Nos. 19-465, 19-518

IN THE
Supreme Court of the United States

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

v.

STATE OF WASHINGTON,
Respondent.

COLORADO DEPARTMENT OF STATE,
Petitioner,

v.

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

On Writs of Certiorari to the
Supreme Court of Washington and the
U.S. Court of Appeals for the Tenth Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF WASHINGTON AND COLORADO

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INTRODUCTION

The fundamental structural design of our federal Republic, incorporated into the Constitution, confirms that each State has authority to bind the electors it appoints to the results of the popular election in that State. The Washington Supreme Court properly adhered to this structural principle. The Tenth Circuit did not. The court erroneously treated Colorado as if it were a subordinate department of the Federal Government rather than a dual sovereign. In so doing, the Tenth Circuit transgressed the inherent authority of each State to express its people's will in presidential elections. This Court should affirm the Washington Supreme Court, reverse the Tenth Circuit, and affirm the integrity of the federal design.

INTEREST OF *AMICUS CURIAE*[1]

The Republican National Committee ("RNC") is the national committee that leads the Republican Party of the United States. The RNC nominates candidates for President and Vice President and seeks to advance their election through fair and lawful election procedures. The RNC, together with its affiliated State committees, likewise plays a critical role in selecting the individuals nominated to serve as presidential electors.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the RNC or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs.

The Constitution requires the States to appoint presidential electors to the Electoral College but does not specify how electors are to be chosen. The States experimented with different methods during the first several presidential elections but quickly converged on using popular elections to select electors who are nominated by the political parties. Popular elections have been the exclusive means of appointing electors in every State for nearly two centuries.

In most States, the names of the presidential electors are not printed on the ballot. When a voter casts his or her vote for the presidential ticket, the State counts that vote as if it were cast for that political party's nominees for the Electoral College. *See* Nat'l Conf. State Legs., *The Electoral College* (Jan. 6, 2020), https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx. The political parties, not surprisingly, typically nominate individuals who are known for their loyalty and service to the party, and who thus can be expected to vote for the party ticket and effectuate the results of the State's popular election. *See id.*

Most of the time, the system works as intended. Occasionally, however, an elector may defect from the results of the popular election in a particular state. Although such a defection has never changed the outcome of a presidential election, thirty-two States and the District of Columbia have enacted laws which *require* electors to vote for the candidates of their political party. *See* Electors' Br., App. A. The remaining States rely on party loyalty and civic duty to enforce the popular will.

The Electors urge a radical departure from these well-established norms. They ask this Court to grant them an unfettered right to vote for whomever they please for President and Vice President, no matter the conditions of appointment imposed by their States. That result, though cloaked in faux originalism, is intended to sow chaos in the Electoral College. *See, e.g.*, Richard Hasen, *The Coming Reckoning Over the Electoral College*, Slate (Sept. 4, 2019), https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html (observing that Electors' counsel "hopes to blow up the current Electoral College system"). But there is no need for this Court to embrace the Electors' brand of constitutional anarchism and undermine a critical institution in our constitutional framework.

Pursuant to the fundamental structural design of our Republic, incorporated into the Constitution, each State has authority to bind the electors it appoints to the results of the popular election in that State. By enforcing the integrity of that design, this Court will protect the values undergirding the Electoral College, guarantee public confidence in our electoral system, and vindicate the liberty enhancing virtues of federalism and the separation of powers.

SUMMARY OF ARGUMENT

Washington and Colorado argue that the Constitution affirmatively grants them authority to require the electors they appoint to follow the popular will of their citizens in presidential elections, and that there is no constitutional provision that prohibits them from doing so. Indeed, it is exactly because

there is no prohibition that the States need not point to any affirmative grant of authority. The implicit ordering of relationships within the federal system, incorporated into the Constitution, establishes a default rule that the States may act unless the Constitution affirmatively limits their power.

The default rule should control these cases. This Court has long confirmed that the presumption of state authority applies to the regulation of presidential electors because, as the States establish, there is nothing in the Constitution that removes that inherent authority. Thus, whether or not the power to bind electors is affirmatively granted by Article II, Washington and Colorado were entitled to enforce their electors' pledges.

