



## Ranked Choice Voting (RCV) Is Compatible with National Popular Vote

April 4, 2022

### QUICK ANSWER:

- The false claim that Ranked Choice Voting (RCV) is incompatible with National Popular Vote requires getting people to believe that the intent of a state enacting an RCV-for-President law is to give voters a ballot that allows them to rank candidates according to their first, second, etc. preferences—but to then count only the voter's first choice. However, no election administrator or court is going to interpret a state's RCV-for-President law in a manner that totally ignores RCV's sole purpose, namely letting voters rank the candidates in order of their preference.
- Even if there were legitimate uncertainty on how to interpret RCV-for-President laws, the issue is **legally moot** in the only state that has ever used RCV in a presidential election (namely Maine). In 2021, Maine amended its 2019 RCV-for-President law to eliminate any possible ambiguity. Moreover, in the only state that is currently poised to use RCV for President in 2024 (namely Alaska), the issue is **politically moot**, because the Republican presidential nominee is almost certain to win an absolute majority of the first-choice

votes—thereby making the first-choice count equivalent to the final RCV count.

- Even if there were any legitimate uncertainty on the proper interpretation of an RCV-for-President law, RCV supporters in the state involved would press election administrators and courts to definitively declare—before Election Day—how votes are going to be counted. Thus, there would be no post-election “constitutional crisis ... throwing the nation into turmoil” as predicted by spokesmen for the false claim that RCV is incompatible with National Popular Vote.
- The false claim that Ranked Choice Voting (RCV) is incompatible with the National Popular Vote Compact ignores the history of writing the Compact. In fact, the leading supporter of RCV at the time was co-author of the Compact. He was head of the leading organization advocating RCV, and that organization was the first organization to endorse the Compact.

#### **MORE DETAILED ANSWER:**

##### **Background on Ranked-Choice Voting (RCV)**

Under Ranked Choice Voting<sup>1</sup> (RCV), the voter ranks candidates in order of preference—first choice, second choice, and so forth.

If one candidate receives a majority of the votes from voters expressing a first choice, that candidate wins outright, and the

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<sup>1</sup> Ranked Choice Voting is also known as also known as “Instant Runoff Voting,” the “single transferrable vote,” or the “Hare system,” after its inventor, Thomas Hare. The traditional plurality voting system is often called “first past the post” (suggesting a horse race in which the winner is the candidate in the lead).

counting process ends. Otherwise, the candidate supported by the fewest voters is eliminated from consideration, and the counting process continues on to an additional round. The ballots favoring the eliminated candidate are redistributed according to the next choice indicated by the voters who cast these ballots. This process of eliminating the lowest candidate and redistributing that candidate's ballots is repeated until one candidate has the support of a majority of the voters expressing a choice on that round.

RCV gives voters more choice than the traditional plurality-voting system (often called "first past the post"). RCV allows voters to support the candidate who most closely matches their views. It eliminates the voter's dilemma of voting for a major-party candidate whom the voter views as the lesser of two evils, instead of a candidate that most closely matches the voter's views. For example, under RCV, a Libertarian voter might give his first-choice ranking to the Libertarian Party candidate, but then give his second-choice ranking to the Republican candidate. A Green voter might give his first-choice ranking to the Green Party candidate, but then give his second-choice ranking to the Democratic candidate.

In contrast, in the traditional plurality-voting system, supporting a minor-party candidate often results in helping the major-party candidate whose views are farthest from the voter's own views. For example, if the 97,488 Floridians who voted for Ralph Nader for President in 2000 had been able to express their second-choice on the ballot, George W. Bush would almost certainly have not carried Florida by a mere 537 votes (and thereby become President).

RCV has been used for decades in municipal elections in numerous cities. New York City used RCV for the first time in June 2021 in its primary for municipal offices.

