

# National Popular Vote still has a Ranked Choice Voting problem

*Sean Parnell*

## Introduction

The National Popular Vote interstate compact (NPV) proposes to have each member state appoint presidential electors in accordance with national vote totals instead of the popular vote of the state's residents. Under the terms of the compact, each state's chief election official must determine candidate vote totals in every other state, aggregate those totals, and appoint the slate of electors pledged to the candidate who received the most aggregate votes.

The compact assumes that vote totals from every state will always be accurate, conclusive, timely, unambiguous, and uniform. The compact merely states, "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," and "shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate." The form of voting known as Ranked Choice Voting (RCV) creates major problems for these assumptions and requirements.<sup>1</sup>

The challenges that RCV poses for NPV seem to have only been raised in recent years. Prior to 2019, there was little from academia or election policy experts on the topic—the only previous acknowledgment of the problem appears to be a proposal from the Equal Vote Coalition for an "Alternative Voting Interstate Compact," which aims to "specify how alternative votes should be summed for states which may choose to assign their electoral votes to the winner of the national popular vote."<sup>2</sup> Alternative votes, in this case, encompass not only RCV but also systems including STAR Voting, Approval Voting, and other methods.

In April 2019 a paper by a researcher at Duke University sketched out the problems that RCV creates for NPV.<sup>3</sup> According to the paper, a state adopting RCV or alternate forms of voting would "cripple the NPV" because their vote totals could not be easily, fairly, or conclusively aggregated with votes from other states.<sup>4</sup> In a later paper the same researcher concluded that because NPV "does not recognize

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**Sean Parnell** is senior legislative director for Save Our States. Previously, he served as the president of the Center for Competitive Politics (now the Institute for Free Speech) and was vice president for public policy at The Philanthropy Roundtable. He is the author of two books and received a B.A. in Economics from Drake University. Sean can be reached at [sean@saveourstates.com](mailto:sean@saveourstates.com).

that a state may use an electoral system other than plurality voting to choose its presidential electors... the national vote totals required for implementing the [NPV compact] may be undefined and therefore indeterminable.”<sup>5</sup> The result of not being able to determine the outcome under NPV would be “tangled results and turmoil” as well as “chaos.”<sup>6</sup>

Advocates for the NPV compact have noted potential problems as well. In October 2019 Rhode Island Secretary of State Nellie Gorbea spoke at a conference of NPV supporters and admitted that she and her colleagues, who under the compact would be responsible for aggregating votes from all fifty states, had yet to be able to conclusively decide “[H]ow would we count the votes?” She noted that one of the two main problems with tabulating the national vote count is “what to do about ranked choice voting.”<sup>7</sup> And Rob Richie, president of the organization Fair Vote and the leading proponent of RCV in the country (and a supporter of NPV), said in a 2020 presentation to other NPV supporters that there was a need for “states with RCV for presidential elections to establish a compact of their own to make it work in concert with the compact.”<sup>8</sup> Richie was also the lead author of a paper in 2021 noting that “...the challenge for supporters of both [NPV and RCV] is to ensure that they can be integrated harmoniously,”<sup>9</sup> acknowledging that the two are in tension and proposing major Congressional legislation and a new interstate compact to resolve the problems (those proposals will be explained later in this memo).

Save Our States is the organization leading the effort to educate state legislators, media, the election policy community, and the public about the benefits of the Electoral College and the severe problems with NPV. As the problem that RCV poses to NPV became clear, we began warning legislators in states considering the compact about this specific danger in testimony, discussions, and a memo: “Incompatible: Ranked Choice Voting and National Popular Vote Cannot Co-Exist.”<sup>10</sup>

The key conflict outlined in the Save Our States memo is that NPV assumes every state will provide a single, conclusive vote total for every candidate, while RCV may produce two or more: an initial vote count of all first-place rankings, and a final vote count once the RCV process is used and the votes of low-performing candidates have been transferred to better-performing candidates. This creates three critical dangers:

