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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/02/17

SPONSOR Stewart LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Agreement to Elect President by Popular Vote SB 42

ANALYST Esquibel

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
N/A	N/A	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicate bills: Senate Bill 42, Agreement to Elect President by Popular Vote; Senate Bill 54, Agreement to Elect President by Popular Vote; Senate Bill 102, Elect President by National Popular Vote

Relates to SJR7, Elect President by National Popular Vote, CA

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Secretary of State's Office (SOS)

Attorney General's Office (NMAG)

### SUMMARY

#### Synopsis of Bill

Senate Bill 42 (SB42) would enact an interstate compact that would require the participating states to award their votes in the electoral college to the winner of the national popular vote, not by the state's own popular vote, thus ensuring the President is elected by the national popular vote.

### FISCAL IMPLICATIONS

The bill does not include an appropriation.

The Secretary of State indicates it expects no fiscal impact related to this legislation.

### **SIGNIFICANT ISSUES**

The Attorney General’s Office (NMAG) indicates under the provisions of the bill, once states totaling 270 electoral votes join the compact, then the next presidential election would be determined by the national popular vote, not the electoral college.

The NMAG reports, to date, the bill has been passed by 11 states possessing 165 electoral votes, or 61% of the 270 electoral votes necessary to activate the provisions of the bill. These states include Rhode Island, Vermont, Hawaii, District of Columbia, Maryland, Massachusetts, Washington, New Jersey, Illinois, New York and California. The bill has passed a total of 33 legislative chambers in 22 states—most recently by a bipartisan 40–16 vote in the Arizona House, a 28–18 vote in the Oklahoma Senate, a 57–4 vote in New York Senate, and a 37–21 vote in Oregon House.

### **TECHNICAL ISSUES**

The Attorney General’s Office notes if the national popular vote was particularly close, the provisions of the bill could extend time and delay the state’s certificate of election until a winner is declared. The compact does not appear to address what body would ultimately determine the finality of the popular vote in the situation where it was “too close to call.”

### **OTHER SUBSTANTIVE ISSUES**

The Attorney General’s Office (NMAG) indicates the compact would modify how participating states implement the U.S. Constitution Article II, Section 1, Clause 2, which requires each state Legislature to define a method to appoint its electors to vote in the electoral college. The federal Constitution does not mandate any particular legislative scheme for selecting electors. State Legislatures have authority to choose how to allocate electors. Currently, New Mexico is similar to 47 other states that award electors based on the candidate with the highest number of votes statewide (Maine and Nebraska award proportionally).

It is not entirely clear whether the compact might violate federal law. Enactment of the compact would reduce the influence in the electoral college of states with smaller populations. Arguments have been raised that the electoral college as currently proportioned helps to protect smaller states. Arguments have been made that the compact could violate the Voting Rights Act of 1965, but the U.S. Department of Justice in 2012 found no such violation or other adverse impact on racial minority voters upon California’s entry into the compact.

There remain many unanswered questions regarding the states’ abilities to enter into and enact the compact with authorization and approval by the U.S. Congress. Article I, Section 10 of the Constitution provides that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.” However, in Virginia v. Tennessee, 148 U.S. 503 (1893), the Supreme Court held that Congressional consent is not always required unless such compact encroaches on federal supremacy. Although the Constitution grants authority to states to determine how to cast electoral votes, this exact issue has not been addressed by the courts.

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The compact could be viewed as circumventing the Constitution and it is not clear whether Congress would have authority to approve the compact without a constitutional amendment. This argument has less legal support, but a number of congressional amendments have been introduced to abolish the electoral college in favor of a national popular vote. All such attempts have failed, never achieving two-thirds vote in both houses of Congress needed to send the proposal for ratification by the states.

RAE/sb