NO. 19-__

In the
Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,
Petitioner,
v.

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Like most States, Colorado requires its presidential electors to follow the will of its voters when casting their Electoral College ballots for President. In the 2016 Electoral College, one of Colorado's electors violated Colorado law by attempting to cast his presidential ballot for a candidate other than the one he pledged to vote for. Colorado removed him as an elector, declined to accept his ballot, and replaced him with an alternate elector who properly cast her ballot for the winner of the State's popular vote, consistent with Colorado law. The removed elector later sued Colorado for nominal damages.

The questions presented are:

1. Whether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion.

2. Does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

Baca v. Hickenlooper, No. 16-cv-02986-WYD-NYW, (D. Colo.) (case voluntarily dismissed Aug. 2, 2017).

Baca v. Hickenlooper, No. 16-1482 (10th Cir.) (final order denying F.R.A.P. 8 injunction entered Dec. 16, 2016).

Williams v. Baca, No. 2016cv034522 (Colo. Dist. Ct. - Denver) (final order entered Dec. 13, 2016).

Williams v. Baca, No. 2016SA318 (Colo.) (final order denying discretionary review entered Dec. 16, 2016).

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The court of appeals' opinion (Pet.App. 1–137) is reported at 935 F.3d 887. The district court's decision (Pet.App. 138–67) is unreported.

JURISDICTION

The judgment below, partially reversing the district court's final judgment on federal constitutional grounds, was entered on August 20, 2019. Pet.App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Article II, § 1, clause 2, and the Twelfth Amendment to the U.S. Constitution, as well as COLO. REV. STAT. § 1-4-304 (2019) are reproduced in the appendix. Pet.App. 203–04.

STATEMENT

I. Colorado's Binding Law.

Colorado, like 28 other States and the District of Columbia, binds its presidential electors to the outcome of the State's popular vote for President.[1] Colorado's binding statute states its electors must "take the oath required by law for presidential electors." COLO. REV. STAT. § 1-4-304(1). Electors are then required to cast their Electoral College ballots for the presidential candidate "who received the highest number of votes at the preceding general election in [Colorado]." *Id.* at § 1-4-304(5).

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[1] National Conference of State Legislatures, *The Electoral College* (Aug. 22, 2016) ("NCSL"), https://tinyurl.com/h5ceupw.

Colorado's statute also provides a mechanism to remove electors who refuse to honor the will of Colorado's voters. The statute states, "If any vacancy occurs in the office of a presidential elector because of death, *refusal to act*, absence, or other cause, the presidential electors present shall immediately proceed to fill the vacancy in the electoral college." *Id.* (emphasis added). Colorado's state courts have interpreted "refusal to act" to include an elector's decision to cast a ballot for someone *other* than the presidential candidate who won the State's popular vote. Pet.App. 201–02.

While Colorado utilizes a removal-and-replacement system, other States use other enforcement methods. Washington, for example, imposed civil penalties on its electors who violated state law during the 2016 election cycle but still accepted their ballots. *In re Guerra*, 441 P.3d 807 (Wash. 2019). Those electors recently filed a petition for writ of certiorari in this Court challenging the Washington Supreme Court's decision upholding those penalties. Case No. 19-465.

II. *Baca I*: Respondents are denied preliminary injunctive relief.

Federal Court Proceedings. After the presidential election in November 2016 but before the Electoral College convened, two Colorado presidential electors, Polly Baca and Robert Nemanich, sought a preliminary injunction barring enforcement of Colorado's binding statute. The district court denied their motion, finding they failed to establish the elements for a preliminary injunction. *Baca v. Hickenlooper* ("*Baca I*"), No. 16-cv-02986-WYD-NYW,

2016 WL 7384286 (D. Colo. Dec. 21, 2016) (found at Pet.App. 168–82). The district court reasoned that granting the electors a preliminary injunction allowing them to vote their individual preferences in the Electoral College "would undermine the electoral process and unduly prejudice the American people by prohibiting a successful transition of power." Pet.App. 181.

The court of appeals upheld the district court in an expedited appeal, stating the electors had not "point[ed] to a single word" in the Constitution that "requires that electors be allowed the opportunity to exercise their discretion in choosing who to cast their votes for." Pet.App. 194. To the contrary, the court observed that Article II empowers the States to appoint their electors "in such Manner as the Legislature thereof may direct" and that the Supreme Court has described this authority as "plenary." Pet.App. 195 (citing *McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892)).

State Court Proceedings. Although the federal courts declined to enjoin Colorado's binding law, the State remained concerned that one or more of the electors may nonetheless choose to disobey the voters' will. Colorado therefore developed a plan of succession and sought state court approval of its plan before the Electoral College convened. The state court ruled that an elector who fails to cast their ballot for the presidential candidate who won the State's popular vote would, as a matter of Colorado law, have "refus[ed] to act," creating a vacancy in that elector's office. Pet.App. 202 (quotations omitted). The

remaining electors present must immediately fill any such vacancy by a majority vote. *Id.*

2016 Electoral College. On the day of the Electoral College, Respondents each took an oath to cast their Electoral College ballots for the presidential candidate who received the most votes in Colorado in the recent election. Pet.App. 217. Ms. Baca and Mr. Nemanich complied with Colorado law by casting their ballots for the candidate who won the popular vote in Colorado—Hillary Clinton. Pet.App. 140. But a third elector, Micheal Baca, violated his oath by attempting to cast his ballot for John Kasich, someone who did not appear as a candidate on any general election ballot anywhere in the country. Pet.App. 217. Consistent with the state court's order, Mr. Baca was replaced with another elector who properly cast her ballot for Hillary Clinton. Pet.App. 218.