1. A state using RCV in its presidential election can choose to report only the initial or final vote tabulations, arbitrarily adjusting the vote totals for the two final candidates upward or downward by tens or hundreds of thousands of votes.
2. A state using RCV in its presidential election can choose to report both the initial and final totals (as well as totals at any intermediate steps), leaving to the chief election official in NPV member states to choose which vote totals to use in aggregating votes, again adjusting the vote totals for the two final candidates upward or downward by tens or hundreds of thousands of votes in a single state.
3. If a third-party or independent candidate finishes in second-place or better in a state using RCV, the votes for the third-place Democratic or Republican candidate could be completely erased, wiping out hundreds of thousands or even millions of votes in the national vote count for one of the two leading candidates.

In June 2022, National Popular Vote, Inc. published “Ranked Choice Voting (RCV) Is Compatible with National Popular Vote,”<sup>11</sup> attempting to dismiss criticisms made by Save Our States. This memo describes six defective claims made by National Popular Vote in its June publication.

### **Claim 1: The issue is moot in the only states with RCV-for-president laws**

NPV asserts that because Maine recently passed a law requiring that only the final, post-RCV process vote totals will appear on its Certificate of Ascertainment, and because the Republican presidential candidate “is almost certain to win an absolute majority of the first-choice votes in Alaska,” the problems raised are not realistic. Both claims are incorrect.

The Maine legislation affects only the vote totals that appear on the Certificate of Ascertainment, not any other document. Every state typically produces at least two documents that are an official account of how many votes were received by each candidate—the Certificate of Ascertainment, and a statewide canvas or similar document.

Both of these (and other) documents are acceptable sources of vote totals under NPV. As NPV Inc. founder and chairman John Koza explained in a memo 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.”<sup>12</sup>

In addition, the book *Every Vote Equal* (published by NPV, Inc.) notes that “The certificate of ascertainment is not, of course, the only official document existing in a state from which the vote count for presidential elections can be determined...” (pp. 267-269, Fourth Edition).

As a result of the discretion states enjoy in how they canvas and certify their election results, and most importantly the information they include in the multiple documents created by this process, it is inaccurate to claim that only the final vote tabulation can or will appear on all of these documents.

Because the rules for Maine’s RCV process specify that initial, final, and any intermediate vote totals are to be reported to the governor and made publicly available,<sup>13</sup> Maine’s initial and final vote totals for each presidential candidate will be available for the chief election officials in NPV member states to choose between.

Regarding Alaska, it is traditionally a Republican state in presidential elections. However, the Republican nominee has failed to win a majority or only barely won a majority in Alaska in four of the past eight elections. In 1992 George H.W. Bush only received 39 percent of the vote, Bob Dole received 51 percent in 1996, and Donald Trump received 51 percent in 2016 and 52 percent in 2020. Given these results and that RCV is likely to increase votes for third-party and independent candidates,<sup>14</sup> it is far from certain that the Republican candidate will easily win a majority of first-choice votes in Alaska. It is not yet clear

how Alaska will report its presidential RCV results, but in the August 2022 special election for Congress, its official statements included both initial and final vote counts for the three candidates on the ballot,<sup>15</sup> suggesting that state's initial and final vote totals for each presidential candidate are also likely to be available for use by the chief election official in NPV member states.

It is worth noting how backward-looking NPV, Inc. is on this point. Designing election systems calls for looking ahead and recognizing that a snapshot of politics today is hardly a guarantee of American politics in a decade or two. The NPV compact was written without serious consideration of RCV because no state used it at that time. Fifteen years later, NPV claims concerns about RCV are overblown because only two states use the system—now.

### **Claim 2: Any ambiguity from RCV will not create a post-election constitutional crisis**

NPV, Inc. also claims that if there is any ambiguity regarding which vote totals should be reported or used from RCV states, RCV supporters in “the states involved” would insist their election administrators resolve these issues before the election, and if that failed they would seek a “declaratory judgment” from a court, thus eliminating any potential post-election crisis.

