

## 20 QUESTIONS:

# THE ELECTORAL COLLEGE AND NATIONAL POPULAR VOTE

**THE ELECTORAL COLLEGE** is the process used in the United States to elect the president and vice president. Each state appoints as many electors as it has Members of Congress – two electors for its two U.S. Senators, plus one additional elector for each of its members of the U.S. House of Representatives. Vermont, with two Senators and one Representative, has three electors, while California’s two Senators and 52 Representatives gives it 54 electors. Every major presidential ticket has a slate of people in each state pledged to support them and who will, if chosen by that state’s voters in November, serve as electors and cast their votes for president in December. The persons receiving a majority of votes cast by electors – at least 270 out of 538 – are elected president and vice president.

**THE NATIONAL POPULAR VOTE** interstate compact (NPV) requires member states to appoint the slate of electors pledged to the presidential candidate determined by that state to have received the most popular votes *nationally*, even if a majority or plurality of that state’s voters chose different candidates. The compact only goes into effect if the member states between them have at least 270 electoral votes. At present, seventeen states and the District of Columbia have joined the compact; they have 209 electoral votes between them.

## QUESTIONS ABOUT THE ELECTORAL COLLEGE

### 1. Does the Electoral College Favor One Party? **NO**

The Electoral College pushes candidates to reach out to geographically, culturally, economically, and politically diverse communities across the country. It thus favors the candidate that is best able to appeal beyond their “base” and address a broad range of issues and interests. Some of those issues and interests will be of national importance and can affect the votes of millions or tens of millions of people, such as taxes and health care, while others will be more local and primarily affect the votes of thousands or tens of thousands of people, such as how federal policy affects the seafood industry. The state-by-state system requires presidential candidates to be responsive to both large voting blocs as well as smaller constituencies that might otherwise be marginalized.

History also demonstrates that the Electoral College does not favor one party over the other. Over the last 100 years (beginning with the election of 1924), Republicans have won twelve presidential elections while Democrats have won thirteen. Over that time both parties have shown the ability to adapt their message and agenda in order to broaden their appeal, including Eisenhower’s embrace of the New Deal and Clinton’s campaigning as a “New Democrat.”

## **2. Is the Electoral College Un-Democratic? NO**

Democracy is not the same as majoritarianism, in which obtaining just a slender majority (or even a plurality) grants the winning side unfettered power. Instead, the United States has democratic processes that include checks and balances on majority power. Our system respects the rights of minorities, ensures that diverse voices can be heard, fosters compromise and moderation, and, through federalism, gives power to local majorities at the state level that may not align with national majorities. Other healthy democracies embrace similar limits on majoritarian power.

The Electoral College is a two-step democratic process. In the first step, the people vote in their respective states for which candidate they want to receive their state's electoral votes. The vote of every person in the state is equal to that of every other person in the state, consistent with the 'one person, one vote' principle. In the second step, presidential electors vote within each state and, again, their votes are all equal. Together, these two steps honor democratic values including respect for minorities and for the role of states in our federal union.

## **3. Do All Other Democratic Nations Directly Elect Their Chief Executive? NO**

Very few major democratic nations directly elect their chief executive. Most, like the United States, utilize an indirect, two-step democratic process in which the people vote directly for an assembly that then chooses the head of government. The main difference is that the United States uses a temporary assembly that disbands immediately after voting, while other democratic nations use a permanent assembly, the national legislature.

Like American presidential electors, not every member of these other nation's legislatures represents the same number of people or voters, meaning a party or coalition receiving fewer popular votes can still win enough seats to select the chief executive. The Liberal Party of Canada finished behind the Conservative Party in popular votes in each of the last two elections, but because Liberal support was spread more evenly throughout the country, it won more seats and appointed the prime minister. Similar outcomes have happened in recent decades in Australia, Japan, New Zealand, Norway, and the United Kingdom.

