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

CONSOLIDATED OPENING BRIEF FOR PRESIDENTIAL ELECTORS

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QUESTIONS PRESENTED

These consolidated cases arise from the unprecedented actions of Washington and Colorado to penalize presidential electors on the basis of their electoral votes for President and Vice President. The questions presented are:

1) Do "electors," who must "vote by Ballot" for President and Vice President, have a "right of choice" that cannot be legally controlled?

2) For *Colorado Dep't of State v. Baca*, No. 19-518, only: Does an elector, who performs a "federal function" in casting a ballot, have standing to sue a state after state officials interfered with his freedom of choice, rejected his vote, and removed him from office?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed on the case captions.

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Chiafalo v. Washington, No. 19-465—The opinion of the Supreme Court of Washington is available at 193 Wash. 2d 380 and is reproduced in *Chiafalo*, Petition for Certiorari, Appendix A. The oral decision of the Washington Superior Court is unpublished and is reproduced in *Chiafalo*, Appendix B. An accompanying Order is reproduced in *Chiafalo*, Appendix C. The administrative order imposing the fines is unpublished and is reproduced in *Chiafalo*, Appendix D.

Colorado Dep't of State v. Baca, No. 19-518—The opinion of the U.S. Court of Appeals for the Tenth Circuit is reported at 935 F.3d 887 and *Baca*, Petition for Certiorari, Appendix A. The district court's decision is unreported but is reproduced at *Baca*, Appendix B.

JURISDICTION

Chiafalo v. Washington, No. 19-465—The decision and judgment of the Washington Supreme Court was entered on May 23, 2019. On August 5, 2019, Justice Kagan granted an extension of time to file the Petition to October 20, 2019 (No. 19A138), and a Petition was timely filed on October 7, 2019. This Court granted certiorari on January 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Colorado Dep't of State v. Baca, No. 19-518—The judgment below, partially reversing the district court's final judgment on federal constitutional grounds, was entered on August 20, 2019. A Petition was timely filed

on October 16, 2019, and this Court granted certiorari on January 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the U.S. Constitution provides in relevant part that "[e]ach State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1.

The Twelfth Amendment provides in relevant part that "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States." U.S. Const. amend. XII.

Additional relevant constitutional and statutory provisions are reproduced in the *Chiafalo* and *Baca* Appendices.

INTRODUCTION

In 2016, two states did something no state had ever done: they penalized electors in the electoral college on the basis of the electors' votes. These unprecedented sanctions interfered with the right of choice vested by the Constitution in "Electors." This Court should restore the practice that has governed for more than 220 years and make clear that while states have plenary power "to appoint" electors, it is the "Electors" who have the power "to vote" free of state control.

STATEMENT OF THE CASE

I. Background

A. The Legislatures Choose How Electors Are Appointed, Which Is Now By Popular Vote In Every State.

The Constitution does not provide for the direct election of the President and Vice President by the people. Instead, under Article II, each state "appoint[s]" a number of presidential electors equal to the total number of the State's Members of the House and Senate. It is those electors who then choose the President and Vice-President. U.S. Const. art. II, § 1; U.S. Const. amend. XII. A state's power over appointment is "plenary," *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), although its exercise of that Article II power is constrained by other constitutional provisions, such as the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate

treatment, value one person's vote over that of another."); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Washington and Colorado, along with forty-six other states and the District of Columbia, appoint a slate of presidential electors from the political party of the candidates for President and Vice President that receive the most popular votes in the state.[1] *See* Nat'l Conference of State Legislatures, "The Electoral College" (Jan. 6, 2020), https://perma.cc/A5XR-G8FG; Colo. Rev. Stat. § 1-4-301, *et seq.*; RCW 29A.56.310, *et seq.* (2016).[2] Thus, once the popular votes are counted and results certified, each state appoints a slate of presidential electors who are members of the same political party as the ticket that received the most votes in the state.

At that point, a state's power over electors ends. Unlike other provisions of the Constitution that give an appointing entity continuing power over the appointee, the Constitution gives a state no continuing power over electors. Instead, the Constitution directs

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[1] Maine and Nebraska use a hybrid system under which they award one elector to the popular vote winner of each congressional district in the state and two electors to the statewide winner.

[2] Several of the state-law provisions relevant to the Washington case were amended in 2019; thus, all Washington state statutory references are to the versions in effect in 2016. *See* 2019 Wa. S.B. 5074 (enacted Apr. 26, 2019). Those amendments do not affect the fines levied against the Washington Electors and thus do not affect this Court's jurisdiction in any way. In fact, the amendments are an attempt by Washington to exert *more* control over the votes of presidential electors than it had in 2016, not less, because the amendments purport to allow the State to remove an elector who does not cast a ballot for the ticket that the electors are expected to support. *See* Wa. SB 5074 § 7 (codified at RCW 29A.56.090). *See also* Appendix A.

that it is the "Electors" themselves who are to "vote by Ballot" for President and Vice President. U.S. Const. amend. XII. That "vote" is the performance of a "federal function." Electors "exercise [that] federal function[] under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Burroughs v. United States,* 290 U.S. 534, 545 (1934). Thus, while states appoint electors, the electors derive their authority not from the state but from the federal Constitution. *See id.*

B. After They Are Appointed, Electors Vote By Ballot And Send The Results To Congress.

Once appointed, electors meet in their respective states "on the first Monday after the second Wednesday in December next following their appointment" to cast their ballots. 3 U.S.C. § 7. The Constitution specifies the procedure by which electors cast their ballots. Within those procedures, there is no substantive role for a state.

The Twelfth Amendment requires electors to "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." U.S. Const. amend. XII. The electors themselves are then required to "make distinct lists of all persons voted for as President" and "all persons voted for as Vice-President," to which the electors then add the "number of votes for each." *Id.* The electors then "sign and certify" the lists and "transmit" them "sealed to the seat of the government of the United States, directed to the President of the Senate." *Id.* After electors' appointment, the Constitution specifies no further role in casting or

tallying votes for anyone other than the electors themselves.

Federal statutory law mirrors the Twelfth Amendment. First, "as soon as practicable after the conclusion of the appointment of the electors," state executives must tell the Archivist of the United States who the electors are by sending a Certificate of Ascertainment. 3 U.S.C. § 6. At this point, the elector appointment is final. Then, at the appropriate place and time, presidential electors vote "in the manner directed by the Constitution." *Id.* § 8. In particular, federal law provides that the "electors shall make and sign six certificates of all the votes given by them." *Id.* § 9. As in the Twelfth Amendment, the electors themselves are then required to certify their own vote, seal up the certificates, and send one copy to the President of the Senate; two copies to the Secretary of State of their state; two copies to the Archivist of the United States; and one copy to a judge in the district in which the electors voted. *Id.* § 11. The only active role mentioned for a state's Secretary of State is to transmit to the federal government one of the Secretary's copies of the certificate of vote. But even that role is conditional: only if the electors themselves fail to send a copy, and a federal official requests a copy, does the Secretary of State have a role to play. *Id.* § 12. Thus, in the ordinary case, because the appointment of electors is "conclu[ded]" well before the electoral vote, *id.* § 6, neither the Constitution nor federal law envisions *any* role for *any* state official during the balloting by electors.

The final step in the presidential selection process occurs on January 6 following each presidential election. On that day, Congress assembles in a joint

session to open the certificates and count the electoral votes. *Id.* § 15. If an electoral vote is questioned, members of each House can initiate a formal debate and then vote on the validity of any electoral vote. *Id.*

Under the Electoral Count Act of 1887, 24 Stat. 373, there has been a formal challenge to an electoral vote cast contrary to expectation only once in the Nation's history. In 1969, a Republican elector chosen to support Richard Nixon voted instead for George Wallace. After an informed debate, Congress determined that the anomalous vote for George Wallace should be counted. *See* 115 Cong. Rec. 246 (Senate vote of 58-33 to count the electoral vote); *id.* at 170–71 (House vote of 228-170). That decision was consistent with Congress's treatment of every vote contrary to a pledge or expectation in the Nation's history that has been transmitted to it—a total of more than 180 votes across twenty different elections from 1796 to 2016. *See* FairVote, "The Electoral College," https://perma.cc/3RFB-Y44R.

C. Recently, Some States Began Requiring Electors To Pledge To Support Nominees, But The Pledges Were Not Enforced Until 2016.

While anomalous voting by presidential electors had been a part of the presidential selection process since the election of 1796, *see infra* § I.B.1, states did not begin to cabin the discretion of presidential electors until the 20th Century. In 1915, Oregon became the first state to require presidential electors to pledge to support the nominee of the electors' party. *See* Oregon Laws 1915, chapter 134. A few additional states followed at a relatively slow pace, though the

pace accelerated somewhat in the second half of the 20th century. *See* Appendix A (chart showing adoption of binding laws). Currently, 33 jurisdictions—32 states and the District of Columbia—have laws purporting to cabin the voting discretion of presidential electors, but the majority (19 states and D.C.) have no specific enforcement mechanism within the text of the statute. *See* Appendix A. Eighteen states do not attempt to restrict the discretion of presidential electors in the state.

In 1952, this Court upheld an Alabama state law that required presidential electors to pledge to support party candidates. *Ray v. Blair*, 343 U.S. 214 (1952). But the Court expressly left open whether the enforcement of such a pledge would be "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college." *Id.* at 230 (citation omitted). In the years before and since, no state had ever attempted to go beyond the line in *Ray* by enforcing a pledge against a presidential elector—until the 2016 election.

II. These Cases

In each of the consolidated cases before this Court, the States imposed novel penalties on presidential electors who voted, or tried to vote, contrary to a pledge. Ignoring 220 years of constitutional practice, during which no elector has ever been punished or removed for voting contrary to a pledge or expectation, Washington fined the petitioner presidential electors in *Chiafalo v. Washington* for voting for a candidate other than the one who won the most popular votes in the state. In *Colorado Department of State v. Baca*, one

respondent elector was removed from office after his vote was rejected for the same reason.

