NO. 19-518

In the
Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,
Petitioner,
v.

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,
Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion.

2. Does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots.

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STATEMENT OF THE CASE

A. Colorado's elector-binding law and state practice

1. Like most States, Colorado binds its presidential electors to the outcome of the State's election for President.[1] The respective political parties select potential electors prior to the November election, and then the State appoints the electors of the party of the candidate who won the State's general election. Colorado's law requires that the State's electors "take the oath required by law for presidential electors," COLO. REV. STAT. § 1-4-304(1), which in turn requires that electors swear or affirm to cast their ballots "for the presidential candidate and vice-presidential candidate who received the highest number of votes at the preceding general election in [Colorado]." 8 COLO. CODE REGS. 1505-1, Rule 24.1.1. Colorado's electors then must cast their ballots consistently with their oath. COLO. REV. STAT. § 1-4-304(5).

Colorado's statute also provides a mechanism to remove electors who refuse to honor the will of Colorado's voters. The statute provides that an elector vacancy can occur because of "death, *refusal to act*, absence, or other cause." *Id.* at § 1-4-305(1) (emphasis added). "[R]efusal to act" includes, according to Colorado courts, an elector's decision to cast a ballot for someone *other* than the presidential candidate who won the State's election. Pet. App. 201–02.

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[1] *See* Appendix A, listing the binding statutes of 32 States and the District of Columbia.

2. Colorado's binding statute is similar to the Uniform Faithful Presidential Electors Act, developed by the National Conference of Commissioners on Uniform State Laws and adopted in substantial part by six States. The uniform act requires that electors take a pledge (§ 4), and it automatically creates an elector vacancy if any elector attempts to cast a ballot inconsistent with their pledge (§ 7(e)). In that event, the State immediately fills the vacancy with a substitute elector (§ 6(b)). Consistent with federal statute, the uniform act requires that the State immediately notify the federal government of any substitute elector by amending its "certificate of ascertainment" provided to the federal archivist (§ 5(2)). *See* 3 U.S.C. § 6 (requiring notice to federal archivist of State's final determination of any "controversy or contest" over elector appointment "as soon as practicable after the conclusion of the appointment of the electors . . . in pursuance of the laws of such State"); *id.* § 4 (permitting States to fill elector vacancies).

3. While Colorado's law and the uniform act utilize a removal-and-replacement system, other States employ a variety of methods to either encourage or require elector faithfulness. North Carolina imposes a fine on electors who do not vote as state law requires and refuses to accept their ballot. N.C. GEN. STAT. § 163-212 (2019). Still other States mandate faithfulness, but do not impose any consequences if an elector ignores the law. *See, e.g.*, WYO. STAT. ANN. § 22-19-108 (2019).

B. Facts and procedural history

Three of Colorado's 2016 presidential electors brought two federal lawsuits, *Baca I* and *Baca II*. Both suits sought to invalidate Colorado's binding law.

1. *Baca I*

1. After the November 2016 election but before the Electoral College convened, two Colorado Electors,[2] Polly Baca and Robert Nemanich, sought a preliminary injunction barring enforcement of Colorado's binding law. The *Baca I* complaint explained that, although Ms. Baca and Mr. Nemanich had signed affidavits promising to cast their electoral ballots for the Democratic Party's nominees for President and Vice President, they had changed their minds and wished to cast their ballots for a "consensus candidate." App. 21–22, 24, 31, 37. They believed that doing so might convince other electors to follow suit, preventing Donald Trump from becoming President. App. 24.

The federal district court denied their motion. Pet. App. 168–82. The court held that allowing the electors to cast electoral ballots as they wished "would undermine the electoral process and unduly prejudice the American people by prohibiting a successful transition of power." Pet. App. 181.

The court of appeals upheld the district court's ruling in an expedited appeal, stating the Electors had not "point[ed] to a single word" in the Constitution that "requires that electors be allowed the opportunity to exercise their discretion in choosing who to cast

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[2] For consistency, we refer to the former presidential elector parties in both cases as Electors.

their votes for." Pet. App. 194. The court observed that Article II empowers the States to appoint their electors "in such Manner as the Legislature thereof may direct" and that the Supreme Court has described this authority as "plenary." Pet. App. 195 (citing *McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892)).

2. Although the federal courts declined to enjoin Colorado's binding law, Colorado remained concerned that one or more of its electors would nonetheless choose to disobey the voters' will. Colorado sought confirmation in state court that state law provided for removal of such electors. The state court confirmed that an elector who fails to cast his or her ballot for the presidential candidate who won the State's election has, as a matter of Colorado law, "refus[ed] to act," thereby creating a vacancy in that elector's office. Pet. App. 202 (quotations omitted).

3. On the day of the Electoral College, Colorado's Electors took an oath to cast their electoral ballots for the presidential candidate who received the most votes in Colorado. Pet. App. 217. Ms. Baca and Mr. Nemanich complied with Colorado law by casting their ballots for the candidate who won the general election in Colorado—Hillary Clinton. Pet. App. 140. But a third elector, Micheal Baca, violated his oath by attempting to cast his ballot for John Kasich, someone who did not appear as a candidate on any general election ballot anywhere in the country. Pet. App. 217. Consistent with the state court's order, Mr. Baca was removed and replaced with a substitute elector who cast her ballot for Hillary Clinton. Pet. App. 218. Following federal law, Colorado notified the federal archivist that it had appointed a substitute elector to

fill Mr. Baca's vacancy.[3] *See* 3 U.S.C. §§ 4, 6. Although Mr. Baca was referred to the Colorado Attorney General for potential perjury charges, no criminal charges were ever filed. Pet. App. 37.

Nationwide, ten electors in the 2016 Electoral College cast, or attempted to cast, a "faithless" electoral ballot.[4]

2. *Baca II*

1. Ms. Baca and Mr. Nemanich voluntarily dismissed their *Baca I* suit without prejudice in August 2017. Nine days later, they refiled substantially the same lawsuit, this time joining Mr. Baca as a plaintiff. The Electors' amended complaint asserted a single claim under 42 U.S.C. § 1983, challenging Colorado's binding statute as unconstitutional under Article II and the Twelfth Amendment. Pet. App. 218–20. In addition to declaratory relief, the Electors sought nominal damages of $1 each. Pet. App. 220. In exchange for the Electors narrowing their claims and waiving their right to § 1988 attorneys' fees, Colorado agreed to waive its Eleventh Amendment immunity and its § 1983 "personhood" defense in this case.

2. The district court granted Colorado's motion to dismiss under Rules 12(b)(1) and 12(b)(6), finding that the Electors lacked standing and failed to state a claim. First, the district court found that electors are

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[3] Colorado's Electoral College results and its corrected certificate of filling Mr. Baca's vacancy are available on the federal archive's website: www.archives.gov/files/electoral-college/2016/vote-colorado.pdf.

[4] FairVote, *Faithless Electors*, https://tinyurl.com/y7fnonw5.

subordinate state officers who lack standing to challenge the constitutionality of Colorado's law. Pet. App. 144–52.

Second, the district court concluded that Article II and the Twelfth Amendment permit States to bind their electors to the outcome of the State's election. In particular, the court held that the Article II power to appoint electors carries with it the power to remove. Pet. App. 153, 165. Relying on *Ray v. Blair*, 343 U.S. 214 (1952), the court explained that the Twelfth Amendment does not demand "absolute freedom for the elector to vote his own choice" and that longstanding historical practice supported States requiring electors to follow the will of the voting public. Pet. App. 156–61.

3. The court of appeals reversed in part in a 2-1 decision. On standing, it agreed that Ms. Baca and Mr. Nemanich suffered no concrete personal injury. Pet. App. 41. But the court concluded that Mr. Baca did suffer a personal injury to a private right because he was removed from his position—something the court of appeals believed he was personally entitled to since he had been selected to the office of elector. Pet. App. 36.