The courts below split on this fundamental issue. The Washington Supreme Court properly adhered to the constitutional structure. It analyzed the Constitution and, finding no withdrawal of state authority to regulate elector discretion, concluded that Washington could bind its electors. The Tenth Circuit, by contrast, held that Colorado could not remove an elector for violating state law when, in the court's view, the Constitution did not confer removal authority expressly.

Any doubt about the correct application of the fundamental structural principles underlying our Constitution is resolved by two-hundred years of unbroken constitutional practice. In the earliest presidential elections, the States experimented with different methods for appointing electors. By the early nineteenth century, however, every State was

appointing its electors from competing political party slates selected based on the results of that State's popular vote—a practice continued through today. Moreover, contrary to the Electors' view of themselves as an unaccountable super-elite with unfettered discretion to pick the President and Vice President, the historical record shows that, in fact, the electors have always been obligated to register the political will of those that appointed them. This result maintains the integrity of the Electoral College, thus reinforcing the liberty enhancing values of federalism and the separation of powers.

ARGUMENT

I. A State May Require Its Electors To Honor The Results Of Its Popular Election Under Our Federal Constitutional Structure.

A. The States Can Exercise All Powers That The Constitution Does Not Withhold From Them.

The States need not point to any affirmative grant of authority in the Constitution in order to require an individual they appoint to the Electoral College to honor his pledge to support a predesignated candidate. The "implicit ordering of relationships within the federal system," *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019), assumes that the States may act unless the Constitution itself affirmatively "limits state sovereignty," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018).

This structural constitutional principle is as old as our Republic. When the original States declared

independence, they became "fully sovereign nations," *Franchise Tax Bd.*, 139 S. Ct. at 1493, with "authority 'to do all ... Acts and Things which Independent States may of right do,'" *Murphy,* 138 S. Ct. at 1475 (quoting Declaration of Independence ¶ 32). "The Constitution limited but did not abolish the sovereign powers of the States[.]" *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) (citation omitted). Thus, in our system of "dual sovereignty," "both the Federal Government and the States wield sovereign powers." *Id.* (citation omitted).

This constitutional arrangement establishes different default rules for the Federal Government and the States. The Constitution confers on the Federal Government "only certain enumerated powers." *Murphy*, 138 S. Ct. at 1476. As a result, the Federal Government has no power to act unless the Constitution affirmatively authorizes it to do so. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power … must stem either from an act of Congress or from the Constitution itself.").

The States are subject to the opposite default rule. The States enjoy broad police powers that predate the Constitution. *See Gamble*, 139 S. Ct. at 1968–69. Because the Constitution "did not abolish" those powers, *Murphy*, 138 S. Ct. at 1476, it is the "right of the States" to enact any and all regulations that do "not interfere with the execution of the powers of the general government, or violate rights secured by the

Constitution of the United States," *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2463–64 (2019) (citation omitted). *See also* U.S. Const. amend. X.

This Court's precedents have consistently applied these default rules to the state regulation of electors. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court examined Michigan's authority to appoint electors by district. The Court found that Article II authorized Congress to determine "the time of choosing the electors and the day on which they are to give their votes" and withdrew from the States the authority to prescribe "the number of electors" and to appoint "certain persons." *Id.* at 35. Because the Constitution was silent about a State's power to divide the appointment of its electors by district, the Michigan arrangement was within "the power and jurisdiction of the state." *Id.*

This Court employed the same analysis in *Ray v. Blair*, 343 U.S. 214 (1952). There, the Court upheld the Alabama Democratic Party's refusal to certify a primary elector who would not "pledge to aid and support 'the nominees of the National Convention of the Democratic Party.'" *See id.* at 215. The Court began its analysis by determining that the pledge did not implicate any enumerated "power of Congress." *Id.* at 227. Next, the Court observed that the pledge was "not bar[red]" by the Twelfth Amendment. *Id.* at 231. Because the Constitution was silent, the State had power to act and the Court therefore held that there could be "no federal constitutional objection" to Alabama's pledge. *Id.*

More recently, this Court relied on the default rules when it resolved a dispute concerning the election of President George W. Bush. In that case, the issue was the inconsistent methodology Florida employed to count the popular vote. The Court recognized that the Florida Legislature had power to withdraw the state franchise "at any time." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). But, for as long as the right of franchise was in place, the State was constrained by the Equal Protection Clause "to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. That obligation thus served as an affirmative, external limit on Florida's otherwise plenary authority.

