Nos. 19-465, 19-518

IN THE
Supreme Court of the United States

PETER BRET CHIAFALO, LEVI JENNET GUERRA, AND ESTHER VIRGINIA JOHN,
Petitioners,
v.
STATE OF WASHINGTON,
Respondent.

COLORADO DEPARTMENT OF STATE,
Petitioner,
v.
MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,
Respondents.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR ROBERT W. BENNETT IN SUPPORT OF STATE PARTIES

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

J. SAMUEL TENENBAUM*
BLUHM LEGAL CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-4808
s-tenenbaum@law.northwestern.edu

Counsel for Amicus Curiae
* Counsel of Record

April 8, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

COURT DOCUMENTS

TABLE OF AUTHORITIES—continued

Page

SCHOLARLY ARTICLES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus is Robert W. Bennett, the Nathaniel L. Nathanson Professor of Law Emeritus and former Dean of the Northwestern University Pritzker School of Law. He is an expert on the electoral college and has researched and written extensively on faithless electors, contributing more than 28 publications on the topic. See Robert W. Bennett, *Taming the Electoral College* (2006); Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 Nw. U. L. Rev. 845 (2001); Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward A Conversational Understanding of American Democracy,* 94 Nw. U. L. Rev. 503 (2000); Robert W. Bennett & Larry Solum, *Constitutional Originalism: A Debate* (2011); Robert W. Bennett, *Talking it Through: Puzzles of American Democracy* (2003).

Since 2009 Professor Bennett has been the reporter for the Committee on a Uniform Faithful Presidential Electors Act, a committee of the Uniform Law Commission. The Committee drafted the Uniform Faithful Presidential Electors Act (UFPEA). This Act requires electors to pledge to vote for the candidates for president and vice president chosen by their state's voters. The Act further provides that if electors express their intent to vote faithlessly, they will be replaced with alternate electors. The Uniform Law Commission ap-

---

[1] In accordance to Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No party other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the filing of *amicus* briefs.

proved the UFPEA and it has, thus far, been adopted by six states.

Professor Bennett files this brief because the Tenth Circuit's approach violates voters' wills and expectations, renders current ballots in many jurisdictions illegal, and risks congressional stalemates. In short, the decision below, if adopted by this Court, would introduce instability and illegitimacy into our electoral process.

INTRODUCTION

The history and evolution of the electoral college has brought us to a point where voters rightly expect that their votes will be cast for the candidate of their choice. Injecting discretion between the ballot box and inauguration would contravene settled voter expectations in radical and potentially tumultuous ways.

In our country's first two elections the constitutional provisions at issue here garnered little notice, because George Washington's ascendancy to the presidency was virtually unquestioned. U.S. Const. art. II, § 1, cl. 3; U.S. Const. art. II, § 1, cl. 4. Indeed, it was widely assumed that he would serve as many (constitutionally prescribed four-year) terms as he wished. When Washington decided to retire after two terms, however, electors entered a radically altered political landscape.

During the intervening eight years two major political parties emerged and each had to approach the election on two levels. First, on a national basis, the parties nominated candidates for president (and vice president). Then, on a state-by-state basis, parties nominated candidates for the office of elector. Popular election had become the favored "manner" of selecting

these electors and, over time, all of the states adopted that manner of selection. Popular election was held on a uniform day selected by Congress (now routinely called "election day"); these chosen electors then cast their electoral votes at subsequent meetings—now about forty days later—for the presidential (and vice-presidential) candidates of the political parties that nominated them. Rather quickly, the election-day ballots were designed to highlight the presidential and vice-presidential candidates. The voters marked their ballots for their chosen candidates, and state law then dictated that those votes would be translated into votes for the electors associated with the candidates who prevailed.[2]

Since the early 1800s, then, voters' working assumptions were that they were selecting a specific presidential candidate. Along with this overriding assumption came an understanding that electors would vote faithfully. The practice of binding electors has long been part of the fabric of American democracy. Even the earliest electors "were understood to be instruments for expressing the will of those who selected them, not independent agents . . . ." Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 903, 911 (2017).

---

[2] In 1796, for example, "political parties were already assuming responsibility for nominating the electors and a [working assumption] had developed that the electors . . . [would] vote for the national candidates of their party." Note, *State Power to Bind Presidential Electors*, 65 Colum. L. Rev. 696, 698 (1965). By the election of 1800, "most electors considered themselves to be party loyalists." Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 Nw. U. L. Rev. 121, 128 (2006).