The court of appeals also held that Colorado's law violated the Constitution. Departing from its prior decision in *Baca I*, the court determined that the Constitution, particularly its use of the word "elector" in Article II and the Twelfth Amendment, suggests that electors "are free to vote as they choose." Pet. App. 103. The court viewed *Ray* as "narrow" because it addressed only elector pledges, not removal, and left open the constitutional question of whether a State's

binding law is enforceable. Pet. App. 83. Similarly, the court held that a State's authority to appoint electors does not come with the power to remove them because, in its view, once appointed, the electors exercise a federal function beyond the control of the appointing State. Pet. App. 92–95.

The court of appeals disagreed with the district court's conclusion that the States' longstanding historical practice of allocating their electoral votes to the winner of their elections should receive significant weight. According to the court, the contemporaneous statements of some Framers are "inconsistent" with electors acting as "mere functionaries." Pet. App. 124.

Judge Briscoe dissented. Pet. App. 130–37. She would have dismissed the appeal as moot because, in her view, regardless of a State's deliberate waiver, 42 U.S.C. § 1983 creates no remedy for damages against the State.[5] Pet. App. 131.

Colorado sought review on the questions of standing and whether the Constitution forbids States from requiring electors to follow the results of the State's election. This Court granted Colorado's petition for writ of certiorari on January 17, 2020, along with the related case arising from Washington, No. 19-465.

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[5] The parties agree that a State may choose to forgo its § 1983 personhood defense. Electors' Br. 14 n.5; *see United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 855 (1996) (declining to reach an issue the government "chose not to" argue, stating "[i]t would be inappropriate for us to reexamine [the issue] in this case, without the benefit of the parties' briefing").

SUMMARY OF THE ARGUMENT

Mr. Baca lacks Article III standing to bring this case. Presidential electors are subordinate state officials subject to state law requirements; their personal concerns about following a state law that they disagree with does not create standing. Mr. Baca also suffered no injury-in-fact when Colorado declined to accept his faithless ballot. Because he was not fined, prosecuted, or otherwise negatively affected in any manner, he lacks standing to challenge Colorado's decades-old binding law.

Even if Mr. Baca had standing, States are authorized to oversee and remove electors to advance our democratic principles and protect our system of stable governance. Article II of the Constitution provides States with "plenary power" to appoint and oversee their presidential electors, including the ability to enforce a binding requirement to follow the election results of the State. The States' authority to appoint electors includes the corollary power to remove them. The longstanding default rule is that the power to appoint includes the power to remove; that rule applies here because the Constitution provides no other method of removal. In *Ray v. Blair*, this Court held that States can require electors to pledge support to their party's candidate before serving in the role. 343 U.S. 214 (1952). The power to enforce that requirement is necessary to avoid a fraud on the public and, even worse, the specter of a bribed elector being able to cast a corrupted ballot.

The Twelfth Amendment, which recognized and embraced the role of political parties, provides further support for requiring electors to cast their ballots for

the candidates of the political party that selected them. The Twelfth Amendment was enacted on the understanding that electors were expected to follow their party affiliation when casting their ballots. Had electors been understood as independent actors who exercised discretion, the need for the Twelfth Amendment would not have arisen.

The public's post-ratification understanding of the electors' role and longstanding practice also confirm the States' plenary authority over their electors. For all of our Nation's history, voters have understood that electors must cast their electoral ballots for the candidate of their affiliated party. Even before the first election held under the Constitution, the States enacted laws mandating that electors operate in defined ways, demonstrating that electors have never been free from state oversight. And Congress has consistently deferred to state authority over electors when counting electoral ballots, supporting a long history of constitutional practice that respects the States' plenary authority.

The Tenth Amendment's reservation of residual state power likewise corroborates the States' plenary authority over their appointed electors. That power includes the States' ability to prescribe qualifications for their subordinate officers—including electors—and to protect the integrity of the electoral process. The dual roles of the States and the federal government in regulating the electoral process, as shown throughout history when the States expanded suffrage beyond the Constitution's requirements, demonstrate that our federal structure encourages different state solutions in the election context. Under

this structure, States can determine the role their electors play—either encourage unbounded discretion, discourage it, or forbid it entirely.

Finally, agency principles underscore that States can require their electors—even when they "vote" "by ballot"—to perform specified functions as required by the principal (here, the people of the State). This agency relationship follows in the practice of proxy voting, which was widespread in the colonies and well understood by the Framers of the Constitution.

ARGUMENT

I. Presidential electors lack Article III standing to challenge state statutes binding electors.

Mr. Baca lacks Article III standing for two reasons: (1) electors are subordinate state officers who may not challenge state statutes prescribing their duties; and (2) electors suffer no injury-in-fact when compelled to either cast their ballot consistent with state law or forfeit their position.

A. Presidential electors are subordinate state officers who may not challenge state statutes prescribing their duties.

This Court has long held that state officials lack Article III standing to challenge the constitutionality of a state statute prescribing their duties when they are not personally affected. *See Columbus & Greenville Ry. Co. v. Miller*, 283 U.S. 96, 99–100 (1931); *Braxton Cty. Ct. v. W. Va.*, 208 U.S. 192, 197–98 (1908); *Smith v. Indiana*, 191 U.S. 138, 148–49 (1903).

In *Smith*, for example, this Court held that a county auditor lacked standing to challenge a property tax statute: "the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so." 191 U.S. at 149. Put another way, "a public official's personal dilemma in performing official duties that he perceives to be unconstitutional does not generate standing." *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009) (quotations omitted).

The conclusion that presidential electors are state officers flows logically from the Constitution's structure and this Court's holdings. Article II, § 1 provides that "[e]ach State shall appoint" its respective electors "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1. The States' power under Article II is "plenary," "exclusive," and "comprehensive." *McPherson*, 146 U.S. at 27, 35. It conveys the "broadest power of determination" on the States. *Id.* at 27. Presidential electors receive their authority to act from their appointing State. *Ray*, 343 U.S. at 224. When they cast electoral ballots, they act within that authority and, in States like Colorado and Washington that require their electors to follow the State's voters, electors express the will of the State in the selection of the President. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) ("The sole function of the presidential electors is to cast, certify, and transmit the *vote of the state* for president and vice president." (emphasis added)).

Unlike members of Congress, electors receive no compensation from the federal government but rather

are paid (if at all) by their appointing State. *See, e.g.*, COLO. REV. STAT. § 1-4-305; *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995) (reasoning that congressperson's "uniform salary to be paid from the national treasury, allows the States but a limited role" over their election). Nor do electors travel to Washington, D.C. to perform their assigned task; they instead convene "in their respective states" to perform a one-time ministerial duty. U.S. CONST. amend. XII. These features of the electors' role confirm they are state officers, not federal officers.

Based on this structure, this Court has stated on three separate occasions that presidential electors "are not federal officers or agents." *Ray*, 343 U.S. at 224; *see also Burroughs v. United States*, 290 U.S. 534, 545 (1934) ("presidential electors are not officers or agents of the federal government"); *Green*, 134 U.S. at 379 (presidential electors "are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress"). From these precedents, a number of courts addressing this question have concluded that presidential electors are "officers of the state." *Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937); *accord Chenault v. Carter*, 332 S.W.2d 623, 626 (Ky. 1960); *In re State Question No. 137, Referendum Pet. No. 49*, 244 P. 806, 808 (Okla. 1926); *but see* Pet. 9 (listing contrary cases).

Just because electors perform a limited role described in the Constitution does not render them federal agents or otherwise confer Article III standing. After all, the Constitution also prescribes certain

election-related duties for each State's governor. U.S. CONST. amend. XVII (each State's governor shall "issue writs of election" to fill Senate vacancies). But governors do not have Article III standing to sue their State in federal court to invalidate state laws instructing them on how they must perform their election-related duties. Rather, a State's governor is a quintessential state officer who lacks such standing. *See Finch v. Miss. State Med. Ass'n, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978). Presidential electors fall into the same category.

