No. 19-465

In the Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR RESPONDENT STATE OF WASHINGTON

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QUESTION PRESENTED

If a person volunteers to serve as a presidential elector for a State and pledges, as a condition of their appointment, to vote for the presidential candidate nominated by their political party and selected by the State's voters, is it unconstitutional for the State to fine the person for violating that pledge?

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INTRODUCTION

The text and original understanding of the Constitution, affirmed by centuries of historical practice and precedent from this Court, demonstrate that States can bind presidential electors to their voters' will. The contrary arguments offered by Petitioners (the Electors) crumble under examination and pose dangerous risks for our democracy.

Under the Constitution, "[e]ach State shall appoint" electors "in such Manner as the Legislature thereof may direct[.]" U.S. Const. art. II, § 1. Thus, "the appointment and mode of appointment of electors belong exclusively to the states[.]" *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). The Framers used "the word 'appoint'" to "convey[] the broadest power of determination," *id.* at 27, and since the framing the "default rule" has been that power to appoint includes power to remove or sanction, *see, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). States' power to appoint electors thus includes power to remove or sanction those who violate the conditions of their appointment. And nothing in the Constitution bars States from conditioning appointment on committing to follow the voters' will. *Ray v. Blair*, 343 U.S. 214, 228 (1952).

The Framers would not have objected to States requiring electors to follow the voters' will. During the constitutional convention, no delegate argued that electors should be free to ignore the will of their appointing States. From the very first presidential election in 1788, electors promised to vote for particular candidates and voters supported them on that premise. *Id.* at 228 n.15. By the time the Twelfth

Amendment was adopted in 1804, creating our current Electoral College system, the role of electors was understood to be "simply to register the will of the" State. *McPherson*, 146 U.S. at 36. And that Amendment was premised on electors following the voters' will. *See Ray*, 343 U.S. at 224 n.11.

Based on constitutional text and original understanding, our country's enduring historical practice has been that electors vote as directed. Less than one percent have ever been faithless, and before 2016, no elector had ever broken a pledge in a State with laws penalizing such conduct.

This Court's precedent confirms this historical understanding. The Court unanimously held over a century ago that the "sole function of the presidential electors is to cast, certify, and transmit the vote *of the state* for president[.]" *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (emphasis added). And although the Electors claim a constitutional "right to vote with discretion," Electors' Br. 16, this Court has specifically rejected "the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice[.]" *Ray*, 343 U.S. at 228.

Accepting the Electors' position not only requires ignoring constitutional text, history, and precedent, but also leads to bizarre and dangerous consequences. It would mean that elections for the most powerful office in our government are and

always have been hollow exercises, because electors have unfettered discretion regardless of the outcome. Such a ruling would profoundly undermine public confidence in the value of participating in our democracy. Moreover, accepting the Electors' claim that "a state's power over electors ends" the moment they are appointed, Electors' Br. 4, would mean that a State could not remove or sanction an elector after appointment even if it learned that he was offering his vote to the highest bidder, was being blackmailed by a foreign power, or had lied about his eligibility to serve. Fortunately for our democracy, nothing in the Constitution requires these results.

This Court should reaffirm the Constitution's—and our society's—enduring vision of the limited role of electors. These 538 individuals are empowered to implement the people's will, not to thwart it. Theirs are not the only votes that matter.

STATEMENT OF THE CASE

I. History of the Electoral College

A. Adoption of the Electoral College in Article II

At the Constitutional Convention, delegates considered a range of methods for choosing the President. *See McPherson*, 146 U.S. at 28. Some supported direct popular elections, but most delegates saw that approach as logistically impossible, and Southern States opposed it because it would weaken their influence due to their disenfranchisement of enslaved people. *See id.*; Tadahisa Kuroda, *The Origins of the Twelfth Amendment* 9 (1994). Some wanted Congress to choose the President, but many

delegates feared this would leave the President too dependent on Congress. *See McPherson*, 146 U.S. at 28; 2 *The Records of the Federal Convention of 1787* (*Farrand*) 29 (Max Farrand ed., 1911). Some wanted the President to be determined by electors chosen by state legislatures, while others wanted electors chosen by the people in each State. *See McPherson*, 146 U.S. at 28; 2 *Farrand* 56-59. Alexander Hamilton wanted a system far removed from the public, in which the President would be chosen "by electors chosen by electors chosen by the people." *McPherson*, 146 U.S. at 28; *see* 3 *Farrand* 617, 622-23 (Appendix F: The Hamilton Plan).

The delegates voted down variations of all of these proposals, *McPherson*, 146 U.S. at 26-29, and then formed a committee of eleven delegates to seek a compromise, 2 *Farrand* 473. The committee included several proponents of direct popular elections, such as James Madison and Gouverneur Morris, but did not include Hamilton. *See* 2 *Farrand* 473; Note, *State Power to Bind Presidential Electors*, 65 Colum. L. Rev. 696, 705 (1965).

The committee's proposal—approved with minimal changes in Article II—"reconciled [all] contrariety of views" by adopting a system of electors but allowing state legislatures "exclusively to define the method" of appointing electors. *McPherson*, 146 U.S. at 28, 27; *accord* 3 *Farrand* 209-11. To facilitate a broad range of options, States' power to "appoint" electors "was manifestly used as conveying the broadest power of determination." *McPherson*, 146 U.S. at 27. In discussing electors, "[n]o delegate argued that electors would be disinterested persons exercising their own judgment without reference to

prevailing opinion and interests in their states." Kuroda 11; *accord* Robert Hardaway, *The Electoral College and the Constitution* 86 (1994) (reviewing "the strong evidence that the framers did not intend electors to exercise independent judgment"); 2 *Farrand* 499-503 (chronicling debates between delegates following the committee's proposal).

Much of the language the delegates adopted remains unchanged today: "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. The original constitutional text specified that electors were to "meet in their respective States, and vote by Ballot for two Persons[.]" U.S. Const. art. II, § 1 (original text). The person with the greatest number of electoral votes would be President, if he received a majority. *Id.* If he did not receive a majority, the House of Representatives would choose the President from the top five candidates. *Id.* In either event, the person having the next greatest number of votes would be Vice President. *Id.*

After agreeing to this language, delegates returned to their States to debate ratification, and in doing so described the role of electors in differing ways. Hamilton portrayed electors as independent (though never having expressed this view during the Convention debates). *See The Federalist No. 68* (Alexander Hamilton). But many others, including Madison, "repeated over and over again that the mode

of electing the President depended ultimately not on states or electors but the people." Kuroda 20; *see e.g.*, 2 *Farrand* 587 (Madison stating that the President "is now to be elected by the people"); 5 *The Writings of James Madison: 1787-1790*, at 211 (Galliard Hunt ed., 1904) (the President was to be "the choice of the people at large").

B. Early Operation of the Electoral College

Two unanticipated developments post-ratification quickly rendered the original Electoral College system problematic. *See Ray*, 343 U.S. at 224 n.11.

First, political parties emerged and began supporting candidates for President and Vice President. *Id.* at 229 n.16; *see also* Joseph Story, *Commentaries on the Constitution of the United States* § 1457 (1833). For example, in the first presidential election in 1788, Federalists and Antifederalists in multiple States prepared lists of approved candidates for elector who would support the parties' candidates for President and Vice President. Kuroda 34; *id.* at 33, 35, 37. In New York, Hamilton's home state, Federalists and Antifederalists each fought to adopt a system for choosing electors "that would make certain their control over electors." Kuroda 49. Neither party "believed that presidential electors were to . . . exercis[e] their independent judgment about who should be President[.]" Kuroda 49. This practice became so widespread that by the 1796 election, "[i]n nine states, all the electors cast their votes for two men of the same party." Kuroda 70. And in the run-up to the 1800 election, there was "scrambling in State

after State to revise the mode for choosing electors so that one party or the other would gain an edge." Kuroda 73; Joshua Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501, 1535-36 (2014) (same).

The emergence of parties created a problem under the original system. Because the Vice President was the runner-up in the electoral count, there was a risk of a President and Vice President of different parties, an outcome that occurred in 1796 and "which could not commend itself either to the Nation or to most political theorists." *Ray*, 343 U.S. at 224 n.11; *see also* 6 *Annals of Cong*. 2096-98 (1797).

A second and closely related development was that, from the very "'first election held under the constitution,'" electors began pledging themselves to vote for particular candidates. *Ray*, 343 U.S. at 228 n.15 (quoting S. Rep. No. 22, 19th Cong., 1st Sess. (1826), p. 4). "'[T]he people looked beyond these agents [electors], fixed upon their own candidates for President and Vice President and took pledges from the electoral candidates to obey their will.'" *Id.* (second alteration in original). "'In every subsequent election, the same thing has been done.'" *Id.*

Thus, elector behavior and public sentiment quickly dashed the hopes of any Framers who may have expected electors to exercise independent judgment. In State after State, electors pledged their votes and met to cast predetermined votes. *See Ray*, 343 U.S. at 228 n.15; Keith Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 904, 911 (2017); Kuroda 31 (Massachusetts electors in 1788 "gathered

to perform the sole duty of casting a predetermined vote"), 59 (in 1792, "New York did not go through any pretense that their electors were free to vote for whomever they wished"), 61 (explaining the 1792 election "results depended on the appointment of electors already committed to particular candidates and parties"), 67 (examples of electors who pledged in advance "for whom they would vote" in the 1796 election). By 1800, observers would say that electors had voted "'fairly'" if they voted "'faithfully' and in accordance with the expectations of those who had appointed them." Kuroda 99; Story § 1457.

