Memorandum

To: General Statutes Commission
From: Susan Kelly Nichols, Member of the NC Delegation to the Uniform Law Commission
Date: September 8, 2021

Re: *Consideration of the Uniform Faithful Presidential Electors Act ("UFPEA")*

Thank you for providing the opportunity to explain the reasons why I requested that the General Statutes Commission reconsider opening a docket to consider the UFPEA. This memo supplements the copy of the UFPEA, the ULC memorandum, *UFPEA-Why Your State Should Adopt*, and a copy of *Chiafalo v. Washington* sent to you by Mr. Unwin earlier this week. The UFPEA was adopted by the Uniform Law Commission in 2010; I was the chair of the committee that drafted the UFPEA and also serve on the N.C. delegation to the ULC.

It is my understanding that the Commission considered whether to open a docket on the UFPEA not long after it was adopted by the ULC. The Commission chose not to do so at least in part because 1) there were concerns about its constitutionality, and 2) N.C. currently has a statute that has remedies for the problem of a rogue elector. (The Attachment includes the N.C. statutes on presidential electors). Each issue is addressed below:

<u>Constitutionality of the UFPEA</u>

In 2020, the United States Supreme Court unanimously upheld state laws that remove or punish rogue presidential electors who refuse to cast their votes for the presidential candidate they pledged to support. The opinion in *Chiafalo v. Washington*, 591 U.S. ___ (2020), decided "whether a State may also [in addition to upholding a pledge to support a party's nominee] penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote." *Id*. (slip op. at 1-2). In adopting a statute to limit elector discretion, whether through a penalty or enforcement of a pledge law, "the State instructs its electors that they have no ground for reversing the vote of millions of its citizens." *Id*. at 17-18.

The Court made three additional pertinent points with respect to the Washington statutes:

1. With respect to the penalty at issue, before an elector's appointment could go into effect, "each elector must 'execute [a] pledge' agreeing to 'mark [her] ballots' for the presidential (and vice presidential) candidate of the party nominating her. §29A.56.084." (slip op. at 6);
2. "[T]he elector must comply with that pledge, or else face a sanction" which at the relevant time "was a civil fine of up to $ 1,000." (slip op. at 6; citation omitted); and
3. "Since the events of this case, Washington has repealed the fine. It now enforces pledges only by removing and replacing faithless electors. See Wash. Rev. Code §29A.56.090(3) (2019)." (slip op. 6, n. 3). Thus, Washington replaced its penalty provision with the UFPEA during the pendency of the case.

In a case decided the same day, *Colorado Department of State v. Baca*, 591 U.S. ___ (2020), the Court in a *per curium* opinion reversed a Tenth Circuit decision which held that under Article II and the Twelfth Amendment of the U.S. Constitution, a state may not remove and replace an elector for using his discretion to vote for someone other than the nominee of his party. *Baca v. Colorado Dep't of State*, 935 F.3d 887 (10th Cir. 2019).

Thus, any question about the constitutionality of state statutes reining in elector discretion was put to rest by the Supreme Court.

Problems with North Carolina's Statutory Scheme

The statute that provides sanctions for a faithless elector is N.C. Gen. Stat. § 163-212. It provides for a $500 civil forfeiture and also that the "refusal or failure of an elector to vote for the candidates of the political party hat 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." The complete statute states:

> **§ 163-212. Penalty for failure of presidential elector to attend and vote.**
>
> 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.
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> The clear proceeds of forfeitures provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1901, c. 89, s. 83; Rev., s. 4375; C.S., s. 6013; 1933, c. 165, s. 11; 1967, c. 775, s. 1; 1969, c. 949, s. 3; 1998-215, s. 131; 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)

The provision on resignation must be read in conjunction with the last paragraph of N.C. Gen. Stat. § 163-210:

> In case of the absence, ineligibility or resignation of any elector chosen, or if the proper number of electors shall for any cause be deficient, the first and second alternates, respectively, who were nominated under G.S. 163-1(c), shall fill the first two vacancies. If the alternates are absent, ineligible, resign, or were not chosen, or if there are more than two vacancies, then the electors present at the required meeting shall forthwith elect from the citizens of the State a sufficient number of persons to fill the deficiency, and the persons chosen shall be deemed qualified electors to vote for President and Vice-President of the United States.

