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# PATH TO A POPULAR VOTE: THE IMPACT OF STATE FAITHLESS ELECTOR STATUTES ON THE NATIONAL POPULAR VOTE PLAN

Laura LaBrecque\*

## INTRODUCTION

Desire to reform the Electoral College is not at all novel, nor is the debate over the correct way to do so. Since its inception as one of the most significant compromises to come out of the Constitutional Convention, the Electoral College has been consistently challenged by politicians, scholars, and the American people.<sup>1</sup> As the United States has become even more polarized, and after two presidential elections in recent memory, in 2000 and 2016, when the winner of the Electoral College did not win the popular vote, outcries for Electoral College reform remain as fervent as ever.<sup>2</sup>

One effort to change the Electoral College is the National Popular Vote Plan, an agreement between states to install a national popular vote without constitutional amendment; once enough states join for the plan to become effective, states' electors will cast their ballots for the national popular vote winner regardless of the vote leader in their state.<sup>3</sup> The plan purports to solve the issues inherent in the winner-take-all Electoral College system, where votes cast in different states have an unequal impact, states yield different levels of power in the presidential election, and presidential candidates need only focus their

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1. See Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 427 (2008).

2. See, e.g., Jamelle Bouie, Opinion, *Getting Rid of the Electoral College Isn't Just About Trump*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/opinion/electoral-college-warren-trump.html>.

3. Robb, *supra* note 1, at 453–55. Throughout this Note, I will use the term “Electors” to mean members of the Electoral College.

campaign efforts on certain parts of the country.<sup>4</sup> Because the plan does not replace the Electoral College, though, and rather utilizes members of the Electoral College who vote for the national popular vote winner, the plan by itself does not solve all issues with the Electoral College.<sup>5</sup>

Notably, the National Popular Vote Plan could be complicated by the recent uptick in “faithless Electors.” While faithless Electors, who vote for a presidential candidate other than the winner of the popular vote in their state for various reasons, have not yet impacted a presidential election, these Electors have the ability to completely undermine the plan by voting for someone other than the national popular vote winner.<sup>6</sup> To combat faithless Electors, states have enacted laws attempting to bind their Electors into voting for the popular vote winner in the state.<sup>7</sup> These Elector-binding statutes could ensure the effectiveness of the National Popular Vote Plan.

The recent Supreme Court decision in *Chiafalo v. Washington*<sup>8</sup> established that states can enforce their Elector-binding statutes to ensure faithful votes.<sup>9</sup> This Note provides a new categorization of the state Elector-binding statutes, focusing on the statutes’ enforcement mechanisms to determine which types of statutes would most effectively ensure that the National Popular Vote Plan works. The statutes are divided into three types: “Honor System” statutes that either merely state that the Elector must vote for the candidate who wins the popular vote in the state or require the Elector to take a pledge to that effect;<sup>10</sup> “Replacement” statutes, which mandate that if the Elector votes for someone other than the candidate who wins the popular vote, the Elector will be replaced;<sup>11</sup> and “Penalty” statutes that

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4. JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 11 (4th ed. 2013), <http://www.every-vote-equal.com/sites/default/files/everyvoteequal-4th-ed-2013-02-21.pdf>.

5. *Id.* at xxxviii (“The concept has too often been referred to by opponents as a ‘partisan’ or even ‘liberal’ effort to eliminate the Electoral College in an attempt to tarnish the issue and scare away those of us on the right side of the political spectrum. But this description could not be further from the truth.”).

6. Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. UNIV. L. REV. 121, 130 (2006).

7. See *infra* Part III and Appendix A.

8. 140 S. Ct. 2316 (2020).

9. *Id.* at 2320.

10. See Appendix A, Table 1.

11. See Appendix A, Table 2.

impose a penalty on Electors for voting for someone other than the candidate who wins the popular vote in the state.<sup>12</sup>

This Note argues that states should enact Elector-binding statutes that require the replacement of Electors who vote faithlessly. Additionally, this Note contends that regardless of whether the National Popular Vote Plan were enacted, the enforceability of state Elector-binding statutes allows states to remove political parties from the process of appointing Electors.

Part I of this Note presents background information on the National Popular Vote Plan and the history of faithless votes in the Electoral College. Part II then describes the three Supreme Court decisions that establish the constitutionality of state Elector-binding statutes and their enforcement, *McPherson v. Blacker*,<sup>13</sup> *Ray v. Blair*,<sup>14</sup> and *Chiafalo v. Washington*. Part III provides a new categorization of state Elector-binding statutes, charted in Appendices A and B. Finally, Part IV considers the implications of the *Chiafalo* decision on the National Popular Vote Plan's effectiveness, analyzes which types of state Elector-binding statutes would best allow the National Popular Vote Plan to work, and considers whether political parties need be included in state Elector appointment.

## I. BACKGROUND

### A. *The National Popular Vote Plan*

In the mid to late 1900s, Congress repeatedly attempted to reform the Electoral College through constitutional amendment, but the barriers to amending the Constitution proved too strong.<sup>15</sup> Given the unlikelihood of amendment, toward the end of the century, momentum towards changing or abolishing the Electoral College all but died.<sup>16</sup> However, following the incredibly close 2000 presidential election, which marked the fourth time in American history that the winner of

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12. See Appendix A, Table 3.

13. 146 U.S. 1 (1892).

14. 343 U.S. 214 (1952).

15. THOMAS H. NEALE & ANDREW NOLAN, CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 4 (2019).

16. See Robb, *supra* note 1, at 452.

the presidential election did not win the popular vote, the movement resurged.<sup>17</sup>

As a direct result of the rising frustrations with the Electoral College, and in an attempt to circumvent the challenging constitutional amendment process, three law professors created the National Popular Vote Plan (NPV).<sup>18</sup> The NPV does not eliminate the Electoral College, but seeks to take advantage of the states' constitutional power to appoint Electors "in such Manner as the Legislature thereof may direct."<sup>19</sup> Under the NPV, individual state legislatures adopt the "Agreement Among the States to Elect the President by National Popular Vote," which prescribes that the state shall award all of its Electoral votes to the presidential candidate who wins the national popular vote.<sup>20</sup> The individual state statutes then only take effect when enough states join the plan to ensure the national popular vote winner will have the requisite 270 Electoral votes.<sup>21</sup> At present, the NPV has been adopted by fifteen states and the District of Columbia, for a total of 195 Electoral votes.<sup>22</sup> Appendix B following this Note contains a table listing which states have adopted the NPV thus far.<sup>23</sup>

In the event that a sufficient number of states join the NPV such that it is enacted, the mechanics of the plan, as enacted by the member

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17. NEALE & NOLAN, *supra* note 15, at 5, 15. The first time the winner of the presidential election did not win the popular vote was the election of 1824, where Andrew Jackson secured a plurality of the votes, but John Quincy Adams won the Electoral College. Jerry Schwartz, *Explainer: They Lost the Popular Vote but Won the Elections*, ASSOCIATED PRESS (Oct. 31, 2020), <https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb>. The next time this occurred was in the election of 1876. *Id.* Rutherford B. Hayes won the Electoral College, leaving Samuel Tilden with the popular vote win just shy of the requisite number of Electoral votes to win the presidency. *Id.* The election of 1888 marked the third time, when Grover Cleveland won the popular vote over Benjamin Harrison, with Harrison securing the Electoral College victory (Grover Cleveland would, of course, go on to win the next election for his second term). *See id.* The fourth and fifth times the winner of the Electoral College did not win the popular vote were in the contested elections of 2000 and 2016, where George W. Bush and Donald Trump, respectively, secured the presidency. *Id.*

18. NEALE & NOLAN, *supra* note 15, at 6.

19. U.S. CONST. art. II, § 1, cl. 2; KOZA ET AL., *supra* note 4, at 258.

20. KOZA ET AL., *supra* note 4, at 259 ("The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.").

21. *Id.* ("This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.").

22. *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/state-status> (last visited Mar. 29, 2021).

23. *See* Appendix B.

states thus far, are fairly simple.<sup>24</sup> Each state in the NPV would conduct an ordinary statewide election for President and Vice President.<sup>25</sup> Then, before all Electors meet in their respective states to cast their votes, the “chief election official” in each member state, typically the state’s Secretary of State or similar official, must determine the winner of the popular vote in the state and ultimately communicate that to the other member states.<sup>26</sup> The national popular vote total encompasses the popular votes of all fifty states and the District of Columbia, regardless of whether the jurisdiction has enacted the NPV.<sup>27</sup> In the count of Electoral votes by Congress, all of each member state’s Electoral votes would be allocated to the national popular vote winner.<sup>28</sup> The text of the NPV includes provisions which apply in cases of a national popular vote tie or where states have an unequal number of nominated Electors to Electoral votes in the state.<sup>29</sup> Lastly, the NPV provides that states may withdraw from the agreement at any time, but, to protect against strategically timed withdrawals, if a state withdraws after July 20 of the election year, the withdrawal does not become effective until after the next president is inaugurated.<sup>30</sup>

Proponents of the NPV argue that the plan would solve the most significant shortcomings of the current Electoral College system of electing the President and Vice President.<sup>31</sup> Specifically, the plan’s creators and advocates argue that, in addition to reflecting the national popular vote, adoption of the NPV would make every state relevant to presidential elections.<sup>32</sup> Under the current winner-take-all system for Electoral votes, presidential candidates are disincentivized from

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24. In the fifteen states and the District of Columbia where the NPV has been enacted, the states have adopted the text of the “Agreement Among the States to Elect the President by National Popular Vote” verbatim. *See* Appendix B; *see, e.g.*, CAL. ELEC. CODE § 6921 (Deering 2021). The NPV Agreement itself requires the member states to enact the Agreement in “substantially the same form.” KOZA ET AL., *supra* note 4, at 259.

25. KOZA ET AL., *supra* note 4, at 259.

26. *Id.* at 259, 263.

27. *Id.* at 263.

28. *Id.* at 259.

29. In the event of a national popular vote tie, the Electors of a state would vote for the popular vote winner in that state. *Id.* If the number of Electors in a state is less than or greater than the number of the state’s Electoral votes, the national popular vote winner nominates additional Electors as needed. *Id.*

30. *Id.*

31. *Id.* at 1.

