

Answering 4 False Statements about the National Popular Vote Compact in relation to Ranked Choice Voting (Maine bill LD1502)

May 18, 2023

Sean Parnell, senior legislative director of Save Our States (a group lobbying against adoption of the National Popular Vote Compact) made 4 false statements about the National Popular Vote Compact (NPV) in relation to Ranked Choice Voting (RCV) in his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023.

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1. 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 law

In his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023, Parnell quoted from a law review article written by Rob Richie, the President of FairVote.

"I will note that lobbyists for NPV claim that it's not possible for there to be any conflict between the compact and RCV because the nation's leading proponent of RCV (Rob Richie, president of FairVote) helped write the compact. This ignores a 2021 paper on this issue that Richie served as the lead author of, which noted:

'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 candidates was eliminated during the RCV tally in a given state?'"

"That paper came out in August 2021, months after Maine changed its law."¹
[Emphasis added]

¹ Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee
Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine's Electoral Votes by Prohibiting

The deceptive nature of Parnell’s written testimony to the Maine Committee becomes apparent when one realizes that Richie’s law review article was published in 2020—not August 2021.

Parnell’s forward-dating of Richie’s 2020 article matters for three reasons.

First, while Richie’s 2020 article did include the above rhetorical questions, Richie answered them in his article by explaining how RCV and NPV are compatible.

Second, the rhetorical questions that Richie raised in 2020 were duly considered in a hearing before the Maine Veterans and Legal Affairs Committee in the spring of 2021. Richie’s rhetorical questions were answered when the Legislature passed, and the Governor signed, a law in 2021 specifying that Maine’s Certificate of Ascertainment must contain the result of the RCV tabulation from the final round.²

Third, by attaching an August 2021 date to Richie’s 2020 article, Parnell tried to create the impression that Richie was saying that a conflict remained between RCV and NPV **after passage of Maine’s 2021 law**. In fact, Maine’s 2021 statutory change answered all the questions that Richie raised in 2020.

Note that Parnell’s deceptive dating of Richie’s 2020 article was intentional.

- The date “2020” appears right at the top of page 159 of Richie’s article—the very page that Parnell quotes.³

- Moreover, Parnell’s footnote for the Richie article indicates intentional deception because the footnote tellingly lacks a date! The footnote was:

“Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. p. 159. Available at: <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf>.”

2. Parnell intentionally deceives Maine Committee with out-of-context quotation from the Chair of National Popular Vote

Parnell uses an out-of-context quotation from the Chair of National Popular Vote (Dr. John Koza) to argue that the federally required Certificate of Ascertainment⁴ is not the gold standard for presidential vote counting, and that therefore states can freely ignore vote counts in the Certificates.

In his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023, Parnell says:

“The chief election official of another state is not required to obtain Maine’s vote totals from the state’s Certificate of Ascertainment—the compact only requires that they obtain vote totals from an ‘official statement,’ a term that encompasses any number of other documents typically produced by states during the post-election tabulation and certification process.

Enactment of the National Popular Vote Interstate Compact, May 17, 2023. Page 3. <https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf>

² Maine Rev. Stat. tit. 21-A, § 803. <https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html>

³ An accurate citation for Richie’s 2020 article is as follows: Richie, Robert; Hynds, Patrick; DeGross, Stevie; O’Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review*. Volume 15. Issue 1. Winter 2020. Pages 145–207. <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf>

⁴ The 51 Certificates of Ascertainment showing each state’s popular-vote count for President in 2020 may be viewed at <https://www.archives.gov/electoral-college/2020>.

“NPV Chairman and founder John Koza explained to the Connecticut legislature in 2014:

‘The National Popular Vote Compact does not depend on any particular piece of paper... The “final determination” of a state’s presidential vote does not have to come in the form of the Certificate of Ascertainment. It could just as well be evidenced by, say, the official minutes of the state board of canvassers or any other official document from the state containing the vote count.’^{5,6}

The deceptive nature of Parnell’s written testimony to the Maine Committee becomes apparent when one reads what was actually contained in the 2014 letter to Connecticut Representative Ed Jutila.

In 2014, Parnell was advocating the theory that the National Popular Vote Compact was flawed because a rogue governor could frustrate the Compact’s operation simply by ignoring federal law.

Under Parnell’s theory, a state governor—on their sole authority—could simply violate federal law and refuse to issue the state’s Certificate of Ascertainment—thereby unilaterally disenfranchising all of the state’s voters (and presumably frustrating the operation of the Compact).

In his 2014 letter, the National Popular Vote Chair explained that while the Certificate of Ascertainment is clearly the gold standard that would normally be used for presidential vote counts, alternative official state records containing identical information could be used in the event of a governor’s illegal action.

Here is the full untruncated quote (and context) of what the National Popular Vote Chair wrote in 2014 (and would say today). The part that Parnell selectively quote is at the bottom, and shown in italics. As can be seen, the portion in italics has an entirely different meaning when read in context.

“Although the National Popular Vote Compact does not specify the exact form of the ‘official statement,’ **the “official statement” would undoubtedly, in practice, simply be an additional copy of the Certificate of Ascertainment** that the state is already required to issue under section 6 of Title 3, chapter 1 of the United States Code.

“The process of determining the presidential vote count for non-compacting states would be entirely routine on occasions when the officials of non-compacting states comply with their own state law and comply with sections 5 and 6 of federal law— as, indeed, 100% of the states have done since enactment of the existing federal procedures shortly after the disputed 1876 presidential elections.

“If the officials of non-compacting states comply with state and federal law and issue their Certificate of Ascertainment, the fifth clause of Article III of the National Popular Vote Compact gives the compacting states no discretion as to how to ‘determine’ the presidential vote count from those 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

⁵ February 24, 2014 letter to Connecticut Representative Ed Jutila from National Popular Vote Chair Dr. John Koza entitled “Answers to Questions about Presidential Vote Counting and the National Popular Vote Bill.”

