2021 SENATE GOVERNMENT AND VETERANS AFFAIRS

SB 2271

2021 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Room JW216, State Capitol

SB 2271
2/11/2021
10:42 AM

Relating to procedures for canvassing & counting votes for presidential electors; provide a contingent effective date.

Chair Vedaa opened the hearing at 10:42 a.m. with Sen Vedaa, Meyer, Elkin, K Roers, Wobbema, Weber, and Marcellais present.

Discussion Topics:

- Electoral college
- Ramifications to small states

Sen Erbele, Dist 28 – introduced the bill.

Curtis Olafson – Protect Your Vote USA – testified via Zoom in support #6349

Additional written testimony:

Tara Ross – support #6352

Adjourned at 10:58 a.m.

Pam Dever, Committee Clerk

#6349

Curtis Olafson

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Testimony for Senate Bill 2271

Our Founders included three very important provisions in the Constitution that were all included for the very same reason. They instinctively foresaw that the major population centers would come under the control of one political party and could potentially run roughshod over the vast majority of the country that would not have heavily concentrated populations.

To prevent that from happening, the three provisions the Founders included were:

1) Equal representation in the Senate irrespective of a state's population.
2) The state-initiated Article V amendment process.
3) The Electoral College.

The Electoral College has served our Constitutional Republic well for over 200 years, but in 2006, a movement started to change the way we elect our presidents. The National Popular Vote Interstate Compact (NPVIC) is a clever albeit malevolent way to circumvent and subvert the Constitution by using the interstate compact process. Contrary to what some people initially believe when they first hear of it, the NPVIC is not an effort to amend the Constitution and directly eliminate the Electoral College. The backers of the NPVIC know that there is no chance whatsoever of getting 38 states to ratify such an amendment. So, they came up with a circuitous way around our Constitution.

As of today, the NPVIC has been adopted in 15 states and the District of Columbia and now encompasses 196 Electoral College votes. It needs another 74 EC votes to go into effect and if that happens, the major population centers, mainly on the east and west coasts, will be in complete control of who is elected president and what party they are from. The presidential election votes cast in a state like North Dakota and dozens of others will become irrelevant.

Senate Bill 2271 is intended to "thwart" the NPVIC should it ever reach 270 Electoral College votes within the compact. The mechanism for doing that is 2271 prohibits the Secretary of State and all other election officials from releasing the "tally" of votes for the presidential election. 2271 specifies that the officials may release information on percentages, but not the vote totals. For example, the Secretary of State could release the results by stating "candidate A received 52% of the vote and candidate B received 48%." Everyone in the state will still know who won the presidential election in ND.

The question sometimes arises as to whether all 50 states would need to pass this legislation in order for it to be effective. The short answer is an emphatic "no." The longer answer can be found in the language of the NPVIC itself.

"***Prior to the time set by law for the meeting and voting by the presidential electors, 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 in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate. The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the "national popular vote winner."***

If the compact member states don't have a tally from **every state in the country**, their own compact language would prohibit them from determining the winner of the national popular vote. Best of all, if this legislation achieves what we believe it will accomplish, the NPVIC backers will have to go back to square one and reintroduce legislation with new compact language in the 16 jurisdictions in which it has already passed.

Two other very important points regarding SB2271:

- Passage of 2271 will have no affect whatsoever on the reporting of any other election contest in the state. It only applies to presidential elections.
- 2271 would not go into effect unless and until the NPVIC reaches 270 EC votes within the compact. If the NPVIC never goes into effect, 2271 never goes into effect.

Please support Senate Bill 2271 and do your part to save the Electoral College as intended by our Founding Fathers.

THE STATE OF NORTH DAKOTA
SENATE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE

SB 2271: An Act relating to withholding vote totals for presidential elections
February 11, 2021

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and *Why We Need the Electoral College*

Overview

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

- A California-based group, National Popular Vote, asks states to sign an interstate compact giving presidential electors to the winner of the national popular vote.
- Fifteen states plus D.C. have signed the compact. Those states hold 196 electors among them. Only 74 more electors are needed to reach the goal of 270.
- The compact will effectively eliminate the Electoral College with the support of only a minority of states.

North Dakota can defend itself

- North Dakota legislators are responsible for the appointment of the state's presidential electors.
- Federal reporting requirements in 3 U.S.C. § 6 are vague and require only "the canvass *or other ascertainment*" supporting the appointment of electors.
- The goal of withholding vote totals is to confuse NPV's efforts to tabulate a national popular vote, without which the compact fails.

The Electoral College is worth protecting

- *The Benefits of Federalism*. Presidential candidates must build national coalitions of voters. Historically speaking, those who build the broadest coalitions win. The process discourages an overfocus on one region, state, or special interest group.
- *Moderation and Compromise.* As a matter of history, the Electoral College has encouraged Americans to work together, across state lines. A direct election system tends to fracture the electorate, as it does in countries like France.
- *Stability and Certainty in Elections.* The Electoral College typically produces quick and certain outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

THE STATE OF NORTH DAKOTA
SENATE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE

SB 2271: An Act relating to withholding vote totals for presidential elections
February 11, 2021

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and
Why We Need the Electoral College

Testimony

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

A California-based group, National Popular Vote ("NPV"), has been working to undermine the Electoral College. NPV asks states to sign an interstate compact known as the National Popular Vote interstate compact. By the terms of the compact, all participating states agree to give their presidential electors to the winner of the national popular vote, regardless of the outcome within their own borders. The compact goes into effect when states holding 270 electors—enough to win a presidential election—have signed. Implementation of the compact would effectively eliminate the Electoral College, without the bother of a constitutional amendment.

NPV has so far convinced 15 states plus the District of Columbia to approve its plan. Those jurisdictions hold 196 electoral votes among them, which means the compact is just 74 electors short of its goal. In other words, NPV is on track to eliminate the Electoral College with only a minority of states supporting its proposal. The formal constitutional amendment process, by contrast, requires approval from a supermajority of states before such radical change can be made.

North Dakota can defend itself

Fortunately, the structure of the Constitution gives North Dakota tools with which to defend itself. North Dakota legislators maintain primary control over North Dakota's election. The Constitution deliberately creates a decentralized process in which each state is responsible for itself. The decentralized process is its own contribution to the system of checks and balances that distinguish our Constitution.

North Dakota can act as a check on other states when they arrogantly assume that a minority of states can overhaul the presidential election system, without so much as asking the remaining majority of states what they think.

The idea behind SB 2271 admittedly sounds odd at first: The legislation would withhold North Dakota's popular vote totals at the end of a presidential election. Those numbers wouldn't be released until after the meetings of the Electoral College (assuming they aren't needed for a recount). The goal of the legislation is to confuse NPV's ability to generate a national popular vote total. Without that tally, the NPV compact fails.

As state officials, you know that there is no official national tally because American presidential elections are conducted state-by-state. NPV's compact instead assumes that it can rely on an "official statement" from any other state regarding the number of popular votes in that state. Such official statements are to be treated as "conclusive."

SB 2271 creates confusion where NPV seeks hard numbers. How can NPV tally numbers that it does not have? NPV might be tempted to ignore North Dakota in generating its national tally, but the wording of its compact should prevent it.

Importantly, that compact specifically requires its participants to "determine the number of votes for each presidential slate **in each State of the United States** and in the District of Columbia in which votes have been cast in a statewide popular election . . . ." (emphasis added).

Finally, federal reporting requirements should not prevent North Dakota from taking such action, despite the protests of NPV. Federal law is vague, asking for only "the canvass or other ascertainment" supporting the appointment of electors. The federal provisions read as they do because no one in Washington D.C. is authorized to control the manner in which North Dakota selects its electors. You, as legislators, can even select those electors directly, without reference to a popular vote. Thus, federal provisions cannot be any more specific than they are.

SB 2271 is just one idea when it comes to confusing the vote totals for NPV's purposes. States could take many other actions, such as reverting to an earlier form of ballot in which voters cast separate votes for each individual presidential elector. Whatever North Dakota chooses, though, it does have power to push back on the large states that have haughtily assumed that they can dictate a form of presidential election to their smaller neighbors.

The Electoral College is worth protecting

The Constitution seeks to reconcile two seemingly irreconcilable goals: The Founders wanted the people to govern themselves, but they also wanted to protect minority interests. A simple democracy would not accomplish this objective: Bare or emotional majorities can too easily

outvote and tyrannize minority groups—even very large, reasonable ones. An old analogy notes that a simple democracy is like two wolves and a sheep voting on what's for dinner.

The sheep doesn't feel good about being eaten just because it got a chance to vote!

The Founders sought to create something better than this type of simple democracy. They created a Constitution with many safeguards: We have separation of powers, presidential vetoes, a bicameral Congress, and supermajority requirements to do things like amend the Constitution. The Electoral College is one of these safeguards, intended to protect our liberty.

The Electoral College continues to help our country in many ways: It encourages coalition-building and motivates candidates to reach out to a wide variety of voters. It penalizes those who rely upon isolated pockets of support in one region, one state, or among voters in one special interest group. It encourages moderation and compromise from political parties and their candidates. Finally, the state-by-state election process isolates voting problems to one or a handful of states, making it much harder to steal elections.

If this is true, then what is happening lately? No one seems very interested in reaching out to voters and building diverse coalitions, as the Electoral College requires.

We've been here before. The country has been divided and angry. We've had series of close presidential elections in which it seemed that coalition-building was a thing of the past. In the years after the Civil War, the Electoral College proved its ability to heal just this sort of division.

Consider the political landscape as it existed back then: Democrats were strong in the South, but they didn't have enough electoral votes in those states to win a presidential election. In the meantime, Republicans were in the opposite situation: They were strong in the North and the Northwest. They had enough electoral votes to win without southern support, but just barely. In other words, both political parties had incentives to earn the support of new voters. Both parties were forced to reach a hand across the political aisle—pretty much whether they wanted to or not. Over time, the incentives inherent in the presidential election process helped to heal some of the divide between North and South.

The incentives today are the same. The first party to realize its mistakes and to once again focus on coalition-building will also begin winning presidential elections in landslides. In a country as large and diverse as our own, such incentives are healthy and necessary if we are to regain our footing. Eliminating the Electoral College will simply undermine our ability to heal.

Conclusion

North Dakota is a sovereign state with complete control over its own method of elector allocation. I urge you to use your power to protect the Electoral College by approving SB 2271. America's unique presidential election process is an important part of the Constitution's checks and balances. It should be preserved.

2021 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Room JW216, State Capitol

SB 2271
2/11/2021

Relating to procedures for canvassing & counting votes for presidential electors; provide a contingent effective date.

Chair Vedaa called to order at 3:21 p.m. with Sen Vedaa, Meyer, Elkin, K Roers, Wobbema, Weber, and Marcellais present.

Discussion Topics:

- Committee Work
- 21.0828.01001

Sen Weber: I move amendment 21.0828.01001
Sen Meyer: I second
Voice Vote taken. Motion Passed

Sen K Roers: I move a **Do Pass as Amended**
Sen Wobbema: I second**.**
Roll Call Vote: 7 -- YES 0 -- NO -0- ab Motion Passed

Senators	Vote
Senator Shawn Vedaa	Y
Senator Scott Meyer	Y
Senator Jay R. Elkin	Y
Senator Richard Marcellais	Y
Senator Kristin Roers	Y
Senator Mark F. Webber	Y
Senator Michael A. Wobbema	Y

Sen Weber will carry the bill

Adjourned at 3:34 p.m.

Pam Dever, Committee Clerk

Adopted by the Government and Veterans Affairs Committee
February 11, 2021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2271

Page 2, line 12, replace "tenth" with "hundredth"

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2271: Government and Veterans Affairs Committee (Sen. Vedaa, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2271 was placed on the Sixth order on the calendar.

Page 2, line 12, replace "tenth" with "hundredth"

Renumber accordingly

2021 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2271

2021 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Pioneer Room, State Capitol

SB 2271
3/18/2021

Relating to withholding vote totals for presidential elections; relating to procedures for canvassing and counting votes for presidential electors; to provide a penalty; and to provide a contingent effective date

Chairman Kasper opened the hearing at 10:43 a.m.

Representatives	Roll Call
Representative Jim Kasper	P
Representative Ben Koppelman	P
Representative Pamela Anderson	P
Representative Jeff A. Hoverson	P
Representative Karen Karls	P
Representative Scott Louser	P
Representative Jeffery J. Magrum	P
Representative Mitch Ostlie	P
Representative Karen M. Rohr	P
Representative Austen Schauer	P
Representative Mary Schneider	P
Representative Vicky Steiner	P
Representative Greg Stemen	P
Representative Steve Vetter	P

Discussion Topics:

- Electoral College Value
- % of Vote Total

Senator Erbele introduced and testified in favor.

