York election official has promised that the state will get its vote count right if it matters. But with four consecutive elections in which tens or hundreds of thousands of votes have been left off of the state's "official statement," it is reasonable to question whether New York could provide an accurate vote count by early December, as the NPV compact requires.

SUMMARY: New York has left off tens or hundreds of thousands of votes from its "official statement" in recent presidential elections. Thus my concern is rooted in the actual facts of recent history while NPV's rebuttal relies on one New York election official's promise.

\*This was the clear error on my part. I previously have stated that there were 85,403 missing votes from New York's Certificate of Ascertainment (CoA). The CoA submitted in December 2008 by New York was missing 131,418 votes. New York then submitted a revised CoA in May 2009 with 85,403 missing votes. My previous statements were based on the revised May 2009 CoA, not the original that would have been used to calculate the national vote count that year if NPV had been in effect.

**"Myth #5. California accidentally gave Trump an extra 4.5 million votes in 2016"**

In my testimony, I stated that California did not have fusion voting. NPV, Inc. claims that that "California did not give Trump an extra 4.5 million votes" in 2016, and further claims that California's use of "fusion voting" explains away the extra votes. There is an academic debate over whether California's "dual labeling" law allowing multiple parties to endorse the same presidential candidate is a form of fusion voting or not,<sup>3</sup> but this is irrelevant to what happened there in 2016.\*\* Whatever California's policy is called, the result is the same: the Golden State credited the Trump/Pence ticket with an extra 4,483,810 votes on its Certificate of Ascertainment that, if NPV had been in effect, *would have made Trump/Pence the national popular vote winner.*

Traditional fusion voting is when two political parties nominate the same candidate, and those candidates then appear on multiple ballot lines.<sup>4</sup> Votes for the same candidate on separate lines are then added together and this aggregate total is used to determine the outcome. Because votes for presidential candidates are actually votes for a slate of presidential electors, with fusion voting the

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<sup>3</sup> See, for example: Joel Rogers and Maresa Strano, "More Than Semantics: Distinguishing Dual Labeling from Traditional Fusion Voting," Sept. 16, 2023, Ballot Access News. Available at: <https://ballot-access.org/2023/09/16/more-than-semantics-distinguishing-dual-labeling-from-traditional-fusion-voting/>

<sup>4</sup> The 2016 ballot in New York listed the Clinton/Kaine ticket three times (Democratic, Working Families, and Women's Equality parties), the Trump/Pence ticket twice (Republican, Conservative), and the Johnson/Weld ticket twice (Libertarian, Independence). See: <https://www.gothamgazette.com/state/6579-limited-down-ballot-choices-for-new-yorkers-come-november-8>

parties nominating the same candidate must also nominate the same electors.<sup>5</sup> Under "dual labeling," on the other hand, candidates appear only once on the ballot and have the names of all parties that have endorsed them next to their name.

NPV, Inc. quotes an August 2016 article in *Ballot Access News* as evidence that California used fusion voting that year. They edited out of the quote, however, the necessary assumption that the Republican and American Independent slates of electors would be identical.<sup>6</sup> The deleted text reads:

"The two parties will each nominate the same set of presidential elector candidates. California has 55 electoral votes. Probably the Republican Party will choose 50 and the AIP will choose five, and then both parties will submit the same list of presidential elector candidates."

NPV, Inc. goes on to claim that "...the votes cast on the Republican and American Independent lines on the ballot were added together..." resulting in "a grand total of 4,483,810 for the Trump-Pence ticket."

But the Republican and American Independent parties did not wind up with identical slates of electors,<sup>7</sup> the California ballot did not put the Trump/Pence ticket on two separate lines, one for each endorsing party,<sup>8</sup> and thus there were no "lines" to "add together" as claimed. Because there was only a single line for the Trump/Pence ticket for voters to mark, when it came time to count and report the votes for the two different slates every Trump/Pence voter was treated as having cast two votes, one for the Republican slate and a second vote for the American Independent slate.<sup>9</sup> This did not affect the outcome of who won California in 2016 because the two different slates tied for second place.

Whether California's "dual labeling" qualifies as a form of fusion voting the end result is the same: on the 2016 California Certificate of Ascertainment the Republican slate of electors pledged to the Trump/Pence ticket is reported as having received 4,483,810 votes and the separate American Independent slate of electors pledged to Trump/Pence is also reported as having received 4,483,810 votes.

This is only a problem if the NPV compact is in effect, because of NPV's process of taking vote totals directly from a state's "official statement." The compact does not grant a member state's chief election official the power to ignore or nullify reported vote totals on an "official statement." NPV, Inc. has been

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<sup>5</sup> New York's 2016 CoA shows the Democratic, Working Families, and Women's Equality parties slates of presidential electors (pledged to the Clinton/Kaine ticket), which are identical for all three parties. The Republican and Conservative parties also had identical slates of electors (pledged to the Trump/Pence ticket). See: <https://www.archives.gov/files/electoral-college/2016/ascertainment-new-york.pdf>

<sup>6</sup> "American Independent Party Formally Nominates Donald Trump and Michael Pence," August 13, 2016. *Ballot Access News*. Available at: <http://ballot-access.org/2016/08/13/american-independent-party-formally-nominates-donald-trump-and-michael-pence/>

<sup>7</sup> The Republican slate of presidential electors and vote totals for the slate appear on the bottom of page 2 of the 2016 California CoA, while the American Independent slate and its vote totals appear at the top of page 3. Two electors appeared on both slates. See: <https://www.archives.gov/files/electoral-college/2016/ascertainment-california.pdf>

<sup>8</sup> See: <https://www.slocounty.ca.gov/Departments/Clerk-Recorder/Forms-Documents/Elections-and-Voting/Past-Elections/General-Elections/2016-11-08-Presidential-General/Sample-Ballot/Sample-Ballot-Ballot-Type-1-2016-11-08.aspx>

<sup>9</sup> NPV Inc. also argues that "California's 2016 Certificate of Ascertainment explicitly states that the Clinton-Kaine ticket's 8,753,788 vote total was "higher" than the vote total of any other ticket," claiming this means California couldn't possibly have doubled the Trump/Pence ticket's vote totals. But as California's certificate explains, it was the slate of electors pledged to the Clinton-Kaine ticket that "received the highest number of votes" while the two slates pledged to the Trump-Pence ticket were not aggregated (nor should they have been) and tied for second place. It is only under the vote-tabulation process of NPV, which requires the counting of "the number of votes for each presidential slate," where the extra votes make a difference.

emphatic in claiming that "...the compact does not give administrative officials in its member states any power to judge the election returns of other states...." Absent ambiguities (see items 6, 7, and 8), this is correct: the job of the chief election official under the compact is simply to add up all the votes for each "presidential slate" appearing on an "official statement" provided by each state regardless of how inaccurate or implausible the results may be.<sup>10</sup> Because the vote totals for the two slates of electors pledged to the Trump/Pence ticket are reported separately, both totals would need to be included in the national vote count.

SUMMARY: NPV requires member states to accept vote totals on an "official statement" from another state. California's 2016 Certificate of Ascertainment includes 4,483,810 votes for the Republican slate of electors pledged to the Trump/Pence ticket and another 4,483,810 votes for the separate American Independent slate of electors also pledged to Trump/Pence. When adding up the votes, NPV member state CEOs would be required to include both vote totals, giving the Trump/Pence ticket an extra 4,483,810 votes in the national popular vote count.

\*\* This is the possible error in my testimony – it all depends on whether "dual voting" is or is not a form of fusion voting, on which reasonable people seem to disagree.

