NOS. 19-465, 19-518

IN THE

# Supreme Court of the United States

PETER B. CHIAFALO, LEVI JENNETT GUERRA, and ESTHER VIRGINIA JOHN,
*Petitioners*,

*v.*

STATE OF WASHINGTON,
*Respondent.*

COLORADO DEPARTMENT OF STATE,
*Petitioner,*

*v.*

MICHAEL 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

## *AMICUS CURIAE* BRIEF OF CITIZENS FOR SELF-GOVERNANCE IN SUPPORT OF THE PRESIDENTIAL ELECTORS

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## INTEREST OF *AMICUS CURIAE*[1]

Citizens for Self-Governance (CSG) is a non-profit Texas corporation founded in 2012 to empower citizens through education, including education on the Constitution's amendment process. CSG promotes the idea that citizens should take an active role in their own government and seeks to give citizens the tools to do so.

While educating citizens on the amendment process, CSG has learned that there is considerable ignorance and uncertainty about that process. For example, most Americans are unaware of the nature and scope of authority exercised by a commissioner (delegate) to an Article V convention for proposing amendments.

Contributing substantially to this brief was Robert G. Natelson, Professor of Law (ret.) at the University of Montana and a prominent legal scholar and constitutional historian whose published research has been relied on by the highest courts of fifteen states, by justices of the U.S. Supreme Court in six cases, and by Justice (then Judge) Gorsuch in *Kerr v. Hickenlooper*, 754 F.3d 1156, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting).

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[1] Counsel of record to the parties have filed blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party pursuant to Sup. Ct. Rule 37.3(a). No counsel to any party authored this brief in whole or in part, nor has any party or counsel to a party made a monetary contribution funding the preparation of this brief.

## SUMMARY OF ARGUMENT

This case involves the scope of a presidential elector's authority: When exercising the "federal functions" of electing a president and vice president, does an elector have constitutional authority to exercise his or her best judgment? Or may state law reduce the scope of that authority by requiring that the elector vote for designated candidates?

By their terms, both the original Constitution and the Twelfth Amendment grant presidential electors authority to exercise their best judgment, irrespective of any conditions precedent required by state law before their election. Whether or not this Court so concludes, however, the Court should limit its holding to presidential electors and clarify explicitly that the holding does not apply to persons and entities executing other "federal functions," such as state legislators exercising their powers under Article V to ratify constitutional amendments or to instruct their commissioners to a convention for proposing amendments.

There are two reasons for limiting the Court's holding. First, the Court should avoid destabilizing judicial and historical precedent fixing the scope of authority of persons and entities exercising other federal functions. Second, explicitly limiting the holding to presidential electors will forestall public confusion about the scope of authority inherent in different functions.

## ARGUMENT

### I. Presidential electors are not officers of the federal government, but they do exercise "federal functions".

*Leser v. Garnett*, 258 U.S. 130 (1922) addressed the power of a state legislature to ratify a constitutional amendment in accordance with U.S. Const. art. V. *Leser* was the first case in which this Court applied the term "federal function" to a responsibility vested by the Constitution in a person or entity other than a federal officer or agency—in that case, a state legislature. 258 U.S. at 137.

Like state legislators ratifying a constitutional amendment, presidential electors are not officers of the federal government. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890).[2] *Burroughs v. United States*, 290 U.S. 534, 545 (1934). However, presidential electors do "exercise federal functions under, and discharge duties in virtue of authority conferred by the Constitution of the United States." *Burroughs*, 290 U.S. at 545. Thus, electors, like other persons and entities exercising federal functions, do not derive their authority from state powers reserved by the Tenth Amendment. *United States v. Sprague*, 282 U.S. 716 (1931) (holding the Tenth Amendment inapplicable to a federal function); *United States v. Thibault*, 47 F.2d 169 (2d. Cir. 1931). *See McPherson v. Blacker*, 146 U.S. 1 (1892) (holding that electors receive their power directly from the Constitution).

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[2] A headnote to the case in Supreme Court Reporter, 10 Sup. Ct. 586, describes presidential electors as *state* officers, but the court's opinion does not support that conclusion.

