No. 19-518

In the Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE COLORADO REPUBLICAN COMMITTEE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion.

2. Does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots.

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INTEREST OF AMICUS CURIAE[1]

The Colorado Republican Committee (Committee) is an unincorporated, nonprofit association and a major political party in Colorado, as defined by Colo. Rev. Stat. § 1-1-104(22) (2020). The primary purpose of the Committee is to elect duly nominated or designated Republican candidates to office, to promote the principles and achieve the objectives of the Republican Party at national and state levels, and to perform the functions required of it under the laws of the State of Colorado. The Committee is dedicated to preserving the integrity of elections in Colorado and safeguarding Coloradans' fundamental right to vote for president and vice president of the United States, *see* Colo. Const. art. VII, § 1.

Consistent with its duties under state statute, the Committee is responsible for nominating the Colorado Republican slate of presidential electors each presidential election year. *See* Colo. Rev. Stat. § 1-4-302(1). The Committee is the only entity under Colorado law licensed to nominate Republican presidential electors, or nominate candidates to fill vacancies of unexpired terms for Republican presidential electors. § 1-4-701(1).

No matter the political affiliation, once a political party's slate of presidential electors are "elected," Colorado law mandates each elector to "vote for the presidential candidate and . . . vice-presidential can-

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[1] All parties have filed blanket consent for the filing of amicus briefs. No party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

didate who received the highest number of votes at the preceding general election in this state." § 1-4-304(5). Because selecting candidates and helping them win public office is "a basic function of a political party," *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)—indeed, a political party has a First Amendment right to promote candidates and to help them prevail, *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)—the Committee has a direct interest in any decision by the Court further defining state power over presidential electors.

The Committee supports the Colorado Department of State's (Department) position in its principal brief, namely that Article II, section 1 and the Twelfth Amendment give the State discretion to remove presidential electors who abdicate their state law obligations by voting inconsistent with the popular vote of the Colorado electorate. The Committee's brief, however, focuses on state political parties' role under Colorado law in nominating candidates for presidential electors. In doing so, the Committee offers its unique voice on issues principal to the case, including the selection of *candidates* for presidential elector and the available mechanisms to enforce pledges made by elector candidates. The Committee thus intends to sharpen any decision encroaching on the selection of nominees for presidential electors and the mechanisms by which state political parties may ensure accountability.

SUMMARY OF THE ARGUMENT

At its core, this case is about whether the State of Colorado may bind its presidential electors to the vote of the people of Colorado. While the Electoral College has existed since the founding, few decisions

have examined the constitutional underpinnings of the College. Nonetheless, the Court's decisions that have studied the text, history, and structure of Article II, section 1 of the Constitution and the Twelfth Amendment have uniformly compartmentalized the functions of the applicable government actors (the states, presidential electors, and federal government) and defined the job of electors as a narrow one. In keeping with those decisions and the text of the Constitution, a state must have the power to bind its presidential electors to the will of its people, as most states have done for nearly two hundred years.

I. This amicus brief addresses state political parties' involvement in the selection of presidential electors and how a decision for Mr. Baca will compel state political parties to respond.

A. It is beyond dispute that states have plenary power in the "appointment" of presidential electors. Since the first presidential election, states have exercised that power to fashion different modes by which to select presidential electors, from appointment by state legislatures, to popular vote by the state or districts, to forms of elector-specific committees. Today, however, all presidential electors are elected by popular vote in the states. Although the mode of selection has changed throughout history, the involvement of political parties has remained constant. Many states, like Colorado, delegate to state political parties the authority to nominate and fill slates of presidential electors. Indeed, each presidential election year, the Committee's chairman selects and nominates the Republican slate of presidential electors for the Colorado Republican Party. In exercising its associational legitimacy to select nominees, the

Committee necessarily invokes its right to exclude unfit candidates—a right the Court has said is most sacred to political associations.

