

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 a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**Brief of Amicus Curiae National Conference of
Commissioners on Uniform State Laws
Supporting Petitioner**

Peter F. Langrock 111 South Pleasant Street P.O. Drawer 351 Middlebury, VT 05753-0351	James Bopp, Jr. <i>Counsel of Record</i> Richard E. Coleson Melena S. Siebert THE BOPP LAW FIRM, PC The National Building 1 South Sixth Street Terre Haute, IN 47807 812/232-2434 telephone 812/235-3685 facsimile jboppjr@aol.com <i>Counsel for Amicus Curiae</i>
Carl H. Lisman <i>NCCUSL President</i> 84 Pine St. Burlington, VT 05401	
Daniel Robbins <i>Chair, NCCUSL Exec. Comm.</i> 15301 Ventura Blvd., Bldg E Sherman Oaks, CA 91403	
Susan Kelly Nichols <i>Chair, UFPEA Drafting Comm.</i> 3217 Northampton St. Raleigh, NC 27609 <i>Of Counsel for Amicus Curiae</i>	

Question Presented

Amicus curiae National Conference of Commissioners on Uniform State Laws (“NCCUSL”), also known as the Uniform Law Commission (“ULC”), addresses Petitioner’s (“Colorado’s”) second question presented:

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?

Amicus ULC focuses on this question from the perspective of its Uniform Faithful Presidential Electors Act (“UFPEA”). Colorado suggests that the UFPEA could be jeopardized by the Tenth Circuit decision. Pet. 35. Amicus ULC agrees and urges the Court to grant Colorado’s Petition.

Table of Contents

Table of Authorities.	(iii)
Interest of Amicus Curiae.	1
Summary of the Argument.	5
Argument.	6
I. The UFPEA Is a Remove-and-Replace Provision, Like Colorado’s but Unlike Washington’s Post-Violation Penalty.	6
A. The UFPEA Removes Faithless Electors Before They “Cast” a Ballot.	7
B. The UFPEA Has Been Adopted by States and Successfully Functioned.	10
C. Colorado’s Provision Is Similar to the UFPEA, but Washington’s Previous Provision Differs.	12
II. The UFPEA Complies with Controlling Federal Constitutional and Statutory Provisions and Precedent.	13
III. Important Principles of Individual Polit- ical Empowerment and Federalism Fa- vor Certiorari.	21
Conclusion.	24

Appendix Table of Contents

Uniform Faithful Presidential Electors Act with Prefatory Note and Comments.	1a
---	----

Table of Authorities

Cases

<i>Abdurrahman v. Dayton</i> , 903 F.3d 813 (8th Cir. 2019).....	11
<i>Abdurrahman v. Dayton</i> , No. 16-cv-4279 (PAM/HB), 2016 U.S. Dist. LEXIS 178222 (D. Minn. Dec. 23, 2016).	11
<i>Asarco, Inc. v. Idaho State Tax Comm’n</i> , 458 U.S. 307 (1982).....	4
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).	11
<i>Flagg Bros., Inc. v. Brooks</i> , 436 U.S. 149 (1978).	3
<i>In re Guerra</i> , 441 P.3d 807 (Wash. 2019).....	12
<i>McDermott, Inc. v. Amclyde</i> , 511 U.S. 202 (1994).	4
<i>Ponte v. Real</i> , 471 U.S. 491 (1985).	4
<i>Ray v. Blair</i> , 343 U.S. 214 (1952).....	11, 20

Constitutions, Statutes, Regulations & Rules

3 U.S.C. Chapter 1.	4, 8, 13, 14, 20
24 Stat. 373 (1887).	4
Colo. Rev. Stat. § 1-4-304.	12
Mich. Comp. Laws Serv. § 168.47.....	10
Minn. Stat. § 208.40.	11
N.C. Gen. Stat. § 163-212.....	10
Sup. Ct. R. 37.. . . .	1
U.S. Const. amend. X.	19
U.S. Const. amend. XII.....	<i>passim</i>