A. The Electors Are Nominated And Appointed As Presidential Electors.

In the summer of 2016, Washington petitioners Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John were nominated as three of a slate of twelve presidential electors for the Washington Democratic Party for the 2016 presidential election. *Chiafalo*, App. 3a (these are referred to as the "Washington Electors"). After a similar process, Colorado respondents Micheal Baca, Polly Baca, and Robert Nemanich were nominated as three of nine Democratic electors in the State of Colorado. *Baca*, App. 10 (the "Colorado Electors").[3]

On November 8, 2016, Hillary Clinton and Tim Kaine, the Democratic nominees for President and Vice President, received the most popular votes in Washington and in Colorado. Both the Washington Electors and Colorado Electors (collectively, the "Presidential Electors" or "Electors") were appointed to serve as presidential electors. App. 3a; *Baca*, App. 10. The appointments were finalized, at the very latest, when Washington sent to the Archivist its Certificate of Ascertainment on December 7, 2019, and when Colorado submitted its Certificate on December

[3] Polly Baca and Micheal Baca share a last name but are not directly related. Further, the unusual spelling of Micheal Baca's first name is correct as printed in this brief. It is pronounced as the name "Michael" normally is.

9, 2016, in Colorado.[4] The respective Certificates communicated the official appointments of all six Presidential Electors for the upcoming election.

B. The Electors Seek Clarity On The Enforceability Of State Laws Of Uncertain Constitutionality.

State law in Washington and Colorado purports to cabin the discretion of presidential electors, although in different ways. At the time of the 2016 election, Washington law provided 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). Colorado law purported to require electors to "vote for the presidential candidate and . . . vice-presidential candidate who received the highest number of votes at the preceding general election in this state." Colo. Rev. Stat. § 1-4-304(5).

Before the vote of the presidential electors, but after the electors had unambiguously been appointed to their federal roles, both sets of Presidential Electors requested preliminary relief to prevent each State from enforcing what the Electors viewed as unconstitutional restrictions on their right to vote freely. In Washington, Chiafalo and Guerra requested preliminary relief that would have prevented the State from enforcing its restriction on elector choice by

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[4] The Certificates of Ascertainment of each state from the 2016 election are easily accessible via the National Archives at https://www.archives.gov/electoral-college/2016 (or permanently at https://perma.cc/5BDW-NXNW). Washington's Certificate is available at https://perma.cc/KRR5-YSNF. Colorado's Certificate is available at https://perma.cc/2LRX-KS6H.

penalizing or removing the electors or otherwise interfering with the vote. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1143 (W.D. Wash. 2016). That request was denied. *Id.* at 1149.

In Colorado, Nemanich asked Colorado's then-Secretary of State Wayne Williams what would happen if a Colorado elector did not vote for Clinton and Kaine. *Baca*, App. 10. The Secretary, through the Colorado Attorney General's office, responded that Colorado law requires electors to vote for the ticket that received the most popular votes, and an elector who did not comply with this law would be removed from office and potentially subjected to criminal perjury charges. *Baca*, App. 10.

Given that response, two of the Colorado Electors, Nemanich and Polly Baca, brought suit in the District of Colorado and requested a preliminary injunction to prevent their removal or any interference with their votes. The district court denied the request. *Baca*, App. 168–82. The Colorado Electors appealed and requested emergency relief, but a Tenth Circuit panel denied the request for an injunction. In denying the request, the panel did not answer the question of whether Colorado could remove electors from office after electoral voting had begun, but it predicted that "such an attempt by the State" would be "unlikely in light of the text of the Twelfth Amendment." *Baca*, App. 197 n.4.

C. The Electors Vote And Are Penalized Because Of Their Votes.

On December 19, 2016, presidential electors throughout the Union met in their respective states to cast their electoral votes for President and Vice

President. *See* 3 U.S.C. § 7 (setting day for meeting of presidential electors). Washington's presidential electors met in Olympia, and Colorado's electors met in Denver.

The Presidential Electors in these cases determined to vote for a candidate other than the nominee of their party. Each believed that their vote, if joined by others across the nation, could move the election to the House of Representatives, and give the House a chance to select a President closer to the preferences of voters in their states than the presumptive winner, Donald Trump.

In Washington, all three Electors voted for Colin Powell for President, and for Maria Cantwell (Guerra), Susan Collins (John), and Elizabeth Warren (Chiafalo) for Vice President. *Chiafalo*, App. 4a, 40a. Washington transmitted these votes to Congress, which later accepted the votes in the official tally of electoral votes. 163 Cong. Rec. H185–90 (daily ed. Jan. 6, 2017) (counting and certifying election results). But on December 29, 2016, Washington fined them $1,000 each under RCW 29A.56.340 for failing to vote for the nominee of their party.

In Colorado, on the day of the vote, the Secretary of State changed the electors' oath of office to put additional pressure on them to vote for Clinton. *Baca*, App. 217. After voting began, Micheal Baca crossed out Clinton's name on the ballot that had been printed with only Clinton's name and voted for John Kasich for President. *Baca*, App. 12–13. The Secretary then rejected Micheal Baca's vote, removed him as an elector, and replaced him with a substitute elector who cast a vote for Clinton. *Baca*, App. 13. The two other

Colorado Electors who had inquired earlier about their rights ultimately cast their electoral votes for Clinton and Kaine. *Baca*, App. 13. After the vote, the Secretary referred Micheal Baca to the state Attorney General for potential perjury prosecution, but no charges were filed. *Baca*, App. 217–18, 31, 34.

D. The Electors Pursue Appeals, And The Lower Courts Split.

1. *Washington: The Electors' fines are upheld.*

The Washington Electors appealed their fines to an Administrative Law Judge and argued the fines were unconstitutional, but the ALJ lacked the power to consider the constitutional objection, and accordingly upheld the imposition of the fine. *Chiafalo*, App. 41a–43a. The Washington Electors appealed the administrative determination to the Washington Superior Court, which issued a brief oral decision rejecting the appeal. *Chiafalo*, App. 30a–32a.

The Washington Supreme Court heard the case on direct appeal and upheld the issuance of the fines in an 8-1 opinion. The majority "acknowledge[d] that some framers had intended the Electoral College electors to exercise independent judgment." *Chiafalo*, App. 22a. But the court concluded that nothing in the Constitution "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." *Chiafalo*, App. 19a. Instead, the Court found that the state's power to appoint electors under Article II, as interpreted by *Ray v. Blair*, was sufficiently broad to include a power to "impose a fine on electors for failing to uphold their pledge." *Chiafalo*, App. 20a.

Justice Steven C. González dissented. He noted that there is a "meaningful difference between the power to appoint and the power to control," and that a state has only the former power under the Constitution. *Chiafalo*, App. 29a. This "leav[es] the electors," Justice González concluded, "with the discretion to vote their conscience." *Chiafalo*, App. 29a.

2. *Colorado: An Elector's removal is ruled unconstitutional.*

In the summer of 2017, the Colorado Electors filed an action under 42 U.S.C. § 1983, alleging that the State's actions, as carried out by the Colorado Department of State through its Secretary, violated the Colorado Electors rights under Article II and the Twelfth Amendment.[5] *Baca*, App. 218–220. The

[5] The Colorado Electors had originally filed their § 1983 action against the Colorado Secretary of State in his individual capacity. At Colorado's request, the Colorado Electors amended their complaint to drop the Secretary of State and name the Department of State as defendant instead. In exchange, Colorado expressly and on the record waived the argument that the Department is not a person. *Baca*, App. 58; Joint Response to Supp. Br. Order, *Baca v. Colorado Dep't of State*, 10th Cir. No. 18-1173 at 2–3 (July 26, 2019) (ECF No. 10666104). It also expressly waived any immunities that could insulate the State from money damages. *Baca*, App. 59. Indeed, before the Tenth Circuit, the parties filed a joint brief explaining that the Court of Appeals had jurisdiction to resolve the case because 1) Colorado had waived the argument that it was not a person, and 2) even if the "personhood" argument were both unwaivable and jurisdictional, the Complaint could be construed or amended on appeal under Fed. R. Civ. P. 15(b)(2) to state a claim directly under the Constitution against Colorado using 28 U.S.C. § 1331 and its "arising under" jurisdiction. *See* Joint Response to Supp. Br. Order at 10–15. Such a direct claim under § 1331 is unusual

district court granted the State's motion to dismiss. The Tenth Circuit reversed and held that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion." *Baca*, App. 127.

The Tenth Circuit reached its decision after canvassing constitutional text, structure, and history. The court analyzed dictionary definitions of the key constitutional terms from at least five early dictionaries and observed that words like "vote" and "elector" "have a common theme: they all imply the right to make a choice or voice an individual opinion." *Baca*, App. 103. The court also recognized that electors perform a "federal function" that must be insulated from control or interference by a state. *Baca*, App. 95. And the court noted that unbroken history—from the enactment of Article II, its alteration by the Twelfth Amendment, and beyond—"provides additional support for [the court's] conclusion that presidential electors are free to exercise discretion in casting their votes." *Baca*, App. 107.

E. This Court Grants Certiorari and Consolidates The Cases.

On January 17, 2020, this Court granted both the Washington Electors' petition to review the Washington Supreme Court's decision in *Chiafalo* and the Colorado Department of State's petition to review

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because sovereign immunity often prevents it, but Colorado has waived sovereign immunity, so it is available here. *See id.*

The Tenth Circuit agreed with the parties and held there was jurisdiction, *Baca*, App. 53–65. Colorado agreed in its Petition to this Court that nothing "preclude[s] this Court from reaching the questions presented" as to elector discretion under the United States Constitution. *Baca*, Pet. 33.

the Tenth Circuit decision in *Baca*, and it consolidated the cases for argument.

SUMMARY OF ARGUMENT

This Court should reverse in *Chiafalo* and affirm in *Baca* on the same grounds: the actions of Washington and Colorado unconstitutionally infringed presidential electors' right to vote with discretion.

