CASE NO. 18-1173
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHEAL BACA, POLLY BACA and ROBERT NEMANICH

Plaintiff-Appellants

v.

COLORADO DEPARTMENT OF STATE

Defendant-Appellee

Appeal from the United States District Court
for the District of Colorado
The Honorable Wiley Y. Daniel, Senior Judge
District Court Case No. 1:17-CV-01937-WYD-NYW

BRIEF OF *AMICI CURIAE* MICHAEL L. ROSIN AND DAVID G. POST

FILED IN SUPPORT OF PLANITFF-APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT

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Oral Argument Not Requested by *Amici Curiae*

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FED. R. APP. P. 29(a)(4)(D) STATEMENT

The *amici* are Michael L. Rosin and David G. Post. Rosin is a published independent historian who is knowledgeable about, and has performed original historical research regarding, the electoral college. Among other things, Mr. Rosin has reviewed and analyzed the contemporaneous records reflecting Congressional debates about the electoral college, the relevant provisions of Article II of the United States Constitution, the Twelfth Amendment, and the Twenty-Third Amendment. Post is an emeritus professor at the Beasley School of Law, Temple University. As scholars, the *amici* have an interest in helping inform the Court's knowledge and understanding of the historical source material. Counsel for all parties have consented to the filing of this brief pursuant to Rule 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

This brief was not authored in whole or in part by counsel to a party. No party or counsel to a party contributed money intended to fund preparing or submitting the brief. No person other than the *amici curiae* or their counsel have contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The Framers of the Constitution understood presidential electors to be independent actors, entitled to vote freely. While the method of their selection was left to the States, the electors were not viewed as mere functionaries. Rather, their independent judgment was and remains a key component of the constitutional system.

Congress has consistently demonstrated the same understanding, reflected during its adoption of the Twelfth Amendment, which modified the process for presidential elections; during the adoption and implementation of the Twenty-Third Amendment, which provided for the District of Columbia to have electoral votes; and consistently throughout the congressional debates on proposed constitutional amendments concerning the functions of an elector.

Moreover, Congress is ultimately responsible for counting and accepting electoral votes, and it has never declined to count an electoral vote because the elector did not vote for a particular candidate. This is true even when that elector previously swore to vote for someone else (referred to as an "anomalous elector") or the elector's vote violated a state law that purported to control that vote. While it has debated the legitimacy of electoral votes for many reasons (such as when they were cast a day late), Congress has only even debated whether to accept an anomalous vote on one occasion. As explained below, an exhaustive review of the historical

source material shows that the District Court's historical analysis, and the reasoning flowing from it, (A. 87-91), clashes irreconcilably with the applicable historical record.

DISCUSSION

I. The Framers of the Constitution Understood Electors to be Independent.

The Federalist Papers are one of the most important sources for interpreting and understanding the original intent of the Constitution. *See, e.g., Printz v. United States,* 521 U.S. 898, 971 (1996) (Souter, J. dissenting) ("In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally determines my position."). The actions of the early Congresses are also widely accepted as strong evidence of constitutional meaning and intent. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (stating that "[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means"). Both of these important sources demonstrate that the Framers viewed electors as independent voters.

A. The Federalist Papers Establish That the Founding Fathers Intended Electors to Exercise Independent Judgment.

The Federalist Papers envision an electoral college composed of a "small number of persons, selected by their fellow-citizens" to exercise reasoned judgment in selecting the president and vice-president. Alexander Hamilton wrote:

> It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.
>
> It was equally desirable, that ***the immediate election should be made by men most capable of analyzing the qualities adapted to the station***, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. ***A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.***

THE FEDERALIST No. 68 (Hamilton) (emphasis added). Similarly, John Jay wrote:

> The Constitution . . . confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded, that wise kings will always be served by able ministers, ***it is fair to argue, that as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment.***

THE FEDERALIST No. 64 (Jay) (emphasis added). By emphasizing judgment and analysis as key components of the elector's role, Hamilton and Jay described an independent actor, not a ministerial functionary.