U.S. Const. art. II, § 1.....	<i>passim</i>
ULC Const. § 6.1(6).....	3
ULC Const. § 8.1.....	3
ULC, Uniform Faithful Presidential Electors Act (2010).	<i>passim</i>
Utah Code Ann. § 20A-13-304(3).....	10
Wash. Rev. Code §§ 29A.56.080-092.	10
Wash. Rev. Code § 29A.56.340.	12
 <i>Other Authorities</i>	
Memorandum from Robert Bennett, UFPEA Re- porter, to the NCCUSL Drafting Committee on Presidential Electors Act (March 2009).....	22
Jesse O. Hale Jr., <i>Reining In Renegade Presiden- tial Electors: A Uniform State Approach</i> , Baker Ctr. J. of Applied Pub. Policy, 2010.	23
Patrick Henry, The Virginia Stamp Act Resolu- tions, House of Burgesses, May 30, 1765.	21
Eric Manpearl, <i>Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Secu- rity Reforms</i> , 24 B.U. J. Sci. & Tech. L. 168 (2018).	23
Beverly J. Ross and William Josephson, <i>The Elec- toral College and the Popular Vote</i> , 12 J. L. & Politics 665 (1996).	22
Robert A. Stein, <i>Forming a More Perfect Union: A History of the Uniform Law Commission</i> (2013).	2

Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 904 (2017)..... 22

Interest of Amicus Curiae¹

ULC History

In 1892, a group of distinguished lawyers established The State Boards of Commissioners for Promoting Uniformity of Law in the U.S. By 1905, the Commission had changed its name to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and adopted a constitution and bylaws. Today, it is commonly called the “Uniform Law Commission” or “ULC.” Louis Brandeis, Wiley Rutledge, William Rehnquist, and David Souter served as ULC Commissioners and were later appointed to the U.S. Supreme Court. Members of the ULC also include legal luminaries Karl Llewellyn and William Prosser.

ULC Structure

The ULC is comprised of approximately 425 Commissioners, representing each State, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each State determines the method and number of Commissioners appointed, with state officials, often the Governor, making appointments. Some Commissioners are state legislators, but most are practitioners, judges, and law professors—all are licensed to practice law. Commissioners receive no compensation for work with the ULC, volunteering

¹ Rule 37 statement: All parties consented to filing this brief; counsel of record received timely notice of intent to file; no counsel for any party authored it in whole or in part; no party counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amicus or its counsel funded it.

their time.² The ULC receives most of its financial support from state appropriations, supplemented by publisher revenue and foundation and federal-government grants.

The ULC's purpose is to provide non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. The ULC strengthens federalism by recommending state statutes and procedures that, if adopted, would be consistent from state to state, but that also reflect the diverse experience of the states. As Justice Sandra Day O'Connor noted, "[t]he [ULC] plays an integral role in both preserving our federal system of government and keeping it vital." Robert A. Stein, *Forming a More Perfect Union: A History of the Uniform Law Commission* Foreword (2013).

ULC Process

The ULC offers a deliberative, intensive, and uniquely open drafting process that not only draws on the expertise of Commissioners, but also utilizes input from legal experts, advisors, and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

The ULC receives proposals for new acts from state bars, state government entities, private groups, ULC Commissioners, or private individuals. The proposal is generally assigned to a Study Committee, which researches the topic and decides whether to recommend drafting an act. The ULC's Executive Committee typi-

² When state law allows, some travel expenses that Commissioners incur are reimbursed, including state reimbursement for annual-meeting attendance and reimbursement for participation in the ULC committee meetings.

cally reviews these recommendations. An approved recommendation leads to the creation of a Drafting Committee.

An expert in the relevant legal field is chosen as the drafter (“Reporter”). Advisors from the American Bar Association, as well as any other interested stakeholders, are invited to assist on every Drafting Committee. Each draft act normally receives a minimum of two years of consideration,³ and all committee drafts are available for review and comment by all ULC Commissioners.

The Committee of the Whole at the ULC’s annual meeting debates draft acts from Drafting Committees. Each must be considered section by section at no less than two annual meetings.⁴ After such consideration, the states vote on the act’s approval. Unless a rare exception is granted, a majority of states present, and no fewer than 20 states, must approve an act before it is officially approved. Upon final approval, ULC Uniform Acts are submitted to state legislatures for enactment.⁵

Many ULC acts have been widely adopted by states, including the Uniform Commercial Code,⁶ Uniform

³ *But see* ULC Const. § 8.1(b) and (c) (allowing rarely used waivers), available at <https://www.uniformlaws.org/aboutULC/constitution>.

⁴ *But see supra* note 3 (waivers).

⁵ ULC Commissioners have a duty to seek introduction/enactment of uniform acts in their states. ULC Const. § 6.1(6).

⁶ The UCC is a joint project with the American Law Institute. This Court considered a constitutional challenge to a provision of the UCC, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), upholding it.

Anatomical Gift Act, Uniform Trade Secrets Act, and Uniform Interstate Family Support Act. This Court has recognized the ULC's influence over many areas of law, including tax policy, tort law, and criminal law. *See, e.g., Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 310 n.3 (1982); *McDermott, Inc. v. Amclyde*, 511 U.S. 202, 209 n.8 (1994); *Ponte v. Real*, 471 U.S. 491, 520 (1985).

