Nos. 19-465, 19-518

IN THE

Supreme Court of the United States

PETER BRET CHIAFALO, LEVI JENNET GUERRA, and ESTHER VIRGINIA JOHN,
Petitioners,

v.

STATE OF WASHINGTON,
Respondent.

COLORADO DEPARTMENT OF STATE,
Petitioner,

v.

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH,
Respondents.

On Writs of Certiorari to the Supreme Court of Washington and the U.S. Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND ISSUE ONE SUPPORTING THE STATES

PAUL M. SMITH
ADAV NOTI
DAVID KOLKER
CAMPAIGN LEGAL CENTER
1101 14th Street, N.W.
Suite 400
Washington, D.C. 20005

TOBIAS S. LOSS-EATON *
JOHN L. GIBBONS †
CODY L. REAVES †
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

Counsel for Amici Curiae

* Counsel of Record

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† Mr. Gibbons and Mr. Reaves are admitted only in California and New York, respectively, and are practicing law in the District of Columbia pending admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

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INTERESTS OF *AMICI CURIAE*[1]

Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 by former Federal Election Commission Chairman Trevor Potter. Its vision is to hold candidates and government officials accountable regardless of political affiliation. Since its inception, CLC has litigated or been involved in around 100 cases about voting rights, gerrymandering, and campaign-finance and disclosure laws. Through this work, CLC seeks to strengthen the democratic process across all levels of government.

CLC does not favor one of the nation's political parties over any other party or unaffiliated voters. CLC's mission focuses on—and its expertise is built on—laws, rules, and regulations affecting accountability in democratic institutions. This expertise informs its view of how a judicial ruling in one of these areas can affect institutions across the governmental spectrum. It believes that the risk of unintended consequences here is particularly acute.

Issue One is a cross-partisan, nonprofit political reform group. It works to unite Republicans, Democrats, and independents to fix our broken political system. One of Issue One's central programs is the ReFormers Caucus, a group of former members of Congress, governors, and cabinet officials. The ReFormers Caucus is instrumental in finding common-sense, bipartisan solutions to some of the greatest political reform issues of our time.

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[1] No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. The parties have consented to the filing of this brief.

Issue One believes that finding solutions to the public-policy challenges facing our nation requires us as citizens to "fix democracy first." For this reason, it works to revitalize our democracy by galvanizing Americans and elected leaders around a host of important and achievable solutions to promote government transparency, integrity, and accountability. Issue One considers state laws binding electors to their state's popular vote integral to its work, as they ensure that each citizen's vote for president matters. When an elector ignores these laws, it undermines public confidence in the election.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution grants states plenary power to appoint presidential electors, which includes deciding the method of appointment. With that power, most states have passed laws requiring electors to pledge to mark their ballots for the presidential and vice-presidential candidates who win the state's popular vote. By enacting and enforcing those laws, states ensure that when their citizens step into the voting booth, each vote matters—that the people have a say in who governs them. Other states without formal laws requiring pledges achieve this same end by relying on the centuries-old tradition, with vanishingly few exceptions, of electors voting in line with the state's popular vote. Indeed, just eight states list named electors on their ballots.

Frustrated with this constitutional design, a handful of the more-than-23,000 presidential electors in the nation's history now claim a right to disregard the votes of their states' citizens. But text, history, and tradition stand in the way. The Constitution, while silent on elector discretion, grants states the power to

appoint electors as their legislatures see fit. And the Court has confirmed the breadth of this power time and again. States have thus enacted laws to ensure that each of their citizens has a true, equal say in which candidates receive the state's electoral votes. The Court should again reaffirm each state's plenary authority to determine its method of appointing presidential electors—which includes imposing conditions on the appointment.

Colorado and Washington have validly exercised this power by requiring electors to pledge their votes and by empowering state officials to enforce the pledge. These laws, duly passed by the state legislatures, make elector appointments contingent on adherence to that pledge—in others words, on compliance with state law. The Court held over seventy years ago that a state may use its appointment power to require electors to pledge themselves to particular candidates as a condition of their appointment. A contrary conclusion would mean that the state's appointment power is not what the Court has often said it is: plenary and exclusive. Indeed, if states lack the power to enforce elector pledges, the appointment power is not only less than plenary—it is almost meaningless.

The cases before the Court involve the proper *ex ante* exercise of the states' appointment power. But even if the Court viewed Colorado's replacement provision and Washington's fine as post-appointment restrictions, it should uphold those laws. The right to enforce a pledge after appointment is a necessary corollary of the right to *require* a pledge in the first place.

A decision unbinding all electors would require a fundamental reworking of how presidential elections operate. If electors can vote as they please, voters must now knowingly choose electors, not candidates, based on the electors' idiosyncratic views. That would

be a radical departure from current law and practice. Such a decision would also cast significant doubt on the other important ways that states regulate and conduct the electoral-college process—from the way the electors organize themselves at their meeting to the simple question of who mails the final votes to the Senate president. What's more, unbinding electors would invite corruption and impropriety that current federal law cannot prevent.

For similar reasons, even if the Court decides that electors must be unbound, the prudential principles announced in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam), weigh heavily against allowing such a judgment to take effect before the 2020 election. It is one thing to upend the election-regulation landscape; it is quite another to do so just months before a hotly contested presidential election. Indeed, sowing chaos is the electors' purpose in bringing this litigation: They hope that, if the Court gives electors unfettered discretion to vote as they please, "it will make more urgent the demand for more fundamental reform" of the electoral college. See Equal Citizens, *Equal Electors: Our Legal Fight to Allow Electors to Vote Their Conscience*, https://bit.ly/3aqQJdd (last visited Apr. 3, 2020). This kind of sweeping change should not take place just months before a nationwide election.

