



Investigation of New Mexico's False Electoral Votes in the
2020 Presidential Election: Findings & Recommended
Legislative Reforms

Final Report

January 5, 2024



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EXECUTIVE SUMMARY

Our Nation's democracy depends on the fairness and integrity of our elections. In 2020, individuals from seven states in which Joseph R. Biden prevailed in the presidential election, including New Mexico, submitted false certificates of electoral votes to Congress purporting to cast ballots for Donald J. Trump. These fake elector certificates were part of a broader scheme, organized by President Trump's associates, to overturn the results of the election and subvert the will of the people. Given the threat the false certificates posed to the Nation's democratic election process, the Federal Government and the states launched criminal investigations into the fake elector scheme.

The previous administration at the New Mexico Attorney General's Office (NMAGO) referred New Mexico's false certificate to federal authorities for investigation. With Attorney General Raúl Torrez taking office at the beginning of 2023 and with no determination having been made in relation to the federal referral, the NMAGO conducted a comprehensive investigation into the unresolved question of whether any state crimes occurred in association with the formation, execution, and submission of the false certificate of electoral votes. Investigators reviewed thousands of pages of documents relating to the scheme in New Mexico and the parallel schemes in the six other states. NMAGO investigators also interviewed the five New Mexico fake electors and many other individuals connected to the false certificate.

The investigation revealed that Trump's team and campaign provided the fake certificate, along with instructions for completing and submitting the document, to five electors designated by the Republican Party of New Mexico. However, unlike the documents the campaign sent to other states declaring the fake electors to be the actual electors of their states, the New Mexico document purported to certify electoral votes only if the signatories were later determined to be the legitimate electors for New Mexico.

The fake electors acted with reckless disregard, and their actions were misleading and dangerous. But under existing law, this conditional language prevents the filing of criminal charges against the fake electors and others associated with New Mexico's false certificate for two reasons. First, New Mexico's Election Code lacks a provision that would make it a crime to submit false electoral votes. Second, there is insufficient evidence that the false certificate was prepared and submitted with an intent to defraud in support of a charge of forgery.

Given the extraordinary threat that this type of misconduct poses to our democracy, it is essential that the New Mexico legislature amend the election code to provide clear legal authority for prosecuting similar misconduct in the future and enhance the security of the electoral process. As such, this report concludes with a proposal for two specific legislative reforms that would make it a crime in New Mexico to submit a false certificate of electoral votes and close the gap in current law that allows conditional language to insulate this dangerous conduct from prosecution under current law.

I. FACTUAL AND LEGAL BACKGROUND

A. The Legitimate Presidential Elector Process

New Mexico's Election Code operates in conjunction with the federal Electoral Count Act and the United States Constitution to establish the procedures for electing the President and the Vice President of the United States. Under New Mexico law, qualified political parties nominate presidential electors from the voters of the party. NMSA 1978, § 1-15-3 (A) (2017). The United States Constitution provides that the number of electors for each state shall be equal to the state's representation in Congress, U.S. Const. art. II, § 1, meaning that New Mexico presently has five elector nominees for each qualified political party. A vote for the pair of presidential and vice-presidential nominees "shall be a vote for the presidential electors of the political party by which the nominees were named." NMSA 1978, § 1-15-4(B) (2019). The popular vote controls the election of the nominees: "[P]residential elector nominees of the party whose nominees for president and vice president receive the highest number of votes at the general election shall be the elected presidential electors for this state, and each shall be granted a certificate of election by the state canvassing board." Section 1-15-4(C).

Before the 2020 general election, six qualified political parties in New Mexico, including the Democratic Party and the Republican Party, nominated five of their voters to serve as presidential electors should the party's pair of candidates prevail in the popular vote. These individuals were presidential elector nominees subject to becoming "elected presidential electors" if their party won the popular vote. On November 3, 2020, Donald J. Trump lost the 2020 presidential general election in

New Mexico to Joseph R. Biden by a significant margin. When New Mexico voters chose Biden and Kamala Harris to be the President and Vice President of the United States, the Democratic Party's nominees became the elected presidential electors for New Mexico. These five elected presidential electors had the mandatory duty, subject to prosecution for a fourth-degree felony, to cast their ballots in the Electoral College "for the candidates of the political party which nominated them as presidential electors," NMSA 1978, § 1-15-9 (1969), meaning Joseph R. Biden for President and Kamala Harris for Vice President.