The UFPEA

Presidential-Electors law is another area the ULC has long sought to influence because of its foundation in state law and importance to the nation. In 1893, the ULC established a committee on the Uniformity of State Action in Appointing Presidential Electors after a federal law requiring states to provide for "ascertainment" of electors was enacted. 24 Stat. 373 (1887) (Repealed and replaced by 3 U.S.C. § 1 et seq. (1948)).

The ULC's interest in Presidential-Electors law was cemented into a uniform law in 2010. Drafting began on the UFPEA in 2009, with Robert Bennett⁷ serving as the Act's Reporter.⁸ Throughout 2009, multiple

⁷ Robert Bennett is the former dean of the Northwestern University School of Law and the author of *Taming the Electoral College* (2006).

⁸ Amicus's counsel of record, James Bopp, Jr. (Indiana) is a ULC Commissioner who served on the UFPEA's Drafting Committee. Of Counsel to Amicus ULC are also prominent ULC Commissioners: Carl H. Lisman (Vermont) is its President, Daniel Robbins (California) is Chairman of its Executive Committee, Susan Kelly Nichols (North Carolina) was the Drafting Committee's Chair, and Peter F. Langrock (Vermont) was its former Vice President and a ULC member for over 50 years.

drafts as well as supporting legal memos and comments were considered, resulting in the 2010 Interim Draft. After further review and comment at the 2010 annual meeting,⁹ the UFPEA was approved by a vote of the States, 44 in favor, one opposed, four abstaining, and four not voting.

Summary of the Argument

Faithless electors hold the potential for serious damage to our democratic process. Voters today are entirely reasonable in thinking they are voting for the candidates whose names appear, either solely or predominantly, on the ballot—not for little-known individuals named by the political parties or candidates. The public outrage that would arise if a faithless elector could determine the outcome of a presidential election would cause a Constitutional crisis that this Court would undoubtedly be asked to decide.

The ULC’s solution, the UFPEA, requires electors to pledge to mark their ballots in compliance with the voters’ wishes and removes and replaces electors breaking that pledge before they cast their ballot. Several states have adopted the UFPEA, and a case in Minnesota demonstrated its function. The UFPEA is substantially similar to Colorado’s remove-and-replace system, while Washington’s previous provision (in No. 19-465) differs by imposing a civil penalty for casting a faithless ballot as the means of attempting to enforce compliance.¹⁰ (Part I.)

⁹ This process complied with the ULC’s standard practice of considering an act for two annual meetings. *See supra* at 3.

¹⁰ After the 2018 election, Washington replaced its after-

The ULC believes that the UFPEA complies with controlling constitutional provisions, statutory provisions, and this Court’s precedent. It is a practical, elegant solution to the problem. The Tenth Circuit decision is inconsistent with controlling provisions and precedent. The Washington Supreme Court properly upheld Washington’s provision, but the rationale of a decision in the present case would readily resolve the Washington case. This Court should grant Colorado’s petition and remand Washington’s for consideration in light of this case. (Part II.)

Given Colorado’s similarity to the UFPEA, the ULC supports a holding by this Court that Colorado’s provision is constitutional—all in light of the vital governmental interests that can be resolved now, rather than during a heated presidential election. Colorado’s petition should be granted for these additional reasons. (Part III.)

Argument

I.

The UFPEA Is a Remove-and-Replace Provision, Like Colorado’s but Unlike Washington’s Post-Violation Penalty.

Colorado says the decision below “throws into doubt the automatic-resignation provision in [the UFPEA], promulgated by the [ULC] and enacted in six states.” Pet. 35 (citing UFPEA § 7(c)). Amicus ULC agrees and discusses here (A) the UFPEA, (B) its application, and (C) how it compares to the faithless-electror provisions of Colorado and Washington.

the-fact, civil penalty with the UFPEA.

A. The UFPEA Removes Faithless Electors Before They “Cast” a Ballot.

The UFPEA with comments is appended.¹¹ In the Prefatory Note, the ULC identifies the problem and includes a solution.

Regarding the problem, the ULC explains that the realities of the selection process have changed dramatically over the years, so that how the electoral college actually functions could hardly have been imagined by those who promulgated the constitutional provisions regarding it. The dissonance between formality and reality has opened room for “faithless electors” who vote for a candidate other than those for whom the popular electoral majority (or plurality) assumed it was casting its votes. Faithless electors hold the potential for serious damage to our democratic processes, making advisable a uniform law to minimize the dangers posed. App. 6a-9a.¹²

Regarding the solution, the Note shows that the UFPEA resolves the problem. The UFPEA requires a state-administered pledge of faithfulness (§§ 4 and 6(c)), with the presentation¹³ of a ballot marked by the elector in violation of that pledge being deemed a resignation from the office of elector (§ 7(c)) and the vacancy

¹¹ Available at <https://www.uniformlaws.org/acts/catalog/current> (search “Faithful Presidential Electors Act”).