32. *Id.* at 255.

campaigning in states in which they will easily win or convincingly lose.<sup>33</sup> Thus, voters in non-“battleground” states are “effectively disenfranchised.”<sup>34</sup> Additionally, NPV creators and advocates claim the plan would make votes in every state “equal,” solving the current issue where voters’ votes have disparate importance depending on where voters are located.<sup>35</sup> Voters in small states have a greater ability to influence Electoral College votes than voters in larger states.<sup>36</sup> Enaction of the NPV, according to its proponents, would make every single state in the United States relevant to the presidential election, and every vote would count equally.<sup>37</sup>

Opponents of the NPV believe the plan violates both the text of the Constitution and the Founders’ intent. Critics argue that the NPV is unconstitutional on its face in two central ways. First, opponents argue it violates the Compact Clause of Article I, Section 10, which forbids states from entering into interstate agreements without Congress’s consent.<sup>38</sup> Critics contend the NPV would be considered a “compact” requiring congressional approval because it “would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States” or “impairs the sovereign rights of nonmember states.”<sup>39</sup> It is quite unlikely that Congress would approve the plan, as smaller states and swing states that reap the benefits of the lopsided Electoral College system in presidential elections would defeat it.<sup>40</sup>

Second, opponents argue that the NPV is unconstitutional because it “exceeds the states’ constitutionally delegated authority” under Article II, Section 1 of the U.S. Constitution.<sup>41</sup> These critics of the NPV view that section’s grant of power to the states to appoint

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33. *Id.* at 11.

34. *Id.* at 12.

35. *Id.* at 51.

36. *Id.* at 55.

37. *Id.* at 53.

38. Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523, 1539.

39. William G. Ross, *Popular Vote Compact: Fraught with Constitutional Perils*, JURIST (Feb. 28, 2012, 1:00 PM), <https://www.jurist.org/commentary/2012/02/william-ross-vote-compact/> (quoting *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472, 477 (1978)).

40. See David Gringer, Note, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 222 (2008) (“[The Electoral College’s] defenders often assert that without the electoral college, small states would ‘have no voting clout at all.’”).

41. Williams, *supra* note 38, at 1583.

their presidential Electors as limited in scope to that power alone.<sup>42</sup> They conclude that because the U.S. Constitution does not explicitly grant states the power to select Electors based on the national popular vote, and states' Electors have not historically voted in accordance with the national popular vote, the state power to appoint is a mere formality.<sup>43</sup>

Moreover, opponents believe the NPV is contrary to the Framers' intent in creating the Electoral College and thus a non-majoritarian democracy.<sup>44</sup> The Framers "expressly rejected" popular election of the President in order to protect smaller states' interests.<sup>45</sup> Because the Framers viewed the presidential Electors as "guardians possessing great wisdom, exhibiting superior character, and exercising independent judgment," opponents of the NPV view the plan as directly antithetical to the Framers' intentions when the Electoral College was established.<sup>46</sup>

The NPV would likely survive both constitutional challenges, though. The Compact Clause would not prove a tough hurdle to surmount. The Supreme Court has held that some types of interstate agreements do not qualify as "compacts" requiring congressional approval.<sup>47</sup> Under the precedent established in *U.S. Steel Corp. v. Multistate Tax Commission*,<sup>48</sup> the NPV would not be considered an interstate agreement qualifying as a "compact" requiring congressional approval because the NPV member states are not "collectively creating a new power that they [do] not already have individually."<sup>49</sup> The agreement only implicates an area where the federal government has an interest, but not exclusive power, given that the U.S. Constitution allows for states to choose Electors however they choose.<sup>50</sup> Thus, the NPV does not require congressional approval, nor

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42. *Id.* at 1573–74 (“[T]he states’ power to regulate the manner of presidential elections is far more limited than the proponents of the [National Popular Vote Plan] contend. . . . That the states generally have the power to choose the manner in which their electors are selected begins the constitutional analysis; it does not end it.”).

43. *Id.* at 1532, 1573–81.

44. *Id.* at 1577.

45. *Id.* at 1528; NEALE & NOLAN, *supra* note 15, at 18–19.

46. *See* Williams, *supra* note 38, at 1559.

47. *Id.* at 1539.

48. 434 U.S. 452 (1978).

49. Michael Brody, *Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause*, 5 LEGIS. & POL’Y BRIEF 33, 45 (2013).

50. *Id.* at 45–46.



does it exceed the states' authority under the U.S. Constitution, as opponents argue.<sup>51</sup>

Assuming constitutionality, in order for the NPV to work, states must be able to effectively ensure that Electors will actually vote for the winner of the national popular vote. The extensive arguments for and against the NPV mirror and complement the arguments for and against binding Electors. Both proponents of the NPV and states with Elector-binding statutes seize on the language in Article II, Section 1 that states have the power to appoint Electors in any manner as justification. On the other hand, opponents of the NPV, often proponents of discretion of Electors to vote faithlessly, believe that appointment power is not unlimited.

### *B. The Electoral College*

#### 1. Constitutional Provisions

The U.S. Constitution does not describe the Electoral College or the states' roles in the presidential election system in much detail. Article II, Section 1, Clause 2 gives states the mandate and the power to appoint Electors "in such Manner as the Legislature thereof may direct," so long as the Electors appointed are not Senators or Representatives and do not hold an "Office of Trust or Profit under the United States."<sup>52</sup> Article II, Section 1, Clause 3 then details the procedures for Elector voting and for counting the Elector votes in the U.S. Senate.<sup>53</sup> Additionally, the Twelfth Amendment directs Electors to vote separately for the President and Vice President.<sup>54</sup> The U.S. Constitution gives no further indication as to how the Electors should be appointed, how the Electors must vote, or what happens if the Electors vote a certain way.

#### 2. Faithless Electors

The lack of constitutional clarity regarding the Electoral College has led to state discretion in the allocation of Electoral votes. In all states, state election laws require that the political parties each choose

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51. The constitutionality of the NPV is beyond the scope of this Note. For additional information regarding constitutional arguments on both sides, see Brody, *supra* note 49, and Williams, *supra* note 38.

52. U.S. CONST. art. II, § 1, cl. 2.

53. *Id.* art. II, § 1, cl. 3.

54. U.S. CONST. amend. XII.

a slate of potential Electors prior to the general election.<sup>55</sup> These Electors are individuals chosen for their loyalty or service to the political parties, or the individuals have some connection to the party's candidate.<sup>56</sup> However, states differ in their methods for allocating Electoral votes after the general election. Forty-eight states and the District of Columbia have enacted winner-take-all systems for awarding their Electoral votes to ensure states maximized their influence in selecting a president.<sup>57</sup> Under the winner-take-all approach, all of a state's Electoral votes are allocated to the winner of the popular vote in that state.<sup>58</sup> Thus, only the Electors from the political party whose candidate wins the state's popular vote cast their vote.<sup>59</sup>

On the other hand, the remaining two states, Maine and Nebraska, allocate their Electoral votes through a district system.<sup>60</sup> In these states, two Electors at large cast their votes for the presidential candidate who wins the statewide popular vote, while Electors of each congressional district cast their votes for the candidates who win such districts.<sup>61</sup> Like in winner-take-all systems, in Maine and Nebraska, the political parties select a slate of Electors at their conventions, and Electors of the parties who win each district and the state popular vote cast their electoral votes.<sup>62</sup> Under the district system, then, theoretically Electors from both political parties could cast their votes, compared to the winner-take-all system where only one party's Electors cast ballots. In both the winner-take-all system and the district system, though, so-called "faithless Electors" who vote for a candidate

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55. See, e.g., ALASKA STAT. § 15.30.020 (2021) ("Each political party shall select a number of candidates for electors of President and Vice-President of the United States equal to the number of senators and representatives to which the state is entitled in Congress. The candidates for electors shall be selected by the state party convention or in any other manner prescribed by the bylaws of the party.").

56. *About the Electors*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/electors> (last visited Apr. 11, 2021).

57. Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 230 (2012); *The Electoral College*, NAT'L CONF. ST. LEGISLATURES (Nov. 11, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx>.

58. Herbst, *supra* note 57, at 230.

59. *The Electoral College*, *supra* note 57.

60. *Id.*

61. ME. STAT. tit. 21-A, § 805(2) (2020); NEB. REV. STAT. § 32-714(2) (2021).

62. ME. STAT. tit. 21-A, § 321; NEB. REV. STAT. § 32-710.

other than the party's nominee undermine the states' ability to control the allocation of their electoral votes.<sup>63</sup>

*a. History and the Occurrence of Faithless Electors in Close Elections*

Historically and customarily, most Electors vote for their party's candidate if that candidate wins the state's popular vote.<sup>64</sup> However, according to FairVote.org, a nonprofit that advocates for a national popular vote election, 165 faithless electoral votes for a presidential or vice-presidential candidate other than the Elector's party candidate have been cast in U.S. history.<sup>65</sup> Of course, in some cases, these votes were faithless not out of a desire to be rebellious but for practical reasons.<sup>66</sup> For example, when party candidates died in the past, Electors were forced to change their vote before the Electoral College convened.<sup>67</sup> Since 1900, only sixteen true faithless votes were cast, and these faithless votes have largely been symbolic.<sup>68</sup> Though faithless votes have not yet determined any presidential elections, the problem of the faithless Elector lurks, with the possibility of a constitutional crisis in polarized and close elections like those in 2000 and 2016.<sup>69</sup> Indeed, in 2016, the Electoral College saw the largest number of faithless votes in U.S. history amid the highly contentious election of Donald Trump.<sup>70</sup> A scenario in which a state's slate of Electors votes for someone other than that state's popular vote winner, possibly becoming the 270th of the requisite 270 electoral votes needed to win the presidency, has the potential to completely undermine voter faith in the election system.<sup>71</sup>

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63. Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. FLA. J.L. & PUB. POL'Y 215, 215–16 (2017).

64. *Id.*

65. *Faithless Electors*, FAIRVOTE, [https://www.fairvote.org/faithless\\_electors](https://www.fairvote.org/faithless_electors) (last updated July 6, 2020); Nina Agrawal, *All the Times in U.S. History that Members of the Electoral College Voted Their Own Way*, L.A. TIMES (June 2, 2019, 3:08 PM), <https://www.latimes.com/nation/la-na-faithless-electors-2016-story.html>.

66. *See Faithless Electors*, *supra* note 65.

67. *Id.*

68. Agrawal, *supra* note 65.

69. *See Bennett*, *supra* note 6, at 124.

70. Drew Penrose, *Faithless Electors Fizzle, but Leave Uncertainty*, FAIRVOTE (Jan. 6, 2017), [https://www.fairvote.org/faithless\\_electors\\_fizzle](https://www.fairvote.org/faithless_electors_fizzle).

71. *See Bennett*, *supra* note 6, at 123.