B. The Maryland Electoral College, A Likely Model for Article II, Required Independent Electors.

Prior to the constitutional convention Maryland had a form of electoral college for the election of state senators. The Framers were undoubtedly aware of this

system and it served as a model for the federal electoral college. Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, Cardozo L. Rev. De Novo 165, 171-72 (2016) (hereafter *Delahunty*)[1]; *see* Charles R. King (ed.) 6 *The Life and Correspondence of Rufus King* 532-34 (G.P. Putnam, New York 1900)[2] ("in this way the Senate of Maryland is appointed; and it appears . . . Hamilton proposed this very mode of choosing the Electors of the President"). Notably, the Maryland Constitution explicitly envisioned electors voting according to their "judgment and conscience." Md. Const. of 1776, art. XVIII.

C. The Framers Rejected the Idea of State Legislative Control Over Electors.

The plain language of the Constitution authorizes state legislatures to decide how their state's electors will be chosen, but not how they must vote. U.S. Const., Art. II, § 1, cl. 2. Indeed, Article II's bar of those who hold federal offices of "profit or trust" from serving as electors only makes sense if the electors are able to exercise independent judgment on behalf of the people. *Id.* It is unnecessary for a purely ministerial function. Further, the Framers clearly knew how to constrain elector's discretion and chose to do so in precisely two respects: Electors were required to (1)

[1] Available online at: http://www.cardozolawreview.com/content/denovo/DELAHUNTY_2016_165.pdf

[2] Available online at: https://babel.hathitrust.org/cgi/pt?id=hvd.hn4rwz;view=1up;seq=570

vote for two persons, (2) at least one of whom was not an inhabitant of the same state as the elector. *Id*. There was no suggestion that states could pass laws expanding on this exclusive list, and it would turn constitutional interpretation on its head to permit state laws purporting to cabin electors' judgment to augment the Constitution's exclusive enumeration.

Had the Framers or the early Congresses intended to allow state legislatures to fully control the votes for president, they could have eliminated the electoral college entirely in favor of each state legislature casting its state's electoral votes directly. Such direct voting by state legislatures was the manner for electing U.S. Senators prior to the adoption of the Seventeenth Amendment. *Delahunty* at 180. This approach, in many ways more straightforward than the electoral college, was not embraced, possibly out of the fear of corruption and separation of powers concerns. In assessing the options for the election of the governor of Virginia, Madison noted that election by the legislature "not only tends to faction intrigue and corruption, but leaves the Executive under the influence of an improper obligation to that department." *Id*. at 172 (quoting James Madison, *Observations on Jefferson's Draft of a Constitution of Virginia*, THE FOUNDERS' CONSTITUTION (1788)). The closest approach available to a legislature is to choose the electors itself, but that still leaves electors as independent agents.

The conscious decision to locate independent judgment with the electors, rather than state legislatures, has remained a constant throughout the history of the constitutional discussion of the electoral college, including the Twelfth and Twenty-Third Amendments.

II. Every Congress That Has Considered the Question Has Understood That Electors May Exercise Independent Judgment.

Neither the Eighth Congress, which enacted the Twelfth Amendment, nor the Eighty-Sixth Congress, which enacted the Twenty-Third Amendment, expressed an understanding that presidential electors could be bound by state law (or anything other than party loyalty). Nor did the Eighty-Seventh Congress express such an understanding as it crafted legislation implementing the Twenty-Third Amendment. The historical record shows a consistent understanding on the part of Congress that anomalous electoral votes are permissible and valid. Indeed, Congress has consistently tallied the votes of faithless electors.

A. The Twelfth Amendment Was Drafted with an Awareness of Possible Strategic Bad-Faith Voting By Electors Seeking Party Advantage

The four presidential elections held before the Twelfth Amendment was ratified all saw electors cast anomalous votes. The 1796 election had the greatest variety, with anomalous votes from ten different states. This was driven, in large part, by the efforts of Hamilton and the Federalists to undermine soon-to-be President Adams by trying to get electors to vote anomalously for Jefferson and for

Thomas Pinckney, Adams's running mate. All told, as many as 59 electors may have cast anomalous electoral votes. Other than Adams, Pinckney, Jefferson, and Burr (Jefferson's running mate), at least nine other people received votes.[3] Federalist Hamilton's attempt to elect Federalist Pickney rather than Federalist Adams did not loom large in Congress's debates on what would become the Twelfth Amendment.