## **4. Was the Electoral College Created to Benefit Slave States? NO**

The method for selecting the president was debated and discussed frequently at the Constitutional Convention of 1787. Both the Virginia Plan and the rival New Jersey Plan proposed having Congress appoint the president, and for most of the Convention that was the intended and accepted method. Because Congressional appointment of the executive gave slave states increased power to pick the executive (at least after adoption of the Three-Fifths Compromise), it was unnecessary to create the Electoral College to do so.

Instead, the Electoral College was created because many delegates to the Convention feared an executive chosen by Congress would not be independent enough. Using electors to pick the president was proposed and supported primarily by Northern anti-slavery delegates including Alexander Hamilton, Gouverneur Morris, and James Wilson. Southern delegates

largely opposed using electors and favored Congressional appointment. Only North Carolina and South Carolina voted against the Electoral College in the final vote, and only those two states plus Georgia voted against an earlier version of the Electoral College when it was first adopted. There was little support at the Convention for direct election of the president.

### **5. Do States Have to Use 'Winner-Take-All'? NO**

The Constitution gives states broad discretion in how they appoint presidential electors, and there is nothing requiring a state to give all of its electoral votes to the candidate receiving the most votes in the state. States have adopted Winner-Take-All primarily because it maximizes a state's influence by giving all of a state's electoral votes to the candidate preferred by its voters.

There are several alternatives to Winner-Take-All. Maine and Nebraska award an electoral vote to the winner of each U.S. House district in the state, and award the last two electoral votes to the statewide winner. States could adopt a proportional system, where candidates receive electoral votes in rough proportion to their share of the statewide vote, or a threshold system in which the second-place candidate in a state receives electoral votes by reaching a certain share of the vote. Other options include dividing the state up into as many districts as the state has electors or giving the governor or legislature the power to pick some of a state's electors.

### **6. Do Only 'Swing States' Matter in the Electoral College? NO**

Every vote matters in presidential elections, whether cast by individual voters or by the electors. Elections are won by candidates who appeal to and motivate both their "base" and those they can persuade to vote for them. The Electoral College is no different – candidates must satisfy their base while also reaching out to build support in competitive states.

Candidates that fail to appeal to their own "safe" states risk seeing them throw their support to a different candidate that doesn't ignore them, as happened in 2000 when Al Gore lost his home state of Tennessee as well as the long-time Democratic stronghold of West Virginia, and in 2008 when John McCain lost reliably-Republican Indiana, North Carolina, and Virginia.

## **QUESTIONS ABOUT THE "NATIONAL POPULAR VOTE" INTERSTATE COMPACT**

### **7. Is There an Official 'National Popular Vote' Count? NO**

There is no federal agency, commission, or other official that aggregates popular vote totals and determines which presidential ticket has received the most votes, nor does the compact create such an agency, commission, or official. Instead each member state's chief election official will try to determine their state's version of the national vote count in four steps: First, obtain official results from every other state (if available); Second, determine if each other state's election satisfies the compact's terms and is thus eligible to be included in the national count; Third, resolve any uncertainties or ambiguities in reported results, assign estimated vote totals where necessary, and determine what vote totals to credit each state with; and, Fourth, aggregate the assigned vote totals from all eligible states, determine the

winning presidential ticket, and appoint the state's electors accordingly.

There is no requirement that chief election officials of member states (let alone non-member states) coordinate with each other to determine the national vote count and winner. As a result, when judging whether another state satisfied the compact's terms, resolving uncertainties or ambiguities, or estimating vote totals, chief election officials in different states will act independently and are free to arrive at different conclusions and determinations, leading to different versions of the national vote count and possibly different determinations of which presidential ticket won.

#### **8. Would a 'National Popular Vote' Count Be Accurate? NO**

Vote totals used to produce the national count are supposed to come from an "official statement" produced by each state, if one is available. But there are multiple documents to choose from and the vote totals on these documents are not always accurate or in agreement. Some errors will be inconsequential in all but the closest elections, such as 5,842 unreported votes from one Iowa county in 2016 or 3,975 misreported votes in Virginia in 2020. Other errors could be more consequential depending on the national margin, such as the 131,518 votes New York didn't report in 2008, the 424,775 votes it didn't report in 2012, and the 101,762 votes it didn't report in 2016. Other errors, such as the extra 4,483,810 votes that California credited the Trump/Pence ticket with in 2016, would change the outcome. The compact requires each member state's chief election official to accept whatever vote totals are reported by other states, with no opportunity to challenge obviously inaccurate or incomplete totals.