Curtis Olafson, National Legislative Liaison, Protect Your Vote USA, testified in favor, #9975, #9974.

Patrick Rosenstiel, Domestic Policy Caucus, testified in opposition.

Saul Anuzis, Former Michigan Republican State Chairman, testified in opposition, #10045.

Rose Christensen testified in opposition.

Donnell Preskey, ND Association of Counties, testified in opposition.

Sean Parnell, Sr. Legislative Director, Save Our States, appeared in a neutral position, #9573.

Additional written testimony: #9831, #9859, #9866, #9878, #9909, #9931, #9938, #9939, #9983.

Chairman Kasper closed the hearing at 12:16 p.m.

Carmen Hart, Committee Clerk

Curtis Olafson

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Testimony for Senate Bill 2271

Our Founding Fathers included three very important provisions in the Constitution, and they were all included for the very same reason. The Founders instinctively foresaw that the major population centers would come under the control of one political party and could potentially run roughshod over the vast majority of the rest of the country that would not have heavily concentrated populations.

To prevent that from happening, the three provisions the Founders included were:
1) Equal representation in the Senate irrespective of a state's population.
2) The state initiated Article V amendment process.
3) The Electoral College.

The Electoral College has served our great country well for over 200 years, but in 2006, a movement started to change the way we elect our presidents. The National Popular Vote Interstate Compact (NPVIC) is a clever, albeit sinister, way to circumvent and subvert the Constitution by using the interstate compact process. Contrary to what some people believe when they first hear of it, the NPVIC is not an effort to amend the Constitution and directly eliminate the Electoral College. The backers of the NPVIC know that there is no chance whatsoever of getting 38 states to ratify such an amendment.

As of today, the NPVIC has been adopted in 15 states and the District of Columbia and now encompasses 196 Electoral College votes. It needs another 74 EC votes to go into effect, and if that happens, the major population centers, mainly on the east and west coasts, will be in complete control of who is elected president and what party they are from. The presidential election votes cast in a state like North Dakota and dozens of others will become irrelevant.

It is very telling to note which states have passed the NPVIC. The states are: Delaware, Hawaii, Rhode Island, Vermont, Colorado, Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Washington, California, Illinois, New York, and the District of Columbia. Ask yourself these two questions: 1) Which political party is solidly in control in those states? 2) Why has not a single red state adopted it after the 15 years of its existence?

This legislation is intended to "thwart" the NPVIC should it ever reach 270 Electoral College votes within the compact. The main mechanism for doing that is SB 2271 prohibits the Secretary of State and all other election officials from releasing the raw vote totals of votes for the presidential election. SB 2271 specifies that the officials may release the election results expressed in percentages.

For example, the Secretary of State could release the results by stating "candidate A received 52% of the vote and candidate B received 48%." Everyone will still know who won the presidential election in North Dakota and which electors should attend, and cast their votes at, the meeting of the Electoral College. The results of the presidential election in North Dakota will absolutely not be "secret" as some opponents have falsely claimed.

Opponents often cite concerns over the integrity of the 2020 election as a reason to oppose SB 2271, but ignore the fact that the integrity of the 2020 election was only in question in a few states. North Dakota was not one of them. This opposition legislation is most appropriate for passage in states that have a history of protecting the integrity of their elections. North Dakota is one of those states.

The question sometimes arises as to whether dozens of states would need to pass this legislation in order for it to be effective; the short answer is an emphatic "no." The longer answer can be found in the language of the NPVIC itself.

"***Prior to the time set by law for the meeting and voting by the presidential electors, 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 in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate. The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the "national popular vote winner."***

If the compact member states don't have the raw vote totals from every state in the country, their own compact language would prohibit them from determining the winner of the national popular vote. Declaring a winner without the raw vote totals would very likely face a legal challenge asserting that the compact member states violated the requirements of their own compact, which is a legal document. Best of all, the NPVIC backers will have to go back to square one and reintroduce legislation with new compact language in the 16 jurisdictions in which it has already passed.

Two other important points regarding SB2271:

- Passage of SB 2271 will not affect any other election contest reporting in the state. It only applies to presidential elections.
- SB 2271 would not go into effect unless and until the NPVIC reaches 270 EC votes within the compact, at which time the compact would go into effect. If the NPVIC never goes into effect, SB 2271 never goes into effect. The purpose of this legislation is to prevent the NPVIC from ever going into effect.

Please support Senate Bill 2271 and do your part to save the Electoral College as intended by our Founding Fathers.

The Heritage Foundation

#9974

LEGAL MEMORANDUM

No. 272 | OCTOBER 8, 2020

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

The National Popular Vote: Misusing an Interstate Compact to Bypass the Constitution

Thomas Jipping

KEY TAKEAWAYS

America's Founders established the Electoral College so that all states could participate in electing the President—requiring campaigns to reach the entire country.

The NPV movement rejects our current system. It wants to skip amending the Constitution and allow only a handful of states to elect the President.

The NPV compact is not only bad policy but, under the Constitution's Compact Clause, is unconstitutional without the consent of Congress.

In February 1938, a Senate Judiciary subcommittee held a hearing on a joint resolution to propose the Equal Rights Amendment. Representing the National League of Women Voters, then a staunch ERA opponent, Dorothy Straus observed that "even intelligent people can become slaves of a slogan."[1]

Slogans can not only lead to bad policies, but can even be used in ways that undermine the foundation of our system of government. This *Legal Memorandum* examines how one campaign—using the slogan "national popular vote"—seeks to employ an interstate compact for an unprecedented purpose: to bypass the Constitution and change how the nation elects the President. Interstate compacts have never been used to change national policy and, without the congressional consent that the Constitution requires, this compact is unconstitutional.

A Union of Sovereign States

Before American independence, disputes between the colonies, typically over borders, were resolved by negotiated agreements that required the approval of the English crown.[2] America's Founders, however, remained "deeply concerned both with divisive interstate disputes and collusive interstate agreements."[3] As a result, after independence, the Articles of Confederation required Congress' approval for any "treaty confederation or alliance" between states.[4]

Unlike in many other countries, the American states are not "mere administrative subdivisions of the central government," but enjoy their own "legal autonomy."[5] Interstate agreements or compacts "adapt to our Union of sovereign states the age-old treaty making power of independent sovereign nations."[6] While the states did not surrender their sovereign right to make compacts with each other,[7] the Constitution is more restrictive than the Articles of Confederation. Declaring its purposes to include forming "a more perfect union," the Constitution provides not only that "[n]o State shall enter into any Treaty, Alliance, or Confederation,"[8] but also that "[n]o State shall, without the Consent of Congress...enter into any Agreement or Compact with another State, or with a foreign Power."[9] The "primary concern of the Compact Clause was to prevent interstate agreements detrimental both to the federal government and to non-compacting states."[10]

The Compact Clause and Congressional Consent

Three theories have been suggested to explain the meaning of the Compact Clause.

- The most restrictive "boundary" theory, even narrower than the Clause's plain language, would permit only compacts, even with congressional consent, that address boundary disputes.[11]

- The "non-political" theory would permit a broader category of interstate agreements that "do not threaten the stability of the Union," although these would still need congressional consent.[12]

- The "currently reigning" theory of the Compact Clause is the most permissive.[13] In this view, states are free to establish non-political agreements without congressional consent "because they do not affect national sovereignty or concern the core meaning of the Compact Clause. Political compacts are permitted, but only with the consent of Congress."[14]

Which Compacts Need Consent? The Supreme Court established the latter theory in its 1893 decision in *Virginia v. Tennessee*.[15] Virginia said that its boundary with Tennessee had been established by the "charters of the English sovereigns"[16] that formed the original colonies. Tennessee said that the original boundary was subsequently changed by a commission created by the two states and approved by their legislatures.[17] The Supreme Court had to decide whether this commission agreement was valid without congressional consent.

The Court observed that the broad terms "agreement" or "compact," if taken by themselves, could cover "all forms of stipulation, written or verbal, and relating to all kinds of subjects."[18] Despite the Compact Clause's plain language, the Court looked to the "object of the constitutional provision" to narrow the category of interstate agreements or compacts that require congressional consent.[19] To that end, the Court distinguished between compacts involving "matters upon which different states may agree that in no respect concern the United States" from those "which may tend to increase and build up the political influence of the contracting states."[20] Only the latter, the Court held, require congressional consent.

Compacts That Do Not Require Consent. Interstate compacts that would not need congressional consent under this theory might involve a land purchase or a plan to fight pestilence.[21] "If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie canal, it would hardly be deemed essential for that state to obtain the consent of congress."[22] Neither would draining a "malarious and disease-producing district" that straddled a state boundary.[23]

In *State of New Hampshire v. State of Maine*,[24] both states had agreed upon the settlement of a border dispute and filed "a proposed consent decree, based on a stipulated record."[25] The Court reaffirmed the narrow application of the Compact Clause it had established in *Virginia v. Tennessee*, concluding that by agreeing to the settlement, "neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government."[26]

In *Northwestern Cement Co. v. Minnesota*,[27] the Supreme Court held in 1959 that state taxes on companies doing interstate business must be nondiscriminatory and properly apportioned.[28] On August 4, 1967, seven states created the Multistate Tax Compact and, with it, the Multistate Tax Commission to facilitate proper determination of the tax liability of multistate businesses. The compact allows a member state to request that the commission perform an audit on its behalf.

More than 20 states had joined the compact by 1972 when U.S. Steel sued on behalf of "all other multistate taxpayers threatened with audits by the Commission."[29] They argued that the Multistate Tax Compact was invalid because it had not received the consent of Congress and asked the Supreme Court to overrule its precedents in *Virginia v. Tennessee* and *New Hampshire v. Maine*. The Court declined to do so, noting that U.S. Steel had offered "no effective alternative other than a literal reading of the Compact Clause."[30] That literal reading would "require the States to obtain congressional approval before entering any agreement among themselves, irrespective of form, subject, duration or interest of the United States."[31] The Court characterized *Virginia v. Tennessee* and subsequent decisions as taking a "functional view of the Compact Clause"[32] and affirmed their "underlying assumption" that "not all agreements between States are subject to the strictures of the Compact Clause."[33]

Political Compacts Require Consent. A political compact that still needs congressional consent is "a compact infringing upon federal or non-compacting state sovereignty by aggrandizing the political power of compacting states."[34] While most court decisions and commentary have focused on a compact's effect on federal interests, the Supreme Court has long recognized that requiring congressional consent "prevent[s] any compact or agreement between any two States, which might affect injuriously the interests of the others."[35] The Supreme Court, for example, held unanimously in 2018 that Congress may withhold its consent if an interstate compact would "injure the interests" of other states or regions in the United States.[36]

In *U.S. Steel*, the Supreme Court recognized that the interests of states that do not join a compact are important in determining whether it violates the Compact Clause[37] and explicitly considered this factor in *Northeast Bancorp v. Board of Governors*.[38] The Supreme Court assumed that statutes passed by Massachusetts and Connecticut regarding a bank holding company in one state acquiring a bank in the other constituted an interstate compact. Citing *Virginia v. Tennessee*, the Court held that this compact did not "enhance the *political* power of the New England States at the expense of other States."[39]

Congress consents to an interstate compact by a legislative vehicle that is presented to the President for approval or veto. The Supreme Court has held that "an interstate compact approved by Congress...is a federal law"[40] and noted "the requirement that all legislation be presented to the President before becoming law."[41] Congress, therefore, has never consented to an interstate compact *except* by a bill or a joint resolution that

was presented to the President. The Congressional Research Service has concluded that "the purpose, function, and structure of the Constitution, coupled with the sustained practice of Congress strongly suggest that legislation approving of an interstate compact is subject to the limitations of the Presentment Clause."[42]

Interstate compacts are "the only method by which states may significantly change their relationship with each other."[43] As a contract, an interstate compact is binding upon "those states that have elected to become parties to it."[44] Those that enhance the power of compacting states *in relation to federal interests or over non-compacting states* require congressional consent.[45]

Use of Interstate Compacts

Only 35 interstate compacts, nearly all of them to settle boundary disputes, were formed between 1783 and 1920.[46] Since World War II, however, that number has grown by more than 150.[47] In modern usage, interstate compacts "are contracts between two or more states creating an agreement on a particular policy issue, adopting a certain standard or cooperating on regional or national matters."[48] These include "conservation and resource management...law enforcement, transportation... education, energy, mental health, workers compensation and low-level radioactive waste."[49] Interstate compacts are properly understood as tools for promoting "interstate cooperation without federal intervention."[50]

The Council of State Governments' National Center for Interstate Compacts divides them into three categories: border compacts, advisory compacts that create study commissions, and regulatory compacts that create administrative agencies.[51] Regulatory compacts that create administrative agencies include some familiar names. New York and New Jersey, for example, established a compact in 1921 that, in turn, created the Port Authority of New York and New Jersey.[52] Similarly, the Washington Metropolitan Area Transit Authority was created by an interstate compact that Congress approved in 1966.[53]

This brief review of interstate compacts shows that they are interstate not only in form, but also in substance. In other words, interstate compacts are more than simply collective arrangements for accomplishing something, but agreements through which states address issues or problems that occur between the states entering the compact.