On November 24, 2020, Governor Michelle Lujan Grisham and Secretary of State Maggie Toulouse-Oliver issued New Mexico's official Certificate of Ascertainment certifying the election results as validated by the State Canvassing Board. Pursuant to state and federal law, New Mexico's five electoral votes were thereafter pledged to then-President-elect Joe Biden and then-Vice President-elect Kamala Harris.

By federal law, "[t]he electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 7. On December 14, 2020, New Mexico's electors complied with state and federal law by meeting at noon at the office of the Secretary of State, casting their ballots for Biden for President and Harris for Vice President, and transmitting their ballots under seal to the President of the Senate. *See* U.S. Const. amend. XII; NMSA 1978, § 1-15-

8 (1977) (“The presidential electors of the state shall meet at noon in the office of the secretary of state on the day fixed by the laws of the United States . . .”).

B. The Fake Elector Certification

At the same time as the legitimate electors’ meeting on December 14, the Republican Party’s nominees met at the State Capitol, a location other than that specified by statute for the elector meeting. The five nominees were Harvey Yates, Deborah Maestas, Jewll Powdrell, Rosie Tripp, and Guadalupe Garcia. Yates was out of the state on December 14. As a result, the other nominees replaced him with Anissa Ford-Tinnin, the outgoing Executive Director of the Republican Party of New Mexico. At the Capitol, these five individuals signed the following document:

**CERTIFICATE OF THE VOTES OF THE
2020 ELECTORS FROM NEW MEXICO**

WE, THE UNDERSIGNED, on the understanding that it might later be determined that we are the duly elected and qualified Electors for President and Vice President of the United States of America from the State of New Mexico, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in Santa Fe, New Mexico at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

FOR PRESIDENT


Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	5

FOR VICE PRESIDENT

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	5

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in Santa Fe, in the State of New Mexico, on this 14th day of December, 2020, subscribed our respective names.


JEWELL POWDRELL, Chairperson


DEBORAH W. MAESTAS, Secretary


LUPE GARCIA


ROSIE TRIPP


ANISSA FORD-TINNIN

The incoming Executive Director of the Republican Party of New Mexico, Nike Kern, attended the meeting with her husband. She video recorded the fake electors' meeting on her phone. Kern provided a copy of the ten-minute video to NMAGO investigators.

After the fake electors signed the certificate, Kern and her husband mailed the certificate to the President of the United States Senate and the National Archives. This certificate of votes never had any validity under New Mexico or federal law because the State Canvassing Board did not issue a certificate of election to the signatories and the Governor of New Mexico did not issue a certificate of ascertainment of these individuals' appointment as electors. *See* § 1-15-4(C); 3 U.S.C. § 5.

C. The Trump Campaign Contacts New Mexico's Fake Electors

The NMAGO's investigation included a thorough review of the Final Report from the Select Committee to Investigate the January 6th Attack on the United States Capitol, indictments in other jurisdictions, depositions, transcripts, and correspondence. Investigators also interviewed Powdrell, Maestas, Garcia, Tripp, Ford-Tinnin, Yates, Kern, Kern's husband, Republican Party of New Mexico Chairman Steve Pearce, and Joshua Findlay, a Trump campaign attorney who participated in the fake elector effort.

In their interviews, the fake electors described their first involvement with the plan to submit an alternate certificate of electoral votes. Ford-Tinnin was not one of the original elector nominees, but on December 12, 2020, she was contacted in her executive director capacity by Thomas Lane, the Trump campaign's operations director for New Mexico. At that time, Ford-Tinnin was aware that Rudy Giuliani and his team planned to file a lawsuit in New Mexico alleging fraudulent voting and asking a court to vacate the certificate of electoral votes for Biden and Harris. In a text exchange between Lane and Ford-Tinnin on the evening of December 12, Lane suggested that the Republican elector nominees meet on December 14 to complete an alternate certification of votes as a placeholder in the event it was needed due to the lawsuit. Ford-Tinnin told NMAGO investigators she had the understanding that the certification would serve as a contingency in case the election results were overturned.