Accordingly, what became known as the electoral college has long been "a formality, as generally the electors would cast their votes consistent with the popular vote of their respective state." *In re Guerra*, 441 P.3d 807, 810 (Wash. 2019). If the Constitution was ever thought ambiguous on the question of binding electors, that concern was resolved by the passage of the Twelfth Amendment in 1804, in combination with the observed "longstanding practice" of electors supporting the party nominee. *Ray* v. *Blair*, 343 U.S. 214, 228–29 (1952). *Accord Guerra*, 441 P.3d at 814, 816 (finding that nothing in the constitution "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislation" and thus rejecting electors' contention that the Twelfth Amendment "demand[s] absolute freedom of choice for electors").

To be sure, on occasion an elector would cast his (or later her) ballot for someone other than the political party's candidate(s), but the vast majority cast their votes "faithfully" in favor of those candidates. The dichotomy between "faithless" and "faithful" electoral college votes crept into the lexicon.

The Tenth Circuit recognized that government practice should inform constitutional interpretation in a case like this. *Baca* v. *Colorado Dep't of State*, 935 F.3d 887, 936 (10th Cir. 2019) (quoting *M'Culloch* v. *State*, 17 U.S. 316, 401 (1819)). But then it largely disregarded the early evolution of the state-chosen election process described above, which has persisted to the present day. As noted, by the time of the Twelfth Amendment, elections had already shifted away from the electoral system that the Tenth Circuit has construed as original intent. See 11 *Annals of Cong.* 1289–90 (1802) (stating that "people do not elect a person for an elector who, they know, does not

intend to vote for a particular person as President" and that the Amendment is intended to adopt such a presumption). And as shown below, the elector-discretion model the Tenth Circuit adopted misleads the voting electorate, violates the Constitution, invites further constitutional litigation and has the potential to undermine our electoral process in ways the Founders could not have envisioned.

I. ELECTOR DISCRETION CONTRAVENES VOTER EXPECTATIONS

A. The presidential ballot form in most states encourages and affirms voters' expectations that casting a ballot directly selects candidates for president and vice president of the United States.

Voters in most jurisdictions fully expect that when they vote for presidential and vice-presidential candidates, their votes will determine the elected candidates. They expect this because in most states, ballots list those candidates, not the electors. *E.g.*, Mass. Gen. Laws, ch. 54 § 43; N.C. Gen. Stat. Ann. § 163-209(a); Vt. Stat. Ann. tit. 17, § 2473(a); see Appendix to the Brief of *Amicus Curiae* Professor Robert W. Bennett ("*Amicus* Br. App.") at 21a, 33a, 45a. And in most states, ballots do not disclose electors' roles in the process. In total, at least twenty-nine states explicitly prohibit the listing of elector's names on general election ballots.[3]

---

[3] Alabama, Ala. Code § 17-14-32; Arkansas, Ark. Code Ann. § 7-8-302(4)(A); California, Cal. Elections Code § 13103(b)(2); Colorado, Colo. Rev. Stat. Ann. § 1-5-403(2); Connecticut, Conn. Gen. Stat. Ann. § 9-175(a); Georgia, Ga. Code Ann. § 21-2-480(g); Hawaii, Haw. Rev. Stat. Ann. § 11-113(a); Illinois, 10 Ill. Comp. Stat. Ann. 5/21-1(b); Indiana, Ind. Code Ann. § 3-10-4-1(a)(3); Iowa, Iowa Code Ann. § 49.32; Kansas, Kan. Stat. Ann.

Even when ballots do mention electors, they are typically not named; instead electors are presented as a slate the voter is required to accept in full. See, *e.g.*, Va. Code Ann. § 24.2-614; S.D. Codified Laws § 12-16-6; *Amicus* Br. App. at 46a, 41a. See also Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 Nw. U. L. Rev. 121, 124–25, 125 n.22 (2006) (discussing the variations in ballots across and within states). Only six states explicitly call for the listing of electors by name on their ballots, but they too suggest elector fidelity to the candidate who earned that vote.[4] Thus, in 2016, 94% of the population selected a candidate on a ballot that did not name electors. *State Population Totals and Components of Change: 2010-2019*, United States Census Bureau (July 2019), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.

