No. 19-465

In The
Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* VINZ KOLLER IN SUPPORT OF PETITIONERS

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INTRODUCTION[1]

Amicus curiae Vinz Koller served as a California Democratic Party presidential elector in the 2016 election. After the popular vote, Mr. Koller joined with the Petitioners in this case and Republican electors in other States to exercise their constitutional right to cast their votes in the Electoral College for a Republican candidate other than Donald J. Trump.

These electors were hampered in their efforts, however, by State laws that would have punished them for casting their Electoral College votes in violation of those State laws. For Mr. Koller, the punishment in California would have been a $1,000 fine *and/or up to three years in prison*. As a convicted felon, he would have lost his right to vote, to sit on a jury, to conduct business with the government, to possess a firearm, and to hold federal office.

Mr. Koller tried and failed to get the district court to rule on the merits of his constitutional efforts and these State punishments – both before and after the Electoral College vote. Before that vote, the court denied Mr. Koller's requested relief based on the

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[1] Pursuant to the Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record for both Petitioners and Respondent were notified of the intent to file this brief on October 18, 2019, and the parties' blanket consents to the filing of *amicus* briefs have been filed with the Clerk's office.

uncertainty of whether California would pursue his criminal prosecution. After that vote, the court denied his requested relief based on mootness and lack of standing. All the while, the court acknowledged the striking lack of clarity regarding the constitutionality of State "faithless elector" laws.

The procedural history of Mr. Koller's case shows why the Court should hear this case now. Mr. Koller's inability to obtain a ruling on the merits reflects the short and fleeting window of time between the federal general election and the Electoral College vote – approximately six weeks every four years.

Because presidential electors will always face this inhospitable schedule, they will always be unlikely to obtain a timely merits ruling on these laws. There is, therefore, a pressing need for the Court to decide the constitutionality of "faithless elector" laws prior to the next election and at the deliberative pace that such constitutional matters deserve.

INTEREST OF *AMICUS CURIAE*

This case presents the issue of whether presidential electors are free to cast Electoral College votes in accord with the deliberative process set forth in the U.S. Constitution, contrary to State law requirements, and without fear of replacement, fine, imprisonment or other punitive consequences, even if State law or State agents try to restrict those rights. Mr. Koller faced such

punitive consequences in December 2016 at the same time as the Petitioners in this case.

Mr. Koller's inability to obtain judicial review of California's "faithless elector" laws illustrates the pressing need to resolve the constitutionality of these laws in this case. Electors are unlikely to obtain a merits ruling on these laws in the short and fleeting window of time between the federal general election and the Electoral College vote, approximately six weeks every four years. It is in Mr. Koller's interest, the interests of all electors, and the national interest, that the Court decide the constitutionality of "faithless elector" laws prior to the next election, and without the frenzied pace inherent in judicial review of a grant or denial of a motion for preliminary injunction completed shortly before an Electoral College vote.

Furthermore, as aptly raised by the California Republican Party and Donald J. Trump and his campaign in opposition to Mr. Koller's action, a determination of this question will materially affect how presidential candidates run their campaigns. In fairness to all, this constitutional question should be decided well before that narrow slice of time between selection of presidential electors and the placing of their votes.

SUMMARY OF ARGUMENT

The procedural history of Mr. Koller's failed attempt to obtain judicial review of the constitutionality of a State "faithless elector" law amply demonstrates

why the Court should wait no longer to resolve the extraordinarily important question Petitioners present. Future electors will likely face the same formidable obstacles as Mr. Koller: difficulty showing irreparable harm to obtain a preliminary injunction prior to an Electoral College vote, and mootness after they cast their votes.