It is true that North Carolina's approach of equating a faithless vote as a resignation is very similar to the approach taken by the UFPEA. Both a fine and resignation/vacancy state sanctions of faithless electors were discussed in *Chiafalo* and deemed constitutional. Nevertheless, I respectfully request the Commission to open a docket on the UFPEA, or at a minimum, to consider revisions to the current North Carolina statutes, for the following reasons:

1. North Carolina does not have in its statutes a pledge for electors to take to bind them to vote for the nominee of the political party or unaffiliated candidate that nominated them. Rather, electors are nominated according to the "plan of organization of the political party" or by a qualified unaffiliated candidate. N.C. Gen. Stat. § 163-1(c). The parties may have a pledge they expect of elector nominees, but our statutes do not. It is preferable that the pledge required of an elector be statutory so it is publicly available and there is no question, as was true in both Washington and Colorado[1], that the state requires an elector to pledge to mark their ballots "for the nominees for those offices of the party that nominated me." UFPEA § 4 (which includes allowance for unaffiliated candidates who nominated the elector).
2. The emphasis of N.C. Gen. Stat. § 163-212 is on a civil penalty of $500 that is insufficient today to be a disincentive for any presidential elector who is contemplating marking his ballot against the will of the voters of North Carolina and against the interest of the party or candidate who nominated him. The only way to protect the interests of the electorate of North Carolina is to consider an attempt by a presidential elector to cast a faithless vote to be a resignation of the office. The part of our statute providing this sanction is buried in the penalty statute and a separate statute describes how the vacancy is filled. The reason the resignation provision reads like an "add on" is because that is what it was. 1969 N.C. Sess. Law 949, https://www.ncleg.gov/EnactedLegislation/SessionLaws/HTML/1969-1970/SL1969-949.html. It was undoubtedly passed after a North Carolina presidential elector cast his ballots for George Wallace and Curtis LeMay instead of Richard Nixon and Spiro Agnew in 1968. This is the only instance in which Congress debated whether to accept the vote of a faithless elector, alluded to in *Chiafalo* (slip op. at 17) and described in greater detail in *Baca*, 935 F.3rd at 949-50. Our statutory scheme would be much more coherent if the provisions of §§ 163-210 and -212 were integrated with each other.
3. Our statutes make no provision for the amendment of the Certificates of Ascertainment required by federal law and described in § 163-210 should one or more alternates be needed. A better approach is set forth in the UFPEA in Sections 5 & 8.

Underpinning all these concerns is the reality that presidential elections have become increasingly litigious. It is in North Carolina's interest to have as clear a statutory scheme as possible. The UFPEA is a concise and well-thought out option. As more states adopt the UFPEA, should litigation arise repeat adoptions should strengthen its defense. According to Lindsay Beaver, Legislative Counsel to the ULC, it has been adopted in Indiana, Minnesota, Montana, Nebraska, Nevada, North Dakota, and Washington. The ULC anticipates that California will consider it again in 2022 and is optimistic about its enactment prospects. It is on the radar of a couple other state delegations, including Hawaii and West Virginia.

Finally, it was introduced in 2011-12 by Representative Stam as HB 638 where it passed the House so there is a version available already tailored to North Carolina's statutes to use as a starting point should the Commission undertake drafting on this issue.
https://www.ncleg.gov/BillLookUp/2011/h638

[1] The constitutionality of the Colorado statute dealing specifically with presidential electors, Colo. Rev. Stat. 1-4-301, was not briefed before the Tenth Circuit, but the statute and its application in the 2016 election were discussed at length. The Court stated in footnote 3: "[I]f the Constitution does not allow states to directly remove an elector after voting has commenced, they cannot do so indirectly by statute." 935 F.3d at 903-4. Of course, the opinion of the Tenth Circuit that a state may not constitutionally limit an elector's discretion was reversed by the Supreme Court.