Nationwide, ten electors in the 2016 Electoral College cast, or attempted to cast, a "faithless" electoral ballot.[2]

III. *Baca II*: Micheal Baca joins the litigation.

Ms. Baca and Mr. Nemanich dismissed their *Baca I* suit against Colorado without prejudice in August 2017 but refiled substantially the same lawsuit ("*Baca II*") nine days later, this time joining Micheal Baca as a plaintiff. The parties jointly sought to enable the court to address the dispute in a normal litigation setting, rather than the type of emergency-based proceedings that occurred in 2016 on the eve of a closely watched Electoral College—a setting not

[2] FairVote, *Faithless Electors*, https://tinyurl.com/y7fnonw5.

conducive to adjudicating important constitutional claims.

With the district court's approval, Respondents amended their *Baca II* complaint to assert a single claim under 42 U.S.C. § 1983 challenging Colorado's binding statute as unconstitutional under Article II and the Twelfth Amendment. In addition to declaratory relief, Respondents sought nominal damages of $1 each for the alleged violation of their rights as electors in the 2016 Electoral College. Pet.App. 220. In exchange for Respondents narrowing their claims and waiving their right to attorneys' fees, Colorado agreed to waive its Eleventh Amendment immunity and its § 1983 "personhood" defense in this case.

The district court granted Colorado's motion to dismiss under Rules 12(b)(1) and 12(b)(6), agreeing that the electors both lacked standing and failed to state a claim. On standing, the district court concluded that electors are subordinate state officers who lack standing to challenge the constitutionality of Colorado's binding law. Pet.App. 144–52. The "plaintiffs lose nothing," the district court explained, "by their having to vote in accordance with the state statute." Pet.App. 149.

The district court also addressed Respondent's argument that electors may disregard state law, concluding that States may bind their electors to the outcome of the State's popular vote without running afoul of Article II or the Twelfth Amendment. The district court stated that Article II, § 1 commits to the States the exclusive power to appoint their electors, which authority carries with it the attendant power to

attach conditions and, if necessary, the power to remove. Pet.App. 153, 165. The district court also relied on this Court's decision upholding an elector pledge requirement in *Ray v. Blair*, 343 U.S. 214 (1952). The district court explained that the *Ray* Court held the Twelfth Amendment does not demand "absolute freedom for the elector to vote his own choice." Pet.App. 156. The district court also determined that the Nation's longstanding historical practice is consistent with electors being bound to follow the will of the voting public. It thus rejected Respondents' argument that certain Framers' initial understanding of the Electoral College should override either longstanding historical practice or this Court's holdings. Pet.App. 157–63.

The court of appeals reversed in part in a 2-1 decision. On standing, it agreed that Ms. Baca and Mr. Nemanich suffered no concrete personal injury; their allegations of coercion to vote for Hillary Clinton impacted "only their official function" as members of the Electoral College, not a private right. Pet.App. 41. But Mr. Baca was different in the court of appeals' view. The court of appeals concluded that he *did* suffer a personal injury to a private right because he was removed from his position—something the court of appeals believed *he* was personally entitled to since he had been elected to the office of elector. Pet.App. 36.

The court of appeals also rejected Colorado's argument that the States may exercise control over their electors, removing them if necessary. Departing from its prior decision in *Baca I*, the court determined that the Constitution, particularly its use of the word "elector" in Article II and the Twelfth Amendment,

suggests that Respondents "are free to vote as they choose" in the Electoral College. Pet.App. 103. The court of appeals viewed *Ray* as "narrow" because it addressed only elector pledges, not removal, and, in the court's view, left open the question of whether a State's binding law is legally enforceable. Pet.App. 83. Similarly, the court of appeals held that a State's right to appoint an elector does not come with a right to remove an elector because, in the court's view, the elector exercises a federal function. Pet.App. 92–95.

The court of appeals also disagreed with the district court's conclusion that the longstanding historical practice of the States allocating their electoral votes to the winner of their jurisdiction's popular vote should override some of the Framers' views. According to the court of appeals, the contemporaneous statements of certain Framers are "inconsistent" with electors acting as "mere functionaries." Pet.App. 124.

Judge Briscoe dissented. Pet.App. 130–37. She would have dismissed the appeal as moot because 42 U.S.C. § 1983 creates no remedy for damages against the State. Pet.App. 131.

REASONS FOR GRANTING THE WRIT

I. The court of appeals' opinion conflicts with decisions of multiple circuit courts and state supreme courts.

On both Article III standing and the States' ability to require electors to follow state law, the court of appeals' decision conflicts with the holdings of multiple circuit courts and state courts of last resort.

Compelling reasons thus support this Court's review. SUP. CT. R. 10(a)-(b).

These conflicting opinions cause significant disruption in the electoral process. In 2016, for example, electors in Colorado, California, Minnesota, and Washington brought four federal lawsuits challenging state law requirements related to the Electoral College. Relying on authority from other circuit courts and state courts of last resort, the four federal district courts each dismissed these challenges. Only in the opinion at issue here did the electors prevail.

A. The decision below finding standing deepens an existing split over whether presidential electors are state officers.

The court of appeals' opinion held that Mr. Baca had Article III standing because, in addition to his removal, presidential electors are "established by the federal Constitution" and "exercise a federal function." Pet.App. 19.

The court of appeals' decision deepens an existing split among the circuit courts and state supreme courts, increasing confusion over the electors' constitutional role. The Eighth Circuit and the supreme courts of Kentucky and Oklahoma have concluded in varying contexts that presidential electors are state officers, not federal officers. *See Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937) (dismissing federal indictment for conspiracy to injure citizens' right to vote for electors since they are state officers, not federal officers); *Chenault v. Carter*,

332 S.W.2d 623 (Ky. 1960); *In re State Question No. 137, Referendum Pet. No. 49*, 244 P. 806 (Okla. 1926).

This line of authority frequently relies on this Court's early precedent indicating that presidential electors are not federal officers: "[a]lthough the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators." *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). Were this line of authority applied in a future case, a presidential elector bringing an official-capacity suit would likely be treated as a subordinate state officer who lacks Article III standing.

