No. 19-518

In the Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PROFESSOR MICHAEL T. MORLEY IN SUPPORT OF NEITHER SIDE

Michael T. Morley
Amicus Curiae and Counsel of Record
FLORIDA STATE UNIVERSITY COLLEGE OF LAW
425 W. Jefferson Street
Roberts Hall, Office 313
Tallahassee, FL 32306
(860) 778-3883
mmorley@law.fsu.edu

NOVEMBER 20, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Rules

Treatises and Other Materials

INTERESTS OF *AMICUS CURIAE*[1]

I am Assistant Professor of Law at Florida State University College of Law, where I research and teach in the fields of Election Law and Federal Courts.[2] I have no personal stake in this case beyond that shared by voters across the nation in the rules and constitutional precedents governing federal elections. I respectfully submit this brief to both promote the sound development of the law and encourage enforcement of constitutional and prudential restrictions on the federal judiciary's authority.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari, vacate the judgment of the U.S. Court of Appeals for the Tenth Circuit, and remand for immediate dismissal of the case. The Tenth Circuit held that Article II and the Twelfth Amendment of the U.S. Constitution prohibit a state from binding its presidential electors. Pet.App. 127-29. It concluded that a state cannot require its electors to cast their

---

[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. CT. R. 37.6, *amicus curiae* certifies that no counsel for a party authored the brief in whole or part, and no party, counsel for a party, or person other than *amicus*, its members, or its counsel made any monetary contributions to fund the preparation or submission of this brief.

[2] My title and institutional affiliation are provided for identification purposes only. I am presenting this brief in my individual capacity and not on behalf of any institution or client.

electoral votes for the presidential candidate who received the plurality of votes within that state. Pet.App. 127-29.[3] Based on this reasoning, the court held Colorado's Elector Binding Law, COLO. REV. STAT. § 1-4-304, unconstitutional. Pet.App. 129.

The Tenth Circuit's ruling purports to resolve a critical issue of constitutional law that presents a matter of first impression for this Court. It calls into question the validity of laws binding presidential electors in 29 other jurisdictions. *See* Pet. at 1.[4] It impacts the constitutional right to vote of tens of millions of voters throughout the nation, potentially undermining public confidence in the presidential election process. And it was wholly unnecessary.

Respondents' sole cause of action in the Second Amended Complaint was a claim under 42 U.S.C. § 1983 against Petitioner Colorado Department of State. Pet.App. 208, 218. The Tenth Circuit properly held that Respondents lacked standing to seek prospective relief concerning future elections, *id.* at 30-31, and a standalone claim for declaratory relief concerning the long-completed 2016 election would be useless, *see id.* at 29 (citing *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997)). The only justiciable avenue for relief that had not become moot was Respondent Micheal Baca's claim for $1 in nominal damages against the Colorado Department of State. *Id.* at 65; *see also id.* at 51-52.

---

[3] "Pet.App." refers to the Appendix accompanying the Petition for Certiorari in this case.

[4] "Pet." refers to the Petition for Certiorari in this case.

As the Tenth Circuit itself candidly admitted, however, § 1983 does not create a cause of action for damages against state agencies. Pet.App. 58; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The court nevertheless chose to adjudicate Respondent Baca's claim because Petitioner had agreed to refrain from invoking sovereign immunity or arguing that § 1983 does not apply to it. Pet.App. 58. Based solely on the parties' agreement, *id.*; *see also* Pet. at 5, the Tenth Circuit adjudicated an unsettled, far-reaching, and controversial question of constitutional law with nationwide impact, notwithstanding the complete lack of a valid underlying cause of action.

"[T]he State and arms of the State . . . are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990). The Tenth Circuit erred by adjudicating a type of claim this Court has characterized as "nonexistent," *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and "not . . . valid," *Lapides v. Bd. of Regents*, 535 U.S. 613, 617 (2002). The error was especially problematic in this case because it led the court to unnecessarily resolve an unresolved constitutional issue. Federal courts are required to avoid gratuitously adjudicating constitutional questions when non-constitutional grounds exist for resolving a case. *See Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946).