Constitutional text and structure, along with an early and unbroken history of anomalous voting by presidential electors, all show that presidential electors cast votes that may not be directed by a state. Indeed, as the Tenth Circuit in *Baca* concluded after an exhaustive analysis of key constitutional terms, the phrases "elector," "vote," and "by ballot" all require that electors exercise a "right of choice" that may not be directed. This is undoubtedly true for congressional electors, who vote for federal officeholders, and the Constitution uses identical words and concepts to ensure the freedom of presidential electors as well. A state's power "to appoint" electors does not grant it the power to control or remove appointees.

Structure and history confirm this understanding. Electors exercise a "federal function" when they vote for President, and a federal function may not be interfered with by a state. Never before has any state tried to control how an elector may vote. Instead, presidential electors have always operated as a kind of national jury system—expected to follow instructions from the voters at large, but with unreviewable discretion not to do so. Until a constitutional amendment changes the process of election, that is how it must be.

Finally, Micheal Baca has standing in the Colorado case. He was prevented from voting and removed from office on the basis of his vote. That is a concrete injury that can be redressed by a favorable ruling, so there is thus no bar on Baca suing to vindicate the right to vote freely. But even if there is not standing for Micheal Baca, this Court can, and should, fully determine the rights of presidential electors in the Washington case.

ARGUMENT

I. The Constitution Requires That Presidential Electors Be Free To Cast Votes Without Interference Or Sanction.

These cases are about constitutional power—about whether states have any power to direct how "Electors" may cast their own "vote by Ballot." In this instance, state power was exercised to induce electors to follow the popular will. But nothing in the Constitution would condition such power upon a state's desire to follow a popular vote. If a state has the power to direct electors to vote consistent with the election returns, a state has the power to forbid electors from voting for candidates who fail to release their taxes returns, who fail to visit the electors' state, or who fail to commit to any political position deemed by a state legislature to be important and correct.

The plain text, structure, and history of the Constitution deny the states any such power. To the contrary, the Constitution vests in "Electors" the judgment of how they will "vote by Ballot." U.S. Const. art. II, § 1; amend. XII. No state may interfere with that judgment, either through a fine (Washington) or removal (Colorado).

A. Article II Requires Elector Independence.

1. *Presidential electors are an independent body of citizens who freely elect the President.*

The electoral college—or colleges, as they were called for most of the 19th Century, *see* Joseph Story, 3 *Commentaries on the Constitution of the United States* §§ 1452, 1457, 1469 (1833) (referring to the "electoral colleges")—is a distinctive institution, both within our own constitution, and across constitutions generally. It was crafted initially because the Framers did not want an executive dependent directly upon Congress nor upon the state governments. And while some Framers supported the idea of the people electing the President directly, there was concern that the people would be unable to select a President given the practicalities of the time. As it could take months for information to travel from one part of the nation to another, the realities of communication in 1787 would make any national campaign directed at the people impossibly difficult. *See generally* William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787* 192–94 (1900).

The Framers' solution was to create an intermediate body, with members appointed within each state in the manner the legislatures might choose, that would "constitute a separate and coordinate branch of the Government of the United States." Vasan Kesavan, *Is The Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1774 (2002). Alexander Hamilton explained the reasons for this design: States would appoint electors who would be "most capable of analyzing the qualities" needed for a

great President, because the electors would be "most likely to possess the information and discernment requisite to such complicated investigations." The plan placed electors "under circumstances favorable to deliberation," because they would be "detached" from "cabal, intrigue, and corruption," as they performed their sole purpose: to select the President and Vice-President of the United States. The Federalist No. 68 (A. Hamilton).

Given this background, it is undisputed that the "plan originally contemplated" envisioned "electors [who] would be free agents, [able] to exercise an independent and nonpartisan judgment as to the [individuals] best qualified for the Nation's highest office[]." *Ray*, 343 U.S. at 232 (Jackson, J., dissenting); *see also McPherson*, 146 U.S. 1 at 36 ("Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive.").

Four words evince the nature of the Framers' design: a state has the power to "**appoint**" "**Electors**," who then "**vote**" "**by ballot**." Together these terms reveal the independence that determines these cases.

2. *A state has the power "to appoint" electors, which does not entail a power to control them.*

The States have a "plenary" power "to appoint" electors. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). From that power, the States claim an additional power to control the electors they appoint. But, as past practice and this Court's cases detailing the nature of the appointment power make clear, the power to

"appoint" does not, without more, carry any power to control the person appointed.

The President, for example, has the power to "appoint" federal judges. U.S. Const. art. II, § 2. That power does not include any power to control judges, whether directly, through an order, or indirectly, through a statute that would purport to impose a fine on a judge who issued a decision contrary to a pledge. *See United States v. Klein*, 80 U.S. 128, 147 (1871) (outcome of particular case may not be directed to court); *Mistretta v. United States*, 488 U.S. 361, 410 (1989) (Congress "could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges"); *United States v. Will*, 449 U.S. 200, 217–18 (1980) ("A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

A president may, of course, seek to determine a judge's judicial philosophy in the context of appointment. It would be permissible (whether or not appropriate) for a president, or a Congress, to secure a nominee's pledge before a judicial appointment. But nothing in the power to "appoint" makes it "proper" for Congress to permit the President to fine or remove any judge who breaks a pledge to either Congress or the President. *Cf. Printz v. United States*, 521 U.S. 898, 923–25 (1997) (a law that violates separation of powers and is "not in accord with the Constitution" cannot be saved by the Necessary and Proper Clause).

So too with U.S. Senators: Before the Senate was popularly elected, state legislatures had plenary power

to appoint Senators. U.S. Const. art. I, § 3. State legislators had a desire to control their appointees, so states regularly instructed the chosen Senators in specific cases or on specific issues. *See* Jay Bybee, *Ulysses At The Mast: Democracy, Federalism, And The Sirens' Song Of The Seventeenth Amendment*, 91 Nw. U.L. Rev. 500, 524–28 (1997) (describing the robust "early practice of instruction" of legislative instruction of Senators from the Founding to the adoption of the Seventeenth Amendment). But as there were not any "contemporaneous means for compelling senators to obey instructions," *id.* at 519, "attempts by state legislatures to instruct senators have never been held to be legally binding," Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 592 (1996). There was no mechanism for sanction, and Senators could not be removed or recalled, except through impeachment. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 890 (1995) (Thomas, J., dissenting) ("[S]tate power to recall [Members of Congress] would be inconsistent with the notion that Congress was a national legislature once it assembled."); *see also Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells*, 204 N.J. 79, 86 (2010) (holding unconstitutional a petition to recall U.S. Senator because "[t]he historical record leads to but one conclusion: the Framers rejected a recall provision and denied the states the power to recall U.S. Senators"). No matter how severe the pressure from political parties or citizens, it was up to each Senator to determine what to do with the instruction. Bybee at 524–28.

The same reasoning limits any legal effect of instructions to electors. Like instructed Senators,

electors who "receive[] instructions contrary to their own views face[] a difficult dilemma." *Id.* at 526. But the dilemma is their own, personally; its resolution may not be dictated by a state. *See id.* at 523 (noting that the Framers' failure to include an express power to instruct Senators meant that the First Congress "avoided the difficult question of enforcement").

That the power "to appoint" does not entail a power to control has been made explicit by this Court in the context of inter-branch appointments. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld the appointment of an independent counsel—an employee of the U.S. Department of Justice—by a "Special Division" of the D.C. Circuit. *Id.* at 659–61. Congress may "vest the Appointment" of inferior executive officers in the "Courts of Law." U.S. Const. art. II, § 2. But from that appointment power, the courts of law do not thereby secure a power to control or remove the officers appointed—even when Congress purports to authorize it.

Thus, in *Morrison*, while Congress attempted to grant the Special Division a statutory power of removal, this Court construed it quite narrowly, to avoid the statute's unconstitutionality. *Morrison*, 487 U.S. at 682. Despite the court's appointing the independent counsel, the Special Division could not have "anything approaching the power to remove the counsel while an investigation or court proceeding is still underway." *Id.* Instead, termination "may occur only when the duties of the counsel are truly completed or so substantially completed that there remains no need for any continuing action by the independent counsel." *Id.* (internal quotation marks omitted). This was the only way to construe the statute so that the

Special Division's "power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority." *Id.* at 683. The full removal power did not—indeed, could not—follow the appointment power.

The one obvious exception to this principle—the President's presumptive power to control and remove inferior officers—proves the general rule that the appointment power does not entail the power to control or remove. As the Tenth Circuit noted, the President's broad power to control or remove subordinates does not flow from the power to appoint them. Instead, the power comes from the Take Care Clause and Article II's Vesting Clause. Presidents may control or remove subordinate *executive branch* officials because "executive officers," as the court wrote, quoting *Myers v. United States,* 272 U.S. 52, 132 (1926), "exercise 'not their own but [the President's] discretion.'" *Baca*, App. 93. And that power to control and remove is held by the President, regardless of who exercises the power to appoint. *See Mistretta*, 488 U.S. at 382 ("Congress may not exercise removal power over [an] officer performing *executive functions*." (citation omitted & emphasis added)).

This proves there is a "meaningful difference," as Justice González noted in dissent in *Chiafalo*, "between the power to appoint and the power to control." *Chiafalo*, App. 29a. A power "to appoint" does not on its own carry any power "to control."

3. *An "Elector" is free to choose.*

Article II vests in "electors" the choice for President and Vice President. The original meaning of that term,

and its use within the Constitution more generally, reveal the discretion that it secures.

At the Founding, as today, the word "Elector" described a person vested with judgment and discretion to choose. Samuel Johnson defined the term "elector" as one "that has a vote in the choice of any officer," 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). John Ash's dictionary defined an "elector" as "[o]ne who chooses, one who has a vote in the choice of any public officer." 1 John Ash, *The New and Complete Dictionary of the English Language* (1795); *see also* Thomas Dyche & William Pardon, *A New General English Dictionary* (11th ed. 1760) (defining elector as "a person who has a right to elect or choose a person into an office"); *Baca*, App. 101 (referencing five Founding Era dictionary definitions). "Electors" are clearly different from "agents" or "delegates," who act on behalf of others but not on their own. *See Bouvier Law Dictionary* (2012) (defining "agent" as "one who acts on behalf of another").