*b. Faithless Electors Would Undermine the NPV*

The occurrence of faithless Electors also has the potential to disrupt the NPV if the plan were enacted in a sufficient number of states. The NPV does not eliminate the Electoral College, so it does not eliminate the possibility of faithless Electors.<sup>72</sup> The plan simply requires that, instead of voting for the winner of the popular vote in the state when the Electors convene (or, in Maine and Nebraska, the winner of the popular vote in the state and the districts), Electors must vote for the *national* popular vote winner.<sup>73</sup> In fact, the text of the NPV bill itself is similar to how most states currently appoint Electors, appointing the “Elector slate nominated in that state in association with the national popular vote winner.”<sup>74</sup> While Electors would be associated with the national popular vote winner, association with a particular candidate has not prevented faithless votes in the past, particularly in the 2016 election.<sup>75</sup> The NPV could present a scenario in which an Elector is unhappy with a particular candidate winning the national popular vote, even if that candidate is from their political party, and thus cast a faithless vote. By itself, the NPV does not solve the faithless Elector problem and could potentially exacerbate it.

## II. CONSTITUTIONALITY OF ELECTOR-BINDING STATUTES AND PENALTIES

The Supreme Court has examined the states’ power in relation to presidential Electors a few times. The Court first explored the states’ power of Elector appointment in *McPherson v. Blacker* in 1892.<sup>76</sup> The Supreme Court next considered whether statutes that conditioned Elector appointment on support for the party’s primary candidate were constitutional in the 1952 case, *Ray v. Blair*.<sup>77</sup> Most recently, a split in lower courts on whether similar state statutes to those in *Ray*, but which included enforcement mechanisms in addition to simple Elector promises, led to the Supreme Court’s decision in *Chiafalo v. Washington*.<sup>78</sup>

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72. KOZA ET AL., *supra* note 4, at 258

73. *Id.* at 264.

74. *Id.*

75. Penrose, *supra* note 70.

76. 146 U.S. 1 (1892).

77. 343 U.S. 214 (1952).

78. 140 S. Ct. 2316 (2020).

*A. McPherson v. Blacker*

Following the 1888 presidential election in which Grover Cleveland won the popular vote but lost in the Electoral College, Michigan, run by a Democratic legislature, sought to secure a Democratic victory for Cleveland.<sup>79</sup> Thus, Michigan enacted a statute changing the state from a winner-take-all state to a district system for the 1892 election.<sup>80</sup> Several nominees for Elector, including William McPherson, Jr., filed suit against the Michigan Secretary of State, Robert R. Blacker, seeking to have the statute declared unconstitutional.<sup>81</sup> The Electors argued the statute was in conflict with Article II, Section 1, Clause 2 of the U.S. Constitution, largely reasoning that because that section states that “each *State* shall appoint” its Electors, each individual state must act as one unit.<sup>82</sup> Thus, the Electors argued, dividing up the state’s electoral votes by district would not be appointment of Electors by the state.<sup>83</sup>

In its first decision addressing the states’ power of appointment of Electors, the Supreme Court considered the constitutionality of the Michigan statute.<sup>84</sup> The Court rejected the Electors’ argument in the case, explaining that the act of appointment, regardless of whether the state is a winner-take-all or district system, is an act of the state as a whole.<sup>85</sup> Most notably, the Court said that the “practical construction” of Article II, Section 1, Clause 2 of the U.S. Constitution “has conceded plenary power to the state legislatures in the matter of the appointment of electors,” and the “appointment and mode of appointment of electors belong exclusively to the States.”<sup>86</sup> Though the Court concluded this in the context of the state enacting a district system by statute, which other states had similarly legislated at various times up until 1892, the Court’s expansive language suggests that the states’ appointment power is absolute.

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79. Paul Egan, *Democrats Once Pulled the Same Electoral College Stunt*, DET. FREE PRESS (Nov. 21, 2014, 3:57 PM), <https://www.freep.com/story/news/politics/2014/11/20/michigan-white-house-presidential-election-electoral-college/70028908/>.

80. *McPherson*, 146 U.S. at 1. The statute was repealed, and Michigan returned to a winner-take-all state following the 1892 election, when Republicans gained legislative and executive control in Michigan. Egan, *supra* note 79.

81. *McPherson*, 146 U.S. at 2.

82. *Id.* at 9 (emphasis added) (quoting U.S. CONST. art. II, § 1, cl. 2).

83. *Id.* at 11.

84. *Id.* at 4–6.

85. *Id.* at 25–26.

86. *Id.* at 35.

### B. Ray v. Blair

In *Ray v. Blair*, an Alabama statute required that candidates for Elector promise to support the winner of the Democratic Party's primary in the general election.<sup>87</sup> One candidate for Elector in the Party, Edmund Blair, refused to take this pledge, and as a result, the chairman of the Executive Committee for the Alabama Democratic Party did not certify Blair as an Elector.<sup>88</sup> The Alabama Supreme Court held that the pledge violated the Twelfth Amendment because Electors are "constitutional officer[s]," mandated to use their own discretion in exercising their duties.<sup>89</sup>

The Supreme Court reversed the Alabama Supreme Court, holding that "[n]either the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party."<sup>90</sup> In its opinion, the Court acknowledged the challenges inherent in Elector-binding statutes, where Electors perform a federal function, but are actually state-appointed.<sup>91</sup> The Court addressed the argument that the Founders intended for Electors to exercise their own judgment, and therefore a promise to vote a certain way interferes with their "constitutional duty."<sup>92</sup> The Court found, though, that a pledge to support a party's nominee is a "method of securing party candidates" and a proper exercise of a state's right to appoint Electors in whatever manner the state chooses.<sup>93</sup> Additionally, the Court held that the Twelfth Amendment, though it establishes that Electors must vote by ballot, implying some choice, does not bar an Elector pledging their choice before the election.<sup>94</sup> The Court found there was a long history of an "implied or oral pledge" for a candidate.<sup>95</sup> Lastly, the Court noted that its decision is applicable only to promises to vote a certain way at the primary election stage and may differ in the general election

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87. 343 U.S. 214, 217–18 (1952).

88. *Id.* at 215.

89. Opinion of the Justices, 34 So. 2d 598, 600 (Ala. 1948); see *Ray v. Blair*, 57 So. 2d 395, 398 (Ala. 1952).

90. *Ray*, 343 U.S. at 225.

91. *Id.* at 224.

92. *Id.* at 225.

93. *Id.* at 227.

94. *Id.* at 228.

95. *Id.* at 228–29.

because of “assumed constitutional freedom of the elector under the Constitution.”<sup>96</sup>

In a dissenting opinion, Justice Jackson argued that the original intent of the framers in creating the Electoral College was for Electors to be “free agents,” using their “independent and nonpartisan judgment.”<sup>97</sup> Though advocating for the abolition of the Electoral College because it is a “mystifying and distorting factor in presidential elections,” Justice Jackson remarked that even if voting for a candidate to whom an Elector promised their vote is a normal practice, custom is not sufficient to amend the U.S. Constitution.<sup>98</sup> Finally, Justice Jackson described the requirement that Electors promise to vote in such a way as “effect[ing] a complete suppression of competition between different views within the party.”<sup>99</sup>

C. *Chiafalo v. Washington and Colorado Department of State v. Baca*

In 2020, the Supreme Court granted certiorari in two cases that resulted in a lower court split, *Chiafalo v. Washington* and *Colorado Department of State v. Baca*.<sup>100</sup> In the wake of the 2016 election, both Democratic and Republican Party Electors across the country endeavored to prevent Donald Trump from entering the White House.<sup>101</sup> These Electors dubbed themselves the “Hamilton Electors,” per Federalist Paper No. 68, in which Alexander Hamilton discussed the necessity of the Electoral College.<sup>102</sup> Hamilton wrote that “[i]t was desirable” that the “men most capable” of selecting the President do so, in order to ensure that “the office of President will never fall to the lot of any man who is not . . . endowed with the requisite qualifications.”<sup>103</sup> The Hamilton Electors hoped to unify enough Democratic and Republican Electors to either elect a moderate Republican “compromise candidate,” like Mitt Romney or John Kasich, or to at least divert enough Electoral votes to prevent Donald

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96. *Id.* at 230.

97. *Id.* at 232 (Jackson, J., dissenting).

98. *Id.* at 233–34.

99. *Id.* at 235.

100. 140 S. Ct. 2316 (2020).

101. Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/>.

102. *Id.*

103. THE FEDERALIST NO. 68 (Alexander Hamilton).

Trump from reaching 270.<sup>104</sup> Both *Chiafalo* and *Baca* involved these Hamilton Electors.<sup>105</sup>

### 1. Facts of the Cases

*Chiafalo* involved the constitutionality of Washington’s Elector-binding statute.<sup>106</sup> Washington’s statute included a penalty for faithless votes.<sup>107</sup> Its Elector-binding statute held that “[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars.”<sup>108</sup> Plaintiffs were Washington Democratic Party Electors, called upon to vote for the Democratic nominee, Hillary Clinton, after she won the popular vote in Washington.<sup>109</sup> The Washington Electors instead voted for Colin Powell as part of the Hamilton Electors movement.<sup>110</sup>

In accordance with Washington’s penalty statute, the Washington Secretary of State fined the plaintiffs \$1,000 each for violating their agreement to vote for the party nominee.<sup>111</sup> The plaintiffs challenged this fine in the superior court, which upheld the fine as constitutional.<sup>112</sup> The Washington Supreme Court affirmed the lower court, holding that the Constitution does not grant to Electors the discretion to vote unencumbered by any state restrictions.<sup>113</sup> The court recognized the federal function that Electors perform, but reasoned that the Constitution “explicitly confers broad authority on the states” to determine the procedures by which Electors are appointed and conduct their federal function, citing both *Ray v. Blair* and *McPherson v. Blacker*.<sup>114</sup> Subsequently, Washington’s statute was repealed and replaced with a statute calling for a Washington Elector who fails to

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104. O’Donnell, *supra* note 101.

105. *Id.*

106. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2322 (2020).

107. WASH. REV. CODE §29A.56.340 (2016) (amended 2019).

108. *Id.*

109. *Chiafalo*, 140 S. Ct. at 2322.

110. O’Donnell, *supra* note 101; *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *aff’d sub nom.* *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020). The plaintiffs also voted for a different vice president than vice presidential nominee, Tim Kaine. *In re Guerra*, 441 P.3d at 808.

111. *In re Guerra*, 441 P.3d at 808.

112. *Id.* at 809.