## II. The nature and scope of federal functions exercised by actors outside the federal government vary considerably.

Presidential electors and state legislators ratifying amendments exemplify two of a wider range of federal functions the Constitution confers on persons and entities outside the federal government. The scope and nature of these federal functions varies considerably.

Some federal functions are electoral in nature, cf. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2667-68 (2015) (so denominating them) because the Constitution grants designated actors power to elect federal officials. Presidential electors exercise electoral functions when they vote for president and vice president. U.S. Const. art. II, § 1, cl. 3. States exercise an electoral federal function when they choose their electors in the manner their legislatures direct. U.S. Const. art. II, § 1, cl. 2. Before ratification of the Seventeenth Amendment, state legislatures exercised an electoral function when they chose United States Senators. U.S. Const., art. I, § 3, cl. 1.

The Constitution, both as originally written and as subsequently amended, grants state governors an *appointive* function. *Arizona State Legislature*, 135 S. Ct. at 2668 n.17 (distinguishing federal electoral, appointive, consenting, and lawmaking functions). Before ratification of the Seventeenth Amendment, governors enjoyed direct authority to make vacancy appointments to the Senate. U.S. Const. art. I, § 3,

cl. 2. Under the Seventeenth Amendment, if authorized by a state legislature, governors still make vacancy appointments to the Senate. U.S. Const., amend. XVII, cl. 2.

Other federal functions involve *state lawmaking*. Thus, the Elections Clause, U.S. Const. art. I, § 4, grants authority to state legislatures to regulate the times, places, and manner of congressional elections. Because this is a lawmaking function, the Constitution's grant of authority is not to state legislatures alone, but to the entire legislative apparatus of each state. This apparatus encompasses, where applicable, initiative and referendum procedures, *Arizona State Legislature*, 135 Sup. Ct. at 2667-68, and signature by the governor. *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (Elections Clause regulations require the governor's signature because "these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this . . . involves lawmaking in its essential features and most important aspect."). The Constitution also grants (subject to some exceptions) lawmaking authority to state legislatures to regulate state choice of presidential electors. U.S. Const., art. II, § 1 cl. 2; *U.S. Term Limits v. Thornton*, 514 U.S. 779, 806 (1995) ("[an] express delegation[] of power to the States to act with respect to federal elections.").

In addition, the Constitution grants state governors some *administrative* federal functions—specifically authority to issue writs of election to fill vacancies in the House of Representatives,

U.S. Const. art. I, § 2, cl. 4, and in the Senate. U.S. Const. amend. XVII, cl. 2.

Finally, Article V, which lays out the Constitution's amendment procedure, confers several federal functions on non-federal entities. Article V empowers a federal convention to formally propose constitutional amendments for state consideration. U.S. Const. art. V. [3] Article V empowers state legislatures and state conventions to ratify amendments by executing "consent functions." *Arizona State Legislature*, 135 Sup. Ct. 2667-68 (distinguishing the federal function of making election laws from the function of consenting to, and therefore ratifying, a proposed amendment). The same Article further authorizes state legislatures to require Congress to call an amendments convention. U.S. Const. art. V.

In Article V, "what is reasonably implied is as much a part of it as what is expressed." *Dillon v. Gloss*, 256 U.S. 368, 373 (1921) (holding that Congress has power to limit time for ratification as

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[3] Although the Constitution gives this conclave a specific name—"Convention for proposing Amendments," U.S. Const. art. V—some persist in referring to it as a "constitutional convention." This is a misnomer that deceives more than it enlightens, because Article V does not grant the convention power to write a new constitution. Article V grants the convention only the power "propose Amendments *to this Constitution*" (italics added). Id.

The Convention for proposing amendments is one of three kinds of conventions authorized by the Constitution. The others are state conventions to ratify the constitution, id., art. VII, and state conventions to ratify amendments, id. art. V.

incidental to its selection of a mode of ratification). Thus, in addition to the functions stated expressly, Article V grants incidental authority.