B. It is for this reason the Court in *Ray v. Blair*, 343 U.S. 214 (1952), blessed the Alabama Democratic Party's exclusion of a candidate for presidential elector when he refused to pledge aid and support to the nominees of the national Democratic Party. Like Colorado, Alabama had delegated the task of nominating presidential electors to state political parties. The Court found no federal constitutional objection when a party chooses to fix the qualifications for elector candidates to guard against intrusion by those with adverse political principles. And, the Court stressed it is the party's affirmative constitutional right to do so as a voluntary association. Thus, the Court rejected the idea that Article II, section 1 and the Twelfth Amendment demand absolute freedom for the elector to vote his or her own choice.

II. Accordingly, based on *Ray*, there is no legal objection to the Committee requiring a pledge by candidates for presidential elector prior to nomination. Even more, the Committee must be allowed to enforce such a pledge against a faithless elector if states may not bind electors to the statewide popular vote. *First*, a conclusion barring states from *imposing* an obligation on presidential electors does not answer whether an elector may *voluntarily* exercise his or her will and agree to be legally bound by a pledge to qualify as a party's nominee for elector. *Second*, failure to recognize state political parties' right to enforce candidate-pledges would violate the parties' associational rights. Because Colorado has decided to use the state political party platform to select nomi-

nees for presidential elector, the exercise of a party's associational legitimacy to nominate a slate of electors for the general election is protected expression, which necessarily includes enforcing pledges and excluding electors with adverse political principles.

ARGUMENT

I. Political Parties' Involvement in Selecting Nominees for Presidential Elector Is Constitutionally Sanctioned and Ubiquitous.

The constitutional design for choosing the president and the vice president delegates significant control over the process to the several states, including the mode by which presidential electors are selected. Although early in the republic states experimented with different ways to appoint presidential electors, today electors are uniformly selected by popular vote in the states. This Part discusses the history of state power over the "appointment" of presidential electors and how, since the Nation's founding, the states have leaned on political parties to aid in the process. It follows by outlining Colorado law governing the selection of presidential electors, with a particular focus on Colorado's state political parties. The Part concludes by reminding of the important associational rights political parties exercise in nominating partisan slates of presidential electors and examines the Supreme Court's express approval of candidate-pledges in *Ray v. Blair*, 343 U.S. 214 (1952), as part of the nominating process.

A. States have plenary power over the appointment of presidential electors.

1. The Constitution grants states broad power to appoint presidential electors. Whether that power

sanctions state law intended to bind presidential electors to the will of the state's voters is a question of constitutional interpretation. The starting point then is the Constitution's text. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). Article II, section 1 provides, "Each State *shall appoint, in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." U.S. Const. art. II, § 1, cl. 2 (emphasis added). This Court has emphasized the breadth of a state's constitutional power under Article II, section 1 to "appoint" electors "in such manner as the Legislature thereof may direct." In *McPherson v. Blacker*, the Court said that the word appoint "was manifestly used as conveying the broadest power of determination" to the states. 146 U.S. 1, 27 (1892). And the "final result" of delegating unbridled discretion upon the states was by design; to be sure, it "reconciled contrariety of views" on other modes of selecting the chief magistrate "by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id.* at 28. From this language and history, the Court concluded "the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." *Id.* at 35.

The Court's statements in *McPherson* are in lockstep with *Fitzgerald v. Green*, 134 U.S. 377 (1890). There, the Court observed that presidential electors "are appointed by the state in such manner as its legislature may direct," and "Congress has never undertaken to interfere with the manner of

appointing electors, or, where . . . the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors." *Id.* at 379, 380. Rather, those are within the exclusive province of the state. It is therefore unsurprising that the Court narrowly defined the federal government's *and* presidential electors' roles in appointment and voting. The "only rights and duties" of the former are in the provisions "authoriz[ing] congress to determine the time of choosing the electors, and the day on which they shall give their votes" and those "direct[ing] that the certificates of their votes shall be opened by the president of the senate in the presence of the two houses of congress, and the votes shall then be counted." *Id.* at 379. And "[t]he sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice-president of the nation." *Id.*

2. From the first presidential elections, states explored their power to appoint presidential electors by fashioning different nomination and selection mechanisms. For example, while the presidential election in 1800 marked its place in history for different reasons, it also exhibited the states' electoral ingenuity. That year, Virginia, Maryland, Rhode Island, North Carolina, and Kentucky chose their presidential electors by popular election, two by general ticket (Virginia and Rhode Island) and the others by congressional districts. Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* at 94–95 (1994). Of the remaining 11 states, ten chose their electors by vote of their state legislatures and Vermont delegated the responsibility to a committee including the

governor, an executive council, and the state house of representatives. *Id.* at 83, 93–94.[2]

