

Date of Hearing: June 29, 2022

ASSEMBLY COMMITTEE ON ELECTIONS

Isaac G. Bryan, Chair

SB 103 (Dodd) – As Amended March 16, 2021

SENATE VOTE: 38-0

SUBJECT: Uniform Faithful Presidential Electors Act.

SUMMARY: Enacts the Uniform Faithful Presidential Electors Act (Act), which provides for the automatic replacement of any presidential elector who does not cast their electoral vote for the candidates for President and Vice President that the elector is pledged to support.

Specifically, **this bill:**

- 1) Requires each political party to nominate an alternate elector for each presidential elector nominated by that political party, as specified.
- 2) Requires an Independent candidate or write-in candidate for presidential elector, when that person files a declaration of candidacy, to include a declaration of an individual who will serve as an alternate elector, and requires that declaration to contain substantially the same information as required in the declaration of candidacy for the candidate, as specified.
- 3) Enacts the Act, which does all of the following:
 - a) Requires, for each elector position in this state, that a political party contesting the position, or an unaffiliated presidential candidate, submit to the Secretary of State (SOS) the names of an elector nominee and an alternate elector nominee.
 - b) Requires each elector nominee and alternate elector nominee to execute a pledge and requires the executed pledge to be submitted to the SOS at the same time that the names of the nominees are submitted to the SOS. Requires the pledge to read as follows:
 - i) In the case of a nominee of a political party: “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 party that nominated me.”
 - ii) In the case of a nominee of an unaffiliated presidential candidate: “If selected for the position of elector as a nominee of an unaffiliated presidential candidate, I agree to serve and mark my ballots for that candidate and for that candidate’s vice presidential running mate.”
 - c) Provides that if a candidate for President or Vice President dies or withdraws after being nominated but before the meeting of electors, the pledge described above applies to the following:
 - i) In the case of a candidate for President or Vice President nominated by a political party, the successor candidate for that office nominated by the political party in

- accordance with the party's rules.
- ii) In the case of an unaffiliated candidate for President or Vice President, the successor candidate for that office nominated by the group of elector nominees of the candidate.
- d) Requires the Governor, when submitting the state's certificate of ascertainment to the United States (US) Archivist as required by federal law, to certify the state's electors, as specified. Requires the Governor to submit an amended certificate of ascertainment stating the names on the final list of the state's electors if a substitute elector is appointed to fill a vacancy in the position of elector.
- e) Requires the SOS to preside over the meeting of electors. Provides that the position of any elector who is not present to vote at the meeting of electors is vacant, and requires the SOS to appoint an individual as a substitute elector to fill that vacancy as follows:
- i) If the alternate elector for the vacant position is present to vote, by appointing that alternate.
 - ii) If the alternate elector is not present to vote, by appointing an elector chosen by lot from among the other alternate electors present to vote.
 - iii) If there are no alternate electors present to vote, by appointing any immediately available individual who is qualified to serve as an elector and chosen by a plurality vote of the remaining electors, as specified.
 - iv) If all elector and alternate elector positions are vacant, by appointing a single presidential elector, who may select other qualified individuals to serve as electors, as specified.
 - v) Requires a substitute elector who is appointed pursuant to these provisions and who was not previously an alternate to 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."
- f) Requires electors, at the time designated for elector voting and after all vacant positions have been filled, to cast their ballots for President and Vice President using the following procedure:
- i) Requires the SOS to provide each elector with a presidential and vice presidential ballot, and requires each elector to mark those ballots with the elector's votes, sign and print the elector's name on the ballots, and present the ballots to the SOS, as specified.
 - ii) Requires the SOS to examine the presented ballots and accept as cast all ballots of electors whose votes are consistent with their pledges. Requires the SOS to reject an elector's ballots if the elector has not marked both ballots or has marked a ballot in violation of the elector's pledge, as specified.

- iii) Provides that an elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge vacates the office of elector, thereby creating a vacancy that is filled in accordance with the provisions detailed above. Requires the SOS, in such a situation, to distribute ballots to and collect ballots from a substitute elector and repeat the process of examining ballots, declaring and filling vacant positions as required, and recording appropriately completed ballots from the substituted electors, until all of the state's electoral votes have been cast and recorded.
 - g) Requires the SOS, after the vote of the state's electors is complete, to prepare an amended certificate of ascertainment and transmit it to the Governor for the Governor's signature if the final list of electors differs from any list that the Governor previously included on a certificate of ascertainment, as specified. Requires the Governor to immediately deliver the signed amended certificate of ascertainment to the SOS and to all other individuals entitled to receive the certificate, as specified. Requires the SOS to prepare a certificate of the vote of the electors and to transmit it in accordance with federal law.
- 4) Provides that alternate electors receive the same compensation as electors.
 - 5) Provides that criminal penalties that apply under existing law for a person who fails to perform a duty imposed by state law relating to elections do not apply to the provisions of state law relating to the meeting of electors and elector voting.
 - 6) Makes technical, corresponding, and conforming changes.

