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 United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* INDEPENDENCE INSTITUTE IN SUPPORT OF THE PRESIDENTIAL ELECTORS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Independence Institute is a nonprofit public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute supports the rule of law, which includes application of the plain meaning of the United States Constitution. The Institute has participated in many constitutional cases before this Court; its *amicus* briefs in *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010) (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

David B. Kopel is the Institute's Research Director. His scholarship has been cited in 21 state appellate opinions and 18 U.S. Circuit Courts of Appeals opinions, including by then-Judge Kavanaugh in *Heller v. District of Columbia* (D.C. Cir. 2011) (*Heller II*).

The research of the Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, was especially helpful in preparing this brief. Professor Natelson is Professor of Law (ret.) at the University of Montana. His research publications have been cited by Justices of this Court in six cases and by the highest courts of 15 states.

[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored it in whole or part. Only *amicus* funded its preparation and submission.

SUMMARY OF ARGUMENT

The United States Constitution permits—indeed, requires—presidential electors to exercise their best discretion when casting votes for President and Vice President. As shown by the definitions of key words in contemporaneous dictionaries and other sources, the discretion is inherent in the text of the original Constitution and the Twelfth Amendment.

The 1787 Constitutional Convention knowingly copied existing electoral models in which elector discretion was protected. Leading Founders affirmed that presidential election was to be free of state control. In fact, the Convention specifically and overwhelmingly rejected a proposal to allow the States to elect the President. During the ratification debates, the Constitution's advocates and opponents agreed that presidential electors would exercise full discretion.

The Twelfth Amendment reaffirmed elector discretion; the Congress that proposed the Amendment retained the original Constitution's language. The congressional debates show broad agreement that electors would retain the right, and duty, to exercise their best judgment. The Constitution does not grant those who appoint electors the power to control electors' judgment any more than the presidential power to appoint judges includes authority to control judges' decisions.

ARGUMENT

I. Standard sources used to interpret the Constitution show that presidential electors are free to exercise discretion.

Sources that are traditionally consulted to interpret the Constitution demonstrate that presidential electors may exercise discretion when casting votes for President and Vice President.

The controlling constitutional language appears in the Twelfth Amendment: "The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves. . . ." U.S. Const. amend. XII. Evidence of the provision's meaning can be gleaned from the debates in the Eighth Congress, which proposed the Twelfth Amendment. That evidence is discussed below.

Evidence of the Constitution's original language is useful as well. The relevant wording in the Twelfth Amendment is almost identical to the corresponding language in the original Constitution: "The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. . . ." U.S. Const. art. II, § 1, cl. 3. Moreover, the Twelfth Amendment was ratified relatively soon after the constitutional ratification process was complete, 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 19, 25 (John P. Kaminski et al. eds., 2011) (hereinafter DOCUMENTARY HISTORY) (ratification

chronology), and several members of the Congress proposing it had been key Founders: Senators Pierce Butler, Abraham Baldwin, and Jonathan Dayton had been delegates to the Constitutional Convention, while others—such as Representatives William Findley and John Smilie of Pennsylvania and Thomas Sumter of South Carolina—had been delegates to state ratifying conventions.

As explained below, all the evidence tells us that presidential electors were to exercise their best judgment when voting.

II. Constitutional texts demonstrate that presidential electors exercise discretion.

"[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). As Chief Justice Marshall explained, "[a]s men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

Thus, contemporaneous dictionaries and similar sources are most useful in elucidating the meaning of the Constitution's text. *See*, *e.g.*, *Heller*, 554 U.S. at 576–600 (deriving the meaning of the Second Amendment's text through an analysis of founding-era sources including dictionary definitions and interpretations of courts, scholars, and legislatures).

A. "Elector"

The key word in both the original Constitution and the Twelfth Amendment is "Elector." Contemporaneous dictionaries tell us that an "elector" exercises free choice. *See* 2 A NEW AND COMPLETE DICTIONARY OF ARTS AND SCIENCES 1049 (Owen, ed., 1763) ("a person who has a right to elect or choose another to an office"); Nathan Bailey, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh, 1783) (unpaginated) (defining "elector" as "a chuser"); 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 6th ed. 1785) (unpaginated) (giving first definition as "He that has a vote in the choice of any officer"); Thomas Dyche & William Pardon, A NEW GENERAL ENGLISH DICTIONARY (12th ed. 1771) (unpaginated) ("a person who has a right to elect or choose a person into an office"); 2 Ephraim Chambers, CYCLOPAEDA; OR, AN UNIVERSAL DICTIONARY OF ARTS AND SCIENCES (London, 1779) (unpaginated) ("a person who has the right to *elect*, or choose another to an office, honour, &c. The word is formed of the Latin *eligere*, *to choose*.") (italics in original).