After Ford-Tinnin provided Lane with the contact information of the Republican elector nominees, Lane emailed them, along with Ford-Tinnin, Kern, and Pearce, inviting them to attend a Zoom meeting in the afternoon on December 13. Shortly after the meeting, Lane emailed the following documents to the same group of individuals: instructions on how to cast electoral votes in New Mexico, a draft press release, a form to be used to fill any elector vacancies, ballots for President and Vice President, and a draft certificate of votes that had the same wording ultimately submitted by the fake electors, including the qualifying language.

Unbeknownst to the New Mexico contingent, the Trump campaign had sent a similar packet of documents to Republican Party executives in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin several days earlier, on December 10. Unlike New Mexico's certificate, the draft certificates sent to the other states did not contain any qualifying language. This conditional language arose later in response to an exchange between the Trump campaign and Pennsylvania's fake elector contingent.

On December 12, 2020, the same day the Trump campaign first contacted the New Mexico contingent through Lane's text exchange with Ford-Tinnin, the Pennsylvania elector nominees had a phone conversation with Giuliani and Kenneth Chesebro, an attorney brought into the Trump campaign after the election as a legal advisor. During this conference call, the elector nominees expressed their apprehension about signing a certificate in which they would be declaring

themselves to be legitimate electors. Giuliani assured them that their certificates would be used only if litigation challenging the results of the election were to be successful. Based on these concerns, however, Chesebro proposed conditional language for the Pennsylvania certificate.

In fact, Chesebro had been the architect of the January 6 scheme of having an alternate slate of electors, and only three days earlier, Chesebro had drafted a memorandum in which he said that the alternate elector certificates would be needed “so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election.” During the evening on December 12, Chesebro sent an email to Mike Roman, who had been the Trump campaign’s national director of election day operations and who was leading the Giuliani team’s effort to get alternate electors in place by December 14. In the email, Chesebro proposed that the Pennsylvania elector nominees use conditional language certifying their votes “on the understanding that it might later be determined” that they are the proper electors, consistent with his memorandum.

As that night passed into the early morning hours, at 12:28 a.m., Chesebro sent Roman and Findlay a separate email with the documents for the New Mexico fake electors, and his draft certification of the votes for New Mexico included the conditional language he had developed for Pennsylvania’s fake electors. The documents were then sent to Lane for him to forward to the New Mexico contingent, and these are the documents Lane emailed to the New Mexico group shortly after

their Zoom meeting on the afternoon of December 13. New Mexico's fake electors, however, had no knowledge of the Pennsylvania developments or Chesebro's memorandum. They were simply presented with a draft certificate that already included the conditional language, together with Lane's placeholder justification.

In fact, at that point, New Mexico's role had barely been under consideration by the Trump campaign. As late as 4:56 p.m. on December 12, 2020, Roman emailed his staff about tracking the fake elector operation and left New Mexico off his list of the states to track. By 9:30 p.m., a campaign attorney, Christina Bobb, sent an email to Roman about the other states and added that the campaign had reached out to the Republican Party of New Mexico "to ask if they can throw this together by Monday." The video recording of the fake electors at the State Capitol confirms an overall lack of knowledge and preparation on their part; Powdrell, named as Chairman by the other fake electors, continually needed to ask Kern's husband for instructions on what to do. The video indicates that the other fake electors seemed equally unprepared and unfamiliar with the process orchestrated by the Trump campaign.

Given the lack of knowledge by New Mexico's fake electors about Pennsylvania's concerns and the source of the conditional language, it is not surprising that they were also unaware of an evolution in Chesebro's alternate elector scheme at the time they completed and submitted their invalid certification of the votes on December 14. As documented by the Final Report from the Select Committee to Investigate the January 6th Attack on the United States Capitol,

Chesebro prepared a memorandum on December 13, the same day the fake elector documents were sent to the New Mexico contingent, in which he advanced a “President of the Senate” strategy that would have the President of the United States Senate (Vice President Mike Pence) unilaterally decide how to resolve conflicting slates of electors. This plan advocated the violation of the Electoral Count Act and the obstruction of the counting of electoral votes during the Joint Session of Congress on January 6, 2021.

New Mexico’s fake electors told NMAGO investigators they did not know about any intent to use their certificate for unlawful or insurrectionist purposes. Ford-Tinnin told investigators that the fake electors “just thought, they’re going to send the papers to the people that need them. If the election is overturned, they’ll take the electoral votes and they’ll go do what they have to with them.” Maestas used the phrase “just in case” five times to explain why she signed the certificate. Garcia remembers that he relied on assertions that the certification would only be operative if the election was overturned. Tripp “just assumed that the Trump campaign felt like New Mexico might come into play. And that would be our job as electors, is to go to Santa Fe and cast our votes. And, in the event that there was a question, at least our votes would count.” Powdrell believed the votes would be a moot subject if the election were not overturned.