The Tenth Circuit's decision to award a remedy—damages against a state agency—that Congress did not authorize also undermined separation-of-powers

principles. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992). Indeed, the Tenth Circuit allowed Respondent to bring against a state agency the very type of statutorily unauthorized claim for damages arising from constitutional violations that this Court expressly refused to recognize against federal agencies in *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). By willfully basing its ruling upon an incorrect construction of § 1983, the Tenth Circuit also issued an unconstitutional advisory opinion in violation of Article III. *See U.S. Nat'l Bank v. Independent Insurance Agents of America*, 508 U.S. 439, 447 (1993). The Tenth Circuit was not bound by Petitioner's purported "waiver" of the § 1983 issue and, especially under the circumstances of this case, should not have accepted it. This Court should grant certiorari for the sole purpose of vacating the Tenth Circuit's gratuitous constitutional adjudication.

Moreover, Article III's adverseness requirements limit litigants' ability to manufacture constitutional litigation through strategic stipulations and waivers. *Arizonans for Official English*, 520 U.S. at 71; *Muskrat v. United States*, 219 U.S. 346, 361-63 (1911); *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893). The parties' cooperation in crafting a lawsuit to secure a judicial ruling on the constitutionality of Colorado's Elector Binding Law further undermines this case's justiciability. Again, vacating the Tenth Circuit's judgment is the proper remedy.

ARGUMENT

This Court should grant the petition for certiorari, vacate the ruling of the U.S. Court of Appeals for the Tenth Circuit, and remand for immediate dismissal of the case. Petitioner and Respondents have cooperated in structuring a friendly suit to have this Court gratuitously adjudicate a constitutional question of nationwide importance, impacting tens of millions of people's right to vote in presidential elections, despite the Respondents' lack of a valid cause of action. The Tenth Circuit's ruling was premised solely on Respondent Baca's § 1983 claim for nominal damages against a state agency—a cause of action this Court has declared to be "nonexistent." *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

By ignoring what it expressly recognized to be "a major flaw in the merits of Mr. Baca's § 1983 claim," Pet.App. 58, the Tenth Circuit violated the constitutional avoidance principle, unnecessarily adjudicating constitutional issues with national ramifications in a case it could have quickly and easily dismissed on non-constitutional grounds. It likewise violated separation-of-powers principles, by exceeding the bounds of the statutory remedy Congress created to award monetary damages for constitutional violations by state actors, *cf. FDIC v. Meyer*, 510 U.S. 471, 486 (1994), as well as Article III's prohibition on advisory opinions, *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993). This Court should neither adjudicate the underlying constitutional issues in this case, nor allow the Tenth Circuit's judgment doing so to stand.

I. SECTION 1983 DOES NOT CREATE A CAUSE OF ACTION AUTHORIZING A COURT TO ADJUDICATE A CONSTITUTIONAL CLAIM FOR NOMINAL DAMAGES AGAINST A STATE AGENCY.

1. The one thing upon which Petitioner, Respondents, and the Tenth Circuit all agree is that there is no valid statutory cause of action underlying Respondents' constitutional claim in this case. *See* Pet.App. 58 ("Baca cannot satisfy the first prong of a § 1983 claim because the Department is not a person for purposes of the statute."); Pet. at 5 (explaining that "Colorado agreed to waive its Eleventh Amendment immunity and its § 1983 'personhood' defense in this case"). Congress has not enacted any laws authorizing a federal court to adjudicate Respondent Baca's claim for damages against a state agency for allegedly violating the U.S. Constitution. Accordingly, this Court should vacate the Tenth Circuit's judgment and remand for dismissal of this case.

