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 Derek T. Muller as *amicus curiae* in support of neither party

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INTEREST OF *AMICUS CURIAE*[1]

Derek T. Muller is a professor of law at Pepperdine University Caruso School of Law. He teaches and writes about election law and federal courts, and he has an interest in the resolution of this case within the appropriate legal framework.

SUMMARY OF ARGUMENT

There are extensive practices in Congress and in the states, including practices at the time of the ratification of the Twelfth Amendment, that should assist this Court in determining whether it ought to leave resolution of counting disputes to Congress and in explaining what the Constitution permits regarding regulation of the presidential election process.

First, this Court should not issue a decision because Congress holds the exclusive power to count, scrutinize, and even reject electoral votes. In 2017, Congress counted Colorado's and Washington's electoral votes, and this Court has been asked to revisit a decision reserved to the judgment of Congress.

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[1] Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Pepperdine University Caruso School of Law provides financial support for faculty members' research and scholarship activities, support that helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of *amicus curiae*.) The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.3(a).

Second, Micheal Baca of Colorado failed to avail himself of congressional remedies. He failed to secure an objection in Congress during the counting of the electoral vote, and he failed to submit credentials to Congress as an elector. That failure should preclude a court's adjudication of his dispute.

Third, states may empower electors to ascertain vacancies in the meeting of electors, and states may levy fines on presidential electors, even after those electors have been selected. In the event this Court reaches the merits of this case, it should identify permissible practices of states in identifying vacancies and fining electors, and existing state statutes might be construed narrowly to avoid addressing constitutional questions.

Fourth, presidential electors must vote "by ballot," but that ballot may be an "open" or a "secret" ballot. States have the discretion to decide how to conduct these meetings.

ARGUMENT

I. The political question doctrine prevents this Court from second-guessing Congress's decision to count all electoral votes cast in 2016, including Colorado's and Washington's votes.

The Twelfth Amendment provides, in part, that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. CONST. amend. XII ("The Counting Clause").

On January 6, 2017, the President of the Senate—Vice President Joe Biden—in the presence of the

Senate and the House of Representatives, and with the assistance of four tellers, opened the certificates of the electors from each of the fifty states and the District of Columbia. The tellers counted the votes aloud, proceeding in alphabetical order by state. The count reached Colorado. The teller, Representative Gregg Harper of Mississippi, announced to the joint session, "The certificate of the electoral vote of the State of Colorado seems to be regular in form and authentic, and it appears therefrom that Hillary Clinton of the State of New York received nine votes for President and Tim Kaine of the Commonwealth of Virginia received nine votes for Vice President." 163 CONG. REC. H186 (daily ed. Jan. 6, 2017). These nine votes were ultimately included in the final vote total for Hillary Clinton, 227 electoral votes. *Id.* at H189. Similarly, Congress counted twelve electoral votes from Washington for various candidates. *Id.* at H188–89.

The Counting Clause provides a textually demonstrable commitment to Congress of counting the electoral vote, including determinations about which electoral votes to count. *See, e.g.*, Albert J. Rosenthal, *Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 27 (1968) ("This is not definitely a final commitment to Congress of the power to resolve dispute votes, but it has some of the hallmarks of one."); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001) ("There is a 'textual commitment' of determining the electoral votes in a slate to Congress."); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 184 (2001) ("Once a dispute over

electors lands in Congress, it is arguable, by analogy to the *Nixon* case, that judicial jurisdiction ceases. The responsibility for counting electoral votes is lodged firmly in Congress by Article II and the Twelfth Amendment (which in this respect is identical to Article II), and there is no suggestion of a right or power of judicial review and no hint of a standard that a court reviewing Congress's decision on which electoral votes to count might steer by."); Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 341–42 (2001) ("[T]he Electoral Count Act, a set of federal statutes enacted after the Hayes-Tilden election to implement Congress's task under the Twelfth Amendment to count the electoral vote, assigns to Congress the authority and responsibility to settle disputes remaining after a state has tried to resolve electoral contests through 'judicial' (which Florida expressly chose to do) or other means."); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 581–82 (2001) ("Article II and the Twelfth Amendment are readily interpretable as embodying a textually demonstrable commitment to Congress of the power to resolve all issues related to the proper tabulation of electoral votes."); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 618 & n.88 (2001) ("[T]he Twelfth Amendment gives Congress broad discretion in counting—and hence determining the validity of—electoral votes. The Court should always affirm Congress's decisions,

absent some plain and egregious violation of the Twelfth Amendment or some other constitutional provision. An example of such a palpable and extreme violation would be Congress's refusal to count electoral votes because they were cast by women or Hispanics."). *Cf. Roudebush* v. *Hartke*, 405 U.S. 15, 19 (1972) ("Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted."). *Accord State* v. *Albritton*, 37 So.2d 640, 643 (Ala. 1948) ("[3 U.S.C. § 17] provides a complete remedy for contesting irregularity of casting votes by presidential electors.").

Disputes concerning the electoral vote totals, including the appropriate identity of electors and the scope of state law concerning the selection of electors, are resolved in Congress, not in the federal judiciary. Consider extensive historical practices in Congress.

A. Early congressional practices

In 1800, members of Congress vigorously debated the scope of Congress's authority to count electoral votes. Senator James Ross of Pennsylvania proposed a committee to "consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice President of the United States, and for determining the legality or illegality of the votes given for those officers in the different States." 10 ANNALS OF CONG. 28–29 (1800). Some objected that Congress lacked the authority to enact legislation in this area. *Id.* at 29–32. Others argued that Congress must have the power to review the qualifications of presidential candidates, to

examine whether electoral votes were defective, or to legislate under the Necessary and Proper Clause. *Id.*

While no legislation arose in the aftermath of this exchange, Congress passed what would become the Twelfth Amendment in 1803, which was ratified in 1804.[2] The major change required presidential electors to cast distinct votes for the offices of President and Vice President. It also clarified procedures about what happened if no candidate received a majority. *See* U.S. CONST. amend. XII.

