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## Power to the People: The Supreme Court's Confirmation of State Power in the Wake of Faithless Electors

Gabrielle Engel

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# Power to the People: The Supreme Court's Confirmation of State Power in the Wake of Faithless Electors

GABRIELLE ENGEL\*

*One of the most cherished American liberties is the right to vote. Yet, the Constitution does little to protect the integrity of individual voters. Instead, the Founding Fathers created an Electoral College to represent states' will. Over time, states enacted laws requiring that electoral votes be cast to reflect the state popular vote. In 2016, several electors voted for candidates who did not win their state's popular vote, grounding their actions in a believed constitutional right to vote freely and unencumbered by state outcomes. The Supreme Court addressed this issue in *Chiafalo v. Washington*, holding that states may bind electoral votes. This Note finds that the Court's decision properly reflects the Framers' intentions and necessarily avoids political chaos while emphasizing a need for either state or congressional action to reform the Electoral College.*

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\* J.D. Candidate 2021, University of Miami School of Law; B.S. 2018, University of Florida. I dedicate this Note to my Grandfather, Lester Engel, who graduated from the University of Miami School of Law in 1959. I am grateful for the unwavering encouragement, support, and patience of my family and friends. The publication of this Note would not be possible without their love. Thank you to Professor Stephen J. Schnably for his guidance and as well as the *University of Miami Law Review* for selecting this Note for publication and scrupulously editing it with me.

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#### INTRODUCTION

The “‘fundamental principle of our representative democracy,’ embodied in the Constitution, [is] that ‘the people should choose whom they please to govern them.’”<sup>1</sup>

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<sup>1</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 946 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 2316 (2020) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848, 879 (1995) (Thomas, J., dissenting)).

The right to vote has long been relished as one of the most sacred elements of a democracy.<sup>2</sup> Millions have fought for the right to be heard by their government, for the right to vote: Black Americans, women, and still today, convicted felons.<sup>3</sup> However, once you pull back the veil, voting is a much more complicated process than it appears on its face.<sup>4</sup> America is a democratic republic rather than a direct democracy.<sup>5</sup> Therefore, Americans vote for electors, not presidential candidates.<sup>6</sup> Until recently, there was not a large problem with this system.<sup>7</sup> After all, most states enacted laws requiring electors to vote for the winners of the state's popular vote, thereby representing the will of the people.<sup>8</sup> But what happens when an elector violates state law and exercises independent discretion in casting their electoral vote in the national election? It is a question that has

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<sup>2</sup> See *Democracy (Ancient Greece)*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/democracy-ancient-greece/> (last visited Jan. 24, 2021) (discussing evolution of democracy).

<sup>3</sup> See Amy Goodmen & Denis Moynihan, Opinion, *Democracy Now | The Struggle to Vote, from the Suffragettes to Today*, SANTA CRUZ SENTINEL (Jan. 4, 2020, 5:00 AM), <https://www.santacruzsentinel.com/2020/01/04/democracy-now-the-struggle-to-vote-from-the-suffragettes-to-today/> (comparing American women's suffrage movement to today's convicted felon movement for right to vote); see also Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 256 (2015) (arguing that loss of right to vote is akin to a "badge of slavery").

<sup>4</sup> See generally Colum Lynch, *Why is it so Hard to Vote in America?*, FOREIGNPOLICY.COM (Nov. 5, 2018, 1:35 PM), <https://foreignpolicy.com/2018/11/05/why-is-it-so-hard-to-vote-in-america/> (covering voter suppression and difficulties of American election process).

<sup>5</sup> Eugene Volokh, Opinion, *Is the United States of America a Republic or a Democracy?*, WASH. POST (May 13, 2015, 2:43 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy/>.

<sup>6</sup> U.S. CONST. art. II, § 1; U.S. CONST. amend. XII; see *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020).

<sup>7</sup> See *Faithless Electors*, FAIR VOTE [hereinafter *Faithless Electors*], [https://www.fairvote.org/faithless\\_electors](https://www.fairvote.org/faithless_electors) (last visited Jan. 24, 2021) (documenting history of faithless electors).

<sup>8</sup> See *Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES [hereinafter *Electoral College FAQ*], <https://www.archives.gov/electoral-college/faq> (last visited Jan. 24, 2021) (discussing "winner-takes-all" system employed by forty-eight states and District of Columbia).

been toyed with by courts in one way or another since the 1900s.<sup>9</sup> A larger than usual number of so-called “faithless electors”<sup>10</sup> in the 2016 presidential election, however, opened the door for Supreme Court review.<sup>11</sup> In a nearly unanimous opinion that preserves modern national election practices, the Court confirmed states have the power to ensure electoral votes reflect the state popular vote.<sup>12</sup>

## I. ROADMAP

This Note will compare the constitutional analyses of the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit in the landmark faithless electors case *Baca v. Colorado Department of State*.<sup>13</sup> The Tenth Circuit’s opinion appeared to threaten modern presidential election practices.<sup>14</sup> Some view the

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<sup>9</sup> See, e.g., *Ray v. Blair*, 343 U.S. 214, 227–30 (1952) (discussing historical difficulties of Electoral College’s purpose).

<sup>10</sup> Faithless electors are electors who vote for a different presidential or vice-presidential candidate than the one for whom they pledged to vote. *Faithless Electors*, *supra* note 7. For more information on the Electoral College, see *Electoral College Fast Facts*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES [hereinafter *Electoral College Fast Facts*], <https://history.house.gov/Institution/Electoral-College/Electoral-College/> (last visited Jan. 24, 2021).

<sup>11</sup> See *infra* Part III.E (discussing faithless electors in 2016); *Chiafalo*, 140 S. Ct. at 2320.

<sup>12</sup> *Chiafalo*, 140 S. Ct. at 2316, 2320. Justice Kagan delivered the opinion of the Court, to which Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, Gorsuch, and Kavanaugh joined. *Id.* at 2317. Justice Thomas concurred in the judgment, to which Justice Gorsuch joined as to Part II. *Id.*

<sup>13</sup> *Id.*; *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 956 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 918 (2020) (“The judgment of the United States Court of Appeals for the Tenth Circuit is reversed for the reasons stated in [*Chiafalo*, 140 S. Ct. 2316].”).

<sup>14</sup> The Tenth Circuit struck down a Colorado statute similarly employed by almost every other state. See *Electoral College FAQ*, *supra* note 8 (discussing widely used “winner-takes-all” system employed by forty-eight states and the District of Columbia); see also Alexander Gouzoules, *The “Faithless Elector” and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. FLA. J.L. & PUB. POL’Y 215, 224–27 (2017) (outlining various deterrence-based statutory schemes states have enacted to prevent faithless electors). Without such statutes, many worried about the integrity of American votes. See Brief of Amicus Curiae National Conference of Commissioners on Uniform State Laws Supporting Petitioner at 5, *Colo. Dep’t of State v. Baca* 140 S. Ct. 2316 (2020) (No. 19-

opinion as too rigid a reading of the Constitution.<sup>15</sup> After all, if states do not have the inherent power to bind electors to vote in accordance with the state's general election popular vote, what value does the popular vote have?<sup>16</sup> Thus, the Supreme Court rightfully stepped in to quash fears that votes would become meaningless prior to the 2020 election.

This Note will argue that the Supreme Court's reasoning was a necessary and sound upholding of federalist principles. Part II will address the facts and issues surrounding *Baca*. Part III will discuss the history of the Electoral College and the evolution of modern voting practices in America. Part IV will compare how the Tenth Circuit and Supreme Court addressed the constitutional issue presented. Finally, Part V will illustrate how the Court's reasoning should be interpreted moving forward.

## II. *BACA V. COLORADO DEPARTMENT OF STATE*: BACKGROUND

### A. *Facts*

In April 2016, the Colorado Democratic Party nominated Michael Baca, Polly Baca, and Robert Nemanich (as a group, "the Electors") to serve as presidential electors.<sup>17</sup> After Secretary Hillary Clinton and Senator Tim Kaine won the popular vote in November 2016, the group was appointed to serve as three of Colorado's nine presidential electors.<sup>18</sup>

Colorado state law requires presidential electors to cast their ballots for president and vice president in favor of the candidates who received the highest number of votes in the Colorado general election.<sup>19</sup> Weary of the state's winners, Mr. Baca asked the Colorado Secretary of State, Wayne Williams, what the consequences would be if he cast his ballot for different candidates.<sup>20</sup> The response was simple: Colorado would remove any electors who did not cast their

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518) ("The public outrage that would arise if a faithless elector could determine the outcome of a presidential election would cause a Constitutional crisis . . .").

<sup>15</sup> See *infra* Part IV (discussing Tenth Circuit's originalist approach).

<sup>16</sup> See *infra* Part V.A.1 (discussing need for broad state power over electors).

<sup>17</sup> *Baca v. Colo. Dep't of State*, 935 F.3d at 902.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; COLO. REV. STAT. § 1-4-304(5) (2020).

<sup>20</sup> *Baca v. Colo. Dep't of State*, 935 F.3d at 902–03.

vote in accordance with state law and appoint new electors until all nine votes were cast for Secretary Clinton and Senator Kaine.<sup>21</sup> Mr. Williams later received guidance from a Colorado court to remove noncompliant electors and appoint new electors who would vote in accordance with Colorado law.<sup>22</sup>

On December 19, 2016, the nine Colorado presidential electors met to mark their ballots.<sup>23</sup> Despite taking an oath to vote for the winners of the Colorado election, Mr. Baca cast his vote for president for John Kasich.<sup>24</sup> Mr. Williams subsequently removed Mr. Baca and replaced him with an elector who cast her ballot for Secretary Clinton.<sup>25</sup> In fear of removal, Ms. Baca and Mr. Nemanich then cast their votes for Secretary Clinton as well.<sup>26</sup> After voting on the presidential candidates completed, Mr. Baca attempted to vote for Senator Kaine for vice president.<sup>27</sup> Mr. Williams did not count his vote and referred Mr. Baca to the Colorado Attorney General for criminal investigation.<sup>28</sup>

#### B. *Procedural History*

Ms. Baca and Mr. Nemanich filed a complaint in the United States District Court for the District of Colorado, to which Mr. Baca joined.<sup>29</sup> The Electors sought to hold Colorado responsible for its deprivation of their supposed constitutional rights under Article II and the Twelfth Amendment.<sup>30</sup> The Electors grounded this claim under Title 42, section 1983 of the United States Code.<sup>31</sup> This section provides that:

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<sup>21</sup> *Id.* at 903.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 904.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see *Baca v. Colo. Dep't of State*, No. 17-cv-01937-WYD-NYW, 2018 WL 10322062 (D. Colo. Apr. 10, 2018), *aff'd in part, rev'd in part*, 935 F.3d 887 (10th Cir. 2019), *rev'd per curiam*, 140 S. Ct. 2316 (2020).

