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## **Answering 15 False Statements about the National Popular Vote Bill in Michigan (HB4156 / SB126)**

March 30, 2023

Sean Parnell, senior legislative director of Save Our States (a group lobbying against adoption of the National Popular Vote Compact) has made 15 false statements about the Compact ([HB4156](#) and [SB126](#) in Michigan) during his recent testimony to state legislative committees in Minnesota, Michigan, and Alaska.

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

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

“The core defect of the compact, which is that **there is no official national vote count** that can be used for this compact.”<sup>1</sup>

### **THE FACTS:**

There is, in fact, a legally defined national popular vote count based on official “Certificates of Ascertainment” that federal law requires each state to issue six days before the Electoral College meets. The federal Electoral Count Reform Act of 2022 states:

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

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

The 2022 Act also created a special three-judge federal court (open only to presidential candidates) to enforce the timely “issuance” of each state’s Certificate and its timely “transmission” to the National Archives.

The 51 Certificates of Ascertainment for the 2020 presidential election may be viewed at <https://www.archives.gov/electoral-college/2020>.

There is a precise legal definition of the “national popular vote total.” It is contained in the National Popular Vote Compact that 15 states and the District of Columbia have already enacted. The Compact arrives at the national total by applying the straight-forward process of addition to the official, state-created Certificates of Ascertainment that are required by federal law.

“The chief election official of each member state shall determine the number of votes for each presidential slate in each state ... and **shall add such votes together to produce a “national popular vote total”** for each presidential slate.”<sup>3</sup> [Emphasis added]

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<sup>1</sup> *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact)*. March 7, 2023. Page 2.  
[https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

<sup>2</sup> Section 5 of the 2022 Act starts on page 1892 of <https://www.congress.gov/bill/117th-congress/senate-bill/4573>. This section is similar to the wording of the earlier Electoral Count Act of 1887.

<sup>3</sup> National Popular Vote Compact. Article III, Clause 1. The full text of the Compact may be found in Michigan bill HB4156 at <http://www.legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4156.pdf>

Parnell dismissively describes the process of adding up the votes from each state by saying:  
“national popular vote **attempts to cobble together** ... an national popular vote count.”<sup>4</sup> [Emphasis added]

It is noteworthy that the National Popular Vote Compact arrives at the national popular vote total in the same way as the constitutional amendment passed by a bipartisan 338–70 vote in the U.S. House of Representatives in 1969. The operative words in that amendment were:

“The pair of persons having **the greatest number of votes** for President and Vice President shall be elected...”<sup>5</sup> [Emphasis added]

In short, there is no mystery about the process of adding up 51 sets of numbers. The 1969 amendment relied on the same official, state-issued Certificates of Ascertainment as the National Popular Vote Compact. Federal law has required similar certificates since 1792.

## **Myth #2: The Compact allows one state to judge another state’s election returns**

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

“NPV provides no guidance on which vote totals to use in calculating the national vote total. The choice is left to the chief election official within each compact state. ... In a close election, this could **give a group of often obscure state officials the power to manipulate the national vote count based on which vote totals they use from other states.** ... This is too much power to vest in any official, and will lead to confusion, controversy, and chaos.”<sup>6</sup>  
[Emphasis added]

### **THE FACTS:**

The NPV Compact does **not** give officials in states belonging to the Compact the power to judge the election returns of other states—much less the power to “manipulate” anything.

In fact, the Compact says exactly the opposite:

“The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate.”<sup>7</sup> [Emphasis added]

The reader is invited to search [the 888 words of the National Popular Vote Compact](#) for anything that even suggests that administrative officials of the Compact’s member states have the discretion or the power of manipulation that Parnell claims.

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<sup>4</sup> Parnell, Sean. 2023. Testimony at Minnesota House Elections Finance and Policy Committee on HB642. February 1, 2023. Timestamp 1:11. <https://www.house.leg.state.mn.us/hjvid/93/896232>

<sup>5</sup> House Joint Resolution 681. 91<sup>st</sup> Congress. 1969.

