

Nos. 19-465, 19-518

IN THE
Supreme Court of the United States

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

v.

STATE OF WASHINGTON,
Respondent.

COLORADO DEPARTMENT OF STATE,
Petitioner,

v.

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

BRIEF OF *AMICUS CURIAE*
MAKING EVERY VOTE COUNT FOUNDATION
IN SUPPORT OF NEITHER SIDE

Reed E. Hundt
Thea A. Cohen
MAKING EVERY VOTE
COUNT FOUNDATION
6416 Brookside Drive
Chevy Chase, MD 20815
(202) 494-4111

Jerrold J. Ganzfried
Counsel of Record
GANZFRIED LAW
5335 Wisconsin Avenue, NW
Suite 440
Washington, DC 20015
JJG@ganzfriedlaw.com
(202) 486-2004

Counsel for Amicus Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. No matter how this Court rules on the existence and scope of discretion presidential electors may exercise, States and political parties will need to revisit their systems of selecting and appointing electors.	4
II. Practical issues with the fair, efficient operation of the process should be understood against the backdrop of modern presidential election reality affecting the relationship between the popular vote and electoral votes.....	9
III. States should consider a proposed ballot form that enhances each voter’s control over how each vote cast is counted toward the State’s popular vote and the State’s electoral votes.	12
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Constitution	
U.S. Const. Art. II §1(3)	7
Statutes	
Ala. Code § 17-14-31.....	5
Alaska Stat. § 15.30.090	5
Az. Stat. § 16-212(C)	5
Cal. Elec. Code § 6906.....	5
Colo. Rev. Stat. § 1-4-304.....	5
Conn. Gen. Stat. § 9-176	5
D.C. Code § 1-1001.08(g).....	5
Del. Code Ann. tit. 15, § 4303(b).....	5
Fla. Stat. § 103.021(1).....	5
Haw. Rev. Stat. § 14-28.....	5
Ind. Code §§ 3-10-4-17,3-10-4-9	5
Mass. Gen. Laws ch. 53, § 8.....	5
Md. Code Ann., Elec. Law § 8-505.....	5
Me. Stat. tit. 21-A, § 805(2).....	5

Mich. Comp. Laws § 168.47	5
Minn. Stat. § 208.46	5
Miss. Code Ann. § 23-15-785.....	5
Mont. Code Ann. § 13-25-307.....	5
N.C. Gen Stat. § 163-212.....	5, 6
N.M. Stat. Ann. § 1-15-9	6
Neb. Rev. Stat. § 32-714.....	5
Nev. Rev. Stat. § 298.075	5
Ohio Rev. Code § 3505.40.....	5
Okla. Stat. tit. 26, §§ 10-102, 10-108-09	5, 6
Or. Rev. Stat. § 248.355(2)	5
S.C. Code Ann. § 7-19-80.....	6
Tenn. Code Ann. § 2-15-104(c)	5
Utah Code Ann. § 20A-13-304(3)	5
Va. Code Ann. § 24.2-203	5
Vt. Stat. Ann. tit 17, § 2732	5
Wa. S.B. 5074 (2019), § 7	5
Wis. Stat. § 7.75(2)	5
Wyo. Stat. Ann. § 22-19-108	5

Other Authorities

Fairvote, *Faithless Elector State Laws* 5

MEVC, *New MEVC Poll: Americans
Want The “National Choice Ballot”* 11, 15

National Archives, *Electoral College
Results* 11

National Archives, *2000 Electoral
College Results* 10

National Conference of State Legisla-
tures, *2020 Legislative Session
Calendar* 6

INTEREST OF *AMICUS CURIAE*¹

The Making Every Vote Count Foundation (“MEVC”) is a 501(c)(3) nonprofit, nonpartisan organization. See <https://www.makingeveryvotecount.com/>. Its bipartisan board of businesspersons and lawyers includes individuals who served in all presidential administrations from Ronald Reagan to Barack Obama. MEVC supports research and civic education on the presidential election process. Its work focuses specifically on the differential impacts of the current electoral system and the national popular vote.

These cases implicate vital functions at the intersection of the popular vote and the Electoral College that fall directly within MEVC’s mission. Because MEVC has conducted studies and collected data on the real-world ramifications of the issues, its views may be helpful to the Court’s deliberations. Consistent with its nonpartisan role, MEVC supports neither side in this litigation. Its amicus brief is designed to assist the Court in fashioning effective guidance for the States’ implementation of the constitutional standards that will govern this Court’s decision. The brief is offered in support of fair, orderly presidential elections that reflect the will of all voters in our great democracy.

