No. 19-465, 19-518

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,

Respondents.

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

BRIEF OF *AMICI CURIAE* MICHAEL L. ROSIN, DAVID G. POST, DAVID F. FORTE, MICHAEL STOKES PAULSEN, AND SOTIRIOS BARBER IN SUPPORT OF PRESIDENTIAL ELECTORS

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INTEREST OF AMICI

Amici, historians and scholars with expertise in constitutional law and the electoral process, submit this brief in support of the Presidential Electors.[1] The brief explains the rich, nuanced historical backdrop that must inform the Court's consideration of this case.

Michael L. Rosin is an independent scholar who has analyzed historical source material about the origins of the Electoral College, proposed and adopted constitutional amendments, and congressional debate on disputed electoral votes. This brief draws on Mr. Rosin's detailed research.

David G. Post was I. Herman Stern Professor at Beasley School of Law, Temple University, before retiring in 2015. He is affiliated with the Center for Democracy and Technology, the Institute for Information Law and Policy at New York Law School, and the Cato Institute. He has authored numerous academic works and has submitted several amicus briefs to the Court.

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[1] All parties have filed written consents to the filing of briefs by amici curiae with the Clerk of the Court. No party nor party's counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

of St. Thomas. He is a constitutional law scholar, author of more than ninety articles, and co-author of a leading casebook on the constitution. His published work on the constitutional voting autonomy of electors predates these litigations. Paulsen, The Constitutional Power of the Electoral College (Public Discourse, Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

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SUMMARY OF ARGUMENT

The Framers of the Constitution crafted the Electoral College to be an independent institution with the responsibility of selecting the President and Vice-President. Therefore, they intended each elector to exercise independent judgment in deciding whom to vote for. A state cannot revise the Constitution unilaterally by reducing the elector to a ministerial agent who must vote in a particular way or face a sanction. The question of each elector's moral or political obligation is not before the Court. Nor is the desirability of the current electoral system. Rather, this case turns on what the Constitution allows, and what it prohibits. The historical record strongly supports the notion that the Constitution allows an elector to exercise independent judgment and prohibits a State from interfering with an elector's ability to do so—a position Congress has consistently reaffirmed.

First, the Framers intended each elector to be independent and entitled to vote freely. Article II's plain

language, along with contemporaneous historical evidence from ratification through the first several elections, demonstrates this common understanding and negates the notion of an elector as a ministerial functionary.

Second, Congress's debates on adopted and proposed constitutional amendments reflect the same understanding. Before approving the Twelfth Amendment, Congress discussed the elector's role, ultimately requiring each elector to designate votes between President and Vice-President. Those debates did not evince a desire to control an elector's votes or empower states to do so. The 1961 debates on implementing the Twenty-Third Amendment, which provided electors to the District of Columbia, reflected the same view. At most, a state's pledging requirements exert only a "moral suasion" over an elector's choices. Likewise, congressional debates on proposed amendments consistently reflect the view that electors enjoy constitutionally guaranteed discretion in casting their votes.

Third, the results of the electoral process time and again reaffirm this constitutional independence. Congress has never declined to count an electoral vote because the elector did not vote for a particular (living) person. This is true even when that elector voted for a person other than the person he or she previously pledged to vote for.[2] Indeed, Congress has only once even debated whether to accept an anomalous vote (and decided to accept it). In contrast, the historical record reveals a number of

[2] Throughout this brief, we use the term "anomalous" to describe such an elector, or such an electoral vote. Electors casting votes of this nature, and the votes themselves, are often referred to as "faithless" electors or votes.

instances in which Congress debated whether to accept electoral votes for other reasons (e.g., when electoral votes were cast a day late).

This robust historical record supports only one conclusion: Our constitutional framework allows each elector to vote as he or she chooses.

ARGUMENT

I. The Framers Intended Each Elector To Exercise Independent Judgment.

The Constitution authorizes "[e]ach state" to "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, cl. 2 (the "Elector Clause"). The contemporaneous historical record shows that the Framers crafted and adopted the Elector Clause with the understanding that they were empowering each elector, once appointed, to vote freely based on their considered judgment.

A. The Federalist Papers and Other Contemporaneous Evidence Establish That the Framers Intended Each Elector to Exercise Independent Judgment.

The Constitution's plain language authorizes each state's legislature to decide how to choose its state's electors but not how each elector may or must vote. U.S. Const., Art. II, § 1, cl. 2. Instead, Article II constrains an elector's voting in only two respects: He or she must (1) vote for two persons, (2) at least one of whom is not an inhabitant of the same state as the elector. *Id.* cl. 3. Article II contains no further limit on an elector's voting choices, nor does it confer state power to impose such limits.