The incidental powers in Article V arise in the same way incidental powers arise in other parts of the Constitution: by custom and necessity. Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause* in Gary Lawson, Geoffrey R. Miller, Robert G. Natelson & Guy I. Seidman, *The Origins of the Necessary and Proper Clause* 60-68 (2010). Examples of Article V incidental powers are the authority of a legislature serving an Article V function to establish its own rules for ratification of a proposed amendment or the authority of a convention to set its own rules for proposal of an amendment. *Dyer v. Blair*, 390 F. Supp. 1291, 1307-08 (N.D. Ill. 1975) (opinion by future Justice John Paul Stevens). Another illustration is the power of a state legislature, if Congress selects the convention mode of ratification, to authorize and constitute a ratifying convention for that state. *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); *In re Opinion of the Justices*, 107 A. 673 (Me. 1919); *In re Opinion of the Justices*, 167 A. 176 (Me. 1933); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933).

A convention for proposing amendments is a "convention of the states." *Smith v. Union Bank*, 30 U.S. 518, 528 (1831); *State of Tennessee v. Foreman*, 16 Tenn. 256, 304 (1835)—a characterization thoroughly supported by the Founding Era record.[4]

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[4] Robert G. Natelson, *Is the Constitution's Convention for*

That means it is a meeting of state delegations consisting of "commissioners" chosen and instructed by the states sending them. *See generally* Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla. L. Rev. 615 (2013); Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process,* 78 Tenn. L. Rev. 693 (2011).

Accordingly, the calling of a convention for proposing amendments confers on state legislatures the incidental federal functions of deciding how their states' commissioners are selected and instructed.

## III. Elector discretion is within the scope of elector authority; however, the scope of authority of others exercising federal functions differs with each function.

In federal function cases, a frequent issue is the scope of authority of the person or entity exercising the function. The issue of whether presidential electors may exercise discretion is essentially one of the scope of their authority: Do they have the constitutional prerogative of exercising their best judgment? Or may state law circumscribe—or even abolish—that prerogative?

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*Proposing Amendments a "Mystery"? Overlooked Evidence in the Narrative of Uncertainty* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516847 (collecting documentation).

Amicus believes the record is clear: According to the meaning of both the original Constitution and the Twelfth Amendment, presidential electors have authority to exercise their best judgment. This is so irrespective of any conditions imposed by state law before or after their election. Indeed, electors have a *constitutional obligation* to exercise their best judgment. *See* Brief of *Amicus* Independence Institute in Support of the Presidential Electors, U.S. Supreme Court (outlining the historical record in detail).

However, rules applicable to presidential electors do not necessarily apply to other federal functions.[5]

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[5] Although this brief focuses on those actors not part of the U.S. government, when exercising its Article V federal function Congress also operates as a free-standing assembly rather than as a legislature. *In re Opinion of the Justices*, 107 A. 673, 674 (Me. 1919) ("Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting on behalf of and as the representative of the people of the United States under the power expressly conferred by article 5."); *State of Idaho v. Freeman*, 529 F. Supp. 1107, 1127-28 (D. Id. 1981), judgment vacated as moot in *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982) (stating that when acting in the amendment process Congress is not acting pursuant to its Article I legislative powers).

Just as the courts have regulated the scope of authority of non-federal persons and entities exercising federal functions, so have they regulated the scope of authority of Congress when exercising its amendment functions. *Hollingsworth v. Virginia*, 3. U.S. 378 (1798) (Congress may propose a constitutional amendment without presentment to the president); *United States v. Sprague*, 282 U.S. 716 (1931) (Congress has the sole discretion to choose a mode of ratification); *State of Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), judgment vacated

This is because federal functions vary substantially, and their purposes and contexts are different. The courts recognize this variation by treating each on its own terms.

For each federal function, the courts deduce an actor's scope of authority from the Constitution's text, the nature of the function, and the historical background. *E.g.*, *Hawke v. Smith*, 253 U.S. 221 (1920) (examining the historical use of the word "legislature" in Article V); *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931) (relying on long acquiescence to the practice of proposing and ratifying constitutional amendments); *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that the governor's signature is necessary to regulations under the Elections Clause because of their legislative nature and long acquiescence); *Ray v. Blair,* 343 U.S. 214 (1952) (defining the scope of the state power to determine mode of choosing electors); *Bush v. Gore*, 531 U.S. 98 (2000) (limiting the state power to determine mode of choosing electors).[6]

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as moot in *National Organization for Women, Inc.* 459 U.S. (Congress may not extend an initial time limit in a constitutional amendment by simple majorities in each house).

