No. 19-465

IN THE

Supreme Court of the United States

PETER BRET CHIAFALO, *ET AL.*,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer-advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including matters involving the integrity and responsiveness of our nation's electoral system. Public Citizen also has a longstanding interest in First Amendment issues and is particularly concerned with claims that invoke the First Amendment in ways that clash with, rather than reinforce, democratic values.

Those concerns are implicated by the argument, made in the petition for a writ of certiorari in this case, that the First Amendment provides presidential electors a right to cast their votes in any manner they see fit, notwithstanding state laws aimed at conforming those votes to the preferences of the broader electorate. Although the petitioners have abandoned that argument in their merits brief, it remains part of the question presented on which this Court granted certiorari. Public Citizen submits this brief to emphasize that First Amendment concerns have no proper bearing on whether electors may be bound to cast their votes in accordance with state law. In *Nevada Comm'n on Ethics v. Carrigan*, Public Citizen explained that the First Amendment affords public officials no "right to utilize the mechanics of governance to convey a message." Br. of Amicus Curiae Public Citizen 8, *Nev.*

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties filed blanket consents to the submission of amicus briefs in support of either or neither party.

Comm'n on Ethics v. Carrigan, No. 10-568 (2011). This Court adopted exactly that view in its decision, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011), and it applies equally to the First Amendment claims here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari in this case was filed by Washington state presidential electors who were subjected to statutory penalties for casting their electoral votes in 2016 for persons other than the candidates who won the statewide popular vote. The petition asked this Court to determine "whether enforcement of this law is unconstitutional because: (1) a State has no power to legally enforce how a presidential elector casts his or her ballot; and (2) *a State penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment*" (emphasis added). Pet. i. The petition urged the Court to grant certiorari in this case because it "cleanly presents all available theories for elector discretion," including "the First Amendment." *Id.* at 29. "In particular," the petition stated, "the presence of a viable First Amendment claim is a strong reason to grant certiorari in this case." *Id.* The Washington Supreme Court's basis for rejection of that claim, the petition asserted, was "wrong," *id.*, and "[c]onsidering the First Amendment thus permits this Court to view the heart of the matter from a different angle than that provided by Article II and the Twelfth Amendment," *id.* at 30. This Court granted the petition without limiting or otherwise altering the question presented.

In their merits brief, however, the electors have excised from their question presented the First

Amendment issue on which the Court granted certiorari at their request, *see* Pet'rs Br. i, and the brief nowhere argues that the Washington statute violates the First Amendment. Indeed, the words "First Amendment" appear in the brief only in a parenthetical to a citation supporting the generic proposition that a fine for constitutionally protected activity is impermissible. *See id.* at 43. In short, the electors have abandoned their First Amendment argument, despite urging it on the Court as a reason for granting certiorari in this case instead of, or in addition to, *Colorado Department of State v. Baca* (No. 19-518), which otherwise presents the same argument as this case that the Constitution grants electors the power to vote for someone other than the candidates they pledged to support. *See* Pet. 30.

Ordinarily, this Court disapproves of such bait-and-switch tactics, and the Court's precedents permit the Court—but do not require it—to dismiss the petition in whole or in part, or to treat the issue as forfeited. *See*, *e.g.*, *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). Here, however, dismissal of the petition in its entirety is unwarranted because the non-First Amendment issues it presents merit review (as evidenced by the Court's grant of certiorari in the Colorado case) and because this case, unlike the Colorado case, will be considered by the full Court.

In addition, if the Court were to rule against the electors on the Article II, Twelfth Amendment, and Supremacy Clause theories they advance, but did not address their First Amendment claims because of the electors' failure to brief them, uncertainty would remain over whether electors may disregard state laws directing the manner in which a state's electoral votes

are to be cast. Electors determined to vote for candidates other than those they were appointed to support would likely again invoke the First Amendment to excuse their conduct.