The 1800 election and the constitutional amendment it precipitated accelerated the electoral evolution for selecting presidential electors into a unitary process: election by popular vote. The Twelfth Amendment, brought about by the electoral calamity of 1800, provided modest changes to the process outlined in Article II, section 1. Most significantly, it directed presidential electors that "they 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. That is, the electors voted separately for president and vice president, eliminating a repeat of a Jefferson-Burr tie, which caused the House of Representatives to decide the 1800 election after 36 rounds of voting. *See* Kuroda, at 105. While the Twelfth Amendment would eventually facilitate a transformation in the way the Country selects its president, notably it did

[2] The first, second, and third presidential elections also exhibited the states' broad discretion in deciding how they would select their presidential electors, along with the gradual evolution of the electoral process for the appointment of electors. In the 1788 election, six of the 11 states chose their electors through vote of their legislatures (but New York lost its right to vote because it failed to timely appoint its electors), and the remainder chose their electors by popular election, two by general ticket (Pennsylvania and New Hampshire). *McPherson*, 146 U.S. at 29–30. In the 1792 election, nine of the 15 states chose their electors through vote of their legislatures, and the remainder chose their electors by popular election, three by general ticket (Pennsylvania, New Hampshire, and Maryland). *Id.* at 30. Finally, in the 1796 election, nine of the 16 states chose their electors through vote of their legislatures, and the remainder chose their electors by popular election, two by general ticket (Pennsylvania and New Hampshire). *Id.* at 31.

not modify or constrict states' right to appoint electors under Article II, section 1. This in itself is telling and reaffirming of the solidarity behind the state's plenary power to appoint presidential electors.

The Twelfth Amendment prompted states to rally around election-by-popular-vote for presidential electors. "Whereas only five states chose their electors by popular vote in 1800, over half did by 1816, and all but one by 1828."[3] Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501, 1556–57 (2014). In that way, the Twelfth Amendment also embraced the involvement of political parties in presidential elections. Hawley, at 1557. Period-specific commentators remarked on the certitude and ubiquity of political parties' influence in early presidential elections, made more efficient and effective by the Twelfth Amendment. In his *Commentaries on the Constitution of the United States*, published only 30 years after ratification of the Twelfth Amendment, Justice Story recognized:

> It is notorious, that the electors are now chosen wholly with reference to particular candidates. . . . The candidates for presidency are selected and announced in each state long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the state legislatures, to secure votes for the favourite candidate, and to defeat his opponents. . . . So, that nothing is left to the electors after their choice, but to register votes, which are al-

[3] At present, all states select presidential electors by popular vote. Nat'l Conf. of State Legislatures, The Electoral College (Jan. 1, 2020), https://bit.ly/2yl46NZ.

> ready pledged; and an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.

3 J. Story, *Commentaries on the Constitution of the United States* § 1457, 321–22 (1833); William Rawle, *A View of the Constitution of the United States of America* 57 (2d ed. 1829) (stating experience has shown "the electors do not assemble in their several states for a free exercise of their own judgment, but for the purpose of electing the particular candidate who happened to be preferred by the predominant political party which has chosen those electors").

This history teaches that political parties almost instantly assumed an important function in the election of the president and vice president after the founding through their coordination efforts and by coalescing the populace behind candidates for office. *Ray*, 343 U.S. at 220–21 ("[Political parties] were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable."). And the ability to accomplish such an objective is aided by the states' plenary power under Article II, section 1, to appoint presidential electors as they see fit.

3. Similar to other states, the State of Colorado elects its presidential electors by statewide popular vote, which is enshrined in the state constitution. Colo. Const. Schedule § 20 ("The general assembly shall provide that after [1876] the electors of the electoral

college shall be chosen by direct vote of the people.").[4] *See also* Colo. Rev. Stat. § 1-4-301 ("At the general election in 1984 and every fourth year thereafter, the number of presidential electors to which the state is entitled shall be elected."). Like for all other statewide partisan elections in Colorado, statute grants the major political parties in the state the right to select—by a method of their choosing—the nominees for presidential electors. § 1-4-302(1).

