No. 19-465

In The
Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

REPLY BRIEF FOR PRESIDENTIAL ELECTORS

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INTRODUCTION

The ordinary expected meaning of the words of the Constitution, read against the deliberations of the Framers, makes clear that a state has no power to control—through law—how a presidential "Elector" must "vote by Ballot." A presidential elector, the Electors argue, no less than a congressional elector, is an "office . . . created by [the] Constitution, and by that alone." *Ex parte Yarbrough,* 110 U.S. 651, 663 (1884) (describing "office" of congressional elector). When electors "vote by Ballot," they "act in a federal capacity and exercise a federal right." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring) (describing congressional electors). That right, "secured by the Constitution," is "secured against the action of individuals as well as of states." *United States v. Classic,* 313 U.S. 299, 315 (1941) (describing congressional electors).

This conclusion is true not despite *Ray v. Blair*, 343 U.S. 214 (1952), but because of it. At least in the context of the Electoral College, *Ray* teaches that it is not the "expectations" of even the (currently) most favored Framers that determine the meaning of Article II and the Twelfth Amendment. Neither is it, as *McPherson v. Blacker*, 146 U.S. 1 (1892), confirms, the expectations of the current public that determines that meaning. Instead, *Ray* and *McPherson* both affirm that the meaning of the Constitution is determined by its words, against the background of their framing context. That meaning is that presidential "Electors"—souls with a "right of choice," as Noah Webster defined them, Independence Institute Br. 6—have that "right" when performing the "federal function in balloting," *Ray*, 343 U.S. at 224. That

"right" precludes a State from directing how an Elector must vote. "Electors" are *electors*. And the text, structure, and history of our Constitution confirm the discretion that the ordinary expected meaning of that term suggests.

Yet that discretion is, of course, not costless, or as Washington describes it, "unfettered." Wash. Br. 3. An Elector, like a United States Senator, has a set of complex moral obligations, both to country and party. Those obligations set the "expectations" about how an Elector will vote, just as similar obligations set the "expectations" about how a United States Senator will vote. Just as a State could not fine a United States Senator for voting contrary to those expectations—even when legislatures "chose" Senators, or even now, when a Governor might "appoint" one, U.S. Const. amend. XVII—a State cannot fine an Elector for voting contrary to expectations when performing his or her "federal function in balloting." Under our Constitution, an Elector—like a Senator, or Representative, or President, or Judge, or Juror—has a legal discretion that cannot be controlled by a State through law.[1]

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[1] The States' Amicus Public Citizen chides the Electors for not addressing the First Amendment claim they raised in their petition for certiorari. *See* Public Citizen Br. 5. But as this Court understands, the original order consolidated this case with *Colorado Department of State v. Baca*, 19-518. Because the essence of the First Amendment argument—that electors cannot be punished for exercising discretion—is the same argument Electors present as a matter of the ordinary expected meaning of the Constitution's language, and given space constraints, the Electors did not pursue the First Amendment claim further.

But Amicus is wrong to argue that a First Amendment claim is fundamentally different from an argument grounded in the

I. The Framers Explicitly Rejected Any Direct Mode For Choosing The President, And Chose Instead An Indirect Method That Requires Elector Discretion.

Across our history, there have been electors who have exercised discretion to vote contrary to expectations or their pledge. Washington now claims the power to regulate that discretion. As it states in its brief, its law aims to "vest discretion in . . . citizens *rather than electors*." Wash. Br. 48 (emphasis added). Those "citizens" would thus effectively choose the President directly, rather than indirectly, through the office of Elector.

This was not the Framers' plan. The Framers considered at least four direct methods for selecting the President: directly by Congress, directly by the states (either by state legislatures or executives), and directly "by the People." *See McPherson*, 146 U.S. at 28 (describing alternatives); Alex Keyssar, *Why Do We*

Speech and Debate Clause. Public Citizen Br. 14 n.2. To the contrary, from the beginning of this case, the immunity that the Electors have defended is parallel to immunity afforded by the Speech and Debate Clause. U.S. Const. art. I, § 6. As this Court recognizes, that clause protects activities, not entities. *Forrester v. White*, 484 U.S. 219, 224 (1988). And as *Nixon v. Fitzgerald*, 457 U.S. 731, 751 n.31 (1982), holds, though by its text the Clause reaches Congress only, its values reach beyond Congress. By arguing for a constitutional discretion when "vot[ing]," Electors advance the same immunity that is granted to Congress expressly, and "every legislature," as Joseph Story put it, "as a matter of constitutional right." 3 *Commentaries* § 439 (1833); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."). The liberty protected by both clauses in our tradition is analogous to the liberty the Electors defend here.