113. *Id.* at 817.

114. *Id.* at 814.



vote for the party's candidate to be removed and replaced with an Elector who will vote for the party candidate.<sup>115</sup>

Similarly, *Baca* involved Colorado's Elector-binding statute.<sup>116</sup> Like Washington's statute, Colorado's provides that Electors shall vote for the candidate who wins the popular vote in that state, yet it fails to articulate any consequence or penalty for voting contrarily.<sup>117</sup> In *Baca*, Micheal Baca, an Elector for the Democratic Party in Colorado, cast his vote for John Kasich instead of Hillary Clinton in violation of the statute and after the Colorado Secretary of State had warned that violation of the oath may subject an Elector to perjury charges.<sup>118</sup> Following Baca's vote for Kasich, the Secretary of State removed Baca as an Elector, nullified his vote, replaced him with an Elector who voted for Clinton, and referred him to the Colorado Attorney General for criminal prosecution.<sup>119</sup> Baca then sued, alleging a violation of his Article II and Twelfth Amendment rights.<sup>120</sup> The Tenth Circuit preliminarily tackled the issue of whether Baca lacked standing to sue and determined that Baca had standing "based on his removal from his role of Elector and the cancellation of his vote."<sup>121</sup> Additionally, the court discussed mootness, but found that the case was not moot because ruling on the issues will have an effect on the world and on Baca because he can receive nominal damages.<sup>122</sup>

Unlike the Washington Supreme Court, the Tenth Circuit ultimately found that Electors are free to exercise discretion in voting for whomever they choose.<sup>123</sup> Its reasoning consistently emphasized that because there is no state removal power expressed in the Constitution, states cannot remove Electors.<sup>124</sup> The court's conclusion echoed its interpretation of the framers' intent that "enlightened and

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115. WASH. REV. CODE §§ 29A.56.084, .090 (2020).

116. *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901 (10th Cir. 2019).

117. COLO. REV. STAT. ANN. § 1-4-304(5) (West, Westlaw through Ch. 7 of the 1st Reg. Sess. of the 73rd Gen. Assemb. (2021)).

118. *Baca*, 935 F.3d at 904.

119. *Id.*

120. *Id.*

121. *Id.* at 922. The standing issue presented in *Baca* is beyond the scope of this Note and will not be discussed further.

122. *Id.* at 928. Similarly, the mootness issue presented in *Baca* is beyond the scope of this Note and will not be discussed further.

123. *Id.* at 955–56.

124. *See id.* at 943.

respectable Electors” would be free to vote in their discretion to select the best candidate as President.<sup>125</sup>

## 2. Supreme Court Opinion

The Supreme Court considered both *Baca* and *Chiafalo* together in its *Chiafalo* opinion.<sup>126</sup> The Court held that states can unequivocally enforce Elector-binding statutes “for reasons much like those given in *Ray*.”<sup>127</sup> The Court primarily surveyed the text of the U.S. Constitution.<sup>128</sup> Given the U.S. Constitution’s sparse description of the Electoral College, the Court, mirroring the states’ arguments in both cases, found that the text of the U.S. Constitution does not prevent states from imposing penalties to prevent faithless Electors.<sup>129</sup> Additionally, based on the language in Article II, Section 1, Clause 2 that states may appoint Electors however they choose, the Court concluded that states’ appointment power necessarily includes the ability to place conditions on appointment.<sup>130</sup> An enforcement mechanism in the Elector-binding law is one such way to condition an Elector’s appointment.<sup>131</sup> The Court also refuted the Electors’ argument that words like “ballot” and “vote” present in Article II, Section 1 and the Twelfth Amendment necessitate that Electors possess discretion.<sup>132</sup> Citing the historical precedent that most Electors have felt bound to reflect the voters’ preferences with their votes, the Court stated that “voting is still voting when discretion departs.”<sup>133</sup>

In its analysis of the history of the Electoral College, the Court examined “long settled and established practice.”<sup>134</sup> Particularly as political parties became engrained in American politics and the Twelfth Amendment was enacted, the “practice that had arisen in the Nation’s first elections” of Electors faithfully voting for their appointers’ preferred candidate was solidified.<sup>135</sup> Washington and

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125. *Id.* at 954.

126. *See* Colo. Dep’t of State v. *Baca*, 140 S. Ct. 2316, 2316 (2020); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020).

127. *Chiafalo*, 140 S. Ct. at 2323.

128. *Id.* at 2324.

129. *Id.* at 2324–25.

130. *Id.* at 2324.

131. *Id.*

132. *Id.* at 2325.

133. *Id.*

134. *Id.* at 2326.

135. *Id.* at 2327.

Colorado's laws, along with all thirty-two other state Elector-binding statutes, "reflect[] a tradition more than two centuries old."<sup>136</sup> Finally, the Court highlighted that in U.S. history, the percentage of faithless votes that have been cast, excluding those cast when a party nominee has died, reflect only one half of one percent of the total Electoral votes cast.<sup>137</sup> Thus, "neither text nor history" support the Electors' arguments that they are able to cast faithless votes unfettered by state restrictions.<sup>138</sup>

In a concurrence, Justice Thomas argued that the states do not derive power to bind Electors from the appointment power in Article II, but rather from the Tenth Amendment, which holds that powers not delegated or prohibited in the U.S. Constitution are reserved to the states.<sup>139</sup>

### III. STATES' AUTHORITY TO APPOINT AND BIND ELECTORS

#### *A. Statutes*

After the Supreme Court upheld the Alabama Elector-binding statute in *Ray v. Blair*, more states adopted similar Elector-binding laws.<sup>140</sup> States want to control the allocation of their Electoral votes and maintain the status quo where Electors vote for the winner of the popular vote in their state.<sup>141</sup> To that end, thirty-three states and the District of Columbia have enacted laws attempting to bind their Electors to vote for their party's candidate after that candidate wins the popular vote in the state.<sup>142</sup> Because the Supreme Court did not give states guidance on drafting these Elector-binding statutes, the statutes vary wildly between states in language, procedures, and penalties.<sup>143</sup>

Scholars have previously categorized the Elector-binding statutes based on the statutes' construction and outcomes.<sup>144</sup> John Zadrozny,

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136. *Id.* at 2328.

137. *Id.*

138. *Id.*

139. *Id.* at 2329–35 (Thomas, J., concurring).

140. *Ray v. Blair*, 343 U.S. 214, 231 (1952); Gouzoules, *supra* note 63, at 223.

141. *See* Gouzoules, *supra* note 63, at 215.

142. *See* Appendix A.

143. Gouzoules, *supra* note 63, at 223.

144. *Id.* at 223–24.

for example, classified the state statutes into three distinct types.<sup>145</sup> The first type of statutes, according to Zadrozny, are “simple statutory declaration[s]” that Electors must vote according to the election results.<sup>146</sup> The second type are state statutes that require Electors to take actual pledges that they will vote with their respective parties.<sup>147</sup> Lastly, under Zadrozny’s classification, the third type mandate that a faithless vote triggers resignation of the Elector and appointment of a new Elector who would vote faithfully.<sup>148</sup> Zadrozny’s characterization of the statutes does not account for other types of penalties like fines or criminal action.<sup>149</sup>

Additionally, Alexander Gouzoules, critiquing Zadrozny’s approach, divided the Elector-binding statutes into different categories.<sup>150</sup> Gouzoules’s “more precise framework” uses two categories: deterrent-based statutes and invalidation-based statutes.<sup>151</sup> Under Gouzoules’s structure, state statutes that require a mere statutory declaration, those that require Electors to certify they will vote for a certain candidate, and those that impose penalties other than removal and replacement of the Elector are deterrent-based statutes.<sup>152</sup> On the other hand, invalidation-based statutes are those that require the removal and replacement of faithless Electors.<sup>153</sup>

This Note provides a new and useful taxonomy of Elector-binding statutes that instead organizes the statutes in terms of their enforcement mechanisms. This enforcement-based approach was developed following the Supreme Court’s decision in *Chiafalo* due to that decision’s focus on whether and by what means states can enforce these statutes.<sup>154</sup> Additionally, this approach combines Zadrozny’s and Gouzoules’s approaches into a more specific organization. Like Zadrozny’s organization, this approach divides the statutes into three categories. However, Zadrozny’s taxonomy separates simple statutory declarations and pledges, when both have the same result in terms of

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145. John A. Zadrozny, Comment, *The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection*, 11 COMMLAW CONSPPECTUS 165, 179 (2003).

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.*

150. Gouzoules, *supra* note 63, at 224.

151. *Id.*

152. *Id.*

153. *Id.* at 226.

154. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

enforcement, as explained below. Zadrozny's grouping also does not take into account penalties apart from removal and replacement, which are notable in light of *Chiafalo*. Moreover, while Gouzoules's framework is closer to an enforcement-based approach, the term "deterrent-based" is imprecise, as removal and replacement statutes can also deter Electors.

Thus, under this Note's classification, state statutes can be characterized as either:

(1) "Honor System" statutes—the statute either contains a declaration that the Elector must vote for the party's candidate or requires the Elector to take a pledge, but there is no explicit penalty for voting for someone other than the popular-vote-winning candidate;<sup>155</sup>

(2) "Replacement" statutes—the statute requires that if the Elector fails to vote for the party's candidate, the Elector will be removed and replaced with an Elector who *will* vote for the party candidate;<sup>156</sup> and

(3) "Penalty" statutes—the statute holds that voting for someone other than the party's candidate results in some penalty, like a monetary fine.<sup>157</sup>

Appendix A following this Note contains tables that group the statutes according to their categories.<sup>158</sup>

### 1. Honor System

Seventeen states and the District of Columbia have adopted Honor System statutes that do not impose replacement, nor any penalty.<sup>159</sup> This Honor System category encompasses both simple statutory declarations and state-mandated pledges, as both types of statutes do not contain enforcement mechanisms in their language. Delaware provides an example of a simple statutory declaration, stating that Electors "shall be required to cast their individual votes for the presidential and vice presidential nominees, or their legal

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155. See Appendix A, Table 1.