<sup>30</sup> *Baca v. Colo. Dep't of State*, 935 F.3d at 904.

<sup>31</sup> *Id.*; see also 42 U.S.C. § 1983.

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>32</sup>

The relief sought was threefold. The Electors requested that the court (1) find the Colorado Department of State (“Colorado”) violated the Electors’ constitutional rights, (2) declare the Colorado law requiring presidential electors to vote in compliance with the state majority winner unconstitutional, and (3) award nominal damages.<sup>33</sup>

In response, Colorado filed a motion to dismiss, arguing that the Electors lacked standing under Federal Rule of Civil Procedure 12(b)(1) and, alternatively, failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).<sup>34</sup> The District Court dismissed the complaint.<sup>35</sup> The Electors appealed to the Tenth Circuit,<sup>36</sup> which

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<sup>32</sup> 42 U.S.C. § 1983 (emphasis added).

<sup>33</sup> *Id.*; COLO. REV. STAT. § 1-4-304 (2020); *Baca v. Colo. Dep’t of State*, 935 F.3d at 904.

<sup>34</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d at 904; *see* FED. R. CIV. P. 12.

<sup>35</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d at 904.

<sup>36</sup> *Id.* at 887. Several questions of justiciability surfaced at the Tenth Circuit; most notably, arguments surrounding the application of 42 U.S.C. § 1983 and Colorado’s waiver that it is not a “person.” *Id.* at 905. The Tenth Circuit noted that “it is a well-established principle . . . that normally the [c]ourt will not decide a constitutional question if there is some other ground upon which to dispose the case[.]” and therefore assessed whether the complaint itself failed because Colorado is not a person under § 1983. *Id.* at 928–29 (quoting *Bond v. United States*, 572 U.S. 844, 855 (2014)); *see* 42 U.S.C. § 1983. Ultimately, the Tenth Circuit found the requirements of § 1983 were not jurisdictional requirements. *Baca v. Colo. Dep’t of State*, 935 F.3d at 929. Instead, the statute’s requirements are elements of the claim, making Colorado’s waiver of the “person” element viable. *Id.* Thus, even though courts should raise jurisdictional issues *sua sponte*, no jurisdiction issues were present, and the court proceeded to adjudicate the constitutional issue. *Id.* At the Supreme Court, the Justices entertained questions of justiciability at oral argument but did not address such issues in the decision. Transcript of Oral Argument at 13, 42–43, *Colo. Dep’t of State v. Baca* 140 S. Ct. 2316 (2020) (No. 19-518). The Justices voiced concerns regarding Colorado’s waiver



published a holding that unsettled widely accepted voter expectations.<sup>37</sup>

The Tenth Circuit found that the Tenth Amendment does not reserve to the states the right to bind electoral votes;<sup>38</sup> therefore, any power to do so would have to be granted under Article II, which contains no such express delegation.<sup>39</sup> Effectively, the court determined that presidential electors may exercise independent discretion when voting, unencumbered by state interference.<sup>40</sup>

Colorado filed a petition for writ of certiorari,<sup>41</sup> to which Mr. Baca responded with a petition in support;<sup>42</sup> additionally, numerous states, scholars, and organizations filed amicus briefs urging the

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of § 1983's "person" requirement: Justice Breyer stated, "[t]he problem that I view is that then any two people, a plaintiff and defendant, who would like an issue decided by us, simply have to waive enough matters so that it has to come before us because it's not jurisdictional." *Id.* at 13. However, ultimately, it appears the Court liberally applied the semantics of § 1983 and conceded to the waiver because it believed that adjudicating the issue was necessary to avoid political chaos. *See id.* at 46 (Justice Alito discussing potential political chaos if electors are granted a constitutional right to unencumbered voting).

<sup>37</sup> *See* *Baca v. Colo. Dep't of State*, 935 F.3d at 887; Noah Feldman, Opinion, *Appeals Court Opens the Door to Electoral College Chaos*, BLOOMBERG OP. (Aug. 25, 2019, 9:21 AM), <https://www.bloomberg.com/opinion/articles/2019-08-25/electoral-college-chaos-is-possible-over-faithless-elector-ruling>.

<sup>38</sup> *Baca v. Colo. Dep't of State*, 935 F.3d at 946.

<sup>39</sup> *Id.* In a 3-1 opinion, the court reversed the dismissal of Mr. Baca's claim and remanded the case to the district court, holding that Mr. Baca stated a viable claim under 42 U.S.C. § 1983. *Id.* at 956. Additionally, the Tenth Circuit found that out of the three Electors, only Mr. Baca had standing to pursue a claim because he suffered an actual injury. *Id.* at 922. Mr. Baca was removed, and his votes were nullified, while Ms. Baca and Mr. Nemanich only suffered a fear of removal which caused them to vote in accordance with Colorado state law. *See id.* at 921. Accordingly, the court affirmed the District Court's ruling in part and Ms. Baca's and Mr. Nemanich's claims were dismissed under Federal Rule of Civil Procedure 12(b)(1). *Id.* at 956.

<sup>40</sup> *See id.*

<sup>41</sup> Petition for Writ of Certiorari, *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (No. 19-518) [hereinafter Colorado Petition for Writ of Certiorari].

<sup>42</sup> Respondents' Brief in Support of Certiorari, *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (No. 19-518) [hereinafter Baca Brief in Support of Certiorari] (urging for Supreme Court review due to inconsistent federal guidance).

Supreme Court to hear the issue.<sup>43</sup> Given the immediacy of the 2020 presidential election, the Supreme Court granted certiorari on January 17, 2020.<sup>44</sup>

The Supreme Court consolidated the case with *Chiafalo v. Washington*, a similar litigation arising from the actions of faithless electors in Washington during the 2016 presidential election.<sup>45</sup> Both cases addressed state laws restricting electoral independence;<sup>46</sup> therefore, one opinion delivered by Justice Kagan applied to both cases.<sup>47</sup>

### C. Holding

The Supreme Court applied Article II liberally, finding that states possess “‘the broadest power of determination’ over who becomes an elector.”<sup>48</sup> After considering long-established state practices of requiring electors to reflect the popular vote when casting ballots, the Court found that state power to appoint electors under Article II necessarily encompasses the ability to impose restrictions on voting.<sup>49</sup> Concurring in the opinion, Justice Thomas found that

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<sup>43</sup> See Brief for South Dakota et al. as Amici Curiae in Support of Petitioner, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (No. 19-518); Brief of Professor Michael T. Morley as Amicus Curiae in Support of Neither Party, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (No. 19-518) (also filed in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465)); Brief of Amicus Curiae National Conference of Commissioners on Uniform State Laws Supporting Petitioner, *supra* note 14; Brief of the Republican National Committee as Amicus Curiae in Support of Washington & Colorado, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (No. 19-518) (also filed in *Chiafalo*, 140 S. Ct. 2316 (No. 19-465)); Brief of Amicus Curiae of the Colorado Democratic Party in Support of Petitioner, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (No. 19-518).

<sup>44</sup> Colo. Dep’t of State v. Baca, 140 S. Ct. 918 (2020) (mem.) (granting petition for writ of certiorari).

<sup>45</sup> See *id.*; *Chiafalo*, 140 S. Ct. at 2322.

<sup>46</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d at 903–04; *In re Guerra*, 441 P.3d 807, 807–08 (Wash. 2019), *aff’d sub nom*, *Chiafalo v. Washington* 140 S. Ct. 2316 (2020).

<sup>47</sup> Colo. Dep’t of State v. Baca, 140 S. Ct. at 2316; *Chiafalo*, 140 S. Ct. at 2323.

<sup>48</sup> *Chiafalo*, 140 S. Ct. at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1982)).

<sup>49</sup> *Id.* at 2327–28 (“State election laws evolved to reinforce that development, ensuring that a State’s electors would vote the same way as its citizens.”).

state power to enact such laws does not stem from Article II;<sup>50</sup> rather, Justice Thomas reasoned that the Tenth Amendment allows states to exercise this power because the Constitution is otherwise silent on the issue.<sup>51</sup>

### III. THE ELECTORAL COLLEGE: THEN & NOW

Before assessing the courts' constitutional interpretations, it is important to understand the history behind the creation of the Electoral College and its function in present day elections.

#### A. *Creation of the Electoral College*

The Electoral College was created to ensure that a president “with ‘talents for low intrigue, and the little arts of popularity’ could not achieve office without the necessary qualifications or the appropriate temperament.”<sup>52</sup> Indeed, today it is easy to envision the type of presidential behavior about which the Framers were worried.

The creation of the Electoral College reflects qualms the Framers had with the creation of a presidential power and issues with early state constitutions.<sup>53</sup> Originally, state governors had smaller powers than today and were chosen by the state legislatures.<sup>54</sup> Accordingly, the Virginia Plan proposed that, likewise, the “national Executive . . . be chosen by the National Legislature.”<sup>55</sup> By contrast, the competing New Jersey Plan recommended that Congress consist of equal state representatives instead of proportionally allocated

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<sup>50</sup> *Id.* at 2329 (Thomas, J., concurring).

<sup>51</sup> *Id.* (“I would resolve this case by simply recognizing that ‘[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.’” (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting))).

<sup>52</sup> Gouzoules, *supra* note 14, at 218 (quoting *THE FEDERALIST* NO. 68, at 354 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001)).

<sup>53</sup> *See* Gouzoules, *supra* note 14, at 218–19.

<sup>54</sup> Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 *ARIZ. L. REV.* 903, 921 (2017). Only three states, New York, Vermont, and Massachusetts, used an alternative method for choosing an executive state power. *Id.* at 921–22.