Indeed, the Constitution's bar against holders of federal "Offices of Trust or Profit" from serving as electors only makes sense if electors are empowered to vote as they choose and not mere ministerial agents. *Id.* cl. 2; see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

The Federalist Papers envision the electors as a group of individuals chosen by their fellow citizens to exercise reasoned judgment in selecting the president and vice-president. For example, Alexander Hamilton wrote that "so important a trust" should only be "confided" to "[a] small number of persons, selected by their fellow-citizens from the general mass . . . ." The Federalist No. 68 (A. Hamilton). Each should be "most capable of analyzing the qualities adapted to the station" of president and vice-president. *Id.* Such a group, reasoned Hamilton, "will be most likely to possess the information and discernment requisite to such complicated investigations." *Id.* Hamilton describes the hallmarks of independent decision-making, envisioning electors "acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice." *Id.*; see also The Federalist No. 64 (J. Jay) (envisioning "an assembly of select electors [who] possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters").

The election of 1789—the nation's first presidential election—provides key contemporaneous evidence of the Framers' design. As that election unfolded, Hamilton explained that, "[e]very body is aware of that defect in the

constitution which renders it possible that the man intended for Vice President may in fact turn up President. Everybody sees that unanimity in Adams as Vice President and a few votes insidiously withheld from Washington might substitute the former to the latter." Letter from Alexander Hamilton to James Wilson (Jan. 25, 1789), *in* 5 The Papers of Alexander Hamilton 248 (Harold C. Syrett ed., 1962). Hamilton concluded that it would "be prudent to throw away a few votes" for vice president to avoid this possibility. *Id.* at 248–49.[3] Hamilton's timing here is significant: he wrote the language quoted above on January 25, 1789, after the presidential electors were appointed but before they voted. See 34 Journals of the Continental Congress 522-23 (1788) (setting out 1789 election timeline).

Some electors followed Hamilton's suggestion. While all 69 voted for Washington, they split their second votes among John Adams, John Hancock, John Jay, and eight others. 1 Annals of Cong. 17 (1789). Adams easily outpaced the field with 34 votes, making him Vice-President. *Id.* A Boston newspaper, discussing the non-Adams votes cast by electors from Connecticut, New Jersey, and Pennsylvania, "supposed" that the electors "really wish[ed] to have Mr. Adams Vice-President, and would have been unanimous for him, had they not been fearful it might have excluded the Great Washington from the Presidential Chair." 4 DHFFE 180 (quoting the Independent Chronicle (Boston) (Feb. 19, 1789)). Adams himself, unhappy about the vote count, chalked it up to a

[3] Hamilton was not the only, or the first, observer to comment on this possibility. See 4 The Documentary History of the First Federal Elections 53, 56, 125, 143-44 (Gordon DenBoer, Merrill Jensen, & Robert A. Becker eds., 1990) (describing five letters or commentaries between August 1788 and January 1789) ("DHFFE"); accord, 2 DHFFE 186.

"dark and dirty Intrigue" designed to "Spread a Panick least I should be President, and G.W. Vice President . . . ." *Id.* at 285. The constitutional "defect" and remedy of "throw[ing] away a few votes," and the public discussion around the 1789 election, make sense only on the premise that each elector was free to choose how to vote.

B. Contemporaneous State Constitutional Provisions Modeled and Reflected Elector Independence.

Maryland's electoral process likely served as a model for the system ultimately enshrined in Article II. The Maryland Constitution explicitly envisioned each elector voting according to his "judgment and conscience" in electing state senators. Md. Const. of 1776, Art. XVIII. The Framers were undoubtedly aware of this system, and it likely informed their design of the electoral college. See Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, Cardozo L. Rev. De Novo 165, 171-72 (2016); see also 6 *The Life and Correspondence of Rufus King* 532-34 (Charles R. King ed., 1900) ("[I]n this way the Senate of Maryland is appointed; and it appears . . . Hamilton proposed this very mode of choosing the Electors of the President.").

Similarly, in 1792, the newly created state of Kentucky adopted an electoral college to choose its state senators and governor. Its constitution charged state electors "to elect, without favor, affection, partiality, or prejudice, such person for governor, and such persons for senators, as they in their best judgment and conscience

believe best qualified for the respective offices." See Ky. Const. of 1792, Art. I, § 14, Art. II, § 2.[4]

Colorado relies on state legislation from the early republic in support of its position, but also recognized that those early statutes "deal primarily with replacing and fining *absent* electors," functions entirely consistent with elector independence. See *Colo. Dep't of State* v. *Baca*, No. 19-518, Pet. for Cert. at 24-25 (emphasis added). By establishing consequences for electors who failed to show up or fulfill their role, those statutes properly exercised the states' power to *appoint* without attempting to *control* any elector's votes. See Consol. Opening Br. for Presidential Electors at 19-23 (contrasting powers to appoint electors and control their votes). For example, Massachusetts legislation recognized that "it may so happen that one or more of the electors of President and Vice-President may be prevented by death, sickness[,] resignation or otherwise from attending on the day appointed to give their votes." 1800-1801 Mass. Acts 172-73. The state then "Resolved That the said Electors . . . who may then and there be present are hereby empowered to fill up all vacancies which may happen as aforesaid . . . by ballot from the people at large so many suitable persons for Electors of president and vice-president." *Id.* at 173. *Nothing* in this resolve suggests a power to replace an elector for anything but absence, nor to direct or influence how any elector votes.