Also similar to other states, Colorado does not print the names of the presidential electors on the ballot. Rather, Colorado law provides, "When presidential electors are to be elected, their names shall not be printed on the ballot, but the names of the candidates of the respective political parties or political organizations for president and vice president of the United States shall be printed together in pairs under the title 'presidential electors.'" Colo. Rev. Stat. § 1-5-403(2). And a vote for candidates for president and vice president "is a vote for the duly nominated presidential electors of the political party . . . by which the pair of candidates were named." *Id.*

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[4] Colorado achieved statehood during the 1876 presidential election year. The State's initial slate of presidential electors was selected by the Colorado general assembly. *See* Colo. Const. Schedule § 19 ("The general assembly shall, at their first session, immediately after the organization of the two houses and after the canvass of the votes for officers of the executive department, and before proceeding to other business, provide by act or joint resolution for the appointment by said general assembly of electors in the electoral college, and such joint resolution or the bill for such enactment may be passed without being printed or referred to any committee, or read on more than one day in either house, and shall take effect immediately after the concurrence of the two houses therein, and the approval of the governor thereto shall not be necessary.").

For the Committee, it selects the Colorado Republican slate of presidential electors each presidential election year through an authorized committee at its state assembly and convention. The nominating committee for presidential electors consists of one person: the state party chairman, who is appointed by resolution of the Republican state convention every presidential election year. *Cf.* Bylaws of the Colo. Republican State Cent. Comm. art. V, § B.1.n (Sept. 21, 2019), https://bit.ly/39AtJHK (listing as one of the chairman's duties "[a]ppointing the Colorado Republican Presidential Electors"). In practice, the chairman considers a number of factors in selecting the Colorado Republican slate of electors, including time of service to the party. *See* Committee's Mot. to Intervene at 4, *Baca v. Hickenlooper*, No. 1:16-cv-02986-WYD-NYW (D. Colo. Dec. 9, 2016), ECF No. 11. Although raw loyalty to a particular candidate for president is not a deciding factor in selecting the slate of electors, *id.*, a decision against the Department would compel the Committee to overhaul candidate qualifications and would also force the Committee to experiment with forms of suasion at the party level, e.g., candidate-pledges, along with methods of enforcement (*see infra* Part II).

4. By now, it is settled that the First Amendment protects the freedom to associate "in furtherance of common political beliefs," which includes "the freedom to identify the people who constitute the association," and the corollary freedom not to associate. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) and *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)). In *Jones*, the Court said "[i]n no ar-

ea is the political association's right to exclude more important than in the process of selecting its nominee," because "it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* at 575. For this reason, the Court's "cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Id.* (quoting *Eu v S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

The State of Colorado's use of the state political party apparatus to field nominees for presidential elector necessarily depends on the parties' associational rights under the First Amendment. That is, when the State requires the Committee to exercise its associational legitimacy to nominate *Republican* presidential electors for the general election, the party's act must gain protected expression. To be sure, these First Amendment guarantees are at their zenith when states "limit[] the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *See Tashjian*, 479 U.S. at 216. So it is, qualifications that state political parties impose on presidential elector nominees who are selected as the party's "standard-bearer who best represents the party's ideology and preferences," *Eu*, 489 U.S. at 224, protect against insincere political intrusion by those with adverse political philosophy, a truth the Court rightly identified in *Ray*, 343 U.S. at 221–22.

B. *Ray v. Blair* expressly approved of pledges to political parties by candidates for presidential elector.

To fully appreciate the Court's decision in *Ray v. Blair*, it is necessary to understand the background of how the case came to be. In the 1948 presidential election, the then-Democratic Party stronghold of Alabama was the only state in the Union in which the incumbent Democratic President Harry Truman did not appear on the ballot. Hugh Alvin Bone, *American Politics and the Party System* 262 (1955). Instead, Alabamans chose between Republican Thomas Dewey and "Dixiecrat" South Carolina Governor Strom Thurmond. *Id.* Governor Thurmond had gained notoriety for leading a walkout of southern delegates at the 1948 Democratic National Convention after that convention, with President Truman's support, adopted a pro civil-rights platform.[5] *Id.*