Application: National Popular Vote Compact

In the United *States* of America, the states elect the President through the Electoral College. Each state casts a number of electoral votes equal to its representatives in both houses of Congress. That calculation incorporates both the equality and the diversity of the states. The states are equal by each having two Senators; they are diverse by their populations determining their number of Representatives in the House. Today, the least populous states such as Wyoming, Vermont, or Alaska have the minimum of three electoral votes while, on the other end of the scale, California has 55, Texas has 39, and Florida and New York each have 29.

The Constitution allows each state to determine how to choose its electors, that is, how to cast its electoral votes.[54] Today, 48 states award all of their electoral votes to the winner of that state's popular vote. Maine and Nebraska award one electoral vote to the winner of the popular vote in each congressional district, and the two remaining electoral votes to the winner of the statewide popular vote. The Electoral College, therefore, is built on the same foundation as republican government itself, namely, the principle that government "derives all its powers directly or indirectly from the great body of the people."[55] In presidential elections, the popular vote is mediated through the states that make up the Union.

Reaching "The People." The Electoral College is consistent with republican government in another way—by forcing presidential candidates to conduct national campaigns to reach "the people." While the United States is a large, diverse country, more people are living in a smaller portion of it than ever before. The 2010 census, for example, showed that the national population was 80.7 percent urban and 19.3 percent rural,[56] the widest gap in American history.

If the President were elected only by national popular vote instead of by the states, a presidential campaign would only need to locate the highest concentrations of voters most likely to support its candidate—and ignore the rest of the country. The ability to do so has never been greater. Maintaining the Electoral College, therefore, is the only way to ensure that those who want to lead the nation seek support across the nation.

Small Margins. The Electoral College, with its winner-take-all formula in nearly every state, can create a situation that may be confusing to those who do not fully understand the system. A candidate can win the popular vote in enough states to win a majority of electoral votes but still lose the popular vote nationally. This has occurred in only four of the 58 presidential elections in American history.[57] In 2000, for example, President George W.

Bush lost the plurality of the popular vote (47.9 percent vs. 48.4 percent) but won 30 states with 50.4 percent of the electoral votes. The five states that Bush won by the largest margin gave him just 20 electoral votes, compared to 55 electoral votes from Al Gore's top-five states. The key to Bush's victory was that the five states he won by the smallest margin, an average of 2.3 percent, gained him 65 electoral votes, compared to 40 electoral votes from the five states that Gore barely won.

Similarly, in 2016, President Donald Trump lost the plurality of the popular vote (46.4 percent vs. 48.5 percent) but also won 30 states, which delivered 56.9 percent of the electoral votes. The five most lop-sided popular vote wins for Trump gave him 22 electoral votes, while Hillary Clinton's top-five states gave her 76 electoral votes. But the five winner-take-all states that Trump won by the smallest margin, an average of just 1.5 points, gained him 90 electoral votes, compared to 32 electoral votes from the five states that Clinton just narrowly won. Trump's 77-point electoral vote victory came from the states in which he barely won the popular vote. Bush and Trump were elected by more of the *country*, if not more of the total population.

Constitutional Amendment Necessary. Formally changing the system to elect the President by national popular vote rather than by the states through the Electoral College would require amending the Constitution. Changing the national charter *should always* be a difficult task. The Constitution "contains the permanent will of the people and is the supreme law of the land."[58] It is binding on judges in every state and takes precedence over state constitutions and laws.[59] In his farewell address in 1796, President George Washington said that the Constitution can be changed only by "an explicit and authentic act of the whole people."[60]

Under Article V of the Constitution, that act of the whole people requires two supermajorities. It requires two-thirds of Congress or a convention (called after application by two-thirds of the states) to propose an amendment—and three-fourths of the states to ratify it. This process forces those who seek to change the Constitution to convince the people's representatives at both the federal and state level, and ensures that any consensus behind such a change is both wide and deep.

An End Run Around the Constitution. The National Popular Vote movement, however, wants to achieve the result of abolishing the Electoral College without having to go through the amendment process. NPV advocates want to bypass the Constitution—and avoid the need to convince even a single supermajority to reject the plan of America's Founders.

States joining the NPV interstate compact commit to awarding their electoral votes not to the winner of their own popular vote, but to the winner

of the *national* popular vote. The compact would, according to its terms, become operational when states representing a majority of electoral votes (today, at least 270) join and, therefore, can dictate the outcome of a presidential election.

To date, 15 states and the District of Columbia have joined the NPV compact, representing a total of 196 electoral votes. In one of those states, Colorado, a bill to join the compact narrowly passed the state legislature and Governor Jared Polis (D) signed it into law on March 15, 2019. Opponents gathered enough signatures, however, to place a measure to overturn this legislative action on the November 2020 ballot.

Rule by a Minority of States. While Washington said that changing the Constitution requires an "explicit and authentic act of the whole people," the NPV compact would effectively abolish the Electoral College through an act of only some of the people. The words of the Constitution would remain unchanged, but their meaning and application would be radically different. While maintaining the façade of the Electoral College, the NPV compact would reduce the body of states that elect the President from the "United States of America" to the "NPV compact states." These few states would be the only ones with an actual, genuine role in electing the President. They would not simply contribute to the presidential election outcome, as every state does in the Electoral College system—but would literally dictate that outcome.

One response might be that states representing a majority of electoral votes elect the President today. That may true, at least mathematically, but the specific states constituting that majority, and actually electing the President, in a particular election are not known until after all have participated. Presidents Trump and George W. Bush, for example, each won the popular vote in a different combination of 30 states. The four states that Bush won but Trump lost had 29 electoral votes, while the four states that Trump won but Bush lost had 52 electoral votes.

In contrast, the NPV compact would identify the states that will actually elect the President in future elections. They will do so no matter how the non-NPV states allocate their electoral votes. Those states (likely a majority) would still go through the motions of choosing electors, but doing so would be, in Shakespeare's famous words, "sound and fury, signifying nothing." The selection of those electors, as well as their votes, would literally be meaningless gestures.

A Political Cartel. In this way, the NPV compact is like a political cartel. The *Merriam-Webster Dictionary* defines "cartel" to include "a combination of political groups for common action."[61] Another defines a cartel as

a "syndicate...formed especially to regulate...output in some field."[62] That precisely describes not only the operation, but the design and purpose, of the NPV compact.

At the same time, however, states that join the NPV compact are potentially disenfranchising their own voters. In the long run, the NPV compact would likely result in at least some states giving their electoral votes to the candidate who lost the popular vote, perhaps by a wide margin, in those states. That irony is obvious. The NPV compact was crafted so that a presidential candidate could no longer win the electoral vote without winning the popular vote at the national level. Yet that is exactly what the NPV compact would, over time, almost certainly produce at the state level.

Consent Necessary. The primary constitutional question regarding the NPV compact is whether it requires congressional consent. If it does, then the NPV compact cannot operate without that consent, no matter how many states join it or how many electoral votes those states control.

A report by the Law Library of Congress notes that, in the *Northeast Bancorp* case, "the Supreme Court indicated that congressional consent would be required for a compact that would increase the political power of compacting states 'at the expense of' non-compacting states."[63] That accurately describes not only the NPV compact's practical effect, but its deliberate design.[64] It fits squarely within the category of interstate compacts that, under *Virginia v. Tennessee* and *Northeast Bancorp*, requires congressional consent.

A report dated April 9, 2008, by the Connecticut legislature's Office of Legislative Research examined how the Supreme Court would evaluate the NPV compact's constitutionality. The first issue would be whether, under *Virginia v. Tennessee*, it constitutes a "political" compact.[65] If so, the primary question would be whether it "encroached on federal power or the power of non-compacting states."[66] The report notes that the Supreme Court "applied a sister state interest analysis" in both *U.S. Steel* and *Northeast Bancorp*.[67]

The interest of a state that does not join the NPV compact is that the Electoral College system work as intended—allowing each state to be a genuine participant in the election of the President. The number of each state's electoral votes reflects the same combination of equality and difference as their representation in the two houses of Congress. The participation by *all* of those states determines the outcome. The NPV compact not only compromises, but actually destroys, that interest by making the election outcome determined by "an arranged collective agreement" by only some states.[68]

Spectators or Participants? Once that critical mass of states representing a majority of electoral votes is reached, the other states become

spectators rather than participants. The electoral votes of non-NPV states cannot affect the outcome. Their votes would be no more relevant than if those states tried to cast them after the next President had already taken office. Although the NPV scheme would appear to retain the Electoral College system, it would be the cartel, rather than the states, that actually elects the President. It is difficult to conceive a plan that would more clearly and deliberately enhance some states' political power at the expense of others.

The NPV compact would either be prohibited altogether or require congressional consent under the Compact Clause's plain language—or *any* of the interpretive theories described above.

- Based on the Clause's plain language, the NPV compact would require consent simply because it is a compact;
- It would be prohibited altogether under the "boundary" theory because it does not involve a border dispute;
- It would require congressional consent under the "non-political" theory because it is clearly a political compact; and
- The NPV compact requires congressional consent under the current theory of *Virginia v. Tennessee* and *Northeast Bancorp* because it enhances the political power of compacting states at the expense of non-compacting states.

Significantly, since states have always had authority to determine how to allocate their electoral votes, each state has been free all along to give those votes to the winner of the national popular vote. No state, including any of the NPV compact members, has chosen to do so. It seems that this becomes their goal only when they know it will produce the result they want, the electoral version of "heads I win, tails you lose."

Conclusion

Although the United States is a union of sovereign states, the Constitution's Compact Clause reflects the deep concern of America's Founders to prevent divisive or collusive interstate agreements. The Supreme Court has held, contrary to the plain language of the Compact Clause, that it requires congressional consent only for interstate agreements or compacts that undermine either federal or sister-state interests. Most interstate compacts

fall outside this category, addressing issues or problems that occur between states. The National Popular Vote compact, however, clearly falls in the "political" category of compacts that, even under the Supreme Court's narrow reading of the Compact Clause, require congressional consent.

NPV advocates are dissatisfied with the Electoral College system designed by America's founders, in which all states participate in electing the President. It appears, however, that they are also dissatisfied with the constitutional amendment process, in which all states participate in deciding whether to change the Constitution. NPV advocates want the result of abolishing the Electoral College in favor of the national popular vote without having to do the hard work of actually changing the Constitution. Instead, they are trying to use an interstate compact in a completely unprecedented way.

Even with congressional consent, the NPV compact is bad policy. Without that consent, it is also unconstitutional.