#### **"Myth #6. NPV assumes every state will always use simple plurality voting"**

NPV, Inc. claims that because the head of FairVote, which it describes as "the leading national organization advocating RCV (ranked choice voting)" helped to write the compact, it must have been "written to accommodate the future adoption of different voting procedures." That may have been the intent, but that is separate from whether it was successful. With RCV recently adopted for presidential elections in two states, and other alternatives to plurality voting being proposed, the conflict between NPV and non-plurality voting has come into focus.

Rob Richie, the head of FairVote referenced above, is the lead author of an August 2021 paper<sup>11</sup> titled "Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact."<sup>12</sup> The paper acknowledges that NPV has a conflict with RCV and other alternatives to plurality voting:

"...as currently drafted, the [NPV compact] seems to assume a plurality system.... [U]sing RCV for Presidential elections in states might seem incompatible with [NPV]. Most fundamentally, which votes should be reported out for the purpose of [NPV]? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If that latter choice were made, what if one of the two strongest national

<sup>10</sup> A similar but completely unproblematic situation occurred in New York in 2016. While the three parties nominating the Clinton/Kaine ticket had a unified slate of electors, as did the two parties endorsing the Trump/Pence ticket, the two parties supporting the Johnson/Weld ticket (Libertarian and Independence) did not. Voters were able to vote for their favored candidate on party-specific ballot lines. On the New York Certificate of Ascertainment that year, votes for the Clinton/Kaine and Trump/Pence slates of electors are aggregated but not the votes of the two separate slates of electors pledged to the Johnson/Weld ticket. Under NPV, each member state's chief election official would rightly aggregate the 118,118 votes for the Independence Party's slate of electors with the 56,833 votes for the separate Libertarian slate of electors for a total of 174,951 votes from New York for the Johnson/Weld "presidential slate."

<sup>11</sup> NPV, Inc. disputes that the paper was released in August 2021. As explained below in "Myth #16," this is the correct date.

<sup>12</sup> Two of the other four co-authors are or were affiliated with FairVote as well. Available at: <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf>

candidates was eliminated during the RCV tally in a given state?"<sup>13</sup>

Other experts on alternatives to plurality voting have reached the same conclusion. Dr. Warren D. Smith of the Center for Range Voting warns that there will be a "trainwreck" as a result of NPV's problems with non-plurality voting:

"The people behind the National Popular Vote (NPV) are well-intentioned voting reformers. And so are the voting reformers advocating better voting methods (e.g. range voting) to replace our present very-flawed "plurality" voting system... these two reforms, unless careful attention is paid to the matter (which it apparently hasn't) will conflict....

Different kinds of voting systems in different states simply were not designed to be agglomerated to yield one overall "popular vote winner."<sup>14</sup>

Steve Cobb of Unsplit the Vote is likewise clear about this conflict:

The NPVIC was unfortunately written assuming the current [plurality voting] method, with no regard for alternative voting methods.<sup>15</sup>

The website for the organization promoting STAR Voting makes a similar point:

"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 alternative voting methods for the presidential general election."<sup>16</sup>

In order to resolve the compact's assumption that all states will use plurality voting, Richie of FairVote advocates either that Congress require every state use RCV ballots<sup>17</sup> or that states using RCV form a compact of their own to report uniform vote totals for use by NPV states.<sup>18</sup> Fairvote has also suggested that a law passed in Maine 2021 resolves this issue (discussed further in item 16, below). The group Equal Vote, another voting reform organization, also proposes an "Alternative Voting Interstate Compact" to resolve the conflict.<sup>19</sup>

Whatever the merits of these proposed fixes, they would not exist and be promoted by leaders of the voting reform community if, as claimed by NPV, Inc., the compact already "...accommodate[s] the future adoption of different voting procedures..."

**SUMMARY:** Many leading advocates for alternative forms of voting, including one drafter of the NPV compact, recognize its conflict with RCV and other alternative voting methods.

<sup>13</sup> Ibid, p. 159.

<sup>14</sup> "Warning! Voting reform trainwreck approaching - need to act now to avoid the problem" available at: <https://www.rangevoting.org/NPVtrainwreck.html>

<sup>15</sup> "The NPVIC and Approval Voting," available at: <https://unsplitthevote.org/the-npvc-and-approval-voting/>

<sup>16</sup> "How Would STAR Voting Work for US Presidential Elections?" available at: [https://www.starvoting.org/presidential\\_elections](https://www.starvoting.org/presidential_elections)

<sup>17</sup> Ibid at note 12, p. 162

<sup>18</sup> Ibid at note 12, p. 177

<sup>19</sup> "Alternative Voting Interstate Compact," available at: [https://www.equal.vote/interstate\\_compact](https://www.equal.vote/interstate_compact)



**"Myth #7. NPV is incompatible with RCV"**

The main problem RCV creates for NPV is that the compact anticipates that every state will produce on its "official statements" a single vote total for each "presidential slate." States using RCV, however, can produce at least two vote totals – the initial count of first-place votes, and the final vote count after votes have been transferred from lower-performing to higher-performing candidates. The compact does not provide guidance on which RCV vote totals to use in tabulating the national vote count, leaving it to the discretion of the chief election official of each member state. Because the difference between the initial and final vote counts could be tens or hundreds of thousands in just the two states using RCV in 2024 (Alaska and Maine), in a close election the choice of which vote totals to use could determine the winner under NPV.

Rather than address this issue, NPV, Inc. falsely claims the concern is about which vote totals *Alaska and Maine* will use to determine the outcome in those two states, stating (correctly) that it would be "preposterous" for a state to give voters an RCV ballot, allow them to rank candidates, and then ignore the whole RCV process. This is not the issue.

The issue is, when the chief election official of each NPV member state obtains "official statements" from Alaska and Maine (and any other states using RCV), which vote totals will they choose to use? There is nothing in the compact dictating the choice of "official statement" (discussed further in item 17, below) or which totals to use if an "official statement" has multiple totals for the same candidate.

NPV, Inc. also falsely asserts that the matter is resolved because "Maine law eliminated any room for doubt by explicitly requiring that the Certificate of Ascertainment report the final-round RCV count." This ignores that Maine will produce other "official statements" that include both the initial and final vote counts, such as the report the Maine Secretary of State is required to file with the governor and make public.<sup>20</sup> The chief election officials of NPV member states are free to choose this report to obtain Maine's vote totals. This will no doubt be true of Alaska as well.<sup>21</sup> Unless an RCV state chose to hide some of its election data, it will produce "official statements" with first-round and final-round results, leaving NPV states to choose on their own which to use.

SUMMARY: The NPV compact anticipates that all states will produce a single vote total for each "presidential slate," but states using RCV may produce two (an initial and a final vote count). This leaves it to the chief election officials in NPV member states to decide which totals to use.

**"Myth #8. The NPV Compact allows vote totals to be estimated"**

NPV, Inc. claims that "There is nothing in the National Popular Vote Compact that authorizes anyone to estimate vote counts." This is contradicted by testimony from two NPV, Inc. lobbyists against a 2021 anti-NPV bill that would have kept North Dakota's vote totals secret in an effort to thwart the compact. According to Saul Anuzis, a longtime lobbyist for NPV, if a state's official election results were unavailable:

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<sup>20</sup> Under rules adopted by the Maine Secretary of State in 2018, initial, final, and any intermediate vote totals are to be reported to the governor and made publicly available following the election. Section 6, subsection 4, "Rules Governing the Administration of Elections Determined by Ranked Choice Voting." Available at <https://www.maine.gov/sos/cec/elec/upcoming/pdf/250c535-2018-230-complete.pdf>.

