
THE CONSTITUTIONAL CASE FOR STATE POWER TO ELIMINATE FAITHLESS ELECTORS

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INTRODUCTION

The 2016 election raised anew the prospect that the candidate who wins the most presidential electors in November might not be the candidate who receives the most electoral votes when the electors convene in their respective states in December or the candidate who Congress officially declares the next President when a joint session counts electoral votes in January.¹ In a public effort to deny the presidency to Donald Trump, electors and nonelectors alike sought to convince electors of both parties to defy expectations, custom, and, in some cases, state law by defecting to a candidate other than Trump.² The difficulty of persuading Republican electors to shun their party's presumptive winner and the array of state laws aimed at preventing or deterring elector defections ultimately proved too much to keep Trump out of the White House. Seven electors, only two of whom were nominated by the Republican Party,³ successfully cast recorded votes for somebody other than their party's nominee,⁴ far short of the thirty-eight Republican elector defections that were needed to alter the election outcome. The votes of three other electors were invalidated and replaced after they voted for someone other than their party's nominee.⁵ Four Washington electors who defected from Hillary Clinton were fined in accordance with state

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¹ See Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. FLA. J.L. & PUB. POL'Y 215, 228-30 (2017). The 2000 election also raised concerns that a few electors, defecting from their party's nominee, would throw the election to Al Gore even though George Bush was perceived to be the winner following the Supreme Court's determination that Bush had won Florida's electors. See Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U.L. REV. 121, 122-26 (2006).

² Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/>.

³ One Texas elector voted for Ron Paul and another voted for John Kasich.

⁴ Gouzoules, *supra* note 1, at 217.

⁵ *Id.*

law.⁶ The litigation that followed brought by the fined and replaced electors has once again brought into stark relief the byzantine process for selecting the nation's chief executive and the legality of elector binding laws in a majority of states aimed at preventing the very outcome the defecting electors in 2016 sought.

I. COMPETING VIEWS ON ELECTOR INDEPENDENCE

Michael Baca sued Colorado's Secretary of State in federal court for removing Mr. Baca as a presidential elector when he crossed out "Hillary Clinton" on his ballot and wrote in "John Kasich."⁷ Peter Chiafalo, Levi Guerra, and Esther John sought judicial review in state court after Washington's Secretary of State fined each of them \$1000 for failing to cast votes for Hillary Clinton.⁸ Unlike other legal challenges brought by 2016 electors against elector binding laws,⁹ the litigation in Colorado and Washington ultimately cleared procedural hurdles for disposition on the merits. The courts there reached diametrically opposed understandings of state legislatures' power to appoint electors under Article II and elector discretion to vote their personal preference under the Twelfth Amendment.

The Tenth Circuit ended the judicial deference, or indifference, to elector binding laws since *Ray v. Blair*,¹⁰ the Supreme Court's last pronouncement on the constitutional role of presidential electors nearly seventy years ago, when it struck down the Colorado law that allowed the Secretary of State to remove Mr. Baca for violating his pledge to vote for his party's nominees.¹¹ The Washington Supreme Court, by contrast, followed the judiciary's tradition of deference to state legislative power over electors and rejected the proposition that the Twelfth Amendment demands absolute freedom for electors to vote their own choice when it upheld the fine imposed on the electors who violated their pledges.¹²

⁶ David Gutman, *4 Washington State Electors Decided Not to Vote for Hillary Clinton in 2016. They Were Fined \$1,000, Went to Court and Lost.*, SEATTLE TIMES (May 23, 2019, 1:09 PM), <https://www.seattletimes.com/seattle-news/politics/states-high-court-upholds-1000-fines-for-rogue-electors-who-didnt-vote-for-hillary-clinton-in-2016/>.

⁷ See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 904 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

⁸ See *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *cert. granted sub nom.*, Chiafalo v. Washington, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-465) (mem.).