> Noah Webster defined "elector" as,
>
> One who elects, or one who has the right of choice; a person who has, by law or constitution, the right of voting for an officer . . . In the United States, certain persons are appointed or chosen to be electors of the president or chief magistrate.

1 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated).[2] Put differently, "In the United States . . . electors of the president" have "the right of choice." *Id.*

The leading law dictionary of the founding era so confirms. Giles Jacob's New Law-Dictionary was the most popular of its kind in America. Herbert A. Johnson, IMPORTED 18TH CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700–1799, at 61 (1978) (Jacob's dictionary was in 12 of 22 surveyed libraries, more than any other law dictionary). Jacob's law dictionary did not define "elector," but it defined "Election" as "when a man is left to his own free will to take or do one thing or

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[2] Published in 1828, Webster's was the first dictionary of *American* English. This Court has relied on Webster's dozens of times to define founding-era terms in constitutional law—most recently in three cases from the previous term. *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (defining "prosecution"); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (defining "cruel"); *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 880 (2019) (defining "full"); *see also Gamble v. United States*, 139 S. Ct. 1960, 1998 n.11 (2019) (Gorsuch, J., dissenting) (defining "offense"); *Haymond*, 139 S. Ct. at 2392 (Alito, J., dissenting) (defining "accused"); *id.* at 2393 (Alito, J., dissenting) (defining "prosecution").

another, which he pleases." Giles Jacob, A NEW LAW-DICTIONARY (10th ed. 1783) (unpaginated).

These definitions are consistent with the Constitution's use of "Electors" to designate voters for the U.S. House of Representatives. U.S. Const. art. I, § 2, cl. 1 ("The . . . Electors in each State shall have the Qualifications. . . ."). The definitions are inconsistent with statutes purporting to bind "electors," dragooning them into subordinating their discretion to the demands of the State.

B. "Ballot"

In both the original and Twelfth Amendment versions of the text, the electors vote by ballot. When the Constitution and the Twelfth Amendment were adopted, "ballot" invariably meant secret ballot—secrecy being the crucial distinction between that method of voting and the other methods, such as *viva voce*. 1 William Blackstone, COMMENTARIES *175 (1st ed. 1765) (distinguishing public voting from voting "privately or by ballot"). *See also* Dyche & Pardon, A NEW GENERAL ENGLISH DICTIONARY (unpaginated) (to "ballot" means "to vote for, or chuse a person into office, by means of little balls . . . privately, according to the inclination of the chuser or voter, or by writing the name . . . so that they cannot be read"); 1 Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated) (noting that "They [ballots] are privately put into a box or urn"); 2 A NEW AND COMPLETE DICTIONARY OF ARTS AND SCIENCES, at 1049 (defining

"balloting" as "a method of voting at elections . . . by means of little balls . . . which are put into a box privately").

Hence in 1800, Senator—and framer of the Constitution—Charles Pinckney could say on the Senate floor, "the Constitution expressly orders that the Electors shall vote by ballot; and we all know, that to vote by ballot is to vote secretly." *Charles Pinckney in the United States Senate*, Mar. 28, 1800, *in* 3 Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385, 390 (1937) (hereinafter FARRAND'S RECORDS).[3]

It is sometimes claimed that the Twelfth Amendment changed the original Constitution's ballot secrecy rule by requiring that electors vote for two persons "one of whom, at least, shall not be an inhabitant of the state with themselves" and that they "shall make distinct lists of all persons voted for . . . and of the number of votes for each." U.S. Const. amend. XII. The gist of that claim is that those requirements cannot be met unless the ballot is open.

Actually, the same requirement was in the original Constitution. U.S. Const. art. II, § 1, cl. 3. An intent to change the secrecy rule is inconsistent with the decision of the Twelfth Amendment's framers to retain the word "ballot." The "distinct lists" rule and the "ballot" secrecy rule are not inconsistent. The system need only tag ballot forms before they are used and then

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[3] FARRAND'S RECORDS is online at the Library of Congress's "American Memory" website, at https://memory.loc.gov/ammem/amlaw/lwfr.html.

distribute them at random. Thus, when electors meet at their state capital, each can randomly receive an unmarked envelope containing two blank ballots of the same color, or displaying the same number or letter. This number, letter, or color is different from those drawn by all other electors. Electors insert the names of their preferred candidates and place the forms in a ballot box. Those counting ballots will not know which elector cast the two ballots inscribed with the number "5," for example, but they will know whether that elector voted for two persons from his or her home state.