Still Have the Electoral College? 4, 20 (forthcoming 2020) (Congress, state legislatures). Over the summer of the convention, however, the Framers came to recognize the problems inherent in any direct method. James Madison summarized the growing understanding that "the election must be made either by some existing authority under the National or State Constitutions, or by some special authority derived from the people, or by the people themselves." 2 *Farrand's Records of the Federal Convention* 109 (1911 ed.). Madison criticized direct appointment by any "existing authority," "State" or "National," as tending towards "cabal, or corruption." *Id.* at 109–11. He expressed support for direct election by the people. *Id.* And he considered the one indirect mode of selection that had been considered thus far: "electors." *Id.* Madison thought this "mode free from many of the objections which had been urged ag[ainst] it, and greatly preferable to an appointment by the Nat[ional] Legislature." *Id.* at 110. But as it "had been rejected so recently [and] by so great a majority," he ignored it, favoring, in the end, direct election by the People. *Id.* at 111.

Six weeks later, however, the Brearley Committee on Unfinished Parts reported back to the convention with a plan that built upon that idea "rejected so recently": electors. The Committee had rejected every direct mode of selection, and fixed instead upon the indirect mode of electors, chosen not, as Madison had proposed, "by the People," but rather "appoint[ed] by" each State, "in such manner as it's [*sic*] Legislature may direct." 2 *Farrand's Records* 493–94.

This choice, expressly made, defeats the State's case. If the Framers chose an indirect mode through

electors, that mode remains indirect *only if* electors retain a legal discretion. If electors have no discretion, if they are mere messengers for either the legislature or the people, then the mode is direct. The danger of the President becoming too dependent upon Congress (risking "cabal or corruption," as Madison feared) is not eliminated if Congress gets to appoint electors, and then through law direct precisely how they must vote. The same is true with every "existing authority" denied the power to select directly: There could be no reason to reject direct selection by any one of them, and then secure to them the power to control through law the electors they chose. As Amicus Edward Foley evinces, electoral discretion was not just understood to be part of the Framers' design. It was a "key to the Electoral College compromise." Edward Foley Br. 6. And none who proposed this indirect method said anything to suggest that such "electors" could be rendered mere county clerks.[2]

Yet that is precisely how Washington now views the office of elector. Washington claims for itself the power to remove any discretion in "Electors," and to "**vest [that] discretion in . . . citizens rather than electors.**" Wash. Br. 48 (emphasis added).

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[2] Washington argues that during the "constitutional convention, no delegate argued that electors should be free to ignore the will of their appointing States." Wash. Br. 1. But many expressly considered—and worried about—the discretion that electors could exercise. *See* Independence Institute Br. 9–11. Why else would they fear for the quality of electors, or craft the Constitution to assure their freedom to deliberate independently? None of the structural features of the Electoral College, such as the Elector Ineligibility Clause or the procedures in the Twelfth Amendment, make any sense if the electors can be rendered as puppets through law.

But the Framers expressly considered direct election by the people. They rejected it. And after the discretion held by electors had already been demonstrated, and complained about, Electors' Br. 33–34, Thomas Jefferson proposed:

> to have no electors, but let the people vote directly, and the ticket which has a plurality of the votes of any state, to be considered as receiving thereby the whole vote of the state.

Letter from Thomas Jefferson to Albert Gallatin, Sept. 18, 1801, *available at* https://perma.cc/8JL7-DSBB.

Jefferson's proposal was not considered, passed, or ratified as an amendment to our Constitution. Instead, the Twelfth Amendment three years later changed a different aspect of the original design, but it left electors with the same discretion that Jefferson was concerned about. Whether wise or not, after the Twelfth Amendment there would remain a human check—a safety valve—that would ultimately determine the electoral votes in a state. Those "votes" were, as the Constitution expressly states, "their"— the Electors'—"Votes," U.S. Const. art. II, § 1, cl. 4, not the votes of a State.

Neither did the Framers give the states a choice about whether or not to have electors. The Framers could easily have given the states the power "to cast votes for president, in such Manner as the Legislature thereof may direct." But that is not the Constitution's design: The states' duty is "to Appoint"; the office they "appoint" is an "Elector"; and it is the duty of the elector, not the state, to "vote by Ballot."