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Endnotes

1. *Equal Rights for Men and Women, Hearing Before a Subcomm. of the S. Comm. on the Judiciary on S.J.Res. 65,* 75th Cong. 2 (1938) (statement of Dorothy Straus, representing National League of Women Voters).
2. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 692 (1925).
3. Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 Election L.J. 372, 376 (2007). See also Frankfurter & Landis, *supra* note 2, at 693 (noting the importance of "protect[ing] the new Union of States established by the Articles of Confederation, from the destructive political combination of two or more States."); Michael Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 296 (2003) (The Founders were "painfully aware" of threats including that "states—of unequal size but equal sovereignty—may, through cooperation, imperil the interests of a sister state.").
4. *See* Frankfurter & Landis, *supra* note 2, at 694.
5. *Id*. at 687.
6. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938). *See also* William Kevin Voit & Nancy J. Vickers, *Interstate Compacts & Agencies 2003* (Council of State Governments, 2003), at 5 ("compacts between states are somewhat like treaties between nations").
7. Poole v. Fleeger, 36 U.S. 185, 209 (1837).
8. U.S. Const., art. I, § 10, cl. 1. *See* Brannon P. Denning, *State Treaties*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/1/essays/69/state-treaties (last visited Sept. 30, 2020).
9. U.S. Const., art. I, § 10, cl. 3. See Michael S. Greve, *Compact Clause*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/1/essays/75/compact-clause (last visited Sept. 25, 2020). The Supreme Court previously held that the more general term "agreement" included "every agreement, written or verbal, formal or informal[,] positive or implied, by the mutual understanding of the parties." Holmes v. Jennison, 39 U.S. 540, 572 (1840).
10. Muller, *supra* note 3, at 376.
11. *Id* at 380.
12. *Id*. at 381.
13. *Id*. at 382.
14. *Id*.
15. 148 U.S. 503 (1893).
16. *Id*. at 504.
17. *Id*. at 505.
18. *Id*. at 518.
19. Michael Greve describes this as holding that "the Compact Clause cannot possibly mean what it says." Greve, *supra* note 3, at 287.
20. 148 U.S. at 518.
21. *Id*.
22. *Id*.
23. *Id*.
24. 426 U.S. 363 (1976).
25. *Id*. at 365.
26. *Id*. at 370.
27. 358 U.S. 450 (1959).
28. *Id*. at 452.
29. *Id*. at 454.
30. *Id*. at 460.
31. *Id*. at 459.
32. *Id*. at 468. *See also* Wharton v. Wise, 153 U.S. 155,168 (1894); Greve, *supra* note 3, at 295 ("Modern Compact Clause theory, such as it is, is avowedly functional, not textual.").
33. 434 U.S. at 469.

34. Muller, *supra* note 3, at 384.
35. Florida v. Georgia, 58 U.S. 478, 494 (1854).
36. Texas v. New Mexico (March 5, 2018), slip opinion at 4.
37. *See also* 434 U.S. at 4949–5 (White, J., dissenting) ("encroachments upon non-compact States are as seriously to be guarded against as encroachments on the federal authority").
38. 472 U.S. 159 (1985).
39. *Id*. at 176 (emphasis in original). *See also* Andrew Winston, *Interstate Compacts in the United States*, Law Library of Congress (June 2018), at 4 ("the Supreme Court considers the interests of states that are not parties to an interstate compact to be an important inquiry in determining whether the interstate compact violates the Compact Clause"), https://www.loc.gov/law/help/interstate-compacts/us-interstate-compacts.pdf (last visited Sept. 25, 2020).
40. Cuyler v. Adams, 449 U.S. 433, 438 (1981). *See also* Alabama v. North Carolina, 560 U.S. 330, 251 (2010); Texas v. New Mexico, 462 U.S. 554, 564 (1983).
41. INS v. Chadha, 462 U.S. 919, 946 (1983).
42. Andrew L. Nolan, "Interstate Compacts and Presidential Presentment of Congressional Consent," *Congressional Research Service Memorandum* (March 18, 2015), at 6. The National Center for Interstate Compact database shows that Congress consented to 96 of the 191 listed interstate compacts currently in force.
43. Michael L. Beunger et al., The Evolving Law and Use of Interstate Compacts 3 (2d edition 2016).
44. Winston, *supra* note 39, at 4.
45. *See* Voit & Vickers, *supra* note 6, at 7 (congressional consent required for compacts that "arguably have a discriminatory effect on non-party states.").
46. Council of State Governments, National Center for Interstate Compacts, *Understanding Interstate Compacts*, at 2, https://gsgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf#:~:text=On%20average%2C%20a%20state%20today%20belongs%20to%2025,establish%20or%20alter%20the%20boundaries%20of%20a%20state (last visited Sept. 25, 2020). *See also* Greve, *supra* note 3, at 288 (counting 36 interstate compacts prior to 1921).
47. *See* Voit & Vickers, *supra* note 6, at 7. This compilation lists 192 compacts, on 20 different subjects, and 25 additional boundary agreements. *See also* General Accountability Office, *Interstate Compacts: An Overview of the Structure and Governance of Environment and Natural Resources Compacts* (April 2007), at 1 (Seventy-six of more than 200 interstate existing compacts address environment and resource management issues, with 46 of them creating interstate commissions.).
48. Council of State Governments, *Compact FAQ*, http://www.csg.org/knowledgecenter/docs/ncic/CompactFAQ.pdf (last visited Sept, 30, 2020). The Supreme Court has long held that a compact between states is a contract. "In fact, the terms compact and contract are synonymous." Green v. Biddle, 21 U.S. 1, 92 (1823).
49. Winston, *supra* note 39, at 4.
50. Council of State Governments, *Evolution of Interstate Compacts* (May 2012), at 1.
51. Council of State Governments, *Understanding Interstate Compacts*.
52. *See* Voit & Vickers, *supra* note 6, at 23.
53. *Id*. at 117.
54. U.S. Const., art. II, § 1, cl. 2. See Einer Elhauge, *Presidential Electors*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/2/essays/79/presidential-electors (last visited Sept. 30, 2020).
55. The Federalist No. 39 (James Madison).
56. U.S. Census Bureau, *2010 Census Urban and Rural Classification and Urban Area Criteria*, https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html (last visited Sept. 30, 2020).
57. See Hans A. von Spakovsky, "Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme," *Legal Memorandum* No. 260, February 19, 2020, at 16, https://www.heritage.org/sites/default/files/2020-02/LM260.pdf (last visited Sept. 30, 2020).
58. VanHorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).
59. U.S. Const., art. VI, cl. 2. See Gary Lawson, *Supremacy Clause*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause (last visited Sept. 30, 2020).
60. The Avalon Project, *Washington's Farewell Address 1796*, https://avalon.law.yale.edu/18th_century/washing.asp (last visited Sept, 30, 2020).
61. *Cartel, Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/cartel (last visited Sept. 30, 2020).
62. *Cartel, Dictionary.com*, https://www.dictionary.com/browse/cartel (last visited Sept. 30, 2020). *See also* Greve, *supra* note 3, at 327 ("The threat of cartelization extends not only to the exploitation of natural resource advantages and bottlenecks…but also to policy arrangements.").
63. Winston, *supra* note 39, at 4.

64. Muller, *supra* note 3, at 392.
65. Meghan Reilly, "Constitutionality of Interstate Compacts," *OLR Research Reports* (April 9, 2008), https://www.cga.ct.gov/2008/rpt/2008-R-0221.htm (last visited Sept, 30, 2020).
66. *Id*.
67. *Id*.
68. *Id*.

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Statement by Former Michigan Republican State Chairman Saul Anuzis on the Secret Presidential Elections Bill in North Dakota (SB2271)

February 19, 2021

North Dakota SB2271 would require the state's presidential vote count to be kept secret until after the Electoral College meets (about 7 weeks after Election Day in November).

Almost identical bills were rejected unanimously by a New Hampshire House committee in 2020, defeated in the South Dakota Senate by a 31–1 vote in 2020, and died in committee in both the Mississippi House and Mississippi Senate in 2021.

1. Secret vote counts conflict with the principle of having public oversight of elections by watchdog groups, candidates, political parties, the media, and ordinary citizens

2. SB2271 contains no plan on how to run a system of vote counting that is half public and half secret—probably because there is no workable or practical way to do this

3. SB2271 contains no fines or jail time for the crime of revealing vote counts

4. Secret court proceedings will be necessary to keep the vote counts secret

5. Keeping the vote count secret would necessarily require trying to muzzle presidential candidates during a recounted or contested election, and could subject the state to ridicule in grand-standing proceedings

6. SB2271 will almost certainly never go into effect, because it allows a single presidential candidate to unilaterally negate the bill simply by initiating a recount or contest

7. SB2271 won't actually keep presidential vote counts secret, but will merely create an easily resolved issue involving 36 votes out of 158,224,999 cast nationally

8. Under SB2271, North Dakota would voluntarily surrender the "conclusive" status that existing federal law confers on each state's "final determination" of its vote count

9. SB2271 violates federal law requiring a Certificate of Ascertainment containing the presidential vote count "on or before" the Electoral College meets

10. The meaning of the word "canvass" as used in existing federal law is based on plain English, historical usage, and common sense, and cannot be redefined by one state's law

11. SB2271 denies North Dakota voters the full value of their vote for President

12. "Particularly nutty" is how *Townhall* describes this secret election bill

13. "Throwing the system into chaos" is the acknowledged purpose of the lobbyist who advocated bills like SB2271 in New Hampshire, South Dakota, and Mississippi

14. "Crazy," "anti-democratic," and "completely unacceptable" is how a long-time National Popular Vote opponent describes this secret election bill in the *Daily Signal*

Detailed discussion on each of these points will be found on the following pages.

1. **Secret vote counts conflict with the principle of having public oversight of elections by watchdog groups, candidates, political parties, the media, and ordinary citizens**

Under SB2271, the North Dakota State Canvassing Board would receive the secret counts from local voting places, add them up in secret, and keep the local and statewide counts secret until after the Electoral College meets (about 7 weeks after Election Day in November).

If vote counts were successfully kept secret at local voting places, the bill would make it impossible for watchdog groups, candidates, political parties, the media, and ordinary citizens to compare the secretly computed statewide vote recorded with what happened on Election Day at local voting places.

Because SB2271's required secrecy does not end until after the Electoral College meets, inadvertent errors would remain undiscovered until after the state's electoral votes were cast in the Electoral College.

2. **SB2271 contains no plan on how to run a system of vote counting that is half public and half secret—probably because there is no workable or practical way to do this**

Members of Congress, state legislators, other elected officials, and ballot propositions are elected at the same time as the President.

North Dakota election law has specific requirements, in dozens of places, requiring that each step of the process be "public."

Watchdog groups, candidates, political parties, the media, and ordinary citizens expect to know the vote counts for Members of Congress, state legislators, other elected officials, and ballot propositions that are on the same ballot at the same time as the presidential race.

However, SB2271 does not impose any requirement of secrecy on watchdog groups, candidates, political parties, the media, and ordinary citizens who are monitoring the same election. Instead, SB2271's secrecy requirement only covers "a public officer, employee, or contractor of this state or of a political subdivision of this state."

In short, SB2271 fails to specify how to operate a system of vote counting that is half public and half secret—probably because there is no workable or practical way to do this.

3. **SB2271 contains no fines or jail time for the crime of revealing vote counts**

SB2271's aim of secrecy can only work if the secrecy is actually enforced for every "public officer, employee, or contractor of this state or of a political subdivision of this state"

However, SB2271 contains no fines or jail time to enforce secrecy—probably because penalizing people for the crime of revealing vote counts would be politically implausible and almost certainly unconstitutional.

4. **Secret court proceedings will be necessary to keep the vote counts secret**

Because elections frequently lead to legal disputes, SB2271 cannot succeed in achieving its goal of secret elections without also requiring secret court proceedings.

Professor Norman Williams of Willamette College in Oregon (the person who first proposed the idea of secret elections in 2011) specifically recognized that secret court proceedings would necessarily have to go hand-in-hand with secret vote counts. Williams pointed out the necessity of

> **"…** releasing the vote totals only to the candidates on the condition that the totals are kept confidential until after the Electoral College meets. Such selective

> release would allow the losing candidate to pursue **a judicial election contest, which itself could be kept closed to the public to ensure the vote total's confidentiality**, but it would frustrate the NPVC [National Popular Vote Compact] by keeping other states from knowing the official vote tally."[1] [Emphasis added]

The bill's failure to make court proceedings secret is a tacit acknowledgement that the bill has no possibility of ever actually working.

5. Keeping the vote count secret would necessarily require trying to muzzle presidential candidates during a recounted or contested election, and could result in grand-standing proceedings

Existing North Dakota law provides for both recounting elections (section 16.1-16-01) and contesting elections (Section 16.1-16-02).

North Dakota law concerning recounts (section 16.1-16-01) specifically permits the presence of a candidate "personally, or by a representative."

When a candidate or the candidate's representative "contests" an election (section 16.1-16-02), the proceedings are conducted in court.

However, SB2271 does not require secrecy by the candidate or the candidate's representative in either recounts or contests.

Instead, the bill's secrecy requirement only covers "a public officer, employee, or contractor of this state or of a political subdivision of this state."

There is no politically plausible—much less constitutional—way by which any state law could succeed in muzzling a presidential candidate in the midst of a presidential recount or contest of an election.