The Electors' reliance on mentions of presidential electors in the Fourteenth and Twenty-fourth Amendments does not support the conclusion that electors are federal officers.

First, the Electors claim that the Fourteenth Amendment's "specific mention of presidential electors in contrast to those who 'hold any office . . . under any State' would be superfluous if electors held a state office." Electors' Br. 41. But the text they omit shows this conclusion does not follow. The full text of the phrase refers to those who "hold any office, *civil or military, under the United States,* or under any State." Section 3 of the Fourteenth Amendment covers both federal and state offices; specifically mentioning electors does not mean they fall outside the category of state offices, just as mentioning Senators and Representatives does not remove them from the category of federal offices.

Second, the Constitution's narrow and specific limits on who States may select as electors—"no Senator or Representative, or Person holding an Office of Trust or Profit under the United States"—confirms

the broad authority left to the States. U.S. CONST. art. II, § 1. The Fourteenth and Twenty-fourth Amendments just add two additional specific limitations—disqualifying prior oath-takers who engaged in insurrection and preventing poll taxes for votes for electors. But these specific, limited prohibitions, by what they do not do, highlight the broad authority States have over their electors.

Because Mr. Baca is a former subordinate state officer, he lacks Article III standing to challenge Colorado's binding law.

B. A State's rejection of a faithless elector's ballot does not cause an injury-in-fact.

In addition to lacking standing as a former state officer, Mr. Baca did not suffer an injury-in-fact when Colorado declined to accept his faithless ballot. Colorado did not fine him, prosecute him, or impose any other constitutionally cognizable negative consequence. He therefore lacks Article III standing.

Article III standing requires an "injury in fact," which this Court defines as "an invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted). The injury must be "concrete and particularized," *id.*, and "must actually exist," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Here, Mr. Baca claims three injuries: his ballot "was rejected, he was removed from office, and he was referred to the Colorado Attorney General for perjury." Electors' Br. 52–53. His third claimed injury—referral for criminal prosecution—was rejected below by the court of appeals. That court held

that Mr. Baca had "failed to allege the referral resulted in any injury." Pet. App. 37. Mr. Baca did not cross-petition to challenge that ruling and, indeed, no criminal charges were brought as a result of the referral.

That holding leaves the rejection of Mr. Baca's faithless ballot and his removal from office. These two alleged injuries create a claimed injury-in-fact in only one sense—they denied him the opportunity to cast an electoral ballot for the candidate of his choice. Casting an electoral ballot is the sole role of a presidential elector.

That type of injury—a general diminution of political power—does not generate Article III standing. When a plaintiff claims standing "based on a loss of political power, not [the] loss of any private right," the injury is not sufficiently concrete to generate standing. *Raines v. Byrd*, 521 U.S. 811, 821 (1997). Indeed, the other two Colorado electors in this suit, Mr. Nemanich and Ms. Baca, claimed this same injury and the court of appeals correctly determined they lacked standing. Pet. App. 38–42. The court concluded that the denial of their claimed right to cast an electoral ballot for their chosen candidate was an injury "based on their official roles as electors." Pet. App. 42.

The same holds true for Mr. Baca. He claims injury after losing the allegedly unfettered power to cast an electoral vote of his choice. While Mr. Nemanich and Ms. Baca say they felt intimidated into casting a ballot for a candidate they did not wish to support, Mr. Baca's faithless ballot was not counted. In each case, they claim the same injury: the denial of

their alleged right to cast a ballot for the candidate of their choosing. Thus, for the same reasons that the court of appeals concluded that Ms. Baca and Mr. Nemanich lack standing, Mr. Baca does too.

The Electors argue that Colorado "confuses" Article III standing with the merits. Electors' Br. 56. That is incorrect. Comparing Washington's fined electors to this case shows the difference between an elector who has suffered an injury-in-fact that meets the standing requirements, and an elector like Mr. Baca who has suffered no actual injury-in-fact and lacks standing.

Even if Mr. Baca claimed here some sort of legislative standing based on the "nullification" of his faithless ballot, as the Tenth Circuit concluded, such an argument should be rejected. Pet. App. 51 (discussing *Coleman v. Miller*, 307 U.S. 433, 437 (1939)). His brief does not rely on legislative standing, nor does he satisfy its prerequisites. He and his co-plaintiffs constituted a minority of Colorado's nine-member Electoral College delegation, and an even smaller minority of the national Electoral College. *See Va. H.D. v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (explaining "individual members lack standing to assert the institutional interests of a legislature").

Nor does Mr. Baca's reliance on *Powell*, *Myers*, and *Allen* support his claim for standing. Electors' Br. 53. Mr. Baca never claimed that he suffered injury because he did not receive compensation as an elector. *Powell* therefore does not support his claim. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (finding expelled congressman's claim justiciable because of

his "obvious and continuing interest in his withheld salary").

Myers does not discuss Article III standing. Like *Powell*, it states that the postmaster's "unpaid salary" was at stake. *Myers v. United States*, 272 U.S. 52, 108 (1926). Not so here.

And in *Allen*, standing was not challenged, leading the Court to mention the standing of local school board members only in a footnote. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968). The Court's passing reference to standing does not necessarily mean that standing actually existed. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). Moreover, as the court of appeals explained, this Court has since cabined *Allen*'s reach by preventing "generalized grievance" suits. Pet. App. 39; *see also* Wright & Miller, *Federal Practice & Procedure* § 3531.11.3 (3d ed. 2008) (stating *Allen* has been "undermined by the more recent developments of general standing doctrine").

Mr. Baca alleges injury based not on an actual injury but instead on his alleged "right to a particular kind of Government conduct, which the Government has [allegedly] violated by acting differently." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982). Such an allegation does not satisfy Article III's standing requirements. *Id.*

II. States may constitutionally mandate that their electors cast electoral ballots consistent with the State's election.

Both Article II and the Twelfth Amendment contemplate plenary state authority over electors. Broad state authority over electors is also consistent with the States' removal power; the public's long-held understanding and historical practice; Congress's consistent deference to the States; the States' residual sovereign power; and settled law on agency.

A. The Constitution grants plenary power to the States to select and control their electors.

Article II commits to the States' legislatures the exclusive right to decide how their electors are selected. Article II, § 1 provides that "[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1 (emphasis added). This expansive text—instructing the States to "direct" the "Manner" of appointment—sets forth no limit. It permits the States to, as Colorado does, require the electors to vote for the winner of the State's election. As indicated, the States' power under Article II is "plenary," "exclusive," and "comprehensive," conveying the "broadest power" possible. *McPherson*, 146 U.S. at 27, 35. The sole constraint in Article II is that "no Senator or Representative, or Person holding an Office of Trust or Profit" is eligible to serve as an elector. U.S. CONST. art. II, § 1. State laws binding electors are consistent with this text.

Consistent with this broad grant of power to the States, the States can enforce the conditions of electors' appointments. In States with the uniform act, for example, the appointment process does not end until the electors present a full set of faithful ballots; only then are the electoral ballots actually cast.[6] The States' Article II power also carries with it the power to remove, which is an incident of the power to appoint. *See infra*, pp. 22–29.

Colorado utilized that removal power here.

But regardless of whether the States' authority is characterized as part of the appointment power or a separate removal power—both are functionally the same—a State's decision to reject a faithless ballot is consistent with its plenary Article II authority. As Justice Thomas has noted, the power to establish requirements for state elections, including the selection of presidential electors, "would mean little without the [States'] ability to enforce them." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1849 (2018) (Thomas, J., concurring). Recognizing this power aligns with this Court's early statements on electoral ballots: they are *the States'* ballots for President, not the individual elector's ballots. *Green*, 134 U.S. at 379 (recognizing the "sole function of the presidential electors is to cast . . . the vote *of the state*." (emphasis added)).

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[6] Br. of Nat'l Conference of Comm'rs on Uniform State Laws as Amicus Curiae at 7–8 (Nov. 20, 2019) (explaining that an elector who presents a faithless ballot automatically vacates his or her position by operation of law and that ballots are "cast" only after a "full set of faithful elector votes is obtained").

