No. 19-518

In The Supreme Court of the United States

OCTOBER TERM 2019

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR SOUTH DAKOTA AND MISSISSIPPI, MARYLAND, INDIANA, NEVADA, ALASKA, NEBRASKA, LOUISIANA, OHIO, OKLAHOMA, ARIZONA, ILLINOIS, DELAWARE, NEW MEXICO, CALIFORNIA, VIRGINIA, SOUTH CAROLINA, WEST VIRGINIA, NORTH DAKOTA, RHODE ISLAND, MONTANA AND TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do Article II or the 12th 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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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are states that have exercised, by varying means acceptable to their respective electorates, their constitutional authority to direct the manner of appointing their presidential electors. Thirty-two states[2] and the District of Columbia have enacted laws binding a political party's designated presidential electors to cast their votes for the party's nominees for President and Vice President. South Dakota, like some states, does not bind its electors, by pledge or otherwise.[3] Throughout South Dakota's history it simply has been understood that electors will honor their party's and the electorate's will and cast their votes for the presidential ticket that won the statewide popular vote.

The increasing polarization of the national electorate, and the record number of rogue electors in the

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[1] Notice of intent to file this brief was served on counsel for the respondent via first class United States mail and e-mail on October 30, 2019.

[2] These *amici curiae* states bind electors: Alaska (Alaska Statute 15.30.040, -90); Arizona (Ariz.Rev.Stat. 16-212); California (Cal.Elections Code § 6906); Delaware (Del. Code Ann. Title 15, § 4303(b)); Indiana (Ind.Code §§ 3-10-4-1.7, -8, -9); Maryland (Md.Code Ann. § 8-505(c)); Mississippi (Miss.Code Ann. § 23-15-785(3)); Nebraska (Neb.Rev.Stat. §§ 32-713(2), -714(2)); Nevada (Nev.Rev.Stat. 298.045(1), 298.075(2)(b)); New Mexico (N.M.Stat.Ann. § 1-15-9 (imposing felony liability for casting vote for any candidate other than nominee of party that appointed elector)); Ohio (Ohio Rev. Code 3505.39, -40); Oklahoma (Okla.Stat.Title 26 § 10-102); South Carolina (S.C. Code Ann. § 7-19-80); Virginia (Va.Code § 24.2-203 ¶ 2); North Dakota; Montana (Mont. Code Ann. § 13-25-304, -307); Tennessee (Tenn. Code Ann. § 2-15-104(c)(1)).

[3] These *amici curiae* states do not bind electors: Illinois, Louisiana, West Virginia, Rhode Island.

2016 election, call the continuing viability of South Dakota's honor system into question. South Dakota must now consider whether to join the ranks of states which bind their electors by law to their party's nominee. Guidance from this Court on the constitutionality of binding electors, and the controls state legislatures may enact to do so, will assist not only South Dakota but all states – binding and non-binding alike – in formulating future policy on this vital question. Without this Court's guidance, the decision below creates considerable uncertainty regarding the authority of states when appointing presidential electors and the validity of laws binding electors to follow the will of the electorate.

SUMMARY OF ARGUMENT

Whether to bind electors and, if so, by what means is the constitutional prerogative of state legislatures. Though nothing in the text of the Constitution or its historical implementation precludes states from conditioning service as an elector on honoring the state's popular vote for a presidential ticket, there is now a conflict of authorities over how to interpret this textual silence.[4] The scope of state autonomy in the matter of appointing electors, particularly the authority to enact

[4] A petition for a writ of *certiorari* to appeal the Washington Supreme Court's recent decision finding that state restraints on electors do not "interfere with any federal [Constitutional] function" is currently pending before this court. *In re Guerra*, 441 P.3d 807 (Wash. 2019), U.S.S.Ct. No. 19-465.

and enforce pledges to honor the popular vote, is increasingly salient in the current political climate. Given that the lower court's decision may rally more electors to cast faithless ballots in future elections, potentially causing disputed outcomes, this case provides an ideal vehicle for addressing this important federal question outside the context of an active election controversy.

ARGUMENT

If it is constitutional to exact a pledge to support a party's nominee as a condition of serving as an elector,[5] it necessarily follows that there is some constitutional means of enforcing that pledge.[6] Mechanisms adopted by states for enforcing such pledges are by no means incompatible with their broad authority and functions under Article II, Section 1 of the United States Constitution. The lower court arrived at its decision to invalidate Colorado's binding statute by interpreting Article II, Section 1 too restrictively, and overlooking the Electoral College's historical role as the voice of the states and their electorates.