156. See Appendix A, Table 2.

157. See Appendix A, Table 3.

158. Appendix A.

159. These states are: Alabama, Alaska, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Maine, Maryland, Massachusetts, Mississippi, Ohio, Oregon, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. See Appendix A, Table 1.

successors, of the political party that nominated the elector.”<sup>160</sup> Other states require Electors to take an actual pledge.<sup>161</sup> Oregon’s statute, for example, mandates that, when selected by their political party, Electors must “sign a pledge that, if elected, the candidate will vote in the electoral college for the candidates of the party for President and Vice President.”<sup>162</sup>

Additionally, the Honor System category includes Maine, which does not have statutorily-prescribed penalties or consequences for faithless voting.<sup>163</sup> However, in the 2016 election, an Elector voted for Bernie Sanders instead of the state’s popular vote winner, Hillary Clinton, in his first ballot, which was invalidated.<sup>164</sup> The Elector’s vote for Sanders triggered a second vote, when he changed his vote to Clinton.<sup>165</sup> Thus, on paper Maine is an Honor System state, but in practice, the state may utilize a rejected ballot type of enforcement.

The Honor System category, however, does not include Colorado. On paper, Colorado looks like an Honor System statute, holding that “[e]ach presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state.”<sup>166</sup> As explained above in the description for *Baca*, in the 2016 election, an Elector voted for John Kasich instead of Hillary Clinton, and the Elector was removed from his position and replaced.<sup>167</sup> Despite no statutory replacement mechanism or penalty in Colorado, the state enforced by replacement. Thus, Colorado is categorized as a Replacement state.

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160. DEL. CODE ANN. tit. 15, § 4303(b) (West, Westlaw through Ch. 3 of the 151st Gen. Assemb. (2021–2022)).

161. See, e.g., OR. REV. STAT. ANN. § 248.355(2) (West, Westlaw through laws enacted in the 2021 Reg. Sess. of the 81st Leg. Assemb.).

162. *Id.*

163. See ME. STAT. tit. 21, § 805(2) (2020).

164. Rebecca Savransky, *Maine Elector Switches Sanders Vote to Clinton*, THE HILL (Dec. 19, 2016, 11:20 AM) <https://thehill.com/homenews/campaign/311017-maine-elector-switches-sanders-vote-to-clinton>.

165. *Id.*

166. COLO. REV. STAT. ANN. § 1-4-304 (West, Westlaw through Ch. 7 of the 1st Reg. Sess. of the 73rd Gen. Assemb. (2021)).

167. See *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 901 (10th Cir. 2019); see *supra* Section II.C.

## 2. Replacement

Eleven states require that Electors vote for their party's candidate, or else they will be removed from office and replaced with an Elector who will vote for the party candidate.<sup>168</sup> Six of the Replacement states have adopted this penalty as part of the Uniform Faithful Presidential Electors Act (UFPEA).<sup>169</sup> Drafted by the Uniform Law Commission, the UFPEA provides language states can adopt, which includes a standard pledge and the remedy of replacement if an Elector votes contrary to the pledge.<sup>170</sup> The Uniform Law Commission expresses that violation of the pledge "effectively constitute[es] resignation from the office of elector."<sup>171</sup> Nebraska's adoption of the UFPEA, for example, contains a standard pledge in one section of the statute, slightly tweaked to reflect Nebraska's district Electoral system, as well as the standard UFPEA remedy in the following section.<sup>172</sup> The remedy section states that a "presidential elector who . . . attempts to present a ballot marked in violation of his or her pledge vacates the office of presidential Elector."<sup>173</sup> Though only six states have enacted this uniform statutory language, the five other Removal and Replacement states use similar language in their statutory construction.<sup>174</sup> Iowa, for example, uses almost identical language, stating that an Elector who casts a faithless vote vacates the office of Elector.<sup>175</sup>

Some states in this Replacement category first cancel a faithless vote that has been cast.<sup>176</sup> Arizona provides an example of a state that first cancels the faithless vote, then removes and replaces the Elector.<sup>177</sup> Under Arizona's statute, if an Elector "knowingly refuses"

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168. These states are: Arizona, Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, Nebraska, Nevada, Utah, and Washington. *See* Appendix A, Table 2.

169. These states are: Indiana, Minnesota, Nebraska, Nevada, Montana, and Washington. *See* Appendix A, Table 2. Washington only enacted the UFPEA in July of 2019 after the decision in *In re Guerra*. WASH. REV. CODE § 29A.56.090(3) (2020).

170. *Faithful Presidential Electors Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d> (last visited Apr. 11, 2021).

171. *Id.*

172. *See* NEB. REV. STAT. §§ 32-713(2), 32-714 (2021).

173. NEB. REV. STAT. ANN. § 32-714 (West, Westlaw through the end of the 2d Reg. Sess. of the 106th Leg. (2020)).

174. *See* Appendix A, Table 2.

175. IOWA CODE § 54.8(3) (2021).

176. *See, e.g.,* ARIZ. REV. STAT. ANN. § 16-212 (2021).

177. *See id.*

to cast their vote for the winner of Arizona’s popular vote, the Elector is “no longer eligible” to serve as a presidential Elector, and the Elector is replaced with someone who casts the vote.<sup>178</sup>

### 3. Penalty

The third category, Penalty statutes, is comprised of the remaining five states with Elector-binding laws.<sup>179</sup> These statutes require Electors to vote for the party candidate and impose some sort of penalty, either in addition to or instead of replacement.<sup>180</sup> For example, up until Washington adopted the UFPEA in 2019, the state previously imposed a \$1,000 fine on Electors who voted for someone other than the popular vote winner.<sup>181</sup> North Carolina’s current statute, on the other hand, requires an Elector who fails to vote for the party candidate to pay \$500, vacate the office of Elector, and the Elector’s vote is nullified.<sup>182</sup> Oklahoma, similarly, imposes a \$1,000 fine in addition to replacement.<sup>183</sup>

Some Penalty states threaten criminal action if a faithless vote is cast. California’s statute either imposes a \$1,000 fine, imprisonment for anywhere from sixteen months to three years, or both a fine and imprisonment, if someone “knowingly or fraudulently acts in contravention” of the statute requiring Electors to cast their vote for the party candidate.<sup>184</sup> New Mexico makes voting for someone other than the party candidate a fourth-degree felony, which comes with up to eighteen months in prison and/or a fine of up to \$5,000.<sup>185</sup> Finally, South Carolina requires that prospective Electors declare who they will vote for if elected, and if they ultimately do not vote for that candidate, they will be “punished according to law” for violating election law.<sup>186</sup>

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178. *Id.*

179. These states are California, New Mexico, North Carolina, Oklahoma, and South Carolina. See Appendix A, Table 3.

180. See Appendix A, Table 3.

181. See *In re Guerra*, 441 P.3d 807, 807–08 (Wash. 2019), *aff’d sub nom.* Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

182. N.C. GEN. STAT. ANN. § 163-212 (West, Westlaw through the end of the 2020 Reg. Sess. of the Gen. Assemb.).

183. OKLA. STAT. tit. 26, §§ 10-102, 10-109 (2021).

184. CAL. ELEC. CODE § 18002 (Deering 2021).

185. N.M. STAT. ANN. § 1-15-9 (West, Westlaw through emergency legislation through Ch. 3 of the 1st Reg. Sess. of the 55th Leg. (2021)); *id.* § 31-18-15.

186. S.C. CODE ANN. § 7-19-80 (2020).



### B. Political Party/Candidate Vetting

Instead of enacting statutes to bind Electors, another possible option for ensuring Electors do not vote faithlessly is for political parties in the various states to vet the Elector candidates more intensely to ensure the Elector will remain faithful.<sup>187</sup> Ideally, the parties would pick people who are more loyal both to the parties and to the candidates.

As the National Popular Vote organization explains, the current system in states without Elector-binding statutes relies on political parties vetting and selecting their Electors carefully.<sup>188</sup> Though the National Popular Vote movement claims that this system of vetting Electors has worked reliably in the past and in the states that do not have Elector-binding laws, the rise in faithless Elector votes suggests otherwise.<sup>189</sup> In 2016, of the ten Electors who cast faithless votes, two of them were from Texas, where there is no Elector-binding law.<sup>190</sup> On the other hand, Pennsylvania enacted a statute that requires the presidential candidates themselves to choose the party's Elector slate.<sup>191</sup> After being nominated by a political party, the presidential candidate then nominates "as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to."<sup>192</sup> No faithless votes were cast by Pennsylvania Electors in 2016.<sup>193</sup> This is, to be sure, a very small sample size, but it reflects the concern that political party vetting absent a statute may not be the most reliable solution, while Electors nominated by presidential candidates may be more effective.

## IV. RAMIFICATIONS FOR THE NPV AND STATES

During the *Chiafalo* oral argument, Chief Justice Roberts asked the attorney for the Electors, "assuming [the NPV] gathers enough support and becomes law, there'd be no way to enforce it [without

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187. *Supreme Court Unanimously Rules that States May Require Presidential Electors to be Faithful*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/faithless-elector-issue-does-not-affect-operation-national-popular-vote> (last visited Apr. 11, 2021).

188. *Id.*

189. *Id.*

190. *Faithless Electors*, *supra* note 65.

191. 25 PA. STAT. AND CONS. STAT. ANN. § 2878 (West, Westlaw through 2021 Reg. Sess. Act 1).

192. *Id.*

193. *Faithless Electors*, *supra* note 65.

Elector-binding laws]?”<sup>194</sup> Lawrence Lessig, attorney for the Electors in *Chiafalo*, responded to Justice Roberts’ question by stating that “if there’s a national popular vote compact, the number of electors for the winner would be so significant, it would be very hard to imagine any discretion affecting the ultimate result.”<sup>195</sup> However, if only enough states join the NPV to secure the required 270 electoral votes to win the presidency, even one faithless vote from a state in the NPV could change the election. Of course, it is conceivable and potentially likely that more states than only the exact number required to get to 270 votes would join the NPV. Furthermore, there may be more states than just those in the NPV whose electoral votes end up directed to the national popular vote winner. However, states should not wait and see whether Electors in their state will vote faithlessly. States can take advantage of the *Chiafalo* decision to enforce their Elector-binding statute in any way they see fit.

The Supreme Court’s decision has implications for the NPV, for states, and for political parties. Two major questions remain following the *Chiafalo* opinion: (1) What is the best way for states to enforce Elector votes to ensure the NPV can work effectively? and (2) Can and should political parties be cut out of the Elector-appointment process, particularly under the NPV?

### A. Enforcement of Electors’ Votes

The Supreme Court’s holding in *Chiafalo* that states can enforce Elector-binding statutes did not place any restrictions on the enforcement mechanisms that states may use.<sup>196</sup> In fact, the case considered both the imposition of a fine on an Elector and the removal and replacement of an Elector, finding both enforcement mechanisms constitutional.<sup>197</sup> Therefore, any of the three categories of Elector-binding statutes—Honor System, Replacement, or Penalty—are constitutionally acceptable forms of Elector-binding statutes.<sup>198</sup>

The states, and particularly states that have enacted the NPV, must determine the best way to ensure their Electors vote with the will of the people. As of the writing of this Note, twelve of the sixteen

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194. Transcript of Oral Argument at 4:56, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465).