By contrast, the supreme courts of Idaho, Texas, and California—now joined by the Tenth Circuit—have rejected arguments that presidential electors are state officers. *See State ex rel. Spofford v. Gifford*, 126 P. 1060, 1067 (Idaho 1912); *Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944); *cf. Spreckels v. Graham*, 228 P. 1040, 1044 (Cal. 1924). The Texas Supreme Court, for example, has held that the position of presidential elector is "created by the Federal Constitution, and not by State authority," leading it to conclude that a state election statute did not apply to its electors. *Stanford*, 181 S.W.2d at 272. But in doing so, the court candidly acknowledged "there are many authorities to the contrary." *Id.* (collecting cases).

These splintered decisions in the lower courts merit granting certiorari. Whether a presidential elector is a state officer impacts whether a presidential elector has Article III standing. Whether presidential

electors have standing to disrupt imminent Electoral College proceedings by filing suit, as occurred in 2016 in four federal courts, should be governed by a national, uniform standard that only this Court can announce. It should not depend on arbitrary distinctions such as which circuit happens to hear an elector's emergency claim on the eve of the Electoral College.

B. The decision below finding a new constitutional right for electors to disregard state law conflicts with decisions from multiple lower courts.

The decision below conflicts with most courts that have considered whether electors may disregard state law, including multiple state courts of last resort.

The court of appeals concluded that Article II and the Twelfth Amendment provide electors the right to cast a ballot for President "with discretion" and that the States "may not interfere with the electors' exercise of discretion." Pet.App. 128. The supreme courts of Alabama, Kansas, and Ohio have expressed a similar willingness to recognize elector discretion. *See Opinion of the Justices*, 34 So.2d 598, 600 (Ala. 1948); *Breidenthal v. Edwards*, 46 P. 469, 470 (Kan. 1896); *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 908 (Ohio 1948).

By contrast, most courts that have considered the question have reached the opposite conclusion. Most recently, the Washington Supreme Court held that the State may fine electors who cast their ballots contrary to state law. *In re Guerra*, 441 P.3d 807. In direct conflict with the decision below, the court held that

nothing in Article II, § 1 "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." *Id.* at 814. Nor do state restraints "interfere with any federal function outlined in the Twelfth Amendment." *Id.*

The California Supreme Court reached the same conclusion in *Spreckels*, 228 P. at 1045. There, the court held that electors do not "exercise [] judgment or discretion in the slightest degree." *Id.* Their "sole function" is "nothing more than clerical—to cast, certify, and transmit a vote already predetermined." *Id.* They "are in effect no more than messengers whose sole duty it is to certify and transmit the election returns." *Id.*

The same is true in Nebraska. Its supreme court affirmed a writ of mandamus requiring the secretary of state to print the names of six replacement electors on the ballot when the original Republican electors "openly declare[d]" they would vote in the Electoral College for another party's candidates. *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912).

In addition to this direct conflict with the Washington, California, and Nebraska supreme courts, the court of appeals' decision contravenes each of the federal district court decisions that recently examined the States' ability to bind electors in the 2016 Electoral College. *See Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193 (D. Minn. Dec. 23, 2016) (denying elector's motion for temporary restraining order and dismissing case), *affirmed on mootness grounds*, 903 F.3d 813 (8th Cir. 2019); *Koller v. Brown*, 224 F. Supp. 3d 871 (N.D. Cal.

2016) (denying elector's motion for temporary restraining order), *motion to dismiss later granted*, 312 F. Supp. 3d 814 (N.D. Cal. 2018); *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140 (W.D. Wash. 2016) (denying elector's motion for preliminary injunction; appeal later voluntarily dismissed).

In each of these cases, the courts reaffirmed the States' ability to impose restraints on their electors. None found that the Constitution protects electors' independence to cast their Electoral College ballots as they choose. *See Abdurrahman*, 2016 WL 7428193, at *4 (stating electors are not an "independent body" and are "not left to the exercise of their own judgment" (quotations omitted)); *Koller*, 224 F. Supp. 3d at 879 (predicting it is "likely" the Supreme Court would take a "realistic approach" when examining restraints on electors and reject elector independence); *Chiafalo*, 224 F. Supp. 3d at 1144 (rejecting elector independence because Article II and the Twelfth Amendment do not "demand[ ] absolute freedom for the elector to vote his own choice") (quotations omitted).

The confusion created by the court of appeals' decision, highlighted by this split of authority, is especially acute given that court's earlier statements on Colorado's ability to require its electors to follow its voters' popular will. When the case was first before the Tenth Circuit during the 2016 election cycle on an expedited timeframe, the court *rejected* the electors' challenge and denied their request for an injunction. Pet.App. 184. The court stated that the electors "fail[ed] to point to a single word" in the Constitution that requires electors "be allowed the opportunity to

exercise their discretion in choosing who to cast their votes for." Pet.App. 194. Thus, the court of appeals' own conflicting orders illustrate the troubling lack of consensus in the lower courts over the independence of electors. Only this Court can remedy that confused state of affairs.

II. The court of appeals' decision is wrong.

On both the question of elector standing and electors' ability to disregard state law, the court of appeals decided important questions of federal law in a way that departs from this Court's precedent. This Court's review is therefore merited. SUP. CT. R. 10(c).

A. Presidential electors lack standing to challenge state binding statutes.

This Court has long held that state officials lack Article III standing to challenge the constitutionality of a state statute when they are not personally affected by the statute. *See Columbus & Greenville Ry. Co. v. Miller*, 283 U.S. 96, 99–100 (1931); *Braxton Cty. Ct. v. W. Va.*, 208 U.S. 192, 197–98 (1908); *Smith v. Indiana*, 191 U.S. 138, 148–49 (1903). In *Smith*, for example, this Court held that a county auditor lacked standing to challenge a property tax statute: "the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so." 191 U.S. at 149.

