No. 19-465 and 19-518

In The Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,

Respondents.

On Writs Of Certiorari To The Supreme Court Of Washington And The U.S. Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* VINZ KOLLER IN SUPPORT OF PRESIDENTIAL ELECTORS

MELODY A. KRAMER
KRAMER LAW OFFICE, INC.
4010 Sorrento Valley Blvd., Ste. 400
San Diego, CA 92121
(855) 835-5520

ANDREW J. DHUEY
Counsel of Record
BRIDGET A. CLARKE
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200
ajdhuey@comcast.net

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM2

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Vinz Koller was nominated as a presidential elector for the California Democratic Party and served as such for the 2016 Presidential Election. After that general election, Mr. Koller joined with the presidential electors in this case, and electors in other States, in an effort to persuade Republican electors to cast their votes in the Electoral College for a presidential candidate other than Donald J. Trump. They sought to do so based on their considered judgment and in accord with the intent of the Founding Fathers and the Constitution. They failed to persuade enough electors to join in their effort, and ultimately had no impact on the election's outcome.

Among the obstacles these electors confronted were State laws that seek to control for whom presidential electors cast their Electoral College votes. Those laws typically require electors to vote for their party's presidential and vice-presidential nominees. Mr. Koller, an elector in California, faced a $1,000 fine and/or up to three years in prison for not voting as the State of California dictated. *Koller v. Brown*, 224 F.Supp.3d 871, 873-74 (N.D. Cal. 2016). The Petitioner electors from Washington were each fined $1,000 by

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[1] Pursuant to the Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. All parties have filed blanket consents to the filing of *amicus* briefs.

the Respondent State of Washington when they did not vote for their party's presidential and vice-presidential nominees. *In re Guerra*, 193 Wn.2d 380, 382 (2019).

When Respondent Micheal Baca voted his conscience, the State of Colorado exercised "the fullest extent of its [alleged] authority over electors" (Colo. Pet. 32): it removed him from the office of elector, refused to count his votes for President and Vice President, and replaced him with a substitute elector (who cast her votes as Colorado required).[2] *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901-02, 904 (10th Cir. 2019); Colo. Pet. 218a (¶ 55). Mr. Baca was also referred to the Colorado Attorney General for possible felony perjury prosecution. *Baca*, 935 F.3d at 904.

This case is fundamentally about whether presidential electors are free to cast Electoral College votes in accord with the deliberative process set forth in the U.S. Constitution, and without fear of replacement, fine, imprisonment or other punitive consequences, even if State law or State agents try to restrict those rights. As a past and potential elector, it is in Mr. Koller's interest, as well as in the interests of all electors and of our nation, that the Court clarify that an elector who has been removed and replaced based on their vote has standing to challenge a State for doing so.

[2] *See Mayhem follows Colorado elector not voting along party lines, his subsequent removal*, https://www.youtube.com/watch?v=0kMvOkfpONE (last visited on March 3, 2020; showing Mr. Baca's removal and replacement during the 2016 Electoral College).

SUMMARY OF ARGUMENT

This brief addresses the first question presented by Petitioner Colorado Department of State,[3] which this Court accepted as part of its grant of certiorari (*Colo. Dep't of State v. Baca*, 2020 U.S. LEXIS 530, 205 L. Ed. 2d 519 (2020)):

> Whether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion.

Colo. Pet. i.

Mr. Koller respectfully submits that the answer to this question should be "no," as Mr. Baca *personally* has suffered the requisite "injury in fact" to establish standing to sue Colorado thanks to its implementation of a "removal-and-replacement regime" on him. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); Colo. Pet. 32.[4]

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[3] Petitioner Colorado Department of State is hereafter referred to as "Colorado" throughout this brief to avoid confusion with Respondent State of Washington in these consolidated cases.

[4] This brief only addresses this standing question with respect to Mr. Baca, who was removed and replaced by Colorado. The brief does not specifically address the standing of Respondents Polly Baca and Robert Nemanich.