⁹ See, e.g., *Koller v. Harris*, 312 F. Supp. 3d 814 (N.D. Cal. 2018); *Abdurrahman v. Dayton*, No. 0:16-cv-04279, 2016 WL 7428193 (D. Minn. Dec. 23, 2016), *aff'd*, 903 F.3d 813 (8th Cir. 2018).

¹⁰ 343 U.S. 214 (1952) (affirming state legislature's plenary authority over elector appointment and upholding Alabama's requirement that party-affiliated elector candidates pledge support to party's nominees as a legitimate method, not barred by the Twelfth Amendment or other constitutional limitations, for securing electors who are committed to party goals).

¹¹ See *Baca*, 935 F.3d at 956.

¹² See *In re Guerra*, 441 P.3d at 808.

Importantly, the two courts diverged on how to frame the core constitutional question. The Washington Supreme Court asked whether anything in the Constitution *prohibits* states from interfering with electors' discretion¹³ whereas the Tenth Circuit asked whether Article II or the Twelfth Amendment expressly "*delegates* to the states the power to bind or remove electors."¹⁴ The divergence is largely explained by the Tenth Circuit's erroneous application of the Supreme Court's federal-function jurisprudence¹⁵ and the Washington Supreme Court's rejection of that line of cases as inapplicable to the facts at hand.¹⁶ As discussed below, the Washington Supreme Court framed the question correctly.

Given this irreconcilable difference between the decisions and the benefit of resolving the issues presented outside the context of a contested presidential election caused by elector defections, the Supreme Court granted petitions for certiorari and consolidated the two cases.¹⁷ A decision this term against state binding laws would be a vivid reminder that the power to select the President rests entirely in the hands of 538 virtually anonymous individuals and would increase the admittedly low possibility that a few rogue electors would elect somebody other than the person Americans believed to have won in November. A decision in favor of state binding laws, on the other hand, would render electors in states with such laws robotic nonentities and decrease the Electoral College's never-before-used power to deny the presidency, regardless of the state vote totals, to a candidate deemed unfit by a majority of electors.

II. KEEPING FAITHLESS ELECTORS OUT OF THE SYSTEM

Regardless of what one thinks the Constitution says about the validity of state binding laws, it is certainly difficult to make the normative case for elector independence. One commentator questions whether there is "any significant public or private interest in American society that is served by elector discretion."¹⁸ Put simply, "the ability of a presidential elector to vote contrary to the wishes and expectations of those who elected him—usually without ever knowing who he was or even that he existed—seems to fly in the face of a basic sense of voter equity" and core democratic principles.¹⁹ Even if the electors were the deliberative, wise men that at least some Framers envisioned, the idea that electors alone hold the power to select a President is abhorrent to modern understandings of American democracy.

¹³ *See id.* at 813.

¹⁴ *Baca*, 935 F.3d at 936-37 (emphasis added).

¹⁵ *Id.* at 943.

¹⁶ *In re Guerra*, 441 P.3d at 814.

¹⁷ *See* *Chiafalo v. Washington*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-465) (mem.); *Colo. Dep't of State v. Baca*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

¹⁸ ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 116 (2006).

¹⁹ LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 44 (1972).

Not even the electors challenging state binding laws at the Supreme Court this term are doing so out of a deep belief that elector independence is an important or worthy constitutional feature. Though Mr. Baca says “[o]ne of the purposes of the Electoral College is to prevent a demagogue from taking office,” he is also transparent about his ultimate goal in having the Supreme Court declare constitutionally protected elector freedom: a constitutional amendment to elect the President purely by popular vote.²⁰

Given the good reasons to doubt this optimist prediction,²¹ state binding laws remain worthwhile, and constitutional, tools for reducing the risk that a few individuals are empowered to choose a President. The contrasting questions presented by the appellant in *Colorado Department of State v. Baca*²² and the appellants in *Chiafalo v. Washington*²³ highlight the lynchpin of the dispute: Must the Court determine whether “Article II or the Twelfth Amendment *forbid* a State from requiring its presidential electors to follow the State’s popular vote when casting their Electoral College ballots”²⁴ or whether “a State *has [the] power* to legally enforce how a presidential elector casts his or her ballot.”²⁵