EXISTING STATE LAW:

- 1) Provides that the voters choose the state's presidential electors.
- 2) Requires each political party to submit to the SOS a certified list of its nominated candidates to serve as presidential electors, as specified. Requires the names of the candidates for President and Vice President nominated by each party to be printed on the ballot instead of the names of the political party's elector nominees.
- 3) Provides that a presidential elector candidate may be nominated by a means other than a primary election. Provides that a group of candidates for presidential electors, equal in number to the number of presidential electors to which this state is entitled, may file a nomination paper with the SOS that names the candidates for President and Vice President that the group pledges to vote for, as specified. Requires the names of the candidates for President and Vice President that the group pledged to vote for to be printed on the ballot instead of the names of the candidates for presidential elector.
- 4) Provides that a group of individuals, equal in number to the number of presidential electors to which this state is entitled, may file a declaration of write-in candidacy for presidential electors with the SOS that names the candidates for President and Vice President that the group pledges to vote for, as specified. Provides that only those write-in votes naming candidates for President and Vice President that a qualifying group pledged to vote for shall be counted.

- 5) Requires the SOS, no later than the 32nd day following the presidential general election, to analyze the votes given for presidential electors and certify to the Governor the names of the proper number of persons having the highest number of votes. Requires the SOS to issue and transmit to each presidential elector a certificate of election accompanied by a notice of the time and place of the meeting of the presidential electors.
- 6) Requires the elected presidential electors to assemble at the State Capitol at 2:00 PM on the first Monday after the second Wednesday in December following their election to vote, by separate ballot, for President and Vice President.
- 7) Provides that, if an elector dies or is absent, the remaining electors shall elect a citizen of this state as a replacement elector.
- 8) Requires the electors to vote for the nominees for President and Vice President of the political party that the electors represent, if both candidates are alive.
- 9) Provides that each presidential elector shall receive \$10 and mileage compensation for the elector's services, as specified.
- 10) Provides, generally, that a person who willfully neglects or refuses to perform a duty imposed upon them by a state law relating to elections, or who in the person's official capacity knowingly and fraudulently acts in violation or contravention of those laws, is guilty of a crime punishable by a fine of up to \$1,000, imprisonment for up to three years, or both.

EXISTING FEDERAL LAW:

- 1) Establishes the Electoral College, which consists of presidential electors from each state who meet in their respective states every four years to elect the President and Vice President of the US.
- 2) Requires each state to appoint, in a manner that the legislature of the state directs, a number of presidential electors equal to the number of Senators and Representatives to which the state is entitled in Congress.
- 3) Requires each state to appoint its presidential electors on the first Tuesday after the first Monday in November in every fourth year succeeding every election of a President and Vice President.
- 4) Requires presidential electors to meet by state and to vote by separate ballot for President and Vice President on the first Monday after the second Wednesday in December following their appointment and to then submit those votes to the President of the Senate to be counted at a joint session of Congress, as specified.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS:1) **Purpose of the Bill:** According to the author:

The 2020 presidential election brought into sharp focus the ways in which the Electoral College system could potentially be manipulated by so called “faithless electors.” Faithless electors are presidential electors who do not adhere to their obligation to vote faithfully for their parties’ candidates and in doing so, threaten the underpinnings of our democracy. While 33 states and the District of Columbia have laws requiring electors to uphold their voting pledges, many do not have any enforcement mechanism and a majority have no way to make sure electors faithfully comply, including California. SB 103 will ensure the state’s presidential electors cast ballots for candidates who won the popular vote and do not instead switch candidates or abstain from voting.

2) **The Electoral College and the Popular Election of Presidential Electors:** When Californians mark their ballots for President and Vice President, they actually are casting their votes for a slate of presidential elector candidates selected by the political party that nominated that presidential ticket (or, in the case of an independent presidential ticket not affiliated with a political party, for a slate of elector candidates that has pledged to vote for that ticket). This is because the voters do not directly elect the President and Vice President; instead, the US Constitution requires each state to appoint electors who have the responsibility of choosing the President and Vice President. Each state is allocated a number of electors equal to the number of Senators and Representatives that the state is entitled to in Congress. As a body, the electors chosen by each state are referred to as the “Electoral College.”

Electors convene by state, vote for President and Vice President on separate ballots, then submit their votes to Congress, where the votes are counted in a joint session of Congress. If a candidate for President or Vice President receives a majority of the Electoral College vote, that person is elected. Currently, there are 538 electors, so a minimum of 270 votes is required to elect a President and Vice President.