That the Founders meant "Elector" to mean what these founding-era sources say it means is confirmed by the other uses of the term "Elector" within the Constitution. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.") In addition to presidential electors, the Constitution uses the word "Elector" to refer to "congressional electors." *Thornton,* 514 U.S. at 901 (Thomas, J., dissenting) (using this term). The parallels between these two run deep and inform the meaning of each.

Congressional electors are established under Article I, § 2. By that clause, states are given the power to determine who the electors of Congress will be. *See* U.S. Const. art. I, § 2 ("Electors . . . shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). Once qualified under state law, those "Electors" choose Members of the House of Representatives, *id.*, and after the Seventeenth Amendment, Members of the Senate, U.S. Const. amend. XVII. It is obvious—and indeed has never been questioned—that a state's right to set the qualifications for congressional electors does not include the power to tell these electors for whom they may vote. Instead, once qualified, congressional electors "act in a federal capacity and exercise a federal right." *Thornton*, 514 U.S. at 842 (Kennedy, J., concurring). The "dominant purpose" of this scheme, as this Court has explained, was to "secure to the people the right to choose representatives by the designated electors." *United States v. Classic*, 313 U.S. 299, 318 (1941) (extending the right of electors to vote freely to state primary elections).

Presidential electors are established in a similar way. Article II, § 1 creates presidential electors. As with congressional electors, the states are given a power to select them. That power is more direct than with congressional electors. Rather than the states setting "Qualifications" for congressional electors, Article II directs the states to "appoint, in such Manner as the Legislature thereof may direct," presidential "Electors." Once appointed, presidential electors have the power to "vote by Ballot." U.S. Const. art. II, § 1. That vote, if by a majority, determines the choice for President and Vice-President.

This Court has remarked on the parallel between congressional and presidential electors repeatedly. *See Ray*, 343 U.S. at 224 ("[P]residential electors exercise a federal function . . . but they are not federal officers or agents any more than the state elector who votes for congress[persons]."); *see also Thornton*, 514 U.S. at 804–05 (noting the Elections Clause "parallels" the Presidential Elector Clause). "Electors" by their nature must be given the right of choice so that "the officers thus chosen [are] the *free* and uncorrupted *choice* of those who have the right to take part in that choice." *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (emphases added).

Finally, the Constitution's restrictions on who may serve as a presidential elector reinforces this independence. Under Article II, "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. If electors were not choosers but instead were meant to act as mere ministerial agents, this provision would be superfluous, as it would be irrelevant whether an elector also has another federal job.

4. *A "vote" is an act of discretion.*

That the Framers intended presidential electors to choose the President themselves is further affirmed by the use of the word "vote" to refer to electors' primary constitutional duty. At the time of the Twelfth Amendment, the term "vote" was defined as "[s]uffrage; voice given and numbered," 2 Samuel Johnson, *A Dictionary of the English Language* (London, 6th ed. 1785); "[v]oice, [a]dvice, or [o]pinion of a [m]atter in [d]ebate," Nathan Bailey, *A Universal*

Etymological English Dictionary (London, 1763); "to speak for or in behalf of any person or thing; also to chuse or elect a person into any office, by voting or speaking," Thomas Dyche & William Pardon, *A New General English Dictionary* (11th ed. 1760); "[a] suffrage, a voice given and numbered, a determination of parliament"; "to chuse by suffrage; to give by a vote," 2 John Ash, *The New and Complete Dictionary of the English Language* (1795); "to give or choose by votes," and "a voice," Noah Webster, *A Compendious Dictionary of the English Language* (1806). *See also Oxford English Dictionary* (2d ed. 1989) (defining "to vote" as "to exercise the right of suffrage; to express a choice or preference by ballot or other approved means").

These sources make clear that to vote is to choose. The power to choose is not a duty to perform the ministerial role of casting a ballot to effectuate another's preference. Executing a duty is not the power to choose.

The meaning of "vote" as tied to "choice" is confirmed by other uses of the word "vote" in the Constitution and by this Court. For instance, if, when choosing the President, there is no majority choice of the electors' "vote by Ballot," the Twelfth Amendment directs that the House "shall choose" the President with "the representation from each state having one vote." U.S. Const. amend. XII. In the Twentieth Amendment, the Constitution directs that the Vice President shall temporarily become President "if the House of Representatives shall not *choose* a President whenever *the right of choice* shall devolve upon them." *Id.* (emphases added); *see also* U.S. Const. amend. XII (now-amended procedure describing what happens

when House members have the "right of choice" for President but do not make a timely selection).[6] And outside the context of presidential selection, the Constitution consistently uses the word "vote" where independent discretion is contemplated: for instance, each Senator "shall have one vote," and, when deciding on bills, the "Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively." U.S. Const. art. I §§ 3, 7. These "votes" are not ministerial.

This Court, too, has linked voting with choice. It has said there is a "*right of choice*" held by congressional electors to vote for "representatives in Congress" that is "secured by Section 2 of Article I." *Classic*, 313 U.S. at 320 (emphasis added); *Yarbrough*, 110 U.S. at 662 (the "election of members of Congress should be the free choice of all the electors"). Joseph Story described the right of choice of presidential electors a half-century after the Framing—and after the passage of the Twelfth Amendment—when he wrote that Article II granted "the *right of choice* [for President] to persons,

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[6] The Twelfth Amendment requires House members to "choose . . . by ballot" in contingent elections, not "vote by ballot" as presidential electors do. U.S. Const. amend. XII. The difference in word choice between "choose" and "vote" is resolved by the next sentence of the Amendment, which says that, in determining the results of a contingent election, "votes shall be taken by states, the representation from each state having one vote." *Id.* Thus, the Twelfth Amendment reserves the word "vote" for the unit of decision that is directly registered to determine who becomes President. Presidential electors themselves get the first set of votes; collections of state delegations in the House get the second set. Either way, whoever votes has the "right of choice." *Id.*

selected for that sole purpose at the particular conjuncture, instead of [to] persons, selected for the general purposes of legislation." Joseph Story, *Commentaries on the Constitution* § 1450 (3d ed. 1833) (emphasis in original).

These sources show conclusively that the "right of choice" is given to "electors" who "vote." By contrast, the Constitution does not use the term "vote" to refer to the consequence of direction from another authority. Instead, voting is the core act of discretion and free judgment on which our system of constitutional government depends. It may not be controlled by a state, and it is not merely ministerial.

5. *The phrase "by ballot" means electors must record their votes to be tabulated without interference.*

The Framers specified not only that "electors" must "vote" for their choices for President, but also that they must do so "by Ballot." U.S. Const. art. II. & amend. XII. As one early commentator noted, an election "by ballot" is "the mode of proceeding best calculated to secure a freedom of choice." William Rawle, *A View of the Constitution of the United States of America* 53 (2d ed. 1829). The special direction to vote "by ballot" provides yet more support for the proposition that state officials have no power to interfere with the freedom of choice that the Constitution grants to presidential electors.

At the Founding, as now, to vote "by ballot" meant to record a vote and place it in a ballot box for counting. Samuel Johnson defined a "ballot" as a "little ball or ticket used in giving votes, being put privately into a box or urn." 1 Samuel Johnson, *A Dictionary of the*

English Language (6th ed. 1785). Madison at the Convention employed this usage when he noted that those writing rules for elections might permit electors to vote either "by ballot" or "viva voce"—that is, in writing or orally. 2 *Farrand's Record of the Federal Convention* 240.

This sense conforms to early practice in the House of Representatives, which is also required to proceed "by ballot" when it conducts a contingent election for President. In the contingent elections of 1801 and 1825, the House required that Representatives "ballot among themselves" and place the ballots into one of "sixteen ballot boxes provided." *House Journal* Feb. 9, 1801, at 791–92; *see also id.* Feb. 7, 1825 at 213–14 (in 1825 contingent election, Representatives would "ballot among themselves" and place the ballots into a "ballot box" that was "provided for each state."). Only after all voting was complete were the ballot boxes opened and the ballots "taken out and counted." *House Journal* Feb. 16, 1801, at 801; *id.*, Feb. 10, 1825 at 222 (same, for 1825 election).

Voting "by ballot" conflicts with any notion of state control over the vote of an elector. Presidential electors vote at the same time with their own personal ballots. They then place their own ballots, which they fill out on their own, into a secure "ballot box" where the votes are counted only after all votes are registered. The Framers required presidential electors to use a particularly secure, reliable, and objective voting method to ensure that the personal choice of each

elector was accurately counted. That deliberate choice of procedures must carry weight.[7]

* * *

Read together, these words reveal the Constitution's plan: While a state has the power "to appoint" "Electors," nothing in that power secures to a state any power to control how the electors may vote. If it did, then the electors would not be "Electors," and their "vote by Ballot" would not be a "vote." The plain meaning of these terms show a discretion that a state has no power to take away.

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[7] Some founding-era sources go further and say that the Founders intended the votes of electors to be by *secret* ballot. *See* Speech of Charles Pinckney in the United States Senate, March 28, 1800, *reprinted in* 3 *Records of the Federal Convention of 1787*, at 390 (Max Farrand ed., 1911) ("The Constitution directs that the Electors shall vote *by ballot* . . . It is expected and required by the Constitution, that the votes shall be secret and unknown."). The States may disagree that the Framers intended secrecy, but any dispute about secrecy is not relevant because secret ballots are not necessary for voter independence. For instance, the votes of members of the House and Senate are constitutionally required to be made publicly available, *see* U.S. Const. art. I § 5, but their votes are personal and may not be compelled. The same is true with the votes of congressional electors during the initial period of American democracy when the secret ballot was not in common use. *See Burson v. Freeman*, 504 U.S. 191, 200–04 (1992) (describing the history of voting and the rise of the so-called "Australian ballot"). What is required for voter independence is vote security and reliability. Those ideas are captured by the requirement that presidential electors vote "by ballot." *See* William Rawle, *supra*.