<sup>6</sup> Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. [https://www.senate.mn/committees/2023-2024/3121\\_Committee\\_on\\_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf](https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf)

<sup>7</sup> National Popular Vote Compact. Article III, Clause 5. The full text of the Compact may be found in Michigan bill HB4156 at <http://www.legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4156.pdf>

### Myth #3: There is no mechanism for resolving disputes under NPV

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

**“NPV provides no mechanism for resolving differences or disputes.... NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and similar issues, makes it **fatally flawed and dangerous to democracy.**”**<sup>8</sup>  
[Emphasis added]

#### THE FACTS:

The reason that the NPV Compact contains no separate “mechanism” for resolving disputes is that the United States already has a fully operational judicial system throughout the country.

Under the National Popular Vote Compact, a state's presidential vote count may be challenged in the **same** five ways that they can be challenged under the current system. The five ways include (1) administrative proceedings in the state-of-origin (e.g., recounts, audits) and proceedings in (2) that state's lower courts, (3) that state's supreme court, (4) lower federal courts lower federal courts covering the state-of-origin, and (5) the U.S. Supreme Court. Aggrieved presidential candidates used all five ways in both 2000 and 2020.<sup>9</sup>

Under our federal system, once litigation over the presidential vote count is decided in the state-of-origin, the Full Faith and Credit Clause of the U.S. Constitution prevents another state's officials (administrative or judicial) from second-guessing that decision. The Constitution states:

“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>10</sup>

### Myth #4: New York can't be trusted to produce an accurate vote total

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

“New York cannot accurately count its votes to save its life.”<sup>11</sup>

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

“You also have the problem that other states, New York in particular, are **not necessarily going to produce an accurate vote total.** ... There's about 425,000 votes that New York was missing off of its 2012 Certificate of Ascertainment.”<sup>12</sup> [Emphasis added]

#### THE FACTS:

Hurricane Sandy resulted in the temporary relocation of hundreds of thousands of New Yorkers just before Election Day in 2012. The state allowed some 425,000 displaced New Yorkers to cast

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<sup>8</sup> Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. [https://www.senate.mn/committees/2023-2024/3121\\_Committee\\_on\\_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf](https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf)

<sup>9</sup> See The Ohio State University's Case Tracker for the 2020 presidential election at [https://electioncases.osu.edu/case-tracker/?sortby=filing\\_date\\_desc&keywords=&status=all&state=all&topic=25](https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25)

<sup>10</sup> U.S. Constitution. Article IV. Section 1.

<sup>11</sup> Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:02:20. <https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4>

<sup>12</sup> Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:00. [https://www.youtube.com/watch?v=ZioPI\\_L-BM](https://www.youtube.com/watch?v=ZioPI_L-BM)

provisional ballots away from their home precinct. This was four times more provisional ballots than usual. Because displaced voters were allowed to vote *anywhere* in the state, each provisional ballot had to be individually analyzed to be sure that the votes cast by each out-of-precinct voter were counted only for the particular district and local offices for which that particular voter was entitled to vote.

It was apparent to all that the result of processing the 425,000 provisional ballots could not possibly have reversed Obama's statewide win in New York (about 2 million votes)—or, for that matter, Obama's nationwide lead.

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

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

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

In any case, there is no doubt today that states are going to produce timely vote counts (under either the current system or National Popular Vote). The Electoral Count Reform Act of 2022 made the sixth day before the Electoral College meeting into a deadline for states to issue their Certificates of Ascertainment (whereas it was merely a “safe harbor” under the 1887 Electoral Count Act).

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

Parnell repeated his claim that states “are not necessarily going to produce an accurate vote total” by telling the Minnesota Senate Elections Committee on January 31, 2023:

“You also have the problem that frankly states can sometimes do some kind of strange things that don't really affect it under the current system, but under national popular vote would be a disaster. Donald Trump, because **California accidentally** gave every Trump voter 2 votes in 2016 **through a bad ballot design**, Donald Trump under the counting mechanism of the compact would have won, because they **gave him an extra 4.5 million votes**. That seems kind of outrageous to me.”<sup>13</sup> [Emphasis added]

#### **THE FACTS:**

Despite what Parnell says, California's 2016 Certificate of Ascertainment was not inaccurate, and California did not give Trump an extra 4.5 million votes—accidentally or otherwise.

