No. 19-465

IN THE
Supreme Court of the United States

PETER BRET CHIAFALO, LEVI JENNET GUERRA, AND ESTHER VIRGINIA JOHN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION 1

REASONS FOR GRANTING THE WRIT 2

I. The Decision Below Directly Conflicts With A Recent Decision Of The Tenth Circuit And Other Decisions. 2

A. The decision below and *Baca* are irreconcilable. 2

B. The decisions deepen a pre-existing split. 4

II. The Question Presented Is Exceptionally Important And Warrants Review In This Particular Case. 5

A. The issue need not "percolate." 5

B. This case is an ideal vehicle. 8

III. The Decision Below Is Incorrect. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Burroughs v. United States, 290 U.S. 534 (1934) 12

INS v. Chadha, 462 U.S. 919 (1983) 11

Koller v. Brown, 224 F. Supp. 3d 871 (N.D. Cal. 2016) 5

Oregon v. Mitchell, 400 U.S. 112 (1970) 11

Ray v. Blair, 343 U.S. 214 (1952) 4, 10

STATUTES

N.C. Gen. Stat. 163-212 8

N.M. Stat. § 1-15-9 8

RCW 29A.56.340 (2016) 3

OTHER AUTHORITIES

Brian C. Kalt, *Of Death And Deadlocks: Section 4 Of The Twentieth Amendment*, 54 Harv. J. on Legis. 101 (2017) 7

Christopher Cousins, "Sanders vote thwarted . . . ," *Bangor Daily News* (Dec. 19, 2016) 8

Colorado Dep't of State v. Baca, No. 19-518, Br. of South Dakota, et al., as Amici Curiae (filed Nov. 20, 2019) 6

Colorado Dep't of State v. Baca, No. 19-518, Petition for Certiorari & Appendix (filed October 16, 2019) ..... *passim*

Colorado Dep't of State v. Baca, No. 19-518, Resps.' Br. In Support of Certiorari (filed Nov. 20, 2019) 9

FairVote, "State Laws Binding Electors," http://bit.ly/StateBindingLaws 6, 9

Jesse Wegman, *Let The People Pick The President* (forthcoming 2020) 7

Michael Kramer, "Bush Set to Fight an Electoral College Loss," *The New York Daily News*, November 1, 2000, https://perma.cc/6YWS-PK23 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XXVI 11

REPLY IN SUPPORT OF PETITION

This petition and that in *Colorado Dep't of State v. Baca*, No. 19-518, present both sides of a clear split in authority between the Washington Supreme Court and the Tenth Circuit on the crucial question of whether, after appointment, a state may by law direct how presidential electors cast their votes for President and Vice President, and enforce that direction through legal penalties. Nearly everyone who has filed a brief in either case—including Colorado and twenty-two other states as *amici*—has agreed that this Court should grant certiorari to resolve the critical, unsettled issue.

Washington's Brief in Opposition in this case instead argues that the Court should deny certiorari. Its arguments are unpersuasive.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With A Recent Decision Of The Tenth Circuit And Other Decisions.

Washington repeatedly recognizes "tension" in the reasoning and holdings of the decision below and *Baca*. Opp. 2, 25, 26. It also acknowledges "disagreement" but calls the disagreement "shallow." Opp. 26. In fact, the disagreement between the courts is fundamental and irreconcilable, and it deepens a pre-existing split on the nature of electors and the functions they execute.

A. The decision below and *Baca* are irreconcilable.

There is no way to reconcile the two courts' constitutional holdings and reasoning. The court below reasoned that states have broad powers of appointment over electors, and said that nothing in the Constitution "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." App. 19a. The Tenth Circuit found the opposite: "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion." *Baca*, Pet. App. 127. Washington gives this Court no persuasive way to reconcile those competing views of constitutional discretion, as there is none.

Washington posits that perhaps the different sanctions in Washington (a fine) versus Colorado (removal) make the decisions reconcilable. Opp. 25. But this assertion ignores the actual reasoning of the decisions. Nothing turned, in either case, on the

particular sanction carried out by the state. The Washington Supreme Court's approval of the fine turned on its view that presidential electors have no discretion and state control of electors does not interfere with a federal function. App. 19a–22a. The *Baca* court's reasoning was just the opposite. *See* Pet. 15–19. As Colorado recognized in its petition in *Baca*, the Tenth Circuit held that "electors may disregard state law" if it interferes with their vote. *Baca*, No. 19-518, Pet. 10. That principle would permit elector discretion even if Colorado had an identical sanction to that in Washington.