¹ Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for petitioners and counsel for respondents in these consolidated cases have filed blanket consents to the filing of all timely amicus briefs.

SUMMARY OF ARGUMENT

Baca and *Chiafalo* place under the microscope one of the most sensitive strands of our national DNA: the presidential election process. Even the slightest adjustment will have a cascading effect on the body politic. For generations.

That will be true however this Court resolves the disputes among the parties on the questions presented. And the pendency of an ongoing presidential race will amplify the practical impact and immediacy of the Court's decision. States, political parties, candidates and voters will have scant time to accommodate themselves to this Court's directives. That effort should begin now.

It is therefore prudent – imperative even – for this Court's consideration of the issues to be informed by a keen understanding of the existing process, of the States' readiness to implement any steps necessary to comply with the constitutional standards this Court enunciates, and of empirical data on preferences for how best to respect voter choice in the outcome of the electoral process.

It is equally prudent – and imperative – for the Court's decision to address more than the particular factual contexts in which these cases arise. Only by guiding the States, political parties, candidates and voters on the vital practical issues they will face can the Court promote an enduring regularity in the presidential election process.

Absent that guidance the prospect looms that this Court will be called on to assess the constitutional compliance of every action affecting the process. By every State. Every election.

Since MEVC's work and research focus on issues that will be directly affected by the rulings in this case, this amicus brief suggests ways in which this Court can facilitate the successful implementation of the controlling constitutional standards. In particular, MEVC commissioned Cluster Consulting to conduct a national survey on voter attitudes about the presidential election process, the national popular vote and the role of electors. That study provides useful data for the Court to consider in deciding these cases and for States to understand in fashioning laws and procedures that comply with this Court's determinations. The data may also be useful for officials to appreciate when selecting and appointing electors, and when casting electoral votes.

Consistent with the results of its national polling, MEVC has developed a ballot form that reflects a broad consensus on how the presidential election process should function. MEVC's ballot form would give each voter, in each presidential election, greater control over how each vote is counted in the popular vote and in selecting electors for each State's electoral votes. This proposal has received an overwhelmingly favorable response among Republicans, Independents and Democrats. It requires no Constitutional amendment. And it could be considered by States in implementing whatever decision the Court reaches in *Baca* and *Chiafalo*.

ARGUMENT

I. No matter how this Court rules on the existence and scope of discretion presidential electors may exercise, States and political parties will need to revisit their systems of selecting and appointing electors.

The 2020 presidential election will be held within a few months of the Court's decision in these cases. Given the broad variations among the States in how members of the Electoral College are selected and perform their Constitutional function, many States may be compelled – or choose – to change their laws following this Court's ruling. Among the key points to highlight:

- The vast majority of States – more than forty, accounting for at least 477 electoral votes – do not identify on their popular-vote ballots the names of potential electors pledged to each candidate.²

² Our review of state ballot forms shows that, at a minimum, the following States and the District of Columbia do not identify proposed electors on their presidential ballots: Alabama (9 electoral votes), Alaska (3), California (55), Colorado (9), Connecticut (7), Delaware (3), District of Columbia (3), Florida (29), Georgia (16), Hawaii (4), Illinois (20), Indiana (11), Iowa (6), Kansas (6), Kentucky (8), Maine (4), Maryland (10), Massachusetts (11), Michigan (16), Minnesota (10), Mississippi (6), Missouri (10), Montana (3), Nebraska (5), Nevada (6), New Hampshire (4), New Jersey (14), New Mexico (5), New York (29), North Carolina (15), Ohio (18), Pennsylvania (20), Rhode Island (4), Tennessee (11), Texas (38), Utah (6), Vermont (3), Virginia (13), Washington (12), West Virginia (5) and Wisconsin (10).

- Sixteen States and the District of Columbia accept electoral votes as cast, with no mechanism to prevent nonconforming votes³ or to penalize the electors who submitted them.⁴
- Fourteen States have laws authorizing the cancellation of nonconforming votes and replacement of the original elector with one who will cast a conforming vote.⁵

³ We use the term “nonconforming” for any electoral ballot naming someone other than the candidate for whom that elector pledged to vote (typically the candidate who won the plurality of popular votes cast in the state). Others describe such votes with terms like “faithless electors,” “protest electors,” “conscience electors,” etc., but we have opted in this brief for language that is less judgmental, pro or con.