This doesn't make sense given NPV, Inc.'s prior claims. Lobbyists and others representing NPV, Inc. insist there are no conflicts between NPV and RCV. What if “RCV supporters” believe them, and thus don't go to their election administrators or the courts to fix what they have been told is not an issue? And it isn't clear that chief election officers would be forced to bow to public pressure or what the legal cause of action would be for a court to issue an order.

In addition, it is unclear which are the “states involved.” As discussed above, states that use RCV are most likely going to provide official documents reporting the initial, final, and any intermediate vote counts—it's the law in Maine, and it's the current practice in Alaska. In NPV member states, the chief election official can make a statement regarding which numbers they intend to use but unless it's promulgated in a rule (or passed as a statute) it is difficult to see how that could be enforced—the compact vests in the chief election official the authority to “determine the number of votes for each presidential slate in each state,” but doesn't put any restrictions of that authority other than that they must use official totals if they are available. The problem here is that the official totals from RCV states will likely include multiple totals for each candidate.

### **Claim 3: Erasure of hundreds of thousands or millions of votes in the national vote count is still better than 'winner take all'**

NPV, Inc. attempts to dismiss the seriousness of hundreds of thousands or even millions of votes being completely erased in the national vote count for either the Democratic or Republican presidential slate if they finish in third place in an RCV state behind a minor party or independent candidate (as happened in two states, albeit without RCV, in 1992, and nearly happened in 2016).<sup>16</sup>

Of note is that NPV, Inc. does not contest that hundreds of thousands or millions of votes would be erased if this happened. In fact, if the previous assertions in the NPV memo were somehow correct, that

there is no ambiguity or uncertainty over vote totals from RCV states and the only possible vote total available to be used for NPV's purposes are the final, post-RCV tabulations, then the erasing of hundreds of thousands or millions of votes for either the Democratic or Republican candidate is guaranteed if a third-party or independent candidate managed to finish in second or first place in an RCV state.

NPV Inc.'s response to this critique is to claim that the "winner take all" method that most states use to allocate electors also erases votes and that the erasure of votes when NPV is combined with RCV is somehow more acceptable. But this is not true: winner-take-all does not erase votes any more than elections for Congress, governor, or state legislature erase votes for losing candidates—the memo treats a figurative or rhetorical use of the word "erase" as being identical to the literal erasure of hundreds of thousands or millions of votes for a major party candidate in the national vote count once the RCV process is completed.

Given the turmoil following the 2020 presidential election, it is highly likely that the literal erasure of votes from the national vote count for the Democratic or Republican candidate at the conclusion of the RCV process will, if it changes the outcome of the election, lead to massive outrage and unrest by supporters of the losing candidate. NPV, Inc. casually ignores this risk.

#### **Claim 4: Any ambiguity from RCV-for-President laws would involve relatively few votes**

NPV, Inc. claims that because the Democratic or Republican winners of each state usually win a majority of the popular vote, there are not many votes that might be affected by RCV, and only a few independent or minority party candidates have managed to win more than one percent of the national vote count in recent elections. Therefore, according to NPV, Inc., any uncertainty or ambiguity in how votes are to be counted would be inconsequential.

This analysis ignores inconvenient history and obscures the problem.

A few key facts:

- Because RCV will lead to more first-choice rankings for third-party and independent candidates, the use of past third-party and independent vote totals underestimates the number of votes at stake. In Utah, Evan McMullin received 243,690 votes in 2016,<sup>17</sup> but likely would have received more first-place rankings under RCV due to the relative unpopularity of the two major party candidates in that state—under RCV, voters who reluctantly voted for Clinton or Trump could have instead cast a first-choice vote for McMullin and their second choice vote for whichever of the other two they found least objectionable.
- The analysis assumes that Alaska and Maine are the only states that will use RCV in the future. Several other states currently have some form of RCV in some elections,<sup>18</sup> and there are efforts underway to get more states to adopt this voting system, including for presidential elections. It is shortsighted to assume that no other state will utilize RCV in future presidential elections, thus expanding the number of votes at stake.