Other members of the New Mexico contingent held the same beliefs. Pearce told investigators the electoral votes served a "preservation" purpose in case the Trump campaign’s lawsuit in New Mexico was successful. He repeated six times

throughout the interview the importance of casting the electoral votes on the correct date at the risk of making a successful lawsuit moot.

Documents prepared contemporaneously with the signing of the certificate corroborate these individuals' statements. A proposed press statement from the Republican Party of New Mexico stated as follows: "Today was the only day for GOP electors to vote, and we are making sure we address this if problems are uncovered. If we didn't take the vote, then it wouldn't matter what problems arose." Similarly, in the minutes of a meeting on December 15, Kern wrote that the certificate was necessary in case "significant anomalies are found here in NM like they have been found in other states" and that, without the certificate, "there may be no recourse." The video recording of the signing of the certificate also does not indicate any knowledge of a plan to use the document for an unlawful purpose; as noted above, it instead indicates that these individuals had little understanding of the process and the steps the campaign wanted them to follow.

The New Mexico contingent was also largely unaware of the role of the Vice President in the January 6th certification proceeding. Ford-Tinnin, Garcia, and Kern told investigators they had never heard the theory that the Vice President, as President of the Senate, could unilaterally choose between competing or alternate electors. Tripp had heard of this theory but only in the aftermath of January 6th. Powdrell believed the Vice President's role was "not to make a judgment call one way or the other, but to actually present the votes." Yates, the elector nominee who was replaced on December 14 because he was out of the state, disagreed that the

Vice President could exercise this unilateral authority. To a person, the New Mexico contingent believed that the alternate certificate of votes would have no legal effect without a successful legal challenge to the election results in New Mexico, and the NMAGO's interviews and review of documents and communications revealed no evidence to the contrary.

D. The Chesebro Plan Gains Momentum after December 14

Just as the fake electors in New Mexico were unaware of Chesebro's new theory about the Vice President's authority on January 6, they also could not have known on December 14 of subsequent developments with this theory. On December 23, 2020, John Eastman, a Trump advisor, prepared a memorandum in which he argued that the President of the Senate could simply refuse to count the electoral votes from the seven states with alternate certificates. Under this scenario, Vice President Pence either "gavels" Trump as having been re-elected or sends the election to the House of Representatives to choose the President by ballot as provided in the Twelfth Amendment when no candidate receives a majority of electoral votes. On January 3, 2021, Eastman added another option under which Vice President Pence could send the competing electoral votes back to the states' legislatures for resolution. Chesebro supported Eastman's arguments. These memoranda are discussed in the Final Report from the Select Committee to Investigate the January 6th Attack on the United States Capitol, and as the Select Committee observed, these arguments would have required Vice President Pence to violate the Electoral Count Act. President Trump, however, adopted Eastman's

plan, and he and Eastman met with Vice President Pence to pressure him to reject the seven states' electoral votes or remand the votes to the states' legislatures. During this meeting, Eastman acknowledged both that the plan would violate the Electoral Count Act and that the alternate elector certificates had no validity because they had not been accompanied by any certificate of ascertainment by the states.

Although these plans largely solidified after the fake electors sent their certificates, the NMAGO investigation has not revealed any evidence suggesting that the New Mexico contingent became aware of these plans before January 6. The fake electors in New Mexico had no contact with Eastman about these plans, and it does not appear that any member of the Trump campaign contacted them to inform them of the theories advanced by Eastman and Chesebro about the authority of the President of the Senate on January 6.

E. Criminal Charges and Actions in Other States

The NMAGO investigation revealed that six other states, Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin, were part of the Trump team's fake elector plan from its inception. New Mexico, it seems, was somewhat of an afterthought in the campaign's national scheme. As noted above, the Trump campaign provided certificates to the other states on December 10. These certificates did not contain qualifying language and included language of the signatories declaring themselves to be their state's legitimate electors. The fake

electors in Arizona, Georgia, Michigan, Nevada, and Wisconsin signed the certificates as originally drafted.