Because the right to enforce elector pledges is well within each state's plenary appointment power; because striking down Colorado's and Washington's laws would undermine countless other state election laws; because existing law does not address the new opportunities for corruption such a ruling would create; and because the Court should not upend our republic's electoral regime just months before a critical election, the Court should affirm the Washington Supreme

Court in No. 19-465 and reverse the Tenth Circuit in No. 19-518.

ARGUMENT

I. THE STATES' PLENARY APPOINTMENT POWER INCLUDES THE ABILITY TO PLACE *EX ANTE* CONDITIONS ON ELECTOR APPOINTMENTS.

The Constitution entrusts "the appointment and mode of appointment of electors … exclusively to the states." *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892); see U.S. Const. art. II, § 1, cl. 2. This is not a limited grant of authority. The states enjoy "the broadest power of determination" in "choosing the manner of appointing electors." *Bush* v. *Gore*, 531 U.S. 98, 113–14 (2000) (per curiam) (citing *McPherson*, 146 U.S. at 27). Indeed, "from the formation of the government until now, the practical construction of [Article II] has conceded plenary power to the state legislatures in the matter of the appointment of electors." *McPherson*, 146 U.S. at 35; accord *Bush*, 531 U.S. at 104.

Colorado and Washington exercised this broad power to pass laws conditioning their electors' appointment on adherence to a pledge: a pledge to mark the ballots "to cast … the vote of the State" for the presidential and vice-presidential candidates who won the state's popular vote. *In re Green*, 134 U.S. 377, 379 (1890). Washington expressly required a "pledge," Wash. Rev. Code § 29A.56.320 (2016), and Colorado achieved the same end by instructing that each appointed elector "shall" vote for the state's popular-vote winner, Colo. Rev. Stat. § 1-4-304(1), (5). By making elector appointments contingent on compliance with state law, these states exercised the "comprehensive," "plenary" appointment power granted to them by Article II. *McPherson*, 146 U.S. at 27, 35; see *Ray* v. *Blair*,

343 U.S. 214, 228 (1952). And by enforcing these laws, the states did the same—if an elector does not satisfy the condition placed on her appointment, she cannot wield the state's power to cast its citizens' votes.

Given the constitutional text, its history, and this Court's precedents, the Court should uphold both states' laws. By requiring a pledge, a state conditions each appointment on fulfillment of that pledge—*i.e.*, on compliance with state law. Thus, when a state legislature duly enacts a law requiring a pledge, the state validly exercises the appointment power granted it by Article II. See *Ray*, 343 U.S. at 228. If states cannot condition appointments in this way, then the appointment power is not "plenary," "exclusive," or "comprehensive." *McPherson*, 146 U.S. at 27, 35.

A. A Legally Mandated Pledge To Follow The State's Popular Vote Is A Condition Of An Elector's Appointment.

Colorado and Washington are not unique in requiring their electors to pledge to vote for the candidates who win the state's popular vote. As the Tenth Circuit and the Supreme Court of Washington recognized, "states now almost uniformly require electors to pledge their votes to the winners of the popular election." *Baca* v. *Colo. Dep't of State*, 935 F.3d 887, 935, 955 (10th Cir. 2019); accord *In re Guerra*, 441 P.3d 807, 814 (Wash. 2019).

Both states' laws speak in mandatory terms—"shall." An elector therefore takes her appointment knowing that it is contingent on faithfully following that pledge. In other words, the state's grant of power is conditioned on that power being deployed in accordance with state law. If an elector delivers a vote that violates that pledge (and state law), the appointment is vitiated. That is, the power granted to the elector

by the state—the power "to cast, certify, and transmit the vote of the State," *In re Green*, 134 U.S. at 379—evaporates when an elector violates her pledge or the law conditioning his appointment.

In the Tenth Circuit's view, "the Constitution provides no express role for the states after appointment of its presidential electors." *Baca*, 935 F.3d at 942. Thus, once a state appoints an elector, it has no say in how the elector casts "*the vote of the State*." *In re Green*, 134 U.S. at 379 (emphasis added). But even accepting that view, Colorado's and Washington's laws should be upheld because conditioning appointments on adherence to a pledge, or to an express state-law requirement, is an exercise of the states' *ex ante* appointment power. See *In re Guerra*, 441 P.3d at 816.

Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors … but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2. Though Article II's text marginally shrinks the pool of persons from which the state may appoint its electors, it leaves the power to appoint electors—and the "manner of their appointment"—untouched. *Burroughs* v. *United States*, 290 U.S. 534, 544 (1934); see *In re Green*, 134 U.S. at 379. "[N]othing in the plain language of [Article II or the Twelfth Amendment] prohibits a state from imposing certain conditions on electors as a part of the state's appointment powers, including requiring electors to pledge their votes." *In re Guerra*, 441 P. 3d at 813.

That view tracks this Court's precedents. More than a century ago, the Court recognized that Article II "convey[s] the broadest power of determination" to the states in appointing electors, "leav[ing] it to the legis-

lature exclusively to define the method" of appointment. *McPherson*, 146 U.S. at 27. And since then, time and again, the Court has reiterated this bedrock constitutional principle. See *Bush*, 531 U.S. at 113 (citing *McPherson*, 146 U.S. at 27).

Against the backdrop of *McPherson*, the Court decided *Ray*. There, the Court considered whether "the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by pledge." 343 U.S. at 228. True enough, the Court said, the Amendment provides that electors "shall vote by ballot." *Id.* But that Amendment "does not prohibit an elector's announcing his choice beforehand, pledging himself." *Id.*; see Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 Ark. L. Rev. 215, 219 & n.7 (1995) (noting that "the Supreme Court came close to approving [state] laws" requiring electors to pledge their votes in the general election in *Ray*, and that "[*Ray*'s] logic" supports that holding).