The Second Amended Complaint—the operative pleading—asserts a single cause of action, under 42 U.S.C. § 1983. Pet.App. 218-20. It alleges that the Colorado Secretary of State violated Article II and the Twelfth Amendment of the U.S. Constitution by removing Micheal Baca "as an Elector when he voted for a candidate other than Hillary Clinton," who had received a plurality of the vote in Colorado during the 2016 Presidential Election. *Id*. at 219. The only Defendant in the case, the Colorado Department of State, is a "state agency." *Id*. at 208.

42 U.S.C. § 1983 (emphasis added), provides,

> Every *person* who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 create a cause of action against any "person" who violates a plaintiff's constitutional rights. This Court has consistently held that the term "person" does not include States, state agencies, or state officials in their official capacity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."); *accord Lapides v. Bd. of Regents*, 535 U.S. 613, 617 (2002) ("[A] State is not a 'person' against whom a § 1983 claim for money damages might be asserted.").[5]

The reach of § 1983 is not merely—as Petitioner characterizes it—a "defense." Pet. at 5. Rather, "the State and arms of the State . . . are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Morse v. Republican Party*, 517 U.S. 186, 221 n.34 (1996)

---

[5] The Court recognized the traditional exception that a state official sued in his or her official capacity for injunctive relief is a person under § 1983. *Will*, 491 U.S. at 71 n.10 (citing Ex Parte *Young*, 209 U.S. 123, 159-60 (1908)). By its very terms, this exception is inapplicable to a claim for nominal damages.

(plurality op.) ("§ 1983 does not reach . . . the States themselves."); *Hilton v. S. Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 201 (1991) ("[A] State is not a 'person' as that term is used in § 1983, and is not suable under the statute . . . ."); *accord Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 708 (2003). Accordingly, a § 1983 suit "does not present a valid federal claim against the State." *Lapides*, 535 U.S. at 617. Even if a state waives its sovereign immunity, a plaintiff cannot use § 1983 "as a vehicle for redress" against a state. *Haywood v. Drown*, 556 U.S. 729, 734 n.4 (2009).

The Court emphasized the bounds of § 1983 in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), a strikingly similar case. The plaintiff was an Arizona state employee who alleged that an amendment to the state Constitution declaring English to be the state's official language violated the U.S. Constitution. *Id.* at 48. Although earlier pleadings had named a range of defendants, *id.* at 49-50, the case ultimately involved a § 1983 claim only against the Governor in her official capacity, *id.* at 68-69.

After filing her complaint, the plaintiff quit her job and did not intend to return to public service. *Id.* The Ninth Circuit held that her claim was not moot because the complaint could be read as seeking nominal damages. *Id.* at 60. This Court reversed, declaring, "The Ninth Circuit had no warrant to proceed as it did." *Id.* at 49.

Once the plaintiff left her state job for the private sector, the English-only provision no longer regulated her speech, mooting her claim for prospective relief.

Id. at 68. The Court held that the plaintiff's claim for nominal damages could not save the case. Although the state had waived its sovereign immunity defense, "§ 1983 actions do not lie against a State." *Id*. at 69 (citing *Will*, 491 U.S. at 71). Consequently, this Court concluded that "the claim for relief the Ninth Circuit found sufficient to overcome mootness was *nonexistent*. . . . The stopper was that § 1983 creates no remedy against a State." *Id*. (emphasis added).

The Tenth Circuit attempted to distinguish *Arizonans for Official English* by construing it to mean that a plaintiff cannot prevent a case from becoming moot by belatedly adding an invalid statutory claim for damages. Pet.App. 56. It pointed out that, unlike the plaintiff in *Arizonans for Official English*, Respondents' complaint had always sought retrospective damages, including nominal damages. *Id*. at 57. Regardless of the timing of Respondents' § 1983 claims against the Colorado Department of State, however, the unavoidable fact is that Respondent Baca's cause of action is simply "nonexistent," *Arizonans for Official English*, 520 U.S. at 69, and "not . . . valid," *Lapides*, 535 U.S. at 617. As the Tenth Circuit's judgment in this case was premised solely on an invalid § 1983 claim against a state agency, this Court should vacate its ruling and remand for dismissal.