<sup>55</sup> *Id.* at 922 (quoting 3 *JAMES MADISON, WRITINGS OF JAMES MADISON* 57 (Gaillard Hunt ed., 1902)).

state representatives.<sup>56</sup> However, state familiarity with governors appointed by the legislature highlighted the need for the national executive power to be independent.<sup>57</sup>

The Framers discussed various options for ensuring independent appointment; importantly, the Framers considered the prospect of a general election.<sup>58</sup> Early in the Constitutional Convention, James Wilson pointed out that the New York and Massachusetts constitutions, which did not appoint state governors chosen by the state legislature, resulted in governors “whose merits have general notoriety.”<sup>59</sup> However, Framers such as George Mason were not easily convinced.<sup>60</sup> So, Wilson came back with a more detailed proposal in which states were divided into electoral districts, each of which would elect an elector who would then vote for the president and vice president.<sup>61</sup> Wilson’s proposal was largely accepted and seen as a mode of “election by the people.”<sup>62</sup> This was true because, compared to the appointment of state governors through the state legislature, this method gave citizens and states considerable control over elections.<sup>63</sup>

The instructions for conducting the presidential election are prescribed in Article II, which vests power in the executive branch and sets forth the method by which the United States selects its president and vice president.<sup>64</sup> Appointing electors is a power that has long been vested to each individual state.<sup>65</sup> Article II, Section 1, Clause 2 establishes that:

[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and

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<sup>56</sup> Whittington, *supra* note 54, at 922. The New Jersey Plan and the Virginia Plan highlighted the opposing interests of small versus large states. *See id.* at 923.

<sup>57</sup> *See id.* at 923–24.

<sup>58</sup> *Id.* at 924.

<sup>59</sup> *Id.* (quoting MADISON, *supra* note 55, at 63).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 924–25 (quoting MADISON, *supra* note 55, at 102).

<sup>63</sup> *See id.* at 925–26 (“[T]he Electoral College was a compromise that minimized the apparent problems with either congressional selection of the president or a national popular vote.”).

<sup>64</sup> U.S. CONST. art. II, § 1.

<sup>65</sup> *See* U.S. CONST. art. II, § 1, cl. 2.

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.<sup>66</sup>

Article II, Section 1, initially called for electors to cast two votes.<sup>67</sup> These votes were then counted by the House of Representatives, and the candidate with the highest number of votes became president while the candidate with the second highest number of votes became vice president.<sup>68</sup> Shortly after, the problem arose that an election could result in a president and vice president who identified with different political parties.<sup>69</sup> That issue came to fruition in both 1796 and 1800.<sup>70</sup>

### B. *Enactment of the Twelfth Amendment*

In 1796, the presidential election resulted in a split-party president and vice president.<sup>71</sup> Federalists supported John Adams for president and Thomas Pinckney for vice president, while Anti-Federalists called for electors to support Thomas Jefferson for president and Aaron Burr for vice president.<sup>72</sup> This rise in party-line voting did not align well with the Constitution because casting an electoral ballot for both Adams and Pinckney respectively could not ensure that Adams would become president with Pinckney serving as his

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<sup>66</sup> *Id.*

<sup>67</sup> U.S. CONST. art. II, § 1, cl. 3.

<sup>68</sup> *Electoral College & Indecisive Elections*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Origins-Development/Electoral-College/> (last visited Jan. 24, 2021).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* In 1800, efficiency became a concern. *See id.* The presidential election resulted in the following electoral vote totals: seventy-three votes each for Aaron Burr and Thomas Jefferson, sixty-five votes for John Adams, sixty-four votes for Charles Pinckney, and one vote for John Jay. 10 ANNALS OF CONG. 1024 (1801). Because two candidates received an equal number of electoral votes, the vote shifted to the House of Representatives. *Baca v. Colo. Dep't of State*, 935 F.3d 887, 947 (10th Cir. 2019), *rev'd per curiam*, 140 S. Ct. 2316 (2020) (discussing the presidential election of 1800). It took thirty-six rounds of polling for the House to elect Jefferson as the president. *Id.*

<sup>71</sup> *Baca v. Colo. Dep't of State*, 935 F.3d at 947.

<sup>72</sup> CONST. RTS. FOUND., *The Troubled Elections of 1796 and 1800*, BILL RTS. ACTION, Fall 2016, at 2.

vice president.<sup>73</sup> Instead, numerous Federalist electors withheld their second ballot and did not cast a ballot for Thomas Pinckney.<sup>74</sup> This was an effort to ensure that Pinckney would receive just a few votes short of Adams but enough to win the vice presidency.<sup>75</sup> This resulted in seventy-one votes for John Adams, sixty-eight votes for Thomas Jefferson, and fifty-nine votes for Thomas Pinckney.<sup>76</sup> Therefore, John Adams, a Federalist, was president alongside Vice President Thomas Jefferson, an Anti-Federalist.<sup>77</sup>

In addition to resulting in a split-party president and vice president, the 1796 election is also considered the first emergence of an elector exercising independent discretion.<sup>78</sup> In 1796, Pennsylvania selected presidential electors by popular vote.<sup>79</sup> The flawed Pennsylvania law, however, provided the governor with a limited amount of time to appoint the winners, resulting in the governor selecting electors prior to the completion of tallying votes.<sup>80</sup>

Samuel Miles, a Pennsylvania elector, led a slate of fifteen electors who supported Federalism.<sup>81</sup> This group of electors was expected to vote for John Adams.<sup>82</sup> Although Adams was not an outright Federalist, it was largely known that he was the candidate who would support federalist ideals; conversely, Thomas Jefferson, a “firm Republican,” did not.<sup>83</sup> When it came time for the governor to appoint Pennsylvania’s electors, thirteen electors supporting Jefferson had won the popular vote.<sup>84</sup> However, Greene County,

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<sup>73</sup> See *Baca v. Colo. Dep’t of State*, 935 F.3d at 947 (explaining that the 1796 election result “created a ‘situation that was manifestly intolerable’” (quoting *Ray v. Blair* 343 U.S. 214, 224 n.11 (1952))).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (“The 1796 electoral college vote consequently resulted in a President who, although disclaiming political affiliation, strongly favored Federalists, serving with a Vice President who was the leader of the opposing party.”).

<sup>78</sup> See *Electoral College Fast Facts*, *supra* note 10; *Faithless Electors*, *supra* note 7 (documenting history of faithless electors).

<sup>79</sup> See JEFFREY L. PASLEY, *THE FIRST PRESIDENTIAL CONTEST* 361–63 (2013) (describing Pennsylvania’s 1796 election).

<sup>80</sup> See *id.* at 362.

<sup>81</sup> See *Baca v. Colo. Dep’t of State*, 935 F.3d at 948.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting PASLEY, *supra* note 79, at 354).

<sup>84</sup> PASLEY, *supra* note 79, at 363.

Pennsylvania, had not yet been tallied.<sup>85</sup> Nonetheless, the governor appointed Miles and Robert Coleman, two Federalist electors, to be the state's remaining presidential electors.<sup>86</sup> Ultimately, the voting showed that two Anti-Federalist, Jefferson-supporting electors should have been appointed for Greene County.<sup>87</sup> The electors who won the popular vote insisted that they replace Miles and Coleman but were refused.<sup>88</sup> Thus, people were frustrated and wished for Miles and Coleman to support the "will of the majority" and vote for Jefferson.<sup>89</sup> Out of fear, or moral desire to represent the majority, Miles voted for Jefferson.<sup>90</sup> However, many were quick to criticize him for going against the will of the Federalists.<sup>91</sup> In fact, a Philadelphia Newspaper headline reflected the frustration and anger voters felt, reading: "What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chose him to act, not to think."<sup>92</sup>

In 1800, Electoral College procedures again resulted in a rival president and vice president, Thomas Jefferson and Aaron Burr, which convinced the Founders that a change was necessary.<sup>93</sup> Accordingly, the Twelfth Amendment to the Constitution was ratified in 1804.<sup>94</sup> The Twelfth Amendment, which reworked Article II, Section 1, Clause 3, constructs the Electoral College voting mechanisms used today.<sup>95</sup> Electors are to meet and cast their ballots in their respective states.<sup>96</sup> Instead of casting two ballots generally, electors cast distinct and separate ballots for president and vice president.<sup>97</sup> A final list of all votes cast for president and vice president is signed

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<sup>85</sup> See *Baca v. Colo. Dep't of State*, 935 F.3d at 948.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See PASLEY, *supra* note 79, at 363.

<sup>90</sup> *Id.* Because Miles ran as a Federalist elector, many consider him the first faithless elector. See *Faithless Electors*, *supra* note 7.

<sup>91</sup> See *Baca v. Colo. Dep't of State*, 935 F.3d at 948.

<sup>92</sup> *Id.* (citing STEPHEN J. WAYNE, *THE ROAD TO THE WHITE HOUSE* 6 (10th ed. 2016)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 932.

<sup>95</sup> See U.S. CONST. amend. XII.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Electors can only vote for one candidate from their respective state. See *id.*

and certified by each elector.<sup>98</sup> This list is then sealed and transmitted by the electors to the president of the Senate, who opens and counts the votes in the presence of the Senate and House of Representatives.<sup>99</sup> The candidate who receives the majority of the electoral votes for president and the candidate who receives the majority of the electoral votes for vice president shall assume their respective offices.<sup>100</sup> In the event no majority exists for the presidency, the House of Representatives casts ballots on the top three candidates who received the most electoral votes for president.<sup>101</sup> Whereas, if no majority exists for the vice president, the Senate casts ballots on the top two candidates who received the most electoral votes for vice president.<sup>102</sup> Thus, the Twelfth Amendment restructured how electoral votes are cast.

### C. *Modern Treatment of the Electoral College*

Many Americans are under the impression that our president is elected in November after each state has conducted its general election.<sup>103</sup> However, the Electoral College actually casts its ballots in December.<sup>104</sup> In fact, Americans vote for electors who represent political parties in the hopes that the elector will cast his or her vote for that party's nominee.<sup>105</sup> Today, forty-eight states and the District of Columbia award all electoral votes to electors who represent the political party of the state's popular vote winners.<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* A quorum "of a member or members from two-thirds of the states" is necessary for such a vote to take place, and a candidate must receive a majority of the House of Representative votes cast. *Id.*

<sup>102</sup> *Id.* A quorum "two-thirds of the whole number of Senators" is necessary for such a vote to take place, and a candidate must receive a majority of the Senate votes cast. *Id.*

<sup>103</sup> *See, e.g.,* Whittington, *supra* note 54, at 906 (clarifying and illustrating presidential election process).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*; U.S. CONST. art. II, § 1.