<sup>21</sup> Alaska's official results in the 2022 U.S. Senate race, which includes initial, intermediate, and final vote totals, is available at: <https://elections.alaska.gov/results/22GENR/US%20SEN.pdf>

"...the chief election officials of the two dozen or so states belonging to the Compact are not going to throw up their hands and declare that the world has come to an end. Instead, the chief election official of each compacting state would still be required by their state's law to "determine the number" and to determine which presidential candidate received the most popular votes in all 50 states and the District of Columbia."<sup>22</sup>

Pat Rosenstiel, the other longtime NPV lobbyist, explained how the chief election officials of member states would have the power to "determine" and "assign" vote totals for states lacking a publicly available "official statement" by the time the compact requires:

"I can tell you that the chief election officials of the compacting states will make a determination based on the turnout that's reported, the percentage of the vote that's reported under this law, and they would determine how many votes to assign to a Republican and a Democratic candidate... assign that as the votes coming out of North Dakota...."

I think that the compacting states... can look at your turnout number, look at the percentages that you report, assign vote values to Republicans and Democrats [and] award their electors in any manner they deem is in their best interest...."<sup>23</sup>

Rosenstiel also claimed that the details of the North Dakota legislation would allow the chief election officials in NPV member states to:

"...get much closer to what your actual vote total was, and it's up to the chief election official of the member state to make a determination to the best of their ability based on the data provided from the state...."

Rather than address these statements by its own lobbyists, NPV, Inc. pretends they don't exist and that the compact's silence is an answer rather than an ambiguity. As these two longtime NPV lobbyists explained, the compact requires the chief election official of each member state to "determine" the vote totals for non-member states even if there are no official vote totals available, and does not provide any guidance or guardrails on how to do so.

SUMMARY: Two longtime NPV lobbyists testified that the phrase "shall determine the number of votes" in the compact gives member state chief election officials the power to "calculate," however they deem appropriate, vote totals for states that do not provide an "official statement" by the time the compact requires, and they will "assign" those estimated vote totals to that state when they determine the national vote count for each "presidential slate."

#### **"Myth #9. Unfinished Recounts and litigation could thwart the compact"**

NPV, Inc. misunderstands the precedent it cites, claiming that the U.S. Supreme Court requires "...all counting, recounting, and administrative and judicial proceedings must be conducted so as to reach a final determination within six days before the Electoral College meeting...." This is incorrect.

<sup>22</sup> "Statement by Former Michigan Republican State Chairman Saul Anuzis on the Secrete Presidential Elections Bill in North Dakota (SB 2271)," p. 5, February 2021, available at: [https://ndlegis.gov/assembly/67-2021/testimony/HGVA-2271-20210318-10045-A-ANUZ-IS\\_SAUL.pdf](https://ndlegis.gov/assembly/67-2021/testimony/HGVA-2271-20210318-10045-A-ANUZ-IS_SAUL.pdf)

<sup>23</sup> Rosenstiel's testimony is available at: <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230425/4051/19652> and begins at approximately 11:16am.

The Supreme Court ruled in *Bush v. Gore* that it was the intent of the Florida legislature when passing its election code that the State of Florida meet what was known as the "safe harbor" date six days before the Electoral College meets:

"The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," ... That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12."<sup>24</sup>

That decision applied to *Florida* law and was binding *only on Florida*.

The 2022 Electoral Count Reform Act did turn the previously optional "safe-harbor" date into a firm deadline. It also established a process for "an aggrieved candidate for President or Vice President" to go before a special 3-judge panel to either challenge the correctness of a Certificate of Ascertainment or to compel issuance of a certificate if one hasn't been issued by the deadline.<sup>25</sup> A certificate "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."<sup>26</sup>

The new language of ECRA plainly allows litigation and recounts that might extend beyond the deadline occurring six days before the Electoral College meets, otherwise an "aggrieved candidate" would be unable to challenge a certificate issued at the last minute. In addition, if litigation and recounts could not extend beyond the deadline, the ECRA language would not refer to certificates issued "prior to the date of the meeting of electors," it would refer to certificates issued by the six-day deadline. Further evidence that litigation and recounts can extend beyond the deadline can be seen Michigan, which recently updated its presidential election certification laws to establish a new process for recounts that extend beyond the deadline.<sup>27</sup>

SUMMARY: The Electoral Count Reform Act can extend recounts, litigation, and other challenges, and allow substitute Certificates of Ascertainment, after the deadline six days before the Electoral College meets, which could interfere with the NPV compact.

#### "Myth # 10. A rogue governor can refuse to issue the Certificate of Ascertainment"

I have never suggested "A rogue governor can refuse to issue the Certificate of Ascertainment" or anything similar – this language and concept is a misinterpretation of my statements invented by NPV, Inc. What I have stated, as demonstrated by the quote provided in the documents by NPV, Inc., is *that non-member states are under no obligation to aid in the execution of the compact*. In fact, other states could intentionally or unintentionally thwart the compact through the normal and legal process of certifying their elections and appointing electors.

Certificates of Ascertainment typically are created and signed between late November and mid-December following a presidential election. One copy is sent to the National Archives, while six

<sup>24</sup> Majority opinion in *Bush v. Gore*, p. 110. Available at: <https://tile.loc.gov/storage-services/service/ll/usrep/usrep531/usrep531098/usrep531098.pdf>

<sup>25</sup> 3 U.S.C. §5 (d)(1), available at: <https://www.congress.gov/bill/117th-congress/senate-bill/4573/text#toc-idAA59C300FD5B401DA58F-031D125E53CD>

<sup>26</sup> 3 U.S.C. §5 (c)(10) (B), see prior note.

<sup>27</sup> Michigan Act 269, Public Acts of 2023, available at <http://legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0269.pdf>

"duplicate-originals" are given to the electors when they meet. As previously noted (in item 9, above), ECRA now establishes a firm deadline six days prior to the meeting of the Electoral College for states to submit Certificates of Ascertainment to the National Archives (with the exception of any certificates subject to continuing recounts or litigation, as also noted in item 9). This applies to both NPV member and non-member states alike.

Many states routinely issue their Certificates of Ascertainment either the day before or the day of the deadline. In 2020, the "safe harbor" date<sup>28</sup> was December 8, six days before the Electoral College met. Based on the dates on each certificate, ten states finalized and transmitted them on or after that day (Alaska, Colorado, Iowa, Kansas, Maryland, Mississippi, Missouri, Oklahoma, Virginia, and West Virginia).<sup>29</sup> Two more states, New Jersey and North Carolina, did this on December 7. None of these states had their certificates posted online before the deadline.<sup>30</sup>

And because Certificates of Ascertainment are not instantly made available by the National Archives, eleven other states (Connecticut, Delaware, Hawai'i, Illinois, Indiana, Nevada, Oregon, Rhode Island, South Carolina, Texas, and Utah) did not have their certificates available by the "safe harbor" deadline either. Several states submitted their Certificates two or even three weeks before they were made available to the public.

This means states could prevent their Certificates of Ascertainment from being available for NPV's purposes simply by doing what many do already – prepare and sign the Certificates on or just before the deadline, send the original to the National Archives via the U.S. Postal Service, and hold onto the remaining copies for distribution to the electors when they meet.

SUMMARY: Non-member states are not required to cooperate with or aid the execution of the NPV compact. States could comply with federal law and still interfere with NPV compact states' attempts to tabulate national vote totals.

### **"Myth #11. Differences in state laws prevent obtaining vote counts"**

NPV, Inc. asserts that every state will "produce a vote count for each presidential-vice-presidential ticket" and adds that "federal law requires that each state issue a CoA certifying those vote counts. Those are the two things that the National Popular Vote Compact needs."

