Nos. 19-465, 19-518

IN THE
Supreme Court of the United States

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

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

On Writs of Certiorari to the Supreme Court of Washington and the United States Court of Appeals for the Tenth Circuit

BRIEF OF PROFESSOR EDWARD B. FOLEY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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SUMMARY OF ARGUMENT

The questions in these cases are whether the Constitution confers on presidential electors a right to cast independent votes, and whether states may punish electors for casting such votes. The answers to those questions depend on the original understanding of Article II, Section 1 and its 1803 revision in the Twelfth Amendment. To aid the Court's inquiry, this brief outlines the drafting and ratification of Article II's Electoral College compromise; its early operation; and the Twelfth Amendment's adoption.

This history shows the Framers expected electors to exercise independent judgment and to be free of state legislatures' direct control after appointment. It also shows that electors did exercise independent judgment in the early republic—even as most electors quickly

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[1] All parties consented to this filing. No party or party's counsel wholly or partially authored this brief. Only *amicus* and *amicus*'s counsel funded its preparation and submission.

became faithful to their parties. Partisan competition affected electors' behavior in 1796, and more so in 1800. In this new environment, the Twelfth Amendment Congress envisioned two-party competition as the "new normal" and altered the Electoral College's structure to safeguard majority rule. The Twelfth Amendment's transformation, however, did not alter electors' authority under Article II to exercise independent judgment.

I. Independent, deliberative electors were critical to the Electoral College compromise that ended the 1787 Convention's deadlock on presidential selection. Some who wanted a strong and independent executive favored direct nationwide election by the people. Others believed Congress should select the President. The majority, however, rejected both approaches. Most delegates opposed direct nationwide election but also deemed it too dangerous to leave the choice of President to sitting congressmen. After multiple votes, the Convention settled on the Electoral College precisely because of its independence. Delegates viewed electors as deliberative enough to choose a President of good character, and independent enough to be unmoved by political factions and state interests. Electors' independence was therefore crucial to the compromise.

The ratification debates confirm this point. During ratification, the Electoral College's few critics fretted that electors might not be independent *enough* of state legislatures—because legislatures could select electors. The Framers' rebuttal was that, because electors held only a temporary appointment for a specific purpose, they would exercise independent judgment. The

Framers contrasted the Electoral College with direct choice by legislatures, which the Framers viewed as opening the selection to intrigue and threatening the separation of powers. Hence, at the ratification stage as well, electors' independence was critical.

II. Founding-era history confirms that electors acted as free agents, as the Framers envisioned. In the Constitution's first decade, independent electors can be categorized into three types. First came *originalist electors* who, lacking party pressure, simply voted their personal preferences. Then, as party structures emerged by the end of President Washington's second term, some electors exercised autonomy by *vote-scattering*. Article II originally required electors to vote indiscriminately for two candidates, without designating a President or Vice President. A party thus faced two undesirable possibilities. Its two candidates could tie if no elector threw away his second vote. But if too many electors did so, the "losing" party's top candidate could receive the second-most electoral votes and become Vice President. Vote-scatterers attempted to avoid those outcomes, while navigating their party's ticket to victory, by strategically voting against the Vice-Presidential candidate to whom they were pledged.

By 1796, a third group emerged: *faithless electors*. At the time, electors were expected to, and did, pledge support to the party ticket. Still, two Federalist electors pledged to John Adams and Thomas Pinckney cast votes for Thomas Jefferson. The early history therefore highlights that electors were independent actors. Even after two-party competition emerged, the constitutional system left electors unbound by party loyalty. Although

they were appointed on the assumption that they would be loyal partisans, electors remained capable—at the crucial moment—of repudiating their parties.

III. The spur for the Twelfth Amendment was the Electoral College tie in the 1800 election, and the fear that losing Federalists in 1804 might strategically vault the majority's Vice-Presidential candidate over Jefferson to become President. The potential for such strategic behavior arose precisely because the Founding generation understood that electors could *not* be bound in their votes for President. But when Congress confronted this problem through the Twelfth Amendment, the solution it chose was not to eliminate electors' independence. Instead, it was to differentiate the ballots for President and Vice President. Indeed, lawmakers—though confident that electors would usually vote the party line (and eager to enable them to do so)—expressly recognized that electors could continue to vote independently, even in defiance of their public pledges. Congress's fix therefore left untouched the independence that Article II protected.

It was no accident that the Twelfth Amendment did not go farther. Its specificity was a political necessity. While Republicans had supermajorities in both houses of Congress, the amendment passed with not one vote to spare. Many indicated that they would not vote for any innovation beyond separate designation of ballots, and Republicans had to rush the amendment through Congress to give states time to ratify it before the 1804 election. It was therefore essential to the Twelfth Amendment's passage that Congress did not further depart from Article II, including its assurance of

independent electors. Because no subsequent amendment has altered that independence, it remains intact today.

ARGUMENT

I. THE ELECTORAL COLLEGE WAS A COMPROMISE TO WHICH ELECTOR INDEPENDENCE WAS CRUCIAL

When the delegates to the Constitutional Convention met in the summer of 1787, it was clear that the lack of an effective executive was a fundamental failure of the Articles of Confederation. But as with the debates over Congress's composition, the federal executive's selection implicated the Convention's deepest fissures: between those who wanted an independent President and those who wanted a dominant Congress; between those who wanted direct election of the President and those who feared unbridled majoritarianism; between representatives of states large and small; and between representatives of states slave and free.