<sup>106</sup> *Electoral College FAQ, supra* note 8. This system is referred to as the "winner-takes-all" model. *Id.* Main and Nebraska utilize an alternative plan known as the "district plan." *Id.*



An overwhelming majority of electors are faithful to their pledge to support a particular candidate.<sup>107</sup> This faithfulness led to state confidence in electoral pledges and influenced states to remove individual electoral candidate names from ballots, and replace them with “the presidential candidate of the national conventions” which would be counted as “a vote for the party’s nominees for the Electoral College.”<sup>108</sup> These “short-form ballots,” as Colorado argued, provide voters with “no basis for judging the prospective electors’ qualifications or trustworthiness, let alone uncovering their identities,” and “[a] voter . . . understandably believes that he or she is casting [his or her] ballot for actual presidential and vice presidential candidates.”<sup>109</sup> Colorado correctly highlighted the confusion Americans have regarding U.S. voting procedures.<sup>110</sup> Short-form ballots arguably disguise such state elections as ones where the people directly vote for presidential and vice presidential candidates.<sup>111</sup>

Thirty-three states and the District of Columbia passed statutes to protect voters from elector discretion in one form or another through pledge laws.<sup>112</sup> Pledge laws require electors to take an oath that they will vote for the candidates to whom they have pledged their support.<sup>113</sup> Yet, a majority of states that require electors to take a pledge do not impose any penalty on electors who break the

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<sup>107</sup> See *Faithless Electors*, *supra* note 7 (documenting history of faithless electors).

<sup>108</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 949 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 2316 (2020) (quoting *Ray v. Blair*, 343 U.S. 214, 229 (1952)).

<sup>109</sup> *Id.* at 950 (quoting Appellee’s Response Brief at 58–59, *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (No. 18-1173)).

<sup>110</sup> See *id.*

<sup>111</sup> *Id.* In reality, people vote for electors, who today represent political parties, under the impression that the elector will cast their vote for that party’s nominee. See Whittington, *supra* note 54, at 906.

<sup>112</sup> *Faithless Elector State Laws*, FAIR VOTE [hereinafter, *Faithless Elector State Laws*], [https://www.fairvote.org/faithless\\_elector\\_state\\_laws](https://www.fairvote.org/faithless_elector_state_laws) (last updated July. 7, 2020). Seventeen states including, Texas, New York, Louisiana, Idaho, Illinois, North Dakota, South Dakota, Kansas, Pennsylvania, West Virginia, New Hampshire, New Jersey, Rhode Island, Kentucky, Missouri, Arkansas, and Georgia do not impose pledge laws. See *id.* While a lack of state pledge laws potentially signals support for independent electoral discretion, it is more likely due to the rare occurrence of faithless electors. See, e.g., *Faithless Electors*, *supra* note 7 (describing history of faithless electors).

<sup>113</sup> *Faithless Elector State Laws*, *supra* note 112. This means the elector will vote for the candidates of the political party the elector represents. *Id.*

pledge.<sup>114</sup> In fact, those states, plus the District of Columbia, still submit all electoral votes to Congress.<sup>115</sup> Alternatively, fifteen states enacted statutes supplementing pledge laws with sanctions,<sup>116</sup> including civil liability, criminal liability, and removal from the Electoral College.<sup>117</sup>

Five states impose penalties on electors who break their pledges: North Carolina imposes a civil fine,<sup>118</sup> while California,<sup>119</sup> New Mexico,<sup>120</sup> Oklahoma,<sup>121</sup> and South Carolina<sup>122</sup> impose criminal liability ranging from a misdemeanor to a felony. On top of these sanctions, Oklahoma and North Carolina refuse to transmit faithless votes to Congress.<sup>123</sup>

The most popular mechanism for enforcing pledge laws is removal. Fourteen states do not submit votes that violate a pledge to Congress;<sup>124</sup> this includes Colorado.<sup>125</sup> Colorado law implements a “removal-and-replacement system,”<sup>126</sup> which means that electors who “refuse to act,” as required by pledge, are replaced with new electors until all electors act in accordance with Colorado law and cast their ballot for the winners of the Colorado popular vote.<sup>127</sup> In the same vein, six states have enacted the Uniform Faithful

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<sup>114</sup> *Id.* Sixteen states plus the District of Columbia do not impose pledge laws. *Id.* These states include Oregon, Alaska, Hawaii, Wyoming, Wisconsin, Tennessee, Mississippi, Alabama, Florida, Virginia, Ohio, Maryland, Delaware, Connecticut, Massachusetts, and Vermont. *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*; Chris Tognotti, *How Faithless Electors Can Be Criminally Charged*, BUSTLE (Nov. 3, 2016), <https://www.bustle.com/articles/191444-criminal-charges-for-faithless-electors-are-highly-uncommon-but-legal-in-these-states>.

<sup>118</sup> N.C. GEN. STAT. § 163-212.

<sup>119</sup> CAL. ELEC. CODE §§ 6906, 18002 (Deering 2020).

<sup>120</sup> N.M. STAT. ANN. § 1-15-9 (LexisNexis 2020).

<sup>121</sup> OKLA. STAT. tit. 26, § 10-102, § 10-108, § 10-109.

<sup>122</sup> S.C. CODE ANN. § 7-19-80 (2020).

<sup>123</sup> *Faithless Elector State Laws*, *supra* note 112. Despite imposing criminal liability, California, New Mexico, and South Carolina did not enact laws regarding the cancelation of faithless votes. *See id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 2.

<sup>127</sup> COLO. REV. STAT. § 1-4-304(1) (2020).

Presidential Electors Act (the “UFPEA”) to enforce removal.<sup>128</sup> The UFPEA calls for electors to pledge their votes to the candidates of the political party they represent or face removal and replacement.<sup>129</sup> Under “winner-take-all” schemes, the UFPEA ensures that all electoral votes are cast for the winners of the state popular vote.

#### D. *The Surge in Faithless Electors*

The results of the November 2016 presidential election left many Americans upset with the Electoral College system.<sup>130</sup> This was not just because of elector independence, but it was also because of a distrust in the Electoral College as a whole.<sup>131</sup> Democrats in particular were angered by Donald Trump’s Electoral College majority, despite Secretary Clinton’s win of the national popular vote.<sup>132</sup> Senator Barbara Boxer expressed wishes to abandon the Electoral College through a Constitutional amendment.<sup>133</sup> She proclaimed the Electoral College to be an “outdated, undemocratic system that does not reflect our modern society.”<sup>134</sup> What ensued was a slew of people rushing to take a closer look at how the electoral vote in December 2016 might be swayed.<sup>135</sup> Political activist Daniel Brezenoff began a movement, calling for electors to “exercise

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<sup>128</sup> See *Faithless Elector State Laws*, *supra* note 112. Amidst varying state laws, the Uniform Law Commission pushes for all states to enact the UFPEA. See *Faithful Presidential Electors Act*, UNIF. L. COMM’N, <https://www.uniform-laws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d> (last visited Jan. 24, 2021).

<sup>129</sup> UNIF. FAITHFUL PRESIDENTIAL ELECTORS ACT §§ 4, 6(c) (UNIF. L. COMM’N 2010).

<sup>130</sup> Whittington, *supra* note 54, at 912.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* After the 2016 election, Senator Boxer introduced a bill calling for the amendment of the Constitution to abolish the Electoral College and ensure “[o]ne person, one vote[.]” Corky Siemaszko, *Senator Boxer Calls for Abolishing Electoral College in Wake of Trump Win*, NBC NEWS (Nov. 15, 2016, 6:09 PM), <https://www.nbcnews.com/storyline/2016-election-day/sen-boxer-calls-abolishing-electoral-college-n684386>.

<sup>134</sup> Siemaszko, *supra* note 133.

<sup>135</sup> See Whittington, *supra* note 54, at 912.

judgment and choice” in evaluating the candidates for president.<sup>136</sup> He hoped that electors would either honor the national popular vote in favor of Clinton or would recognize then-presidential candidate Trump’s “danger to the Constitution” and cast their vote for an alternative candidate.<sup>137</sup>

One might argue that the Electoral College was created precisely for times such as this. Such an argument was made by so-called “Hamilton Electors,” who urged electors not to cast their votes for Donald Trump.<sup>138</sup> These electors argued that Alexander Hamilton intended electors to “act as a constitutional failsafe against those lacking the qualification for becoming president.”<sup>139</sup> Many clamored to support this notion.<sup>140</sup> The viewpoint was supported by the notion that the Framers “self-consciously limited the people’s voice” and created a Constitution that mirrored John Adams’ view that “[d]emocracy never lasts long. It soon wastes, exhausts and murders itself.”<sup>141</sup>

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<sup>136</sup> *Id.* at 912–13 (quoting Albert Kaufman, *An Open Letter to the Electors*, BLUEOREGON (Dec. 14, 2016), <https://www.blueoregon.com/2016/12/open-letter-electors/>); see also Tierney McAfee, *Inside One Man’s “Hail Mary” Attempt to Yet Elect Hillary Clinton President*, PEOPLE (Dec. 5, 2016), <https://www.yahoo.com/news/inside-one-man-hail-mary-152440975.html>.

<sup>137</sup> McAfee, *supra* note 136.

<sup>138</sup> HAMILTON ELECTORS, <http://www.hamiltonelectors.com/about> [<https://web.archive.org/web/20170126025006/www.hamiltonelectors.com/about>] (last visited Jan 24, 2021).

<sup>139</sup> *Id.*

<sup>140</sup> Whittington, *supra* note 54, at 914.

<sup>141</sup> See Peter Beinart, *The Electoral College Was Meant to Stop Men Like Trump from being President*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/the-electoral-college-was-meant-to-stop-men-like-trump-from-being-president/508310/> (quoting Letter from John Adams to John Taylor (Dec. 17, 1814) FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-6371>). Some argue that while many Americans feel that the Framers created a superior democratic society, in fact the Framers created a system with both democratic and non-democratic features. See *id.* These non-democratic features include the Electoral College and the appointment of Supreme Court Justices. *Id.*

### E. *Varied Treatment of State Appointment Power*

Congress has never failed to give power to a vote submitted to the Senate from a faithless elector.<sup>142</sup> In 2016 alone, thirteen electors voted inconsistently.<sup>143</sup> All thirteen of those votes were counted by Congress.<sup>144</sup> And, before Colorado did so in 2016, no state had ever removed an elector for voting anomalously.<sup>145</sup>

The 2016 election resulted in electors from four states—Colorado, Minnesota, Washington, and California—filing suit to challenge their state electoral laws.<sup>146</sup> All four cases were initially dismissed.<sup>147</sup> Notably, only in the Tenth Circuit did the electors prevail.<sup>148</sup> Yet, the state supreme courts of Ohio,<sup>149</sup> Alabama,<sup>150</sup> and Kansas<sup>151</sup> all expressed that elector independence in one form or another stems from the Constitution.<sup>152</sup> Interestingly, Colorado’s

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<sup>142</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 949 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 2316 (2020).