These pledges and party preferences created a challenge: "[i]f all the electors of the predominant party voted for the same two men," who they wanted to be President and Vice President, "the election would result in a tie, and be thrown into the House, which might or might not be sympathetic to that party." *Ray*, 343 U.S. at 224 n.11. This occurred in 1800, when the Republican candidates for President and Vice President—Thomas Jefferson and Aaron Burr—received the same number of electoral votes, and the House of Representatives, controlled by Federalists, chose between them. *See* 10 *Annals of Cong.* 1022-28 (1801). It took thirty-six ballots to break the tie and declare Jefferson President. 10 *Annals of Cong.* 1028.

C. The Twelfth Amendment

In 1804, in response to the "manifestly intolerable" outcomes of the 1796 and 1800 elections, Congress proposed and the States ratified the Twelfth Amendment, requiring electors to vote by separate ballot for President and Vice President. *Ray*, 343 U.S. at 224 n.11; U.S. Const. amend. XII. The amendment's purpose was to embrace the by-then standard practice of parties choosing preferred candidates and electors pledging to support them. "Under this procedure, the party electors could vote the regular party ticket without throwing the election into the House. Electors could be chosen to vote for the party candidates for both offices, and the electors could carry out the desires of the people, without confronting the obstacles which confounded the elections of 1796 and 1800." *Ray*, 343 U.S. at 224 n.11 (citing 11 *Annals of Cong.* 1289-90 (1802)); *id.* at 228 n.15 ("'[T]he people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President. Therefore, practically, the very thing is adopted, intended by this amendment.'"). Thus, by the time of the Twelfth Amendment, electors operated much like they do today. *See id.* at 228 ("History teaches that the electors were expected to support the party nominees."); Kuroda 172 (at the time of ratification, "the Constitution's provision for presidential electors assumed its modern aspect").

The election of 1804, the first after the Twelfth Amendment, illustrates how it was intended to operate. Republicans decided that Jefferson would be their nominee for President and George Clinton for Vice President. *See* Edward Stanwood, *A History of Presidential Elections* 49 (1884). Federalists agreed to

support Charles Pinckney for President and Rufus King for Vice President. *See* Stanwood 49. Then, in State after State, electors were chosen on a partisan basis to support these candidates. *See* Stanwood 50. In States where legislators appointed electors, such as New York, legislators chose electors committed to vote for the party ticket. Kuroda 166-67. In States where the people chose electors, like Massachusetts, both parties distributed lists of electors pledged to support their nominees. Kuroda 165. When the electors met in their States, they all did as directed. Only the party nominees received any electoral votes, with Jefferson and Clinton each receiving 162, and Pinckney and King each receiving 14. *See* 14 *Annals of Cong.* 56 (1805).

It was clear to the public, press, and elected officials in 1804 that the meetings of electors were formalities. Newspapers in many States reported before the electors met how they would vote. *See* Kuroda 166; *Republican Spirit!*, Independent Chron., Nov. 5, 1804, https://www.loc.gov/resource/rbpe.04702200/ (announcing before Massachusetts electors met that they would vote for Jefferson and Clinton). In New York, newspapers described the electors as "the merest machines," and their meeting as "a little specious formality[.]" Kuroda 166. Rhode Island electors signed ballots "previously prepared in a common hand" that listed Jefferson for President and Clinton for Vice President. Kuroda 165. In Georgia, all twelve ballots were for Jefferson and

Clinton and all in the same handwriting, "suggest[ing] that the use of the ballot was a mere formality." Kuroda 168. When Congress met in joint session to count these electoral votes, no one challenged any ballot. Kuroda 169.

In short, from the earliest days of American history, "whether chosen by the legislatures or by popular suffrage on general ticket or in districts, [electors] were so chosen simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36. By the early 1800s, for an elector to vote against his pledge "would be treated[] as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." Story § 1457.

II. History of State Appointment and Regulation of Electors

A. The States' Plenary Power

The Constitution allows state legislatures "exclusively to define the method" of appointing electors. *McPherson*, 146 U.S. at 27; *see also* 10 *Annals of Cong*. 128-29 ("By the Constitution, Electors of a President are to be chosen in the manner directed by the State Legislatures—this is all that is said.").

States initially exercised this plenary power in various ways. *See McPherson*, 146 U.S. at 28-35 (chronicling States' practices for appointing electors through 1877). In some States, legislatures appointed electors, while others used popular elections. *Id*. at 29.

By the mid-1800s, nearly all States used the popular vote to appoint electors. *McPherson*, 146 U.S. at 32-33. It also became standard practice for States to allow political parties to nominate electors pledged to the parties' candidates. *See Ray*, 343 U.S. at 228-29 & nn.15-16. States then held popular elections in which state citizens voted either for the slate of electors nominated by the political parties or, more commonly, for the presidential and vice presidential candidates themselves. *Id.* at 229. In the latter case, a vote for specific presidential and vice presidential candidates counted as a vote for the slate of electors pledged to those candidates. *Id.*

Today, all fifty States and the District of Columbia vest the right to vote for President in their citizens. All also delegate to political parties selection of electors in some way.[1]

The overwhelming majority of States do not name presidential elector candidates on general election ballots; rather, when voters cast their ballots, they vote for a particular President and Vice President. *See Electoral College: About the Electors supra* note 1. Review of 2016 ballot forms shows that forty-four States and the District of Columbia

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[1] Nat'l Archives, *Electoral College: About the Electors*, https://www.archives.gov/electoral-college/electors (last visited Mar. 29, 2020); Nat'l Ass'n of Sec'ys of State, *Summary: State Laws Regarding Presidential Electors* (Nov. 2016), https://perma.cc/V3U8-MJ6L (summarizing state electoral laws as of November 2016).

listed only the names of the candidates for President and Vice President, not listing electors at all. The others listed both electors and candidates for President and Vice President, all under party labels, treating the electors and nominees as a unit. *See also* Richard Niemi & Paul Herrnson, *Beyond the Butterfly: The Complexity of U.S. Ballots*, 1 Persp. on Pol. 317, 323 (2003).

States have set a range of elector qualifications, such as requiring that electors be qualified registered voters or residents of specific districts for a specified period. *See* App. B.

States have also exercised their plenary power by enacting myriad mechanisms to ensure that electors adhere to the State's popular vote. *See Summary: State Laws Regarding Presidential Electors supra* note 1. Many States require electors to take an oath or pledge or to vote for the candidates who won the States' popular vote. *See* App. A. Other States require electors to vote for the candidates of the political party they represent. *See* App. A. Some States will count a faithless elector's ballot but impose a sanction (as Washington did in 2016), while other States prevent the counting of such a ballot, removing and replacing any elector who attempts to vote contrary to their pledge. *See* App. A.

B. Congressional Recognition of States' Broad Authority

Congress has long acknowledged States' plenary authority over electors. Beyond the constitutional language granting States appointing authority, federal law specifies that "each State may, by law, provide for the filling of any vacancies . . . in

its college of electors[.]" 3 U.S.C. § 4. Additionally, a State may "by laws enacted prior to the day fixed for the appointment of electors" come to a "*final determination* of any controversy or contest concerning the appointment of all or any of the electors of such State[.]" 3 U.S.C. § 5 (emphasis added). Federal law also specifies that Congress generally must defer to State decisions in several respects as to a State's electoral votes if the State has certified them as valid. 3 U.S.C. § 15.

Congress has also explicitly recognized that elector discretion may be bound. In 1960, when many States had already adopted laws requiring electors to vote as pledged, Congress passed the Twenty-third Amendment, granting the District of Columbia the right to "appoint [electors] in such manner as Congress may direct[.]" Shortly after ratification, Congress followed the lead of most States by enacting a statute requiring D.C.'s electors to follow the District's popular vote. *See* Pub. L. 87-389, 75 Stat. 817-20 (Oct. 4, 1961). Every presidential elector in the District must pledge "that he will vote for the candidates of the party he has been nominated to represent, and it shall be his duty to vote in such manner in the electoral college." *Id.* at 819; *see* D.C. Code 1-1001.08(g).

III. Washington's 2016 Electoral College

A. Petitioners are Nominated as Electors After Pledging Their Votes

Washington State exercised its authority under Article II, Section 1 by enacting statutes governing the State's participation in the Electoral College. Pet. App. 51a-54a (former Wash. Rev. Code §§ 29A.56.310-

.360). In 2019, the State significantly revised its laws, including eliminating the provision at issue in this case. *See* 2019 Wash. Sess. Laws 755-58 (codified as Wash. Rev. Code §§ 29A.56.080-.092, .320-.350).[2] The State describes here the laws as they existed during the 2016 election.