B. The Twelfth Amendment Did Not Alter The Independence Contemplated By Article II.

The Twelfth Amendment was ratified in 1804, and it altered presidential selection by, among other things, requiring electors to vote separately for President and Vice President. *See* U.S. Const. amend. XII. Yet the Twelfth Amendment did not change the role of electors themselves. Rather, electors voted independently before the Amendment, and they maintained that independence after the Amendment's adoption.

1. *When the Twelfth Amendment was adopted, there had already been dozens of anomalous electoral votes.*

In the Constitution's original design, presidential electors cast two votes on one ballot. The candidate receiving the most votes, if a majority, became President. The candidate remaining with the most votes became Vice President. U.S. Const. art. II.

This design made sense in the political culture at the time. In a country without political parties and with limited general awareness of any national figures, the Framers expected that the electors would choose a person of broad stature like George Washington. *See* The Federalist No. 68 ("It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.")

Yet once political parties emerged, the original design no longer could be trusted to work. In 1796, in the first genuinely contested presidential election, the Federalist presidential candidate, John Adams,

received 71 electoral votes, one vote more than the majority of 70. Because many of the electors who supported Adams also wanted to assure that he received more electoral votes than his running mate, Thomas Pinckney, not all the Adams electors voted for Pinckney, and Pinckney received 59 electoral votes. But Adams' chief rival, the Democratic-Republican Thomas Jefferson, received 68 electoral votes. Thus, under the unamended regime, Jefferson was elected Vice President—even though he did not run for the position, was not pleased to serve in it, and was of a different political party from Adams. *See generally* Jeffrey L. Pasley, *The First Presidential Contest: 1796 and the Founding of American Democracy* (2013).

In that election, there were 59 anomalous electors, including one particularly prominent one: Samuel Miles of Pennsylvania. That year, Pennsylvania's 15 electors were all selected by an at-large, statewide popular vote—that is, each Pennsylvania voter had to vote individually for 15 different elector positions, and the 15 highest vote-getters would be the state's presidential electors. Miles headed the slate of fifteen Federalist electors. Pasley, 351, 360–63.

At the time when Pennsylvania law required certification, the vote from Greene County was missing. As a result, two Federalist electors, including Miles, were among the top 15. The governor, a Federalist, thus appointed 13 Democratic-Republican electors, plus Miles and a Federalist colleague. Yet when the returns from Greene County were finally received, they placed two additional Democratic-Republican electors ahead of the two Federalists. If all votes had been counted before the electors were appointed, all 15 electors would have been Democratic-

Republicans. But, as the appointments could not be changed once certified, Miles remained an elector. *See id.*

Miles recognized the anomaly in his appointment. He understood that even though he was expected to vote for Adams, Jefferson had won the popular vote in the state. So Miles did not vote as his party expected he would. He voted for Jefferson rather than Adams. *See id.* at 363.

This act created a significant controversy. As a prominent critic responded, "What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think." *See Gazette of the United States* (Dec. 15, 1796).[8] Yet despite its anomalous nature, Congress ignored the protests, and counted Miles' vote for Jefferson.

Miles was not the only elector to stray from a party ticket in 1796. The entire contingent of South Carolina electors voted for the cross-party ticket of Jefferson (Democratic-Republican) and Pinckney (Federalist), apparently desiring Pinckney, a South Carolinian, to leap over Adams and become President should the Federalists actually prevail. At the same time, Federalist electors in other states tried to prevent Pinckney from besting Adams by voting for Adams and, with their second votes, a mishmash of individuals with little chance of being elected, including Oliver Ellsworth (11 votes) and John Jay (5 votes). All told, by this count, seventy-nine electors voted as expected in 1796, while fifty-nine electors

[8] Available at https://perma.cc/EZ5D-3CBP (see bottom-half of page, far left hand column).

voted anomalously. *See* Appendix B (complete accounting of 1796 vote). That means more than 40% of the electors in the first contested presidential election voted contrary to how they were expected to vote.

Four years later, during the election of 1800, a new plan was hatched to address potential strategic voting by presidential electors. This plan too would rely upon the ability of electors to exercise discretion. That year, candidates ran on party tickets. One candidate was understood to be the candidate for President, and the other the candidate for Vice President. Almost every elector from that party would vote for both choices. But one elector who supported the ticket would exercise discretion and vote for the party's presidential candidate but not for the party's vice-presidential candidate. That would mean the party's presidential candidate would receive one more electoral vote than the vice-presidential candidate. And assuming the election was not tied between two tickets, the two politicians on the same ticket would be selected to their proper offices.

This plan worked with the Federalists. John Adams received 65 electoral votes, and his running mate Charles Pinckney (Thomas's brother) received 64; one elector in Rhode Island exercised discretion and voted for John Jay instead of Pinckney. But the plan did not work with the Democratic-Republicans. Thomas Jefferson, understood to be the presidential candidate, received 73 electoral votes. But Aaron Burr, the ticket's presumptive Vice President, also received 73. No elector had exercised discretion to vote for someone other than Burr, and this led to a tie. The election was sent to the House of Representatives,

which chose Jefferson after 36 ballots. *See* Thomas N. Baker, *"An Attack Well Directed": Aaron Burr Intrigues for the Presidency*, 31 Journal of the Early Republic 553 (2011); *Baca*, App. 74–75.

After these two troubling elections, both of which featured anomalous electors, Congress resolved to amend the Constitution to change presidential selection. That determination resulted in the Twelfth Amendment.

2. *The Twelfth Amendment did not alter elector independence.*

For the drafters of the Twelfth Amendment, one obvious flaw was the potential for intrigue that had almost defeated Jefferson in 1800. That flaw would be fixed by separating the ballot for President from the ballot for Vice President.

But a second obvious flaw—or feature, depending on the perspective—was the reality that some electors would cast anomalous votes. The Nation had just experienced two elections in which anomalous votes were obvious and significant. Yet despite this fact, the drafters of the Amendment did not even consider a rule to bind electors to the will of their appointing Legislature. None of the drafts of what would become the Twelfth Amendment even purported to address the issue of elector freedom. And nowhere in the debates was there any concern with anomalous electors nor any suggestion that electors could be legally bound to vote for a ticket. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501, 1541–54 (2014) (describing the debates in detail and noting that debates focused on "three major issues": the "designation of ballots,"

the "proper number of candidates to be referred to the House in the event of a disputed election," and the "status of the vice-presidency").

Thus while the Twelfth Amendment fixed one flaw in the original design, it left elector freedom untouched. The rule that had existed before the Twelfth Amendment would thus continue after the Twelfth Amendment: electors could vote as they wished. *See Baca*, App. 111 (concluding that "the historical context of the Twelfth Amendment supports our textual conclusion that states cannot interfere with the presidential electors' votes and that presidential electors have the constitutional right to exercise discretion when casting those votes").

3. *The Twelfth Amendment's specific insulation of the electors' voting confirms that states may not interfere with it.*

Not only did the Twelfth Amendment's drafters refuse to eliminate the possibility of anomalous votes, but the detailed instructions for elector voting insulates electors' performance of their core function from state interference. It does so by excluding state officials from the entire process of elector voting.

The Twelfth Amendment requires electors *themselves* to "make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each." U.S. Const. amend. XII. Electors *themselves* must then "sign and certify" those lists and transmit the lists directly to the federal government. *See* U.S. Const. amend. XII. The Constitution directs this process to occur by electors *themselves* and without identifying any involvement from any state official.

The federal statutes implementing the Amendment likewise have no role during the voting or tallying for anyone other than electors. According to Congress, the sole permissible action by any state official in the entire selection process is to provide a list of the electors that the electors themselves must attach to the certificates of vote. 3 U.S.C. § 9. After the vote has concluded and the votes tallied and certified, a state official may also transmit to the federal government a copy of the certificate by request, but only if the electors themselves fail to send one. *Id.* § 12.

If the text of the Amendment and statutes are followed, there can be no elector removal and, by implication, no fine either. The Colorado Secretary of State did what the electors themselves are supposed to do: tally and transmit the votes of the electors to Congress. And by fining the Washington Electors who did not vote the way the State wished, Washington unduly burdened the constitutional rights of the electors to cast and transmit their own votes, and therefore tried to do indirectly what the Twelfth Amendment and federal law directly prohibit. Neither action was constitutional.

C. The Constitution's Structure Confirms That States Have No Power To Direct How Electors Perform Their Duty.

In a federal system of divided powers with a Supremacy Clause, a state may not control or direct the performance of a "federal function." Colorado and Washington therefore had no power to control presidential electors as they performed their "federal function."

1. *Electors perform a "federal function," and the Supremacy Clause shields that function from state control.*

For nearly a century, this Court has made clear that presidential electors perform a "federal function" when they cast, tally, and transmit to the federal government their votes for President and Vice President. *Burroughs*, 290 U.S. at 545; *see also Ray*, 343 U.S. at 224 (noting that "presidential electors exercise a federal function in balloting for President and Vice-President" and comparing the "federal function" of a presidential elector to "the state elector who votes for congress[persons]"); *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (same, quoting *Burroughs*, 290 U.S. at 545). It follows that states cannot control the performance of that federal function either directly or indirectly.

This Court has explained this immunity, which derives from the Supremacy Clause, most comprehensively in the context of amendment ratification. When determining whether to approve an amendment to the federal Constitution, state legislators are neither employed by the federal government nor federal officers. But as this Court has held, in that moment when they cast their votes, they perform a "federal function." That federal function cannot be directed by anyone—even the sovereign of the state, the people, acting through referendum.