- At least three of the past sixteen presidential elections have had close national vote margins (approximately 113,000 or 60,000 in 1960, depending on how the Alabama votes are counted; about 512,000 in 1968, and roughly 544,000 in 2000), meaning that arbitrary decisions over how to count just a few hundred thousand votes could decide the election outcome.
- In the last two instances where a third-party or independent candidate finished in second place—Maine and Utah in 1992—the number of votes that would have been erased if RCV had been in place is close to 400,000.

NPV, Inc. describes Alaska—one of the least populous states in the nation—as illustrative of how few votes it believes will be subject to uncertainty or erasure and compares it to the total number of votes cast in the most recent election. The only relevant comparison is how many votes are at stake compared to the national margin, and clearly, there are more than enough votes in both current and future RCV states to exceed a narrow national margin.

#### **Claim 5: The National Popular Vote Compact was drafted with RCV in mind**

NPV, Inc. contends that because Rob Richie of FairVote, the leading RCV proponent in the country, helped draft the NPV compact, it must have been drafted with RCV in mind, and thus there can be no conflict between the two. But whether it was written with RCV in mind isn't relevant, only whether the compact as written adequately addresses problems created if NPV takes effect while one or more states use RCV for presidential elections. As explained in this memo, the answer is clearly "no."

Given the prominence NPV, Inc. (deservedly) gives to Rob Richie as an expert on RCV and as someone who helped draft the NPV compact, it is worth considering his proposals to resolve the conflict. The 2021 paper he coauthored describes the problems RCV creates for NPV:

"...as currently drafted, the [NPV] seems to assume a plurality system...using 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? While not an [NPV] deal breaker, it is an ambiguity worth seeking to resolve... [R]eformers can expect these small perceived tensions to grow if more state legislatures begin seriously considering passing [NPV] and RCV for presidential elections without clear guidance for how to integrate the two reforms."<sup>19</sup>

To resolve these "tensions" the paper proposes two options:

1. Federal legislation that would require every state to give voters an RCV ballot, which would then be tallied by the Election Assistance Commission (EAC), a federal agency. States that are members of NPV would use the EAC's results. States that are not

members of NPV would have the choice of using the RCV final results for their state, as provided by EAC, or could opt to ignore RCV results and continue to use first-past-the-post to allocate their electors.<sup>20</sup>

2. Creation of an interstate compact for states that use RCV in presidential elections. Member states would report out only the first-choice vote totals for the purposes of NPV, until at least five states had joined, at which time member states would “pool their votes, run a single RCV tally down to the top two candidates, and report out their vote totals as their popular vote totals.” Members of this RCV compact would, if also members of NPV, appoint their electors according to whatever national vote count is derived from this process, while states that are in the RCV compact but not in NPV would use RCV results derived only from their own state’s votes.<sup>21</sup>

A future memo will address the serious problems with these two alternatives, but in brief:

1. The proposed federal legislation would be politically controversial at best, would probably not pass, and is almost certainly unconstitutional.<sup>22</sup>
2. The proposed second interstate compact is byzantine and wholly inadequate to the problems it seeks to address (the paper acknowledges that an RCV compact “comes with some significant logistical and political concerns as well”).<sup>23</sup>

For now, it is enough to note that the expert NPV, Inc. points to has actually written in detail about the need for either major federal legislation or yet another interstate compact in order to “integrate” NPV with RCV, for reasons that largely mirror critiques made by Save Our States.