The Electors dispute this assessment of Article II, arguing both that the text leaves no room for State control and that the Framers adopted Hamilton's view of unbounded elector discretion. Electors' Br. 19 (citing THE FEDERALIST NO. 68). This view of the text, however, is far too narrow.

The text does not expressly *forbid* the States from attaching conditions to electors. And in the absence of an express textual limit, the States retain plenary authority over their appointees. *See Alden v. Maine*, 527 U.S. 706, 739 (1999) (explaining the Court rejects "implied constitutional limit[s] on the power of the States"); *accord Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498–99 (2019) (States enjoy sovereign immunity even though "no constitutional provision explicitly grants that immunity").

The Electors also misstate the Framers' views at the Philadelphia Convention. The Committee of Eleven proposed the basic structure of the Electoral College on September 4, 1787, and the delegates approved it two days later. 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 493–96, 528–29 (1911). The delegates' debates over those two days focused not on the role of presidential electors, but rather on more pressing questions such as the role of the Senate and House, the length of the President's term, and whether the President could serve additional terms. *See, e.g.*, *id.* at 511–15, 521–29.

The Electoral College emerged as a compromise reflecting the need for a national process for selecting a president that accommodated state authority. It represented a structural resolution—over how much influence each State had—that replicated the

compromises struck with the bicameral legislature. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 90 (1996) (noting that "[t]he political logic of the Electoral College almost exactly replicated the debate over representation" and contributed to "the framework of compromises and bargains the delegates now knew they were constructing"). In short, the "Electoral College was not derived from a grand design of political theory[; rather,] the political debate that produced it was . . . [a compromise that called for] the existence of a state role in electing the President of the United States." Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2107 (2001); *see also* Rakove, at 267 (the Electoral College "owed more to the perceived defects in alternative modes of election than to any great confidence that this ingenious mechanism would work in practice").

The electors' specific role, by contrast, and whether States could exercise control over them, was "never discussed." Robert M. Hardaway, *The Electoral College and the Constitution* 85 (1994); *cf.* Festa, at 2122 ("[A]ll that can truly be agreed upon is that the Convention records show no consensus on [how electors would be appointed], and hence, it was left to the individual states to decide for themselves").

While Hamilton *later* expressed his own vision of elector discretion in a Federalist Paper, other Framers like Madison took the opposing view. In a different Federalist Paper, Madison emphasized the role of state authority: "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 determine it." THE FEDERALIST NO. 45.

A thorough reading of the history of the Founding shows that the delegates to the Convention formed no consensus on the States' ability to control their appointed electors and some arrived at conflicting views. The Electors' reliance on the Federalist Papers to urge the adoption of a new constitutional right is therefore misplaced. *See McCreary Cty, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 877 (2005) (recognizing conflicting views of the Framers and the need to "consider the full range of evidence showing what the Framers believed").

B. The States' plenary power to appoint includes the power to remove.

The States' broad Article II power over their appointed electors is also consistent with the constitutional principle, first recognized in the common law, that the power to appoint, unless otherwise limited, carries with it the corollary power to remove. *Myers*, 272 U.S. at 119 ("[A]s a constitutional principle the power of appointment carried with it the power of removal"); *see also In re Hennen*, 38 U.S. 230, 247 (1839) (affirming a district court's right to remove a clerk because the power to appoint includes the power to remove and recognizing "at common law, a custom for the appointing power to remove ad libitum . . . was always held to be a good custom."). As Justice Brandeis held in *Burnap v. United States*: "The power to remove is, in the absence of statutory provision to the contrary, an incident of

the power of appoint." 252 U.S. 512, 515 (1920) (citing *Hennen*).

Unlike the impeachment analogue for removing the President or a federal judge, no express mechanism exists in the Constitution for removing a presidential elector who acts unlawfully.[7] But *some* removal mechanism must be available to oust an elector who, for example, engages in rebellion against his or her State or the United States. U.S. CONST. amend. XIV, § 3 ("No person shall be . . . [an] elector of President and Vice President" if that person engaged in "insurrection or rebellion"). Where the Constitution does not provide specific procedures for removal, the background principle that the power to appoint includes the power to remove applies.

The removal principle arises from the structure of the Constitution and, like other constitutional doctrines, is "not spelled out in the Constitution but [is] nevertheless implicit in its structure and supported by historical practice." *Hyatt*, 139 S. Ct. at 1498–99. Examples include judicial review, *Marbury v. Madison*, 5 U.S. 137, 176–180 (1803); intergovernmental tax immunity, *M'Culloch v. Maryland*, 4 Wheat. 316, 435–436 (1819); executive privilege, *United States v. Nixon*, 418 U.S. 683, 705–706 (1974); executive immunity, *Nixon v. Fitzgerald*,

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[7] *Morrison v. Olson*, 487 U.S. 654 (1988), cited by the Electors, is inapposite because an explicit removal power was provided in that context. Electors' Br. 22. The Ethics in Government Act authorized the Attorney General, rather than the appointing court, to remove the independent counsel. 487 U.S. at 682. By contrast, no constitutional or federal statutory provision speaks to the removal of a State's appointed elector.

457 U.S. 731, 755–758 (1982); and state sovereign immunity, *Hyatt*, 139 S. Ct. at 1499. Like the removal principle, each of these doctrines is a "historically rooted principle embedded" in the Constitution. *Id.*

Myers sets forth the logic for the removal principle. 272 U.S. 52. The *Myers* Court explained that the appointing authority—there, the President—must have "implicit faith" in his or her subordinates. *Id.* at 134. "The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay." *Id.* This removal power applies regardless of whether the appointee exercises discretion on his or her principal's behalf or discharges "other normal duties," such as ministerial tasks. *Id.*

This removal principle covers both electors in binding States who receive clear instruction on how they must perform their duties and electors in non-binding States who are free to exercise discretion, but nonetheless may have other constraints, such as residency or age requirements. Were it otherwise, the States' plenary authority over their electors would be hollow, rendering them powerless to vindicate their Article II authority. And States would have no ability to remove electors whose failure to meet residency or age requirements was not discovered until after their appointment.

The court of appeals below held that this removal power extends solely to the President's appointment and removal of *executive* branch officers. Pet. App. 92–95. But the Constitution provides no reason to limit the removal principle to the President or the executive branch. Indeed, in cases analyzing the

Appointments Clause, this Court has applied the removal principle to subordinate officers residing outside the executive branch. *See United States v. Allred*, 155 U.S. 591, 594 (1895) (circuit court commissioner). *Myers*, too, recognized that the removal principle is not restricted to the executive branch; two of the three cases it cites as support for the removal principle involved *non*-executive branch officers. *See Myers*, 272 U.S. at 119 (citing *In re Hennen*, 38 U.S. at 259 (judicial clerk)); *Reagan v. United States*, 182 U.S. 419, 424 (1901) (commissioner for Indian territory, appointed by an Article IV judge).

Without the state oversight that the removal principle provides, electors would be free to violate their oath, take a bribe, or cast a ballot for a constitutionally ineligible candidate. Such an outcome would deprive the States' voters of their voice in the selection of the President. *See Myers*, 272 U.S. at 123 ("The President is a representative of the people" who is "elected by *all* the people." (emphasis added)). While an elector might face criminal charges after taking a bribe to vote for a candidate, without the removal power, the bribed vote would still bind the Nation, potentially swaying a Presidential election based on a corrupted ballot.

The logic of *Ray v. Blair*, 343 U.S. 214 (1952) also supports the States' use of the removal principle when an elector breaks his or her promise. In *Ray*, the Alabama legislature delegated to the political parties the authority to nominate electors. *Id.* at 217 n.2. Alabama's Democratic Party required its nominees for electors to pledge "aid and support" to the presidential nominee of the national Democratic Party. *Id.* at 215.