Thus, as this Court held in *Hawke v. Smith*, 253 U.S. 221 (1920), the people of Ohio could not use a popular referendum to override the votes of state legislators who ratified the Eighteenth Amendment. *Id.* at 230. As the Court explained, "the power to ratify

a proposed amendment to the federal Constitution has its source in the federal Constitution." *Id.* Because "[t]he act of ratification by the State derives its authority from the Federal Constitution," it is a federal function that is immune from state control. *Id*.

Two years later, the Supreme Court reaffirmed this principle in the context of state legislators' ratification of the Nineteenth Amendment, granting women the right to vote. In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court rejected the claim that a state constitution could render inoperative state legislators' votes to ratify the amendment. "[T]he function of a state legislature in ratifying a proposed amendment to the federal Constitution," the Court explained, "like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution." *Id.* at 137. The performance of that function "transcends any limitations sought to be imposed by the people of a state." *Id.*[9]

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[9] Related cases have made clear that the noninterference rule also applies to private federal contractors and federal employees performing federal functions, because "'the federal function must be left free of state regulation.'" *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)); *see also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956) (federal contractors cannot be forced to submit to state licensing procedures that would add to the qualifications required to receive the federal contract); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (federal postal officials may not be required to get a state driver's license to perform their duties because that would "require[] qualifications in addition to those that the [Federal] Government has pronounced sufficient"); *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal official may not be "held in the state court to answer for an act which he [or she] was authorized to do by the law of the United States").

The rule of these cases is straightforward, and it resolves these appeals: a state may not interfere with an individual's performance of a federal function, even if the relevant individual is appointed under state law—indeed, even if he or she is a state officer, as a legislator is, directed by the state's sovereign, as the people are.

In fact, the argument for the independence of presidential electors is even stronger than the argument for independence of state legislators acting as ratifiers of amendments. Unlike legislators, presidential electors are not state officials.

The Fourteenth Amendment explicitly distinguishes between elections for "the choice of electors for President" and elections for "executive and judicial officers of a state, or the members of the legislature thereof." U.S. Const. amend. XIV, § 2; *see also id.* § 3 ("No person shall be a Senator or Representative in Congress, *or elector of President and Vice President*, or *hold any office . . . under any State*," if that person engaged in "insurrection or rebellion.") (emphasis added). The Amendment's specific mention of presidential electors in contrast to those who "hold any office . . . under any State" would be superfluous if electors held a state office.

A century later, the Twenty-Fourth Amendment confirmed this distinction. That Amendment banned the payment of poll taxes as a requirement for voting in *federal* elections, including elections "for electors for President or Vice President." U.S. Const. amend. XXIV. But this Amendment did not extend to "the right to vote in state elections." *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). Thus, an

election for presidential elector cannot be a "state election."

Instead, as this Court has recognized, "elections for presidential and vice-presidential electors" are "national elections." *Oregon v. Mitchell*, 400 U.S. 112, 118, 134 (1970). This Court later reinforced that conclusion when it said that the Presidential Elector Clause, along with the Elections Clause, are "express delegations of power to the States to act with respect to *federal elections*." *Thornton*, 514 U.S. at 805 (emphasis added). Elections for presidential electors are not state elections, and a state's claim to be able to interfere with the performance of electors' core function is therefore even weaker than in *Hawke* and *Leser*.

2. *A state cannot control indirectly what it cannot control directly.*

The non-interference principle applies not only to the direct control of an individual performing a federal function, but also the indirect control, through legal burdens placed on individuals performing the federal function. That means this doctrine resolves not only the Colorado case but also the Washington case in favor of the Electors.

This conclusion is the clear import of judicial enforcement of the Supremacy Clause as far back as *McCulloch v. Maryland*, 17 U.S. 316 (1819). In that case, James W. McCulloch, as cashier of the Bank of the United States, performed a federal function in service to the Bank. That service included issuing notes that had not been inscribed on the stamped paper required by Maryland state law. Maryland brought an action against James McCulloch to recover

the fine that was incurred because of his failure to obey Maryland law. This Court rejected the power of Maryland to tax McCulloch, because Maryland had no power to direct how McCulloch performed his duties. Instead, the Court held the Bank of the United States was immune from state taxation because the "[C]onstitution, and the laws made in pursuance thereof, shall be the supreme law of the land" and cannot be interfered with by a state. *Id.* at 433.

That interference cannot come in the form of a financial penalty after the fact any more than it can come in the form of removal before—or even after, as here—the vote is cast. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (a government's imposition of a fine for observation of Saturday Sabbath would be unconstitutional interference on the exercise of constitutional right); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("distinction between laws burdening and laws banning [protected] speech is but a matter of degree"). Given the presidential electors' unqualified core freedom of choice, the states can neither invalidate their votes nor fine them any amount, large or small, for exercising that right. *See Kunz v. New York*, 340 U.S. 290, 291 (1951) (reversing $10 fine whose imposition violated First Amendment).

3. *The only substantive limits on elector freedom that states may enforce are those specified by the Constitution's text.*

The text of the Constitution includes just one express restriction on the freedom of electors "to vote," and it contains three limitations on the eligibility of candidates for President and Vice-President. The

direct restriction prohibits electors from voting for two candidates from their own state. U.S. Const. amend. XII. The eligibility limits require that presidents be "natural born Citizen[s]," at least thirty-five years old, and have resided in the United States for fourteen years. This indirectly denies presidential electors the freedom to vote for ineligible candidates. U.S. Const. art. II, § 1. Beyond these constitutional limitations, neither the states nor Congress has any power to constrain electoral freedom.

This conclusion is consistent with this Court's decisions in *Powell v. McCormack*, 395 U.S. 486 (1969), which forbade Congress from failing to seat a duly-elected member, and *U.S. Term Limits, Inc. v. Thornton*, which invalidated a ban on ballot access for candidates for House or Senate who had served more than three or two prior terms, respectively. 514 U.S. at 791. But the argument for the unconstitutionality of these elector binding laws is even stronger than it was for the ballot access restrictions struck down in *Thornton*. As the *Thornton* dissent noted, prior to the Constitution, states had a power to supplement the qualifications that candidates needed to appear on the state's ballots, and nothing in the Constitution expressly denied such a power. 514 U.S. at 904. That power, in the dissent's view, was therefore "reserved" under the Tenth Amendment, and thus states could add to such qualifications. *Id.* at 861–66.

Yet this case is not about the qualifications of the electors. This case is about a power never exercised by any state in our history of republican government: the power to control how an elector may vote. Thus, even if states were to have the power to regulate ballot access for officers representing that state, because of

the Tenth Amendment, there would be no authority for controlling how voters—electors—may vote.

To recognize the contrary, and thereby invent the unprecedented power to control how an elector may vote, would invite strategic or political innovations within state legislatures wholly destructive of the national plan. Some states are already considering legislation banning electors from voting for candidates who have not released copies of recent tax returns. *See* A. 2193, § 2(b), 219th Leg., Reg. Sess. (N.J. 2020) ("An elector shall not vote for a candidate for President or Vice-President of the United States, unless the candidate had filed, or caused to be filed, the candidate's federal income tax returns."), S. 26, § 3, Assemb. Reg. Sess. 2017–2018 (N.Y. 2017) (similar New York bill). Creating a state power to control the vote would invite states to prohibit electors from voting for candidates who have not visited the state during the general election campaign, or who have not committed to some program that the state legislature deems fundamental.

This level of state control over the franchise of congressional electors was expressly considered—and rejected—by Justice Douglas in *Powell*: as he argued, if Congress could add to the qualifications to be a House Member given by the Constitution, nothing would clearly prohibit the nullification of a congressional elector's votes for a "Communist," a "Socialist," or anyone who "spoke[] out in opposition to the war in Vietnam." *Powell*, 395 U.S. at 553 (Douglas, J., concurring). That same limitation exists with presidential electors as well. Beyond the restrictions expressed within the Constitution itself, neither

Congress nor the states have any power to control how electors may vote.

D. Centuries Of History Show That Electors Have Discretion To Vote For Eligible Candidates Of Their Own Choice.

In *National Labor Relations Board v. Noel Canning,* 573 U.S. 513 (2014), this Court looked to "the longstanding 'practice of the government' [to] inform [the] determination of 'what the law is.'" *Id*. at 514. Using Madison's notion of "constitutional liquidation," the Court crafted an interpretation of the Recess Appointments Clause that did not disturb centuries of practice by concluding, "in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause." *Id.* at 538.

This approach confirms the right of electors to exercise discretion in casting their "vote." *See* Rebecca Green, *Liquidating Elector Discretion*, Harvard L. & Policy Rev. (forthcoming 2020), *available at* https://perma.cc/C4LC-5A7J. No government within our tradition has ever purported to control how any elector, whether presidential or congressional, may vote. To the contrary, with presidential electors, Congress has consistently viewed anomalous votes as valid.

1. *Congress has always accepted anomalous votes by electors.*

Congress has long recognized the right of electors to vote contrary to their pledge or expectation. Across the nation's history, Congress has counted more than 180 anomalous electoral votes for either President or Vice President, and no such votes have ever been

rejected. *See* FairVote, "The Electoral College," https://perma.cc/3RFB-Y44R.

In the one instance when such a vote was ever challenged under the procedures of 3 U.S.C. § 15, Congress reaffirmed the principle of legal elector independence and counted the vote. In 1969, a North Carolina Republican elector voted for George Wallace rather than Richard Nixon, the Republican nominee. Each House independently considered the formal objection. In the Senate, Senator Sam Ervin stated that the "Constitution is very plain on this subject": Congress may not "take what was an ethical obligation and convert it into a constitutional obligation." 115 Cong. Rec. at 203–04 (statement of Sen. Ervin). Several Representatives similarly noted that, although possibly bound morally, "electors are constitutionally free and independent in choosing the President and Vice President." 115 Cong. Rec. 148 (1969) (statement of Rep. McCulloch). Ultimately, each House reached the same result: the anomalous vote was valid. 115 Cong. Rec. 246 (Senate vote of 58-33); *id.* at 170–71 (House vote of 228-170).