In this case, the court of appeals correctly applied this principle to two electors, Ms. Baca and Mr. Nemanich, stating they *lacked* standing to challenge Colorado's binding law. Pet.App. 38–42. Their allegations of coercion to cast their ballots consistently

with Colorado law established an injury that impacted only their "official function" as members of the Electoral College, not a personal injury that would support standing. Pet.App. 41.

But the court of appeals found that a third elector, Mr. Baca, *did* have standing. Mr. Baca was different, the court of appeals said, because Colorado removed him from his position as elector and cancelled his ballot for John Kasich. Pet.App. 36. In support of its distinction between Mr. Baca and the other two electors, the court of appeals cited this Court's statement in *Raines* suggesting that an official may have standing if they are deprived of something to which they "*personally* are entitled—such as their seats as members of Congress after their constituents had elected *them*." Pet.App. 36 (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).

The court of appeals' reliance on *Raines* was error for at least three reasons. *First*, it ignores the very next sentence in *Raines*: "[A]ppellees' claim of standing [which the Court rejected] is based on a loss of political power, not loss of any private right, which would make the injury more concrete." 521 U.S. at 821. Mr. Baca's claim in this case arises from the loss of his independent political power as an elector under Colorado's binding law, not the loss of a personal right. Pet.App. 32 (summarizing complaint allegations). Like the county auditor in *Smith*, the performance or nonperformance of the duties prescribed by Colorado law for electors is of "no personal benefit" to Mr. Baca. 191 U.S. at 149.

Second, this Court's statement in *Raines* was grounded in the Court's earlier decision in *Powell*

finding standing for an expelled congressman based on his "consequent loss of salary." 521 U.S. at 820–21 (citing *Powell v. McCormack*, 395 U.S. 486, 496, 512–14 (1969)). Nowhere in *Powell* did the Court suggest that the expelled congressman had standing based on a personal right to represent constituents that had elected him. But Mr. Baca asserts precisely that type of right here. Unlike *Powell*, he does not allege injury resulting from the loss of the nominal $5 or mileage reimbursement that electors receive under Colorado law. COLO. REV. STAT. § 1-4-305. The Tenth Circuit thus erred by expanding the statement in *Raines* beyond its holding.

Third, *Raines* is a legislator standing case. It thus has limited applicability when determining a *non*-legislator's general standing to bring suit. *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2656, 2663–66 (2015) (explaining requirements for legislator standing). The court of appeals nonetheless found the principles underlying legislator standing "support Mr. Baca's claim for standing." Pet.App. 47–48. But even if the Electoral College has some similarities to a legislature, one elector, Mr. Baca, still does not satisfy the requirements for legislator standing. He and his co-plaintiffs constituted a minority of Colorado's nine-member Electoral College delegation, and an even smaller minority of the national Electoral College. *See Va. H.D. v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (explaining "individual members lack standing to assert the institutional interests of a legislature"). And in any event, Respondents no longer hold the office of elector. *Karcher v. May*, 484 U.S. 72, 81 (1987) (stating former legislators "lack authority to pursue" appeal because

"they no longer hold those offices"). The court of appeals thus erred by relying on legislator standing principles.

B. States may require electors to vote consistent with the State's popular vote.

The court of appeals' opinion finding a new constitutional right permitting electors to ignore the state voters' popular will is incorrect because it: (1) contravenes this Court's binding precedent; (2) misinterprets the Constitution; and (3) wrongly discounts the Nation's longstanding practice. Any one of these errors merits reversal on its own. When combined in the court of appeals' holding, they threaten to undermine the democratic principles underpinning over two centuries of electing United States presidents.

1. This Court has already rejected claims that electors may disregard state binding statutes.

The court of appeals' holding conferring unfettered discretion on presidential electors disregards this Court's reasoning in *Ray*. There, the Alabama legislature delegated to the political parties the authority to nominate electors. *Ray*, 343 U.S. at 217 n.2. Alabama's Democratic Party required its nominees for electors to pledge "aid and support" to the presidential nominee of the national Democratic Party. *Id.* at 215. Mr. Blair, a candidate for elector, objected to the pledge on the ground that it restricted his freedom to vote in the Electoral College for the presidential candidate of his choice. *Id.*

This Court rejected his challenge and upheld the pledge requirement, finding "no federal constitutional objection" when a State authorizes a party to choose its nominees for elector and to "fix the qualifications for the candidates." *Id.* at 231. The Court held that the Twelfth Amendment does not demand "absolute freedom" for the elector to "vote his own choice." *Id.* at 228. The Court thus declined to recognize a new constitutional right for electors to vote their individual preferences.

By contrast, the dissent in *Ray* fully embraced the concept of unrestricted elector decision-making. The *Ray* dissent viewed presidential electors as "federal officials" who perform a "federal function" beyond the States' control. *Id.* at 231, 233 (Jackson, J., dissenting). Presidential electors are "free agents," the dissent explained, who exercise an "independent and nonpartisan judgment" when casting their Electoral College ballots. *Id.* at 232. In the dissent's view, "no state law could control the elector in the performance of his federal duty." *Id.* But that view did not carry the day.

Here, the court of appeals wrongly adhered to the *Ray* dissent rather than the *Ray* majority. Passages from the lower court's opinion are interchangeable with the *Ray* dissent. *Compare id.* (electors "exercise an independent nonpartisan judgment"), *with* Pet.App. 124 ("electors were to vote according to their best judgment and discernment"). Although the lower court emphasized that *Ray* did not actually decide whether elector pledges are enforceable, Pet.App. 83, it nonetheless failed to abide by *Ray*'s binding reasoning. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d

1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (stating lower courts' respect for a prior decision's reasoning—its "ratio decidendi"—must "be at its zenith when the decision emanates from the Supreme Court").

The Court in *Ray* rejected the dissent's view of unbound elector independence in favor of the "long-continued practical interpretation" permitting States to impose elector pledges. 343 U.S. at 229. From that reasoning, it follows that States may enforce their lawful pledge requirements by removing and replacing a faithless elector. Members of this Court have indicated as much, explaining that the States' "power to establish requirements would mean little without the ability to enforce them." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1849 (2018) (Thomas, J., concurring) (analogizing the States' Article II, § 1 authority over electors to the Voter Qualifications Clause).