In November 2016, Maine voters approved an initiative petition that adopted RCV for elections for U.S. Senator and U.S. Representative. The constitutionality of RCV was contested, and upheld by a federal district court and a federal appeals court in 2018. These federal-court rulings found that RCV is a “one-person, one-vote” system, in which a voter’s second choice becomes the voter’s vote after the voter’s first-choice has been eliminated. The court rulings characterized many of the objections to RCV as primarily political opinion as to what constitutes desirable features of a voting system—as opposed to legal arguments as to what constitutes a constitutional system.<sup>2,3</sup>

In 2019, the Maine legislature passed a law extending RCV to presidential elections. In 2020, Maine became the first state to use RCV in a presidential election. Because Joe Biden won a majority of the first-choice votes, the vote counting process ended with the first round.<sup>4</sup> That is, the first-round count was equivalent to the final-round count.

In 2020, Alaska voters approved an initiative petition that will result in RCV being used in general elections for state and congressional offices starting in November 2022, and in the presidential general election starting in November 2024.<sup>5</sup> In

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<sup>2</sup> *Brett Baber v. Matthew Dunlap*. 376 F. Supp. 3d 125 (D. Maine 2018), appeal dismissed, 2018 WL 8583796 (1st Cir. 2018). The opinion of United States District Judge Lance Walker on November 15, is at <https://legislature.maine.gov/doc/2493>

<sup>3</sup> Pildes, Richard H. and Parsons, G. Michael. 2021. The legality of Ranked-Choice Voting. 109 *California Law Review*. Volume 109. Number 5. October 2021. <https://www.californialawreview.org/print/the-legality-of-ranked-choice-voting/>

<sup>4</sup> In Maine, RCV is applied at both the statewide level (for two electoral votes) and at the congressional-district level in the state’s two districts. Joe Biden won a majority in both districts as well as statewide.

<sup>5</sup> Bohrer, Becky. 2021. Judge to hear case challenging ranked-choice election initiative approved by Alaska voters. *Associated Press*. July 9, 2021. <https://www.adn.com/politics/2021/07/09/judge-to-hear-case-challenging-ranked-choice-election-initiative-approved-by-alaska-voters/>

2021, the Alaska Supreme Court upheld the constitutionality of RCV.<sup>6</sup>

**There is no plausible uncertainty about interpreting RCV-for-President laws**

Today, many supporters of RCV are supporters of National Popular Vote, and vice versa. Because of this, opponents of RCV, opponents of National Popular Vote, and opponents of both ideas have attempted to divide the electoral reform community by claiming that it is “impossible” for RCV and National Popular Vote to co-exist.

Sean Parnell, the senior legislative director of Save Our States (the leading group that employs lobbyists to oppose adoption of the National Popular Vote Compact) wrote in January 2021:

**“Ranked choice voting makes a National Popular Vote impossible.”<sup>7</sup>**

A policy memo from Save Our States said in 2021:

**“The incompatibility of RCV and NPV could prevent a conclusive determination of which candidate has won the presidency, causing a political, legal, and constitutional crisis and throwing the nation into turmoil.”<sup>8</sup>**

The memo also said:

**“The problem is that ... the RCV process can yield two different vote counts—an initial total of all voters’ first choice votes, and a final number that**

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<sup>6</sup> *Kohlhaas v. State of Alaska*. Order of the Supreme Court of the State of Alaska. January 19, 2022. See also Lee, Jeanette. 2022. Alaska Supreme Court Upholds State’s New Election System. *Sightline*. January 24, 2022. <https://www.sightline.org/2022/01/24/alaska-supreme-court-upholds-states-new-election-system/>

<sup>7</sup> Parnell, Sean. 2021. Ranked choice voting makes a National Popular Vote impossible. *Go Erie*. January 24, 2021. <https://www.goerie.com/story/opinion/columns/2021/01/24/ranked-choice-voting-makes-national-popular-vote-impossible/4210235001/>

<sup>8</sup> Save Our States policy memo. 2021. “Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist.” April 26, 2021. Page 1.

has eliminated votes for some candidates and added votes to others.”<sup>9</sup> ... [Emphasis added]

“If NPV is in effect, does [an RCV state] report on its Certificate of Ascertainment the initial numbers, or the final numbers after the RCV process has been used? **There is no obviously correct answer.**”<sup>10</sup>  
[Emphasis added]

Actually, there *is* an “obviously correct answer.”