Congress continued to count electoral votes of these anomalous electors through the most recent election. In January 2017, Congress counted the votes of seven such electors, including the three votes for Colin Powell cast by the Washington Electors in this case. See 163 Cong. Rec. H185–89 (daily ed. Jan. 6, 2017) (counting and certifying election results). Congress's recent actions extend its unbroken history of recognizing and accepting the votes of electors who have exercised the freedom to vote contrary to their pledge or expectation of party loyalty.

2. *Consistent with practice and* Ray v. Blair*, Congress does not enforce the pledge required of D.C.'s electors through legal sanction.*

Consistent with its longstanding practice, Congress has placed only an unenforceable ethical "duty" on the three electors appointed in the District of Columbia. The D.C. elector law, which is unchanged in relevant part since its enactment in 1961, provides that electors must pledge to vote for the candidate of their party. The statute goes on to say that it shall be an elector's "duty" to follow through on that pledge. D.C. Code Ann. § 1-1001.08(g)(2). But there are no penalties or enforcement mechanisms, nor is there any evidence that Congress thought there would be. Instead, as one legislator said in hearings on that bill, the provision regarding electors' "duty" "has no legal effect" but simply "a moral suasion." Subcommittee 3 of the House Committee on the District of Columbia, "Hearings on H. R. 5955," May 15 and 16, 1961, at 34 (Rep. Huddleston). Anything more than that "moral suasion" would require an amendment of the Constitution. *Id.* (Rep. Tobriner). This line between the "moral suasion" that a pledge carries and its legal enforcement mirrors the line this Court had drawn a decade earlier in *Ray v. Blair* when it upheld the elector pledge but said the pledge's enforcement may be "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college." 343 U.S. at 230 (citation omitted).

Congress confirmed this understanding following the 2000 election. That year, a D.C. elector who was pledged to Al Gore failed to follow through on her

pledge and voted for no candidate for President. David Stout, *The 43rd President: The Electoral College; The Electors Vote, and the Surprises Are Few*, N.Y. Times (Dec. 19, 2000). That elector was not sanctioned or removed from office. Rather, her action was legally valid, and Congress in Joint Session counted only two of D.C.'s three electoral votes that year. 147 Cong. Rec. 103–04 (2001).

E. The Expectations Of The Public Have Not Amended The Constitution.

The Presidential Electors concede that our current political culture views the power of presidential electors differently from how the Framers did. Throughout the nineteenth century, it was commonplace to remark on the evolved understanding of the electors' role. By the end of the century, practically everyone viewed electors as mere delegates. *See McPherson*, 146 U.S. at 36 (noting that the "original expectation" of electors as independent agents had "been frustrated"). As Professor Keith Whittington describes it, "[a]s the notion of an organic, living constitution began to take hold, the Electoral College was the obvious example of how the framers' intentions had been left behind." Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors,* 59 Ariz. L. Rev. 903, 934 (2017).

But the power the Constitution vests in electors to "vote"—just like the power given to states to choose electors by district, if they choose, *see McPherson*, 146 U.S. at 42—has not "ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created." *Id.* at 36. *See also*

William H. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 695–97 (1976) ("A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution."). Even if public opinion now views electors as bound to the public's vote, there has been no change in our fundamental law to transform the power "to appoint" into the power to control how an elector "vote[s]."

For the States to prevail in these cases, this Court must conclude that the Constitution can be amended by custom, as a New York trial court so held in *Thomas v. Cohen*, 262 N.Y.S. 320 (1933). In that case, the court upheld a state law that hid the names of presidential electors from the voters. *Id.* at 321. The court reasoned that the law was permissible because presidential electors no longer served any substantive purpose and so had effectively been written out of the Constitution. The court candidly acknowledged that under "the exact language" of the Constitution, electors have "freedom of action." *Id.* at 323. But because the "American people have grown to regard the electoral college as a matter of minor importance," the electors' role could now be considered "purely ministerial"—"notwithstanding the language of the Constitution," that is. *Id.* at 324.

However appropriate it is for political practices to change with time, they may only evolve consistent with the language of the Constitution. Courts cannot create a wholly new power to control how electors may "vote." As Justice Jackson described in *Ray,* "powers or discretions granted to [presidential electors] by the Federal Constitution" are not "forfeited by the Court

for disuse," and thus [a] "political practice which has its origin in custom must rely upon custom for its sanctions." 343 U.S. at 233 (Jackson, J., dissenting); *see also* Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Constitutional?*, 2016 Cardozo L. Rev. de novo 165, 189 (arguing that "the Constitution protects the elector's discretion against efforts at *legal compulsion*" (emphasis added)).

It may seem unusual for the Constitution to secure a power that cannot be checked through law. Yet the Constitution does this precisely in at least one other familiar context: the jury. The Constitution embeds the jury within our system of government. U.S. Const. art. III, § 2 (criminal juries), amend. VI (criminal), amend. VII (civil). And at the time of the framing, the common law secured to the jurors a discretion that could not be controlled through law. Even if jurors could be instructed and obliged through an oath to follow the law, no juror could be penalized for their vote. *Bushel's Case,* 124 E.R. 1006 (C.P.1670).

That understanding has not been changed within our tradition. *See* James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 169 (1898) ("In no way could [juries] be punished for giving verdicts against law or evidence."); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (dismissing "[t]he suggestion that a jury's verdict of acquittal could be overturned and a defendant retried" because it "would be unconstitutional"); Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* ch. 2 (1994). The act of a juror, even if contrary to the law and contrary to his or her own pledge, to this day cannot be legally sanctioned.

The same principle applies here. The overwhelming majority of presidential electors have voted consistently with their pledges or expectations. But here, the Presidential Electors believed they were acting according to the will of the people in their states. They believed that the exceptional circumstances of the 2016 election counseled that they act contrary to their pledges. Just as Samuel Miles adjusted his vote as an elector given his understanding of the popular will, so too did these Electors change—or, for Micheal Baca, try to change—their votes, given their understanding of the popular will and the potential, given that popular will, to shift the election to the House. Perhaps their acts will inspire now a new tradition, in which presidential electors will exercise their judgment at least when one candidate fails to prevail in the popular vote of an election. Yet regardless of whether that new tradition emerges, there has been no amendment granting a state the authority to legally resist such an effort by duly appointed electors. That discretion, like the discretion of a juror, is vested in the electors.

II. Micheal Baca Has Standing Against Colorado.

There is no dispute that the Court must reach the merits of the Washington case, and given that the Washington case is a challenge to $1,000 fines that Washington still wishes to collect from the Washington Electors, there can be no dispute about jurisdiction. But Colorado has argued that the Colorado Electors, who are the plaintiffs in that lawsuit, "lack[] standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion." *Baca*, Pet. i. Micheal Baca does

have standing here. Colorado's argument to the contrary ignores a clear, particularized injury and confuses standing with the merits.

A. Electors Have Standing Because They Are Vindicating A Personal Right To Vote For President.

Micheal Baca's vote was rejected, he was removed from office, and he was referred to the Colorado Attorney General for perjury. *Baca*, App. 217–18. After suffering those concrete, personal injuries, he sued for nominal damages. As the Tenth Circuit correctly held, "Mr. Baca's loss of his office—however brief its existence—is an injury in fact." *Baca*, App. 36. He thus has standing to request damages.

This analysis was correct because the loss of a government office is a sufficient injury to confer standing. *See Myers*, 272 U.S. at 106, 176 (postmaster who claimed the President unlawfully dismissed him had standing to allege deprivation, even though postmaster legally could be terminated); *Powell*, 395 U.S. at 496, 512–14 (1969) (plaintiff had standing to challenge alleged deprivation of right to be seated as a member of Congress); *Bd. of Education of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968) (school board officials' "refusal to comply with [a state law that is] likely to bring their expulsion from office" gave them a "personal stake in the outcome of this litigation" that conferred standing) (quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (citing *Powell* and noting that officials could have standing if they had alleged that they had "been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress

after their constituents had elected *them*"). Colorado does not dispute this point.

Instead, Colorado suggests that presidential electors are not really officeholders at all. Thus, Colorado makes the remarkable statement that "Colorado voters did not elect Mr. Baca" and thus he "has no personal entitlement to his former position as an elector." *Baca*, Pet. Reply 5. The argument that "Colorado voters did not elect Mr. Baca" is wrong. Indeed, Colorado's claim would surprise anyone who reads the Federal Constitution, Colorado's Constitution, or Colorado's laws.

Section 2 of the Fourteenth Amendment, which provides for reduction of representation for states that deny or abridge the right to vote in specific elections, does not mention any general right of a citizen to vote for President. Instead, it mentions "any election for the choice of electors for President and Vice President of the United States." U.S. Const. amend. XIV, § 2. Colorado's Constitution also happens to be the only state Constitution that expressly says its legislature shall provide that "the electors of the electoral college shall be chosen by direct vote of the people." Colorado Const. sched. § 20. And Colorado law says that "every fourth year . . ., the number of presidential electors to which the state is entitled shall be elected." Colo. Rev. Stat. § 1-4-301. Only one conclusion is possible: Colorado voters in fact elected Mr. Baca.

Given that Micheal Baca was duly elected and then duly appointed, he must have had a "personal entitlement" to his position. After all, Colorado's Certificate of Ascertainment, which was sent to the Archivist on December 9, 2016, appointed *him* to be an

elector: not a Republican or Libertarian elector, and not "anyone who will vote for Hillary Clinton." No: the Certificate of Ascertainment specifically appointed "Micheal Baca" of "Denver." *See* Certificate of Ascertainment at 2 (December 9, 2016), https://perma.cc/2LRX-KS6H. As the Tenth Circuit correctly said, that appointment was brief but real. But then Baca lost his position and his vote was rejected. He thus suffered an injury sufficient to confer standing.

