6 The National Popular Vote Compact

The purpose of the National Popular Vote Compact is to guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

The Compact will take effect when enacted by states with a majority of the electoral votes (270 of 538). Then, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will get all the electoral votes from all of the enacting states.

Thus, the candidate receiving the most popular votes nationwide will be guaranteed enough electoral votes to become President.

Section 6.1 presents the text (888 words) of the Compact—also known as the "Agreement Among the States to Elect the President by National Popular Vote."

Section 6.2 explains it on a section-by-section basis.

6.1. TEXT OF THE COMPACT

Table 6.1 Text of the Compact

Clause	Text
	Article I—Membership
I–1	Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.
	Article II—Right of the People in Member States to Vote for President and Vice President
II–1	Each member state shall conduct a statewide popular election for President and Vice President of the United States.
	Article III—Manner of Appointing Presidential Electors in Member States
III–1	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.
III–2	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."
III–3	The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.
III–4	At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.
III–5	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.

(Continued)

Table 6.1 (Continued)

Clause	Text
	Article III—Manner of Appointing Presidential Electors in Member States (continued)
III–6	In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.
III–7	If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees.
III–8	The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.
III–9	This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.
	Article IV—Other Provisions
IV–1	This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.
IV–2	Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.
IV–3	The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.
IV–4	This agreement shall terminate if the electoral college is abolished.
IV–5	If any provision of this agreement is held invalid, the remaining provisions shall not be affected.
	Article V—Definitions
V–1	For purposes of this agreement, "chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;
V–2	"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;
V–3	"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;
V–4	"presidential elector" shall mean an elector for President and Vice President of the United States;
V–5	"presidential elector certifying official" shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;
V–6	"presidential slate" shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;
V–7	"state" shall mean a State of the United States and the District of Columbia; and
V–8	"statewide popular election" shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

6.2. SECTION-BY-SECTION EXPLANATION OF THE COMPACT

6.2.1. Explanation of Article I—Membership

An interstate compact is both a state law and a contract.

Article I of the National Popular Vote Compact identifies the prospective parties to the contract:

> "Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement."

The potential parties to the Compact are the 51 jurisdictions that are currently entitled to appoint presidential electors under the U.S. Constitution. These jurisdictions include the 50 states and the District of Columbia (which acquired the right to appoint presidential electors under terms of the 23rd Amendment ratified in 1961).

The term "member state" refers to a jurisdiction where the Compact has been enacted into law and is currently in effect.

The uncapitalized word "state" (defined in Article V of the Compact) refers to any of these 51 jurisdictions.

6.2.2. Explanation of Article II—Right of the People in Member States to Vote for President and Vice President

Article II requires that each member state conduct a popular election for President and Vice President:

> "Each member state shall conduct a statewide popular election for President and Vice President of the United States."

The term "statewide popular election" is defined in Article V as:

> "a general election at which votes are cast for presidential slates by individual voters and counted on a statewide basis."

From the perspective of the Compact's operation, this clause guarantees that there will be popular votes for President and Vice President to count from each member state. This clause guarantees continuation of the practice of the member states (universal since the 1880 election) to permit the people to vote for President.

As discussed in section 3.3.1, the people of the United States have no federal constitutional right to vote for President and Vice President. The voters chose presidential electors in only six states in the nation's first presidential election in 1789. The people acquired the privilege to vote for President and Vice President as a consequence of state legislative action in their respective states.

Moreover, except in Colorado, the people have no state constitutional right to vote for President and Vice President, and the existing privilege may therefore be withdrawn merely by passage of a state law. Indeed, state legislatures occasionally did precisely that in the early years of the Republic for purely political reasons. For example, just prior to the 1800 presidential election (section 2.6), the Federalist-controlled legislatures of Massachusetts and New Hampshire—each fearing Jeffersonian victories in the upcoming popular

elections in their states—repealed their existing statutes allowing the people to vote for presidential electors and vested that power in themselves.

Because every interstate compact is a contractual obligation among the member states, the provisions of a compact take precedence over any conflicting law of any member state. This principle applies regardless of when the conflicting law may have been enacted. Thus, once a state enters into an interstate compact and the compact takes effect, the state is bound by the compact's terms as long as it remains a member of the compact.

Because a compact is a legally binding contract, a state must remain in the compact until it withdraws from it in accordance with the particular compact's terms for withdrawal (section 5.13.3). Thus, in reading each provision of any interstate compact, the reader may find it useful to imagine that that provision is preceded by the preface:

> "Notwithstanding any other provision of law in the member state, whether enacted before or after the effective date of this compact…"

As long as a state remains as a member of the National Popular Vote Compact, Article II establishes the right of its people to vote for President and Vice President.

In addition, this provision requires continued use by member states of another feature of presidential voting that is currently in universal use by the states, namely the short presidential ballot (section 2.14).

Under the short presidential ballot, the voter is presented with a choice among "presidential slates" containing a specifically named presidential nominee and a specifically named vice-presidential nominee. Article II of the Compact does not prevent states from displaying the names of the candidates for presidential elector on the ballot associated with the presidential candidate (as three states currently do). It merely requires that the names of the presidential candidates appear on the ballot.

The term "presidential slate" is defined in Article V of the Compact as:

> "a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons …."

The continued use of the short presidential ballot permits the aggregation, from state to state, of the popular votes that have been cast for the various presidential slates.

If, for example, the voters in a particular state were to cast separate votes for individual presidential electors (as they did in 1960 in Alabama as shown by figure 3.10a and figure 3.10b in section 3.13 and discussed further in section 9.30.12), the winning presidential electors from that state would each inevitably receive a (slightly) different number of popular votes. Thus, there would not be any single number available to add into the nationwide tally being accumulated by each presidential slate.

6.2.3. Explanation of Article III—Manner of Appointing Presidential Electors in Member States

Article III is the heart of the National Popular Vote Compact. It establishes the mechanics of a nationwide popular election by prescribing the "manner of appointing presidential electors in member states."

As previously mentioned, an interstate compact is both a state law and a contract.

In particular, the National Popular Vote Compact is a state law that exercises the state's power under Article II, section 1, clause 2 of the U.S. Constitution:

> "**Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[1] [Emphasis added]

In other words, the National Popular Vote Compact is a state law that expresses the state's choice as to the manner by which it will appoint its presidential electors.

The first three clauses of Article III are the main clauses for implementing nationwide popular election of the President and Vice President.

Officials of each member state must perform three steps:

- **determining** the number of popular votes that have been cast for each presidential slate in each state
- **designating** the "national popular vote winner"
- **appointing** the presidential electors.

First Clause of Article III—the Determining Clause

The purpose of the first clause of Article III is to determine the popular-vote count from each state.

The first clause of Article III states:

> "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 phrase "the time set by law for the meeting and voting by the presidential electors" refers to federal law (section 7 of the Electoral Count Reform Act of 2022) that provides:

> "The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day."[2]

For example, the designated day for the Electoral College meeting in 2024 is Tuesday, December 17.

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[1] U.S. Constitution. Article II, section 1.

[2] Note that under the Electoral Count Act of 1887, the Electoral College meeting day was one day earlier (that is, the first Monday after the second Wednesday in December).