As demonstrated in this memo, obtaining accurate, unambiguous, timely, and conclusive vote totals from every state and ensuring every member state produces an identical national vote count is more complicated than NPV admits. To recap:

- vote counts provided by states aren't necessarily accurate (see items 4 and 5);
- ranked choice voting can produce two or more vote counts from a single state for a presidential candidate (see items 6, 7, and 12);

<sup>28</sup> The Electoral Count Reform Act of 2022 transformed the "safe harbor" date into a firm deadline, though it is unclear what the penalty or consequences will be if a state misses this deadline and submits its CoA after the deadline.

<sup>29</sup> Dates can be confirmed on each state's CoA, available at <https://www.archives.gov/electoral-college/2020>.

<sup>30</sup> I maintain a log of when CoAs are posted on the web site of the National Archives, as well as what the date is on each CoA which generally corresponds to the date it was signed and submitted by each state. The National Archives also maintains a log of when they are received, and possibly when they are approved for public posting; I am attempting to obtain this log.

- vote counts for some states could have to be estimated (see item 8);
- Certificates of Ascertainment are unlikely to be available from every state by the time NPV states need them (see items 9, 10, and 17); and
- vote totals from some states might not be included in the national vote count if a state doesn't run its election or report its results the way the compact requires (see items 13 and 14).

SUMMARY: States run their own elections according to their own election laws and procedures some of which present significant problems for the NPV compact, as this memo describes in detail.

**"Myth #12. A major-party candidate might come in third in a state under RCV"**

If an independent or third-party candidate finishes ahead of a major-party candidate in a state using ranked choice voting, and final-round totals are used in the national count, hundreds of thousands or even millions of votes will be erased from the national vote count for that major-party candidate. In a close election, this could change the outcome.

NPV, Inc. focuses its reply almost exclusively on the rare occurrence of an independent or third-party candidate *winning* a state ("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," "...it is exceedingly rare for a third-party candidate to finish ahead of the two major-party presidential candidates in any state," etc.) rather than address the concern I raised, which only requires a third-party or independent candidate to finish in *second* place in a state using RCV. NPV, Inc. also claims this erasure of votes would be more acceptable than what happens under the current "winner take all" system that most states use for presidential electors, and that voters know what they are doing when they vote for third-party and independent candidates so there is no basis for complaints or concerns.

Regarding the rarity of a third-party or independent candidate for president finishing ahead of a major party candidate, it has happened more than seventy times between 1892 and 1992. The future is unknown, of course, but it seems likely that it will happen again in the future, especially if the spread of RCV leads to more voting for third-party and independent candidates. For example, if Utah used RCV in 2016 Hillary Clinton might have wound up in third place in the state behind Evan McMullin (the two were separated by just a few percentage points, and RCV may very well have helped him win enough additional votes to finish ahead of her). This would have meant more than a quarter million votes being initially reported for Clinton on election night that would be erased from her national tally once the RCV process was complete.

In fact, in 1992 Ross Perot did push Bill Clinton into third place in Utah. He did the same thing to George H.W. Bush in Maine. In such scenarios, RCV could result in a major party candidate having all their votes in such a state eliminated from the national vote count.

Most important to consider here is timing of such an occurrence as well as the public's response. Unlike the results of most elections, which typically are known on election day or shortly thereafter, final RCV results typically take much longer to be determined. In 2022, the winner of Maine's 2nd Congressional district wasn't known until November 16, nearly two weeks after the November 3 election. That same year in Alaska, results weren't announced until November 23 for the state's lone U.S. House race. In both races, however, most of the first-round vote totals were public on election night.

Assuming this timeline is repeated for presidential election results, the initial votes will be publicly available on 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 widespread public outrage – and more – by supporters of a candidate who led the national vote count as reported by media, but drops behind weeks later owing to hundreds of thousands of votes being removed from their tally.

Likewise, it is not difficult to predict significant pressure on sympathetic chief election officials in NPV member states to “correct” what many partisans will undoubtedly call a “stolen” or “wrong winner” election. The simple and obvious move for a sympathetic chief election official would be to choose an “official statement” from the RCV state that includes both initial and final vote totals, and then use the initial vote totals in the national vote count.

SUMMARY: Third-party and independent candidates for president have finished in first or second place in a state more than 70 times since 1892, most recently in 1992. If this happened in a state using RCV with NPV in effect, it could erase enough votes from a major-party candidate to change the outcome, sparking national outrage and chaos.

**“Myth #13. The NPV Compact is flawed because it does not accommodate a legislature seeking to authorize itself to appoint presidential electors”**

Once again, NPV, Inc. mischaracterizes the issue, even deceptively editing my testimony. The concern is that the compact will only count votes from states that run elections according to the NPV compact's definition of a “statewide popular election” (Article V, Section 8). There are several once-common election practices that would not qualify as a “statewide popular election” even though millions of voters participated in their state's popular elections.

In 2022, legislation introduced in Arizona proposed that voters choose presidential electors by Congressional district, similar to Maine and Nebraska.<sup>31</sup> The final two electors would be selected by a joint session of the legislature (Maine and Nebraska award them to the statewide winner). If any state adopted this system, because votes for presidential electors would not be “counted on a statewide basis” as the compact requires, no votes from the state would be included in the national vote count (if NPV compact states followed the letter of their state law). I described this legislation in a 2023 hearing before the Elections Committee of the Michigan House of Representatives.

NPV, Inc.'s first response was to deny that the compact requires a “statewide popular election”<sup>32</sup> for votes to be included in the national vote count. Once this falsehood<sup>33</sup> was exposed, NPV, Inc. sent to the committee the first “Answering 15 False Statements” document which implied that the Arizona bill would have given the legislature power to pick all the state's electors. To do so, NPV, Inc. deleted from my testimony three separate references to Arizona voters electing most of the state's electors, making it

<sup>31</sup> HB 2476, available at: <https://apps.azleg.gov/BillStatus/BillOverview/76974>

<sup>32</sup> Video of March 7, 2023 hearing in Michigan. NPV, Inc. lobbyist Chris Pearson's comments on this issue begin at approximately 1:25:15. <https://www.house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4>

<sup>33</sup> This relevant section of the compact reads in its entirety: “Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.”

read as though I was describing a bill giving the legislature the power to select all the state's presidential electors. In a deceptively edited quote, NPV, Inc. makes three deletions to remove everything in my testimony that hints at Arizona voters electing all but two of the state's electors.

After this next deception was exposed, NPV, Inc. crafted a new response similar to the first and submitted it in Nevada. The new doctored quote suggests the legislature would only pick "some of" the electors, but otherwise still leaves out the original references to the state's voters choosing electors. This time, however, a footnote admits the legislature would pick only two electors and "...the remaining electoral votes would be allocated according to the popular vote in each of the state's congressional districts." Still missing is any acknowledgement that those millions of popular votes would be excluded from the national vote count.

SUMMARY: The NPV compact states that it will only count votes from states that run a "statewide popular election," which could leave millions of votes excluded from the national vote count. Rather than acknowledge these concerns, NPV, Inc. has attempted to mislead state legislatures with deceptively edited information.

#### **"Myth #14. The 1960 Alabama election reveals a flaw in the NPV Compact"**

The 1960 presidential election reveals the NPV flaw discussed in item 13, that the compact won't necessarily include every vote in its "national" vote count because of NPV's definition of a "statewide popular election." Roughly 11 million votes from seven states would have been excluded from the national tally in 1960 using NPV's definition, and Richard Nixon would win with a national margin of 617,118 votes.

NPV, Inc. wants to focus exclusively on Alabama, which would have been excluded from the national count because it did not list presidential and vice-presidential candidates on its ballot, only the parties. NPV, Inc. ignores that Georgia, Louisiana, New York, South Carolina, Tennessee, and Vermont would also have had their votes excluded because they allowed voters to vote for individual presidential electors (as did Alabama).

SUMMARY: The 1960 presidential election demonstrates a serious flaw in the NPV compact, that it would not necessarily count all votes from every state. Applying NPV's definition of a "statewide popular election" in 1960 would erase eleven million votes from seven states and change the winner.

