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

February 19, 2021

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

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

1. **Secret vote counts conflict with the principle of having public oversight of elections by watchdog groups, candidates, political parties, the media, and ordinary citizens**
2. **SB2271 contains no plan on how to run a system of vote counting that is half public and half secret—probably because there is no workable or practical way to do this**
3. **SB2271 contains no fines or jail time for the crime of revealing vote counts**
4. **Secret court proceedings will be necessary to keep the vote counts secret**
5. **Keeping the vote count secret would necessarily require trying to muzzle presidential candidates during a recounted or contested election, and could subject the state to ridicule in grand-standing proceedings**
6. **SB2271 will almost certainly never go into effect, because it allows a single presidential candidate to unilaterally negate the bill simply by initiating a recount or contest**
7. **SB2271 won't actually keep presidential vote counts secret, but will merely create an easily resolved issue involving 36 votes out of 158,224,999 cast nationally**
8. **Under SB2271, North Dakota would voluntarily surrender the "conclusive" status that existing federal law confers on each state's "final determination" of its vote count**
9. **SB2271 violates federal law requiring a Certificate of Ascertainment containing the presidential vote count "on or before" the Electoral College meets**
10. **The meaning of the word "canvass" as used in existing federal law is based on plain English, historical usage, and common sense, and cannot be redefined by one state's law**
11. **SB2271 denies North Dakota voters the full value of their vote for President**
12. **"Particularly nutty" is how *Townhall* describes this secret election bill**
13. **"Throwing the system into chaos" is the acknowledged purpose of the lobbyist who advocated bills like SB2271 in New Hampshire, South Dakota, and Mississippi**
14. **"Crazy," "anti-democratic," and "completely unacceptable" is how a long-time National Popular Vote opponent describes this secret election bill in the *Daily Signal***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "The chief election official of each member state shall treat as conclusive an official statement containing the **number** of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

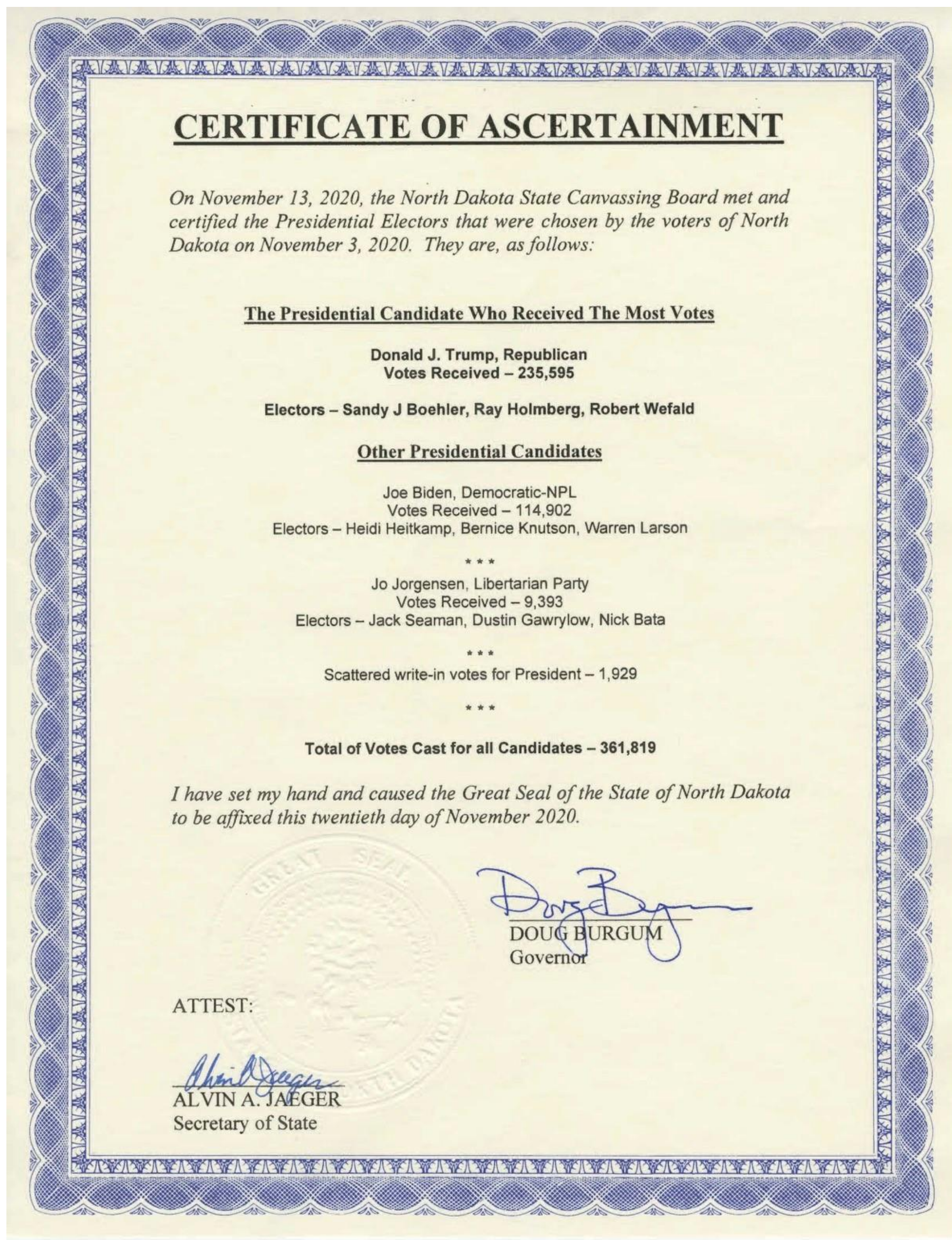
Parnell's **selective quotation** of existing federal law failed to mention that there is, in fact, a specific deadline in federal law concerning the other six identical copies of the Certificate of Ascertainment, namely "**on or before the day"** of meeting of the Electoral College.

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

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

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

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



CERTIFICATE OF ASCERTAINMENT

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

The Presidential Candidate Who Received The Most Votes

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

Electors – Sandy J Boehler, Ray Holmberg, Robert Wefald

Other Presidential Candidates

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

* * *

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

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Scattered write-in votes for President – 1,929

* * *

Total of Votes Cast for all Candidates – 361,819

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

DOUG BURGUM
Governor

ATTEST:

ALVIN A. JAEGER
Secretary of State

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SB2271 says:

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

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

> "**A very simple way for any non-member state to thwart the Compact**, either intentionally or unintentionally, would simply be to not submit their Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos**."[7] [Emphasis added]

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

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

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

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

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

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

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

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

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

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