The facts are that California's Certificate of Ascertainment explicitly states that Clinton-Kaine ticket's 8,753,788 vote total was “higher” than the vote total of any other ticket—including the 4,483,810 votes cast for the Trump-Pence ticket. The Certificate says:

“I, Edmond G. Brown, Governor of the State of California, hereby certify ... the following persons **received the highest number of votes** for Electors of the President and Vice President of the United States for the State of California ...

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<sup>13</sup> Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:33. [https://www.youtube.com/watch?v=ZioPI\\_L-BM](https://www.youtube.com/watch?v=ZioPI_L-BM)

**California Democratic Party Electors Pledged to Hillary Clinton for President** of the United States and Tim Kaine for Vice President of the United States ... **Number of Votes—8,753,788.**<sup>14</sup> [Emphasis added]

If there was any truth to Parnell’s claim that California accidentally gave Trump an extra 4.5 million votes, the state’s Certificate would necessarily have identified the Trump-Pence ticket as having “received the highest number of votes” and therefore the Trump-Pence ticket would have received California’s 55 electoral votes.

The reader is invited to search [California’s 2016 Certificate of Ascertainment](#) for anything that says the Trump-Pence ticket received more than 4,483,810 votes.

By way of background, California allows two or more political parties to nominate the same presidential and vice-presidential candidates—that is, so-called “fusion” voting. In 2016, the Republican Party and American Independent Party both nominated the Trump-Pence ticket. When the votes cast on the Republican and American Independent lines on the ballot were added together (that is, “fused”), the result was a grand total of 4,483,810 for the Trump-Pence ticket.

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

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

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

“The NPV compact was drafted at a time when RCV was not used in any states in presidential elections. Since then, Alaska and Maine have adopted RCV and other states are considering it. **NPV assumes every state will use simple plurality voting** that produces a single vote count for each presidential candidate.”<sup>15</sup> [Emphasis added]

#### **THE FACTS:**

The National Popular Vote Compact was specifically written to accommodate the future adoption of different voting procedures, such as Ranked Choice Voting (RCV). In fact, the president of FairVote (the leading national organization advocating RCV) was a co-author of the Compact, and FairVote was the first organization to endorse the Compact.

### **Myth #7: NPV is incompatible with RCV**

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

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

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<sup>14</sup> California’s 2016 Certificate of Ascertainment is at <https://www.archives.gov/files/electoral-college/2016/ascertainment-california.pdf>

<sup>15</sup> Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. [https://www.senate.mn/committees/2023-2024/3121\\_Committee\\_on\\_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf](https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf)

litigation, and opportunities for manipulation if NPV took effect.”<sup>16</sup> [Emphasis added]

### **THE FACTS:**

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

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

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

Jeanne Massey, Executive Director of FairVote Minnesota, submitted written testimony to the Minnesota House Election Finance and Policy Committee on February 1, 2023 saying:

“I have read the opposing testimony related to RCV and National Popular Vote compatibility, and it is misleading and incorrect. **The testimony comes from an organization opposed to both RCV and NPV [that is, Save Our States] and has a clear motive—to hurt both reforms.** Like Maine, which uses RCV for presidential elections and has clarified its state laws to ensure compatibility with electing presidential electors under NPV, Minnesota will do the same. I urge you to disregard the unproven, misleading argument that RCV and NPV are incompatible and support the NPV legislation before you.”<sup>17</sup> [Emphasis added]

In 2021, Maine amended its RCV-for-President law to eliminate any arguable ambiguity by requiring that the state’s Certificate of Ascertainment report the final-round RCV count.