II. Recognizing A Constitutional Discretion In Electors Is Compelled By *Ray v. Blair*.

Washington argues that recognizing a constitutional discretion in electors is inconsistent with *Ray v. Blair*, 343 U.S. 214 (1952). To the contrary, such a discretion is compelled by *Ray*.

Ray expressly distinguished between (a) a state's power "to Appoint" electors and (b) a "federal function in balloting" by electors. 343 U.S. at 224. A state's power to appoint is plenary; a state's power over a "federal function" is non-existent.

Thus, the state can require a pledge by electors within a party primary, as *Ray* described, as "an *exercise of the state's right to appoint electors* in such manner, subject to possible constitutional limitations, as it may choose." *Id*. at 227 (emphasis added). But "balloting" is outside the scope of the state's power "to Appoint." Instead, as *Ray* explains, electors "ballot" through an authority given to them by a state, but which the state "receives . . . from the federal constitution." *Id.* at 225. Chief Justice Rehnquist confirmed that understanding in *Bush v. Gore*: electors "exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Burroughs v. United States,* 290 U.S. 534, 545 (1934)).

In *Ray*, the potential elector challenged the indirect effect of a pledge upon his freedom to deliberate. But there is nothing indirect about Washington's regulation in this case. Washington does not purport to enforce a pledge. Washington directly regulates the vote. *See* RCW 29A.56.340 (2016) ("Any elector who

votes for a person or persons not nominated . . . .") (emphasis added).

This is fundamentally different from *Ray*. In *Ray,* the question pressed was the expectations about how the College would function. Echoing that concern, Justice Jackson wrote:

> No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices.

343 U.S. at 232 (Jackson, J., dissenting).

Justice Jackson was certainly correct about what the Framers "originally contemplated," Washington's astonishing disagreement notwithstanding. *See In Support of Justice Jackson,* Medium, *available at* https://bit.ly/DefendingJackson; Independence Institute Br. 9–21.

Yet Justice Jackson was wrong to argue that those "expectations" could somehow constrain the state's power "to Appoint." Every American expects every state will hold an election to choose the President, rather than the legislature selecting the electors themselves. Yet this Court has repeatedly affirmed that those expectations do not constrain the states. *Bush,* 531 U.S. at 104; *McPherson,* 146 U.S. at 35. "Expectations" are not the Constitution's meaning. At least with the Electoral College, it is its words, interpreted in context, that fix its meaning.

No doubt, "expectations" about the Electoral College changed—and quickly. The first contested presidential election inaugurated those changes, and the Twelfth Amendment, as Professor (now Senator) Josh Hawley argues, ratified them. Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501 (2014). After the Twelfth Amendment, the presidency was radically different. No longer would the President not be a "political actor." *Id.* at 1506. Instead, the President would become a political leader, speaking for a party, and eventually, for "the people."

Thus, the question in *Ray* was, *given* these new expectations, was it permissible for a state, pursuant to its power "to Appoint," to require a loyalty oath from those seeking to join the slate of electors for a political party?

Subject to a latent qualification about the meaning of any such "pledge," see *infra* § IV, the answer to that question was "yes." Regardless of the original fantasies of Hamilton and others, the Constitution had vested in the States an explicit power: the power "to Appoint." Inherent in any such power is a freedom to discriminate among potential appointees, at least in a constitutionally appropriate way. A state could not, as *Ray* explained, discriminate racially. 343 U.S. at 227. But within a party-based system for selecting the President, it was plainly appropriate for a state to discriminate on the basis of party pledges. That pledge was thus, as *Ray* expressly described it, "an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." *Id.*

In this way, *Ray* followed the interpretive method of *McPherson v. Blacker*, 146 U.S. 1 (1892). There too, the candidates seeking to become electors relied upon expectations to challenge a state's law—though in that case, modern, not original, expectations. Michigan had recently switched to a district method for selecting electors, contrary to the then-universal norm of allocating electors by winner-take-all. This Court acknowledged the prevailing norm, but rejected the idea that the meaning of the Constitution turned on the public's expectations. Meaning depends upon language, in the context that the Framers had used them. Those words had vested a discretion in state legislatures. Neither custom nor disuse constrained that discretion. *McPherson*, 146 U.S. at 36.