ARGUMENT

MR. BACA PERSONALLY HAS SUFFERED THE REQUISITE INJURY IN FACT TO ESTABLISH HIS STANDING TO SUE COLORADO

I. The Elements of Standing Are Met Here.

To "reach the merits of a case, an Article III court must have jurisdiction." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). Standing is an "'essential aspect'" of the jurisdiction requirement (*id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013))) and is "the threshold question in every federal case. . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As Colorado acknowledges, standing should be resolved *before* addressing the merits of Mr. Baca's claim. Colo. Reply Br. 1;[5] *Blumenthal v. Trump*, 2020 U.S. App. LEXIS 3765, *7 (D.C. Cir. 2020) ("our standing inquiry precedes our merits analysis").

The "standing question is whether the plaintiff has 'alleged such a *personal* stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498-99 (emphasis added; quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Mr. Baca has alleged the requisite personal stake in this case.

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[5] "Colo. Reply Br." in this brief refers to the reply brief Colorado filed in support of its cert. petition in case no. 19-518 on December 4, 2019.

There are three required elements for standing: "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Bethune-Hill*, 139 S. Ct. at 1950. Mr. Baca's concrete and particularized injuries are the loss of his position as presidential elector and of his considered votes in the Electoral College, as well as his referral for perjury prosecution. These injuries are directly traceable to Colorado's challenged conduct of removing him from office, refusing to count his votes, replacing him with a compliant elector, and referring him for prosecution. *See* Colo. Pet. 217a-219a. His injuries are redressable in his section 1983 action against Colorado by the award of the declaratory relief and intertwined nominal damages that he seeks. *See* Colo. Pet. 220a (Second Amended Complaint, Prayer for Relief); *Baca*, 935 F.3d at 911, 914-15 (Mr. Baca's request for a finding that Colorado violated his federally protected rights and his corresponding request for nominal damages together constitute a legally cognizable request for retrospective declaratory relief); *Carey v. Piphus*, 435 U.S. 247, 248, 266 (1978) (nominal damages are recoverable in a case brought under 42 U.S.C. § 1983); *Amnesty Int'l v. Battle*, 559 F.3d 1170, 1177 (11th Cir. 2009) (by alleging violation of constitutional rights, the plaintiff "established standing to bring a § 1983 claim for nominal damages even without alleging a specific injury flowing from those violations.").

II. Analysis of Mr. Baca's Allegations Confirms His Standing.

A. The Allegations of the Second Amended Complaint.

Because Mr. Baca's Second Amended Complaint was dismissed by the District Court under Federal Rule of Civil Procedure 12(b)(1) for lack of standing (*Baca*, 935 F.3d at 901), the Court should examine that complaint's allegations to assess standing. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689-90 (1973) (affirming the denial of a motion to dismiss the complaint "for failure to allege sufficient standing to bring this lawsuit," noting that the proper approach is to analyze the pleadings related to standing to see if their allegations, "if proved, would place them squarely among . . . persons injured in fact").

Mr. Baca's injuries are described in his Second Amended Complaint as follows:

> 54. Despite the new oath, Plaintiff Micheal Baca cast his ballot for John Kasich. Mr. Baca noted that the ballot was pre-printed with Hillary Clinton's name, he requested a new ballot, but his request was denied. Mr. Baca then crossed out Mrs. Clinton's name and wrote in Mr. Kasich's name with the undisputed intention that his ballot be counted for purposes of the final tally of Electoral College votes.
>
> 55. Despite the clear language of the 10th Circuit Court of Appeals indicating that Secretary

> [Wayne] Williams had no authority to remove an Elector once the Elector was seated – either because the statute did not so empower him or because the 12th Amendment would not permit it even if the statute did so empower him – Secretary Williams, acting on behalf of the Colorado Department of State, willfully removed Plaintiff Micheal Baca as an Elector, refused to count Mr. Baca's vote, and referred him to Colorado's Attorney General for criminal investigation and prosecution. Mr. Baca was replaced by a substitute Elector who cast her ballot for Mrs. Clinton. When the vote for Vice President was held, Mr. Baca cast a ballot for Mr. Kaine by writing Mr. Kaine's name on a pen box, which the Secretary, through a surrogate, retained but did not count.