---

§ 25-616; Kentucky, Ky. Rev. Stat. Ann. § 118.305(6); Maryland, Md. Code Ann., Elec. Law § 8-504(b)(1); Massachusetts, Mass. Gen. Laws ch. 54, § 43; Mississippi, Miss. Code Ann. § 23-15-785(4); Missouri, Mo. Ann. Stat. § 115.243.1; Montana, Mont. Code Ann. § 13-25-101(7); New Hampshire, N.H. Rev. Stat. Ann. § 656:4; New Jersey, N.J. Stat. Ann. § 19:14-8.1; New Mexico, N.M. Stat. Ann. § 1-15-4(A); North Carolina, N.C. Gen. Stat. Ann. § 163-209(a); Ohio, Ohio Rev. Code Ann. § 3505.10(B)(3); Oregon, Or. Rev. Stat. Ann. § 254.135(2); Texas, Tex. Election Code Ann. § 192.034(b); Utah, Utah Code Ann. § 20A-6-301(2)(c); Vermont, Vt. Stat. Ann. 17 § 2473(a); Washington, Wash. Rev. Code Ann. § 29A.56.320(2); West Virginia, W. Va. Code Ann. § 3-1-14; Wisconsin, Wis. Stat. Ann. § 5.64.2. *See also Amicus* Br. App.

[4] Arizona, Ariz. Rev. Stat. Ann. § 16-502(C)(1); Idaho, Idaho Code Ann. § 34-711; Louisiana, La. Stat. Ann. § 18:1259(B)(4); North Dakota, N.D. Cent. Code Ann. § 16.1-06-07.1; Oklahoma, 26 Okla. Stat. Ann. tit. 26, § 10-105; South Dakota, S.D. Codified Laws § 12-16-6. *See also Amicus* Br. App. at 3a, 12a, 18a, 34a, 36a, 41a.

Html# (follow Excel spreadsheet beginning "Annual Estimates of the Resident Population") (subtracting population total of six states that name electors, see, *supra*, at 5 n.3, from population of fifty states). Whether a ballot lists candidates or a slate of electors, voters are thus led to believe that electors are tethered to a specific candidate and would have no sense that an individual elector would have discretion to depart from the designated candidate.

These voter expectations have been shaped by state statutes and reaffirmed by state court decisions. Several state statutes are constructed in a way that—at a minimum—implicitly suggests that a vote for a candidate is a vote for the associated electors who in turn vote for the candidate. For example, Hawaii's statute treats votes for candidates and votes for electors interchangeably: "In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party." Haw. Rev. Stat. Ann. § 11-113(a); see also Md. Code. Ann., Elec. Law § 8-504(b)(2) ("A vote for the candidates for President and Vice President of a political party shall be considered to be and counted as a vote for each of the presidential electors of the political party.").

State court decisions likewise reflect this understanding by downplaying the elector presence on ballots and by finding the elector's role irrelevant to the voting process. See, *e.g.*, *Thomas* v. *Cohen*, 262 N.Y.S. 320, 323–31 (1933) (rejecting citizen's challenge to ballot candidate-selection requirement and holding that because of long-established custom of electors following voter will, the absence of elector names was

permissible); *State* v. *Pettijohn*, 194 P. 328, 329 (Kan. 1920) (electors are "mere representative[s] of [their] party" and that the voters are "utterly indifferent as to the persons through whom legal effect is to be given to their action"). In short, electors are widely perceived as mere conduits for voters' choices for president and vice president.

If presidential electors have unfettered voting discretion, the political parties' use of primaries, caucuses and nominating conventions to select their presidential and vice-presidential candidates is merely advisory. As this Court has noted, the purpose of a primary or caucus is to allow "citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Under the Tenth Circuit's logic, however, those choices by voters and political parties are non-binding.