The Counting Clause of the amendment mimicked Article II, Section 1, Clause 3: when electoral votes were returned to Congress, "the votes shall then be counted." During debate over the amendment, Senator John Quincy Adams of Massachusetts "thought that some explanation should be given of the principle upon which the votes were to be counted." 13 ANNALS OF CONG. 125 (1803). No such principle was included in the text of the amendment.

After passage of the Twelfth Amendment, Congress has routinely decided whether to count electoral votes, from shortly after its passage to today. For instance, on December 26, 1808, Representative Joseph Barker of Massachusetts introduced "a representation of sundry inhabitants of Hanover" that the "late appointment of Electors" was "irregular and unconstitutional." 19 ANNALS OF CONG. 909 (1808). More such petitions were brought before

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[2] Accordingly, the original public meaning of the Twelfth Amendment is best understood as fixed at this time. The *Federalist Papers* or other statements made during the ratification debates about terms superseded by the Twelfth Amendment are not the best evidence of meaning.

Congress on January 31, 1809. 19 ANNALS OF CONG. 1241 (1809). Ezekiel Bacon of Massachusetts urged "a joint committee to examine the subject of the petitions." *Id.* at 1302. John Randolph of Virginia strongly opposed such a committee, worrying that Congress would act "at the expense of the dearest rights of the States." *Id.* at 1302. John Rowan of Kentucky argued that "Congress certainly did not possess a superintending power over the acts of the States." *Id.* at 1376. But Bacon argued that "the adoption of the resolution would not commit the House at all." *Id.* at 1377. The House agreed to form a committee by a 51-24 vote. *Id.* In the end, the votes of Massachusetts's presidential electors were ultimately counted without apparent dispute. *Id.* at 1425.

Also in 1808, Matthew Walton of Kentucky was chosen as one of the Kentucky's eight electors. As the time for the meeting of electors approached, he wrote that he had contracted "a very severe fit of either the gout or rheumatism" and that he would likely be unable to attend the meeting of Kentucky's presidential electors. UNBOUND RECORDS OF THE U.S. SENATE, 10TH CONGRESS, 1807–1809, Nat'l Archives & Records Admin., 2007, Microfilm Publication M1710, Roll 6, SEN 10A-H1, at 53–54. He asked the electors to fill his seat if laws concerning a vacancy permitted replacement; alternatively, he included a sworn statement of his votes for President and Vice President. *Id.* at 41–42, 53–54. When the electors met, they did not fill any vacancy and listed only seven votes for President and Vice President. *Id.* at 45. All these materials, including Walton's correspondence and attempted votes, were submitted to Congress.

When Congress met, it counted only seven electoral votes. 19 ANNALS OF CONG. 1425 (1809) (noting that Kentucky's electors cast 7 votes for James Madison for President and 7 votes for George Clinton for Vice President, "[o]ne of the votes of Kentucky lost from the non-attendance of one of the electors"). When a member of House sought to explain "why one vote was deficient from the State of Kentucky" in the event Congress might want to count such a vote in another election, the sentiment of House was that "precedent to govern future proceeding" should be "done with great deliberation" and declined to do so. *Id.* at 1426.

Congress has repeatedly confronted challenges about whether and how to count electoral votes. In 1817, it debated whether to count Indiana's electoral votes given that it appeared the votes had been cast before Indiana was a state. *See* 30 ANNALS OF CONG. 943–49 (1817). Congress faced a similar dispute in 1821 regarding Missouri's votes before it achieved statehood, *see* 37 ANNALS OF CONG. (1821) (providing two counts, one including the contested votes and one excluding them, explaining that the winner was the same under either circumstance), and in 1837 regarding Michigan, *see* 13 REGISTER OF DEBATES IN CONG. 698–701, 738–39, 1582–85, 1655–58 (1837) (same). In 1837, Congress scrutinized whether deputy postmasters were "person[s] holding an office of trust or profit under the United States," U.S. CONST. art. II, § 1, cl. 2, which might disqualify several presidential electors. *See* 13 REGISTER OF DEBATES IN CONGRESS 617, 698–701, 738–39, 1582–85, 1655–58 (1837) (ultimately counting all votes). In 1856, five Wisconsin electors cast their votes on a day other than that proscribed by federal law due to poor weather,

and their votes were counted in Congress over several objections. *See* CONG. GLOBE, 34TH CONG., 3D SESSION 644–60 (1857).

In 1873, the House declined to count three electoral votes from Georgia cast for Horace Greeley after Greeley had died. CONG. GLOBE, 42D CONG., 3D SESSION 1286–87, 1297–98 (1873). Mississippi's electoral votes were counted over objections that the electors failed to certify that they had voted by ballot and that the replacement of an elector occurred without gubernatorial signature under state law. *Id.* at 1287–88, 1298–99. Texas's electoral votes were counted over similar objections. *Id.* at 1289–91, 1300–01. Georgia's remaining electoral votes were counted over the objection that at least one elector failed to cast a vote for at least one person who was not an inhabitant of Georgia. *Id.* at 1299–1300. Congress rejected electoral votes cast from Arkansas, based on the objection that they were not lawfully elected. *Id.* at 1291–94, 1301, 1303–04. Louisiana sent two sets of returns, and Congress rejected counting either of them—one objection being that "there is no State government in said State which is republican in form." *Id.* at 1291–92, 1301–05; *see also id.* at 1305 ("The three votes for Georgia for Horace Greeley, of New York, for President were excluded. The electoral votes of Louisiana and Arkansas were not counted.").

B. Congressional counting practices since 1887

Congress's historical practices counting electoral votes came under scrutiny after the acrimonious election of 1876. Some states presented Congress with competing slates of presidential electors, leaving

Congress with a bitter dispute to determine which candidate won. *See* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004); *see also* Bush v. Gore, 531 U.S. 98 (2000) (Breyer, J., dissenting).