Consistent with this reasoning, other courts, including the district court below, have interpreted *Ray* to sanction the enforcement of other types of elector binding laws. Pet.App. 155 (*Ray* "strongly implies that state laws directly binding electors to a specific candidate are constitutional"); *accord Abdurrahman*, 2016 WL 7428193, at *4 (*Ray* "implied that such enforcement would be constitutional"); *Koller*, 224 F. Supp. 3d at 879 ("If that sort of reduction in an elector's independence [in *Ray*] is determined constitutional ... Plaintiff's argument based on Article II, § 1 collapses"); *Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) ("Though the [*Ray*] Court was not in a position to decide whether the

pledge was ultimately enforceable, the opinion's reasoning strongly suggested that it would be").

These decisions are correct. Under *Ray*'s "ratio decidendi," if a State can demand a pledge and thus restrict an elector's independence, nothing in the Constitution prevents the State from enforcing that pledge through other means of control. The court of appeals' contrary limiting principle—sustaining a pledge but striking down efforts to enforce it—is arbitrary, not well-grounded in constitutional text, and contravenes this Court's precedent. It should be reversed.

2. The Constitution permits States to bind their electors.

Three constitutional provisions bear on the question of States binding their electors: (a) Article II, § 1; (b) the Twelfth Amendment; and (c) the Tenth Amendment. Each supports the States' authority to bind their electors or, at the very least, does not expressly prohibit the States from doing so.

Article II, § 1. The Constitution commits to the States' respective legislatures the exclusive right to decide how their presidential electors are selected and, if necessary, removed. Article II, § 1 provides that "[e]ach state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1 (emphasis added). By broadly empowering the States to choose the "manner" in which electors are selected, the Constitution permits the States to attach conditions to

their appointment. *See Husted*, 138 S. Ct. at 1849 (Thomas, J., concurring).

Consistent with this expansive constitutional authority, this Court describes the States' power under Article II as "plenary," "exclusive," and "comprehensive." *McPherson v. Blacker*, 146 U.S. 1, 27, 35 (1892). It conveys the "broadest power of determination" on the States. *Id.* at 27.

The court of appeals, however, circumscribed the States' plenary authority over their electors, believing the States' power ceases once the State appoints its electors and they begin casting their presidential ballots. Pet.App. 91. But the States' power to remove a disloyal elector is a necessary corollary of their expansive authority to "direct" the "manner" of appointment under Article II, § 1. *See Myers v. United States*, 272 U.S. 52, 119 (1926) ("[A]s a constitutional principle the power of appointment carried with it the power of removal."); *Burnap v. United States*, 252 U.S. 512, 515 (1920) (similar). Were it otherwise, the States' plenary, exclusive, and comprehensive authority over their electors would be hollow, rendering them powerless to vindicate their rights under Article II. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("[E]very right, when withheld, must have a remedy.").

The court of appeals rejected Colorado's reliance on this well-established removal principle, concluding it extended solely to the President's appointment and removal of *executive* branch officers. Pet.App. 92–95. In its view, the President as chief executive is "in charge of and responsible for administering functions of government" and therefore must have the

"unrestricted power" to remove subordinates the moment he "loses confidence in the[ir] intelligence, ability, or loyalty[.]" Pet.App. 92–93 (quotations omitted). But the Constitution provides no reason to limit this removal principle to the President or the executive branch. And in cases analyzing the Appointments Clause, this Court has applied the removal principle to subordinate officers residing outside the executive branch. *See United States v. Allred*, 155 U.S. 591, 594 (1895) (circuit court commissioner); *In re Hennen*, 38 U.S. 230, 259 (1839) (judicial clerk). It should apply equally here. Even the primary authority relied on by the court of appeals, *Myers*, recognized that the removal principle applies outside the executive branch; two of the three cases it cites as support for the removal principle involved *non*-executive branch officers. *See Myers*, 272 U.S. at 119 (citing *In re Hennen*, 38 U.S. 230, and *Reagan v. United States*, 182 U.S. 419, 424 (1901) (commissioner for Indian territory, appointed by an Article IV judge)).

As this Court has indicated, presidential electors are mere ministerial officers who transmit the ballots of *their State*, not their own ballot. *Green*, 134 U.S. at 379 ("The sole function of the presidential electors is to cast, certify, and transmit the vote *of the state* for president and vice-president of the nation." (emphasis added)); *see also Ray*, 343 U.S. at 224 (electors "act by authority of the state" that appoints them). Under the logic of the removal power, the States share similar unrestricted power of removal as the President.

Twelfth Amendment. The Twelfth Amendment separates electoral votes for President and Vice President and fixed the problem of ties in Electoral

College balloting. It does not grant presidential electors discretion to cast an Electoral College ballot for the candidate of their choice.

Under the original Constitution, the electors "did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill." *Ray*, 343 U.S. at 224 n.11. The person receiving the most votes became President and the person receiving the second most votes became Vice President. But that system quickly proved unworkable with the arrival of the political party system. In 1800, for example, the election ended in a tie because Democratic-Republican electors had no way to distinguish between Presidential nominee Thomas Jefferson and Vice-Presidential nominee Aaron Burr when they each cast two votes for President. *See* Robert M. Hardaway, *The Electoral College and the Constitution*, 91–92 (1994). Because that situation was "manifestly intolerable," *Ray*, 343 U.S. at 224 n.11, the Twelfth Amendment was adopted to allow the electors to cast "distinct ballots" for President and Vice President. U.S. CONST. amend. XII.