Over the national party's objection, Governor Thurmond was placed on the ballot as the Democratic Party nominee in Alabama and handily carried the state.[6] This was a manifest catastrophe for Democratic Party governance. Alabama's Democratic Governor Jim Folsom unsuccessfully sued his party's electors—including one Edmund Blair—in an at-

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[5] Governor Thurmond intended his third-party bid would deprive President Truman of enough electoral votes to either throw the election into the House of Representatives (where southern Democrats could exact concessions on civil rights in exchange for their support) or to outright deprive Truman of another term as president. William C. Berman, *The Politics of Civil Rights in the Truman Administration* 132 (1970).

[6] Governor Thurmond was also placed on the ballot as the Democratic Party nominee in Louisiana, Mississippi, and South Carolina, and he handily carried these states. Berman, at 132.

tempt to force them to cast their votes for President Truman. *See State v. Albritton*, 37 So. 2d 640 (Ala. 1948). In the end, Governor Thurmond received the votes of Alabama's 11 presidential electors in 1948.

For the 1952 presidential election, the Alabama Democratic Party responded by adopting a resolution requiring all candidates running in its primary to pledge aid and support to the nominees of the national Democratic Party. *Ray*, 343 U.S. at 222. This party-resolution had legal effect. Alabama's legislature delegated to the state political parties the authority to nominate electors. *Id.* at 217 n.2. And the state's election code authorized the political parties to "fix and prescribe the political or other qualifications of its own members, and . . . declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein . . . ." *Id.* Alabama's election code further provided that the chairman of the party's executive committee must certify a candidate's name to the secretary of state before he may appear on that party's primary ballot, effectively giving the party a veto over any declared candidacy. *See* Ala. Code § 17-344 (1940).

Mr. Blair, one of the 11 Alabama electors in 1948 who had refused to support and indeed voted against the national Democratic Party's nominee, again sought to be a candidate for presidential elector for the 1952 presidential election. *Ray v. Blair*, 57 So. 2d 395, 399 (Ala. 1952) (Brown & Simpson, JJ., dissenting). Alabama's Democratic Party Chairman Ben Ray refused to certify Mr. Blair's name to the primary ballot, thus legally preventing him from becoming a candidate for elector. *See Ray*, 343 U.S. at 215, 217 & n.2. Mr. Blair sought and received a writ of man-

damus requiring Mr. Ray to certify his name on the ground that the Twelfth Amendment required he be free to vote for the candidate of his choice and that the Democratic Party's refusal to certify his name to the ballot absent a pledge of his vote effectively interfered with that choice. *Ray*, 57 So. 2d. at 397 (majority opinion). In affirming the writ, the Alabama Supreme Court held that the question was whether the Twelfth Amendment "confers on electors freedom to exercise their judgment in respect to voting in the electoral college for a president and vice-president." *Id.* at 397. It held it did. *Id.* at 398.

This Court reversed and upheld the pledge requirement, rejecting "the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice." *Ray*, 343 U.S. at 228. Importantly, this Court found "no federal constitutional objection" when a state authorizes a party to choose its nominees for presidential elector and to "fix the qualifications for the candidates." *Id.* at 231. Indeed, not only is there no constitutional objection to political parties' fixing of qualifications for candidates for presidential elector, parties have an affirmative constitutional right to do so as voluntary associations. As recognized by this Court in *Ray*, such activities "protect[] a party from intrusion by those with adverse political principles." *Id.* at 221–22. Illustrating the propriety of parties acting to protect their associational interests, the Court cited with approval a Texas case in which the Democratic Party of Texas withdrew its nomination of candidates for presidential elector—and thereby legally precluded them from seeking the office—when these candidates announced their intention to vote against President

Roosevelt in 1944. *See id.* at 222 n.9 (citing *Seay v. Latham*, 182 S.W.2d 251, 253 (Tex. 1944)).