The term "chief election official" is defined in Article V as:

> "the state official or body that is authorized to certify the total number of popular votes cast for each presidential slate."

The "chief election official" is the official or board established for the purpose of making a final determination of the state's popular-vote count.

In most states, the "chief election official" is a board. For example, it is the State Elections Board in Oklahoma.[3] However, it is the Secretary of State in many states and the Lieutenant Governor in Alaska.

The first clause of Article III requires the chief election official of each member state to "determine" the number of popular votes cast for each presidential slate in each state.

The source of this information is the official or board in each state that is responsible for compiling and certifying the popular-vote count for President.

Appendix D shows what board or official performs this canvassing and certifying function.[4]

The number of popular votes cast for each presidential slate in each state is available shortly after Election Day.

For example, the Oklahoma State Election Board completed the process of counting and certifying the state's popular-vote vote for President a week after Election Day.

The minutes of the Oklahoma State Election Board for November 10, 2020 show that the following action was taken to certify the popular-vote count for President:

> "BUSINESS CONDUCTED: Report by the Secretary, discussion, and possible action regarding the certifications of results in the General Election held on November 3, 2020.
>
> ACTION TAKEN: Ms. Cline moved to certify the results in the General Election held on November 3, 2020. Dr. Mauldin second the motion.
>
> ROLL CALL VOTE: Mr. Montgomery—Aye; Dr. Mauldin—Aye; Ms. Cline—Aye; Motion passed 3–0. (**Summary of Results attached; Official Certification Reports signed and archived**)"[5] [Emphasis added]

Figure 6.1 shows the minutes of the State Election Board certifying the popular-vote count in Oklahoma in 2020.

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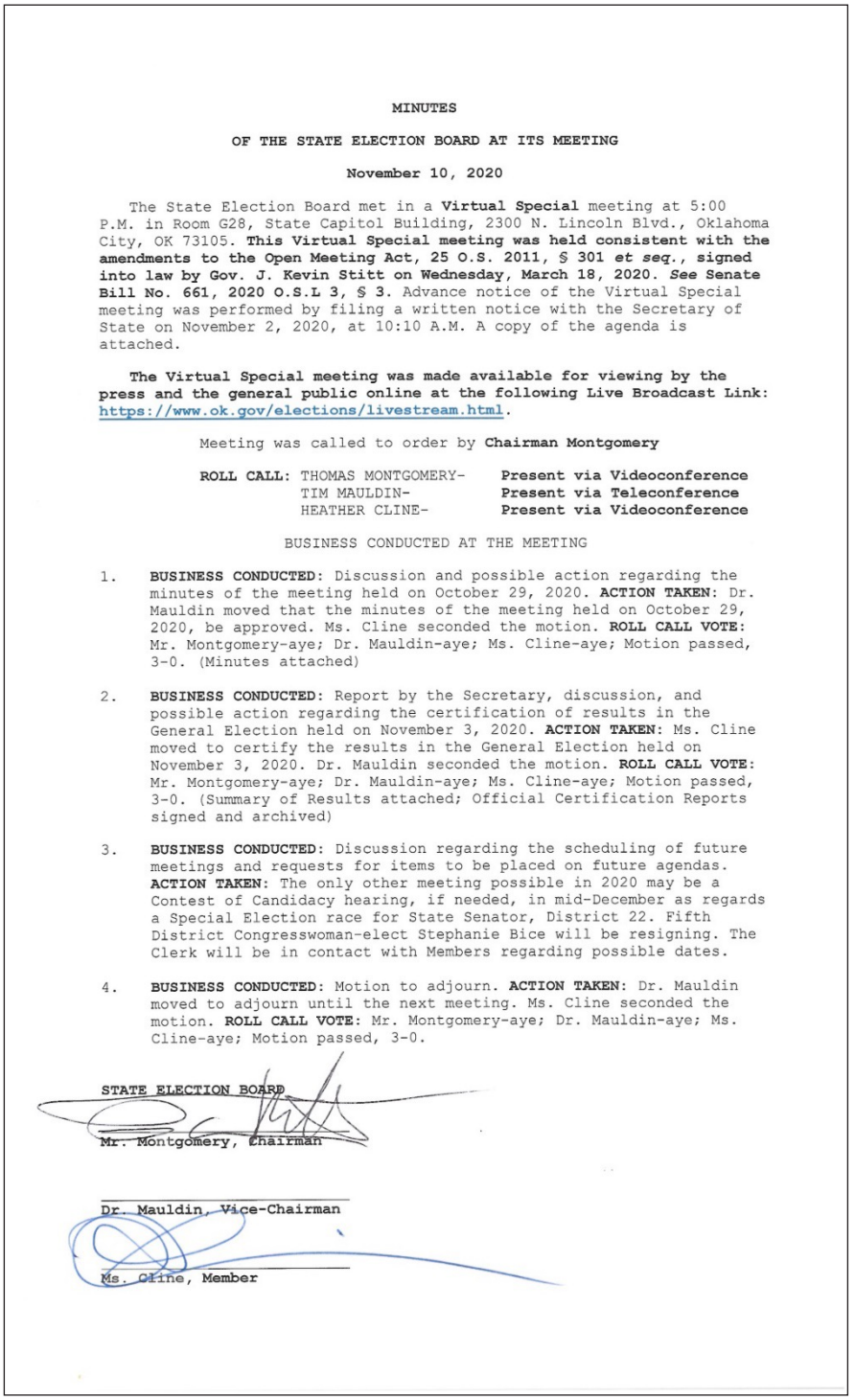
[3] Note that the "chief election official" for purposes of the Compact is not necessarily the same as the "chief election official" for purposes of other state laws. In Michigan, for example, the Board of Canvassers is the "chief election official" for purposes of the Compact. However, for purposes of the Michigan election code, the Secretary of State is the "chief election official."

[4] See also National Conference of State Legislatures. 2024. *Canvass Deadlines*. https://www.ncsl.org/elections-and-campaigns/canvass-deadlines

[5] The Oklahoma State Board of Elections met on November 10, 2020. The agenda of the meeting is available at https://oklahoma.gov/content/dam/ok/en/elections/agendas/agendas-2020/agenda-11102020.pdf. The "meeting packet" containing the statewide vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/election-results/2020-election-results/2020-general-election-results/meeting-packet-11102020.pdf. The minutes of the meeting showing the Board's certification of the vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/minutes/2020-minutes/minutes-11102020.pdf



MINUTES

OF THE STATE ELECTION BOARD AT ITS MEETING

November 10, 2020

The State Election Board met in a **Virtual Special** meeting at 5:00 P.M. in Room G28, State Capitol Building, 2300 N. Lincoln Blvd., Oklahoma City, OK 73105. **This Virtual Special meeting was held consistent with the amendments to the Open Meeting Act, 25 O.S. 2011, § 301 *et seq.*, signed into law by Gov. J. Kevin Stitt on Wednesday, March 18, 2020. *See* Senate Bill No. 661, 2020 O.S.L 3, § 3.** Advance notice of the Virtual Special meeting was performed by filing a written notice with the Secretary of State on November 2, 2020, at 10:10 A.M. A copy of the agenda is attached.