2. The Tenth Circuit willfully ignored § 1983's limitations on the grounds that Petitioner "expressly waived the argument" that the statute does not create a cause of action against states or state agencies. Pet.App. 58, 69-70. The court held that, since the "personhood" issue is non-jurisdictional, it could

ignore Respondents' undisputed failure to satisfy this element and reach the underlying constitutional issue.

The Tenth Circuit's decision to gratuitously adjudicate an unsettled constitutional issue of national importance, despite having an undisputedly valid statutory basis for disposing of this case, flies in the face of the constitutional avoidance principle. A federal court has a special obligation to dispose of a case on statutory grounds when necessary to avoid "pass[ing] on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see also Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946). Federal courts must "refus[e] to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties." *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam).

Petitioner's purported waiver of what it characterized as its § 1983 defense is immaterial. "The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction. . . .'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1258 (2018) (Thomas, J., dissenting) ("[W]e cannot permit the Government's concessions to dictate how we interpret a statute, much less cause us

to invalidate a statute enacted by a coordinate branch."). This Court has even invoked affirmative defenses such as collateral estoppel *sua sponte* when they offered a way to avoid reaching a constitutional issue. *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 386-87 (1960).

In addition to violating the constitutional avoidance canon, the Tenth Circuit's judgment also contravened separation-of-powers principles. Congress is primarily responsible for creating remedies—particularly damage-based remedies—for constitutional violations. *See Bush v. Lucas*, 462 U.S. 367, 388-90 (1983). By granting relief against defendants that Congress did not include within the ambit of § 1983, the Tenth Circuit exceeded the bounds of its authority. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992) ("Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action.").

Awarding damages when a statute's elements have indisputably not been satisfied is akin to creating a new cause of action. This Court has questioned the "authority of courts to extend or create private causes of action," because "'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and

enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.").

In *FDIC v. Meyer*, this Court refused to recognize an implied cause of action for damages against federal agencies based on constitutional violations. 510 U.S. 471, 486 (1994) ("An extension of *Bivens* [*v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)] to agencies of the Federal Government is not supported by the logic of *Bivens* itself."). *Meyer* held that the purpose of a *Bivens* claim was to deter individual federal officers. If plaintiffs could sue federal agencies directly, thereby avoiding individual officers' qualified immunity defenses, "the deterrent effects of the *Bivens* remedy would be lost." *Id*. at 485. Additionally, recognizing *Bivens* liability for federal agencies would "creat[e] a potentially enormous financial burden for the Federal Government" that only Congress may authorize. *Id*.

The concerns identified in *Meyer* apply with equal force to a federal court's adjudication of § 1983 claims against state agencies. As the *Meyer* Court feared, Respondent here avoided the Secretary of State's qualified immunity defense by replacing a claim against the Secretary in his official capacity, Complaint, Doc. #1, at 2 (Aug. 10, 2017), with a claim against the Department of State, Pet.App. 219. Since this Court refused to recognize an implied right of action for constitutional violations against federal agencies without congressional authorization, it should likewise refuse to endorse the Tenth Circuit's decision to allow such a suit to proceed against a state agency. Thus, because Respondent did not state a

valid claim under § 1983, this Court should vacate the judgment below and remand for dismissal.

3. This Court should also vacate the Tenth Circuit's ruling since it was an unconstitutional advisory opinion in violation of Article III. Litigants may not stipulate to an incorrect interpretation of a federal statute to "extract the opinion of a court on hypothetical Acts of Congress," because it "would be difficult to characterize [such an opinion] as anything but advisory." *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993). Here, the Tenth Circuit allowed the litigants to "extract" a ruling on the constitutionality of Colorado's Elector Binding Law, COLO. REV. STAT. § 1-4-304, despite the fact that Respondent had undisputedly failed to bring a legally valid claim requiring the issue to be adjudicated. *Cf. Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (holding that a federal court "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies").