Save Our States would have people believe that the Maine legislature passed its RCV-for-President law in 2019 with the intention of giving voters a ballot that lets them rank candidates according to their first, second, etc. preferences—but to then count only the voter’s first choice.

In interpreting an RCV-for-President law, election administrators and courts would look to the purpose of the law.

The state’s counting only first-choice rankings would negate the sole purpose of an RCV-for-President law, namely allowing voters to express their order of preference among the candidates. If only the first-choice rankings are counted, the state would be inviting voters to rank candidates, but then saying that it is going to ignore all the rankings other than their first choice.

No election administrator or court is going to interpret a state’s RCV-for-President law in a manner that totally ignores the law’s sole purpose, namely letting voters to rank the candidates in order of their preference.

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<sup>9</sup> Save Our States policy memo. 2021. “Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist.” April 26, 2021. Page 2.

<sup>10</sup> Save Our States policy memo. 2021. “Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist.” April 26, 2021. Page 4.

**The question of interpretation is already legally moot in the only states with RCV-for-President laws**

Even if there were any legitimate uncertainty on how to interpret an RCV-for-President law, Save Our States' claims are already legally moot in the only state that has actually used RCV in presidential elections (namely Maine).

In 2021, Maine Secretary of State Shenna Bellows recommended an amendment to the state's election law that eliminated any possible question. The Secretary of State's recommended amendment specifically designated the final RCV tally as the presidential vote count that will appear in Maine's Certificate of Ascertainment (a legal document that reports the state's final determination of its presidential vote). The Secretary of State's proposed amendment was passed by the legislature and signed by the Governor in June 2021.<sup>11</sup>

Moreover, the issue is politically moot in the only other state that is poised to use RCV for President in 2024 (namely Alaska). The Republican presidential nominee is almost certain to win an absolute majority of the first-choice votes in Alaska—thereby making the count of first-choice votes equivalent to the final RCV tally.<sup>12</sup>

**Even if there were legitimate ambiguity in RCV-for-President laws, the issue would be resolved before Election Day**

Even if there were legitimate uncertainty on the proper interpretation of an RCV-for-President law, Save Our States' claim that the ambiguity could result in a "constitutional crisis and throwing the nation into turmoil" is incorrect.

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<sup>11</sup> The relevant section (21-A MRSA §803) of Maine's recently enacted law is found on page 12 of <http://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0450&item=3&snum=130>

<sup>12</sup> The Republican presidential nominee has won an absolute majority in Alaska in all but one election in the last 50 years. In 1992, when Ross Perot received 28% of the popular vote in Alaska, the Republican presidential nominee (President George H.W. Bush) still swept Alaska with 40%, while Bill Clinton received 30% and other candidates received 2%.

In the real world, RCV supporters in the state involved would press election administrators and courts to definitively declare—before Election Day—how votes are going to be counted. Thus, there would be no post-election question as to what counting procedure was going to be used.

**Save Our States continues to complain when the alleged ambiguity is resolved**

In 2021, when the Maine Secretary of State offered an amendment to Maine’s 2019 RCV-for-President law to eliminate this arguable ambiguity, Save Our States opposed eliminating the ambiguity.

In testifying before the Maine Committee on Veterans and Legal Affairs on May 11, 2021, Sean Parnell, the senior legislative director of Save Our States, pointed out that Ross Perot finished second in Maine in 1992 by virtue of having a 316-vote lead over incumbent Republican President George H.W. Bush, who came in third.<sup>13</sup> That is, a minor-party nominee came in second.