195. *Id.* at 5:02.

196. *See Chiafalo*, 140 S. Ct. at 2318.

197. *See id.*

198. *See id.*

states that have enacted the NPV also have Elector-binding laws.<sup>199</sup> The remaining four states that have enacted the NPV must also enact either Replacement or Penalty Elector-binding laws to prevent their Electors from invalidating the NPV completely.<sup>200</sup> The NPV's effectiveness in implementing a national popular vote election depends on Electors faithfully voting for the national popular vote winner.

With the implications of the *Chiafalo* decision in mind, the Replacement statutes and Penalty statutes are the most effective solutions states can implement to ensure faithful Electors. First, Honor System statutes, which lack any enforcement mechanism, would not guarantee that the NPV would be effective. While Alexander Gouzoules categorizes these statutes as “deterrent-based,” there is no statutory or practical indication that these statutes actually deter Electors.<sup>201</sup> Without a consequence for breaking the promise or pledge, or a penalty imposed, Electors would not be effectively deterred from voting for someone who does not win the national popular vote. A clear example of the lack of effectiveness of Honor System statutes can be seen in one of the faithless votes cast in the 2016 presidential election. When the Electors convened to vote following the election, David Mulinux, an Elector from Hawaii, cast his vote for Bernie Sanders instead of Hillary Clinton because he purportedly believed the Electoral College is “outdated.”<sup>202</sup> Hawaii's Honor System statute simply states that the Electors “shall vote . . . for that person for president and that person for vice president of the United States, who are, respectively, the candidates of the political party or group which they represent.”<sup>203</sup> Clearly, Mulinux was not deterred in any way from voting for someone other than Clinton, nor was he removed from his position of Elector or penalized in some other way. There is nothing in Honor System statutes that prevents Electors from voting for the popular vote winner, and these statutes cannot so simply be described as “deterrent-based.”

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199. See Appendix A; Appendix B.

200. The states that have enacted the NPV but do not have elector binding laws are Illinois, New Jersey, New York, and Rhode Island. See Appendix A; Appendix B.

201. Gouzoules, *supra* note 63, at 224–25.

202. Julia Boccagno, *Which Candidates Did the Seven “Faithless” Electors Support?*, CBS NEWS (Dec. 21, 2016, 12:13 AM), <https://www.cbsnews.com/news/which-candidates-did-the-seven-faithless-electors-support-election-2016/>.

203. HAW. REV. STAT. § 14-28 (2020).

Weakness of Honor System statutes can also be seen in two other instances following the 2016 election. As discussed above, in Maine and Colorado, the states instituted enforcement of Electors' faithless votes that were not statutorily-prescribed. In Maine, the Elector's faithless vote triggered a second vote, in which the Elector voted faithfully.<sup>204</sup> In Colorado, the Elector's faithless vote resulted in the Elector's replacement.<sup>205</sup> If Honor System statutes are not just that, an honor system, then states ought to convert these statutes into Penalty or Replacement statutes, which do have spelled-out enforcement mechanisms. The workability of the NPV necessitates that state Elector-binding statutes carry some sort of consequence or penalty.

Next, Penalty statutes are certainly better than Honor System statutes and may allow the NPV to work properly. However, the penalty would likely need to be significant for it to be effective, or possibly combined with another outcome like removal and replacement. Notably, the faithless Electors in *Chiafalo* were faced with a \$1,000 fine and chose to vote in violation of the statute, nonetheless.<sup>206</sup> If \$1,000 is not enough, North Carolina's \$500 fine, for example, probably would not be enough by itself.<sup>207</sup> North Carolina, though, removes and replaces the Elector in addition to the fine, which might be the most effective way to deter faithless votes.<sup>208</sup> Additionally, states could follow in New Mexico's footsteps and make voting in violation of the statute a felony, which is more likely to be effective at deterring faithless votes than fines.<sup>209</sup> It is unlikely that presidential Electors, many of them prominent members of their political party, would want to risk criminal action by voting faithlessly. Because Penalty statutes may be less of a deterrent for an Elector trying to make a statement or simply not caring about paying a fine in the event of a faithless vote, Replacement statutes may be the best option to ensure the effectiveness of the NPV.

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204. See Savransky, *supra* note 164.

205. See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901 (10th Cir. 2019).

206. *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *aff'd sub nom.* *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

207. See N.C. GEN. STAT. ANN. § 163-212 (West, Westlaw through the end of the 2020 Reg. Sess. of the Gen. Assemb., subject to changes made pursuant to direction of the Revisor of Statutes).

208. *Id.*

209. N.M. STAT. ANN. § 1-15-9 (West, Westlaw through emergency legislation through Ch. 3 of the 1st Reg. Sess. of the 55th Leg. (2021)).

Replacement statutes would likely be the most effective form of Elector-binding statutes for NPV states because they combine the deterrent nature of Penalty statutes with the last resort of actually being removed from office. If a potential Elector is aware in advance that a faithless vote results in removal from the office, the person will most likely either choose not to be an Elector at all or will commit to vote for the national popular vote winner as required. In the event that an Elector is not sufficiently deterred by the statute itself and the prospect of removal, choosing to cast a faithless vote regardless, their vote will not count and the Elector will be replaced with someone who will vote faithfully. States could ensure that any replacement Elector will assuredly vote for the national popular vote winner. Additionally, the NPV organization endorsed the UFPEA as a potential option states could use in 2011, indicating that the organization itself believes that Replacement statutes would ensure the NPV would be able to work properly.<sup>210</sup> Thus, Replacement statutes would be the best option to bind presidential Electors and allow the NPV to operate effectively.

*B. Appointment of Electors, Political Parties, and the NPV*

Not long after the creation of the Electoral College and ratification of the U.S. Constitution, political parties were entangled in the Electoral process, despite initial intentions to keep the Electoral College non-partisan.<sup>211</sup> Today, parties remain heavily involved in the process. The Electors themselves, as they have been since the near beginning of the Electoral College, are often party members who are rewarded for their loyalties to the party with the Elector position.<sup>212</sup> Even beyond the practices of the parties themselves, states statutorily prescribe the role of the political parties in the Electoral process. The parties each must provide to the state a slate of Electors who will cast their votes in the event that party's candidate wins the popular vote in the state.<sup>213</sup>

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210. *Supreme Court Unanimously Rules that States May Require Presidential Electors to be Faithful*, *supra* note 187 (“In 2011, the National Popular Vote organization endorsed the ‘Uniform Faithful Presidential Electors Act . . .’ written by the Uniform Law Commission in 2010. The Supreme Court decision makes clear that the Uniform Law Commission’s proposed law is constitutional.”).

211. Robb, *supra* note 1, at 436.

212. *Id.* at 436–37; Kyle Cheney, *Who Are the Electors?*, POLITICO (Dec. 18, 2016, 12:57 PM), <https://www.politico.com/story/2016/12/electoral-college-electors-232791>.

213. *See, e.g.*, ALASKA STAT. ANN. § 15.30.020 (West, Westlaw through Ch. 32 and Ballot Measure 2 of the 2020 2d Reg. Sess. of the 31st Leg.) (“Each political party shall select a number

While the incorporation of the political parties into the process makes practical sense, as party-nominated Electors would theoretically represent the will of the people who voted for their party candidate, the occurrence of faithless Electors illustrates that this is not always the case. In increasingly polarized elections, including contested primaries like the 2016 Democratic Primary that have the potential to fracture the political parties, involving the political parties so heavily makes less sense today.<sup>214</sup> Particularly if the NPV were enacted into law by a sufficient number of states, the political parties likely can and should be cut out of the process to further ensure faithful votes for the national popular vote winner.

The current mechanics of many state Elector-appointment laws, requiring each political party to appoint a slate of Electors to be called upon to vote if their party's candidate wins, can be amended to cut the political parties out. Pennsylvania's statute, for example, requires the candidates themselves to appoint the Electors, rather than the political parties.<sup>215</sup> The statute describes that the "nominee of each political party for the office of President of the United States shall . . . nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to."<sup>216</sup> In theory, a statute like Pennsylvania's would result in Electors who are more loyal to the candidates themselves rather than merely the parties, and thus more likely to vote for the candidate who nominated them.

Statutes like Pennsylvania's would also work under the NPV. The text of the NPV bill provides that "the presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in

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of candidates for electors of President and Vice-President of the United States equal to the number of senators and representatives to which the state is entitled in Congress. The candidates for electors shall be selected by the state party convention or in any other manner prescribed by the bylaws of the party. The chairperson and secretary of the state convention or any other party official designated by the party bylaws shall certify a list of the names of candidates for electors to the director on or before September 1 in presidential election years.").

214. Cheney, *supra* note 212 ("But the most important factor—and the one contributing to recent unrest—is the fact that many electors were selected in the heat of a divisive and protracted 2016 primary season. As a result, elector slates in many states were packed with supporters of Bernie Sanders and Ted Cruz, many of whom were left embittered by the outcome of divisive primaries.").

215. 25 PA. STAT. AND CONS. STAT. ANN. § 2878 (West, Westlaw through 2021 Reg. Sess. Act 1).

216. *Id.*

association with the national popular vote winner.”<sup>217</sup> The statute does not further clarify what “association with the national popular vote winner” means.<sup>218</sup> The explanation of the bill on the National Popular Vote website includes references to the political party’s slate, but there does not appear to be anything in the text of the bill itself that prevents candidates themselves from nominating their Elector slate in each state.<sup>219</sup>

Statutes like Pennsylvania’s, that rely on presidential candidate vetting of Elector candidates, are likely more effective for ensuring the NPV’s workability than an Honor System statute. These statutes can also be combined with Replacement or Penalty statutes to ensure faithful votes. With the combination of statutes, states all but guarantee that Electors who are appointed support the national popular vote winner, and if for some reason they do not and vote faithlessly, they will be removed or penalized.