To summarize, the constitutional structure confirms the power of the States to exercise all powers that the Constitution itself does not withhold from them. *Accord* Colorado Br. 43–45. And this Court has consistently applied that principle when considering the constitutionality of particular state regulations of presidential electors.

B. The Constitution Does Not Withhold State Power To Bind Electors To Popular Election Results.

Because the constitutional structure incorporates as a default rule the principle that the States may exercise all powers that the Constitution does not withhold from them, the relevant question here is whether the Constitution withdraws a State's power to enforce an elector's pledge to support a predesignated candidate based on the results of that State's popular election. It does not.

To begin, Article II expressly affirms the power of the States. It provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" equal to that State's representation in Congress. U.S. Const. art. II, § 1, cl. 2. This Court has described that power as "plenary," *Bush*, 531 U.S. at 104, and so "framed that congressional and federal influence might be excluded" from the State's choice, *McPherson*, 146 U.S. at 35. Washington and Colorado explain how the power to appoint includes the power to control, *see* Washington Br. 21–25; Colorado Br. 18–29, 43–45, and the Constitution nowhere removes or restricts that power. Moreover, there is nothing in Article II that suggests any prohibition on a State's power to enforce an electors' "implied or oral pledge of his ballot." *Ray*, 343 U.S. at 229.

The Twelfth Amendment further confirms the breadth of state authority. Among other things, the Amendment provides that "[t]he Electors shall meet in their respective states." U.S. Const. amend. XII. That instruction might have been intended in part to protect electors from "heats and ferments, that might be communicated from them to the people." The Federalist No. 68, at 352 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). But it also empowers States "where … the mode of appointment prescribed by the law of the state is election by the people" to "regulate the conduct of such election," to "punish any fraud in voting for electors," and to ensure that the State's electors accurately "cast, certify, and transmit *the vote of the state*." *See In re Green*, 134 U.S. 377, 379–80 (1890) (emphasis added).

The Electors attempt to wring a contrary result from Article II and the Twelfth Amendment by "construe[ing] words 'in a vacuum.'" *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality). They squeeze the terms "vote," "Elector," and "ballot" in hopes of producing "choice." *But see* Washington Br. 34–38 (explaining original public meaning of these terms). Article II, however, ascribes a power of "chusing" only to the state legislatures. U.S. Const. art. II, § 1, cl. 4. And the Twelfth Amendment provides that, in the event of a tie, "the House of Representatives shall choose … the President" and "the Senate shall choose the Vice-President." U.S. Const. amend. XII. Conspicuously absent is any ascription of "choice" to the electors. *Cf. M'Culloch v. Maryland*, 17 U.S. 316, 387–88 (1819) (contrasting constitutional clauses and finding omitted term dispositive). Thus, while it may be constitutional for a State to determine that its electors should exercise discretion in casting their ballots, the careful wording of Article II and the Twelfth Amendment plainly do not require the State to do so.

Any doubt about the preservation of state authority to bind electors is removed by the Twenty-Fourth Amendment. The Amendment prohibits poll taxes in elections "for *electors* for President or Vice President" and, significantly, in elections "for *President* or *Vice President*." U.S. Const. amend. XXIV, § 1 (emphasis added). The latter wording reflects the fact that, by the time of the Amendment's 1962 proposal and 1964 ratification, nearly half the States already did "not print the names of the candidates for electors on the general election ballot." *Ray*, 343 U.S. at 229. In these States, "a vote for the

presidential candidate" was "counted as a vote for his party's nominees for the electoral college." *Id.* Moreover, as the Electors concede, by 1960 a significant number of the States had already enacted laws which *required* electors to "vote for the candidates of their political party," Electors' Br., App. A, thus allowing these States to guarantee what is in fact an election "for President or Vice President," U.S. Const. amend. XXIV, § 1.[2]

In short, nothing in Article II or the Twelfth Amendment withdraws a State's power to enforce an elector's pledge to support a predesignated candidate. And the Twenty-Fourth Amendment removes any doubt by ratifying the popular election of presidential candidates and the practice of appointing electors bound to those candidates.