The Tenth Circuit's main rationale for adjudicating Respondent Baca's constitutional claim is that Petitioner "expressly waive[d] any argument in this case that it is not a person under § 1983." Pet.App. 68. This Court applies differing standards in determining the validity of litigants' waivers of legal issues and stipulations of law. *Compare* Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 299-301 (2014) (discussing this Court's precedents regarding waivers (quoting

Singleton v. Wulff, 428 U.S. 106, 121 (1976)), *with id.* at 302-04 (same for stipulations of law (quoting *U.S. Nat'l Bank*, 508 U.S. at 448). Regardless of how this Court characterizes the litigants' actions in this case, however, it has discretion to reach the statutory issue and dispose of Respondent Baca's claim based on § 1983. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) ("[W]e are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts."); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (holding that this Court "retains the independent power to identify and apply the proper construction of governing law"); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

In *U.S. Nat'l Bank v. Independent Insurance Agents of America*, 508 U.S. at 443, an Oregon bank had applied to the Comptroller of the Currency for permission to sell insurance nationwide. The Comptroller approved the request, citing 12 U.S.C. § 92 (1926 ed.), a provision that was initially enacted in 1916 and appeared in printed copies of the U.S. Code through 1946. *U.S. Nat'l Bank*, 508 U.S. at 441. Starting in 1952, however, printed editions of the U.S. Code omitted § 92, stating that Congress had repealed the provision in 1916. *Id.* at 441-42. The Comptroller had nevertheless continued to "act[] on the understanding that [§ 92] remains the law." *Id.* at 442.

Various trade associations sued to challenge the Comptroller's approval of the Oregon bank's request, claiming among other things that it violated § 92. *Id.* at 443-44. None of the parties challenged § 92's existence before the district court, which held that the Comptroller's decision was consistent with the statute. *Id.* at 444. On appeal, the D.C. Circuit held that it had a "duty" to confirm the statute's continued existence, and *sua sponte* ordered the parties to brief the issue. *Id.* It then ruled that Congress had repealed the statute. *Id.*

This Court held that, even though none of the litigants had contested § 92's existence, the D.C. Circuit acted properly in *sua sponte* considering the issue. *Id.* at 446-47. While declining to address whether the court had an absolute duty to confirm the statute's existence, this Court ruled that "the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law." *Id.* at 448 (citing *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289 (1917)); *see also* Morley, *supra* at 304. Here, rather than relying on a statute which may have been inapplicable due to repeal, Respondent Baca instead predicated his claim upon a statute which indisputably is inapplicable since it does not authorize constitutional actions for damages against state agencies. As in *U.S. Nat'l Bank*, this Court has discretion to refuse to "render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree on it." *Id.* at 447 (quoting *Burke*, 504 U.S. at 246 (Scalia, J., concurring)).

In short, the only way the Tenth Circuit was able to address the constitutionality of Colorado's Elector Binding Law was by disregarding the constitutional avoidance principle, the separation-of-powers concerns that counsel against authorizing new constitutional causes of action, and Article III's prohibition on advisory opinions. Rather than exacerbating these problems by adjudicating this case, this Court instead should vacate the Tenth Circuit's judgment and remand for dismissal.

4. The defect in Respondent Baca's claim is fatal and cannot be remedied through artful re-pleading. Respondents' original claim against the Secretary of State in his individual capacity, *see* Complaint, Doc. #1, at 2 (Aug. 10, 2017), was legally valid under § 1983, *Hafer v. Melo*, 502 U.S. 21, 31 (1991), but would have triggered insurmountable affirmative defenses, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (explaining the requirements for qualified immunity); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (recognizing "objectively reasonable reliance on existing law" as a defense available to individuals sued under § 1983). Moreover, any such judgment would have been limited to Wayne W. Williams himself, rather than binding his successors, as well. *See Kentucky*, 473 U.S. at 167-68; *cf. Hafer*, 502 U.S. at 25.