#### **"Myth #15. While (falsely) saying that the Compact authorizes one state to judge another state's election returns, Parnell simultaneously claims the opposite"**

There is no inconsistency. In most circumstances the "official statements" used to obtain results from other states will report consistent and unambiguous vote totals. In those cases, it will be the responsibility of each NPV member state's chief election official to aggregate these vote totals even if they are disputed, inaccurate, incomplete, inflated, the result of fraud or vote suppression, or otherwise manipulated.

For example, as described in the response to Item 4, the Certificate of Ascertainment for New York routinely fails to include tens or hundreds of thousands of votes. If New York or another state submitted incomplete vote totals on the only "official statement" available or other "official statements" contain the same inaccuracies, the chief election official of a compact member state would be required to use those inaccurate totals.

In certain circumstances, however, there is ambiguity. In those situations, the chief election officials

of compact member states must make decisions that will affect the national vote count. As explained in item 7, above, some "official statements" from states using ranked choice voting may include both initial and final totals, leaving it to the chief election officials of each member state to decide, first, which "official statement" to use and, second, which vote total to use. And as discussed in item 8, if a state does not provide an "official statement" in time, then NPV states' chief election officials will have several critical decisions to make, including whether and how to estimate vote totals for that state. They may also decide, as NPV, Inc. lobbyist Patrick Rosenstiel explained to the North Dakota legislature, that there was no "statewide popular election." Rosenstiel suggested that these officials "...may determine and courts might decide... that you've opted out of a national popular vote election... and they report votes out of North Dakota as 'zero' for the Republican candidate and zero for the Democratic candidate...." He noted his belief that these officials would be "gracious" and instead estimate vote totals from such states, another area where judgment would be exercised by chief election officials of compact member states.

SUMMARY: There will be no judgment required by chief election officials when unambiguous vote totals (even if inaccurate or disputed) are available from another state's "official statements." Judgment will be required in cases where vote totals are ambiguous or need to be estimated. They also may have to judge whether a state followed NPV's definition of a "statewide popular election."

#### **Responses to NPV, Inc.'s "4 False Statements" document for Maine<sup>34</sup>**

**"Myth #16. Parnell intentionally deceives Maine Committee by saying that the President of FairVote thinks that RCV and NPV conflict even after passage of Maine's 2021"**

NPV, Inc. claims I mis-dated a paper that Rob Richie, president of Fairvote, was the lead author of ("Toward A More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact")<sup>35</sup> and that I cited in my testimony. The quoted section of the paper repeats concerns I and others have raised about the conflict between the compact and ranked choice voting. I noted in my testimony that this paper was published in August 2021, several months after Maine passed legislation purporting to address this issue.<sup>36</sup>

According to NPV, Inc., the paper was published in 2020, not 2021, and I am "forward-dating" the article in order to "...create the impression that Richie was saying a conflict remained between RCV and NPV after passage of Maine's 2021 law." The only evidence of my alleged "intentional deception" NPV points to the fact that the Richie article appeared in the Winter 2020 edition of the *Harvard Law & Policy Review* (HLPR), claiming this proves the article was published well before August 2021.

HLPR is published twice a year, with a Winter and a Summer edition, but (as is common with academic journals) the publication dates do not always line up neatly with the named seasons. Several sources confirm an August 2021 publication date for the Winter 2020 issue of HLPR.

- A blog post on the FairVote website dated August 5, 2021, references the "forthcoming" paper and explains that "When that article is public, FairVote will introduce its proposals in

<sup>34</sup> The numbering of the "myths" in the document is 1 thru 4, I have changed them here to be 16 thru 19 for ease of organization.

<sup>35</sup> Available at: <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf>

<sup>36</sup> The legislation, LD 1363 did not, in fact, resolve this issue, as will be explained in the next section.



more detail.<sup>37</sup>

- An August 14, 2021 post on the *Election Law Blog* titled "Harvard Law and Policy Review releases symposium issue on the Electoral College" and linking to the Winter 2020 HLPR issue.<sup>38</sup>
- An August 30, 2021 tweet from the Twitter account of HLPR inviting people to view the Winter 2020 edition of HLPR, the only reference of this edition on HLPR's Twitter feed.<sup>39</sup>

The Winter 2020 issue of HLPR was published in August, 2021, and NPV is in error when it states otherwise. Whether Richie believes the Maine legislation fully resolves the conflict between NPV and RCV is unknown, but it should be noted that the legislation did not address the second issue raised in the paper, that of large numbers of votes being erased from the national count if an independent or third-party candidate finishes ahead of either the Democratic or Republican candidate in a state using RCV.<sup>40</sup>

SUMMARY: NPV, Inc. falsely accuses me of "intentional deception" based on their own failure to understand the full substance of the academic paper at issue and its actual publication date, which was in fact after the 2021 Maine legislation.

### **"Myth #17. Parnell intentionally deceives Maine Committee with out-of-context quotation from the Chair of National Popular Vote"**

At the heart of NPV, Inc.'s claim here is that the Certificate of Ascertainment is the "gold standard" for vote totals and thus what compact member states must use for results from other states (or at least from non-member states), and that a 2014 quote from NPV, Inc. Chairman John Koza suggesting otherwise was limited to a specific circumstance he believes is highly improbable or even impossible.

There are numerous problems with NPV, Inc.'s claim, beginning with the fact that the 2014 Koza quote allegedly taken "out-of-context" is substantively identical to a statement in NPV Inc.'s self-published book *Every Vote Equal* (Fourth Edition, 2012).

**"The certificate of ascertainment is not, of course, the only official document existing in a state from which the vote count for presidential elections may be determined... [T]he vote counts for all elective offices (including the votes for presidential slates) are already officially recorded and contained in certificates that are created at the local level and then transmitted to the state official or body that is authorized to certify the total number of popular votes for each elective office in the state. Thus the same information as contained in the Certificate of**

<sup>37</sup> "Maine Legislation Clarifies Ranked Choice Voting Rules for President," available at: [https://fairvote.org/maine\\_legislation\\_clarifies\\_ranked\\_choice\\_voting\\_rules\\_for\\_president/](https://fairvote.org/maine_legislation_clarifies_ranked_choice_voting_rules_for_president/)

<sup>38</sup> Available at: <https://electionlawblog.org/?p=124030>

<sup>39</sup> Available at: <https://twitter.com/hlpronline/status/1432354216681562113?s=20>

<sup>40</sup> Ibid at note 12. The last part of the quote from the Richie, et. al. paper is: "...If that latter choice were made [to use the final round vote totals], what if one of the two strongest national candidates was eliminated during the RCV tally in a given state?" Slightly different phrasing and framing, but essentially identical to the concern about either the Democratic or Republican candidate (who in almost all elections will be the "two strongest national candidates") having votes erased from the national vote count if they finish in third place in a state using RCV.

Ascertainment is available from other sources in the state."<sup>41</sup>

There is no discussion around this statement, or anywhere else in the book, suggesting this applies only to extreme circumstances. Instead, after touting Certificates of Ascertainment as a preferred source of official vote totals, the book simply explains that there are also alternative sources.

In fact, the compact itself mandates in Article III, Section 4 that each member state produce an "official statement" for other member states to use as the source of vote totals,<sup>42</sup> which *cannot* be the state's Certificate of Ascertainment. This is because compact states must obtain all other states' results before creating their own Certificate of Ascertainment. Requiring these certificates to be the source of vote totals among member states would create a "chicken and egg" problem. If only the Certificates were acceptable sources of vote totals, no member state could produce its own without seeing the Certificates of other member states, meaning none of them could ever complete the NPV compact process.<sup>43</sup> The Article III, Section 4 "official statement" fills the gap that would otherwise exist.