In Georgia, Fulton County District Attorney Fani Willis secured a grand jury indictment against three fake electors, Chesebro, and others in relation to the fake elector scheme, in addition to separate charges related to election subversion against former President Trump and a number of co-defendants. The fake elector scheme charges include impersonating a public officer, forgery, false statements and writings, and conspiracy. Chesebro pleaded guilty to conspiracy to commit filing false documents.

Michigan Attorney General Dana Nessel charged sixteen fake electors. The charges included forgery, uttering and publishing false or forged records or instruments, election law forgery, and conspiracy.

Nevada Attorney General Aaron Ford secured a grand jury indictment against six fake electors. They are charged with offering a false instrument for filing and uttering a forged instrument. In 2023, the Nevada Legislature passed a statute specifically making it a crime to create or serve in a false slate of presidential electors or to conspire to do so, but Governor Joe Lombardo vetoed the bill.

Arizona Attorney General Kris Mayes has publicly acknowledged an ongoing investigation. Arizona's fake electors broadcast their signing of the certification and publicly called on Vice President Pence to count their illegitimate votes instead of the legitimate votes of the actual Arizona electors on January 6.

In Wisconsin, a civil lawsuit against the fake electors resulted in a settlement. Under the agreement, the fake electors admitted their actions were part of an unlawful attempt to overturn the 2020 presidential election results.

Pennsylvania's fake electors submitted a document to the President of the Senate titled, "Certificate of the Votes of the 2020 Electors from Pennsylvania." However, consistent with the concerns they articulated to Giuliani and Chesebro, their certificate included qualifying language. It certified their vote "on the understanding that if, as a result of a final non-appealable Court Order or other proceeding prescribed by law, [they] are ultimately recognized as being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Pennsylvania." This language differed from the language proposed by Chesebro for both Pennsylvania and New Mexico in its requirement of a court order or equivalent legal declaration of the signatories being valid electors. Pennsylvania Governor Josh Shapiro, while serving as Attorney General, indicated publicly that, although the fake electors' actions were intentionally misleading and damaging to the Nation's democracy, the certificate with the conditional language would not meet the legal standard for forgery in Pennsylvania.

II. ANALYSIS OF NEW MEXICO'S CRIMINAL LAWS

NMAGO prosecutors examined the New Mexico Criminal and Election Codes to determine whether the fake electors, executives in the Republican Party of New Mexico, or members of Trump's team and campaign committed a crime under state law through the drafting, execution, and transmission of the false certificate of votes. Although the Election Code contains several election-specific crimes, there are no provisions of the Election Code that apply to the conduct here. New Mexico has no equivalent to Georgia's impersonating a public officer or Michigan's election law forgery. In addition, New Mexico's crime of falsely voting with knowledge of not being a qualified elector, NMSA 1978, § 1-20-8(A) (2011), does not apply to the ballot process for elected presidential electors. The Legislature expressly defined a "qualified elector" as "any resident of this state who is qualified to vote under the provisions of the constitution of New Mexico and the constitution of the United States and includes any qualified resident." NMSA 1978, § 1-1-4(A) (2019). In other words, a "qualified elector" is "a voter." Section 1-1-4(B). False voting under Section 1-20-8(A) therefore applies only to individuals falsely voting in an election without being a qualified voter. The fake electors were qualified voters and did not violate this statute.

The Election Code proscribes falsifying election documents, including the preparing or submitting of a false election document. NMSA 1978, § 1-20-9(E) (2009). However, this crime does not apply to a certificate of electoral votes. It

instead expressly applies only to “any false certificate of nomination, registration record or election return.” *Id.*

Turning to the Criminal Code, the crime of fraud does not apply because it requires the misappropriation or taking of property having some value. NMSA 1978, § 30-16-6 (2007); *State v. Lee*, 2009-NMCA-075, ¶ 13, 213 P.3d 509. The fake electors did not misappropriate property having a dollar value.

The general crime of forgery is the one that most closely aligns with the conduct of the fake electors, as indicated by the forgery-related charges in Georgia, Michigan, and Nevada. However, the NMAGO’s investigation found that the fake electors’ conduct, while meeting two of the elements of forgery, does not satisfy the element of an intent to defraud.

New Mexico defines forgery in relevant part as “falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud.” NMSA 1978, § 30-16-10(A) (2006). This crime has three essential elements: (1) falsely making or altering a signature to, or any part of, a writing; (2) the writing purports to have legal efficacy; and (3) the individual acted with an intent to injure or defraud.

