

TESTIMONY OF REP. LAWRENCE R. KLEMIN  
HOUSE BILL NO. 1078  
SENATE JUDICIARY COMMITTEE  
FEBRUARY 10, 2021

Members of the Senate Judiciary Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here to testify in support of House Bill 1078, which enacts the Uniform Faithful Presidential Electors Act (UFPEA) and also reorganizes and updates the existing North Dakota statutes on presidential electors. I will testify on Section 23 of the bill, which creates Chapter 16.1-14.1, the Uniform Faithful Presidential Electors Act. Secretary of State Jaeger will testify on the rest of the bill.

The U.S. Constitution provides for the election of the President and Vice President by the Electoral College based on the votes cast for those offices in the States. Attached are relevant provisions from the U.S. Constitution relating to electors. Each State is entitled to a number of electors equal to the total number of its Senators and Representatives in Congress. North Dakota is therefore entitled to 3 electoral votes.

Every 4 years after the general election, the electors are required to be chosen in the manner that the Legislature directs. In North Dakota, this means that the party whose candidates for President and Vice President win the popular vote are selected as the electors. North Dakota law then sets out the process by which the electors cast their votes for President and Vice President on a date selected by Congress that is uniform throughout the country. That occurred on Dec. 14. Then the ballots are sealed and sent to Congress to be opened in a joint session of the Senate and the House of Representatives on Jan. 6. The candidates with the most votes by the Electoral College are then elected as President and Vice President.

There is currently nothing in North Dakota law that would prevent an elector from voting contrary to the popular vote in this State. For instance, an elector chosen by one party as a result of the popular vote could decide to cast a vote for the candidates of the party that lost the popular vote.

A number of States have passed legislation requiring an elector to vote for the candidates of the party that won the popular vote in the State. Colorado has such a law, and it was challenged in Court. Last July, the United States Supreme Court unanimously upheld State laws that remove or punish presidential electors who refuse to cast their votes for the candidates they pledged to support. Electors do not have discretion in how they vote. The United States Supreme Court upheld Colorado's adoption of the Uniform Faithful Presidential Electors Act.

I am one of the Commissioners on the North Dakota Commission on Uniform State Laws. After the decision by the United States Supreme Court, the North Dakota Commission decided to introduce the UFPEA here to also require our electors to vote for the candidates whose party won the election in our State. I am also attaching

relevant materials from the Uniform Law Commission, including a summary of the UFPEA and why North Dakota should enact it.

Sections 1 through 22 of House Bill 1078 clarify and reorganize the existing law. Secretary Jaeger will explain these sections in more detail. Section 23 of the bill creates Chapter 16.1-14.1, which is the Uniform Faithful Presidential Electors Act. Each political party contesting the presidential election must submit the names of an elector and alternate elector for each elector position. The State's electors are then the winning elector nominees under the laws of this State.

Each elector nominee and alternate must execute a pledge that says, "If selected for the position of elector, I agree to serve and mark my ballots for president and vice president for the nominees of those offices of the party that nominated me."

The Governor presides at the meeting of the electors where the electors vote and cast their ballots for President and Vice President. The Secretary of State examines the ballots to ensure that the electors have voted consistent with their pledges. If a ballot is blank or if an elector has not voted consistent with his pledge, then that elector position is deemed vacated and a substitute elector takes his place and votes. The Secretary of State certifies the vote, and the ballots are sent to Congress to be included in the vote of the Electoral College.

This process for electing the President and Vice President has been the law of the United States since 1804. House Bill 1078 creates a method for ensuring that electors vote as they have pledged.

I urge your support for HB 1078. Thank you.

## **The Formal Constitutional Process**

Under the Constitution, each state is entitled to a number of electors equal to its total representation in the two houses of Congress. ...

Electors are chosen "in such manner as [each state's] . . . legislature may direct" and every four years they meet in separate state meetings on a date chosen by Congress. That date is constitutionally required to be uniform throughout the country. *See* U.S. CONST., Art. II, § 1, cls. 2 & 3, Am. XXIII. At those state meetings the electors choose the nation's president and vice president.

## **US Constitution Article 2 Section 1 (in part) The Executive**

The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

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.

## **ARTICLES OF AMENDMENT**

### **ARTICLE 12**

**The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves. They shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which lists they**



shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president. A quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

**Source:**

**Proposed by Congress on December 12, 1803; declared to have been ratified by the legislatures of three-fourths of the states on September 25, 1804.**





## UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT

### *Summary*

Almost all presidential electors in this country's history have voted for their parties' candidates, but in a few incidents electors have not voted as directed by the party. 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. In several elections where close Electoral College votes seemed possible (but did not come about), campaigns have made plans to court faithlessness, and some electors have contemplated voting faithlessly.

The **Uniform Faithful Presidential Electors Act** addresses the problem of elector who decides to vote inconsistently with the way they were elected to vote by the people of the state. The UFPEA 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 process.