#### **Claim 6: It’s not true that each NPV state can decide how to count votes from RCV states**

NPV, Inc. quotes the compact to the effect that the chief election official of each NPV member state is required to “treat each state’s timely determination of its presidential vote count as ‘conclusive,’” and also claims that the Certificate of Ascertainment is the “official statement” that will be relied on for vote totals “in most cases.” This, NPV, Inc. argues, removes any discretion from chief election officials in determining which numbers to use from RCV states.

But no reason is given why the Certificate of Ascertainment will “in most cases” be the “official statement” used to obtain vote totals, and even if that were the case it acknowledges not all of the vote totals will come from those certificates. In 2020 the certificates for at least six states—Connecticut, Kansas, Maryland, Mississippi, Missouri, and Utah—were unavailable to the public before the Electoral College met, and would thus have not been available for NPV’s purposes had it been in effect.<sup>24</sup>

And as NPV, Inc. Chairman and founder John Koza explained in that 2014 memo to the Connecticut legislature, “The National Popular Vote Compact does not depend on any particular piece of paper...”<sup>25</sup> There is nothing that compels a chief election officer of an NPV member state to use vote totals provided on a Certificate of Ascertainment, nor is there anything that prohibits a chief election officer

from selecting either the initial or final vote tabulations provided on a statewide canvas or other “official statement” that includes multiple vote totals for each presidential candidate. The compact also does not provide for any sort of dispute resolution mechanism or coordinating body to ensure that each state is picking the same vote totals from the same documents.

The compact leaves it entirely to the discretion of each NPV member state’s chief election official to decide which document and which vote totals will be used to determine the election outcome. This opens the door not only to confusion and conflict if different chief election officers in different states use different vote totals to determine the winner, but also to bad-faith actors manipulating the outcome by selecting the numbers most advantageous to their own political party. This gives each member state’s chief election official staggering power to decide the outcome of the presidential race.

### **Conclusion**

Save Our States and others who have examined this issue, including many advocates of NPV, point to two basic problems caused by the attempt to use vote totals from RCV states in determining the winner under the compact:

- There are likely to be at least two different official vote totals for each candidate reported by RCV states, causing uncertainty over the outcome and giving the chief election official in NPV member states arbitrary authority to choose which numbers to use.
- When a third-party or independent presidential candidate finishes ahead of either the Democratic or Republican candidate in an RCV state, hundreds of thousands or even millions of votes for a leading candidate could be erased from national totals.

NPV Inc. disputes the existence of the first problem and acknowledges the second while arguing it is still preferable to what it sees as the problems with the “winner take all” system used by most states. Either situation would generate outrage and unrest akin to 2000 or 2020 should it throw the outcome of a presidential election into doubt. For these reasons, Save Our States reiterates its conclusion that NPV and RCV are fundamentally incompatible.