Also, as described in item 10, above, Certificates of Ascertainment for some non-member states are unlikely to be available by the compact's deadline. Obviously, something other than the "gold standard" Certificates of Ascertainment would be used these instances (or vote totals would need to be estimated, see item 8, above).

It is worth noting that Certificates of Ascertainment are typically not the source of commonly cited national vote counts. Several months after the November election, the Federal Election Commission produces a report containing popular vote totals for each presidential candidate for the purposes of determining eligibility for federal matching funds.<sup>44</sup> The 2020 report identifies the source of vote totals for the "Popular Vote" as "State Election Offices"<sup>45</sup> (not Certificates of Ascertainment). Dave Leip's Atlas of U.S. Presidential Elections and The American Presidency Project at UC Santa Barbara, two well-regarded sources of presidential election vote totals, also rely on state canvases and other results provided by state election offices – not Certificates of Ascertainment.<sup>46</sup>

NPV, Inc. claims that federal law "designates the Certificate of Ascertainment as 'conclusive,'" implying that NPV member states must use them as the source of vote totals. This law applies only to Congress.

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<sup>41</sup> pp. 267-269

<sup>42</sup> "At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state."

<sup>43</sup> For example: The chief election official of compact state A requires the CoA of compact state B in order to determine the national vote totals, appoint presidential electors according to those national vote totals, and prepare state A's CoA. At the same time, the chief election official of compact state B requires the CoA of compact state A in order to determine the national vote totals, appoint presidential electors according to those national vote totals, and then prepare state B's CoA. Neither can act until the other does, meaning neither state can act at all.

<sup>44</sup> Because this report is not released until well after the Electoral College meets, it is not available for use by NPV member states as a source of an official national vote count. The report on the 2020 election appears to have come out in late January 2021.

<sup>45</sup> "Official 2020 Presidential General Election Results," p. 12, Federal Election Commission. Available at: <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>

<sup>46</sup> See: United States Presidential Election Results: 2020 Presidential Election Data Sources, available at: <https://uselectionatlas.org/RESULTS/> and The American Presidency Project, available at: <https://www.presidency.ucsb.edu/statistics/elections/2020>.

There are only two references to Certificates of Ascertainment being "conclusive" in federal law: 3 USC §5 (c) (1)(A), which states that they "...shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State," and 3 USC §5 (c)(2) which reads "The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors *shall be conclusive in Congress.*"

SUMMARY: The quote from NPV, Inc.'s chairman is not "out-of-context" but consistent with the explanation in *Every Vote Equal*. The compact specifies only that an "official statement" be used to obtain vote totals (if one is available), and does not otherwise define that term.

**"Myth #18. Parnell inaccurately claims that the first-choice rankings alone are an accurate reflection of the voice of the voters in an RCV election"**

No such claim has been made by me, as even the quote from my testimony cited by NPV, Inc. demonstrates.

"Under RCV, however, there are at least two vote totals for each presidential slate – an initial total of first round votes, and then a final total, after the RCV process has concluded."

As discussed previously (items 7 and 16), because the "official statement" used to obtain some states' vote totals will include both the initial and the final vote counts, the question is which set of vote totals from RCV states will be used by compact member states when determining the national vote count.

There is an argument to be made that it should be the final vote totals – the numbers those RCV states have opted to use in selecting their own presidential electors. But a chief election official in a compact member state *could* conclude that the initial vote totals are more comparable to other states' results, or may simply oppose RCV. They also may be unwilling to use only the final vote count if it would cause hundreds of thousands or millions of votes to be erased from the total for one of the top-two national candidates (see item 12, above). Of course, there could be partisan motivations if the choice of vote totals would change the outcome of the election under NPV. Whatever the reasoning, NPV provides no guidance on which vote totals should be used, leaving it to the discretion of each member state's chief election official.

SUMMARY: Nothing I have said indicates whether "first choice rankings alone" are the appropriate vote totals to use. There is no question that a state using RCV to choose presidential electors will use the final vote totals. The question is which set of vote totals NPV states will use, and the compact does not provide guidance on this issue.

**"Myth #19. Parnell inaccurately states the NPV Compact allows state officials to judge the election returns from other states and to pick and choose what vote counts to use"**

As explained previously (see, in particular, items 7, 8, and 15), some choices – "judgments" – must be made by a member state's chief election official to execute the compact.

1. Did a state hold a "statewide popular election" that meets the compact's definition, therefore allowing the state's votes to be included in the national count?
2. Which "official statement" should be used as the source of vote totals?
3. If the chosen "official statement" is from a state using ranked choice voting and it reports more than one vote total for a candidate, which vote total should be used?

4. If a state has not made an "official statement" public by the time the compact requires, should that state be determined to have not held a "statewide popular election" and be excluded from the national vote count?
5. If a state has not made an "official statement" public by the time the compact requires and vote totals are to be estimated, what methodology will be used?

Often, the answers will be obvious and the decisions inconsequential. But in some instances these judgments will be substantive and potentially outcome-deciding. This could obviously be the case when deciding how to incorporate ranked choice voting results or how to "determine" or "assign" vote totals for states where no "official statement" is available in time.

It's also worth recognizing that the popular vote totals are not conclusive in Congress, as NPV, Inc. implies with its statement that "federal law characterizes the vote counts in the Certificate as 'conclusive.'" Instead, it is the appointment of electors that is "conclusive" in Congress – the purpose of the certificates is to certify to Congress whom the state has appointed as electors, not to determine a national vote count.<sup>47</sup>

SUMMARY: The chief election official in each compact member state will be required to first determine whether other states held a "statewide popular election" as defined by NPV, and then which "official statement" to obtain vote totals from. Depending on those decisions, further judgments may need to be made. Sometimes this will lead to decisions that could have outcome-determining consequences.

## Conclusion

In response to my testimony in several states during 2023, NPV, Inc. produced three documents riddled with errors and even intentional deceptions. Ironically, they did this while accusing me of making "false statements" in testimony. This memo sets the record straight, and provides a road-map for exploring defects in the compact that need careful examination.

<sup>47</sup> The popular vote totals are of no interest to Congress because Congress does not count popular votes, only electoral votes. 3 U.S. Code § 5 makes clear that the purpose of the CoAs is to confirm which electors have been appointed by the state.

# Count on Chaos—NPV's Recount Problems

*Sean Parnell*

## Introduction

The National Popular Vote interstate compact (NPV) attempts to mimic a direct, nationwide election for president. Member states agree to award their presidential electors to the candidate deemed to have received the most popular votes nationally,<sup>1</sup> regardless of which candidate won in individual member states.

One critical issue is what happens if the results are close enough to justify a recount? Although NPV creates the illusion of a nationwide election with a national electorate, each of the fifty states and Washington, DC will still run their own elections under their own election codes and policies. The compact itself is silent on the issue of recounts. This means that each individual state, whether in the compact or not, would have to decide on its own whether and how to apply its recount laws.

This memo summarizes the issue of recounts under NPV and then lays out three scenarios that illustrate the challenges a close election would pose if the compact was in effect. These scenarios show that a nationwide recount would be impossible, and that between twenty-five percent and sixty-one percent of all ballots would not be recounted even in an election where the candidates were separated nationally by just 0.07 percent after the initial count.

## Recount Laws: The Basics<sup>2</sup>

Every state except Mississippi provides for either an automatic recount if the margin between leading candidates is less than a specified threshold, or provides candidates, voters, or election officials with the ability to request a recount. Many states provide for both an automatic recount and the ability to request a recount.