The emergence of political parties, the designation by those parties of presidential and vice-presidential candidates, and the parties' nomination of presidential electors in each state who it was assumed would vote for the parties' presidential and vice-presidential candidates has created dissonance between what the Constitution envisaged and the realities of the electoral process. In many states the ballot contains no mention of a role for electors at all. Instead, the names of candidates for president and vice president appear on the ballots, accompanied by political party designation. Votes for these candidates are then turned by state law into votes for electors. Even where ballots do make some mention of electors, the names of presidential and vice-presidential candidates appear and are typically given greater prominence. To all appearances voters are thus casting ballots directly for presidential and vice-presidential candidates. That is surely the working assumption of the overwhelming preponderance of the voters in the country, even if some of them — perhaps even many — appreciate that the eventual winner is determined by the electoral vote count.

In the contemporary electoral context, faithless votes hold the potential for great mischief, producing a president or vice-president (or both) other than those for whom voters were led to believe they were casting their votes. In order to address electoral mischief, approximately thirty states have taken some action to discourage or forbid faithless electoral votes. Some employ pledges of faithfulness, administered in some cases by political parties and in other cases as part of the ballot qualification process. Others forbid faithlessness, some with civil, or even criminal penalties. And some provide that faithless voting constitutes resignation from the office of elector.

The variation in state laws opens up the possibility for disputes about whether a faithless vote is to be counted, and also whether a faithful vote might be substituted for it. Different conclusions might be reached under different state laws, and there might be further dispute about the consequences of one resolution or another for the number of appointed electors — the base across the country for determining the required majority. These various potential sources of discord and confusion argue strongly in favor of a uniform law adopted by every state that would forbid or nullify elector faithlessness and assure that each state submits an electoral vote count that reflects faithful voting.

The UFPEA proposes a state-administered pledge of faithfulness, with any attempt by an elector to submit a vote in violation of that pledge effectively constituting 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 uniform law 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.

Additionally, the Act focuses narrowly on the possibility that an elector will break a commitment upon which popular voters were entitled to rely. Thus 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.

The possibility of later substitution is central to the Uniform Act's approach to the problem of elector faithlessness, and for that reason Section 5 of the Act instructs the state executive to make explicit in the certificate of ascertainment that later substitution is possible and that where it has proved necessary a later amended certificate of ascertainment will be provided with a revised list of the state's electors. Section 8 then provides for submission of any amended certificate of ascertainment that proves necessary.

The Act addresses a problem that, in practice, may only rarely arise but has the potential to inflict great harm to our electoral process. Uniform adoption of the Act will assure that the solution is consistent among the states, foreclosing attempts to "peel off" electors and helping states to secure their full complements of electoral votes.

For further information about the UFPEA, please contact ULC Legislative Program Director Katie Robinson at (312) 450-6600 or [krobinson@uniformlaws.org](mailto:krobinson@uniformlaws.org).





# Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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## WHY YOUR STATE SHOULD ADOPT THE UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT

In 2010, the Uniform Law Commission (ULC) approved the **Uniform Faithful Presidential Electors Act (UFPEA)**, to address the rare but historically persistent problem of presidential electors who do not adhere to their obligation to vote faithfully for their parties' candidates. Many states have enacted provisions to deal with "faithless" electors or to ensure that those selected discharge their duty faithfully – however, the solutions vary, and conflicting results or discounted votes could cause confusion or an indecisive outcome in the Electoral College.

Moreover, the United States Supreme Court unanimously upheld in *Chiafalo v. Washington*, 591 U.S. \_\_\_\_ (2020), state laws that remove or punish rogue presidential electors who refuse to cast their votes for the presidential candidate they pledged to support. In *Colorado Department of State v. Baca*, 591 U.S. \_\_\_\_ (2020), decided the same day as *Chiafalo*, the U.S. Supreme Court reversed a Tenth Circuit opinion that had declared Colorado's adoption of the UFPEA to be an unconstitutional limit on elector discretion.

In other words, the Supreme Court has made clear that states have the authority to bind their electors to the candidates they have pledged to support. By enacting legislation like UFPEA, states assure citizens that their votes will not be overridden by a single elector and protects the country from the chaos that would ensue if a handful of electors could negate the will of the voters.

The UFPEA provides an effective remedy to prevent the potential harm from faithless elector voting. Some important reasons why your state should adopt the UFPEA include:

- **UFPEA provides the voters of the state with the confidence** that the votes they have cast will be honored when the Electoral College meets to decide the outcome of presidential elections.
- **UFPEA prevents parties and candidates from engaging in nefarious behavior** such as the courtship of faithless electors in close or particularly charged election in order to sway the outcome in favor of one candidate.
- **UFPEA creates a relatively simple process** by which electors commit to vote as the popular will and the parties they represent intend.
- **UFPEA prevents the potentially damaging consequences of rogue elector voting.**
- **UFPEA ensures the orderly operation of states' Electoral College voting** and protecting the will of the people as expressed by the underlying election.

For further information about UFPEA please contact Lindsay Beaver, Legislative Counsel at [lbeaver@uniformlaws.org](mailto:lbeaver@uniformlaws.org), or Katie Robinson, Legislative Program Director & Communications Officer at [krobinson@uniformlaws.org](mailto:krobinson@uniformlaws.org).

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.