C. Washington's And Colorado's Enforcement Of Their Popular Election Results Was Constitutional.

Nothing in the Constitution prohibits a State from requiring its electors to express the popular will of its people, so the default rule of state authority applies in these cases, and Washington and Colorado were entitled to enforce their electors' pledges.

The courts below divided over this fundamental structural principle. The Washington Supreme Court analyzed the Constitution and, finding that "[t]he

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[2] Perhaps not surprisingly, the number of States binding their electors' discretion more than tripled following the ratification of the Twenty-Fourth Amendment. *See* Electors' Br., App. A.

Constitution does not limit a state's authority in adding requirements to presidential electors," correctly concluded that Washington could bind its electors. Chiafalo Pet. App. 19a–20a. The Tenth Circuit, by contrast, treated Colorado as if it were a department of the Federal Government in need of an affirmative grant of authority to bind its appointees. Because, in the Tenth Circuit's view, the Constitution manifested an "absence of such a delegation," the court erroneously held that Colorado could not "remove" or "interfere" with its electors. Baca Pet. App. 99; *see id.* at 88–90.

The Tenth Circuit's error stems from its overreading of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and its resulting misapplication of the default rules. In *Thornton*, a majority of this Court held that Arkansas could not establish term limits for its representatives in Congress without an express "constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution." 514 U.S. at 805. Although that departure from the constitutional norm was debatable for reasons four Justices explained in dissent, *see id.* at 848 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia & O'Connor, JJ.), it does not control here.

To begin, the subject of *Thornton* was state authority to prescribe qualifications for those to be *elected* to Congress. Here, by contrast, the issue is not state authority to choose the qualifications of those to be *elected* as President and Vice President, but the qualifications of *those who will do the electing*. That distinction is important because the *Thornton*

majority, relying on Federalist No. 52, drew an explicit contrast between "the lack of state control over the qualifications of the *elected*" and what the majority agreed was the undisputed power of the States "over the qualifications of *electors*." 514 U.S. at 806 (emphasis added). Because that distinction was critical to the majority's reasoning, the Tenth Circuit was wrong to conclude that *Thornton* "applies to presidential *electors*." Baca Pet. App. 90 (emphasis added).

Indeed, the majority in *Thornton* found that the lack of a constitutional delegation foreclosed Arkansas's "power to set the qualifications for membership in *Congress*." 514 U.S. at 805 (emphasis added); *see also, e.g.*, *id.* at 783 (same), 837 (same). As the four dissenting Justices pointed out, the majority's limitation of its holding to congressional qualifications created a "divergence between Article I's provisions for the selection of Members of Congress and Article II's provisions for the selection of members of the electoral college." *See id.* at 895. But it also spared the majority the difficult task of overturning a century of unbroken precedent confirming the States' authority to regulate the qualifications of presidential electors. *See, e.g.*, *McPherson*, 146 U.S. at 35. The Tenth Circuit was thus bound by the limitation marked out by the majority in *Thornton*, and the decision to transgress that limitation was error.

Finally, the Tenth Circuit misjudged the constitutional import of the presidential electors' status as state officers. The Tenth Circuit believed that Colorado could not "reserve … the power to

remove … electors because no such power was held by the states before adoption of the federal Constitution." Baca Pet. App. 90. But the States have *always* had power to remove and replace state officers at will. *See In re Hennen*, 38 U.S. 230, 247 (1839). And a finding to the contrary would lead to the absurd result where a State could not declare a vacancy and replace an elector who becomes incapacitated after his appointment for some other reason, such as death or imprisonment for a crime. *See* Tyler Creighton, *The Constitutional Case for State Power to Eliminate Faithless Electors*, 100 B.U. L. Rev. 23, 31 (2020).