The delegates' challenge was therefore to address the Articles of Confederation's weaknesses by creating an effective and independent executive, while guarding against the risk that this powerful office could be captured by private or legislative interests, or undone by the perceived instability of popular rule in a large republic. The delegates also had to build a majority among states with vastly different populations and economic interests. The Electoral College emerged as the compromise. And its very premise was electors' independence—the understanding that electors, chosen for the specific task of selecting a President, would

engage in deliberative and independent decision-making, beholden neither to the chaotic pressures of populism nor to the machinations of legislative bodies (state or federal). This compromise balanced the Framers' many concerns and enabled the Constitution to proceed to ratification.

A. The Convention Debates Reveal That Elector Autonomy Was Key to the Electoral College Compromise

At the Constitutional Convention, history offered the Framers few models of an effective, democratically selected executive governing a vast and diverse territory. The examples they did have fell into two main categories: In 1787, eight out of thirteen state executives were chosen by state legislatures; other states, including the powerful states of New York and Massachusetts, elected governors by statewide popular vote. Neil R. Peirce & Lawrence D. Longley, *The People's President: The Electoral College and the Direct Vote Alternative* 19-21 (2d ed. 1981).

The Convention seriously considered only three models of presidential selection: "election by Congress … election by a direct vote of the people throughout the nation, and election by intermediate electors," *id.* at 19, the third being a compromise between the first two. Selection by Congress, favored by those who preferred a strong legislature and feared the risk of monarchical tyranny, was the early frontrunner. This proposal nearly succeeded: it "was specifically approved by votes of the convention on four occasions." *Id.*

But this approach was unacceptable to those who favored a system of separated powers, with a strong and independent executive—including such influential delegates as James Wilson, Gouvernour Morris, and James Madison. They favored direct election. As Madison explained, "a dependence of the executive on the legislature would render it the executor as well as the maker of the laws; and then, according to the observation of Montesquieu, tyrannical laws may be made that they may be executive in a tyrannical manner.'" 2 *The Records of the Federal Convention of 1787*, at 500 (Max Farrand ed., 1966); *see also id.* at 52-53 (Morris arguing that "the executive magistrate should be the guardian of the people, even of the lower classes, against legislative tyranny…. If he is to be the guardian of the people, let him be appointed by the people."); *id.* at 68-69 (Wilson arguing that the examples of a directly elected governor in New York and Massachusetts showed it "was both a convenient and successful mode"). Supporters of direct election argued that it was more likely that, if Congress elected the President, legislators would form a cabal to control the Presidency. Peirce & Longley 22. They also worried about state loyalties: If the President were selected by Senators selected by state legislatures, and Representatives with state loyalties, the President might act in state legislatures' interests. As Madison argued, "the President is to act for the *people* not the *states*." 2 Farrand 403.

But there was little appetite among the delegates for direct election. Opponents argued that the people were uninformed and would be "led by a few designing men"; George Mason of Virginia likened "refer[ring] the choice

of a proper magistrate to the people" to "refer[ring] a trial of colors to a blind man." *Id.* at 30-31. Representatives of smaller states, such as Roger Sherman of Connecticut, worried that direct election would favor the most populous states. Because people would "generally vote for some man in their own state," Sherman argued, "the largest states will have the best chance for appointment." *Id.* at 29; *see also id.* at 30 (Charles Pinckney of South Carolina arguing that the "most populous states by combining in favor of the same individual will be able to carry their points"). Even proponents of direct election knew well that, at the time, "[i]t ha[d] been a maxim in political science that Republican Government is not adapted to a large extent of Country." *Id.* at 52 (statement of Gouverneur Morris, July 19, 1787). Thus, both times it came to a vote, the proposal for direct election was overwhelmingly defeated, "by a 1 to 9 vote on July 17 … and by a 2 to 9 vote on August 24." Peirce & Longley 22.

The arguments for direct election by the people did, however, effectively blunt support for direct election by Congress. And when the Convention discarded direct election, it focused attention on creating a palatable alternative—a deliberative mechanism that would sufficiently distance the President from existing political factions and legislators, while ensuring election of an individual of good character.

The compromise option of elector intermediaries was "first advanced on June 2 by Wilson." *Id.* Although the proposal initially failed, more delegates became convinced of the plan as debate progressed through June and July. Injecting independent electors addressed

concerns that Congress or political cabals would have too much control. Allowing for a deliberative choice by individuals specially picked for the task would also mitigate the perceived dangers of populist democracy. Meanwhile, given the ever-present struggle between large and small states, electors allowed the Convention to carry over the Connecticut Compromise into Presidential selection—by allocating electors according to congressional representation. In addition, the proposal "possessed the virtue of being the second choice of many delegates, though it was the first choice of few, if any, when the convention began." *Id.*

Thus, when the Convention became deadlocked in August, the Committee of Eleven appointed to break the impasse settled on the Electoral College. In this compromise, "[t]he big states got an element of population-based apportionment in choosing the electors," while "the small states got equal voting rights in the contingent election plan when a majority of the electors failed to agree"; "the feelings of states'-rights advocates were acknowledged by giving the state legislatures the right to decide how the electors should be chosen," while "those who wanted to entrust the choice of the president to the people could see at least the potential for popular vote." *Id.* at 23.