In an automatic recount, once the initial vote count is determined to be below the threshold then officials must authorize a recount. This threshold varies by state – in most it is between 0.5 and 1 percent, though in a few it is lower (Hawaii and Ohio both have a 0.25 percent threshold; Oregon's is 0.2 percent). In a handful of states the threshold is a specific vote total – in New York the top candidates must be within 5,000 votes to trigger an automatic recount, while Michigan requires a margin of 2,000 votes or less.

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<sup>1</sup> Technically the compact will only count popular votes cast in a "statewide popular election" and will ignore states holding popular elections that do not comply with the compact's requirements. For the purposes of this brief memo, we assume all states hold elections that meet the compact's requirements.

<sup>2</sup> Information on state recount laws is drawn from two sources: The National Conference of State Legislatures, available at <https://www.ncsl.org/elections-and-campaigns/election-recounts>, and: Ballotpedia, available at [https://ballotpedia.org/Election\\_recount\\_laws\\_and\\_procedures\\_in\\_the\\_50\\_states](https://ballotpedia.org/Election_recount_laws_and_procedures_in_the_50_states)

The process for requesting recounts also varies by state. In some, such as California, any candidate or voter may request a recount regardless of the margin. Other states' laws are more restrictive in terms of the margin and who can request a recount. In Minnesota there is no threshold requirement, but only the losing candidate may request a recount. Alabama requires the candidates to be within 0.5 percent to request a recount, but any candidate or voter may make the request. Utah requires the candidates to be within 0.25 percent and only the losing candidate may request a recount.

### **Problem 1: State or National Margin?**

The first and most significant problem is that state recount laws were written with only the in-state margin in mind, not the margin of a synthesized "national popular vote." In an election where the national margin is very close, the margin in most states is unlikely to be close at all.

For example in the 1960 election, in which either John Kennedy won the popular vote by between roughly 112,000 and 119,000 votes or Richard Nixon won the popular vote by about 60,000 votes,<sup>3</sup> the national margin was between 0.17 and 0.09 percent. But the margin between Kennedy and Nixon was below 0.5 percent in only two states (Hawaii and Illinois).

If the in-state margin is what triggers an automatic recount, or allows a recount to be requested, then even with a very close national margin under NPV, relatively few states could conduct recounts under their current laws.

### **Problem 2: Who's the Loser?**

An additional complication is that many states allow a recount to be requested only by the losing candidate. Just as it is unclear whether the national or in-state margin should be used to determine whether a recount is triggered or can be requested, it is unclear whether it would be the in-state loser or the national loser who can request a recount.

For example, both Illinois and Texas only permit the losing candidate to request a recount. If the national margin was close with the Democrats narrowly ahead after the initial count, and both Illinois and Texas intended to use the national margin to determine whether a recount could be requested, the Republicans would be the "losers" with the power to decide whether either state would conduct a recount. Republicans might reasonably believe that a recount in Texas would be to their advantage, turning up more votes for them than their opponent, while a recount in Illinois would benefit their opponent. In this case, the Republicans are likely to request a recount in Texas but not Illinois, and because the Democrats are the "winners" after the initial count they cannot request a recount in Illinois.

### **Who Recounts? Three Scenario**

The following three scenarios show how states could interpret their recount laws in relation to a close national election if NPV is in effect. Each scenario is based on the same hypothetical election, which assumes a Republican candidate with the same number of votes in each state as Donald Trump received

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<sup>3</sup> Historians and political scientists disagree over how to allocate the popular votes cast in Alabama, where six of eleven Democratic electors were not pledged to Kennedy and ultimately voted for Sen. Harry Byrd.

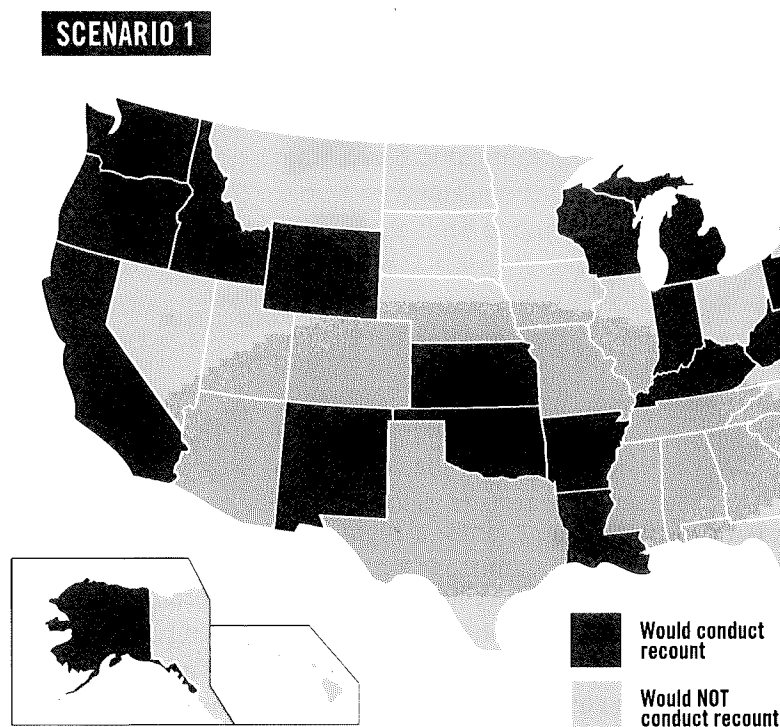
in 2024, and a Democratic candidate with 2.9 percent more votes in each state than Kamala Harris received in 2024. In such a case, the Republicans would have a national lead of roughly 109,000 votes, or a 0.07 percent national margin.

Each scenario assumes that unless the margin is within 1 percent a candidate will not request a recount in a state they have lost, and also assumes that recounts will be conducted in all states where voters can request a recount.

#### SCENARIO 1 – STRICT INTERPRETATION

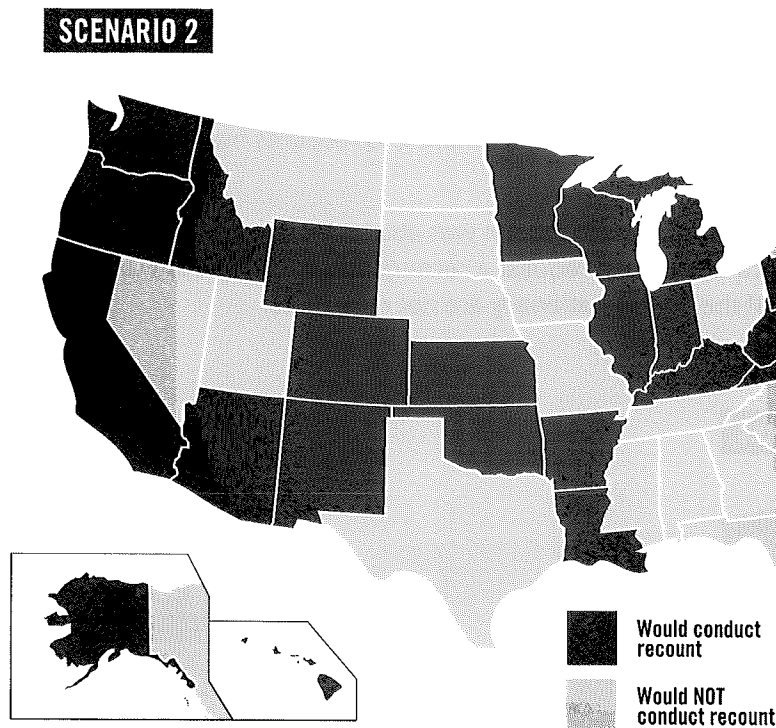
Under this scenario, all state recount laws are interpreted to consider only in-state results. State officials thus ignore the initial national margin and outcome for the purposes of recounts. Only twenty-one states (including Washington, DC) conduct recounts in this scenario. This includes two states (Michigan and Pennsylvania) where the in-state margin is close enough to trigger an automatic recount. A recount would be requested in Wisconsin because the in-state margin between the two candidates is 0.56 percent, under the state's one percent threshold to request a recount. In the remaining eighteen states conducting recounts, there is no threshold requirement and recounts may be requested by either candidate or a voter.

