



## NEW JERSEY LAW REVISION COMMISSION

### Draft Tentative Report Regarding Uniform Faithful Presidential Electors Act

**February 8, 2021**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” N.J.S. 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 18, 2021**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary

This Report recommends enactment of the Uniform Faithful Presidential Electors Act approved by the Uniform Law Commission in 2010 and the incorporation of the substance of the Uniform Act into existing New Jersey law in a way that preserves the “Agreement Among the States to Elect the President by National Popular Vote” that is part of existing New Jersey law.

## Analysis

In 2010, the Uniform Law Commission approved the Uniform Faithful Presidential Electors Act. The Act provides a mechanism to assure that electors vote for the candidate chosen by the voters. The UFPEA has been enacted in six states and introduced in one other.<sup>1</sup>

The ULC explained that

[f]rom the very beginning, the formalities of presidential (and vice-presidential) selection under the United States Constitution have revolved around what has come to be known as the “electoral college.” Despite this formal constancy, the realities of the selection process have changed dramatically over the years, to the point that the electoral college actually functions in a way that could hardly have been imagined by those who promulgated the constitutional provisions. The dissonance between formality and reality has opened room for what are called “faithless electors,” members of the electoral college who vote for candidates for president or vice president (or both) other than those for whom the popular electoral majority (or plurality) assumed it was casting its votes. Faithless electors hold the potential for serious damage to our democratic processes, making advisable a uniform law to minimize the dangers posed.<sup>2</sup>

Almost all presidential electors in this country’s history have voted for their parties’ candidates but, in a few instances, electors have not voted as directed by the voters. Fortunately, that occasional “faithless” elector has not changed the outcome of a presidential election, but that is in good part because most Electoral College counts are not very close.<sup>3</sup>

The UFPEA addresses the problem of elector who decides to vote inconsistently with the vote by the people of the state. It creates a procedure that helps assure that all states attempting to appoint a complete complement of electors will succeed, and maintains the sanctity of the electoral

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<sup>1</sup> Washington, Indiana, Minnesota, Nebraska, Nevada, and Montana have enacted the Act, and it was introduced in North Dakota this year.

<sup>2</sup> UNIFORM LAW COMMISSION, Uniform Faithful Presidential Electors Act, Prefatory Note, Introduction; <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c98d06fd-0be3-aff9-a9ab-af16d701c771&forceDialog=0> (viewed Feb. 03, 2021).

<sup>3</sup> UNIFORM LAW COMMISSION, Uniform Faithful Presidential Electors Act, Prefatory Note, The Problem of “Faithless” Electors; <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c98d06fd-0be3-aff9-a9ab-af16d701c771&forceDialog=0> (viewed Feb. 03, 2021).

process. While the problem of faithless electors may not be the most important problem with the electoral process, it is a problem, and one that can be addressed by state law.

The United States Supreme Court, in *Chiafalo v. Washington*, unanimously upheld state laws that remove or punish rogue presidential electors who refuse to cast their votes for the presidential candidate they pledged to support.<sup>4</sup> In *Colorado Department of State v. Baca*, decided the same day as *Chiafalo*, the United States Supreme Court reversed a Tenth Circuit opinion that declared Colorado’s adoption of the UFPEA to be an unconstitutional limit on elector discretion.<sup>5</sup> The Supreme Court has made clear that states have the authority to bind their electors to the candidates they pledged to support.

The UFPEA proposes a state-administered pledge of faithfulness, and provides that any attempt by an elector to submit a vote in violation of that pledge effectively constitutes a resignation from the office of elector. The Act provides a mechanism for filling a vacancy created for that reason or any other, with the substituted elector taking a similar pledge. After a full set of faithful elector votes is obtained, the Act further provides that the official notification of the identity of the state’s electors that is required under federal law be officially amended by the Governor, so that the state’s official list of electors contains the names of only faithful electors.

The Act focuses narrowly on the possibility that an elector will break a commitment upon which popular voters were entitled to rely. It explicitly provides that death of a presidential or vice-presidential candidate brings no obligation for an elector to vote for the dead candidate, or, in the case of the death of a presidential candidate, to vote for the vice-presidential running mate. To this time, six states have adopted the UFPEA and approximately 15 others have adopted provisions that require electors to follow the state popular vote. New Jersey has no similar law.