[5] *Ray v. Blair*, 343 U.S. 214 (1952).

[6] *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1849 (2018) (Thomas, J., concurring) (analogizing the States' Art. II, § 1 authority over electors to the Voter Qualifications Clause and explaining the States' "power to establish [voting] requirements would mean little without the ability to enforce them").

A. Binding Electors Is Textually And Historically Consistent With The States' Broad Constitutional Appointment Powers Under Article II, Section 1

The constitution's delegation to the states of the power to direct the manner in which electors are appointed is, by its terms, sufficiently open-ended to allow conditioning service as an elector on a pledge to support the nominees of the presidential ticket that won the state's popular vote.[7] It has ever been so. "In the first election held under the constitution, the people looked beyond these agents (electors), fixed upon their own candidates for President and Vice President and took pledges from the electoral candidates to obey their will. In every subsequent election, the same thing has been done."[8] Alexander Hamilton's concept of a college of "informed" and "discerning," independent electors simply was not embodied in, and never understood to emanate from, the adopted constitutional language.[9]

The absence of textual support for the Hamiltonian model of the electoral college may stem from the contemporaneous controversy that surrounded the

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[7] United States Constitution, Article II, Section 1, Clause 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators or Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector").

[8] 2 Story On The Constitution, § 1463 (5th Ed. 1891).

[9] Hamilton (Publius), Federalist 68, published March 12, 1788.

paternalistic concept of a college of men choosing the President according to their "informed" and "discerning" opinions rather than the popular will. Countering Hamilton was Anti-Federalist 72, asking if "free people" should "resign their right of suffrage into other hands besides their own" and whether "it [is] rational, that the sacred rights of mankind should thus dwindle down to Electors of electors."[10] Though the interposition of an Electoral College between the people and their President had carried the day at the time of Anti-Federalist 72's publication (largely to induce southern states into the union), a textual requirement of strict independence did not. Rather, as noted in Anti-Federalist 72, the appointment of electors was delegated to "the legislative body of each state . . . to point out to their constituents some mode of choice [of electors], or (to save trouble) may choose themselves, a certain number of electors."[11]

Article III of the Constitution demonstrates that the framers knew how to create independent institutions. "Doubtless it was supposed [by Hamilton and like-minded framers] that the electors would exercise a reasonable independence and fair judgment in the selection" of the President.[12] But not all framers were of a like mind;[13] if it had been the determined and universal intent of all the framers (or even a majority of

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[10] Republicus, Anti-Federalist 72, published March 1, 1788.

[11] Republicus, Anti-Federalist 72, published March 1, 1788.

[12] *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

[13] *McPherson*, 146 U.S. at 28 (describing the varied proposals floated at the convention for the appointment of electors).

them) that the people should "resign their right of suffrage" to independent intermediaries, Article II, Section 1 (like Article III) would contain concrete measures to assure elector independence. Instead, even proponents of the Hamiltonian model admit that strict elector independence is no more than "implicit" in the adopted text.[14]

By omitting such concrete measures for elector independence, or *any* limitations on state authority concerning elector qualifications beyond the ineligibility of certain federal officers, Hamilton's "original expectation *may* be said to have been frustrated," "completely frustrated" even.[15] But, as this Court has pointed out, the convention did not slavishly adopt Hamilton's views on every matter.[16] As one of the "enlarged and liberal"[17] minds of his time, Hamilton certainly could see for himself that Article II, Section 1 did not implement his Electoral College design. He doubtlessly would have pressed for language that did if he had believed his fellow delegates would have accepted it. But Hamilton and other Federalist delegates had to make compromises with Anti-Federalists. Article II, Section

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[14] *Ray*, 343 U.S. at 232 (Jackson, J., dissenting).

[15] *McPherson*, 146 U.S. at 36 ("may" italicized to illustrate how the court treated the proposition that Hamilton's concept of the Electoral College had been "frustrated" by its historical manner of implementation as merely arguable); 3 Story, Commentaries On The Constitution Of The United States § 1457 (1833).

[16] *McPherson*, 146 U.S. at 28 (convention rejected Hamilton's suggestion of "electors chosen by electors chosen by the people").

[17] 3 Story, Commentaries On The Constitution Of The United States § 1457 (1833).

1 is that compromise; as adopted, it "reconciled contrariety of views" by granting states "the broadest power of determination" to select the Hamiltonian model or some other of their own choosing.[18] It would appear Hamilton published Federalist 68 as a means of persuading the populace to implement the Electoral College according to his preference.