That result would be particularly unfortunate because the First Amendment argument that electors may disregard the will of the voters in violation of state law is insubstantial. In casting electoral votes, electors do not engage in speech protected by the First Amendment, but perform official acts with legal significance—conduct that is outside the First Amendment's realm. *See Carrigan*, 564 U.S. at 125–26. If other provisions of the Constitution do not prevent states from imposing penalties on electors who refuse to cast their ballots in accordance with the outcome of the popular vote (whether on a statewide, district, or even nationwide basis), the First Amendment surely does not. The insubstantiality of the First Amendment argument no doubt explains why the Washington electors ultimately chose not to advance it in their merits brief even though the Court had accepted their invitation to address it.

Under these circumstances, if the Court otherwise affirms that Washington has constitutional authority to penalize electors who fail to cast their ballots for the candidates they were appointed to support, the Court should consider addressing the First Amendment question presented in the petition and holding that the First Amendment provides no shelter for electors who vote contrary to their pledges and the requirements of state law. At a minimum, the Court should say nothing to encourage the incorrect view that the First Amendment grants electors the power to disregard state law if the Constitution's structural provisions do not.

ARGUMENT

I. The electors have offered no argument for their claim that the First Amendment gives them unfettered discretion to cast their electoral votes without regard to state law.

The Washington electors who are petitioners in this case were administratively assessed civil penalties of $1,000 each for casting their electoral votes for candidates other than those whom they were appointed to support. The electors sought judicial review of the penalties in state court based on two theories: (1) their claim that the provisions of the United States Constitution governing the election of the President prevent states from penalizing faithless electors, and (2) the theory that the First Amendment protects the freedom of electors to cast their votes for whomever they please, regardless of state law. The electors' First Amendment argument was addressed and rejected on the merits both by the state trial court, *see* Pet. App. 34a, and the state supreme court, *see* Pet. App. 24a–27a.

The electors' petition for a writ of certiorari expressly included the First Amendment issue in its question presented, Pet. i, argued that the state courts' resolution of that issue was erroneous, *id*. at 29, and emphasized the importance of granting a petition including the First Amendment issue so that "every strong argument will be thoroughly considered by the Court." Pet. 29. This Court granted certiorari without limiting or rephrasing the question presented, and thereby accepted the electors' invitation that it take up the First Amendment question together with the others proffered in the petition. *See Irvine v. California*, 347 U.S. 128, 129 (1954)

(plurality opinion of Jackson, J.) ("The issues here are fixed by the petition unless we limit the grant.").

Despite having highlighted the First Amendment issue both in their framing of their question presented and in the body of their petition as a "strong reason" for accepting their case, Pet. 29, the electors have abandoned it in their merits brief. The brief rewrites the question presented to omit mention of the First Amendment, referring instead to a "right of choice" apparently derived from the Twelfth Amendment's statement that electors are to "vote by [b]allot." Pet'rs Br. i. Although that reformulation might be considered to "fairly include" a First Amendment argument were one presented in the brief, the electors' brief excludes the First Amendment from its list of constitutional provisions involved in the case, omits mention of the First Amendment holdings of the lower courts in its statement of the case, and presents no argument based on the First Amendment. Likewise, none of the briefs of amici curiae supporting the electors mentions the words "First Amendment."

It is unusual for parties to seek review of a question, succeed in persuading this Court to entertain it, and then completely ignore it in their briefing. After all, a petitioner in this Court "generally possesses the ability to frame the question to be decided in any way he chooses," as long as the case genuinely presents it. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Thus, although this Court sometimes rephrases, adds to, or limits the question presented, "by and large it is the petitioner himself who controls the scope of the question presented." *Id*.