⁴ Alabama, Ala. Code § 17-14-31; Alaska, Alaska Stat. § 15.30.090; Connecticut, Conn. Gen. Stat. § 9-176; Delaware, Del. Code Ann. tit. 15, § 4303(b); District of Columbia, D.C. Code § 1-1001.08(g); Florida, Fla. Stat. § 103.021(1); Hawaii, Haw. Rev. Stat. § 14-28; Maryland, Md. Code Ann., Elec. Law § 8-505; Massachusetts, Mass. Gen. Laws ch. 53, § 8; Mississippi, Miss. Code Ann. § 23-15-785; Ohio, Ohio Rev. Code § 3505.40; Oregon, Or. Rev. Stat. § 248.355(2); Tennessee, Tenn. Code Ann. § 2-15-104(c); Vermont, Vt. Stat. Ann. tit 17, § 2732; Virginia, Va. Code Ann. § 24.2-203; Wisconsin, Wis. Stat. § 7.75(2); Wyoming, Wyo. Stat. Ann. § 22-19-108. See FairVote, *Faithless Elector State Laws*, https://www.fairvote.org/faithless_elector_state_laws.

⁵ Arizona, Az. Stat. § 16-212(C); California, Cal. Elec. Code § 6906; Colorado, Colo. Rev. Stat. § 1-4-304; Indiana, Ind. Code §§ 3-10-4-17, 3-10-4-9; Maine, Me. Stat. tit. 21-A, § 805(2); Michigan, Mich. Comp. Laws § 168.47; Minnesota, Minn. Stat. § 208.46; Montana, Mont. Code Ann. § 13-25-307; Nebraska, Neb. Rev. Stat. § 32-714; Nevada, Nev. Rev. Stat. § 298.075; North Carolina, N.C. Gen Stat. § 163-212; Oklahoma, Okla. Stat. tit. 26, §§ 10-102, 10-108; Utah, Utah Code Ann. § 20A-13-304(3); Washington, 2019 Wa. S.B. 5074, § 7 (enacted April 26, 2019)

- Two States count nonconforming votes as cast, but provide for a penalty to be imposed on the nonconforming elector.⁶
- The legislatures of thirty-nine States are not scheduled to be in session between July 1, 2020 and election day, November 3, 2020.⁷

Since this Court’s resolution of the questions presented in these cases may stimulate – or even require – legislative action in many states, the narrow post-decision/pre-election window poses a serious risk of disorder. And that risk will exist no matter what this Court rules.

Suppose the Court determines, for example, that electors have unfettered discretion to vote for whom-ever they choose, that states are obligated to count those ballots, and that states are barred from replacing or penalizing electors who cast nonconforming

(law amended since 2016 election at issue in *Chiafalo* case). See FairVote, *Faithless Elector State Laws*, https://www.fairvote.org/faithless_elector_state_laws. Of these, two states (Oklahoma and North Carolina) permit penalties to be imposed later on the original electors who sought to cast nonconforming votes. See N.C. Gen Stat. § 163-212; Okla. Stat. tit. 26, § 10-109.

⁶ New Mexico, N.M. Stat. Ann. § 1-15-9; South Carolina, S.C. Code Ann. § 7-19-80.

⁷ Only California, Illinois, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, and the District of Columbia have regular sessions of their legislatures scheduled between July 1 and the end of the year. See National Conference of State Legislatures, *2020 Legislative Session Calendar*, https://www.ncsl.org/Portals/1/Documents/NCSL/2020_session_calendar1.pdf. The 2020 legislative sessions of the two States that are parties to these consolidated cases – Washington and Colorado – end on March 12 and May 7, respectively. *Id.*

votes. The laws in many states would quickly have to be amended. Not only that. States would also have powerful reasons to consider whether their ballot forms should be redesigned to provide all voters the names of prospective presidential electors. Political parties (state and national) would reassess their processes for nominating electors. And all changes would have to be implemented by the deadline for finalizing 2020 ballot forms.