The frustration of Hamilton's commendable, if unrealistic, idyll of independent electors is "no reason for holding that the power confided to the states by the Constitution has ceased to exist."[19] The plenary powers of states under Article II, Section 1 are not abridged just "because the operation of the system has not fully realized the hopes of those by whom it was created."[20]

B. The Lower Court Interpreted The States' Role And Powers Under Article II, Section 1 Too Restrictively

Most states have exercised their plenary authority under Article II, Section 1 to field electors who act as agents[21] of the states, bound by state law to the

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[18] *McPherson*, 146 U.S. at 28.

[19] *McPherson*, 146 U.S. at 36.

[20] *McPherson*, 146 U.S. at 35, 36.

[21] As implemented since "the first election held under the constitution," voters "looked beyond these agents (electors)" and "fixed upon their own candidates for President and Vice President;" electors are "mere agents" who "are not left to the exercise of their own judgment." 2 Story On The Constitution, § 1463 (5th Ed. 1891); *McPherson*, 146 U.S. at 27, 36 ("state . . . acts . . . through its electoral college" and electors are "chosen simply to register

electorate's will in its selection of President and Vice President.[22] Inherent in the power to appoint agents is the power to limit their authority[23] and replace them if they act outside the scope of that authority.[24] This

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the will of the appointing power in respect of a particular candidate").

[22] A minority of states, like South Dakota, do not formally bind electors. Custom and practice in South Dakota have simply dictated that electoral voting reflect the popular vote. Most states have enacted specific mechanisms for binding electors, ranging from removal, fines or automatic abdication to criminal liability. The Constitution's broad delegation of authority allows, even encourages, states to experiment with and settle upon a manner of appointment suited to and accepted by its residents.

[23] The lower court erred in finding that Micheal Baca's "removal" from office conferred standing to challenge the constitutionality of Colorado's binding statutes in federal court. To the extent *dictum* in *Raines v. Byrd*, 521 U.S. 811, 821 (1997), hypothesized otherwise, it is not apposite here because Colorado voters did not elect *Micheal Baca*; his name did not appear on any general election ballot. Colorado utilizes a "short form" ballot that lists only the names of presidential and vice presidential candidates, not electors. A vote for a presidential candidate results in the appointment of an unnamed slate of party-nominated electors pledged to the party's presidential ticket. Also, Baca was a *state* not a federal officer. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). Per *Smith v. Indiana*, 191 U.S. 138 (1903), a state officer's personal disagreement with a state policy he is charged with implementing does not confer standing to challenge (or jurisdiction to hear) the constitutionality of that policy in federal court. Accordingly, this Court could grant *certiorari* to review and reverse the lower court's decision on the grounds that *Raines* does not confer standing for Baca to challenge state law in federal court in light of principles recognized in *Smith* and *Fitzgerald*.

[24] Restatement 3rd of Agency § 301 (agent's "authority . . . is created by a principal's manifestation to an agent that . . . expresses the principal's assent that the agent take action on the principal's behalf"), § 306 ("agent's actual authority may be terminated by:

system "has prevailed too long and been too uniform to justify . . . interpreting the language of the Constitution as conveying any other meaning."[25]

As noted by the lower court, Article II, Section 1 is silent in regard to a state's authority to remove and replace rogue, ineligible or absentee electors.[26] The lower court's approach to interpreting or resolving this silence differs from *Ray's* in significant ways that warrant review. Though the Constitution is to be interpreted according to its text, the lower court relied inordinately on extra-textual sources – such as Federalist 68 and period dictionaries – to import meaning that is not present.[27] Federalist 68 and the adopted language of Article II, Section 1 are not in agreement, and period

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. . . (4) an agreement between the agent and the principal or 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 . . . (5) a manifestation of revocation by the principal to the agent, or of renunciation by the agent to the principal . . . (6) the occurrence of circumstances specified by statute"), § 309 ("agent's actual authority terminates (1) as agreed by the agent and the principal . . . or (2) upon 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") (2006).

[25] *McPherson*, 146 U.S. at 27, 36 (where "ambiguity or doubt" surround constitutional provisions, "contemporaneous and subsequent practical construction[s] are entitled to the greatest weight").

[26] *Baca v. Colorado Department of State*, Petitioner's Appendix at 1, 78, 90 (Constitution is "silent" regarding the power of states to remove electors after they have been appointed or to strike their votes).

[27] *Utah v. Evans*, 536 U.S. 452, 474 (2002).

definitions of "elector," "vote" and "ballot" are by no means incompatible with a system of pledged electors.[28] *Ray* did not infill textual voids with partisan Federalist doctrine or broad usages of textual terms.