The point of a secret ballot is to hide the elector's choice to ensure that choice is free. Laws that bind electors deny that freedom of choice.

III. The Constitutional Convention agreed that presidential electors would exercise discretion.

The first Constitutional Convention delegate to propose a system of presidential electors was James Wilson of Pennsylvania. 1 FARRAND'S RECORDS, at 77 (Journal, June 2, 1787). Wilson was born, raised, and educated in Scotland, 2 DOCUMENTARY HISTORY, at 733, and his proposal was likely based on the Scottish method for choosing members of the British House of Commons. In Scotland, those members were chosen by "commissioners" elected by voters or by local governments. Alexander Wight, A TREATISE ON THE LAWS CONCERNING THE ELECTION OF THE DIFFERENT

REPRESENTATIVES SENT FROM SCOTLAND TO THE PARLIAMENT OF GREAT BRITAIN 115 (Edinburgh, 1773) (discussing qualifications of freeholders who elect commissioners); *id.* at 277–300 (outlining freeholders' election of commissioners); *id.* at 347–70 (describing commissioners' election of members of Parliament); *id.* at 318–19 (describing election by local government councils).

Free choice was inherent in the Scottish process, and commissioners could be required to swear that they had not received anything of value—apparently including their position as elector ("Office, Place, Employment")—in exchange for their votes. *Id.* at 359–60; 16 Geo. 2, ch. 11, § 34 (1743). A Scottish elector's choice was not dictated by the locality choosing him.

Another model for the framers was Maryland's constitution, which used electors elected by voters to choose state senators. Md. Const. art. XVIII (1776). At the Constitutional Convention, Alexander Hamilton noted that this model had been "much appealed to." 1 FARRAND'S DEBATES, at 289 (June 18, 1787). *See also id.* at 218 (June 12, 1787, reporting that Madison discussed the Maryland system). Elector discretion was part of the Maryland model. Electors were required to swear that they would "elect without favor, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." Md. Const. art. XVIII.

Madison reported that one of Wilson's goals was to ensure that the President was "as independent as

possible of . . . the States." 1 FARRAND'S DEBATES, at 69 (June 1, 1787). Most other framers shared the same goal, for when Elbridge Gerry proposed that the President be chosen by "the suffrages of the States, acting though their executives, instead of Electors," *id.* at 80 (June 2, 1787), the convention trounced his motion by a margin of ten states to zero, with one state delegation divided. 1 *id.* at 80 (June 2, 1787); *id.* at 174–75 (Journal, June 9, 1787). As Edmund Randolph observed, "A Natl. Executive thus chosen will not be likely to defend with becoming vigilance & firmness the national rights agst. State encroachments." *Id.* at 176 (June 9, 1787).

The Convention was determined to prevent state governments from deciding the presidential election.

IV. The debates over the Constitution's ratification confirm that presidential electors exercise discretion.

Debates over whether to ratify the Constitution began when the Constitution became public on September 17, 1787. They continued until May 29, 1790, when the thirteenth state, Rhode Island, ratified the document. 2 DOCUMENTARY HISTORY, at 19, 26 (chronology). The debates were carried on in speeches, pamphlets, broadsides, letters, and newspapers—as well as in the state ratifying conventions themselves. The records of the ratification debates show clearly that participants understood that presidential electors were to exercise their own judgment when voting.

The most-quoted ratification-era statement on the subject is Alexander Hamilton's Federalist No. 68:

> A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. . . . And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

THE FEDERALIST NO. 68. Here, Hamilton was elaborating on a point he had made in Federalist No. 60:

> The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

THE FEDERALIST NO. 60. In Federalist No. 64, John Jay likewise implied elector choice and independence:

> The convention . . . have directed the President to be chosen by select bodies of electors, to be deputed by the people for that express purpose . . . As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in

> general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.

THE FEDERALIST NO. 64.