There can also be uncertainty over how to incorporate votes from some states into the national count, as happened in 1960 when Alabama allowed people to vote for individual electors and six of the eleven Democratic electors were "unpledged" and ultimately did not vote for John Kennedy. There is no obviously correct way to allocate Alabama's popular votes in the national count, and different methods that were used at the time and since to produce an unofficial national vote count would either pronounce Kennedy the winner by between approximately 112,000 and 119,000 votes or give Nixon the win by roughly 64,000 votes.

#### **9. Is the NPV Compact Compatible with Ranked Choice Voting? NO**

The National Popular Vote compact assumes that every state will produce a single, unambiguous vote total for each presidential ticket. This will not always be the case, in particular if states use alternatives to traditional plurality voting such as ranked choice voting. That system will produce two different vote totals for each presidential ticket, the first-round results and the final-round results. These can differ by tens or even hundreds of thousands of votes. The compact does not provide any guidance, leaving it to the judgment of the chief election official in each compacting state to decide which vote totals to use.

Additionally, a third-party or independent candidate that finishes ahead of either the Democratic or Republican candidate in a state with ranked choice voting can cause

hundreds of thousands or even millions of first-round votes to be erased from one of the major party's national vote count. Third-party and independent candidates have finished in second-place or better in a state 59 times since 1892.

#### **10. Can Estimated Vote Totals Be Used to Determine the NPV Winner? YES**

NPV directs the chief election official of every member state to determine the vote total for every other state. If no "official statement" is available from a state for some reason, such as an ongoing recount or a state declining to cooperate with the compact, the chief election officials are still required to determine vote totals. When asked about this in a hearing, an NPV lobbyist testified that these officials could estimate totals. The compact does not specify a method for estimating vote totals, leaving it to the chief election official in each member state.

#### **11. Can the NPV Compact Be Manipulated? YES**

States have considerable latitude in how elections are conducted and how results are reported, giving them the ability to skew the results and manipulate the compact. For example, a state could revive the once-common practice of treating each individual voter as having cast as many votes as the state has presidential electors. A state with one million voters and five electoral votes could report a total of five million votes, turning a 200,000 vote margin into a one million vote margin. The chief election officials of NPV states would be forced to accept these inflated vote totals.

These chief election officials also have the power to manipulate the outcome under some circumstances. If an "official statement" containing vote totals isn't available from another state, they can estimate totals using a methodology that favors one candidate over the other. In addition, when deciding which vote totals to use from states that report multiple totals for each candidate, as is the case with ranked choice voting, they can choose the vote totals that advantage their preferred candidate.

#### **12. Would NPV Permit Minors and Non-citizens to Vote? YES and PROBABLY YES**

States have always had the power to expand their voter rolls beyond constitutional minimums. Some women were allowed to vote in New Jersey at the time of the first presidential election, and Wyoming granted women the right to vote well before the 19th Amendment was ratified. Georgia allowed those 18 and older to vote beginning in 1943, and several other states followed over the next two decades, all before the 26th Amendment. Several states have considered legislation in recent years that would allow those under 18 to vote. Allowing 16- and 17-year olds to vote, or children even younger, would increase a state's share of the national vote at the expense of states that maintain 18 as the voting age. States could also give parents the ability to cast ballots on behalf of their minor children, as the Republican Party's 2024 vice presidential nominee has proposed.

Federal law currently prohibits non-citizens from voting in federal elections, but this is likely unconstitutional as applied to presidential elections, where states have much broader power than in elections for Congress. Many states allowed non-citizens to vote in elections during

the 1800s, and the U.S. Supreme Court recognized and approved of this practice in decisions affirming the power of states to set their own standards for voter eligibility (so long as those standards didn't violate the Constitution). It is likely that a state could boost its share of the national vote under the compact by allowing non-citizens to vote for president.