⁶ *Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine’s Electoral Votes by Prohibiting Enactment of the National Popular Vote Interstate Compact), May 17, 2023. Page 2.* <https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf>

presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress.' [Emphasis added]

"In other words, the National Popular Vote Compact gives deference—in the same way as the current system gives deference—to each state's 'final determination' made by the 'safe harbor' date (six days before the meeting of the Electoral College).

"However, the National Popular Vote Compact does not depend on any particular piece of paper. The officials administering the National Popular Vote Compact in the compacting states have a statutory obligation to ensure that their own state's electoral votes are cast, and that they are cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.). The 'final determination' of a state's presidential vote does not have to come in the form of the Certificate of Ascertainment. It could just as well be evidenced by, say, the official minutes of the state board of canvassers or any other official document from the state containing the vote count."

The Electoral Count Reform Act of 2022 eliminated even the theoretical need for a state belonging to the Compact to look for alternative official source of vote counts.

To guarantee rapid enforcement of the federal requirement that each state provide its official vote count, the new 2022 federal law created a special three-judge federal court (open only to presidential candidates, operating on an expedited basis, and with expedited appeals) to enforce both the timely "issuance" of each state's Certificate and its timely "transmission" to the National Archives.

The 2022 federal law 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." [Emphasis added]

The 2022 law also requires that each state transmit its Certificate of Ascertainment to the National Archives

"immediately after the issuance ... by the most expeditious method available."⁸

The National Archives, in turn, is required to make the Certificates "public" and "open to public inspection."

The 2022 law also designates the Certificates of Ascertainment as "conclusive."

In short, Parnell misrepresented what the National Popular Vote Chair said in 2014, and the existence of the new special federal court eliminates the issue by ensuring that every state's Certificate of Ascertainment will be issued.

⁷ Section 5 of the Electoral Count Reform Act of 2022 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 which was in effect between 1887 and 2022.

⁸ Section 5 of the Electoral Count Reform Act of 2022 starts on page 1892 of <https://www.congress.gov/bill/117th-congress/senate-bill/4573>.

3. Parnell inaccurately claims that the first-choice rankings alone are an accurate reflection of the voice of the voters in an RCV election

In his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023, Parnell wrote:

“RCV creates serious problems for NPV because the compact anticipates that every state will, at the end of the election, provide a single vote total for each presidential slate, which can then be added into the national vote count.

“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.”⁹

The foundational error in Parnell’s theory is that counting only the first-choice rankings in an RCV election would be an accurate reflection of the voice of Maine voters.

In fact, it would be preposterous to interpret RCV to mean that the 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.

A state that enacts an RCV-for-President law has made a policy choice with only one plausible interpretation—to use RCV to determine the results of the that election.

Finally, as the response above notes, Maine eliminated any room for doubt in 2021 by explicitly requiring the state’s Certificate of Ascertainment report the final-round RCV count.¹⁰

In short, there is no legitimate uncertainty as to whether to use the first-round count or the final-round count in an RCV election.

4. 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

Parnell’s written testimony continues:

“The compact does not provide any guidance on which vote totals are to be used by member states in determining the national vote count for each presidential slate, leaving it to the discretion of each member state’s chief election official (typically, as in Maine, the Secretary of State).”¹¹ [Emphasis added]

The deceptive nature of Parnell’s written testimony to the Maine Committee is apparent when one reads the language of the National Popular Vote Compact.

The Compact does **not** give administrative officials in the states belonging to the Compact any power to judge the election returns of other states—much less any discretion to choose the numbers they like.

⁹ *Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine’s Electoral Votes by Prohibiting Enactment of the National Popular Vote Interstate Compact), May 17, 2023. Page 1. <https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf>*

¹⁰ Maine Rev. Stat. tit. 21-A, § 803. <https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html>

¹¹ *Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine’s Electoral Votes by Prohibiting Enactment of the National Popular Vote Interstate Compact), May 17, 2023. Page 1. <https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf>*

Instead, the Compact does the exact opposite. The Compact reads:

“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 made by the day established by federal law for making a **state’s final determination** conclusive as to the counting of electoral votes by Congress.”¹² [Emphasis added]

In 2021, Maine enacted a law that explicitly required that the state’s Certificate of Ascertainment report the final-round RCV count.

The Certificate of Ascertainment is a document that federal law requires each state to issue after each presidential election.

The Certificate of Ascertainment is the gold standard insofar as presidential vote counting is concerned, because federal law characterizes the vote counts in the Certificate as “conclusive.”

Indeed, when there is a dispute about a presidential vote count, that dispute revolves around what numbers will appear in the state’s Certificate.

Parnell’s written testimony continues:

Lobbyists for NPV ... [claim] ... that Maine’s law requiring that final-round vote totals appear on the state’s Certificate of Ascertainment resolve this issue. What this assertion ignores, however, is that **Maine’s law has no effect on the choice made by other states that are in the compact.**” [Emphasis added]

Contrary to what Parnell writes, Maine’s law does have an effect on other states—in fact, Maine’s final determination of its presidential vote count is “conclusive” on them.

By the way, the current system of electing the President is based on the same principle.

There can, of course, be challenges to a state’s vote count—as we have seen in recent elections.

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

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

Aggrieved presidential candidates used all five ways in both 2000 and 2020.¹³

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.”¹⁴

¹² National Popular Vote Compact. Article III, Clause 5. The full text of the Compact may be at <https://www.nationalpopularvote.com/bill-text>

¹³ 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

¹⁴ U.S. Constitution. Article IV. Section 1.