²⁰ Adam Edelman, *A ‘Faithless Elector’ Betrayed His State’s Voters. You Won’t Believe Why.*, NBC NEWS (Jan. 23, 2020, 4:30 AM), <https://www.nbcnews.com/politics/supreme-court/faithless-elector-betrayed-his-state-s-voters-you-won-t-n1120551> [<https://perma.cc/4KVE-JE6M>]; Richard L. Hasen, *The Coming Reckoning Over the Electoral College*, SLATE (Sept. 4, 2019, 11:08 AM), <https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html>.

²¹ Many states already allow their electors to vote independently of the popular will, and as we saw in 2016, sometimes their electors choose to exercise that independence. Yet those experiences have not catalyzed any new momentum for abolishing the Electoral College. If anything changed minds about the Electoral College in 2016, it was the fact that the current President garnered three million fewer votes nationwide than his opponent. Slightly more Democrats now support electing the popular-vote winner than did in 2000, but support among Republicans collapsed after 2016. See Geoffrey Skelley, *Abolishing the Electoral College Used to Be a Bipartisan Position. Not Anymore.*, FIVETHIRTYEIGHT (Apr. 2, 2019, 4:13 PM), <https://fivethirtyeight.com/features/abolishing-the-electoral-college-used-to-be-bipartisan-position-not-anymore/> [<https://perma.cc/RSS6-2FM6>]. Opinions would certainly change if elector defections actually altered an election outcome, but history suggests that scenario is highly unlikely even with the elimination of state binding laws. Derek T. Muller, *Why ‘Faithless Electors’ Have Little Power to Change the Winner of Presidential Elections*, EXCESS DEMOCRACY (Oct. 14, 2019), <https://excessofdemocracy.com/blog/2019/10/why-faithless-electors-have-little-power-to-change-the-winner-of-presidential-elections> [<https://perma.cc/8GEW-MHH9>]. Much more so than state binding laws, party loyalty is the strongest enforcer of elector faithfulness.

²² 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

²³ 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-465) (mem.).

²⁴ Petition for Writ of Certiorari at *i, *Baca*, No. 19-518 (U.S. Oct. 16, 2019), 2019 WL 5390121 (emphasis added).

²⁵ Petition for Writ of Certiorari at *i, *Chiafalo*, No. 19-465 (U.S. Oct. 7, 2019), 2019 WL 5084130 (emphasis added).

The correct inquiry should examine whether the Constitution forbids state binding laws for the simple reason that presidential electors are state officers and states have broad latitude to appoint, remove, and otherwise control their officers. Yet recognizing electors as state officers is not the only path to upholding state binding laws. There is at least one other method for states to eliminate elector independence, in accordance with the Constitution and current federal law, even if the Court holds that any state action after elector appointment is unconstitutional: delay certifying electors' appointment until after they have correctly marked their ballots. In this way state binding laws are transformed from laws imposing conditions on appointment that are enforced *post*-appointment to laws enforcing the same conditions *pre*-appointment.

A. *State Binding Laws Are Valid Exercises of Power over State Officers*

State binding laws are constitutional because presidential electors are state officers and states, both before and since ratification of the Constitution, have always exercised plenary discretion, subject to minimal constitutional protections under the First and Fourteenth Amendments,²⁶ over state officers' roles and how, when, and why they are removed from their posts. In 1890, the Supreme Court proclaimed that “[a]lthough the electors are appointed and act under and pursuant to the constitution of the United States,” they, like members of the state legislatures acting as electors of U.S. senators before the Seventeenth Amendment, are not federal officers.²⁷ The Washington Supreme Court and the Tenth Circuit cited the same proposition,²⁸ but like many courts before them, they did not definitively say whether that makes electors state officers. In its standing analysis the Tenth Circuit explicitly abstained from resolving that question,²⁹ despite the trial court's conclusion that electors are indeed state officers.³⁰ At the same time, the Tenth Circuit strongly hinted that electors are not state officers³¹ but more like the electors, or voting public, who select members of Congress.³²

²⁶ See, e.g., *Nev. Comm'n on Ethics v. Corrigan*, 564 U.S. 117, 125 (2011) (First Amendment); *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 593-95 (1898) (Fourteenth Amendment).