### **13. Will NPV Increase Litigation and Controversy In Presidential Elections? YES**

Presidential elections have become increasingly litigious over the past two decades, and NPV creates numerous new opportunities for litigation. The areas where there will almost certainly be litigation include determining if a recount is required or permitted, how to incorporate into the national count vote totals from states using ranked choice voting, and the method used for estimating vote totals if necessary. Fifty-one separate elections run under fifty-one separate election codes will have to be applied to the compact by fifty-one state courts and ninety federal district courts, causing similar or even identical issues to have different outcomes in different states.

NPV could also upend the U.S. Supreme Court's decision in 2020 that one state does not have standing to challenge the election processes or results of other states. Unlike many interstate compacts, NPV does not include a process for resolving disputes, meaning that any disputes between member states would have to be resolved in court.

### **14. Could NPV Create the Need for a Nationwide Recount? YES**

In very close elections, recounts are important for maintaining public trust and confirming results. Most states set a threshold of one percent or less to trigger a recount. Three of the last sixteen presidential elections have had national popular vote margins of less than one percent. Because one to two percent of ballots are typically rejected from initial counts (including absentee ballots and provisional ballots that need further verification), a threshold of at least 0.5 percent and possibly up to one percent seems like an appropriate threshold. It is entirely possible to have a narrow national popular vote margin that leaves the initial count and outcome in doubt, ordinarily necessitating a recount. The NPV compact, however, is silent on the entire topic.

### **15. Is a Nationwide Recount Possible if the Election is Close? NO**

While a close national margin may necessitate a recount, a national recount is impossible. Every state has different laws regarding recounts, all of which were intended to be applied to a close in-state margin. The national margin may be close even when the in-state margin in most or even all states is not. In 1960, with a national margin of less than two-tenths of a percent, only seven states had a margin under one percent. There is no provision in the compact or any other law that says states can use the national margin rather than the in-state margin to trigger a recount. States also have different margins to trigger recounts, some as low as a few thousand votes while others allow recounts to be requested regardless of margin. In some states only a losing candidate may request a recount, but it is unclear whether that would be the in-state loser or the NPV loser, something likely to be decided in court on a state-by-state basis.

The timing of when states complete initial vote counts also makes a national recount impossible. While many states conclude within just a few days of the election, others take weeks. Al Gore's final national margin in 2000 was 0.52 percent, but two weeks after election day it was three-tenths of a percent with more than a million ballots still uncounted. In 2016, California and New York were still counting hundreds of thousands of votes in December. Delays like this would make it impossible to know whether the national margin is close enough to require a recount until after most states have certified their elections and appointed electors. Ultimately, differences in state election timelines and recount laws make a national recount – even if obviously necessary – impossible.

#### **16. Does 'National Popular Vote' Guarantee Every Vote is Counted? NO**

The compact specifies that votes will be counted only from states holding what it defines as a "statewide popular election." Many once-common election methods would not qualify, and some states still allow these practices or could bring them back. For example, some states allow voters to cast a "split ballot" for electors through the write-in process, voting for nominated electors of different parties. If any voter were to cast a "split ballot," either all the votes from the state would be excluded from the national count or just those for slates where every elector candidate did not receive the same number of votes.

Recent legislation in Arizona and Virginia proposed alternatives to Winner-Take-All that would have voters choose presidential electors by U.S. House district and either the legislature or governor would appoint the last two electors. In each case millions of popular votes would be cast but because there would not be a "statewide" count, those millions of voters would be disenfranchised by NPV. Another alternative to Winner-Take-All is to allow voters to choose electors by specially-drawn elector districts. This has been done before, but a state using this method would be excluded and its voters disenfranchised by NPV. Some alternatives to plurality voting, such as Range Voting and STAR Voting, also do not produce election results that can be incorporated into the national vote count, meaning more popular votes disenfranchised by NPV.