Shorn of its incorrect structural presumptions, the Tenth Circuit's analysis collapses. Because there is nothing in the Constitution that withdraws a State's power to enforce an elector's pledge to support a predesignated candidate based on the results of that State's popular election, Washington's and Colorado's enforcement actions were constitutional.

II. The Historical Practice Of The States Confirms That A State May Require Its Electors To Honor The Results Of Its Popular Election.

A. The Electoral College Was Never Comprised Of Constitutional Free Agents.

Any doubt about the correct application of the fundamental structural principles underlying our Constitution is removed by two-hundred years of constitutional practice. Although practice cannot create constitutional power, it may help to liquidate an otherwise opaque text. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (collecting cases).

The Electors present themselves as constitutional übermensch, together forming a 538-member Star Chamber with no accountability to the people or to the state legislatures. In their telling, no one dared interfere with their discretion until Oregon broke ranks in 1915. And they push this narrative for the express purpose of demonstrating the absurdity of the Electoral College in order to bring about its downfall. But the history reveals otherwise.

The first contested presidential election—which took place in 1796—proves the point. By this time, the "two great [political] parties were formed in every state." 4 John Marshall, *The Life of George Washington* 193 (1926). The candidates for presidential electors declared their support for particular candidates and were carefully vetted by partisans before the States appointed them to the Electoral College. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 903, 911 (2017). Of the 136 electors selected in this manner, only one—Samuel Miles of Pennsylvania—broke his pledge. *See Faithless Electors*, FairVote (rev. Mar. 19, 2020), https://www.fairvote.org/faithless_electors ("FairVote Data"). When Miles switched his vote from Adams to Jefferson, he became the first—and, as it turns out, only—presidential elector ever to change his vote from one major party's nominee to another major party's nominee. *See id.*[3]

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[3] Other examples of elector faithlessness have typically involved votes for the "wrong" candidate within the elector's own party,

The Electors try to spin the data from the 1796 election to claim that "fifty-nine electors voted anomalously." Electors' Br. 34–35. In fact, the supposedly "anomalous" voting the Electors identify was the result of strategic voting directed, albeit poorly, by the political parties. *See* Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 Fla. St. U. L. Rev. 925, 928 (2001); *see also* 1 Kenneth R. Bowling & Donald R. Kennon, *Establishing Congress: The Removal to Washington, D.C., and the Election of 1800* 29 (2005) (attributing the outcome of the 1796 election to a "failure to coordinate" by "still-forming parties"); Rosin Br. 10 ("Many of the anomalous votes [in 1796] were examples of partisan jockeying[.]"). And that political party direction was, in turn, attributable to the States. *See Ray*, 343 U.S. at 227 ("[T]he party exclusion was state action[.]"). Thus, contrary to the Electors' view, these supposedly "anomalous" votes support, rather than refute, the States' power to direct votes in the Electoral College.

The 1800 election likewise supports the States' authority to control their presidential electors through the party system. In that election, every elector voted as instructed by his party. The Federalists implemented a coordinated interstate voting scheme to try to ensure that they would win both the Presidency and the Vice Presidency. Because the Twelfth Amendment had not yet split the ballots for the President and the Vice President, the

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or for third-party and independent candidates. *See* FairVote Data.

political parties faced a dilemma. If all their electors cast *both* of their ballots for the parties' intended presidential and vice-presidential candidates, it would result in a tie, and the House of Representatives would choose the President from among the top five vote-getters.

Accordingly, the Federalists instituted a plan wherein the party instructed one "elector [to] vote[] for John Jay to avoid a potential tie vote between Adams and Pinckney." Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 Fordham L. Rev. 965, 975 (2016). The result was that Adams received sixty-five votes, and Pinckney sixty-four. *Id.* However, the Federalists did not win the election, and the Democratic-Republicans "did not properly anticipate the problem—Jefferson and Burr each received a total of seventy-three electoral votes, creating the first and only Electoral College tie in the nation's history." *Id.* It is therefore plain from the historical record that every elector cast his ballot as instructed by his party, and the result "testifies to partisan voting by the electors." Stephen J. Wayne, *Presidential Elections and American Democracy*, *in The Executive Branch* 103, 106–07 (Joel D. Aberbach and Mark A. Peterson, eds. 2005). Thus, the 1800 election likewise supports the authority of the States.

