No. 19-518/No. 19-465

In The Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, POLLY BACA AND ROBERT NEMANICH,

Respondents.

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Writs Of Certiorari To The Supreme Court Of Washington And The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR SOUTH DAKOTA AND 44 STATES AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF COLORADO AND WASHINGTON

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QUESTION PRESENTED

Do Article II, Section 1 or the Twelfth Amendment of the United States Constitution forbid a state from binding its presidential electors to the state's popular vote when casting their Electoral College ballots?

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INTEREST OF *AMICI CURIAE*

Amici curiae 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 and allotting their electoral votes. Thirty-two states and the District of Columbia have enacted laws binding a political party's designated presidential electors to cast their vote for the party's nominees for President and Vice President.[1] South Dakota, like other states, does not bind its electors, by pledge or otherwise.[2] For South

[1] These *amici curiae* states bind electors: Alabama (Ala. Code § 17-14-31); Alaska (Alaska Statute 15.30.040, -90); Arizona (Ariz.Rev.Stat. 16-212); California (Cal. Elections Code § 6906); Connecticut (Conn.Gen.Stat. § 9-176); Delaware (Del. Code Ann. Title 15 § 4303(b)); Florida (Section 103.021(1), Fla.Stat.); Hawai'i (Haw.Rev.Stat. § 14-28); Indiana (Ind. Code §§ 3-10-4-1.7, -8, -9); Maine (21-A Me.Rev.Stat. § 805(2)); Maryland (Md. Code Ann. § 8-505(c)); Massachusetts (Mass.Gen. Laws Ch. 53 § 8); Michigan (Mich.Comp.Laws Ann. § 168.47); Minnesota (Minn.Stat. §§ 208.43, 46); 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)); Montana (Mont. Code Ann. § 13-25-304, -307); North Carolina (N.C.Gen. Stat. § 163-212); Ohio (Ohio Rev. Code 3505.39, -40); Oklahoma (Okla.Stat. Title 26 § 10-102); Oregon (Ore.Rev.Stat. 248.355(2)); South Carolina (S.C. Code Ann. § 7-19-80); Tennessee (Tenn. Code Ann. § 2-15-104(c)(1)); Utah (Utah Code Ann. § 20A-13-304); Vermont (Vt.Stat.Ann. Title 17, § 2732); Virginia (Va. Code § 24.2-203 ¶ 2); Wisconsin (Wis. Stat. § 7.75(2); Wyoming (W.S. 22-19-108). See also District of Columbia (D.C. Code § 1-1001.08(g)).

[2] These *amici curiae* states do not bind electors: Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Missouri, New Hampshire,

Dakota and other states, custom and practice have dictated that electors honor the electorate's and prevailing party's will and cast their votes for the presidential ticket that won the statewide popular vote. Whether by statute or custom and practice, today forty-eight states and the District of Columbia allot their electoral votes to the winner of the statewide popular vote; Maine and Nebraska allot two electors to the winner of the statewide popular vote and one elector to the winner of the popular vote in each of the state's congressional districts.[3]

The intensifying polarization of the national electorate, and the record number of rogue electors in the 2016 election, have led to challenges to the historical practices of binding and non-binding states alike. The *Chiafalo* decision preserves state authority over electoral balloting but the *Baca* decision nullifies binding statutes in all states within its jurisdiction and shrouds the binding statutes and practices of other states in doubt. *Amici curiae* file this brief in the interest of preserving the constitutional authority of state legislatures to determine for themselves and their electorates the manner of selecting presidential

New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota and West Virginia.

[3] National Association of Secretaries of State, *Summary: State Laws Regarding Presidential Electors* (Nov. 2016), https://www.nass.org/node/131; National Conference of State Legislatures, The Electoral College (Jan. 2020), https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx; Me.Rev.Stat. 21-A § 805; Neb.Rev.Stat. § 32-714.

electors, conducting electoral balloting and allotting their electoral votes.