Since *Ray*, the Court's protection of political parties' associational rights has only strengthened. *See LaRouche v. Fowler*, 77 F. Supp. 2d 80, 88–89 (D.D.C. 1999) (examining the Court's associational rights cases post *Ray*), *aff'd*, 529 U.S. 1035 (2000). At bottom, political parties must be free to prevent such intrusion and, as determined by *Ray*, nothing in the Twelfth Amendment curbs this freedom in the context of selecting candidates for presidential elector.

II. State Political Parties Must Be Allowed to Enforce Pledges to the Party by Candidates for Presidential Elector.

Having approved of candidate-pledges for presidential electors in *Ray*, the next logical question is whether those "pledges" have meaning and are enforceable. The Court did not provide a conclusive answer in *Ray*. *See* 343 U.S. at 230. It's worth noting it has taken nearly 70 years, or 17 presidential election cycles, for this question (although in a different form and context) to reach the Court. This is so because the status quo, namely, that presidential electors adhere to the will of the people expressed in the state popular vote, has worked. It's only because a rogue Colorado elector broke rank in December 2016 with settled practice and expectations that pledges by Colorado presidential electors, whether administered by the State or state political parties, now take on added significance.[7] The remainder of this Part is

[7] The Committee acknowledges Mr. Baca was ostensibly acting in concert with faithless presidential electors in other states, such as Washington. *See generally In re Guerra*, 441

dedicated to explaining how state political parties like the Committee might fill the vacuum created by a decision rejecting state authority to bind presidential electors to the statewide popular vote. In doing so, it reveals a disconnect in the Electors' pitch for unrestrained voting discretion and supports the State's view of its plenary power under Article II, section 1 and the Twelfth Amendment.

The Committee's associational right to exclude candidates for presidential electors unfit to represent the party's ideologies and preferences is strongest in its process for selecting nominees. *See Jones*, 530 U.S. at 575. As the Court recognized in *Ray*, "certainly neither provision of the Constitution [Article II, section 1 or the Twelfth Amendment] requires a state political party . . . to accept persons as candidates who refuse to agree to abide by the party's requirement." 343 U.S. at 225; *see also Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 167 (5th Cir. 2009) ("[U]ntil the Supreme Court modifies *Ray*, we cannot hold that a prospective candidate has a right to compel a political party to place him on its ballot when he refuses to agree to support its candidates."). Consistent with *Ray*, state political parties must be able to exact pledges from candidates vying for their party's nomination for presidential elector, including a promise that the candidate will support the national party's nominee for president and vice president.

These pledges differ from the State of Colorado's pledge[8] in several ways. *First* is for whom the pledgor

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P.3d 807 (Wash. 2019), *cert. granted sub nom. Chiafalo v. Washington*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-465).

[8] That pledge states: "I, [elector's name], do solemnly swear or affirm that I will support the constitution of the United

pledges support, i.e., the winners of the statewide popular vote versus party nominees. *Second*, candidate-pledges, by definition, are pledges by candidates for office rather than elected presidential electors. *Third*, and most significantly, is the authority from which the right to impose a pledge originates. The State's right, at least in part, is derived from its power to appoint presidential electors as outlined in Article II, section 1 (*see* Dep't's Br. 28), whereas the Committee's right to nominate the Colorado Republican slate of presidential electors is derived from state statute. Quite critically, as detailed later, the exercise of that delegated authority and the party's right to insist on candidate-pledges comes from the Committee's use of its political legitimacy to nominate Colorado presidential electors. That is, the constitutional significance is not from Article II, section 1 or the Twelfth Amendment, but rather the Committee's First Amendment associational rights, which are strongest when nominating candidates.

The Electors hint at this last distinction in their brief without completing the thought. (*See* Electors' Br. 48.) As their argument goes, states may require moral-suasion pledges, but may not enforce because "enforcement may be 'violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college.'" (*Id.* (quoting *Ray*, 343 U.S. at 230).) Setting aside the liberal use of the quote from *Ray*, even if a

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States and of the state of Colorado, that I will faithfully perform the duties of the office of presidential elector that I am about to enter, and that I will vote for the presidential candidate and vice-presidential candidate who received the highest number of votes at the preceding general election in this state." 8 Colo. Code Regs. § 1505-1:24.1.1.

state's *imposition* of an obligation to vote consistent with the statewide popular vote may be constitutionally infirm—because "of an assumed constitutional freedom of the elector"—it does not follow that a presidential elector is barred from *voluntarily* exercising his or her will and agreeing to be legally bound by pledge in order to qualify as a party's nominee for elector. If free choice exists under Article II, section 1 and the Twelfth Amendment, a presidential elector may waive that freedom through a legally binding pledge to a state political party in pursuit of that party's nomination. *Cf. D. H. Overmyer Co. Inc. v. Frick Co.*, 405 U.S. 174, 186–87 (1972).