The Tenth Circuit's approach likewise would render the current form of presidential ballots unconstitutional. If electors retain complete discretion to vote separately from and contrary to the preferences of the voters, then voters are actually voting for electors, not presidential candidates. With no binding commitment from electors, it would be misleading to list the names of the presidential and vice-presidential candidates on the ballot. Voters would be required to vote for individual electors, not slates of electors. Under that system, voters would have to not only educate themselves about the party's candidates for president and vice president, but also each elector and his or her likelihood of faithfulness because voters would be transferring their votes completely to the discretion of electors. Voters in Colorado, for example, would have to research and select nine electors, while

citizens of more populous states would carry an even greater burden; California has fifty-five electors.

B. The Tenth Circuit decision will invite additional constitutional litigation.

If upheld, the Tenth Circuit decision could likewise be viewed as violating not only the one-person-one-vote principle, but also the right to have that vote counted. This Court has long held that "it is 'as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.'" *Reynolds* v. *Sims*, 377 U.S. 533, 554–55 (1964) (quoting *United States* v. *Mosley*, 238 U.S. 383, 386 (1915)). Congress, too, has recognized this fundamental principle. In the Voting Rights Act, Congress codified the definition of the right to vote to "include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. § 10310(c)(1).

Under the current systems developed by the states, the voting process is not complete—a voter's vote is not "counted"—until the presidential electors have submitted their ballots as instructed by the state. A majority of states have laws directing electors to cast ballots for candidates of political parties that choose them as electors. See *The Electoral College*, Nat'l Conference of State Legislatures (Jan. 6, 2020), https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx; see also, *e.g.*, Ohio Rev. Code Ann. § 3505.30; Or. Rev. Stat. Ann. § 248.355. This Court, too, has held that electors are considered state ministerial officers who submit the ballot of their state, and not their own ballot. *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890); see also *Ray*, 343 U.S. at 228–29, 228 n.15 ("[Electors] are not left to

the exercise of their own judgment[] . . . . They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not." (quoting 11 *Annals of Cong.* 1289–90 (1802)) (internal citations omitted))). If an elector is permitted to act faithlessly, then others will inevitably complain that, as a state agent, she has caused an equal-protection violation by ensuring that others' votes are not "counted." Alternatively, if a state permits (or is powerless to prevent) faithlessness, then the state itself will be accused of violating the Constitution, denying voters "[t]he right to vote freely for the candidate of one's choice." *Reynolds*, 377 U.S. at 555.[5]

II. THE TENTH CIRCUIT DECISION INVITES CHAOS

A. Faithless voting among electors would lead to democratic instability and unrest.

In today's political climate it is foreseeable that faithless electors will have an outcome-determinative effect on an election if state statutes restricting faithless electors are held unconstitutional. That faithless electors have never altered a presidential election[6]

---

[5] Even if presidential electors are deemed federal—not state—actors, the reverse-incorporation doctrine set forth in *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) would likewise result in equal protection challenges.

[6] The closest situation occurred in 1876, when one electoral college vote decided the election. Petition for a Writ of Certiorari at 26, *Chiafalo* v. *Washington*, No. 19-465 (Oct. 7, 2019). Also, in 1836, faithless votes sent the vice-presidential selection to the backup procedure in the Senate. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & Pol'y 665, 679–80 (1997). The Senate then voted for the candidate who would have been elected had the electors voted faith-

results in large part from the deterrent effect of the state laws that codify expectations of fidelity. These laws affirmatively discourage or even forbid faithless voting. See Robert C. Moormann, *Idealistic but Unrealistic: The Amar Plan and Its Ingenuity, but Ultimate Futility*, 34 Ohio N.U. L. Rev. 613, 626–27 (2008) (suggesting based on surveys of electors that fewer electors considered voting faithlessly in states that imposed penalties for faithlessness). Twenty-nine states and the District of Columbia have such rules. *Summary: State Laws Regarding Presidential Electors*, Nat'l Ass'n of Sec'ys of State (Nov. 2016), https://www.nass.org/node/131; *Faithless Elector State Laws*, FairVote, https://www.fairvote.org/faithless_elector_state_laws (last visited Feb. 26, 2020). But if such procedural bars did not (or could not) exist, reining in faithless electors would be impossible, with potentially radical effects on the electoral landscape.