Key to all this was that the electors would have a meaningful deliberative function; otherwise, the "compromise" would have been meaningless on nearly every issue. For instance, towards the end of the Convention, Charles Pinckney "renewed his opposition to the mode [of electing the President], arguing that the electors will not have sufficient knowledge of the fittest

men, & will be swayed by an attachment to the eminent men of their respective States." 2 Farrand 511. Indeed, delegates were consistently concerned that the electors should be among the fittest Americans so that they would exercise good, independent judgment in selecting the President. In response to a proposal that the President be selected by members of Congress chosen by lot for that responsibility, Elbridge Gerry argued that "this is committing too much to chance. If the lot should fall on a set of unworthy men, an unworthy Executive must be saddled on the Country." *Id.* at 105. Further, the Electoral College compromise required that each elector's two votes be cast for candidates from different states, on the assumption that the first vote would be for a state's "native son" and the second would be for someone judged to reflect the overall national interest. The delegates thus intended that future electors would use their independent judgment to identify the most Washington-like figure possible.

By the end of the Convention, then, delegates reached consensus about the intended virtue of the electors—that they could exercise their individual judgment, independent from the people of their states and the legislatures that appointed them. The only question was whether, in practice, electors would fulfill this vision.

B. The Ratification Debates Highlighted Elector Autonomy to Sell the Electoral College

Presidential selection proved far less contentious during the ratification debates in state legislatures. In the Pennsylvania debates, James Wilson—originally a strong proponent of direct election—noted that "[t]he

manner of appointing the President of the United States, I find, is not objected to." 3 Farrand 166. Indeed, the only comment of leading Anti-Federalist Federal Farmer regarding the Presidential selection method was that "[t]he election of this officer [the Vice President], as well as the president of the United States seems to be properly secured." Richard Henry Lee, Letter III of a Federal Farmer (Oct. 10, 1787), *reprinted in Pamphlets on the Constitution of the United States* 298 (Paul L. Ford ed., 1888).

The method's few opponents objected to the fact that the Constitution did not entrust the election of the President to the people directly, instead providing an intervening Electoral College whose deliberations were expected often to result in a final decision by Congress. As Republicus wrote in Anti-Federalist No. 72: "Is it then become necessary, that a free people should first resign their right of suffrage into other hands besides their own," such that "the sacred rights of mankind should thus dwindle down to Electors of electors, and those again electors of other electors? This seems to be degrading [the people] even below … 'servant of servants.'" David J. Siemers, *The Antifederalist: Men of Great Faith and Forbearance* 171-72 (2003).

Others were concerned that the Constitution's failure to provide for direct election would make the executive beholden to state legislatures rather than to the people. One ratification opponent, future President James Monroe, told the Virginia convention: "I believe that [the President] will owe his election, in fact, to the state governments, and not the people at large." *Journal Notes of the Virginia Ratification Convention*

Proceedings (June 18, 1788), https://www.consource.org/document/journal-notes-of-the-virginia-ratification-convention-proceedings-1788-6-18. To be fair, this concern was not without basis in ratification supporters' rhetoric. To allay concerns that the Constitution would create a nationalist executive trampling upon state sovereignty, James Madison wrote: "Without the intervention of the state legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determined it." The Federalist No. 45, at 287 (Clinton Rossiter ed., 2003). But it should be no surprise that the Constitution's supporters agreed that state legislatures would have practical influence, even if not legal control, over electors' votes. The fundamental (and prescient) assumption driving most debate about the Constitution's institutional architecture was that fallible human beings would feel beholden to whatever people or bodies had appointed them, even if—as a legal matter—the Constitution protected their authority to exercise that power independently.

Eleven days after Republicus's critique of the Electoral College, Alexander Hamilton published Federalist No. 68, "The Mode of Electing the President." Although Hamilton noted the general consensus in support of the Presidential selection method, he responded to concerns that the executive would be selected by electors, not the people directly. Hamilton argued that the Electoral College's virtue was its independence from both the "tumult and disorder" of direct elections and the "cabal, intrigue, and corruption" that could arise if the President were selected by pre-

existing bodies such as state legislatures or Congress, where the members had their own, separate political designs. *Id.* at 411-12. Instead, the Constitution required that "complicated … investigation" of who would be best to serve as President be "made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern *their* choice." *Id.* at 410 (emphasis added). It was the purposely "detached situation" of the electors, selected for the "single purpose of making the important choice" of federal executive, that would enable them to "vote for some fit person as President." *Id.* at 411-12.

