NO. 19-518

In the
Supreme Court of the United States

COLORADO DEPARTMENT OF STATE,
Petitioner,
v.

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

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents agree that this Court should grant certiorari. Respondents recognize that the lower courts disagree over whether presidential electors are state officers or otherwise subject to state control, and that this case is an appropriate vehicle for this Court to resolve these questions of national importance in a deliberate manner—without the outcome of a Presidential election riding on the decision. The bipartisan *amici* support from 22 States, interested academics, and the Uniform Law Commission further support the critical importance of this Court granting certiorari.

Only two issues create some disagreement: which side's framing of the questions presented should be granted and, as raised in a professor's *amicus curiae* brief, whether Colorado's express waiver of certain procedural defenses creates any jurisdictional impediment to this Court's review. This Reply Brief addresses those two issues.

ARGUMENT

I. The jurisdictional question of electors' standing is cert-worthy and should be resolved before this Court addresses the merits.

Respondents suggest that this Court should ignore the Article III standing issue in Colorado's first question presented and address "only the substantive question of elector discretion [to] ensure the cleanest presentation." Resp. 19. But because standing is a constitutional requirement limiting the jurisdiction of all federal courts, Respondents' argument is incorrect.

Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). This Court has an independent obligation to assure itself of a litigant's standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). This independent obligation to verify the plaintiff's standing applies even when no party raises the potential jurisdictional defect. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

Here, Colorado's petition raises an important and unsettled question concerning an elector's standing to sue their appointing State to invalidate a state law prescribing their duties. This jurisdictional question has been raised at every level and generated divergent court rulings.

Respondents contend that Colorado's petition "confuses standing with the merits." Resp. 17. They are incorrect. The petition adheres to this Court's standing jurisprudence, recognizing that standing requires an "injury in fact," which this Court defines as "an invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). If a claim implicates no legally protected interest, no cognizable injury has occurred and the plaintiff lacks standing, regardless of the merits issue. *Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("[T]he alleged injury must be legally and judicially cognizable."). While the existence of a legally protected interest may overlap somewhat with questions bearing on the merits, that does not mean that Article III's standing requirements are coterminous with the merits. The two remain distinct. After all, there are many cases from this Court finding standing for a plaintiff but rejecting their merits arguments. *See, e.g.*, *Franklin v. Massachusetts*, 505

U.S. 788, 801–06 (1992); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 448–67 (1989).

Moreover, far from being relegated to the merits analysis, determining whether a presidential elector is a state officer is an inherent component of assessing their standing to challenge state law. If electors are state officers, they fall squarely within the ambit of *Smith v. Indiana*, 191 U.S. 138 (1903). Under *Smith*, a state officer's interest in the scope of their official duty—or in getting to carry out that duty—does not create standing. *Id.* at 148–49. Respondents do not suggest otherwise or even discuss *Smith*. To the contrary, they agree that the lower court split over whether electors qualify as state officers is "real" and "important." Resp. 14.

In contrast, if electors are not state officers, the remaining elements of Article III standing must be evaluated. The bare violation of a law, for example, does not alone confer standing; rather, an actual injury must occur. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Mr. Baca here claims three injuries: "the denial of his right to vote, removal from office, and subsequent referral for perjury prosecution." Resp. 18. The third claimed injury—referral for criminal prosecution—was rejected below by the court of appeals. That court found that Mr. Baca had "failed to allege the referral resulted in any injury." Pet.App. 37. The referral for criminal prosecution thus cannot constitute an adequate basis for Article III standing.

That leaves the first two alleged injuries: the denial of Mr. Baca's right to vote as an elector and his removal from the position of elector. Although Respondents identify these as separate injuries, close

inspection reveals that, in fact, the removal from office creates a claimed injury in only one sense—it denied Mr. Baca the opportunity to cast an Electoral College ballot for the candidate of his choice. Due to this singular characteristic of the position of presidential elector, Mr. Baca's removal resulted in no other alleged injury.

This singular characteristic that defines the position of presidential elector is perhaps unique among government roles. The court of appeals acknowledged that the elector position does not "confer[] pecuniary interest [or] ongoing duties," but concluded that a non-economic injury can confer standing. Pet.App. 35. To support this conclusion, the court of appeals cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where this Court recognized that standing may be appropriate where the plaintiff has a specific, non-economic interest frustrated by the defendant. *Id.* at 263 (noting the plaintiff's "interest in making suitable low-cost housing available in areas where such housing is scarce" and finding injury to that interest sufficient for standing). But here, the only interest at stake that the court of appeals identified was "Mr. Baca's loss of his office—however brief its existence." Pet.App. 36. But by failing to engage in a meaningful analysis of the "office" of presidential elector, the court of appeals misapplied this Court's precedent.