Colorado also wrongly claims that early electors in Kentucky could "be replaced," citing a 1799 law. *Baca*, Pet. for Cert. at 25. The relevant statute said nothing about replacement, nor purported to control any elector's

[4] In 1799, Kentucky scrapped its electoral college altogether in favor of direct election of senators and the governor. See Ky. Const. of 1799, Art. II, § 14, Art. III, § 2.

votes. It simply provided that an elector "failing to perform the duties herein required, and also the duties prescribed by the laws of congress regulating his conduct, … shall forfeit and pay one hundred dollars . . . ." 2 William Littell, *Statute Law of Kentucky*, ch. CCXII, § 20, at 352 (1810). And it clarified that when electors actually "proceed to the election of a president," they do so "pursuant to the constitution and laws of congress for regulating their conduct," *id.*, not any state law purporting to compel their votes. See also *id.* § 19 (stating that every four years qualified voters shall "vote for some discreet and proper person . . . as an elector . . . to vote for a president of the United States, in conformity to the constitution and laws of congress."). In short, the Kentucky statute did not authorize the state to replace, or control the votes of, electors, but instead recognized them as free to vote under federal law.

II. Congress Has Consistently Recognized and Maintained Elector Independence.

Congress's debates and actions over time are uniformly consistent with the Framers' understanding that an elector's voting choices cannot be bound by state law. Recognition of elector independence is a constant theme through the crafting and implementing of the Twelfth and Twenty-Third Amendments, and Congress's consideration of would-be amendments.

A. The Twelfth Amendment Was Adopted to Prevent Strategic Partisan Voting Without Limiting Elector Independence.

Presidential elections held before ratification of the Twelfth Amendment all saw electors cast anomalous votes. In 1796, electors casting undesignated votes elected the losing party's presidential candidate as vice-president

alongside the winning party's presidential candidate. In 1800, Aaron Burr almost won the presidency in the House and possibly in the Electoral College itself, nearly inverting the Jefferson-Burr ticket. Congress could have eliminated the partisan scheming that affected the 1796 and 1800 elections by limiting elector independence or authorizing states to control the votes of electors. It did neither.

Instead, Congress adopted the Twelfth Amendment, which requires each elector to designate his or her votes for president and vice-president. This reform *presumed* each elector could vote independently and changed the rules to deter the partisan tactics of the prior elections. Indeed, the historical record reveals that no member of the Seventh or Eighth Congress suggested that state law could bind an elector's votes, pledged or not. See, e.g., *Harmelin* v. *Michigan*, 501 U.S. 957, 980 (1991) ("The actions of the First Congress . . . are of course persuasive evidence of what the Constitution means . . . ."). Understood in historical context, the Twelfth Amendment is a resounding affirmation of elector independence.

1. The 1796 and 1800 elections

The 1796 election featured the greatest variety of anomalous votes, and remains the only election resulting in a president and vice-president from different parties. Many of the anomalous votes were examples of partisan jockeying: For example, Alexander Hamilton successfully persuaded South Carolina's eight electors to vote for Jefferson and Federalist Thomas Pinckney (Adams's running mate). About thirty more Jefferson electors cast their second votes for someone other than running mate Aaron Burr. In anticipation of Hamilton's ploy, some Federalist electors sloughed off their votes for Pinckney.

All told, as many as 59 electors cast anomalous votes. Other than Adams, Pinckney, Jefferson, and Burr, at least nine other persons received votes. When the dust settled, Adams and Jefferson received the first and second highest electoral vote totals.[5]

By contrast, the 1800 election featured only a single anomalous vote. Yet, unlike 1796, this election caused great alarm because Aaron Burr nearly bested Thomas Jefferson for the presidency by capitalizing on Hamilton's "defect." Jefferson and Burr defeated Adams and his running mate Charles Pinckney, but Jefferson and Burr each received 73 votes, sending the election to the House of Representatives, which took 36 ballots before finally electing Jefferson president. 10 Annals of Cong. 1025-33 (1801).

In the wake of the election, stories surfaced of Burr's efforts to persuade electors to vote anomalously and swing the presidency to him. See 36 *Papers of Thomas Jefferson* 82–88 (Julian P. Boyd ed., 1950) (hereafter Boyd); James Cheetham, *A View of the Political Conduct of Aaron Burr, Esq. Vice President of the United States* 44 (1802) (hereafter Cheetham). For example, in December 1801, New York journalist James Cheetham wrote to President Jefferson that Anthony Lispenard, a Jefferson-Burr elector in New York, almost cast his votes for Burr and a third candidate, but DeWitt Clinton forced the New York electors to display their ballots to each other. Boyd at 82–88. Cheetham also claimed that Burr had attempted to recruit New Jersey and South Carolina Federalist electors to change their

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[5] For an overview of the 1796 electoral vote, see Jeffrey L. Pasley, *The First Presidential Contest: 1796 and the Founding of American Democracy* 348–404 (Kansas 2013). See also Consol. Opening Br. for Presidential Electors at 33–35 & App. B (listing anomalous votes).

votes from Pinckney to Burr. Cheetham at 43-45. Had even one elector switched his vote, Burr would have been elected president by the Electoral College.