Should a district court grant an elector preliminary relief, a court of appeals and this Court would have at most a few weeks and perhaps only days to decide whether to affirm or reverse the injunction. And if a State were to replace an elector after a non-compliant vote (*e.g.*, the facts of *Baca v. Colorado*[2]), the federal courts could be in the position of reversing the outcome of the Electoral College vote, based on whether to count the replaced elector's vote or the replacement's vote. A matter of such consequence should not be addressed in rushed judicial proceedings, but should instead be reviewed on a complete record and with the opportunity for thorough briefing, as in Petitioners' case.

Leaving for another day the answer to this constitutional question would maintain for at least another presidential election cycle the many States' coercive restrictions on electors' votes. That is untenable. Electors should not risk replacement, financial penalties or even imprisonment to vote consistent with their good judgment and their conscience, as was intended by the Founding Fathers and is required by the Constitution.

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[2] *Baca v. Colorado Dep't of State*, 935 F.3d 887 (10th Cir. 2019).

This case is the ideal vehicle, arriving at an opportune time, for resolution of the question Petitioners present.

ARGUMENT

THERE IS A PRESSING NEED TO RESOLVE THE CONSTITUTIONALITY OF "FAITHLESS ELECTOR" LAWS IN THIS CASE.

I. *Koller* Illustrates That Courts Will Likely Reject on Procedural Grounds Elector Challenges to the Constitutionality of "Faithless Elector" Laws if Brought During the Short Time Between the Federal General Election and the Electoral College Vote.

The procedural details of *Koller* illustrate that courts are likely to reject elector challenges to the constitutionality of "faithless elector" laws if brought during the short time between the federal general election and the Electoral College vote. If brought during that brief window, electors will rarely be able to get a ruling on the merits, even when they may have presented a meritorious position.

A. After the General Election, Koller Wished to Cast His Electoral College Vote for a Republican Other Than Donald J. Trump.

On Tuesday, November 8, 2016, the Democratic candidates for the offices of President and Vice President, Hillary Rodham Clinton and Timothy Kaine,

"'won the California popular vote by a large margin.'" *Koller v. Brown*, 224 F.Supp.3d 871, 873 (N.D. Cal. 2006) (*Koller I*). Although those candidates also won the nationwide popular vote, it was clear after the general election that if each State's electors were to vote consistent with the popular vote of their respective States when they convened on December 19, 2016, then the Republican candidates, Donald J. Trump and Michael Pence, would be elected to those offices. *Id*.

Mr. Koller was chosen as an elector of the Democratic Party for the 2016 Presidential Election. *Koller I*, 224 F.Supp.3d at 874. As such, he believed that his duty under the Constitution was "'to vote for the person who he believes will make the best President." *Id.* at 873-74. Furthermore, he believed that electors should be allowed to consider "'facts and evidence that come to their attention' from the date of the election to the date of their vote." *Id.* at 874.

During the 41 days between the general election and the meeting of the Electoral College, Mr. Koller learned "'that the CIA [had] concluded with "high confidence" that Russia sought to influence the U.S. election. . . .'" *Koller I*, 224 F.Supp.3d at 874. This information affected Mr. Koller as an elector because he felt duty-bound to ensure "'that no one be put into the office of the President or Vice-President that might be subject to foreign influence. . . .'" *Id*.

Based on the foregoing, Mr. Koller believed that the Republican presidential candidate, Donald J. Trump, was not properly fit or qualified, but that there

were other "'qualified compromise candidate[s]'" such as Mitt Romney or John Kasich for whom Mr. Koller could cast his vote in good conscience. *Koller I*, 224 F.Supp.3d at 873.

It is important to note that Mr. Koller, a Democrat, did not seek to further his personal interests or the interests of the Democratic party in his role as an elector. Instead, he sought to put the interests of his country above all others when it came time to vote for the President of the United States. *See Koller I*, 224 F.Supp.3d at 873-74.