[6] *See* also *Leser v. Garnett*, 258 U.S. 130 (1922); *Walker v. Dunn*, 498 S.W.2d 102 (1972); *Trombetta v. State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973); and *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (all holding that a legislature is free to ignore various state constitutional rules when ratifying an amendment).

In the case of *electoral* functions, wide discretion is appropriate: If a chosen candidate meets constitutional qualifications, no outside court or legislative body should dictate whom an elector or appointing authority should select. Thus, before the adoption of the Seventeenth Amendment, state legislatures were free to choose the Senators they wished. Similarly, presidential electors should be free to vote for the candidates of their choice.

However, electors' authority is not unlimited: It is restricted to voting for president and vice president. If electors tried, for example, to send a constitutional amendment to the states for ratification, that action would be *ultra vires*. *See Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) ("The 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.").

When a state exercises its *lawmaking* function under the Election Clause, its scope of authority is constrained by the fact that Congress may override state regulations. U.S. Const. art. I, § 4. It is further constrained by constitutional rules prohibiting certain regulations. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (holding that state legislatures acting under the Elections Clause could not add qualifications for members of Congress beyond those listed in the Constitution).

A governor's *administrative* function in issuing writs of election to fill congressional vacancies is also limited. In the usual case, issuing such a writ is

mandatory, and refusing to do so is outside the governor's scope of authority. *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970); *American Civil Liberties Union v. Taft*, 385 F.3d 641 (6th Cir. 2004); *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010). Similarly, a governor's appointive function of filling Senate vacancies is controlled in part by state law. *Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D. N.Y. 1968), affirmed, 393 U.S. 405 (1969); *Tedards v. Ducey*, 398 F. Supp. 3d 529 (D. Ariz. 2019).

Article V creates a series of federal functions. *See* U.S. Const. art. V. The scope of authority of an entity proceeding under Article V may differ from the scope of authority in other federal functions. By way of illustration, a state legislature acting under the Elections Clause *may not* adopt regulations without the governor's signature (if required by the state constitution). But a state legislature *may* undertake its Article V functions without gubernatorial approval. *Opinion of the Justices to the Senate*, 366 N.E. 2d 1226 (Mass. 1977); cf. *Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (when Congress proposes an amendment the president's signature is not necessary).

Moreover, the scope of authority accorded an Article V actor differs with the specific Article V function being executed. Sometimes the actor has very broad discretion. A state legislature considering whether to apply for a convention to propose amendments has unfettered discretion as to whether to apply and for what amendments to apply. Lawmakers cannot be coerced by voter initiatives or

otherwise. *American Federation of Labor-Congress of Industrial Organizations v. Eu*, 686 P.2d 609 (Cal. 1984).[7] State legislatures are similarly free to ratify, or refuse to ratify constitutional amendments. *Hawke v. Smith*, 253 U.S. 221 (1920). [8] State legislatures may sponsor advisory referenda, *Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628 (Cal. 2016), but are, of course, limited to ratifying amendments that are duly proposed.

State legislatures also are free to rescind ratifications before three fourths of the states have ratified. *State of Idaho v. Freeman*, 529 F. Supp. 1107, 1150 (D. Idaho 1981), judgment vacated as moot, *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982). They are free to rescind applications for a convention before two thirds of the states have applied. *Padilla*, 363 P.3d at 779 (citing *Fletcher v. Peck*, 10 U.S. 87, 135 (1810): "What the Legislature has enacted, it may repeal.")

On the other hand, state legislatures are not free to exercise their federal functions in ways prohibited by the constitutional text or by the understanding of

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[7] Other cases standing for the same proposition include *State of Montana ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *In re* Initiative Petition 364, 930 P.2d 186 (Okla. 1996); Opinion of the Justices, 673 A.2d 693 (Me. 1996); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).