While it is up to the petitioners to decide whether they want to present a question, their choice has

"significant consequences." *Id.* In addition to generally limiting the issues the Court will be willing to consider if it selects a case for plenary review, their choice "assists the Court in selecting the cases in which certiorari will be granted" by framing its assessment of whether the case is one of the "small fraction" that "will enable [the Court] to resolve particularly important questions." *Id.* at 536. "When 'a legal issue appears to warrant review, [the Court] grant[s] certiorari in the expectation of being able to decide that issue.'" *Buck v. Davis*, 137 S. Ct. 759, 780 (2017) (citation omitted).

For that reason, the Court is insistent that a respondent identify in its brief in opposition to a petition—before the Court grants certiorari and commits its resources to hearing and deciding the case—any nonjurisdictional reasons why a question framed by the petitioner is not properly presented by the case. For the same reason, the Court is ill-served when a petitioner "induce[s] [the Court] to grant certiorari" by presenting a question "that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside uninvited." *Sheehan*, 135 S. Ct. at 1779 (Scalia, J., concurring in part and dissenting in part).

Accordingly, when a petitioner has engaged in such "bait-and-switch tactics," *id.*, the Court has exercised its discretion to dismiss a writ of certiorari, in whole or in part, as improvidently granted. *See Visa v. Osborn*, 137 S. Ct. 289, 289 (2016) (dismissing writs in their entirety when, "[a]fter '[h]aving persuaded us to grant certiorari' on this issue, … petitioners 'chose to rely on a different argument' in their merits briefing" (citation omitted)); *Sheehan*, 135 S. Ct. at 1774 (dismissing "question presented as improvidently

granted" where the petitioners' merits brief failed to argue for the position they advocated on that question in their petition for certiorari).

Although the Washington electors may have gained an advantage—the granting of their petition together with the one in the Colorado case—in part through the inclusion in their petition of a First Amendment question that is not presented in the Colorado case, this case does not appear to be one in which dismissal of the petition in its entirety would be appropriate. In *Sheehan*, the dissenting Justices advocated such an across-the-board dismissal because of their view that the only question the petition presented that would have merited a grant of certiorari was the one that the petitioners abandoned0 in their merits brief; the Court, however, declined to dismiss the petition altogether because the majority concluded that the petition included another question that "independently merited review." 135 S. Ct. at 1774 n.3. Here, the Court's grant of certiorari in the Colorado case, which presents only non-First Amendment issues concerning the states' power to direct the votes of electors, clearly indicates that it views those issues as independently worthy of review. Moreover, although dismissal of this case would leave the Colorado case available as a vehicle for resolution of those issues, the recent recusal of one of the Court's Justices from consideration of that case increases the chance that those important issues could go unresolved if the Court were to dismiss this case.

Under the circumstances here, even dismissal of the First Amendment question may be unwarranted. The issue is properly before the Court because of its express inclusion in the question presented, and the Court has discretion to address it notwithstanding the

Washington electors' default in briefing it. Indeed, this Court has held that it may address issues that are "'fairly included' within the question presented" even when the parties have not briefed them. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 56 (2006). If that is so, the Court necessarily has authority to address an issue that petitioners *expressly* included in their question presented, *see*, *e.g.*, *Madison v. Alabama*, 139 S. Ct. 718, 726 n.3 (2019), even if they did not think it was meritorious enough to brief when push came to shove.

Failure to put the First Amendment issue to rest, moreover, may have significant consequences. To be sure, if the Court were to hold that the constitutional design reflected in Article II, the Twelfth Amendment, and the Supremacy Clause forecloses states from directing electors to honor the choices of voters, the First Amendment issue would be academic. But if the Washington electors' structural arguments fail, leaving the First Amendment issue unaddressed will perpetuate uncertainty over whether states can enforce laws aimed at holding electors to their oaths. Rogue electors will continue to seek refuge in the First Amendment to avoid their obligation under state laws to respect the voters' wishes.