Hamilton also addressed concerns that voters themselves should select the President. Despite the electors' independent responsibility for choosing the President, he wrote, the "sense of the people" would "operate in the choice" because the electors would be "chosen by the people for this special purpose." *Id.* at 410. This created a more direct connection between the people and the executive as an independent branch, ameliorating concerns from Wilson and others that Congress could dominate the President. But this connection was also mediated by the electors' independent judgment, and their "right of making" the final selection. *Id.*

As Wilson explained to the Pennsylvania convention, although "the Convention [delegates] were perplexed with no part of this [Constitution's] plan so much as with the mode of choosing the President of the United States," and although he preferred direct election, "it

was the opinion of a great majority in Convention that the thing was impracticable." 3 *The Debates, Resolutions, and Other Proceedings in Convention* 297-98 (Jonathan Elliott ed., 1830). But appointment by legislative bodies was also unacceptable: "To have the executive officers dependent upon the legislative, would certainly be a violation of that principle, so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent." *Id.* at 298. "To avoid the[se] in conveniences already enumerated, and many others that might be suggested, the mode before us [of the Electoral College] was adopted. By it we avoid corruption, and we are little exposed to the lesser evils of party and intrigue…. I flatter myself that the experiment will be a happy one for our country." *Id.*

Thus, according to ratification's leading proponents, who had themselves crafted the Constitution's compromises, it was electors' independent deliberation and decision-making authority that lessened the dangers of chaos (at one extreme) and cabal (at the other). The electors' independence from both the people and legislative bodies was, therefore, well understood by the supporters and opponents of ratification as fundamental to the Constitution's design and necessary for the compromises from which it emerged.

II. ELECTORS EXHIBITED AUTONOMY IN THE EARLY REPUBLIC

Early practice confirms that electors in fact exercised the autonomy the Framers contemplated. In the four presidential elections between 1789 and 1800, the early Republic's autonomous electors can be

categorized into three types: (1) originalist electors, who voted *without* party pressure as the Framers envisioned, (2) vote-scatterers, who split tickets to *protect* their parties' Presidential candidates, and (3) faithless electors, who voted *against* the interest of the party they pledged to support.

A. Originalist Electors Voted Without Party Pressure

The elections of 1789 and 1792 provided the first test of the Framers' vision. Parties began to form even by Washington's reelection, concentrating the Vice-Presidential contest around preferred choices. Yet many electors exercised the independence that the Framers envisioned.

In the election of 1789, every elector gave one of his two votes to George Washington. Yet, with no party pressure or loyalty, electors divided on the second vote. Tadhisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804*, at 28-38 (1994). Many Federalist electors chose someone other than leading Vice-Presidential contender John Adams, and Anti-Federalists across the country each chose their favorite candidate. *Id.* Out of 69 possible votes, Adams received only 34, with ten candidates splitting the remainder. *Id.* at 38.

By 1792, nascent political factions had already agreed upon unified electoral strategies. The Federalists supported the incumbents, Washington and Adams, while Anti-Federalists settled on Washington for President and George Clinton for Vice President. *Id.* at

59. Although Anti-Federalist electors generally stuck to the party plan and voted for Washington and Clinton, *id.* at 59-61, a number rejected this proto-ticket. Some electors thus voted for their preferred Anti-Federalist candidates: four for Thomas Jefferson and one for Aaron Burr. *Id.* at 60, 176.

Thus, despite nascent political parties seeking to control the Electoral College in these early contests, the electors adhered to the Framers' vision that they would exercise independent judgment.

B. Autonomous Electors Scattered Vice-Presidential Votes to Help Their Presidential Nominees

Under Article II's original design, a party's candidates for President and Vice President could tie if all electors voted party-line. Or a candidate for Vice President could become President with the vote of a single elector from the other party. While the Framers believed these problems would not come to pass because Electors would cast one vote for their state's "native son," this prediction proved incorrect when national tickets emerged. Edward B. Foley, *Presidential Elections and Majority Rule* 12 (2020). Parties thus had to *encourage* small numbers of electors to deviate from the party line, to avoid a tie between the candidates meant for President and Vice President.

Such efforts began in the nation's first election. Some Federalists became concerned that, if each Federalist elector voted for his top two choices—assumed to be Washington and Adams—there would be a tie with "no way of formally signaling the huge difference between

the two." Akhil Amar, *America's Constitution: A Biography* 337 (2005). Alexander Hamilton had further concerns: "Every 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." *Alexander Hamilton: Writings* 514 (Joanne B. Freeman, ed. 2001). He therefore suggested Federalists "throw away a few votes say 7 or 8; giving these to persons not otherwise thought of." *Id.*

Washington won unanimously, but electors scattered more second votes than Hamilton anticipated. For example, Maryland "Elector Robert Smith complained that inadequate communication frustrated concerted action with electors in other states." To ensure Washington's election, Maryland's electors cast their second votes for state Supreme Court Chief Justice Robert Harrison. Kuroda 34. And no such efforts were required in 1792, as both factions supported Washington.

The first post-Washington election was a different matter. The original Electoral College system presented the developing parties with "several interrelated risks." Amar 338; *see* Robert M. Alexander, *Representation and the Electoral College* 57 (2019). First, electors who pledged to support the ticket could instead attempt to invert it by voting for their party's Vice-Presidential candidate but not its Presidential candidate. Amar 338. Second, the double-ballot system "risked cross-party inversion." *Id.* If one party realized it would receive a minority of electoral votes, it could strategically direct some of its votes to the other party's Vice-Presidential candidate and elect that person as President. *Id.* The

only response would be for the majority party to further scatter its second votes.