The Virtual Special meeting was made available for viewing by the press and the general public online at the following Live Broadcast Link: https://www.ok.gov/elections/livestream.html.

Meeting was called to order by **Chairman Montgomery**

ROLL CALL:	THOMAS MONTGOMERY-	**Present via Videoconference**
	TIM MAULDIN-	**Present via Teleconference**
	HEATHER CLINE-	**Present via Videoconference**

BUSINESS CONDUCTED AT THE MEETING

1. **BUSINESS CONDUCTED:** Discussion and possible action regarding the minutes of the meeting held on October 29, 2020. **ACTION TAKEN:** Dr. Mauldin moved that the minutes of the meeting held on October 29, 2020, be approved. Ms. Cline seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0. (Minutes attached)

2. **BUSINESS CONDUCTED:** Report by the Secretary, discussion, and possible action regarding the certification of results in the General Election held on November 3, 2020. **ACTION TAKEN:** Ms. Cline moved to certify the results in the General Election held on November 3, 2020. Dr. Mauldin seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0. (Summary of Results attached; Official Certification Reports signed and archived)

3. **BUSINESS CONDUCTED:** Discussion regarding the scheduling of future meetings and requests for items to be placed on future agendas. **ACTION TAKEN:** The only other meeting possible in 2020 may be a Contest of Candidacy hearing, if needed, in mid-December as regards a Special Election race for State Senator, District 22. Fifth District Congresswoman-elect Stephanie Bice will be resigning. The Clerk will be in contact with Members regarding possible dates.

4. **BUSINESS CONDUCTED:** Motion to adjourn. **ACTION TAKEN:** Dr. Mauldin moved to adjourn until the next meeting. Ms. Cline seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0.

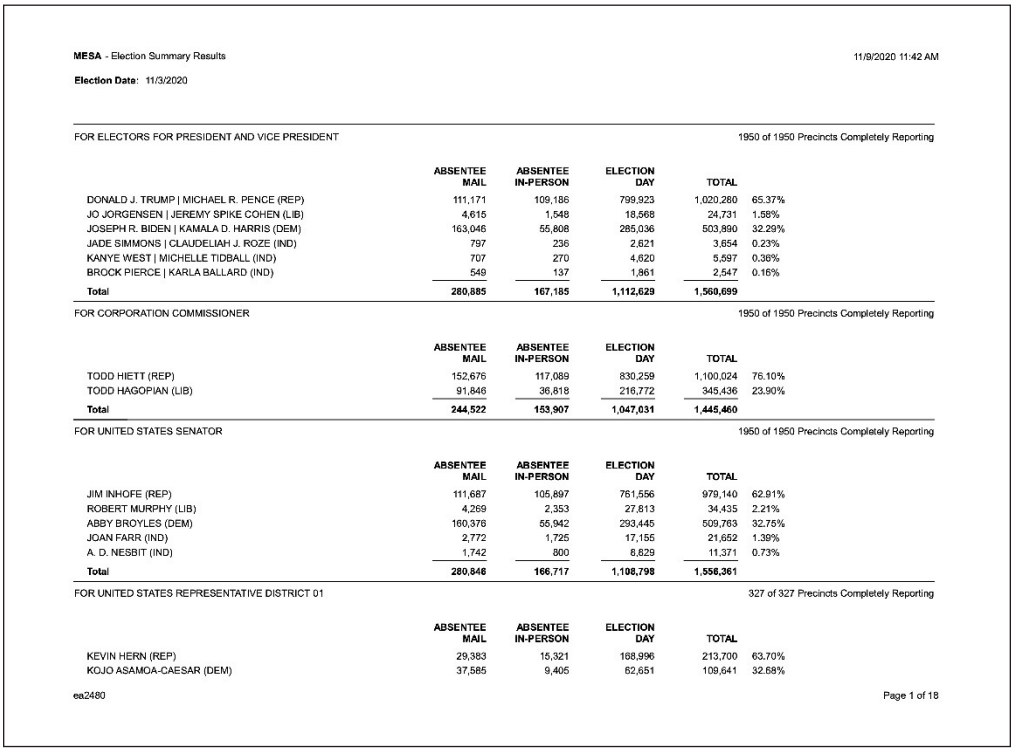
STATE ELECTION BOARD

Mr. Montgomery, Chairman

Dr. Mauldin, Vice-Chairman

Ms. Cline, Member

Figure 6.1 Minutes of the Oklahoma State Election Board certifying the 2020 popular-vote count



MESA - Election Summary Results 11/9/2020 11:42 AM

Election Date: 11/3/2020

FOR ELECTORS FOR PRESIDENT AND VICE PRESIDENT — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
DONALD J. TRUMP | MICHAEL R. PENCE (REP)	111,171	109,186	799,923	1,020,280	65.37%
JO JORGENSEN | JEREMY SPIKE COHEN (LIB)	4,615	1,548	18,568	24,731	1.58%
JOSEPH R. BIDEN | KAMALA D. HARRIS (DEM)	163,046	55,808	285,036	503,890	32.29%
JADE SIMMONS | CLAUDELIAH J. ROZE (IND)	797	236	2,621	3,654	0.23%
KANYE WEST | MICHELLE TIDBALL (IND)	707	270	4,620	5,597	0.36%
BROCK PIERCE | KARLA BALLARD (IND)	549	137	1,861	2,547	0.16%
Total	**280,885**	**167,185**	**1,112,629**	**1,560,699**	

FOR CORPORATION COMMISSIONER — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
TODD HIETT (REP)	152,676	117,089	830,259	1,100,024	76.10%
TODD HAGOPIAN (LIB)	91,846	36,818	216,772	345,436	23.90%
Total	**244,522**	**153,907**	**1,047,031**	**1,445,460**	

FOR UNITED STATES SENATOR — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
JIM INHOFE (REP)	111,687	105,897	761,556	979,140	62.91%
ROBERT MURPHY (LIB)	4,269	2,353	27,813	34,435	2.21%
ABBY BROYLES (DEM)	160,376	55,942	293,445	509,763	32.75%
JOAN FARR (IND)	2,772	1,725	17,155	21,652	1.39%
A. D. NESBIT (IND)	1,742	800	8,829	11,371	0.73%
Total	**280,846**	**166,717**	**1,108,798**	**1,556,361**	

FOR UNITED STATES REPRESENTATIVE DISTRICT 01 — 327 of 327 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
KEVIN HERN (REP)	29,383	15,321	168,996	213,700	63.70%
KOJO ASAMOA-CAESAR (DEM)	37,585	9,405	62,651	109,641	32.68%

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Figure 6.2 Popular-vote counts certified on November 10, 2020, by the Oklahoma State Election Board

The minutes, in turn, refer to the "Official Certification Report."

Figure 6.2 shows the first page of the "Official Certification Report." That document shows that the Trump-Pence slate received 1,020,280 votes and that the Biden-Harris slate received 163,046 votes in Oklahoma in 2020.

The chief election official of each member state might, on his or her own, choose to obtain the certified popular-vote count from each state's canvassing board or official.