Although some historians doubt the veracity of Cheetham's claims, see, *e.g.*, Milton Lomask, 1 Aaron Burr 322 (1979), their truth is beside the point. It is undisputed that such accounts were in the air. For example, Albert Gallatin wrote to Thomas Jefferson in 1801 expressing concern that the Federalists might connive to make Aaron Burr president in the next election.

> [I]t seems to me that there are but two ways, either to support Burr once more, or to give only one vote for President, scattering our votes for the other person to be voted for. If we do the first, we run, on the one hand, the risk of the federal party making B. president; & we seem, on the other, to give him an additional pledge of being eventually supported hereafter by the republicans for that office. If we embrace the last party, we not only lose the Vice President, but pave the way for the federal successful candidate to that office to become President. All this would be remedied by the amendt. of distinguishing the votes for the two offices . . . .

35 Boyd at 286. Jefferson responded that "the amendment to the constitution of which you speak would be a remedy to a certain degree." 35 Boyd at 314. His response also touted "a different amendment which I know will be proposed, to wit, to have no electors, but let the people vote directly, and the ticket which has a plurality of the votes of any state, to be considered as receiving thereby the whole vote of the state."*Id.*

2. Congress did not consider limiting elector independence as a response to concerns about the early elections.

Congress could have addressed the concerns raised by the 1796 and 1800 elections by binding electors or eliminating them altogether.[6] Instead, it adopted the Twelfth Amendment, directing each elector to designate one vote for president and one for vice-president—an approach entirely consistent with and supportive of each elector's independent judgment.

In addition to preventing the election of the winning ticket's vice presidential candidate as president (as nearly happened in 1800), Congress was also concerned with the election of one of the losing ticket's candidates as vice president (as happened in 1796). See, *e.g.,* 13 Annals of Cong. 85—87 (1803) (recording statement by Democratic-Republican Senator Butler of South Carolina that absent a constitutional amendment "the people called Federalists will send a Vice President into that chair"). In February 1802, during the Seventh Congress, the Federalists introduced amendments requiring designation of electoral votes and popular election of electors from single-elector districts. 11 Annals of Cong. 509, 602-603 (1802). In the waning days of the session, and with no substantive discussion or debate, a designation-only amendment comfortably passed the House, but fell a single vote short of the required two-thirds in the Senate. *Id.* 304, 1288-94. The next year the Eighth Congress narrowly approved the Twelfth Amendment, with the Senate voting in favor by 22-10, and

[6]Amici's research to date reveals no evidence of the "different amendment" mentioned by Jefferson that would have eliminated electors.

the House Speaker leaving the chair to vote yea, making the vote 84-42. 13 Annals of Cong. 209, 776 (1803).

The relevant debates reflect that Congress did not consider limiting elector independence. A statement by Representative Samuel Mitchill during the brief House debate[7] on the Seventh Congress's proposed designation amendment is sometimes mistakenly cited as questioning elector independence. See *Baca*, Pet. for Cert. at 29-30 (quoting *Ray* v. *Blair*, 343 U.S. 214, 228 n.15 (1952)); *Chiafalo* v. *Washington*, No. 19-465, Br. in Opp'n to Pet. for Writ of Cert. at 6-8, 18 (same); *Baca*, App. 158. In fact, Mitchill was advocating for designation of votes:

> Under the Constitution electors are to vote for two persons, one of whom does not reside in the State of the electors; but it does not require a designation of the persons voted for. Wise and virtuous as were the members of the Convention, experience has shown that the mode therein adopted cannot be carried into operation; for the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President. Therefore, practically, the very thing is adopted, intended by this amendment.

11 Annals of Cong. 1289-1290 (1802). Read in its proper context, Mitchill's statement reflects the ambient concern about tactical, partisan voting. It is not a comment against (or even about) elector independence.

The near-inversion of the Jefferson-Burr ticket animated the Eighth Congress's debates as it passed the Twelfth Amendment. For example, Representative

[7] The debate in the Committee of the Whole and the House proper spans only six pages in the Annals. 11 Annals of Cong. 1288-94 (1802).

Campbell told his colleagues that designation would "secure to the people the benefits of choosing the President, so as to prevent a contravention of their will as expressed by Electors chosen by them . . . ." 13 Annals of Cong. 421 (1803). Campbell further explained that, in the "extraordinary cases" of House contingent elections, designation would ensure "that those only should be capable of Legislative election who possessed a strong evidence of enjoying the confidence of the people." *Id.* Representative Clopton operationalized Campbell's observation, suggesting that a House contingent election "should be restrained to the smallest number above an unit, or to those persons who have equal electoral votes," *id.* at 424, making it "more likely to insure the ultimate election of President and Vice President according to the will of the people . . . ." *Id.* at 377. This debate—about designation as a means to avoid inversion of president and vice president—had nothing to do with elector independence.