#### **17. Does NPV Uphold 'One Person, One Vote'? NO**

States are free to give their voters more than one vote, so long as all residents are able to cast their votes on an equal basis. It was once common to regard each voter as casting multiple votes, one for each of their state's presidential electors. New York's 1984 election results, for example, report roughly 252 million votes cast by approximately seven million voters. A state with one million voters and five electoral votes could give each voter five votes, and report its results as three million for candidate A and two million for candidate B, rather than 600,000 for A and 400,000 for B. Some alternative forms of voting that states may adopt in the future also give voters multiple votes. For example, Approval Voting allows voters to vote for as many candidates as they like (the candidate with the most votes still wins).

In any of these instances, member states would be required by the compact to accept whatever results are reported by those states, resulting in "One Person, Multiple Votes." And

as discussed above (Question 16), some voting methods are simply incompatible with the compact and, in such cases, the reality will be “One Person, No Vote.”

### **18. Would NPV Cause Candidates to Ignore Small Town and Rural Americans? YES**

Presidential campaigns must use their limited resources in the most efficient way possible, maximizing their candidate’s time, advertising dollars, policy positions, and turnout operations. Under the current system, candidates work to win individual states and it is a good use of their resources to campaign in and appeal to voters in rural areas and small cities like Bullhead City, AZ (population 43,200); Traverse City, MI (15,700); Bemidji, MN (15,900); Gilford, NH (7,200); Goldsboro, NC (33,200); Gettysburg, PA (8,500); and Manitowoc, WI (34,600), all of which received campaign visits in 2020.

Under NPV it would be far more efficient to focus on major urban and suburban areas rather than voters in small towns and rural areas. Roughly twenty-six percent of Americans live in just the ten largest metropolitan areas (each with at least five million people) and another fifty-two percent live in metropolitan areas with populations between a quarter million and 4.9 million people. Rural and small-town voters will be marginalized when Presidential campaigns have to decide between policy decisions and campaign visits that could add a few thousand votes from rural voters or tens of thousands of votes from metropolitan areas.

### **19. Can inaccurate vote totals be challenged or corrected under the compact? NO and YES**

The U.S. Supreme Court ruled in 2020 that one state does not have a “judicially cognizable interest in the manner in which another State conducts its elections.” If this precedent remains, it would prevent a compacting state from suing a non-compacting state or doing anything else to force it to correct or change its reported results. Under some circumstances the candidates or the voters of a non-compacting state may request recounts or otherwise challenge results, but such laws differ by state and in many instances it would be impossible for a request or challenge to succeed in forcing a correction, particularly if the inaccuracy would not change the outcome in the non-compacting state (even if it would change the NPV outcome). Compacting states would be forced to accept inaccurate vote totals and cannot challenge the results of any state.

By entering the compact, however, member states would appear to gain the “judicially cognizable interest” in one another’s elections – in the absence of a dispute-resolution mechanism or body created by the compact to resolve differences, litigation will likely be needed to resolve disputes, such as differences in how to estimate missing official vote totals from non-member states and which vote totals to use from states with ranked choice voting. Voters in compacting states would also be able to sue their own state over inaccuracies or differing interpretations of how to handle ambiguous situations, though it’s unclear if they could sue other states.

### **20. Is NPV Constitutional? Unknown**

The U.S. Supreme Court would ultimately determine whether NPV is consistent with our



nation's Constitution. One recent unanimous ruling by the Court stated that electors "are to vote for the candidate whom the State's voters have chosen," while another recent unanimous ruling rejected state action that would "create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles" in presidential elections. While neither case was about NPV, such language suggests which way the Supreme Court might lean. It also is vulnerable to being struck down because it gives member states power to dictate how non-member states conduct elections, something at odds with "federalism principles" as well.

In addition, NPV may violate the constitutions of many states. Almost every state constitution limits voting to residents of that state. By counting the votes of non-residents to determine the outcome of their own election for presidential electors, the compact effectively allows non-residents to vote in member states. In particular, Colorado (currently in the compact) and Michigan (currently not in the compact), have language in their constitutions that seems to prohibit those states from implementing the compact. Courts in these and other states could easily rule against NPV membership and withdraw their states from the compact at any time, even shortly before or after election day.