In a presidential election year, each political party in Washington that nominates candidates for President and Vice President "shall [also] nominate presidential electors for this state." Former Wash. Rev. Code § 29A.56.320. The party must then submit to the Secretary of State a certificate listing the party's presidential electors. Former Wash. Rev. Code § 29A.56.320. For the 2016 election, the Democratic Party certified twelve electors, including Petitioners. *See* Pet. App. 39a.

As a condition of appointment, State law required that "[e]ach presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by [their] party." Former Wash. Rev. Code § 29A.56.320. State law also provided that "[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." Former Wash. Rev. Code § 29A.56.340. Washington law thus did not disqualify faithless

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[2] Washington's current law creates an elector vacancy if electors violate their pledge. Wash. Rev. Code §§ 29A.56.084, .090(3).

electors or exclude their ballots, it simply imposed a financial penalty if they violated their pledge. Petitioners signed and submitted pledges agreeing to "vote for the candidates nominated by the Democratic Party for the President of the United States and Vice President of the United States." BIO App. 41a (Chiafalo), 44a (Guerra), 1a (John).

As in most States, the names of electors do not appear on Washington's general election ballot. Former Wash. Rev. Code § 29A.56.320. Voters instead cast ballots for presidential candidates. Wash. Rev. Code § 29A.36.161(4); Former Wash. Rev. Code § 29A.56.320. Each vote for President counts for that candidate's slate of electors. Wash. Rev. Code § 29A.56.320. Once the votes are certified, the winner of Washington's popular vote for President determines which party's electors serve as Washington's electors. Former Wash. Rev. Code §§ 29A.56.320, .330; *see also* BIO App. 6a, 27a-34a.

Hillary Clinton and Tim Kaine won Washington's 2016 popular vote. BIO App. 6a. The Democratic Party's slate of electors, including Petitioners, thus served as Washington's electors. BIO App. 27a, 33a-34a.

B. Petitioners Violate Their Pledge at Washington's Meeting of the Electoral College

Shortly before the Electoral College meeting, Petitioners Chiafalo and Guerra sought an injunction in federal court, arguing that former Wash. Rev. Code § 29A.56.340 violated the Constitution. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140 (W.D. Wash. 2016). The district court denied their request, concluding

that Chiafalo and Guerra were unlikely to prevail on their constitutional claims. *Id.* at 1444-46. The Ninth Circuit denied Chiafalo and Guerra's emergency motion for an injunction pending appeal, finding that they had not "shown a likelihood of success or serious questions going to the merits[.]" *Chiafalo v. Inslee*, No. 16-36034 (9th Cir. Dec. 16, 2016) (Docket No. 16).

Washington's Electoral College convened on December 19, 2016, as required by Article II, Section 1 and 3 U.S.C. § 7. *See* BIO App. 35a. State law provides that "[i]f there is any vacancy in the office of an elector . . . the electors present shall immediately proceed to fill [the vacancy] by voice vote[.]" Former Wash. Rev. Code § 29A.56.340. Electors thus have the option of declining to participate in the Electoral College and being replaced. Former Wash. Rev. Code § 29A.56.340. Instead, Petitioners each cast ballots in violation of their pledge, all for Colin Powell for President. BIO App. 39a-40a, 42a-43a, 45a-46a. Washington's electors then signed and submitted certificates memorializing the electoral votes cast for the State. BIO App. 35a-38a. On January 6, 2017, Congress counted the electoral votes submitted by the States, including Washington's twelve votes exactly as cast. 163 Cong. Rec. H185-190 (daily ed. Jan. 06, 2017).

IV. Proceedings Below

On December 29, 2016, Washington Secretary of State Kim Wyman, Chief Elections Officer for the State, issued Notices of Violation and a civil penalty of $1,000 against each Petitioner under

former Wash. Rev. Code § 29A.56.340. *See* Pet. App. 36a-43a. Petitioners challenged the notices administratively, and an administrative law judge affirmed the penalties. Pet. App. 42a-43a.

Petitioners sought judicial review in state court. Pet. App. 30a-35a.[3] The superior court denied the petition. Pet. App. 34a. The Washington Supreme Court affirmed, holding that it was within the State's "absolute authority in the manner of appointing electors" under Article II "to impose a fine on electors for failing to uphold their pledge[.]" Pet. App. 20a. Applying this Court's cases, the court rejected Petitioners' contention that the Constitution "prohibits a state from imposing certain conditions on electors as a part of the state's appointment powers, including requiring electors to pledge their votes." Pet. App. 16a. The court likewise rejected Petitioners' claims that the Twelfth Amendment "demands absolute freedom for presidential electors" and that the $1,000 penalty impermissibly interfered with a "federal function." Pet. App. 23a, 19a. "Unlike the cases appellants rely on for support that states cannot interfere with a federal function, here, the Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors." Pet. App. 19a. Finally, the court rejected Petitioners' claim that the penalty violated electors' First Amendment rights. Pet. App. 26a-27a.

This Court granted certiorari.

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[3] A fourth elector also violated his pledge but did not seek further judicial review.

SUMMARY OF ARGUMENT

Constitutional text, original understanding, precedent, and longstanding practice all confirm that States can require electors to follow the voters' will.

The Constitution allows each State to "appoint" electors "in such Manner as the Legislature thereof may direct[.]" U.S. Const. art. II, § 1. Since the founding, the "default rule" has been that the power to appoint includes the power to remove or sanction, unless the removal power is specifically limited. *See Free Enter. Fund*, 561 U.S. at 509. Nothing in the Constitution limits States' ability to remove electors who violate the conditions of their appointment.

The Electors claim that appointment power does not include removal power, citing as examples federal judges, Senators, and the independent counsel. But in each example, explicit language limits removal authority. The Electors also claim that the "default rule" applies only to presidential appointees, but this Court has rejected that position for nearly 200 years. *See In re Hennen*, 38 U.S. 230, 259-60 (1839). And the Electors' claim that founding-era definitions of "elector," "vote," and "ballot" require elector discretion is simply incorrect.

Original understanding also demonstrates that States have authority to bind electors to the people's will and remove or sanction those who refuse to comply. At the Convention, the Framers expressed no intention that electors have discretion. And the Framers of the Twelfth Amendment, which created the modern Electoral College, expected that electors

would behave faithfully. They viewed the role of electors as "simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36. Their key goals included facilitating state control over electors and preventing rogue electors from determining the outcome of an election. The Electors' only evidence of original intent, a quote from Hamilton, does not represent a shared view of the Framers, was contradicted by contemporary practice, and was thoroughly rejected by the time of the Twelfth Amendment.

This Court's precedent confirms State authority to control electors. This Court has held that the "sole function of the presidential electors is to cast, certify, and transmit the *vote of the state* for president and vice-president[.]" *Fitzgerald*, 134 U.S. at 379 (emphasis added). And the Court has rejected the argument that the Constitution creates a right "for the elector to vote his own choice, uninhibited by pledge." *Ray*, 343 U.S. at 228.

Longstanding practice confirms States' broad authority. Electors have pledged to support particular candidates, and have been chosen on that basis, in every presidential election since the first one, in 1788. *Ray*, 343 U.S. at 228 n.15. And States have removed and replaced electors who violated the conditions of their appointment since the founding. States, Congress, the public, this Court, and electors themselves have for centuries understood the electors' role as "to register the will of the" State. *McPherson*, 146 U.S. at 36. Our presidential election system has

long depended on this premise, as most States long ago stopped listing electors' names on the ballot because their identities are irrelevant. For the Court now to hold that electors are the only Americans whose votes matter would upend long-settled expectations and undermine Americans' confidence that their votes have any meaning. There is no basis for such a holding.

ARGUMENT

I. The Text and Original Understanding of the Constitution Demonstrate State Authority to Remove or Penalize Electors Who Violate the Conditions of their Appointment

The Constitution's text, as understood by those who wrote it and ever since, gives States plenary authority over appointment of presidential electors. This authority includes the power to impose conditions on elector appointment and to remove or penalize those who violate those conditions. While States can choose to let electors vote as they wish, they can also choose to require electors to vote as directed by the State's voters, and to penalize or remove those who refuse to do so.

A. Article II Places No Limits on State Ability to Impose and Enforce Conditions on Elector Appointment and to Remove Those Who Fail to Comply

Under Article II, Section 1 of the Constitution, "the appointment and mode of appointment of electors belong exclusively to the states[.]" *McPherson*, 146

U.S. at 35. "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. The Framers used "the word 'appoint'" to "convey[] the broadest power of determination," deliberately leaving it to States to decide how to choose electors because the Framers could not reach agreement. *McPherson*, 146 U.S. at 27, 28; *see also* Thomas Sheridan, *A General Dictionary of the English Language* (1780) (to appoint: "[t]o fix any thing; to establish any thing by decree"); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (citing founding-era dictionaries defining "appoint").