The Electors try to recast the party-directed voting that occurred in the 1800 election as dependent on "the ability of electors to exercise discretion." Electors' Br. 35. They are mistaken. The nearly successful Federalist plan would have been unworkable if individual electors had exercised

discretion. The fact that the plan almost succeeded demonstrates the effectiveness of state reliance on party control, not on individual discretion.

Nor are the Electors correct when they insist that the 1800 election "featured anomalous electors." Electors' Br. 36. The *only* elector that did not vote for one of his party's predesignated candidates in 1800 was, as explained above, following his party's express instructions which were calculated to ensure the election of that party's ticket. *All* other electors "cast both of their votes for their party's two candidates," Bowling, *supra* at 29, confirming that by 1800 any exercise of discretion was "effectively eliminated" by the States, *id.* at 30. *See also Ray*, 343 U.S. at 228 ("in the early elections … electors …. were expected to support the party nominees").

The Twelfth Amendment further solidified party control within the Electoral College. Following ratification of that Amendment, the States began formalizing their practice of requiring from each elector, as a condition of appointment, "an implied or oral pledge of his ballot." *Ray*, 343 U.S. at 229. The essentially ministerial role of electors was so pronounced that by the mid nineteenth century, commentators were commonly describing pledged electors as "messengers" and "instrumentalit[ies] for registering the people's vote." Whittington, *supra* at 933 (collecting sources). This understanding illustrates the real-world effectiveness of party pledges at ensuring each State's control over its electors. Indeed, when this Court subsequently affirmed the constitutionality of party pledges, it agreed that electors were "chosen simply to register

the will of the appointing power in respect of a particular candidate," *Ray*, 343 U.S. at 229 n.16 (quoting *McPherson*, 146 U.S. at 36), and that this "long-continued practical interpretation" by the States helped to show its constitutionality, *id.* at 229–30.

Against this backdrop, faithless electors are seen for what they are: a minor historical curiosity. The States, acting through the political parties, have been exceedingly effective in preventing faithless electors. According to FairVote, 23,507 electoral votes have been counted in 58 presidential elections, but only 90 votes for President and 75 for Vice President did not correspond to the elector's own party nominee. Even if all those votes are counted as "faithless"—in fact, many of them were not[4]—they would comprise a mere .007% of all electoral votes. Moreover, elector defection has never changed the outcome of an election. *See* FairVote Data. The occasional occurrence of elector faithlessness is therefore inconsequential.

The Electors rely on Alexander Hamilton for the proposition that the Framers expected presidential electors to exercise independent judgment. Electors' Br. 19, 32. Even if the Electors were correct that Hamilton's view was universally shared, *but see*

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[4] More than two-thirds of the 90 anomalous presidential votes occurred in 1872 because the Democratic Party candidate died after the November popular election but before the Electoral College met. FairVote Data. These plainly "*are not faithless electors*, because voting for their nominee was not meaningful[ly] an option." *Id.*

Colorado Br. 21–22 (explaining Hamilton's view was contrary to James Madison), that would only show that the States could empower their electors to exercise discretion, not that they were compelled to do so. In any event, as this Court has previously explained, the weight of historical evidence teaches that Hamilton's view was not widely shared by the founding generation. *See Ray*, 343 U.S. at 228–29 & 228 n.15.

The Electors also rely on supposed silence in the text and legislative history of the Twelfth Amendment to argue that the drafters of that Amendment wished to maintain elector freedom. Electors' Br. 36–37. The better explanation is that the drafters chose not to dwell on elector faithlessness given its rare occurrence and the inherent power of the States to address it when and if they deemed it a problem. And that explanation is supported by the Twenty-Fourth Amendment which, as explained in section I.B., *supra*, ratifies the States' practice of appointing legally bound electors.

