No. 19-465

In the Supreme Court of the United States

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

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF *AMICI CURIAE* MICHAEL L. ROSIN AND DAVID G. POST IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

A Washington State law threatens a fine for presidential electors who vote contrary to how the law directs. RCW 29A.56.340 (2016). Petitioners are three 2016 presidential electors who were fined under this provision solely because they failed to vote as the law directs, namely for the presidential and vice-presidential candidates who won a majority of the popular vote in the State.

The question presented is whether enforcement of this law is unconstitutional because:

(1) a State has no power to legally enforce how a presidential elector casts his or her ballot; and

(2) a State penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.

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INTEREST OF AMICI[1]

Amicus curiae Michael L. Rosin is a historian and scholar of the Electoral College. He has conducted extensive original historical research on the subject. Rosin has reviewed and analyzed historical source material, including contemporaneous records that reflect the Founders' opinions and debates about the Electoral College, later debates regarding proposed and adopted constitutional amendments, and congressional debate on disputed electoral votes. Rosin seeks to draw on his deep historical knowledge to help inform the Court's consideration of this critical constitutional question.

Amicus curiae David G. Post retired from his position as I. Herman Stern Professor at Beasley School of Law, Temple University, in 2015; currently, he is a Fellow at the Center for Democracy and Technology, a Fellow of the Institute for Information Law and Policy at New York Law School, an Adjunct Scholar at the Cato Institute, and a contributor to the Volokh Conspiracy blog. In addition to numerous scholarly articles on a variety of topics, Mr. Post has submitted amicus briefs to the Court, including a petition-stage amicus brief in *Minnis* v. *Illinois*, No. 16-8052 (Brief of the Cato Institute Supporting the Petition for Certiorari, filed Mar. 24, 2017), and merits amicus briefs in *Packingham* v. *North Carolina*, No. 15-1194

[1] As required by Supreme Court Rule 37, counsel of record for all parties have consented to the filing of this brief. Counsel for amici provided notice to counsel of record for all parties of the intention to file this brief more than 10 days prior to its filing. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amici funded its preparation or submission.

(Brief of Electronic Frontier Foundation et al., filed Dec. 22, 2016), *Nelson* v. *Colorado*, No. 15-1256 (Brief of Cato Institute & Institute for Justice, filed Nov. 18, 2016), *Henderson* v. *United States*, No 13-1487 (Brief of Institute for Justice, filed Dec. 12, 2014).

SUMMARY OF THE ARGUMENT

The Court should grant the petition in this case to resolve a critical question concerning the election of our nation's president and vice-president: whether the Constitution permits a state to mandate for whom presidential electors must vote and to legally enforce that mandate. The Washington Supreme Court held below that states' authority to decide "the manner and mode of appointing presidential electors" is "absolute" and includes the power to limit or restrict electors' votes. Pet. App. 19-20a. Its decision squarely conflicts with the Tenth Circuit's recent decision in *Baca* v. *Colorado Dep't of State*, 935 F.3d 887 (10th Cir. 2019). That conflict illustrates the need for this Court to address and decide this issue before the next presidential election.

Granting review in this case, which arises out of the 2016 election, will avoid the severe time constraints presented by past cases related to the electoral process. As explained below, the typical timetable for such cases is measured in days. By contrast, the Court can decide this case with the benefit of full briefing and argument, in the ordinary course. And by doing so, the Court will provide much-needed certainty well before the next election. The need for such certainty is paramount, given the very real possibility that this issue, left unresolved, will recur in the

context of an in-process election, with the outcome hanging in the balance.

In addition, unhurried review will be especially beneficial here, because the questions before the Court exist against a rich, nuanced historical backdrop. As explained in Point II below, that history—which was not thoroughly explored by the court below—strongly supports petitioners' position on the merits. From the drafting and ratification of the Constitution through the ratification of the Twelfth and Twenty-Third Amendments, congressional and other source material reflects a consistent understanding that individual electors enjoy discretion of a constitutional dimension in casting their electoral votes. That understanding is confirmed by Congress's longstanding practice of counting and accepting votes cast by electors for candidates other than those specified by state law or by electors' pledges. Accordingly, and in light of the reasons set out in the petition, amici respectfully submit that the petition should be granted.