But this could lead to a third risk: by over-scattering its Vice-Presidential vote, the majority party could allow the minority party's Presidential candidate to slip into second place and claim the Vice Presidency. *Id.* This is in fact what occurred in 1796. Northern Federalists all cast their first votes for Adams, their party's Presidential candidate; they gave most of their second votes to their Vice-Presidential candidate, Thomas Pinckney, but scattered the rest. Kuroda 66, 70. Republicans, meanwhile, had settled on Jefferson and Burr as their ticket but "made little attempt actually to coordinate their voting for [Burr as] Vice President." Edward J. Larson, *A Magnificent Catastrophe: The Tumultuous Election of 1800, America's First Presidential Campaign* 114 (2007). Republicans likewise scattered their second votes to ensure Jefferson rather than Burr maintained primacy. Kuroda 70. Indeed, South Carolina's electors voted for Jefferson and *Federalist* Vice-Presidential candidate (and favorite son) Pinckney. *Id.* at 88. When the dust settled, Federalist electors proved to have over-scattered their votes away from Pinckney, and Jefferson came in second place. *Id.* at 177.

This widespread vote scattering—including by those who participated in the Constitution's drafting and ratification—was possible only because Article II guaranteed electors the independence to vote as they saw fit.

C. Faithless Electors Emerged by 1796

Early elections also saw the rise of a third form of autonomous elector: faithless electors, who voted against their party's interest. These electors exercised genuinely independent judgment, acting contrary to party loyalty.

"[I]n the early elections," in which "candidates for electors" were "contemporaries of the Founders," "electors were expected to support the party nominees," even if they could not be bound. *Ray v. Blair*, 343 U.S. 214, 228 (1952). "[P]arties which lost referred to electors as puppets whose strings were pulled by party organizations," yet they "praised such behavior by electors as fair and faithful" when they won. Kuroda 107; *see id.* at 99.

Despite hoping that electors would stick to the party line, both parties knew electors could defect. The 1796 election featured the first "faithless" electors. Samuel Miles, one of Pennsylvania's two Federalist electors, had pledged "to give [his] suffrages in favor of men who will probably continue the same system of wise and patriotic policy" as the Washington administration. Jeffrey L. Pasley, *The First Presidential Contest: 1796 and the Founding of American Democracy* 360, 363 (2016). There was no doubt that this meant voting for Adams and Pinckney. *Id.* at 360. Yet immense pressure arose to follow Pennsylvania's Democratic-Republican majority vote—particularly since the Federalist electors squeaked in only because some votes did not reach Philadelphia in time to be counted. *Id.* at 362-63. Miles succumbed and voted for Jefferson instead of Adams. *Id.*; *see* Kuroda 177.

Two more such votes would have deprived Adams of an electoral majority and thrown the election to the House. Had those two votes gone to Jefferson, he would have received 70 votes and the Presidency. Another Federalist rebuked Miles in the *United States Gazette*: "What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to *act*, not to *think*." Peirce & Longley 36. But whatever this disappointed Federalist *believed* he had chosen Samuel Miles to do, the Constitution's design protected Miles' right to exercise independent judgment.

It also appears that a Maryland Federalist elector broke ranks in 1796, voting for both Adams *and* Jefferson. Kuroda 71; Pasley 395. Records indicate that seven of Maryland's ten electors pledged themselves to the Adams ticket, and three to the Jefferson ticket. Tufts Univ., *1796 President of the United States, Electoral College* n.4, A New Nation Votes: American Election Returns 1787-1825 (2012), http://elections.lib.tufts.edu/catalog/tufts:us.potus.1796. But returns showed four votes for Jefferson, not three. Kuroda 177. Electors' second votes were otherwise accounted for: four Federalists voted for Pinckney while two scattered their votes to Maryland's governor; the three Republicans voted for Burr. *Id.*; Tufts Univ. As in Pennsylvania, then, in Maryland one Federalist elector voted for the Republican candidate.

Electors thus were "not … bindable by the people," and they "were hardly guaranteed to be mere organs" of the people's—or the parties'—will. Pasley 313. By the late 1790s, "[m]any electors still voted their consciences

or sectional loyalties." Larson 115. Hence, when Congress weighed the Twelfth Amendment, it had before it not just the possibility of faithless electors, but the reality.

III. THE TWELFTH AMENDMENT DID NOT AFFECT ELECTORS' AUTONOMY

The original Electoral College design provided for, and Founding-era elections demonstrated, electors' right to exercise independent judgment. All of this was familiar to those who crafted the Twelfth Amendment—who did nothing to alter this autonomy. Nor did Congress in the Twelfth Amendment add any language permitting states to control how electors performed their federal duties. The Twelfth Amendment's authors felt no need to change the original Constitution on this point, since—in practice—adequate party loyalty had already developed: Electors already pledged themselves to party tickets, and states chose electors with party loyalty in mind. The Twelfth Amendment's changes therefore did not address electors' autonomy.