The Commission recommends enactment of the substance of the Uniform Faithful Presidential Electors Act. However, New Jersey is a signatory of the “Agreement Among the States to Elect the President by National Popular Vote”. That Agreement, if it is adopted by states with a majority of electoral votes, requires electors in each state to vote for the candidate who has the majority of popular votes nationally. As a result, the Uniform Law must be adjusted to reflect the Agreement.

In addition, while New Jersey does not have law that addresses the purposes of the Uniform Law, it has statutes that overlap with some of its provisions, so the Appendix identifies which New Jersey statutes are recommended for preservation and which are recommended for repeal.

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<sup>4</sup> *Chiafalo v. Washington*, 140 S.Ct. 2316, 2328-2329 (2020).

<sup>5</sup> *Colorado Department of State v. Baca*, 140 S.Ct. 2316 (2020).

## Appendix

The Commission recommends enactment of the Uniform Faithful Presidential Electors Act with the following proposed changes (additions are indicated by underlining and deletions by ~~strikeout~~). Where the Act calls for the insertion of state-specific references, those references have been included below.

The Commission's recommendation does not affect N.J.S. 19:36-3 Organization, performance of duties or N.J.S. 19:36-4 "Agreement Among the States to Elect the President by National Popular Vote." These sections, which contain the Agreement Among the States to Elect the President by National Popular Vote, are to be preserved.

### SECTION 1. SHORT TITLE

This act may be cited as the Uniform Faithful Presidential Electors Act.

### SECTION 2. DEFINITIONS.

In this act:

- a. "Cast" means accepted by the Secretary of State in accordance with Section 7(b).
- b. "Elector" means an individual selected as a presidential elector under applicable state law and this act.
- c. "President" means President of the United States.
- d. "Vice President" means Vice President of the United States.

### SECTION 3. DESIGNATION OF STATE'S ELECTORS

For each slate of candidates for president and vice president, the political party or committee designated by the candidate for president ~~candidate elector position in this state, a political party contesting the position [, or an unaffiliated presidential candidate,]~~ shall submit to the Secretary of State the names of two qualified individuals for each position as an elector. One of the individuals must be designated "elector nominee" and the other "alternate elector nominee". ~~Except as otherwise provided in Sections 5 through 8, this state's electors are the winning elector nominees under the laws of this state.~~

#### COMMENT

The change from the Uniform law reflects that the candidates for president and vice president, not the electors, are the candidates. The change also provides more simply for situations where a presidential candidate is not part of a political party.

### SECTION 4. PLEDGE

Each elector nominee and alternate elector nominee of a committee or political party shall execute the following pledge: "If selected for the position of elector, I agree to serve and to mark

my ballots for President and Vice President for the nominees for those offices of the committee or party that nominated me.” ~~Each elector nominee and alternate elector nominee of an unaffiliated presidential candidate shall execute the following pledge: “If selected for the position of elector as a nominee of an unaffiliated presidential candidate, I agree to serve and to mark my ballots for that candidate and for that candidate’s vice presidential running mate.”~~ The executed pledges must accompany the submission of the corresponding names to the Secretary of State.

#### COMMENT

The change from the Uniform law provides more simply for situations where a presidential candidate is not part of a political party.

### SECTION 5. CERTIFICATION OF ELECTORS.

In submitting this state’s certificate of ascertainment as required by 3 U.S.C. Section 6, the Governor shall certify this state’s electors and state in the certificate that:

a. the electors will serve as electors unless a vacancy occurs in the office of elector before the end of the meeting at which elector votes are cast, in which case a substitute elector will fill the vacancy; and

b. if a substitute elector is appointed to fill a vacancy, the Governor will submit an amended certificate of ascertainment stating the names on the final list of this state’s electors.