REASONS FOR GRANTING THE WRIT

I. This case presents an unusual opportunity for the Court to decide a constitutional question of national importance regarding elections in circumstances that allow for unhurried deliberation and full consideration of the historical record.

This case provides an excellent vehicle for the Court to decide whether states may constrain the votes of federal presidential electors *in advance* of the next presidential election. Because the State of Washington fined these electors, the case presents a live, concrete dispute.

But the election itself is settled. That means the Court can decide this issue in the usual course, with time for full briefing and without the distraction of a charged political environment. The Court should grant review and settle this issue now, for at least four reasons.

First, history teaches that courts, including this Court, are often forced to decide serious constitutional questions at a breakneck pace in post-election disputes. Few tasks are more important for courts than ensuring the legitimacy of democratic elections. But legal challenges that call into question the outcome of an election usually must be decided with great urgency, sometimes in a matter of days.

That was the case, for example, when the 2000 presidential election was disputed. In *Bush* v. *Gore,* 531 U.S. 98 (2000), the petition for writ of certiorari was filed on December 9, 2000; a stay issued the same day; argument was held on December 11; and the decision issued on December 12. *See id.* at 98, 100.[2]

That same urgency marks the Court's prior decisions regarding the selection of presidential electors. The nineteenth-century case of *McPherson* v. *Blacker,* 146 U.S. 1 (1892), in which the Court addressed Michigan's method of selecting electors, was decided in a matter of days. The Court explained in *McPherson* that the application made on October 11 was "granted at once in view of the exigency disclosed upon the face of the papers," and "heard that day." *Id.* at 4. It was decided just six days

[2] Election-related litigation has increased, possibly substantially, since 2000. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 958 (2005) (describing factors that may contribute to this "litigation explosion").

later. *See id.* Half a century later, the Court again expedited proceedings to review Alabama's process for nominating electors in advance of the state's upcoming primary election. *Ray* v. *Blair,* 343 U.S. 214 (1952). *Ray* was granted on March 24, 1952, argued on March 31, and decided in a per curiam ruling on April 3. *See id.* at 216; *see also Ray* v. *Blair*, 343 U.S. 154, 155 (1952) (per curiam). The decision was needed so urgently in advance of the May 6 primary that the Court issued a supplemental opinion several weeks after the ruling. *See* 343 U.S. at 215-16 (noting that the April 3 ruling had stated "summarily our conclusion on the federal constitutional issue").

Likewise, in October 1968 the Court invalidated Ohio laws that made it "virtually impossible" for a new political party to be placed on the ballot for the selection of presidential electors. *Williams* v. *Rhodes*, 393 U.S. 23, 24 (1968). The *Williams* proceedings were so rushed that only one prevailing party, which had immediately sought an interim order from Justice Stewart, was able to obtain relief. Even though the Court decided *Williams* in a matter of weeks, the decision came after the ballots had been printed, and thus too late for the other party to be placed on the ballot. *See id.* at 34-35.

In some circumstances, time is simply too short for the Court to address a pending issue without disrupting an election. In 2004, for example, Justice Stevens was presented with last-minute emergency applications regarding voter-challenge procedures in the battleground state of Ohio. As he explained in his chambers ruling, with "just several hours left before the first voters will make their way to the polls, the plaintiffs have applied to me . . . to enter an order reinstating" injunctions that had been vacated earlier that day by a divided Sixth Circuit. *Spencer*

v. *Pugh*, 543 U.S. 1301, 1302 (2004) (Stevens, J., in chambers) (citing *Summit Cty. Democratic Cent. & Exec. Comm.* v. *Blackwell*, 388 F.3d 547 (6th Cir. 2004)). Justice Stevens denied the applications for "[p]ractical considerations," noting that "the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties' submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested." *Id.*