Parnell testified:

“Under Ranked Choice Voting, if a third party or an independent candidate were to finish ahead of either the Democratic or Republican candidate, ... **the votes for that Democratic or Republican candidate gets completely erased** and will not be reported.

“In 1992, for example, Ross Perot finished ahead of George Bush in Maine. George Bush would have had subtracted, or never appeared in the national vote totals about 207,000 votes. The amendment that your

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<sup>13</sup> In Maine in 1992, George H.W. Bush received 206,504 votes and came in third place; Ross Perot received 206,820 votes and came in second place; and Bill Clinton received 263,420 votes and came in first place.



Secretary of State has offered does not address this problem.”<sup>14</sup>

At a debate conducted by the Broad and Liberty group in Philadelphia, Sean Parnell said:

“If you’re just using the final votes, then if a candidate—a Democrat or Republican—ever finishes in third place in a state with ranked choice voting, ... then **what you wind up doing is literally zeroing out votes.** If you ever have a Republican candidate or Democratic candidate finishing third place in a state with ranked choice voting, then you are literally going to watch **hundreds or thousands, maybe even millions of votes, be completely erased.**”<sup>15</sup>

Of course, the major argument in favor of ranked choice voting is that it allows voters to freely express their preferences. Parnell apparently thinks that the State of Maine or Maine voters are obligated to protect the two major-party presidential nominees from the consequences of their own failure to earn enough votes to come in first or second place in every election.

Given that Save Our States vigorously defends the current state-by-state winner-take-all method of awarding electoral votes, Parnell’s concern about votes being transferred away from the two major-party presidential candidates strikes an odd note. Indeed, the current winner-take-all system erased the votes of *every* voter in *every* state who did not vote for the candidate who received the most popular votes in their respective state in 2020, 2016, 2012, 2008, 2004, 2000, and 1996.

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<sup>14</sup> Testimony of Sean Parnell. Maine Committee on Veterans and Legal Affairs. May 11, 2021

<sup>15</sup> Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 <https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s>

Moreover, had RCV and National Popular Vote been in effect in Maine in 1992, every voter in Maine would have had their vote counted for a candidate **for whom the voter actually voted**. In contrast, the current winner-take-all system routinely counts the voter's ballot for a candidate for whom the voter did **not** vote.

**Even if there were ambiguity in RCV-for-President laws, it is not clear how many votes would be involved**

Save Our States has made hyperbolic claims that the arguable ambiguity discussed would involve “hundreds of thousands” or “millions” of votes.<sup>16</sup>

The two states that are poised to use RCV in the 2024 presidential election together have 0.6% of the U.S. population.

The number of voters who would actually make use of RCV in presidential elections is unclear. In an average of 45 states in the six presidential elections between 2000 and 2020, one presidential candidate won an absolute majority of the state's popular vote. In particular, one candidate won an absolute majority

- in all but 5 states in 2020<sup>17</sup>
- in all but 12 states in 2016<sup>18</sup>
- in 100% of the states in 2012
- in all but 4 states in 2008<sup>19</sup>
- in all but 3 states in 2004<sup>20</sup>
- in all but 9 states in 2000.<sup>21</sup>

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<sup>16</sup> Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 <https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s>

<sup>17</sup> Arizona, Georgia, North Carolina, Pennsylvania, and Wisconsin.

<sup>18</sup> Arizona, Colorado, Florida, Maine, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Virginia, and Wisconsin.

<sup>19</sup> Indiana, Missouri, Montana, and North Carolina.

<sup>20</sup> Iowa, New Mexico, and Wisconsin.

<sup>21</sup> Florida, Iowa, Maine, Nevada, New Hampshire, New Mexico, Ohio, Oregon, and Wisconsin.

Moreover, only four minor-party presidential candidates received more than 1% of the national popular vote during the six presidential elections between 2000 and 2020, namely

- 1% for Jo Jorgensen in 2020,
- 1% for Jill Stein in 2016,
- 3% for Gary Johnson in 2016, and
- 3% for Ralph Nader 3% in 2000.<sup>22</sup>

Also, the number of votes involved in the arguable ambiguity is not the number of votes received by minor-party presidential candidates, but the number of votes that might be distributed when the minor-party candidate is eliminated.

