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## Faithless Electors and the National Popular Vote Interstate Compact After *Chiafalo v. Washington*

Coy Westbrook

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## COMMENT

### FAITHLESS ELECTORS AND THE NATIONAL POPULAR VOTE INTERSTATE COMPACT AFTER *CHIAFALO V. WASHINGTON*

COY ALLEN WESTBROOK\*

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## I. INTRODUCTION

The Electoral College<sup>1</sup> is a marvel of political thought, which provides all states—regardless of size—with the power to influence the national election of the President and Vice President of the United States.<sup>2</sup> Our Founders established a system of checks and balances on the power of the federal government through the separation of enumerated powers between the three branches.<sup>3</sup> The structural protection of federalism, created from splitting the powers between the state and federal governments, further shielded the citizens from tyranny by the federal government.<sup>4</sup> Specifically,

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1. See U.S. CONST. art. II, § 1, cl. 2 (“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 . . .”). It is worth noting, that the original plan for the president did not even involve the Electoral College. In fact, as noted during the discussion on what would become Section 2 of Article II, the original plan amounted to the president being elected by a joint ballot of the members of legislature present at that time and he would hold office for a single seven-year term. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 511 (Max Farrand ed., Yale University Press 1966) [hereinafter RECORDS] (noting the comments related to the report of the Committee of Eleven, indicating how Mr. Rutledge wanted to scrap the proposed election process and use the original proposed plan: “He shall be elected by joint ballot by the Legislature to which election a majority of the votes of the members present shall be required: He shall hold his office during the term of Seven years; but shall not be elected a second time” (internal quotation marks omitted)).

2. Ronald D. Rotunda, *How the Electoral College Works—and Why It Works Well*, CATO (Nov. 13, 2000), <https://www.cato.org/publications/commentary/how-electoral-college-works-why-it-works-well> [<https://perma.cc/L624-97YV>] (“[The Founders] created the Electoral College to protect the residents of the smaller states, and they rejected government by simple majority because plebiscites historically have been the tool of dictatorships, not democracy.”).

3. See U.S. CONST. art. I, § 1 (granting the legislative power to the Congress and splitting it into two chambers, the Senate and the House of Representatives); *id.* art. II, § 1, cl. 1 (vesting the executive power with the President of the United States and providing for a vice president to serve alongside him); *id.* art. III, § 1, cl. 1 (vesting the judicial power in the Supreme Court).

4. The genius of our Founding Fathers is unparalleled in their understanding that man, at his very core, will always be corrupted by power—which explains why they split the power of our government into several branches. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see also ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON III, at 9 (2002) (retelling an apocryphal discussion between George Washington and Thomas Jefferson, in which Washington opined that

regarding the Electoral College, the Founding Fathers feared that without proper protections in selecting the president, a cabal of corrupt individuals could usurp the will of the people. Thus, the Fathers developed the Electoral College.<sup>5</sup>

Regarding the election of our chief executive, the Founders were especially protective. They sought to create not one individual election—easily swayable and subject to corruption—but numerous, simultaneous elections in each state, with the chief objective of offering more protection from corruption by an evil cabal. Each of the fifty states is tasked with creating their own election laws and the means by which electors are selected.<sup>6</sup> Further, each state will have its electors meet at a location (likely the state's capital) in each respective state to cast ballots to elect the President of the United States and Vice President of the United States, then transmit those results to the “Seat of the Government of the United States,” where the votes will be counted and certified under the eye of the President of the Senate.<sup>7</sup>

While such a scheme is, of course, not without faults<sup>8</sup>, our system of electing the president and vice president—albeit an indirect process—ensures that neither a cabal of powerful men nor a tyranny of the majority will ever be permitted to elect someone whom a majority of the states do not want as the president. It is paramount that the reader understands, and thereby conveys to the public, that it is the will of a majority of states, and not the will of a majority of the population, that is required in electing the president. This is the check and balance of power amongst the populace, because to require anything other than a majority of the states to elect the president would subject the people to the will of a few states, which are

Congress is split into two chambers to allow the passionate legislation from the House to be poured into the Senate to cool it, as one would do with hot tea into a saucer). *But see* U.S. CONST. amend. XVII (removing one layer of protection against the consolidation of power by the senators directly elected). However, not all men assume the office of president through elections, such as President Chester A. Arthur, who ascended to the office after the assassination of James A. Garfield. Austin W. Halvorson, *Yellowstone 1883: Historical Background*, THE RANCHER (Jan. 4, 2022) (available on Spotify.com).

5. RECORDS, *supra* note 1, at 499–501 (detailing fears several of the Founding Fathers held regarding the proposed system of electing the president and vice president).

6. *See* U.S. CONST. art. II, § 1, cl. 2.

7. *See id.* art. II, § 1, cl. 3. *See generally*, Joe Rogan and H.R. McMasters, #1763—*General H.R. McMasters*, JOE ROGAN EXPERIENCE (Jan. 13, 2022) (available on Spotify.com) (discussing the peaceful transition of power as facilitated by the Congress through the certification of the Electoral College votes).

8. THE FEDERALIST NO. 68 (Alexander Hamilton) (“If [the Electoral College] be not perfect, it is at least excellent.”).

small in number but large in population (e.g., California and New York). As Hamilton wrote, speaking as Publius in *Federalist No. 68*, “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.”<sup>9</sup>

The Electoral College is a paramount safeguard of federalism and the separation of powers, which must be protected from movements—such as the National Popular Vote Interstate Compact<sup>10</sup>—that only seek to destroy this separation and undermine the sagacious wisdom of our Founders. Proponents of such movements seem to overlook the imperative and dominant purpose behind the Electoral College: acting as a check and balance on power in our Republic between the several states in determining the president.<sup>11</sup> Therefore, there should be no question that attempts to undermine the Electoral College would violate the Constitution. Thus, if parties feel strongly enough about a national popular vote, they should change the Constitution through the one clear method allowed to change the election process—amending the Constitution.<sup>12</sup> It should be noted, this Author is not of the opinion that the Electoral College needs to be changed; rather, it is this Author’s opinion that the Electoral College is one of the greatest legacies of our Founding Fathers, which has protected citizens of the United States from the tyranny of the majority for over two hundred years.

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9. *Id.* (explaining further, “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”).

10. Darrell M. West, *It’s Time to Abolish the Electoral College*, BROOKINGS (Oct. 15, 2019), <https://www.brookings.edu/policy2020/bigideas/its-time-to-abolish-the-electoral-college/> [https://perma.cc/XRF2-EQJ6] (“One such mechanism [to abolish the Electoral College] that a number of states already support is an interstate pact that honors the national popular vote.”).

11. Jessica Kline, *The Essential Electoral College*, THE HERITAGE FOUND. (Sep. 14, 2020), <https://www.heritage.org/election-integrity/commentary/the-essential-electoral-college> [https://perma.cc/48GD-5X64] (detailing briefly the essential role of the Electoral College, urging readers to realize the import of its preservation); see also Norman R. Williams, *The Danger of the National Popular Vote Compact*, HARV. L. REV.: BLOG (Mar. 13, 2019), <https://blog.harvardlawreview.org/the-danger-of-the-national-popular-vote-compact/> [https://perma.cc/NN9A-7HLC] (commentating on the dangers of the National Popular Vote Interstate Compact, stating, “In my view, it is unconstitutional for states to appoint electors . . . in accordance with the will of voters outside the state. . . . [T]he NPVC will invite litigation on a far greater scale . . . than what the nation witnessed in [*Bush v. Gore*]”).

12. See U.S. CONST. art. V. (providing technically for two methods of amending the Constitution: (1) amendments proposed by Congress, or (2) amendments proposed by an Article V Convention of States).

To restate the infallible wisdom of Hamilton, “The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”<sup>13</sup> The citizenry should neither turn to the Court nor to backhanded means of subverting the Constitution to achieve their desired political goals; instead, they should turn to the amendment process. This two-century old wisdom aside, however, the Electoral College is continually under attack, and even Members of Congress call to end the Framers’ electoral machinery.<sup>14</sup> The purpose of this Comment is to identify the attacks on our Republic and to assist those interested in understanding how some persons seek to undermine our electoral process.

Ultimately, this Comment will address the potential threat the citizens of our Republic face from the attempted usurpations of the Electoral College. The remainder of Part I will address the history of the Electoral College as well as address the boundaries of this Comment. Elections should lead to peaceful transitions of power, but too often they are tumultuous events. Indeed, almost every election is embroiled in some form of attempted usurpation of the will of the people, yet this Comment will be limited to the Electoral College as it relates to *Chiafalo v. Washington*.<sup>15</sup> Part II will address the Electoral College process and early powers of states over electors. Part III addresses the perceived impact of *Chiafalo* on faithless elector laws. Part IV introduces the National Popular Vote Interstate Compact. Part V discusses the potential impacts of *Chiafalo* on faithless electors and the efforts to institute a national popular vote. Lastly, Part VI provides a brief conclusion and prediction regarding faithless electors.

#### A. *The Historical Foundation of the Electoral College*

From the founding of the Republic, drafting of the Constitution, and through to the present day, the concern over the election of the chief executive is firmly fixed in the minds of the nation’s most prominent figures.<sup>16</sup> Regarding the appointment of “the Chief Magistrate of the

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13. THE FEDERALIST NO. 78 (Alexander Hamilton).

14. Benjamin Fearnow, *Adam Schiff Tells Bill Maher Abolishing Electoral College an ‘Overdue’ Constitutional Change*, NEWSWEEK (Oct. 10, 2020), <https://www.newsweek.com/adam-schiff-tells-bill-maher-abolishing-electoral-college-overdue-constitutional-change-1538051> [<https://perma.cc/5PN4-EE4C>] (describing Chairman of the House Intelligence Committee Congressman Adam Schiff’s desire to abolish the Electoral College).

15. *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

16. See THE FEDERALIST NO. 68, *supra* note 8 (discussing the manner in which the chief executive shall be selected); Russell Wheeler, *Can the Electoral College be Subverted by*

United States,” the leading figures of the Founding Era noted that establishing the process of appointment for this position was an onerous battle to procure during the Constitutional Convention.<sup>17</sup> Without a doubt, the adoption of our Constitution was difficult; its implementation was filled with deep negotiation, politicking, and at times, sheer lack of resolution due to obligations delegates owed to their home states.<sup>18</sup>

The main story behind the promulgation of the present clause starts on Friday, August 31, 1787, with the motion of Mr. Roger Sherman of Connecticut, prior to the adjournment of the House, that a Committee of Eleven<sup>19</sup> be appointed to take up and address remaining parts of the Constitution—including the formation of the clause affecting electors.<sup>20</sup> This Committee of Eleven did not present a report upon the election of the president and vice president until Tuesday, September 4, 1787.<sup>21</sup> The honorable Mr. Brearley presented the Committee’s report, starting with the discussion of impeachments and Indian treaties.<sup>22</sup>

After several motions and votes to approve other clauses suggested by Mr. Brearley and the Committee of Eleven, the members moved to postpone the discussion on the “mode of electing the President . . . .”<sup>23</sup> Of note, one suggestion in the early discussion proposed that in the event one fails to receive a majority of electors, “then from the five highest on the list, the Senate shall choose by ballot the President.”<sup>24</sup> Second, after electing the president, the vote for vice president would take place, and “should remain two or more who have equal votes, the Senate shall choose from

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“Faithless Electors”?, BROOKINGS (Oct. 21, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/21/can-the-electoral-college-be-subverted-by-faithless-electors/> [https://perma.cc/2NL2-GBA7] (questioning the Electoral College and partially analyzing the history of the body).

17. See *Chiafalo*, 140 S. Ct. at 2320 (reviewing the Constitutional Convention of 1787, Justice Kagan identified the difficulties the delegates faced upon deciding the process for picking the president, noting: “The issue, one delegate to the Convention remarked, was ‘the most difficult of all [that] we have had to decide’” (quoting RECORDS, *supra* note 1, at 501)).