### SECTION 6. PRESIDING OFFICER; ELECTOR VACANCY.

a. The Secretary of State shall preside at the meeting of electors described in Section 7.

b. The position of an elector not present to vote is vacant. The Secretary of State shall appoint an individual as a substitute elector to fill a vacancy as follows:

(1) if the alternate elector is present to vote, by appointing the alternate elector for the vacant position;

(2) if the alternate elector for the vacant position is not present to vote, by appointing an elector chosen by lot from among the alternate electors present to vote who were nominated by the same committee or political party.

(3) if the number of alternate electors present to vote is insufficient to fill any vacant position pursuant to paragraphs (1) and (2), by appointing any immediately available individual who is qualified to serve as an elector and chosen through nomination by and plurality vote of the remaining electors, including nomination and vote by a single elector if only one remains;

(4) if there is a tie between at least two nominees for substitute elector in a vote conducted under paragraph (3), by appointing an elector chosen by lot from among those nominees; or

(5) if all elector positions are vacant and cannot be filled pursuant to paragraphs (1) through (4), by appointing a single presidential elector, with remaining vacant positions to be filled under paragraph (3) and, if necessary, paragraph (4).

c. To qualify as a substitute elector under subsection b., an individual who has not executed the pledge required under Section 4 shall execute the following pledge: "I agree to serve and to mark my ballots for President and Vice President consistent with the pledge of the individual to whose elector position I have succeeded chosen through nomination by and plurality vote of the remaining electors, including nomination and vote by a single elector if only one remains."

d. In any year in which, on July 20, the "Agreement Among the States to Elect the President by National Popular Vote" is in effect in states cumulatively possessing a majority of the electoral votes, and the State of New Jersey remains a member of that agreement, any vacancy in the college of electors shall be filled in accordance with the provisions of section 1 of this act, P.L.2007, c.334 (C.19:36-4).

#### COMMENT

The addition of subsection (d) to the Uniform law is in compliance with New Jersey's existing statutory language including the interstate Agreement Among the States to Elect the President by National Popular Vote

### SECTION 7. ELECTOR VOTING.

a. In any year in which, on July 20, the "Agreement Among the States to Elect the President by National Popular Vote" is in effect in states cumulatively possessing a majority of the electoral votes, and the State of New Jersey remains a member of that agreement, the electors for president and vice president shall be those electors certified as the elector slate in accordance with section 1 of P.L.2007, c.334 (C.19:36-4).

b. At the time designated for elector voting and after all vacant positions have been filled under Section 6, the Secretary of State shall provide each elector with a presidential and a vice-presidential ballot. The elector shall mark the elector's presidential and vice-presidential ballots with the elector's votes for the offices of President and Vice President, respectively, along with the elector's signature and the elector's legibly printed name.

c. Except as otherwise provided by law of this state other than this act, each elector shall present both completed ballots to the Secretary of State, who shall examine the ballots and accept as cast all ballots of electors whose votes are consistent with their pledges executed under Section 4 or 6(c). Except as otherwise provided by law of this state other than this act, the Secretary of State may not accept and may not count either an elector's presidential or vice-presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector's pledge.

d. An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge executed under Section 4 or 6(c) vacates the office of elector, creating a vacant position to be filled under Section 6.

e. The Secretary of State shall distribute ballots to and collect ballots from a substitute elector and repeat the process under this section of examining ballots, declaring and filling vacant positions as required, and recording appropriately completed ballots from the substituted electors, until all of this state's electoral votes have been cast and recorded.

## COMMENT

The addition of subsection a. to the Uniform law reflects New Jersey's existing statutory language including the interstate Agreement Among the States to Elect the President by National Popular Vote. The other subsections have been re-lettered to reflect the addition.

### **SECTION 8. ELECTOR REPLACEMENT; ASSOCIATED CERTIFICATES**

a. After the vote of this state's electors is completed, if the final list of electors differs from any list that the Governor previously included on a certificate of ascertainment prepared and transmitted under 3 U.S.C. Section 6, the Secretary of State immediately shall prepare an amended certificate of ascertainment and transmit it to the Governor for the Governor's signature.

b. The Governor immediately shall deliver the signed amended certificate of ascertainment to the Secretary of State and a signed duplicate original of the amended certificate of ascertainment to all individuals entitled to receive this state's certificate of ascertainment, indicating that the amended certificate of ascertainment is to be substituted for the certificate of ascertainment previously submitted.

c. The Secretary of State shall prepare a certificate of vote. The electors on the final list shall sign the certificate. The Secretary of State shall process and transmit the signed certificate with the amended certificate of ascertainment under 3 U.S.C. Sections 9, 10, and 11.