There is also a wealth of evidence outside the pages of The Federalist. In one of the widely published Fabius letters supporting ratification, John Dickinson, who represented Delaware at the Philadelphia convention, described elector conduct in a way consistent only with free choice:

> When these electors meet in their respective states, utterly vain will be the unreasonable suggestions derived for partiality. The electors may throw away their votes, mark, with public disappointment, some person improperly favored by them, or justly revering the duties of their office, dedicate their votes to the best interests of their country.

John Dickinson, *Fabius II*, 15 April 1788, *in* 17 DOCUMENTARY HISTORY, at 120, 124–25.

Similarly, Roger Sherman, another convention delegate (and later an influential United States Representative and Senator), wrote that the President would be "re eligible as often as the electors shall think proper." Roger Sherman, Letter of Dec. 8, 1787, *in* 14 DOCUMENTARY HISTORY, at 386, 387. An essayist signing his name *Civis Rusticus* wrote that the choice of

"the president was by electors." VA. INDEPENDENT CHRON., Jan. 30, 1788, *in* 8 DOCUMENTARY HISTORY, at 331, 335.

Other ratification advocates emphasized that the Constitution would protect electors from outside influence. In explaining the importance of the Same Day Clause (U.S. Const. art. II, § 1, requiring all electors to vote on the same day), future Supreme Court Justice James Iredell told the North Carolina ratifying convention:

> Nothing is more necessary than to prevent every danger of influence. Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But [with the Same Day Clause] [i]t is probable that the man who is the object of the choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in a high degree, the confidence and respect of his country.

4 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 105 (1941) (hereinafter ELLIOT'S DEBATES).[4] *See also Caroliniensis*, CHARLESTON CITY GAZETTE, Apr. 1, 1788, *in* 27 DOCUMENTARY HISTORY, at 235, 238

[4] ELLIOT'S DEBATES is online at the Library of Congress's "American Memory" website, at https://memory.loc.gov/ammem/amlaw/lwed.html.

(pointing out that the presidential electors are not subject to popular tumult because they meet in different states).

Some participants in the ratification debates discussed how presidential electors would be appointed. *See*, *e.g.*, *A Democratic Federalist*, INDEPENDENT GAZETTEER, Nov. 26, 1787, *in* 2 DOCUMENTARY HISTORY, at 294, 297 (observing that state laws could allow the people to vote for them). But none claimed the appointers would dictate their electors' votes. Appointment of electors and the electors' subsequent conduct were distinct subjects. As Thomas Thacher stated at the Massachusetts ratifying convention, "The President is chosen by the electors, who are appointed by the people." 2 ELLIOT'S DEBATES, at 145. Likewise, James Iredell told the North Carolina convention that "the President . . . is to be chosen by electors appointed by the people." 4 *id.* at 74.

Opponents of the Constitution agreed that electors would have discretion. The essayist *Centinel* asserted that the state legislatures would "nominate the electors who choose the President of the United States." *Centinel II*, PA. FREEMAN'S J., Oct. 24, 1787, *in* 13 DOCUMENTARY HISTORY, at 457, 459. "Candidus" feared "the choice of President by a detached body of electors [as] dangerous and tending to bribery." *Candidus I*, INDEP. CHRONICLE, Dec. 6, 1787, *in* 4 DOCUMENTARY HISTORY, at 392, 395.

V. The congressional debates on the Twelfth Amendment reaffirmed that presidential electors do exercise discretion.

The relevant language in the Twelfth Amendment is almost identical to the language in the original Constitution. There is no satisfactory explanation of why, if the standards of elector discretion were altered, the Constitution's language was not.

Indeed, the debates in the Eighth Federal Congress—which proposed the Twelfth Amendment—confirm that elector discretion was to continue. The debates show that the electors would represent the states and people in the same general way that members of Congress and convention delegates do: by considering the wishes of their constituents but relying ultimately on the evidence before them and on their best judgment.

Thus, members of Congress referred to presidential candidates being "intended by the electors," ANNALS OF THE CONGRESS OF THE UNITED STATES (EIGHTH CONGRESS) 710, 736, 739 (1852) (Rep. Lowndes and Rep. Holland); "preferred by the electors," *id.* at 740 (Rep. Holland); and "selected by the Electors," *id.* at 696 (Rep. Purviance). *Cf. id.* at 535 (Rep. Hastings, "the Electors . . . will be induced"). Even Rep. Clopton, a professed advocate of direct popular election, *id.* at 422, used similar language acknowledging that the electors would choose, *id.* at 491 ("intended . . . by a majority of the Electors"), *id.* at 495 ("contemplated for President by any of the electors").