For example, in 2016 the number of electors that tried to vote faithlessly—ten—would have changed the outcome in five of the last fifty-eight elections. See *Faithless Electors*, FairVote, https://www.fairvote.org/faithless_electors (last visited Apr. 4, 2020). Similarly, in 2000, five elector votes determined the outcome. *The Electoral College*, FairVote, https://www.fairvote.org/the_electoral_college#controversial_elections (last visited Apr. 6, 2020). Only two faithless electors would have been needed to send the election to the backup procedure in the House of Rep-

---

fully. *See* S. Doc. No. 113-1, at 1345 (2014) ("Standing Rules of the Senate"); *The Senate Elects a Vice President*, United States Senate, https://www.senate.gov/artandhistory/history/minute/The_Senate_Elects_A_Vice_President.htm (last visited Mar. 31, 2020).

resentatives. See Bennett, *Faithless Electors*, *supra*, at 122.

Increased risk of faithless electors affecting elections harms a healthy democracy and leads to instability. Even those who encourage faithless electorship acknowledge as much. In 2016 a political science professor and journalist who encouraged electors to vote faithlessly against Donald Trump noted that faithless electors posed "a 'terrifying prospect' that risked destabilizing the American democratic system as a whole . . . ." Whittington, *supra*, at 915–16 (quoting Atlantic contributor and Professor Peter Beinart). Calls for faithless voting led to campaigns trying to influence electors. *Id.* at 917. And there is no clear process for finding a presidential election invalid if enough faithlessness occurs. Julia Azari, *What Happens If the Election was a Fraud? The Constitution Doesn't Say*, FiveThirtyEight (Jul. 6, 2017), https://fivethirtyeight.com/features/what-happens-if-the-election-was-a-fraud-the-constitution-doesnt-say/. As electoral college margins narrow, and campaigning becomes more sophisticated with technological advances, faithless electors create a real risk to the outcome of our elections, a result directly at odds with the democratic underpinnings of our constitutional form of government.

B. Faithless electors who alter the outcome of an election would damage confidence in the electoral process and the incoming administration.

Because the electoral college meets forty days after the nationwide, general election, on election night the American people would believe that one person pre-

vailed in the contest but, forty days later,[7] learn that a different person "won" the presidency. Conceivably the election would be in further doubt because the discretion-wielding electors created a tie. 3 U.S.C. § 1. Modern ballots allow voters to signal without reservation a preference for a paired duo of candidates for president and vice president. Given this modern understanding, widespread social turmoil, even violence, could well occur if an election result was seemingly altered after forty days by faithless electors. See Bennett, *Faithless Electors*, *supra*, at 125.

In short, should faithless electors determine the outcome of an election, it "would be like a coup, kicked off by obscure individuals that no one expects to wield real power." Ian Millhiser, *The Supreme Court Will Decide if "Faithless Electors" Can Ignore the Will of the People*, Vox (Jan. 22, 2020), https://www.vox.com/policy-and-politics/2020/1/22/21074453/supreme-court-faithless-electors-chiafalo-baca. This, in turn, would exacerbate current partisanship and distrust. In such an instance, it is possible that neither candidate would concede. According to one commentator, "a faithless elector could change the outcome of a close presidential race, a scenario that would trigger a constitutional crisis of the highest order." Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 Fordham L. Rev. 1021, 1029 (2016). What would follow this constitutional crisis would at best be an administration hampered by the mantle of citizens' mistrust. See, *e.g.*, Lee Rainie,

---

[7] Congress has stated that the electoral college meets "the first Monday after the second Wednesday in December" after the election, yielding a date in mid-December while the election is "on the Tuesday next after the first Monday in November . . . ." 3 U.S.C. § 7.

Scott Keeter, & Andrew Perrin, *Trust and Distrust in America*, Pew Research Ctr. (Jul. 22, 2019), https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/.

C. A system that embraces faithless electors is one that courts lobbying and corruption.

In modern elections, candidates already spend immense amounts of money in seeking election. Jason Lange, *Bloomberg Presidential Campaign Reports $409 Million in Total Spending So Far*, Reuters (Feb. 20, 2020), https://www.reuters.com/article/us-usa-election-bloomberg-spending/bloomberg-presidential-campaign-reports-409-million-in-total-spending-so-far-idUSKBN20E2M0; Sara Fischer, *Ad Spending on 2020 Primary Tops $1 Billion*, Axios (Feb. 28, 2020), https://www.axios.com/presidential-primary-ad-spending-record-e5b6a234-a24c-4ac8-801f-55881dba6712.html. For most candidates, it would be a small financial step to allocate funds to leverage elector votes if such votes could directly affect the election.