There was great concern, however, about another issue: attempts to place a winning ticket's vice-presidential nominee in the presidency through strategically "throwing away" or "sloughing off" presidential electoral votes. Prior to the adoption of the Twelfth Amendment electors did not distinguish between their votes for president and vice president. Rather, the top vote getter became president, and the runner up became vice president. Thus, there was the potential for electors from the winning party to cast votes that "should" have gone to that party's presidential nominee for a third party, causing the vice presidential candidate to become the top vote getter, and president. Electors from the losing party could also be induced to switch one of their votes, to the same effect. Hamilton wrote with respect to the 1789 election of Washington and Adams:

> Every body is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President. Everybody sees that unanimity in Adams as Vice President and a few votes

[3] For an overview of the 1796 electoral vote see, generally, Jeffrey L. Pasley, *The First Presidential Contest: 1796 and the Founding of American Democracy* 348–404 (Kansas, 2013).

> insidiously withheld from Washington might substitute the former to the latter.

Harold C. Syrett, and Jacob E. Cooke, (eds.), 5 *The Papers of Alexander Hamilton* 248 (Columbia, 1961–1987). Hamilton concluded that it would "be prudent to throw away a few votes" for vice president to avoid this possibility. *Id*. at 248–49.

In contrast to 1796, the 1800 election featured only a single anomalous vote, which did not impact the outcome. Yet, unlike the 1796 election, this election caused great alarm. Jefferson and his running mate Burr defeated Adams and his running mate Pickney, but Jefferson and Burr each received 73 votes, sending the election to the House of Representatives, which took 36 ballots before finally electing Jefferson president. 10 *Annals of Cong*. 1025-33 (1801).

In the wake of the 1800 election, stories surfaced of Burr's efforts to persuade electors to vote anomalously and swing the presidency to him. *See* Julian P. Boyd (ed.), 36 *Papers of Thomas Jefferson* 82-88 (Princeton, 1950) (hereafter *Boyd*); James Cheetham, *A View of the Political Conduct of Aaron Burr, Esq. Vice President of the United States* 44 (Denniston & Cheetham, 1802) (hereafter *Cheetham*).[4] For example, in a letter dated December 10, 1801, New York journalist James Cheetham wrote to President Jefferson that Anthony Lispenard, one of the Jefferson-Burr electors in New York, almost cast his vote for a third candidate instead of Jefferson,

[4] Available online at: https://catalog.hathitrust.org/Record/006540014.

so as to place Burr in the presidency, but DeWitt Clinton forced the New York electors to display their ballots to each other. *Boyd* at 82–88. Had Lispenard sloughed off his vote for Jefferson and cast it for someone else not in the running, Burr would have been elected president with seventy-three electoral votes, one more than Jefferson.

Cheetham also claimed that Burr had attempted to recruit electors from New Jersey and South Carolina to directly switch sides in his favor by changing their votes from Adams or his running mate Pickney to Burr. *Cheetham* at 44-45. If even one of these electors had switched his second electoral vote from Pinckney to Burr, Burr would have once again received one more electoral vote than Jefferson.