B. Koller Challenged the Constitutionality of California's "Faithless Elector" Laws.

Unfortunately, California law required Mr. Koller to cast his electoral vote for the Democratic candidate like a mindless robot or a rubber stamp and without regard to his conscience, considered judgment or intervening circumstances. Indeed, two California statutes compelled him to vote thusly or face a fine of up to $1,000 or imprisonment for up to three years or both. *Koller I*, 224 F.Supp.3d at 874 and nn.1-2. Furthermore, had Mr. Koller violated these statutes, he risked becoming a convicted felon, which would have led to the loss of his rights to vote, to sit on a jury, to conduct business with the government, to possess a firearm, and to hold federal office. *See id*.

Fearing these penalties, Mr. Koller filed an action in the United States District Court for the Northern

District of California on December 9, 2016. The suit was filed ten days before he and all other members of the California Electoral College were due to "'meet, deliberate and cast' votes in the election of the President and Vice President. . . .'" *Koller I*, 224 F.Supp.3d at 874-75.

In his action, Mr. Koller sought a declaratory judgment that the California statutes compelling him to vote for the Democratic presidential and vice-presidential candidates were unconstitutional under Article II, § 1 of the Constitution as amended by the Twelfth Amendment. *Koller I*, 224 F.Supp.3d at 875-76. He also sought an injunction prohibiting California government officials (the governor, the attorney general and the secretary of state) from enforcing the statutes against him and other electors. *Id*. Three days after filing his complaint, Mr. Koller filed an application for a TRO and preliminary injunction. *Id*.

In analyzing the application, the District Court acknowledged the lack of legal clarity regarding the issue, concluding that there were "equally plausible opposing views concerning the constitutionality" of the challenged statutes. *Koller I*, 224 F.Supp.3d at 879. Although, according to the court, Mr. Koller had not demonstrated that he was likely to succeed on the merits of his arguments any more than the defendant government officials had, he had identified a "question 'serious enough to require litigation,'" and thus had satisfied a required element for a TRO grant. *Id*. The court acknowledged that the statutes,

> which together compel California electors to vote for predefined candidates on pain of criminal punishment, cannot be neatly reconciled with the duties [Alexander] Hamilton attributed to the Electoral College in Federalist No. 68, one of which was the privilege to analyze and deliberate on the choice of the office of the President. And in turn, the statutes appear not only contrary to Article II, § 1, but render the implications of that section superfluous as to the votes of California electors.

Id. at 877.

C. The District Court Denied Koller Injunctive Relief.

Ultimately, the District Court denied Mr. Koller's application because the "potential ensuing harm is not the type of 'immediate threatened injury' required for a TRO." *Koller I*, 224 F.Supp.3d at 880. The court reasoned that Mr. Koller was relying "on the mere potential for a criminal prosecution" under the applicable California statutes and that he had not demonstrated that "a prosecution is *likely* should he vote for individuals other than Clinton and Kaine." *Id.* (emphasis in original). In reaching this conclusion, the court pointed to "the absence of evidence . . . showing that any California elector has ever been prosecuted or threatened with prosecution" under the statutes. *Id*. The court also reasoned that "even assuming a criminal prosecution is likely," Mr. Koller "would still have mechanisms to divert or defend against a prosecution if one were

initiated, and to challenge a conviction if one was obtained" (which would be true of any criminal prosecution). *Id*. Significantly, the court also faulted Mr. Koller for seeking injunctive relief before he had committed to violate the statutes by voting for someone other than Hillary Clinton. *Koller I*, 224 F.Supp.3d at 880 (characterizing Mr. Koller's statement that he would "vote for Clinton 'as the California law stands now' " as being "equivocal").

This procedural history demonstrates the untenable position that electors face if circumstances arise after the general election that compel them to re-evaluate whether they should mechanically vote for the presidential nominee designated by their political party. Under the District Court's reasoning, Mr. Koller could not have obtained injunctive or declaratory relief prior to the December 19, 2016 Electoral College vote because of the uncertainty that he faced more than the "mere potential for a criminal prosecution." *Koller I*, 224 F.Supp.3d at 880.