Mr. Blair, a candidate for elector, objected to the pledge on the ground that it restricted his freedom to vote in the Electoral College for the candidate of his choice. *Id.* This Court rejected his challenge and upheld the pledge requirement, finding "no federal constitutional objection" when a State authorizes a party to choose its nominees for elector and to "fix the qualifications for the candidates." *Id.* at 231. The Court held that the Twelfth Amendment does not demand "absolute freedom" for the elector to "vote his own choice." *Id.* at 228. The Court thus declined to create a new constitutional right for electors to vote according to their individual preferences.

By contrast, the dissent in *Ray* fully embraced the concept of unrestricted elector choice. The *Ray* dissent viewed presidential electors as "federal officials" who perform a "federal function" beyond the States' control. *Id.* at 231, 233 (Jackson, J., dissenting). Presidential electors are "free agents," the dissent asserted, who exercise an "independent and nonpartisan judgment" when casting their electoral ballots. *Id.* at 232. In the dissent's view, "no state law could control the elector in performance of his federal duty." *Id.* But that view did not carry the day.

Here, Mr. Baca, like the court of appeals, erroneously embraces the *Ray* dissent rather than the majority. Electors' Br. 19, 50, 51 (discussing *Ray*'s dissent). But the *Ray* majority rejected the dissent's view of unbounded elector discretion in favor of the "long-continued practical interpretation" permitting States to impose elector pledges. 343 U.S. at 229. From that reasoning, it follows that States may enforce their lawful pledge requirements by removing a faithless

elector who "voluntarily assume[d] obligations to vote for a certain candidate." *Id.* at 230; *see also D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184–88 (1972) (recognizing constitutional rights can be waived).

Although *Ray* reserved the question whether elector pledges are "legally unenforceable," 343 U.S. at 230, lower federal courts post-*Ray* have uniformly interpreted its reasoning to condone state enforcement. Pet. App. 155 (*Ray* "strongly implies that state laws directly binding electors to a specific candidate are constitutional"); *accord Abdurrahman v. Dayton*, No. 16-cv-4279, 2016 WL 7428193, at *4 (D. Minn. Dec. 23, 2016) (*Ray* "implied that such enforcement would be constitutional"); *Koller v. Brown*, 224 F. Supp. 3d 871, 879 (N.D. Cal. 2016) ("If that sort of reduction in an elector's independence [in *Ray*] is determined constitutional, . . . Plaintiff's argument based on Article II, § 1 collapses"); *Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) ("Though the [*Ray*] Court was not in a position to decide whether the pledge was ultimately enforceable, the opinion's reasoning strongly suggested that it would be"). Only in the decision below has a court held otherwise post-*Ray*.

The Electors attempt to reconcile *Ray* by extrapolating a bizarre legal principle that sanctions fraud on the electorate: States may require a pledge but cannot enforce it. No constitutional text or doctrine supports their contention.

Even in the juror context, which the Electors analogize to, a judge can set aside a jury's verdict if clearly contrary to the evidence. 49 C.J.S. *Judgments* § 94. And judges can remove jurors before they render

a verdict for failing to follow instructions or violating their oaths. *See, e.g.,* FED. R. CIV. P. 47(c) ("During trial or deliberation, the court may excuse a juror for good cause."); FED. R. CRIM. P. 23(b)(3) (allowing a jury of 11 to render verdict if juror excused for good cause during deliberations). Electors do not hold "unreviewable discretion" any more than jurors do. Electors' Br. 16.

Under *Ray*'s reasoning, States may enforce their lawful pledge requirements. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) (stating Supreme Court's "reasoning underlying" a decision is "just as binding" as its holding).

The Electors also seek to limit the removal principle and *Ray* by casting electors' role as akin to federal Senators. Electors' Br. 20–22. Constitutional text and longstanding practice both counsel against such a comparison. The Constitution sets forth a specific process for replacing a Senator when a vacancy arises. U.S. CONST. art. I, § 3; amend. XVII. The Constitution is silent, however, on the process for filling a vacancy in the Electoral College. This silence, and the applicable federal statute, leave room for the States to create their own processes for both determining when a vacancy occurs and filling that vacancy. 3 U.S.C. § 4 (authorizing "[e]ach State" to provide by law for "the filling of any vacancies" but not otherwise delineating when a vacancy occurs).

The Constitution similarly spells out numerous duties of Senators that necessarily require discretion, further rendering the Electors' comparison inapt. Among other duties, Senators over the course of a six-year term may try impeachments (art. II, § 3), concur

on treaties (art. II, § 2), override presidential vetoes (art. I, § 7), and advise and consent on appointments (art. II, § 2). Presidential electors, by contrast, are temporarily appointed to perform a single act that occurs on one day. Immunity from oversight and removal would render them wholly unaccountable to the people or their appointing States. Because of these significant differences, the Electors' comparison to Senators does not cast doubt on the removal principle.

C. The Twelfth Amendment recognized the role of political parties in selecting the President.

The Twelfth Amendment enabled partisan Electoral College voting for President and Vice President, because its Framers understood that States could assert control over their appointed electors to enforce their pledges. Under the original Constitution, electors "did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill." *Ray*, 343 U.S. at 224 n.11. The person who received the most votes became President; and the one with the second-most votes became Vice President.

But with the arrival of political parties, that system quickly proved unworkable. In 1800, the Electoral College vote ended in a tie because Democratic-Republican electors had no way to distinguish between presidential nominee Thomas Jefferson and vice-presidential nominee Aaron Burr when they each cast two ballots for President. Hardaway, at 91–92. It took 36 rounds of balloting in the House of Representatives to finally break the tie.

Id. at 92. Because that situation was "manifestly intolerable," *Ray*, 343 U.S. at 224 n.11, the Twelfth Amendment was adopted to allow the electors to cast "distinct ballots" for President and Vice President. U.S. CONST. amend. XII; Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 11 (2000) ("The Twelfth Amendment (1804) sought to harmonize political parties with the electoral college to avoid the problems the House of Representatives had with the election of 1800").

In effect, the Twelfth Amendment reflected and, in turn, enabled the role that political parties played in selecting the President, reflecting the confidence that electors would remain faithful to their declared party. The amendment's revised balloting process permitted the States to select electors who would "vote for the party candidates for *both* offices," avoiding the unworkability of having a President from one party but a Vice President from a rival party. *Ray*, 343 U.S. at 224 n.11 (emphasis added). This process ensured that electors could "carry out the desires of the people, without confronting the obstacles which confounded the election[ ] of . . . 1800." *Id.* at 224 n.11; Howard M. Wasserman, *The Trouble With Shadow Government*, 52 EMORY L. J. 281, 311 (2003) ("The Amendment brought formal constitutional selection mechanisms in line with informal party practices by making those party practices the constitutional norm.").

At the most basic level, the amendment was the solution to the unique problems posed when electors are pledged and bound to the candidates of their declared party. Keith E. Whittington, *Originalism,*

Constitutional Construction, and the Problem of Faithless Electors, 59 ARIZ. L. REV. 903, 911 (2017) ("[P]residential electors were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment."); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1291 (2002) (the Twelfth Amendment "recognized the existence of political parties and the linkage between candidates and mass publics"). Without that historical practice, dating back to at least 1800, the Twelfth Amendment would not have been necessary in the first place. The Twelfth Amendment thus anticipates and supports the contemporary practice of binding electors to their pledged candidate. And it provides an additional reason for rejecting the Electors' and the *Ray* dissent's call for "independent and nonpartisan judgment" by electors. 343 U.S. at 232 (Jackson, J., dissenting).

The Electors overlook this historical context and instead focus on isolated words, like "vote," in the amendment's text. Electors' Br. 26–27. But the amendment's detailed and lengthy provisions just address the procedures for tallying and transmitting the electoral ballots. The amendment prescribes, for example, that the electors shall cast their ballots for President and Vice President in "distinct ballots" and make "distinct lists" for each, thus ensuring no tie between the party's candidates. U.S. CONST. amend. XII. Nowhere does it purport to confer unbridled discretion on electors.