Beyond the text, the Court found support for this conclusion in Founding-era evidence. "History teaches that the electors were expected to support the party nominees." *Ray*, 343 U.S. at 228. Given that evidence, the Court found the contrary suggestion—"that in the early elections candidates for electors … would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors"—"impossible to accept." *Id.* "Whether chosen by voters or by state legislators, the presidential electors were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment." Keith E. Whittington, *Originalism, Constitutional Construction, and the*

Problem of Faithless Electors, 59 Ariz. L. Rev. 903, 911 (2017).

Given this history, the "long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weigh[s] heavily in considering the constitutionality of [that] pledge." *Ray*, 343 U.S. at 229–30; cf. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (noting the weight of "long settled and established practice" in constitutional interpretation (alterations omitted)). *Ray* thus recognizes that, even if electors perform a federal function and otherwise vote as they see fit, a state that requires electors to pledge their votes does not exceed its broad Article II power. Indeed, Justice Jackson said exactly that in dissent: He observed that the majority had "sanction[ed] … [a] device of prepledged and oath-bound electors" under state law. *Ray*, 146 U.S. at 233–35 (Jackson, J., dissenting).

Even the Tenth Circuit's unduly "narrow" reading of *Ray* aligns with this robust view of the states' appointment power. *Baca*, 935 F.3d at 935. The court read *Ray* as "recogniz[ing] the states' plenary power to determine how electors are appointed." *Id.* (citing *Bush*, 531 U.S. at 104). So the problem, as the court saw it, was not that Colorado's law required electors to pledge their votes, but that it imposed *post*-appointment restrictions. *Id.* at 936 (suggesting that "*Ray* does not address restrictions placed on electors after appointment"). Yet that is not what Colorado's law does (or Washington's). Rather, both laws condition the power granted to the state's electors, making an elector's appointment contingent on faithfully executing the pledge and complying with state law.

This view fits the electors' limited function, as the Court's precedents make clear. "The *sole function* of

the presidential electors is to cast, certify and transmit *the vote of the State* for the President and Vice President of the nation." *In re Green*, 134 U.S. at 379 (emphasis added). Thus, implicit in the state's grant of power to cast *the state's* vote is the requirement that the elector deploy that power in accordance with state law. See *Ray*, 343 U.S. at 229. A vote that breaks a legally mandated pledge or otherwise violates a condition of the state law governing "the manner of appointing electors," *Bush*, 531 U.S. at 114, is not "the vote of the State" and undoes the appointment.

B. Enforcing An Elector's Pledge Is A Valid Exercise Of The State's Appointment Authority.

Colorado exercises its appointment authority through replacement provisions that enforce the pledges mandated by state law. As the Court made clear in *Ray*, electors "act by authority of the state" under Article II. 343 U.S. at 224; see *In re Green*, 134 U.S. at 379 ("[E]lectors … are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators."). By linking appointments to a state-law pledge, states condition the power granted to electors to cast the state's vote. For the "plenary" appointment power vested by Article II to be anything more than an empty vessel, states must have this authority.

In considering this question, the Tenth Circuit wrestled with the principle of "constitutional and statutory construction" set out by the Court in *Myers* v. *United States*: that "the power of appointment carrie[s] with it the power of removal." 272 U.S. 52, 119 (1926). Tracing the principle's application, the court of appeals ultimately held that it "extends solely to the executive." *Baca*, 935 F.3d at 940. But this Court need not wade into that question here. The state laws at

issue do not remove an elector *after* appointment—they impose *ex ante* conditions that must be fulfilled before the appointment is perfected. That is, when an elector violates the terms of the state law governing her appointment, she vitiates the appointment and can no longer cast the state's vote. See *In re Green*, 134 U.S. at 379.

On this point, *Ray*'s logic is compelling: "[C]ertainly neither provision of the Constitution requires a state political party … to accept persons as candidates [for elector] who refuse to agree to abide by the party's [pledge] requirement." 343 U.S. at 225; see *In re Guerra*, 441 P.3d at 814. By the same token, nothing in the Constitution requires a state to exercise its plenary power to appoint an elector who refuses to abide by legal conditions the state sets. See Amar, *supra*, at 219 n.7 ("Though the Court bracketed the issue, [*Ray*'s] logic would seem to allow state enforcement of a similar party pledge rule in the November general election." (citation omitted)).

Yet even viewing these laws as restricting electors *after* their appointments, the Court need only rely on the broad power conveyed by Article II to uphold them. See *In re Guerra*, 441 P.3d at 817 (holding that "the fine imposed pursuant to [state law] falls within" the states' "plenary power to direct the manner and mode of appointment of electors"). As explained, the Constitution grants each state a "comprehensive," "plenary" appointment power. *McPherson*, 146 U.S. at 27, 35. And if the states' appointment power includes the power to impose conditions—as it must—then it must also include the power to enforce those conditions. A contrary conclusion effectively rewrites Article II, removing the plenary authority granted to the states and threatening the fundamental bargain struck by the states in ratifying the Constitution. See, *e.g.*, *Williams*

v. *Rhodes*, 393 U.S. 23, 43 n.2 (1968) (Harlan, J., concurring).