Finally, the mere existence of a law calling for secret elections could result in grand-standing proceedings.

6. SB2271 will almost certainly never go into effect, because it allows a single presidential candidate to unilaterally negate the bill simply by initiating a recount or contest

The goal of keeping the presidential vote count secret inherently conflicts with a candidate's ability to recount or contest an election.

SB2271 attempts to deal with this conflict by creating an exception to its secrecy requirements, saying:

> "**Unless a recount has been requested under chapter 16.1-16 or a contest is initiated under this chapter**, a public officer, employee, or contractor of this state or of a political subdivision of this state may not release to the public the number of votes cast in the general election for the office of the president of the United States until after the times set by law for the meetings and votes of the presidential electors in all states."

However, this exception enables a single presidential candidate to unilaterally disable the bill.

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[1] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 213.

The conflict between secret elections and recounts and contests is probably irresolvable. In any case, allowing a single presidential candidate to unilaterally negate the bill is an explicit acknowledgement that the bill has no possibility of ever actually becoming operational.

7. SB2271 won't actually keep presidential vote counts secret, but will merely create an easily resolved issue involving 36 votes out of 158,224,999 cast nationally

SB2271 would require the state's presidential vote count to be kept secret until after the Electoral College meets (about 7 weeks Election Day in November).

It does, however, allow for the public release of the percentage of the vote received by each presidential candidate "to the nearest hundredth of a percentage point."[2]

Thus, SB2271 would not actually make North Dakota's presidential vote count secret—or even particularly mysterious—because simple arithmetic will quickly reveal the lowest possible number of votes that each presidential candidate received in the state, and the highest possible number.

In practice, this calculation could be done by anyone with a calculator, using the total number of voters who are publicly reported to have voted in the simultaneous non-secret voting for Members of Congress, state legislators, other officials, and ballot propositions.

The table below shows the number of votes received in North Dakota in 2020 by President Donald Trump; then-Vice-President Joe Biden; and other candidates, according to the North Dakota State Board of Canvasser and North Dakota's 2020 Certificate of Ascertainment.

Column 4 shows the percent of the votes received by each candidate to the nearest hundredth of a percent. This is the number that would be publicly reported if SB2271 became law.

Column 5 shows the *smallest number* of votes that a candidate could have received in North Dakota given the percentage shown in column 4, and column 6 shows the *highest*.

Column 7 shows that difference between the lowest possible number of votes from column 5 and the highest possible number from column 6. The difference is 36 votes for each candidate.

For example, give that President Trump's percentage in 2020 was 65.11% (to the nearest hundredth of a percent), then President Trump could have received anywhere between 65.105% and 65.115% of the vote. That means President Trump received between 235,562 and 235,598 votes—a difference of 36 votes.

In short, the effect of SB2271 would be—no more or less than—to create 36 votes of uncertainty in North Dakota's vote for President.

Candidate	Votes	Percent	Percent to nearest hundredth	Fewest votes candidate could have received	Most votes candidate could have received	Difference
Trump	235,595	65.11405%	65.11%	235,562	235,598	36
Biden	114,902	31.75676%	31.76%	114,895	114,931	36
Others	11,322	3.12919%	3.13%	11,307	11,343	36
Total	**361,819**	**100.00000%**	**100.00%**			

[2] As specified in the amended version of SB2271 in the Senate Committee Government and Veterans Affairs Committee.

Note that this calculation could alternatively be performed on the reported number of persons actually going to the polls or the number of voting-age persons in the state (which SB2271 does not make secret). As another alternative, if the calculation were performed on the state's entire voting-age population (from the Census Bureau), the effect of SB2271 would be to create 56 votes of uncertainty. If the calculation were performed on the state's entire population (from the Census Bureau), it would create 68 votes of uncertainty.

Sean Parnell, a lobbyist opposed to the National Popular Vote Compact, has promoted legislation such as SB2271 in New Hampshire in 2020, South Dakota in 2020, and Mississippi in 2021 as "preemptive measures against National Popular Vote."

However, SB2271 wouldn't actually have any material effect on the operation of the National Popular Vote Compact.

In determining the national popular vote count, the National Popular Vote Interstate Compact requires the chief election officials of the compacting states to give respect and deference to, and treat as "conclusive," the "final determination" of each state's vote count, provided this "final determination" is made six days before the Electoral College meets.

This is the exact same deference to each state's "final determination" that existing federal law (the Electoral Vote Count Act of 1887[3]) requires of Congress when Congress counts the electoral votes on January 6 after every presidential election.

In fact, the 5th clause of Article III of the National Popular Vote Compact parallels the wording of existing federal law and provides:

> "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."

If North Dakota voluntarily waives the benefits of this conclusiveness by providing percentages instead of "numbers," the chief election officials of the two dozen or so states belonging to the Compact are not going to throw up their hands and declare that the world has come to an end.

Instead, the chief election official of each compacting state would still be required by their state's law to "determine the number" and to determine which presidential candidate received the most popular votes in all 50 states and the District of Columbia.

Despite the introduction of 36 votes of uncertainty out of 158,224,999 cast nationally, an accurate conclusion can still be confidently reached as to which presidential candidate is entitled to be designated as the "national popular vote winner" for purposes of receiving all the electoral votes from all compacting states.

Anyone contemplating litigation challenging the correctness of the designation of the "national popular vote winner" would have to establish, at the beginning of the litigation, that the 36 votes of uncertainty created by SB2271 resulted in an incorrect designation. Of course, the designation of the national popular vote winner would be correct unless the 36 votes happened to be critical to deciding the nationwide winner in an election involving 158,224,999 votes. If the 36 votes could not possibly have affected the correctness of the designation of the national popular vote winner,

[3] The "safe harbor" provision is now section 5 of Title 3 of the U.S. Code.

there would be no aggrieved party in the litigation, and the situation would be, at most, a case of "no harm, no foul."

8. Under SB2271, North Dakota would voluntarily surrender the "conclusive" status that existing federal law confers on each state's "final determination" of its vote count

Existing federal law gives "conclusive" status to a state's "final determination" of its vote only if the "final determination" is made at least **six days before** the Electoral College meets.

Because the explicit purpose of SB2271 is to delay North Dakota's "final determination" of its presidential vote count until **after** the meeting of the Electoral College, North Dakota's electoral votes would lose their "conclusive" status—thereby becoming open to challenge in the courts and at the constitutionally required Joint Session of Congress on January 6.

The Electoral Vote Count Act of 1887 (now section 5 of Title 3 of the U.S. Code, and often called the "safe harbor" law) provides:

> "**If any State shall have provided**, by laws enacted prior to the day fixed for the appointment of the electors, **for its final determination** of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, **such determination made** pursuant to such law so existing on said day, and **made at least six days prior to said time of meeting of the electors, shall be conclusive**, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

9. SB2271 violates federal law requiring a Certificate of Ascertainment containing the presidential vote count "on or before" the Electoral College meets

Advocates of SB2271 strenuously deny that it violates the Electoral Vote Count Act of 1887 (now section 6 of title 3 of U.S. Code). However, their denials are based on **selectively quoting** only part of the relevant statute.

The facts are that existing federal law requires each state's governor to produce and deliver, "**on or before the day"** of meeting of the Electoral College, six duplicate-original copies of a "certificate of ascertainment" containing "the names of such electors and the **canvass** or other ascertainment under the laws of such State **of the number of votes given or cas**t."

Sean Parnell a lobbyist opposed to the National Popular Vote Compact, claimed the opposite in his February 24, 2014 testimony before the Connecticut Government Administration and Elections Committee.

Parnell's testimony **selectively mentioned** only one of the seven identical copies of the state's Certificate of Ascertainment, namely the copy that is sent to the National Archives for historical purposes on a leisurely basis. Parnell testified:

> "The Certificate includes popular vote totals for presidential candidates or their electoral college slates.
>
> "However, contrary to the assumption of the Compact's advocates and assertions made in *Every Vote Equal*, states are not required to submit their Certificates or make them public prior to the meeting of the Electoral College.
>
> **Federal law is very clear** – the governor of each state is required to submit the Certificate of Ascertainment via registered mail to the Archivist of the United

> States '…as soon as practicable after the conclusion of the appointment of the electors…'
>
> "**There is nothing in federal law that requires the governor to submit it prior to the meeting of the Electoral College**. [Emphasis added]

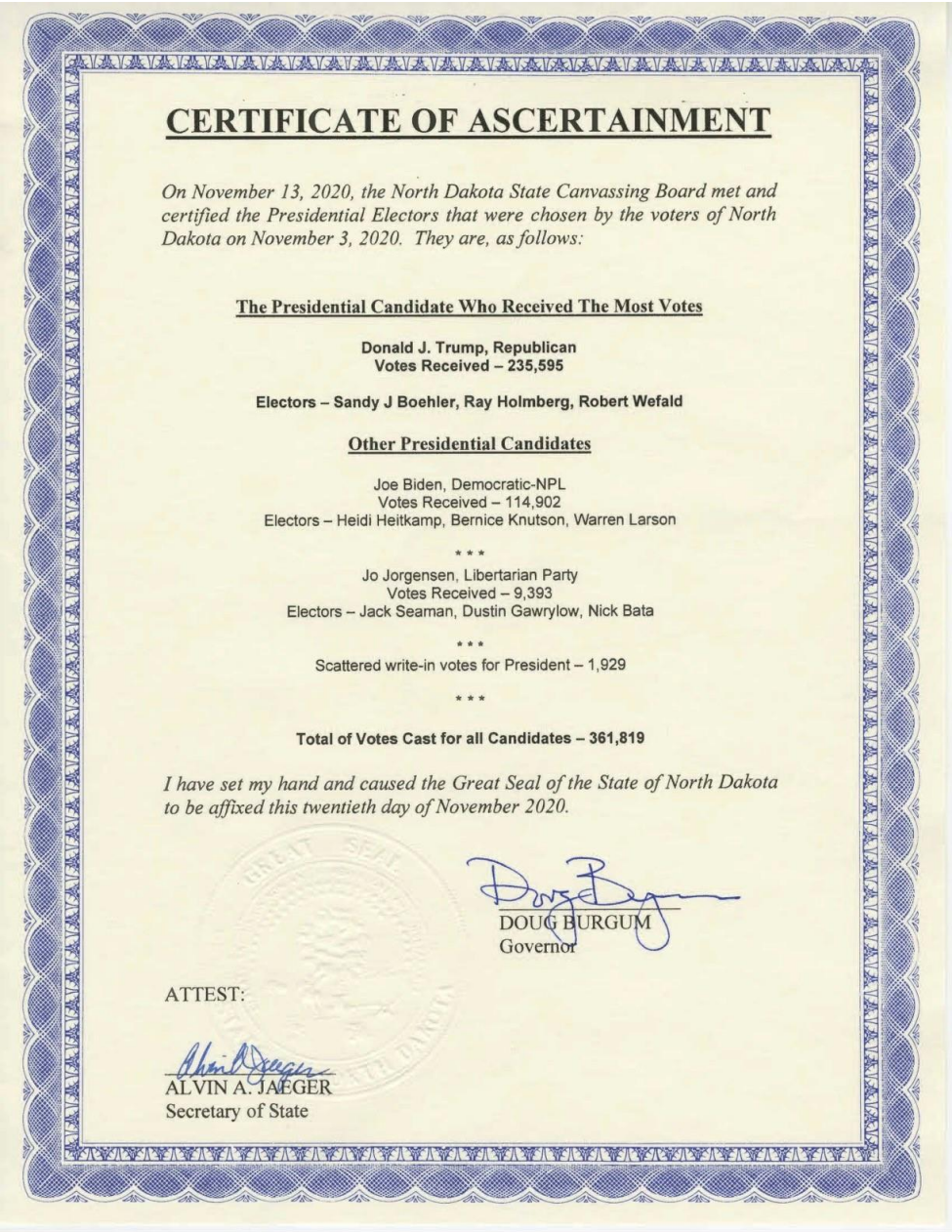
Parnell's **selective quotation** of existing federal law failed to mention that there is, in fact, a specific deadline in federal law concerning the other six identical copies of the Certificate of Ascertainment, namely "**on or before the day"** of meeting of the Electoral College.

Here is what the Electoral Vote Count Act of 1887 (now section 6 of title 3 of U.S. Code) actually says:

> "It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and 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; and **it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate** under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration."

Indeed, "Federal law is very clear." However, Parnell only selectively quoted it.