Nor could Respondents have saved this lawsuit by seeking a prospective injunction against the Secretary in his official capacity under Ex Parte *Young*, 209 U.S. 123, 159-60 (1908). Any request for injunctive or declaratory relief concerning the 2016 election would be moot as the election is over,

Colorado's electoral votes have been cast, and Donald Trump has been inaugurated as President. Moreover, the State ultimately decided not to prosecute Baca for violating the Elector Binding Law, eliminating any "credible threat of future enforcement against him" based on that election. Pet.App. 31. And Respondents cannot invoke the exception to the mootness doctrine for claims that are "capable of repetition, yet evading review." As the Tenth Circuit correctly found, Respondents never alleged an intent to either run for the position of presidential elector again or cast their electoral votes in violation of the Elector Binding Law. Pet.App. 30.

Consequently, Article III limited Respondent Baca to retrospective relief—damages. Pet.App. 38 (holding that Baca has standing to challenge his removal from the office of presidential elector). Because § 1983 does not create a cause of action against the Colorado Department of State for damages, and no comparable way of presenting his claim existed, this Court should vacate the Tenth Circuit's literally baseless ruling.

II. THIS COURT DECLINES TO EXERCISE JURISDICTION WHEN LITIGANTS COOPERATIVELY STRUCTURE A LAWSUIT TO HAVE THE COURT UNNECESSARILY ADJUDICATE A CONSTITUTIONAL QUESTION.

This Court should vacate the Tenth Circuit's ruling and remand for dismissal because Petitioner and Respondents worked together in crafting this litigation in order to obtain a constitutional ruling

from the federal judiciary that would otherwise be unnecessary. This Court has consistently resisted such attempts to manipulate federal jurisdiction through friendly lawsuits.

As Petitioner explains, "In exchange for Respondents narrowing their claims and waiving their right to attorneys' fees, Colorado agreed to waive its Eleventh Amendment sovereign immunity and its § 1983 'personhood' defense in this case." Pet. at 5. In other words, Petitioner refrained from raising several unavoidably meritorious issues that would have allowed the lower courts to immediately dispose of this case on non-constitutional grounds, to attempt to box the district court into adjudicating the constitutionality of Colorado's Elector Binding law. Article III does not permit litigants to manufacture constitutional litigation in this manner. Litigants' cooperation in ginning up a "friendly suit" to attempt to force adjudication of constitutional issues violates Article III's adversity and live controversy requirements. *See Chicago & G.T. R. Co. v. Wellman*, 143 U.S. 339, 345 (1892); *see generally Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (discussing Article III's requirements for justiciable controversies); Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 657-60 (2014) (arguing that Article III's adverseness requirement has traditionally been understood as constitutionally mandated, despite recent precedents suggesting that it is prudential).

Article III adversity between parties may not exist when they stipulate their way into having a federal

court unnecessarily adjudicate a legal issue. *See, e.g.*, *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893) (holding that "[n]o stipulation of parties or counsel" can empower a federal court to "decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules which cannot affect the result . . . in the case before it"). In *Arizonans for Official English*, 520 U.S. at 71, this Court expressly recognized that a state's agreement to allow a private plaintiff to bring a constitutional claim for nominal damages against it—particularly when necessary to avoid mootness concerns—implicates "the federal courts' lack of authority to act in friendly or feigned proceedings."

Likewise, in *Muskrat v. United States*, Congress had enacted a law giving the Court of Claims and this Court jurisdiction to hear lawsuits brought by particular plaintiffs, identified in the law itself, to challenge the constitutionality of certain other legal provisions affecting members of Indian tribes, 219 U.S. 346, 348-51 (1911) (citing Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1028 [hereinafter, 1907 Act]). The Court held that this attempt to obtain a judicial ruling on the constitutionality of federal laws did not present a live case or controversy. *Id.* at 361. The "whole purpose" of the 1907 Act was to have a court "determine the constitutionality" of Congress' other Indian-related enactments, in cases where "the only judgment required [was] to settle the doubtful character of the legislation in question." *Id.* at 361-62; *see also id.* at 361 (recognizing that the 1907 Act was "an attempt to provide for a judicial

determination, final in this court, of the constitutional validity of an act of Congress").