Or suppose the Court determines that States can – or must – replace any elector seeking to cast a nonconforming vote. Some States may be required to amend their laws; others would have a strong incentive to make changes; and all would be prudent to reassess.

This uncertainty will play out in the run-up to the general election and continue through the months-long process of Electoral College balloting and final tally before the Senate and House of Representatives in joint session. *See* U.S. Const. Art. II §1(3). To minimize the risk inherent in a disorderly process, the Court should offer guidance that will help the States establish procedures that are constitutionally compliant, transparent and readily implemented.

Unless the Court provides instructive guidance to the States, they will have to act in great haste to answer crucial questions remaining after these cases are decided. A few examples expose the scope and gravity of the task confronting the States:

- Even if the Court rules that States cannot constrain the exercise of discretion by electors to vote as they please, are States also barred from imposing constraints on *political parties* in *their* selection and nomination of prospective

electors? Could *political parties* require and enforce pledges from prospective electors? Could States require (or permit) political parties to obtain promises from electors before they are nominated, and to enforce those promises before electoral ballots are cast?

- Could States conceal the names of electors on the ballot or does the Constitution require all electors to be identified on the popular vote ballot?
- Could States keep off the ballot a slate of independent electors who are neither proposed by a political party nor pledged to any candidate, but who seek votes in order to use their judgment and discretion in casting electoral votes?
- Could States place limits on expenditures or lobbying activities designed to influence electors, or to influence political parties in their selection of prospective electors?
- Could States require electors to express an intent to vote in a certain way? Could States require – or are they barred from requiring or permitting – political parties to obtain pledges, available to the public, from all prospective electors?

The dangers of a disorderly process are multiple: foreign enemies can take advantage of an unsettled interregnum to foment discord or advance other nefarious goals; division and disharmony can lead an unsettled polity to disaffection and even disruption; important social problems can go unaddressed; and this Court can be asked to intervene – on an expedited basis in frenzied times – in matters it believes belong

exclusively in the political arena. Most importantly, democracy is jeopardized when the mechanics of an election don't work smoothly, efficiently and fairly.

II. Practical issues with the fair, efficient operation of the process should be understood against the backdrop of modern presidential election reality affecting the relationship between the popular vote and electoral votes.

In deciding these cases and guiding the States' implementation of constitutional standards, the Court should be mindful that current demographics and recent history suggest the clear possibility – indeed, even probability – that slim popular vote margins in very few states will be pivotal. A few nonconforming votes could change the outcome. This reality has powerful repercussions for the upcoming election and beyond.

A core problem is that in the current political alignment of the country approximately forty states are regarded by the two major parties as uncontestable. Presidential elections turn on states that make up just a small percentage of the national population. And state-of-the-art analytics enable campaigns to target voters in those few states with a surgical precision that produces razor-thin pluralities.

In contrast to the exceedingly slim margins in the few contested States that can determine the electoral vote outcome, the differential in the national popular vote tends to be much larger. Given that reality, it is not unlikely that one candidate may win the national popular vote and the other the electoral count. In

these circumstances, the shift of even a few nonconforming votes by electors could alter the outcome. And if this Court decides that electors have a constitutional right to vote as they wish, electors could be motivated to act in unpredicted ways for myriad reasons – whether well-intentioned or not. Some might seek to promote national unity by casting electoral ballots for the candidate who won the national popular vote. Others may be swayed by post-Election Day information or events. Some may choose to advance personal preferences for other reasons. The possibilities are endless. The consequences enormous.

By way of illustration, if two Republican electors had voted for someone other than George Bush in 2000 his total of 271 would have dropped to 269; the election would then have gone to the House of Representatives for decision. And if four electors had switched to Al Gore, he would have reached the 270 threshold and become president, aligning the outcome in the Electoral College with the popular vote totals.⁸

The 1968 election provides another telling example. Third-party candidate George Wallace carried five States (Alabama, Arkansas, Georgia, Louisiana and Mississippi), resulting in 45 electoral votes (plus a 46th vote from a nonconforming elector in North Carolina). To put that number in perspective, consider the following: in six presidential elections since 1960,

⁸ Because one elector in the District of Columbia, which Gore carried, did not cast a vote, the official Electoral College tally was 271(Bush)-266(Gore). Thus, a drop in two votes would have cost Bush's electoral majority, but Gore would have needed to gain four more votes to win. See National Archives, *2000 Electoral College Results*, <https://www.archives.gov/electoral-college/2000>.