North Dakota's 2020 Certificate of Ascertainment is shown below.[4] As can be seen, the North Dakota State Canvassing Board made its "final determination" on November 13, 2020 (10 days after the election), and the Governor signed the document a week later on November 20—long **before** the meeting of the Electoral College on December 14, 2020.



CERTIFICATE OF ASCERTAINMENT

On November 13, 2020, the North Dakota State Canvassing Board met and certified the Presidential Electors that were chosen by the voters of North Dakota on November 3, 2020. They are, as follows:

The Presidential Candidate Who Received The Most Votes

Donald J. Trump, Republican
Votes Received – 235,595

Electors – Sandy J Boehler, Ray Holmberg, Robert Wefald

Other Presidential Candidates

Joe Biden, Democratic-NPL
Votes Received – 114,902
Electors – Heidi Heitkamp, Bernice Knutson, Warren Larson

* * *

Jo Jorgensen, Libertarian Party
Votes Received – 9,393
Electors – Jack Seaman, Dustin Gawrylow, Nick Bata

* * *

Scattered write-in votes for President – 1,929

* * *

Total of Votes Cast for all Candidates – 361,819

I have set my hand and caused the Great Seal of the State of North Dakota to be affixed this twentieth day of November 2020.

DOUG BURGUM
Governor

ATTEST:

ALVIN A. JAEGER
Secretary of State

After the state's members of the Electoral College met on December 14, 2020, the state created a "Certificate of Vote" recording how the state's presidential electors voted.[5]

[4] https://www.archives.gov/files/electoral-college/2020/ascertainment-north-dakota.pdf

[5] https://www.archives.gov/files/electoral-college/2020/vote-north-dakota.pdf

10. The meaning of the word "canvass" as used in existing federal law is based on plain English, historical usage, and common sense, and cannot be redefined by one state's law

Section 16.1-14-01 of SB2271 attempts to redefine the word "canvas" to mean "percentages," instead of "numbers."

However, a state law cannot redefine a word used in a federal law.

The plain English, historical usage, and common-sense meaning of the word "canvas" is a numerical vote count—not percentages.

Indeed, the state of North Dakota has never used percentages (instead of numbers) in the Certificates of Ascertainment required by the federal Electoral Vote Count Act of 1887 in any presidential-election year since its statehood in 1889.

11. SB2271 denies North Dakota voters the full value of their vote for President

The National Popular Vote Compact has not gone into effect at the present time. It will only go into effect when enacted by states possessing a majority of the electoral votes (270 of 538).

Both before and after the Compact takes effect, North Dakota will continue to choose North Dakota's presidential electors in accordance with North Dakota law.

North Dakota, like all other states, currently allows its voters to cast a vote for President. However, the North Dakota legislature has the power (under Article II, section 1 of the U.S. Constitution) to choose the method for selecting the state's presidential electors. For example, the legislature could specify that it—instead of the people—will select the state's presidential electors.

However, once the North Dakota legislature allows its voters to choose the state's presidential electors, the voters acquire "fundamental" rights, including the right to have their vote counted.

The states that have enacted the National Popular Vote Compact have decided to incorporate the choices of voters in **all** 50 states and the District of Columbia in a nationwide count that will decide how the compacting states will cast all the electoral votes that they collectively possess.

That is, the Compact gives each individual North Dakota voter the right to have their vote influence the disposition of all of the electoral votes of all of the states that have enacted the Compact.

The State of North Dakota simply does not have the legal power to deprive any individual North Dakota voter of the additional value given to their vote by the Compact.

In short, SB2271 attempts to deprive North Dakota voters of the full value of their vote.

12. "Particularly nutty" is how *Townhall* describes this secret election bill

Shortly after legislation virtually identical to SB2271 was introduced in New Hampshire in 2020, an article in the conservative publication *Townhall* entitled "National Popular Vote Opponents Are Afraid of the Constitution" by Ashley Herzog said:

> "The tinfoil hat wearers, the faction that includes moon-landing deniers and the kind of crackpots William F. Buckley Jr. and Russell Kirk expelled from mainstream conservatism, has set its sights on derailing the National Popular Vote Interstate Compact. … One pundit is actually suggesting that the Granite State defy federal law, specifically section 3, title 3 of the U.S. code—a provision in effect since 1887—to throw a monkey wrench into the final nationwide tally for president. **This particularly nutty idea** would involve

> New Hampshire refusing to submit the state's official vote count until after electors meet."[6] [Emphasis added]

The New Hampshire bill was unanimously killed in committee in 2020. Another bill (virtually identical to SB2271) was killed by the South Dakota Senate by a 31–1 vote in 2020.

13. "Throwing the system into chaos" is the acknowledged purpose of the lobbyist who advocated bills like SB2271 in New Hampshire, South Dakota, and Mississippi

SB2271 does not claim that the administration of North Dakota elections will be improved by conducting secret elections.

If that were so, the bill would take effect promptly after enactment—not after **other states** enact certain **other legislation** in the future.

SB2271 says:

> "This Act becomes effective upon certification by the secretary of state to the legislative council of the adoption and enactment of substantially the same form of the **national popular vote interstate compact** has been adopted and enacted by a number of states cumulatively possessing a majority of the electoral college votes."

"**Throwing the system into chaos**" is the specific goal of this kind of legislation—as Sean Parnell, a Virginia-based lobbyist opposed to the National Popular Vote Compact, explicitly acknowledged in his February 24, 2014 testimony before the Connecticut Government Administration and Elections Committee:

> "**A very simple way for any non-member state to thwart the Compact**, either intentionally or unintentionally, would simply be to not submit their 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**."[7] [Emphasis added]

14. "Crazy," "anti-democratic," and "completely unacceptable" is how a long-time National Popular Vote opponent describes this secret election bill in the *Daily Signal*

Since 2007, Tara Ross has regularly testified at state legislative hearings throughout the country in opposition to the National Popular Vote Compact. She is the author of three books defending the current state-by-state method of awarding electoral votes.

On January 14, 2020 (shortly after legislation virtually identical to SB2271 was introduced in New Hampshire), Tara Ross wrote in the conservative publication *Daily Signal*:

> "New Hampshire legislators have introduced an election bill that would be **completely unacceptable** under normal circumstances. But these are not normal times.
>
> "Constitutional institutions, especially the Electoral College, are under attack.
>
> "Extraordinary action may be needed. Thus, some New Hampshire legislators have proposed to withhold popular vote totals at the conclusion of a presidential

---

[6] Herzog, Ashley. 2020. National Popular Vote Opponents Are Afraid of the Constitution. *Townhall*. January 18, 2020. https://townhall.com/columnists/ashleyherzog/2020/01/18/national-popular-vote-opponents-are-afraid-of-the-constitution-n2559694

[7] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014 .

> election. The numbers would eventually be released, but not until after the meetings of the Electoral College.
>
> "The idea sounds **crazy** and **anti-democratic**. In reality, however, such proposals could save our republic: They will complicate efforts to implement the National Popular Vote legislation that has been working its way through state legislatures."[8] [Emphasis added]

While we don't often agree with Tara Ross, we do agree with her that this secret elections bill is "crazy," "anti-democratic," and "completely unacceptable."

The New Hampshire bill was unanimously killed in committee in 2020. Another bill (virtually identical to SB2271) was killed by the South Dakota Senate by a 31–1 vote in 2020.

[8] Ross, Tara. 2020. New Hampshire Is Fighting Back to Defend the Electoral College. *Daily Signal*. January 14, 2020. https://www.dailysignal.com/2020/01/14/new-hampshire-is-fighting-back-to-defend-the-electoral-college/

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.

SB 2271 was sold to the North Dakota Senate as a "countermove" in the event that other states enact the National Popular Vote Interstate Compact (**NPVIC**) for US President. The NPVIC is an afront to the US Constitution, but in passing SB 2271 we would taking a dangerous path for North Dakota and the United States. SB 2271 says that *in the event NPVIC is enacted*, North Dakota would "hide" all vote count results for Presidential races until the Electoral College casts their votes.

The *nuanced prerequisite language* in SB 2271 activating the election obfuscation *only* in the event of NPVIC is already lost on our local press. They and the nation will continue to see SB 2271 simply as "secret election counting". Should North Dakota, a famously Republican state, pass SB 2271 it will be used as justification by Democrat and swing states and their allies to pass similar legislation without the NPVIC clause.

The 2020 election demonstrated the power of publicly available interval vote count data. It allowed non governmental individuals and organizations to perform their own election fraud analysis in real-time. The effect of SB 2271 would be to make charts such as below impossible until after the electoral college has already cast their votes. At best SB 2271 is an exchange of a gold standard (election transparency) to *perhaps/maybe* prevent a bad thing that *may* come to pass (the NPVIC). At worst, and more likely, North Dakota is being tricked into an embarrassing legislative act that will be used by the political left to justify their own "secret election counts".

SB 2271 will be considered a gift by North Dakota to bad actors in other states who seek to make it easier to steal elections.

North Dakota should be fortifying our election integrity, not trading it away to meet other

challenges. Please **DO NOT PASS** SB 2271.

References

SB 2271 PDF

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National Popular Vote

Scott Hennen: Letter: For election transparency, SB 2271 must be defeated | INFORUM

Rob Port: Plain Talk: North Dakota Senate Has Passed a Bill Hiding Presidential Vote Counts - Say Anything (sayanythingblog.com)

Verified Voting

March 17, 2021

House Government and Veterans Affairs Committee
North Dakota Legislative Assembly
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

RE: Verified Voting Opposition to Senate Bill 2271

A copy of this testimony was previously submitted to the bill's sponsors along with members of House leadership.

Dear Committee Members,

On behalf of Verified Voting, I write today in strong opposition to Senate Bill 2271. Verified Voting is a nonpartisan nonprofit organization whose mission is to strengthen democracy for all voters by promoting the responsible use of technology in elections. We believe that the integrity and strength of our democracy rely on citizens' trust that each vote is counted as cast. This bill threatens to undermine that trust by potentially concealing detailed presidential vote counts for over a month after a presidential election. Public trust in elections depends on transparency; this bill sets course in the wrong direction.

The principle of election transparency dates from the inception of the United States, when voting was quintessentially public. Well into the 19th century, and in some places until the 1880s, voters cast their votes orally, *viva voce*, for all to witness. As Americans accepted the importance of voting in private (the "secret ballot"), transparency came to entail making results available as soon as possible, often at each polling place on election night. Sharing detailed results allows for scrutiny that may reveal errors in the vote counts -- and it supports the idea that elections belong to the public, who have a right to know the results. This bill effectively takes the public out of the results phase of the election for over a month.

The 2020 election cycle illustrated what can happen when the public lacks confidence in their electoral system and the procedures that hardworking election officials use to count ballots and report results. We agree with the expert consensus that the November election was the most secure in recent history -- but the public themselves are the ultimate arbiters. How can the public trust the security of the election if they are prevented from knowing the results?

Please consider the lasting damage that this bill could do. We recognize that, if passed, it would not become effective until or unless the national popular vote compact comes into effect. (We take no position on the compact.) But even the precedent of preparing to conceal vote counts

until after the Electoral College meets would be dangerously misguided. We urge Senate Bill 2271 be rejected.

Respectfully submitted,

Mark Lindeman
Acting Co-Director

Representatives:

Please **DO NOT PASS** SB 2271.

SB 2271 is a gift by North Dakota to bad actors in other states who seek to make it easier to steal elections.

Please consider these unintended negative consequences that go along with passing SB 2271:

1) The "only open in the event of NPVIC" language may seem reasonable to the initiated, but you can bet that is not how SB 2271 will be spun by others who seek to make our elections less secure.
2) SB 2271 is a tactic that is likely to only work once, if even once. It leverages NPVIC bill language that can be easily amended.
3) Data is critical for fraud detection. The chart below (Figure 1) was not created by government and would NOT be possible in states that enact something like SB 2271.
    a. As you read this SOND is responding to a significant successful cyber-attack upon SOND software systems. Election data transparency provides balance against risks inherent to software-enabled elections.

North Dakota should be fortifying our election integrity, not trading it away to meet other challenges.