Some historians doubt the veracity of Cheetham's claims. *See, e.g.*, Milton Lomask, 1 *Aaron Burr* 322 (Farrar, Straus, Giroux 1979). Their truth is beside the point; it is undisputed that such accounts were in the air in Washington by 1802. Members of Congress, were aware both that electors had voted anomalously in prior elections and in 1800 and of the phenomenon of sloughing off votes, but their concern and legislative efforts were focused on preventing the election of the winning ticket's vice presidential candidate as president by the House or by electors from the losing party voting for him. They were also concerned with the election of the loosing ticket's presidential candidate as vice president as a result of sufficient counter-sloughing by the winning side, as happened in 1796. *See, e.g.,* 13 *Annals of*

Cong. 87 (1803) (recording statement by Democratic-Republican Senator Butler of South Carolina that absent a constitutional amendment "the people called Federalists will send a Vice President into that chair"). Critically for present purposes, Congress might have considered an amendment binding electors to the popular vote but according to the *Annals of Congress* it did not consider such an approach. Instead, as described below, it developed what became the Twelfth Amendment, which required electors to designate their votes for president and vice-president—a requirement entirely consistent with electors' ability to exercise independent judgment.

B. The Twelfth Amendment Does Not Bind Electors.

By requiring electors to designate one vote for president and one for vice-president, the Twelfth Amendment prevented electors from voting strategically so as to place a nominal candidate for vice president in the presidency. Indeed, the debates in the Eighth Congresses reveal that lawmakers were trying to prevent such strategic electoral college voting from subverting the will of the people, and trying to avoid a repeat of 1800—when the House threatened to invert the public's choice of president and vice-president. It did nothing, however, to prevent electors from voting for whichever presidential and vice-presidential candidates they chose.

In February 1802, during the Seventh Congress, the Federalists introduced a resolution calling for a designation amendment, requiring electors to designate their

votes for president and vice president, along with an amendment requiring popular election of electors from single-elector districts. 11 *Annals of Cong*. 509, 602-603 (1802). In the waning days of the session, and with no substantive discussion or debate, the designation amendment passed the House 47-14, but barely failed in the Senate, falling one vote short of the required two-thirds (15-8). *Id.* 304, 1288-94. The next year the Eighth Congress narrowly approved the Twelfth Amendment, with the Senate voting in favor by 22-10, and the House Speaker casting the 84th vote in favor, exactly the count needed to pass in the face of 42 nay votes. 13 *Annals of Cong*. 209, 776 (1803).

At no point in the debates of the Seventh and Eight Congress did any member suggest that states could bind electors or that designation was intended to cabin electors' independent judgment. Rather, inversion of the presidential and vice presidential nominees in a House contingent election animated the debates and the ultimate passage of the Twelfth Amendment. *See, e.g., id.* at 421 (Representative George Campbell stating that designation would "secure to the people the benefits of choosing the President, so as to prevent a contravention of their will [by a House vote, if no majority was achieved] as expressed by Electors chosen by them"). It was also focused on avoiding the kind of strategic electoral voting, calculated to subvert the popular will, attempted in 1796 and 1800. *Id.* at 87, 98, 186 (recording statements that, absent designation, tactics like those attempted in prior elections could yield a

Federalist vice-president alongside a Republican president). The Twelfth Amendment thus embodies a balance between Congress's understanding that electors may vote *independently* (contrary to their pledged position) and its desire to prevent electors or the House from voting *strategically* to achieve a result contrary to the popular will.

Notably, several amendments proposed in Congress in the early nineteenth century would have replaced the provision requiring the House to elect a president in the case no one received a majority of the electoral vote (U.S. Const., Art. II, § 1, cl. 3 as amended) with one sending the choice of president and vice president back to the electors. 41 *Annals of Cong*. 41, 43-46, 74, 864-66, 1179-81 (1823-24). The mere consideration of that option only makes sense if Congress understood the electors to have the freedom to change their votes even after the enactment of the Twelfth Amendment.

Justice Story's *Commentaries* are consistent with this view. Justice Story bemoaned what he saw as the frustration of the Framers' expectations by the "notorious" fact that "the electors are now chosen wholly with reference to particular candidates" and that as a result "the whole foundation of the system, so elaborately constructed, is subverted." 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1457 (1833). He was concerned that electors felt even morally compelled to vote in accordance with prior pledges, and he cannot be read to suggest