18. In a humorous note, Mr. George Mason of Virginia, in opposition of cutting discussion on a proposed article short, “Declar[ed] that he would sooner chop off his right hand than put it to the Constitution as it [then stood].” See RECORDS, *supra* note 1, at 479.

19. The eleven individuals comprising the committee consisted of “Mr[.] Gilman, Mr. King[,] Mr[.] Sherman[,] Mr. Brearley, Mr. Govr. Morris, Mr. Dickinson, Mr. Carrol, Mr. Madison, Mr. Williamson, Mr. Butler[,] & Mr. Baldwin.” *Id.* at 481.

20. *Id.*

21. *Id.* at 493–501.

22. *Id.* at 493.

23. *Id.* at 499.

24. *Id.* at 498.



them the vice-President.”<sup>25</sup> Thereby, all power in deciding who would serve as both president and vice president would ultimately rest *not* with the Electoral College, but with the Senate.<sup>26</sup> This would potentially vest the Senate with *de facto* power in selecting the chief executive and his deputy, and it is not difficult to see how this could easily be corrupted.<sup>27</sup>

Great discussion commenced between the likes of Mr. Madison, (who later would be elected after a modification of this clause by the Twelfth Amendment), Mr. Morris, Mr. Sherman, Mr. Pinkney, and others.<sup>28</sup> Specifically, James Madison—one of the Fathers of the Constitution who would be integral to several historic events related to the Constitution<sup>29</sup>—appeared apprehensive and worried the suggested plan would provide the Senate with the power to decide, in the case of a lack of majority for president and a tie for vice president, both of our Republic’s highest officers.<sup>30</sup>

The debate continued with Mr. Morris noting six reasons why this form of election was appropriate: (1) there “was the danger of intrigue [and] faction” in allowing the Legislature to appoint electors; (2) this mode could create an “inconveniency of an ineligibility” to “lessen its evils”; (3) appointment by the Legislature would complicate the impeachment

25. *Id.*

26. The Author realizes until April 8, 1913, with the ratification of the Seventeenth Amendment states still selected senators, thus making senate selection of the president and vice president a *de facto* secondary state election. See U.S. CONST. amend. XVII (removing the power of the states to select senators and providing for the direct election of senators by the majority vote of the state’s population).

27. It is not beyond the pale of imagination to see a group of senators situated in our nation’s capital, far away from their electorate and easily swayed by the influence of powerful men could lead to a small, powerful cabal to influence the senators to vote for someone different than their state’s desired. See RECORDS, *supra* note 1, at 499–501 (noting the corruption of the process by a cabal who seeks to control every election); cf. ROBERT A. CARO, THE PATH TO POWER: THE YEARS OF LYNDON JOHNSON I 46–47 (1982) (noting at the turn of the 20th century in the Texas Legislature a cabal of big business and lobbyists used their money and “beefsteak, bourbon[,] and blondes” to influence poor legislators in “one long orgy; in its backrooms [and] even on the floor of the Legislature” to receive the lobbyists’ desired results).

28. RECORDS, *supra* note 1, at 499–501.

29. See generally *Marbury v. Madison*, 5 U.S. 137 (1803) (noting the Court’s opinion is considered one of the foundations of United States constitutional law).

30. See RECORDS, *supra* note 1, at 500 (discussing Mr. Madison’s belief that this process of allowing the Senate to decide amongst the five highest candidates for each office “would have the effect at the same time, he observed, of giving the nomination of the candidates to the largest States”). But see *id.* at 499 (noting Mr. Sherman did not object to the clause and believed “[t]he choice of the President was to be made out of the five highest, obscure characters [that of which] were sufficiently guarded against in that case: And he had no objection to requiring the vice-President to be chosen in like manner, where the choice was not decided by a majority in the first instance”).

process; (4) no one was thoroughly satisfied by the Legislature appointing electors; (5) the people needed an immediate choice from the people; and (6) allowing the Legislature to appoint electors would create an imbalance in the separation of powers.<sup>31</sup> Others, such as Mr. Pinkney, objected that it would be improper to effectively allow the Senate de facto power to elect the president, in addition to allowing it to act as “Judges in [the] case of an impeachment.”<sup>32</sup> Mr. Williamson’s objections rested chiefly upon this current process, which made the president dependent on the Senate if he desired reelection.<sup>33</sup> In an attempt to salvage the plan, Mr. Wilson noted that for the election of the president by one of the Houses, the House of Representatives would be better than the Senate, as most prior disagreements arose in part because the Senate would be the party electing the President in the event of a tie.<sup>34</sup> Shortly after this, it was moved to postpone further consideration of this until another day.<sup>35</sup> The following day, September 5, 1787, the delegates continued their attempts to edit what would be Clause 2 of Article II, yet little progress was made as most motions to amend the language failed to pass.<sup>36</sup> It appears that on September 6, 1787, progress began to take shape, and several parts of the clause we are familiar with today started to pass.<sup>37</sup> It is after this point the groundwork for the current clause was nearly completed.

After the Convention, the Constitution was ratified and provided that each state shall have electors tasked with casting ballots to elect the president.<sup>38</sup> The power to elect the president was given by the Constitution to the States “*in such Manner as the Legislature thereof may direct . . .*”<sup>39</sup>

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31. *Id.* at 500 (indicating Mr. Mason believed this plan “removed some capital objections, particularly the danger of cabal and corruption. [However, it] was liable . . . that nineteen times in twenty the President would be chosen by the Senate, [whom he opined] an improper body for the purpose”).

32. *Id.* at 501.

33. *Id.*

34. *Id.* at 502.

35. *Id.*

36. *Id.* at 507.

37. *Id.* at 517–19.

38. *See* U.S. CONST art. II, § I, cl. 2 (“Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

39. *Id.* (emphasis added).

### B. *The Boundaries of This Comment*

It is understandable that the issues surrounding the Electoral College and the election of the President rouse strong and passionate responses—from both those in support, and those in opposition—whether from partisan beliefs or from historic events. However, this Comment does not seek to address partisan aspects,<sup>40</sup> and specific attention was taken during its drafting to maintain a neutral balance, to use sources from both sides of the discussion, and to not delve further into current political matters unless absolutely necessary. The sole objective of this Comment is to provide an understanding regarding where the Electoral College is today, and what forces may be at work to influence it.

This Comment will not directly address many of the Electoral College adjacent issues which arose during the early 21st century, specifically the numerous attempts to decertify election results or to reject certified electors from states over the past two decades.<sup>41</sup> Further, although a novel and interesting thought experiment, this Comment will not address any of the potential powers of the vice president to overturn or reject the certified electors of the several states.<sup>42</sup> Neither will this Comment address the issues encompassing President Donald J. Trump's attempts to invalidate election results, nor the events centering around the certification of the election results on January 6, 2021.<sup>43</sup> Lastly, the procedures of Congress to

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40. In fact, it is the Author's opinion that issues addressed regarding the Electoral College are no more Republican versus Democrat as they are Federalist versus Democratic-Republicans. Instead, the issue falls along the lines of whether one believes the power to select the president rests with a majority of the states—as each is sovereign and the country exists with their consent to be joined—or if one believes a small number of states with a larger population can dictate to the rest of the nation who will be their leader.

41. Derek T. Muller, *Democrats Have Been Shameless About Your Presidential Vote Too*, N.Y. TIMES (Jan. 06, 2021), <https://www.nytimes.com/2021/01/06/opinion/democrat-republican-electoral-votes.html> [<https://perma.cc/3TBG-JGKB>] (“[S]tarting with George W. Bush’s victory in the 2000 presidential election, Democrats contested election results after every Republican win.”).

42. See Kevin Breuninger, *DOJ Opposes Republican Suit That Seeks to Have Pence Overturn Biden Election in Trump’s Favor*, CNBC (Dec. 31, 2020, 7:59 PM), <https://www.nbcnewyork.com/news/business/money-report/doj-opposes-republican-suit-that-seeks-to-have-pence-overturn-biden-election-in-trumps-favor/2807470/?amp> [<https://perma.cc/SY24-Y3TY>] (discussing the lawsuit by Congressman Louie Gohmert to have Vice President Michael R. Pence reject the 2020 election results during a Joint Session of Congress); see also *Gohmert v. Pence*, 510 F. Supp. 3d 435, 437 (E.D. Tex.), *aff’d*, 862 F.App’x 349 (5th Cir. 2021) (“[Challenging] the constitutionality of the Electoral Count Act of 1887 . . .”).

43. See Alex Samuels & Patrick Svitek, *After Riot at the U.S. Capitol, Ted Cruz Gets Fierce Blowback for his Role in Sowing Doubts about Joe Biden’s Victory*, TEXAS TRIBUNE (Jan. 07, 2021, 7:00 PM), <https://www.texastribune.org/2021/01/07/ted-cruz-riot-capitol/> [<https://perma.cc/MYJ8-PEF4>]

object to election results will not specifically be addressed, as this Comment is more directly related to the power the states have over electors.<sup>44</sup>

That being said, this Comment will analyze and address the principal issue of how *Chiafalo v. Washington* will impact “faithless electors”<sup>45</sup> and the National Popular Vote Interstate Compact (NPVIC) (or any similar plan for effectively bypassing the Electoral College), and additionally, the issues surrounding state control over the electors.<sup>46</sup> Although the Supreme Court did not take or have the opportunity to specifically address whether the NPVIC or any form of interstate compact would be valid under the Constitution, a plethora of commentary will assist in addressing this point.<sup>47</sup>

### 1. A Brief Introduction to *Chiafalo v. Washington*

This Comment will specifically revolve around the impact of one case, *Chiafalo*, thus, an introduction to that case is now necessary. The *Chiafalo* case arose as a result of the 2016 presidential election, and directly dealt with whether a state could fine a faithless elector for not voting for the presidential candidate to which he or she was pledged to vote for as part of being an elector.<sup>48</sup> Further, the litigation revolving *Chiafalo*, as discussed

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(discussing the events of January 6, 2021, and the attempt of senators to invalidate 2020 election results).

44. See 3 U.S.C. § 15 (“Upon such reading . . . the President of the Senate shall call for objections, if any. Every objection shall be made in writing . . . and shall be signed by at least one Senator and one [Representative] before the same shall be received.”).

45. A “[f]aithless elector” is “a member of the Electoral College who does not vote for his or her party’s nominee for president or vice president.” *What Are Faithless Electors in the Electoral College?* (2020), BALLOTPEDIA, [https://ballotpedia.org/What\\_are\\_faithless\\_electors\\_in\\_the\\_Electoral\\_College%3F\\_\(2020\)](https://ballotpedia.org/What_are_faithless_electors_in_the_Electoral_College%3F_(2020)) [https://perma.cc/UT32-VTGK] (Jan. 13, 2021); see also Paul LeBlanc, *What Faithless Electors Are and Why They Won’t Matter This Year*, CNN (Dec. 14, 2020, 6:39 AM), <https://www.cnn.com/2020/12/13/politics/what-matters-december-13/index.html> [https://perma.cc/98PB-J9JC] (“Historically, electors have overwhelmingly voted for the candidate who wins the popular vote in their state[,] but they can stray. If they do, they’re called faithless electors.”).

46. See Thomas Jipping, *The National Popular Vote: Misusing an Interstate Compact to Bypass the Constitution*, THE HERITAGE FOUND. (Oct. 8, 2020), <https://www.heritage.org/civil-rights/report/the-national-popular-vote-misusing-interstate-compact-bypass-the-constitution> [https://perma.cc/59KU-VNRQ] (highlighting the possibility that the National Popular Vote Interstate Compact may violate the Constitution as an attempt to circumvent the amendment process).

47. *Chiafalo v. Washington*, 140 S. Ct. 2319–22 (2020); see also Edward A. Hartnett, *The Pathological Perspective and Presidential Election*, 73 SMU L. REV. 445, 461–66 (2020) (providing an in-depth discussion of the National Popular Vote Interstate Compact and the interplay between the NPVIC and the Compact Clause).