In yet other cases, the press of time required a single justice to decide who was listed on a ballot, and who was not. *See, e.g., Fishman* v. *Schaffer*, 429 U.S. 1325, 1327 (1976) (Marshall, J., in chambers) (denying petition to place candidate on ballot); *McCarthy* v. *Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers) (granting petition to place independent presidential candidate on Texas ballot).[3]

As these and other decisions confirm, sometimes the Court cannot avoid deciding complex election disputes in expedited proceedings. But doing so is far from ideal. And because this case presents a live dispute separate from a pending election, the Court *can* avoid an expedited, rushed proceeding. If the Court grants this case, it will have the benefit of full briefing from the parties, as well as briefing from amici able to share historical findings, scholarly analysis, and policy perspectives. The Court can

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[3] When election cases are not decided in expedited proceedings, the reverse often happens: cases take years and are decided too late to redress any claimed harm. *See, e.g., Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (deciding moot issue, because it was capable of repetition yet evaded review); *Anderson* v. *Celebrezze*, 460 U.S. 780, 782 (1983) (deciding in 1983 whether John Anderson was entitled to be on the Ohio ballot in the 1980 presidential election).

consider that rich context over a period of months instead of days. This issue, which is central to how Americans choose their elected leader, deserves that full and deliberate review.

Second, by settling the issue in advance of the next election, the Court will ensure that the nation knows the rules *before* any votes are cast. It matters whether presidential electors may exercise discretion when casting their ballots, or whether states may bind their votes and legally enforce that mandate.[4] As it stands now, there is one rule for electors in Washington and another for those in the states of the Tenth Circuit—a situation that is obviously untenable for a presidential election.

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[4] At least thirty states attempt to constrain the votes of presidential electors. *See, e.g.*, Ala. Code 1975 17-14-31(c) (1975); Alaska Stat. Ann. § 15.30.040 (West 1960); Cal. Elec. Code § 6906 (West 1994); Colo. Rev. Stat. Ann. § 1-4-304(5) (West 2001); Conn. Gen. Stat. Ann. § 9-176 (West 1961); Del. Code Ann. tit. 15, § 4303 (West 2019); Fla. Stat. Ann. § 103.021(1) (West 2011); Haw. Rev. Stat. Ann. § 14-28 (West 1981); Me. Rev. Stat. tit. 21-A, § 805(2) (1989); Md. Code. Ann., Elec. Law § 8-505(c) (West 2010); Mass. Gen. Laws Ann. ch. 53, § 8 (West 1990); Mich. Comp. Laws Ann. § 168.47 (West); Minn. Stat. Ann. § 208.43, 46 (West 2015); Miss. Code Ann. § 23-15-771 (West 1987); Mont. Code Ann. § 13-25-304, 307(4) (West 2011); Neb. Rev. Stat. Ann. § 32-713(2), 714 (West 2015); Nev. Rev. Stat. Ann. § 298.065.3, 298.075.2(b)(2) (West 2013); N.M. Stat. Ann. § 1-15-9 (West 1978); N.C. Gen. Stat. § 163A-1231 (West 2017); Ohio Rev. Code Ann. § 3505.40 (West 1969); Okla. Stat. Ann. tit. 26, § 10-102, 109 (West 2013); Or. Rev. Stat. Ann. § 248.355(2) (West 2001); S.C. Code Ann. § 7-19-80 (West 1976); Tenn. Code Ann. § 2-5-104(c) (West 1998); Utah Code Ann. § 20A-13-304(3) (West 1995); Vt. Stat. Ann. tit. 17, § 2732 (West 1979); Va. Code Ann. § 24.2-203 (West 2001); Wash. Rev. Code Ann. § 29A.56.340 (West 2019); Wis. Stat. Ann. § 7.75(2) (West); Wyo. Stat. Ann. § 22-19-108 (West 1973).