However, it would be much more efficient if these officials decided to streamline this process by establishing an administrative clearinghouse in which they designate one or more of their colleagues (perhaps on a rotating basis, from election to election) to act as their agent to collect and distribute copies of the certified popular-vote count produced by each state's canvassing board or official.

The work of the chief election official of each member state—whether acting unilaterally or through a clearinghouse—will be facilitated by the fact that the fourth clause of Article III of the Compact (explained below) provides a direct means by which that official will automatically receive the certified popular-vote count from each other member state.

Existing federal law (section 5 of the Electoral Count Reform Act of 2022) requires that each state's official popular vote count for President (the "canvass") be certified in the form of a Certificate of Ascertainment that is to be sent to the National Archives.

Thus, the Certificate of Ascertainment provides an additional way by which the

chief election official of each member state may receive a state's popular-vote count for President.

The popular-vote count certified by the Oklahoma State Election Board becomes incorporated into the state's "Certificate of Ascertainment."[6]

For example, Oklahoma's 2020 Certificate of Ascertainment issued by Governor Stitt (figure 9.19, figure 9.20, and figure 9.21) noted that the vote counts in his Certificate were the certified counts produced by the State Elections Board.

> "I further certify, that the votes given at said election for the Electors of President and Vice President of the United States as appears by **the certified returns of the Oklahoma State Election Board** and examined by me in accordance with the laws were as follows." [Emphasis added]

Note that the chief election official of each member state will usually not have the Certificate of Ascertainment for the member states. That is, the chief election official of each member state will usually be using the official certified popular-vote count obtained from the canvassing board or official or, in the case of another member state, the official statement sent in accordance with the fourth clause of Article III of the Compact.

The popular vote counts from all 50 states and the District of Columbia are included in the "national popular vote total" regardless of whether the jurisdiction is a member of the Compact. That is, the Compact counts the popular votes from non-member states on an equal footing with those from member states.

Of course, popular votes can only be counted from non-member states if there are popular votes available to count.

Even though all states have permitted their voters to vote for presidential electors in a "statewide popular election" since the 1880 election, non-member states are, of course, not bound by the Compact. In the unlikely event that the legislature of a non-member state were to take the presidential vote away from its own voters (perhaps lodging the choice in the legislature itself), there would be no popular-vote count available from that state. In other words, that state would be voluntarily opting out of the national popular vote count.

Article II of the Compact also requires that all member states continue to use the short presidential ballot, which enables a voter to conveniently cast a single vote for a named candidate for President and a named candidate for Vice President. In the unlikely event that a non-member state were to remove the names of the presidential nominees from the ballot and present the voters with, say, only names of the individual candidates for presidential elector and require its voters to cast separate votes for individual presidential electors as was the case in 1960 in Alabama (as shown by the ballot in figure 3.10a and figure 3.10b and discussed in section 3.13 and also section 9.30.12), there would be no popular-vote count from that state to add to each presidential slate's nationwide tally. In other words, that state would be voluntarily opting out of the national popular vote count.

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[6] The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

The Compact addresses the above two unlikely possibilities by specifying that the popular votes that are to be aggregated to produce the "national popular vote total" are those that are:

> "cast 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]

The term "statewide popular election" is defined in the eighth clause of Article V of the Compact as follows:

> "'statewide popular election' shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis."

In this way, the first clause of Article III of the Compact, in conjunction with the definition of a "statewide popular election," deals with the unlikely possibility that a state opts out of the national popular vote (as discussed in detail in section 9.31.6).

Finally, the first clause of Article III of the Compact also requires the adding up of the number of votes cast for each presidential slate in each jurisdiction in which votes have been cast in a "statewide popular election."

The result of this arithmetic is the "national popular vote total" for each presidential slate." Because each state belonging to the Compact is required to treat the certified popular-vote count from each other state as "conclusive" (as discussed below in connection in the 4th clause of Article III), the results of this arithmetic step will be the same in each member state.

Second Clause of Article III—the Designating Clause

The purpose of this clause is to identify the winner of the presidential election.

The second clause of Article III provides:

> "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.'"

Third Clause of Article III—the Appointing Clause

The purpose of Article III is to appoint presidential electors.

The third clause of Article III results in the appointment of presidential electors from each member state:

> "The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner."

The term "presidential elector certifying official" is defined in Article V as follows:

> "'presidential elector certifying official' shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors."

The Compact governs the appointment of presidential electors only in years when its membership possesses a majority of the electoral votes. Thus, the effect of this clause is that the "national popular vote winner" will receive a majority of the electoral votes when the Electoral College meets in mid-December.

The phrase "nominated in that state in association with the national popular vote winner" refers to the presidential slate that received the most popular votes nationwide. Candidates for the position of presidential elector are nominated, under existing state laws, by the political party (or other political organization) that nominated the presidential and vice-presidential candidate (section 3.2).

Because the purpose of the National Popular Vote Compact is to implement a nationwide popular election of the President and Vice President, it is the *national* popular vote total—not each state's separate statewide popular vote—that determines which presidential electors are appointed in each member state.

For example, if the Republican presidential slate is designated as the "national popular vote winner" under the terms of the Designating Clause (the second clause of Article III), the candidates for presidential elector nominated in association with the Republican presidential slate would win election as members of the Electoral College in every state belonging to the Compact.

Because the Compact becomes effective only when it encompasses states collectively possessing a majority of the electoral votes (i.e., 270 or more of the 538 electoral votes), the presidential slate receiving the most popular votes in all 50 states and the District of Columbia is guaranteed at least 270 electoral votes when the Electoral College meets in December. Note that the national popular vote winner may also receive additional electoral votes from states that do not belong to the Compact.

The Compact is a self-executing state law. It empowers a specific official in each member state to perform each necessary task. The three major tasks include determining the popular vote counts from all the states and adding them up to yield the "national popular vote total" (the Determining Clause), designating the "national popular vote winner" (the Designating Clause), and certifying the appointment of the presidential electors nominated in association with the national popular vote winner in their state (the Appointing Clause).

Fourth Clause of Article III—the Communication Clause

The fourth clause of Article III provides:

> "At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state."

The deadline in this clause is the same safe harbor deadline contained in section 5 of the Electoral Count Reform Act of 2022 (and the earlier Electoral Count Act of 1887).

For example, the federally established Safe Harbor Day for the 2024 presidential election is Wednesday December 11 (that is, six days before the Electoral College meeting on Tuesday December 17).

This clause of the Compact is a backstop for existing state and federal deadlines.

An additional effect of explicitly stating this deadline is that each member state is, to use the Supreme Court's terminology, expressing its "legislative wish"[7] to receive the benefits of complying with the federal safe harbor deadline.

The word "communicated" in the fourth clause of Article III is intended to allow transmission of a state's "official statement" by secure electronic means that may be available (rather than, say, physical delivery of the official statement by a courier service).

Fifth Clause of Article III—the Conclusiveness Clause

The fifth clause of Article III 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."

This clause requires that each member state treat every other state's timely final determination of its popular-vote canvass as conclusive.

That is, the role of the chief election official of each member state is entirely ministerial.