The court of appeals relied on the suggestion in *Raines* that a government official might have standing if "deprived of something to which they *personally* are entitled—such as their seats as Members of Congress

after their constituents had elected *them*." 521 U.S. at 821. The court of appeals' reliance on *Raines* was in error for the reasons that Colorado has already identified. Pet. 14–16. But even accepting the court of appeals' interpretation of *Raines* that members of Congress have a personal entitlement to their offices because their constituents elected them, that rule has no bearing here. Colorado voters did not elect Mr. Baca. Instead, like most States, Colorado uses the "short form" ballot format in its general election, printing only the names of actual presidential candidates on voters' ballots, not electors. Pet.App. 112. Political parties nominate Colorado's presidential electors and the State appoints them. COLO. REV. STAT. § 1-4-302 (2019). Colorado voters in the 2016 general election had no easy or ready way to learn Mr. Baca's identity before voting or otherwise gauge his trustworthiness for casting a faithful Electoral College ballot. As such, even applying the court of appeals' erroneous view of *Raines*, Mr. Baca has no personal entitlement to his former position as an elector.

Besides the lack of a personal entitlement, other unique characteristics of presidential electors demonstrate that they have no standing to sue their appointing State, even if removed. While other cases from this Court recognize an official's standing to challenge their removal based on their consequent loss of salary, *Powell v. McCormack*, 395 U.S. 486, 496, 512–14 (1969), presidential electors in Colorado receive only five dollars and mileage reimbursement. COLO. REV. STAT. § 1-4-305 (2019). Mr. Baca makes no claim of injury based on his possible loss of these nominal sums. Nor does he allege deprivation of any other personal benefit. That's because there is none.

As the district court found, outside of their nominal compensation, the elector position does not come with *any* personal benefits. Pet.App. 150. Electors carry out a singular duty in their position: they arrive at the state capitol on the specified day, take an oath, and cast a ballot for the candidates chosen by the people of Colorado. COLO. REV. STAT. § 1-4-304 (2019). Electors have no physical office, serve no constituents, and receive no employment benefits or training. After they complete their allotted task, their work is done. Unlike other government positions—even volunteer ones—the position of presidential elector comes with no meaningful benefits that might generate Article III standing if removed.

Reflecting this reality, Mr. Baca's only plausible claim of injury is the denial of his alleged right to cast an Electoral College ballot for the candidate of his choice. Yet the other two Respondents, Mr. Nemanich and Ms. Baca, claimed this same injury and the court of appeals correctly determined they *lacked* standing. Pet.App. 38–42. The court correctly concluded that the denial of their claimed right to cast an Electoral College ballot for their chosen candidate was an injury "based on their official roles as electors." Pet.App. 42. That type of injury—a general diminution of political power—does not generate Article III standing. *Raines*, 521 U.S. at 821. The same holds true for Mr. Baca. While Mr. Nemanich and Ms. Baca allegedly felt intimidated into casting a ballot for a candidate they did not wish to support, Mr. Baca's faithless ballot was not counted. In each case, they claim the same injury: the denial of an elector's alleged right to cast a ballot for a candidate of their choosing. Thus, for the same reasons that the court of appeals concluded that Ms.

Baca and Mr. Nemanich lack standing, Mr. Baca does too.

The opposite conclusion would lead to an absurd result. Under *Smith*, government officials do not have standing to challenge state laws that implicate only their official interests. 191 U.S. at 149. Nor may plaintiffs manufacture standing by self-inflicting harm. *Clapper*, 568 U.S. at 416. But Respondents' theory of standing permits a government official to do exactly that. Under their theory, when a State fires an officer for refusing to enforce state law, that officer would have standing to sue based solely on their own decision to ignore the state law prescribing their duties. The same outcome would result even if the State takes some lesser punitive action against the officer for their refusal to follow the law. That theory would undermine *Smith* and contravene *Clapper*.[1] This Court should not allow Respondents to circumvent Article III in this manner. Allowing Mr. Baca to bring his challenge is "tantamount to accepting a repackaged version of [Mr. Nemanich's and Ms. Baca's] failed theory of standing." *Clapper*, 568 U.S. at 416.

Because an elector does not have standing to sue its appointing State, this Court should grant certiorari

[1] As Washington points out, the challengers seek to injure themselves by their own conduct so they may use *Baca* and *Chiafalo* to "precipitate a national crisis of confidence in the hopes of spurning a movement against the Electoral College." Brief in Opposition at 32–33, *Chiafalo v. Washington*, No. 19-465 (U.S. Nov. 8, 2019). Under *Clapper*, that type of self-inflicted injury does not generate Article III standing. 568 U.S. at 416.

and reverse the court of appeals' decision finding standing for Mr. Baca.

II. Colorado's express waiver of certain procedural defenses does not affect this Court's jurisdiction.

Respondents agree that this case presents an appropriate vehicle to resolve the questions presented. Resp. 15–16. A professor's amicus brief, however, echoes the dissent below, asserting that the court of appeals' exercise of jurisdiction over this case was inappropriate because 42 U.S.C. § 1983 creates no damages remedy against a state agency. Br. of Prof. Morley as *Amicus Curiae*, pp. 6, 20. The court of appeals' decision reaching the merits of elector discretion was error, Professor Morley argues, even though Colorado deliberately waived the argument that it is not a "person" under § 1983. *Id.* at 10.

The procedural issues identified by Professor Morley pose no obstacle to this Court's review, for three reasons.