Section 1 of Article II of the US Constitution provides, in part, that “[e]ach 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 Congress...” In the country’s first few elections, most state legislatures directly appointed the electors who represented the state. By 1832, however, all but one state had abandoned legislative appointments in favor of allowing their voters to directly elect presidential electors. Initially, voters picked between competing slates of elector candidates nominated by each political party with the understanding that the winning slate would vote for its own party’s presidential ticket. By the early 20th century, most states dropped the names of the elector candidates from the ballot and instead listed only the names of the presidential and vice-presidential nominees for each party. In this way, a vote for a presidential ticket became a vote for that party’s slate of elector candidates, although the typical voter would not know who those electors were. In California, the names of presidential electors appeared on the ballot through the 1936 presidential election; AB 584 (Heisinger and Richie), Chapter 266, Statutes of 1937, amended state law to provide that the names of candidates for presidential

elector would not appear on the ballot if the candidate for presidential elector was pledged to support a particular Presidential and Vice Presidential ticket.

In accordance with that authority granted to the state legislatures, California and 47 other states (along with the District of Columbia) have chosen to award all electoral votes to the Presidential ticket that receives the greatest number of votes in the state (or in the District). Two states, Maine and Nebraska, have chosen to award one electoral vote to the Presidential ticket that receives the greatest number of votes in each Congressional district in the state, and two electoral votes to the Presidential ticket that receives the greatest number of votes in the state.

- 3) **Faithless Electors:** There is no federal requirement that presidential electors vote according to their party's (or their state's voters') wishes. Because parties have a strong incentive to vet their elector nominees, however, so-called "faithless electors" who abstain or vote for someone other than their party's presidential ticket have been a rarity in American history. Over 59 presidential elections, with more than 24,000 electoral votes cast, only 90 electors did not vote for their party's presidential nominee and 75 electors (often the same electors) did not vote for their party's vice presidential nominee.

According to an analysis of faithless electors' presidential votes by FairVote, "more than two-thirds of deviant votes (63) were due to the death of the party's nominee. Of the remaining 27 deviant votes, 24 were cast for another candidate, 3 of which were cancelled or retracted due to the operation of state law; and only one cast for the opposite party's nominee in a close election. The final three deviant votes consist of one abstention, one abnormal vote (switching the presidential and vice presidential nominees) and one apparent accident."

Since 2000, there were no faithless electors in 2020, ten in 2016, none in 2012 or 2008, and one each in 2004 and 2000. To date, no California elector has voted against the presidential ticket that won the state's popular vote.

While faithless votes therefore represent a tiny percentage of overall electoral votes, in a particularly close contest even a small number of elector defections could undo the will of millions of voters. So far, faithless electors have never changed the outcome of a presidential election, but on one occasion did force the Senate to decide a vice presidential election. In 1836, Democratic electors from Virginia voted for their party's presidential nominee, Martin Van Buren, but refused to vote for his vice presidential running mate, Richard Mentor Johnson. Van Buren was elected President by a majority of the Electoral College but, because of Virginia's faithless electors, Johnson fell short of the majority needed to be elected Vice President outright. However, when the decision moved to the Senate, that body selected him to be Vice President on a party-line vote.

- 4) **State Laws Requiring Faithful Voting:** To address the risk posed by faithless electors, and to protect the effectiveness of their citizens' votes for President, a majority of states have passed laws requiring presidential electors to vote for their party's presidential ticket. According to an analysis by FairVote, 33 states (plus the District of Columbia) require an elector to vote for their party's nominee. These laws are of three general types:

Pledge States: Most states (16 plus the District of Columbia) require that electors vote for their party's nominee but do not provide for any penalty or any mechanism to prevent an

elector from casting a faithless vote. Most commonly, these states only require elector nominees to pledge to vote for their party's nominee.

Penalty States: By contrast, five states, including California, penalize an elector for voting against their party's presidential ticket, which may include a fine or imprisonment.

Removal States: Fourteen states prevent faithless voting from occurring by automatically cancelling an attempted deviant vote and by removing the faithless elector and replacing them with a substitute elector, the general approach proposed in this bill.

(Hybrid States: Two states both penalize and remove faithless electors.)

This bill would repeal penalties for faithless voting, and instead enact the Act, which provides for the removal and replacement of faithless electors. The Act is a model law, drafted by the Uniform Law Commission, which has been adopted by seven states to date: Indiana, Minnesota, Montana, Nebraska, Nevada, North Dakota, and Washington.