48. *Chiafalo*, 140 S. Ct. at 2322–24.

later, is the companion case of *Baca v. Colorado Department of State*.<sup>49</sup> Although that case dealt with slightly different matters, *Baca* was reversed through a memorandum opinion, which only cited the reasoning in *Chiafalo* as the cause for reversing.<sup>50</sup> In *Chiafalo*, The Supreme Court of the United States ultimately affirmed the decision of the Washington Supreme Court, which permitted the fine of the faithless electors.<sup>51</sup> Thus, this case provides an insight into the future of interpreting the power state legislatures have over electors.<sup>52</sup>

## II. THE ELECTORAL COLLEGE PROCESS

The public desire to abolish the Electoral College is not a novel development of the last decade—people have been arguing against the Electoral College from the beginning.<sup>53</sup> Unsurprisingly, the calls to abolish the Electoral College often come from the candidate who lost the previous election.<sup>54</sup> However, manipulation and attacks on the Electoral College are not new, and began soon after the founding of the Republic.<sup>55</sup> As a note of the importance of the Electoral College, many of the most recent

49. *Baca v. Colorado Dep't of State*, 935 F.3d 887 (10th Cir. 2019), *rev'd*, 140 S. Ct. 2316 (2020) (mem.) (per curiam).

50. *See id.* (detailing the matter in the 10th Circuit, which was ultimately reversed by the Supreme Court); *Chiafalo*, 140 S. Ct. at 2316 (containing the reasoning ultimately used to reverse *Baca*).

51. *Chiafalo*, 140 S. Ct. at 2329.

52. *Id.* at 2316.

53. *See* Jesse Wegman, *Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, 89 *FORDHAM L. REV.* 103, 104–07 (2020) (discussing the efforts of Senator Birch in the 1960s, attempting to replace the Electoral College with a direct popular vote).

54. *See* Dan Merica, *Clinton: It's Time to Abolish the Electoral College*, CNN POLITICS (Sept. 14, 2017), <https://www.cnn.com/2017/09/13/politics/hillary-clinton-anderson-cooper-electoral-college-cnnvtv/index.html> [<https://perma.cc/ZY2X-LUM4>] (calling to abolish the Electoral College after losing it to President Donald J. Trump); *see also* Rebecca Savransky, *Al Gore: End the Electoral College*, THE HILL (Nov. 29, 2016, 5:24 PM), <https://thehill.com/blogs/blog-briefing-room/news/307966-al-gore-says-he-supports-elimination-of-electoral-college> [<https://perma.cc/B872-M8UV>] (discussing the one-time presidential hopeful, Vice President Al Gore, who believed elimination of the Electoral College would improve voter turnout). *But see* George Will, *The President Who Knew Too Little About the Electoral College*, NAT'L REV. ONLINE (May 3, 2018, 6:30 AM), <https://www.nationalreview.com/2018/05/president-trump-electoral-college-complaints-unfounded/> [<https://perma.cc/YM3V-53ME>] (highlighting President Trump's calling for the direct election of the president, as it is easier to overcome than the traditional Electoral College system. However, had this been in place in 2016, President Trump would have lost the White House to Hillary Clinton.).

55. *See* Letter from Thomas Jefferson to James Madison (Mar. 4, 1800) (James Madison Papers, Manuscript Division, Library of Congress (97) [Digital ID#s us0097, us0097\_1]) (describing a plan to manipulate the selection of electors in three states for the upcoming election).

presidential elections have often rested on the Electoral College.<sup>56</sup> However, the recent elections are not the only time periods in which the Electoral College has played a pivotal role in selecting the President.<sup>57</sup> Further, the election of President George W. Bush in 2000 stirred up a new desire to end the Electoral College when he became President after winning the requisite number of states to have enough electors to win the Electoral College despite losing the overall national popular vote.<sup>58</sup> This fire was intensified by the 2016 election of President Donald J. Trump, and years later these grievances have not waned—there is still a raging debate centered around ending the Electoral College.<sup>59</sup>

Further, based on the current political climate, it seems that regardless of the events surrounding the 2020 election outcome and the various elections challenges and political matters encircling it,<sup>60</sup> elections—especially close and contentious elections—will cast the Electoral College into greater debate.<sup>61</sup> The Electoral College—the protector of the Republic from the

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56. See FEDERAL ELECTIONS COMMISSION, FEDERAL ELECTIONS 2000, ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 11–12 (2001) (noting President George W. Bush received over 500,000 fewer votes than Al Gore in the populace but received a majority of the Electoral College votes); FEDERAL ELECTIONS COMMISSION, FEDERAL ELECTIONS 2016, ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5–6 (2017) (noting President Donald J. Trump received 3,000,000 fewer votes than Hilary Clinton in the popular vote but received over seventy-seven more Electoral College votes).

57. See Dave Roos, *5 Presidents Who Lost the Popular Vote but Won the Election*, HIST. (Nov. 2, 2020), <https://www.history.com/news/presidents-electoral-college-popular-vote> [<https://perma.cc/RF3F-XP28>] (discussing five times where the Electoral College has been a center point in the final decision of who would ultimately become the President of the United States).

58. See generally Ky Fullerton, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717 (2001) (analyzing the 2000 Election, the Electoral College, and the national popular vote).

59. See Steve Coll, *The Case for Dumping the Electoral College*, NEW YORKER (Sept. 13, 2020), <https://www.newyorker.com/magazine/2020/09/21/the-case-for-dumping-the-electoral-college> [<https://perma.cc/DSV7-JN5Q>] (criticizing the Electoral College by characterizing it as broken, and opining President Trump's win was inevitable, even if he were to lose the popular vote, as the President likely wins the Electoral College).

60. See Michael Lee, *House Democrats Introduce Constitutional Amendment to Ban Electoral College*, MSN (Jan. 13, 2021), <https://www.msn.com/en-us/news/politics/house-democrats-introduce-constitutional-amendment-to-ban-electoral-college/ar-BB1cIRc7> [<https://perma.cc/A88P-5DVU>] (noting a proposed amendment to the Constitution over the events surrounding the 2020 election).

61. See Tim Alberta, *Blowout for Biden or Narrow Win for Trump?*, POLITICO (Sept. 8, 2020 4:30 AM), <https://www.politico.com/news/magazine/2020/09/08/smoke-filled-zoom-convention-edition-243505> [<https://perma.cc/YYYY-7HBTR>] (discussing the opinions of four former Republican presidential candidates' staffers that then 2020 Presidential Candidate Biden will win the popular vote in a landslide but noting former President Trump's likelihood of winning through the Electoral

tyranny of the majority—is facing ever mounting calls for abolishment.<sup>62</sup> For example, at least one Joint Resolution was submitted in an attempt to abolish the Electoral College during the 116th Congress, but the resolution did not move further than the introductory stage.<sup>63</sup> However, it reappeared in the 117th Congress.<sup>64</sup>

A. *States Select the President Through a Process Outlined in the 12th Amendment*

As introduced in Part I<sup>65</sup> of this Comment, the path to deciding how to elect the president was not without difficulty. Thus, it comes as no surprise that the direct election of a president failed numerous times during the Constitutional Convention.<sup>66</sup> Although much thought was placed upon the selection of the president, the system quickly became one of the most visible areas of the Constitution that needed refinement. This was particularly apparent after the results of two contentious elections, which challenged the structure of the original process of electing the president outlined in the Constitution.<sup>67</sup> Two consecutive difficult elections demonstrated that the original Article II, Section 1 of the Constitution had a flaw, which resulted in the House of Representatives selecting the president when a tie resulted between all of the candidates in the Electoral College, as the votes were

College). Further, as noted, this Comment will not touch on the issues truly regarding the 2020 Presidential Election. See Kevin Breuninger, *supra* note 42 (discussing one of the issues faced after the 2020 Presidential Election).

62. See Spenser Mestel, *Why The Electoral College Is More Relevant Today Than Ever*, HUFFPOST (Nov. 30, 2016 1:09 PM), [https://www.huffpost.com/entry/why-the-electoral-college-is-more-relevant-today-than\\_b\\_583f08a7e4b048862d73fd70](https://www.huffpost.com/entry/why-the-electoral-college-is-more-relevant-today-than_b_583f08a7e4b048862d73fd70) [<https://perma.cc/ZCD6-E6VA>] (opining on the desire to abolish the Electoral College).

63. See H.R.J. Res. 7, 116th Cong. (2019) (attempting to amend the Constitution by abolishing the Electoral College).

64. See H.R.J. Res. 14, 117th Cong. (2021) (proposing a constitutional amendment by abolishing the Electoral College in favor of directly electing the President through a national popular vote); see also Lee, *supra* note 60 (detailing the reasons for the Members of Congress putting forward H.R.J. Res. 14 in the 117th Congress).

65. See *supra* Section I(A).

66. See Jim King, *Presidential Selection the Electoral College v. Direct Election*, 34 WYO. LAW. 26, 28 (2011) (“Despite the advocacy of such influential delegates as Morris and James Madison, the Convention twice voted down proposals for direct election of the President.”).

67. See *Tally of Electoral Votes for the 1800 Presidential Election*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/1800-election/1800-election.html> [<https://perma.cc/HZ6L-YPSW>] [hereinafter *Tally of Electoral Votes*] (discussing the identification of unforeseen issues within the electoral system which ultimately led to the passage of the Twelfth Amendment).

taken for all names regardless if one was a candidate for vice president or president.<sup>68</sup>

The original text of Article II, Section 1 of the Constitution did not provide, as the Twelfth Amendment does, two separate votes—one for president and one for vice president. Instead, when the Electoral College was evenly split, the House of Representatives became the final and only body to choose the president.<sup>69</sup> With the House of Representatives having the final vote, such a process led to tremendous levels of confusion and unintended consequences, as two candidates from opposing parties were essentially being thrown into the offices of president and vice president.<sup>70</sup>

The trouble with both the election of 1796<sup>71</sup> (when Federalist John Adams was forced to have Republican Thomas Jefferson as his vice president) and of 1800<sup>72</sup> (where the House of Representatives cast thirty-five ballots to determine the president after a tied Electoral College) was rectified when Congress passed the Twelfth Amendment.<sup>73</sup> The Twelfth Amendment provides that:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States . . . . The person having the greatest number of votes for President, shall be the

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68. *See id.* (emphasizing the problems which came to fruition following the election of 1800, including the dozens of votes cast by the House of Representatives during two contested elections).

69. *See* U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII (describing the process by which the President would be chosen and for the fallback procedure should the Electoral College be split evenly); *see also id.* (amending the issue of a split between the Electoral College to provide for two separate ballots as well a better procedure for a split of the Electoral College).

70. *See Tally of Electoral Votes, supra* note 67 (“The framers of the Constitution had not anticipated such a tie nor had they considered the possibility of the election of a President or Vice President from opposing factions[—]which had been the case in the 1796 election.”).

71. In this election, John Adams and Thomas Jefferson—although belonging to different parties—finished first and second respectively, meaning that the president and vice president would be of opposing parties. *See* DAVID MCCULLOUGH, JOHN ADAMS 465–66 (Simon & Schuster 2001) (noting James Madison was worried that Jefferson would have to serve under Adams, yet Jefferson relented (and likely resented) that “[Adams] has always been my senior, from the commencement of my public life”).

72. Historian David McCullough raises the important point making the Election of 1800 even more contentious, this was “the first (and last) time in history, the President was running against the Vice President.” *Id.* at 537.

73. *See Tally of Electoral Votes supra* note 67 (discussing the background issues that led to the passage of the Twelfth Amendment).



President, if such number be a majority of the whole number of Electors appointed; and if no person has such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote . . . .<sup>74</sup>

After the passage of the Twelfth Amendment, this process outlines the modern process of electing the president, which we are familiar with today.<sup>75</sup>

### B. *Steps of Selecting Electors*

The present process of appointing the electors is still, for the most part, robustly defined by state law, but there are certain mandates found in federal law (even though the electors are selected by processes in the several states).<sup>76</sup>

#### 1. General Federal Law Applying to the Electoral College Under Title 3 of the United States Code

Although state laws apply, there are certain provisions in Title 3 of the United States Code that apply to the selection of electors.<sup>77</sup> For instance, by statute, electors are appointed on the date of the Presidential Election.<sup>78</sup> In addition, after Tuesday, November 3, 2020, electors from each state were

74. U.S. CONST. amend. XII.

75. See generally *Presidential Election Process*, USAGOV, <https://www.usa.gov/election> [<https://perma.cc/H477-GJ7M>] (Jan. 14, 2021) (outlining the process for electing the President); *Electoral College History*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/history#whyec> [<https://perma.cc/4JJ9-P3FY>] (noting answers to the general process of the Electoral College and its modern-day functions).