Thereafter, Congress enacted the Electoral Count Act in 1887, codified within 3 U.S.C. §§ 5 *et seq.*, which provides the mechanisms that Congress still uses today to handle disputes concerning presidential electors. *See Bush* v. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000) (per curiam).

Counting occurs in a joint session. 3 U.S.C. § 15. Any "objections" to the counting of votes "shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received." *Id.* Then the Senate and the House of Representatives withdraw for separate deliberation. *Id.* In the event "one return has been received," then "no electoral vote or votes from any state which shall have been regularly given" "shall be rejected" unless "the two Houses concurrently . . . reject the vote or votes." *Id.* Other rules provide for how to decide between "more than one return or paper purporting to be a return from a State." *Id.*

In 1961, Congress avoided a crisis after it received three separate electoral certificates from Hawaii, two of which claimed the Democratic slate of electors had been elected, and one of which claimed the Republican slate of electors had been elected. 107 CONG. REC. 289–90 (1961). Vice President Richard Nixon—the Republican nominee for President in 1960—presided

over the meeting. He stated, "In order not to delay the further count of the electoral vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii." *Id.* at 290. There was no objection, and three electoral votes for John F. Kennedy for President and for Lyndon B. Johnson for Vice President were counted. *Id.*; *see also Bush* v. *Gore*, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting).

In 1969, a North Carolina elector cast a presidential vote for George Wallace instead of Richard Nixon, whom he was supposed to support. Members of Congress objected under the Electoral Count Act, and pursuant to 3 U.S.C. § 15, each chamber deliberated whether to count the vote. Congress ultimately counted the vote—in part because North Carolina law did not compel an elector to cast a vote for any particular candidate. *See* 115 CONG. REC. 164 (1969) (statement from the Deputy Attorney General of North Carolina that "under the North Carolina statutes a presidential elector is not required to cast his vote for any particular candidate"); *id.* at 166 (statement of Mr. Fountain) ("There is no requirement in the Constitution of the United States, the constitution of North Carolina, the United States Code, or the statutes of North Carolina that binds a presidential elector to any one candidate. Nor to my knowledge has a decision binding our electors been issued by any competent court. Therefore, regardless of whether we agree or disagree with Dr. Bailey's decision, Congress is powerless to act as proposed."); *id.* at 167 (statement of Mr.

Wyman) ("At the Federal level unless and until this is changed by constitutional amendment, or to a lesser extent within the several States by State law, electors are legally free to vote as they individually see fit."); *id.* at 168 (statement of Mr. Fish) ("[N]either is there a requirement in the law of North Carolina binding an elector to vote for the winner of the popular vote, nor was any challenge to the elector's action made in North Carolina."); *id.* at 169 (statement of Mr. Schwengel) ("In this case, North Carolina's laws do not specifically bind the electors to the outcome of the popular vote."); *id.* at 202 (statement of Mr. Muskie) ("I understand that the statute is not expressly binding."); *id.* at 215–26 (statement of Mr. Mundt) ("Dr. Bailey broke no law, because the only law that could be applicable to him as an elector would be the law of North Carolina; and the law of North Carolina stands silent on this point.").

Admittedly, this was not the exclusive reason that members of Congress opposed excluding the vote of this faithless elector. *See, e.g.*, *id.* at 221 (statement of Mr. Byrd) (describing practice of electors to vote for their party's candidate as "unwritten custom. It is not a matter of constitutional law. Custom, however well established, cannot supersede the Constitution."). In the end, Congress provided no single reason as to why it would count the vote.

In recent elections, Congress has been acutely aware of its power to challenge the counting of electoral votes under the Counting Clause and the Electoral Count Act. Several members of the House of Representatives serially tried to lodge objections to counting Florida's electoral votes in 2001. *See* 147 CONG. REC. 104–06 (2001). No objection was

sustained because 3 U.S.C. § 15 requires that "at least one Senator and one Member of the House of Representatives" object in writing, and no Senator joined these objections. And in the same election, the District of Columbia only cast two electoral votes for President and two votes for Vice President. *See id.* at 103–04. Congress counted them, even though the District of Columbia was entitled to three electoral votes. *See* U.S. CONST. amend. XXIII, § 1.

In 2005, a member of the House and a member of the Senate objected to counting electoral votes from Ohio "on the ground that they were not, under all of the known circumstances, regularly given." 151 CONG. REC. 198 (2005). Members of Congress debated whether to count Ohio's electoral votes. *See, e.g.*, *id.* at 169 (statement of Mr. Obama) ("I am absolutely convinced that the President of the United States, George Bush, won this election. I also believe he got more votes in Ohio."). The objection failed, and Ohio's electoral votes were counted. *See id.* at 199–242 (objection failing in the House by a vote of 267-31, with 132 not voting); *id.* at 157–73 (objection failing in the Senate by a vote of 74-1, with 25 not voting). In the same election, Congress counted what was assuredly an erroneous ballot cast from Minnesota—9 votes for John Kerry for President, 1 vote for John Edwards for President, and 10 votes for John Edwards for Vice President. *Id.* at 198.

C. Congress counted the votes of Colorado's and Washington's presidential electors in 2017.

Congress was actively engaged when counting electoral votes in 2017. Members of Congress

attempted to object to the electoral votes cast from Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming. *See* 163 CONG. REC. H186–H189 (daily ed. Jan. 6, 2017). But as in 2001, no Senator joined these objections, Congress engaged in no debate, and all the votes were counted.