Because federal law requires each state to certify its final determination of its popular-vote count, and because the Compact requires that the chief election official of each member state treat the count from every state as conclusive, all of the member states will, after they perform the simple arithmetic involved, arrive at the same "national popular vote total." That, in turn, means that they will all reach the same conclusion as to which presidential slate to designate as the "national popular vote winner."

Existing state and federal laws provide numerous avenues for adjudicating election disputes between aggrieved presidential candidates.

For example, a state's determination of its popular-vote count may be challenged in five ways:

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[7] The enactment by Congress of the Electoral Count Reform Act of 2022 makes it unnecessary for states to express this "legislative wish." In 2000, the U.S. Supreme Court noted the importance of a state's expressing its "legislative wish" in *Bush v. Gore* (531 U.S. 98 at 113) by saying, "In *McPherson v. Blacker*, 146 U. S. 1 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and 'leaves it to the legislature exclusively to define the method' of appointment. 146 U. S., at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question. Title 3 U. S. C. §5 informs our application of Art. II, §1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors 'shall be conclusive, and shall govern in the counting of the electoral votes' if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd.*, ante, at 78: 'Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a **legislative wish to take advantage of the 'safe harbor'** would counsel against any construction of the Election Code that Congress might deem to be a change in the law.' If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate **the legislative desire** to attain the 'safe harbor' provided by §5." [Emphasis added]

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings, and
- federal proceedings at the U.S. Supreme Court.

Indeed, aggrieved presidential candidates used all five ways in both 2000 and 2020.

After the final determination of a state's popular-vote count in the state-of-origin, the Compact requires that each member state treat that state's timely final determination as conclusive.

The Conclusiveness Clause also means that the venue for initiating litigation of a state's popular-vote counts is *state-of-origin*—the same as it is today.

The state or federal courts in the state-of-origin are the appropriate place for resolving issues (under both the Compact and current system) because that is where:

- the events in question took place,
- the records exist,
- the witnesses (if any) are located, and
- the administrative officials and judges are most knowledgeable about the applicable state laws and procedures.

Note that the Conclusiveness Clause of the Compact is an analog of the Full Faith and Credit Clause of the U.S. Constitution. Once a matter is litigated in the state-of-origin, the officials of all other states must honor the decision. The Full Faith and Credit Clause states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[8]

See section 9.30.3 and section 9.30.4 for additional discussion.

Sixth Clause of Article III—National Tie-Breaking

The sixth clause of Article III deals with the highly unlikely event of a tie in the national popular vote count:

> "In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state."

Seventh Clause of Article III—Back-Up Nominating Procedure

Under normal circumstances, presidential electors are nominated in accordance with each state's laws by the state political party or other organization associated with the presidential candidate.

The seventh clause of Article III is a contingency clause designed to ensure that the

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[8] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4/

presidential slate receiving the most popular votes nationwide gets what it is entitled to, namely 100% of the electoral votes of each member state. The clause states:

> "If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees."

This clause addresses five known situations that might prevent the national popular vote winner from receiving all of the electoral votes from each member state.

These unlikely situations arise because of gaps and ambiguities in state election laws concerning the nomination of presidential electors.

The seventh clause of Article III provides a rapid and decisive resolution of any situation that might prevent the presidential slate receiving the most popular votes nationwide from getting all of the electoral votes of each member state.

This clause is based on Pennsylvania's law for nominating presidential electors (section 9.1.20 and section 9.37.2). Under this law (enacted in 1937), each presidential nominee personally nominates *all* of the presidential electors who will run under his or her name in Pennsylvania.[9]

The National Popular Vote Compact uses the Pennsylvania approach only in the rare situation when an incorrect number of presidential electors have been nominated in a given state on behalf of the national popular vote winner. In those rare situations, the state's presidential elector certifying official would then certify the appointment of the national popular vote winner's nominees for presidential elector.

This back-up nominating procedure deals with five known situations.

First, a full slate of presidential electors might not be "nominated in association with" the national popular vote winner in a particular member state because ineligible persons were nominated.

Article II, section 1, clause 2 of the U.S. Constitution provides:

> "No Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Despite the Constitution's clear wording, ineligible persons have been repeatedly nominated for the position of presidential elector over the years.

In 2016, the Idaho Republican Party nominated Layne Bangerter and Melinda Smyser for presidential elector, and both were elected in the November general election when Donald Trump carried their state. However, Bangerter and Smyser were federal employees on

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[9] The method of direct appointment of presidential electors by the presidential nominee is regularly used in Pennsylvania for all of its presidential electors. Section 2878 of the Pennsylvania election code (enacted on June 1, 1937) provides: "The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the position of presidential electors the State is then entitled to." See section 3.2.1.

the staffs of Idaho Senators Mike Crapo and Jim Risch, respectively. Both were replaced during the Electoral College meeting on December 19, 2016, in accordance with a procedure provided by Idaho law.[10]

Similarly, in 2020, the Iowa Republican Party nominated Kolby DeWitt, a staffer for U.S. Senator Joni Ernst. He was elected as a presidential elector when Trump won the state in November. As it happens, Iowa law provides for alternate electors, and the alternate took DeWitt's place.[11]

The situation in Ohio in 2004 was considerably more complicated and had the potential to change the national outcome of the presidential election. Ohio law provides:

> "**At the state convention** of each major political party held in 1952, and in each fourth year thereafter, **persons shall be nominated as candidates for election as presidential electors** to be voted for at the succeeding general election. Within five days after the holding of each such convention, the chairman and secretary thereof shall **certify in writing to the secretary of state the names of all persons nominated at such convention** as candidates for election as presidential electors."[12] [Emphasis added]

In 2004, then-Congressman Sherrod Brown was nominated as a Democratic presidential elector at the Ohio Democratic Party's state convention.

Shortly after the convention adjourned, the Ohio Democratic Party realized that it had nominated an ineligible person to serve as presidential elector.

Congressman Brown then signed a document asserting that he was resigning his nomination as presidential elector.

Officials of the Ohio Democratic Party then executed a document nominating a replacement.

However, given that Brown had been ineligible to have been nominated as a presidential elector in the first place, it was not clear that he could resign.

Moreover, the Ohio statute specifically required that presidential electors be nominated at the state convention—not later. The Ohio statute also did not empower any official of the Ohio Democratic Party to act in lieu of the delegates to the state convention.

Ohio law contains a procedure by which the state's remaining presidential electors can fill vacancies when the Electoral College meets at the state Capitol in mid-December. However, the wording of Ohio's statute was very narrow. The procedure (§3505.39) may only be used:

> "to fill **vacancies existing because** duly elected presidential electors are not present." [Emphasis added]

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[10] Two Idaho presidential electors might be replaced for Monday vote. *Idaho Press-Tribune*. December 15, 2016. https://www.idahopress.com/news/local/two-idaho-presidential-electors-might-be-replaced-for-monday-vote/article_dc58c934-b2c9-5046-bafe-088fefe093d4.html

[11] Dockter, Mason. DeWitt bows out as 4th District elector due to constitutional concerns; Granzow to step in. *Sioux City Journal*. December 12, 2020. https://siouxcityjournal.com/news/local/govt-and-politics/dewitt-bows-out-as-4th-district-elector-due-to-constitutional-concerns-granzow-to-step-in/article_021b7220-f9b0-5594-9792-ba193a2f55ff.html

[12] Ohio Revised Code§ 3513.11.