A contrary ruling would also elevate form over substance. Colorado's law is substantially similar to the Uniform Faithful Presidential Electors Act (UFPEA), which has been approved by forty-four states' representatives to the Uniform Law Commission and opposed by only one. ULC Amicus Br. in Supp. of Cert. 5. As the National Conference of Commissioners on Uniform State Laws' certiorari-stage *amicus* brief confirms, affirming the Tenth Circuit could "jeopardize[ ]" the UFPEA. See *id.* at (i).

The UFPEA requires each "elector nominee" to execute a state-administered pledge of faithfulness: "If selected for the position of elector, I agree to serve and to mark my ballots … for the nominees for those offices of the party that nominated me." UFPEA § 4 (Unif. Law Comm'n 2010); see also *id.* § 6(c). If an elector then presents a ballot marked in violation of that pledge, the elector automatically vacates the office of elector, creating a vacancy. *Id.* § 7(c). Once a state obtains a full slate of faithful elector votes, the UFPEA provides that the Secretary of State "immediately shall prepare an amended" elector list so that the state's official list of electors contains the names of only faithful electors. *Id.* § 8(a)–(b).

Colorado law effectively operates the same way.[2] By violating a state-law pledge, an elector creates a vacancy. True, the UFPEA explicitly requires that "elector nominees" must pledge their votes, while Colorado's and Washington's laws do not use the term

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[2] Washington's law has done so as well since 2019, when that state replaced the civil penalty at issue in *In re Guerra* by adopting the UFPEA's automatic-resignation provision. See Wash. Rev. Code § 29A.56.084.

"nominee" (and Colorado imposes a condition by mandate rather than pledge). But given these laws and the elector candidates' knowledge of them, both states place the same restriction on would-be electors. Elector candidates in Colorado and Washington must know, just like the "elector nominees" in the states that have adopted the UFPEA, that their appointments are contingent on adhering to the conditions the state imposes. See Brief of *Amici Curiae* Presidential Electors Mary Beth Corsentino, Stratton Rollins Heath, Jr., and Celeste Landry in Support of Petitioner 9 (No. 19-518). The "broadest power of determination" conveyed to the states by Article II cannot rest on so fine a distinction as whether state law designates electors as "elector nominees." *Bush*, 531 U.S. at 113 (citing *McPherson*, 146 U.S. at 27). The Court should therefore uphold both challenged state laws.

II. STATE AND FEDERAL LAW ARE NOT EQUIPPED TO HANDLE UNBOUND ELECTORS.

The electors frame Colorado's and Washington's sanctions against faithless electors as novel and unprecedented, urging the Court to "restore the practice that has governed for more than 220 years." Consol. Br. 3. In fact, these states' laws accord with the established understanding that the Constitution "grant[s] extensive power to the States to pass laws regulating the selection of electors." *Williams*, 393 U.S. at 29. On the other hand, the electors' far-reaching arguments would unsettle laws and procedures in nearly every state, just months before the 2020 election. And federal law is ill-equipped to address the opportunities for corruption such a ruling would invite.

A. Unbinding Electors Would Require States To Radically Rework Their Electoral Processes And Would Undermine Established Election Laws And Practices.

"[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways … both federal and state elections." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). These regulations must exist "if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* The electors here argue, however, that the Constitution "exclud[es] state officials from the entire process of elector voting." Consol. Br. 37. They assert, moreover, that state government may not interfere with electors' "federal function" under any circumstances. *Id.* at 39–42. But this argument reaches far beyond laws conditioning elector appointments, and would unnecessarily introduce chaos where now there is order.

Unbinding electors would require states to reconstruct their presidential-election procedures, sometimes at great cost. "States [would] need to urgently reconsider every aspect of nominating and selecting their presidential electors." Adav Noti, *The Chaos Coming for the U.S. Election*, The Atlantic (Mar. 12, 2020), https://bit.ly/2XbYJvd. Most importantly, states would have to provide detailed information on the electors themselves. After all, if the electors can vote however they want, voters can no longer simply choose their preferred candidates for president or vice president. Voters must instead scrutinize the electors—whose identities and views they could safely ignore until now—to identify those electors who are most likely to exercise their newfound freedom consistently with the voters' views. Cf. Whittington, *supra*,

at 906 ("Modern ballots generally make the electors more invisible—and the salient choice made by the voter more apparent—by leaving the names of the presidential electors off the government-issued ballot and asking voters to simply select the presidential candidate they wish to support.").

This would be a fundamental shift in how we conduct presidential elections. Indeed, under many states' current laws, putting electors' names on the ballots would be illegal.[3] Thus, states would either need to change their laws or find another way to communicate this information. States that provide instructions or information to voters or election officials would likely need to revamp how they provide that information. *E.g.*, Ariz. Rev. Stat. Ann. § 16-513 (requiring "instructions for the guidance of voters and election officers"); *Henry* v. *Ysursa*, 231 P.3d 1010, 1014–15 (Idaho 2008) (describing the Idaho Secretary of State's duties to distribute election information). Other states would face significant pressure to provide that information for the first time. And states would have to translate these materials into other languages to serve "covered jurisdictions" under federal election law, see 28 C.F.R. §§ 55.15, 55.19(a), and retrain election officials on any updated laws or procedures.

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[3] *See* Alaska Stat. § 15.15.030(7); Ark. Code Ann. § 7-8-302(4)(A); D.C. Code § 1-1001.08(e); Fla. Stat. § 103.021(2); Haw. Rev. Stat. § 11-113(a); 10 Ill. Comp. Stat. § 5/21-1(b); Ind. Code § 3-10-4-1(a); Md. Code Ann., Elec. Law § 8-504(b)(1); Mass. Gen. Laws ch. 54, § 43; Mont. Code Ann. § 13-25-101(7); N.M. Stat. Ann. § 1-15-4(A); N.C. Gen. Stat. § 163-209(a); Ohio Rev. Code Ann. § 3505.10(B); Or. Rev. Stat. § 248.360(2); S.C. Code Ann. § 7-19-70; Tex. Elec. Code Ann. § 192.034(b); Wash. Rev. Code § 29A.56.320(2); W. Va. Code § 3-1-14; Wis. Stat. §§ 5.10, 5.64(1)(em).