In the other thirty states either the in-state margin was above the threshold to trigger or request a recount, or only the losing candidate can request a recount and would not opt to do so. As a result, roughly sixty-one percent of the ballots nationally are not recounted.



## SCENARIO 2 – SPLIT INTERPRETATION

Under this scenario, states that are members of the compact interpret their recount laws to apply the national margin and determination of winners and losers.<sup>4</sup> States that are not in the compact continue to interpret their recounts laws to only apply the in-state margin and results. Thirty states (including Washington, DC) conduct recounts in this scenario, including 19 of the 23 compact member states.<sup>5</sup> The four compacting states that do not recount (Connecticut, Delaware, New York, and Rhode Island) have thresholds that are tied to a specific number of votes (2,000, 1,000, 5,000, and 1,500, respectively) that would not be met by the roughly 109,000 vote national margin. The twenty-one states that do not conduct recounts account for approximately forty-five percent of all ballots cast.



## SCENARIO 3 – GENEROUS INTERPRETATION

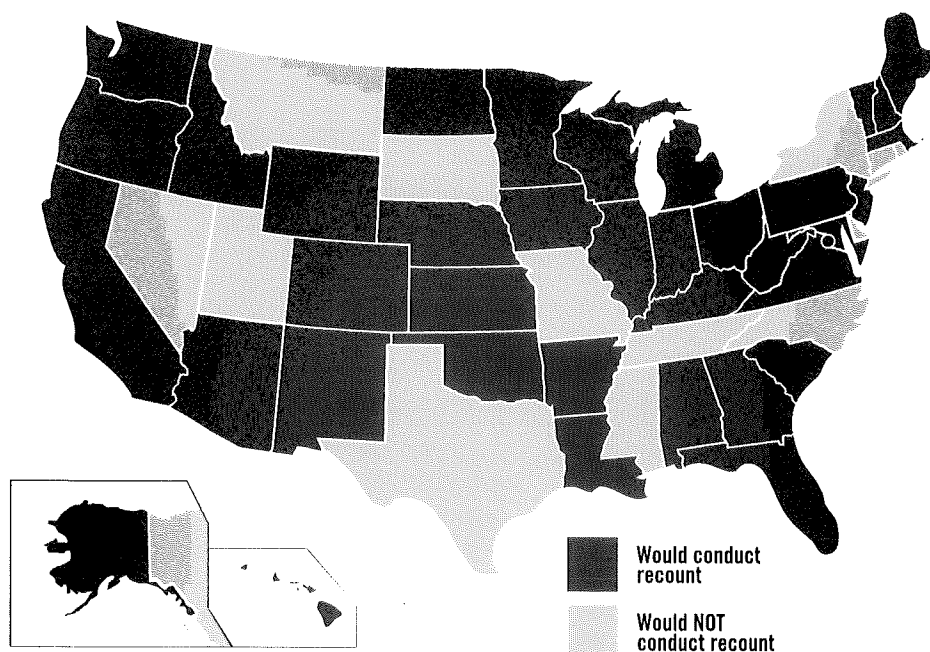
In this scenario every state, regardless of membership in the compact, interprets its recount law to apply the initial national margin and determination of the winning and losing candidates. Thirty-eight states conduct recounts in this scenario, with the increase over Scenario 2 attributable to automatic recounts being triggered in several non-compacting states. Thirteen states still do not conduct recounts,

<sup>4</sup> This scenario assumes that the following additional states have joined the compact in order to put it into effect: Arizona, New Hampshire, Nevada, Pennsylvania, Virginia, and Wisconsin.

<sup>5</sup> Ibid.



either because their margin for triggering or allowing recounts is a set number of votes rather than a percentage, or because the candidate deemed the loser after the initial national count would not request recounts in states they lost. The states that would not conduct a recount would represent about twenty-five percent of all ballots cast.

**SCENARIO 3****Conclusion**

Recounts are a critical part of the election process and serve two purposes. Most obviously, recounts are used to ensure that the correct candidate wins. Perhaps as important, recounts can reassure the public that the process was fair and accurate.

Unfortunately, the National Popular Vote Interstate compact cannot deliver on either purpose. Although it purports to create a nationwide election and national electorate, each state must continue to run its own elections under its own election code. The compact does not even attempt to solve the problem of recounts. Instead, it leaves it to each state—including states not in the compact—to figure out as best they can how their recount laws should operate with regard to NPV.

This means a true nationwide recount could not be conducted even if it were needed. Instead, a close national election would lead to a situation where some states conduct recounts while others do not, stirring confusion and distrust among the broader public, and possibly handing the presidency to a candidate that did not actually receive the most popular votes. This critical defect in the NPV compact warrants its rejection.

State of Alaska  
2024 GENERAL ELECTION  
Election Summary Report  
November 5, 2024  
OFFICIAL RESULTS

Precincts Reported: 403 of 403 (100.00%)

Voters Cast: 340,981 of 611,078 (55.80%)

U.S. President / Vice President

Precincts Reported: 403 of 403 (100.00%)

		Total	
Times Cast		340,981 / 611,078	55.80%
Candidate	Party	Total	
Harris/Walz	DEM	140,026	41.41%
Kennedy/Shanahan	NOM	5,670	1.68%
Oliver/Maat	LIB	3,040	0.90%
Sonski/Onak	ASP	702	0.21%
Stein/Ware	NOM	2,342	0.69%
Terry/Broden	CON	812	0.24%
Trump/Vance	REP	184,458	54.54%
West/Abdullah	AUR	1,127	0.33%
Total Votes		338,177	

U.S. Representative

Precincts Reported: 403 of 403 (100.00%)

		Total	
Times Cast		340,981 / 611,078	55.80%
Candidate	Party	Total	
Begich, Nick	REP	159,550	48.41%
Hafner, Eric	DEM	3,417	1.04%
Howe, John Wayne	AIP	13,010	3.95%
Peltola, Mary S.	DEM	152,828	46.37%
Write-in		750	0.23%
Total Votes		329,555	

## Senate District B

Precincts Reported: 18 of 18 (100.00%)

		Total	
Times Cast		20,505 / 32,580	62.94%
Candidate	Party	Total	
Kiehl, Jesse	DEM	15,508	96.51%
Write-in		561	3.49%
Total Votes		16,069	

## Senate District D

Precincts Reported: 17 of 17 (100.00%)

		Total	
Times Cast		20,555 / 34,566	59.47%
Candidate	Party	Total	
Carpenter, Ben	REP	7,848	40.64%
Wegener, Tina	DEM	2,182	11.30%
Bjorkman, Jesse J.	REP	9,234	47.82%
Write-in		47	0.24%
Total Votes		19,311	

## Senate District F

Precincts Reported: 13 of 13 (100.00%)

		Total	
Times Cast		18,497 / 30,870	59.92%
Candidate	Party	Total	
Kaufman, James D.	REP	8,147	47.91%
Park, Janice L.	DEM	7,646	44.96%
Borbridge, Harold	REP	1,178	6.93%
Write-in		35	0.21%
Total Votes		17,006	

## Senate District H

Precincts Reported: 13 of 13 (100.00%)

		Total	
Times Cast		19,127 / 31,767	60.21%
Candidate	Party	Total	
Claman, Matt	DEM	9,924	55.24%
Vazquez, Liz	REP	7,989	44.47%
Write-in		53	0.30%
Total Votes		17,966	