Under common usage when the Constitution was adopted, and still to this day, the "default rule" is that the power to "appoint" includes the power to remove. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 509 ("Under the traditional default rule, removal is incident to the power of appointment."); *Keim v. United States*, 177 U.S. 290, 293 (1900) (same). The Framers believed "that as a constitutional principle the power of appointment carried with it the power of removal." *Myers v. United States*, 272 U.S. 52, 119 (1926) (citing 1 *Annals of Cong.* 491 (1789)). "This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since." *Id.*

Where the Framers intended the appointment power not to include removal power, such as with federal judges, they explicitly said so. *See*

U.S. Const. art. III, § 1; *Shurtleff v. United States*, 189 U.S. 311, 316 (1903). Any limitation on the removal power "is not to be implied." *Myers*, 272 U.S. at 121. Rather, the right of removal "inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away." *Shurtleff*, 189 U.S. at 316.

The text and original understanding of the Constitution demonstrate that the "default rule" applies to electors.

As a textual matter, nothing in Article II or anywhere else in the Constitution expressly limits State authority to appoint or remove electors. To the contrary, in Article II, Section 1, the Framers used "the word 'appoint'" to "convey[] the broadest power of determination." *McPherson*, 146 U.S. at 27, 28. While States certainly must comply with other constitutional requirements in selecting electors, such as the Equal Protection Clause, *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam), nothing in Article II, Section 1 limits States' appointment or removal authority.[4]

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[4] The Electors claim that if States can bind Electors to the popular vote, they can also bind them to vote only for presidential candidates who meet various conditions, such as releasing their tax returns or taking specific policy positions. Electors' Br. 17. But States cannot impose additional "qualifications" to run for President, so those requirements would be unconstitutional if they counted as "qualifications." *See, e.g.*, *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1179 (E.D. Cal. 2019) (holding that state law requiring presidential candidates to release tax returns likely violated the presidential Qualifications Clause, U.S. Const., art. II, § 1, cl. 5.).

As a matter of original understanding, from the earliest days of the Republic it was commonly understood that the power to appoint electors included the power to impose conditions on their appointment and to remove or punish those who failed to satisfy those conditions. For example, even before the adoption of the Twelfth Amendment in 1804, multiple states had enacted laws allowing removal and replacement of electors who failed to show up for the meeting of the Electoral College, while others fined electors who failed to appear. Kuroda 55, 74, 167 (citing pre-1804 laws in North Carolina, Massachusetts, and Pennsylvania); 2 William Littell, *Statute Law of Kentucky*, ch. CCXII, § 20, at 352 (1810) (1799 Kentucky statute imposing fine and removal); 1788 Va. Acts, ch. I, § V, at 4 (Virginia fine statute); 1800 N.H. Laws 566-67 (New Hampshire removal statute). If State authority to "appoint" included no power to remove or regulate electors after appointment, such measures would have exceeded State authority, but the Framers never questioned them.

There is also no historical reason to think that the Framers would have considered it improper for States to remove or sanction an elector for refusing to follow the will of a State's voters. From our country's earliest days, electors were expected to follow the will of the State appointing them. Not a single Framer argued during the Constitutional Convention that "electors would be disinterested persons exercising their own judgment[.]" Kuroda 11. In State after State, from the very first election, legislators and political parties worked to ensure that

electors would vote faithfully for the presidential and vice-presidential candidates preferred by that State's voters. *Supra* pp. 6-8. They expected electors to cast "a predetermined vote," entertaining no "pretense that their electors were free to vote for whomever they wished." Kuroda 31, 59. The People, likewise, expected electors to behave faithfully, not independently. From "the first election held under the constitution, the people looked beyond these agents [electors], fixed upon their own candidates for President and Vice President and took pledges from the electoral candidates to obey their will. In every subsequent election, the same thing has been done." *Ray*, 343 U.S. at 228 n.15 (quoting S. Rep. No. 22). This was all widely known, yet no one suggested that it violated the Constitution.

Hamilton, of course, had suggested in *The Federalist No. 68* that electors should be independent, but even in his own state his view did not carry the day. *Supra* p. 6. His preferred approach simply was not embodied in the constitutional text or shared by other Framers.

B. The Twelfth Amendment Confirms State Authority to Impose and Enforce Conditions on Elector Appointment

If there were any doubt about State authority to condition elector appointment on following the will of the State's voters and to remove those who refuse to comply, the Twelfth Amendment eliminated it. The Framers of the Amendment had a clear shared understanding that "electors" were expected to follow

the will of the people. And one of their primary motivations was to prevent rogue electors from swinging the outcome of a presidential election, a goal incompatible with any constitutional right to elector independence.

By the adoption of the Twelfth Amendment, it was commonly understood that the job of electors was "simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36. Indeed, the Twelfth Amendment was premised on the idea that electors would vote as directed: "Electors could be chosen to vote for the party candidates . . . and the electors could carry out the desires of the people, without confronting the obstacles which confounded the elections of 1796 and 1800." *Ray*, 343 U.S. at 224 n.11 (citing 11 *Annals of Cong.* 1289-90). Thus, while the Framers of the Twelfth Amendment were well aware that States were choosing electors to carry out the people's will and electors were pledging to do so, they expressed no concern about these trends. Instead, they embraced this reality and amended the Constitution to make the system work in light of these developments. *See id.* at 228 n.15 (citing S. Rep. No. 22).

The Framers of the Amendment specifically wanted to limit electors' ability to override the people's choice for President. Because electors cast undifferentiated votes for President and Vice President prior to the Twelfth Amendment, Congress was concerned that electors of one party who opposed the other party's nominee for President could cast

their votes for the opposing party's vice-presidential nominee, making that person the President. Edward Foley, *Presidential Elections and Majority Rule* 29, 43 (2020). This was not a hypothetical concern: In the 1800 election, an Electoral College tie between the Republican nominees for President and Vice President, Jefferson and Burr, nearly allowed the Federalist-controlled House to install Burr as President. With the Republican ticket virtually certain to win the 1804 election, Congress was extremely concerned that Federalist electors could prevent Jefferson from being reelected by using some of their votes to support whoever the Republican vice-presidential nominee would be. Foley 29 ("[I]t was imperative to make sure that Federalists could not use the electors' second vote to cause someone other than Jefferson to get the most electoral votes."). Congress did not want a person to become President against the public will. Foley 30. Over and over again in the debate over the Amendment, members of Congress expressed the sentiment that: "The people hold the sovereign power, and it was intended by the Constitution that they should have the election of the [President.]" Foley 42. In short, the Framers of the Twelfth Amendment wanted to prevent electors from overriding the will of the majority, not to enable it. *See* Hawley, 55 Wm. & Mary L. Rev. at 1507, 1555.

The election of 1804, conducted immediately after adoption of the Twelfth Amendment, confirms that the Framers of the Amendment had no expectation of elector independence. Republicans and Federalists each developed a ticket and every elector

in the country voted for their party's nominees.[5] The meetings of the electors were a mere formality, ratifying decisions the voters and legislatures had already made. "Electors voted faithfully, not independently. They met to vote, not to deliberate." Kuroda 172; *see also id.* at 165, 168 (examples of how elector balloting was treated as a formality); *supra* pp. 9-11. The same members of Congress who had approved the Twelfth Amendment met to review the ballots. "There were no objections and no challenges to the votes." Kuroda 169. If the Framers of the Twelfth Amendment saw anything wrong with States controlling how their electors voted, they gave no indication.

C. The Electors' Contrary Reading of the Text and Original Understanding Cannot Withstand Scrutiny

Despite the Constitution's textual grant of authority to States to appoint electors and the clear historical understanding that States could impose and enforce conditions on elector appointment, the Electors claim a constitutional "right to vote with discretion." Electors' Br. 16. But their argument relies on selectively chosen definitions of a few terms while ignoring the rest of the constitutional text, structure, and history. And their argument leads to absurd results rejected since the founding.

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[5] In fourteen states, every elector voted for Jefferson and Clinton. 14 *Annals of Cong.* 56. In two states, every elector voted for Pinckney and King. *Id.* Only in Maryland, where electors were chosen by voters in districts, did the electors divide their votes. *Id.*; Kuroda 167-68.

1. The Electors' Fleeting Discussion of Original Understanding is Inaccurate and Incomplete

Although they claim that their position is the only one consistent with the Framers' intent, the Electors spend barely a page presenting evidence of the Framers' intent. Electors' Br. 18-19. Instead, citing the dissent in *Ray* and dicta in *McPherson*, they say "it is undisputed that" the Framers intended electors to have unfettered discretion. Elector's Br. 19. That is not what the historical record shows.

As detailed above, during the Constitutional Convention the Framers spent very little time discussing how electors would operate, and no one argued that "electors would be disinterested persons exercising their own judgment[.]" Kuroda 11. The Electors' only contemporaneous citation is to Hamilton's *Federalist No. 68*, but that was published months after the Convention ended (March 12, 1788) and was contradicted by statements of many other Framers, who "repeated over and over again that the mode of electing the President depended ultimately not on states or electors but the people." Kuroda 20; *supra* p. 6.