¹² For readability, some language from UFPEA comments is used herein without quotation marks but with citations.

¹³ Presenting a marked ballot is not “casting” a vote because “cast” is defined to require acceptance of a ballot compliant with the pledge. UFPEA § 2(1) (“cast” defined); § 7(b) (only compliant ballots are accepted and counted).

so created being filled by a substitute elector taking a similar pledge (§ 6(b) and (c)). After a full set of faithful elector votes is obtained, the UFPEA provides that the official notification of the identity of the state’s electors (“certificate of ascertainment,” *see* 3 U.S.C. § 6) be officially amended by the Governor, so the state’s official list of electors contains the names of only faithful electors (§ 8). App. 7a-9a.

The applicable provisions of UFPEA are set forth next. Some sections are described. Critical ones are stated in full.

Section 2, “Definitions,” defines “cast” as “accepted by the [Secretary of State] in accordance with Section 7(b).” App. 10a.¹⁴

Section 3 provides for “**Designation of State’s Electors.**” It provides for political parties to designate an “elector nominee” and an “alternate elector nominee.” “Except as otherwise provided in Sections 5 through 8, this state’s electors are the winning elector nominees under the laws of this state.” Elected alternates are a convenient vehicle to facilitate filling elector vacancies, dealt with under Section 6. App. 11-12a.

Section 4 mandates the “**Pledge**” by electors “to serve and mark my ballots for President and Vice President for the nominees for those offices of the party that nominated me.” App. 13a-14a.¹⁵

Section 6 provides for “**Presiding Officer; Elector Vacancy.**” Section 6(a) provides that a designated

¹⁴ Brackets indicate where the proper state-law official is inserted or optional text is provided. App. 11a (Comment).

¹⁵ Note the use of “mark” instead of “cast,” which distinction and significance is discussed herein.

public official shall preside at the meeting of electors, and Section 6(b) provides a means of filling vacancies among electors. App. 17a-19a.

Section 7 provides for “**Elector Voting**”:

(a) At the time designated for elector voting and after all vacant positions have been filled under Section 6, the [Secretary of State] shall provide each elector with a presidential and a vice-presidential ballot. The elector shall mark the elector’s presidential and vice-presidential ballots with the elector’s votes for the offices of President and Vice President, respectively, along with the elector’s signature and the elector’s legibly printed name.

(b) Except as otherwise provided by law of this state other than this [act], each elector shall present both completed ballots to the [Secretary of State], who shall examine the ballots and accept as cast all ballots of electors whose votes are consistent with their pledges executed under Section 4 or 6(c). Except as otherwise provided by law of this state other than this [act], the [Secretary of State] may not accept and may not count either an elector’s presidential or vice-presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector’s pledge.

(c) An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector’s pledge executed under Section 4 or 6(c) vacates the office of elector, creating a vacant position to be filled under Section 6.

(d) The [Secretary of State] shall distribute

ballots to and collect ballots from a substitute elector and repeat the process under this section of examining ballots, declaring and filling vacant positions as required, and recording appropriately completed ballots from the substituted electors, until all of this state’s electoral votes have been cast and recorded.

App. 20a-22a. This section describes the conditions under which the Secretary of State “accepts” ballots for purposes of the “cast” definition. Ballots not accepted (for noncompliance with legal requirements as to marking or pledge) are not “cast.” Electors proffering noncompliant, unaccepted ballots immediately—by action of law—“vacate[] the office of elector, creating a vacant position to be filled under Section 6.” App. 21a-22a.

B. The UFPEA Has Been Adopted by States and Successfully Functioned.

The UFPEA has been adopted in Washington,¹⁶ Indiana, Nebraska, Nevada, Montana, and Minnesota.¹⁷

¹⁶ In 2019, Washington adopted the UFPEA. *See* Wash. Rev. Code §§ 29A.56.080-092. The provision at issue in the Washington certiorari petition (No. 19-465) has been replaced, i.e., the Washington Supreme Court reviewed the former statute.