SUMMARY OF ARGUMENT

Whether to bind electors and, if so, by what means is the constitutional prerogative of states and their legislatures. With the "plenary power . . . in the matter of the appointment of electors" that this Court has long recognized comes the authority to take steps to ensure that electoral votes are cast in the manner mandated by each state's legislature. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *Ray v. Blair*, 343 U.S. 214, 227 (1952) (recognizing "state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose"). Given that state sovereignty is integral to our federal system, and states are central to the role and function of the electoral college under the Constitution, it seems axiomatic that if the framers had wanted to limit state influence over electoral balloting and allotting electoral votes they would have done so explicitly. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)(when "the Constitution is silent," states retain their traditional "legislative prerogative" to address the matter as they see fit).

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 conflict over how to interpret this textual silence. The scope of state autonomy in the matter of

appointing electors (particularly the authority to enact and enforce statutory or party pledges to honor the popular vote), conducting electoral balloting and allotting electoral votes is increasingly salient in the current political climate. Given the inherently undemocratic and chaotic nature of an unbridled electoral college, and the potential for disputed outcomes in future elections, the lower court's decision in *Baca* should be reversed and the Washington Supreme Court's decision in *Chiafalo* affirmed.

ARGUMENT

If it is constitutional to exact a pledge to support a party's nominee as a condition of serving as an elector, it stands to reason that there is some constitutional means of enforcing that pledge. *Ray,* 343 U.S. at 227 (1952); *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"). 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 or the constitutional function of the electoral college.[4] The *Baca* court arrived at its

[4] 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.

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.

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

The Constitution places no injunction upon the states regarding the manner in which they appoint their electors, conduct the meeting of electors or allot their electoral votes. Article II, Section 1's delegation to the states of the power to direct the manner in which they will perform these functions is, by its terms, sufficiently open-ended to allow conditioning service as an elector on a pledge to support the nominees of the

Some states provide for the removal and replacement of faithless electors, with the vote of the replacement elector counted and included in the tally sent to Congress. Colo.Rev.Stat. § 1-4-304; Nev.Rev.Stat. § 298.075; Utah Code Ann. § 20A-13-304. Some states impose penalties, such as fines or potential incarceration, on faithless electors. N.M.Stat.Ann. § 1-15-9; S.C. Code Ann. § 7-19-80. Other states require electors to vote for their party's presidential candidate, but do not explicitly specify how the requirement is enforced. Haw.Rev.Stat. § 14-28; Ohio Rev. Code 3505.40. This leaves open the possibility that faithless electoral votes from these states, cast in violation of state law, might nevertheless be included in the electoral vote tally sent to Congress, as was the case for two faithless electoral votes from Texas and one from Hawaii in the 2016 presidential election. 163 Cong.Rec. H188 (daily ed. Jan. 6, 2017); 163 Cong.Rec. H186 (daily ed. Jan. 6, 2017).

presidential ticket who won the state's popular vote.[5] 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."[6] 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.[7]

The absence of textual support for the Hamiltonian model of the electoral college may stem from the preference of certain influential constitutional convention delegates, like James Wilson, George Mason and Gouverneur Morris, "for an immediate choice [of the President and Vice President] by the people."[8] But even Mason considered direct voting "impracticable" in an age before organized national political parties and

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[5] 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").

[6] 2 Story On The Constitution, § 1463 (5th Ed. 1891).

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

[8] https://avalon.law.yale.edu/18th_century/debates_904.asp (Morris); https://avalon.law.yale.edu/18th_century/debates_601.asp (Wilson); https://avalon.law.yale.edu/18th_century/debates_824.asp (Carrol).

mass communication.[9] Wilson (a future Justice of this Court) bowed to this perception and made a proposal for "election [of the President and Vice President] to be made by Electors."[10]

This created some common ground with opponents of direct election like Hamilton, whose "British Plan" proposed "the election [of the chief executive] . . . by Electors *chosen by the people* in the Election Districts."[11] But, consistent with Hamilton's preference for a strong central government, his "British Plan" contained certain proposals considered monarchical by some convention delegates, such as a chief executive who wielded an absolute veto and served for life.[12] As a result, convention delegates favored Wilson's plan.