## Endnotes

- <sup>1</sup> This memo does not take a position on RCV.
- <sup>2</sup> A summary and full text of this proposal is at [https://www.equal.vote/interstate\\_compact](https://www.equal.vote/interstate_compact).
- <sup>3</sup> Dr. Richard Potthoff, Visiting Scholar, Duke University Department of Political Science and Social Science Research Institute, "Three Bizarre Presidential Election Scenarios: The Perils of Simplism," April 2019, available at <https://ideas.repec.org/a/gam/jscscx/v8y-2019i5p134-d226941.html>.
- <sup>4</sup> *Ibid*, p. 19.
- <sup>5</sup> Dr. Richard Potthoff, Visiting Scholar, Duke University Department of Political Science and Social Science Research Institute, "Clashes Involving National Popular Vote, Hare ("RCV"), Maine, Alaska," August 2021, p. 5, available at <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/abs/clashes-involving-national-popular-vote-hare-rcv-maine-alaska/AB088ED515CB890971129734D038AC88>.
- <sup>6</sup> *Ibid*, p. 1.
- <sup>7</sup> Comments of Rhode Island Secretary of State Nellie Gorbea to the Making Every Vote Count conference in October 2019, transcript available at <https://www.makingeveryvotecount.com/mevc/2019/10/15/watch-rhode-island-secretary-of-state-nellie-gorbea-on-the-national-popular-vote>.
- <sup>8</sup> Available at <https://www.youtube.com/watch?v=ieOvGpCsmV8>, relevant comments start at approximately 15:45.
- <sup>9</sup> Rob Richie, Patrick Hynds, Stevie DeGross, David O'Brien, & Jeremy Seitz-Brown, "Toward A More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact," *Harvard Law & Policy Review*, Vol. 15, Iss. 1, p. 146, August 2021, available at <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf>.
- <sup>10</sup> Available at [https://saveourstates.com/uploads/Policy-Memo\\_Ranked-Choice-Voting-and-NPV.pdf](https://saveourstates.com/uploads/Policy-Memo_Ranked-Choice-Voting-and-NPV.pdf).
- <sup>11</sup> Available at <https://www.nationalpopularvote.com/ranked-choice-voting-rcv-compatible-national-popular-vote>.
- <sup>12</sup> John Koza, "Answers to Questions about Presidential Vote Counting and the National Popular Vote Bill," memo to Connecticut State Representative Ed Jutila, February 2014. Available at <https://saveourstates.com/uploads/NPV-Response-on-Vote-Counting-V37-2014-2-24.pdf>.
- <sup>13</sup> Section 6, subsection 4, "Rules Governing the Administration of Elections Determined by Ranked Choice Voting," prepared by the Division of Elections of the Maine Secretary of State's office, November 2018. Available at <https://www.maine.gov/sos/cec/elec/upcoming/pdf/250c535-2018-230-complete.pdf>.
- <sup>14</sup> Voters may no longer fear the "spoiler effect" of voting for an independent or minor-party candidate since they can also rank a major-party candidate after their first choice.
- <sup>15</sup> "State of Alaska, 2022 SPECIAL GENERAL ELECTION, RCV Tabulation, August 16, 2022, OFFICIAL RESULTS", available online at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjqsVqK9sv6AhVCLFkFHeHvDPAQFnoECBIQA-Q&url=https%3A%2F%2Fwww.elections.alaska.gov%2Fresults%2F22SSPG%2FRcvDetailedReport.pdf&usg=AOvVaw0yYQby3ByT6XnUfxvWw-M4x>.
- <sup>16</sup> Ross Perot finished in second place in Maine and Utah in 1992, and Evan McMullin finished in third place approximately six percentage points behind Hillary Clinton in Utah 2016.
- <sup>17</sup> Official results available at <https://elections.utah.gov/Media/Default/2016%20Election/2016%20GE%20Canvass.xlsx>.
- <sup>18</sup> Hawaii recently adopted RCV for special elections, a statewide ballot measure for RCV in Massachusetts failed with 45% of the vote in 2018, and Utah currently has an RCV pilot project for municipal elections. Military and overseas voters in Alabama, Arkansas, Georgia, Louisiana, Georgia, Mississippi and South Carolina use RCV in most elections (but not in presidential elections). States where RCV is currently in use is at [https://www.fairvote.org/rcv#where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used).
- <sup>19</sup> *Ibid* at note 9, pp. 159-160.
- <sup>20</sup> *Ibid*, pp. 162-164.
- <sup>21</sup> *Ibid*, pp. 177-178.
- <sup>22</sup> Consider that the NPV compact relies on the argument that the Constitution gives state legislatures nearly unlimited power over how to choose their electors, but this RCV-NPV fix relies on Congress overriding that power without any clear constitutional authority to do so.
- <sup>23</sup> *Ibid* at note 9.
- <sup>24</sup> Sean Parnell, "Electoral Count Reform Act poses serious problems for National Popular Vote," October 3, 2022, Save Our States blog, available at <https://saveourstates.com/blog/electoral-count-reform-act-poses-serious-problems-for-national-popular-vote>.
- <sup>25</sup> *Ibid* at note 12.