Congressional debates on the Twelfth Amendment confirm that many understood and

expected that electors would act as agents for expressing the people's will:

- Sen. Smith of Maryland: "[T]he Constitution . . . intended that the election of the Executive should be in the people, or as nearly as was possible, consistent with public order and security to the right of suffrage. . . . Our object in the amendment is or should be to make the election more certain by the people." 13 ANNALS OF CONG. 120 (1803).

- Sen. Nicholas of Virginia: "The people hold the sovereign power, and it was intended by the Constitution that they should have the election of the Chief Magistrate." *Id.* at 103.

- Rep. Campbell of Tennessee: the duty of the House "in introducing an amendment to the Constitution on this point, [is] to secure to the people the benefits of choosing the President, so as to prevent a contravention of their will as expressed by Electors chosen by them; . . . This was the true spirit and principle of the Constitution, whose object was, through the several organs of the Government, faithfully to express the public opinion." *Id.* at 421.

- Rep. Clopton of Virginia: "[T]he electoral votes are to be considered as [the people's] expression of the public will[.]" *Id.* at 377. "The Electors are the organs, who, acting from a certain and unquestioned knowledge of the choice of the people, by whom they themselves were appointed, and under immediate responsibility to them, select and announce those particular

> citizens . . . . The adoption of this medium . . . was no abandonment of the great principle, that the appointment of the constituted authorities ought to be conformable to the public will. . . . It is a primary, essential, and distinguishing attribute of the Government, that the will of the people should be done; and that the elections should be according to the will of the people." *Id.* at 423.
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> ● Rep. Holland of North Carolina: "[T]he public will is of binding obligation" and "[t]he framers were obliged to resort to elections and delegations of power by which agents were to be appointed to express and execute their will[.]" *Id.* at 735.

The weight of this authority demonstrates that the Twelfth Amendment empowers States to require that electors comply with their pledges and cast partisan-based ballots.

D. The public's post-ratification understanding and longstanding historical practice confirm that States may control their electors.

In interpreting the Constitution, this Court recognizes that the public's post-ratification understanding from "immediately after" the Constitution's ratification is a "critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Likewise, a "long settled and established practice" is entitled to "great weight" when interpreting constitutional provisions. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (quotations omitted). Historical practice is critical

"even when th[e] practice began after the founding era" and even when the "nature or longevity" of the practice is in dispute. *Id.* at 525; *accord Ray*, 343 U.S. at 228–29 (citing "longstanding practice" to uphold pledge requirement).

In this case, the public's post-ratification understanding and historical practice both support the States' ability to enforce electors' pledges. The development of political parties and the early state statutes governing electors inform this understanding.

1. The advent of political parties supports state control over electors.

Political parties arose shortly after the Founding and animated the prompt ratification of the Twelfth Amendment. The parties quickly became the "organizing media of politics," and almost immediately reached not only into Congress but into the Electoral College mechanism for selecting the President. Robert W. Bennett, *Taming the Electoral College* 20 (2006). The Twelfth Amendment's design illustrates their influence and the importance of political parties.

As discussed, the amendment's central feature separated the electoral ballots for President and Vice President, ensuring no tie or split-ticket officeholders. But this feature worked only on the understanding that electors would adhere to their pledges and cast their ballots for the candidates of their declared party. Whittington, at 911 ("The electors were not cyphers, and political operatives took care 'to ascertain the complexion of the electors' so as to be assured that they would vote appropriately." (quoting George

Gibbs, 1 *Memoirs of the Administrations of Washington and John Adams* 387 (1846)). Individual voters, in other words, knew they were not voting for the elector as an individual but rather for the political party's presidential nominee to whom the elector had pledged.

This Court's decisions recognize that the public understood after the Constitution's ratification that electors were expected to support the prevailing party's nominees. In *McPherson*, the Court observed that "experience soon demonstrated that [electors] were so chosen simply to register the will of the appointing power in respect of a particular candidate." 146 U.S. at 36. And in *Ray*, the Court explained that electors post-Founding were "expected to support the party nominees." 343 U.S. at 228. "The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is *impossible* to accept." *Id.* (emphasis added). Electors had become "mere agents" as early as the first election held under the Constitution.[8] *Id.* at 228 n.15 (quotations omitted). This history and tradition, covering all previous presidential elections held under the Constitution

[8] State courts agree—the electors' role is symbolic and narrowly circumscribed. They are appointed solely to cast a ballot for the political party's nominee with whom they are affiliated. *See, e.g.*, *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924); *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912); *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (N.Y. Sup. Ct. 1933).

spanning 232 years, is entitled to "great weight." *Noel Canning*, 573 U.S. at 524 (quotations omitted).

This Court has recognized that our constitutional design accommodates the role of political parties, even when not explicit in the Constitution's text. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), for example, the Court held the States may prohibit "fusion" candidates from appearing on the ballot for more than one party. *Timmons,* moreover, explained that States do not violate the First or Fourteenth Amendments by deciding that a healthy two-party system best serves political stability; rather, States may decide that tempering the "destabilizing effects of party-splintering" and "excessive factionalism" best serves effective government. *Id.* at 367.

Likewise, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Court struck down California's open primary system, finding that allowing any voter to participate in a party's primary election, regardless of his or her political affiliation, violates the Constitution because it infringes on the party's First Amendment right of association. Moreover, it explained that a political party's First Amendment associational right to nominate its "standard bearer who best represents the party's ideologies and preferences" overrides any state interest in holding an open primary. *Id.* at 575 (quotations omitted); *accord Ray*, 343 U.S. at 221–22 (explaining pledge to support a nominee "protects a party from intrusion by those with adverse political principles").

These decisions illustrate the legal principle first manifested by the Twelfth Amendment: neither the federal government nor the States violate the Constitution by enacting laws designed to protect voters' ability to organize themselves into parties. Colorado's and Washington's elector-binding laws, which protect voters' expectations when they cast votes for electors selected by a party, fit comfortably within this mold.

2. Early state statutes support broad state authority over electors.

Early state statutes also demonstrate that States have always exercised authority over electors that went beyond mere appointment. This state authority included not only determining when a vacancy occurred and filling it, but also punishing electors who failed to perform their official duties.

Kentucky's 1799 statute, for example, stated that an elector who "fail[ed] to perform the duties herein required . . . shall forfeit and pay one hundred dollars." 2 William Littell, *Statute Law of Kentucky*, ch. CCXII, § 20, at 352 (1810). Virginia's fine in 1788—before the first presidential election—was 200 pounds, while North Carolina in 1837 charged derelict electors $400. 1788 Va. Acts, ch. I, § V, at 4; Frederick Nash, et al., *Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836-7*, at 247 (1837). These early state statutes authorizing monetary fines, like Washington's 2016 law, illustrate that States have consistently exercised control over their electors.

Determining when an elector vacancy occurred and creating a process to fill it also fell to the States in the early days of our republic. In New Jersey, the governor was authorized to fill any vacancy created by "death, *removal or otherwise*." Joseph Bloomfield, Compiler, *Laws of the State of New Jersey*, 42–43 (1811) (emphasis added). Other States like Massachusetts allowed the present electors to fill a vacancy by majority vote. 1796–1797 Mass. Acts 260. New Hampshire, Pennsylvania, and Georgia required that their legislatures fill any elector vacancy. 1800 N.H. Laws 566–67; James T. Mitchell, *Statutes at Large of Pennsylvania from 1682 to 1801*, § IV, at 52–53 (1700–1809); Lucius Q.C. Lamar, *Compilation of the Laws of the State of Georgia, Passed by the Legislature since the Year 1810 to the Year 1819, Inclusive* 7C (1821).

These early state statutes, both from before and after the Twelfth Amendment's ratification, confirm that electors have never enjoyed complete autonomy from state control. They also demonstrate that the public never understood the elector's role as one free from state oversight.