Finally, state governments could entirely cut both political parties and candidates out of the Electoral appointment process. The states could appoint a slate of Electors, without any personal or party loyalty involved. These Electors could be nominated in a non-partisan or multi-partisan fashion, or these Electors could include state government officials. The Elector slates would be appointed prior to an election. In order for this to work, though, states would need proper Elector-binding statutes in place. Replacement statutes would be the most effective in this instance, as Penalty statutes could allow party loyalists to incur penalties in order to vote for another candidate. With Replacement statutes, state government appointment of Electors would be even better than Pennsylvania’s approach. There is no necessary reason for political parties to be statutorily included under this system, and this could potentially open the door to allow third party candidates to win presidential elections. Removing the political parties from the statutorily-prescribed process may help preserve the integrity of presidential elections.

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217. See KOZA ET AL., *supra* note 4, at 259.

218. *Id.*

219. *Text of the National Popular Vote Compact Bill*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/bill-text> (last visited Mar. 14, 2021) (“[I]f, for example, the Republican presidential slate is the national popular vote winner, the presidential electors nominated by the Republican Party in *all* states belonging to the compact would win election as members of the Electoral College in those states.”).

## CONCLUSION

The increasingly polarizing nature of U.S. presidential elections has come to a head in recent years, and with only seventy-four remaining electoral votes needed to put it in motion, the National Popular Vote Plan is gaining traction in many states.<sup>220</sup> The NPV, if enacted, has the potential to make individual voters' votes count more, rather than having to be translated through a political party figure who may or may not vote with the will of the people. Now that the Supreme Court has decided that state Elector-binding statutes with enforcement mechanisms are constitutionally permissible, in order to ensure that the NPV can work, states in the NPV need to uniformly implement Replacement or Penalty statutes. Additionally, given the existence of and the ability for states to enact such statutes, the political parties can be taken out of the electoral appointment process to ensure the integrity of presidential elections and potentially neutralize some of the sharp partisanship in the U.S.

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220. *Status of National Popular Vote Bill in Each State*, *supra* note 22.



APPENDIX A

TABLE 1. HONOR SYSTEM STATUTES

STATE	CITATION	TEXT OF STATUTE
Alabama	ALA. CODE § 17-14-31	Each person so listed [as an Elector] shall execute the following statement which shall be attached to the certificate or petition when the same is filed with the Secretary of State: “I do hereby consent and do hereby agree to serve as elector for President and Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such Elector for _____ for President and _____ for Vice President of the United States” (inserting in the blank spaces the respective names of the persons named as nominees for the respective offices in the certificate to which this statement is attached).

<b>Alaska</b>	ALASKA STAT. ANN. §§ 15.30.04, 15.30.090	<p>§ 15.30.040: The party shall require from each candidate for elector a pledge that as an elector the person will vote for the candidates nominated by the party of which the person is a candidate.</p> <p>§ 15.30.090: After any vacancies have been filled, the electors shall proceed to cast their votes for the candidates for the office of President and Vice-President of the party that selected them as candidates for electors . . . and shall perform the duties of electors as required by the constitution and laws of the United States.</p>
<b>Connecticut</b>	CONN. GEN. STAT. § 9-176	Each such elector shall cast his ballots for the candidates under whose names he ran on the official election ballot, as provided in section 9-175. If any such elector is absent or if there is a vacancy in the electoral college for any cause, the electors present shall,

		before voting for President and Vice President, elect by ballot an elector to fill such vacancy, and the person so chosen shall be a presidential elector, shall perform the duties of such office and shall cast his ballots for the candidates to whom the elector he is replacing was pledged.
<b>Delaware</b>	DEL. CODE ANN. tit. 15, § 4303(b)	In all cases, the electors chosen or appointed in this State for the election of a President and Vice President of the United States under this chapter shall be required to cast their individual votes for the presidential and vice presidential nominees, or their legal successors, of the political party that nominated the elector.
<b>District of Columbia</b>	D.C. CODE § 1-1001.08(g)	Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he or she will vote for the

		candidates of the party he or she has been nominated to represent, and it shall be his or her duty to vote in such manner in the electoral college.
<b>Florida</b>	FLA. STAT. § 103.021(1)	Each such elector shall be a qualified elector of the party he or she represents who has taken an oath that he or she will vote for the candidates of the party that he or she is nominated to represent.
<b>Hawaii</b>	HAW. REV. STAT. § 14-28	The electors, when convened, if both candidates are alive, shall vote by ballot for that person for president and that person for vice president of the United States, who are, respectively, the candidates of the political party or group which they represent, one of whom, at least, is not an inhabitant of this State.
<b>Maine</b>	ME. STAT. tit. 21, § 805(2)	The presidential electors at large shall cast their ballots for the presidential and

		vice-presidential candidates who received the largest number of votes in the State according to the ranked-choice method of counting votes described in section 723-A. The presidential electors of each congressional district shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in each respective congressional district according to the ranked-choice method of counting votes described in section 723-A.
<b>Maryland</b>	MD. CODE ANN., ELEC. LAW § 8-505(c)	After taking the oath prescribed by Article I, § 9 of the Maryland Constitution before the Clerk of the Court of Appeals or, in the Clerk's absence, before one of the Clerk's deputies, the presidential Electors shall cast their votes for the candidates for President and Vice President who received a plurality of

		the votes cast in [the State of Maryland].
<b>Massachusetts</b>	MASS. GEN. LAWS ch. 53, § 8	Said acceptance form shall include a pledge by the presidential elector to vote for the candidate named in the filing.
<b>Mississippi</b>	MISS. CODE ANN. § 23-15-785(3)	Each person so listed shall execute the following statement which shall be attached to the certificate or petition when it is filed with the State Board of Election Commissioners: “I do hereby consent and do hereby agree to serve as elector for President and Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such for ..... for President and ..... for Vice President of the United States” (inserting in said blank spaces the respective names of the persons named as nominees for said respective offices in

		the certificate to which this statement is attached).
<b>Ohio</b>	OHIO REV. CODE ANN. § 3505.40	A presidential elector elected at a general election or appointed pursuant to section 3505.39 of the Revised Code shall, when discharging the duties enjoined upon him by the constitution or laws of the United States, cast his electoral vote for the nominees for president and vice-president of the political party which certified him to the secretary of state as a presidential elector pursuant to law.
<b>Oregon</b>	OR. REV. STAT. ANN. § 248.355(2)	A candidate for elector when selected shall sign a pledge that, if elected, the candidate will vote in the electoral college for the candidates of the party for President and Vice President. The Secretary of State shall prescribe the form of the pledge.
<b>Tennessee</b>	TENN. CODE ANN. § 2-15-104(c)(1)	The electors shall cast their ballots in the electoral college for the candidates of the

		political party which nominated them as electors if both candidates are alive.
<b>Vermont</b>	VT. STAT. ANN. tit. 17, § 2732	The electors must vote for the candidates for President and Vice President who received the greatest number of votes at the general election.
<b>Virginia</b>	VA. CODE ANN. § 24.2-203	Electors selected by the state convention of any political party as defined in § 24.2-101 shall be required to vote for the nominees of the national convention to which the state convention elects delegates.
<b>Wisconsin</b>	WIS. STAT. § 7.75(2)	The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or



		the candidate or candidates who filed their names under s. 8.185(2), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting.
<b>Wyoming</b>	WYO. STAT. ANN. § 22-19-108	All Wyoming electors shall vote for the candidates for the office of president and vice-president receiving the highest number of votes in the Wyoming general election.

TABLE 2. REPLACEMENT STATUTES

STATE	CITATION	TEXT OF STATUTE
<b>Arizona</b>	ARIZ. REV. STAT. ANN. § 16-212	§ 16-212(B): After the secretary of state issues the statewide canvass containing the results of a presidential election, the presidential electors of this state shall cast their electoral college votes for the candidate for president and the candidate for vice president who jointly received the highest number of votes in this state as prescribed in the canvass.
		§ 16-212(C): A presidential elector who knowingly refuses to cast that elector's electoral college vote as prescribed in subsection B of this section is no longer eligible to hold the office of presidential Elector and that office is deemed and declared vacant by operation of law. The chairperson of the state committee of the political party represented by that elector shall appoint a person who is otherwise qualified to be a presidential elector. The replacement presidential elector shall cast the elector's electoral college vote as prescribed by this section.
<b>Colorado</b>	COLO. REV. STAT. ANN. § 1-4-304	§ 1-4-304(1): The presidential electors shall convene at the capital of the state, in the office of the governor at the

		<p>capitol building, on the first Monday after the second Wednesday in the first December following their election at the hour of 12 noon and take the oath required by law for presidential electors. If any vacancy occurs in the office of a presidential elector because of death, refusal to act, absence, or other cause, the presidential electors present shall immediately proceed to fill the vacancy in the electoral college. When all vacancies have been filled, the presidential electors shall proceed to perform the duties required of them by the constitution and laws of the United States.</p> <p>§ 1-4-304(5): Each presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state.</p>
<b>Indiana</b>	<p>UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, IND. CODE §§ 3-10-4-1.7(a), 3-10-4-9(d)</p>	<p>§ 3-10-4-1.7(a): Each presidential elector nominee and each alternate presidential elector nominee of a political party shall execute the following pledge: "If selected for the office of presidential elector, I agree to serve and to mark my ballots for President and Vice President for the</p>

		nominees for those offices of the party that nominated me.”
		§ 3-10-4-9(d): A presidential elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the presidential elector’s pledge executed under section 1.7 or 8(c) of this chapter, vacates the office of presidential elector. The vacant presidential elector office shall be filled as provided in section 8 of this chapter.
<b>Iowa</b>	IOWA CODE § 54.8	§ 54.8(2): Except as otherwise provided by law of this state outside of this chapter, each elector shall present both completed ballots to the state commissioner who shall examine the ballots and accept and cast all ballots of electors whose votes are consistent with their pledges executed under section 54.5 or 54.7. Except as otherwise provided by law of this state outside of this chapter, the state commissioner shall not accept and shall not count an elector’s presidential and vice presidential ballots if the elector has not marked both ballots or has marked one ballot in violation of the elector’s pledge.