First, none of the authorities cited by Professor Morley suggests that a State's "personhood" defense under § 1983 amounts to a nonwaivable jurisdictional defense. A nonjurisdictional defense is deemed waived if not affirmatively raised by the defendant. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010). While this Court has not specifically addressed whether § 1983's personhood defense is jurisdictional, it has indicated more broadly that "whether a federal statute creates a claim for relief is not jurisdictional." *Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 365 (1994). Applying this

principle, the lower circuit courts uniformly hold that whether a party is a "person" under § 1983 is "not a jurisdictional question but rather a statutory one." *Paeste v. Guam*, 798 F.3d 1228, 1234 (9th Cir. 2015) (collecting cases) (quotations omitted); *see also Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 821 (3d Cir. 1991) (en banc) (Alito, J.) ("[T]he argument that SEPTA is not a 'person' under Section 1983, when stripped of its Eleventh Amendment component, does not implicate federal jurisdiction").

These circuit courts correctly resolved this question. Lower courts should treat statutory restrictions as "'nonjurisdictional in character'" absent a "clear statement" from Congress that the rule is jurisdictional. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006)). Given this Court's strong direction to avoid mischaracterizing statutory restrictions as jurisdictional, the court of appeals below correctly determined that Colorado could—and did—intentionally waive its personhood defense under § 1983.

Second, the court of appeals' decision to accept Colorado's waiver is fully consistent with this Court's holdings in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In *Will* the Court stated that a "State is not a 'person' within the meaning of § 1983." 491 U.S. at 65. But nowhere in *Will* did the Court suggest that the issue amounted to jurisdictional limit on the power of federal courts to hear a case. To the contrary, the *Will* Court reasoned that the Congress that enacted § 1983 could not have

intended "to disregard the well-established immunity of a State from being sued *without its consent*." *Id.* at 67 (emphasis added). In the paragraph describing Congress's thinking, the *Will* Court used the phrase "without its consent" in three consecutive sentences. *Id.* Interpreting *Will* to override Colorado's consent and *prohibit* it from agreeing to proceed under § 1983 would thus extend *Will* far beyond its holding.

Arizonans also does not create a nonwaivable jurisdictional bar. 520 U.S. 43. There, a state employee sued Arizona and various state officials claiming that a new state law making English the official state language was unconstitutional. *Id.* at 50. The Court found the plaintiff-employee's claims for injunctive and declaratory relief under § 1983 moot because she left state employment. *Id.* at 70–72. The employee's "changed circumstances . . . mooted the case stated in her complaint," the Court explained, and a contrived claim for nominal damages "extracted late in the day" from the complaint's general prayer for relief could not avoid mootness. *Id.* at 71–72. *Arizonans* thus stands for the uncontroversial proposition that a plaintiff's changed circumstances during litigation may render her claims for prospective equitable relief moot. But as the court of appeals below correctly explained, *Arizonans* "does not teach that *any* claim for damages against a state pursuant to § 1983 is moot." Pet.App. 56 (emphasis added). Here, no changed circumstances render Respondents' original request for nominal damages moot. Their status and requested relief have remained constant since the case's inception, rendering *Arizonans* inapplicable.

Third, a presidential elector can bring a § 1983 claim for *prospective* injunctive and declaratory relief against state officials acting in their official capacities. *See Ex parte Young*, 209 U.S. 123 (1908). In such a suit, state officials cannot rely on Eleventh Amendment immunity or § 1983's personhood defense. Indeed, none of the state defendants in the four federal lawsuits that disrupted the 2016 Electoral College were able to assert these defenses. Both are available only to the State or a state agency in a damages suit.

Similar litigation under *Ex parte Young* will almost certainly occur again in the days leading up to a future Electoral College. Because meetings of the Electoral College have strict deadlines, such litigation will by necessity require highly expedited proceedings that do not provide an adequate mechanism for adjudicating weighty constitutional questions. Rather than await a repeat of the harried litigation that disrupted the 2016 Electoral College, Colorado sensibly chose to intentionally waive its Eleventh Amendment immunity and its § 1983 personhood defense in this case so that the courts can provide an answer to this ongoing controversy in a normal litigation setting. Colorado's litigation decision renders this vehicle more appropriate for certiorari review, not less, because it permits this Court to resolve these important constitutional questions in a deliberate manner where it can decide the case

without knowing which presidential candidate will benefit from its decision.[2]

Colorado believes that this case provides an ideal vehicle to resolve the questions presented in an orderly fashion. However, if the Court views the procedural issues raised by Professor Morley as precluding certiorari and argument on the merits, this Court should, as Professor Morley suggests, restore the *status quo ante* by either summarily reversing or granting certiorari, vacating, and remanding for dismissal. Allowing these procedural concerns to prevent merits review while leaving the underlying decision undisturbed—which arises from the same procedural posture—would prejudice Colorado and the other States in the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[2] Colorado's choice to waive certain defenses does not render this case a "friendly or feigned" proceeding that lacks the hallmarks of a genuine case or controversy. *Arizonans*, 520 U.S. at 71. As the litigation below demonstrates, the parties have consistently taken opposing positions on both questions presented.

Respectfully submitted,

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December 4, 2019