²⁷ *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890).

²⁸ See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 907 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.); *In re Guerra*, 441 P.3d 807, 811, 813 (Wash. 2019), *cert. granted sub nom.*, *Chiafalo v. Washington*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-465) (mem.).

²⁹ *Baca*, 935 F.3d at 908.

³⁰ *Id.* at 906; see also *Baca v. Colo. Dep't of State*, No. 1:17-cv-01937, 2018 WL 10322062, at *4 (D. Colo. Apr. 10, 2018), *rev'd*, 935 F.3d 887 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

³¹ See *Baca*, 935 F.3d at 946 (“[T]he states have no authority over the electors’ performance . . .”).

³² *Id.* at 945-46.

Despite both courts' inattention to the status of electors, concluding that electors are state officers is key to determining that the correct constitutional inquiry seeks an explicit *prohibition* against state binding laws rather than explicit *permission* for them. Full recognition of electors as state officers would invalidate the Tenth Circuit's denial of state power to remove electors under the Tenth Amendment. The Tenth Circuit contended that "[t]he Tenth Amendment could not 'reserve' to the states the power to remove or bind electors because no such power was held by the states before adoption of the federal Constitution."³³ But of course states had the power to regulate the appointment and removal of *state* officers before adoption of the Constitution and they retain that power today.³⁴ That presidential electors did not exist prior to the Constitution does not limit the power of state legislatures over them—just as state legislatures are not limited in regulating state auditors, state transportation secretaries, and any number of other state offices created after 1789. Analysis under the Tenth Amendment then leads to the conclusion that state legislatures are free to enforce elector binding laws so long as nothing in the Constitution prohibits or precludes that power.

But are electors actually state officers? Some federal and state courts have concluded that they are.³⁵ Other state courts have demurred on the question,³⁶ and still others have explicitly denied that electors are state officers as matters of state law rather than federal constitutional law.³⁷ These latter courts appear to recognize the power of state legislatures to classify electors as state officers at their discretion, which as a matter of constitutional law seems implausible but does conform in some ways to the long-recognized understanding of states directing their electoral votes in whatever idiosyncratic way they desire.³⁸

The federal court decisions declaring electors to be state officers are predicated entirely on the Supreme Court's longstanding contention, most recently affirmed in 2000,³⁹ that electors are not federal officers. But even if the Court has been emphatic for the last 130 years that electors are *not* federal officers, it has never explicitly stated that electors are then state officers. The

³³ *Id.* at 939 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803-04 (1995)).

³⁴ *See, e.g.*, *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892); *In re Hennen*, 38 U.S. (13 Pet.) 230, 247 (1839).

³⁵ *See, e.g.*, *Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937); *Baca*, 2018 WL 10322062, at *4; *Park v. Parnell*, No. 3:16-cv-00281, 2016 WL 10650412, at *1 n.8 (D. Alaska Dec. 16, 2016); *Hadnott v. Amos*, 295 F. Supp. 1003, 1013 (M.D. Ala. 1968), *rev'd on other grounds*, 394 U.S. 358 (1969); *Chenault v. Carter*, 332 S.W.2d 623, 626 (Ky. 1960); *Mahoney v. Lomenzo*, 252 N.Y.S.2d 708, 710 (Sup. Ct. 1964); *Davis v. Simpson*, 244 P. 806, 808 (Okla. 1926).

³⁶ *See, e.g.*, *Opinion of the Justices*, 217 So. 2d 53, 55 (Ala. 1968).