A presidential election is far too important for the nation to be left guessing at the rules that will determine the outcome. Indeed, federal courts have frequently held that changing the rules of an election after the fact violates due process. *See, e.g., Roe* v. *State of Ala. By & Through Evans,* 43 F.3d 574, 581 (11th Cir. 1995) (noting that a "post-election departure from previous practice" would implicate "fundamental fairness" and certifying state-law question to state supreme court); *Griffin* v. *Burns,* 570 F.2d 1065, 1078-1079 (1st Cir. 1978) (finding due process violation where secretary of state sanctioned use of certain ballots, including absentee ballots, and state supreme court quashed the ballots after the election); *Hoblock* v. *Albany Cty. Bd. of Elections*, 487 F. Supp. 2d 90, 95-98 (N.D.N.Y. 2006) (finding due process violation where elections board distributed absentee ballots, and after the fact state court ordered ballots not counted); *cf. Ne. Ohio Coal. for Homeless* v. *Husted,* 696 F.3d 580, 597 (6th Cir. 2012) (due process implicated where voters who rely on poll-worker guidance are disenfranchised for voting in wrong precinct).

The votes cast by presidential electors decide who will serve as the president and vice-president of the United States. Whether states may—or may not—place constraints on those votes is a critical issue that should be settled in advance, not after the fact.

Third, there is a substantial likelihood that the issue presented in this case will recur in a future election, with the outcome of a national presidential election at stake. And that could happen soon. The United States is

experiencing the "longest era of highly competitive elections since the Civil War."[5] Every presidential election since 1988 has had a popular vote margin less than 10%—and in two of those elections, the candidate who received the most popular votes lost the Electoral College vote.[6] Before 2000, the last time that happened was in 1888.[7] These close presidential contests sharply increase the odds of a narrow margin in the Electoral College.[8] Indeed, in the contested 2000 election, President George W. Bush received only 271 electoral votes, just one more than the 270 needed to win.[9]

The possibility that electors attempting to exercise discretion in a close race could change the outcome is real. The Tenth Circuit has held that electors may exercise discretion in casting their ballots. *Baca*, 935 F.3d at 955 ("Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion.").

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[5] Geoffrey Skelley, *Are Blowout Presidential Elections a Thing of the Past?*, FiveThirtyEight (May 28, 2019), https://fivethirtyeight.com/features/are-blowout-presidential-elections-a-thing-of-the-past/.

[6] *Id.*

[7] *Id.*

[8] *See, e.g.,* Robert W. Bennett, *Electoral College Reform Ain't Easy*, 101 Nw. U.L. Rev. Colloquy 1, 2-3 (2006) ("[C]lose electoral college elections may well start coming with greater frequency, and . . . the danger of elector faithlessness changing an outcome in a close election is quite real.").

[9] National Archives and Records Administration, U.S. Electoral College, Historical Election Results, https://www.archives.gov/federal-register/electoral-college/scores2.html.

Even before *Baca*, the 2016 election saw a record number of electors who refused to vote for the candidate who won their state's (or district's) popular vote. At least ten electors tried to vote for someone else in 2016 and seven succeeded.[10] In 2000, it would have taken only two electors changing their votes to affect the outcome.[11] Had that happened, this Court would almost certainly have been drawn into that election yet again, this time to make an outcome-dispositive ruling on the actions of those electors and the responses of the states those electors represent.

It is not difficult to draw an electoral map in which the 2020 election is decided by a small number of electoral votes. The 2000 presidential election provides one example. Commentators have suggested others.[12] All it takes

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[10] Kiersten Schmidt and Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, New York Times, Dec. 19, 2016, https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html. Other sources report that 13 electors publicly announced a desire to vote for a different candidate. *See* Alexander Gouzoules, *The 'Faithless Elector' and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. Fla. J.L. & Pub. Policy 215, 236 (2017).

[11] There were reports in 2000 that both presidential campaigns contemplated the possibility of elector "defections" in the event the candidate won the popular vote and lost the Electoral College. *See* 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 (2006) (citing sources from both campaigns).

