

**Testimony of Sean Parnell
to the
Privileges & Elections Committee of the Virginia House of Delegates
February 5, 2024
Re: HB375 (The National Popular Vote interstate compact)**

I am Sean Parnell and I represent Save Our States Action, an organization focused on defending the Electoral College and opposing the National Popular Vote interstate compact (NPV). I am urging you to vote against this dangerous and defective compact.

My testimony today focuses largely on the numerous technical defects in this compact that will, in the words of one of the law professors who originally developed the concept of NPV, lead to “electoral crises” and an “historic debacle” if the compact is implemented as it is currently written.

I’ll address these defects in a minute, but first I’d like to point out the biggest problem with this compact – if it were ever to go into effect, it would silence the voice of Virginia in the presidential election process. Just as the people of my community have elected Delegate Sickles to represent us here in Richmond, Virginians expect Virginia’s thirteen electoral votes to represent the people of Virginia and not a mythical national electorate. This bill would end a vital link that preserves federalism and ensures that every state is represented in the presidential election process.

The technical defects of this compact are numerous and serious. In most cases, these defects stem from the same basic problem: there is no official, timely, accurate, and conclusive national vote count that can be used for this compact. No federal agency, commission, or official will prepare an official vote total for every candidate that will then be used by member states to determine the outcome, nor does the compact create or empower such an agency, commission, or official.

Instead, the chief election official of each member state is responsible, independently from one another, for obtaining vote totals from other states and aggregating them in order to produce

national vote totals that are only applicable in their own state. Lobbyists for NPV insist this is an uncomplicated task – as one said last year in a hearing, “We can all do the math.” This simplistic hand-waving ignores the fact that votes in every state are cast, counted, recounted, and reported in different ways, some of which cause serious problems for National Popular Vote and will lead to confusion, controversy, chaos, crisis, and a lack of a conclusive determination of the winner if the national vote is close, as four of the last sixteen presidential elections have been.

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

- The “official statements” from other states that are supposed to be used as the source of vote totals from other states can contain significant errors. For example, New York has left tens or hundreds of thousands of votes off of its Certificate of Ascertainment as well as its statewide canvas. In 2008 New York left 131,418 votes off, in 2012 it was missing 424,775 votes, in 2016 there were 101,762 votes missing, and in 2020 it left 28,881 votes off of its “official statements.”¹
- Ranked choice voting, which Alaska and Maine will use for president in 2024, poses a challenge because “official statements” from those two states will include both the initial and final vote totals,² with no guidance in the compact on which vote totals are to be used in tabulating the national vote. Because initial and final vote totals can differ by tens or even hundreds of thousands of votes, the choice of which totals to use could determine the outcome under NPV in a close election.
- Another major problem ranked choice voting creates for NPV is a situation where a third-party or independent candidate finishes ahead of the Democratic or Republican candidate in a state using ranked choice voting. In this instance, the final vote total from that state for that third-place Democrat or Republican will be zero, meaning hundreds of thousands or even millions of votes erased from the national vote count for the third-

¹ Final, certified state totals for New York in each of the last four presidential elections are available on the web site of the New York State Board of Elections, <https://www.elections.ny.gov/>. The Certificate of Ascertainment are available online for 2016 (<https://www.archives.gov/files/electoral-college/2016/ascertainment-new-york.pdf>) and 2020 (<https://www.archives.gov/files/electoral-college/2020/ascertainment-new-york.pdf>) and the certificates for 2008 and 2012 are available upon request.

² See: RCV Detailed Report, U.S. House of Representatives, Alaska Division of Elections, 2022, available at: <https://www.elections.alaska.gov/results/22GENR/US%20REP.pdf>

place Democrat or Republican if the final-round totals are used for calculating the national vote count.

- 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 if a state’s process and timeline for finalizing their vote counts simply don’t line up with what the compact requires– then the chief election official in each NPV member states has the power to estimate – “assign” in the language of NPV’s lobbyists – vote totals for that state using any methodology they think appropriate. Several of the methods that could be used to estimate vote totals that NPV’s own lobbyists described in a 2021 North Dakota hearing would have been off by tens or hundreds of thousands of votes.³ And it is unlikely that every state’s chief election official would use the exact same methodology to estimate vote totals, and in a close election the different methods chosen could cause a compact member states to split in which candidate is declared the winner.
- There could not be a national recount if the national vote is relatively close, as four of the last sixteen have been. Every state would decide for itself, based on its own laws that were written to assume a close in-state margin, whether a close national margin triggers a recount or allows for one to be requested. Those states that decide to conduct a recount will then have to decide (likely through litigation) whether to only recount the same ballots that were initially counted or whether new ballots, such as absentee ballots or provisional ballots that were initially excluded, should be added in. States conducting recounts will also come to different conclusions regarding the standards for determining “voter intent” – essentially, a repeat of the “hanging chads” vs. “pregnant chads” issue from Florida 2000.
- State laws and election processes can sometimes operate in ways that do not affect the outcome under the current system but would lead to odd results and pose a serious problem for the compact. For example, California permits what is known as “dual labeling” for presidential elections, meaning that more than a single party can endorse the same presidential candidate. This happened in 2016 when the American Independent Party endorsed the Trump/Pence ticket. That ticket appeared on the ballot

