No. 19-518

In the Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,

PETITIONER

v.

MICHAEL BACA, POLLY BACA, AND ROBERT NEMANICH,

RESPONDENTS

ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF INTERESTED LEGAL SCHOLAR ROBERT M. HARDAWAY AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Robert M. Hardaway is a legal scholar and University of Denver, Sturm College of Law professor who fears the Tenth Circuit Court of Appeal's decision endangers the bedrock principles of federalism as established by the U.S. Constitution. The approach taken within that decision misunderstands the history behind the formation of the electoral college and misinterprets the corresponding powers of state legislatures to appoint and replace electors. These errors allow a deluge of unintended consequences, not least of which could be the nullification of a state populace's vote by a faithless elector with no recourse or remedy available to the state.

Having closely studied and researched the history of this matter, the *amicus* implores this Court to address this matter now. The formation and development of the electoral college was a point of debate for this country's Framers, and its development was the product of centuries of state regulation and implementation within the framework established by the U.S. Constitution. The procedures promulgated by the states serve to ensure democratic representation, a cornerstone of the republic. If the Tenth Circuit's decision is permitted

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[1] Pursuant to Rule 37.2(a), *amicus* provided timely notice of his intention to file this brief. A blanket consent was filed in this matter on October 23, 2019, permitting *amicus*. In accordance with rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus* or his counsel made a monetary contribution to fund the brief's preparation or submission.

to stand, a state's ability to protect its citizens' election preference in a constitutional manner by appointing electors and filling vacancies, historically the state's purview, would be severely undermined.

Case in point, in the 2016 election, 1,338,870 Coloradans voted for the presidential electors who had promised to cast their ballots for Hillary Clinton. One of those voters, Michael Baca, determined he would attempt to cast his ballot for someone else. Had he been successful in his endeavor, he would have nullified the votes of one-ninth of the voters in the state. The *amicus* is distressed at the notion voters in Colorado, or any other state, could be disenfranchised at an elector's fancy in violation of the populous' choice and state law.

The *amicus* wishes to see the foundational principles of this republic upheld so as to avoid a constitutional crisis. Answering this question now, when the 2016 presidential election is settled and the issue is ripe and one of pure legal interpretation, preserves the Constitution and prevents strain to the pillars of this federalism.

SUMMARY OF THE ARGUMENT

State legislatures, such as Colorado's, carry the plenary power under article II, § 1 of the United States Constitution to direct and provide by law the manner in which presidential electors are to be appointed. This is undisputed. However, once appointed, the constraints on a state's power to replace an elector who violates the state statute merits this Court's consideration.

The Tenth Circuit curtailed that power, providing a state could not limit an elector's independent judgment under the Twelfth Amendment. Guidance is necessary so states may properly enforce state and federal provisions absent confusion. Whether a state may provide procedures for filling electoral vacancies as it deems appropriate, including requiring compliance with constitutional state provisions, is a burning question that goes to the very heart of a state's constitutional power to promote and effectuate its population's vote. The issue is vital and worthy of this Court's consideration.

The Petition further merits review given the conflict between the Tenth Circuit Court of Appeal's decision and Washington's highest court's decision in *In re Guerra*, 441 P.3d 807 (Wash. 2019). The Washington Supreme Court held that the U.S. Constitution does not foreclose the state's ability to enforce legislative limits on an electors' discretion to depart from the state's general election, and that issue is also before this Court on a petition for a grant of a writ of certiorari under docket number 19-465. The conflicting precedent is perplexing, and could lead to various applications of the same constitutional principles, causing disastrous results.

Addressing the question presented at this juncture, rather than waiting until it is potentially decisive of a future presidential election, allows the matter to be reviewed solely on its legal merits. Waiting until the question decides the executive leader of this country will politicize this Court's

holding. Such a situation could create a constitutional crisis.

Presented in this context, ripe but in a completed election, avoids undue scrutiny. The allocation of authority between the states and federal government is of utmost import and should be a purely legal matter. A grant of certiorari in this case provides that opportunity.

REASONS FOR GRANTING THE PETITION

I. The court below misinterpreted a state's rights to appoint, and the corollary right to remove, electors of the electoral college.