A. Vote-Scattering Failure and the Prospect of Minority Rule Spurred the Twelfth Amendment

In the highly partisan election of 1800, the original Constitution's two-vote system—which contemplated consensus candidates and native sons—"badly malfunctioned." Foley 29. Congressional Republicans passed the Twelfth Amendment to avoid repeating these events, in which a tie between the Republican candidates almost left the country without a President and even risked military conflict. Congress also sought

to mitigate the risk that one party could interfere with the other's ticket by strategically boosting that party's Vice-Presidential candidate. *Id.*

In 1800, the Federalist candidates were Adams for President and Charles Pinckney for Vice President. Federalist electors voted in near lockstep, with one casting his second vote for John Jay instead of Pinckney to avoid a tie. Kuroda 95, 97. Republicans, meanwhile, supported Jefferson for President and Burr for Vice President. Several states considered dropping one or two Burr votes, and Republican leaders encouraged such behavior. *Id.* at 99; Larson 118-19. But no leader ever secured commitments to spoil a vote. Kuroda 99; Larson 242. And no elector did. Hence, Jefferson and Burr each received 73 votes, to Adams's 65 and Pinckney's 64. Kuroda 178. Tied, the vote proceeded to the lame-duck House, which deadlocked: eight delegations had Republican majorities, six had Federalist majorities, and two had no majority—with nine majorities required to elect a President. Larson 243-44.

Republicans like Jefferson hypothesized that Federalists might draw out the balloting until March 3, when Adams's term would expire, then attempt to install a Federalist successor. *Id.* at 245, 259-60. Or Burr could collude with Federalists and a few Republicans to reverse the ticket and become President. *Id.* at 246. Some Federalist congressmen did, indeed, pursue the latter course. *Id.* at 262-66. But in the end, on the thirty-sixth ballot, enough Federalists abstained to throw the election to Jefferson. *Id.* at 267-68.

B. The Twelfth Amendment Congress Recognized Elector Autonomy But Sought Only Ballot Designation

After the 1800 election, the need for reform was clear, but the path was not. Amending the Electoral College implicated the same controversies that nearly drove the 1787 Convention to impasse. For instance, then-President Jefferson thought that the problem was independent electors themselves and floated a version of the direct-election option rejected at the Convention. Letter from Thomas Jefferson to Albert Gallatin (Sept. 18, 1801), https://founders.archives.gov/documents/Jefferson/01-35-02-0245. But no such proposal made it to Congress, perhaps due to the same suspicion of direct elections that yielded the Electoral College to begin with.

The Republican Congress's "immediate aim [in passing the Twelfth Amendment] was securing the smooth re-election of Jefferson." Foley 29. Republicans believed Jefferson had the popular will on his side and sought to avoid a repeat of 1800. These Republicans envisioned that, under a reformed Article II, the majority of voters would choose the electors in each state, and only a candidate who won a majority of those state-level majorities would become President. *Id.*

But they also knew that under the existing system, the electors of a "losing" party could still elect their preferred Vice President, or even throw their electoral votes to the majority's pick for Vice President and make *him* President. With just a narrow majority in Congress and the need to ratify any amendment before the 1804 election, Congressional Republicans focused not on

limiting electors' independence but on ensuring the separate designation of Presidential and Vice-Presidential electoral votes.

i. The House Debate

A principal argument for the Twelfth Amendment in the House was that the existing system allowed the minority party's electors to flip the majority party's ticket. Yet instead of restricting electors' independent authority, the House chose only to bifurcate electors' choices into Presidential and Vice-Presidential votes.

A resolution requiring such designation was introduced on October 17, 1803. 13 Annals of Cong. 372 (1803). Debate focused on the procedure if no candidate received a majority of electors—namely, an election in the House with each state delegation receiving one vote. *Id.* at 374-77. The designation proposal was then sent to a select committee, along with another proposal mandating electors be chosen by district. *Id.* at 380-81. Only the designation amendment made it back to the floor. *Id.* at 383, 420.

Subsequent debate made clear that the amendment's authors knew well that, under the original Article II, electors were free to vote for candidates other than those to whom they were pledged. With this in mind, Congressmen repeatedly raised the specter of an electoral vote splintered among more than the four party nominees. *Id.* at 376-77 (statement of Rep. Clopton); *id.* at 427 (statement of Rep. Dawson); *id.* at 428-29 (statement of Rep. Elliot); *id.* at 431 (statement of Rep. Alston). Republicans therefore sought to lower the number of candidates eligible for House selection, to

prevent the House from choosing a candidate supported by only a small number of electors.

When the debate moved to the merits of designating votes for President and Vice President separately, supporters clarified that "the great object of the amendment ought to be to prevent persons voted for as Vice President from becoming President." *Id.* at 428 (statement of Rep. Sanford). Representative John Clopton of Virginia gave the leading speech in favor of designation. Foley 34. He unspooled an elaborate hypothetical to illustrate how the 1787 system could make the majority's Vice-Presidential nominee President. 13 Annals of Cong. 491. Say the majority supports A over B for President, and scatters some second votes from its Vice-Presidential candidate C. Suppose, also, that the minority casts a significant number of its second votes for C, rather than for its own Vice-Presidential candidate D. *Id.*[2] In this scenario, C, whom the majority did not prefer, would become President. 13 Annals of Cong. 491. Thus, "'the will of the majority is defeated' by the 'anomalous effect' of the original Electoral College's faulty mechanics." Foley 36 (quoting 13 Annals of Cong. 491).