³ See: “Missed it by that much, Part I,” March 2021, Save Our States blog. Available at: <https://saveourstates.com/blog/missed-it-by-that-much-part-1>

on a single line with both the Republican and American Independent designations, although the American Independent Party nominated a different slate of presidential electors than the Republican Party. Because there was no way for California election officials to differentiate between a voter supporting the Republican slate or the American Independent slate, they treated and reported every Trump/Pence voter as having cast two votes, one for the Republican slate and a second vote for the American Independent slate. This didn't change the outcome in California because the Republican and American Independent slates tied for second place with 4,483,810 votes each. But because they are reported on separate lines – roughly four and a half million for the Republican slate of electors and another four and a half million votes for the American Independent slate, both pledged to the Trump/Pence ticket, for NPV's purposes California would effectively double the vote totals for the Trump/Pence ticket.⁴

- The compact stipulates that votes will only be included from states that hold a “statewide popular election.” As explained in the book *Every Vote Equal*, published by National Popular Vote, this doesn't actually mean every state where people vote for presidential electors, it means every state where people vote for presidential electors *according to National Popular Vote's definition of a “statewide popular vote.”*⁵ If a state were make changes how it awards electoral votes, votes cast by that state's residents could be excluded from NPV's national count. For example, a few years ago legislation was introduced in Arizona that would adopt a congressional method system like Maine and Nebraska have, in which voters would pick presidential electors by congressional districts, but the legislature would chose the last two electors.⁶ Even though under this system millions of Arizonans would be going to the polls to cast their votes, NPV would exclude those votes Because Arizona's popular election wouldn't meet the compact's definition of a “statewide popular election.”
- The compact can be easily gamed or manipulated. One fairly simple way for a state to increase its influence in the final outcome would be to expand voting rights to those

⁴ See: “2016 ‘National Popular Vote’ winner – Donald Trump?” November 2022, Save Our States blog. Available at: <https://saveourstates.com/blog/2016-national-popular-vote-winner-donald-trump>

⁵ Article III, Section 1 of NPV stipulates that votes will be included in the national vote count if they have been cast in a “statewide popular election” and defines that term in Article V, Section 8 in such a way to exclude elections in which, for example, voters can vote for individual presidential electors or votes are not tabulated “on a statewide basis.”

⁶ HB 2476, available at: <https://apps.azleg.gov/BillStatus/BillOverview/76974>

under 18, or allowing parents to cast votes on behalf of their minor children. Another option would be for the chief election official of a state to report on its “official statements” each voter as having cast as many votes as the state has presidential electors. Based on 2020 results, if Wyoming’s Secretary of State – an individual currently characterized as an “election denier” by some⁷ – were to do so, it would add nearly a quarter-million net votes to the Republican’s national vote totals, and more populous states that tend to vote strongly for one party’s candidate can easily add millions of phantom votes to the national vote count. The chief election officials in NPV member states would be required to accept these inflated vote totals.

I’d like to point out that these and other technical defects are not just the concerns of people opposed to the compact. Most notably, the three law professors who initially developed the NPV concept have all expressed serious doubts about how this compact is supposed to operate.

- Professor Akhil Amar at the Yale Law School has referred to NPV as “a bit of a harebrained scheme” that “has some problems,” and in particular he points to how easily states could game the system by inflating their voter roles.⁸
- Professor Vikram Amar at the University of California - Davis law school, has concluded that NPV has “dangerous gaps” that could lead to “electoral crises”⁹ and a “historic debacle.”¹⁰ He urges states considering adopting NPV to include a 10-year delay in its effective date, which he hopes will give Congress time to pass legislation fixing the many defects in this compact.
- Professor Robert Bennet of Northwestern University’s law school has characterized the compact’s inability to deal with the need for a nationwide recount as its “most glaring

⁷ “Meet the First Election Denier Poised to Win for Secretary of State This Year,” August 2022, Bolts. Available online at: <https://boltsmag.org/wyoming-first-election-denier-secretary-of-state/>

⁸ Akhil Amar, “Remarks by Akhil Reed Amar,” Fordham Law Review 89, no. 1, October 2020, pp. 9-12

⁹ Vikram Amar, “Overcoming Partisan Objections to Electoral College Reform: How Red States Could (and Should) Adopt the National Popular Vote Interstate Compact But Defer Implementation Until 2032,” April 2019 at Justia.com. Available at: <https://verdict.justia.com/2019/04/18/overcoming-partisan-objections-to-electoral-college-reform>

¹⁰ Vikram Amar, “The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, The National Popular Vote Compact, and Congressional Power,” p. 11, October 2011, UC Davis Legal Studies Research Paper Series. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936374

defect,” and he is critical of what he calls the “bravado” of NPV’s lobbyists who dismiss this concern.¹¹

In addition, many leaders in the alternative voting community, such as those advocating for ranked choice voting and approval voting, have also noted that anything other than conventional plurality poses serious problems for the compact, with one predicting a “train wreck” if NPV is adopted and any states use ranked choice voting.¹²

The National Popular Vote compact would not only silence the voice of Virginia’s people in the presidential election process, it would also lead the nation to “electoral crises” and an “historic debacle” as a result of its numerous defects, as even many of those inclined to favor it have admitted. I urge you to reject this legislation.

¹¹ Robert W. Bennett, “Possibilities and Problems in the National Popular Vote Movement,” p. 183-184, *Election Law Journal* 7, No. 3. Sep. 2008

¹² “*Warning! Voting reform trainwreck approaching – need to act now to avoid the problem,*” available at: <https://www.rangevoting.org/NPVtrainwreck.html>