Ray and *McPherson* are thus both directly contrary to Washington's argument. For in this case, it is not the Electors who are championing "expectations" over text. Washington is. At least fifteen times in its brief, Washington mentions "expectations" as a way to amend the ordinary expected meaning of the terms "Electors" and "vote by Ballot." Wash. Br. 8, 9, 19, 21, 24, 25, 25, 25, 27, 30, 31, 36, 39, 40, 45. Again and again, Washington's central claim is that the meaning of the Constitution should now bend to modern "expectations." Like Justice Jackson in *Ray* or the candidates in *McPherson*, Washington asks this Court to look beyond the Constitution's plain text, and instead fix its meaning upon these expectations. Those current expectations yield, on Washington's view, an affirmative power to "vest discretion in . . . citizens rather than electors," Wash. Br. 48, by securing to the

states the authority to coerce electors to vote as directed.[3]

The issue in this case, however, is meaning, not expectations. And the relevant terms are "Appoint," "Electors" and "vote by Ballot." The meaning of those terms must be informed by their use throughout the Constitution. Electors' Br. 24–26. None could imagine that a congressional elector (a voter) could be fined for "voting" contrary to the will of the state legislature, even though the legislature sets the qualifications for such electors, and even if a state requires a pledge in a primary to vote for the nominee of that party. *See infra* § IV. So too must it be with a presidential elector.

That meaning is informed as well by the ordinary expected meaning of the term "Elector"—one with "the right of choice," *see supra* 1—and its obvious echo in the Twelfth Amendment, describing that "right of choice" "devolv[ing] upon" the House. U.S. Const. amend. XII. When that happens, Members make their choice "by ballot." *Id.* House rules required each ballot to be placed into a protected box until all ballots were

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[3] Washington calls this design pro-democratic, but there is nothing inherently democratic in the power that Washington claims. Washington does not argue that "expectations" mean the People must rule. Rather the power that Washington asserts means that it is the choice of the legislature that must rule, whether or not for the People. If the state has the power to direct how electors may vote, is there any limit to that power? May Washington forbid its electors from voting for anyone who hasn't campaigned in Washington? Or who doesn't pledge to appoint justices who will uphold *Roe v. Wade*? Or who hasn't released their tax returns, as bills introduced in New York and New Jersey purport to do? *See* S. 26, § 3, Assemb. Reg. Sess. 2017-2018 (N.Y. 2017); A. 2193, Statement, 219th Leg., Reg. Sess. (N.J. 2020).

cast. *House Journal* Feb. 9, 1801, 791–92. Thus, no state could effectively direct a Member how to vote. That was made clear in 1837 when the choice of Vice President devolved upon the Senate, and the legislatures of Kentucky and Rhode Island instructed Senators from those states to vote for the Democrat—but all four Senators ignored the instruction. *See* Journal of the House of the Commonwealth of Kentucky 177–78 (1837); Resolution of the Legislature of Rhode Island of Feb. 13, 1837; *see also* Jay S. Bybee, *Ulysses At The Mast*, 91 Nw. U. L. Rev. 500, 519 (1997) (there was "no contemporaneous means for compelling senators to obey instructions").

That textual discretion in turn confirms the "expectations" that are most clearly evidenced across our history—that in principle, elector discretion could misfire. That concern was expressed directly to Thomas Jefferson by Albert Gallatin in 1801, leading Jefferson to suggest eliminating electors. Letter from Albert Gallatin to Thomas Jefferson, Sept. 14, 1801, *available at* https://perma.cc/54FX-VYE4. It has driven many to propose amendments to achieve exactly what Jefferson had originally suggested.[4] If it turns out now that all the states had to do to avoid this potential misfiring was to pass a simple statute that

[4] Proposals for an amendment effectively eliminating the office of Elector, or constraining it through law, were common in the 19th century. Herman Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* 86–111 (1897). The most active reformer in the 19th Century, Thomas Hart Benton, reintroduced his amendment eliminating electors each year for 20 years. Keyssar, *supra*, at 87. Many national leaders called for electors to be eliminated, including President Jackson, Charles Sumner, George Norris and Lyndon Baines Johnson. *Id.* at 111, 144, 181, 214.

would fine the "unfaithful," then, to remix a bit Chief Justice Roberts' opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, "what chumps!" 135 S. Ct. 2652, 2678 (2015) (Roberts, C.J., dissenting). How many endless hours of committee hearings and floor debate have been wasted because none were as clever as the lawyers in Washington to think of fining electors directly?