The Tenth Circuit Court of Appeals' decision established a fundamental misunderstanding of federalism. If allowed to stand, the holding would effectively nullify thousands of citizens' votes and their choice for executive. This result would undermine the foundation of this republic, meriting a grant of certiorari review.

A. Analysis of state electoral succession procedures requires a balanced application of federal constitutional provisions, best performed by this Court.

The right to appoint electors is not only reserved to the states; the U.S. Constitution explicitly grants them that power. U.S. CONST. art. II, § 1, cl. 2. Unlike the federal government that can only act as permitted by the Constitution, states maintain their

police power to act regardless of a grant of power. *Bute v. People of State of Ill.*, 333 U.S. 640, 650-51 (1948). A state's actions need not be tied to an enacting provision. *Nat'l Fed'n of Indep. Businesses v. Sebelius*, 567 U.S. 519, 535 (2012). However, where a right is explicitly reserved by the U.S. Constitution to the states, the federal government's ability to infringe on the state's management is severely circumscribed to the direct contours of the Constitution. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (reciting limitations imposed on the federal government in establishing rules governing electors).

The Tenth Amendment captures the reservation of rights to the states or the people:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

U.S. CONST. amend. X. The Constitution explicitly provides that the states shall appoint electors as the state legislatures direct:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an

Elector.

U.S. CONST. art. II, § 1, cl. 2. The Twelfth Amendment enumerates the procedural steps by which the electors' votes are counted, but in so doing recognizes the vote is captured from "the majority of the whole number of Electors appointed . . . ." U.S. CONST. amend. XII. Rather than modifying or constricting the state's right to appoint electors, the Twelfth Amendment reaffirms the first step is state appointment.

Colorado acted pursuant to its directive and legislative procedures in 2016. Recall that the state's general population cast 1,338,870 votes for Ms. Clinton's Democratic electors, making her the executive of choice for a majority of the state's participating voters. The nine sworn Democratic electors pledged to cast their electoral ballots for Ms. Clinton. The citizens of Colorado reasonably and lawfully expected the electors' votes to reflect the population's choice for the country's executive.

The voter's faith in such a democratic result was justified by both: (1) article II, § 1, of the U.S. Constitution, which guarantees to each state the power to appoint electors "in such manner as the Legislature thereof may direct"; and (2) Colorado Revised Statute § 1-4-304(5), which in accordance with those article II powers institutes eligibility requirements for service as an elector, including that the elector "vote for the presidential candidate who received the highest number of votes at the preceding general election in that state."

B. The method of replacing an elector has historically been left to the states.

Under the power to select the method of appointment, Colorado also had the ability to fill any vacancy that arose from an elector's "death, refusal to act, absence, or other cause . . . ." COLO. REV. STAT. § 1-4-304(1). History shows such provisions are reasonable and necessary.

For example, Michigan was left scouring the vicinity of its capital when six of its nineteen electors failed to appear on the appointed date and time for electors to cast their ballots in 1948. *Election of President and Vice President: Hearing on S.J. Res. 2 Before a Subcomm. of the Comm. on the Judiciary*, 81st Cong. 118-119, 119 n.6 (1949) (article of Prof. Joseph E. Kallenbach, associate professor, University of Michigan) (citing *Ann Arbor News*, Dec. 14, 1948, p. 3). The state hastened to replace the absentee electors with six people found wandering the immediate area. *Id.* One replacement elector had to be corrected when he inadvertently attempted to cast his ballot for Harry S. Truman, believing he was to adopt the winner of the *national* presidential election as opposed to the winner of the *state's* popular vote for that position, Thomas E. Dewey. *Id.*

Absent directing the question to the state legislature, the U.S. Constitution is entirely silent on the appointment of electors, and deliberately so. The Framers never achieved consensus regarding the role of electors during the Constitutional

Convention. *See* 4 *The Writings of James Madison: The Journal of the Constitutional Convention* (G. Hunt ed. 1902). Thus, they wisely chose to leave that important question to state resolution.

Historical abstracts citing various Framers' opinions as to what might be the best role for electors are therefore irrelevant to the issue at hand. The Framers may have had preferences, but those preferences were intentionally omitted from the drafted language in the Constitution.