The Twelfth Amendment thus permitted the voting public to select electors who would "vote for the party candidates for both offices," allowing them to "carry out the desires of the people, without confronting the obstacles which confounded the election[ ] of ... 1800." *Ray*, 343 U.S. at 224 n.11. If anything, the Twelfth Amendment supports the contemporary practice of binding electors, not conferring independence on them. It was the solution to the unique problems posed when electors are

pledged and bound to the candidates of their declared party. Without that historical practice, dating back to at least 1800, the Twelfth Amendment would not have been necessary in the first place.

The court of appeals had a much different take on the Twelfth Amendment, stating its text "allows no room" for States to bind electors, Pet.App. 98, and that the historical context of its enactment reveals that States "cannot interfere" when electors cast faithless ballots, Pet.App. 111. Neither conclusion is correct.

As for the Twelfth Amendment's text, its detailed and lengthy provisions address the bookkeeping procedures for tallying and transmitting the Electoral College ballots. The amendment prescribes, for example, that the electors shall cast their ballots for President and Vice President in "distinct ballots" and make "distinct lists" for each, thus ensuring no tie results between the party's candidates. U.S. CONST. amend. XII. But nowhere does the amendment purport to confer unbridled discretion on electors.

By implanting a restriction on the States not found in the amendment's text, the lower court interpreted the Constitution to preclude state power by negative implication—something this Court has counseled against. *See Alden v. Maine*, 527 U.S. 706, 739 (1999) (explaining the Court's "reluctance to find an implied constitutional limit on the power of the States"). The Twelfth Amendment does not address, for example, what occurs if an elector votes for a constitutionally ineligible candidate. Pet.App. 103 n.27 (acknowledging this possibility). Can the State cancel their ballot and replace them? What if an elector declines to cast a ballot, or leaves their ballot

blank? Does the State have authority to act then? Nothing in the Twelfth Amendment's text expressly addresses these situations. But that does not mean the State is powerless to remedy the problem and give a voice to its electorate's choice for President.

The historical context surrounding the Twelfth Amendment's ratification also does not support the lower court's holding. The court observed that the 1796 election produced a faithless electoral ballot from a Pennsylvania elector, Samuel Miles. Pet.App. 109–10. Despite this, those who drafted and ratified the Twelfth Amendment from 1801 to 1804 did nothing to prevent future faithless ballots. Pet.App. 111. But this argument wrongly presupposes that Congress and the States must mend all that ails the Electoral College in one fell swoop. This Court has repeatedly rejected that line of thinking, recognizing that changes can be made incrementally rather than in sweeping fashion. *See, e.g.*, *Califano v. Jobst*, 434 U.S. 47, 57 (1977).

The court of appeals' historical analysis regarding the Twelfth Amendment's ratification also overlooks the early state statutes that support upholding broad state authority over electors. Massachusetts in 1796, for example, enacted a statute permitting electors to replace members who had died or resigned before convening. 1796–1797 Mass. Acts 260. The legislature in 1800 expanded the list of vacancy-triggering events, authorizing electors to fill vacancies caused by "death, sickness[,] resignation *or otherwise*." 1800–1801 Mass. Acts 172–73 (emphasis added). New Hampshire passed an analogous law in 1800 requiring its legislature to replace any elector who was not "present" at a specified date and time to accept their

appointment. 1800 N.H. Laws 566–67. Pennsylvania took a similar approach in 1802, while in New York the absence of any elector in 1804 was filled by a majority vote of the remaining electors. James T. Mitchell, *Statutes at Large of Pennsylvania from 1682 to 1801*, § IV, at 52–53 (1700–1809); 1804–1805 N.Y. Laws, vol. IV, ch. II, at 3–4.

Other States went beyond replacing absent electors and punished those who neglected their duties. Virginia, for example, enacted a law in 1788—before the first presidential election—providing that an elector who "fail[ed] to attend ... as herein directed" would "forfeit and pay two hundred pounds." 1788 Va. Acts, ch. I, § V, at 4. Kentucky's 1799 statute was similar, stating that an elector who "fail[ed] to perform the duties herein required ... shall forfeit and pay one hundred dollars." 2 William Littell, *Statute Law of Kentucky*, ch. CCXII, § 20, at 352 (1810).

While these statutes deal primarily with replacing and fining absent electors, they demonstrate that electors have never enjoyed complete independence from the States. And close inspection reveals these early state laws are not far removed from today's modern binding statutes. Both would permit the State to fill a vacancy caused by an elector who either fails to attend or attends but opts to leave their ballot blank. The earliest electors in Kentucky could even be replaced if they failed to perform "the duties" prescribed by the state legislature. Colorado's law is no different.

The prevailing historical practice in the States during the Twelfth Amendment's ratification does not

support Respondents' position seeking complete elector autonomy.

Tenth Amendment. Although Article II, § 1 provides the States with plenary, comprehensive, and exclusive authority over their electors, the Tenth Amendment provides an alternative source for the States' authority.

The Tenth Amendment ensures that the States and the people retain residual authority to exercise those powers not expressly granted by the Constitution to the Federal government: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; *see Printz v. United States*, 521 U.S. 898, 919 (1997).

Through this amendment, the Framers intended the States to "keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 543 (2013) (quotations omitted). While the Federal government retains some control over federal elections, such as regulating the time and manner for electing Senators and Representatives, U.S. CONST. Article I, § 4, cl. 1, the States retain broad powers under the Tenth Amendment to "prescribe the qualifications of its officers." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quotations omitted). This includes the authority to "establish qualifications" for their presidential electors. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting).

The court of appeals disagreed that the Tenth Amendment provided Colorado with authority to remove Mr. Baca once he cast his faithless ballot. The lower court reasoned that the States possess "no powers whatsoever" that "exclusively spring out of the existence of the national government." Pet.App. 89 (quotations omitted). The States cannot "reserve" the power to remove or bind electors, the court of appeals said, because they cannot reserve that which they never possessed before the Constitution was adopted. Pet.App. 90.