³⁷ *See, e.g.*, *Spreckels v. Graham*, 228 P. 1040, 1044 (Cal. 1924) (in bank); *State ex rel. Spofford v. Gifford*, 126 P. 1060, 1067 (Idaho 1912); *Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944).

³⁸ *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 7 (1892).

³⁹ *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring).

Court's analogy to state legislators, who are themselves unquestionably state officers, certainly implies that electors are then also state officers. But the powers and duties of state legislators are created wholly by state constitutions and statutes, whereas presidential electors can trace their origins directly to the Federal Constitution. Even so, a state legislature's ability to effectively eliminate its state's electors by simply not appointing any, as New York managed to do in the 1788 election,⁴⁰ means that electors rely on more than just the Federal Constitution for their practical existence.

Possibly recognizing the limits to the state legislator comparison, the *Baca* court instead analogized presidential electors to the "electors" who, per Article I, Section 2, Clause 1 and the Seventeenth Amendment, elect members of Congress—in other words, general American voters.⁴¹ The Tenth Circuit's analogy has some textual appeal under the interpretative technique of intratextualism, which calls for "read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."⁴² But of course we understand that the electors who choose members of Congress are at least somewhat different from the electors who choose presidents in that only the latter occupy some official government position even if we can't define precisely the nature of that office. Additionally, general voters do not in fact have "unfettered discretion in casting their vote at the ballot box," as the Tenth Circuit asserts.⁴³ Ballot access laws keep candidates off the ballot and the Supreme Court has upheld laws prohibiting write-in candidates.⁴⁴ Perhaps states could enforce elector faithfulness by doing the same for Electoral College ballots.

Continuing the analogy, the Tenth Circuit further argued that any power state legislatures have to regulate elections for presidential electors and the manner in which electors cast their ballots must necessarily be lesser than the power state legislatures have to regulate congressional elections.⁴⁵ The Constitution gives states the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives,"⁴⁶ but there is no analogous delegation of power for regulating presidential elections. In fact, for presidential elections, the Constitution delegates some of that power to Congress, which "may determine the Time of chusing the Electors, and the Day on which they shall give their Votes."⁴⁷ Meanwhile state legislatures are only explicitly given

⁴⁰ See BENNETT, *supra* note 18, at 155.

⁴¹ See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 945 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

⁴² See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

⁴³ *Baca*, 935 F.3d at 945.

⁴⁴ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 442-443 (1992).

⁴⁵ See *Baca*, 935 F.3d at 945 n.28.

⁴⁶ U.S. CONST. art. I, § 4, cl. 1.

⁴⁷ *Id.* art. II, § 1, cl. 4.

the power to direct the manner in which electors are appointed.⁴⁸ But the Constitution implicitly reserved to the states broad authority over regulating state elections⁴⁹ and “the right to vote for presidential electors depends directly and exclusively on state legislation.”⁵⁰ If presidential electors are state officers elected in state elections, states then have broad authority over regulating how presidential electors vote and the conditions under which individuals can become electors, even without explicit permission in the Constitution.

Perhaps presidential electors are unique and have no helpful analog for determining their role in the constitutional scheme and the level of control states can exert over them. Those arguing against state binding laws in *Chiafalo* and *Baca* contend that electors are not “traditional state officeholders” and that regardless of their status, electors “are immune from key aspects of state regulation” given the federal function they perform.⁵¹ The litigants make two textual points, one strong and one a non sequitur. The strong one emphasizes that the Fourteenth Amendment prohibits certain traitorous persons from being an “elector of President” or “hold[ing] any office . . . under any State.”⁵² The Constitution’s inclusion of both the office of elector and state offices on the list of prohibited positions implies that the office of elector is not included under the heading of “any office . . . under any State.”⁵³ The opposite conclusion would make the inclusion of elector on the list superfluous.⁵⁴ Of course this surplusage canon should only be embraced with caution given that “humans speak redundantly all the time.”⁵⁵