For example, James Madison believed that, at least in the absence of state regulation, the executive as the guardian of the people should be appointed by the people, which by 1876 every state had adopted. *Id.* at 3. Hamilton expressed his opinion in The Federalist No. 68 that the election might be made by "men most capable of analyzing the qualities adapted to the nation." The Federalist No. 68, 435 (Scigliano ed. 2000). However, Hamilton later clarified that he thought the "sense of the people should operate in the choice of the person to whom so important a trust was to be confided." Lucius Wilmerding, Jr., *The Electoral College*, 19 (1958). The diversity of opinions highlights the open interpretation of electors' roles following the enactment of the U.S. Constitution.

At the Constitution's direction, states formed their own appointment procedures in accordance with the exclusive powers granted to them. U.S. CONST. art. II, § 1, cl. 2. Despite the formal delegation of the appointment power to the states,

and Colorado's requirement pursuant to that delegation that an elector cast his or her ballot for the candidate who has received the most votes in the popular election, one elector chose to ignore his legal obligation to the Colorado voters during the 2016 presidential election. On December 19, 2016, Mr. Michael Baca, an appointed elector to Colorado's Democratic slate, decided unilaterally to betray the Colorado voter's public trust. Apparently believing the violation would have no repercussions, Baca refused to cast his ballot for Ms. Clinton.

This faithlessness, if permitted, would have nullified and effectively disenfranchised one-ninth of the Colorado voters who had cast their votes for the electoral slate pledged to Ms. Clinton—a total of 148,763 popular votes cast for Ms. Clinton in reliance on both the U.S. Constitution and Colorado law. Those votes for Ms. Clinton were thus made unequal to others, not condoned by a Constitution that compels equality among voters. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court's] decisions.").

For the first time in American legal history, the Tenth Circuit pronounced that neither the U.S. Constitution nor Colorado law provide the authority to ensure the popular votes cast for a presidential candidate's electoral slate are democratically reflected in the Electoral College. Pet.App. 99. That extraordinary proposition undercuts the foundational

principle, unanimous among the states since 1876, that grants the state's electorate at large the power to govern an elector's ballot. Robert Hardaway, *The Electoral College and the Constitution: The Case for Preserving Federalism*, 100 (1994). Indeed, it would render the constitutional conventions established to reflect the will of the majority of a state's voting population meaningless. *See* A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 285 (1889). Without adherence to those convictions, the "sovereignty of the people" ceases. *Id.* at 286.

States must know whether they can enact proscriptions on an elector's independence, left open intentionally by the constitutional framers, but a matter now ripe for examination.

C. The Tenth Circuit departed from this Court's precedent when it constrained the state's power to replace an elector who violated state law.

The Tenth Circuit held that the Constitution limited a state's right to replace an elector who casts a ballot in violation of state statute, but it did so in conflict with this Court's precedent. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-795 (1995) (collecting relevant historical materials supporting the protection of the people's right to select the person governing them); *Ray v. Blair*, 343 U.S. 214, 230 (1952) ("Surely one may voluntarily assume obligations to vote for a certain candidate."); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (state's appointment power under the Constitution "cannot

be held to operate as a limitation on that power itself"); *Fitzgerald*, 134 U.S. at 379 ("Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than . . . the people of the States when acting as electors of representatives in congress.").

As early as 1892, this Court declared in *McPherson* that the Constitution "leaves it to the legislature exclusively to define the method" of appointing electors, including the power to "fill any vacancy which may occur in the Electoral College." 146 U.S. at 41. By 1876, every state had exercised its exclusive Article II power to delegate the power to appoint electors to the voters of their respective states. The Tenth Circuit broke from this precedent when it held the state could not assure an elector's ballot complied with a constitutional, state legislative requirements.

As electors rarely violate their pledges, and have yet to affect the ultimate outcome of a presidential election, some states have not felt it necessary to enact laws requiring the appointed electors to vote for a pledged candidate. Tara Ross, *The Indispensable Electoral College: How the Founders' Plan Saves Our Country From Mob Rule*, 118 (2017) (finding no more than 17 of 21,291 elector ballots from 1796 to 1996 were cast against instruction). However, Colorado joins the majority of states in promulgating laws that require electors to cast their electoral votes in accordance with the will of the people who elected them. *Id.* at 175-80. To deny

Colorado, or any other state, the right to safeguard the populace's selection in favor of an elector's caprice unconstitutionally disenfranchises the voters in that election. *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws . . . .").