In many states, this isn't a matter of simply adding a new section to an existing document. In Alaska, for example, electors are not "candidates" under Alaska Stat. §§ 15.25.030 or 15.25.180, and so state regulations would not permit the lieutenant governor to include elector information on the official election pamphlets mailed to voters. See Alaska Admin. Code tit. 6, § 25.690. State officials would have to come up with an additional way to communicate this information. And though Vermont might not have a hard time assembling information on three elector-nominees for each of the states' six recognized political parties, see Vt. Sec'y of State, *Parties & Party Organization*, http://bit.ly/38Dzzro (last visited Apr. 3, 2020), it would be extraordinarily burdensome and expensive for California to distribute publicly that same information for its 330 potential electors, see Cal. Sec'y of State, *Qualified Political Parties*, http://bit.ly/2TONs0o (last visited Apr. 3, 2020).

Ruling for the electors would thus upend the states' settled practices, imposing significant costs and creating real uncertainty. It is fantasy to pretend that the electors' preferred "practice … has governed for more than 220 years." Consol. Br. 3. State statutes and customs show that a different "practice" has in fact governed our most important elections for centuries. This historical and practical reality—not to mention the universal public expectation today—is that electors vote for the state's popular vote winner, and so voters need not learn anything about the electors' identity or ideology. The simple fact that losing candidates concede on election night when the television networks project a winner—over a month before the electoral college actually votes—shows how deeply engrained

this principle is.[4] Upending that landscape would create significant costs and challenges for the state and local officials tasked with running this nation's elections in a few short months. And such upheaval would divert desperately needed resources away from the emergency efforts already underway to conduct the elections in the midst of a global pandemic.

That is not all. A decision for the electors would also cast doubt on the many ways in which state governments currently participate in and facilitate the electoral-college process.

For example, many states mandate that state officials preside over, conduct, organize, or play some other formal role in the electors' meetings following each general election.[5] Other state laws dictate how the electors themselves must conduct their meetings. Massachusetts, New Jersey, New Mexico, Ohio, and South Carolina require that the electors select a presiding officer and one or more secretaries. See Mass. Gen. Laws ch. 54, § 148; N.J. Stat. Ann. § 19:36-3;

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[4] *See, e.g.*, Amy B. Wang, *Hillary Clinton Concedes to Trump: 'We Owe Him an Open Mind and the Chance to Lead*,*'* Wash. Post (Nov. 9, 2016), https://wapo.st/2WqjD9s; *Thomas* v. *Cohen*, 146 Misc. 836, 840–41 (N.Y. Sup. Ct. 1933) ("Election night in the United States is devoted by the public, generally, to learning the result of the vote which has been cast that day by the citizens of the nation. … No one has ever ventured the thought that the announcement of the victors should await the meeting of the presidential electors.").

[5] *See, e.g.*, Alaska Stat. § 15.30.090; Ind. Code § 3-10-4-7(b); Mass. Gen. Laws ch. 54, § 148; Minn. Stat. §§ 208.45(a), 208.47(c); Mont. Code Ann. § 13-25-306(1); Nev. Rev. Stat. § 298.065(1); N.M. Stat. Ann. § 1-15-6(D); N.C. Gen. Stat. § 163-210; Tex. Elec. Code Ann. § 192.006(b); Wash. Rev. Code § 29A.56.088(1); *see also* R.I. Gen. Laws § 17-4-12 (requiring the governor and secretary of state "be present at the state house" during the electors' proceedings).

N.M. Stat. Ann. §§ 1-15-6(B), 1-15-8; N.Y. Elec. Law § 12-104; Ohio Rev. Code Ann. § 3505.39; S.C. Code Ann. § 7-19-90; see also Ga. Code Ann. § 21-2-12 (referring to "the presiding officer of the college"); 25 Pa. Stat. and Cons. Stat. Ann. § 3194 (same). Texas similarly mandates that electors choose a chairperson. See Tex. Elec. Code Ann. §§ 192.006(b), 192.007(b). Ohio takes this one step further, requiring that the electors designate a state official as their secretary. Ohio Rev. Code Ann. § 3505.39.[6]

All of these laws and practices reflect the established understanding that states may regulate the critical "process of elector voting." *Contra* Consol. Br. 37. And a ruling for the electors would cast doubt on these reasonable, longstanding measures to foster "some sort of order" in the "democratic processes." *Storer*, 415 U.S. at 730.

The electors' argument that states cannot interfere with their "federal function," Consol. Br. 39–42, would likewise undermine laws in nearly every state. Forty-nine states burden electors with a responsibility beyond simply casting their votes—to fill vacancies in their ranks during the electors' meeting itself.[7] In at

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[6] *See also* Colo. Rev. Stat. § 1-4-304(1) (requiring that electors take an oath at the meeting); D.C. Code § 1-1001.08(g) (same); Md. Code Ann., Elec. Law § 8-505(c) (same); Neb. Rev. Stat. § 32-713(2) (same); Okla. Stat. tit. 26, § 10-102 (same); Iowa Code § 54.8 (directing the governor to transmit the electors' votes to federal recipients); Wash. Code. Ann. § 29A.56.092(3) (same, for secretary of state).