A similar logic applied to the Twenty-Fourth Amendment is said to reinforce electors non-state status, but the logic doesn’t withstand scrutiny. The Twenty-Fourth Amendment prohibits poll taxes that deny the right to vote “in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress.”⁵⁶ Because the amendment says nothing about poll taxes in elections for typical state offices like governor and state legislator but does cover elections for presidential electors, the office of elector must not be a typical state office, so the argument goes.⁵⁷ Of course if the Twenty-Fourth Amendment had also prohibited poll taxes in gubernatorial races but not state legislative races, we

⁴⁸ *Id.* art. II, § 1, cl. 2.

⁴⁹ *See id.* art. II, § 4, cl. 1; *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).

⁵⁰ *Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937).

⁵¹ *See* Respondents’ Brief in Support of Certiorari at 24, *Colo. Dep’t of State v. Baca*, No. 19-518 (Nov. 20, 2019), 2019 WL 6211320, at *24 [hereinafter *Baca* Respondents’ Brief].

⁵² U.S. CONST. amend. XIV.

⁵³ *See Baca* Respondents’ Brief, *supra* note 51, at 24.

⁵⁴ *See id.*

⁵⁵ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2161 (2016).

⁵⁶ U.S. CONST. amend. XXIV.

⁵⁷ *Baca* Respondents’ Brief, *supra* note 51, at 24-25.

would not similarly conclude that governors are not state officers. The respondents in *Baca* write that the amendment bans poll taxes as a requirement for voting in “federal elections,” but the amendment in fact makes no reference to “federal elections.” It merely lists several elections to which the amendment applies, three of which happen to be quintessentially federal. It doesn’t follow that the inclusion of elections for electors among the three federal elections somehow means that elections for electors are not state elections, any more than the inclusion of an apple in a bowl of three vegetables makes the apple a vegetable.

No matter how electors are classified states must have some power to replace appointed electors. If not, states would be forced to forgo electoral votes when electors passed away or were imprisoned before convening in December or simply failed to show up at the required time. There is no limiting principle to distinguish a state’s power to fill vacancies under these circumstances from a state’s power under other circumstances a state might establish. The scenario in which an elector fails to report for duty provides the clearest example. If states have no discretion in declaring vacancies, they would be forced to equate a no-show elector with an elector who abstains from voting. True abstentions are possible and have been recognized by states and Congress,⁵⁸ but nobody seriously contends that states are required to relinquish one of their electoral votes if intervening circumstances prevent an elector’s attendance at the Electoral College vote.

Unlike for members of Congress,⁵⁹ the President,⁶⁰ and executive officers,⁶¹ the Constitution is silent on filling vacancies in the offices of electors. It also does not say when the term of an elector ends. Surely the Constitution does not require states to maintain the same electors from election to election until they voluntarily leave office. As with electors, the Constitution makes no specific mention of how vacancies in executive offices arise, but the Supreme Court has since declared that “the power of removal of executive officers [is] incident to the power of appointment”⁶² even though “the Constitution contains no words which specifically grant to the President power to remove duly appointed officers.”⁶³ The Tenth Circuit held that an incidental removal power cannot likewise be read into the state legislatures’ power to appoint electors because “the power to remove subordinates in the executive branch derives from the President’s broad executive power” and electors are not responsible for carrying

⁵⁸ *Faithless Electors*, FAIRVOTE, https://www.fairvote.org/faithless_electors [<https://perma.cc/A66R-VZ74>] (last updated Mar. 13, 2020).

⁵⁹ See U.S. CONST. art. I, § 2, cl. 4; *id.* amend. XVII.

⁶⁰ See *id.* art. II, § 1, cl. 6; *id.* amend. XX; *id.* amend. XXV.

⁶¹ See *id.* art. II, § 2, cl. 3.

⁶² *Myers v. United States*, 272 U.S. 52, 119 (1926).