Though Wilson's and Hamilton's plans both employed electors in lieu of direct election, Hamilton's plan (animated by his concern that "inclin[ing] too much to democracy" would lead to popular "tumult and dissent")[13] provided no role for the general electorate

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[9] https://avalon.law.yale.edu/18th_century/debates_601.asp (Mason).

[10] https://avalon.law.yale.edu/18th_century/debates_602.asp (Wilson, Hamilton).

[11] https://avalon.law.yale.edu/18th_century/debates_618.asp (Hamilton).

[12] https://avalon.law.yale.edu/18th_century/debates_618.asp (Hamilton); https://founders.archives.gov/documents/Hamilton/01-04-02-0098-0004.

[13] https://founders.archives.gov/documents/Hamilton/01-04-02-0108; https://founders.archives.gov/documents/Hamilton/01-04-02-0098-0004; https://harvardpolitics.com/united-states/the-illusion-of-mob-rule/; Hamilton (Publius), Federalist 68, published

except to vote for *who* would serve as an elector. By contrast, Wilson's plan reflects his greater faith in the electorate by providing that electors would be appointed to their task by "any mode [a state's] legislature saw fit to adopt." *McPherson,* 146 U.S. at 29. The broader powers afforded to electorates, acting through their legislatures, under Wilson's plan are inclusive of more than one mode of appointment and implementation. Thus, the record of the constitutional convention reflects no consensus on the independence of electors, only a consensus that the manner of appointing electors and conducting electoral balloting would belong to the states and their electorates.

The present-day argument for strict electoral independence derives not from Wilson's convention commentary or the adopted constitutional text but Federalist 68, in which Hamilton promotes this concept of the electoral college. "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 as conceived by his "British Plan." *McPherson,* 146 U.S. at 36. But not all framers were of a like mind. *McPherson,* 146 U.S. at 28 (describing the varied proposals floated at the convention for the appointment of electors). Some were less inclined to see "free people resign their

March 12, 1788; Hamilton or Madison (Publius), Federalist 63, published March 1, 1788; Madison (Publius), Federalist 10, published November 22, 1787; Madison (Publius), Federalist 55, published February 13, 1788; Hamilton (Publius) Federalist 35, published January 5, 1788.

right of suffrage into other hands besides their own"[14] based on a fear of mob rule,[15] or concede that "the sacred rights of mankind should thus dwindle down to Electors of electors."[16] Though the interposition of an electoral college between the people and their President had carried the day (partly to induce southern states into the union), a textual requirement of strict independence did not. Rather, in accordance with Wilson's plan and the adopted language of Article II, Section 1, it was the province of "the legislative body of each state . . . to point out to their constituents some mode of choice" of electors.[17] It would appear Hamilton published Federalist 68 as a means of persuading states to implement the electoral college according to his "British Plan."

Article III of the Constitution demonstrates that the framers knew how to create independent institutions. If it had been the determined and universal intent of all the framers (or even a majority of them) that the people should wholly "resign their right of suffrage" to independent intermediaries, Article II, Section 1 (like Article III) would contain concrete measures to assure elector independence. Instead,

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[14] Republicus, Anti-Federalist 72, published March 1, 1788. Notable Anti-Federalists were Patrick Henry, Thomas Paine, George Mason, George Clinton and Luther Martin. https://www.usconstitution.net/consttop_faf.html.

[15] https://harvardpolitics.com/united-states/the-illusion-of-mob-rule/.

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

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

even proponents of the Hamiltonian model admit that strict elector independence is no more than "implicit" in the adopted text. *Ray,* 343 U.S. at 232 (Jackson, J., dissenting).