<sup>143</sup> *Id.* at 950. The thirteen anomalous presidential electors in 2016 resulted in the following votes: three votes for Colin Powell (Washington), one vote for John Kasich (Texas), one vote for Ron Paul (Texas), one vote for Bernie Sanders (Hawaii), and one vote for Faith Spotted Eagle (Washington). *Id.* (citing 163 CONG. REC. H189 (daily ed. Jan. 6, 2017)). The rest were for the electoral votes for vice president: two votes for Elizabeth Warren (Hawaii and Washington), one vote for Maria Cantwell (Washington), one vote for Susan Collins (Washington), one vote for Carly Fiorina (Texas), and one vote for Winona LaDuke (Washington). *Id.* (citing 163 CONG. REC. H189 (daily ed. Jan. 6, 2017)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 949.

<sup>146</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 8.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 908–09 (Ohio 1948) (“It is only by force of a moral obligation, not a legal one, that the presidential electors pledged to certain candidacies fulfill their pledges after election.”).

<sup>150</sup> *See Opinion of the Justices No. 87*, 34 So. 2d 598, 600 (1948) (finding “the action of the electors in casting their votes by ballot is governed by the Federal Constitution” and such votes are bound to party nominees only by “virtue of their own consciences”).

<sup>151</sup> *See Breidenthal v. Edwards*, 46 P. 469, 470 (1896) (“[I]f these electors should be chosen they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States.”).

<sup>152</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 10.

petition for certiorari noted a larger number of state court decisions have upheld state power to bind electors.<sup>153</sup>

During the 2016 election, Washington imposed civil penalties on electors who did not comply with state law.<sup>154</sup> Still, Washington submitted those electors' ballots to the Senate.<sup>155</sup> In *Chiafalo*, the Washington Supreme Court noted that nothing in Article II suggests that electors have an absolute freedom to vote as they please.<sup>156</sup> Washington law, at the time of litigation, imposed a civil penalty of up to \$1,000 on electors who did not vote for the winners of the state popular vote as required by state law.<sup>157</sup> The court felt that nothing about Washington's state law interfered with the purposes of the Twelfth Amendment.<sup>158</sup> The California Supreme Court came to the same conclusion for a similar law, finding that an elector's "sole function is to perform a service which has come to be nothing more than clerical—to cast, certify and transmit a vote already predetermined."<sup>159</sup> The California Supreme Court recognized that

[i]t was originally supposed by the framers of our national constitution that the electors would exercise an independent choice, based upon their individual judgment. But in practice so long established as to be recognized as part of our unwritten law, they [act] . . . "simply to register the will of the appointing power in respect of a particular candidate."<sup>160</sup>

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<sup>153</sup> *Id.* at 10–12; *see, e.g.*, *Spreckels v. Graham*, 194 Cal. 516, 531–33 (1924) (“[T]he fact remains that the sole public duty to be performed by [electors] *after election* involves no exercise of judgment or discretion . . .”).

<sup>154</sup> *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *aff’d sub nom*, *Chiafalo v. Washington* 140 S. Ct. 2316 (2020).

<sup>155</sup> *Id.* Later, in 2019, Washington adopted the UFPEA. *See Faithless Elector State Laws*, *supra* note 112; *Faithful Presidential Electors Act*, *supra* note 128.

<sup>156</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 10–11; *see In re Guerra*, 441 P.3d at 807.

<sup>157</sup> *In re Guerra*, 441 P.3d at 808.

<sup>158</sup> *Id.* at 810, 814.

<sup>159</sup> *Spreckels v. Graham*, 194 Cal. 516, 531 (1924).

<sup>160</sup> *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1, 36 (1892)).

There, the California court made an argument that the Tenth Circuit expressly rejected.<sup>161</sup>

On the one hand, in *Chiafalo*, the Washington electors who did not cast their votes for the winners of the popular vote filed petitions for certiorari to the Supreme Court, arguing that the civil liabilities imposed on them were unconstitutional.<sup>162</sup> On the other hand, in *Baca*, Mr. Baca argued that Colorado made an “unprecedented decision to actually cancel the vote of a presidential elector.”<sup>163</sup> While each case presented different facts, there was “no meaningful legal distinction in the question at the heart of each” case.<sup>164</sup> Therefore, the Supreme Court was called upon to answer one question: Can states control electoral votes through state pledges?<sup>165</sup>

#### IV. ANALYSIS OF THE SUPREME COURT’S OPINION IN *CHIAFALO*

The Supreme Court’s opinion can be organized into the following sections: (1) application of Supreme Court precedent; (2) application of Article II and its impact on state power to appoint electors; and (3) application of the Tenth Amendment and powers reserved to the states.

##### A. *Legal Precedent: A Case of First Impression*

The Supreme Court acknowledged that the original purpose of the Electoral College has evolved.<sup>166</sup> Yet, because faithless electors have been few and far between, legal precedent on elector

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<sup>161</sup> *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 949–52 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 2316 (2020).

<sup>162</sup> Petition for Writ of Certiorari at 1, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465) [hereinafter *Washington Electors Petition for Writ of Certiorari*].

<sup>163</sup> *Baca* Brief in Support of Certiorari, *supra* note 42, at 1–2.

<sup>164</sup> *Id.*

<sup>165</sup> See *Washington Electors Petition for Writ of Certiorari*, *supra* note 162, at 3–5; *Colorado Petition for Writ of Certiorari*, *supra* note 41, at i.

<sup>166</sup> See *McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that . . . they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated.”).

independence is sparse.<sup>167</sup> However, the topic of electoral independence was briefly addressed by the Court in *Ray v. Blair*.<sup>168</sup> In *Ray*, the Court faced a similar question regarding electoral pledges required by political parties in primary elections.<sup>169</sup> There, it held that, in states that permit political parties to (1) select electoral nominees through a primary election and (2) set qualifications for the electoral candidates, a political party may require candidates to pledge support to the party's nominees without infringing on the Constitution.<sup>170</sup>

The Court recognized that Article II, Section 1, grants states the power to "appoint electors in such manner, subject to possible constitutional limitation, as it may choose."<sup>171</sup> In *Ray*, Alabama allowed political parties to utilize primary elections to select their candidates for the Electoral College.<sup>172</sup> The chairman of the Alabama Executive Committee of the Democratic Party denied certification of Edmund Blair as a candidate for presidential elector in the Democratic primary.<sup>173</sup> Blair refused to take a pledge, required by all Democratic candidates, to support "the nominees of the National Convention of the Democratic Party for President and Vice President of the United States."<sup>174</sup>

Mr. Blair argued that such a pledge violated the "freedom of a federal elector to vote in his Electoral College for his choice for President."<sup>175</sup> The Court disagreed, finding that "presidential electors *exercise a federal function* in balloting for President and Vice President, *but they are not federal officers or agents* any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution."<sup>176</sup> Thus, Article II, Section 1, creates an anomaly; electors play a unique role in that they cast a ballot for the highest office of

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<sup>167</sup> See, e.g., *Faithless Electors*, *supra* note 7 (documenting history of faithless electors).

<sup>168</sup> *Ray v. Blair*, 343 U.S. 214, 228–31 (1952).

<sup>169</sup> See *id.* at 215–18.

<sup>170</sup> *Id.* at 231.

<sup>171</sup> *Id.* at 227 (citing U.S. CONST. art. II, §1).

<sup>172</sup> See *id.* at 227.

<sup>173</sup> *Id.* at 215.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 224–25 (emphasis added).



the national government but are under the control of their state government.<sup>177</sup> The Court paid particular attention to societal practices and noted that:

[h]istory teaches that electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college.<sup>178</sup>

Pledges used by political parties were essential to ensuring party candidates in the general election reflected “the philosophy and leadership of that party.”<sup>179</sup> The Court reasoned that, although the Constitution allows electors to vote by ballot, nothing in the Constitution limits electors from pledging their votes.<sup>180</sup> In fact, it stated, “The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept.”<sup>181</sup>

Ultimately, *Ray* dealt with electoral candidacy in a *primary* election.<sup>182</sup> Primary elections are distinct from general elections in that the elector is free to run independently.<sup>183</sup> Alabama did not prohibit candidates who did not wish to align with political parties from participating in the primary election.<sup>184</sup> Thus, the Court reasoned that

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<sup>177</sup> *Id.* at 225, 227 (explaining that Article II grants states the “right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose”); U.S. CONST., art. II, § 1.

<sup>178</sup> *Ray*, 343 U.S. at 228–29 (footnotes omitted).

<sup>179</sup> *Id.* at 227.

<sup>180</sup> *Id.* at 228.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 215–16.

<sup>183</sup> *Id.* at 230 (“A candidacy in the primary is a voluntary act of the applicant.”).

<sup>184</sup> *Id.* (“The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary.”).

whether the Constitution granted electoral independence had no bearing on the issue at hand.<sup>185</sup>

In *Chiafalo*, the Supreme Court faced a different question—whether a *state* requirement to pledge support for a particular candidate in the *general election* for the presidency is legally enforceable.<sup>186</sup> Under Colorado law, electors in the general election were provided with no alternative.<sup>187</sup> If Colorado electors chose not to vote for the candidate winning the Colorado popular vote, they faced removal.<sup>188</sup> Alternatively, in *Ray*, if electors chose not to comply with party requirements, they could run independently.<sup>189</sup> Even with the legal precedent set under *Ray*, the Supreme Court agreed the situation in *Chiafalo* presented an issue of first impression.<sup>190</sup>

### B. *Article II: State Appointment Power*

By examining both historical and modern election practices, the Supreme Court majority applied a pragmatic interpretation of Article II, overturning the Tenth Circuit’s originalist reading.