In any event, the Electoral College used today is not the one originally adopted, but rather the significantly revised approach of the Twelfth Amendment. *See, e.g.*, Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 407 (1995) ("[T]he Twelfth Amendment directly changed the method for electing a president described in Article II."). Thus, to

understand the intended role of electors, one must consider the intent of the Framers of that Amendment, who "gave far more extensive and well-developed thought to the design of the system they were adopting than the delegates to the Constitutional Convention of 1787 did in creating the original Electoral College." Foley 27. As detailed above, the Framers of the Amendment did not want to enable rogue electors, but rather to prevent them from dictating election outcomes. *Supra* pp. 26-27. They expected electors to continue faithfully following the directions of their appointing States, and they altered the election process to accommodate that. *Ray*, 343 U.S. at 224 n.11 (citing 11 *Annals of Cong.* 1289-90). They viewed the job of electors as "simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36. There is no historical evidence that they intended electors to have a constitutional right to ignore the will of voters.

Ignoring this evidence, the Electors claim that the Framers of the Twelfth Amendment must have intended elector independence because some electors voted faithlessly before 1804 and the Twelfth Amendment did not prohibit that. Electors' Br. 32-38. But the question in this case is not whether the Constitution itself *requires* electors to follow the popular will; the appointment of electors belongs "exclusively to the States," *McPherson*, 146 U.S. at 35, and States are free to allow their electors discretion, as some did before 1804 and as some do today. The question is whether the Constitution *prohibits* States from binding electors. By 1804, States routinely appointed electors precisely because they had pledged

to vote for particular candidates. *Supra* pp. 9-11, 26-27. Congress had no need to explicitly authorize what States were already doing, and Congress's decision not to prohibit faithless voting at most shows that the decision whether to do so remained with States.[6]

2. The Electors' Interpretation of "Appoint" Ignores Constitutional Text, Structure, and History, and Leads to Absurd Results

The Electors' primary textual argument is that in granting States authority to "appoint" electors, the Constitution gave States no authority to remove or regulate electors. They claim that as soon as a State appoints electors, "a state's power over electors ends." Electors' Br. 4. This suggestion is textually, historically, and practically untenable.

As detailed above, the "default rule" since the founding has been that power to appoint includes power to remove. *Free Enter. Fund*, 561 U.S. at 509; *Myers*, 272 U.S. at 122. And the power to remove of course includes the power to impose lesser sanctions. *See Burnap v. United States*, 252 U.S. 512, 515 (1920)

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[6] The Electors exaggerate "faithless" voting pre-1804. They claim that electors behaved "anomalously" if they intentionally voted for a candidate other than their party's Vice-Presidential nominee to avoid having that person inadvertently become President. Electors' Br. 32-36. But this was hardly "faithless"—they wanted to ensure that their State's preferred Presidential candidate won. And it shows how entrenched the expectation was that electors would normally vote for their party's ticket. It was only because electors so uniformly supported the party ticket that there was a meaningful risk of the party's nominees receiving the same number of votes.

("[T]he power of suspension is an incident of the power of removal.").

The Electors never acknowledge this "default rule." Instead, they mischaracterize the default rule as an "exception" that applies only to the President's power to remove subordinate officers, and they use a few examples of exceptional situations to claim they are the norm. Electors' Br. 19-23. They are wrong.

To begin with, it is incorrect to say that the "default rule" applies only to presidential appointments. Electors' Br. 23. This Court expressly rejected this argument nearly 200 years ago, holding that the power of removal "and the control over the officer appointed, does not at all depend on the source from which it emanates." *In re Hennen*, 38 U.S. at 260. This Court has repeatedly applied the default rule to appointments made by others, such as federal judges. *See id.* at 259 (holding that judge with power to appoint clerk of court also had power to remove clerk: "In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."); *Reagan v. United States*, 182 U.S. 419, 424 (1901) (holding that commissioners appointed by judges "fall within the settled rule that the power of removal is incident to the power of appointment").

As to the Electors' alleged counterexamples, each actually proves the default because in each situation explicit language limits the removal authority of the appointing power. *See Carlucci v. Doe*, 488 U.S. 93, 95 (1988) ("[A]bsent a 'specific provision to the contrary, the power of removal from office is

incident to the power of appointment.'" (quoting *Keim*, 177 U.S. at 293)); *Shurtleff*, 189 U.S. at 316.

The Electors first note that the President's power to "appoint" federal judges in Article II, Section 2 does not give him the power to remove or control them. Electors' Br. 19-20. But the Constitution separately protects judges from removal at will. U.S. Const. art. III, § 1; *Shurtleff*, 189 U.S. at 316 ("The tenure of the judicial officers of the United States is provided for by the Constitution[.]"). Indeed, the very section that gives the President power to appoint judges also allows him to appoint officers, and because they are not protected from removal separately, the President can remove them at will. *Free Enter. Fund*, 561 U.S. at 509; *Myers*, 272 U.S. at 119. Electors, unlike judges, have no separate constitutional protection from removal.

The Electors next note that States lack power to control or remove their Senators before their term expires, but this comparison is even less apt. The original constitutional text said that Senators would be "chosen by" state legislatures, not "appointed by" them, so it is unclear why this example sheds any light on the meaning of "appoint." Moreover, the Constitution guarantees Senators a six-year term, U.S. Const. art. I, § 3, the Framers eliminated the right to recall Senators that had been part of the Articles of Confederation, and the first Congress overwhelmingly rejected a constitutional amendment that would have allowed States to "instruct" Senators how to vote. *See* Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1508 (1994); 1 *Annals of Cong.* 733-47 (1789). There are thus clear textual and historical reasons why States cannot

remove or control Senators, reasons missing as to electors.

The Electors' final example, the independent counsel, is again unhelpful. The statutory provisions for appointing an independent counsel also contained detailed limitations on removal, making this an obvious exception to the default rule. *See Morrison v. Olson*, 487 U.S. 654, 663-64 (1988).

The Electors' argument also leads to absurd results. If "a state's power over electors ends" once they are appointed, Electors' Br. 4, then States have no power to sanction or remove electors even where that would obviously be warranted. For example, if appointed electors announced their intention to sell their votes to the highest bidder, or to skip the electors meeting, the State would be powerless to remove and replace them (even though States removed and replaced electors for failure to appear even before the Twelfth Amendment). *See supra* pp. 24-25. If a State had rules, as many do, requiring that electors reside in the State or be registered voters, and learned after the election that an elector had lied about their eligibility, the State would be powerless to act. Nothing in the Constitution's text or original understanding requires this.

3. The Electors' Cherry-picked Definitions for "Elector," "Vote," and "Ballot" Fail to Demonstrate a Constitutional Right of Elector Independence

The Electors' remaining textual arguments turn on selectively chosen definitions ripped out of context, none of which can bear the weight they claim.

They first argue that founding-era dictionaries demonstrate that "elector" can only mean someone with "discretion to choose" the President. Electors' Br. 24. This argument fails on two levels.

To begin with, founding-era dictionaries offered multiple definitions of "elector," none of which inherently required unfettered discretion. The most common definition of "elector" was one "that has a vote in the choice of any officer." 1 Samuel Johnson, *A Dictionary of the English Language* (*Johnson Dictionary*) (6th ed. 1785); 1 John Ash, *The New and Complete Dictionary of the English Language* (*Ash Dictionary*) (1795) ("one who has a vote in the choice of any public officer"); Electors' Br. 24. But in ordinary usage, a person "has a vote" even if they have only one choice as to how to use it. For example, it is commonplace in American elections, especially down-ballot races, for there to be only one candidate for an office. A voter still "has a vote" in that race. A person likewise "has a vote" even if they surrender the right to control their vote to someone else. If a person says: "I vote the way my pastor tells me," or, "I vote the way my union tells me," we might question their judgment, but not that they have a vote. And the Framers were very familiar with the concept of voting on behalf of another, as proxy voting was commonplace in many of the colonies. *See* Cortlandt Bishop, *History of Elections in the American Colonies* 98 (1893); Robert Luce, *Legislative Principles* 96-112 (1930); Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 617 n.103 (1996). There is thus nothing textually inconsistent in saying that an elector "has a vote" in choosing the President even if they are required to vote for the candidate chosen by the people of their

State. This point also refutes the Electors' claim that the term "vote" inherently requires discretion. Electors' Br. 26-27; *see* John Vlahoplus, *Bound Electors*, 106 Va. L. Rev. Online 1, 8 (2020) (period dictionary definitions would include "electors bound to vote by ballot for a specific candidate").