Our forebears were not chumps. And even if the Constitution's text were unclear—and it is not—the longstanding recognition of this potential for electors to vote contrary to plan should evince a liquidated understanding of our Constitution's meaning. *See National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 525 (2014). The repeated efforts to remove this discretion reveal an unbroken recognition that settles any question about the constitutional discretion of electors. That settled understanding is that of course, electors, like judges, can pledge before appointment, and of course, states, like Presidents, can insist upon a pledge as a condition of appointment. But neither electors nor judges can be compelled by law to vote in a particular way, regardless of any pledge.

III. Washington Has Identified No Power To Authorize Its Regulation Of The "Federal Function In Balloting."

Washington claims a power to regulate the "federal function in balloting." *Ray,* 343 U.S. at 224. It claims that power not by virtue of the Tenth Amendment. Instead, Washington grounds its argument in the power "to Appoint." The Electors had argued that the power "to Appoint" "does not, *without more*, carry any

power to control the person appointed." Electors' Br. 20. The State disagrees, insisting that "since the framing the 'default rule' has been that power to appoint includes power to remove or sanction." Wash. Br. 1.

Washington's purported rule conflates vertical appointment power cases with interbranch, or horizontal, appointment power cases. It is of course correct that an entity appointing a position or officer *inferior to itself* has, by implication at least, the power to remove or control that officer. This is because, in every such case, the "more" referenced by Electors' "without more" is either an express or implied power to control. Thus in the context of the President's Article II power, the Take Care Clause, U.S. Const. art. II, § 3, gives an appointing officer a presumptive power to remove—not because removal is inherent in appointment, in whatever context, but because it is necessary to the Take Care power in the Article II context. Practically every case cited by Washington evidences this Article II power. *See Myers v. United States,* 272 U.S. 52, 119 (1926) (citing the need for "those in charge of and responsible for administering functions of government"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (accounting board within executive branch); *Burnap v. United States*, 252 U.S. 512, 515 (1920) (employee within the War Department); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (customs officer); *Keim v. United States*, 177 U.S. 290, 293 (1900) (military officer).

The only cases outside of Article II cited by Washington also demonstrate this unremarkable point. Each appointment is within the judicial branch;

each is a vertical delegation of power from the appointing officer to an inferior under that officer's control. *See Reagan v. United States*, 182 U.S. 419, 424 (1901) ("inferior" court commissioner appointed by Article IV court within Indian territory); *In re Hennen*, 38 U.S. 230, 259–60 (1839) ("inferior" court clerk appointed by an Article III court).

But the appointments of inferior officers within branches entails nothing about interbranch, or horizontal, appointments. Washington acknowledges as much when it confesses that its so-called "default rule" applies to just one horizontal appointment: presidential electors. That's because, as Washington has jiggered it, its "default rule" does not apply whenever the term of the appointee is set. Thus, the "default" does not apply to judges, because judges serve during good behavior, and it doesn't apply to Senators, because Senators serve a term of six years. Wash. Br. 33. As crafted by Washington, the only horizontal appointment that this so-called "default rule" applies to is presidential electors.

Washington is doubly wrong. First, even on its own terms, this rule does not apply to presidential electors, because there is nothing unspecified about the term of a presidential elector. That term begins when the elector is "appointed"; it ends after the elector casts a ballot, certifies, and sends the vote as the Twelfth Amendment directs. No presidential elector has ever been confused about whether their term extends beyond the day the electors "vote."

But the deeper problem is that this so-called "default rule" makes no sense of the interbranch, or horizontal appointment power. Article II gives Con-

gress the power to vest the appointment of inferior officers in "the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2. That power includes the power to make interbranch appointments. *Morrison v. Olson*, 487 U.S. 654, 673–75 (1988). Yet such an appointment does not, *by virtue of the appointment alone*, create any power in the appointing officer to control the officer appointed. And indeed, when Congress has tried to secure such control to the appointing officer, this Court has expressly limited it, at least if such power conflicts with the independent authority of that separated branch to supervise its own inferior officers.