The Eighth Congress also sought to attenuate the impact of strategic elector voting. Senator Butler of South Carolina put it bluntly, referencing 1796: "[I]f you do not alter the Constitution, the people called Federalists will send a Vice President into that chair. . . ." *Id.* at 87; see also *id.* at 98 (Senator William Cocke: "[T]he object of our amendment was to prevent a Federal[ist] Vice President being elected. . . ."). Although the Federalists in Congress voted unanimously against the Twelfth Amendment, they acknowledged the Democratic-Republican majority's interest in thwarting machinations designed to seat a minority-party vice president alongside a majority-party president. See *id.* at 171, 178 (statements of Senator Tracy); 196 (statement of Senator Pickering).

The Twelfth Amendment thus embodies a balance between the Eighth Congress's understanding that each elector was free to vote independently (even contrary to a pledged position) and its desire to prevent electors from engaging in tactical, partisan voting intended to put a winning ticket's vice presidential candidate into the presidency, or a losing-party candidate into the vice-presidency alongside a winning majority-party candidate. As New York Secretary of State Thomas Tillotson recognized in a letter to James Madison shortly after Congress approved the Amendment:

> In consequence of the Electors designating the Characters they vote for as President and Vice President, the field for management and intrigue is very much circumscribed. Neither Mr. Burr or his adherents can well afford to sink down to their former indigence. December 20, 1803.

6 The Papers of James Madison, Secretary of State Series 189.

Ratifiers in the state legislatures also understood that designation addressed these twin concerns. As State Senator Bidwell commented during Massachusetts' debate on the adoption of the Twelfth Amendment, "[i]t is a manifest absurdity, that votes given for a candidate, *with a view to one office*, should without the consent of the voters, through the agency of other electors, or by mere calamity, be liable to be thus converted into votes for *another office not intended*." *Massachusetts Legislature Debate on The Amendments to the Constitution*, Boston Independent Chronicle (1804) (emphasis added).

Finally, leading nineteenth century constitutional interpreters confirm this baseline understanding of the

elector as an independent actor. For example, Justice Story bemoaned the "notorious" fact that "the electors are now chosen wholly with reference to particular candidates" and that as a result "the whole foundation of the system, so elaborately constructed, is subverted." Joseph Story, 3 *Commentaries on the Constitution of the United States*, § 1457 (1833). His premise—that electors may feel compelled to vote according to party alignment or pledges—accepts as a given the legal "foundation of the system," namely, that electors choose for whom to vote. *See also*, William Rawle, *A View of the Constitution of the United States of America* 57–58 (2d ed. 1829) (arguing that public pledges of electors destroy the foundations of the electoral college, and noting that they are bound by political not legal compulsion); William Alexander Duer, *A Course of Lectures on the Constitutional Jurisprudence of the United States; Delivered Annually in Columbia College, New York* 96 (1843) (same); Thomas M. Cooley,*The General Principles of Constitutional Law in the United States of America* 161 (1898) ("The theory of the Constitution is that there shall be chosen by each State a certain number of its citizens . . . who shall independently cast their suffrages for President and Vice President of the United States, according to the dictates of their individual judgments.") (emphasis omitted).

Further, Senator Daniel Webster, one of Congress's greatest constitutional interpreters, urged that Massachusetts' pro-Webster Whig electors "*should act with entire freedom* from all considerations merely personal to myself; and that *they should give the vote of the state in the manner they think most likely to be useful*" in the context of the 1836 election. *See* 4 *The Papers of Daniel Webster Series 1, Correspondence* 161–62 (Charles M. Wiltse ed. 1980) (letter published in the

December 17, 1836 Niles Weekly Register) (emphasis added).

Properly contextualized, the Twelfth Amendment limited an elector's ability to vote tactically to achieve a partisan outcome by requiring each elector to designate their votes for president and vice-president. That reform, like Article II's original design of the electoral process, presumes that each elector can and will vote independently.

B. The Deliberations and Actions of Subsequent Congresses Have Consistently Recognized Elector Independence.

Proposals and deliberations in later congresses confirm an accepted background understanding: that Article II and the Twelfth Amendment protect elector independence. Even where these proposals were not adopted, the record provides useful historical evidence of the political consensus. For example, several amendments proposed in the early nineteenth century would have replaced election by the House, when no candidate received the votes of a majority of the electors appointed, in favor of sending the choice of president and vice president back to the electors. 41 Annals of Cong. 41, 43-46, 74, 864-66, 1179-81 (1823-24). The mere consideration of that option only makes sense if Congress understood electors as free to change their votes even after adoption of the Twelfth Amendment.

Congress also considered, and rejected, abolishing the office of elector while preserving electoral votes. See, e.g., Cong. Deb. 22nd Congress, 1st Sess. at 1963-64 (1832) (statement of Rep. Erastus Root); *id.*, 2d Sess. at 940 (1833). Reporting on such a proposal in 1874, a Senate report noted "[t]hat the candidates for electors should be

pledged in advance to vote for particular persons was not only not contemplated by the framers of the constitution, but was explicitly excluded by their theory." S. Rep. No. 43-395, at 3 (1874).