#### 1. MANNER OF APPOINTMENT

The Supreme Court held that state pledge laws do not violate the Constitution because Article II, Section 1, Clause 2, grants states a broad power to appoint electors.<sup>191</sup> The Constitution empowers states to “appoint, in such *Manner* as the Legislature thereof may direct, a number of electors . . . .”<sup>192</sup> As argued by Colorado, the word “*Manner*”<sup>193</sup> endows states with the authority “to attach conditions to their appointment.”<sup>194</sup> Colorado pointed to Supreme Court precedent that referred to this electoral appointment power as

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<sup>185</sup> *Id.* (“[E]ven if . . . [there is] an assumed constitutional freedom of the elector under the Constitution . . . it would not follow that the requirement of a pledge in the primary is unconstitutional.”).

<sup>186</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

<sup>187</sup> *See id.* at 2323.

<sup>188</sup> *See id.*

<sup>189</sup> *Ray*, 343 U.S. at 230.

<sup>190</sup> *Chiafalo*, 591 U.S. at 2323–24.

<sup>191</sup> *Id.* at 2324.

<sup>192</sup> U.S. CONST. art. II, § 1 (emphasis added).

<sup>193</sup> *Id.*

<sup>194</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 19–20.

“plenary,” “exclusive,” and “comprehensive.”<sup>195</sup> It maintained that the Tenth Circuit’s finding that state appointment power ceases once an elector begins balloting leaves state appointment power “hollow, rendering [states] powerless to vindicate their [appointment] rights under Article II.”<sup>196</sup>

Under precedent set in *McPherson v. Blacker*, the Court interpreted the clause “as ‘convey[ing] the broadest power of determination’ over who becomes an elector.”<sup>197</sup> In *McPherson*, Michigan electors contested the constitutionality of a Michigan law that called for the appointment of electors by congressional district.<sup>198</sup> Upholding Michigan’s ability to do so, the Court set important precedent.<sup>199</sup> The Court noted that the Constitution does not prohibit nor require any method of appointment.<sup>200</sup> While recognizing “that the word ‘appoint’ is not the most appropriate word to describe the result of a popular election[,]”<sup>201</sup> the Court found “it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination.”<sup>202</sup> As such, the ability to direct the appointment of electors is left “exclusively” to the state legislature.<sup>203</sup>

In *Chiafalo*, the Court reasoned that a state’s ability to appoint electors “in any manner” includes imposing conditions to

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<sup>195</sup> *Id.* at 20 (citing *McPherson v. Blacker*, 146 U.S. 1, 27, 35 (1892)).

<sup>196</sup> *Id.* at 20 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“[E]very right, when withheld, must have a remedy.”)).

<sup>197</sup> *Id.* at 20 (quoting *McPherson*, 146 U.S. at 27).

<sup>198</sup> *McPherson*, 146 U.S. at 24–25 (“The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act.”). The Michigan electors argued that appointing electors by district infringed on the rights of voters to select and be represented by all of the state’s electors. *See id.*

<sup>199</sup> *Id.* at 41–42.

<sup>200</sup> *Id.* at 27 (“The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors.”).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 35.

appointment.<sup>204</sup> This includes the ability to require that “an elector live in the State or qualify as a regular voter during the relevant time period.”<sup>205</sup> Of course, this power is second to the Constitution.<sup>206</sup> Such conditions to appointment are not immune from other constitutional provisions such as the Equal Protections Clause.<sup>207</sup> However, “nothing in the Constitution expressly prohibits States from taking away presidential electors’ voting discretion.”<sup>208</sup> Thus, the Court concluded that state pledges are merely conditions of appointment well within state power.<sup>209</sup>

## 2. THE TWELFTH AMENDMENT

In further support of its reading of Article II, the Court pointed to historical practices and the enactment of the Twelfth Amendment. The Court held that the Constitution is “barebones about electors” and expressed that, if the Founders intended for the Electoral College to be an independent body unencumbered by state control, they could have clearly done so.<sup>210</sup> Mr. Baca argued that the Twelfth Amendment made clear that state appointment power ceased after electors were selected; therefore, Mr. Baca reasoned that Colorado could not remove him from the Electoral College once he cast his ballot.<sup>211</sup> Pointing to its historical adoption, Colorado contended that the Twelfth Amendment merely solved the problem of a split-ticket president and vice president and that it did not provide grounds for finding validity in elector discretion.<sup>212</sup> Colorado wrote that:

The Twelfth Amendment thus permitted the voting public to select electors who would “vote for the party candidates for both offices,” allowing them to “carry out the desires of the people, without

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<sup>204</sup> Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).

<sup>205</sup> *Id.* at 2324.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 2324 n.4.

<sup>208</sup> *Id.* at 2324.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2324–27 (reasoning that Framers could have included language in Constitution similar to language in the Constitutions of Maryland and Kentucky at the time).

<sup>211</sup> Baca Brief in Support of Certiorari, *supra* note 42, at 20.

<sup>212</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 22.

confronting the obstacles which confounded the election[] of . . . 1800.” If anything, the Twelfth Amendment supports the contemporary practice of binding electors, not conferring independence on them. It was the solution to the unique problems posed when electors are pledged and bound to the candidates of their declared party. Without that historical practice, dating back to at least 1800, the Twelfth Amendment would not have been necessary in the first place.<sup>213</sup>

The Court agreed.<sup>214</sup> It reasoned that faithless electors did not pose enough of a problem for the Framers to take interest in combating elector independence at the time of the ratification of the Twelfth Amendment.<sup>215</sup> Instead, the primary concern was split-party tickets during a rise in allegiance to political parties.<sup>216</sup> The Twelfth Amendment “brought the Electoral College’s voting procedures into line with the Nation’s new party system[,]” and by 1832, “all States but one had introduced popular presidential elections.”<sup>217</sup> Although some Framers penned their expectations that “the Electoral College would ‘be composed of the most enlightened and respectable citizens,’ whose choices would reflect ‘discretion and discernment[,]’” such words never made it into the Constitution.<sup>218</sup> In fact, as early as 1833, courts and commentators recognized that “exercise of an independent judgment [by an elector] would be treated[] as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.”<sup>219</sup>

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<sup>213</sup> *Id.* at 22–23 (alteration in original) (citations omitted) (quoting *Ray v. Blair*, 343 U.S. 214, 224 n.11 (1952)).

<sup>214</sup> *See Chiafalo*, 140 S. Ct. at 2324–25 (finding primary purpose of the Twelfth Amendment was to solve split-party outcomes).

<sup>215</sup> *See id.* at 2324–26.

<sup>216</sup> *Id.* at 2327.

<sup>217</sup> *Id.* at 2321.

<sup>218</sup> *Id.* at 2325–26 (quoting THE FEDERALIST NO. 64, at 391 (John Jay) (Clinton Rossiter ed., 1961)).

<sup>219</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1457, 322 (1833).

### 3. THE MEANING OF A “VOTE”

The Court examined Mr. Baca’s argument that the use of the words “elector,” “vote,” and “ballot” in the Constitution demonstrated the Framers’ intent for the Electoral College to vote freely.<sup>220</sup> Because interpreting the Constitution requires one to look at how the vocabulary would have been understood at the time of drafting, it is worth examining several early American dictionaries.<sup>221</sup> In 1785, the word “elector” was defined as someone “that has a vote in the choice of any officer”<sup>222</sup> or “[o]ne who chooses, one who has a vote in the choice of any public officer.”<sup>223</sup> “To vote” was defined as, “[s]uffrage; voice given and numbered,”<sup>224</sup> and as a “[v]oice, [a]dvice, or [o]pinion of a [m]atter in [d]ebate.”<sup>225</sup> Lastly, dictionaries defined “ballot” as “[a] little ball or ticket used in giving votes, being put privately into a box or urn.”<sup>226</sup> Further, “to ballot” was defined as “putting little balls or tickets, with particular marks, *privately* in a box; by counting which, it is known what is the result of the poll, *without any discovery by whom each vote was given.*”<sup>227</sup>

The Court did not find that any of the language in the Constitution implies individual discretion.<sup>228</sup> It made an important distinction that, while a vote is choice, a vote does not “always connote

<sup>220</sup> *Chiafalo*, 140 S. Ct. at 2325–26.

<sup>221</sup> *See id.*; *United States v. Sprague*, 282 U.S. 716, 731 (1931) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”).

<sup>222</sup> *Electors*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

<sup>223</sup> *Electors*, 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775); *see also Electors*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (14th ed. 1771) (defining “elector” as “a person who has a right to elect or choose a person into an office”); *Electors*, NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806) (defining “elector” as “one who elects,” and “elect” as “to choose, select for favor, prefer”).

<sup>224</sup> JOHNSON, *supra* note 222, at *Vote*.

<sup>225</sup> *Vote*, NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1765).

<sup>226</sup> JOHNSON, *supra* note 222, at *Ballot*; *see also ASH, supra* note 223, at *Ballot* (defining “ballot” as “[t]o choose by dropping a little ball or ticket into a box; to choose by holding up the hand”).

<sup>227</sup> JOHNSON, *supra* note 222, at *To Ballot* (emphasis added).

<sup>228</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325–26 (2020).

independent choice.”<sup>229</sup> The Court pointed to voting mechanisms like proxy voting where one casts a ballot on behalf of another in accordance with the principal’s wishes.<sup>230</sup> In that instance, balloting does not encompass the freedom to vote as one pleases.<sup>231</sup> Additionally, the Court provided examples of when a vote is valid even if the result of outside influence, including the guidance of unions, pastors, and spouses.<sup>232</sup> Yet, whether a vote necessarily connotes an independent choice does not in itself negate the practice of state pledges.<sup>233</sup> Rather, it is the finding that states may regulate this discretion as a condition of appointment that matters in this case.<sup>234</sup>

### C. *The Tenth Amendment: Powers Reserved to the States*

Colorado looked to the Tenth Amendment, arguing that it provided an alternative ground for state control of electors.<sup>235</sup> Colorado pointed to Supreme Court precedent to illustrate that “the Framers intended the States to ‘keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.’”<sup>236</sup> The Tenth Amendment reads, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>237</sup> Amidst public fear of a strong national government, states ratified the Tenth Amendment, as part of the Bill of Rights, to confirm elements of state sovereignty.<sup>238</sup> Colorado argued that while the Federal government

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<sup>229</sup> *Id.* (“[V]oting is still voting when discretion departs.”).

<sup>230</sup> *Id.* at 2325.