Without his requested injunctive relief, Mr. Koller had two options: (1) comply with State law by voting for his party's nominee and go against his better judgment and conscience, as well as the Constitution's mandate; or (2) violate California law by voting for another candidate at the Electoral College and risk criminal prosecution and its many negative consequences. *See Koller I*, 224 F.Supp.3d at 879-80 (describing such consequences).

Mr. Koller chose the first option. *See Koller v. Harris*, 312 F.Supp.3d 814, 820, 822 (N.D. Cal. 2008) (*Koller II*). Had he chosen the second option, he would have had no way of knowing whether he ultimately could have obtained judicial relief post-Electoral College vote. Indeed, the District Court acknowledged that the constitutionality of State statutes restricting the voting rights of electors was unsettled. *Koller I*, 224 F.Supp.3d at 879 (finding "equally plausible opposing views concerning the constitutionality" of the challenged statutes).

D. The District Court Dismissed Koller's Post-Election Claims on Mootness, Standing and Immunity Grounds.

After denial of Mr. Koller's application for a TRO and preliminary injunction, and after the 2016 Electoral College vote, Mr. Koller filed an amended complaint (FAC). *Koller II*, 312 F.Supp.3d at 820. In the FAC, he detailed additional, post-election reports of foreign interference in the presidential election, including reports "that Mr. Trump's campaign may have had numerous contacts with Russian intelligence officers during the campaign, raising further questions about the connection between Mr. Trump and the Russian government." *Id*. He reiterated his belief that he "'should have been allowed to exercise his judgment and free will to vote for whomever he believe[d] to be the most qualified and fit for the offices of President and Vice President within the circumstances and with the knowledge known on December 19, 2016, whether

those candidates [were] Democrats, Republicans, or from a third party.'" *Id.* He also explained that the "risk of criminal prosecution. . . . [had] 'chilled' the exercise of his constitutional rights. . . ." *Koller II*, 312 F.Supp.3d at 822.

The FAC sought: a declaratory judgment that the applicable California statutes were unconstitutional as well as violative of State and federal statutes prohibiting coercion of a person's vote; an injunction against California prosecution of any presidential elector on the basis of their vote; and compensatory damages for violating 42 U.S.C. § 1983. *Koller II*, 312 F.Supp.3d at 820-21.

The District Court went on to dismiss the FAC for mootness, lack of standing, and based on the prosecutorial and qualified immunity of the defendants, who were the current and former California attorneys general, and the California secretary of state. *Koller II*, 312 F.Supp.3d at 818, 829. Regarding mootness, the District Court reasoned that since the 2016 Presidential Election had "'come and gone,' there [was] simply no extant controversy between [Mr. Koller] and any defendant. . . . The court cannot provide any effective . . . relief related to the completed vote of California electors. . . . Success on any cause of action could not be retroactive, and would not affect [Mr. Koller's] 2016 vote or change the outcome of the election." *Id*.

The court similarly rejected Mr. Koller's reliance on the "capable of repetition, yet evading review" exception to mootness. *Koller II*, 312 F.Supp.3d at 823. As

Mr. Koller explained in the FAC, "'the length of a presidential elector's actual service [lasts] for a single day, and the designation of someone as being a presidential electo[r] [is] never . . . made more than six weeks prior to that one day. . . .'" *Id*. Consequently, "'it is impossible for any court case to be completed in time.'" *Id*.

In refusing to apply this exception to mootness, the court reasoned that Mr. Koller had failed to allege "a reasonable likelihood" that he *personally* "would face the same or similar dilemma in future elections." *Koller II*, 312 F.Supp.3d at 824. In order to establish the requisite likelihood, Mr. Koller would need to establish "contingencies, none of which are within [his] control," namely: that he would "be re-elected as an elector for the California Democratic Party"; that "the outcome of the 2020 Presidential Election would . . . position the current President, or a Republican candidate like the current President, as the expected winner of the Electoral College"; that Mr. Koller would "object to the expected winner of the Electoral College in the same way he [had] objected to Trump"; and that "the Democratic candidate would . . . win the popular vote in California." *Id*. The court acknowledged that there simply were "no additional allegations that could make out a live controversy," thus establishing that it would be impossible for an elector in Mr. Koller's position to ever seek post-Electoral College relief. *Id*.