More broadly, seeking to define the role of electors solely by looking to dictionaries rather than examining more broadly what the Framers meant by the term is misguided. *Cf. Nixon v. United States*, 506 U.S. 224, 230 (1993) (rejecting attempt to define constitutional term based on varied historical definitions). A common dictionary definition of "elector" in 1787 was "a German prince who has a voice in the choice of the emperor." 1 *Ash Dictionary*; 1 *Johnson Dictionary* (same). The Framers were well aware of this meaning and discussed it at the Convention. 1 *Farrand* 290, 296. But this is obviously not the meaning they intended. They were creating a new role, not exactly like anything that had previously existed. Dictionary definitions can only convey part of what they meant. A fuller understanding requires looking at how they actually expected and accepted that electors would operate. And here, it is quite clear that by the time they created the modern Electoral College in the Twelfth Amendment, they simply did not intend the term "elector" to require exercising independent judgment. They expected electors "simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36.

The Electors next argue that presidential "electors" must possess unfettered discretion because the Constitution also created the position of

congressional "elector" and States have no "power to tell these electors for whom they may vote." Electors' Br. 25. But the Framers clearly intended presidential elector to mean something different than congressional elector given the differences between the two roles. The Framers could not agree on how presidential electors should be chosen, and therefore explicitly gave States authority to "appoint" electors "in such Manner as the Legislature thereof may direct[.]" U.S. Const. art. II, § 1. By contrast, the Framers did not want States to play a role in choosing members of the House of Representatives, and they did not allow States to appoint congressional electors; rather, they explicitly limited State authority to tinker with who could be a congressional elector by specifying that congressional electors would be whatever people of the state "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). Thus, the Framers clearly and intentionally gave States broader authority in their "appointment" of presidential electors than in their choice of congressional electors. The Framers unquestionably would have objected to a State dictating how its people could vote in congressional elections, but there is no reason to think they would have objected to a State allowing its People to dictate how presidential electors vote.

Finally, the Electors argue that the requirement that electors vote "by ballot" demonstrates an ability to exercise unfettered discretion. Electors' Br. 29-30. This reads far too much into vague definitions and ignores historical practice. Contemporaneous

dictionaries simply defined "ballot" as "[a] little ball or ticket used in giving votes." 1 *Johnson Dictionary*; 1 *Ash Dictionary* ("[a] little ball or ticket used in elections"). This straightforward definition says nothing about the level of discretion involved. And in multiple elections immediately after adoption of the Constitution and leading up to the Twelfth Amendment, the form of "ballots" demonstrated no exercise of discretion. For example, in 1800, electors in Georgia simply signed "a form which had two columns, one for Jefferson and one for Burr," the Republican ticket. Kuroda 94; *see* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 Va. L. Rev. 551, 591 (2004). In 1804, electors in Rhode Island signed ballots for the Republican ticket previously prepared for them in a common hand, and in Georgia, all the ballots were for the Republican ticket and in the same handwriting. Kuroda 165, 168. When Congress reviewed these ballots, no one questioned their propriety. Kuroda 169.

Ultimately, the Electors' cherry-picked definitions cannot overcome the Constitution's textual commitment to the States of authority to appoint electors and the clear historical understanding that this authority included the power to direct presidential electors to vote in accordance with the people's will.

II. Uniform Precedent, Federal Statute, and Historical Practice Confirm States' Plenary Authority Over Electors

This Court, Congress, States, voters, and electors themselves have long treated the role of

electors as a ministerial vehicle for registering the will of States. This Country's electoral framework depends on the expectation that electors respect the will of their States' voters. This long-settled construction negates Petitioners' argument that 538 citizens alone have the right to select the President.

A. This Court's Precedent Affirms State Power to Bind Electors' Votes

For over a century, this Court has recognized States' expansive authority over electors and has described the role of electors as ministerial. These holdings discredit the Electors' central claim that State authority ends at the moment of appointment and that electors possess unfettered discretion to vote as they choose.

In its very first case analyzing Article II and the Twelfth Amendment, this Court unanimously held that the "sole function of the presidential electors is to cast, certify, and transmit the *vote of the state* for president and vice-president[.]" *Fitzgerald*, 134 U.S. at 379 (emphasis added).

This Court's next decision regarding electors emphasized repeatedly that the Constitution gave States, rather than Congress, authority over electors. "Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes . . . but *otherwise the power and jurisdiction of the state is exclusive*[.]" *McPherson*, 146 U.S. at 35 (emphasis added).[7] The Court also rejected the idea that any historical expectation of

[7] *See also Fitzgerald*, 134 U.S. at 379 (describing limited federal role in electoral process).

elector independence should control the Court's interpretation, noting that any such expectation was not included in the Constitution's text and was almost immediately disavowed. *See McPherson*, 146 U.S. at 36. And the Court specifically rejected the idea that State authority over electors ends as soon as they are appointed, noting that well after the initial appointment, "the state is fully empowered to fill any vacancy which may occur in its electoral college." *Id.* at 41.

In *Ray*, the Court relied on these earlier decisions to conclude that there was no constitutional right "for the elector to vote his own choice, uninhibited by pledge." *Ray*, 343 U.S. at 228. After thoroughly canvassing historical practice, the Court explained that from the very earliest elections "the electors were expected to support the party nominees," and the Framers saw nothing wrong with this. *Id.* The Court held that this "long-continued practical interpretation . . . weights heavily in considering the constitutionality of a pledge[.]" *Id.* at 229-30.[8]

The Electors try to distinguish this settled law by arguing that States' *enforcement* of a pledge rather than the pledge itself violates electors' individual discretion and exceeds States' appointment authority. Electors' Br. 42-43. But it makes no sense to say that a State can constitutionally set a condition for elector

[8] While *Ray* addressed the constitutionality of pledges in a primary election, its analysis applies equally to a general election, which the Court recognized formed a "single instrumentality" with the primary for selection of President and Vice President. *Ray*, 343 U.S. at 227.

appointment but cannot enforce it. For example, many States require that to serve as an elector, a person must live in the State or be a registered voter. *See* App. B. If such conditions are constitutional (and the Electors offer no reason to think they are not), it is unfathomable that a State could not enforce them by removing an elector who violated the condition (e.g., the elector had never been a registered voter, or moved out of state before the election). By the same token, if a pledge is constitutional, it makes no sense to say that a State cannot remove or penalize an elector who violates that condition.

Even the Electors' own legal theory refutes their narrow line-drawing. They argue that *any* limitation on electors' discretion, even a nominal fine, is unconstitutional. Electors' Br. 38, 42-43. But they admit that a pledge *is* a means of controlling electors' votes, one that has helped to ensure electors abide by the will of States' electorates. Electors' Br. 7-8. Enforcing such pledges as a mechanism of control represents a difference in degree, not in kind, as the Electors concede. Electors' Br. 44-45.

The Electors mischaracterize *Ray* as suggesting that enforcement of a pledge "may" violate an electors' constitutional rights. Electors' Br. 48. In fact, *Ray* held that even assuming a constitutional right of choice existed, a voluntary pledge would not violate it. *Ray*, 343 U.S. at 230. "Surely one may voluntarily assume obligations to vote for a certain candidate." *Id.* This same reasoning would apply to Washington's enforceable pledge. Serving as an

elector is entirely voluntary, and an elector has the option of resigning at any time before balloting. Wash. Rev. Code § 29A.56.340. The Court in *Ray* accurately characterized service as an elector as a purely "voluntary" act. *Ray*, 343 U.S. at 230. Conditioning appointment on an enforceable pledge does not make the electors' acceptance of such conditions involuntary, in the same way that a contract does not become involuntary simply because it binds future conduct on pain of enforceable penalties. *See generally Restatement (Second) of Contracts* § 235 (1981).

B. Federal Statutes Confirm State Authority to Bind Electors' Votes

Congress has similarly recognized States' expansive authority over electors. The Electors mischaracterize this law, claiming that elector appointments are "final" after initial appointment, at which point "a state's power over electors ends." Electors' Br. 6, 4. Federal statutes, in fact, provide for States' wide-ranging control over electors' votes until they are counted by Congress.

States' appointment of electors occurs on presidential election day. 3 U.S.C. § 1. As "soon as practicable" thereafter, the executive of each state sends a "certificate" of "[final] ascertainment" identifying the State's presidential electors to the National Archivist. 3 U.S.C. § 6. If there is no controversy over elector appointments, electors then meet and vote in their respective States on the date in December designated by statute. 3 U.S.C. § 7.

States, however, retain authority to resolve controversies over the appointment of electors and the counting of their votes. Indeed, a State's

determination of any controversy over electors' appointments is "conclusive" if done pursuant to laws enacted before election day, and finalized at least six days before the electors' December meeting. 3 U.S.C. § 5; *see also Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring)Nope. Y. States' authority over such controversies does not terminate upon expiration of this "safe harbor" period; it merely defines the point at which States' resolutions of such controversies are no longer "conclusive." *Id.* at 130 (Souter, J., dissenting).

Upon a State's final determination of any elector controversy, the State's executive sends a certificate of such determination to the National Archivist. 3 U.S.C. § 6. This certificate then plays a central role in determining which electors may vote. *See* 3 U.S.C. § 9 (requiring electors to annex certificates provided by State executive to certificate of electors' votes). Control over the certificate thus gives States practical control over balloting.