By omitting concrete measures for elector independence, Hamilton's "original expectation *may* be said to have been frustrated," "completely frustrated" even.[18] *McPherson,* 146 U.S. at 36 ("may" italicized to illustrate that 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). But, as the historical record reflects, the convention did not reflexively adopt Hamilton's views on every matter. *McPherson,* 146 U.S. at 28 (convention rejected Hamilton's suggestion of "electors chosen by electors chosen by the people"). Hamilton would have pressed for language that implemented his electoral college design, and other features of his "British Plan," if he had believed his fellow delegates would have accepted it. But Hamilton and other Federalist delegates had to make compromises with other delegates. Article II, Section 1 is that compromise; as adopted, it "reconciled [a] contrariety of views" by dispensing with direct election but granting states "the broadest power of determination" to select the Hamiltonian model or some other of their own choosing. *McPherson,* 146 U.S. at 28.

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[18] 3 Story, Commentaries On The Constitution Of The United States § 1457 (1833).

The frustration of Hamilton's unrealistic idyll of independent, impartial electors[19] is "no reason for holding that the power confided to the states by the Constitution has ceased to exist." *McPherson,* 146 U.S. at 36. Wilson, ever guided by the principle that all governmental power derived from the people,[20] appears to have anticipated that the role of the electoral college would evolve and change as the nation matured. Wilson predicted that "Continental Characters will multiply as we more & more coalesce, so as to enable the electors in every part of the Union to know & judge them."[21]

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[19] In theory, the Senate, with its longer terms of office, was constituted as an institution that placed "attachment to the public good" over ideological faction. Hamilton or Madison (Publius), Federalist 63, published March 1, 1788; https://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (six year terms created to "make senators largely independent of public opinion"). In practice, few would argue that the Senate is as immune to public opinion as originally intended. Nor was it quite realistic to expect the electoral college to function in practice as intended in theory – as an informed and discerning independent body concerned only with the commonweal and selecting the national executive solely on qualification and character. States understood the discrepancy between theory and practice early and determined to structure electoral college balloting in a way that would not allow intermediaries to simply substitute their interests and ideological perspectives for those of the electorate's.

[20] https://www.usconstitution.net/consttop_ccon.html.

[21] https://avalon.law.yale.edu/18th_century/debates_904.asp (Wilson). Throughout the notes of the convention, "Electors" in the sense of members of the electoral college are generally referred to with a capital "E" while "electors" in the sense of voters at large are generally referred to with a lower case "e."

The swift formation of political parties, and their effective promotion of candidates of national stature by means of "a circulation of newspapers through the entire body of the people,"[22] gave rise, by the time of the first contested election, to an electorate that was itself sufficiently informed and discerning as to have no use for a Hamiltonian-style electoral college. The Twelfth Amendment's ratification in 1804 encouraged the formation of political parties through which the general electorate could influence everything from the selection of candidates to appointment of electors pledged to the party. This singular constitutional "recognition of the *de facto* importance of political parties"[23] "connect[ed] the [presidency] to popular majorities in a way it had not been before."[24]

The presumed impracticalities of the "immediate choice" of President and Vice President thus overcome, state legislatures opted for direct election to the extent permitted by Article II, Section 1 by exacting "pledges from the electoral candidates to obey" the state's popular vote.[25] Though these early elections

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[22] Rutland, *James Madison The Founding Father* at 108-109 (1987)(describing Madison's essays in the National Gazette supportive of the Democratic-Republican party's opposition to Federalist policies and candidates).

[23] Levinson, *Article V After 230 Years: Time for a Tune-Up,* 67 Drake L.Rev. 913, 931 (2019).

[24] Hawley, *The Transformative Twelfth Amendment,* 55 Wm. & Mary L.Rev. 1501, 1507 (2014).

[25] https://avalon.law.yale.edu/18th_century/debates_601.asp (Wilson, Mason);

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

were predominantly populated by candidates culled from the nation's founders, "[n]o question was raised [by them or the parties they represented] as to the power of the state to appoint" electors in this manner if "its legislature saw fit." *McPherson,* 146 U.S. at 29, 36 (where "ambiguity or doubt" surround constitutional provisions, "contemporaneous and subsequent practical construction[s] are entitled to the greatest weight").