Indeed, Washington's confession that it "does not suggest that removal of electors exceeds the State's appointment authority," Opp. 25 n.5, underscores that the distinction it offers this Court is illusory.[1] The court below endorsed the idea that a state may "restrict[]" elector discretion, App. 19a, but the Tenth Circuit said that the Twelfth Amendment contains no "language restricting the electors' freedom of choice or delegating the power to impose such restrictions to the states." *Baca*, No. 19-518, Pet. App. 111. Recently, the Washington Legislature chose a side and reaffirmed

[1] Ironically, Washington's primary attempt to thread the needle between the two decisions relies on inattention to its own state law. Washington claims that the court below "fin[ed] Petitioners *for violating their voluntary pre-appointment pledge*," and that a fine might fall within a state's appointment power even if electoral removal does not. Opp. 24 (emphasis added). Washington misstates its own law. Petitioners were actually fined under a law that provides that "[a]ny elector who *votes for a person or persons not nominated by the party of which he or she is an elector* is subject to a civil penalty of up to one thousand dollars." RCW 29A.56.340 (2016) (emphasis added) (reproduced at App. 52a–53a). The law does not mention the pledge and cabins elector discretion directly.

the strong view of the (contested) power to restrict elector discretion by revising its law to permit elector removal. Colorado's. Opp. 11 & n.2. Washington law, as it stands today, is thus indistinguishable from that in Colorado. But the State identifies no constitutional problems with the revised law under the decision below, when that law is plainly unconstitutional under *Baca*. This underscores the direct, irreconcilable conflict between the two decisions.[2]

B. The decisions deepen a pre-existing split.

Washington acknowledges there were conflicting decisions about the role of electors before the most recent round of decisions, but it dismisses the import of that split on the grounds that most cases pre-dated *Ray v. Blair*, 343 U.S. 214 (1952). Opp. 27–30. But *Ray* did not put the issue of elector discretion to rest; instead, as the court in *Baca* stated, *Ray* explicitly "leaves open the relevant enforcement question." *Baca*, No. 19-518, Pet. App. 83. There is thus no reason to discount cases that directly implicate the question of discretion, even if they predate *Ray*. Certainly, *Ray* did not purport to address them.

Washington's argument also ignores the fact that post-*Ray* courts still recognize the pre-existing split that the State downplays. Several recent opinions issued in the course of emergency litigation by electors in 2016 expressed uncertainty about the state of the

[2] Even if Washington were correct that the courts' decisions are merely in "tension" and not in "direct conflict," this Court should still grant certiorari. As Colorado recognized, it is critical for this Court to resolve the "troubling lack of consensus in the lower courts over the independence of electors," *Baca*, No. 19-518, Pet. 13, given the need for predictability and regularity in presidential elections.

law. A district court in California found there were "equally plausible opposing views" on the merits of elector discretion. *Koller v. Brown*, 224 F. Supp. 3d 871, 879 (N.D. Cal. 2016). Separately, a 2016 motions panel of the Tenth Circuit thought the actual removal of an elector would be "unlikely in light of the text of the Twelfth Amendment" (though it occurred three days later). *Baca*, No. 19-518, Pet. App. 197 n.4. Indeed, Washington's argument fails to recognize that the court below and the court in *Baca* are irreconcilably split on the issue of whether *Ray* resolves the question presented. *Compare* App. 23a ("*Ray*'s holding rests on a rejection of [electors'] position") *with Baca*, No. 19-518, Pet. App. 83 ("*Ray* . . . leaves open the relevant enforcement question").

Given the uncertainty in multiple decisions since 2016, it is clear that *Ray* has not resolved the question of elector discretion. To the contrary: the pre-existing split has only grown sharper. This Court's review is warranted.

II. The Question Presented Is Exceptionally Important And Warrants Review In This Particular Case.

A. The issue need not "percolate."

Washington suggests that, even if decisions addressing the unresolved constitutional question of elector discretion are "in tension," this Court should allow the issue to "percolate" so that there can be "[f]urther development in the case law." Opp. 26, 30. That is not a good idea.