The Democrats risked losing one electoral vote not because Congressman Brown was going to be absent from the state Capitol on the day of the Electoral College meeting, but because he had never occupied the position of presidential elector in the first place.

Prior to Election Day, the Republican Party of Ohio made it clear that they would vigorously challenge the casting of this electoral vote by *any* Democratic replacement.

The issue was significant at the time because, if John Kerry had won Ohio in 2004, the loss of one electoral vote from Ohio (in conjunction with incumbent President George W. Bush losing New Hampshire) would have resulted in a 269–269 tie in the Electoral College. Based on the partisan composition of the U.S. House of Representatives on January 6, 2005, the House would then have elected Bush as President—even though Kerry would have been entitled to 270 electoral votes.

On the other hand, if Kerry had been the national popular vote winner in 2004, and if the National Popular Vote Compact had governed the conduct of the presidential election in that year, the seventh clause of Article III would have enabled Kerry to expeditiously resolve this legal conundrum by directly nominating a Kerry supporter for the unoccupied position of presidential elector.

As it happened, Kerry did not carry Ohio in 2004, and this hair-splitting legal issue became moot.

The constitutional prohibition against federal appointees serving as presidential electors has generated murky legal questions in numerous other elections.

For example, this issue arose in two states during the prolonged dispute over the presidential election of 1876.

Republican Rutherford B. Hayes was eventually declared to have won the presidency on March 2, 1877—two days before Inauguration Day. Hayes won the presidency by a margin of 185–184 electoral votes, thanks in part to an 8–7 ruling by a special Electoral Commission that gave him all of the disputed electoral votes from Florida, Louisiana, and South Carolina.

However, two additional electoral votes were also in dispute because of the constitutional prohibition against federal appointees serving as presidential electors. Tilden would have become President if he had received either of these two other disputed electoral votes.

The Oregon Republican Party had nominated a postmaster, John W. Watts, as one of the party's three elector candidates. Hayes carried Oregon. However, Watts did not send in his letter of resignation as postmaster until the day *after* Election Day, so he was ineligible as of Election Day. Moreover, the Postmaster General did not acknowledge Watt's resignation until a week *after* Election Day.

Oregon had a law empowering the state's remaining presidential electors (two Republicans in this case) to fill a vacancy among the state's presidential electors that occurs before the date for the Electoral College meeting. However, the Democrats contended that there was no vacancy to fill, because Watts was not eligible in the first place—essentially the same hair-splitting argument that Ohio Republicans made in 2004.

Oregon Democrats in 1876 argued that the Oregon Republican Party had nominated only two candidates for presidential elector. Therefore, the popular votes cast for ineligible candidate Watts should be discarded (as if his name were never on the ballot), and that the elector candidate receiving the next-highest number of popular votes on Election Day (that

is, one of the three Democratic nominees) had been elected as the state's third presidential elector. Again, this is the same argument that Ohio Republicans were making in 2004.

Based on this argument, the Democratic Governor, Lafayette F. Grover, sent a certificate to Washington declaring two Republicans and one Democrat as the state's presidential electors.

Meanwhile, the Oregon Secretary of State submitted a conflicting certificate recognizing the three Republicans—that is, his certificate included the ineligible Postmaster.

A variation of this eligibility issue arose in Vermont. Postmaster Henry N. Sollace (a Republican elector candidate) sent his letter of resignation on the day *before* Election Day, but his resignation was not acknowledged by the Postmaster General until *after* Election Day.[13,14]

If the special Electoral Commission had sided with the Democrats in either the Oregon or Vermont case, Hayes would have lost the presidency by one electoral vote (even after receiving favorable rulings from the Commission concerning Florida, Louisiana, and South Carolina). However, the Commission sided with Hayes by an 8–7 margin concerning both ineligible Postmasters—thus giving Hayes the presidency by one electoral vote.

Second, a third-party or independent candidate could theoretically win the national popular vote without being on the ballot in every state. Third-party or independent presidential candidates who have significant national support generally qualify for the ballot in every state (section 9.30.16). Indeed, a candidate who wins the most popular votes nationwide will, almost certainly, have managed to be on the ballot in every state. In the unlikely event that a minor-party or independent presidential candidate wins the national popular vote, but fails to get onto the ballot in a particular compacting state, there would not be any presidential electors "nominated in association with" the nationwide winner in that particular state.[15] The seventh clause of Article III of the Compact provides a way for that candidate to receive the electoral votes to which he or she is entitled from the member state. It does so by empowering a national popular vote winner to directly nominate presidential electors if the correct number of electors have not been provided through the normal operation of state law.

Third, because of the use of fusion voting in some states, the possibility exists that more presidential electors might be nominated in association with a presidential candidate than the state is entitled to send to the Electoral College. Fusion voting (section 3.12) creates the theoretical possibility that two or more competing slates of presidential electors could be nominated by different political parties in association with the same presidential slate.

Because fusion voting is routinely used in New York, the procedures for handling it in connection with presidential elector slates are a settled issue there. For example, in 2004, voters in New York had the opportunity to vote for the Bush–Cheney presidential

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[13] Holt, Michael F. 2008. *By One Vote: The Disputed Presidential Election of 1876*. Lawrence, KS: University Press of Kansas. Pages 201–203.

[14] Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

[15] Note that it is possible in many states for a candidate who is not on the ballot to nonetheless file a slate of presidential electors with state election officials so that they can receive write-in votes. See section 3.9.

slate on either the Republican Party line or the Conservative Party line (as shown by the voting machine face in figure 3.8 in section 3.12). Political parties supporting the same presidential-vice-presidential slate generally nominate a common slate of candidates for presidential electors. Thus, the Republican and Conservative parties nominated the same slate of 31 presidential electors for the 2004 presidential election. The popular votes cast for Bush–Cheney on the Republican and Conservative lines were added together and treated as votes for all 31 Republican-Conservative candidates for presidential elector. Similarly, the popular votes cast for the Kerry–Edwards slate on the Democratic Party line and the Working Families Party line were aggregated and attributed to the common Kerry–Edwards slate of presidential electors. In 2004, the Kerry–Edwards presidential slate received the most popular votes in New York and was therefore declared to be elected to the Electoral College. New York's 2004 Certificate of Ascertainment shows this aggregation.[16]

Fusion voting is currently permissible under the laws of several other states under various circumstances. The laws of states could lead to situations in which two competing elector slates are nominated under the banner of the same presidential slate. The seventh clause of Article III provides a way to remedy the unlikely situation of there being two fully populated elector slates with different elector(s) supporting the same national popular vote winner.

Fourth, there is another way in which more presidential electors might be nominated in association with a particular presidential candidate than the state is entitled to send to the Electoral College. In states permitting advance filing of write-in candidates for President (section 3.9), different slates of presidential electors might be filed in association with the same write-in presidential slate. In the unlikely event that such a presidential slate were to win the national popular vote, the winning presidential candidate would have twice as many presidential electors associated with his candidacy in the state involved. The seventh clause of Article III provides an expeditious way for the winning presidential candidate to pare down the list of presidential electors in that state.