76. See Sarah Pruitt, *How Are Electoral College Electors Chosen?*, HIST. (Dec. 14, 2020), <https://www.history.com/news/electors-chosen-electoral-college> [<https://perma.cc/9LAT-QWN9>] (“[M]ost [state’s] method of choosing electors is by state party convention. Each political party’s state convention nominates a slate of electors, and a vote is held at the convention. In a smaller number of states, electors are chosen by a vote of the state party’s central committee.”).

77. See generally 3 U.S.C. § 1 et seq. (regarding the federal provisions under Title 3 governing the Electoral College).

78. See *id.* (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”).

selected according to each state's law in accordance with the mandates of Article II of the Constitution.<sup>79</sup>

If a state fails to select their electors “on the Tuesday next after the first Monday in November,”<sup>80</sup> then the state shall soon thereafter appoint electors pursuant to each state's specific laws.<sup>81</sup> Regardless of the certification date per the states, either on election day or after, Congress has established the hard deadline for the electors to vote for the president and vice president to be “on the first Monday after the second Wednesday in December next following their appointment . . . .”<sup>82</sup>

## 2. Outlining the Selection of Electors

Although there are federal laws detailing procedural aspects of the electors,<sup>83</sup> the present model for the selection of electors is a wholly political process.<sup>84</sup> Unsurprisingly, the electors themselves are unelected figures<sup>85</sup> and are chosen well in advance of the November election by members of the several political parties in the various states.<sup>86</sup> Aside from giving the power to select electors to the several states, the only apparent restraints in

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79. See U.S. CONST. art. II, § 1, cl. 2 (“Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”); see also TEX. ELEC. CODE ANN § 192.003 (“[A] person must be nominated as a political party's elector candidate in accordance with party rules or named as an elector candidate by an independent or write-in candidate for president.”); Michael S. Rosenwald, *Biden, Once One of the Nation's Youngest Senators, Will Be Its Oldest President*, WASH. POST (Jan. 11, 2021, 6:00 AM), <https://www.washingtonpost.com/history/2021/01/11/youngest-senators-joe-biden/> [<https://perma.cc/HMC6-8Z8U>] (noting Joseph R. Biden, Jr. will be the 46th President of the United States of America).

80. 3 U.S.C. § 1.

81. See *id.* § 2 (“Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”).

82. See *id.* § 7 (providing the date on which the electors will meet and cast their vote for President and Vice President); see also TEX. ELEC. CODE ANN. § 192.006(a) (instructing electors to meet “at the State Capitol at 2 p.m. on the first Monday after the second Wednesday in December” following the Presidential election).

83. See 3 U.S.C. § 1 (stating federal laws and procedures surrounding electors).

84. See Scott Bomboy, *Who Are the Electors in the Electoral College?*, NAT'L CONST. CTR. (Oct. 21, 2016), <https://constitutioncenter.org/blog/who-are-the-electors-in-the-electoral-college> [<https://perma.cc/XE9U-6HQJ>] (detailing the process by which states select slates of electors).

85. See U.S. CONST. art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an [O]ffice of [T]rust or [P]rofit under the United States, shall be appointed an Elector.”).

86. See Bomboy, *supra* note 84 (“The list of the electors, or the slate of electors, within a state usually doesn't appear on the election ballot . . . . Each political party decides how to submit its slate of electors, at the request of its presidential candidate.”); *cf.* THE FEDERALIST NO. 68, *supra* note 8 (noting that the selection of the president would be “not to any preestablished body, but to men chosen by the people for the special purpose . . . .”).

the Constitution for the selection of electors are the Fourteenth Amendment's prohibition that "[n]o person shall be a[n] . . . elector of President and Vice President . . . [if they] have engaged in insurrection or rebellion against the [Constitution of the United States], or given aid or comfort to the enemies thereof[.]"<sup>87</sup> and Article II's requirement that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."<sup>88</sup> The final guidepost established in the Constitution for the selection of electors is that no means of selection of electors is permitted to violate any other clause or article of the Constitution: essentially, even though there are limited restraints outlined in Article II and the Twelfth Amendment, electors may not be appointed if their appointment would violate any other part of the Constitution or laws of the United States.<sup>89</sup>

### 3. A Citizen's Power to Elect an Elector Does Not Exist Unless the State Grants This Right

One surprising note regarding a citizen's power to elect an elector comes from the 2000 case, *Bush v. Gore*.<sup>90</sup> In *Bush*, the Court noted that a person does not have a general right to vote for their electors "until the *state legislature chooses* a statewide election as the means to implement its power to appoint members of the Electoral College."<sup>91</sup> To that point, this requirement that the state must confer this right seems in line with what the Court has previously stated in the nineteenth century case of *McPherson v. Blacker*,<sup>92</sup> where the Court noted that the Constitution provides the states with plenary power over how to choose electors.<sup>93</sup>

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87. U.S. CONST. amend. XIV, § 3; see Pruitt, *supra* note 76 (highlighting some of the steps in modern process of selecting the members of the Electoral College).

88. U.S. CONST. art. II, § 1, cl. 2.

89. See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (stating, "[T]hese granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution").

90. *Bush v. Gore*, 531 U.S. 98 (2000).

91. *Id.* at 104 (emphasis added) (citing U.S. CONST. art. II, § 1).

92. *McPherson v. Blacker*, 146 U.S. 1 (1892).

93. See *id.* at 35 ("[F]rom the formation of the government until now the practical construction of [Article II, Section 1] has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

C. *Power over Electors Pre-Chiafalo*

The Constitution, as mentioned above, communicates few demands on how an elector may be chosen.<sup>94</sup> Further, the power to select electors is vested with the several state legislatures to decide how to select the electors.<sup>95</sup> Since the founding of the Republic, the Supreme Court has spoken only a few times about the power over electors.<sup>96</sup> The ground zero principle, which Justice Kagan spoke of early in *Chiafalo*, states that nearly all states will bind electors of either party to vote for that party's nominee if such nominee wins the election of that state.<sup>97</sup> Further, the Court once before upheld this binding of parties by denying that being an elector “demands absolute freedom for the elector to vote his own choice . . . .”<sup>98</sup> In *Ray v. Blair*,<sup>99</sup> the Court faced an individual from Alabama alleging that the state's law requiring him to vote for the winner of the state's general election violated his constitutional rights as an elector.<sup>100</sup> Specifically, he argued the “intention of the Founders was that [presidential] electors should exercise their judgment in voting[.]” and requiring him to pledge his vote “interfere[d] with the performance of this constitutional duty to select [a president] according to the best judgment of the elector.”<sup>101</sup> The Court in *Ray* noted that often electors' votes did not matter, and, in fact, the electors were supposed to act as conduits for the will of the parties.<sup>102</sup> Thus, the Court upheld the Alabama law in *Ray*, as nothing in the Twelfth Amendment barred “a political party from requiring the pledge to support the nominees of the National Convention.”<sup>103</sup> As Justice Kagan noted,

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94. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XIV, § 3.

95. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such [M]anner as the Legislature thereof may direct, a [N]umber of [E]lectors . . . .”).

96. See generally *McPherson v. Blacker*, 146 U.S. 1 (1892) (discussing the Electoral College, and some of the early powers over it recognized by the Supreme Court); *Ray v. Blair*, 343 U.S. 214 (1952) (discussing some limits on the power over electors).

97. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020) (“Most States also compel electors to pledge in advance to support the nominee of that party.”).

98. *Ray*, 343 U.S. at 228.

99. *Ray v. Blair*, 343 U.S. 214 (1952).

100. *Id.* at 225.

101. *Chiafalo*, 140 S. Ct. at 2323 (quoting *Ray*, 343 U.S. at 225) (alteration in original).

102. See *id.* at 2323 (“To the contrary, [h]istory teaches that the electors were expected to support the party nominees’ as far back as the earliest contested presidential elections.”) (quoting *Ray*, 343 U.S. at 228 (alteration in original)).

103. *Ray*, 343 U.S. at 231.

today at least fifteen states have enacted laws that provide for sanctions if electors are faithless.<sup>104</sup>

As the Court reaffirmed in *Chiafalo*, a state does not have to give unlimited freedom to an elector in his or her choosing of the president.<sup>105</sup> For example, a state may require an elector to sign a pledge requiring them to vote for a certain candidate, and states do not have to give the electors unlimited freedom in making their decision.<sup>106</sup> However, one thing is clear, “the power to select electors [cannot] be exercised in such a way as to violate express constitutional commands . . . .”<sup>107</sup>

### 1. How States Divide Their Electors

Each state has the power to appoint electors based on the decisions of the people through the various state legislatures.<sup>108</sup> Today, all but two states give the winner of the state’s popular vote all of their electoral college votes.<sup>109</sup>

The two states—Maine and Nebraska—that do not give all of their electors to the candidate who wins the overall popular vote,<sup>110</sup> instead give two electors at large for the winner of the state’s popular vote, and then give

104. *Chiafalo*, 140 S. Ct. at 2322 n.2 (listing the specific statutes from fifteen states providing for sanctions of faithless electors).

105. *See id.* at 2320 (reaffirming the reasoning in *Ray*, 343 U.S. 214).

106. *See id.* (“This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution ‘demands absolute freedom for the elector to vote his own choice.’”) (quoting *Ray*, 343 U.S. at 228).

107. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (discussing the application of the Equal Protection Clause related to the selection of presidential electors for political parties at the state level).

108. *See* U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such manner as the Legislature thereof may direct, a [N]umber of [E]lectors . . . .”); *see also Chiafalo*, 140 S. Ct. at 2324 (“This Court has described that clause as ‘conveying the broadest power of determination’ over who becomes an elector.”) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)). The question this Comment does not address, is one created by Justice Thomas’ assertion that Article II, Section 1 provides no delegation of power, just a duty for the states to fulfill. *See Chiafalo*, 140 S. Ct. at 2329 (Thomas, J. concurring in the judgment) (“This obligation to provide the manner of appointing electors does not expressly delegate power to States; it simply imposes an affirmative duty.”) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 862–63 (1995) (Thomas, J. dissenting)).

109. *See Chiafalo*, 140 S. Ct. at 2321 n.1 (“[In] Maine and Nebraska . . . two electors go to the winner of the statewide vote and one goes to the winner of each congressional district.”); *How Are Electors Chosen?*, TAEGAN GORDON’S ELECTORAL VOTE MAP, <https://electoralvotemap.com/how-are-electors-chosen/> [<https://perma.cc/J9EZ-NLGV>] (discussing the various methods that states appoint electors and providing links to state statutes governing electors).

110. *See* ME. REV. STAT. tit. 21-A, § 802 (providing, “[o]ne presidential elector shall be chosen from each congressional district and [two] at large”).

one elector the winner of the popular vote in each congressional district.<sup>111</sup> The process adopted by both Maine and Nebraska allows for the interesting aspect where the total winner of the overall votes may be one candidate who collects the most votes statewide, and then each of the congressional districts will give their elector to a candidate who, though did not win the overall vote, won the majority of that district.<sup>112</sup>

### III. *CHIAFALO V. WASHINGTON* CHANGED THE LANDSCAPE OF FAITHLESS ELECTOR LAWS

The narrow question presented for the Court to consider in *Chiafalo* boiled down to “whether a State may [in addition to binding electors to a promise] penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State’s popular vote.”<sup>113</sup> The Court answered this question in the affirmative; states may (1) bind electors to promises to vote for a specific candidate; and (2) punish an elector—by removal, fine, or otherwise—should they not vote in accordance with that promise.<sup>114</sup>

#### A. *Background of Chiafalo v. Washington and Colorado Department of State v. Baca*

Two cases stand out as what could be considered the start of a major re-evaluation for the potential future for how states control their electors, and the future of faithless electors.<sup>115</sup> First, a brief background on each case.

