



## MEMORANDUM

**TO:** Senator Chris Kapenga  
**FROM:** Joseph T. Kreye, senior coordinating attorney  
**DATE:** November 17, 2020  
**SUBJECT:** Appointment of electors

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### Introduction

This memorandum addresses your question as to whether the Wisconsin State Legislature may appoint its own slate of presidential electors following the 2020 general election. The short answer is no. The legislature has by law set forth the procedure for appointing presidential electors. Any change in that process would require a change in the law, subject to the governor's approval. Furthermore, changing the presidential elector appointment procedure after the election implicates equal protection concerns under the Fourteenth Amendment to the U.S. Constitution.

### Analysis

The U.S. Constitution requires each state to appoint presidential electors "in such manner as the legislature thereof may direct."<sup>1</sup> In Wisconsin, the legislature has directed that presidential electors be appointed by a vote of the people at the presidential election. Under [Wis. Stat. §5.10](#), a vote for the candidates for president and vice president named on the ballot is a vote for those candidates' electors. Under [Wis. Stat. § 7.75 \(1\)](#), the electors meet at the state capitol at noon on the first Monday after the second Wednesday in December.<sup>2</sup> For this election cycle, that date is December 14, 2020.

Consistent with Article II of the U.S. Constitution and the holdings of the U.S. Supreme Court, a state legislature may reserve to itself the authority to appoint the state's presidential electors or give the people of the state the power to appoint the state's presidential electors at an election. But this determination must be by law. If, as is the case in Wisconsin, state law gives the people the power to appoint presidential electors at an election, then the legislature has no unilateral

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<sup>1</sup> [Article II, section 1, clause 2 of the U.S Constitution.](#)

<sup>2</sup> This date coincides with the date set by federal law under [3 U.S.C. § 7](#) for the meeting of electors.

authority to reverse the choice of the people of the state. Once the state legislature gives the people the franchise with respect to the appointment of presidential electors, equal protection rules governing the right to vote apply, especially the rule of one person, one vote.<sup>3</sup>

## **Conclusion**

While the Wisconsin State Legislature has broad power under the U.S. Constitution to determine by law the manner of appointment of the state's presidential electors, because the legislature has enacted laws to give the people of the state the power to elect presidential electors at the presidential election, the legislature has no power to reverse that determination after the election.

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<sup>3</sup> "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." [Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 \(1966\)](#). See also, , [Bush v. Gore, 531 U.S. 98, 104-05 \(2000\)](#)