Alaska’s current RCV law is not as explicit as Maine’s. This will probably be of no practical importance because the Republican presidential nominee is almost certain to win an absolute majority of the first-choice votes in Alaska. When that happens, Alaska’s RCV law specifies that the counting process stops—thus making the count of first-choice votes equivalent to the final-round RCV count.

Having said that, if this question of statutory interpretation is not clear in Alaska by the time when the National Popular Vote Compact comes into effect, RCV supporters in Alaska and other Alaska voters would undoubtedly demand a definitive statutory interpretation before Election Day as to how their RCV votes for President will be counted. If state election officials do not provide a satisfactory answer prior to Election Day, voters would undoubtedly seek a declaratory judgement from Alaska courts. In the extremely unlikely event that this question of statutory interpretation in Alaska was not settled prior to Election Day, the question would (assuming it mattered) be litigated in Alaska after Election Day. At the end of the day, Alaska’s Certificate of Ascertainment will reflect the statutory interpretation made by Alaska courts. Whatever the decision, the National Popular Vote Compact requires that Alaska’s “final determination” be treated as “conclusive.” In short, no state administrative official outside Alaska has any role interpreting Alaska law—much less any “opportunities for manipulation.”

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<sup>16</sup> Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. [https://www.senate.mn/committees/2023-2024/3121\\_Committee\\_on\\_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf](https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf)

<sup>17</sup> Massey, Jeanne. 2023. Testimony before Minnesota House Elections Finance and Policy Committee. February 1, 2023. <https://www.house.mn.gov/comm/docs/TYRWZhxR-kCyJCxmXC5Z1Q.pdf>

Parnell was also inaccurate when he told the Michigan House Elections Committee on March 7, 2023:

“I’ll note that NPV’s leadership insists that the final vote count in RCV states is what must be used.”<sup>18</sup>

In fact, neither the NPV organization nor the National Popular Vote Compact “insists” that the final RCV count be used—in preference to the first-choice count or anything else. Each state is free to decide this question for itself if it ever adopts RCV. What we have said is that using the first-choice count would be a very strange decision, because it would negate the purpose of adopting RCV in the first place.

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

There are several inaccuracies in the sentence below from Parnell’s testimony to the Michigan House Elections Committee on March 7, 2023. We examine them one at a time.

“If for some reason there is not an ‘official statement’ available to obtain vote totals by the time the compact needs them—for example, if there is a recount still underway or court challenges to results, or if a state is simply refusing to cooperate with the compact, then **the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate.**”<sup>19</sup> [Emphasis added]

#### **THE FACTS:**

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

The reader is invited to search [the 888 words of the National Popular Vote Compact](#) for anything about estimating.

And, as previously mentioned, the Compact does not allow state officials in member states to judge the election returns of other states. The Compact states:

“The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate.”<sup>20</sup> [Emphasis added]

### **Myth #9: Unfinished recounts and litigation could thwart the Compact**

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

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<sup>18</sup> Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. [https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

<sup>19</sup> Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. [https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

<sup>20</sup> National Popular Vote Compact. Article III, Clause 5. The full text of the Compact may be found in Michigan bill HB4156 at <http://www.legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4156.pdf>



“If for some reason there is not an ‘official statement’ available to obtain vote totals by the time the compact needs them—for example, if there is a **recount still underway or court challenges** to results, or if a state is simply refusing to cooperate with the compact, then the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate.”<sup>21</sup> [Emphasis added]

#### **THE FACTS:**

In the *Bush v. Gore* dispute in 2000 and disputes in 2016 and 2020 involving recounts of presidential elections, the U.S. Supreme Court and all lower courts have uniformly followed the principle that 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 (the so-called “safe harbor” day under the Electoral Count Act of 1887).

The Electoral Count Reform Act of 2022 treats this date as a deadline.

In short, the premise underlying Parnell’s scary scenario (namely that recounts and court proceedings could be “still underway” after the Electoral College meets) is false.