We do not suggest that the Washington electors have deliberately "snookered" the Court, *Sheehan*, 135 S. Ct. at 1780 (Scalia, J., concurring in part and dissenting in part), by withholding their First Amendment argument as a hedge against the possibility that the Court's decision may put an end to arguments for elector "independence" in one stroke. More likely, the electors' decision not to make the First Amendment argument represents a rational decision not to detract from their chances of prevailing by devoting limited

briefing space to an insubstantial argument. For that reason, and because the First Amendment argument for rogue electors is meritless, they will have little ground for complaint should the Court decide the question they chose to present and then chose not to argue.

II. An elector has no First Amendment right to use the mechanics of government to advance a personal agenda.

The First Amendment embodies "the premise that every citizen shall have the right to engage in political expression and association." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). It protects the "political freedom of the individual," *id*., by "prohibit[ing] laws abridging the freedom of speech, which, as a general matter … means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Carrigan*, 564 U.S. at 121 (internal quotation marks and citations omitted). "Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Lane v. Franks*, 573 U.S. 228, 235–36 (2014) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment's protection thus applies to expression engaged in by a person "as a citizen," *id*. at 237, or a "member of the general public." *Pickering v. Bd. of Educ.*, 391 U.S. 564, 573 (1968).

The three Washington electors in this case, however, do not seek protection for the right to express themselves in the same manner as other citizens of Washington and members of the general public. No

one has interfered with their right to engage in such expression. The State of Washington does not contest their unfettered right to say whatever they want about presidential candidates or the presidential electoral system established by the Constitution, and it did not fine them for engaging in any such expression. Rather, the electors were fined for official misconduct. They seek First Amendment protection for the act of *doing* something that only nine other Washington citizens could do in 2016: casting a share of the state's electoral votes for the President and Vice President of the United States—votes with the legal effect of helping determine who would assume those high offices. The First Amendment provides no such protection.

The casting of an electoral vote is, undisputedly, an official action with legally operative effect. To be sure, the Washington electors argue that electors perform a "federal function" rather than a state one. Pet'rs Br. 39. However that dispute may be resolved, what is decisive for First Amendment purposes is that the role of electors is not to express themselves as individuals, but to represent their state in performing the *official* function of exercising its constitutionally allocated power to participate in the election of the President and Vice President. This Court has repeatedly so characterized the role of presidential electors. In *Fitzgerald v. Green*, 134 U.S. 377 (1890), the Court stated that "[t]he sole function of the presidential electors is to cast, certify, and transmit *the vote of the state* for president and vice-president of the nation." *Id*. at 379 (emphasis added). Thus, "[t]he state … acts individually through its electoral college." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). In carrying out their role in this process, individual electors "discharge duties in virtue of authority conferred by … the

Constitution of the United States." *Burroughs v. United States*, 290 U.S. 534, 545 (1934). "They act by authority of the state that in turn receives its authority from the federal constitution." *Ray v. Blair*, 343 U.S. 214, 224–25 (1952).

Thus, just as the vote of a state legislator is "the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal," *Carrigan*, 564 U.S. at 125–26, an elector's vote is the commitment of her apportioned share of the state's power to the election of particular candidates. In *Carrigan*, this Court held that the act of wielding such authority on behalf of the people of a state falls outside the First Amendment both because it is not an exercise of an individual right, *see id.* at 126, and because it is not speech, *see id.* at 126–27. As the Court put it, "the act of voting symbolizes nothing"; it is not "an act of communication." *Id.* Rather, "the act of voting [is] nonsymbolic conduct engaged in for an independent governmental purpose." *Id.* at 127.