¹⁷ *See* <https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d>. Other states, while not adopting the UFPEA, have adopted statutes providing that an elector’s faithlessness constitutes resignation from the office of elector, with the vacancy to be filled by a designated process. *See, e.g.*, N.C. Gen. Stat. § 163-212 (2019) (also provides a fine for faithless electors); Mich. Comp. Laws Serv. § 168.47

In 2016, a Minnesota “faithless elector” challenged that state’s adoption of the UFPEA. (Minn. Stat. § 208.40 et seq.). The elector had pledged to mark his ballot for the Democratic nominees for President and Vice-President, if they won the popular vote. *See Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 U.S. Dist. LEXIS 178222, at *2 (D. Minn. Dec. 23, 2016), *aff’d on mootness grounds*, 903 F.3d 813 (8th Cir. 2019). When he presented a ballot in noncompliance with his pledge, the Secretary of State refused to accept and count his ballot and appointed an alternate to replace him, per the statute. *Id.*

The court found the faithless elector unlikely to succeed on the merits and denied his requested preliminary injunction, reasoning that, under the Constitution and the arc of history, electors are not independent and not “left to the exercise of their own judgment.” *Id.* at *11. Instead, the court said electors have “degenerated into mere agents,” and these agents must be faithful, lest they be “dangerous.” *Id.* (quoting *Ray v. Blair*, 343 U.S. 214, 230 n. 15 (1952) (internal citations omitted)). The court emphasized that this Court has reiterated that “[h]istory has now favored the voter” by allowing *citizens*, rather than legislators, to vote for electors. *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). The court’s initial constitutional analysis upheld Minnesota’s UFPEA and provides insight here.

(LexisNexis 2019); Utah Code Ann. § 20A-13-304(3) (LexisNexis 2019).

C. Colorado’s Provision Is Similar to the UFPEA, but Washington’s Previous Provision Differs.

The UFPEA operates by an automatic remove-and-replace system that functions *before* a vote is “cast,” with “cast” meaning “accepted” as legally compliant.

Colorado’s remove-and-replace system, as interpreted by Colorado state courts, operates in a similar manner to the UFPEA. *See* Pet.App. 204-05 (Colo. Rev. Stat. § 1-4-304). Under § 1-4-304(5), “[e]ach presidential elector shall vote for the presidential [and vice-presidential] candidate . . . who received the highest number of votes at the preceding general election in this state.” Under § 1-4-304(1), “refusal to act” requires that “the presidential electors present shall immediately proceed to fill the vacancy.” The district court in the Colorado case held that “[a] presidential elector’s failure to comply with § 1-4-304(5)[] is a ‘refusal to act’ . . . and causes a vacancy” that “shall be immediately filled.” Pet.App. 201-02. “Colorado’s 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. 2 (emphasis added; original emphasis removed).

According to the facts alleged in the Colorado case, when Mr. Baca’s decision to cast a noncompliant ballot was revealed, he was removed and his noncompliant ballot was not accepted and so was not cast. *See* Pet.App. 217-18 (¶¶ 54, 55).

The Washington provision in No. 19-465 provides that: “Any elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars.” Wash. Rev. Code § 29A.56.340. The Washington Supreme Court upheld that provision. *In re Guerra*,

441 P.3d 807 (Wash. 2019). Thus the critical difference between that Washington provision and Colorado’s (and the UFPEA) is that the Washington provision relies on the prospect of a civil penalty to attempt to force compliance while Colorado (and the UFPEA) provides a pre-vote-replacement mechanism to ensure compliance. Since Washington replaced that provision with the UFPEA, this is another reason to accept the Colorado petition and not Washington’s.

The ULC requests that this Court grant review of the Colorado provision because such review allows this Court to consider that provision in light of other removal-and-replacement systems, including the UFPEA. This Court’s rationale in the decision in the present case would not only govern the Washington case, but would also provide needed clarity before any future efforts are made to promote the UFPEA in other states.

II.

The UFPEA Complies with Controlling Federal Constitutional and Statutory Provisions and Precedent.

Of course, the UFPEA, if enacted by a state, would be subject to federal constitutional and statutory provisions. The ULC believes that the UFPEA complies with applicable federal law: the U.S. Constitution’s Article II, § 1 and Twelfth Amendment and 3 U.S.C. Chapter 1. Since Colorado’s provision operates similarly, it also complies with applicable federal law.

Article II, § 1 authorizes states to appoint their electors “*in such Manner as the Legislature thereof may direct . . .*” (emphasis added). Pet.App. 203. Thus, state legislatures have a broad mandate to control the *manner* of appointing electors, i.e., *who* may be an elector

(e.g., by setting qualifications) and *how* individuals become and be electors. For example, the legislature itself might appoint electors, establishing its own qualifications and applying its own procedural rules for becoming and being an elector. That broad who-and-how authority remains if the legislature allows electors to be chosen by election. This authority includes whether to mention electors on ballots (and if so, how prominently). If a state does not mention electors on the ballot, it leads voters to believe they are voting directly for candidates. Then the state has a strong interest in ensuring that the voters' choice is followed, and it may impose who-and-how measures to avoid voters believing they have been defrauded.