The Federalist minority opposed designation for precisely the same reason Clopton and other Republicans supported it: they wanted the option to vote for the majority's Vice-Presidential candidate and

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[2] Republicans were concerned that Federalist electors might vault Jefferson's running mate over Jefferson himself in 1804, just as Burr might have leapfrogged Jefferson in 1800 with one more vote. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501, 1545 (2014).

secure a President indebted to the minority for his office. 13 Annals of Cong. 528-29 (statement of Rep. Huger); *id.* at 535-36 (statement of Rep. Hastings). Thus, while the parties took different sides on this issue, they agreed that it was a driving concern behind the amendment. Limiting electors' autonomy to cast their ballots pursuant to their own free will was not on the agenda.

ii. The Senate Debate

The Senate took up its own measure. Senators were also concerned about electors voting for another party's candidate. But like the House, the Republicans in the Senate sought a focused, fast resolution. The Senate did nothing to prevent faithless electors, or to allow the states to prevent them.

The Federalist minority also understood the Republican desire for reform before 1804, and sought to slow things down. At the outset of debate, one senator immediately moved to eliminate the position of Vice President. *Id.* at 21. Republicans' opposition illustrated their focus on speed and their concerns about keeping their coalition together. *Id.* at 22-25. As one senator put it, "his mind was made up to vote for nothing but the discriminating principle"; "he would not go into consideration of any other amendments" because he "wished this to go into operation before the next election." *Id.* at 23 (statement of Sen. Breckenridge).

Despite the hurry, the Senate became bogged down in other matters, such as approving the Louisiana Purchase, throughout late October and November of 1803. Hawley 1543. When discussion resumed, it focused on whether, if no candidate received a majority of

electors, the House should choose from the top three candidates or the top five. 13 Annals of Cong. 87-90, 97-103, 108-24. Republican senators argued for the smaller number because electors might vote for more than the four candidates on the parties' tickets. *See id.* at 101 (statement of Sen. Jackson); *id.* at 103 (statement of Sen. Nicholas); *id.* at 114 (statement of Sen. Jackson); *id.* at 120, 122 (statement of Sen. S. Smith). One senator referenced the single electoral vote John Jay received in 1800, pointing out that letting the House choose between five candidates would "place him, who had only one vote, on the same footing with him who had seventy-three" should a future election devolve upon the House. *Id.* at 101 (statement of Sen. Jackson). The Republican majority successfully reduced, from five to three, the number of candidates subject to the House backup procedure. *Id.* at 124.

As to designation, the Senate debate also revealed the shared understanding that, under Article II, electors' votes could not be bound. Several Republican senators wanted to prevent the Federalists, whom they assumed would remain a minority, from electing a Federalist as Vice President if the Republican electors scattered their second votes. *Id.* at 123 (statement of Sen. Smith); *id.* at 152 (statement of Sen. Cocke); *id.* at 182, 186 (statement of Sen. Taylor); *id.* at 205 (statement of Sen. S. Smith). Others, including John Quincy Adams, echoed Congressman Clopton's concern that electors could install someone other than the majority's preferred candidate as President—something that would have been impossible if states could bind their electors. *Id.* at 131 (statement of Sen. Adams); *id.* at 182 (statement of Sen. Taylor); *id.* at 206-07 (statement of

Sen. Breckenridge). Federalists opposed the amendment for precisely the same reasons as their House colleagues. *Id.* at 159, 162-64, 170 (statement of Sen. Tracy); *id.* at 190 (statement of Sen. Hillhouse).

Although Republicans ultimately triumphed, it was close: the Twelfth Amendment passed by a vote of 22-10, a two-thirds majority with nothing to spare. *Id.* at 209. The Republicans had to navigate between the Scylla of Federalist obstructionism and the Charybdis of moderate Republican fence-sitting. Kuroda 138. "Because the final two-thirds vote would be close and there were a few Republicans . . . who might desert, proponents had to be alert to attendance of all their members and keep tabs on the vote count." *Id.* The Twelfth Amendment's reforms were, of necessity, confined to Congress's highest priorities.

The Senate's amendment thus mimicked the House's, but with two changes. First, it limited the House backup plan to just three candidates. Second, it added contingency plans to avoid having no elected President (as almost occurred in 1801) by providing that the Vice President would become President if the electors or the House did not choose a new President by Inauguration Day. *Id.* at 136-37. But like the House, the Senate made only one reform to the Electoral College itself: vote designation.

iii. Debate Returns to the House

Because Republican senators had already left Washington when the Senate's version arrived at the House, House Republicans had to swallow the changes. Kuroda 145. Somehow, they had to cobble together a

two-thirds majority from a set of Republicans (and a few Federalists) who sought a clean designation amendment and a set of Federalists who would accept designation only if paired with an ill-fated proposal to choose electors by district. *Id.* at 145-46.

After losing some congressmen who supported designation alone, and anxious to give states enough time to ratify before the 1804 election, Republicans rushed debate forward so that a vote could be taken on December 8, 1803. 13 Annals of Cong. 686-90. Each side had time only to reiterate the points for and against the amendment. *Id.* at 702-76.