Indeed, Congress reaffirmed elector independence in 1932, during the adoption of the Twentieth Amendment. First, the language of the Amendment itself acknowledges elector independence in addressing House contingent elections:

> The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a *President whenever the right of choice shall have devolved upon them*, and for the case of the death of any of the persons from whom the Senate may choose a Vice President *whenever the right of choice shall have devolved upon them.*

U.S. Const. amend. XX, § 4 (emphasis added).

The "right of choice" is the right of each Member of Congress to choose a President or Vice President under the Twelfth Amendment. There is only one place from which this right of choice can "devolve[] upon" members of Congress—the right of choice possessed by each elector, as the Twelfth Amendment makes explicit (and Article II implies).

Commenting on the need for this constitutional enhancement, the accompanying House Committee report noted:

> A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections.

> Presidential electors and not the President are chosen at the November election. The electors, under the present Constitution *would be free* to choose a President, notwithstanding the death of a party nominee. Inasmuch as the electors *would be free* to choose a President, a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors vote.

H. Rep. No. 72-345, at 5 (1932) (emphasis added).

Mid-twentieth century Senate debates also reflect the understanding that electors are independent. For example, as the Senate debated the Twenty-Second Amendment, Rhode Island Republican Theodore Green contemplated "[w]hether or not the President and Vice President should be elected by the Electoral College, as at present, and if so whether or not the members should be legally bound to vote in accordance with their instructions. … There is no provision in the law as to that." 93 Cong. Rec. 1964 (1947). A 1948 survey of state laws found that only California and Oregon had laws requiring pledges from electors and recommended wider adoption of laws requiring pledges, but observed that "[n]o action, however, could probably be taken to compel the election to abide by his pledge." *State Law on the Nomination, Election, and Instruction of Presidential Electors* 42(3) The American Political Science Review 523, 529 (Ruth C. Silva, 1948).

Elector freedom was also discussed during a 1956 debate as the Senate considered two proposed constitutional amendments to prohibit the winner-take-all, unit rule. Although opposed to elimination of the unit rule, John F. Kennedy did support a proposal *to amend*

the Constitution to prohibit elector discretion. 102 Cong. Rec. 5157 (March 20, 1956). Kennedy continued by noting that "half of the States have already removed the danger of electoral college delegates not reflecting the views of the States. *States can take care of that situation themselves*." *Id.* (Emphasis added.) This drew a sharp response from Tennessee Democrat Albert Gore and New Jersey Republican Clifford Case:

> [Gore] … under the present system it is an elector's *constitutional right* to cast a ballot as he pleases. Legally he has the opportunity to do so. . . .
>
> [Case] I must disagree with the statement that an elector, even though there may be no law in his State requiring him to do so, is free to cast his vote as he wishes. He is not free, under our system. He is under the greatest obligation to conform with the--
>
> [Gore] Which is a moral obligation.
>
> [Case] Yes; a moral obligation, which is the greatest of all.

Id. (emphasis added). Gore and Case got it right. The ongoing discussion about the electoral process that began with the framing of Article II consistently shows that each elector is free to vote according to his or her independent judgment, and that the consequences of voting independently are political, not legal.

C. Congress Understood That State Legislatures Lacked the Power to Prevent an Elector From Exercising Independent Judgment When It Approved and Implemented the Twenty-Third Amendment.

The story of the Twenty-Third Amendment continues the unbroken historical narrative of elector independence. That Amendment provides for the appointment of electors for the District of Columbia "as the Congress may direct." U.S. Const., Amend. XXIII, § 1. Thus, Congress first used its constitutional authority to amend the Constitution and award electors to the District of Columbia. Then it passed legislation to implement that provision and direct the manner of appointment for the District's electors.

To accomplish the first step, the Twenty-Third Amendment provides that the District of Columbia shall appoint:

> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State . . . and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Id.

The House Judiciary Committee report accompanying the resolution that eventually became the Amendment expressly noted that the proposed language "follows closely, insofar as it is applicable, the language of article II of the Constitution." H.R. Rep. No. 86-1698, at 4

(1960).[8] Two representatives reiterated this equivalence during the House's sole, two-hour debate on the Twenty-Third Amendment. 106 Cong. Rec. 12553, 12558, 12571 (June 14, 1960). The Senate then approved it after no more than an hour of debate, and without a recorded vote, on June 16, 1960. *Id.* at 12850-58.

Needless to say, there is no evidence in the Congressional Record of any comment or discussion suggesting that the amendment empowered Congress to bind the District's electors.

Congress returned to the subject of the District's electors when it enacted enabling legislation in 1961. The resulting statute provides that an elector must "take an oath or solemnly affirm that he or she will vote for the candidates of the party he or she has been nominated to represent, and it shall be his or her duty to vote in such manner in the electoral college." D.C. Code § 1–1001.08(g) (2017). Critically, the relevant hearings reveal a consensus view that Congress could, at most, enact a statute applying "moral suasion" to each D.C. elector's voting choices but could not prevent an elector from voting independently.