Under the Act as proposed in this bill, each political party (and independent presidential campaign) must designate an alternate for each of its presidential elector nominees. Those nominees and alternates must pledge to support their party's nominee (or the independent presidential ticket). After the election, the winning presidential electors and their alternates assemble at the State Capitol at a meeting presided over by the SOS. Before an elector's presidential and vice presidential ballots are accepted, the elector must present them to the SOS. If they are consistent with the elector's pledge, the ballots are accepted. If not, the ballots are rejected, and the elector is immediately replaced with that elector's alternate, or, in some cases, a different substitute elector as specified. This process continues, with faithless electors being replaced, until all of the state's electoral votes have successfully been cast. The practical effect of the Act is to prevent a presidential elector from successfully casting a faithless vote.

- 5) **Constitutionality of Faithless Elector Laws:** In 2020, the US Supreme Court upheld two state law approaches to deterring or preventing faithless voting, including one similar to current California law and one similar to this bill. In *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), the Supreme Court upheld a Washington law fining presidential electors up to \$1,000 for violating a pledge to support their party's nominee. The plaintiffs, three faithless electors from the 2016 election, argued that the Constitution guarantees electors the freedom to vote for whomever they want. The Court disagreed, holding that the text and history of the Constitution gives "States broad power over electors, and give electors themselves no rights." In particular, Article II of the Constitution provides that state legislatures decide the "manner" in which electors are appointed, which includes the power to place conditions on that appointment like a requirement that they vote for their party's nominee or face a penalty. In a companion case to *Chiafalo*, *Colorado Department of State v. Baca*, 140 S. Ct. 2316 (2020), the Court also upheld the constitutionality of a Colorado law which automatically nullified a faithless elector's vote and replaced them with an alternate elector, similar to what this bill proposes. Rather than provide a separate analysis, the Court cited its reasoning in *Chiafalo* to justify its holding.

Prior to the Supreme Court's decisions in *Chiafalo* and *Colorado Department of State*, a California presidential elector challenged the constitutionality of California's laws that

penalize an elector for voting against their party's presidential ticket. In that case, which was filed 10 days before the meeting of the presidential electors following the 2016 presidential election, Vinzenz Koller sought an order from the US District Court for the Northern District of California declaring that California's laws providing penalties for faithless electors was unconstitutional under the US Constitution, and enjoining various California officials from prosecuting any presidential elector on the basis of the elector's vote placed for a presidential or vice presidential candidate. That case ultimately was dismissed on procedural grounds, and the Court did not rule on the constitutionality of California's laws as they relate to faithless electors.

- 6) **National Popular Vote:** In 2011, the Legislature approved and Governor Brown signed AB 459 (Hill), Chapter 188, Statutes of 2011, pursuant to which the state ratified the Agreement Among the States to Elect the President by National Popular Vote, popularly known as the National Popular Vote Interstate Compact (compact). Under the compact, each signatory state agrees to award all its Electoral College votes to the presidential ticket that wins the national popular vote, regardless of whether that ticket also won the popular vote in that state. The compact only goes into effect once states cumulatively possessing a majority of the Electoral College vote have signed on. In this way, the compact ensures that the winner of the national popular vote will also win the Electoral College vote that decides the presidency. According to the organization National Popular Vote, a nonprofit organization that advocates for the approval of the compact, 15 states and the District of Columbia have ratified the compact, possessing 195 out of the 270 necessary electoral votes.

The Act does not conflict with the compact, should it go into effect. The Act binds presidential electors to voting for the presidential ticket that they have pledged to support as candidates, but it does not determine which slate of electors are selected to represent a state. With the compact activated, California would be required to select the slate of elector candidates pledged to the presidential ticket that won the national popular vote, regardless of state returns. The Act would then ensure those electors voted faithfully for that ticket.

- 7) **Arguments in Support:** The sponsor of this bill—the California Commission on Uniform State Laws—writes in support:

Existing California law provides for the nomination of electors of President and Vice President of the United States by the political parties. Those electors assemble in the State Capitol in December following a presidential election and cast electoral ballots for the President and Vice President who are the candidates of the political party that nominated the electors. If an elector in California willfully neglects or refuses to perform these duties, or knowingly and fraudulently acts in violation of these duties, the elector is subject to a fine, imprisonment, or both. But, that elector's rogue vote is still counted.

Senate Bill 103 would change existing California law to ensure that faithless electors are replaced rather than merely punished. The bill would require each political party to specify alternate electors in addition to their elector nominees. Electors and alternate electors would be required to execute a pledge promising to cast their electoral ballots for the presidential and vice-presidential candidates to whom they are pledged. If an elector casts a ballot in violation of the pledge, the elector's position would be vacated automatically.

REGISTERED SUPPORT / OPPOSITION:

Support

California Commission on Uniform State Laws (sponsor)
Conference of California Bar Associations

Opposition

None on file.

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