Despite controversies about the electoral votes cast by electors in California, Colorado, Minnesota, and Washington, no objections were raised about these votes, much less objections joined by a member of the House and a member of the Senate. *See, e.g.*, *Koller* v. *Brown*, 224 F. Supp. 3d 871 (N.D. Cal. 2016) (claim from a California presidential elector); *Baca* v. *Hickenlooper*, 2016 WL 7384286 (10th Cir. Dec. 21, 2016) (claim from Colorado presidential electors); *Abdurrahman* v. *Dayton*, 903 F.3d 813 (8th Cir. 2018) (opinion of Colloton, J.) (claim from a Minnesota elector who vacated his office upon attempting to cast a vote for a candidate other than the candidate he pledged to support); *Chiafalo* v. *Inslee*, 224 F. Supp. 3d 1140 (W.D. Wash. 2016) (claim from Washington presidential electors). Congress counted all electoral votes cast—including all the electoral votes cast in Colorado and Washington.

D. This Court cannot and should not contradict Congress's judgment.

Congress's decisions to count electoral votes or to refuse to count electoral votes may be persuasive to this Court, or they may not. This Court may deem Congress's precedents to have high value or low value. This Court might have its own view on these and other episodes about how to count electoral votes. But

all that is beside the point. It is within Congress's sole power to count electoral votes. And it is reserved to Congress to determine whether to count or not to count, and to determine the scope, applicability, and persuasiveness of precedent. *See, e.g.*, 3 HINDS' PRECEDENTS (1907), Chapter 58 ("Procedure of the Electoral Count"), Chapter 59 ("The Electoral Counts, 1789 to 1873"), Chapter 60 ("The Electoral Counts, 1877 to 1905"), Chapter 61 ("Objections at the Electoral Count").

The Tenth Circuit concluded that Baca "is not seeking to somehow belatedly credit that vote" he attempted to cast for John Kasich for President. *Baca* v. *Colo. Dep't of State*, 935 F.3d 887, 920 (10th Cir. 2019). But if this Court chooses to scrutinize the constitutionality of Colorado's law, it ought to recognize that it will be passing judgment on a matter that is squarely within Congress's constitutional authority and that Congress has already had the opportunity to consider. *See* U.S. CONST. amend. XII. Baca asks this Court to find that a Colorado law concerning the existence of a vacancy in the meeting of the state's electoral is unconstitutional. To do so means contradicting the judgment of Congress, which accepted the vote cast by a replacement elector who filled a vacancy in the meeting of Colorado's electors.

How this Court treats congressional reaction to Washington's law is a greater challenge.[3] The

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[3] Washington repealed its civil penalty statute in 2019. *See* Uniform Faithful Presidential Electors Act, 2019 Wash. Legis. Serv. Ch. 143, § 11 (2019) (striking relevant portions of REV. CODE WASH. § 29A.56.340). Washington now conditions receipt of "a subsistence allowance and travel expenses" for electors who "give[] his or her vote for president consistent with his or her

presidential electors from Washington were able to cast votes for their preferred candidates. Congress counted the votes cast for those candidates. Washington subsequently fined those electors. On the one hand, this Court might conclude that Congress has the power to judge the "regularity" of the appointment of electors, including existing state laws that would result in fines imposed on electors in certain circumstances. The Court might also conclude that if Congress has authorized the greater power of a state in recognizing that an elector vacates his seat in certain circumstances, Congress has authorized the lesser power of financial penalty against faithless electors. On the other hand, the presidential electors in Washington received a penalty only after Congress met and counted their votes.

The Tenth Circuit was incomplete when it identified "a history of anomalous votes, all of which have been counted by Congress," or "we are aware of no instance in which Congress has failed to count an anomalous vote." *Baca*, 935 F.3d at 949. Until recently, no state law recognized a vacancy in the office of presidential elector when an elector cast a vote contrary to the candidate he pledged to support. Consider North Carolina in 1968, discussed above, when no state statute authorized replacing a "faithless" elector. Only in recent history have such statutes been enacted. And only in 2016 were such statutes ever used.

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pledge." *See id.* § 12, *amending* REV. CODE WASH. § 29A.56.350. The conferral of a penalty has been replaced with the denial of a benefit.

More to the point is whether Congress has ever counted the vote of a replacement elector who filled the office of an elector who vacated the office for such reasons. And in 2016, Congress did so twice—Congress counted the vote cast by a Colorado elector who replaced Baca when a vacancy arose, and Congress counted the vote of a replacement elector in Minnesota. Furthermore, Congress *did* refuse to count the votes of "faithless" electors—Congress did not count Baca's vote because it did not recognize Baca as an elector.

The Twelfth Amendment expressly gives Congress the power to count electoral votes. That is a power to determine which electors are proper and which electoral votes to count. This Court should not second-guess Congress's judgment, because the Constitution gives the power of determining the identities of electors and counting electoral votes to Congress.

II. Baca failed to avail himself of political and congressional remedies.

Congress did not actively debate whether to count Colorado's electoral votes or whether Colorado's vote from a replacement elector was valid. But in this Court's landmark cases adjudicating political disputes in other branches, the party challenging the action consistently availed himself of political solutions first.

For instance, William Marbury and three others "requested Mr. Madison to deliver them their said commissions, who has not complied with that request." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 139 (1803). On January 10, 1967, Adam Clayton

Powell's name was included by the clerk of the House of Representatives among "those persons whose credentials show they were regularly elected in accordance with the laws of the several States and of the United States." 113 CONG. REC. 11 (1967); *see id.* at 12 (naming Powell of New York). Powell was instructed to "step aside" and "to be seated" as other members of the House took the oath of office. *Id.* at 14. From there, the House adjudicated whether Powell should be seated and ultimately concluded not to seat him. *Powell* v. *McCormack*, 395 U.S. 486, 489–93 (1969).

In both *Marbury* and *Powell*, this Court determined whether a party was entitled to the office.[4] But Baca never tried to convince Congress that his vote ought to be counted, or that the vote of his replacement was improper. Whether this Court situates Baca's failure as lack of exhaustion, waiver, or ripeness, Baca has failed to avail himself of available opportunities in Congress.

Baca's refusal to act created a vacancy under state law during the meeting of the electors. A majority of the electors recognized that there was a vacancy and voted to replace him. A majority of the eight remaining electors voted for Celeste Landry to fill the vacancy. *See* Colorado, Vacancy Nomination by Members of the Electoral College, Dec. 19, 2016, https://www.archives.gov/files/electoral-college/2016/vote-colorado.pdf.