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111. See NEB. REV. STAT. § 32-710 (providing, “[o]ne presidential elector shall be chosen from each congressional district, and two presidential electors shall be chosen at large”).

112. See *Split Electoral Votes in Maine and Nebraska*, 270 TO WIN, <https://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/> [<https://perma.cc/NH2Y-4CBE>] (discussing the possibility of “multiple popular vote contests in these states . . .”); *Maine Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/maine> [<https://perma.cc/4ES6-LBLA>] (detailing Donald Trump receiving one electoral vote in Maine while Hillary Clinton received three electoral votes).

113. *Chiafalo*, 140 S. Ct. at 2320.

114. See *id.* at 2320 (“We hold that a State may [penalize faithless electors.]”); see also *Ray v. Blair*, 343 U. S. 214, 228 (1952) (noting that electors may be bound to vote in a particular way and do not have unlimited freedom to choose for whom they cast their vote).

115. See generally *Chiafalo*, 140 S. Ct. 2316; *Colo. Dep’t of State v. Baca*, 140 S. Ct. 2316 (2020) (mem.) (per curiam).

### 1. The Background of *Colorado Department of State v. Baca*

*Colorado Department of State v. Baca*<sup>116</sup> originated after the 2016 election where Mr. Baca, as a presidential elector in Colorado, was removed for casting a vote for John Kasich instead of Hillary Clinton.<sup>117</sup> The Colorado Secretary of State removed Mr. Baca from office as an elector, discarded his vote, and replaced him with an elector who would vote for Hillary Clinton.<sup>118</sup>

The parties brought a 42 U.S.C. § 1983 action in a federal district court in Colorado against the Colorado Department of State for the removal of Mr. Baca and the feared removal of two other Electors.<sup>119</sup> The district court granted the Department of State's motion to dismiss, but the Tenth Circuit Court of Appeals reversed, determining that the nullification and removal of Mr. Baca as elector was unconstitutional and violated his rights as an elector.<sup>120</sup>

### 2. The Background of *Chiafalo v. Washington*

The leading case that the Supreme Court employed to decide the overall matter of a state's power to punish an elector is that of *Chiafalo v. Washington*.<sup>121</sup> Similar to the facts in *Baca*, *Chiafalo v. Washington* also stems from the 2016 election. There, two more presidential electors for the State of Washington, who were selected to vote for Hillary Clinton as president, voted instead for a different candidate, thus becoming faithless electors subject to their states own applicable laws regarding the punishment of faithless electors.<sup>122</sup>

However, unlike in *Baca*, the votes were counted and transmitted to Washington D.C.<sup>123</sup> After the ballots were counted, the Washington

116. *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (mem.) (per curiam).

117. *See Baca v. Colo. Dep't of State*, 935 F.3d 887, 901–02 (10th Cir. 2019) (providing background information on the origins of the case), *rev'd*, 140 S. Ct. 2316 (2020) (mem.) (per curiam).

118. *Baca*, 935 F.3d at 901–02.

119. *See id.* (discussing the basis of the suit where “Micheal Baca, Polly Baca, and Robert Nemanich . . . were appointed as three of Colorado’s nine presidential electors for the 2016 general election”). Mr. Baca was removed as a presidential elector by the Colorado Secretary of State and Mr. Baca and Mr. Nemanich feared their removal on similar grounds. *Id.*

120. *Id.*

121. *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

122. *See In re Guerra*, 441 P.3d 807, 807–08 (Wash. 2019) (providing background details on the case which later became *Chiafalo v. Washington*).

123. *See id.* (discussing pertinent facts of *Chiafalo*); *cf. Baca*, 935 F.3d at 904 (noting that the votes cast by the Electors in *Baca* were not transmitted to Washington, D.C., because the Electors from Colorado were removed from office instead of fined).

Secretary of State fined the faithless electors under the applicable Washington law.<sup>124</sup> The parties then appealed their fine to an administrative law judge (ALJ), where, following an unfavorable decision due to the jurisdiction of the ALJ, the parties entered state district court.<sup>125</sup>

The Supreme Court of Washington affirmed the trial court's decision to allow the fine, and rested its analysis, *inter alia*, on the grounds that "Article II, [S]ection 1 of the United States Constitution grants to the states plenary power to direct the manner and mode of appointment of electors to the Electoral College."<sup>126</sup>

In the State of Washington, if an elector did not vote the way that they were required and pledged to do based on the political party the electors were selected by, then the original punishment was a \$1,000 fine.<sup>127</sup> However, now the fine has been changed and the elector is removed from office as punishment.<sup>128</sup> The original punishment in Washington is different than that described in *Baca*, which solely appeared to be the removal of a presidential elector, and the replacement of him with an elector who would vote as instructed.<sup>129</sup>

The Supreme Court of the United States took up the matter of *Chiafalo* and *Baca*, and the cases were granted certiorari<sup>130</sup> to the Supreme Court of Washington and the Tenth Circuit Court of Appeals, respectively.<sup>131</sup> Because *Baca* was determined exclusively by the rationale used in *Chiafalo*, this Comment will neither directly discuss nor analyze the *Baca* rationale, as it is the same as in *Chiafalo* but with slightly different facts.<sup>132</sup>

### 3. A Note on *Baca*'s Punishment and the Present Law of the State of

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124. See *Guerra*, 441 P.3d at 808; WASH. REV. CODE § 29A.56.340 (2016) (issuing \$1,000 fine on faithless electors).

125. See *Guerra*, 441 P.3d at 809 (describing the procedural history of the events leading to *Chiafalo*).

126. *Id.* at 817 (holding the fine did not violate the Constitution of the United States).

127. See WASH. REV. CODE § 29A.56.340 (2016) (issuing \$1,000 fine on faithless electors).

128. See *id.* at § 29A.56.090(3) (2019) (removing faithless electors).

129. See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901 (2019), *rev'd*, 140 S. Ct. 2316 (2020) (mem.) (per curiam) (describing the removal of Mr. Baca for not casting his vote for Hillary Clinton).

130. See *Chiafalo v. Washington*, 140 S. Ct. 918 (2020) (mem.) (granting certiorari to the Supreme Court of Washington and to the United States Court of Appeals for the 10th Circuit and consolidating cases).

131. *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (mem.) (per curiam).

132. See *id.* ("The judgment of the United States Court of Appeals for the Tenth Circuit is reversed for the reasons stated in *Chiafalo v. Washington* . . .").



## Washington Regarding Faithless Electors

Surprisingly, in an attempt to differentiate between *Chiafalo* and *Baca*, it is interesting to note that a state also has the power to remove an elector for failing to uphold the oath to vote for the correct candidate.<sup>133</sup> Further, this Comment will analyze generally Justice Kagan's rationale as it is applied to *Baca's* reversal by the Supreme Court, which tends to indicate that a presidential elector can be subjected to punishment—whether removal or a fine—for failing to comply with the election laws of the state for which they are electors.<sup>134</sup>

It is interesting to note that, presently, the punishment for acting as a faithless elector in Washington now matches the punishment in *Baca*, and not the fine mentioned in *Chiafalo*.<sup>135</sup>

B. *Analysis of Chiafalo, and What it Means for Faithless Electors*1. The Historical Analysis Found in *Chiafalo*

Justice Kagan begins her opinion in *Chiafalo* by discussing the history of the development of our Electoral College system from the Constitutional Convention period, noting the events causing the development of the Twelfth Amendment,<sup>136</sup> and further developments to elector laws over the course of the country's history.<sup>137</sup> Highlighting this development, the Court identified, all but one state of the Republic, by 1832, had arrived at a system whereby there was a popular election of the president in each state, and such was used to apportion electors to the appropriate candidate.<sup>138</sup>

Then detailing states during the early twentieth century, the Court observed that states began “enact[ing] statutes meant to guarantee that

133. See generally, *Baca*, 935 F.3d at 901.

134. See *Chiafalo*, 140 S. Ct. at 2328 (“Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise.”)

135. See *Baca*, 140 S. Ct. 2316 (2020); *Chiafalo*, 140 S. Ct. at 2322; see also WASH. REV. CODE § 29A.56.090(3) (2019) (removing faithless electors, the punishment presently in place); cf. *id.* § 29A.56.340 (2016) (issuing the \$1,000 fine in place during *Chiafalo*).

136. Humorously, Justice Kagan makes the following analogy to one of the causes of the Twelfth Amendment, implemented after the 1796 election, where “John Adams came in first among the candidates, and Thomas Jefferson second. That meant the leaders of the era’s two warring political parties . . . became President and Vice President respectively. (One might think of this as fodder for a new season of *Veep*.)” *Chiafalo*, 140 S. Ct. at 2320–21.

137. See *id.* at 2321–22.

138. See *id.* at 2321.

outcome—that is, to prohibit so-called *faithless voting*. Rather than just assume that party-picked electors would vote for their party’s winning nominee, those States insist that they do so.”<sup>139</sup> Shortly after these “faithless elector” laws were put into place, a large number of states began to enact legislation providing for fines for those electors who violate a pledge to vote for a specific candidate.<sup>140</sup> With this framework in place, the Court then moves into the true implications of *Chiafalo*.<sup>141</sup>

## 2. A Discussion of Caselaw Supporting the *Chiafalo* Decision

The Court began its analysis by looking to the Court’s prior case, *Ray v. Blair*, and notes how that case failed to address the question of: “Could a State enforce those pledges through legal sanctions?”<sup>142</sup> Then turning to the Constitution and prior precedent, the Court states that “each State may appoint electors ‘in such Manner as the Legislature thereof may direct[.]’”<sup>143</sup> and, further, that the mandate by the Founders in Article II, “‘convey[s] the broadest power of determination’ over who becomes an elector.”<sup>144</sup>

Justice Kagan calls attention to one critical argument regarding the presidential electors by stating that “nothing in the Constitution expressly prohibits States from taking away presidential electors’ voting discretion as Washington does.”<sup>145</sup> When considering whether there is historical precedent for faithless electors to be allowed, the opinion suggests that during the course of the history of our Republic, from time-to-time, there have been occasions where electors were faithless.<sup>146</sup> However, with

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139. *See id.* (emphasis added) (stating that “As of [July 2020], 32 States and the District of Columbia have such statutes on their books”).

140. *See id.* at 2322 (describing state sanctions, including Washington’s).

141. *See id.* at 2323–24 (stating the question of whether a state may enforce elector pledges through sanctions was unanswered by the Court and would now be answered).

142. *See id.* at 2323 (signaling to *Ray v. Blair*, 343 U.S. 214, 230 (1952) and noting that the conclusion of the case did not address whether an elector may be fined for failure to uphold a voting pledge).

143. *Id.* at 2324 (quoting U.S. CONST. art. II, § 1, cl. 2.).

144. *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)). “Article II, § 1 [provides] an ‘express delegation[ ] of power to the States.’” *Id.* at n.5 (quoting *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)) (alteration in original); *see also* Keith E. Whittington, *The Vexing Problem of Faithless Electors*, *CATO S. CT. REV.*, 2019–2020, at 87 (discussing the Court’s connection to *McPherson* and how it relates to the reasoning in *Chiafalo*).

145. *Chiafalo*, 140 S. Ct. at 2324.

146. *See id.* at 2326–28 (mentioning some periods of faithless electors in the history of the Republic).

history exposing only one time when a faithless elector's vote counted after it was challenged, Justice Kagan concludes that "[t]he Electors' constitutional claim has neither text nor history on its side."<sup>147</sup> Finally, Justice Kagan deduces that states have a right to sanction and punish electors for failing to keep the pledges required by state law because "[faithless electors] have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule."<sup>148</sup> Thus, the mandate of the Court that "We the People rule"<sup>149</sup> may be the true key for allowing the National Popular Vote Interstate Compact to come to fruition.