[7] *See* Ala. Code § 17-14-36; Alaska Stat. § 15.30.080; Ark. Code Ann. § 7-8-307; Cal. Elec. Code § 6905; Colo. Rev. Stat. § 1-4-304(1); Conn. Gen. Stat. § 9-176; Del. Code Ann. tit. 15, § 4304; Fla. Stat. § 103.061; Ga. Code Ann. § 21-2-12; Haw. Rev. Stat. § 14-27; Idaho Code § 34-1504; 10 Ill. Comp. Stat. § 5/21-5; Ind. Code § 3-10-4-8(b); Iowa Code § 54.7; Kan. Stat. Ann. § 25-802;

least nineteen of those, state law affirmatively bars those present from casting their own votes until they have filled the vacancies. See, *e.g.*, Ind. Code § 3-10-4-9(a); Kan. Stat. Ann. § 25-802; Md. Code Ann., Elec. Law § 8-505(b)(1); Mich. Comp. Laws § 168.47; N.Y. Elec. Law § 12-104; Ohio Rev. Code Ann. § 3505.39; Va. Code Ann. § 24.2-203. If, as these electors claim, the electoral college is "a separate and coordinate branch of the Government of the United States," Consol. Br. 18, whose operations states cannot regulate, it is unlikely that states could permissibly impose these post-appointment obligations. And prohibiting the electors from casting their votes at the time and place of the appointed meeting until they fulfil another responsibility—filling vacancies—would arguably be an unconstitutional interference with their "federal function" under these electors' novel theory.

The states' longstanding, commonplace involvement in electoral-college proceedings contradicts these electors' sweeping pronouncements. And their claim that "[u]nlike legislators, presidential electors are not state officials," Consol. Br. 41, clashes with the simple fact

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Ky. Rev. Stat. Ann. § 118.445; La. Stat. Ann. § 18:1264; Me. Stat. tit. 21-A, § 804; Md. Code Ann., Elec. Law § 8-505(b)(1); Mass. Gen. Laws ch. 54, § 138; Mich. Comp. Laws § 168.47; Minn. Stat. § 208.45(b)(3); Miss. Code Ann. § 23-15-789; Mo. Rev. Stat. § 128.130; Mont. Code Ann. § 13-25-306(2)(c); Neb. Rev. Stat. § 32-714(1); Nev. Rev. Stat. § 298.065(2)(c); N.H. Rev. Stat. Ann. § 660:28; N.J. Stat. Ann. § 19:36-2(a); N.M. Stat. Ann. § 1-15-6(C); N.Y. Elec. Law § 12-104; N.C. Gen. Stat. § 163-210; N.D. Cent. Code § 16.1-14-05; Ohio Rev. Code Ann. § 3505.39; Okla. Stat. tit. 26, § 10-108; Or. Rev. Stat. § 248.370; 25 Pa. Stat. and Cons. Stat. Ann. § 3193; R.I. Gen. Laws § 17-4-11; S.C. Code Ann. § 7-19-90; S.D. Codified Laws § 12-24-2; Tenn. Code Ann. § 2-15-105; Tex. Elec. Code Ann. §§ 192.006(c), 192.007(a); Utah Code Ann. § 20A-13-304(3); Vt. Stat. Ann. tit. 17, § 2732; Va. Code Ann. § 24.2-203; Wash. Rev. Code § 29A.56.088(2)(c); W. Va. Code § 3-1-14; Wis. Stat. § 7.75(1); Wyo. Stat. Ann. § 22-19-106.

that state governments *do* treat presidential electors as state functionaries. For example, all states but one compensate electors from the state treasury. In some cases, compensation is limited to expense reimbursements, often on the same terms allowed to state officials generally.[8] Over twenty states pay the electors a lump sum in exchange for their services.[9] Only Utah flatly denies presidential electors any compensation. See Utah Code Ann. § 20A-13-302(2). Washington even bases expense reimbursements on the elector voting "consistent with his or her pledge." Wash. Rev. Code § 29A.56.350.

Electors act as state officials in other ways as well. Delaware, Maine, and New Hampshire allow electors to hire a "clerk," "secretary," or "clerical employees," who are compensated with state funds. Del. Code Ann. tit. 15, § 4305; Me. Stat. tit. 21-A, § 806; N.H. Rev. Stat. Ann. § 660:30. Georgia law provides that the

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[8] Alaska Stat. § 15.30.100; Fla. Stat. § 103.071; 10 Ill. Comp. Stat. § 5/21-4; Ky. Rev. Stat. Ann. § 118.455; N.M. Stat. Ann. § 1-15-10; N.D. Cent. Code § 16.1-14-06; Okla. Stat. tit. 26, § 10-107; Or. Rev. Stat. § 248.380; S.C. Code Ann. § 7-19-110; S.D. Codified Laws § 12-24-5; Tex. Elec. Code Ann. § 192.008(a); *see also* Cal. Elec. Code § 6909 (providing expense reimbursements in addition to other compensation); Ga. Code Ann. § 21-2-13 (same); Haw. Rev. Stat. § 14-31 (same); Idaho Code § 59-509(d) (same).