The idea of lobbying electors is not without precedent. In 2000 a website encouraged people to reach out to electors pledged to George W. Bush, providing both their contact information and a script that could be used when calling electors to encourage them to switch their votes to Al Gore. Matt Grossmann, *What I Learned from Lobbying the Electors in 2000*, Vox (Dec. 14, 2016), https://www.vox.com/polyarchy/2016/12/14/13944698/electoral-college-lobbying. In 2016 Republican electors were swamped with requests to switch their votes. Whittington, *supra*, at 911–15. That year, "[e]lectors found themselves inundated by letters, petitions, tweets and Facebook posts, urging them to cast a ballot for an alternative candidate. Many received threats, as well." Scott

Detrow, *Donald Trump Secures Electoral College Win, With Few Surprises*, NPR (Dec. 19, 2016), https://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises; see also Whittington, *supra*, at 917 (mentioning harassment directed at some electors). One elector reported that he received more than 75,500 letters, emails and phone calls. Detrow, *supra*. In the 2016 election cycle, people suggested intelligence briefings for electors so that they could understand the role Russia played in the election before casting their votes. Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. Fla. J.L. & Pub. Pol'y 215, 229 (2017). Even when not rising to the level of bribery, efforts to influence electors through lobbying and intimidation have been significant and would surely increase if states are forbidden from proscribing faithless elector voting.

D. Indecision in the electoral college would send the election decision to Congress.

If no candidate secures a majority of electoral votes, the Constitution provides that the House of Representatives would resolve the outcome; if the process is triggered by faithless electors, it could undermine trust in the resulting presidency and the government overall. U.S. Const. amend. XII. See also Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 Geo. L.J. 173, 183 (2011) (explaining that the House of Representatives has only resolved two presidential elections: in 1800 and 1824). In the House, each state would receive one vote and a candidate would need a majority of states to become president. *Id.* Many states have an even number of representatives, so indecision within a state's con-

gressional delegation could cause a stalemate in the delegation and lead the state to abstain. The requirement of a majority of states could then lead to a House stalemate. If the House itself becomes deadlocked and unable to select a candidate by the required majority, then the prolonged delays or the appointment of an "acting" president will erode public trust in the electoral system.

If the House cannot decide, the Constitution requires that the vice president act as president no later than March fourth. U.S. Const. amend. XII; see also Bennett, *Faithless Electors*, *supra*, at 127. This procedure could create a perverse incentive for a vice-presidential candidate or his or her supporters to encourage electoral defection in order to appoint the vice president as acting president. See John Harrison, *Nobody for President*, 16 J.L. & Pol. 699, 702–09 (2000) (discussing Congress's role as electoral decision maker, particularly in light of the 2000 election).

In a close electoral college contest, some purported backers of the apparent presidential "winner" might actually prefer the apparently victorious vice-presidential candidate as an "acting" president. They then might convince enough electors to be faithless in the presidential race to send the contest to the back-up procedure in the House, while those same electors would produce a decisive vice-presidential outcome. Some House members might actually prefer that "acting" status, because it could give them leverage over that "acting" president given that they could reinstitute the presidential selection process at any time. See Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 Ky. L.J. 345, 353–56 (2002) (discussing the meaning of acting president). An acting president could also raise separation-of-power concerns; the framers expressly limited the

legislative role in selecting the executive. *Id.* at 365–68. These consequences are easily avoided by simply following the widely-accepted historical practice, one ratified by the Twelfth Amendment.

Social psychology research has long taught that in evaluating institutional legitimacy, individuals care more about fairness of process than outcome. John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (1975); see also Tom R. Tyler, *What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & Soc'y Rev. 103, 104 (1988). More specifically, discontent with the political system itself and lack of confidence in its procedures "represents the true threat to political stability," because this unhappiness leads to ambivalence, disengagement with the system, and attempts to change the system itself rather than working within it. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 150 (1988).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Tenth Circuit and affirm the decision of the Washington Supreme Court.

Respectfully submitted,

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

J. SAMUEL TENENBAUM*
BLUHM LEGAL CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-4808
s-tenenbaum@law.northwestern.edu

Counsel for Amicus Curiae

* Counsel of Record

April 8, 2020