Rep. Elliot referred to the risk of introducing "a person to the Presidency, not contemplated by the people or the Electors." *Id.* at 668. Rep. Thatcher worried that "those Electors who are not devoted to the interest of the ruling faction will exercise a preference of great importance, they will select the candidate least exceptionable." *Id.* at 537. Senator Pickering even urged electors to change their recent voting habits, *id.* at 198, something he clearly assumed they were free to do. *See also id.* at 718 (similar exhortation by Rep. Goddard).

At least one member, Senator Hillhouse, suggested that as an alternative to a presidential run-off in the House of Representatives, electors be re-convened to vote again. *Id.* at 132–33. This suggestion assumes, of course, that electors could debate, re-consider, and change their votes.

Some Members of Congress expressed that electors had a duty to vote for those they deemed best qualified. *Id.* at 709 (Rep. Lowndes, referring to electors' "obligation of voting for none but men of high character"); *id.* at 752 (Rep. Griswold, referring to "the great and solemn duty of Electors . . . to give their votes for two men who shall be best qualified. . . .").

Several Members alluded to the risk that electors might be corrupted and therefore not vote for the best candidates. *See*, *e.g.*, *id.* at 141 (Senator White), 155 (Senator Plumer), 170 (Senator Tracy). Senator Tracy worried that "by the force of intrigue and faction, the Electors may be induced to scatter their votes for both President and Vice President. . . ." *Id.* at 174. Rep.

Purviance feared the time might come when Electors were bought "by promises of ample compensation." *Id.* at 692. Rep. Griswold worried the electors could be bought by lures of public office. *Id.* at 750; *see also id.* at 170–74 (Senator Tracy, speaking of the danger of corruption among electors and intrigue with them). Of course, the above concerns and wishes necessarily rest on the premise that presidential electors have freedom to choose.

The famous Virginia Senator John Taylor of Caroline thought choice by electors was preferable to choice by Congress: "Would the election by a Diet," he asked, "be preferable or safer than the choice by Electors in various places so remote as to be out of the scope of each other's influence, and so numerous as not to be accessible by corruption?" *Id.* at 115.

Under the original Constitution, each elector voted for two persons without designating whom the elector favored for President or Vice President. U.S. Const. art. II, § 1, cl. 3. Much of the debate over the Twelfth Amendment centered around whether to replace this double-vote rule with what participants called the *designation principle*. The new principle was embodied in the words, "The Electors shall . . . 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. Members debated the merits of the double-vote versus designation principles according to how well each would operate in the context of elector discretion. Thus, Rep. Randolph defended designation this way:

> When Electors designate the offices and persons, respectively, for whom they vote, after choosing the person highest in their confidence for President, they will naturally make choice of him who stands next in their esteem for Vice President; but where they are not permitted to make this discrimination, they will, to secure the most important election, give all their votes to him whom they wish to be President, and scatter the other votes; thus leaving to chance to decide who shall be Vice President.

ANNALS (EIGHTH CONGRESS), at 768. Rep. Holland, another designation advocate, decried the double-vote rule because,

> The Electors are compelled to put two persons' names in a box, depriv[ing] them of the liberty of exercising their rationality as to the application of either person to any specific office, and must leave the event to blind fate, chance, or what is worse, to intrigue to give him a President.

Id. at 736.

On the other hand, Senator Plumer, who supported the double-vote rule, argued that designation would have "a tendency to render the Vice President less respectable. . . . In electing a subordinate officer, the Electors will not require those qualifications requisite for supreme command. . . ." *Id.* at 155. Senator White, another double-vote advocate, argued that designation would "render[ ] the Electors more indifferent

about the reputation and qualification of the candidate [for Vice President], seeing they vote for him but as a secondary character." *Id.* at 143. Senator Tracy supported the double-vote because under that system, "The Electors are to nominate two persons, of whom they cannot know which President will be; this circumstance . . . induces them to select both from the best men." Rep. Lowndes made a similar argument. *Id.* at 709.

Thus, the framers of the Twelfth Amendment, like the framers and ratifiers of the original Constitution, understood that electors could—indeed, were obliged to—exercise their judgment and vote as they thought best.