Indeed, Colorado's standing argument lays bare its unconstitutional denial of the essential existence of presidential electors. Colorado argues that Micheal Baca's office was a constitutional nullity because the ballot for party slates of presidential electors did not list Baca's name and voters "had no easy or ready way to learn Mr. Baca's identity . . . or otherwise gauge his trustworthiness." *Baca*, Pet. Reply 5. While that fact reveals how far the states have strayed from the constitutional design, Colorado is incorrect that the State's hiding as much about Micheal Baca as possible means that Colorado has abolished the position of presidential elector. If Colorado wants to do that, its legislature should call for a constitutional amendment to do so.

B. Electors Are Not Subordinate State Officials.

Colorado's secondary argument is that, granting that presidential electors hold some office, they are mere lower state officers subject to control by the Secretary of State, and so they may not sue their own state. *Baca*, Cert. Reply at 3. This is wrong, because as discussed extensively above at § I.C.1, presidential

electors are not lower state officers subject to control by state executive officials. Instead, the text of the Fourteenth and Twenty-Fourth Amendments, along with this Court's precedents, make clear that elections for electors are "national elections." *See id.* (citing, among others, *Oregon*, 400 U.S. at 134). They can thus sue to vindicate their constitutional right to exercise that federal function when, for the first time in U.S. history, it is denied to them.

C. Colorado's Argument Confuses Standing With The Merits.

Finally, Colorado's argument also confuses standing with the merits of elector freedom. Colorado claims that Baca "lacks standing to sue [Colorado] because [he] hold[s] no constitutionally protected right to exercise discretion." *Baca*, Pet. i. But that makes standing turn entirely on the substantive constitutional question that is at the heart of this case: if electors do have a "constitutionally protected right to exercise discretion," then they, and Micheal Baca in particular, have standing to vindicate it.

On Colorado's theory, there is no way that this Court could simultaneously hold that Baca has standing to sue to protect a "right to exercise discretion" but also hold that presidential electors lack the very same right on the merits. The Court's precedents are clear that standing claims that entirely overlap with merits claims are not properly classified as standing claims. *See Ariz. State Legislature*, 135 S. Ct. at 2663 ("[O]ne must not confus[e] weakness on the merits with absence of Article III standing." (second alteration in original) (quotation marks omitted)); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989)

("[A]lthough federal standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the [claim]." (second alteration in original) (citation and quotation marks omitted)). This is such a case.

III. Even If *Baca* Is Not Justiciable, This Court Must Still Clarify Elector Freedom With A Decision In *Chiafalo* Only.

If the Court does not reach the merits of the Colorado case, the Court can nonetheless determine the constitutional rights of the Presidential Electors in the Washington case.

Washington argued below that its fine may be permissible even if electors have some protected discretion, because the power to fine a presidential elector does not necessarily entail the power to remove an elector and reject a vote. *See Chiafalo*, Pet. Opp. 25. As mentioned previously, that is not correct; the power to fine and the power to remove are two forms of the same unconstitutional infringement on elector freedom. *See supra* § I.C.2. States cannot attempt to control the votes of *congressional* electors by fining them or by rejecting their votes because congressional electors have a right to choose freely. So too does each sanction equally infringe the rights of *presidential* electors.

Still, if the Court decides the Washington case only, it can and should clarify not only whether the fine itself is permissible but what powers states have to control the votes of presidential electors. This is what the Washington Supreme Court did when it approved the fine because of its view that presidential electors have no constitutional discretion and state control of

electors does not interfere with a federal function. *Chiafalo*, App. 19a–22a. That principle, though incorrect, would permit all forms of state laws that interfere with elector discretion. A contrary decision rejecting the fine imposed by Washington should likewise describe what discretion presidential electors have to vote freely.

* * *

The "duty" of this Court is to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That "duty" does not include the power to craft how "the People" might prefer their law to be. Four amendments to our Constitution are the direct response to decisions of this Court that "the People" wished to change. *See* U.S. Const. amend. XI (responding to *Chisolm v. Georgia*, 2 U.S. 419 (1793)); amend. XVI (responding to *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895)); amend. XXIV (responding to *Breedlove v. Suttles*, 302 U.S. 277 (1937)); amend. XXVI (responding to *Oregon*, 400 U.S. at 130). Those responses signal democratic health, not judicial weakness. They reveal a constitution that lives, not a Court that was mistaken.

The Presidential Electors in this case see wisdom in the Framers' choice to secure to them a discretion. Their conscience drove them to exercise it. But whether their view is shared broadly still, it remains the rule of the Constitution. Neither Colorado nor Washington has the power to do what has never been done in America before—control, through legal coercion, the free votes of "Electors," whether presidential or not.

The decision of the Washington Supreme Court should be reversed, and the Tenth Circuit affirmed.

CONCLUSION

For the foregoing reasons, this Court should protect the freedom of choice of presidential electors. It should thus reverse in *Chiafalo* and affirm in *Baca*.

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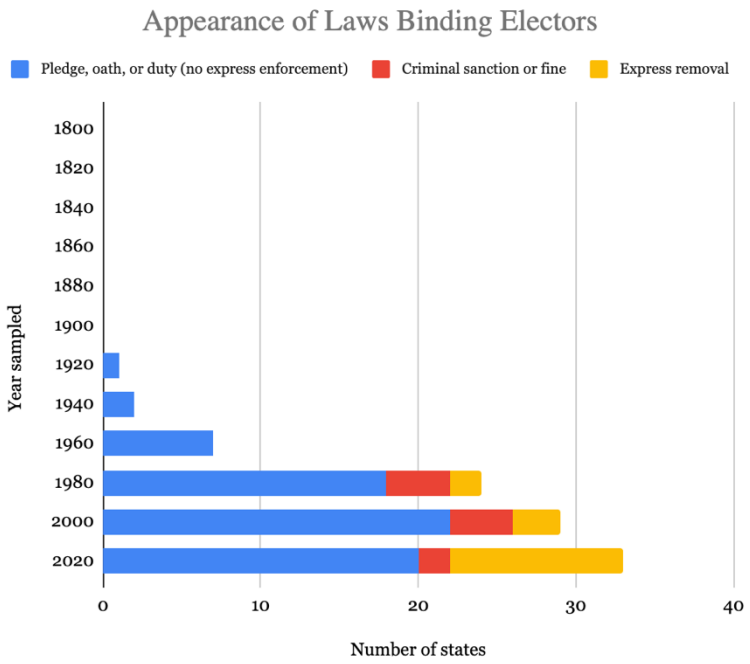
APPENDIX

APPENDIX A

The following chart tracks the appearance of laws that attempt to cabin elector discretion.



The **blue bars** represent the number of states that, as of January 1 of the given year, had laws that imposed a pledge, oath, or legal duty on presidential electors to vote for the candidates of their political party, though with no express enforcement mechanism in the statute.

The **red bars** represent the number of states that, as of January 1 of the given year, had laws that imposed a fine or other criminal sanction on electors who did not vote for the candidates of their political party, though with no express mechanism for rejecting a vote or removing an elector who voted against expectation.

The **yellow bars** represent the number of states that, as of January 1 of the given year, had laws that expressly permitted state officials to reject votes by electors cast contrary to expectation and replace an elector who attempted to cast such a vote.

* * *

The first binding law appeared in 1915 in Oregon. *See* Oregon Laws 1915, chapter 134. The next law was passed in California in 1937. *See* California Statutes 1937, chapter 54, § 2. Currently, 32 states and the District of Columbia has some form of law attempting to cabin the discretion of presidential electors. (For purposes of the data in the chart, the District of Columbia is considered a state.)

The data behind this chart can be found at http://presidentialelectorlaws.us.

APPENDIX B

The Electoral Vote in 1796

In 1796, there were 138 electors from 16 states. The Federalist ticket was John Adams as President and Thomas Pinckney. The Democratic-Republican ticket was Thomas Jefferson and Aaron Burr. In the table:

"St" is the state.

"PEs" is the number of presidential electors.

"JA" is a vote for John Adams, and "TP" is a vote for Thomas Pinckney. This ticket is shown in **yellow**.

"TJ" is a vote for Thomas Jefferson, and "AB" is a vote for Aaron Burr. This ticket is shown in **green**.

"O" is a vote for someone else. These votes are shown in **blue**.

"F" is the number of regular votes for the Federalist ticket of Adams and Pinckney.

"DR" is the number of regular votes for the Democratic-Republican ticket of Jefferson and Burr.

"A" is the number of anomalous votes.

The Electoral Vote in 1796

	Electoral Vote						Regular		Not
St.	**PEs**	**JA**	**TP**	**TJ**	**AB**	**O**	**F**	**DR**	**A**
CT	9	9	4	0	0	5	4	0	5
DE	3	3	3	0	0	0	3	0	0
GA	4	0	0	4	0	4	0	0	4
KY	4	0	0	4	4	0	0	4	0
MA	16	16	13	0	0	3	13	0	3
MD	10	7	4	4	3	2	4	3	3
NC	12	1	1	11	6	5	1	6	5
NH	6	6	0	0	0	6	0	0	6
NJ	7	7	7	0	0	0	7	0	0
NY	12	12	12	0	0	0	12	0	0
PA	15	1	2	14	13	0	1	13	1
RI	4	4	0	0	0	4	0	0	4
SC	8	0	8	8	0	0	0	0	8
TN	3	0	0	3	3	0	0	3	0
VA	21	1	1	20	1	19	0	1	20
VT	4	4	4	0	0	0	4	0	0
TOTALS									
Tot	138	71	59	68	30	48	**49**	**30**	**59**
							79 Regular		**59 Not**

Source: 6 *Annals of Cong.* 1543–44. (Feb. 8, 1797); *see also* Pasley at 406.

Note: The vote count for Virginia appears to have one regular Federalist elector, one regular Democratic-Republican elector, and 19 anomalous electors. In fact, there was no regular Federalist elector. Instead, the single votes for Adams and Pinckney must have come from separate people. Elector Leven Powell is known to have voted for a ticket of Adams and George Washington, meaning that the other Pinckney vote came from an elector who also split his ticket. *See* Pasley at 329.