E. Longstanding federal practice supports plenary state control over electors.

The Electors assert that no State before 2016 had ever removed or fined a faithless elector. Electors' Br. 8. They also allege that Congress has a long history of accepting anomalous electoral ballots from faithless electors. Electors' Br. 46–47. From this, they infer that electors hold a federal constitutional right to vote their conscience, unfettered by state oversight. Electors' Br. 57–58. The Electors only reach this faulty

conclusion, however, by overlooking critical historical facts and longstanding congressional deference to the States.

As to historical facts, Colorado has found no instance of an elector before 2016 ever casting a faithless ballot in a State with a law authorizing his or her removal or imposition of a fine. Pet. 31. Congress's past acts of counting faithless ballots from States that *lack* such laws says little about the States' authority to enforce their binding statutes.

And Congress *did* count multiple electoral ballots from States that enforced their binding statutes in 2016, ratifying the States' practice of controlling their electors. In addition to Colorado's removal and replacement of Mr. Baca, Minnesota removed an elector who attempted to cast his ballot for Bernie Sanders rather than Hillary Clinton; Minnesota replaced him with a substitute elector who followed state law and cast a ballot for Clinton.[9] Similarly, a Maine elector attempted to cast his electoral ballot for Sanders, but the presiding officer ruled his ballot out of order; the elector then switched his ballot to Clinton.[10] Each of these ballots was accepted by Congress without debate, despite being compelled by the States over the original electors' objections. 163 CONG. REC. H185–87 (daily ed. Jan. 6, 2017). Congress's counting of these compelled ballots

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[9] J. Patrick Coolican, *Minnesota electors align for Clinton; one replaced after voting for Sanders*, STAR TRIBUNE (Dec. 20, 2016), https://tinyurl.com/rjrv2dn.

[10] Scott Thistle, *Maine electors cast votes for Clinton, Trump – after protests inside and outside State House*, PRESS HERALD (Dec. 19, 2016), https://tinyurl.com/su4zn9u.

affirmed the States' authority to both bind their electors and enforce that binding. *See M'Culloch v. Maryland*, 4 Wheat. 316, 401 (1819) (stating Congress's decisions, especially on "doubtful question[s]," should "receive a considerable impression from that practice" and not be "lightly disregarded").

To be sure, Congress has accepted faithless electoral ballots transmitted by the States at various points throughout our history. Electors' Br. 46–47. But the Electors draw the wrong legal conclusion from Congress's actions. Consistent with Congress's counting of the States' compelled ballots in 2016, its decision to *also* accept faithless ballots follows its longstanding practice of deferring to the States. Following passage of the Electoral Count Act of 1887, 24 Stat. 373, Congress has never failed to count either a compelled or faithless electoral ballot forwarded by a State when the State transmits a single set of electoral certificates.[11]

Congress's deference to the States is best illustrated by its 1969 debate over a faithless electoral ballot from North Carolina. The faithless elector, Dr. Lloyd Bailey, cast an anomalous ballot for George Wallace rather than the Republican nominee, Richard Nixon. Some members of Congress objected to counting his ballot, arguing that Congress was responsible for preventing a faithless elector from

[11] *See* Br. of Prof. Derek Muller as Amicus Curiae at 10–11 (Mar. 6, 2020) (recounting Congress's decision in 1961 to count just one of three competing sets of certificates forwarded by Hawaii).

thwarting the people's will. 115 CONG. REC. 148 (1969) (statement of Rep. Edmonson). Opponents of the objection, while critical of Dr. Bailey's faithless ballot, argued that Congress could not change or disregard electoral ballots from the States. *Id.* at 149 (statement of Rep. McCulloch). In their view, it was the *States'* responsibility to pass laws prohibiting faithless electors: "the responsibility rests on the State of North Carolina and the other States of the Union to make it impossible in the future for the election of a President of the United States to turn on the whim or predilection of individual electors." *Id.* at 147 (statement of Rep. Jonas). In the end, Congress rejected the objection and accepted Dr. Bailey's ballot. *Id.* at 171. While North Carolina did not demand faithfulness from its electors before the Bailey incident, it took the cue from Congress and quickly amended its law to impose fines on faithless electors and reject their ballots. 1969 N.C. Sess. Laws, ch. 949, § 3. In short, by counting Dr. Bailey's ballot, Congress expressed its view that the States, not the federal government, regulate presidential electors. Hardaway at 53 (suggesting Congress considers itself "bound by the selection of an appointed slate certified by a governor").

A statute passed by Congress eight years earlier further confirms Congress's deference to state control. In 1961, after the Twenty-third Amendment placed the District of Columbia on equal footing with the States in its allocation of electors, Congress enacted implementing legislation binding the District's electors to the outcome of its election. D.C. CODE ANN. § 1-1001.08(g)(2); Pub. L. No. 87-389, 75 Stat. 818. The D.C. statute contains no enforcement provision,

however, as demonstrated in 2000 when a D.C. elector abstained from casting a ballot to protest the District's lack of congressional representation.[12] The District transmitted just two electoral ballots even though it was entitled to three, and Congress accepted the two ballots without debate. 147 CONG. REC. H33–H34 (daily ed. Jan. 6, 2001). In line with Congress's acceptance of Dr. Bailey's faithless ballot and the 2016 compelled ballots, the D.C. statute exemplifies Congress's view that the States have discretion to permit faithlessness, discourage it, or forbid it altogether.

The federal statute implementing the Electoral College also supports the States' plenary power over their electors. 3 U.S.C. § 1, *et seq*. Section 4 of the statute authorizes each State by law to fill "any vacancies" in their respective colleges of electors "when such college meets to give its electoral vote." *Id.* at § 4. This section makes clear that only the States are authorized to determine when a vacancy occurs and how to fill it. And section 15 further supports state authority, recognizing the States' ability to have "successors or substitutes" to the original electors, selected "in the mode provided by the laws of the State." *Id.* at § 15. Section 5, governing controversies in appointing electors, provides that the States' determination "shall be conclusive," so long as it is made at least six days before the electors convene. *Id.* at § 5. Section 15 applies to Congress's counting of the electoral ballots; it permits Congress to resolve any objection, but only to ensure compliance with the

[12] FairVote, *Faithless Electors*, https://tinyurl.com/y7fnonw5.

ministerial certification and transmittal provisions in §§ 5 and 6.

Taken together, these provisions demonstrate that Congress generally defers to the States in deciding whether to count the electors' ballots.

F. The Tenth Amendment's reservation of state power confirms States' authority over their electors.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Through this amendment, the Framers intended the States to "keep for themselves . . . the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991) (affirming state age limit on judges) (quotations omitted). Although the federal government exercises some control over federal elections, U.S. CONST. art. I, § 4, cl. 1, the States retain broad powers under the Tenth Amendment to "prescribe the qualifications of its officers." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quotations omitted). This includes the authority to establish qualifications for their presidential electors. *Thornton*, 514 U.S. at 861 (Thomas, J., dissenting).

As dual sovereigns, the States have always held the common-law power to control—and remove, if necessary—their subordinate appointees. *See In re Hennen*, 38 U.S. at 247. This common-law power resided with the States before the federal Constitution

and remains with the States today under the Tenth Amendment.

That the federal Constitution describes in general terms the duty for the subordinate state officer does not remove the officer from this historical state control. The Constitution also prescribes certain election-related duties for each State's governor. U.S. CONST. amend. XVII.

But no one suggests that a State's governor is beyond state regulation when performing his or her election-related duties under the Seventeenth Amendment. Six States, for example, require that the governor appoint a replacement Senator from the same political party as the vacating Senator.[13] In the context of presidential electors, the States' actions are on even firmer ground—their authority is plenary, comprehensive, and exclusive. *McPherson*, 146 U.S. at 27, 35.