That question first arose when Representative J. Carlton Loser inquired during the testimony of Walter Tobriner, President of the District of Columbia Board of Commissioners, "Is there some Constitutional provision

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[8] Committee reports are considered a particularly reliable source of Congress' intended meaning. *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (internal quotation omitted).

involving the question of electors, how they shall vote?" *To Amend the Act of August 12, 1955 Relating to Elections in the District of Columbia*, hearing on H.R. 5955, House of Representatives Subcommittee No. 3 on the Committee of the District of Columbia, 87th Cong. 34-37 (1961). The subsequent colloquy among Tobriner, Loser, and Representative George Huddleston made clear that such a provision would have no legal effect:

> [Rep. Huddleston] … Once the electors are appointed and certified as the electors of that party, if that party carries the election these electors are still authorized to vote for whomever they please.
>
> [Rep. Loser] But this Administration bill requires them to vote for the party which they represent.
>
> [Rep. Huddleston] *I think that has a moral suasion. I don't think that has any legal effect at all.*
>
> ….
>
> [Rep. Loser] Are you saying, sir, that the provision of the bill is ineffective or is not compulsory that the electors vote for the candidate of the party they represent?
>
> [Mr. Tobriner] There is not provision in the bill, sir, setting forth any compulsory means by which this may be enforced.
>
> [Rep. Huddleston] *I think probably that is preferable to some naked statement that the electors are required to support a candidate, because that has no legal effect at all;* whereas your oath would accomplish this same purpose

> because it also gives rise to a moral suasion. When a man takes an oath, although that oath has no legal effect either, still a person thinks a long time before he violates an oath he has given. I think your provision would accomplish the same purpose from a legal point of view as the Administration bill.

Id. at 34-37 (emphasis added).

The Senate passed the bill 66-6 without discussing the possibility of legal consequences for an anomalous elector. 107 Cong. Rec. 20217 (Sept. 19, 1961). When the bill came back from the conference committee, the reporting senator noted that "it was agreed that a duty would be imposed on a person chosen as an elector to vote in the electoral college for the candidate of the political party which he represents" and the Senate approved the report without further discussion. *Id.* at 21052 (Sept. 23, 1961). However, the statute provides no legal consequences, requiring only that an elector must "take an oath or solemnly affirm that he or she will vote for the candidates of the party he or she has been nominated to represent, and it shall be his or her duty to vote in such manner in the electoral college." D.C. Code § 1–1001.08(g). As Representative Huddleston articulated, the statute was designed to make an elector "think a long time" before casting a vote for someone other than "the candidates of the party he or she has been nominated to represent." To go further, by, for example, barring electors from voting otherwise or punishing them for doing so, would have had "no legal effect at all" in light of the text and structure of Article II and the Twelfth Amendment. Congress thus respected that boundary in adopting and implementing the Twenty-Third Amendment.

As the Twenty-Third Amendment was being ratified by the states in 1961, the Senate Judiciary Subcommittee on Constitutional Amendments considered twenty-three resolutions making a total of twenty-five proposals regarding presidential elections. A single report covered many of them. S. Rep. No. 87-1305 (1962). The section titled "The office of presidential elector" opened with the following comment:

> *Under present constitutional provisions, the elector is free to exercise his independent judgment in voting, regardless of whether he is instructed by State law or has given a pledge*, or whether his own name was even on the ballot. This power to frustrate the popular will has seldom been used, but its continued existence is unnecessary under any system.

Id. at 9 (emphasis added).

This section concluded "All pending proposals would eliminate the possibility of independent or unpledged electors." *Id.* at 10. None of these proposals was sent to the states. In sum, Congress has never taken an action suggesting that the Constitution, as originally adopted or as amended, empowers a state to prohibit or penalize an elector for exercising discretion.

III. Congress Has Never Failed to Count an Anomalous Electoral Vote.

Congress's consistent practice of counting anomalous electoral votes is additional compelling evidence that electors enjoy independence in deciding how to cast their votes. In the wake of the Twelfth Amendment, at least four nineteenth century elections saw electors vote anomalously for president, and at least

eight saw anomalous votes for vice-president.[9] Critically, Congress tallied and accepted all those votes without question. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1654, 1678-94 (2002) (hereafter Kesavan) (surveying congressional debates questioning legitimacy of electoral votes). In fact, Congress has never refused to count and accept the electoral votes cast by an anomalous elector. By counting those votes, Congress effectuates the selection of the president and vice-president. *Id.* at 1658. This unbroken record of accepting anomalous votes confirms Congress's longstanding view that state laws may apply moral suasion, but they do not, because they cannot, override the authority conferred on electors by the Constitution to vote as they choose. Indeed, Congress has consistently counted anomalous electoral votes up through the 2016 election.[10] 163 Cong. Rec. H189-90 (daily ed. Jan. 6, 2017).

This Court's decision in *McPherson* v. *Blacker*, 146 U.S. 1 (1892), did not alter this practice, nor otherwise

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[9] For president these were 1808, 1816, 1820, and 1872. For vice president they were 1812, 1816, 1820, 1824, 1828, 1840, 1872, and 1896.