Carrigan emphasizes that an official actor's subjective desire to convey some message—such as a protest, or a statement that the nation would be better served by bipartisanship than by adherence to divisive party candidates—"does not transform [official] action into First Amendment speech." *Id.* Rather, as *Carrigan* explains, the "Court has rejected the notion that the First Amendment confers a right to use government mechanics to convey a message." *Id.* Thus, for example, the Court held in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997), that the First Amendment gives political parties no right to use official ballots to convey their messages: "Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. And in *Burdick v. Takushi*,

504 U.S. 428 (1992), the Court rejected the proposition that an individual voter has a First Amendment right to have a state count a write-in vote because of "the message he seeks to convey through his vote." *Id.* at 438. *Burdick* emphasized that "the function of the election process" is to elect candidates, "not to provide a means of giving vent" to personal views or to serve "a more generalized expressive function." *Id.* By the same token, *Carrigan* held, "a legislator has no right to use official powers for expressive purposes." 564 U.S. at 127. The same reasoning holds true for electors: Their "governmental act" of casting a ballot does not "become[] expressive simply because [they] wish[] it to be so," *id.* at 128, any more than do the acts of legislators.

The proposition that a public official does not engage in speech protected by the First Amendment when casting a vote representing a legally effective commitment of a portion of a state's authority is a specific application of the more general proposition that a public official does not engage in First Amendment-protected activity when carrying out the official duties that her position entails, even when those duties are carried out verbally. *See Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006). In performing official duties, public officials "are not speaking as citizens for First Amendment purposes." *Id.* at 421. Thus, for example, a government attorney has no First Amendment right to determine what to say, or what not to say, in a brief filed on behalf of the state. *See id.* at 422. When an official's duties are ministerial, such as issuing a license to someone eligible to receive it, it is even more apparent that First Amendment speech rights do not protect her refusal to carry out those duties properly, regardless of whether she intends to express some

point of view through her mal- or nonfeasance. *See*, *e.g.*, *Miller v. Davis*, 123 F. Supp. 3d 924, 941 (E.D. Ky.) (finding no likelihood of success on a claim that compelling a county clerk to issue marriage licenses to qualified applicants infringed First Amendment speech rights), *stay denied*, 136 S. Ct. 23 (2015), *vacated as moot*, 667 F. Appx. 537 (6th Cir. 2016).

Here, for example, no one would seriously suggest that electors have a First Amendment right to refuse to certify their votes before transmitting them to the President of the Senate. By the same token, the votes themselves are official actions outside the scope of First Amendment protection. If, therefore, the Constitution's structural provisions allow the states to provide legally, as they have long done in practice, that electors are "chosen simply to register the will of the appointing power in respect of a particular candidate," *McPherson*, 146 U.S. at 36, the First Amendment provides neither a sword for electors seeking to set aside a duty imposed on them by law nor a shield to protect them against the consequences of failing to perform it.[2]

Moreover, affording First Amendment protection to the act of casting an electoral vote would have implications beyond protecting the quixotic acts of a handful of faithless electors who wish to cast ballots for candidates who have no hope of an electoral majority. Where fully protected speech is concerned, the

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[2] By contrast, structural considerations (such as, on the federal level, the Speech or Debate Clause and the principle of separation of powers) protect legislators' freedom to vote as they see fit on legislation if they are qualified to vote on it. The First Amendment is neither the source of, nor necessary for, such protection.

First Amendment protects not only the content of speech, but also the choice whether to speak at all. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). Thus, holding that the casting of an electoral vote is protected speech would entitle electors to refuse to perform their fundamental duty: casting a share of their state's electoral vote. An individual elector, by choosing not to cast a ballot, could effectively deprive a state's people of a substantial part of their constitutionally assigned voice in the selection of the President. The view that casting a state's electoral votes is an exercise of the electors' personal First Amendment rights is thus fundamentally incompatible with the Twelfth Amendment's elemental requirement that electors vote.

In sum, the First Amendment claims urged below and in the electors' petition for certiorari are groundless. The electors' choice not to address one of their questions presented need not dissuade this Court from making clear that the Supreme Court of Washington correctly rejected those claims. On the question whether the Constitution entitles electors to act in disregard of the will of the people of their state, the First Amendment has nothing to say.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Washington.

Respectfully submitted,

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