The Twelfth Amendment mandates (inter alia) that electors (i) vote by casting ballots and (ii) cast separate ballots for President and Vice-President. Pet. App. 203. The Twelfth Amendment does not vitiate the who-and-how “manner” authority over electors in Article II, § 1, except to specify separate votes by ballot. Since the *manner* of casting ballots is not specified, that is left to state regulation as before—unless otherwise governed by federal statute.

The provisions at 3 U.S.C. Chapter 1 (“Presidential Elections and Vacancies”) generally codify constitutional provisions (with some added specifics) and recognize broad state “manner” authority:

- Section 1 requires appointment of electors on an appointed day, but it provides no restriction on the broad who-and-how “manner” authority of appointing electors under Article II, § 1—so the states retain that broad, plenary authority (apart from the limited requirements in Chapter 1 as to the day of appointment and number of electors);

- Section 2 recognizes state authority to select a “subsequent day *in such manner as the legislature of such State may direct*” (emphasis added) to appoint electors if a state failed to do so on the appointed day—so that the choice of that day is left to the states’ “manner” authority;
- Section 4 recognizes state authority to “*by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote*” (emphasis added)—so vacancies are left to the states’ “manner” authority;
- Section 5 recognizes state authority to “*provid[e] . . . for . . . final determination of any controversy or contest concerning the appointment of . . . electors . . . [which determination] shall be conclusive, and shall govern the counting of the electoral votes . . . so far as the ascertainment of the electors appointed by such State is concerned*” (emphasis added)—so states retain their “manner” authority over controversies and contests about the who-and-how of electors’ appointment;
- Section 6 recognizes state authority to determine and certify the “final ascertainment,” done “*under and in pursuance of the laws of such State providing for such ascertainment*” (emphasis added)¹⁸—so

¹⁸The “certificate of ascertainment” certifies “the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast” *Id.* (emphasis added). “[C]anvass or other ascertainment” refers to the number of popular votes obtained by all elector candidates in the state. App. 15a (Comment).

states retain their who-and-how “manner” authority over the final determination and certification of who is an elector;

- Section 7 requires electors to cast their ballots on the appointed day “at such place in each State as the legislature of such State shall direct”—so states retain their authority over *how* electors vote that was left to states by the Twelfth Amendment; and
- Section 8 requires that “[t]he electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution”—so given the lack of other restrictions imposed by statute, states retain their authority over *how* electors vote (except that there must be two votes by ballot).

This federal statute does not restrict the states’ generally broad authority under Article II, § 1 and the Twelfth Amendment, other than appointing a day and prescribing the number of electors. Congress understood states’ authority to be broad—over activities ranging from elector selection to the manner of casting ballots—and Congress affirmed that broad authority by a statute authorizing particular state laws. Congress authorized states to enact laws to govern (i) *who* is an authorized elector, (ii) *how* individuals may become and be electors, and (iii) *how* electoral ballots are cast and counted. The necessity of the states regulating the *how* of voting is clearly implicit because otherwise electors could, e.g., refuse to use provided ballots and instead text or email their preferences, or, as Mr. Baca did, “by writing Mr. Kaine’s name on a pen box.” Pet.App. 218 (¶ 55). So the electoral college is a *joint* state-federal process, and states have a vital authorized role.

The UFPEA was designed to be entirely consistent with the foregoing provisions under the states' authority to regulate *who* may become and be an elector, *how* electors are selected, and *how* they cast ballots. The UFPEA permissibly governs the who and how of *electors* in several ways:

- Section 3 provides for the designation of elector and alternate-electoral nominees;
- Section 4 requires a faithfulness pledge as a condition of being an elector;
- Section 5 provides that the certificate of ascertainment state that the electors will serve unless a vacancy occurs, in which case a replacement will fill it and an amended certificate will follow;
- Section 6 governs filling elector vacancies;
- Section 7 governs elector voting and establishes function-of-law vacancies (to be filled under § 6), which include a vacancy caused by presenting a ballot to the presiding official in violation of the pledge; and
- Section 8 provides for amended certification of the list of electors to be substituted for the prior certificate.