Fifth, in some states permitting presidential write-ins, it is possible that an insufficient number of presidential electors may be nominated in association with a particular presidential slate. For example, the Minnesota election code does not specifically require that a full slate of 10 presidential electors be identified at the time of the advance filing of write-in slates (section 3.9). In fact, the law only requires advance filing of the name of one presidential elector, even though Minnesota has 10 electoral votes.[17] Moreover, voters in Minnesota may cast write-in votes for President without advance filing, and it is therefore possible (albeit unlikely) for the national popular vote winner to be a write-in.

Eighth Clause of Article III—Public Information Clause

The eighth clause of Article III enables the public, the press, and political parties to closely monitor the implementation of the Compact within each member state:

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[16] New York's entire 2004 Certificate of Ascertainment is shown in appendix H (page 809) of the 4th edition of this book available at https://www.every-vote-equal.com/4th-edition

[17] Minnesota election law. Section 204B.09, subdivision 3.

> "The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained."

The unmodified term "statement" is intended to refer to the "official statements" of a state's final determination of its presidential vote (such as required from member states by the fourth clause of Article III) and any intermediate statements that the chief election official may obtain at any time during the process of determining a state's presidential vote. The unmodified term "statement" is also intended to encompass the variety of types of documentation used by various states for officially recording and reporting their presidential count.

For example, the minutes or other records by a state Board of Canvassers (or other board or official) of a certification of the state's popular-vote count would be such a "statement." Of course, a Certificate of Ascertainment issued by the state in accordance with federal law[18] would also be considered to be a "statement."

Because time is limited prior to the constitutionally mandated Electoral College meeting in mid-December, the term "immediately" is intended to eliminate any delays that might otherwise apply to the release of information by a public official under general public-disclosure laws.

Ninth Clause of Article III—the Governing Clause

The ninth clause of Article III provides:

> "This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes."

This clause operates in conjunction with the first clause of Article IV relating to the date when the National Popular Vote Compact as a whole first comes into effect:

> "This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state."

The ninth clause of Article III employs the date of July 20 of a presidential election year, because the six-month period starting on this date contains the following six important events relating to presidential elections:

- the national nominating conventions,[19]
- the fall general election campaign period,
- Election Day on the Tuesday after the first Monday in November,

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[18] Title 3, chapter 1, section 6 of the United States Code deals with issuance of Certificates of Ascertainment by the states (and is discussed in section 2.4). See appendix A of this book for the provisions of the U.S. Constitution and appendix B for provisions of federal law relating to presidential elections.

[19] All recent national nominating conventions of the major parties have met after July 20.

- the Electoral College meeting on the first Tuesday after the second Wednesday in December,
- the counting of the electoral votes by Congress on January 6, and
- the scheduled inauguration of the President and Vice President for the new term on January 20.

The ninth clause of Article III addresses the question of whether Article III governs the conduct of the presidential election in a particular year, whereas the first clause of Article V specifies when the Compact as a whole initially comes into effect.

As long as the compacting states possess a majority of the electoral votes on July 20 of a presidential election year, the ninth clause specifies that Article III will govern the upcoming presidential election.

The ninth clause is important because it is theoretically possible that the National Popular Vote Compact could come into effect by virtue of enactment by states collectively possessing a majority of the votes in the Electoral College (currently 270 out of 538), but at some future time, the compacting states might no longer possess a majority of the electoral votes.

This situation could arise in at least five different ways, including a:

- reapportionment of electoral votes among the states resulting from the census held every 10 years,
- change in the total number of electoral votes resulting from the admission of a new state to the Union,
- change in the total number of electoral votes resulting from a federal statutory change in the size of the U.S. House of Representatives,
- change in the total number of electoral votes resulting from a constitutional amendment, and
- withdrawal by a state from the Compact.

The first possibility is that a future federal census might reduce the number of electoral votes cumulatively possessed by the compacting states so that they no longer possess a majority of the electoral votes on July 20 of a presidential election year. This could occur, for example, if the compacting states were to lose population relative to the remainder of the country.

If this contingency (or any of the others listed above) were to occur, the Compact as a whole would remain in effect, because it would have come into initial effect under the first clause of Article IV. However, because the majority requirement would no longer be satisfied, the ninth clause of Article III specifies that the Compact would not govern the upcoming presidential election. That is, the Compact would hibernate through the upcoming election. If subsequent enactments of the Compact were to raise the number of electoral votes possessed by the compacting states above the required majority by July 20 of a presidential election year, the ninth clause of Article III specifies that the Compact would again govern that upcoming presidential election.

As a second example, if a new state were admitted to the Union, and if the total number of seats in the U.S. House of Representatives (and hence the total number of electoral votes) were temporarily or permanently adjusted upward because of the new state, it is

conceivable that the compacting states would no longer possess a majority of the new number of electoral votes. For example, Puerto Rico is frequently mentioned as a potential new state.

As a third example, if the number of U.S. Representatives (set by federal statute) were changed so that the number of electoral votes possessed by the compacting states no longer accounted for a majority of the new number of electoral votes, the ninth clause of Article III specifies that the Compact would not govern the next presidential election.

Proposals to change the number of members of the House are periodically floated for a variety of reasons. One frequently mentioned reason is that congressional districts have gotten larger and larger as the total population of the country has grown. As another example, in 2005, Representative Tom Davis (R–Virginia) proposed increasing the number of Representatives from 435 to 437 on a temporary basis (until the reapportionment based on the 2010 census) in connection with his (never enacted) bill to give the District of Columbia voting representation in Congress.[20]

As a fourth example, if a federal constitutional amendment were to increase the total number of electoral votes, the number of electoral votes collectively possessed by the compacting states could fall below the required majority.

As a fifth example, if one or more states were to withdraw from the Compact and thereby reduce the number of electoral votes possessed by the remaining compacting states below the required majority on July 20 of a presidential election year, the ninth clause of Article III provides that the Compact as a whole would remain in effect but would not govern the next presidential election.

As a practical matter, the above scenarios can only arise if the number of electoral votes possessed by the compacting states were to hover close to 270.

In all likelihood, the behavior of states with respect to the Compact will parallel their behavior with respect to federal constitutional amendments in that additional states would probably approve the Compact after it first becomes effective. For example, after the 19th Amendment (women's suffrage) was ratified by the requisite number of states (36 out of 48, at the time) and became effective on August 18, 1920, over a dozen additional states signified their approval by ratifying the amendment over a period of years, starting with Connecticut in 1920.

In any case, there is little likelihood of any abrupt surprise arising from any of the five scenarios described above. None of these five scenarios occurs with head-spinning frequency. The question of whether the Compact would govern a particular presidential election would be known, in practice, long before July 20 of a presidential election year for the following reasons.