Control over the certificate also provides States significant control over which electors' votes are counted by Congress when it meets in January to count electors' votes. 3 U.S.C. § 15. For example, if only one record of electors' votes from a State has been received, Congress is *required* to accept those votes that are "regularly given by electors whose appointment has been lawfully certified to" by the State's executive pursuant to Section 6. 3 U.S.C. § 15. This rule applies unless both Houses of Congress concurrently agree that the votes have not been "regularly given by electors whose appointment has been so certified[.]" 3 U.S.C. § 15.

States also have exclusive authority to fill electoral "vacancies" occurring at electors' December meeting. *See* 3 U.S.C. § 4. State appointments to fill such vacancies shall be "in the mode provided by the laws of the State." 3 U.S.C. § 15. This exclusive authority creates an additional mechanism of state control over electors' votes, as many state laws create an elector vacancy whenever an elector attempts to cast a faithless vote. *See* App. A. States can use their authority to prevent the casting of faithless votes by appointing and certifying an alternate elector to fill the vacancy created by the attempted faithless votes. *See* 3 U.S.C. §§ 4, 6.

States can also prevent Congress from counting any submitted faithless vote under 3 U.S.C. § 15 by deeming the elector's position "vacant" and submitting a separate record to Congress of votes by alternate electors appointed by the State. In such circumstances, Congress shall count the votes that have been "regularly given by electors who are shown by the determination mentioned in section 5 [safe harbor provision]," or by "such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the state[.]" 3 U.S.C. § 15. These statutes, first adopted in the mid-1800s, demonstrate Congress's recognition that States' authority under Article II extends well beyond the initial appointment.

The Electors cite examples of *Congress's* decision to count faithless votes as demonstrating States' lack of authority to regulate electors. Congress, however, has limited authority to reject an elector vote submitted by a State. Congress's decision

to accept such votes thus does not mean States had no power to reject the votes in the first instance. Congress itself has recognized States' expansive power over electors' appointment *and* votes for well over a century. *See*, *e.g.*, Act, 28th Cong. (Jan. 23, 1845), ch. 1 (predecessor to 3 U.S.C. § 4 acknowledging State authority to fill elector vacancies); Act, 49th Cong., Sess. II (Feb. 3, 1887), ch. 90 (predecessors to 3 U.S.C. §§ 5, 6, 15 regarding safe harbor and State ascertainment).

C. Consistent Historical Practice Confirms State Power to Bind Electors' Votes

This country's historical treatment of electors further demonstrates that States have the power to require and enforce elector pledges.

As detailed above, the practice of electors pledging themselves to particular candidates and the public expectation that they would follow through on their pledges began with the nation's first election and has continued ever since. *Ray*, 343 U.S. at 228 n.15. The Twelfth Amendment was ratified against the backdrop of this prevailing practice and was intended to facilitate it, not change it. *Id.* at 228; *supra* pp. 9-11. Thus, from the earliest days of this country, electors have been "chosen simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36.

States have since built their electoral systems on this settled view of electors' ministerial role. For nearly 200 years, virtually all States have used a

state wide popular election in presidential elections. *McPherson*, 146 U.S. at 32-33; *Ray*, 343 U.S. at 228-29 & nn.15-16. Most States long ago adopted processes in which the identity of electors became irrelevant. *Ray*, 343 U.S. at 229. Today, forty-four States do not even list electors' names on the ballot. Even the few that do list the electors together with the candidates to which they are pledged. Given that most voters have no idea who their presidential electors are, they would surely be astonished to learn that these unidentified individuals can nullify their choice for President. This Court has held that once a "state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush*, 531 U.S. at 104. Under the Electors' theory, this "fundamental right" is essentially meaningless, because all that really matters is the electors' choice.

Against this backdrop, faithless electors have always been a historical anomaly. The Electors argue that the acts of a negligible minority prove that electors have always possessed the right to exercise discretion. Electors' Br. 46-47. But the acts of tens of thousands of electors who remained faithful to the will of their States' electorates signify far more than the relative few who did not. Since the creation of the Electoral College, there have been only 165 faithless electors, representing less than one percent of the electoral votes cast for President. *See* FairVote, *Faithless Electors*, https://perma.cc/2FCK-WBCU. Of these 165, 71 electors in just two elections (1872 and 1912) changed their votes because their pledged

candidate died before they cast their votes. *Id.* Fifty-three of the others, in 1832 and 1836, voted faithlessly only as to the vice-presidential nominee. *Id.* The scattered examples that remain have been largely symbolic gestures with no chance of impacting results. Over the last century, no elector for a winning presidential candidate has switched votes to the losing candidate. *Id.* Contrary to the Electors' strained characterizations, this Country has no meaningful history of faithless electors, much less faithless electors affecting the outcome of an election. *Id.*

The Electors place heavy weight on their contention that, before 2016, no State had ever enforced a pledge against a faithless elector. *See* Electors' Br. 3. But before 2016, no elector had ever broken a pledge in a state with laws penalizing such conduct. Only four electors have ever violated a state law prohibiting a faithless vote without an enforcement mechanism. *See* FairVote, *Faithless Electors*, https://perma.cc/2FCK-WBCU. In several instances, States without laws binding electors promptly enacted such laws the first time a faithless vote was cast.[9]

In contrast to these isolated and anomalous votes, the acceptance by this Court, Congress, States, voters, and electors themselves of States' right to bind electors, honored by tens of thousands of electors over the past two centuries, is weighty evidence that

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[9] *See* Okla. Stat. tit. 26, § 521 (Supp. 1964); 1969 N.C. Sess. Laws ch. 949; 1977 Wash. Sess. Laws ch. 238; 2015 Minn. Sess. Laws ch. 70.

electors have never had a right to ignore the will of the voters. This Court has long placed great weight on this historical treatment of electors in assessing state authority. *See Ray*, 343 U.S. at 229-30 ("This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weights heavily in considering the constitutionality of a pledge, such as the one here required, in the primary."); *McPherson*, 146 U.S. at 27 (giving "contemporaneous and subsequent practical construction" greatest weight where two views of constitutional text can be entertained); *see also NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) (in analyzing constitutional questions for first time in 200 years, courts "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached"). This history has now become "too strong and obstinate to be shaken or controlled." *McPherson*, 146 U.S. at 27. The long-established treatment of electors confirms that any decision to grant electors discretion belongs to States. States' decision to vest discretion in their citizens rather than electors weighs strongly in favor of upholding States' continuing ability to do so.

D. The Federal Function Doctrine Does Not Constrain State Power to Bind Electors' Votes

The Electors' "federal function" argument ignores constitutional text, historical practice, and the most relevant precedent to argue that States are barred under the Supremacy Clause from regulating electors after appointment. Their argument is

contradicted by the very cases they cite, which confirm that electors derive their authority from States and that States have expansive authority over electors.

The Electors first misleadingly cite this Court's use of the term "federal function" in two cases dealing with electors—*Burroughs v. United States*, 290 U.S. 534 (1934), and *Ray*—to claim that States cannot regulate electors. But that is not how this Court used the term in either case, and the cases' holdings refute the claim.

Burroughs addressed whether the federal government could prosecute a political committee for making illegal contributions to support presidential electors in two States. *Burroughs*, 290 U.S. at 542-43. The defendants argued that only States, not the federal government, could regulate voting for presidential electors. *Id.* at 544. The Court rejected this argument, concluding that the integrity of presidential elections was too important to the national government to be beyond federal power, and it was in this context that the Court said electors "exercise federal functions[.]" *Id.* at 545. But nothing in *Burroughs* suggests that *only* the federal government can regulate electors. To the contrary, the Court emphasized that "presidential electors are not officers or agents of the federal government," and it cited with approval *Fitzgerald*, 134 U.S. at 379, which held that States have the power to punish fraud in the selection of electors. *Burroughs*, 290 U.S. at 545 While "electors are appointed and act under and pursuant to the constitution of the United States," they are

not federal officers or agents. *Fitzgerald*, 134 U.S. at 379. Rather, their "sole function . . . is to cast, certify, and transmit the *vote of the state* for president and vice-president[.]" *Id.* (emphasis added). States "clearly" have authority to regulate "votes for presidential electors" and "the conduct of [presidential] elections" "unaffected by anything in the constitution and laws of the United States." *Id.* at 380.

Ray, similarly, uses the "federal function" language in passing while emphasizing state authority over electors. Although "presidential electors exercise a federal function," "they are not federal officers or agents" and they "act by authority of the state that in turn receives its authority from the constitution." *Ray*, 343 U.S. at 224-25. And *Ray*'s holding—that States can require electors to commit to supporting the presidential nominee of their party, *id.* at 230-31—is irreconcilable with the notion that electors serve a purely federal role and can be regulated only by the federal government.