The States' broad authority over their appointed electors is also consistent with their general authority to protect the integrity and reliability of the electoral process. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008). The States hold authority under the Tenth Amendment, for example, to establish qualifications for their voters—persons the Electors call "congressional electors." *Sugarman*, 413 U.S. at 647; Electors' Br. 25. This state authority exists even though voting for members of Congress is a "federal function" that is governed in part by federal law. Electors' Br. 38. As they often do, state and

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[13] Nat'l Conf. of State Legislatures, *Filling Vacancies in the Office of United States Senator*, https://tinyurl.com/qttc66z.

federal law governing the same subject matter coexist together.

This laudable feature of our federal structure is demonstrated best by those points in history when States afforded their residents greater voting rights than required by the Constitution. Certain States expanded voting rights before the Fourteenth and Fifteenth Amendments were ratified. *Oregon v. Mitchell*, 400 U.S. 112, 156 (1970) (observing that six States had extended African Americans the right to vote by the end of the Civil War). The same is true for women. The States, one by one, led the initiative to extend suffrage to women long before passage of the Nineteenth Amendment in 1920. The Wyoming Territory first enfranchised women in 1869. Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 662 (1996). Colorado, Idaho, and Utah followed in granting female suffrage by 1896. *Id.* at 663. In all, 30 States extended some level of suffrage to women before the Nineteenth Amendment was ratified in 1920. Karen M. Morin, *Political Culture and Suffrage in an Anglo-American Women's West*, 19 WOMEN'S RTS. L. REP. 17, 21 (1997).

The States' early experimentation with extending suffrage beyond white males is characteristic of our system of federalism. Absent a recognized constitutional restriction, the Tenth Amendment *encourages* the States' attempts at different solutions in the election context. The States' diverse approaches in regulating their presidential electors is a prime example of federalism at work, not a constitutional violation. *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of

the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.").

The Electors resist this understanding of the States' reserved powers by relying on this Court's holding in *Thornton* that barred States from adding qualifications for members of Congress beyond those in the Constitution. 514 U.S. 779. Building on *Thornton*, the Electors argue that enforcement of the States' binding laws would spur "strategic or political innovations." Electors' Br. 45.

The Electors' argument fails for two reasons. First, *Thornton* makes clear that a State does not add an impermissible qualification when it requires that the successful candidate be "elected at the general election." 514 U.S. at 828 (quotations omitted). *Thornton* recognized the importance of the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them." *Id.* at 783 (citations and quotations omitted). Imposing this common-sense requirement advances States' interest in protecting the "integrity and regularity" of the election process. *Id.* at 835. It permits States to protect voter expectations by avoiding the spectacle of a bribed elector being permitted to cast a corrupted ballot, subverting the people's choice of "whom they please to govern them." *Id.* at 783. Adopting this core democratic value does not add a qualification that runs afoul of the Qualification Clauses. *See Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974) (stating California's law "no more establishes an additional requirement for the office of Representative than the

requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support").

Second, the Electors' embrace of elector faithlessness is far more likely to generate "strategic and political innovations" than the States' adherence to their decades-old binding laws. The Electors' admitted purpose in bringing this litigation is not to protect elector discretion but rather to "precipitate a national crisis of confidence in the hopes of spurning a movement against the Electoral College." Br. in Opp'n 32–33, *Chiafalo v. Washington*, No. 19-465 (Nov. 8, 2019) (citing Equal Citizens' publications). The conduct giving rise to this lawsuit also exhibits a potentially dangerous political innovation: Mr. Baca and his fellow "Hamilton Electors" sought to convince other 2016 electors across the country to ignore their pledges by casting ballots in favor of a "responsible Republican candidate" rather than Donald Trump or Hillary Clinton. Whittington, at 914. This scheme to subvert the election result represents the very "cabal" that the Framers sought to avoid. 2 Farrand, at 500 ("As the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided.").

G. Barring States from enforcing limits on electors would upset settled agency law.

The Electors claim a right to cast an electoral ballot according to their individual preferences in the Electoral College even though they pledged to honor the choice of Colorado's voters and took an oath to follow Colorado's binding statute. The Electors' position not only disenfranchises millions of voters in

the selection of the President, but also violates agency law.

Electors have served as "mere agents" ever since the first election held under the Constitution. *Ray*, 343 U.S. at 228 n.15 (quotations omitted). Their "sole function" is to "transmit the vote of the state" that appointed them. *Green*, 134 U.S. at 379. Under black-letter agency law, the principal may limit its agent's authority and terminate the relationship if the agent attempts to act beyond her authority. *See* Restatement 3rd of Agency § 2.02 cmt. g. (2006) ("A principal may direct an agent to do or refrain from doing a specific act."); *see also id.* § 3.06 (stating "agent's actual authority may be terminated by . . . (4) an agreement between the agent and the principal or the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf . . . [or] (5) a manifestation of revocation by the principal to the agent"). Applying these familiar agency principles, a State acts lawfully when it terminates its agency relationship with a faithless elector who attempts to exceed the conferred authority.

This understanding of electors' limited role is not new. Analogous electoral systems involving proxy ballots were well-known during the pre-Founding era. Massachusetts voters as early as 1636 could deliver their votes for magistrate by proxy because of the "great inconvenience" caused by having "to meet in one place for [the] election." William Dummer Northend, *The Bay Colony* 240 (1896); *see also* John Winthrop, *The History of New England from 1630 to*

1649 220 n.2 (James Savage ed., 1853) (stating voters were allowed to remain at home "for the safety of their towns" and to "send their voices by proxy").

John Winthrop, the governor of Massachusetts Bay Colony, wrote in his journal that a similar proxy procedure was used for electing a new governor and his deputy. Winthrop, at 248. The ballots were directed proxies, not general proxies that permitted the agent to exercise discretion; deputies in each town collected the votes of those desiring to vote by proxy and delivered them to the general court for tabulation. Northend, at 240; Winthrop, at 262 n.3. Versions of proxy electoral systems also developed in Connecticut, Maryland, New Jersey, New York, Rhode Island, and South Carolina. Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 53, 130, 210 n.5, 239, 416–17, 443 (1905); *see also* 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 220 (1918) (stating New England contributed "innovation to American elections in the proxy vote").

Given the prevalence of proxy voting, the concept of electors acting as bound delegates flows logically from the Constitution's historical backdrop. Whittington, at 910 (explaining distinction between the trustee and delegate models of representation, and concluding electors are akin to bound delegates). Unlike legislators who serve for a term of years and must necessarily exercise judgment on several complex issues, presidential electors are "uniquely situated" to act as bound delegates or agents. *Id.* Electors must "only answer one question" and can be "readily instructed" as to how they must perform their

single task. *Id.* Indeed, appointed electors act "'very wrong'" if they not only fail to follow the instruction of their principal but in fact do the opposite of what they desire. *Id.* (quoting Hanna Fenichel Pitkin, *The Concept of Representation* 151 (1967)).

* * *

Article II and the Twelfth Amendment give the States plenary authority over their appointed electors. To fulfill the expectation of the voters who select them, States may require electors to comply with their pledges to support particular candidates.

George Washington implored in his farewell address that "[t]owards the preservation of your government . . . it is requisite . . . that you resist with care the spirit of innovation upon its principles." George Washington, Washington's Farewell Address to the People of the United States (Sept. 19, 1796), *reprinted in* S. Doc. No. 106-21, at 15. "[T]ime and habit" are necessary to "fix the true character of governments" and "experience is the surest standard by which to test the real tendency of the existing constitution of a county." *Id.*

This Court should not endorse an untested "innovation" in the method of selecting the President but rather should adhere to the "time and habit" that has developed in the States' practices for more than 230 years. *Id.* Indeed, the practice of electors pledging themselves has prevailed since the "first election held under the [C]onstitution." *Ray*, 343 U.S. at 228 n.15 (quotations omitted). Permitting the States to enforce those lawful pledges is not only constitutional but necessary to protect the true character of our Nation's

democratic principles and system of stable governance.

CONCLUSION

The judgment of the court of appeals should be reversed.

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