Failure to recognize the enforceability of candidate-pledges required by state political parties would run roughshod over their associational rights. Stated differently, if the Court's decision in *Ray*, and its later decisions earmarking the importance of political parties' associational rights in the nomination process, *see, e.g.*, *Jones*, 530 U.S. at 575, are to have meaning, the parties must be permitted to legally enforce pledges given by candidates for presidential elector (*cf.* State's Br. 27 (collecting lower court cases approving of *state* enforcement measures)). This conclusion follows from the same reasoning animating the Court's approval of candidate-pledges in *Ray*: "Such a provision protects a party from intrusion by those with adverse political principles." 343 U.S. at 221–22; *id.* at 226 n.14 (stating pledge strengthens "party system by protecting the party from a fraudulent invasion by candidates who will not support the party"). This reasoning extends to the enforceability of pledges. Indeed, it would be quite perverse to say that political parties may require pledges to protect against intrusion from those at odds with the party's

political philosophy and leadership, but handcuff them in responding to a breach of the pledge. That result simply cannot follow after *Ray*.

Hence, at the very least, if the Court holds that states lack the power to bind electors, state political parties will be forced to hold electors accountable. The obvious first step is candidate-pledges. For this reason, the Committee is actively considering pledges for its 2020 slate of Colorado Republican presidential electors. One option is to require candidates for presidential electors to pledge to support the national party's nominee for president and vice president, to vote consistent with that pledge, and, if an elector fails to adhere with his or her pledge, agree to nullify the vote and immediately vacate the seat as elector. Further, the candidate-pledge could include a confession of judgment memorializing the pledge, agreeing it is enforceable, and setting forth a nullification and vacatur remedy if the pledge is breached. The confession could also contain a waiver of all defenses, including any claim of immunity. (*See* Electors' Br. 39.)

Another option is to require candidate-pledges to be secured by the posting of a bond, and accompanied by a confession of judgment. The confession would require a faithless presidential elector to forgo the bond if he or she breaches the pledge. Although this scenario would avoid nullification of the elector's vote in breach of a candidate-pledge, the bonding requirement in a sufficient amount would operate as a form of suasion and would signal to the elector the seriousness of renouncing the electoral duties owed to the voting populace of the state.

Obviously the options outlined above are not exhaustive, but they do provide a forward-looking ac-

count of how state political parties like the Committee will respond to a decision circumscribing state authority to bind presidential electors to the result of a statewide popular vote. To be sure, state political parties will test the bounds of creativity with pledges and modes of enforcement to safeguard their most critical constitutional right: the right to associate. As Justice Scalia reminded in *Jones*, "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." 530 U.S. at 574. Along the same lines, it would be incomprehensible for the Committee to silently watch a presidential elector who exploited the associational guarantees of the Colorado Republican Party become faithless.

This discussion begs a question: If state political parties can enforce (in various ways) pledges, whereby a candidate for presidential elector pledges to vote for the national party's nominees for president and vice president, then how is it that state plenary power under Article II, section 1 and the Twelfth Amendment does not permit states to bind electors to the people's vote? It may be the question is begged because the answer is necessarily that it does.

CONCLUSION

The Tenth Circuit's decision is irreconcilable with the broad power states have over the appointment process for presidential electors. Nevertheless, it is undisputed states have the power to determine the mode by which presidential electors are to be appointed. And, when a state delegates the selection of nominees for presidential elector to state political parties, any exercise of the party's associational

rights to exclude unfit candidates through pledges must be respected. As detailed above, these candidate-pledges are enforceable, and failure to recognize their enforceability would do harm to a political party's right to select the ambassadors who best represent the party's ideologies and preferences.

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