With respect to the first element, “[t]he crime of ‘forgery’ consists in the act of making the false instrument with an intent to defraud.” *State v. Smith*, 1927-NMSC-012, ¶ 24, 252 P. 1003. “Though a forgery . . . requires a lie, it must be a lie about the document itself; the lie must relate to the genuineness of the document.” *State v. Baca*, 1997-NMSC-018, ¶ 5, 934 P.2d 1053. The Republican elector

nominees made a certificate of electoral votes even though they had no authority to create the document and even though the document was not a genuine certification of electoral votes supported by a certificate of ascertainment. There is sufficient evidence to establish this element.

For the purposes of the second element of forgery, legal efficacy can apply to commercial and public documents. A non-commercial document purports to have legal efficacy if (1) it must be filed or recorded by law or is necessary or convenient to the discharge of a public official's duties, (2) it could be made the foundation of liability on its face, and (3) it is good and valid to serve the purpose for which it was created. *State v. Martinez*, 2008-NMCA-058, ¶¶ 7, 9, 183 P.3d 935. This test looks at the instrument the false document purports to be. For example, New Mexico courts have held that a fingerprint card, a traffic citation, an I-9 form, a W-4 form, a social security card, and a resident alien card have legal efficacy under this test. *Id.* ¶¶ 7-11; *State v. Sandoval*, 2007-NMCA-103, ¶¶ 13-17, 166 P.3d 473.

As indicated by its title, format, and content, and by the timing and location of its execution and its submission to the President of the United States Senate, the fake electors purported to make a certification of electoral votes for the offices of President and Vice President of the United States from the New Mexico presidential electors. A certificate of electoral votes is required to be filed by law, Section 1-15-8; 3 U.S.C. § 9, it is a source of liability on its face in its use to elect the President and the Vice President, and it is good and valid to serve that purpose. By falsely making this document, the fake electors interfered with the purposes the

document serves and undermined confidence in the integrity of such documents. The certificate met the second element of forgery by purporting to have legal efficacy, whether as casting ballots for New Mexico's electoral votes or as a placeholder for those votes in case the Republican nominees were later declared to be the duly elected and qualified electors for New Mexico.

The final element of forgery is an intent to injure or defraud. However, this element does not require an intent to cause economic harm; it instead refers to an intent to cheat or deceive. UJI 14-1643 committee cmt. The State is not required to prove an intent to cheat or deceive a specific person. *Id.*

After a comprehensive investigation and a thorough examination of the facts, the NMAGO found that the fake electors' conduct did not meet this final element of forgery. The fake electors received and signed a document that had qualifying language that communicated they were not, at that time, New Mexico's legitimate presidential electors. They knew that a lawsuit challenging New Mexico's election results would be filed close in time to their execution of the certificate, and Lane told Ford-Tinnin this document would be used only if the litigation were to be successful. The totality of the evidence does not establish that the fake electors intended to deceive the President of the Senate into thinking that they were the actual electors from New Mexico and using their votes in place of New Mexico's actual electors without a court ruling overturning the election results. In other words, the evidence does not support an intent to defraud. Because proof of an

essential element of forgery is missing, these individuals cannot be charged with the crime.

The fact that there was no substantive crime of forgery does not foreclose the commission of an initiatory crime like conspiracy or solicitation. Conspiracy is the agreement to commit a felony and requires an intent that the felony be committed. NMSA 1978, § 30-28-2 (1979). A person who “solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony” with the intent that the felony be committed is guilty of solicitation. NMSA 1978, § 30-28-3 (1979).

The NMAGO has found that there was no initiatory crime in New Mexico. As described above, there was a scheme at the national level to overturn the legitimate results of the election. To advance this scheme, members of Trump’s team and campaign sent draft certifications of electoral votes to Republican Party executives in seven states with the intent that the certifications be completed by elector nominees that were not the actual presidential electors for those states. They further intended for the certificates to be completed in the manner provided by law and to be sent to the President of the Senate to be counted, to nullify the actual electoral votes, or to disrupt or delay the electoral college process. In five other states and Pennsylvania, those draft certificates included language declaring the individuals to be the duly elected and qualified electors of their states. If such a document had been sent to New Mexico party executives or the New Mexico fake electors, those who drafted and transmitted the documents may have been guilty of

solicitation of forgery under New Mexico law because they would have been asking the fake electors to submit a false certificate with an intent to defraud. However, the fake electors never received a draft with this false declaration. They instead received a draft with conditional language, and Lane, a member of Trump's campaign, conveyed that the document served as a contingency in case the lawsuit in New Mexico succeeded. Moreover, any agreement to commit a felony by national actors did not include New Mexico actors or take place in New Mexico. There is thus insufficient evidence to establish a solicitation or conspiracy in this state.