As Colorado and twenty-two other states recognize, there is now "considerable uncertainty" around the

constitutional rights of electors. *See* Br. of South Dakota, et al., as Amici Curiae in *Baca*, No. 19-518, at 2. Thirty-two states have a pledge or law that limits the discretion of presidential electors. *See* FairVote, "State Laws Binding Electors," http://bit.ly/StateBindingLaws. When electors in any of those states seek to depart from their pledge, state officials and lower courts will be unable to determine whether they are free to do so. Within the Tenth Circuit, electors can vote with discretion; in Washington, electors cannot; in other states, it'll be anyone's guess.

Washington does not dispute that no one knows what would occur in a future election if the issue arose. Instead, it contends that electors' "limited historical impact" makes a nightmare scenario unlikely. Opp. 31. This response manages to be both irrelevant and inaccurate.

It is irrelevant because a decision in this case can affect only future elections, and so the question is what would happen in 2020 and beyond given *Baca*, the decision below, and the events of 2016. Thus, even granting the incorrect proposition that anomalous electoral votes have had no "historical impact," that still would not mean that they will have no future impact. The legal and political landscape has changed, and it is a very real possibility that so-called anomalous electors could swing a presidential election.

Moreover, the State's history is inaccurate. Anomalous electors threw the 1836 vice presidential election to the Senate. That year, Virginia's Democratic presidential electors were instructed to vote for party nominee Richard Johnson as Vice President, but they withheld their votes en masse and

voted for another person; this denied Johnson an electoral college majority and sent the selection of the Vice President to the Senate. *See* Brian C. Kalt, *Of Death And Deadlocks: Section 4 Of The Twentieth Amendment*, 54 Harv. J. on Legis. 101, 111 (2017). Forty years later, the 1876 presidential election turned on the related question of the validity of a single vote by an Oregon elector who was a member of a different party than the slate originally appointed. *See* Pet. 26–27 (describing the "crisis" election of 1876). And just two electors defecting from the candidate who receives the most electoral votes, as happened in 2016, would have thrown the presidential election to the House as recently as 2000. *See* Pet. 27. Indeed, reports that year reveal that the campaign for President Bush had prepared an argument to persuade electors to vote for Bush if he had prevailed in the popular vote but failed to secure a majority of electors. *See* Michael Kramer, "Bush Set to Fight an Electoral College Loss," *The New York Daily News*, November 1, 2000, https://perma.cc/6YWS-PK23.[3]

"Percolation" is a particularly bad idea now, because this is the rare chance to decide the issue of elector discretion outside of the contested stakes of a presidential election. As explained in an amicus brief, litigation by presidential electors is hard to preserve beyond the frantic days surrounding a presidential election. *See* Br. of Vinz Koller as Amicus Curiae at 15. That is what makes it all the more important to grant certiorari in this case and decide these difficult issues in the normal course of an unrushed hearing with no

[3] This episode is discussed in Jesse Wegman, *Let The People Pick The President* 236 (forthcoming 2020). George W. Bush chief strategist Karl Rove denies that this strategy was ever discussed.

direct political stakes. *See* Br. of Michael Rosin and David Post as Amici Curiae at 3–12. Washington's suggestion that this Court leave the issue unresolved until there is a constitutional emergency is profoundly unwise.

B. This case is an ideal vehicle.

Washington does not dispute that this case presents a justiciable controversy. Nor does it deny that the merits of elector discretion are directly presented. Instead, Washington gives a single reason to support its argument that this case is a "poor vehicle": that Washington's 2016 laws were "unique" and have since been revised. Opp. 30. But there is nothing unique in Washington's legal theory that gave rise to this case. And that erroneous constitutional theory will continue to support dozens of state laws—unless this Court intervenes.

Although the language of elector-binding laws across the country varies, the laws broadly fall into four categories based on whether they have any express enforcement mechanism, and if so, what that is: (1) states with binding laws that, like Colorado and now Washington, permit removal of electors who cast anomalous votes; (2) states that, like Washington in 2016, would transmit an anomalous vote but impose criminal or civil penalties, *e.g.*, N.M. Stat. § 1-15-9; (3) states that both permit removal and provide for a sanction for any anomalous elector, *e.g.*, N.C. Gen. Stat. 163-212; and (4) states with pledges but no statutory enforcement mechanism, but that nonetheless may be enforced in some way, *see* Christopher Cousins, "Sanders vote thwarted . . . ," *Bangor Daily News* (Dec. 19, 2016) (noting that a Maine elector's vote was ruled "out of order" because it

was cast for Bernie Sanders in a state with an elector pledge requirement but no express enforcement mechanism). *See generally FairVote*, "State Laws Binding Electors," http://bit.ly/StateBindingLaws.