### 3. It Is Unclear What Happens if There Is a Death of a Candidate Post-Election But Prior to the Electoral College Certifying the Election

As a strange, but novel aside to the overall discussion—which may one day be a pressing and present issue, but here is not addressed—is a complaint from the petitioners in *Chiafalo*, about what happens when a candidate dies between Election day and the date the Electoral College meets to vote.<sup>150</sup> This concern is raised in the last footnote, at the close of the majority opinion in *Chiafalo*, where Justice Kagan addresses a complaint from the Petitioners in *Chiafalo* about what happens when a candidate dies between Election day and the date the Electoral College meets to vote.<sup>151</sup> Justice Kagan—while reminding that the question is not before the Court and thus not considered—left open the possibility of compelling an Elector to vote for a deceased candidate.<sup>152</sup>

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147. *See id.* at 2328 (concluding after discussing the electors attempt to dictate that history is a constitutional reason for permitting faithless electors "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years").

148. *Id.* at 2328; *see* Whittington, *supra* note 144, at 92 ("[T]he Court was clear that rogue electors are inherently anti-democratic and at odds with the spirit of American constitutional democracy.").

149. *Chiafalo*, 140 S. Ct. at 2328.

150. *Id.* at n.8

151. *See id.* (addressing the concerns of a post-election, but pre-Electoral College balloting death).

152. *See id.* (noting that if a candidate died prior to when the Electoral College meets, "[W]e suspect . . . States without a specific provision would also release electors from their pledge . . . [B]ecause the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate").

## IV. THE NATIONAL POPULAR VOTE INTERSTATE COMPACT

Although there may be other instances in the history of our Republic where individuals or groups have sought to circumvent the Electoral College, the most pressing danger to this is the growing trend of a national popular vote interstate compact. It would seem that, should this be permitted to be enacted, Mr. Mason's fears of a cabal controlling and dictating the outcome could come to fruition.<sup>153</sup>

A. *History of the Compact*

The National Popular Vote in its present state dates back to at least 2001, directly after the 2000 Presidential Election and *Bush v. Gore*.<sup>154</sup> Current commentators view the National Popular Vote Interstate Compact as a tool to allow for the direct election of the president and vice president without going through the traditional amendment process.<sup>155</sup> As discussed, a candidate must receive 270 votes in the Electoral College to win the presidency.<sup>156</sup> However, by the breakdown of electoral votes per state, a person can win the requisite number of electoral votes *without* winning a majority of the overall national vote, thus allowing a person to become

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153. See RECORDS, *supra* note 1, at 500 (noting Mr. Mason believed that the Electoral College “removed some capital objections, particularly the danger of cabal and corruption”). Should the NPVIC be allowed to be enacted, it could, and this Author believes will, lead to a cabal of states who are small in number but large in population dictating to the other sovereign states who will be their leader.

154. See Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution: Part Three of A Three-part Series on The 2000 Election and The Electoral College*, FINDLAW (Dec. 28, 2001), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html> [<https://perma.cc/TU9Z-9J4C>] (describing the path to direct election of the President); *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE INC., <https://www.nationalpopularvote.com/written-explanation> [<https://perma.cc/RZX6-9DET>] [herein after *Agreement Among the States*] (explaining the history of the National Popular Vote and the states that have subscribed).

155. See *The National Popular Vote Interstate Compact*, PROJECT VOTE, <http://www.projectvote.org/issues/voting-policy/national-popular-vote-interstate-compact/> [<https://perma.cc/CPJ6-GPBM>] (describing the idea for a national popular vote as a way to get around an impossible amendment process and mentioning the fact that a majority of the votes cast have twice gone to the losing candidate because of the Electoral College vote).

156. See Pruitt, *supra* note 76 (“There are 538 total electors, including one for each U.S. senator and representative and three electors representing the District of Columbia, and presidential candidates need a majority of 270 votes to win the White House.”).

president without winning the overall national popular vote, but merely winning a majority of the Electoral College vote.<sup>157</sup>

With this strategy of only needing to win a majority of the electors in mind, an early leader and founder of the nonprofit currently leading the efforts for the NPVIC, is attempting to move on a state-by-state basis to have states pledge their electors to vote for the candidate who receives the overall national popular vote victory.<sup>158</sup> While presently, the National Popular Vote appears to have been wholeheartedly welcomed in mainly Democrat controlled states, the proponents of the NPVIC further insist that the compact should not be a partisan Issue and that the overall goals of the National Popular Vote are focused on bipartisan goals of creating a stronger and more engaged electoral system.<sup>159</sup>

#### B. *The Overall Goal of the National Popular Vote Interstate Compact*

The overall goal of the National Popular Vote Interstate Compact is to “guarantee the Presidency to the candidate who receives the most popular votes across all 50 states and the District of Columbia.”<sup>160</sup> However, this national popular vote is truly nothing more than an end-run around the Constitutional requirement of the Electoral College.<sup>161</sup> Although it is not part of the analysis of this Comment nor discussed in *Chiafalo*, if the NPVIC were to reach the threshold of 270 electors pledged to it, it would most likely encourage and drive a constitutional amendment to permit, alter, or

157. Roos, *supra* note 57 (“Of the 58 presidential elections in the history of the United States, 53 of the winners took both the Electoral College and the popular vote. But in five . . . elections . . . the winner of the Electoral College was in fact the loser of the popular vote.”).

158. See Elliot Ramos, *There’s a Plan Afoot to Replace the Electoral College, and Your State May Already Be a Part of It*, NBC NEWS (Nov. 10, 2020, 9:07 A.M.), <https://www.nbcnews.com/politics/2020-election/map-national-popular-vote-plan-replace-electoral-college-n1247159> [https://perma.cc/D7ZZ-Y54J] (noting opinions from John Koza regarding his motivation for the NPVIC).

159. See *id.* (highlighting the NPVIC has support of former Republican National Committee members, and that the purpose is to have candidates focus on the entire country, not just swing states).

160. *Agreement Among the States*, *supra* note 154. But see Jipping, *supra* note 46 (discussing how the National Popular Vote violates the limited ways states may make interstate compacts).

161. See Hans von Spakovsky, *Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme*, THE HERITAGE FOUND. (Feb. 19, 2020), <https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular-0> [https://perma.cc/CXY6-U326] (detailing how the NPV will destroy federalism); Brian C. Kalt, *Unconstitutional but Entrenched Putting UOCAVA and Voting Rights for Permanent Expatriates on A Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 514 (2016) (mentioning the novel idea of the NPV as a way to eliminate the electoral college without amending the Constitution).

eliminate the NPVIC, if it is not struck down by the Court.<sup>162</sup> A peculiar consideration would be if a super majority of states, more than 3/4th of the states, enacted the NPVIC—or for that matter any binding law together that would, in effect, alter the Constitution—and if this would be a de facto convention of states under Article V. An important aside is that the Court’s taking up and deciding *Chiafalo* is a strong indication that the Court will not view Electoral College questions as nonjusticiable political questions.

However, in addition to that, proponents of the NPVIC purport to have more democratic ideas related to the compact, including the ability to increase voter turnout by forcing candidates to have to focus more on non-swing states.<sup>163</sup> Further, the move to the NPVIC may provide for greater ballot security, as under the current system there is the ability for one to possibly alter and tamper with ballots in several swing states to change the course of the election because smaller numbers of votes can alter the overall number of electors received.<sup>164</sup>

Additionally, proponents of the NPVIC state that the compact would provide the millions of voters in states where their selected candidate is not the winner of that state’s popular vote but the winner of the overall national popular vote with the ability to vindicate their vote by permitting it to count as their selected candidate won the overall national popular vote.<sup>165</sup> This would essentially mean that the caster of a blue vote in a red state and a red vote in a blue state would still count the same, regardless of which party won the state, if their party’s candidate won the national popular vote.<sup>166</sup>

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162. Kalt, *supra* note 161 (opining that if there were truly an NPV that it would likely be altered or amended by Congress).

163. See Patrick Rosensteel & Scott Drexel, *National Popular Vote: Bipartisan Reform to Presidential Elections*, REAL CLEAR POL. (Jan. 15, 2020), [https://www.realclearpolitics.com/articles/2020/01/15/national\\_popular\\_vote\\_bipartisan\\_reform\\_to\\_presidential\\_elections\\_142147.html#!](https://www.realclearpolitics.com/articles/2020/01/15/national_popular_vote_bipartisan_reform_to_presidential_elections_142147.html#!) [<https://perma.cc/QQ7Q-HYLX>] (highlighting data showing higher voter turnout in swing states versus the turnout in non-swing states).

164. See *Id.* (noting how in a close election like the 2000 election of President George W. Bush, a handful of altered ballots could have swung the election).

165. See *id.* (“[A] move to a National Popular Vote for president, [preserves] the integrity of our presidential elections for generations to come. It’s time to end the tyranny of a handful of battleground states that suck up every dollar and ounce of candidate time, money, and energy and leave 215 million Americans in 38 states sitting on the political sidelines.”).

166. *E.g., id.* (attempting to provide examples of votes counting regardless of the state party winner).

### 1. The Uniform Faithful Presidential Elector Act

One side note regarding a growing, current trend, although in only a small fraction of states, is the Uniform Faithful Presidential Electors Act (UFPEA), which is presently adopted by seven states.<sup>167</sup> At the time of writing this Comment in early 2021, only six states had adopted UFPEA; however, North Dakota became the seventh state to adopt UFPEA.<sup>168</sup> The Uniform Faithful Presidential Electors Act, if passed would, among other things, remove an elector from office for violating the following pledge: “If selected for the position of elector, I agree to serve and to mark my ballots for President and Vice President for the nominees for those offices of the party that nominated me.”<sup>169</sup>

Along this line of power over the electors, some individuals suggest that, because of the Supreme Court’s ruling in *Chiafalo* and *Baca*, the Court is signaling that UFPEA is constitutional.<sup>170</sup> However, the Court has yet to speak on this issue.

### C. *The Opposition to the National Popular Vote Interstate Compact*

Presently, there is great opposition to the National Popular Vote Interstate Compact with commentators referring to this as an unconstitutional matter.<sup>171</sup> Further, if the NPVIC were fully enacted, it would potentially bypass and effectively repeal any power the House and Senate have regarding the selection of the president and vice president in

167. See *2010 Faithful Presidential Elector Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=6b56b4c1-5004-48a5-add2-0c410cce587d&tab=groupdetails> [<https://perma.cc/A355-N9CB>] (listing the six states that have adopted the Faithful Presidential Electors Act: Indiana, Minnesota, Montana, Nebraska, Nevada, and Washington).

168. See *id.* (indicating that the Faithful Presidential Elector Act is presently introduced in North Dakota).

169. See, UNIF. FAITHFUL PRESIDENTIAL ELECTORS ACT § 4 (UNIF. L. COMM’N 2010) (stating the pledge that electors must take) or (“Each elector nominee and alternate elector nominee of a political party shall execute the . . . pledge . . .”); see also *2010 Faithful Presidential Elector Act*, *supra* note 167 (“UFPEA has a state-administrated pledge of faithfulness . . .”).

170. *Supreme Court Unanimously Rules that States May Require Presidential Electors to Be Faithful*, NAT’L POPULAR VOTE INC., <https://www.nationalpopularvote.com/supreme-court-unanimously-rules-states-may-require-presidential-electors-be-faithful> [<https://perma.cc/64MV-HXY3>] (arguing the Court’s ruling in *Chiafalo* signals that the Uniform Faithful Presidential Elector Act is constitutional).

171. Rob Natelson, *Why the “National Popular Vote” Scheme Is Unconstitutional*, INDEP. INST. (Feb. 04, 2019), <https://i2i.org/why-the-national-public-vote-scheme-is-unconstitutional/> [<https://perma.cc/W7P7-YM7S>] (commenting on the possibility the NPVIC is unconstitutional without Congress approving an interstate compact or the need for a constitutional amendment).

the event of a tie of the Electoral College.<sup>172</sup> Thus, this would raise issues of whether the state could curtail the powers expressly granted to the House and Senate.