#### **Myth #10: A rogue governor can refuse to issue a certificate of ascertainment**

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

“If for some reason there is not an ‘official statement’ available to obtain vote totals by the time the compact needs them—for example, if there is a recount still underway or court challenges to results, or **if a state is simply refusing to cooperate with the compact**, then the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate.”<sup>22</sup> [Emphasis added]

#### **THE FACTS:**

The National Popular Vote Compact does not rely on cooperation by states that do not belong to the Compact to do anything.

It does rely on all states to comply with federal law, as required by the Supremacy Clause of the U.S. Constitution.

Parnell has advanced the theory for many years that a rogue state governor has the power—at this one person’s sole discretion—to cancel the votes of all of the state’s voters by simply refusing (or even forgetting) to issue the Certificate of Ascertainment required by federal law.

In his testimony to the Connecticut Government Administration and Elections Committee on February 24, 2014, Sean Parnell said:

**“A very simple way for any non-member state to thwart the Compact, either intentionally or unintentionally, would simply be to not submit their**

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<sup>21</sup> Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. [https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

<sup>22</sup> Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. [https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos.**” [Emphasis added]

**“There is nothing in federal law that requires the governor to submit it prior to the meeting of the Electoral College.”**<sup>23</sup> [Emphasis added]

The U.S. Constitution states that:

“Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors....”<sup>24</sup> [Emphasis added]

No state legislature has given its governor the unilateral power to keep the votes of the state’s voters from being counted or any other discretionary power concerning the presidential vote count. A state governor’s role in signing the state’s Certificate of Ascertainment is an entirely ministerial and non-discretionary function. It is also a function explicitly required by federal law.

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

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

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

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

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

“It simply will not be possible to conclusively determine which candidate has received the most votes because **every state runs its own election**, and will continue to do so under the compact. They run their own election according to their own codes, standards, policies, practices, and procedures. And **those don’t always line up well with what the compact requires.**”<sup>25</sup> [Emphasis added]

#### **THE FACTS:**

Although there are various differences in election procedures from state to state, one thing that all states have in common is that they all produce a vote count for each presidential-vice-presidential ticket.

And, federal law requires that each state issue a Certificate of Ascertainment certifying those vote counts.

Those are the two things that the National Popular Vote Compact needs.

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<sup>23</sup> Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

<sup>24</sup> U.S. Constitution. Article II, section 1, clause 2.

<sup>25</sup> Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:01:52. <https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4>

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

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

“Ranked Choice Voting creates another problem for the compact. Which is what happens when a third-party candidate finishes ahead of either the Democrat or the Republican, **as has happened many times in our nation’s history.**”<sup>26</sup>  
[Emphasis added]

### **THE FACTS:**

Before proceeding, it should be noted that the premise of this rhetorical question is inaccurate. In fact, it is exceedingly rare for a third-party candidate to finish ahead of the two major-party presidential candidates in any state.

The last time a third-party presidential candidate came in ahead of the two major-party presidential candidates in a state was 1968 when segregationist Governor George Wallace of Alabama won five states. The only time since 1968 when a third-party candidate even came in ahead of one of the two major-party candidates in a state was when Ross Perot came in second in Maine and Utah in 1992. That is, the major-party candidate came in first or second place in 610 of the 612 state-level votes in the 12 presidential elections between 1972 and 2020.

But, for sake of argument, let’s say this infrequent event occurred.

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

“Under Ranked Choice Voting, if a third party or an independent candidate were to finish ahead of either the Democratic or Republican candidate, ... **the votes for that Democratic or Republican candidate gets completely erased** and will not be reported.”<sup>27</sup> [Emphasis added]

It should be remembered that the current state-by-state winner-take-all method of awarding electoral votes routinely erases the popular votes cast for **every** second- or third-place candidate in **every** state in **every** election.

Of course, the precise purpose of RCV is to honor the voter’s second (or later) choice in case the voter’s first-choice cannot win. RCV does this by transferring a voter’s ballot from a candidate who cannot win to the next-ranked candidate on that voter’s ballot. Thus, RCV could, in rare cases, leave a major-party candidate who comes in third place in one state with zero votes.