<sup>231</sup> *See id.*

<sup>232</sup> *Id.* (“Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he “votes” or fills in a “ballot.”).

<sup>233</sup> *See id.* at 2325–26.

<sup>234</sup> *See id.* at 2326. It is important to keep in mind that States are under no requirement to bar electors from exercising independent judgement. *See id.* at 2328.

<sup>235</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 26.

<sup>236</sup> *Id.* (quoting *Shelby County v. Holder*, 570 U.S. 529, 543 (2013)).

<sup>237</sup> U.S. CONST. amend. X.

<sup>238</sup> *See United States v. Sprague*, 282 U.S. 716, 733 (1931) (“The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified . . .”).

regulates national elections, the states retain power to “prescribe the qualifications of its officers,”<sup>239</sup> including the power to “establish qualifications” for their presidential electors.<sup>240</sup>

The Supreme Court majority did not address the Tenth Amendment in its opinion; instead, the Court found support for pledge laws in Article II.<sup>241</sup> Contrarily, Justice Thomas, who concurred in the judgment, found that support for state pledge requirements stems from the Tenth Amendment, not Article II.<sup>242</sup> Justice Thomas relied heavily on a narrow application of *U.S. Term Limits, Inc. v. Thornton*, consistent with the reasoning he expressed there in his dissenting opinion.<sup>243</sup> Justice Thomas maintained that “[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication,’ the power is ‘either delegated to the state government or retained by the people.’”<sup>244</sup> In agreement with the majority that nowhere in the Constitution are states expressly granted or prohibited the power to enact and enforce state pledges, Justice Thomas found that the Tenth Amendment provides Constitutional support for the practice of state pledges.<sup>245</sup>

The issue the concurring opinion took with the majority concerned the interpretation and application of “Manner” in Article II.<sup>246</sup> The concurrence felt that the majority’s reading of Article II was too broad and argued that nothing about state pledge laws concerns appointment.<sup>247</sup> Thus, including “the power to impose requirements as to how the electors vote *after they are appointed*” within Article II’s delegation of appointment power, bends the language

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<sup>239</sup> Colorado Petition for Writ of Certiorari, *supra* note 41, at 26 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

<sup>240</sup> *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting)).

<sup>241</sup> *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020).

<sup>242</sup> *Id.* at 2329, 2333 (Thomas, J., concurring).

<sup>243</sup> *See id.* at 2329.

<sup>244</sup> *Id.* at 2334 (alterations in original) (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 847–848 (Thomas, J., dissenting)).

<sup>245</sup> *Id.* at 2333–34.

<sup>246</sup> *Id.* at 2330 (quoting U.S. CONST. art II, § 1).

<sup>247</sup> *See id.* at 2331 (finding that Washington’s pledge law “simply regulated electors’ votes, unconnected to the appointment process”).



into something it is not.<sup>248</sup> Justice Thomas compared Article II, Section 1, Clause 2,<sup>249</sup> with the Elections Clause, Article I, Section 4, Clause 1.<sup>250</sup> In *U.S. Term Limits, Inc.*, the Court held that “‘Manner’ in Article I includes only ‘a grant of authority to issue procedural regulations,’ not ‘the broad power to set qualifications.’”<sup>251</sup> The argument followed that “Manner” in Article II could not include the ability to set qualifications for electors; instead, that power stemmed from the Tenth Amendment.<sup>252</sup>

However, this argument fails to recognize the difference between the role of an elector and the role of a member of Congress. Members of Congress are “officer[s] of the union, deriving [their] powers and qualifications from the constitution, and [are] neither created by, dependent upon, nor controllable by the states.”<sup>253</sup> An elector is an integral piece of a larger voting process used to elect the president and vice president, not an officer of the federal government.<sup>254</sup> As such, an elector’s oath to support the winner of the popular vote does nothing more than create a system for representing the will of the people. As was the case in *U.S. Term Limits, Inc.*, imposing qualifications for members of Congress beyond those

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<sup>248</sup> *Id.* at 2330.

<sup>249</sup> *Id.* at 2329–31. “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 . . . .” U.S. CONST. art. II, § 1, cl. 2.

<sup>250</sup> *Chiafalo*, 140 S. Ct. at 2329–31 (Thomas, J., concurring). “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .” U.S. CONST. art. I, § 4, cl.1.

<sup>251</sup> *Chiafalo*, 140 S. Ct. at 2331 (Thomas, J., concurring) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–833 (1995) (majority opinion)). Justice Thomas took issue with the Court’s finding that “Manner” in Article I and Article II granted different powers. *Id.*

<sup>252</sup> *See id.* at 2333–35.

<sup>253</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 803 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627, 435 (3d ed. 1858)).

<sup>254</sup> *See Ray v. Blair*, 343 U.S. 214, 224–25 (1952) (“The presidential electors . . . are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution.”).

outlined in the Constitution limits who is eligible to run for office.<sup>255</sup> Conversely, pledge laws have no bearing on the eligibility of candidates for president and vice president. Pledge laws are procedural in nature because they protect the integrity of individual voters rather than alter qualifications for the national legislature.<sup>256</sup> Although not addressed by the majority, precedent set in *U.S. Term Limits, Inc.* makes clear that “[s]tates are . . . entitled to adopt ‘generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.’”<sup>257</sup> Pledge laws do exactly that by creating a system that reflects the “fundamental principle of our representative democracy” that “the people should choose whom they please to govern them.”<sup>258</sup>

## V. THE FUTURE OF THE ELECTORAL COLLEGE

While the Court’s opinion assuages potential issues with the Electoral College, it addresses just the tip of the iceberg. The majority upheld state pledge laws under a broad interpretation of Article II appointment power, without much comment on the bounds of such power.<sup>259</sup> Under existing laws, broad state power may be necessary; however, considering the decision and the rise in societal challenges to the traditional function of the Electoral College, congressional action should be taken before new problems arise.

### A. *Filling in Constitutional Gaps*

Broad state power may be necessary when one thinks about the holes left by the Framers. The Constitution is not perfect and did, in

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<sup>255</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 837–38.

<sup>256</sup> *See Chiafalo*, 140 S. Ct. at 2328.

<sup>257</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

<sup>258</sup> *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting a speech by Alexander Hamilton in 2 JOHN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (2d ed. 1836)).

<sup>259</sup> *Chiafalo*, 140 S. Ct. at 2328–29. The Court noted that the decision does not validate state pledges requiring electors to vote for deceased candidates, *id.* at 2328 n.8, nor does it permit state pledges that frustrate other provisions of the Constitution, *see id.* at 2324 n.4.

fact, leave many questions unanswered.<sup>260</sup> The Supreme Court's green light to enforcing state pledges protects the integrity of state popular votes in states that require them; but, some question whether the Supreme Court was the correct body to address this issue.<sup>261</sup> Under the Twelfth Amendment, the president of the Senate counts the electoral votes before the House of Representatives and Senate.<sup>262</sup> Because Congress counted the electoral votes of Washington and Colorado in 2016, some argue that Congress approved of the states' actions and that there was no need for judicial action.<sup>263</sup>

However, this argument fails to take into account the intricacies of election processes and state pledge laws, which can also involve civil penalties.<sup>264</sup> Waiting on congressional action weeks after popular votes are conducted is unrealistic and inefficient, and Congress's validation of such a small percentage of faithless elector votes is not indicative of congressional power.<sup>265</sup> Further, Congress counted the electoral votes of Washington electors who disobeyed state law, as well as the electoral votes of the Colorado replacement electors.<sup>266</sup> Such actions are more akin to simple procedure than a conscious decision to comment on the validity of individual state actions. Congress had no choice to make, especially when considering Colorado's faithless electors did not submit their votes to the Senate.<sup>267</sup> Ultimately, the Electoral College as it stood was a ticking time bomb.<sup>268</sup> The Supreme Court rightfully stepped in to interpret the basic construction of the Electoral College and its constitutional function in today's political climate. *Chiafalo* confirmed that

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<sup>260</sup> See, e.g., *id.* at 2324 (describing Constitution as “barebones,” regarding guidance on electors).

<sup>261</sup> See Derek Muller, *Leave Courts out of Presidential Elector Dispute*, SCOTUSBLOG (Apr. 22, 2020, 11:30 AM), <https://www.scotusblog.com/2020/04/symposium-leave-courts-out-of-presidential-elector-dispute/>.

<sup>262</sup> *Id.*; U.S. CONST. amend. XII.

<sup>263</sup> Muller, *supra* note 261.

<sup>264</sup> See *Chiafalo*, 140 S. Ct. at 2322 (noting that at the time of the 2016 elections, electors in Washington faced civil penalties for failing to comply with pledge laws).

<sup>265</sup> See *id.* at 2328 (“Congress’s deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.”).

<sup>266</sup> 163 CONG. REC. H189 (daily ed. Jan. 6, 2017).

<sup>267</sup> See *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 920 (10th Cir. 2019), *rev’d per curiam*, 140 S. Ct. 2316 (2020).

<sup>268</sup> See *supra* Part III.E (discussing varied state appointment conditions).

electoral power is not absolute and must comply with state appointment laws. Left unanswered are the bounds of such appointment powers. Some argue that Congress cannot interfere with state appointment power,<sup>269</sup> but is election of the most powerful federal office beyond federal regulation?

#### 1. BROAD STATE POWER IN THE ABSENCE OF COMPREHENSIVE FEDERAL LAW

There are several issues surrounding the Electoral College that neither the Constitution nor federal law address. Given that electors are elected in November and cast their votes in December,<sup>270</sup> there are myriad issues that could arise, including arrest or illness, of either the elector or candidate. Colorado argued that the ability to remove electors is necessary in events such as when an elector refuses to cast a vote, or votes for a candidate who does not meet the constitutional qualifications for president.<sup>271</sup> In fact, states have enacted laws allowing electors to be replaced in cases of “death, sickness[,] resignation or otherwise.”<sup>272</sup> States have also enacted laws expressly allowing for elector discretion when a candidate dies before electoral votes are cast.<sup>273</sup> Such state laws demonstrate that states require the power to ensure that electors are present and comply with the Constitution.<sup>274</sup>

Additionally, electors are not bound by federal transparency laws, unlike other political candidates and officials who must disclose certain financial contributions.<sup>275</sup> In theory, electors can sell

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<sup>269</sup> See Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 875 (2002) (stating that Congress cannot “tamper with basic state rules about the selection of presidential electors”).