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[4] While Baca seeks declaratory relief and nominal damages, his claim turns on whether or not he was entitled to remain in the office of presidential elector. *Cf. Powell* v. *McCormack*, 385 U.S. 486, 517–18, 550 (1969).

Colorado's nine presidential electors then acted pursuant to their duties under the Twelfth Amendment, federal law, and state law. The Twelfth Amendment requires that presidential electors make "distinct lists of all persons voted for as President, and of all persons voted as Vice-President, and of the number of votes for each, which lists they shall sign and certify." U.S. CONST. amend. XII; *see* 3 U.S.C. § 9. Colorado's nine electors identified themselves as "qualified electors." They listed Hillary Clinton as the recipient of all nine votes for President and Tim Kaine as the recipient of all nine votes for Vice President. *See* Colorado, Results of the Electoral Vote, Dec. 19, 2016, https://www.archives.gov/files/electoral-college/2016/vote-colorado.pdf.

The Twelfth Amendment instructs that this signed and certified list must be transmitted "sealed to the seat of government of the United States, directed to the President of the Senate." U.S. CONST. amend. XII; *see* 3 U.S.C. § 11. That was done—Congress read the results and counted the votes. *See* 163 CONG. REC. H186 (daily ed. Jan. 6, 2017).[5]

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[5] The Tenth Circuit recites allegations from the complaint that the Colorado Secretary of State "removed Mr. Baca as an elector, refused to count his vote, and replaced him with a substitute elector." *Baca*, 935 F.3d at 904; *see id.* at 922 (describing "conduct" as "removing him from office and striking his vote for President" and identifying injury as "his removal from his role of elector and the cancellation of his vote"). These allegations are inaccurate as to the Secretary of State. For instance, the other presidential electors submitted a vacancy nomination form. Colorado law expressly provides that "the presidential electors present shall immediately proceed to fill the vacancy in the electoral college." COLO. REV. STAT. § 1-4-304(1). Indeed, the Tenth Circuit's opinion is internally inconsistent on this point.

Baca ought to have recognized that under existing law, these electoral votes would be treated as "regularly given," and he ought to have raised a challenge to Congress. At least two plausible avenues for raising a challenge exist.

First, Baca might have encouraged members of Congress to object. Examples of the public encouraging Congress to scrutinize electoral votes date from the time of the enactment of the Twelfth Amendment to the 2016 presidential election. *See, e.g.*, 19 ANNALS OF CONG. 909 (1809) ("Mr. Barker presented a representation of sundry inhabitants of Hanover, in the county of Plymouth, and State of Massachusetts, stating that the late appointment of Electors of President and Vice President of the United States, by the Legislature of that State, is irregular and unconstitutional . . . ."); 163 CONG. REC. H187 (daily ed. Jan. 6, 2017) (statement of Ms. Lee) ("Mr. President, I object because people are horrified by the overwhelming evidence of Russian interference in our elections."). Baca failed to avail himself of congressional remedies ahead of the counting of electoral votes.

Second, Baca might have submitted to Congress a competing slate of presidential electors from the State of Colorado. He might have filed a slate of electors

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See Baca, 935 F.3d at 903 (quoting state court decision that state law requires that a vacancy be "filled by a majority vote of the presidential electors present"). Furthermore, the Secretary of State has no power to "count," "refuse to count," "strike" or "cancel" votes. Instead, Baca's claim lies with Colorado's nine presidential electors and with Congress—Colorado's nine presidential electors listed a "count" of nine electoral votes for Hillary Clinton, and Congress counted those nine votes.

that he deemed the "true" slate, one that included his vote. *See* 107 CONG. REC. 289–90 (1961) (three competing slates of presidential electors from Hawaii submitted to Congress). This would have required Colorado's eight other electors to join, and all of them ultimately rejected Baca as a legitimate elector. Or Baca might have submitted a separate certificate with just his own vote. Congress would have been compelled to determine which set of certificates was legitimate. *See* 3 U.S.C. § 15 (setting forth procedure "[i]f more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate").

Baca never availed himself of congressional remedies to resolve this dispute. As a result, no court should hear his claim.

III. Since the Founding, presidential electors have determined whether vacancies arise and states have fined electors for improper behavior.

In the event this Court chooses not to recognize that Congress is the appropriate avenue to resolve these disputes, and in the event this Court does not conclude that disputes ought to be first raised with Congress before being raised in a federal court, the Court must articulate with specificity when "vacancies" may legitimately arise in the meeting of electors, and the circumstances in which states may authorize presidential electors to identify such vacancies and fill them. Capacious reasoning, like that from the Tenth Circuit, wrongly narrows state authority.

The Constitution provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ." U.S. CONST. art. II, § 1, cl. 2.[6] Neither Article II nor the Twelfth Amendment explains what should happen in the event a vacancy occurs in the meeting of presidential electors. But shortly after ratification of the Constitution and through the time of the ratification of the Twelfth Amendment, states recognized that they had some power to condition the appointment and replacement of electors.

The Constitution grants state legislatures plenary authority to direct the manner of appointing presidential electors. *McPherson* v. *Blacker*, 146 U.S. 1, 25 (1892). State legislatures understandably wanted to ensure that presidential electors would meaningfully represent the interests of their state. Legislatures did more than simply direct the manner of appointment of electors. They passed laws to ensure that electors would properly participate in the meeting of electors. First, states imposed rules that would allow replacement presidential electors in the event those electors were absent at the time the electors met. Second, states levied fines on presidential electors if they failed to carry out their duties.