There is a key difference in the rare and benign transferring that occurs under RCV as compared to the “erasing” that routinely occurs under the winner-take-all system. If RCV and National Popular Vote had been in effect in 1992 when Bush came in third in Maine and Clinton came in third in Utah, every voter in Maine and Utah would have had their vote counted for a candidate **for whom that voter actually voted**. In contrast, the current winner-take-all method of awarding electoral votes erases votes in a manner that creates the illusion that the state’s voters were unanimous. That is, the winner-take-all system routinely transfers the voter’s vote to a candidate **for whom the voter did not vote**.

If Perot had carried Maine or Utah in 1992 under the *current* winner-take-all method of awarding electoral votes, neither George H.W. Bush or Clinton would have received any votes in the Electoral College from those states. Admittedly, that would have made it more difficult for Bush or Clinton to win in the Electoral College. But it is not the job of lawmakers, voters, or the

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<sup>26</sup> Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:04:07. <https://house.mi.gov/VideoArchivePlayer?video=HELEEC-030723.mp4>

<sup>27</sup> Testimony of Sean Parnell. Maine Committee on Veterans and Legal Affairs. May 11, 2021

RCV voting system to protect the two major-party presidential nominees from the consequences of their failure to earn enough support to come in first or second place.

In deciding whether to adopt RCV, states must weigh the argued advantages of RCV in 610 of the 612 state-level elections since 1968 versus the merits of the simple plurality-vote system. The National Popular Vote Compact can handle either choice that a state makes.

Given that Parnell vigorously defends the current state-by-state winner-take-all method of awarding electoral votes, this concern about votes being transferred away from one of the two major-party presidential candidate is little more than crocodile tears.

### **Myth #13: The NPV Compact is flawed because it would not accommodate the Arizona legislature if it decided to authorize itself to choose the state's presidential electors**

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

“A couple of years ago **there was a bill in Arizona proposing that ... electoral votes would be chosen by the legislature.** I don't really have an opinion one way or the other on whether this is a good idea or not. But **it's an interesting idea** that's out there. If Arizona were to do that, National Popular Vote would look at that and say ‘there is no statewide popular election for electors.’ ... That **seems like it's going to be a problem.**”<sup>28</sup> [Emphasis added]

#### **THE FACTS:**

Every state currently has laws saying that the state's presidential electors are to be chosen by the voters—not the state legislature. In fact, no state legislature has chosen the state's presidential electors since 1876.

The National Popular Vote Compact adds up popular votes cast by *individual citizen* voters in a statewide popular election.

It is unequivocally true that the Compact would not accommodate the Arizona legislature if it were to decide, at some future time, to designate itself as the authority to choose any of the state's presidential electors. Far from viewing this as “a problem,” we regard this as a feature—not a bug.

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

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

“Historians still argue whether Richard Nixon or John Kennedy won the popular vote in 1960, owing largely to uncertainty over how to count votes from Alabama that year. It's an interesting bit of historical trivia because of course Kennedy won the Electoral College regardless of the Alabama issues, but **under National Popular Vote, not being able to conclusively determine a winner would be a national crisis.**”<sup>29</sup> [Emphasis added]

#### **THE FACTS:**

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

<sup>29</sup> Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 4. [https://house.mi.gov/Document/?Path=2023\\_2024\\_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf](https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf)

The reason it is uncertain whether Kennedy or Nixon won the national popular vote in 1960 is that neither Kennedy nor Nixon's name appeared on the ballot in Alabama that year.

That is, there simply were no votes to count for Kennedy and Nixon from Alabama in 1960.

The various unofficial national popular vote totals for 1960 that are bandied about reflect the slightly different speculative calculations made by the editors of various almanacs.

In the early days of the Republic, voters' ballots did not contain the names of the presidential and vice-presidential candidates. Thus, a voter in a state with, say, 11 electoral votes (as Alabama had in 1960) would have to vote for 11 separate candidates for the position of presidential elector.

A majority of the states abandoned this cumbersome approach by the middle of the 20<sup>th</sup> century and adopted the so-called "short presidential ballot" that lists the names of the presidential and vice-presidential candidates on the ballot and allows a voter to conveniently vote directly for their chosen presidential-vice-presidential slate.