Next, the Constitution expressly prohibits states from entering interstate compacts without the consent of Congress.<sup>173</sup> However, this may not be an issue because the Supreme Court has previously held that an interstate compact does not violate the sovereign power of the United States and may be permitted without the blessing of Congress, unless, in regards to the compact: “[T]he clause in which [the term compact] appear[s], it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”<sup>174</sup>

Finally, the NPVIC is viewed as a tool to circumvent the Article V power to amend the Constitution.<sup>175</sup> It is noted that a national popular vote amendment is a high hurdle to overcome in that it would likely be easily blocked by the smaller states who appear to lose their representation under the current Electoral College system.<sup>176</sup>

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172. See *id.* (noting the NPVIC would eliminate the possibility of a tie in the Electoral College, thus bypassing the tiebreaking powers of the House of Representatives); U.S. CONST. art. II § 1 (detailing the procedures of a tie in a presidential election) or (“[I]f no person have a majority, then from the five highest on the list the said House shall in like manner chose the President.”); U.S. CONST. amend XII (describing how the House and Senate handle a presidential election) or (“[I]f no person have such majority, . . . the House of Representatives shall choose immediately, by ballot, the President.”).

173. See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”); see also Michael S. Greve, *The Heritage Guide to the Constitution: Compact Clause*, THE HERITAGE FOUND. (Dec. 09, 2020), <https://www.heritage.org/constitution/#/articles/1/essays/75/compact-clause> [<https://perma.cc/MB9B-MV2W>] (discussing the Founders’ apprehension to states creating factions to circumvent the protections of the Constitution).

174. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468, (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)) (“[I]t was necessary to construe the terms of the Compact Clause by reference to the object of the entire section in which it appears.”).

175. See U.S. CONST. art. V (describing the process for amending the Constitution of the United States); *The Current Threat: What Would Happen if the Electoral College Was Eliminated?*, THE HERITAGE FOUND. (Sept. 21, 2020), <https://www.heritage.org/the-essential-electoral-college/the-current-threat> [<https://perma.cc/E22Q-BWF8>] (highlighting the way the NPVIC circumvents the amendment process).

176. See Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N. U. L. REV. 467, 477 (2007) (describing how thirteen states could block the amendment process to create a national popular vote).



### 1. The NPVIC Is Not the Tool to Fix the Country's Presidential Electoral System

Although the focus of this Comment is the NPVIC after *Chiafalo*, it is interesting to identify the other approaches proposed to “fix” the alleged problems of the Electoral College system. Again, the Author does not believe the Electoral College is broken, yet it is important to view the opposing argument to identify its flaws and weaknesses. In opposition of the NPVIC, at least one commentator contends that the NPVIC will not fix the problem with the Electoral College, as the Electoral College system—because of its strange nature—would not be part of a new Constitution, if one were ever drafted in the modern day.<sup>177</sup>

Proffering that, instead of taking on the long process and headache of passing the national popular vote in enough states to make it work, the trend should be to pass a constitutional amendment, which would transform the presidential election by having the winner decided by the winner of the overall national popular vote, and thus completely abolishing the Electoral College.<sup>178</sup>

Although the commentator pointed this out in 2019, it is not the first time a direct popular vote has been suggested as a tool, as it has been suggested for years.<sup>179</sup> Presently, in light of the 2020 Presidential Election, there are also members of Congress calling to abolish the Electoral College and replace it with a direct election via national popular vote.<sup>180</sup> A constitutional amendment was introduced to this extent, as discussed prior, in the 117th Congress, and would—if it had passed and been ratified—have removed the need for the NPVIC and abolished the Electoral College by making the chief executive and vice president directly elected.<sup>181</sup> With the

177. See Williams, *supra* note 11 (“I have no doubt that, if we were to rewrite the Constitution today, we would not adopt the Electoral College system that we have.”).

178. *Id.* (“The right way to go about jettisoning the Electoral College is to adopt an amendment to the Constitution abolishing the college and providing for the direct election of the President based on the national popular vote.”).

179. See Daniella Diaz, *Sen. Barbara Boxer to Introduce Bill to End Electoral College*, CNN (Nov. 15, 2016, 3:25 PM), <https://www.cnn.com/2016/11/15/politics/barbara-boxer-electoral-college-donald-trump-2016-election/index.html> [<https://perma.cc/722W-UR6B>] (reporting a Senator planned to introduce a bill which “would determine the winner of presidential elections by the outcome of the popular vote.”).

180. See Lee, *supra* note 60 (opining that the Electoral College is broken because it has awarded the presidency to the winner of the Electoral College when they did not win the popular vote, and noting that the system is out of touch with modern society).

181. See H.R.J. Res. 14, 117th Cong. (2021) (calling for the direct election of the president and vice-president, and eliminating the Electoral College, because, among other things, “the electoral

possibility of a direct election of the president, and anything after January 6, 2021, being up in the air regarding what could happen in Washington, D.C., it could be a short period of time before something, like the direct election amendment introduced in 2020, could pass and therefore dramatically transform the electoral system.<sup>182</sup>

## 2. At Least One Commentator Has Noted That the NPVIC Violates a State's Constitution

In regard to the passage of an act enabling the National Popular Vote Interstate Compact, one commentator has pointed out that it is directly unconstitutional to the state enacting it because of the state's constitution.<sup>183</sup> The commentator asserts this because of a specific provision in the Colorado Constitution stating: "The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people."<sup>184</sup> The clear language of this section appears to be contrary to the language of the National Popular Vote Interstate Compact, which would give the electoral votes to the winner of the national popular vote instead of the winner of the direct vote in Colorado.<sup>185</sup>

Finally concluding that "[t]he NPV statute's multistage Secretary of State appointment scheme violates the Colorado Constitution[,] Colorado's slate of presidential electors must always be chosen 'by direct vote of the people.'"<sup>186</sup> Although, the author asserts that there is no other provision at play in any other state constitution regarding the required constitutional

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college has become an anachronism"); *see also* H.R.J. Res. 7, 116th Cong. (2019) (doing the same, but in a prior session of Congress).

182. *See* H.R.J. Res. 14, 117th Cong. (2021) (demonstrating the type of legislation that could be passed to amend the Constitution to include the direct election of the president and vice president); *see also* Lee, *supra* note 60 (reporting that the author of H.R.J. Res. 14 "cited the siege of the U.S. Capitol [on January 6, 2021], arguing that 'efforts can be made to manipulate the Electoral College vote using falsehoods and shenanigans by ambitious politicians'").

183. David B. Kopel & Hunter Hovenga, *The National Popular Vote Violates the Colorado Constitution*, 98 DENV. L. REV. F. 1, 1 (2020) ("The Colorado Constitution . . . guarantees the right to the people to direct election of presidential electors. In 2019, the general assembly enacted a statute to violate that right.").

184. *See id.* (quoting COLO. CONST. sched., § 20) ("[T]he electors of the electoral college shall be chosen by direct vote of the people.").

185. *Id.*

186. *See id.* at 28 ("Colorado's slate of presidential electors must always be chosen 'by direct vote of the people.'").

direct election of presidential electors, it is interesting to note the potential first of many areas at which the NPVIC may be challenged at a state level.<sup>187</sup>

#### V. *CHIAFALO*, THE NATIONAL POPULAR VOTE, AND THE FUTURE OF FAITHLESS ELECTORS

After the Supreme Court handed down *Chiafalo*, the fervor and fire behind the National Popular Vote returned, as some started to see this as a tool that may assist in ushering in an end to the Electoral College.<sup>188</sup> As noted, *Chiafalo* is interpreted and thought to stand for the principle that, if a state has faithless elector laws on the books, then the state may enforce those laws against a faithless elector, whether that be removal from office or a fine.<sup>189</sup> Further, *Chiafalo* appears to lay the groundwork for state control over electors and open the door to testing whether the National Popular Vote Interstate Compact has the necessary constitutional footing.<sup>190</sup>

##### A. *Chiafalo May Mean That Any Constitutional Challenge Against the National Popular Vote Interstate Compact Will Fail*

With *Chiafalo* concluding that “Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights[.]” the Court provides the gateway that states—through their legislatures—have the power to decide how an elector will act and what they may or may not do, and further, how to punish an elector if he or she fails

187. See *id.* at 1 (discussing that Colorado is the only state with a constitutional provision guiding for direct election of presidential electors by the people.).

188. Josh Gerstein & Kyle Cheney, *States Can Punish “Faithless” Electors*, *Supreme Court Rules*, POLITICO (July 7, 2020, 10:17 AM), <https://www.politico.com/news/2020/07/06/supreme-court-faithless-electors-349728> [<https://perma.cc/7GJ2-UBHF>] (“The effort also renewed national focus on the creaky and untested processes that surround the Electoral College, as well as an effort by a growing list of states to circumvent it by pledging their votes to the winner of the national popular vote.”).

189. Adam Liptalk, *States May Curb ‘Faithless Electors,’ Supreme Court Rules*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/us/politics/electoral-college-supreme-court.html> [<https://perma.cc/P3GK-YF8E>] (detailing the freedom for states to punish faithless electors, by interpreting *Chiafalo* as “saying that states are entitled to remove or punish electors who changed their votes”).

190. Andrew C. McCarthy, *Supremes Signal a Brave New World of Popular Presidential Elections*, NAT'L REV. (July 11, 2020, 10:44 AM), <https://www.nationalreview.com/2020/07/supremes-signal-a-brave-new-world-of-popular-presidential-elections/> [<https://perma.cc/QF5F-DZMD>] (analyzing the danger of the decision in *Chiafalo* and stating that “[t]he case thus prepares the ground for future extravagant claims of undeniable state authority to dictate how electors must vote”).

to execute the will of those legislatures.<sup>191</sup> At least one commentator reviewing the Court's decision in *Chiafalo* has suggested that the case may "ease the path a bit for the National Popular Vote Interstate Compact."<sup>192</sup>

This commentator elaborated that one of the critical issues in overcoming the hurdle of enacting the NPVIC is that regardless of what law a state enacts, in order for the plan to be successful, there will still need to be a power of the state to force electors to vote as required by the compact.<sup>193</sup> Finally, the commentator wrapped up this part of the issue by stating: "States would need both to detach the slate of electors from party control and to create a binding pledge directing the electors to vote for the winner of the national popular vote."<sup>194</sup> To that point, a state could finally mandate that an elector must follow the NPVIC—if adopted in the state—or face sanctions under the applicable statute, and this would effectively take away the voice of the people in that state.<sup>195</sup>

Further, *Chiafalo*'s holding, permitting states to fine or remove a person for failing to vote as they are pledged, could signal, that even if the winner of a state's popular vote was of a different political party than the national popular vote winner, a state may be able to enforce compliance to ensure that the electors vote as they are required to under the NPVIC.<sup>196</sup>

Turning again to *Chiafalo*, it has been identified that *Chiafalo* and *Baca* help the National Popular Vote Interstate Compact in several ways.<sup>197</sup> First, looking closely at *Chiafalo*, the case gives the states the power to control and select electors as necessary.<sup>198</sup> Further, supporters of the National Popular

191. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) ("Article II and the Twelfth Amendment . . . give electors themselves no rights.")

192. See Whittington, *supra* note 144, at 94 ("[T]he outcome of the faithless elector cases might ease the path a bit for the National Popular Vote Interstate Compact.")

193. See *id.* at 94–95 ("One challenge to the success of such a compact, however, is how to ensure that presidential electors actually cast their ballots in this way.")

194. *Id.* at 95.

195. See McCarthy, *supra* note 190; see also Whittington, *supra* note 144, at 67, 95 (discussing questions and implications of binding electors).

196. See Whittington, *supra* note 144, at 67, 95 ("If states have no legal capacity to discourage faithless electors, that task becomes even more complicated."); *Chiafalo*, 140 S. Ct. at 2328 ("A State follows in the same tradition if . . . it chooses to sanction an elector for breaching his promise.")

197. Vikram David Amir, *The Future of Faithless Electors and the National Popular Vote Compact: Part Two in a Two-Part Series*, JUSTIA (July 17, 2020), <https://verdict.justia.com/2020/07/17/the-future-of-faithless-electors-and-the-national-popular-vote-compact> [https://perma.cc/746Y-MU37] (discussing the benefit of the *Chiafalo* decision on the NPV).