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

Most states have exercised their plenary powers under Article II, Section 1 to field electors who act as agents of the states, bound by state law to the electorate's will in its selection of President and Vice President. [26] Inherent in the power to appoint agents is the power to limit their authority and replace them if they act outside the scope of that authority.[27] This system

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

[27] 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

"has prevailed too long and been too uniform to justify . . . interpreting the language of the Constitution as conveying any other meaning." *McPherson,* 146 U.S. at 27, 36

As noted by the *Baca* court, Article II, Section 1 is silent in regard to a state's authority to remove and replace rogue, ineligible or absentee electors.[28] The *Baca* court's approach to interpreting or resolving this silence differs from *Ray's* in significant ways that warrant reversal. Though the Constitution is to be interpreted according to its text, the *Baca* court relied inordinately on extra-textual sources – such as Federalist 68 and period dictionaries – to import meaning that is not present.[29] Federalist 68 and the adopted language of Article II, Section 1 are not in agreement, and period definitions of "elector," "vote" and "ballot"

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terminated by: . . . (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).

[28] *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).

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

are by no means incompatible with a system of pledged electors.

Period dictionaries identify both broad and narrow accepted usages of the terms "elector," "vote" and "ballot." While the *Baca* 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."[30] 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").

Ray did not infill textual voids with partisan Federalist doctrine or the broadest 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. *Ray,* 343 U.S. at 224 ("Neither the language of Art. II, [§] 1, nor that of the

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[30] *Baca,* Petitioner's Appendix at 102.

Twelfth Amendment forbids a party to require from candidates in its primary a pledge of conformity"). The *Baca* court took the opposite approach, forbidding Colorado from binding electors to their oath because of the absence of constitutional language expressly *permitting* it.[31] The *Chiafalo* court did not make this mistake; like *Ray, Chiafalo* ruled that elector pledges could be imposed and enforced because the Constitution did not *prohibit* them.[32] The *Ray* and *Chiafalo* courts' analysis appropriately mirrors the Tenth Amendment's reservation of all powers to the states not prohibited by Article II, Section 1. Article II, Section 1 could scarcely function any other way.

Case in point, Article II, Section 1's only express limitation on the eligibility of persons to serve as electors is a prohibition against certain federal officers. Were state authority over who may serve as an elector limited to what Article II, Section 1 expressly permits, then states could not impose further, sensible eligibility criteria such as residency, age, competency, party affiliation or a clean criminal history. Yet, such

[31] *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").

[32] *In the Matter of Guerra,* 193 Wash.2d 380, 399 (Wash. 2019).

eligibility criteria are commonplace.[33] Once one accepts the incontestable proposition that eligibility criteria beyond those provided in Article II, Section 1 are imperative to empaneling capable electors, then it follows that state authority over the appointment of electors, conducting electoral balloting and allotting electoral votes is greater than what Article II, Section 1 expressly permits.

The *Baca* court rationalized its restrictive view of state authority under Article II, Section 1 on the ground that Clause 3 describes the mechanics of voting

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[33] Wash.Const.Art. VI, §§ 1, 3, 4 (setting minimum age of 18 and residency, clear criminal history and competency requirements for service as an elector); Ala. Code §§ 17-14-30 – 17-14-37 (electors must be qualified to vote in Alabama); Haw.Rev.Stat. § 14-23 (electors must be registered voters of the state); Nev. Const.Art. 2, § 1 (electors must be competent, reside in state, be at least 18 and have no felony convictions); Tenn. Code Ann. § 2-15-102 (two at-large electors must be residents of the state and remainder must be residents of the congressional district they represent); Mich.Comp.Laws Ann. § 168.41 (electors must have been U.S. Citizen for 10 years and two at-large electors must be residents of the state and remainder must be residents of the congressional district they represent); D.C. Code § 1-1001.08(g)(1), (2)(elector must be resident of the District for a period of 3 years immediately preceding the date of the presidential election and a registered voter); Mass.Gen. Laws Ch. 53 § 9 (electors must be resident of state, 18 years of age); 21-A Me.Rev.Stat. § 352 (electors must be a resident of and registered voter in the electoral division he/she seeks to represent); Minn.Stat. § 208.42/ Minn.Const.Art. VII, § 6 (electors must be 21, resident of state, eligible to vote, U.S. citizen, competent, no conviction for treason); Section 97.041, Fla.Stat. (party electors must satisfy citizenship, residency, age and other requirements of a registered voter); Alaska Statute 15.30.030 (elector must meet citizenship, residency, age and other qualifications of a registered voter).