⁶³ *Id.* at 238.

out a state function.⁶⁴ The former ignores a recognized incidental removal power outside the context of the executive branch and specifically in the context of state officers,⁶⁵ and the latter is a dubious proposition given the Court's repeated affirmation that electors "transmit the vote *of the state* for president and vice-president."⁶⁶

The lack of specificity around the many scenarios in which we would like to see electors replaced implies that we must look beyond the Constitution to settle these questions. Given that state legislatures are entrusted with the appointment power and electors are intended to transmit the vote of their state, state legislatures are the most obvious body for establishing rules for creating and filling vacancies. Congress is another possible choice, but the plenary appointment power delegated to state legislatures is more related to vacancy procedures than to Congress's limited constitutional powers of "determin[ing] the Time of chusing the Electors, and the Day on which they shall give their Votes."⁶⁷ Even if we assume Congress holds the power, Congress has provided ample room for states to determine the circumstances that create vacancies and the procedures for filling them.⁶⁸ Because electors are either state officers, or at the very least because the Constitution and federal law imply that states have the power to fill vacancies and by extension to declare when a vacancy exists, state binding laws, including Washington's fine and Colorado's remove-and-replace mechanism, are constitutional.

B. *Alternative Mechanism: Bind Electors by Delaying Appointment Certification*

State binding laws that enforce elector faithfulness with post-appointment sanctions like a fine or removal from office are not, however, the only available methods for states to ensure that electors support their states' popular-vote winners. State binding laws could still pass constitutional muster even if electors are not considered state officers and the Court strikes down binding laws like Washington's and Colorado's, which exert control over electors *after* they have been appointed. A decision against binding laws on the grounds that state control over electors is plenary only up to the moment of appointment could be avoided by instead conditioning official appointment on electors marking their ballots

⁶⁴ *Baca v. Colo. Dep't of State*, 935 F.3d 887, 941 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (U.S. Jan. 17, 2020) (No. 19-518) (mem.).

⁶⁵ *See supra* note 34.

⁶⁶ *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (emphasis added); *see also* *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

⁶⁷ U.S. CONST. art. II, § 1, cl. 4.

⁶⁸ *See* 3 U.S.C. § 4 (2018) ("Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.").

for the state's popular-vote winner.⁶⁹ In other words the persons who convene in their respective states would not be declared official electors until they had correctly *marked* ballots but before they had *cast* those ballots.

The constitutionality of a pre-appointment dismissal mechanism draws on reasoning used by the Uniform Law Commission to defend the Uniform Faithful Presidential Electors Act (UFPEA).⁷⁰ The UFPEA's alleged constitutionality rests on the proposition that "[m]arking and casting [ballots] are distinct acts, both physically and conceptually."⁷¹ If a voter simply marks a ballot but does not deposit it in the ballot box or marks a ballot that does not comply with legal requirements, one could not say that the voter had also cast a ballot.⁷² By delaying elector appointment until the day of voting, states can exercise their authority over elector appointment, including setting certain qualifications or conditions as permitted in *Ray*, to establish the marking of ballots for the state's popular-vote winners as an appointment condition. Refusal to properly mark one's ballot would result in dismissal of an elector finalist and replacement by an alternate finalist. Once all of the ballots have been properly marked, the finalists would be officially appointed and their votes would then be cast.

Such a scheme is valid under the Constitution and federal law. The Constitution gives Congress the power to "determine the Time of chusing the Electors."⁷³ Pursuant to that power, Congress established "Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President" as the Time when "[t]he electors of President and Vice President shall be appointed."⁷⁴ This section read alone seems to preclude states from delaying the electors' official appointment until they mark ballots, but the preceding sections in Title Three give states the necessary wiggle room. Section Two, for example, says, "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."⁷⁵ Additionally, "[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote."⁷⁶ Section Five allows procedures established by state law to adjudicate any "controversy

⁶⁹ See *Ray v. Blair*, 343 U.S. 214, 227 (1952) (recognizing state's plenary power to appoint electors including by imposing pre-appointment qualifications on elector candidates).