Rather, in the absence of a "definite answer" to the question of whether a state may exact pledges from its electors, the *Ray* Court condoned the practice because neither Article II, Section 1 (nor the 12th Amendment) expressly *prohibit* it.[29] The lower court took the opposite approach, forbidding Colorado from binding electors to their oath (or, it would seem, from imposing other sensible, non-textual qualifications such as residency, age, competency or a clean criminal history)

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[28] Period dictionaries identify both broad and narrow accepted usages of the terms "elector," "vote" and "ballot." While the lower court fixed on the broad usages, the narrower usages are compatible with pledged electors. Both pledged and independent electors "vote" in the sense of a "voice given and numbered," "speak[ing] for or in behalf of any person or thing," and "determin[ing] by suffrage" the outcome of an election. Both pledged and independent electors are "electors" in the sense of having "a vote in the choice of any public officer" and "right to elect . . . a person into an office." Both pledged and independent electors cast a "ballot" in the sense of registering a vote by a "ball or ticket." *Baca*, Petitioner's Appendix at 102. Since service as an elector is a voluntary act, states impose no unconstitutional handicap upon that service by hewing to narrower, historical usages of terms like "elector," "vote," or "ballot" to enforce a pledge law. *Ray*, 343 U.S. at 229 (electors may "voluntarily assume obligations to vote for a certain candidate").

[29] *Ray*, 343 U.S. at 224 ("Neither the language of Art. II, [§] 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of conformity").

because of the absence of constitutional language expressly *permitting* it.[30]

The lower court rationalizes this opposite approach on the ground that Clause 3 of Article II, Section 1 describes the mechanics of voting in more detail than Clause 2 describes a state's electoral appointment powers. "From the moment the electors are appointed," the lower court observed, "the election process proceeds according to detailed instructions set forth in the Constitution itself."[31] According to the lower court, Clause 3 is "inconsistent with [removal] power"[32] because it allegedly "provides no express role for the states after appointment of its presidential electors . . . and the Constitution affords them no other role"[33] beyond their Clause 2 appointment power. But since detail is incongruous with a broad delegation of authority like Clause 2's, and Clause 3 is just as silent as Clause 2 in regard to a state's authority to enforce conditions of appointment once voting is underway, there is no reason to analyze Clause 3 any differently than the *Ray* Court analyzed Clause 2.

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[30] *Baca*, Petitioner's Appendix at 89, 97 (absent "constitutional delegation to the states of power to add qualifications to those enumerated in the constitution, such power does not exist," prohibiting binding electors to their pledges because the "Constitution provides no express role for the states after appointment of its presidential electors," the "Constitution affords [states] no other role in the selection of the President and Vice-President").

[31] *Baca*, Petitioner's Appendix at 98.

[32] *Baca*, Petitioner's Appendix at 99.

[33] *Baca*, Petitioner's Appendix at 97.

But Clause 3 is not altogether silent concerning the states' role after the appointment of its presidential electors. Per Clause 3, the states conduct and preside over the proceedings where votes are cast, certified and transmitted to Congress. "The sole function of the presidential electors is to cast, certify, and transmit *the vote of the state* for president and vice-president of the nation."[34] Though they perform a federal function in these proceedings, electors are *state* agents who derive their authority from the "appointing power," subject, like any agent, to basic agency principles.[35] Replacing a faithless agent in the course of a proceeding presided over by the appointing principal hardly seems incompatible with the active role in electoral balloting that Clause 3 assigns to the states.

A Colorado elector who casts a faithless ballot[36] has cast no ballot at all because he is not authorized to make a selection. Indeed, the elector ceased to be an

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[34] *Fitzgerald*, 134 U.S. at 379.

[35] *Fitzgerald*, 134 U.S. at 379 (electors are *state* officers); *McPherson*, 146 U.S. at 27 ("[t]he state . . . acts . . . through its" electors).

[36] The lower court also reasoned that states were impotent to enforce elector pledges because the 12th Amendment "did nothing to prevent future faithless voting." *Baca*, Petitioner's Appendix at 111. But this reasoning cuts both ways; the 12th Amendment also did nothing to prevent pledged electoral ballots, and Congress has never declined to count a pledged ballot. Congress also counts the ballots of electors, such as those from Colorado, whose names never appeared on any general-election voting form, thus counting the ballots of electors whose identities, let alone their capacity for "informed" and "discerning" decision making, were unknown to voters.

elector the moment he formed the intent to act outside the scope of his authority; the state has not "removed" this elector so much as the elector has abdicated his agency by resolving to act outside the scope of his authority.[37] Under such circumstances, all that remains is for the state simply to replace this elector, just as it would (*must*, to prevent dilution of its electoral votes) if an elector had committed a felony, died, failed to appear, moved out of state, been appointed to a federal office [United States Senate or House of Representatives, cabinet, or the federal judiciary] or otherwise become ineligible to serve in the interregnum between appointment and voting.