in more detail than Clause 2 describes a state's electoral appointment powers. "From the moment the electors are appointed," the *Baca* court reasoned, "the election process proceeds according to detailed instructions set forth in the Constitution itself."[34] According to *Baca*, Clause 3 is "inconsistent with [removal] power"[35] because it allegedly "provides no express role for the states after appointment of its presidential electors . . . and the Constitution affords them no other role"[36] beyond their Clause 2 appointment power.

Clause 3 itself exposes the flaws in these premises. Clause 3's two-sentence description of the mechanics of *state* voting is hardly "detailed."[37] And since those two sentences of Clause 3 are just as silent as Clause 2[38] in regard to a state's authority to enforce conditions

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

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

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

[37] Article II, Section 1, Clause 3 reads in pertinent part: "The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate."

[38] Article II, Section 1, Clause 2 reads: "Each 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

of appointment once voting is underway, there is no reason to analyze Clause 3's textual silence any differently than the *Ray* Court analyzed Clause 2's, which is to say no reason to deviate from the principle that when "the Constitution is silent," it is the "legislative prerogative" of the states to address matters as they see fit. *Levin,* 560 U.S. 413 at 427.

Moreover, contrary to *Baca's* central premise, the states' role does not end with its Clause 2 appointment of presidential electors. Per Clause 3, the states conduct and preside over the meeting of electors, certify the ballots and transmit the results 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." *Fitzgerald v. Green,* 134 U.S. 377, 379 (1890). All functions of the electoral college are performed in the states by the states. Indeed, prior to the transmittal of the balloting to Congress, the only federal role in the meeting of electors is to set the day of the meeting.[39] "[O]therwise, the power and jurisdiction of the state" over electoral balloting "is exclusive." *McPherson,* 146 U.S. at 35.

Though electors perform a "federal function" at this meeting, they are *state* agents who derive their authority from the "appointing power," subject, like any agent, to basic agency principles. *Fitzgerald,* 134 U.S. at 379 (electors are *state* officers); *McPherson,* 146 U.S.

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[39] *Burroughs v. United States,* 290 U.S. 534, 544 (1934)(only federal function in connection with electoral balloting is to set "the time of choosing electors, and the day on which they shall give their votes").

at 27 ("[t]he state . . . acts . . . through its" electors). Per basic agency principles, a Colorado elector who casts a faithless ballot has cast no ballot at all because he is not authorized to make a selection.[40] Indeed, Micheal Baca ceased to be an elector the moment he formed the intent to act outside the scope of his authority; the state did not "remove" Baca so much as he abdicated his agency by unilaterally resolving to act outside the scope of his authority.[41]

Under such circumstances, all that remains is for the state simply to replace a wayward elector, just as it

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[40] The *Baca* court also reasoned that states were impotent to enforce elector pledges because the Twelfth Amendment "did nothing to prevent future faithless voting." *Baca,* Petitioner's Appendix at 111. But this reasoning cuts both ways; the Twelfth 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.

[41] Restatement 3rd of Agency § 306(4)(agency terminates once "agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf"); 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 (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)(presidential elector who "attempts to present a ballot in violation of his or her pledge vacates the office").

would (*must*, to prevent dilution of its electoral votes and influence) if an elector committed a felony, died, failed to appear, moved out of state, was appointed to a disqualifying federal office [United States Senate or House of Representatives, cabinet, or the federal judiciary] or otherwise became ineligible to serve in the interregnum between appointment and voting. Replacing a faithless agent in the course of a proceeding conducted and presided over by the appointing principal hardly seems incompatible with the active role in electoral balloting that Clause 3 assigns to the states.