In 1796, the Massachusetts legislature enacted a statute that would permit electors to replace one of their members who had died or resigned before convening. MASS. RESOLVES OF 1796, Ch. 9, at 260. The Massachusetts legislature in 1800 enacted a law

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[6] This provision—the "manner" of appointment—was not amended by the Twelfth Amendment.

permitting electors to fill vacancies caused "by death, sickness[,] resignation or otherwise." MASS. RESOLVES OF 1800, Ch. 57, at 172–73. Vacancies in 1804 "by death or resignation" would be filled by the Massachusetts legislature. MASS. RESOLVES OF 1804, Ch. 21, at 298.

The New Hampshire legislature in 1800 passed a law providing that if electors were not "present" to accept their appointment, the legislature could replace them. Act, Nov. 25, 1800, THE LAWS OF THE STATE OF NEW-HAMPSHIRE, 556, 557. Electors could also fill vacancies on the day they convened. *Id.* The Pennsylvania legislature in 1802 took a similar position. If any electors were absent when the Electoral College met, the legislature by joint vote could replace them. Act, Chapter MMCXXXI, Section IV, Feb. 2, 1802, at 50, 52, *in* JAMES T. MITCHELL, STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801. And the New York legislature in 1804 did the same. If an elector was absent on the day the Electoral College was to meet, the remaining electors could elect a replacement by majority vote. Act, Chapter II, Nov. 12, 1804, at 4, *in* LAWS OF THE STATE OF NEW YORK (1806).

Some state legislatures levied penalties against electors who acted improperly. In 1788—before the very first presidential election—Virginia enacted a statute that would punish presidential electors who abdicated their responsibilities. "[F]ailing to attend and vote for a President . . . except in cases of sickness or any other unavoidable accidents" meant that the elector would "forfeit and pay two hundred pounds." ACTS OF VIRGINIA, Ch. I, § V, Nov. 17, 1788. In 1799, Kentucky enacted a statute modeled on Virginia's. It

provided that presidential electors who failed "to perform the duties herein required" except in cases of "sickness or unavoidable accident" "shall forfeit and pay one hundred dollars." Chapter CCXII, section 20 (1799), in WILLIAM LITTELL, STATUTE LAW OF KENTUCKY; WITH NOTES, PRAELECTIONS, AND OBSERVATIONS ON THE PUBLIC ACTS at 339, 352 (1809).

In 1845, Congress enacted a statute fixing the date of choosing presidential electors "on the Tuesday next after the first Monday in the month of November." Act of Jan. 23, 1845, 5 Stat. 721. It also provided that "each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote." *Id*. A version of that statute exists today. *See* 3 U.S.C. § 4 ("Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote."). Congress recognizes that state legislatures have the authority to provide for filling of vacancies.

Colorado law provides that in the event of a vacancy in the electoral college for "death, refusal to act, absence, or other cause," the remaining presidential electors may vote to fill the vacancy. COLO. REV. STAT. § 1-4-304(1). Under state law, "refusal to act" includes failure to vote for the candidates who won the state's popular vote. *Williams* v. *Baca*, No. 2016CV34522 (Denver Dist. Ct. Dec. 13, 2016); *see* COLO. REV. STAT. § 1-4-304(5).

To what extent can presidential electors appropriately identify a "vacancy" under state law?

To what extent can a state fine an elector for acting improperly? Could state laws be tailored in such a way to render certain decisions of electors unacceptable? Consider some hypotheticals:

1) Suppose an elector chose not to attend the meeting of electors in "protest."

2) Suppose an elector cast a blank vote in "protest."

3) Suppose an elector attempted to cast a vote for an ineligible candidate—say, a vote for John F. Kennedy. There is, after all, precedent in Congress that votes cast for a deceased candidate would not be counted. *See* CONG. GLOBE, 42D CONG., 3D SESSION 1286–87, 1297–98 (1873); *see also Baca*, 935 F.3d at 945 n.27 ("This freedom is not without constitutional limit. The presidential electors are bound by the constitutional directions regarding electors' votes and by who may serve as President or Vice President.").

4) Suppose an elector attempted to cast a vote for a candidate, but that candidate had expressly and publicly stated, "I am not a candidate for president and ask that electors not vote for me when they gather." *See* Statement, John Kasich, Dec. 6, 2016, https://twitter.com/JohnKasich/status/806209819950665730.

5) Suppose Baca or Washington's electors cast a vote for a person who failed to file candidacy papers with the state election authority before Election Day. *Cf. Burdick* v. *Takushi*, 504 U.S. 428, 436 (1992) (upholding law in which "the system outlined above provides for easy access to the ballot until the cutoff date").

These are some possible circumstances that might be within state authority to replace or fine electors. Since the Founding and at the time of the ratification of the Twelfth Amendment, states have recognized that certain activities of presidential electors can create a "vacancy," or certain activities of electors can subject them to fines. The electors' theory of the case threatens to imperil presidential election statutes that have been on the books since the very first presidential election.

IV. The Constitution does not require presidential electors to cast anonymous ballots.

Presidential electors cast their votes "by ballot" according to the text of the Twelfth Amendment. U.S. CONST. amend. XII. That may lead one to believe that the ballot must be "secret" or anonymous, given today's understanding that ballots are often anonymous. And if presidential electors have an expectation of anonymity in casting their ballots, it would strengthen the electors' argument that presidential electors have discretion to cast votes for whomever they like. But by the very terms of the Twelfth Amendment, the ballot cannot be anonymous. Indeed, state practices and congressional understanding of electors' ballots show that ballots cannot be anonymous. Instead, states may decide whether those ballots may be "secret" or "open" ballots, whether they may be pseudonymous or bear the electors' names.

A. As a matter of logic, ballots cast under the Twelfth Amendment cannot be anonymous.

The original Constitution required electors to "vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves." U.S. CONST. art. II, § 1, cl. 3. The top vote-getter would become President, and the second place vote-getter would become Vice President. Shortly after ratification, the system did not operate as anticipated. First, political parties arose, with distinct factions vying to win these two offices. Second, parties ran pairs of candidates, one considered the presidential candidate and the other the vice presidential candidate. *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 336–44 (2005).