Thank you, Morgan Korn

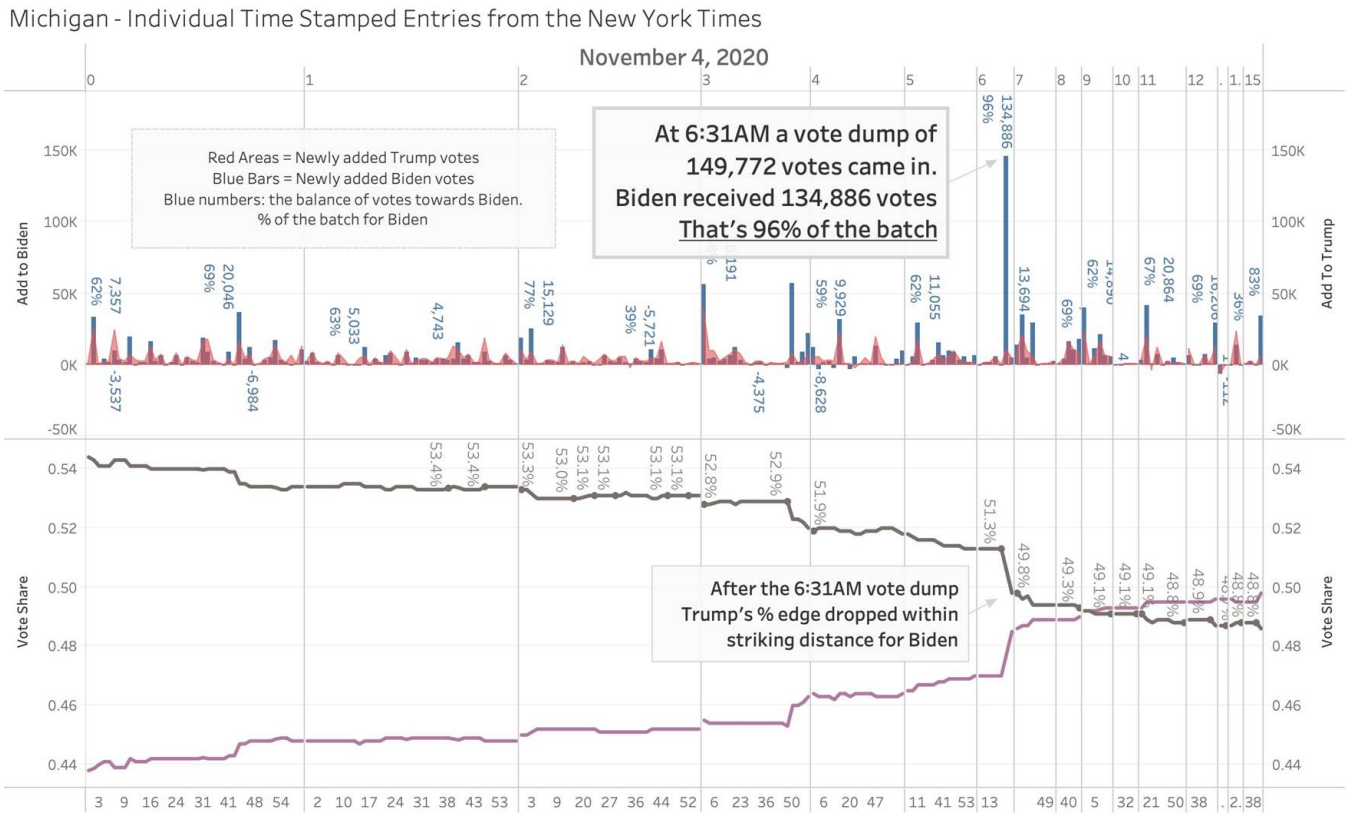

Figure 1: Interval Vote Count Data for Michigan

House Member,

This is an absolute NO!

This is totally ridiculous and allows for more fraud and will be challenged in court if passed.

Have we not learned what happened in the last election!

We need election results the night of any election to reduce on election fraud.

This serves NO purpose to the voters and we demand this bill be voted down!

Thank you,

Mr. Mitchell S. Sanderson

Dear NDCA Member,

SB 2271 would require the states presidential vote count to be kept secret until after the electoral college which means about seven weeks after the November election. This bill was sold to the North Dakota Senate as a countermove in the event that other states enact the National Popular Vote Interstate Compact (NPVIC) for the U.S. President. The North Dakota Senate passed it, but it is time now to rally the North Dakota House of Representatives to defeat this bill!

Why?

SB 2271 will be considered a gift from North Dakota to bad actors in other states who seek to make it easier to steal elections. If SB 2271 passes, it will be spun that North Dakota says it is OK for election counts to be conducted in secret. This will encourage bad actors around the nation to follow suit and make their own elections secret.

Defeating SB 2271 is essential for election integrity.

THE STATE OF NORTH DAKOTA
HOUSE GOVERNMENT AND VETERANS AFFAIRS PUBLIC HEARING

SB 2271: An Act relating to withholding vote totals for presidential elections
March 18, 2021

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and *Why We Need the Electoral College*

Overview

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

- A California-based group, National Popular Vote, asks states to sign an interstate compact giving presidential electors to the winner of the national popular vote.
- Fifteen states plus D.C. have signed the compact. Those states hold 196 electors among them. Only 74 more electors are needed to reach the goal of 270.
- The compact will effectively eliminate the Electoral College with the support of only a minority of states.

North Dakota can defend itself

- North Dakota legislators are responsible for the appointment of the state's presidential electors.
- Federal reporting requirements in 3 U.S.C. § 6 are vague and require only "the canvass *or other ascertainment*" supporting the appointment of electors.
- The goal of withholding vote totals is to confuse NPV's efforts to tabulate a national popular vote, without which the compact fails.

The Electoral College is worth protecting

- *The Benefits of Federalism*. Presidential candidates must build national coalitions of voters. Historically speaking, those who build the broadest coalitions win. The process discourages an overfocus on one region, state, or special interest group.
- *Moderation and Compromise.* As a matter of history, the Electoral College has encouraged Americans to work together, across state lines. A direct election system tends to fracture the electorate, as it does in countries like France.
- *Stability and Certainty in Elections.* The Electoral College typically produces quick and certain outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

THE STATE OF NORTH DAKOTA
HOUSE GOVERNMENT AND VETERANS AFFAIRS PUBLIC HEARING

SB 2271: An Act relating to withholding vote totals for presidential elections
March 18, 2021

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and
Why We Need the Electoral College

Testimony

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

A California-based group, National Popular Vote ("NPV"), has been working to undermine the Electoral College. NPV asks states to sign an interstate compact known as the National Popular Vote interstate compact. By the terms of the compact, all participating states agree to give their presidential electors to the winner of the national popular vote, regardless of the outcome within their own borders. The compact goes into effect when states holding 270 electors—enough to win a presidential election—have signed. Implementation of the compact would effectively eliminate the Electoral College, without the bother of a constitutional amendment.

NPV has so far convinced 15 states plus the District of Columbia to approve its plan. Those jurisdictions hold 196 electoral votes among them, which means the compact is just 74 electors short of its goal. In other words, NPV is on track to eliminate the Electoral College with only a minority of states supporting its proposal. The formal constitutional amendment process, by contrast, requires approval from a supermajority of states before such radical change can be made.

North Dakota can defend itself

Fortunately, the structure of the Constitution gives North Dakota tools with which to defend itself. North Dakota legislators maintain primary control over North Dakota's election. The Constitution deliberately creates a decentralized process in which each state is responsible for itself. The decentralized process is its own contribution to the system of checks and balances that distinguish our Constitution.

North Dakota can act as a check on other states when they arrogantly assume that a minority of states can overhaul the presidential election system, without so much as asking the remaining majority of states what they think.

The idea behind SB 2271 admittedly sounds odd at first: The legislation would withhold North Dakota's popular vote totals at the end of a presidential election. Those numbers wouldn't be released until after the meetings of the Electoral College (assuming they aren't needed for a recount). The goal of the legislation is to confuse NPV's ability to generate a national popular vote total. Without that tally, the NPV compact fails.

As state officials, you know that there is no official national tally because American presidential elections are conducted state-by-state. NPV's compact instead assumes that it can rely on an "official statement" from any other state regarding the number of popular votes in that state. Such official statements are to be treated as "conclusive."

SB 2271 creates confusion where NPV seeks hard numbers. How can NPV tally numbers that it does not have? NPV might be tempted to ignore North Dakota in generating its national tally, but the wording of its compact should prevent it.

Importantly, that compact specifically requires its participants to "determine the number of votes for each presidential slate **in each State of the United States** and in the District of Columbia in which votes have been cast in a statewide popular election . . . ." (emphasis added).

Finally, federal reporting requirements should not prevent North Dakota from taking such action, despite the protests of NPV. Federal law is vague, asking for only "the canvass or other ascertainment" supporting the appointment of electors. The federal provisions read as they do because no one in Washington D.C. is authorized to control the manner in which North Dakota selects its electors. You, as legislators, can even select those electors directly, without reference to a popular vote. Thus, federal provisions cannot be any more specific than they are.

SB 2271 is just one idea when it comes to confusing the vote totals for NPV's purposes. States could take many other actions, such as reverting to an earlier form of ballot in which voters cast separate votes for each individual presidential elector. Whatever North Dakota chooses, though, it does have power to push back on the large states that have haughtily assumed that they can dictate a form of presidential election to their smaller neighbors.

The Electoral College is worth protecting

The Constitution seeks to reconcile two seemingly irreconcilable goals: The Founders wanted the people to govern themselves, but they also wanted to protect minority interests. A simple democracy would not accomplish this objective: Bare or emotional majorities can too easily

outvote and tyrannize minority groups—even very large, reasonable ones. An old analogy notes that a simple democracy is like two wolves and a sheep voting on what's for dinner.

The sheep doesn't feel good about being eaten just because it got a chance to vote!

The Founders sought to create something better than this type of simple democracy. They created a Constitution with many safeguards: We have separation of powers, presidential vetoes, a bicameral Congress, and supermajority requirements to do things like amend the Constitution. The Electoral College is one of these safeguards, intended to protect our liberty.

The Electoral College continues to help our country in many ways: It encourages coalition-building and motivates candidates to reach out to a wide variety of voters. It penalizes those who rely upon isolated pockets of support in one region, one state, or among voters in one special interest group. It encourages moderation and compromise from political parties and their candidates. Finally, the state-by-state election process isolates voting problems to one or a handful of states, making it much harder to steal elections.

If this is true, then what is happening lately? No one seems very interested in reaching out to voters and building diverse coalitions, as the Electoral College requires.

We've been here before. The country has been divided and angry. We've had series of close presidential elections in which it seemed that coalition-building was a thing of the past. In the years after the Civil War, the Electoral College proved its ability to heal just this sort of division.

Consider the political landscape as it existed back then: Democrats were strong in the South, but they didn't have enough electoral votes in those states to win a presidential election. In the meantime, Republicans were in the opposite situation: They were strong in the North and the Northwest. They had enough electoral votes to win without southern support, but just barely. In other words, both political parties had incentives to earn the support of new voters. Both parties were forced to reach a hand across the political aisle—pretty much whether they wanted to or not. Over time, the incentives inherent in the presidential election process helped to heal some of the divide between North and South.

The incentives today are the same. The first party to realize its mistakes and to once again focus on coalition-building will also begin winning presidential elections in landslides. In a country as large and diverse as our own, such incentives are healthy and necessary if we are to regain our footing. Eliminating the Electoral College will simply undermine our ability to heal.

Conclusion

North Dakota is a sovereign state with complete control over its own method of elector allocation. I urge you to use your power to protect the Electoral College by approving SB 2271. America's unique presidential election process is an important part of the Constitution's checks and balances. It should be preserved.

Senate Bill 2271

A BILL for an Act to create and enact section 16.1-14-29 of the North Dakota Century Code, relating to withholding vote totals for presidential elections; to amend and reenact sections 16.1-14-01 and 16.1-14-27 of the North Dakota Century Code, relating to procedures for canvassing and counting votes for presidential electors; to provide a penalty; and to provide a contingent effective date.

This is absolutely ridiculous and is coming at a time when we should be having more transparency in our government. It is the voters right to know what the total votes are on election day in real time! Kind of gives the impression that there is something to hide!!

This is not good and SB 2271 needs to be defeated and I urge a NO VOTE!

Cheryl Burckhard
Minot, ND

Testimony on SB 2271
Please vote NO on SB 2271. SB 2271 will be considered a gift from North Dakota to bad actors in other states who seek to make it easier to steal elections. If SB 2271 passes, it will be spun that North Dakota says it is OK for election counts to be conducted in secret. This will encourage bad actors around the nation to follow suit and make their own elections secret.