The lower court's reasoning ignores, however, that presidential electors are subordinate state officers. *See Walker*, 93 F.2d at 388. As indicated, their "sole function" is to "transmit the vote *of the state*" that appointed them. *Green*, 134 U.S. at 379 (emphasis added). As dual sovereigns, the States have always held the power to control—and remove, if necessary—their subordinate officers. This authority long predates the Constitution. *See, e.g.*, *In re Hennen*, 38 U.S. at 247 ("[A]t common law, a custom for the appointing power to remove ad libitum ... was always held to be a good custom.").

Applied here, Colorado acted well within its preexisting common law power when it removed its appointee, Mr. Baca, for violating his oath and Colorado law. The court of appeals erred when it concluded otherwise.

C. The public's post-enactment understanding and longstanding historical practice both support State control of electors.

Throughout its majority opinion, the court of appeals relies on some pre-ratification views of certain Framers of the Constitution. The court of appeals leans heavily, for instance, on statements in the Federalist Papers indicating that Alexander Hamilton and John Jay expected electors would exercise independent "judgment and discernment." Pet.App. 124. These pre-ratification interpretations by the Framers, in the court of appeals' view, demonstrate that electors were not intended as "bound proxies." Pet.App. 123.

Of course, some Framers reasonably expected that electors would exercise independent judgment when casting their ballots. This Court has already said as much. *McPherson*, 146 U.S. at 36 ("Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive.").

But what certain Framers reasonably anticipated would occur before ratification does not solely define the Constitution's meaning. Take for example the Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). There, the Court rejected as "dubious" the Second Amendment's pre-enactment legislative history and looked instead to the public's *post*-enactment understanding from "immediately after its ratification through the end of the 19th century." *Id.* at 603–05. Inquiring into the post-enactment interpretations of those who were subject to the

amendment, the Court explained, is a "critical tool of constitutional interpretation." *Id.* at 605.

The post-enactment understanding provides particular insight when, as here, significant changes occurred in the early days of our republic with the rise of political parties. The pre-enactment views of the Electoral College relied on by Respondents manifest a prediction about how that institution would function—as a set of free agents open to supporting the best candidate. But starting when George Washington was no longer a candidate in 1796, and ever since, political parties emerged as a dominant force. *See* Robert W. Bennett, *Taming the Electoral College* 20 (2006) ("Political parties ... quickly became the organizing media of politics, and almost immediately reached not only into the legislature but into the electoral college mechanism for selecting the president as well."). Electors represented those parties and were to support the candidate with whom they were associated. *See id*. Individual voters, in other words, were not voting for the elector as an individual, but the political party's presidential nominee to whom the electors had pledged.

As recounted in *Ray*, electors were "expected to support the party nominees." 343 U.S. at 228. "The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees ... is *impossible to accept*." *Id.* (emphasis added). The voting public in those early days understandably did not select a person for elector who they knew did not "intend to vote for a particular person as President."

Id. at 228 n.15 (quoting 11 Annals of Congress 1289–1290, 7th Cong., 1st Sess. (1802)). The voting public, instead, "fixed upon their own candidates" for President and "took pledges" from elector candidates to "obey their will." *Id.* (quoting S. Rep. No. 22, 19th Cong., 1st Sess., p. 4 (1826)). "They are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents." *Id.*

The downfall of the Electoral College design initially conceived of by certain Framers was swift and immediate. The electors had "degenerated into mere agents" as early as the first election held under the Constitution. *Id.* "In every subsequent election, the same thing has been done." *Id.*; *see also McPherson*, 146 U.S. at 36 ("[E]xperience soon demonstrated that ... [electors] were so chosen simply to register the will of the appointing power in respect of a particular candidate."). This well-established post-enactment understanding by the public, coupled with longstanding historical practice, is entitled to no less weight than that placed on the pre-enactment statements by some Framers relied on by Respondents. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (stating "long settled and established practice" deserve "great weight" in constitutional interpretation (quotations omitted)); *Ray*, 343 U.S. at 228–29 (citing "longstanding practice" to uphold pledge requirement).

Respondents and the court of appeals resist both this history and the public's post-enactment understanding of the electors' role. They rely, for example, on a purported "uninterrupted history" of

Congress counting faithless electors' ballots. Pet.App. 115. Commentators have rightly determined that this claim is both "irrelevant and false."[3] The claim is irrelevant because, before 2016, no elector had ever cast a faithless ballot in a State that had a law authorizing the removal of a disloyal elector. *Muller, supra* n.3. Congress's past act of counting faithless ballots from States that *lack* a replacement regime thus says little about the States' authority to enforce their binding statutes. *Id.* Similarly, the claim is false because Congress *did* count two ballots from replacement electors in January 2017—one from Colorado and one from Minnesota. *Id.* Congress's decision to count these replacement ballots thus had the effect of ratifying what the States had already been doing for over a half century: binding their electors and using their oversight power to enforce that requirement.

The adoption of the Twenty-third Amendment likewise demonstrates that Congress agrees the States may bind their electors. Ratified in 1961, the Twenty-third Amendment placed the District of Columbia on equal footing with the States in its allocation of presidential electors. Congress subsequently enacted implementing legislation that binds the District's electors to the outcome of its

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[3] Derek T. Muller, *Analysis: 10th Circuit finds Colorado wrongly removed faithless presidential elector in 2016*, Excess of Democracy (Aug. 21, 2019), https://tinyurl.com/yxrog7bg ("Muller"); *see also* Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty after the Election of Donald Trump*, 28 U. Fla. J.L. & Pub. Pol'y 215, 215–16 (2017) (recognizing that "in the thirty years prior to 2016 ... only two faithless votes were recorded").

popular vote. D.C. CODE ANN. § 1-1001.08(g)(2). Accordingly, as far as Congress is concerned, binding electors to the outcome of a jurisdiction's popular vote is fully consistent with the Constitution, not violative of it. Against the backdrop of the States' long-sustained practice of binding their electors, Congress's express approval of its own elector binding law is entitled to great weight. *See M'Culloch v. Maryland*, 17 U.S. 316, 401 (1819) (stating Congress's acquiescence in a particular action, "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice").