Muskrat concluded that the 1907 Act impermissibly purported to authorize the Court to adjudicate nonjusticiable claims and issue advisory opinions. *Id.* at 362-63. The Colorado Department of State achieved the same result here by waiving sovereign immunity and refusing to invoke § 1983's limits. It is highly implausible that *Muskrat* would have turned out differently if the 1907 Act had made the named plaintiffs eligible for $1.00 in nominal damages.

This Court has consistently "approved and encouraged" amicable cooperation between litigants that "facilitate[s] greatly the administration of justice." *Lord v. Veazie*, 49 U.S. 251, 255 (1850). The litigants here, however, have gone beyond the constitutionally permissible bounds of cooperation to jointly craft a test case to obtain a premature and unnecessary adjudication of an important constitutional issue that impacts the rights of voters, presidential electors, and presidential candidates throughout the nation. Whether on Article III or prudential grounds, this Court should conclude that the exercise of jurisdiction over this case was inappropriate, vacate the Tenth Circuit's judgment, and remand for dismissal.[6]

---

[6] Substantively, the Tenth Circuit's ruling is also in tension with this Court's holding in *Ray v. Blair*, 343 U.S. 214, 228 (1952) (rejecting the argument that "the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by a pledge"), as well as the Constitution's allocation of primary responsibility for determining the validity of electoral

III. DENYING CERTIORARI IS AN INADEQUATE REMEDY.

Rather than simply denying the Petition for Certiorari, this Court should grant certiorari, vacate the Tenth Circuit's ruling, and remand for dismissal of the case. The lower court violated the constitutional avoidance principle, separation-of-powers restrictions on recognition of damages-based remedies for constitutional violations, and Article III's prohibition on advisory opinions—all to reach an unnecessary constitutional adjudication premised on an indisputably erroneous interpretation of 42 U.S.C. § 1983.

If the Tenth Circuit's ruling is allowed to stand, its precedential effect will likely result, at a minimum, in the invalidation or non-enforcement of elector binding laws in the other states within its jurisdiction, including New Mexico, N.M. STAT. ANN. § 1-15-9; Oklahoma, OKLA. STAT. tit. 26, § 10-102; and Utah, UTAH CODE ANN. § 20A-13-304(3) (and also possibly Wyoming, though that statute does not contain an express enforcement mechanism, WYO. STAT. ANN. § 22-19-108). The judgment also raises equal protection concerns, since some presidential electors participating in the 2020 election would be free to ignore their states' binding requirements, while others would remain subject to them. *Cf. Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

---

votes to Congress, *see* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2090-96 (2018).

Moreover, the ruling may have the effect of affirmatively encouraging electors to exercise discretion when casting their electoral votes, rather than voting in accordance with the popular vote within their respective states. Such faithless electors would trigger politically charged controversies when Congress meets to count the electoral votes, *see* U.S. CONST. amend. XII; 3 U.S.C. § 15, potentially throwing the presidential election into chaos.

The Tenth Circuit had no basis for considering the constitutionality of Colorado's Elector Binding Law in this case. This Court should restore the *status quo ante* and vacate its judgment.

CONCLUSION

For these reasons, this Court should grant the petition for certiorari, vacate the ruling of the U.S. Court of Appeals for the Tenth Circuit, and remand for dismissal of this lawsuit.

Respectfully submitted,

MICHAEL T. MORLEY
Amicus Curiae and
Counsel of Record
FLORIDA STATE UNIVERSITY
COLLEGE OF LAW
425 W. Jefferson St.
Roberts Hall, Office 313
Tallahassee, FL 32306
(860) 778-3883
mmorley@law.fsu.edu

NOVEMBER 20, 2019