[8] Other cases standing for the same proposition include *Leser v. Garnett*, 258 U.S. 130 (1922) and *Decher v. Vaughan*, 177 N.W. 388, 391 (1920).

history. Thus, a state legislature authorizing a ratifying convention must provide for delegate-selection by district rather than at large. *In re Opinion of the Justices*, 167 A. 176 (Me. 1933). Nor may a legislature yield its power to establish a ratifying convention to a popular referendum. *In re Opinion of the Justices*, 107 A. 673 (Me. 1919); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933). *See also In re Opinions of the Justices*, 172 S.E. 474 (N.C. 1933) (discussing the scope of a legislature's authority to constitute a ratifying convention).

More constrained than a state legislature operating under Article V is the convention for proposing amendments. According to the uniform history of similar "conventions of the states," an amendments convention is limited by the scope of its call and its commissioners are subject to state legislative instruction. Natelson, *Founding-Era Conventions*, *supra*. Moreover, a convention for proposing amendments has only proposal power; other actions would be *ultra vires*.

The scope of authority of delegates to a ratifying convention is structured differently yet: They are limited to the purposes of their call (an up-or-down vote on the proposed amendment) but within that limit they are free to exercise discretion. *In re Opinion of the Justices*, 167 A. 176, 180 (Me. 1933) ("The convention must be free to exercise the essential and characteristic function of rational deliberation.")

Whatever the function, the scope of authority under implied powers is limited to prevent the powers of any one person or entity from defeating or impairing the constitutional functions of other actors.[9] For example, fixing the time and place of meeting is incidental to Congress's power to call an amendments convention. Natelson, *Founding-Era Conventions, supra*, 65 Fla. L. Rev. at 629. Allowing Congress to dictate rules and other procedures to the convention, as some have suggested, [10] would undercut the convention's intended role as a way to bypass Congress, Natelson, *Rules*, *supra*, 78 Tenn. L. Rev. at 699-700, and would violate the convention's incidental power to determine such matters for itself. *Cf. Dyer v. Blair*, 390 F. Supp. 1291, 1307-08 (N.D. Ill. 1975) (opinion by future Justice John Paul Stevens) (convention may establish its own rules).

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[9] Thus, in *Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628 (Cal. 2016), the California Supreme Court held that a state legislature acting under Article V enjoys an incidental power to investigate, but that

> [T]he investigative power is not unlimited. While the Legislature's powers and functions are extensive . . . they must share space with powers reserved to the executive and judicial branches. Although the Legislature's activities can overlap with the functions of other branches to an extent, the Legislature may not use its powers to "defeat or materially impair" the exercise of its fellow branches' constitutional functions, nor "intrude upon a core zone" of another branch's authority."

*Id.* at 634.

[10] E.g., Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L. J. 957, 959, 964 (1963).

**IV. The distinctions in scope of authority among different federal functions justify the Court distinguishing its presidential elector holding from other federal functions.**

As explained above, federal functions differ, and the scope of authority of those exercising them differs. An extensive body of judicial and historical precedent helps determine the boundaries in each case.

Whatever decision the Court reaches on the authority of presidential electors, the Court should clarify that its holding applies only to them. A decision or opinion that can be interpreted as applying to other federal functions may produce uncertainty in the law and cause public confusion with regard to those other functions.

For example, an opinion concluding that electors must vote as their state dictates should not be written so broadly as to encourage claims that the state legislative ratifying function can be controlled by a popular referendum. *Cf. Hawke v. Smith*, 253 U.S. 221 (1920) (holding that state ratification depends on action by the state legislature and cannot be subject to referendum). Similarly, a holding that electors may vote according to their conscience should not create the impression that commissioners representing state legislatures in an amendments convention—or delegates in ratifying conventions—may disregard established limits on their authority and wander whithersoever they wish.

Thus, to avoid unsettling established precedent or confusing the public, the Court should clarify that its holding applies only to the Electoral College, and not to other persons or entities exercising federal functions.

## Conclusion

The Court should carefully limit its holding to presidential electors, clarifying that the decision is not applicable to others performing federal functions.

Respectfully submitted,

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