This Court has previously enshrined the principle that "[n]either the language of Art. II, s 1 *nor that of the Twelfth Amendment* forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party." *Blair*, 343 U.S. at 225 (emphasis added). The Court further recognized that, while it was of course true that electors perform a federal function in the narrow sense that they cast ballots for presidential and vice presidential candidates, "they are *not* federal officers or agents any more than the State elector who votes for congressman." *Id.* (emphasis added). As state officers, they stand subject to state regulation.

In states that have not yet found it necessary to pass laws requiring that an elector reflect the will of the people when casting a ballot in the Electoral College, electors are of course free to cast their ballots for whomever they please. In the majority of states, those that have promulgated procedures or sanctions governing electors in order to protect their populace's right to choose the nation's executive, the elector's choice is constitutionally restricted.

II. The Washington Supreme Court's decision—at odds with the 10th Circuit—held legislation providing recourse against rogue electors constitutional.

In *In re Guerra, et al.*, 441 P.3d 807 (Wash. 2019), the Supreme Court of Washington rejected the supposition that the states' hold no rights to affix obligations on an elector's ballot in accordance with his or her sworn pledge. *In re Guerra*, 441 P.3d at 815-16. That case held that an elector's power to cast the ballot comes from the state, and the federal constitutional provisions stated in art. II, § 1, the First Amendment, and the Twelfth Amendment did not prohibit the state from imposing a fine if an elector violated that pledge. *Id.* at 816-817.

A. Both courts addressed the same constitutional provisions, but came to different results regarding a state's rights.

In so doing, Washington rejected similar arguments to those adopted by the Tenth Circuit. *See id.* It also rejected the Tenth Circuit's holding that an elector is a free agent, able to select whomever he or she chooses regardless of state law. Washington's highest court repudiated the incongruous notion that a state could constitutionally enact laws regulating appointment and replacement of electors, while simultaneously rendering the states toothless to enforce such laws. *Id.* at 817. Like *Blair*, Washington refuted the notion that the Twelfth Amendment, the purpose of which

was nothing more than to require that electors vote for the president and vice-president separately, somehow abrogated a state's plenary power under Article II to regulate the qualifications of electors and enforce those regulations. *Id.* at 815-816; *see Blair*, 343 U.S. at 228.

Washington's well-reasoned approach accounts for the historical development of state legislation regarding the electoral college and the commensurate implementation. As early as 1788, New Hampshire had promulgated legislation appointing electors by direct election of the state's eligible voters. *Laws, New Hampshire*, 169 (Adopted Nov. 12, 1788, codified 1789). Less than half a century later in 1832, all but North Carolina had adopted similar statues providing for direct popular election of the electors. Hardaway, 46. Less than one century later, a Senate committee pronounced in1874 that "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states." Staff of S. Subcomm. on Constitutional Amends. of the Judiciary, 87th Cong., *The Electoral College, Operation and Effect of the Proposed Amends. to the Const. of the U.S.*, 13 (Comm. Print 1961). The state's power to determine the proper method for elector replacement is similarly federally codified. 3 U.S.C. § 4.

In order to effectuate the popular vote, at least 24 states and the District of Columbia require electors to pledge to vote for a party's presidential and vice presidential nominee as part of the appointment

process. Michael C. Glennon, *When No Majority Rules: The Electoral College and Presidential Succession*, 34 (1992). Via this method, "[t]he multitude of American citizens speaks through the presidential electors." Herbert W. Horwill, *The Usages of the Am. Const.*, 8 (1925). The electors were not intended to make decisions absent control of the populace. Wilmerding, *The Electoral College*, 19.

State legislatures promulgate laws believing they have great latitude, correct under the Constitution, to implement electoral appointment and fill electoral vacancies. They have developed different means of achieving that goal. For example, Colorado varies from Washington in that it omits a penalty, be it fine or imprisonment, for an elector who violates the public trust. *Compare* COLO. REV. STAT. § 1-4-304 *with* WASH. REV. CODE § 29A.56.340. Rather, Colorado institutes a procedural remedy to dispatch a replacement for an electoral vacancy that results from an elector's "death, refusal to act, absence or other cause . . . ." COLO. REV. STAT. § 1-4-304(1).