We can get a rough idea of the magnitude of the difference between the first-choice tally and the final RCV tally by looking at Alaska's vote count in 2016—a year when minor-party candidates (notably Libertarian Gary Johnson and Green Party candidate Jill Stein) received an unusually high percentage of the vote.

Of the 318,608 votes cast in Alaska in 2016, Libertarian Party nominee Gary Johnson received 18,725 and Green Party nominee Jill Stein received 5,735.

Suppose we make assumption that 100% of the Johnson voters would have given their second-choice votes to Trump, and 100% of the Stein voters would have given their second-choice votes to Clinton. This assumption is quite generous because some minor-party supporters are not willing to cast a second-choice vote for any major-party candidate. But, under this assumption, Trump's

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<sup>22</sup> In 2012, Libertarian nominee Gary Johnson came close to receiving 1% of the national popular vote.

runaway 46,033-vote margin over Hillary Clinton in Alaska would have been expanded by 12,990 votes.<sup>23</sup>

All of these numbers need to be viewed in the context of a presidential election with over 158,000,000 voters in 2020.

**The National Popular Vote Compact was drafted with RCV in mind**

The false claim that Ranked Choice Voting (RCV) is incompatible with the National Popular Vote Compact ignores the history of the Compact's writing.

In fact, the leading supporters of RCV worked closely with the National Popular Vote organization on the drafting of the Compact to ensure that the Compact would be compatible with RCV.

Specifically Rob Richie, President of [FairVote](#), the leading advocacy group for RCV, was a co-author of the Compact, and a co-author of the 2006 book describing the Compact, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*. FairVote was the first organization to endorse the National Popular Vote Compact. In 2006, Rob Richie spoke at NPV's first press conference announcing the Compact.

Although RCV was not used at the state level by any state at the time when the National Popular Vote Compact was written, the Compact anticipated the possibility that states would adopt innovative voting systems in the future. Accordingly, the Compact made each state's timely determination of its presidential vote count "conclusive" on the states belonging to the Compact. The Compact requires deference to each state's presidential count if it is finalized in an "official statement" in a

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<sup>23</sup> We assume Castle's 3,866 voters, Fuente's 1,240 voters, and the 9,201 write-in voters divide equally in their preference for the two major-party nominees—that is, these 14,307 votes do not affect the spread between the two major-party nominees.

timely manner. The fifth clause of Article III of the NPV Compact states:

“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.”

In most cases, the “official statement” is, in practice, the state’s Certificate of Ascertainment.<sup>24</sup>

The State of Maine unambiguously specified how RCV votes for President will be reported in Maine’s Certificate of Ascertainment by providing in §803:

“The certificate shall must state ... the number of votes each candidate for President received statewide and for each congressional district in the **final round**

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<sup>24</sup> The role of the seven Certificates of Ascertainment is specified by 3 U.S. Code §6, which states, “It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.”

**of tabulation** under section 723-A.”<sup>25</sup> [Emphasis added]

Note that there is nothing new or novel about the National Popular Vote Compact’s deference to each state’s presidential vote count. The Compact’s wording simply mirrors long-standing federal law (3 USC §5) making each state’s final determination of its canvass of its presidential vote count “conclusive” when Congress counts the electoral votes on January 6.

## **Conclusion**

The false claim that RCV and National Popular Vote are incompatible is part of an effort to deflect attention from the fact that the current state-by-state winner-take-all method of awarding electoral votes does not

- **guarantee the Presidency to the candidate who gets the most votes nationwide,**
- **make every vote equal, and**
- **give candidates a reason to campaign in all 50 states.**

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<sup>25</sup> The relevant section (21-A MRSA §803) of Maine’s recently enacted law is found on page 12 of <http://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0450&item=3&snum=130>