And the UFPEA permissibly governs the how of *casting ballots* in several ways:

- Section 2(1) defines “cast” as “accepted . . . in accordance with Section 7(b)”;
- Section 7(a) and (b) distinguish between (i) “mark[ing]” ballots, (ii) “present[ing]” them, and (iii) a ballot’s “accept[ance] as cast”; and
- Under § 7(b), only after an elector presents a ballot consistent with the pledge and the official examiner confirms compliance and accepts the ballot as cast

is the ballot actually cast. Presenting a noncompliant ballot does not cast a ballot but rather—by operation of law—immediately removes the former elector and creates a vacancy to be filled by a faithful elector.

The analytical distinction between the steps involved in elector voting is readily seen in two other voting contexts. First, a voter at the polls receives a paper ballot.¹⁹ She goes to a booth and marks the ballot. Then she goes to the ballot box and casts the ballot. Marking and casting are distinct acts, both physically and conceptually. Were she to do anything other than deposit the marked ballot in the ballot box, no ballot would be cast. And if she deposits in the ballot box a ballot that is unmarked or improperly marked under governing law, no vote is cast. Thus, compliance with legal requirements is necessary for a vote to be legally cast.

The second context involves absentee voting. If the ballot is unmarked or improperly marked under governing law or if other legal requirements for absentee ballot voting are not complied with, no vote is cast. Thus, marking, submitting for approval, and casting of a ballot are clearly distinct factually and conceptually. Casting a ballot and actually voting both require compliance with controlling law, and casting a ballot depends on compliance with state law.

The UFPEA merely applies these ordinary, practical, and conceptual distinctions to define “cast” as being *accepted as legally compliant*. It distinguishes (i) marking a ballot, (ii) proffering it to the presiding offi-

¹⁹ In non-paper-ballot systems, voters still “mark” candidates then “cast” the ballot after reviewing their marks.

cial for compliance inspection, and (iii) acceptance of the ballot as compliant. Only the third step constitutes casting the ballot. This recognition of the ordinary, practical, and conceptual voting acts that are also inherent in elector voting allows an automatic-electoremoval provision (§ 7(b)) to prevent a proffered non-compliant ballot from being *cast* and to substitute a faithful voter who casts a faithful ballot. Note that the pledge is to “mark” the ballot as prescribed (§ 4), not to “cast” it as prescribed. So the presiding official is able to review the ballot after marking, and a noncompliant elector is removed for breaking the pledge before any ballot is “cast.” And the faithless former elector is replaced by an elector who is faithful to the pledge or is in turn replaced—until compliance with the pledge is achieved by all electors.

The UFPEA’s approach is intended to be a constitutional, lawful, practical, and elegant solution to the possibility of a faithless elector by preventing faithless votes from being cast. It does not impose civil or criminal penalties on electors after the fact, which may not be effective, by avoiding the possibility of electors accepting the consequences (e.g., a \$1,000 civil penalty in Washington) and casting a faithless vote.²⁰

The UFPEA was also designed to be consistent with

²⁰ The ULC does not address here Colorado’s Tenth Amendment argument (Pet. 26-27), since the ULC deems UFPEA-type provisions fully consistent with Article II, § 1, the Twelfth Amendment, and 3 U.S.C. Chapter 1. The ULC agrees that “[t]he public’s post-enactment understanding and longstanding historical practice both support State control of electors” (Pet. 28-32), and the UFPEA is part of that understanding and practice.

the rationale of *Ray*, 343 U.S. 214, which upheld a provision requiring electors to pledge “aid and support” for a political party’s nominee, *id.* at 215. Against an argument for absolute liberty of choice for electors, this Court held that there is “no federal constitutional objection” where a system of choosing electors “fix[es] the qualifications for the candidates” because the Twelfth Amendment does not mandate such “absolute freedom” for electors.” *Id.* at 231. The *Ray* dissent advocated for such complete liberty of choice, but that was of course in *dissent*. *Id.* at 232 (Jackson, J. dissenting). As the Colorado Petition elaborates, the Twelfth Amendment does not grant electors such absolute freedom. Pet. 21-26. Moreover, *Ray* is consistent with the view that regulating electors up until their ballot is formally cast under state law is a state function, not a federal function, so that states are free to regulate within their own sphere up until that time, as allowed by the governing constitutional and statutory provisions.

The Tenth Circuit decision jeopardizes the UFPEA’s solution to the faithless-electors problem. By adopting the *Ray* dissent’s rationale, instead of the *Ray* majority’s, and by interpreting the Twelfth Amendment as mandating absolute elector discretion, the decision below jeopardizes *all* efforts to rein in faithless electors. And the Tenth Circuit decision even casts doubt on the ballot designs used by many states because (i) many make no mention of electors, (ii) some do so only in small print, and (iii) no choice of individual electors in a slate is possible—which makes the ballots deceitful unless electors are faithful. Most voters do not contemplate that they are voting for electors instead of candidates for office. If the results of a November election were overturned some 40 days later, based on

what many voters would deem deception, “the potential is great for harm to our democracy,” as the UFPEA’s Prefatory Note explains. App. 9a.