The Twelfth Amendment accommodated these practices. Presidential electors would now "name in their ballots the person voted for as President." Then, "in distinct ballots" they would vote for a Vice President. The Twelfth Amendment still dictated that electors "vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves." U.S. CONST. amend. XII.

Here arises a logical difficulty. Under the original Constitution, electors would cast ballots with two names on them. It would be easy to ascertain whether an elector voted for two candidates who were inhabitants of the same state as the elector. But now that the elector is casting a vote for President and a vote for Vice President on "distinct ballots," how can

Congress determine whether the elector has voted for at least one candidate who is not an inhabitant of the same state as the elector?

Consider New York's nineteen presidential electors in the Election of 1808. For President, there were 13 votes for James Madison of Virginia, and 6 votes for George Clinton of New York. For Vice President, there were 13 votes for Clinton, 3 votes for Madison, and 3 votes for James Monroe of Virginia. It appears that the James Madison's thirteen electors then voted for George Clinton for Vice President. But how would we know? Only if the ballots were not anonymous—that is, only if we had a way of linking the presidential votes with the vice presidential votes, cast on "distinct ballots."

True, it would make little sense for a New York elector to vote for George Clinton of New York for President and Clinton for Vice President. *But see* 151 CONG. REC. 198, 243 (2005) (Minnesota elector casting ballot for John Edwards of North Carolina for President and John Edwards of North Carolina for Vice President). The Twelfth Amendment, however, expressly forbids that vote.

This example demonstrates that ballots must have distinct marks identifying them to ensure that electors cast at least one vote for a candidate who is not an inhabitant of their state. Electors' ballots could be pseudonymous. Or they could list electors' names. In any event, they cannot be anonymous. Otherwise, the Twelfth Amendment's requirement that at least one candidate "shall not be an inhabitant of the same state with themselves" would be unenforceable. If states opt for a secret ballot, they risk Congress

rejecting electoral votes that may run afoul of the Twelfth Amendment.

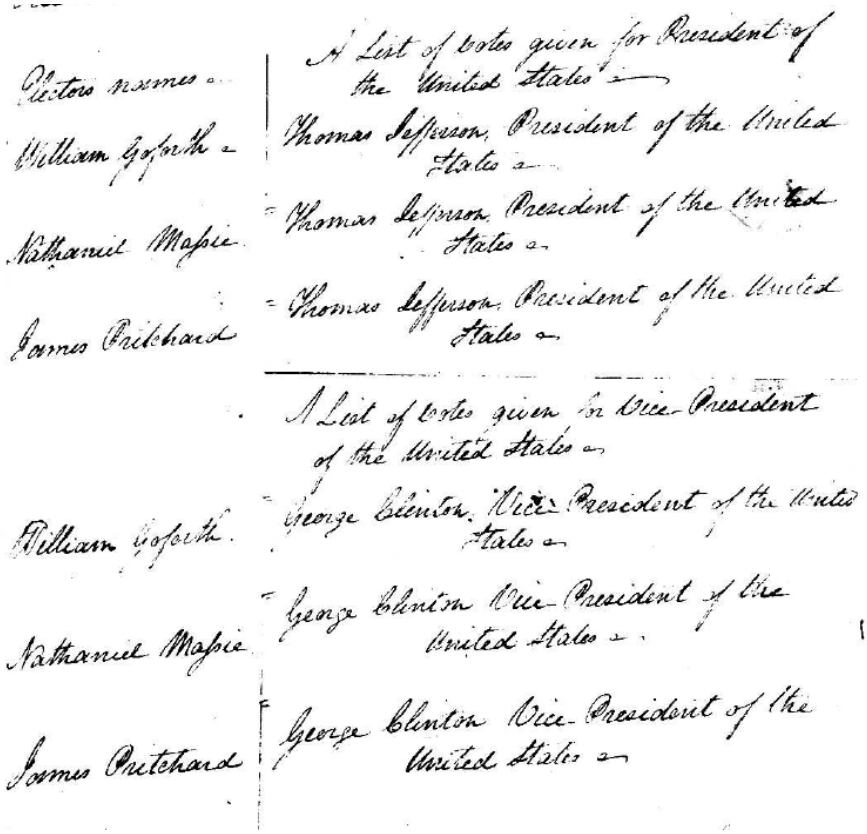
B. State practices at the time of the ratification of the Twelfth Amendment show that ballots were not always anonymous.

The internal logic of the Twelfth Amendment dictates that ballots cannot be anonymous. State practices immediately after the ratification of the Twelfth Amendment bear this out.

The Twelfth Amendment requires that electors "shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States." U.S. CONST. amend. XII. But some states went above and beyond this requirement: they kept track of individual electors' votes for each ballot cast and reported those votes to Congress.

Ohio's electoral report submitted to Congress in 1804 includes two columns: "Electors Names," and beside them, "A list of votes given for President of the United States." *See* Figure 1, *infra*. It lists the names of electors William Goforth, Nathaniel Massie, and James Pritchard, along with each of their votes for "Thomas Jefferson, President of the United States," listed three times, once beside each name. They are also individually identified as casting votes for George Clinton for Vice President. RECORDS OF THE UNITED STATES SENATE, 8TH CONGRESS (1804), Nat'l Archives & Records Admin., Record Group 46, Ohio.

Figure 1.