Nearly four years after the Twelfth Amendment's ratification, Rep. William Findley—a delegate to Pennsylvania's constitutional convention—confirmed the above understanding. Discussing executive power on the House floor, Findley "could not admit that electors, carefully selected throughout the whole United States, would ever choose a President destitute of moral virtue." ANNALS OF THE CONGRESS OF THE UNITED STATES (TENTH CONGRESS—FIRST SESSION) 2231 (1852).

Electors are representatives of the states and people, and they represent the people in the same way legislators and convention delegates do—by exercising their best judgment. The results of legislative deliberations may not always comport with campaign pledges, but for constitutional purposes, their votes are "presumed to be the will of the people." ANNALS (EIGHTH

CONGRESS), at 720 (remarks by Rep. G.W. Campbell during the congressional debates on the Twelfth Amendment). Similarly, during the debates over the Constitution, many candidates for election to the state ratifying conventions announced stands, even pledges, to vote one way or another. Yet the delegates remained free to change their minds after considering the debate at the conventions themselves. Indeed, if convention delegates had lacked the right to vote according to their best judgment, the battle to ratify the Constitution would have been lost. 23 DOCUMENTARY HISTORY, at 2501–09 (editor's notes, describing votes at the New York and Virginia ratifying conventions).

Both the original Constitution and the Twelfth Amendment were designed to ensure similar discretion for presidential electors.

VI. Because the Constitution does not grant the States power to control or coerce electors, that power does not exist.

The Constitution grants the States power to determine how electors are appointed. U.S. Const. art. II, § 1, cl. 2. It does not follow, however, that because States may *appoint* electors, they may *control* electors. Quite the contrary.

The Constitution's text articulates when an appointer may control the conduct of appointees. In the case of executive functions, the Constitution both authorizes the President to *appoint* executive branch officials, U.S. Const. art. II, § 2, cl. 2, and to *control* their

subsequent conduct, *id.* at art. II, § 3 (power to "take Care that the Laws be faithfully executed"); *id.* at art. II, § 2, cl. 1 (power to require opinions from heads of departments); *id.* at art. II, § 2, cl. 1 (vesting the executive power in the President). *Cf. Myers v. United States*, 272 U.S. 52, 117–18 (1925) (explaining that the President must have authority to remove officers because of the power granted by the Executive Vesting Clause and Take Care Clause); *id.* at 119 (explaining that "the express recognition of the power of appointment" in the Constitution reinforces the view that the Executive Vesting Clause granted executive power to the President). Additionally, art. II, § 3 provides that the President commissions officers; the Founders understood this commissioning power to carry authority to supervise, because in the founding era, the same person granting a commission generally issued instructions. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1, 14 (2009).

The express textual grants—not the appointment power alone—are why the President is granted authority to remove executive branch officials.

In contrast, the Constitution's other grants of appointment power do *not* include authority to supervise or remove. For example, the President's power to "appoint . . . Judges of the supreme Court," is not accompanied by a textual prerogative to remove or control them. U.S. Const. art. II, § 2, cl. 2. Similarly, before

adoption of the Seventeenth Amendment, the Constitution provided that state legislatures would appoint Senators, but did not grant the separate power to dictate how they voted. U.S. Const. art. I, § 3, cl. 1. In the case of presidential electors, the Constitution grants states power to appoint them, *id.* at art. II, § 1, cl. 2, but not to direct their decisions after appointment.

The natural reading of the text is buttressed by the fact that the Constitution is a document of enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). A power not expressly listed is granted only if incidental to an enumerated power. *Id.* at 406. To be incidental to an enumerated power, however, the implied power must be of lesser importance than the enumerated power. For example, Congress's authority to "regulate" interstate commerce does not include the "great substantive and independent power" to compel individuals to engage in commerce. *N.F.I.B. v. Sebelius*, 567 U.S. 519, 561 (2012); *see also* Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, *in* Gary Lawson, et al., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 61 (2010) (a power cannot be incidental to a principal [enumerated] power unless it is of lesser importance than the principal).

Authority to dictate subsequent behavior is at least as important as authority to appoint in the first instance. That is why the Constitution expressly grants the President authority over the executive branch. The decision not to grant the States like

authority over presidential electors confirms that the States have no such authority.

CONCLUSION

Laws binding presidential electors violate the electors' constitutional rights, contrary to the plain text and original meaning of the Constitution. Although there may be policy arguments for and against the constitutional system of electors, the rule of law requires that the system actually in the Constitution be obeyed. This Court should protect the presidential electors' freedom of choice by ruling in their favor.

Respectfully submitted,

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