

# FAQ on the King-Klobuchar-Durbin Electoral Count Modernization Act (ECMA)

## What does the bill do?

The Electoral Count Modernization Act (ECMA) updates the vague and outdated Electoral Count Act of 1887. It establishes clear rules and procedures states must follow for appointing presidential electors to ensure finality of the election results at the state level prior to congressional certification; updates the procedures for transmitting states' electoral votes to Congress to further insulate the process from wrongful interference; clarifies the largely ministerial role of Congress and the Vice President in the January 6 vote-counting session; provides specific, narrow grounds for objecting to a state's transmitted electors or electoral votes; and raises the thresholds for Congress to consider and sustain such objections.

## How does the bill ensure that a state's Electoral College tally reflects the final results of a popular election?

The ECMA requires states to hold elections for president on Election Day and in accordance with the state's own laws duly enacted prior to Election Day. The bill also sets a new deadline of December 20 for states to resolve any post-election disputes and to hold any recounts permitted by state law. Where a state has not reached a final determination of its election results by the deadline, the bill allows a presidential candidate to bring an action in federal court to ensure that the final certified results transmitted to Congress reflect the results of the state's popular election.

## Would this bill prevent the submission of false slates of electors?

The ECMA contains several protections against the possibility of individuals submitting false slates of electors to Congress.

First, for any slate of electors to be considered conclusive and to govern the counting of electoral votes by Congress, the electors must have been appointed in accordance with the state's own laws that were duly enacted prior to Election Day. Any slate of electors purporting to reflect the state's election outcome which are made in a manner contrary to the laws of the state are void and without legal effect under the ECMA. This requirement is enforceable in federal court and would ensure any forgeries or false slates of electors are invalid and could not be considered by Congress.

Second, the ECMA requires the governor of each state to transmit official certificates of its list of electors to various federal officials and to publish the appointed list of electors online and to make it available for public inspection, which would protect against a separate, false slate of electors from being wrongly submitted to Congress. Relatedly, under the ECMA, members of Congress participating in the joint session for counting electoral votes would have prior notice of each state's certified list of electors prior to the official list being announced and counted in Congress.

Finally, while the grounds for objecting to electors are greatly narrowed under the ECMA, one of the grounds for objection under the new rules is if a slate of electors is not "valid," i.e. do not reflect the final appointment of electors as determined by the laws of the state and certified by the responsible official under state law.

## What if a Governor or Legislature of a state “goes rogue” and attempts to certify a set of electors that differs from that popularly chosen? Or refuses to certify the results of the election?

The ECMA contains several provisions to guard against subversion of popular election results.

All states must follow the state laws that are in place on Election Day for holding elections for the selection of presidential electors. Any attempt to appoint electors after Election Day using different rules would be invalid, and a candidate could go to federal court to obtain a ruling that the electors appointed reflect the state’s election results.

If a governor refuses to prepare and transmit the official list of electors that reflects the state’s election outcome, the chief state election official would have the power under the ECMA to fulfill these duties. If the chief state election official also fails to transmit the official list of electors, a candidate can sue in federal court to have the court perform these duties so the will of the voters prevails.

## What role does the Vice President play at the Joint Session?

The draft bill makes clear that the Vice President has no role in the process of counting electoral votes, except that assigned by the Constitution: simply to open the envelopes containing states’ electoral votes. The Vice President would have no other powers or role in the process of counting electoral votes, and the bill makes clear the Vice President has no power to overturn the will of the voters.

## May a member of Congress object to a state’s electoral vote count?

Under very limited circumstances, members of Congress may object to a state’s electors or to their electoral votes.

In general, the ECMA ensures that election disputes are resolved under state law procedures established long before the votes are counted in Congress. States must comply with their own laws in place on Election Day and thus may not send slates of electors that do not reflect the state’s popular vote results. If state officials refuse to certify the election results and submit those results to Congress, the ECMA allows federal courts to issue a state’s final determination and provide the necessary documents for Congress to count the state’s electors according to the state’s election results.

If, in the extremely unlikely case that an official slate of electors is received by Congress that does not comply with state law procedures for counting and certifying electoral votes, members of Congress may object if the following conditions are met:

1. The objection is made in writing;
2. The objection is signed by one-third of the members of the House of Representatives and one-third of the members of the Senate; and
3. The objection states clearly and concisely one of the narrow grounds for objection permitted by the ECMA.

## What may Congress object to?

Congress may object to a state’s *slate of electors* only if:

- The certificate that identifies a state’s electors is not the valid certificate submitted under the procedures of Section 6 of the ECMA.
- An individual listed on the Certificate of Identification of Electors is constitutionally ineligible to fulfill that office under Article II, section 1, clause 2 or section 3 of the Fourteenth Amendment to the Constitution.

If more than one valid Certificate of Identification of Electors is somehow supplied, the ECMA provides a set of rules for which certificate of identification must prevail.

Congress may object to the *votes* of electors only on three bases:

1. A vote was cast for a candidate for President and a candidate for Vice President both of whom reside in the same State as the electors, in violation of the Twelfth Amendment to the Constitution.
2. A vote was cast for a candidate who is constitutionally ineligible to serve as President or Vice President.
3. A vote was cast on a day other than the day prescribed by section 7 (December 29 of election years).

These are significant improvements over the 1887 law, which allows objections for any and indeterminate reason, since the grounds for objection are not specifically enumerated in the statute.