

HOUSE BILL REPORT

SB 5074

As Reported by House Committee On:
State Government & Tribal Relations

Title: An act relating to enactment of the uniform faithful presidential electors act.

Brief Description: Enacting the uniform faithful presidential electors act.

Sponsors: Senators Kuderer, Pedersen, Hunt, Conway, Nguyen, Saldaña, Palumbo, Wellman and Darneille; by request of Uniform Law Commission.

Brief History:

Committee Activity:

State Government & Tribal Relations: 3/15/19, 3/22/19 [DP].

Brief Summary of Bill

- Provides that a presidential elector for the Electoral College who refuses to vote for the nominee of the political party that appointed the elector is deemed to have vacated the position of elector.
- Provides that vacant elector positions will be filled by alternate electors selected by the party, when possible.
- Removes the civil fine imposed on electors who refuse to vote for the nominee of the political party that appointed them.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

Majority Report: Do pass. Signed by 5 members: Representatives Gregerson, Chair; Pellicciotti, Vice Chair; Appleton, Dolan and Hudgins.

Minority Report: Do not pass. Signed by 4 members: Representatives Walsh, Ranking Minority Member; Goehner, Assistant Ranking Minority Member; Mosbrucker and Smith.

Staff: Jason Zolle (786-7124).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Electoral College. Article II of the United States Constitution provides that the President of the United States is chosen through a process known as the Electoral College. States are given a number of electors equal to the number of senators and representatives the state has in Congress. As originally provided in the Constitution, each elector was entitled to two votes; the candidate receiving the most votes was elected president (so long as the candidate received a majority of votes), and the runner-up was elected vice president. Use of the Electoral College in the first two elections after George Washington's presidency, however, led to some unintended consequences. The president and vice president elected in 1796 were from different political parties, which caused significant turmoil, particularly with respect to foreign policy. The 1800 election resulted in a tie that had to be resolved by the House of Representatives.

The Twelfth Amendment—conceived in 1801, proposed by Congress in 1803, and ratified by the states in 1804—was designed to solve these issues. Electors were instead instructed to vote separately for president and vice president. The person who receives a majority of the electors' votes for president is elected president. If one candidate does not receive a majority, the House of Representatives must select the president from the top three candidates.

Selection of State Electors. Washington has 12 electors. Article II of the United States Constitution provides that states may appoint their electors "in such Manner as the Legislature thereof may direct." In Washington, each political party nominates a slate of electors by the third Tuesday in August. Per the United States Constitution, electors may not be federal congressmen or officeholders. If an elector's position becomes vacant by death, refusal to act, lack of attendance, or otherwise, the electors who are present vote for a replacement elector.

Votes cast for the presidential nominee of a political party at the general election in November are considered votes for the electors of that party. In practice, the electors that are nominated by the political party that wins Washington's general election for president become the state's presidential electors. (All but two other states use the same system).

Washington state has adopted an agreement under which its electors instead will be the slate of electors nominated by the political party that is associated with the winner of the nationwide popular vote, but this agreement is not in effect. The agreement takes effect when a number of states that cumulatively possess a majority of the electoral votes have enacted the agreement in substantially the same form. Currently, 11 states and the District of Columbia have adopted this agreement, totaling 172 of the 270 electoral votes needed for the agreement to take effect.

Electors' Votes. Electors in Washington state must sign a pledge verifying that they will vote for the presidential and vice presidential candidates nominated by the party that selected them. Washington does not prohibit a voter from voting for a different person, but an elector who votes for a person that was not nominated by the party of which he or she is an elector is subject to a civil penalty of up to \$1,000.

Shortly after the 2016 election, in which the Democratic Party nominee won the popular vote in Washington, two electors nominated by the Democratic Party filed a lawsuit in federal court seeking to prevent the state from fining them or attempting to remove them as electors

if they voted for a different person than they had pledged to support. The district court held that being fined or removed for failing to vote in accordance with their pledge did not violate the United States Constitution, including the First, Twelfth, and Fourteenth Amendments. The Ninth Circuit Court of Appeals affirmed in an unpublished order.

When the state's electors cast their votes for president on December 19, 2016, four of Washington's electors voted for a person who was not the Democratic Party nominee. They were each fined \$1,000 by the Secretary of State. Three of them challenged the fine as unconstitutional under the First and Twelfth Amendments, but a superior court judge in Thurston County rejected their arguments and upheld the fines. The Washington Supreme Court accepted the case for direct review and is expected to issue a decision in due course.

A similar situation played out in Colorado after the 2016 elections. After taking an oath to vote for the Democratic Party nominee, one elector in Colorado cast a vote for a different person. The Secretary of State removed the elector from his position, refused to count his vote, and replaced him with a substitute elector who cast a ballot for the Democratic Party nominee. The elector sued the state. The judge rejected his arguments that removing him as an elector violated the Twelfth Amendment or unconstitutionally interfered with a federal function. The judge also held that the removed elector lacked standing to claim a violation of his constitutional rights because he had no personal interest in the vote—his interest was an "official interest" as a state official. This case is currently on appeal in the Tenth Circuit Court of Appeals.

Summary of Bill:

Washington's procedure to ensure that its presidential electors vote in accordance with Washington's popular vote is modified.

For each elector position, a political party nominates two electors—one nominee and one alternate. If an elector presents the Secretary of State with a ballot that is inconsistent with the voter's pledge to mark the ballot for the nominee of the elector's party, the ballot is rejected and is not counted. In that situation, or if the elector refuses to present a ballot or presents an unmarked ballot, the elector is deemed to have vacated the position of elector, creating a vacant position.

Vacancies in the position of elector are no longer filled by vote of the other electors present. A vacancy is instead filled as follows:

First, the alternate elector for the vacant position is appointed as a substitute. If the alternate elector is not present or vacates the position too, the position is filled with a substitute chosen by lot from the other alternate electors of the same party. If there are an insufficient number of alternate electors to fill all vacancies, another qualified individual is chosen to be an elector by vote of the remaining electors. Substitute electors must execute a pledge to vote for the president and vice president of the party that chose the original electors.

The civil fines for refusing to vote for the nominee of the elector's party are removed.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There is a problem in Washington in which one-third of the electors in 2016 did not vote as they had pledged to. Allowing the electors to have discretion to vote for whomever they choose elevates their vote above the votes of the people. The founders did not intend to have 538 unaccountable electors voting for President. All votes should matter. This bill replaces the meaningless fine with an effective remedy that requires electors to follow their word. If an elector will not follow the pledge, he or she will be replaced with someone who will. The United States Supreme Court upheld the constitutionality of requiring a pledge in 1952. If we believe that electors should have free choice, we should put the electors' names on the ballot and have them campaign to show how wise and thoughtful they are. No state does that, however.

(Opposed) There are problems with the existing law, but there are also problems with this bill. It is a good idea to eliminate fines, but electors have a constitutional duty and right to vote for whomever they choose. It is problematic to allow the Secretary of State to examine ballots in order to replace electors—it introduces concerns with tampering. The Constitution requires the list of votes to be made, sealed, and sent to Washington, D.C., by the electors themselves.

Persons Testifying: (In support) Senator Kuderer, prime sponsor; and Richard Van Wagenen.

(Opposed) Rebecca Faust.

Persons Signed In To Testify But Not Testifying: None.