⁷⁰ See Brief of Amicus Curiae National Conference of Commissioners on Uniform State Laws Supporting Petitioner at 13-21, *Colo. Dep't of State v. Baca*, No. 19-518 (Nov. 20, 2019), 2019 WL 6271906, at *13-21.

⁷¹ *Id.* at 18.

⁷² See *id.*

⁷³ U.S. CONST. art. II, § 1, cl. 4.

⁷⁴ See 3 U.S.C. § 1.

⁷⁵ *Id.* § 2.

⁷⁶ *Id.* § 4.

or contest” over appointment,⁷⁷ and Section Six puts the state’s executive in charge of communicating the results of such adjudications to the U.S. Archivist.⁷⁸ Together these sections provide states with statutory authority to appoint their electors on the day electors vote rather than on the day general voters vote for electors.

CONCLUSION

The pending Supreme Court decision on state binding laws has put a giant spotlight on America’s absurd process for selecting its chief executive. The electors challenging their states’ binding laws hope that a decision in their favor will catalyze broader changes to the presidential selection process by reminding the public that faceless electors, not American voters, wield ultimate control over who will lead the executive branch and country. While a laudable goal, the view is overly optimistic. Instead the system would in all likelihood carry on with a slightly higher but still low risk that faithless electors will deny the presidency to the presumptive winner. Even if the Court’s decision provoked the desired call to reform, it is not clear that the diverse spectrum of opponents of faithless electors would coalesce around the more fundamental changes the litigants seek. In all likelihood they would not be able to coalesce around any changes with calls for constitutional amendments that simply eliminate human electors or grant states permission to legally bind electors shot down by those seeking larger-scale reforms.

The Electoral College has been broken from the start and remains so today, but faithful electors are not why. Giving a minority of voters the right to select the President against the wishes of the majority because they happen to live in states whose arbitrarily drawn borders created sparsely populated jurisdictions with at least three electoral votes is of course anti-democratic and a poor method to select a nation’s leader. But so too is a system that lets electors unknown to American voters choose for themselves.

The Supreme Court should minimize the risk that electors are able to disregard the wishes of their state’s voters and elect a President of their choice by upholding state binding laws like Washington’s fine and Colorado’s remove-and-replace mechanism. The Constitution does not prohibit such laws. Because there is no constitutional prohibition and electors are state officers, states are free to exercise substantial control over electors, including conditioning their appointment and establishing the grounds for their removal and replacement.

If the Court disagrees on the constitutionality of the binding laws at issue, alternative binding laws that delay electors’ appointment until after they have already proven that they will mark a ballot in accordance with a pledge to support the state’s popular-vote winner would still be constitutional under existing Supreme Court precedent and federal law. State legislatures and political parties should enact pre-appointment binding laws and other

⁷⁷ *Id.* § 5.

⁷⁸ *Id.* § 6.

mechanisms for deterring faithless electors, such as open ballots for electoral votes, party pledges like the one upheld in *Ray*, delegation of elector selection to the party's presidential nominee,⁷⁹ and prohibitions on lobbying or contacting electors before they meet in December.⁸⁰

⁷⁹ See Vikram David Amar, *Three Observations About the (Limited) Impact of the Tenth Circuit's Recent Decision (in Baca v. Colorado Department of State) Concerning "Faithless" Electors in the Electoral College*, VERDICT (Sept. 5, 2019), <https://verdict.justia.com/2019/09/05/three-observations-about-the-limited-impact-of-the-tenth-circuits-recent-decision-in-baca-v-colorado-department-of-state-concerning-faithless-electors-in-the-electoral> [<https://perma.cc/P75D-WXST>].

⁸⁰ See generally Robert M. Alexander, *Lobbying the Electoral College: The Potential for Chaos*, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 159, 159-74 (Gary Bugh ed., 2010) (discussing past efforts to lobby electors between Election Day and when electors cast their ballots).