Crucially, the legality of enforcing any of these laws is based on whether electors have constitutionally protected discretion to vote. If electors have such discretion, then pledges or binding laws cannot be enforced through removal, criminal sanction, fine, or otherwise. If they do not, then all of the above sanctions are permissible, so long as they are enforced consistently with other constitutional provisions. Washington does not contend otherwise.[4]

This unity was vividly illustrated by the two recent appellate decisions. As explained, both the decision below and *Baca* turned entirely on the concept of elector discretion under the Constitution. *See supra* 2–4. Because the courts reached different views on that crucial question, they reached different results in the cases. The particular enforcement mechanism played no role in either decision. This makes the change in Washington's law irrelevant for purposes of certiorari. Any decision in this case would apply to Washington's new law just as it would apply to the 2016 law and any other state binding law, no matter the enforcement mechanism.

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[4] As explained in Respondents' Brief in Support of Certiorari in *Baca*, to ensure that any disposition here explicitly applies to statutes that provide for electoral removal and those that provide for non-removal sanctions, the best course is likely to grant certiorari in both cases. *See Baca*, No. 19-518, Resps.' Br. In Supp. at 15–16. Petitioners are confident, however, that granting certiorari in this case only while holding *Baca* would still permit the Court to resolve the core constitutional issue definitively.

III. The Decision Below Is Incorrect.

On the merits, this Court should reverse the decision below. The Washington Supreme Court's holding that presidential electors lack discretion to vote for their preferred candidates is based on a flawed analysis of history, precedent, and constitutional text and structure.

Washington argues that the long political tradition of electors supporting candidates of their parties supports binding statutes, Opp. 6–10, 20, but that mistakes tradition for law: as amici Rosin and Post explain, "the political tradition of electors pledging support for candidates based on party affiliations has always existed *against the backdrop* of the largely unchallenged view that states could not direct electors to vote for particular candidates." Br. of Michael Rosin and David Post as Amici Curiae at 12. And Washington incorrectly claims that this Court's precedents somehow signal a constitutional acquiescence to historical practice, Opp. 20, when in fact this Court in *Ray v. Blair* expressly left open the question of pledge enforcement even against that same historical backdrop, *see* 343 U.S. at 230.

Washington also ignores the constitutional text that requires elector discretion. *See* Pet. 19, 31. And it attempts to dismiss the principle that states may not interfere with federal functions by offering a non sequitur about Congress's limited power over electors. Opp. 20. But Petitioners have never said Congress could control electors' votes. Instead, presidential electors are independent actors appointed by states—like state legislators when ratifying constitutional amendments or, before the Seventeenth Amendment, when appointing U.S. Senators—and they may not be

interfered with in the performance of their core federal function. *See* Pet. 32–33. Washington has no response to that dispositive structural point.

Finally, Washington argues that this Court should avoid resolving this question because it believes Petitioners' real aim is to motivate reform of the electoral college. Opp. 32–33. But Petitioners' primary motive is to insist that a state has no power to fine (or remove) electors for failing to vote one way or another. If a decision of this Court interpreting the Constitution then motivates a political response, that's not a failure. That's called democracy. *See, e.g.*, U.S. Const. amend. XXVI (granting voting rights to citizens aged 18 or older in all elections, in response to *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that Congress had no constitutional power to lower the voting age in state and local elections).

In the end, Washington reveals that it wants this Court to deny certiorari because its position is out of step with the Constitution. It claims this Court should avoid granting certiorari because "[m]ost Americans . . . would be shocked to learn . . . that when they vote for President, they are really just voting for someone else who gets to choose who to vote for as President." Opp. 32. But that is what the Constitution provides, and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). If what the Constitution actually requires would truly "shock" most Americans, then the public can respond in a democratically appropriate way.

* * *

"The importance of [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs v. United States*, 290 U.S. 534, 545 (1934). Given the undeniable importance of having a clear, fair outcome in future presidential elections, Washington's suggestion that the split on this issue should continue to "percolate," Opp. 30, risks too much. The petition should be granted so that the Court need not address the issue of elector discretion in the heat of a disputed election.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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