"[T]he word 'appoint' . . . was manifestly used as conveying the broadest power of determination," including the plenary power to take steps to ensure electoral votes are cast in accordance with the state legislature's mandate. *McPherson,* 146 U.S. at 27. Electors receive their appointments subject to legislative limitations on their authority (just as judges receive their appointments subject to legislative limitations on their jurisdiction and authority to act in many areas). If the power to replace an agent when circumstances dictate is not inherent in the power to appoint, a state and its voters 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 vote and influence by 33% per lost elector. One faithless elector diminishes not only their *state's* relative influence in

the electoral college and nationally, but also nullifies the votes of a population of voters roughly equivalent to an entire congressional district. And 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.[42]

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. *Ray,* 343 U.S. at 225. "[S]ecuring party candidates in the general election, pledged to the philosophy and leadership of that party . . . is an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." *Ray,* 343 U.S. at 227. But the *Baca* court has now

[42] 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. Historically, Congress has counted all electoral votes transmitted to it by the states, including those of both bound and faithless electors. But faithless electors are uniquely problematic because, unlike bound electors, they can deviate from both the state's popular vote *and* the national popular vote (as all seven faithless electors in 2016 did). A presidency made possible by a faithless elector could generate lasting and damaging controversy, as would, no doubt, a presidency made possible by a bribed elector whom a state was powerless to replace.

divested states within its jurisdiction of authority to replace electors who are unfaithful to the philosophy and leadership of the party they were appointed to serve 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,[43] 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 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.[44] *McPherson,* 146 U.S. at 27.

The *Baca* court's reasoning and decision cannot be reconciled with the sovereign authority of the states to act in areas reserved to them by the Constitution, the plain language of Article II, Section 1 or this Court's precedents. Doubtless some delegates expected electors to exercise independent judgment, but it is equally doubtless that, while the delegates agreed on the formation of an electoral college, they did not agree on a mechanism for appointing electors, conducting the

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

[44] Restatement 3rd of Agency § 306(4), (5), (6), § 309, Note 19 *supra.*

balloting or allotting electoral votes. Article II, Section 1 "leaves it to the [state] legislature[s] exclusively to define the method of effecting" these objectives. *McPherson,* 146 U.S. at 27. The determination of a large majority of states to formally bind their electors to the popular vote is by no means incompatible with a system born of a desire "for [the] immediate choice [of the President and Vice President to be] by the people"[45] or Article II, Section 1's adopted language. With a presidential election months away, affirming the traditional practices of Colorado, Washington and other binding states is essential to the proper functioning of the electoral college, the prevention of the disenfranchisement of voters by wayward electors, and the avoidance of divisive disputes over the outcome of the election.

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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.[46]

Instead of resolving this "contrariety of views" in favor of one faction or the other, the founders left it to state legislatures to adopt the Hamiltonian model or another of their own choosing. *McPherson,* 146 U.S. at 27. "[F]rom the formation of the government until now

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[45] https://avalon.law.yale.edu/18th_century/debates_904.asp (Morris).

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

the practical construction of [Article II, Section 1] has conceded plenary power to the state legislatures in the matter of the appointment of electors," including the power to remove and replace them as circumstances dictate. *McPherson,* 146 U.S. at 35. 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 [some of] those by whom it was created." *McPherson,* 146 U.S. at 35, 36.

The nation's experience with binding electors to national party candidates has, ironically, proven to both optimize Wilson's preference for direct election of the President and Vice President and serve as Hamilton's firewall against mob rule, provincialism, extreme faction and cabal. In the interest of orderly democratic elections, the *amici curiae* states urge this Court to preserve state autonomy over electoral college balloting and state authority to bind electors to "the vote of the state" should the electorate, acting through their legislatures, so mandate. *Fitzgerald,* 134 U.S. at 379.

CONCLUSION

This Court should reverse the Tenth Circuit's *Baca* decision and affirm the decision of the Washington Supreme Court in *Chiafalo*.

Respectfully submitted this 8th day of April 2020.

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