



MEMORANDUM

TO: Speaker Robin Vos
FROM: Michael Gallagher, senior coordinating attorney
DATE: November 16, 2020
SUBJECT: Presidential electors

You have asked whether the legislature, after a presidential election, may affect the selection or actions of the state's presidential electors. For the reasons discussed in this memorandum, the legislature may determine the manner of selection of presidential electors but may not affect the selection or actions of presidential electors after the election.

Discussion

The appointment of Wisconsin's presidential electors is governed by statute, and the Wisconsin State Legislature has no current statutory role in the appointment and certification of the state's presidential electors following a presidential election. Additionally, as further discussed below, because Wisconsin law vests the power to appoint presidential electors in the people of the state at a presidential election, the equal protection clause of the Fourteenth Amendment to the U.S. Constitution would prevent any government entity or official from interfering with a duly elected presidential elector's legitimate exercise of his or her statutory duties with respect to voting for a presidential and vice presidential candidate.

Article II, section 1, clause 2 of the U.S Constitution requires each state to appoint presidential electors "in such manner as the legislature thereof may direct." 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. After the presidential election, the Wisconsin Elections Commission must certify the slate of presidential electors of the presidential and vice presidential candidates winning the election (Wis. Stat. § 7.70 (5) (b)). Wisconsin is a "winner-take-all" state. Under Wis. Stat. § 7.52 (2), when the state's presidential electors convene, they are generally required to "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 current law, the state legislature has no role in this process.

While the U.S. Supreme Court has repeatedly held—most recently in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020)—that U.S. Const. art. II, § 1, cl. 2. confers upon state legislatures the “broadest power of determination” with respect to the manner of appointment of presidential electors, that power is couched in the lawmaking process. A state legislature may reserve to itself by law the authority to appoint the state’s presidential electors, and several states did just that for a number of years following ratification of the U.S. Constitution. Conversely, a state legislature may, again by law, give the people of the state the power to appoint presidential electors at an election, as is the case now in Wisconsin and every other state.

However, if, as in Wisconsin, state law gives the people of the state the power to appoint presidential electors at an election, the legislature has no unilateral authority to reverse the choice of the people of the state. While it is true that the state legislature, “after granting the franchise in the special context of Article II, can take back the power to appoint electors” (*Bush v. Gore*, 531 U.S. 98, 104 (2000)), 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. As a result, the state legislature may not arbitrarily reverse or otherwise interfere with the choice of the people of the state at a presidential election. The U.S. Supreme Court spoke to this point directly in *Bush v. Gore*:

When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . . The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) (“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.”).

Id. at 104–05.

In summary, while the 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 Wisconsin Legislature, by statute, has given the people of the state the power to elect presidential electors at the presidential election, the legislature has no power to affect the selection or actions of presidential electors after the election.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.