### ~~**SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION**~~

~~In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.~~

## COMMENT

This section of the Uniform law is not recommended for enactment. The changes made to reflect the interstate Agreement Among the States to Elect the President by National Popular Vote, make the section inappropriate.

In addition to the language shown above, the Commission recommends the following changes to current New Jersey law:

#### **~~19:36-1. Time and place of meeting.~~**

~~The electors of president and vice president shall convene at the State House at Trenton, or in another State building within the State House Complex at Trenton, or the War Memorial at Trenton, on the day appointed by congress for that purpose, at the hour of three o'clock in the afternoon of that day, and constitute an electoral college. In any year in which, on July 20, the "Agreement Among the States to Elect the President by National Popular Vote" is in effect in~~

~~states cumulatively possessing a majority of the electoral votes, and the State of New Jersey remains a member of that agreement, the electors for president and vice president shall be those electors certified as the elector slate in accordance with section 1 of P.L.2007, c.334 (C.19:36-4).~~

#### COMMENT

The first sentence of this section is recommended for deletion as unnecessary. The second sentence is preserved as Subsection 7(a) above.

#### **~~19:36-2. Vacancies; filling.~~**

~~a. When a vacancy shall happen in the college of electors, or when an elector shall fail to attend, by the hour of three o'clock in the afternoon of the day fixed by congress for the meeting of the college of electors, at the place of holding such meeting, those of such electors who shall be assembled at the hour and place shall immediately proceed to fill by a majority of votes such vacancy.~~

~~b. If the members of the electoral college shall have been nominated and elected as representing different political parties, any vacancy occurring shall be filled by the elector or electors representing the same political party as the absent elector; and if there shall be no elector present representing the same political party as the absent elector, then such vacancy shall be filled by a majority of the electors present, who shall choose some person of the political party which the absent elector represents.~~

~~c. Notwithstanding the provisions of subsections a. and b. of this section, in any year in which, on July 20, the "Agreement Among the States to Elect the President by National Popular Vote" is in effect in states cumulatively possessing a majority of the electoral votes, and the State of New Jersey remains a member of that agreement, any vacancy in the college of electors shall be filled in accordance with the provisions of section 1 of this act, P.L.2007, c.334 (C.19:36-4).~~

#### COMMENT

The bulk of this section is replaced by the more specific provisions of the Uniform Law. The substance of subsection c. is preserved in the recommended version of Section 6 shown above.

#### **~~19:13-21. Candidate for Presidential elector.~~**

~~If the nomination vacated is that of a candidate for elector of the President and Vice-President of the United States, the vacancy shall be filled by the committee to whom power shall have been delegated to fill vacancies if such there be, otherwise by the State committee of the political party which nominated the elector whose nomination is vacated. The chairman and secretary of the vacancy committee or State committee shall file with the Secretary of State on or before the 54th day prior to the general election a certificate of nomination for filling the vacancy. This certificate shall be made and filed in the same manner and form as heretofore provided for filling vacancies among candidates nominated at the primary and there shall be annexed thereto the oath of allegiance prescribed in section 41:1-1 of the Revised Statutes duly taken and subscribed by the person so nominated before an officer authorized to take oaths in this State.~~



**COMMENT**

This section is recommended for deletion as unnecessary.

**~~19:14 8.1. Ballots for presidential electors~~**

~~When Presidential Electors are to be elected, their names shall not be printed upon the ballot, either paper or voting machine, but in lieu thereof, the names of the candidates of their respective parties or political bodies for President and Vice President of the United States shall be printed together in pairs under the title "Presidential Electors for." All ballots marked for the candidates for President and Vice President of a party or political body, shall be counted as votes for each candidate for Presidential Elector of such party or political body.~~

**COMMENT**

This section is recommended for deletion as unnecessary.