had the winner received 46 fewer electoral votes, the outcome would have been different.⁹

Should the Court allow States to compel electors to conform to the wishes of a plurality of voters, States would still have thorny questions to answer before the upcoming election. According to a February 2020 survey commissioned by MEVC and conducted by Cluster Consulting, 49% of Americans prefer that States be permitted to require electors to vote for the presidential candidate who won their State's popular vote; only 31% disagree.¹⁰ If the Court holds that States are empowered to require such adherence, then presumably

⁹ 1960: Kennedy won with 303 electoral votes. 1968: Nixon, 301. 1976: Carter, 297. 2000: Bush, 271. 2004: Bush, 286. 2016: Trump: 304. See National Archives, *Electoral College Results*, <https://www.archives.gov/electoral-college/results>.

¹⁰ The actual question in the survey was:

As you may know, the US Supreme Court is considering whether presidential electors can be required by state law to vote in the electoral college for the candidate preferred by more voters in their state, or if presidential electors have a Constitutional right to vote for the candidate they think is best suited to become president. How do you think the Supreme Court should rule on this question?

- Court should rule that states can require electors to vote for candidate who won more votes in state [49%];
- Court should rule that electors can vote for whomever they want [31%].

MEVC, *New MEVC Poll: Americans Want The "National Choice Ballot,"* <https://www.makingeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmyt-59jcw-zxcc2>.

all States would need at least to consider passing laws that eliminate the risk of a nonconforming vote.

If the Court holds that States may enact such laws, it would greatly enhance the orderly electoral process to encourage States to begin the necessary legislative steps forthwith. But States are not the only entities that need to start planning for the aftermath of this Court's decision. Political parties – at the national and state levels – would be well-advised to assess whether their existing mechanisms for nominating electors should be altered.

III. States should consider a proposed ballot form that enhances each voter's control over how each vote cast is counted toward the State's popular vote and the State's electoral votes.

Some of the uncertainty these cases will generate is inherent in the Constitution's multi-level system that spreads steps in the presidential process over two months (between Election Day in November and the formal counting of Electoral College votes before the Senate and House of Representatives in January). As long as there are intermediate decisionmakers between the voters and the official outcome – and a sizeable period in which the results are not final – some danger will inevitably exist that the go-betweens will become kingmakers.

Whatever the wisdom of political commentary and scholarship urging abolition of the Electoral College (a subject on which MEVC takes no position), a constitutional amendment is unlikely. Certainly not before the Court decides these cases. And just as certainly not before the 2020 election. So it is even more

important that States respond promptly to this Court's ruling.

An especially difficult political problem the States will face arises from the conflict between those who want the national popular vote to be the sole determinant of presidential elections and those who prefer the current state-by-state system that weighs votes differently depending on the State in which they are cast. MEVC proposes an alternative that makes the national vote relevant, while preserving to each State control over how its electoral votes are cast. In short, this proposal maintains the process of separate state-by-state selections of presidential electors, with each State having the weight that comes from the electors assigned by the Constitution. MEVC's proposal is to present voters in at least some states a ballot that looks like the one reproduced on the following page.

As this ballot explains, all voters can determine how their individual vote is counted at both crucial steps in the presidential election process. By selecting a candidate, each voter expresses a preference that is accounted for in the State's popular vote tally. But this ballot does more. It also allows each voter to direct whether, in determining how the State's electoral ballots are cast, the vote should count for the winner of the State popular vote *or* the winner of the national popular vote.

With this ballot, each vote is counted in accord with the views each voter expresses. The only ballots counted for the winner of the national popular vote are those on which the voter marked that candidate's name or marked "YES" on the national-vote option.

Voters get to express their preferences on both questions. And the preferences they express govern how their votes are counted.

State Sample Ballot
General Election
 November 3, 2020

Instructions

Making selections

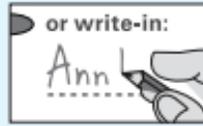


Fill in the oval to the left of the name of your choice. You must blacken the oval completely, and you must not make any marks outside the oval. You do not have to vote in every race.



! Do not cross out or erase, or your vote may not count. If you make a mistake or a stray mark, ask for a new ballot from the poll workers.

Optional write-in



or write-in:
 Ann L

To add a candidate, fill in the oval to the left of "or write-in" and print the name clearly on the dotted line.