The primary Republican speaker argued that designation would help achieve majority rule. Foley 43. And he repeated an argument similar to Congressman Clopton's: that reform was needed so that the minority could not flip the majority's ticket. 13 Annals of Cong. 720. Such a vote would be purely strategic. The majority's Vice Presidential candidate would not even be "in most cases agreeabl[e] to the minority, but" merely "preferred by them" to the majority's Presidential candidate as "most likely to favor the measures of the minority." *Id.* (statement of G.W. Campbell). Such a ticket-flip, however, depended on "[a] difference of opinion among the majority, with regard to the person who shall be Vice President, or a greater unanimity in their choice of a person as Vice President, than in that of President." *Id.* at 721. Again, this scenario would only be possible on the understanding that Article II empowered electors to vote unbound—by state, party, or otherwise.

Other statements during the House's debate recognized that electors could vote contrary to their party's or state legislature's wishes. One Federalist opponent raised the prospect of elector corruption under the amendment: "One office may be promised to this Elector as the price of his vote, whilst other offices are promised to other Electors on the same corrupt consideration, and the aspiring candidate may thus mount to the first office in the Government." *Id.* at 750 (statement of Rep. R. Griswold). The 1787 Electoral College reduced the utility of such promises, because no candidate could be sure that he would come in first and receive a majority of electoral votes. *Id.* By designating their votes, electors would raise the majority-party nominee's chance of success, increasing the "means of corruption." *Id.*

No one responded with any suggestion that electors could be bound to vote with the popular majority, whether by their party pledges or their state's legislature. Instead, they insisted the "great danger of intrigue" lay in the existing Electoral College mechanism. *Id.* at 759 (statement of Rep. Jackson). Under the double-ballot system, even if states agreed to support one Presidential candidate, a Vice-Presidential candidate could collude with electors to break the states' agreement and make the Vice-Presidential candidate President. *Id.*

The House eventually passed the Senate's version of the Twelfth Amendment with no votes to spare: the Speaker stepped down from the dais to cast the vote that clinched the two-thirds majority, 84-42. *Id.* at 775-76. Enough states ratified the amendment for it to take

effect the next summer, "just in time for the presidential election of 1804." Amar 341.

C. The Twelfth Amendment's Text Does Not Authorize Interference with Elector Autonomy

These debates yielded constitutional text that left electors' independence untouched. Such independence was, as detailed above, a shared assumption of the Twelfth Amendment's framers—who, for example, often raised the possibility that electors could stray from the party line due to intrigue, corruption, or preference. They particularly feared that the minority party's electors could raise the majority party's choice for Vice President above its choice for President. Yet Congress added no language that would prevent electors from acting faithlessly or that would allow states to prohibit the practice. True, the Twelfth Amendment's authors—etching their expectation of two-party competition into the Constitution—removed much of electors' *incentive* to exercise independent judgment when casting their ballots. But they did not remove electors' *capacity* to vote autonomously.

The Twelfth Amendment "direct[ed] electors to designate their ballots for President and Vice-President and … reduc[ed] Congress's role in presidential elections in favor of greater and more direct control by the people." Hawley 1542. It made no change to, and did not expand the scope of, states' power to appoint electors. Its only alteration to the Electoral College concerned how electors' votes were cast and tallied: as separate choices for separate offices, rather than two undifferentiated Presidential votes. It provided that

"[t]he Electors shall meet in their respective states and vote by ballot for President and Vice-President," and that "they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." U.S. Const. amend. XII.[3]

The Twelfth Amendment's targeted scope reflects Congress's razor-thin vote margins and desire for rapid passage and ratification. Republicans could not summon a two-thirds majority for anything beyond designating electors' votes, conforming the congressional backup to this designation principle, and providing a contingency if that backup failed. Thus, "the terms of that Amendment address only 'the specific provisions of the Constitution that had raised concerns during the ratification debates'" and that external constraints—on both votes and time—let supporters address. *Franchise Tax Bd. of*

[3] States' power to rescind electors' appointments over the votes they cast implicates another Electoral College feature, which the Twelfth Amendment also left unaltered. Article II requires that all electors vote on the "same" day. This provision strongly implies (if not necessitates) that, once duly appointed electors cast their ballots on that uniform day, their appointment cannot be undone because of objections to their choices. Instead, the remedy for any such objection lies solely in the special joint session of Congress convened, pursuant to the Twelfth Amendment, to receive the states' electoral votes. Indeed, Justice Joseph Bradley resolved the disputed election of 1876 in favor of Rutherford Hayes based on this precise understanding of the *finality* of the electors' role. Edward B. Foley, *Ballot Battles* 133-35 (2016).

California v. Hyatt, 139 S. Ct. 1485, 1496 (2019) (citation omitted).[4]

CONCLUSION

Electors' independence did not arise, or endure, by chance. It was critical to the compromise that secured the Constitution's passage, and it was well-known to those who crafted the Twelfth Amendment. At the Founding, the Framers carefully considered arguments that electors should *not* be deliberative, and they carefully calibrated electors' independence from the states (on one hand) and the people (on the other). The Twelfth Amendment debates recognized, and did not disturb, this independence.

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[4] The same is true of the other amendments affecting Presidential selection, the Twenty-Second and Twenty-Third Amendments. Both were adopted after electors' loyalty to parties had become routine practice, but neither enacted language affecting Electoral College procedures or electors' autonomy.