[9] *See* Cal. Elec. Code § 6909; Conn. Gen. Stat. § 9-177; Ga. Code Ann. § 21-2-13; Haw. Rev. Stat. § 14-31; Idaho Code § 34-1507; Iowa Code § 54.9; Kan. Stat. Ann. § 25-803; La. Stat. Ann. § 18:1265; Me. Stat. tit. 21-A, § 806; Miss. Code Ann. § 23-15-791; Mo. Rev. Stat. § 128.120; Neb. Rev. Stat. § 32-715; N.H. Rev. Stat. Ann. § 660:30; N.Y. Elec. Law § 12-110; N.C. Gen. Stat. § 163-211; Ohio Rev. Code Ann. § 3505.39; 25 Pa. Stat. and Cons. Stat. Ann. § 3194; Va. Code Ann. § 24.2-205; W. Va. Code § 3-1-14; Wyo. Stat. Ann. § 22-19-109; *see also* Del. Code Ann. tit. 15, § 4306 ("[E]lectors … shall receive for attendance and travel the same compensation as members of the General Assembly…."); Mont. Code Ann. § 13-25-106 (similar).

"reasonable expenses of the electoral college" will be paid by the state treasury at the direction of "the presiding officer of the college"—meaning that the Georgia electors' president has the authority to order disbursements of state funds. Ga. Code Ann. § 21-2-13; see also 25 Pa. Stat. and Cons. Stat. Ann. § 3194 ("[T]he contingent expenses of the electoral college, not exceeding one hundred dollars in amount, shall likewise be paid by the State Treasurer….").

All of these procedures undermine the electors' descriptive claim to be federal, rather than state, actors. And all of them would be called into question by a ruling in the electors' favor. In sum, if the Court rules for these electors, "[s]tates will need to urgently reconsider every aspect of nominating and selecting their presidential electors," at significant cost and on a rushed timetable. Noti, *supra*.

B. Current Federal Law Does Not Address Significant Opportunities For Corruption If Electors Are Unbound.

Unbinding electors would also introduce real risks of bribery and corruption. As one court observed nearly 100 years ago, "[t]o allow [the electors] to set at naught the popular election would be to invite a second campaign to be held between election day in November and the day that the electors meet." *Thomas*, 146 Misc. at 842. Just as candidates' campaigns create a risk of corruption, see *Citizens United* v. *FEC*, 558 U.S. 310, 357 (2010), so too would a "second campaign" to win over electors. In fact, the risks of impropriety in a "second campaign" would be even greater because there are fewer potential targets to influence or bribe. And neither federal campaign-finance laws nor federal criminal statutes currently apply to elector corruption.

Campaign-finance laws exist because of the practical difficulties in proving criminal bribery beyond a reasonable doubt. They are prophylactic measures to prevent corruption or its appearance. See *Citizens United*, 558 U.S. at 357; *Buckley* v. *Valeo*, 424 U.S. 1, 26 (1976) (per curiam). Because "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," this Court has said that Congress may conclude that more regulation is necessary through campaign-finance laws. *Buckley*, 424 U.S. at 27–28.

But federal campaign-finance laws do not apply to presidential electors. The definitions of "election" and "Federal office" in those laws do not include positions in the electoral college. See 52 U.S.C. § 30101(1)-(3). Thus, candidates for presidential elector neither register nor file disclosures with the FEC. And the FEC appears to have no statutory jurisdiction to regulate them. Together with the principle that Congress may not constitutionally limit campaign expenditures, see *Buckley*, 424 U.S. at 22–23, or independent expenditures, see *Citizens United*, 558 U.S. at 345–46, 365, this leaves open the possibility that presidential campaigns and outside groups could direct large sums of money to crucial or wavering electors, and federal campaign-finance law would have no say in the matter.[10]

Foreign nationals could also partake freely in this newfound opportunity to influence the electors, because the statute prohibiting foreign "contributions" or

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[10] On the merits, this gaping hole in campaign-finance regulation also suggests that Congress took for granted states' traditional power to bind their electors and so saw no need to include presidential electors in the federal campaign-finance regime.

donations "in connection with a Federal, State, or local election," likewise would not apply to elector proceedings. See 52 U.S.C. § 30121; *id.* § 30101(1) & (8)(A) (defining "election" and "contribution"). Thus, foreign governments, agents, individuals, and corporate entities could spend unlimited amounts to influence electors' votes. Nor would the ban on "electioneering communications" by foreign nationals apply to advertisements seeking to influence the electors. See *id.* §§ 30104(f)(3)(A)(i)(I), 30121(a)(1)(C). The electors' preferred Framer would see this as particularly problematic, given one of the reasons for the electoral college's existence was to prevent "foreign powers" from "gain[ing] an improper ascendant in our councils." The Federalist No. 68 (Alexander Hamilton).

The Ethics in Government Act does not apply to electors either. See 5 U.S.C. app. § 101(f) (defining "officers and employees" subject to requirements). No court, to *amici*'s knowledge, has ever held that this statute imposes obligations on presidential electors, nor has the Attorney General ever sought to enforce it against electors under § 104. See Noti, *supra* ("Presidential electors … have never been considered true elected officials or policy makers, so these [financial ethics and transparency] laws don't cover them."). As such, electors need not disclose their personal assets, income, or debts when they take office. So there would be no mechanism for the public to know where electors' money comes from or to whom they owe debts. "Electors could legally accept contributions worth millions of dollars in connection with their official duties, and the public would never know." *Id.*

Crucial federal criminal laws likewise would not apply to presidential electors. The public-official bribery statute prohibits any person from "directly or indi-

rectly, corruptly giv[ing], offer[ing] or promis[ing] anything of value to any public official … with intent … to influence any official act." 18 U.S.C. § 201(b)(1). But "presidential electors are not officers or agents of the federal government," *Burroughs*, 290 U.S. at 545, and thus the statutory definition of "public official" does not appear to reach them, see 18 U.S.C. § 201(a)(1) ("the term 'public official' means Member of Congress, Delegate, or Resident Commissioner, … or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror"). And even if Congress expanded this definition, this Court has interpreted § 201's prohibitions narrowly. See *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372–73 (2016).