[12] *See, e.g.,* Richard L. Hasen, *The Coming Reckoning Over the Electoral College*, Slate (Sept. 4, 2019), https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html.

is another close presidential election and a handful of electors attempting to exercise discretion contrary to state law—and this issue will be back in court, with electors insisting on their independence and states insisting that electors follow state law. Those disputes could be litigated in multiple state and federal courts, with split decisions and urgent calls for this Court's review. As with past election disputes, this Court would likely have to decide serious and difficult constitutional questions in a matter of days or weeks. And the case would not just be rushed: it would decide the outcome of a presidential election. Far better to address the issue now, and preemptively avoid what one scholar calls "election meltdown." Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 991 (2005) (advocating that courts "be more willing to entertain pre-election challenges and less willing to entertain post-election challenges").

Fourth, the central issue in this case—whether states have authority to constrain the independent votes of presidential electors—calls for careful, in-depth historical analysis. Amici provide a brief survey of key areas of historical inquiry below. As with other important questions of constitutional interpretation, the Court should consider this rich and nuanced historical record. *See, e.g., Powell* v. *McCormack,* 395 U.S. 486, 522-548 (1969) (analyzing "relevant historical materials" in deciding power of House of Representatives to exclude a duly elected representative); *U.S. Term Limits, Inc.* v. *Thornton,* 514 U.S. 779, 798-819 (1995) (reviewing constitutional history in addressing whether states have power to add qualifications for members of Congress); *Alden* v. *Maine,* 527 U.S. 706,

713-727 (1999) (analyzing historical context of framing and adoption of Eleventh Amendment in deciding scope of state sovereign immunity); *D.C.* v. *Heller,* 554 U.S. 570, 575-619 (2008) (conducting detailed historical review in interpreting Second Amendment). Granting review in this case offers that opportunity.

There is every reason to grant review in this case: it is an issue of national importance; the lower courts have disagreed on a question that could determine the outcome of a presidential election; the parties are represented by experienced counsel; and there are no procedural obstacles to reaching the merits. And there is no reason to wait. Any benefit gleaned from allowing the issue to percolate further is decisively outweighed by the risk of a chaotic election outcome.

II. The Court's analysis of the constitutionality of state-law constraints on federal electors must include consideration of the historical record.

The historical record bearing on the questions raised in the petition is rich and multi-faceted, and the petition affords the Court an ideal opportunity to review that record deliberately and searchingly. Granting the petition will also allow the Court to correct the Washington Supreme Court's flawed historical analysis. As explained below, the political tradition of electors pledging support for candidates based on party affiliations has always existed *against the backdrop of* the largely unchallenged view that states could not direct electors to vote for particular candidates, not *in opposition to* it. The Court should take this opportunity to perform its own historical analysis, rather than leave the Washington Supreme Court's decision

as the final word on the key federal rights and obligations at play here.

From the framing and ratification of the Constitution through the early elections, the ratification of the Twelfth Amendment, the adoption of the Twenty-Third Amendment, and Congress's consistent acceptance and counting of anomalous electoral votes, historical evidence shows that the Framers and every Congress to consider the question understood the Constitution as empowering electors to "vote according to their best judgment and discernment." *Baca*, 935 F.3d at 954. In other words, the fact that "[n]either article II, section 1, nor the Twelfth Amendment addresses electors' discretion," Pet. App. 8a, viewed in its proper historical context, leads to the conclusion that states lack the constitutional power to control how electors use that discretion. The Washington Supreme Court reached the opposite—and incorrect—result in part because it did not thoroughly and accurately account for historical context.