that they can or should be legally bound to do so by states. Justice Story's view harmonizes with those of the Framers, the early Congresses, and other leading nineteenth-century constitutional authorities. *See* William Rawle, *A View of the Constitution of the United States of America* 57–58 (Phillip Nicklin 2d, 1829)[5] (arguing that public pledges of electors destroy the foundations of the electoral college, and noting that they are bound by political not legal compulsion); William Alexander Duer, *A Course of Lectures on the Constitutional Jurisprudence of the United States; Delivered Annually in Columbia College, New York* 96 (Harper, 1843)[6] (same); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 161 (Little, Brown, & Company 3d, 1898)[7] ("The theory of the Constitution is that there shall be chosen by each State a certain number of its citizens . . . who shall independently cast their suffrages for President and Vice President of the United States, according to the dictates of their individual judgments.") (emphasis omitted).

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[5]Available online at: https://babel.hathitrust.org/cgi/pt?id=nyp.33433081767034;view=1up;seq=7

[6] Available online at: https://babel.hathitrust.org/cgi/pt?id=nyp.33433081766796;view=1up;seq=9.

[7] Available online at: https://babel.hathitrust.org/cgi/pt?id=mdp.49015000646852;view=1up;seq=5.

C. Congress Has Never Failed To Count An Anomalous Electoral Vote.

Congress's consistent practice of counting anomalous electoral votes is perhaps the most compelling evidence of its understanding of electors' authority. In the wake of the Twelfth Amendment, at least four nineteenth century elections saw electors vote anomalously for president, and at least eight saw anomalous votes for vice-president.[8] Critically, Congress tallied all those votes without question. *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1654, 1678-94 (2002) (hereafter "*Kesavan*") (surveying congressional debates questioning legitimacy of electoral votes). Congress has never refused to count the electoral votes cast by an anomalous elector. By counting those votes, Congress effectuates the selection of the president and vice-president. *Id*. at 1658. Actions speak louder than words, and its unbroken track record of tallying anomalous votes is powerful proof of Congress's longstanding view that state laws may carry moral suasion, but they do not, because they cannot, override the authority conferred on electors by the Constitution to vote as they choose.

For example, in 1896 Williams Jennings Bryan ran with Arthur Sewall as the nominees of the Democratic Party and with Thomas Watson as the nominees of

[8] For president these were 1808, 1816, 1820, 1872. For vice president they were 1812, 1816, 1820, 1824, 1828, 1840, 1872, 1896.

Populist Party. Bryan's strategy was to run a single slate of electors in as many states as possible, some pledged to Bryan and Sewall, others pledged to Bryan and Watson. *See* William Jennings Bryan, *The First Battle. A Story of the Campaign of 1896,* 293 (W.B. Conkey, 1896).[9] Kansas was not one of them. In Kansas two separate Bryan lines appeared on the ballot with the same set of electors. *Breidenthal v. Edwards*, 46 P. 469, 469 (Kan. 1896). Knowing that the Bryan electors all intended to vote for Sewall rather than Watson, Kansas Populist Party chairman John Breidenthal brought suit to have Watson's name removed from the ballot. The Kansas Supreme Court ruled against Breidenthal and Watson seven days before the general election, opining, "if these electors should be chosen, they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States." *Id*. at 470. When the electoral votes were tallied the Bryan electors in Colorado, Idaho, and North Carolina did not cast their vice-presidential votes as originally pledged. *See "Election in All States,"* The New York Times (Nov. 4, 1896).[10] Nevertheless, their votes were counted by Congress without question. Congress has consistently counted anomalous electoral

[9] Available online at: https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t93778b3h;view=1up;seq=1.

[10] Available at https://timesmachine.nytimes.com/timesmachine/1896/11/04/106851347.pdf.

votes up through the 2016 election.[11] 163 *Cong. Rec*. H189-90 (daily ed. Jan. 6, 2017).

