

Testimony of Sean Parnell, Senior Legislative Director, Save Our States
to the
Government and Veterans Affairs Committee of the North Dakota House of
Representatives
SB 2271
March 18, 2021

I am testifying today on behalf of Save Our States, an organization that promotes and defends the Electoral College. My organization does not take a position in favor of or against SB 2271, although we do appreciate the desire by its sponsors and supporters to prevent the National Popular Vote interstate compact (NPV) from eliminating the voice of North Dakota in the presidential selection process.

What I would like to do is offer information that might help you to better understand some of the issues that this bill touches on, in particular the process that federal law requires for the certification of electors and the reporting of vote totals, and how this intersects with NPV.

Because NPV is an interstate compact, it cannot compel the cooperation of non-member states, though it depends on such cooperation for its successful execution. To the best of my knowledge, it is the only such compact that cannot execute itself solely with the participation of member states, which is one of the many grave defects of the compact.

SB 2271 would prevent the release of vote totals from North Dakota until after the Electoral College has met and cast its votes, thus preventing the compact from successfully operating. A key question is, is this allowable under federal law?

The answer to this legal question is unknown and unknowable, at least until a court has ruled on the matter.

3 USC § 6 requires that each state submit what is known as a Certificate of Ascertainment, which is a document intended to certify the individuals who have been appointed as presidential electors. In addition to the names of those appointed, the law requires that the certificate include “the canvass or other ascertainment 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.” It is from this document that vote totals for determining the winning candidate under NPV are supposed to be obtained by compact member states, at least according to the book *Every Vote Equal*, published by National Popular Vote, Inc. (the relevant language is on page 580 of the fourth edition).

Advocates for NPV have cited 3 USC § 6 to claim that non-member states must release to the public the full vote totals used to ascertain which electors have been appointed, and furthermore must release them prior to the meeting of the Electoral College. But the first claim is a matter of debate, while the second is simply incorrect.

3 USC § 6 requires that each state's Certificate of Ascertainment report the canvas "*or other ascertainment under the laws of the State.*" The term "other ascertainment" combined with the reference to state law is sufficiently ambiguous and legally untested that what is proposed in SB 2271 could be found to comply with federal law.

Furthermore, it is entirely within the discretion of the state when it makes its Certificate of Ascertainment available to the public, and most states do not make their certificates available to the public prior to the meeting of the Electoral College. The copy of the certificate that is submitted to the National Archives (and then posted online by it) can be submitted after the Electoral College meets, or just prior to the meeting, making that copy unavailable for NPV's purposes as well.

If North Dakota were to file its certificate with the National Archives in accordance with the requirements of SB 2271 but the National Archives deemed vote percentages to be inadequate under federal law and rejected the submitted certificate— which does occur from time to time, such as Nevada in 2020 and Wisconsin in 2012 – all that happens is that staff from the National Archives work with your elections officials to resolve any problems and an amended Certificate is later submitted.

Such amended certificates can be submitted after the Electoral College meets and would thus also serve the purpose of denying to NPV the vote totals it needs to function.

While SB 2271 is likely to frustrate the successful operation of NPV, the approach is not without a downside. The assumption of this legislation seems to be that the compact simply could not function at all, or that its passage would force states that have already joined the compact to adopt some new, revised language in response. But it is not clear this would be the case.

The language of the compact requires member states to "determine the number of votes" in each state, which may leave the door open for them to concoct estimated vote totals to use. Compact member states might also simply opt to not include any vote totals from North Dakota and only use results from the other forty-nine states and Washington DC, thus completely excluding North Dakota from the presidential selection process.

It should also be noted that the compact does not create a mechanism or body that could provide guidance or resolve differences in how member states determine the vote counts of non-member states. This means that some compact member states might use estimated vote totals for North Dakota while other member states do not include any vote totals at all for the state, and in a close national election this could cause a split between member states in who is determined to be the winner.

As noted earlier, Save Our States does not take a position on whether SB 2271 should be passed, But whatever the outcome of this bill, it does help to expose several of the most critical defects of NPV:

1. The lack of an official national vote count that can be relied upon to accurately and conclusively determine a winner;

2. The incorrect assumption that non-member states must and will fully cooperate with the operation of the compact;
3. The compact's inability to handle the differences in how states conduct elections, count votes, and report results.
4. The compact's failure to include any mechanism or body that can resolve differences or disputes in how member states determine the votes of non-member states.

I'd like to close by thanking the sponsors of SB 2271 for helping to expose these defects, and for their commitment to preserving the vital role that states play in the presidential selection process. Regardless of whether this bill is passed, I encourage all of you and your colleagues to continue to explore all options for opposing NPV and protecting the Electoral College.

Thank you.