III. CONCLUSION AND RECOMMENDED LEGISLATIVE REFORM

Building upon extensive investigations of the January 6 scheme by the Federal Government and several other states, the NMAGO's investigators determined that New Mexico is uniquely situated among the seven states that were part of a national scheme. New Mexico's fake electors did not receive a draft certification until after it had been modified to include conditional language to assuage the concerns of Pennsylvania's fake electors. This conditional language, combined with the New Mexico fake electors' understanding of how the document would be used, prevents a prosecution for the violation of New Mexico law.

This conclusion, however, does not change the fact that former President Trump and his team attempted to use this certificate unlawfully to disrupt the electoral college process and overturn the legitimate results of the election. As Governor Shapiro observed, the fake electors' preparation and submission of a false certificate was misleading. Their conduct endangered a lawful and orderly transition of power and posed the threat of contributing to a coup d'etat. Although the conduct was not criminal under current law, it is the type of dangerous conduct that should be criminalized to protect the integrity of state and national elections. For this reason, New Mexico should strengthen its election laws.

More specifically, New Mexico's Election Code can be strengthened by amending the crime of falsifying election documents in Section 1-20-9 and by creating a new crime of falsely acting as a presidential elector like the one passed by the Nevada Legislature. In Section 1-20-9, the required mental state of knowingly

falsifying an election document would adequately separate criminal from innocent conduct; knowledge of falsity poses a significant risk of interfering with the election process and should be proscribed without the additional requirement of an intent to deceive or mislead. Section 1-20-9 also should be expanded to include a broader range of documents required to be filed in an election. Even with these changes to Section 1-20-9, however, New Mexico should have a separate crime of falsely acting as a presidential elector because of the gravity and risk of harm posed by an attempt to disrupt a presidential election. Further, the statute should foreclose the use of conditional language to defeat criminal liability. The NMAGO offers the following two proposed election integrity statutes:

1-20-9. Falsifying election documents.

Falsifying election documents consists of performing any of the following acts willfully and with knowledge [~~and intent to deceive or mislead any voter, precinct board [election board], canvassing board or other election official~~]:

A. printing, causing to be printed, distributing or displaying false or misleading instructions pertaining to voting or the conduct of the election;

B. printing, causing to be printed, distributing or displaying any official ballot, sample ballot, facsimile diagram or pretended ballot that includes the name of any person not entitled by law to be on the ballot, or omits the name of any person entitled by law to be on the ballot, or otherwise contains false or misleading information or headings;

C. defacing, altering, forging, making false entries in or changing in any way a certificate of nomination, registration record, ~~or~~ election return or other election document required by or prepared and issued pursuant to the Election Code [Chapter 1 NMSA 1978];

D. suppressing any certificate of nomination, registration record or election return required by or prepared and issued pursuant to the Election Code;

E. preparing or submitting any false certificate of nomination, registration record, ~~or~~ election return or other election document required to be filed by law or upon which an election official is required to rely as part of the official's election duties; or

F. knowingly falsifying any information on a nominating petition or other election document required to be filed by law or upon which an election official is required to rely as part of the official's election duties.

Whoever falsifies election documents is guilty of a fourth-degree felony.

[A New Section of Article 20 of Chapter 1] Falsely Acting as a Presidential Elector.

A. Falsely acting as a presidential elector consists of a person knowingly representing to an election official or in an election document that the person is an elector for the state for the offices of president and vice president of the United States without receiving a certificate of election by the state canvassing board pursuant to Section 1-15-4 NMSA 1978.

B. It shall not be a defense, justification or excuse for the violation of this section that the representation is accompanied by the conditional occurrence of some event in the future.

C. The attorney general and the district attorney in the county of jurisdiction have concurrent jurisdiction to enforce the provisions of this section.

Whoever falsely acts as a presidential elector is guilty of a second-degree felony.