Only one time has Congress even *debated* the question of whether to accept an elector vote cast by an anomalous elector.[12] In 1968 an elector cast his vote for George Wallace and Curtis LeMay rather than Richard Nixon and Spiro Agnew. When Congress met to count the electoral vote Senator Edmund Muskie and

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[11] For a compendium through 1992 *see* 139 Cong. Rec. 961 (1993). In 2000, one of the electors abstained and the joint convention of Congress took no notice. 147 *Cong. Rec*. 33-34 (Jan. 6, 2001). In 2004 John Edwards received a presidential electoral vote and a vice presidential electoral vote from the same elector and once again Congress recorded the votes per its usual practice. 151 *Cong. Rec.*, H85 (Jan. 6, 2005). In 2016 seven electors voted anomalously for president and six did so for vice president, and Congress accepted all of these electoral votes without comment. *See* 163 *Cong. Rec.*, H186-90 (daily ed. Jan. 6, 2017). Five electors from Hawaii and Washington cast their votes in violation of State law. There was no statute in Texas applying to its two Republican electors, who failed to vote for Donald Trump. The process by which Congress counts votes and may choose to reject them is set forth in the Electoral Count Act of 1887, codified at 3 U.S.C. §§ 5-6 15-18.

[12] Notably, Congress has not hesitated debating questions relating to the legitimacy of electoral votes for other reasons. In 1856 a blizzard hit Madison, Wisconsin making it impossible for Wisconsin's electors to meet. They cast their electoral votes the next day, one day after the day prescribed by law and Congress spent the better part of two days debating whether or not to accept the votes. *See Cong. Globe*, 34th Cong., 3rd Sess., 644–60, 662–68 (1857). Similarly, in 1873, the Congress decided not to count votes for Horace Greely, who had died after the popular election, but before the electors met, and had received a handful of electoral votes from electors who voted for him even knowing that he was dead, but only after close votes. *Kesavan* at 1687. Other incidents occurred in 1809, 1817, 1821, 1837, 1873, and 1877. *Id.* at 1679-92.

Representative James O'Hara filed a formal objection to counting the elector's vote, arguing the Twelfth Amendment constitutionalized an obligation for electors to vote according to the popular vote in their state. 115 *Cong. Rec.* 146 (Jan. 6, 1969). In the end, their objection failed by votes of 33-58 in the Senate (*id.* at 246) and 170-228 in the House. *Id.* at 170-71, 246. Thus, the one time Congress debated the tallying of an anomalous vote, it decisively adhered to past practice and counted the vote.

D. Congress Understood That It Lacked the Power to Punish Anomalous Electors When It Enacted and Implemented the Twenty-Third Amendment.

The Twenty-Third Amendment provides for the appointment of electors for the District of Columbia. While crafting the amendment in 1960 Congress explicitly noted that this power paralleled the Elector Clause of Article II. When Congress enacted enabling legislation under the Twenty-Third Amendment in 1961 it recognized that the Constitution did not grant it the power to penalize faithless electors with legal consequences. The most Congress could do was enact a statute providing "moral suasion" that electors vote in accordance with the popular vote.

1. The Elector Clause of the Twenty-Third Amendment Parallels and Incorporates Article II and the Twelfth Amendment.

The Twenty-Third Amendment provides that the District of Columbia shall appoint:

> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the

> District would be entitled if it were a State, … and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const., Amend. XXIII, § 1. The Judiciary Committee report accompanying the resolution that eventually became the Amendment, noted that the proposed language "follows closely, insofar as it is applicable, the language of article II of the Constitution." H.R. Rep. No. 86-1698, at 4 (1960).[13] Two representatives reiterated this equivalence during the House's sole, two-hour debate on the Twenty-Third Amendment. 106 *Cong. Rec*. 12553, 12558, 12571 (June 14, 1960). The Senate then approved it after no more than an hour of debate, and without a recorded vote, on June 16, 1960. *Id.* at 12850-58. There is no evidence in the Congressional Record of any comment or discussion regarding whether the amendment empowered Congress to bind the District's electors.

2. When Implementing the Twenty-Third Amendment, Congress Recognized it Could Not Enact Legislation to Punish Anomalous Electors.

The Eighty-Seventh Congress considered the extent of congressional power granted by the Twenty-Third Amendment as it crafted legislation to implement the

[13] Committee reports are considered a particularly reliable source of Congress' intended meaning. *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (internal quotation omitted).

amendment. These hearings reveal a consensus view that all Congress could do was enact a statute offering "moral suasion" that electors vote faithfully.