A List of votes given for President of the United States

Electors names

William Gofnth — Thomas Jefferson, President of the United States

Nathaniel Mafsie — Thomas Jefferson, President of the United States

James Pritchard — Thomas Jefferson, President of the United States

A List of votes given for Vice-President of the United States

William Gofnth — George Clinton, Vice-President of the United States

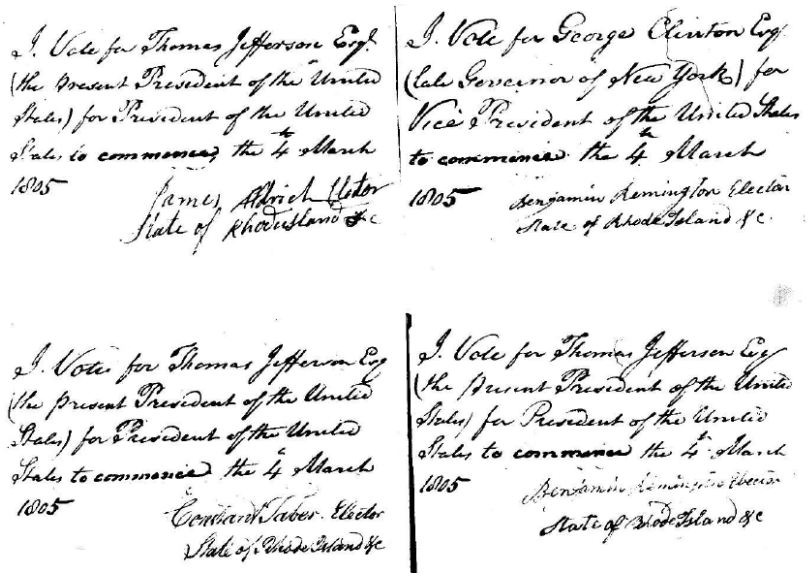
Nathaniel Mafsie — George Clinton Vice-President of the United States

James Pritchard — George Clinton Vice-President of the United States

In 1804, Rhode Island's four electors each individually completed ballots with their names attached. *See* Figure 2, *infra*. One ballot signed by James Aldrich read, "I Vote for Thomas Jefferson Esq. (the present President of the United States) for President of the United States to commence the 4th [of] March 1805." RECORDS OF THE UNITED STATES SENATE, 8TH CONGRESS (1804), Nat'l Archives & Records Admin., Record Group 46, Rhode Island. Electors Constant Taber, James Helme, and Benjamin Remington signed similar ballots. Each also filled out similar individual ballots revealing

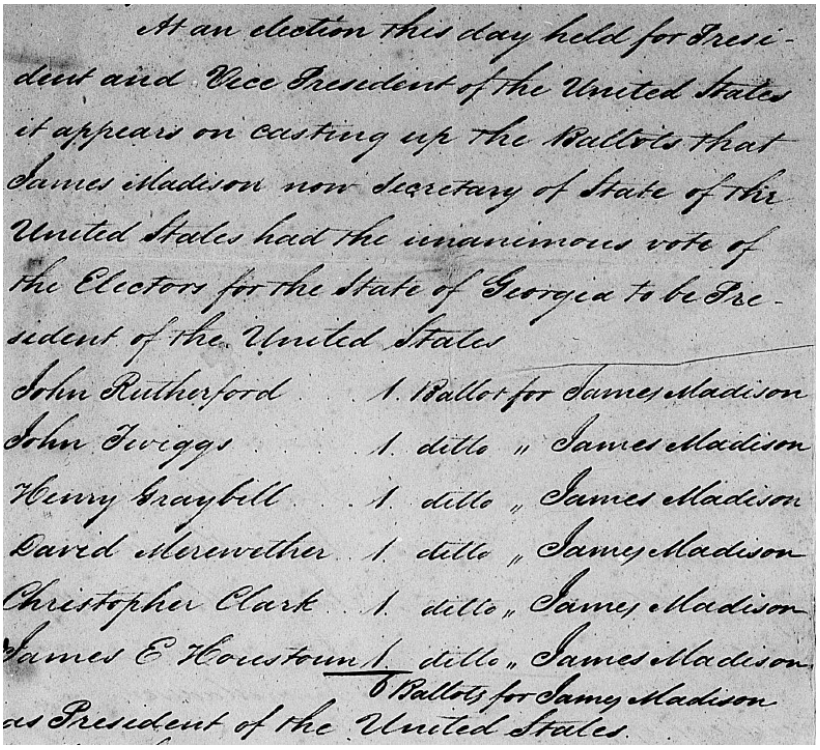
votes for "George Clinton Esq. (late Governor of New York) for Vice President." These individual ballots were submitted to Congress.

Figure 2.



In 1808, Georgia's six electors were John Rutherford, John Twiggs, Henry Graybill, David Meriwether, Christopher Clark, and James E. Houstoun. *See* Figure 3, *infra*. Each elector's individual ballot was recorded. The first elector is identified as casting "1. Ballot for James Madison." UNBOUND RECORDS OF THE U.S. SENATE, 10TH CONGRESS, 1807–1809, Nat'l Archives & Records Admin., 2007, Microfilm Publication M1710, Roll 6, SEN 10A-H1, at 26, 28, 31, 36. The remaining five are each identified as casting "1. ditto ″ James Madison," with a sum total below them, "6 Ballots for James Madison as President of the United States." Individual votes for electors for George Clinton for Vice President were also listed.

Figure 3.



at an election this day held for President and Vice President of the United States it appears on casting up the Ballots that James Madison now secretary of State of the United States had the unanimous vote of the Electors for the State of Georgia to be President of the United States

John Rutherford 1. Ballot for James Madison
John Twiggs 1. ditto " James Madison
Henry Graybill 1. ditto " James Madison
David Merewether 1. ditto " James Madison
Christopher Clark 1. ditto " James Madison
James E Houstoun 1. ditto " James Madison.
6 Ballots for James Madison
as President of the United States.

Contemporaneous state activity immediately following the ratification of the Twelfth Amendment includes examples of the individual votes of electors collected with their names attached and publicly disclosed. Congress received these records and counted the votes from these states. State legislatures may choose to hold elections by "open ballot" or by "secret ballot."

CONCLUSION

Amicus respectfully submits that this Court conclude that the electors cannot raise their claims in federal court. In the alternative, this Court should

clearly identify the circumstances in which states can recognize vacancies in the meeting of electors and fine electors, and acknowledge that ballots need not be cast anonymously.

Respectfully submitted,

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