First, changes resulting from the census would never be a surprise, because the

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[20] Utah was the state that would have become entitled to one of the two additional congressional seats under the existing formula for apportioning U.S. Representatives among the states. The District of Columbia would have received the other seat. As a matter of practical politics, the two additional seats would have been expected to divide equally between the Democrats and Republicans. Under the proposed D.C. Fairness in Representation Act of 2005 (H.R. 2043), the number of seats in the House would have reverted to 435 after the 2010 census.

census does not affect congressional reapportionment until two years after the year in which the census is taken.[21]

Second, admission of a new state to the Union is a rare event, and it only occurs after a laborious multi-year process. The admission of Alaska and Hawaii in 1959 was the last time a new state has been admitted.

Third, enactment of a federal statute changing the number of seats in the U.S. House of Representatives is a time-consuming, multi-step legislative process involving approval of the bill by a committee of each house of Congress, debate and voting on the bill on the floor of each house, and presentment of the bill to the President for approval or disapproval (and consideration by the legislature as to whether to override a veto).

Fourth, enactment of a federal constitutional amendment is a time-consuming, multi-step process involving a "proposing" step at the federal level and a "ratification" step at the state level. The 23rd Amendment gave the District of Columbia electoral votes in 1961. That was the only time a constitutional amendment has altered the allocation of electoral votes.

Fifth, enactment of a state law withdrawing from the Compact is a multi-step legislative process involving approval of the bill by a committee of each house of the state legislature, debate and voting on the bill on the floor of each house, and presentment of the bill to the state's Governor for approval or disapproval (and consideration by the legislature as to whether to override a veto).[22] Moreover, in many states, a new state law does not take immediate effect but, instead, only takes effect after a (typically considerable) delay specified by the state constitution (table 9.40).

6.2.4. Explanation of Article IV—Additional Provisions

The first clause of Article IV specifies the time when the Compact initially could take effect.

> "This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state."

Note that a state is not counted, for purposes of this clause, until the state statute enacting the Compact is "in effect" in the state in accordance with the state's constitutional schedule specifying when state laws take effect.

The phrase "substantially the same form" is found in numerous interstate compacts and is intended to permit minor variations (e.g., differences in punctuation, differences in numbering, typographical errors, inconsequential omission of words such as "the" or "and") that sometimes occur when the same law is enacted by various states.[23]

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[21] For example, the 2020 federal census (taken in April 2020) did not affect the allocation of electoral votes in the 2020 presidential election. Instead, the apportionment of electoral votes among the states in 2020 was based on the 2010 census.

[22] If the citizen-initiative process were used to withdraw from a compact, that process is also a time-consuming, multi-step process that typically involves an initial filing and review by a designated state official (e.g., the Attorney General), circulation of the petition, and voting in a statewide election (usually the next November general election).

[23] When Congress consents to an interstate compact, the congressional act typically contains language such as "The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States." See section 5.19.1.

The second clause of Article IV permits a state to withdraw from the Compact at any time but provides for a "blackout" period that delays the withdrawal by approximately six months under certain circumstances:

> "Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term."

The purpose for the delay in the effective date of a withdrawal is to ensure that a withdrawal will not be undertaken—perhaps for partisan political purposes—in the midst of a presidential campaign and, in particular, the period encompassing Election Day in early November, the Electoral College meeting in mid-December, and the counting of electoral votes by Congress on January 6.[24] Note that the Electoral Count Reform Act of 2022 separately requires that presidential electors be appointed in accordance with laws enacted prior to Election Day. The blackout period starts on July 20 of a presidential election year and would normally end on January 20 of the following year (the scheduled inauguration date). Thus, if a statute repealing the Compact in a particular state were enacted and were to come into effect in the midst of the presidential election process, that state's withdrawal would not take effect until completion of the entire current presidential election cycle.

The date for the end of the current President's term is fixed by the 20th Amendment as January 20; however, the Amendment recognizes the possibility that a new President might, under certain circumstances, not have been "qualified" by that date. Thus, the blackout period in the Compact ends when the entire presidential election cycle is completed under the terms of the 20th Amendment.

The third clause of Article IV concerns the process by which each state notifies all of the other states of the status of the Compact. Notices are required when:

- the Compact has taken effect in a particular state;
- the Compact has taken effect generally (that is, when it appears that it has been enacted and taken effect in states cumulatively possessing a majority of the electoral votes); and
- a state's withdrawal has taken effect.

The fourth clause of Article IV provides that the Compact would automatically terminate if the Electoral College were to be abolished.

The fifth clause of Article IV is a severability clause.

6.2.5. Explanation of Article V—Definitions

Article V of the Compact contains definitions.

There are separate definitions for the "chief election official" and the "presidential elector certifying official," because these terms typically apply to different officials or bodies.

The definition of "presidential slate" in Article V is important because voters cast

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[24] Delays in the effective date of withdrawals are commonplace in interstate compacts. See section 5.15.3 for additional discussion on withdrawals from interstate compacts in general and section 9.25 for a discussion of withdrawal from the National Popular Vote Compact in particular.

votes for a team consisting of a presidential and vice-presidential candidate and because the votes for each distinct slate are aggregated separately in the national count. "Presidential slate" is defined as:

> "a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state."

The above definition permits the substitution of nominees on a given presidential slate if, for example, a nominee were to die during the presidential election cycle,[25] resign from a slate,[26] or become disqualified.

Because ballots in North Dakota and Arizona list only the name of the presidential candidate, the Compact's definition of "presidential slate" contains a savings clause for those states.

Note that this definition comports with present practice in that it treats a slate as a unit containing two particular candidates in a specified order. As discussed in section 3.12 and shown in figure 3.8, Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of both the Independence Party and the Peace and Justice Party. Nader ran with Jan D. Pierce for Vice President on the Independence Party line in New York in 2004, but with Peter Miguel Camejo for Vice President on the Peace and Justice Party line. Thus, there were two different "Nader" presidential slates in New York in 2004. Each "Nader" slate had different presidential electors in New York in 2004. The votes for these two distinct "presidential slates" were counted separately (as shown on the sixth page of New York's 2004 Certificate of Ascertainment).[27] That is, there were two distinct presidential slates and two distinct slates of presidential electors. There was no fusion of votes between the Independence Party and the Peace and Justice Party in this situation.

The definition of "statewide popular election" in Article V is important. At the present time, all states conduct a "statewide popular election" for President.

However, if a state were to take the vote for President away from its voters and authorize the state legislature to appoint presidential electors (as Massachusetts and New Hampshire did in the 1800 presidential election, as described in section 2.6), there would be no popular votes available to count from that state, and that state would no longer be conducting a "statewide popular election" for purposes of the Compact.

Similarly, if a state were to abandon the short presidential ballot, that state would no longer be conducting a "statewide popular election" for purposes of the Compact.

If a state were to stop conducting a "statewide popular election," the "national popular vote total" would necessarily not include that state.

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[25] Horace Greeley, the (losing) Democratic presidential nominee in 1872, died between the time of the November voting and the counting of the electoral votes.

[26] Senator Thomas F. Eagleton of Missouri resigned from the 1972 Democratic presidential slate.

[27] New York's entire 2004 Certificate of Ascertainment is shown in appendix H (page 809) of the 4th edition of this book available at https://www.every-vote-equal.com/4th-edition