The historical record also shows that individual States took action when they experienced a faithless elector. For example, in 1960, an elector appointed by Oklahoma cast his vote for Barry Goldwater instead of Richard Nixon. FairVote Data. The following year, Oklahoma passed a statute requiring electors to adhere to their pledge, enforceable with criminal sanctions. *See Laws Binding Electors*, Electors, https://presidentialelectorlaws.us/ (last visited April 7, 2020) ("Electors' Data"). That pattern—a faithless elector one year followed by a law prohibiting faithless electors the next year—is a recurring one.

Compare FairVote Data (North Carolina faithless elector in 1968; Washington faithless elector in 1976; Minnesota faithless elector in 2004) *with* Electors' Data (North Carolina faithless elector law in 1969; Washington faithless elector law in 1977; Minnesota faithless elector law in 2005). Finally, it is not significant that Congress has occasionally counted faithless elector votes, tolerated and submitted by the States, that had no practical impact. *See* Electors' Br. 46–47.[5]

The bottom line is that, contrary to the Electors' radical theory, the Electoral College has never been comprised of constitutional free agents able to select the President and Vice President at will. From 1796 until today, the States have appointed electors based on their partisan identity and with the expectation that the parties will constrain electors' discretion. And they have not hesitated to adopt more formalized measures when they deemed it necessary.

B. The States Have Converged On Binding Popular Elections To Populate The Electoral College.

The federal structure of our Republic famously enables the States to function "as laboratories for

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[5] Moreover, the Electors are mistaken when they assert that no faithless "votes have ever been rejected." Electors' Br. 46–47. Congress has deferred to States that have chosen not to transmit faithless votes. For example, "electors from Minnesota and Colorado were replaced following their deviant votes, so their votes were not reported in the final count." FairVote Data. Similarly, an elector from Maine who cast a deviant vote "was ruled out of order and switched his vote." *Id.*

devising solutions to difficult legal problems." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (citation omitted). The Electoral College, also a creature of federalism, is an important beneficiary of the dynamic experimentation that results from political pluralism.

From the earliest days of the Republic, the States have employed a variety of different approaches to selecting presidential electors. In the first presidential election, held in 1788, Pennsylvania opted "for the election of electors on a general ticket." *McPherson*, 146 U.S. at 29. Virginia, on the other hand, divided itself into 12 separate districts so that "an elector [was] elected in each district." *Id.* Five States—Connecticut, Delaware, Georgia, New Jersey, and South Carolina—forwent elections in favor of direct appointment by the legislature. *Id.* The remaining States employed a variety of more complicated methods, including combinations of popular voting and appointment by public officials. *See id.* at 29–30.

The elections that followed likewise saw States employ "various modes of choosing the electors." *McPherson*, 146 U.S. at 28. In the third presidential election, for example, Tennessee appointed "certain persons" from different counties that would then, in turn, "elect an elector" for their respective districts. *Id.* at 31. And in the fourth presidential election, Massachusetts shifted from a district-level popular majority vote to selection of electors by the legislature. *Id.* at 32.

By the early nineteenth century, every State in the Union was appointing its electors from competing political party slates selected based on the results of that State's popular vote. *See McPherson*, 146 U.S. at 36. And that is the method that prevails in all fifty States today. Nat'l Ass'n Sec'ys State, *State Laws Regarding Presidential Electors* (Nov. 2016), https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf.

Despite two centuries of experience with popular elections, not every State appoints their electors in the precise same manner. For example, although most States employ a "winner-take all" system where the statewide winner receives all of the State's electoral college votes, Nat'l Archives & Recs. Admin., *Distribution of Electoral Votes* (Mar. 6, 2020), https://www.archives.gov/electoral-college/allocation, Maine and Nebraska appoint two of their electors based on the statewide popular vote and the rest based on the "popular vote for each Congressional district," *id.*

In addition, the process for nominating the political party elector slates varies by State. Texas, for example, requires that each elector be "a qualified voter" and "affiliated with the party" that nominates that elector. Tex. Elec. Code § 192.002. Oregon, by contrast, requires each elector to "sign a pledge" to vote for his party's candidate but does not require party affiliation or qualified voter status. *See* Or. Rev. Stat. Ann. § 248.355. Some States print the names of electors on their ballots. *See, e.g.*, S.D. Codified Laws § 12-16-6. Most do not. *See* Nat'l Conf. State Legs., *The Electoral College* (Jan. 6, 2020),

https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx.