This Court should grant certiorari to consider Colorado’s removal-and-replacement system, which is similar in application to the UFPEA.

III.

Important Principles of Individual Political Empowerment and Federalism Favor Certiorari.

Petitioner’s case is perfectly suited for consideration. By granting certiorari, this Court can settle critical issues of law before they arise in crisis. In particular, the case implicates states’ interests in bolstering individual political empowerment and protecting popular election results from manipulation. Obtaining clarity on these issues is vital.

Individual political empowerment is at the core of our nation’s founding—as “no taxation without representation” was a recognition that the governed control, via representation, those charged with governance. *See* Patrick Henry, The Virginia Stamp Act Resolutions, House of Burgesses, May 30, 1765. The mid-twentieth-century civil-rights movement illustrates the resulting political division when many reasonably believe their votes for representatives are ignored or they are disenfranchised by those in power. The UFPEA and similar statutes represent efforts to bolster individual political empowerment and the sense that presidential elections are conducted in an orderly, fair manner, thus yielding “greater stability of and confidence in our government.” Beverly J. Ross and William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & Politics 665,

747 (1996).

If the Court denies certiorari, the Tenth Circuit's decision might lead to subsequent challenges regarding the constitutionality of ballots making little or no mention of electors. *See supra* at 20. During times of high political polarization, the electoral college is the subject of greater debate and scrutiny, especially when no party achieves sufficient electoral dominance to decrease the likelihood of close electoral votes. Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 904, 904 (2017). Presently, key "battleground" states can lead to a tie or a razor-thin electoral victory.

Close votes might increase "as technology and increasing campaign sophistication heighten the competitiveness of presidential elections." Memorandum from Robert Bennett, UFPEA Reporter, to the NCCUSL Drafting Committee on Presidential Electors Act (March 2009).²¹ With close votes, "there is ample reason to think that parties and candidates will be tempted to court faithlessness."²² *Id.* Indeed, "one significant motivation for states to adopt [a faithless-voter act is] to avoid the political havoc that would ensue from more deeply embroiling the courts in a controversial election where a candidate might attempt to swing an election with the defection of a faithless elector."

²¹ See <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8a4d3ae7-90eb-d67f-4c7c-0ee622724148&forceDialog=0>.

²² From 1808 through 2004, there were 19 faithless electors. In the 2016 election alone, there were seven. See <https://www.wsj.com/graphics/electoral-college-2016/>.

Jesse O. Hale Jr., *Reining In Renegade Presidential Electors: A Uniform State Approach*, Baker Ctr. J. of Applied Pub. Policy, 2010, at 8.²³ Granting certiorari now means the critical issue of the extent to which states can bolster individual political empowerment will be decided outside of the heat of a close presidential election.

Moreover, federalism and the decentralization of presidential elections protect our presidential election system from interference. See Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. Sci. & Tech. L. 168, 182 (2018). Under the UFPEA or the Colorado statute at issue here, changing the actual outcome of the election, would require somehow changing the number of votes cast for a particular candidate in particular precincts in particular states, which use different types of voting machines and computer systems. See *id.* But if faithless electors are allowed, one need only “tamper” with a few electors in strategic states. Denying certiorari could therefore cast doubt on the constitutionality of a primary method states use to protect the integrity of presidential elections and our democracy.

Conclusion

This Court should grant Colorado’s petition for a writ of certiorari and hold the Washington petition for remand in light of the decision in the Colorado case.

²³ Mr. Hale (Tennessee) is also a ULC Commissioner and a member of the Drafting Committee.

Carl H. Lisman
 84 Pine St.
 Burlington, VT 05401

Daniel Robbins
 Bldg E
 15301 Ventura Blvd.
 Sherman Oaks, CA 91403

Susan Kelly Nichols
 3217 Northampton St.
 Raleigh, NC 27609

Peter F. Langrock
 111 South Pleasant Street
 P.O. Drawer 351
 Middlebury, VT 05753-0351
*Of Counsel for Amicus Cu-
 riae*

Respectfully submitted,
 James Bopp, Jr.
 jboppjr@aol.com
Counsel of Record

Richard E. Coleson
 rcoleson@bopplaw.com

Melena S. Siebert
 msiebert@bopplaw.com
 THE BOPP LAW FIRM, PC
 The National Building
 1 South Sixth Street
 Terre Haute, IN 47807
 812/232-2434 telephone
 812/235-3685 facsimile
*Counsel for Amicus Cu-
 riae*