Thank You,
Hannah

Testimony HB 2271
House Government and Veteran Affairs Committee
March 18, 2021

Mr. Chairman and members of the House Government and Veterans Committee, my name is Don Morrison. I live in Bismarck and am providing testimony for North Dakota Voters First. We are a non-partisan group of North Dakotans working to strengthen our democracy, help make our elections and public policy more open, ethical, and accountable to the people of our state.

SB 2271's provisions to not release vote counts would bring unprecedented secrecy to our elections. Not releasing votes counts in North Dakota means we will not know the actual election results of how our precincts, counties, districts, or state voted until after the Electoral College has cast their ballots. At that point it is too late for any of us in North Dakota to have done any public scrutiny of the actual election results for president of our country. Is that the kind of open and transparent government we pride ourselves about in our state?

Americans of all perspectives – conservative, moderate or liberal – believe in open government. North Dakota Voters First joins Republicans, Democratic-NPLers, Liberaltarians, blogger Rob Port, talk show host Scott Hennen and many others to urge you to recommend a DO NOT PASS on SB 2271. Thank you for the opportunity to talk with you this morning. I would try to answer any questions you may have.

2021 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Pioneer Room, State Capitol

SB 2271
4/1/2021

Relating to withholding vote totals for presidential elections; relating to procedures for canvassing and counting votes for presidential electors; to provide a penalty; and to provide a contingent effective date

Chairman Kasper opened the committee work meeting at 9:05 a.m.

Representatives	Roll Call
Representative Jim Kasper	P
Representative Ben Koppelman	P
Representative Pamela Anderson	P
Representative Jeff A. Hoverson	A
Representative Karen Karls	P
Representative Scott Louser	P
Representative Jeffery J. Magrum	P
Representative Mitch Ostlie	P
Representative Karen M. Rohr	P
Representative Austen Schauer	P
Representative Mary Schneider	P
Representative Vicky Steiner	P
Representative Greg Stemen	P
Representative Steve Vetter	P

Discussion Topics:

- Changing to resolution
- Committee action

Rep. B. Koppelman presented **amendment 21.0828.02003,** #11270, and moved to **adopt.** **Rep. Vetter** seconded. **Voice vote. Motion carries.**

Rep. B. Koppelman moved **Do Pass as amended. Rep. Vetter** seconded.

Representatives	Vote
Representative Jim Kasper	Y
Representative Ben Koppelman	Y
Representative Pamela Anderson	Y
Representative Jeff A. Hoverson	A
Representative Karen Karls	Y
Representative Scott Louser	Y
Representative Jeffery J. Magrum	Y
Representative Mitch Ostlie	Y
Representative Karen M. Rohr	Y
Representative Austen Schauer	Y
Representative Mary Schneider	Y
Representative Vicky Steiner	N

Representative Greg Stemen	Y
Representative Steve Vetter	Y

Motion passes. 12-1-1. **Rep. B. Koppelman** is the carrier.

Chairman Kasper ended at 9:16 a.m.

Carmen Hart, Committee Clerk

DP 4/1/21
1 of 1

21.0828.02003
Title.03000

Prepared by the Legislative Council staff for
Representative B. Koppelman
March 31, 2021

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2271

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide a statement of legislative intent regarding presidential elections; and to provide a directive.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE INTENT - OPPOSITION TO NATIONAL POPULAR VOTE INTERSTATE COMPACT - APPEAL TO CONGRESS. It is the intent of the sixty-seventh legislative assembly to oppose the national popular vote interstate compact, which would circumvent the electoral process set forth in the United States Constitution. If the compact becomes effective, the compact will require each signatory state to award the state's electoral college votes to the presidential candidate who received the most popular votes in all fifty states and the District of Columbia. Fifteen states and the District of Columbia have adopted the compact. However, the current system for awarding electoral college votes to the winners of state elections fulfills the requirements for appointing electoral college electors under Article II of the United States Constitution and ensures states have proportionate representation in presidential elections. The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution.

SECTION 2. DIRECTIVE TO SECRETARY OF STATE. The secretary of state shall forward a copy of the enrolled version of this bill to the president of the United States Senate, the speaker of the United States House of Representatives, and each member of the North Dakota congressional delegation."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2271, as engrossed: Government and Veterans Affairs Committee (Rep. Kasper, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed SB 2271 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide a statement of legislative intent regarding presidential elections; and to provide a directive.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE INTENT - OPPOSITION TO NATIONAL POPULAR VOTE INTERSTATE COMPACT - APPEAL TO CONGRESS. It is the intent of the sixty-seventh legislative assembly to oppose the national popular vote interstate compact, which would circumvent the electoral process set forth in the United States Constitution. If the compact becomes effective, the compact will require each signatory state to award the state's electoral college votes to the presidential candidate who received the most popular votes in all fifty states and the District of Columbia. Fifteen states and the District of Columbia have adopted the compact. However, the current system for awarding electoral college votes to the winners of state elections fulfills the requirements for appointing electoral college electors under Article II of the United States Constitution and ensures states have proportionate representation in presidential elections. The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution.

SECTION 2. DIRECTIVE TO SECRETARY OF STATE. The secretary of state shall forward a copy of the enrolled version of this bill to the president of the United States Senate, the speaker of the United States House of Representatives, and each member of the North Dakota congressional delegation."

Renumber accordingly

21.0828.02003
Title.

Prepared by the Legislative Council staff for
Representative B. Koppelman
March 31, 2021

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2271

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide a statement of legislative intent regarding presidential elections; and to provide a directive.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE INTENT - OPPOSITION TO NATIONAL POPULAR VOTE INTERSTATE COMPACT - APPEAL TO CONGRESS. It is the intent of the sixty-seventh legislative assembly to oppose the national popular vote interstate compact, which would circumvent the electoral process set forth in the United States Constitution. If the compact becomes effective, the compact will require each signatory state to award the state's electoral college votes to the presidential candidate who received the most popular votes in all fifty states and the District of Columbia. Fifteen states and the District of Columbia have adopted the compact. However, the current system for awarding electoral college votes to the winners of state elections fulfills the requirements for appointing electoral college electors under Article II of the United States Constitution and ensures states have proportionate representation in presidential elections. The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution.

SECTION 2. DIRECTIVE TO SECRETARY OF STATE. The secretary of state shall forward a copy of the enrolled version of this bill to the president of the United States Senate, the speaker of the United States House of Representatives, and each member of the North Dakota congressional delegation."

Renumber accordingly

2021 CONFERENCE COMMITTEE

SB 2271

2021 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Room JW216, State Capitol

SB 2271
4/15/2021
Conference Committee a

Relating to procedures for canvassing and counting votes for presidential elector; provide a contingent effective date.

Called to order at 4:00 PM. Present: Sen Meyer (chair), Sen Vedaa, Sen Marcellais, Rep Kasper (chair), Rep Rohr, Rep B Koppelman.

Discussion Topics:

- US Supreme Court issue
- Constitutionality of Compact
- Electoral college

Jim Silrum – Deputy Sec of State [4:05]: asked to podium to discuss constitutionality.

Conference will reschedule.

Adjourned at 4:15 PM

Pam Dever, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Room JW216, State Capitol

SB 2271
4/16/2021
Conference Committee b

A BILL for an Act to provide a statement of legislative intent regarding presidential elections; and to provide a directive.

Called to order at 11:01 AM. Present: Sen Meyer (chair), Sen Vedaa, Sen Marcellais, Rep Kasper (chair), Rep Rohr, Rep. B Koppelman.

Discussion Topics:

- ND Constitution
- Interstate Compact

Sen Meyer brought forth amendment 21.0828.02005 for the committee to review
Rep Koppelman shares concerns of amendment and proposed changes to amendment.

B Koppleman moved the House recede to the House amendments and further amend [LC 21.0828.02005]
Rep Kasper seconded

Motion Passed

Roll Call Vote: 6 -- YES 0 -- NO -0-ab

Sen Vedaa will carry in the Senate

Rep Rohr will carry in the House

Adjourned at 11:15 AM

Pam Dever, Committee Clerk

21.0828.02005
Title.04000

Adopted by the Conference Committee

April 16, 2021

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2271

That the House recede from its amendments as printed on pages 1313 and 1314 of the Senate Journal and page 1438 of the House Journal and that Engrossed Senate Bill No. 2271 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide a statement of legislative intent regarding presidential elections; to provide for a legislative management study; and to provide a directive.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE INTENT - OPPOSITION TO NATIONAL POPULAR VOTE INTERSTATE COMPACT - APPEAL TO CONGRESS. It is the intent of the sixty-seventh legislative assembly to oppose the national popular vote interstate compact, which would circumvent the electoral process set forth in the United States Constitution. If the compact becomes effective, the compact will require each signatory state to award the state's electoral college votes to the presidential candidate who received the most popular votes in all fifty states and the District of Columbia. Fifteen states and the District of Columbia have adopted the compact. However, the current system for awarding electoral college votes to the winners of state elections fulfills the requirements for appointing electoral college electors under Article II of the United States Constitution and ensures states have proportionate representation in presidential elections. The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - NATIONAL POPULAR VOTE INTERSTATE COMPACT. During the 2021-22 interim, the legislative management shall consider studying how to defeat the effort of the national popular vote interstate compact to ensure the electoral college process is preserved as prescribed in the United States Constitution. The study also must include examination of how states report presidential election results and whether states report the results using vote percentages or vote totals. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

SECTION 3. DIRECTIVE TO SECRETARY OF STATE. The secretary of state shall forward a copy of the enrolled version of this bill to the president of the United States Senate, the speaker of the United States House of Representatives, and each member of the North Dakota congressional delegation."

Renumber accordingly

Date: 4/16/2021
Roll Call Vote #: "Enter Vote #"

2021 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2271 as (re) engrossed

Senate "Enter committee name" Committee

Action Taken
- ☐ **SENATE accede to House Amendments**
- ☐ **SENATE accede to House Amendments and further amend**
- ☐ **HOUSE recede from House amendments**
- ☒ **HOUSE recede from House amendments and amend as follows**

☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Rep. B. Koppelman Seconded by: Rep. Kasper

Senators				Yes	No		Representatives				Yes	No
Chairman Meyer				x			Rep. Kasper				x	
Senator Vedaa				x			Rep. Rohr				x	
Senator Marcellais				x			Rep. B. Koppelman				x	
Total Senate Vote				3	0		Total Rep. Vote				3	0

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Senator Vedaa House Carrier Representative Rohr

LC Number 21.0828 . 02005 of amendment

LC Number 21.0828. . 04000 of engrossment

Statement of purpose of amendment:
To turn it into a study.

Insert LC: 21.0828.02005
Senate Carrier: Vedaa
House Carrier: Rohr

REPORT OF CONFERENCE COMMITTEE

SB 2271, as engrossed: Your conference committee (Sens. Meyer, Vedaa, Marcellais and Reps. Kasper, Rohr, B. Koppelman) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1313-1314, adopt amendments as follows, and place SB 2271 on the Seventh order:

That the House recede from its amendments as printed on pages 1313 and 1314 of the Senate Journal and page 1438 of the House Journal and that Engrossed Senate Bill No. 2271 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide a statement of legislative intent regarding presidential elections; to provide for a legislative management study; and to provide a directive.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE INTENT - OPPOSITION TO NATIONAL POPULAR VOTE INTERSTATE COMPACT - APPEAL TO CONGRESS. It is the intent of the sixty-seventh legislative assembly to oppose the national popular vote interstate compact, which would circumvent the electoral process set forth in the United States Constitution. If the compact becomes effective, the compact will require each signatory state to award the state's electoral college votes to the presidential candidate who received the most popular votes in all fifty states and the District of Columbia. Fifteen states and the District of Columbia have adopted the compact. However, the current system for awarding electoral college votes to the winners of state elections fulfills the requirements for appointing electoral college electors under Article II of the United States Constitution and ensures states have proportionate representation in presidential elections. The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - NATIONAL POPULAR VOTE INTERSTATE COMPACT. During the 2021-22 interim, the legislative management shall consider studying how to defeat the effort of the national popular vote interstate compact to ensure the electoral college process is preserved as prescribed in the United States Constitution. The study also must include examination of how states report presidential election results and whether states report the results using vote percentages or vote totals. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

SECTION 3. DIRECTIVE TO SECRETARY OF STATE. The secretary of state shall forward a copy of the enrolled version of this bill to the president of the United States Senate, the speaker of the United States House of Representatives, and each member of the North Dakota congressional delegation."

Renumber accordingly

Engrossed SB 2271 was placed on the Seventh order of business on the calendar.