And the States continue to innovate. Following the 2016 election cycle, Arizona and Indiana enacted statutes providing for the removal of electors that fail to vote for their parties' nominees. *See* Electors' Data (citing Az. Stat § 16-212; Ind. Code §§ 3-10-4-1.7, 3-10-4-9). Similarly, between 2011 and 2019, six other States enacted the Uniform Faithful Presidential Electors Act, a model act which provides that any elector who submits a vote in violation of a state-administered pledge of faithfulness effectively resigns from office. *See* Uniform Law Comm'n, *Faithful Presidential Electors Act* (2020), https://www.uniformlaws.org/. And in 2004, Colorado considered, but did not adopt, a ballot initiative that would have allocated its electors proportionally. *See* Kirk Johnson, *Coloradans to Consider Splitting Electoral College Votes*, The New York Times (Sept. 19, 2004), https://www.nytimes.com/2004/09/19/politics/campaign/coloradans-to-consider-splitting-electoral-college-votes.html.

There is a common denominator to all this diversity: the various state designs only work if the State can bind its electors to the results of its popular vote. For example, a statewide popular vote for the presidential and vice-presidential candidates will not work unless the State can ensure that the electors vote for the party ticket chosen by its citizenry. Today, thirty-two States and the District of Columbia have formalized that obligation by enacting laws which *require* electors to vote for the candidates of their political party. *See* Electors' Br., App. A. The

remaining States rely on party loyalty and civic duty to enforce the popular will. Thus, even this choice is a product of political pluralism. And it is made by the precise party entrusted by the Constitution to do so: the States.

C. The Electoral College Continues To Play A Vital Role In Our Constitutional System.

Notwithstanding the absence of elector discretion, the Electoral College plays an important role in our constitutional system. The Electoral College grew out of the Connecticut Compromise, an agreement reached between the large and small States that ensured appropriate representation in Congress. Goldfeder, *supra* at 967; *see* Wayne, *supra* at 131 n.15. Article II implements that agreement in the selection of the President and Vice President by providing that the "Number of Electors" appointed by each State shall be "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, cl. 2. That method of apportionment was designed, foremost, to ensure that the largest States would not dominate the new national government. But the Electoral College reinforces other important structural constitutional principles as well.

Within the Federal Government, for example, the Electoral College enhances the separation of powers. The Framers debated having the Congress select the President but worried they could not also secure the independence of the office. Wayne, *supra* at 116. By rejecting congressional appointment in favor of an Electoral College controlled by the States, the

Framers ensured the Executive's independence from the Legislative Branch. *See* Goldfeder, *supra* at 967.

The same decision reinforced federalism. The Electoral College "gave each state implicit representation as a sovereignty" by assigning the State the preeminent role in selecting the President. Thomas Gais and James Fossett, *Federalism and the Executive Branch*, *in The Executive Branch* 486, 488 (Joel D. Aberbach and Mark A. Peterson, eds. 2005). Moreover, because each State would determine how it would choose electors, the Electoral College would cause the President to depend on the support of the States to win and stay in office. *See* Goldfeder, *supra* at 967.

The structural features of the Electoral College are not an end unto themselves. Federalism and the separation of powers promote individual liberty. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (explaining the liberty enhancing benefits of federalism and the separation of powers). By enhancing federalism and the separation of powers, the Electoral College likewise helps to promote individual liberty.

Notably, none of the structural benefits afforded by the Electoral College depend in any way on an exercise of individual discretion by a member of the Electoral College. Thus, contrary to the suggestion of the Electors here, the Electoral College would play an important role in our constitutional system even if every State foreclosed permanently the possibility of affording its electors discretion.

CONCLUSION

The Court should affirm the decision of the Washington Supreme Court, reverse the decision of the Tenth Circuit, and affirm the authority of the States to express effectively the will of their people in presidential elections.

Respectfully submitted,

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