III. This case is an ideal vehicle for resolving the questions presented.

For three reasons, this case provides the Court a model vehicle for resolving the important questions presented.

First, unlike the related case from Washington where the faithless electors were subject to after-the-fact fines, this case involves a State exercising the fullest extent of its authority over electors: removal and replacement. A decision from this Court deciding the constitutionality of Colorado's removal-and-replacement regime will thus resolve the constitutionality of all lesser measures that the States may employ to secure elector loyalty. Using a different vehicle, by contrast, may leave lingering questions unanswered. Addressing only the constitutionality of elector fines, for example, could leave States like Colorado that remove and replace electors with continued uncertainty about their law.

Second, and relatedly, this case raises the question of elector standing under Article III—an issue not present in the parallel Washington case. With four different federal courts hearing suits by presidential electors in 2016 alone, this case presents the opportunity for this Court to address this threshold question before the 2020 presidential election in an orderly manner that avoids chaotic litigation on the eve of an Electoral College vote. If the Court agrees with Colorado and the district court that electors are subordinate state officers who lack standing absent some personal injury, that rule will provide a level of certainty that largely prevents future elector lawsuits. The Court should not proceed to address the ability of States to bind their electors, in any case, without first addressing this important threshold question of elector standing. This case squarely presents that question.

Third, the court of appeals' dissenting opinion, suggesting that 42 U.S.C. § 1983 provides no remedy against a State, does not preclude this Court from reaching the questions presented. As the majority noted, Colorado expressly waived its personhood defense under § 1983 and its Eleventh Amendment immunity for this case so that the federal courts could address these important issues in an orderly fashion. Pet.App. 15, 59. This Court has indicated that Eleventh Amendment immunity is not jurisdictional and, thus, is waivable by the States. *See, e.g., Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906). It has suggested the same thing regarding § 1983's personhood defense. *Cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) ("We cannot conclude that § 1983 was intended to disregard the well-

established immunity of a State from being sued *without its consent*." (emphasis added)).

Accordingly, this case provides the Court an ideal vehicle for addressing the questions of elector standing and the States' ability to bind their electors. Both this case and the Washington case present strong arguments for granting certiorari. But as between this case and the Washington case, only this case presents the issue of Article III standing. Respondents did not assert a First Amendment claim in this case and the First Amendment claim in the Washington case does not present a certworthy question, largely because it overlaps with the core question presented here of whether a State can restrict the votes of its presidential electors. However, regardless of the Court's disposition of the Washington electors' petition, Colorado requests that certiorari in this case be granted and this case argued, either alone or with the Washington case. Holding this case for resolution of the Washington case would leave important questions unanswered before the 2020 election.

IV. The questions presented are of profound importance to the Nation.

The issues of elector standing and independence presented by this case are of utmost national importance. Indeed, the multiple *amici curiae* briefs submitted in connection with this case and the parallel Washington case demonstrate that the factors justifying certiorari review are amply satisfied. Three points illustrating the issues' profound significance merit brief discussion.

First, and most obvious, this case implicates the procedures for electing the President of the United States under federal and state law. "The importance of [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs v. United States*, 290 U.S. 534, 545 (1934). Since the very first election held under the Constitution, and in "every subsequent election," voters have "looked beyond these agents (electors)" to choose their own candidates for President. *Ray*, 343 U.S. at 228 n.15 (quotations omitted). That is, voters have always been secure in the knowledge that the exercise of their fundamental right to vote for President actually matters. Far from being an academic exercise, the American people choose the President while electors are "mere agents" who cast their Electoral College ballots "according to the will of their constituents." *Id.* Not the reverse. The court of appeals decision upsets over two centuries of practice covering all previous presidential elections.

Second, the court of appeals' decision jeopardizes the elector-binding laws of 29 States and the District of Columbia. *See* NCSL, *supra* n.1. It also throws into doubt the automatic-resignation provision in the Uniform Faithful Presidential Electors Act ("UFPEA"), promulgated by the Uniform Law Commission and enacted in six States.[4] *See* UFPEA, § 7(c). While these laws demand elector faithfulness in different ways (e.g., oaths, fines, resignation, removal), each now faces constitutional vulnerability

[4] Uniform Law Commission, *Faithful Presidential Electors Act*, https://tinyurl.com/y3s7qarw.

under the court of appeals' far-reaching decision. *See New York v. O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari where lower court's decision "brings into question the constitutionality of a statute now in force in forty-two States").

The immediate and mandatory impact the decision below has within the Tenth Circuit also creates significant concern. Among the six States in the Tenth Circuit, five have elector-binding laws. COLO. REV. STAT. § 1-4-304(5); N.M. STAT. ANN. § 1-15-9; OKLA. STAT. tit. 26, § 10-109; UTAH CODE ANN. § 20A-13-304(3); WYO. STAT. ANN. § 22-19-108. Absent intervention from this Court, the court of appeals' binding decision among those States may prevent future enforcement of these elector-binding laws. In addition, the court of appeals' decision provides authority for other challengers outside the Tenth Circuit to use in the 2020 election. The widespread impact and uncertainty created by the court of appeals' decision makes this case an exceptionally strong candidate for certiorari review.

Third, this important question should be decided by this Court now, not in the heat of a close presidential election. In the hectic litigation leading up to the Electoral College, a judicial decision can become hyper-partisan because the winners and losers from any court decision are known. By contrast, deciding this question now, before the voters cast their ballots and States pick their electors, allows this Court to address the principles raised in a more neutral environment.

Colorado's experience with the 2016 electors demonstrates the chaos and uncertainty that

accelerated litigation creates. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."). And 2016 demonstrated that an increasing number of electors seek to take advantage of legal uncertainty to challenge state restrictions. State election administrators therefore need this Court's guidance, and fairness dictates that state restrictions on electors face a uniform legal standard nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 16, 2019