[10] For a compendium through 1992, see 139 Cong. Rec. 961 (1993). In 2000, one of the electors abstained and the joint convention of Congress took no notice. 147 Cong. Rec. 33-34 (Jan. 6, 2001). In 2004 John Edwards received a presidential electoral vote and a vice presidential electoral vote from the same elector and once again Congress recorded the votes per its usual practice. 151 Cong. Rec., H85 (Jan. 6, 2005). In 2016 seven electors voted anomalously for president and six did so for vice president, and Congress accepted all of these electoral votes without comment. See 163 Cong. Rec., H186-90 (daily ed. Jan. 6, 2017). Five electors from Hawaii and Washington cast their votes in violation of State law. There was no statute in Texas applying to its two Republican electors, who failed to vote for Donald Trump. The process by which Congress counts votes and may choose to reject them is set forth in the Electoral Count Act of 1887, codified at 3 U.S.C. §§ 5-6, 15-18.

undermine elector independence. The issue in *McPherson* was not elector independence, but whether electors could be chosen by district. *Id.* at 24-25. Read in that context, the holding in *McPherson* was that the district system of choosing electors remained constitutionally valid even though it had been dormant for a long time. *Id.* at 36. To the extent it had anything to say about the independence of electors, those statements were dicta.

The first election following *McPherson* illustrated that the decision did not limit elector independence. In 1896, William Jennings Bryan received the presidential nominations of both the Democratic Party and the Populist Party. Arthur Sewall of Maine was his running mate on the Democratic line. On the Populist line, it was Thomas Watson of Georgia.[11] Bryan's strategy was to run a single slate of electors in as many states as possible, some pledged to Bryan and Sewall, others pledged to Bryan and Watson.[12] Washington was one such state, with two Bryan electors pledged to Sewall and two to Watson. Bryan carried Washington, and its four electors faithfully cast their electoral votes for vice president as pledged.[13]

A different situation occurred in Kansas, where two separate Bryan lines (Democrat and Populist) appeared on the ballot with the same set of electors. *Breidenthal* v. *Edwards*, 57 Kan. 332, 46 P. 469 (1896). Knowing that the Bryan electors all intended to vote for Sewall rather than Watson, Kansas Populist Party chairman John Breidenthal brought suit to have Watson's name removed from the ballot. The Kansas Supreme

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[11] Karl Rove, *The Triumph of William McKinley: Why the Election of 1896 Still Matters* 295–96, 302, 304–05 (Simon & Schuster 2015).
[12] William Jennings Bryan, *The First Battle. A Story of the Campaign of 1896* 293 (W. B. Conkey Company 1896).
[13] See 29 Cong. Rec. 1694, 1715 (Feb. 10, 1897).

Court ruled against Breidenthal seven days before the general election, reasoning that "if these electors should be chosen, they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States." *Id.* at 470.

In the end, when the electoral votes were tallied, the Bryan electors in Colorado, Idaho, and North Carolina did not cast their vice-presidential votes as originally pledged. See *"Election in All States,"* The New York Times (Nov. 4, 1896). Nevertheless, their votes were counted by Congress without question. That result, and the *Breidenthal* decision, powerfully indicate that *McPherson* did not curtail elector independence.

Only once has Congress even *debated* the question of whether to accept a vote cast by an anomalous elector.[14] In 1968 an elector cast his votes for George Wallace and Curtis LeMay rather than Richard Nixon and Spiro Agnew. When Congress met to count the electoral vote Senator Edmund Muskie and Representative James O'Hara filed a formal objection to counting the elector's vote, arguing the Twelfth Amendment constitutionalized

[14] Notably, Congress has not hesitated debating questions relating to the legitimacy of electoral votes for other reasons. See Kesavan at 1679-92 (describing several examples from 1809 through 1877). For example, in 1856 a blizzard hit Madison, Wisconsin making it impossible for Wisconsin's electors to meet. They cast their electoral votes the next day, one day after the day prescribed by law, and Congress spent the better part of two days debating whether or not to accept the votes. See Cong. Globe, 34th Cong., 3rd Sess., 644–60, 662–68 (1857). Similarly, in 1873, Congress decided not to count votes for Horace Greeley, who had died after the November election, but before the electors met, and had received a handful of electoral votes from electors who voted for him even knowing that he was dead, but only after close votes. This is the only time that Congress rejected an electoral vote because of the name on the ballot. Kesavan at 1687.

an obligation for each elector to vote according to the popular vote in his or her state. 115 Cong. Rec. 146 (Jan. 6, 1969). In the end, the objection failed by votes of 33-58 in the Senate (*id.* at 246) and 170-228 in the House. *Id.* at 170-71, 246. Thus, since the 1873 debate about electoral votes for the recently deceased Horace Greeley, the only time that Congress debated the question of whether to count the votes of an anomalous elector it counted the votes, decisively rejecting the idea that the Twelfth Amendment imposed an obligation on electors to vote in accordance with State popular vote tallies.

CONCLUSION

In sum, the historical record confirms that, under our constitutional framework, each elector is free to vote as he or she chooses. Therefore, this Court should reverse in *Chiafalo* and affirm in *Baca*.

Respectfully submitted.

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