That just leaves 18 U.S.C. § 597, which prohibits "mak[ing] or offer[ing] to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate." This statute's limitations, however, would be particularly acute in the elector context. First, quid pro quo arrangements are notoriously difficult to prove. That is why Congress has enacted campaign-finance laws to preemptively stave off corruption. *Citizens United*, 558 U.S. at 357. Second, the ban on vote-buying likely would not capture more attenuated exchanges between campaigns and presidential electors that would and should raise eyebrows. For example, would an unscrupulous presidential candidate violate § 597 by flying wavering electors to the Bahamas for a three-week vacation in late November 2020? What if the campaign explicitly stated that the electors should feel no obligation to vote for

that candidate? Section 597's text may not prohibit such conduct.[11]

What's more, presidential electors present a problem not found in other electoral contexts: The beneficiary of their wrongdoing will possess "unlimited" pardon power, "not subject to legislative control." See *Ex parte Garland*, 71 U.S. 333, 380 (1866). The prospect of prosecution may have no deterrent value if the candidate promises to pardon any electors who back him. It's not far-fetched to say that a presidential candidate ethically challenged enough to bribe presidential electors in the first place would likely feel little restraint about pardoning them afterward. States are the only sovereigns in our constitutional order with power to prevent or punish elector impropriety in a way that a corrupt president cannot wipe out.

At any rate, after-the-fact prosecution does not prevent the real harm of elector impropriety. The true injury is that corruptly influenced votes are cast in the process of filling the nation's highest office. "Corruption is a subversion of the political process." *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials … engage in activities which arouse suspicions of malfeasance and corruption.'" *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (quoting *United States* v. *Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)). States' broad powers to appoint presidential electors, includ-

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[11] Because campaign-finance laws do not apply to electors, 18 U.S.C. § 602 would not prohibit electors from soliciting what would otherwise be "contributions," either.

ing the power to bind electors, permits states to eliminate all opportunity for under-the-table dealings with their chosen electors.

In sum, a ruling for these electors would mean that electors are subject to virtually *no* anti-corruption laws. Of course, "[i]f men [and women] were angels, no government would be necessary." The Federalist No. 51 (James Madison). But they are not. And current law is poorly equipped to handle these risks. As long as opportunities to profit from official responsibilities exist, there is a danger that officials will abuse their positions.[12] "Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 788 (1978) (footnote omitted). "Preservation of the individual citizen's confidence in government is equally important." *Id.*

III. ANY RULING FOR THE ELECTORS SHOULD NOT TAKE EFFECT UNTIL AFTER THE 2020 ELECTION.

As explained, a ruling for the electors risks upending the national electoral regime. Assuming this Court rules by the end of June, states, voters, and Congress would have just four months to respond before the 2020 presidential election. That is not enough time, for all the reasons discussed above. Thus, were the Court to rule for the electors, the reasoning in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam), would

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[12] *See, e.g.*, Jeff Coen & Bob Secter, *Blagojevich Trial: Jury Hears 'I've Got This Thing and It's (Expletive) Golden' Quote*, Chi. Trib. (June 29, 2010), http://bit.ly/2vw1EmO (describing former Illinois governor's efforts to profit off his power to appoint Barack Obama's successor in the U.S. Senate).

counsel against allowing the judgment to take effect shortly before a hotly contested election already marked by whispers of attempted foreign interference and voter suppression, and likely to be affected by the ongoing global pandemic.

Purcell recognized that "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5. So if the Court holds that electors are "free agents," *Ray*, 343 U.S. at 231 (Jackson, J., dissenting), the Court should delay that ruling until after the 2020 election to give the states time to enact new measures in response to the Court's opinion. Voters, too, will need time to adjust. And Congress may well want to respond with new laws. Four months is not nearly long enough for any of that to happen.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu* v. *S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Confidence in the integrity of our electoral processes, moreover, "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. If voters "fear their legitimate votes will be outweighed by fraudulent ones," they will feel disenfranchised. *Id.* Likewise, if a state's voting population fears that their legitimate votes will be set aside based on the whim of a nameless, faithless elector they did not vote for, they will feel—and will be—disenfranchised.

Atop the myriad legal issues discussed above, *supra*, § II.A–B, it seems increasingly likely that the coronavirus pandemic, which has already disrupted primaries, will also cause problems in the general election. See Marshall Cohen & Kelly Mena, *Experts Are Warning Coronavirus Puts the Integrity of the 2020 Election at Risk. Here's What Could Happen in November*, CNN

(Mar. 29, 2020), https://cnn.it/2xC61gI. Adding a sudden Court decision unbinding electors on top of the novel, pandemic-related issues states will likely face would simply increase the risks to election integrity. See *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, No. 19A1016, slip. op. at 2–3 (U.S. Apr. 6, 2020) (cautioning against "changing the election rules so close to the election date" and emphasizing "the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion"); *id.* at 5 (Ginsburg, J., dissenting) (agreeing that last-minute judicial interventions in elections are "ill advised"). *Purcell* counsels against destabilizing the American democratic system with this cocktail of confusion and instability so close to an election.

CONCLUSION

For these reasons, the Court should affirm the Washington Supreme Court in No. 19-465 and reverse the Tenth Circuit in No. 19-518.

Respectfully submitted,

PAUL M. SMITH
ADAV NOTI
DAVID KOLKER
CAMPAIGN LEGAL CENTER
1101 14th Street, N.W.
Suite 400
Washington, D.C. 20005

TOBIAS S. LOSS-EATON *
JOHN L. GIBBONS
CODY L. REAVES
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

Counsel for Amici Curiae

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* Counsel of Record