Thus, in *Morrison,* this Court held that Congress may not vest the judiciary with broad powers of removal over the Special Counsel, even though it may vest the appointment of the Special Counsel within the judiciary. Congress had given the Special Division an overlapping power to terminate the Special Counsel. This Court interpreted that removal power narrowly, so as to avoid "the Special Division [having] anything approaching the power to remove the counsel while an investigation or court proceeding is still underway." *Morrison*, 487 U.S. at 682. Likewise, in *Mistretta v. United States*, 488 U.S. 361 (1989), the President's interbranch appointment of judges to the Sentencing Commission could not include any power to control or supervise those judges, because of the independence of the Judicial Branch secured by separated powers. As this Court wrote, "[t]he notion that the President's power to appoint federal judges to the Commission somehow gives him influence over the Judicial Branch . . . is fanciful." *Id.* at 409.

Washington's attempt to explain *Morrison* has it exactly backwards. The State claims that its "default rule" did not apply because Congress attempted to add "detailed limitations on removal." Wash. Br. 34. But if the power to remove flowed constitutionally from the power to appoint, it should have been these "detailed limitations" that would have unconstitutionally infringed on the Special Division's removal power. Yet this Court held the opposite: that the *removal power* had to be construed narrowly, showing that it does *not* necessarily run with the appointment power in every context of appointment. *See Morrison*, 487 U.S. at 682.

These cases make clear that any constitutional implications of a vertical appointment power do not carry over to interbranch or horizontal appointments. Washington cites not a single case which suggests that they do. And nothing in Washington's brief supports the idea that electors are inferior officers to state executives. The Electoral College is, "in effect, a temporary legislature, an assembly that could not legislate and thus could not wield ongoing influence or be corrupted." Keyssar, *supra*, at 24. *See Baca* Reply § I.A. (discussing status of electors in detail). It is not inferior to any other branch or institution. Neither are the electors inferior to the state legislatures that determine their appointment.

IV. A Political Pledge Has *Never* Been Legally Enforceable.

Washington defends its regulation of the votes by electors not directly but indirectly, citing *Ray*'s upholding of a party pledge. Relying on nothing more than the Second Restatement of Contracts, the State argues that "if a pledge is constitutional, it makes no

sense to say that a State cannot remove or penalize an elector who violates that condition." Wash. Br. 40–42. Indeed, Washington insists it would be "unfathomable that a State could not enforce [a pledge] by removing an elector who violated [it]." Wash. Br. 41.

Yet in fact, American jurisprudence has yet to "fathom" any such power. The law is littered with cases in which political pledges or party loyalty oaths have been deemed unenforceable, even if validly required. So far as the Electors have been able to determine, *never* in American history has a Court enforced a political pledge directly or through monetary penalties. In fact, in *Ray* itself, this Court cited approvingly (at 343 U.S. at 219) a companion case acknowledging that such a pledge was "unenforceable through the courts because … merely a moral obligation," *Ray v. Garner*, 257 Ala. 168, 171 (1952) (party loyalty pledge conditioning participation in a primary).[5]

The idea of a legally unenforceable obligation is commonplace in American jurisprudence. Courts have repeatedly upheld requirements that even congressional electors (voters) who wish to vote in a party primary must pledge to support the party's nominees. But those pledges have always been understood to be moral obligations that "fail[] to give rise to any legal obligation." *See Kucinich v. Texas Democratic Party*, 530 F. Supp. 2d 879, 884 (W.D. Tex.

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[5] The Court also relied on a leading scholar of presidential electors, Ruth Silva, *State Law on the Nomination, Election, and Instruction of Presidential Electors,* 42 Am. Pol. Sci. Rev. 523, 529 (1948), who had concluded "[n]o action . . . could probably be taken to compel the elector to abide by his pledge." *Ray*, 343 U.S. at 229 n.17.

2008), *aff'd*, 563 F.3d 161 (5th Cir. 2009) (pledge of a presidential candidate to "fully support" nominee); *Chapman v. King*, 154 F.2d 460, 462 (5th Cir. 1946) (acknowledging "the practical potency of the party pledge" despite there being "no way for the party to compel those who voted in its primary to support the nominee"); *see also Koy v. Schneider*, 110 Tex. 369, 383 (1920) (party pledges impose a "moral obligation"); *State ex rel. Labauve v. Michel*, 121 La. 374, 387 (1908) (same). Outside of elections, jurors, too, take oaths to follow the law that cannot be enforced legally, s*ee* Electors' Br. 51, just as it is with judges, presidents, senators, and representatives.