1. Although the Washington Supreme Court acknowledged that the Framers understood electors as independent actors, it gave far too little weight to that history, declining to engage substantively with the meaning and significance of the historical record. *See* Pet. App. 6-7a (quoting The Federalist No. 68 (Alexander Hamilton)); *id.* at 22a. Hamilton recognized that "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations." The Federalist No. 68 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *accord* The Federalist No. 64 (John Jay) (George W. Carey & James McClellan eds., 2001) ("[A]s an assembly of select

electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment."). And the relevant historical context goes beyond the Federalist Papers. As just one example, the Framers were undoubtedly aware of the Maryland Constitution, which explicitly empowered electors, voting according to their "judgment and conscience," to elect state senators. Md. Const. of 1776, Art. XVIII. *See* Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, Cardozo L. Rev. 165, 171-72 (2016); Charles R. King (ed.), *The Life and Correspondence of Rufus King, Vol. VI*, 532-34 (G.P. Putnam, New York 1900) ("in this way the Senate of Maryland is appointed; and it appears . . . Hamilton proposed this very mode of choosing the Electors of the President").

2. While the Washington Supreme Court acknowledged the role the 1800 election played in the development of the Twelfth Amendment, it failed to grasp the nuance of the full historical context. As early as 1789, Hamilton wrote "[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." Harold C. Syrett, and Jacob E. Cooke, eds., 5 The Papers of Alexander Hamilton 248 (Columbia, 1961–1987). Hamilton was referring to the fact that the Constitution empowered each elector to "vote by Ballot for two Persons" without identifying which vote was for president and which was for vice-president. U.S. Const. art. II, § 1.

Hamilton's concern was nearly realized in the election of 1800. Thomas Jefferson and his running mate Aaron Burr defeated John Adams and his running mate Charles Pinckney, but Jefferson and Burr each received 73 electoral 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, e.g.*, James Cheetham, *A View of the Political Conduct of Aaron Burr, Esq. Vice President of the United States*, 43-46 (Denniston & Cheetham, 1802) (claiming that Burr had attempted to recruit Federalist electors from New Jersey and Connecticut to change their votes from Pinckney to him); *see also* Julian P. Boyd, ed., 36 Papers of Thomas Jefferson 82-88 (Princeton, 1950) (describing thwarted effort of Anthony Lispenard, a New York Jefferson-Burr elector, to cast his vote for a third candidate instead of Jefferson, so as to place Burr in the presidency). Had even one elector switched his vote, Burr would have been elected president.

After the 1800 election, members of Congress were focused on preventing the election of the winning ticket's vice presidential candidate as president by the House or by electors from the losing party voting for him. They were also concerned with the possibility of the winning side shifting enough electors' votes to elect the losing ticket's presidential candidate as vice president, as happened in 1796. *See, e.g.*, 13 Annals of Cong. 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"). Critically, Congress could have addressed the 1800 election by cabining electors' discretion to vote for the candidates of their choosing, but chose another avenue.

In 1803, the Eighth Congress crafted the Twelfth Amendment and sent it to the states to prevent electoral gamesmanship by requiring electors to designate their votes for president and vice-president. U.S. Const. amend. XII. (requiring electors to "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each"). The debates in the Eighth Congress reflect that designation was viewed as the appropriate means of preventing the inversion of presidential and vice-presidential candidates either through a House contingent election, *see, e.g.*, 13 Annals of Cong. 209, 421 (1803) (Representative George Campbell stating that designation would "secure to the people the benefits of choosing the President, so as to prevent a contravention of their will [by a House vote, if no majority was achieved] as expressed by Electors chosen by them"), or through tactical electoral voting, *see id.* at 87, 98, 186 (recording statements that, absent designation, tactics like those attempted in prior elections could yield a Federalist vice-president alongside a Republican president). In other words, the Twelfth Amendment, properly viewed against its historical backdrop, accepts as a given the fact that electors can and will vote *independently*, and uses the mechanism of designation to inhibit their ability to vote *tactically*.