<sup>270</sup> Whittington, *supra* note 54, at 906.

<sup>271</sup> See Colorado Petition for Writ of Certiorari, *supra* note 41, at 23–24.

<sup>272</sup> *Id.* at 24 (citing 1800–1801 Mass. Acts 172–73).

<sup>273</sup> Chiafalo v. Washington, 140 S. Ct. 2316, 2328 n.8 (2020).

<sup>274</sup> See Colorado Petition for Writ of Certiorari, *supra* note 41, at 24.

<sup>275</sup> See *States Can Require Presidential Electors to Follow Popular Vote*, U.S. Supreme Court Rules, CAMPAIGN LEGAL CTR. (July 6, 2020), <https://campaignlegal.org/press-releases/states-can-require-presidential-electors-follow-popular-vote-us-supreme-court-rules> (discussing potential bribery of the Electoral College).

their vote without the public having any knowledge.<sup>276</sup> Although societal expectations and moral high grounds have kept electors overwhelmingly in line with supporting the popular vote,<sup>277</sup> the public should be protected from loopholes in the structure of the Constitution.

Congress recognizes state power to settle issues that arise surrounding electoral appointment in the Electoral Count Act (the “ECA”). The ECA expressly gives states the power to make a “final determination” over “any controversy or contest” over the appointment of an elector.<sup>278</sup> State failure to resolve election issues results in congressional review.<sup>279</sup> The Supreme Court has never commented on the constitutionality of the ECA outright; however, Justice Breyer expressed approval of the ECA in his dissent in *Bush v. Gore*. Putting constitutionality aside, the ECA is a clear indicator that some level of congressional control over elections is necessary and accepted.<sup>280</sup> Given the ambiguities in federal election practices,

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<sup>276</sup> *Id.*

<sup>277</sup> See *Chiafalo*, 140 S. Ct. at 2328 (discussing rarity of faithless electors).

<sup>278</sup> 3 U.S.C. § 5 (such determination must be “made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned”).

<sup>279</sup> 3 U.S.C. § 15; see Coenen & Larson, *supra* note 269, at 876 (2002) (noting that the ECA did not place additional duties on states, but instead, it encouraged timely reporting).

<sup>280</sup> There are several congressional acts that regulate federal elections. The Voting Rights Act of 1965 upholds the principles of the Equal Protections Clause and Fifteenth Amendment by prohibiting voting qualifications or standards that result in the denial of the right to vote. 52 U.S.C. § 10301; see *Voting Rights Act of 1965*, HISTORY (Aug. 25, 2020), <https://www.history.com/topics/black-history/voting-rights-act> (discussing Selma to Montgomery March, which prompted President Johnson to combat voter discrimination). After the 2000 presidential election, Congress enacted the Help America Vote Act, which established minimum standards for certain election functions that, if met, qualified states to receive additional funding, and created the Election Assistance Commission to review state election procedures. See 52 U.S.C. §§ 20901–20921; see also Amanda K. Myers, *Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?*, 37 PEPP. L. REV. 1113, 1136 (2010) (discussing voting technology requirements the Help America Vote Act established).

it can be argued that the Necessary and Proper Clause gives Congress the authority to fill in the gaps left by the Framers.<sup>281</sup>

## 2. GRANTING BROAD APPOINTMENT POWER UPHOLDS FEDERALIST PRINCIPLES

State ability to direct the manner of electoral appointment goes hand in hand with state power to regulate state elections. Under Article I, Section 4, “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.”<sup>282</sup> Accordingly, states employ various laws governing voter eligibility.<sup>283</sup> These laws differ mainly on the ability of convicted felons, as well as the mentally incompetent, to vote.<sup>284</sup> Some argue that these incongruencies are solved through independent electors who serve as a check on state power and undue influence by representing both voters and non-voters.<sup>285</sup>

Under Supreme Court precedent, these arguments now ring hollow. The Electoral College was not an attempt by the Framers to achieve equality or protect individual voters—rather, it was a compromise amongst states to maintain federalism.<sup>286</sup> This compromise ultimately left each state nearly complete control over its participation in national government elections and created a system to

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<sup>281</sup> See Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 324–326 (2019) (“Congress, being a political body, expresses the people’s will far more accurately than does an unelected court.”).

<sup>282</sup> U.S. CONST. art. I, § 4.

<sup>283</sup> See generally *Voter Registration Rules*, VOTE.ORG, <https://www.vote.org/voter-registration-rules/> (last visited Jan. 24, 2021) (outlining voter eligibility requirements for all states).

<sup>284</sup> *Id.*

<sup>285</sup> See Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. STATE L. J. 1237, 1239 (2012) (examining purpose of the Electoral College).

<sup>286</sup> Amanda Onion, *How the Great Compromise and the Electoral College Affects Politics Today*, HISTORY (Mar. 21, 2019), <https://www.history.com/news/how-the-great-compromise-affects-politics-today#:~:text=The%20Great%20Compromise%20was%20forged,smaller%20states%20demanded%20equal%20representation.>

apportion to each state a number of electoral votes.<sup>287</sup> Thus, the Supreme Court's ruling of broad appointment power is congruent with the principles of federalism embedded in Article I and Article II.

### B. *Looking Towards Reform*

The Supreme Court's findings do not make electoral reform impossible. Various actions can be taken by states to change how electors are required to vote.<sup>288</sup> "The District Plan" is an alternative elector appointment system currently used in Maine and Nebraska.<sup>289</sup> Under the District Plan, the number of a state's electors remains equal to that state's delegation in the House of Representatives plus two, one elector for each of the state's senators; however, the voters in each congressional district in that state would vote for one elector,<sup>290</sup> and the remaining two electors are required to vote for the candidate who wins the state's popular election.<sup>291</sup> Notably, critics argue that relying on congressional districts will lead to increased gerrymandering.<sup>292</sup> Alternatively, "The Automatic Plan" requires electoral votes to be given to the state plurality winner.<sup>293</sup>

Surprisingly, Colorado's argument before the Supreme Court included nothing about the National Popular Vote Compact ("the Compact"), which Colorado enacted, but mentioning its existence when discussing modern practices and potential alternatives is fitting.<sup>294</sup> The Compact is a means of ensuring that the president and vice president are the winners of the national popular vote.<sup>295</sup> The Compact states that all members will appoint electors who will cast

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<sup>287</sup> *Id.*

<sup>288</sup> See Joy McAfee, *Should the College Electors Finally Graduate? - The Electoral College: An American Compromise from its Inception to Election*, 32 CUMB. L. REV. 643, 666–70 (2002) (describing various alternatives to current Electoral College).

<sup>289</sup> *Id.* at 669.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 669–70.

<sup>292</sup> *Id.* at 670.

<sup>293</sup> *Id.*

<sup>294</sup> *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (Feb. 13, 2020) [hereinafter National Popular Vote Explanation], <https://www.nationalpopularvote.com/written-explanation>.

<sup>295</sup> See *id.* ("[B]ecause of state winner-take-all statutes, five of our 45 Presidents have come into office without having won the most popular votes nationwide.").

their vote in accordance with the winner of the national popular vote.<sup>296</sup> The Compact has been enacted by fifteen states and the District of Columbia—a total of 196 electoral votes—and will go into effect once an additional 74 electoral votes join.<sup>297</sup>

However, even if the Compact is enacted by states holding a majority of the electoral votes, its constitutionality is questionable and hotly debated.<sup>298</sup> Critics point out that the Compact's language does not adequately deal with numerous situations, including withdrawals from the Compact, states tampering with elections, and election recounts.<sup>299</sup> Second, critics point to the Compact Clause of Article I, Section 10, which prohibits states from entering into agreements with one another without congressional approval.<sup>300</sup> Compact supporters rebut this argument by pointing to Supreme Court precedent that authorizes certain agreements between states.<sup>301</sup> Yet, there are critics who argue that even if not prohibited by the Compact Clause, it is unconstitutional under Article II.<sup>302</sup> In particular, it has been argued that while states have broad discretion to appoint electors, doing so based on the winners of the national popular vote in *other* states is unconstitutional because the constitutional purpose of electors is to represent the people of their respective states.<sup>303</sup>

Although there is no ruling on the constitutionality of the Compact, the Court has held that states have broad appointment powers,<sup>304</sup> and it may not be unreasonable to conclude that states can require electors to take pledges to vote for the national popular vote winner. After all, Article II gives states the “‘broadest power of determination’ over who becomes an elector.”<sup>305</sup> Thus, if states and their citizenry support such agreements, who is to stop them?

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<sup>296</sup> *Text of the National Popular Vote Compact Bill*, NAT'L POPULAR VOTE <https://www.nationalpopularvote.com/bill-text> (last visited Jan. 24, 2021).

<sup>297</sup> National Popular Vote Explanation, *supra* note 294.

<sup>298</sup> See Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523, 1539 (2012) (arguing that National Popular Vote Compact violates Article II).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1526.

<sup>301</sup> *Id.* at 1539–40.

<sup>302</sup> *Id.* at 1540.

<sup>303</sup> *Id.*

<sup>304</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020).

<sup>305</sup> *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1982)).



## CONCLUSION

The Supreme Court's reasoning in *Baca* and *Chiafalo* is supported by modern practices and federalist ideologies. The Tenth Circuit made a compelling argument in favor of elector independence, emphasizing the historical intent of the Framers.<sup>306</sup> The Supreme Court, however, did not shy away from historical intent; rather, the Court looked beyond the text to early state practices and scholarship.<sup>307</sup> The Court's opinion is an important acknowledgment of some of the oldest American values—representation in government and voting. The ruling acknowledges that it is up to the individual states to determine how to handle electoral appointment procedures.<sup>308</sup> Thus, even under a liberal reading of the Constitution, the basic principles of federalism are kept intact. Those who seek to abolish or reform the Electoral College must realize the answer lies not in the Supreme Court but, rather, in the hands of the people, who must urge Congress or their states' legislatures, to act. After all, we live under the “trust of a Nation that here, We the People rule.”<sup>309</sup>

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<sup>306</sup> See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 952–56 (10th Cir. 2019), *rev'd per curiam*, 140 S. Ct. 2316 (2020).

<sup>307</sup> See *Chiafalo*, 140 S. Ct. at 2325–27.

<sup>308</sup> *Id.* at 2329.

<sup>309</sup> *Id.*