198. See *id.* (examining the possibility that a state, post *Chiafalo* could simply select "electors who are dedicated to electing the national-popular-vote-winning presidential candidate"); *McPherson v.*

Vote look to the very fact that *Chiafalo* and *Baca* were decided as a guide or indication that the Court will have a role—through the use of the precedent started in *Chiafalo* and potential later precedent—to shape the future of the Electoral College or whatever system is in place.<sup>199</sup>

Directly after the announcement of the decision in *Chiafalo v. Washington*, the Congressional Research Service released a report analyzing *Chiafalo* and concluded that the Court's holding may “suggest [the National Popular Vote Interstate Compact], if enacted, would survive constitutional challenge.”<sup>200</sup> This conclusion is further supported by the concluding sentence of Justice Kagan's decision for the Court in *Chiafalo*, by declaring that the People or the legislatures of the several states make the ultimate decision.<sup>201</sup>

The directly beneficial line for the future of the National Popular Vote may again come from the concluding paragraph of the opinion, in which Justice Kagan elaborates:

The Electors' constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors and give *electors themselves no rights*. Early in our history, States decided to tie electors to the presidential choices of others, *whether legislatures or citizens*. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.<sup>202</sup>

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Blacker, 146 U.S. 1, 35 (1892) (indicating the power of the state legislature to control and select the elector).

199. Amir, *supra* note 197 (noting that the Court by deciding *Chiafalo*, “implicitly reject[ed] the idea that disputes over the operation of the electoral college are so-called ‘political questions’ that only states and Congress can resolve”).

200. See JACOB D. SHELLY, CONG. RSCH. SERV., LSB10515, SUPREME COURT CLARIFIES RULES FOR ELECTORAL COLLEGE: STATES MAY RESTRICT FAITHLESS ELECTORS 4 (2020) (“By affirming that Article II allows each state to appoint electors ‘in whatever way it likes,’ the Supreme Court's opinion in *Chiafalo* could be read to suggest the plan, if enacted, would survive constitutional challenge.”).

201. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) (“[T]he State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.”).

202. *Id.* (emphasis added).

In reaching such conclusion, Justice Kagan noted that “[s]tates decided to tie electors to the presidential choices of others, whether legislatures or citizens . . . [e]xcept that legislatures no longer play a role,” thereby leaving open the question of whether the legislature, by adopting the National Popular Vote Interstate Compact, may have the power to tie the electors, or if that decision as to who the president is, is solely tied to the people.<sup>203</sup> This is because the people elect the state legislatures, thus making the actions of the legislature effectively, the will of the people.

Therefore, the question is raised as to whether the legislatures can, in fact, enact a law on behalf of the people that would make their votes only matter if their votes matched that of the national popular vote winner. Regardless, this opinion now leaves open questions about the true extent of the power of legislatures and opens the door for further debate regarding whether legislatures can constitutionally bind presidential electors in a way contrary to the Electoral College scheme.<sup>204</sup>

B. *The Decision in Chiafalo Could Signal That the Court Would Strike Down the NPVIC*

As a result of the *Chiafalo* decision, some commentators have suggested that *Chiafalo* is the Court signaling that the Court cares for the will of the voters, and that by allowing states to punish faithless electors, the Court may be signaling that it will strike down a NPVIC challenge, if and when the requisite number of states sign the compact.<sup>205</sup> Further, *Chiafalo*, being, a signal that the Court is willing to uphold the NPVIC, is solely one side of the argument, and it is not clear whether the Court will uphold the NPVIC when faced with the challenge.<sup>206</sup>

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203. *Id.*

204. As a note, this Comment does not analyze the implications of the Equal Protection Clause and the principle of “one person, one vote.” See *Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .”); see also *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (“Readers surely could have fairly taken this to mean, ‘one person, one vote.’”); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

205. Kyle Sammin, *The Supreme Court Just Confirmed The Electoral College Is Here To Stay*, THE FEDERALIST (July 9, 2020), <https://thefederalist.com/2020/07/09/the-supreme-court-confirmed-the-electoral-college-here-to-stay/> [https://perma.cc/X3HF-GF2W] (speculating the decision in *Chiafalo* is actually the Court desiring to keep the will of the people).

206. Michael Abramowicz, *The Faithless Electors Decision Doesn’t End the Possibility of Constitutional Crisis*, REASON (July 6, 2020, 1:04 PM) <https://reason.com/volokh/2020/07/06/the-faithless->

For a self-evident example of what is now recognized, consider that, although the Court has given (under *Chiafalo*) great latitude to state legislatures to create the rules by which the states assign electors, under the Guarantee Clause, the Supreme Court could find that the NPVIC violates the Constitution.<sup>207</sup> Or, there may be a further area of the Constitution, which has not been addressed yet, that the NPVIC would fail to comport.

However, *Chiafalo* did not attempt to answer the question of whether the Court would decide if the NPVIC did violate the Constitution, and as such, this leaves open the question of whether the NPVIC—once reaching the necessary electoral vote promises from the several states—would survive a direct constitutional attack by opponents.<sup>208</sup>

Lastly, at least one legal commentator has concluded that the decision in *Chiafalo* should not be construed as the Court permitting state legislatures to enter a compact to give their vote to the winner of the national popular vote.<sup>209</sup> The commentator asserted this argument by stating that “one might reasonably conclude that because the situation was not before the Court, nothing in the opinion should be taken to permit the states to choose electors who are bound to support the candidate chosen by some set of people outside the state.”<sup>210</sup>

### C. *The Use of Chiafalo in Election Litigation Post-2020 Election*

At the time of writing this Comment in early 2021, only a few cases have relied upon *Chiafalo*, but the likelihood of this case seeing real world application will dramatically increase should there be an issue with the electors during or after the 2024 (or any future) election. First, for example, *Chiafalo* is standing for the principle that states have a far-reaching power over the electors as they track a state's popular vote.<sup>211</sup> Further, *Chiafalo* advocates the principle that states have the power to control electors, and

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electors-decision-doesnt-end-the-possibility-of-constitutional-crisis/# [https://perma.cc/KR9X-8CS4] (noting it is unanswered whether the NPVIC would survive constitutional scrutiny under various forms of analysis).

207. *See id.* (questioning whether a state could promise its electors); *see also* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

208. Abramowicz, *supra* note 206 (concluding *Chiafalo* did not answer the final question of whether the Court would find the NPVIC in violation of the Constitution).

209. Hartnett, *supra* note 47, at 468.

210. *Id.*

211. Baten v. McMaster, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) (discussing that *Chiafalo* enforces that the states have a strong power over controlling their electors).

the process for which electors in states are selected.<sup>212</sup> Additionally, in a surprising case from December 2020, *Chiafalo* was cited in a discussion over whether the State of Wisconsin violated its own state laws with the “manner” in which electors for the 2020 election were selected.<sup>213</sup> Again, flowing from the 2020 Presidential Election, in Georgia, the “manner” of election was also challenged.<sup>214</sup>

In answering these questions, though *Chiafalo* did not play a central role, both courts looked to the words of Justice Thomas when discussing that the use of the term “manner” in the Constitution is solely related to the form in which the electors are selected by the states.<sup>215</sup> If anything is to be taken from these cases, it is the observation that, in less than a year since the handing down of *Chiafalo*, the case has played a role in two election challenge cases, and most likely this will be only the beginning of its use.<sup>216</sup>

## VI. CONCLUSION

In conclusion, the opinion of the Court in *Chiafalo* sets a dangerous precedent. The Court gave the states the power to control and to remove

212. See *Rodriguez v. Newsom*, 974 F.3d 998, 1003 (9th Cir. 2020) (indicating *Chiafalo* reinforces the idea that states cannot select electors in violation of the Constitution’s protections such as the equal protection clause); see also *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 n.4 (2020) (“A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause.”) (internal citation omitted).

213. See *Trump v. Wis. Elections Comm’n*, 506 F. Supp. 3d 620, 636 (E.D. Wis. 2020), *aff’d*, 983 F.3d 919 (7th Cir. 2020) (using *Chiafalo* as part of the analysis as to whether the state of Wisconsin improperly selected manners).

214. See *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1336–37 (N.D. Ga. 2021) (“Plaintiff argues that Defendants’ alleged violation of Georgia election laws means that the ‘manner’ for choosing electors established by the legislature was not followed and is in violation of Article II of the U.S. Constitution.”).

215. See *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring) (“Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom may become an elector.”); *Wisconsin Elections Comm’n*, 506 F. Supp. 3d at 637 (“Put another way, [manner] refers simply to ‘the mode of appointing electors—consistent with the plain meaning of the term.’” (quoting *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring))); *Kemp*, 511 F. Supp. 3d at 1337 (“[R]equires state legislatures merely to set the approach for selecting Presidential electors.”) (quoting *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring)).

216. See generally *Kemp*, 511 F. Supp. 3d at 1336–37 (“This argument confuses and conflates the ‘manner’ of appointing presidential electors—by popular election—with underlying rules of election administration.”); *Wisconsin Elections Comm’n*, 506 F. Supp. 3d at 637 (“Absent proof that defendants failed to follow this ‘Manner’ of determining the state’s Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause.”).



electors who failed to cast their votes in accordance with the candidate who won their state's electoral votes.<sup>217</sup> However, with the growth of the National Popular Vote now in sixteen jurisdictions, there are questions as to whether the Supreme Court, when faced with a challenge to this interstate compact, would hold that the Compact was in violation of the Constitution.<sup>218</sup> Additionally, with the possibility that the NPVIC may violate state constitutions, there will be rigorous debate and challenges brought forth over the true power of state legislatures to assign electors under the National Popular Vote.<sup>219</sup> Without a doubt, enacting the NPVIC in more states will invite a tremendous amount of litigation over whether the national popular vote and NPVIC is constitutional.<sup>220</sup> Nevertheless, keeping in mind the instruction of the Court, that it is the power of the state legislatures to appoint the electors, may well prove that the states have the power to implement the NPVIC.<sup>221</sup>

In closing, the words of Justice Kagan should echo through the debate across the nation regarding whether the various state legislatures may assign their electors to either the winner of the state's popular vote or to the overall national popular vote winner, that as long as "[t]hat direction accords with the Constitution—as well as with the trust of a Nation that here[—] *We the People rule.*"<sup>222</sup> However, we must keep in mind that our august Founding Fathers used every ounce of their sagacity to develop a system where we no longer had to fear the tyranny of the majority or a dark cabal of bad actors seeking to dictate every aspect to a group they deemed inferior. The system in place quelled several of the fears of wise men, such as Mr. George Mason,

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217. See *Chiafalo*, 140 S. Ct. at 2328 ("Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise."); see also Gerstein & Cheney, *supra* note 188 (describing the link between the *Chiafalo* decision and the National Popular Vote).

218. See *Agreement Among the States*, *supra* note 154 (noting that sixteen jurisdictions have adopted the NPVIC and pledge their votes to the overall winner of the national popular vote); Natelson, *supra* note 171 (commenting on the possibility the NPVIC is unconstitutional without Congress approving an interstate compact or the need for a constitutional amendment).

219. Kopel & Hovenga, *supra* note 183.

220. See Williams, *supra* note 11 ("Yes, that may be politically difficult, but it would be far preferable for supporters of the NPVC to put their political muscle into that effort than the adoption of the NPVC, which would usher in a far more politically fraught and litigious era of presidential elections.").

221. See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (noting that from the founding of our Republic that Article II, Section 1 vests the state legislatures with the power to appoint electors).

222. *Chiafalo*, 140 S. Ct. at 2338 (emphasis added); see Whittington, *supra* note 144, at 67, 92 (discussing the future of faithless electors post the *Chiafalo* decision).

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and we should head their warnings and zealously guard the protections they put in place to ensure that the people are sovereign over the national government.<sup>223</sup>

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223. See RECORDS, *supra* note 1, at 500 (noting Mr. Mason feared the cabal from being able to usurp the will of the states).