Relying on the same "'speculative chain of possibilities'" that it relied on in its mootness analysis, the District Court dismissed on standing grounds Mr. Koller's claims for declaratory and injunctive relief

related to *future* elections. *Koller II*, 312 F.Supp.3d at 826. According to the court, the "FAC's allegations . . . only allege[d] the *possibility* of a future injury that is insufficient to establish an injury in fact." *Id.* (emphasis added).

Finally, the District Court concluded that the California secretary of state and the former California attorney general were both "absolutely immune" and "entitled to qualified immunity for the alleged decision to disclaim an intent to prosecute" Mr. Koller. *Koller II*, 312 F.Supp.3d at 827-28. Regarding qualified immunity, the court acknowledged that whether the California statutes at issue "were unconstitutional and could not be enforced" had not been "clearly-established" as there was an absence of "either controlling authority or a 'robust consensus' of persuasive authority placing the constitutional question beyond debate." *Id*. The court further recognized that the Supreme Court's opinion in *Ray v. Blair*, 343 U.S. 215 (1952) had left an "analogous issue . . . undecided." *Koller II*, 312 F.Supp.3d at 828. Thus, the District Court again acknowledged the striking lack of clarity regarding the constitutionality of State "faithless elector" laws such as the ones at issue in Mr. Koller's case.

II. The Result in *Koller* – Never a Ruling on the Constitutional Merits – Illustrates Why the Court Should Grant Review in This Case.

Koller shows how difficult it will be for any elector to obtain preliminary relief prior to an Electoral College vote, and also how unlikely the courts are to rule on the constitutionality of "faithless elector" laws after the elector casts their vote in compliance with State law. Voting in contravention of a State's laws will likely be electors' only means of challenging the constitutionality of these laws, and even then, it will be a State that decides whether to subject its laws to judicial review by deciding whether to replace or punish the elector. The coercion of having the laws on the books might never be removed.

Still, imagine if the California Attorney General had warned Mr. Koller that he *would* face prosecution should he cast his vote in violation of State law. The District Court might then have enjoined California from enforcing its "faithless elector" laws against Mr. Koller. Both the court of appeal and this Court would have had only a handful of days to decide whether to affirm or reverse the injunction. That is no way to resolve a constitutional issue of this magnitude.

This case has none of the procedural difficulties in *Koller*. Resolution now of the constitutional question Petitioners present would avoid the highly undesirable possibility that the federal judiciary would be put in the position of in effect deciding an Electoral College

result, based on a rushed decision on the constitutionality of a State's replacement of a "faithless" elector.

Finally, regarding the merits, *i.e.*, the constitutionality of "faithless elector" laws, it is worth noting that the fact that such laws require presidential electors to commit in advance to their votes is part of their unconstitutional coercion. *See* U.S. Const. art. II, § 1; U.S. Const. amend. XII (calling for electoral votes to be transmitted "sealed" to the President of the Senate and only opened and counted once they are in the presence of the Senate and House of Representatives). Nowhere in our country's system of free elections is it permissible to coerce or penalize votes. Nowhere in our system is there a process for ceremonial voting, one in which the outcome is known in advance. However, when it comes to the choice of President and Vice President, these State laws allow for the abrogation of electors' voting rights. Had the Founding Fathers intended such a result, they would have said so, and the Constitution would so read.

CONCLUSION

The Court should grant the petition for writ of *certiorari* and reverse the decision of the Washington Supreme Court.

Respectfully submitted,

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