This pattern is correct because of the character of any such pledge. In the political context, a pledge expresses a present intention of loyalty. In this case, for example, when the Washington Electors made their pledges, they each certainly intended to carry it into effect. But when circumstances change, our tradition protects the freedom of the voter to deviate from such a pledge. If that deviation is public, it may come with practical or political consequences. But even if it is not public, a person swearing an oath must answer to his or her own God or conscience. A free society does not allow those exercising a public franchise to bind themselves legally in that act. Votes cannot be sold; neither can they be sold indirectly, through a pledge enforced through law.

Thus when *Ray* upheld Alabama's pledge, the tradition that it spoke from had in fact *never* made such a pledge enforceable. *Ray*'s dicta—"even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Consti-

tution," 343 U.S. at 230—expressly reserved the question. Yet that express reservation has inadvertently suggested to some that making a pledge enforceable would raise no serious questions. That suggestion is false, and, in any case, not *Ray*'s holding. All that *Ray* can be read to affirm is that a pledge creating a moral, not legal, duty does not conflict with the "federal function in balloting." *Ray* says nothing to sanction a law that actually and directly regulates the vote.

V. There Is A Continuing Need For Elector Discretion Within Our System For Electing The President.

The Framers of both the Constitution and the Twelfth Amendment presupposed elector discretion. *See* Independence Institute Br. 3–21; Edward Foley Br. 6–33. So too did the Framers of the Twentieth Amendment presume elector discretion. That amendment empowers Congress to address the contingency of death after the Electoral College votes. The Framers of that amendment openly acknowledged that before the College votes, the contingency of death would be addressed by elector discretion. *See Baca* Reply § II.D. This presupposition is in direct conflict with the laws of Colorado, and the amended law of Washington. Both purport to cast an automatic vote, regardless of death, removing any possibility for discretion if a candidate dies before the College votes. *See* RCW 29A.56.090; *see also Baca* Reply § II.D (by removing the discretion presumed by the Twentieth Amendment, the Colorado law potentially wastes the vote of one party, risking crisis).

But the death of a candidate is not the only case in which the Framers' choice would make sense. A candidate could have a stroke and be essentially disabled. Or a candidate could be convicted of a crime, or commit a plain and obvious crime. Or it could become obvious after a popular election that a candidate is controlled by a foreign power. Alternatively, the vote of the electors may be a presumptive tie, 269–269. Under the Twelfth Amendment, those two would be the only candidates that the House could select between. In such a case, having several electors deviate from their pledges to give the House a third candidate, as a possible compromise, could potentially break a likely deadlock in the House.

Indeed, given the dynamics of the vote in the Electoral College, the *only* way that an election could ever be swayed against the presumptive winner is if enough electors *in the winner's own party* chose to vote against that candidate. In only three elections decided by the College has the difference in the College been less than 10 electoral votes (1796, 1876, 2000). "Close" elections are typically at least 30 electors apart. If such a substantial number from the candidate's own party judged the candidate's election improper, that could signal a critical need to avoid the automatic selection of that candidate.

In all these cases, one might well prefer to regulate these contingencies through law. That's precisely what the Twentieth Amendment secured to Congress for after the electors vote. But that Amendment did not add any power, either to Congress or to the States, to regulate such contingencies before the presidential electors vote. The Framers of that Amendment, like the Twelfth Amendment and Article II, placed their

faith in human judgment to ratify the results of any process of selection. That human check continues to be appropriate, and given the Twentieth Amendment, potentially necessary.

The States' Amici complain that this safety valve creates a democratic vacuum: That the electors are "an unaccountable super-elite," Republican National Committee Amicus Br. 5.

That argument reveals not truth, but a lack of imagination. There is nothing in the Constitution that would forbid the states from making state officials electors. If every elector were an elected state official, any inappropriate exercise of discretion could be challenged in the following election. That accountability would be more perfect than the accountability of a second-term president, not to mention a judge or juror. There is therefore no need to bend the meaning of "Appoint," or to ignore the meanings of "Elector" and "vote by Ballot," to make automatic what the Framers meant to be human. To this day, electors take their duty seriously, and believe themselves charged with an obligation to exercise discretion. *See* Robert M. Alexander, *Representation and the Electoral College* ch. 6 (2019). Especially at this moment, there is no reason to remove them from that role.

CONCLUSION

The decision below should be reversed.

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May 1, 2020