If the power to replace when circumstances dictate is not inherent in the power to appoint, a state could be disenfranchised in whole or in part if one or more electors were to become ineligible, unavailable or unwilling to serve in the interval between appointment and voting. In South Dakota, which has 3 electoral votes, the inability to replace an ineligible, unavailable or unwilling elector after appointment would diminish the state's electoral vote and voting power by 33% per

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[37] Restatement 3rd of Agency § 306(4), (5), (6), Note 19 *supra.* See also Uniform Faithful Presidential Electors Act § 7(c) ("An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge . . . vacates the office of elector"); Mich.Comp.Laws Ann. § 168.47 (2019) (refusal or failure to vote for the presidential and vice presidential candidates appearing on the ballot of the political party that nominated the elector constitutes "a resignation from the office of the elector"); Neb.Rev.Stat. § 32-714(4) (2016) (presidential elector who "attempts to present a ballot in violation of his or her pledge vacates the office").

lost elector. The historically close elections of 1876 (Hayes 185/Tilden 184) and 2000 (Bush 271/Gore 266) demonstrate how the inability to replace even one elector could throw an election.[38]

Until now, such irregularities have been prevented by the accepted proposition that "[n]either the language of Art. II, § 1, nor that of the Twelfth Amendment, forbids" the appointing power from setting eligibility criteria for service as a presidential elector, and replacing an elector who, subsequent to appointment, becomes ineligible, unavailable or unwilling to serve.[39] But the lower court has now divested states within its jurisdiction from replacing electors after appointment based on reasoning that does not square with *Ray*.

While it is true that Clause 3 contains no express provision for removal of an elector after appointment, or for nullification of an elector's selection of an unauthorized candidate,[40] this is not the proper question. Per *Ray* and *McPherson*, unless the Constitution "forbids" it, Article II, Section 1's plenary power of appointment, and the state's express role in presiding over

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[38] Binding electors serves as a prophylaxis against a scenario that proponents and detractors of the electoral college would likely agree is problematic: the inauguration of a president who had won neither the electoral nor popular vote. A presidency made possible by a faithless elector could generate significant controversy.

[39] *Ray*, 343 U.S. at 225.

[40] *Baca*, Petitioner's Appendix at 97 ("Constitution provides no express role for the states after appointment of its presidential electors").

electoral balloting, are "sufficiently comprehensive" to encompass limits on the authority of state agents and the inherent power to remove them for acting outside the scope of their agency.[41]

A significant conflict of authority has now developed over the question of the liberty states possess in setting qualifications and conditions of service for their electors. Most states have chosen to formally bind their electors, others have not. The lower court's decision nullifies binding laws in states within its jurisdiction, and shrouds such laws in states outside its jurisdiction in uncertainty. With a presidential election less than one year away, clarity in this area is important to the proper functioning of the electoral college. This case provides a vehicle for resolving this conflict outside of a fevered dispute over the outcome of a presidential election.

CONCLUSION

Federalist 68 describes how Hamilton *wanted* the electoral college to work, but other founders loathed the idea of the people "resign[ing] their right of suffrage" to a *collegium electi* of "informed" and "discerning" intermediaries.[42] Instead of resolving this "contrariety of views" in favor of one faction or the other, the founders left it to state legislatures to adopt

[41] *McPherson*, 146 U.S. at 27.

[42] Republicus, Anti-Federalist 72, published March 1, 1788; Hamilton (Publius), Federalist 68, published March 12, 1788.

the Hamiltonian model or another of their own choosing.[43] "[F]rom the formation of the government until now the practical construction of [Article II, Section 1] has conceded plenary power to the state legislatures in the matter of the appointment of electors,"[44] including the power to remove and replace them as circumstances dictate. Thus, in the interest of preserving traditional state autonomy and authority in this area, this Court should grant *certiorari* and reverse the lower court.

Respectfully submitted this 20th day of November 2019.

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[43] *McPherson*, 146 U.S. at 27.

[44] *McPherson*, 146 U.S. at 35.

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