		<p>§ 54.8(3): 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 54.5 or 54.7 vacates the office of elector. The state commissioner shall declare the creation of the vacancy and fill the vacancy pursuant to section 54.7.</p>
<b>Michigan</b>	MICH. COMP. LAWS § 168.47	<p>Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy.</p>
<b>Minnesota</b>	UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, MINN. STAT. ANN. §§ 208.43, 208.46(c)	<p>§ 208.43: Each elector nominee and alternate elector nominee of a 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 party that nominated me."</p>
		<p>§ 208.46(c): An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's</p>

		pledge executed under section 208.43 or 208.45, paragraph (c), vacates the office of elector, creating a vacant position to be filled under section 208.45.
<b>Montana</b>	UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, MONT. CODE ANN. §§ 13-25- 304, 13-25-307(4)	§ 13-25-304: Each Elector nominated by a political party under 13-25-101 or by an unaffiliated presidential candidate 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 of the political party that nominated me.” The executed pledges must accompany the submission of the corresponding names to the secretary of state under 13-25-101(1).
		§ 13-25-307(4): An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot in violation of the elector’s pledge executed under 13-25-304 or 13-25-306(3) vacates the office of elector, creating a vacant position to be filled under 13-25-306.
<b>Nebraska</b>	UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, NEB. REV. STAT.	§ 32-713(2): Each presidential elector shall execute the following pledge: As a presidential elector duly selected (or appointed) for this position, I agree to serve and

	§§ 32-713(2), 32-714(4)	to mark my ballots for President and Vice President for the presidential and vice-presidential candidates who received the highest number of votes in the state if I am an at-large presidential elector or the highest number of votes in my congressional district if I am a congressional district presidential elector.
		§ 32-714(4): A presidential Elector who refuses to present a ballot, who attempts to present an unmarked ballot, or who attempts to present a ballot marked in violation of his or her pledge vacates the office of presidential Elector.
<b>Nevada</b>	UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, NEV. REV. STAT. §§ 298.065(5), 298.075	<p>§ 298.065(5): Except as otherwise provided in subsection 6, a person appointed to the position of presidential elector pursuant to this section may not serve in that position unless the person signs a pledge in substantially the following form: I agree to serve as a presidential elector and to vote only for the nominees for President and Vice President of the party or the independent candidates who received the highest number of votes in this State at the general election.</p> <p>§ 298.075: Does not present both ballots, presents an unmarked ballot or presents a</p>

		<p>ballot marked with a vote that does not conform with the provisions of subsection 1: (1) The Secretary of State shall refuse to accept either ballot of the presidential elector; and (2) The Secretary of State shall deem the presidential elector's position vacant. The vacancy must be filled pursuant to the provisions of NRS 298.065. The person appointed to fill the vacancy in the position of presidential elector, after signing the pledge described in NRS 298.065, shall mark both ballots and present both ballots to the Secretary of State pursuant to this section.</p>
<b>Utah</b>	<p>UTAH CODE ANN. § 20A-13-304(3)</p>	<p>Any elector who casts an electoral ballot for an individual not nominated by the individual, or by the party of which the elector is an elector, except in the cases of death or felony conviction of a candidate, is considered to have resigned from the office of elector, the elector's vote may not be recorded, and the remaining electors shall appoint another individual to fill the vacancy.</p>
<b>Washington</b>	<p>UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, WASH. REV. CODE §§</p>	<p>§ 29A.56.084: Each elector nominee and alternate elector nominee of a political party shall execute the following pledge: "If selected for the position of elector, I agree to</p>



	29A.56.084, 29A.56.090	serve and to mark my ballots for president and vice president for the nominees for those offices of the 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.
		§ 29A.56.090(3): 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 RCW 29A.56.084 or 29A.56.088(3) vacates the office of elector, creating a vacant position to be filled under RCW 29A.56.088.

TABLE 3. PENALTY STATUTES

STATE	CITATION	PENALTY	TEXT OF STATUTE
California	CAL. ELEC. CODE	\$1,000 fine or imprisonment	§ 6906: The electors, when

	§§ 6906, 18002		convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.
			§ 18002: Every person charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it, or who, in his or her official capacity, knowingly and fraudulently acts in contravention or violation of any of those

			laws, is, unless a different punishment is prescribed by this code, punishable by fine not exceeding one thousand dollars (\$1,000) or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months or two or three years, or by both that fine and imprisonment.
<b>New Mexico</b>	N.M. STAT. ANN. § 1-15-9	Fourth degree felony (up to 18 months in prison and/or a fine of up to \$5,000, per N.M. STAT. ANN. § 31-18-15	§ 1-15-9(A): All presidential electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as presidential electors.
			§ 1-15-9(B): Any presidential elector who casts his ballot in violation of the provisions

			contained in Subsection A of this section is guilty of a fourth degree felony.
<b>North Carolina</b>	N.C. GEN. STAT. ANN. § 163-212	Replacement; \$500 fine	Any presidential elector having previously signified his consent to serve as such, who fails to attend and vote for the candidate of the political party which nominated such elector, for President and Vice-President of the United States at the time and place directed in G.S. 163-210 (except in case of sickness or other unavoidable accident) shall forfeit and pay to the State five hundred dollars (\$500.00), to be recovered by the Attorney General in the Superior Court of Wake

			County. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill such vacancy as hereinbefore provided.
<b>Oklahoma</b>	OKLA. STAT. tit. 26, §§ 10-102, 10-109	Replacement; up to \$1,000 fine	§ 10-102: Every party nominee for Presidential Elector shall subscribe to an oath, stating that said nominee, if elected, will cast a ballot for the persons nominated for the offices of President and Vice President by the nominee's party . . . Refusal or

		<p>failure to vote by a Presidential Elector for the persons nominated for the offices of President and Vice President by the nominee’s party shall constitute a violation of the oath and shall result in the immediate forfeiture of the Elector’s office. In such event, the vote shall not be recorded, a vacancy shall be declared, and the Presidential Electors present shall proceed to fill such vacancy as provided in Section 10-108 of this title.</p>
		<p>§ 10-109: Any Presidential Elector who violates his oath as a Presidential Elector shall be guilty of a misdemeanor and, upon conviction</p>

			thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00).
<b>South Carolina</b>	S.C. CODE ANN. § 7-19-80	Criminal action	Each candidate for presidential and vice-presidential elector shall declare which candidate for president and vice-president he will vote for if elected. Those elected shall vote for the president and vice-president candidates for whom they declared. Any person selected to fill a vacancy in the electoral college shall vote for the candidates the elector whose place he is taking had declared for. The declaration shall be made to the Secretary of State on such form as he may

			<p>require not later than sixty days prior to the general election for electors. No candidate for president and vice-president elector shall have his name placed on the ballot who fails to make such declaration by the prescribed time. Any elector who votes contrary to the provisions of this section shall be deemed guilty of violating the election laws of this State and upon conviction shall be punished according to law. Any registered elector shall have the right to institute proper action to require compliance with the provisions of this section. The Attorney General shall</p>
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			<p>institute criminal action for any violation of the provision of this section. Provided, the executive committee of the party from which an elector of the electoral college was elected may relieve the elector from the obligation to vote for a specific candidate when, in its judgment, circumstances shall have arisen which, in the opinion of the committee, it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.</p>
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## APPENDIX B

## NATIONAL POPULAR VOTE STATUS (AS OF NOVEMBER 2020)

STATE	STATUS	ELECTOR-BINDING STATUTE CATEGORY (IF ANY)
<b>Alabama</b>	Not Enacted	Honor System
<b>Alaska</b>	Not Enacted	Honor System
<b>Arizona</b>	Not Enacted	Replacement
<b>Arkansas</b>	Not Enacted	No Statute
<b>California</b>	Enacted in CAL. ELEC. CODE §§ 6920, 6921	Penalty
<b>Colorado</b>	Enacted and subject to statewide vote in November 2020	Replacement
<b>Connecticut</b>	Enacted in 2018 Conn. Pub. Act No. 18-9	Honor System
<b>Delaware</b>	Enacted in DEL. CODE ANN. tit. 15, § 4300A	Honor System
<b>District of Columbia</b>	Enacted in D.C. CODE § 1-1051.01	Honor System
<b>Florida</b>	Not Enacted	Honor System
<b>Georgia</b>	Not Enacted	No Statute
<b>Hawaii</b>	Enacted in HAW. REV. STAT. § 14D-1	Honor System
<b>Idaho</b>	Not Enacted	No Statute
<b>Illinois</b>	Enacted in 10 ILL. COMP. STAT. ANN. 20/5	No Statute
<b>Indiana</b>	Not Enacted	Replacement
<b>Iowa</b>	Not Enacted	Replacement
<b>Kansas</b>	Not Enacted	No Statute
<b>Kentucky</b>	Not Enacted	No Statute
<b>Louisiana</b>	Not Enacted	No Statute

<b>Maine</b>	Not Enacted	Honor System
<b>Maryland</b>	Enacted in MD. CODE ANN., ELEC. LAW § 8-5A-01	Honor System
<b>Massachusetts</b>	Enacted in An Act Relative to the Agreement Among the States to Elect the President by National Popular Vote, ch. 229, 2010 Mass. Acts	Honor System
<b>Michigan</b>	Not Enacted	Replacement
<b>Minnesota</b>	Not Enacted	Replacement
<b>Mississippi</b>	Not Enacted	Honor System
<b>Missouri</b>	Not Enacted	No Statute
<b>Montana</b>	Not Enacted	Replacement
<b>Nebraska</b>	Not Enacted	Replacement
<b>Nevada</b>	Not Enacted	Replacement
<b>New Hampshire</b>	Not Enacted	No Statute
<b>New Jersey</b>	Enacted in N.J. STAT. ANN. § 19:36-4	No Statute
<b>New Mexico</b>	Enacted in N.M. STAT. ANN. § 1-15- 4.1	Penalty
<b>New York</b>	Enacted in N.Y. ELEC. LAW § 12- 402	No Statute
<b>North Carolina</b>	Not Enacted	Penalty
<b>North Dakota</b>	Not Enacted	No Statute
<b>Ohio</b>	Not Enacted	Honor System
<b>Oklahoma</b>	Not Enacted	Penalty
<b>Oregon</b>	Enacted by S.B. 870, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019) (not codified as of this writing)	Honor System

<b>Pennsylvania</b>	Not Enacted	No Statute
<b>Rhode Island</b>	Enacted in 17 R.I. GEN. LAWS ANN. § 17-4.2-1	No Statute
<b>South Carolina</b>	Not Enacted	Penalty
<b>South Dakota</b>	Not Enacted	No Statute
<b>Tennessee</b>	Not Enacted	Honor System
<b>Texas</b>	Not Enacted	No Statute
<b>Utah</b>	Not Enacted	Replacement
<b>Vermont</b>	Enacted in VT. STAT. ANN. tit. 17, §§ 2751–2755	Honor System
<b>Virginia</b>	Not Enacted	Honor System
<b>Washington</b>	Enacted in WASH. REV. CODE § 29A.56.300	Replacement
<b>West Virginia</b>	Not Enacted	No Statute
<b>Wisconsin</b>	Not Enacted	Honor System
<b>Wyoming</b>	Not Enacted	Honor System