This Court's passing use of the phrase "federal function" in these cases, which recognized expansive state authority over electors, stands in stark contrast to the "federal function" cases cited by the Electors that dealt with "enclaves" of exclusively federal property or authority. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) (state regulation of federal nuclear power plant, authorized by federal statute to carry out a federal mission, on federal property, under federal control); *Hancock v. Train*, 426 U.S. 167, 179 (1976) (state regulation providing authority to shut down "federal enclave" of federally owned and operated nuclear power plant); *M'Culloch v. Maryland*, 17 U.S. 316 (1819) (state tax of national

bank created by Congress). The federal function doctrine in these cases bears no relation to electors, who are *not* federal officers, who "act by authority of the state," *Ray*, 343 U.S. at 224, and whose "sole function . . . is to cast, certify, and transmit the vote of the state for president and vice-president," *Fitzgerald*, 134 U.S. at 379.

Simply put, the federal function doctrine is inapt where "[t]here [is] no discrimination against the Federal Government," "no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, [and] not even the slightest interference with its property." *United States v. County of Fresno*, 429 U.S. 452, 467 (1977) (citing *City of Detroit v. Murray Corp.*, 355 U.S. 489, 495 (1958)). The Electors do not argue that state regulation of electors obstructs the functioning of the federal government—the federal government does not vote for President. Nor do they argue that Congress alone has the power to control their votes. They claim instead that no government has such authority. They seek to vindicate their own claimed rights, not to prevent state interference in activities or property of the federal government. The federal function doctrine is just not implicated here.

The Electors also rely heavily on two inapposite cases striking down state laws conflicting with constitutional requirements for ratifying constitutional amendments: *Leser v. Garnett*, 258 U.S. 130 (1922), and *Hawke v. Smith*, 253 U.S. 221 (1920). But the state laws challenged in those cases directly conflicted with explicit constitutional language providing that constitutional amendments become effective when ratified by the "Legislatures of three-

fourths of the several states" or by "conventions in three-fourths thereof," as "may be proposed by the Congress[.]" *Hawke*, 253 U.S. at 226 (quoting U.S. Const. art. V). "The language of the article is plain, and admits of no doubt in its interpretation." *Id.* at 227. Here, by contrast, the Constitution explicitly says that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors[.]" U.S. Const. art. II, § 1. This language allows state legislatures "exclusively to define the method" of appointing electors, including deciding what conditions electors must meet. *McPherson*, 146 U.S. at 27; *Thornton*, 514 U.S. at 805 (states' Article II appointment power is an "express delegation[] of power to the States to act with respect to federal elections").

Hawke specifically acknowledged that its reasoning did not necessarily apply to other constitutional provisions with different allocations of state and federal power, as here. *Hawke*, 253 U.S. at 230-31. The Court explained that states could use the referendum process in drawing districts for congressional elections because Article I, Section 4 of the Constitution allows states to determine the "times, places, and manners" of federal elections. *Id*. Thus, although congressional elections undeniably serve a "federal function," just like elections for President and Vice President, this alone does not preclude state regulation of congressional elections. *Hawke* thus contradicts the Electors' argument that States are precluded from regulating any and all federal functions.

In sum, the Electors' invocation of the federal function doctrine fails at every level. Electors derive their authority from States and are subject to States' control, as recognized throughout history by this Court, Congress, and electors themselves.

CONCLUSION

This Court should affirm the judgment of the Washington Supreme Court.

RESPECTFULLY SUBMITTED.

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APPENDIX

APPENDIX A

The following table lists State laws binding electors.

State	Citation	Type
Alabama	Ala. Code § 17-14-31	Pledge, oath, or duty to vote for party's candidates
Alaska	Alaska Stat. § 15.30.040	Pledge, oath, or duty to vote for party's candidates
Arizona	Ariz. Rev. Stat. § 16-212	Replacement of faithless elector not voting for State's popular vote winners
California	Cal. Elec. Code §§ 6906, 18002	Fine and/or criminal action for not voting for party's candidates
Colorado	Colo. Rev. Stat. § 1-4-304	Replacement of faithless elector not voting for State's popular vote winners
Connecticut	Conn. Gen. Stat. § 9-176	Pledge, oath, or duty to vote for party's candidates
Delaware	Del. Code tit. 15, § 4303	Pledge, oath, or duty to vote for party's candidates
District of Columbia	D.C. Code § 1-1001.08	Pledge, oath, or duty to vote for party's candidates

Florida	Fla. Stat. § 103.021	Pledge, oath, or duty to vote for party's candidates
Hawai'i	Haw. Rev. Stat. § 14-28	Pledge, oath, or duty to vote for party's candidates
Indiana	Ind. Code §§ 3-10-4-1.7, 3-10-4-9	Replacement of faithless elector not voting for party's candidates
Maine	Me. Rev. Stat. tit. 21-A, § 805	Pledge, oath, or duty to vote for State's popular vote winners
Maryland	Md. Code, Elec. Law § 8-505	Pledge, oath, or duty to vote for State's popular vote winners
Massachusetts	Mass. Gen. Laws ch. 53, § 8	Pledge, oath, or duty to vote for party's candidates
Michigan	Mich. Comp. Laws § 168.47	Replacement of faithless elector not voting for party's candidates
Minnesota	Minn. Stat. §§ 208.43, 208.46	Replacement of faithless elector not voting for party's candidates
Mississippi	Miss. Code § 23-15-785	Pledge, oath, or duty to vote for party's candidates

Montana	Mont. Code §§ 13-25-304; 13-25-307	Replacement of faithless elector not voting for party's candidates
Nebraska	Neb. Rev. Stat. §§ 32-713; 32-714	Replacement of faithless elector not voting for State's popular vote winners
Nevada	Nev. Rev. Stat. §§ 298.045; 298.075	Replacement of faithless elector not voting for State's popular vote winners
New Mexico	N.M. Stat. § 1-15-9	Criminal action for not voting for party's candidates
North Carolina	N.C. Gen. Stat. § 163-212	Fine and/or replacement of faithless elector for not voting for party's candidates
Ohio	Ohio Rev. Code Ann. § 3505.40	Pledge, oath, or duty to vote for party's candidates
Oklahoma	Okla. Stat. tit. 26 §§ 10-102; 10-109	Replacement of faithless elector, and fine and/or criminal action for not voting for party's candidates
Oregon	Or. Rev. Stat. § 248.355	Pledge, oath, or duty to vote for party's candidates
South Carolina	S.C. Code § 7-19-80	Criminal action for not voting for party's candidates

Tennessee	Tenn. Code § 2-15-104	Pledge, oath, or duty to vote for party's candidates
Utah	Utah Code § 20A-13-304	Replacement of faithless elector not voting for party's candidates
Vermont	Vt. Stat. tit. 17, § 2732	Pledge, oath, or duty to vote for State's popular vote winners
Virginia	Va. Code § 24.2-203	Pledge, oath, or duty to vote for party's candidates
Washington*	Wash. Rev. Code §§ 29A.56.084; 29A.56.090	Replacement of faithless elector not voting for party's candidates
Wisconsin	Wis. Stat. § 7.75	Pledge, oath, or duty to vote for party's candidates
Wyoming	Wyo. Stat. § 22-19-108	Pledge, oath, or duty to vote for State's popular vote winners

* In 2019, Washington significantly revised its laws, including eliminating the provision at issue in this case. *See* 2019 Wash. Sess. Laws pp. 755-58 (codified as Wash. Rev. Code §§ 29A.56.080-.092, .320-.350). The laws as they existed during the 2016 presidential election subjected a faithless elector to a civil penalty. *See* Wash. Rev. Code § 29A.56.340 (2016) ("Any Elector who votes for a person or persons not nominated by the party of which he or she is an Elector is subject to a civil penalty of up to one thousand dollars.").

APPENDIX B

The following table provides examples of State laws setting elector qualifications unrelated to binding electors to the vote of the State.

State	Citation	Requirement
Alabama	Ala. Code § 17-14-31	Qualified voter
Alaska	Alaska Stat. § 15.30.030	Qualified voter
Arizona	Ariz. Rev. Stat. § 16-121	Qualified voter
District of Columbia	D.C. Code § 1-1001.08	Qualified voter; length of residence
Hawai'i	Haw. Rev. Stat. § 14-21	Qualified voter
Iowa	Iowa Code § 54.1	Residence
Louisiana	La Rev. Stat. § 18-1252	Qualified voter; residence
Maine	Me. Rev. Stat. tit. 21-A, §§ 352, 802	Qualified voter; residence
Michigan	Mich. Comp. Laws § 168.41	Length of citizenship; qualified voter; residence; length of residence
Missouri	Mo. Rev. Stat. § 115.399	Residence
Nebraska	Neb. Rev. Stat. § 32-710	Residence

Nevada	Nev. Rev. Stat. § 298.035	Party registration (for electors of major parties)
New Jersey	N.J. Rev. Stat. § 19:13-15	Oath of allegiance
New York	N.Y. Elec. Law § 6-102	Residence
North Carolina	N.C. Gen. Stat. § 163-1	Residence
Oklahoma	Okla. Stat. tit. 26 § 10-104	Qualified voter
Tennessee	Tenn. Code § 2-15-102	Residence
Texas	Tex. Elec. Code § 192.002	Qualified voter; party affiliation (for a political party elector)
Wisconsin	Wis. Stat. § 8.18	Residence