The question of Congress's power to bind the District's electors with legal consequences first arose when Representative J. Carlton Loser inquired during the testimony of Walter Tobriner, President of the District of Columbia Board of Commissioners, "Is there some Constitutional provision involving the question of electors, how they shall vote?" *To Amend the Act of August 12, 1955 Relating to Elections in the District of Columbia*, hearing on H. R. 5955, House of Representatives Subcommittee No. 3 on the Committee of the District of Columbia, 87th Cong. 34-37 (1961).[14] (emphasis added). The subsequent colloquy among Tobriner, Loser, and Representative George Huddleston made clear that such a provision was considered unconstitutional:

> [Rep. Huddleston] … Once the electors are appointed and certified as the electors of that party, if that party carries the election these electors are still authorized to vote for whomever they please.
>
> [Rep. Loser] But this Administration bill requires them to vote for the party which they represent.
>
> [Rep. Huddleston] ***I think that has a moral suasion. I don't think that has any legal effect at all.***

[14] Available online at: http://congressional.proquest.com/congcomp/getdoc?HEARING-ID=HRG-1961-DFCH-0014 (May 15, pp. 1–67) and http://congressional.proquest.com/congcomp/getdoc?HEARING-ID=HRG-1961-DFCH-0015 (May 16, pp. 34)

> ….
>
> [Rep. Loser] Are you saying, sir, that the provision of the bill is ineffective or is not compulsory that the electors vote for the candidate of the party they represent?
>
> [Mr. Tobriner] There is not provision in the bill, sir, setting forth any compulsory means by which this may be enforced.
>
> [Rep. Huddleston] ***I think probably that is preferable to some naked statement that the electors are required to support a candidate, because that has no legal effect at all;*** whereas your oath would accomplish this same purpose because it also gives rise to a moral suasion. When a man takes an oath, although that oath has no legal effect either, still a person thinks a long time before he violates an oath he has given. I think your provision would accomplish the same purpose from a legal point of view as the Administration bill.

Id. at 34-37 (emphasis added).

The Senate passed the bill 66-6 without discussing the possibility of legal consequences for a faithless elector. 107 *Cong. Rec*. 20217 (Sept. 19, 1961). When the bill came back from the conference committee the reporting senator noted that "it was agreed that a duty would be imposed on a person chosen as an elector to vote in the electoral college for the candidate of the political party which he represents" and the Senate approved the report without further discussion. *Id*. at 21052 (Sept. 23, 1961). However, the statute provides no legal consequences, requiring only that an elector must "take an oath or solemnly affirm that he or she will vote for the candidates of the party he or she has been nominated to represent, and it shall be his

or her duty to vote in such manner in the electoral college." D.C. Code § 1–1001.08(g) (2017).

The District Court expressed the view that "Congress itself has passed a law binding the District of Columbia's electors to the result of the popular vote . . . [and] that as far as Congress is concerned, binding electors to the outcome of a jurisdiction's popular vote promotes federal objectives." A. 96 (internal citation omitted). As explained above, this view is incompatible with the historical record, which shows that Congress did not pass a law binding electors with legal consequences because it believed such a law would be unconstitutional.

CONCLUSION

Congress has consistently understood electors to be entitled to vote as they see fit and has never failed to count the votes of an anomalous elector. The District Court's incomplete analysis of the historical record led it to incorrectly conclude that "longstanding historical practice" has endowed states with the power to compel electors to vote for particular candidates. A. 86-87. As explained above, a more complete reading of the historical record—like that conducted here—shows that elector independence has remained an unbroken constant in every Congress's consideration of elector-related questions. To the extent the District Court determined otherwise, it should be reversed.

Dated: June 29, 2018

Respectfully submitted,

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Dated: June 29, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 2018, a true and correct copy of the **BRIEF OF *AMICI CURIAE* MICHAEL L. ROSIN AND DAVID G. POST** was filed with the Court and served electronically via CM/ECF on the following:

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