Actions that subsequent Congresses considered and rejected confirm that conclusion. For example, in the 1820s Congress considered amendments that would have replaced the House contingent election (in the event that no candidate received a majority of electoral votes) by sending the choice of president and vice-president back to the electors. 41 Annals of Cong. 41, 43-46, 864-66, 1179-81 (1823-1824). The mere fact that such a measure was proposed demonstrates that electors were understood to have discretion when casting their electoral votes, even with the Twelfth Amendment in place. Congress also considered, and rejected, the most direct path to eliminating elector independence—eliminating the office of elector. *See, e.g.,* 8 Reg. Deb. 1964 (1832) (22d Congress, 1st Sess. Statement of Rep. Erastus Root); 9 Reg. Deb. 940-942 (1833) (2d Sess.). The Washington Supreme Court's abbreviated historical analysis omits this key contextual information.

3. Nor did the Washington Supreme Court consider Congress's deliberations on the Twenty-Third Amendment, which provides that the District of Columbia shall appoint electors to "perform such duties as provided by the twelfth article of amendment." U.S. Const. amend. XXIII, § 1. The measure was lightly debated, *see* 106 Cong. Rec. 12553, 12558, 12571, 12850-58 (daily ed. June 14, 1960), and it appears that there was no debate or comment suggesting that the amendment would empower Congress to bind the District's electors. Indeed, the Judiciary Committee report accompanying the resolution that became the Amendment noted that the proposal "follows closely, insofar as it is applicable, the language of article II of the Constitution." H.R. Rep. No. 86-1698, at 4 (1960).

The following year, Congress considered the extent to which the Twenty-Third Amendment empowered it to bind the District's electors, concluding that at most it could require electors to pledge their votes while remaining free to ultimately vote as they please. Accordingly, the resulting enabling legislation requires an elector to swear an oath to vote for her party's candidates and states that it is the elector's "duty to vote in such manner," D.C. Code Ann. § 1-1001.08(g) (West 2017), but imposes no enforcement mechanism or other means of binding electors, reflecting the same understanding of elector independence underlying Article II and the Twelfth Amendment. *See 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) ((statement of 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.").

4. Finally, Congress's consistent practice of counting and accepting anomalous electoral votes powerfully illustrates the longstanding view that state laws do not, and cannot, override the discretion conferred on electors by the Constitution to vote as they choose. Indeed, Congress has counted anomalous elector votes up through the 2016 election, including the votes of the petitioners in this case. *See* 163 Cong. Rec., H186-90 (daily ed. Jan. 6, 2017) (reflecting three electoral votes from Washington for Colin Powell, among other anomalous votes). Meanwhile, Congress has not hesitated to debate the legitimacy of elector votes on other grounds. *See, e.g.*, 11 Cong. Rec. 1372, 1386-

88 (1881) (46th Cong., 3d Sess.) (debating whether to accept the votes of Georgia's electors, where governor, invoking a Georgia statute, instructed electors to vote one week after date set by federal law); Cong. Globe, 34th Cong., 3d Sess. 644-660, 662-668 (1857) (debating whether to accept Wisconsin's electoral votes after they were cast one day late due to a blizzard); *see generally* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1654, 1679-92 (2002) (summarizing Congressional debates over electoral votes).

Tellingly, the one time Congress even debated the question of whether to accept an anomalous electoral vote cast for a living person,[13] it decisively adhered to past practice and counted the vote. In 1968 an elector from North Carolina cast his vote for George Wallace and Curtis LeMay rather than Richard Nixon and Spiro Agnew. A member of each chamber filed a formal objection, arguing the Twelfth Amendment constitutionalized an obligation for electors to vote according to the popular vote. 115 Cong. Rec. 146 (daily ed. 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. The Washington Supreme Court's passing acknowledgement that "there have been instances where an elector voted for another candidate," Pet. App. 8a, overlooks the historical significance of Congress's longstanding acceptance of anomalous electoral votes.

* * * *

[13] In 1873, Congress debated whether to accept votes for Horace Greeley, who had died after the 1872 election, and decided not to count them. Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. at 1687.

The unique American tradition of selecting presidential electors is embedded in our constitutional history. That history confirms that electors were intended to, and do, have discretion in casting their ballots for president and vice-president. The Court should grant review in this case to address this question and decide it in a context that allows ample time for analysis of the historical record.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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