When Mr. Baca revealed that he did not meet the statutory requirements for electors, he created a vacancy. Colorado acted to correct the violation by replacing an illegal ballot under state law, and the elector who had cast that ballot, with an alternate elector. The alternate cast a valid ballot that complied with state law. While the Tenth Circuit found the replacement unconstitutional, the Washington Supreme Court applied the same federal provisions and found state sanctions for an elector's faithlessness appropriate.

B. States must understand their ability to fill an electoral vacancy in order to avoid confusion.

Taken at face value, the holding of the court below would prevent a state from filling a vacancy created by death, disability, or even refusal to serve pursuant to the state's appointment law because the Constitution does not specifically provide for such. Regardless, the Washington Supreme Court pronounced the better understanding that a state is free to place requirements on electors as part of the "plenary power to direct the manner and mode of appointment of electors to the Electoral College." *In re Guerra*, 441 P.3d at 817.

The situation parallels a jury trial in which a seated juror reveals that he is not a citizen, not a resident, only 15 years old, is closely related to a party, or intends to convict the defendant regardless of the evidence. The presiding judicial officer is under no obligation to permit the juror to remain on the jury in contravention of the controlling law. The offending juror is removed. Even if this information comes to light following the swearing of the jury, the judicial officer may fill that vacancy with an alternate juror.

Similarly, if an elector were found to be under the age of 18 at the time his or her ballot were cast, the state would be expected to disqualify the offending elector and replace the person with a valid elector. The Tenth Circuit announced a rule that ignores these realities. It declared that even when an elector

refuses to meet the state qualifications for that position, "there is nothing in the federal Constitution that allows the State to remove that elector or to nullify his votes." Pet.App. 131. But the state legislature is expressly permitted to establish procedures for filling an electoral vacancy such as those that occur when an elector fails to fulfill the duties of the appointment. U.S. Const. art. II, § 1, cl. 2. Unless the state law conflicts with a federal constitutional provision, which Colorado's does not, the state reserves the right to appoint and replace electors. *See* COLO. REV. STAT. § 1-4-304(1).

Washington's highest court and the Tenth Circuit Court of Appeals proffer distinctly different interpretations of a state's constitutional appointment powers and its ability to fill electoral vacancies. The question is properly presented and should be addressed on the merits. Failure to do so creates inharmonious applications of the same constitutional provisions, resulting in confusion and discord. States must know the appropriate strictures their legislatures can place on electors under the federal Constitution. Otherwise, an amalgamation of methods and results could lead to different applications of the same requirements in different states. This creates inequity in the voting population, valuing some votes differently and endangering future elections.

III. The validity of presidential elections is predicated on an understanding that the electors will act for the people.

The United States is "at bottom a government by the people." *Bute*, 333 U.S. at 653 (1948). As early as the 1787 Constitutional Convention, one delegate noted that "[t]he people will not readily subscribe to the National Constitution if it should subject them to be disenfranchised." 4 *The Writings of James Madison: The Journal of the Constitutional Convention*, 117 (G. Hunt ed. 1902) (comment of delegate Oliver Ellsworth). Time is of the essence to address this issue in order to prevent facing the same matter at a date when a presidential election hangs in the balance.

A. Certainty in elections and absence of corruption is a paramount concern.

In the aftermath of the 2016 general presidential election, the country experienced the spectacle of electors receiving death threats, being individually campaigned to vote for a candidate not the winner of their state's general election, and collecting offers for monetary compensation in exchange for their faithless ballots. Alexandra King, *Electoral College Voter: I'm getting death threats*, CNN (Nov. 30, 2016, 4:27 PM) https://www.cnn.com/2016/11/30/politics/banerian-death-threats-cnntv/index.html; Ruth Sherlock, *Thousands send letters, death threats, to pressure Electoral College to avert outcome of presidential election*, The Telegraph (Dec. 19, 2016 1:35 AM),

https://www.telegraph.co.uk/news/2016/12/19/thousands-send-letters-death-threats-pressure-electoral-college/. In the end, seven electors broke from their state's popular vote to cast a ballot for someone not chosen by the people. Eric M. Johnson, Jon Herskovitz, *Trump wins Electoral College vote; a few electors break ranks*, Reuters (Dec. 18, 2019 11:04 PM) https://www.reuters.com/article/us-usa-election-electoralcollege-idUSKBN1480FQ (four in Washington, two in Texas, and one in Hawaii).