A write in vote for only a vice president **will not be counted.**

President of the United States

Vote for 1

Donald Trump
Republican

Democratic Candidate
Democratic

or write-in:

 For President

National Choice Voting

Vote yes or no

The STATE will count your vote for president and vice president along with all other votes in this STATE, and add them to all votes cast in all other states and the District of Columbia in order to determine who has won the national popular vote.

Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES.

Yes

No

The STATE will count the votes of all those who filled in the YES oval as cast for the winner of the national popular vote for the purpose of appointing electors as otherwise provided by this state law.

Illus. 1. MEVC State Sample Ballot.

Modern presidential election history illustrates how this ballot would work. In all five of the States George Wallace won in 1968, Richard Nixon was second and Hubert Humphrey third. With MEVC's proposed ballot, had enough voters in those States opted to have their ballots counted for the winner of the national popular vote, then the Nixon electors would have been appointed. In a tight contest, that could change the outcome in the Electoral College or allow the Electoral College to resolve an election that would otherwise go to the House of Representatives.

Consistent with the reality that MEVC's proposed ballot has much to recommend it, the Claster Consulting survey revealed that 65% of Americans want this option on their presidential ballot. Only 23% do not.¹¹ Support is strong at all points on the political spectrum – among Republicans, Independents and Democrats – and among all segments of the population, whether categorized by ethnicity, gender or age.¹²

¹¹ See MEVC, *New MEVC Poll: Americans Want The "National Choice Ballot,"* <https://www.makeeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmymt-59jcw-zxcc2>.

¹² See *id.* (Republicans: 53% support, 36% oppose. Independents: 60% support, 26% oppose. Democrats: 80% support, 8% oppose. Whites: 62% support, 26% oppose. Hispanics: 76% support, 11% oppose. African-Americans: 77% support, 12% oppose. Men: 66% support, 25% oppose. Women: 64% support, 20% oppose. Age 18-29: 74% support, 15% oppose. Age 30-44: 75% support, 16% oppose. Age 45-64: 60% support, 26% oppose. Age 65+: 55% support, 33% oppose).

This proposal offers powerful potential benefits:

1. It strongly incentivizes increased voter participation. In the approximately forty states viewed as not contestable, voters labor under the knowledge that their individual preferences have little or no impact on the outcome. To many there is little urgency, and possibly little importance, to vote for a candidate who is sure to lose – or sure to win – your State. The State’s Electoral College votes won’t change. But if your vote could affect the choice of electors in your State (and, possibly other States as well) by moving the national popular vote in your candidate’s favor, you have even more reason to go to the polls. Precisely the same factors would encourage national campaigns to direct more attention to the country as a whole, beyond the small segment of the population in “contested” states.

2. It enhances the control each voter has over how each vote is counted in each election. The choice whether to accept or reject the national popular vote as the basis for casting the State’s electoral votes remains open every four years. How your vote is counted toward the Electoral College ballot isn’t determined by a decision the legislature made decades ago. Your vote is counted the way you direct it to be counted, at the time you cast it.

The proposal achieves these benefits without any need to alter the existing Constitutional structure. And without any State depending on any other State to make the same choice. MEVC’s proposal thus fits comfortably within the range of legislative options States should consider in designing the ballots they provide to voters in 2020 and beyond. The short time between the decision in these consolidated cases and

the election will require extremely prompt action to implement this Court's ruling. States would be well-advised to begin their processes now, even before these cases conclude.

CONCLUSION

Although MEVC does not take a position on the questions presented, it respectfully urges the Court to provide ample guidance on crucial practical issues that will inevitably arise no matter what the Court rules in *Baca* and *Chiafalo*. That guidance is needed to help the States implement presidential election procedures that comply with Constitutional requirements, promote an enduring regularity in presidential elections, and accurately reflect the choices of all voters in our democratic republic.

Respectfully submitted,

Reed E. Hundt
Thea A. Cohen
MAKING EVERY VOTE
COUNT FOUNDATION
6416 Brookside Drive
Chevy Chase, MD 20815
(202) 494-4111

Jerrold J. Ganzfried
Counsel of Record
GANZFRIED LAW
5335 Wisconsin Avenue, NW
Suite 440
Washington, DC 20015
JJG@ganzfriedlaw.com
(202) 486-2004

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