Three-quarters of the states did so by the mid-1960s. Since 1980, all states have used the so-called "short presidential ballot"

Back in 1960, segregationists in Alabama (whose ballot did not contain either Kennedy's name or Nixon's name) seized on this dying system as a way to elect Democratic presidential electors who would not vote in the Electoral College for the Democratic Party's national nominee (that is, Kennedy). The segregationists succeeded in electing 6 of Alabama's 11 presidential electors in 1960, and those electors did not vote for Kennedy in the Electoral College. Meanwhile, no popular votes were recorded for either Kennedy or Nixon in 1960 from Alabama, since their names were not on the ballot.

The National Popular Vote Compact is based on the fact that every state has (very sensibly) used the "short presidential ballot" since 1980.

If any state today were to exclude the names of the presidential candidates from the ballot (as Alabama did in 1960), it would, in effect, be opting out of the national popular vote process, because there would be no vote count for any actual presidential candidate from that state. Such a maneuver would be a very poor policy decision. However, if a state legislature decided to opt-out of the national popular vote count in this manner, their departure would present no operational difficulties in terms of the Compact's ability to quickly and conclusively compute the national popular vote total from the states that conducted a "statewide popular election." There would be no "national crisis"—simply a lot of voters angry with their state legislature.

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

As we saw earlier in myth #2, Sean Parnell has inaccurately claimed that the NPV Compact allows administrative officials in states belonging to the Compact to judge the election returns of other states.

Nonetheless, he wrote in a newspaper op-ed in his home state of Virginia:

"The NPV compact also risks causing an electoral crisis due to its poor design. ... **States that join the compact are supposed to accept vote totals from every other state even if they are disputed, inaccurate, incomplete, or the result of fraud or vote suppression.**"<sup>30</sup> [Emphasis added]

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<sup>30</sup> Parnell, Sean. Opinion: Voting compact would serve Virginians badly. Charlottesville Virginia *Daily Progress*. August 9, 2020. [https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article\\_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html](https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html)

## **THE FACTS:**

The facts are that administrative officials in states belonging to the Compact cannot judge the vote counts certified by other states. Under our federal system, election disputes must be litigated using the administrative processes and the state or federal courts of the state-of-origin. The Compact's approach is, of course, exactly the same approach used by the current winner-take-all method of awarding electoral votes.

Contrary to the impression created by Parnell's statement, this does not mean that erroneous state election returns cannot be challenged. A state's presidential vote count may be challenged under the Compact in the same five ways that it can be challenged under the current system. The five ways include (1) administrative proceedings in the state involved (e.g., recounts, audits) and proceedings in (2) that state's lower courts, (3) that state's supreme court, (4) lower federal courts covering the state-of-origin, and (5) the U.S. Supreme Court. Aggrieved presidential candidates used all five ways in both 2000 and 2020.<sup>31</sup>

When the state of Texas challenged Pennsylvania's presidential vote count in 2020, the U.S. Supreme Court refused to let Texas file a bill of complaint, saying:

“Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”<sup>32</sup>

## **Conclusion**

None of the above myths about vote counting under the National Popular Vote Compact are true.

These myths are part of an effort to distract attention from the fact that the defenders of the current state-by-state winner-take-all method of electing the President never address—and cannot address—the shortcomings of the current system of electing the President, namely that it does not

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

The National Popular Vote Compact would.

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<sup>31</sup> See The Ohio State University's Case Tracker for the 2020 presidential election at [https://electioncases.osu.edu/case-tracker/?sortby=filing\\_date\\_desc&keywords=&status=all&state=all&topic=25](https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25)

<sup>32</sup> *Texas v. Pennsylvania*. December 11, 2020. Order 155-ORIG. 592 U.S.

## **Who Supports the National Popular Vote bill?**

A copy of the complete article is on file with the  
Committee Manager ([AsmLOE@asm.state.nv.us](mailto:AsmLOE@asm.state.nv.us)).