The final 2016 electoral college result was 304 to 227, with 270 ballots being the necessary tally to declare victory. *Id.* Yet even with a sizeable margin of electoral votes padding the electoral victory, bribery was attempted. *See* Sherlock, https://www.telegraph.co.uk/news/2016/12/19/thousands-send-letters-death-threats-pressure-electoral-college/. Bribery constitutes an especially alarming issue during a close presidential election, as it may induce an elector to vote for someone other than the candidate to whom he or she is pledged. Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, PUBLIC CHOICE 123:1, 2 n.6 (2005). An elector could disregard the prevailing choice of the state's majority of voters' made in November, instead casting a purchased ballot.

An open season on electors based on the belief they have an uninhibited right to cast a ballot for the candidate of their choosing could nullify the general election in future years. Currently, the executive is believed to be elected on the first Tuesday in

November quadrennially. Horwill, *The Usages of the Am. Const.*, 39-40. If electors were not beholden to the state that appoints them and the laws governing that appointment, any election would remain in question until the electors assembled to cast ballots. *See id.*

Clearly Hamilton did not intend this result when he said electors exist to avoid "tumult and disorder" that could result from other methods of election. *See* The Federalist No. 68 (Alexander Hamilton) 435 (Scigliano ed. 2000). In that writing, he envisioned the assembly would prevent cabal and corruption through independent judgment, but the historical reality shows the state's limitation on elector qualifications more effectively circumvents corruption and disorder. *See id.* At 436-37. A political party maintains few desired attributes for an elector appointed to the electoral slate, with one author and elector noting his intellect and sound judgment had nothing to do with his appointment—the funds he contributed to the party supplied his main credentials. James A. Michener, *Presidential Lottery: The Reckless Gamble in Our Electoral System*, 9 (1969). In light of the potential pitfalls that otherwise could ensnare electors, reasonable measures to ensure electoral college balloting conforms to election results are appropriate under article II, section 1.

B. But for elector adherence to the popular vote as required by state law, the general voting public's choice would be greatly diminished.

Elector independence in violation of the popular vote could create its own election cycle. A member of the electoral college or group of members could determine to nullify the people's vote. The country could experience direct campaigning of the electors, as occurred to varying degrees in 2016, with the goal of robbing the people of their preferred candidate. Regardless of the differing viewpoints the Founders expressed, the result would be untenable to the citizens of this country today.

The concept is not farfetched. In 2000, the presidential election was decided by a margin of two electoral votes. Ross, *The Indispensable Electoral College*, 170. Had but one or two electors chosen to cast their ballots for a candidate not selected by the general population of the states that appointed them, no candidate would have had a majority. Colorado alone had three electors attempt to exercise prerogative to cast a faithless ballot in 2016, the respondents in this case, which could have turned a close election.

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court held "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has proscribed is fundamental . . . ." *Bush*, 531 U.S. at 104. The state may not value the vote of one citizen over another—a result that will

occur if electors exercise unfettered independence. *See id.* at 104-105. By requiring electors to fulfill their obligation to the public or be replaced, states forbid arbitrary and disparate treatment of the voting public. *See id.* at 105.

The election of 2000 is not alone. The elections of 1876, 1884, 1916, and 2004, all resulted in the president-elect receiving fewer than 55 percent of the electoral college votes. Ross, *The Indispensable Electoral College*, 159-171. If electors had been free to cast ballots in breach of state legislation that marries electors' ballots to the will of the people, each of these elections could have rewritten history.

Absent state protection, electors and not the general populace would have an outsized influence. The Electoral College, instead of being a formality, could become the body to which candidates direct their attention and platforms when seeking election or reelection. The voting public's voice would be muffled or muted in favor of pandering to a slate of men and women whose main purpose previously was to ratify the will of the people.

That result should be avoided. The Petitioner's presented question should be decided now, when it is a purely legal question without political consequences. This Court's judicial independence should remain above reproach.

CONCLUSION

The *amicus* respectfully requests that this Court grant the Petitioner's Writ of Certiorari to the United States' Tenth Circuit Court of Appeals.

Respectfully submitted,

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