Colo. Pet. 217a-218a. And:

> Defendant Department of State, acting through its Secretary Wayne Williams, deprived Plaintiffs [sic] Micheal Baca of a federally protected right when it removed him as an Elector when he voted for a candidate other than Hillary Clinton.

Id. at 219a. Finally, Mr. Baca's complaint alleges that, as a result of Colorado's actions described *supra*, he was deprived of his constitutional rights under Article II and the Twelfth Amendment. Pursuant to 42 U.S.C. § 1983, the complaint seeks a declaration that Colorado violated his federal rights and prays for nominal damages. Colo. Pet. 218a-220a.

B. Colorado Conflates Standing with the Merits.

Colorado frames the issue for review as follows:

> Whether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State *because they hold no constitutionally protected right to exercise discretion*.

Colo. Pet. i (emphasis added). The italicized portion improperly assumes that Mr. Baca's case fails on the merits. Assuming that a presidential elector has no constitutionally protected right to exercise discretion in their voting is tantamount to assuming that the State law at issue (or how Colorado interprets that law) is constitutional.

The correct approach is to assume the contrary: that the State law purporting to bind presidential electors to vote for the presidential and vice-presidential nominees of their party *is unconstitutional*, and to leave the issue of whether such a law is, in fact, unconstitutional to the merits analysis. *See Warth*, 422 U.S. at 501 ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

Colorado attempts to bring in a premature merits analysis by emphasizing that an "injury in fact" for standing purposes is defined as "an invasion of a

legally protected interest." Colo. Reply Br. 2 (citing *Lujan*, 504 U.S. at 560). Again, to establish standing, Mr. Baca needs to *allege* such an invasion; resolution of the issue of whether his invaded interest is in fact "legally protected" is for the merits analysis. *SCRAP*, 412 U.S. at 689-90. Mr. Baca has satisfied this requirement: he has alleged an invasion (removal as an elector, cancellation of his votes and referral for prosecution) of his legally protected interest (voting "for whomever [he saw] fit for President and Vice President of the United States" in the Electoral College). *See* Colo. Pet. 218a-219a.

In order to separate out the threshold standing analysis from the subsequent merits analysis, consider a hypothetical. What if Mr. Baca had been removed by Colorado from the office of elector after he had already cast his votes based on some other unconstitutional State law, rather than the one at issue. For example, what if Colorado had removed Mr. Baca after he had cast his votes because Colorado had discovered that he was Roman Catholic? And what if, in so doing, Colorado was enforcing a State law prohibiting Roman Catholics from being presidential electors? Would Mr. Baca have standing to sue Colorado for removing him as an elector and canceling his votes? If so, why could not Mr. Baca sue Colorado based on what must be assumed for standing purposes to be the unconstitutional law at issue in this case?

The parties in this case disagree on the merits: whether presidential electors have the right to vote as they see fit. Even if Colorado prevails on this issue,

that does not preclude a finding that Mr. Baca has standing. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) ("[O]ne must not 'confus[e] weakness on the merits with absence of Article III standing.'") (quoting *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011)); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (standing in no way depends on the merits of the claim). Further, the material facts do not appear to be in dispute and the constitutional question presented is hotly contested. *See* Colo. Pet. 7-8, 10-13; *see also Koller v. Harris*, 312 F.Supp.3d 814, 828-29 (N.D. Cal. 2018) (whether California's faithless elector statutes "were unconstitutional and could not be enforced" had not been "clearly-established" as there was an absence of "either controlling authority or a 'robust consensus' of persuasive authority placing the constitutional question beyond debate."). There can be no doubt that Mr. Baca's allegations are sufficiently plausible for standing purposes. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to avoid dismissal, a complaint must only allege "enough facts to state a claim to relief that is plausible on its face.").

III. The Characteristics of the Office of Presidential Elector Support Standing in This Case.

According to Colorado, a presidential elector would *never* have standing to sue their appointing State, even for removal, because of presidential electors' "unique characteristics." Colo. Reply Br. 5. Its

argument seems to be that since the role of elector does not offer or involve much of value or importance, Mr. Baca's removal from that role cannot be a basis for standing. An examination of the characteristics of the office of presidential elector reveals the contrary.

A. An Elector Holds a Very Important Office, Albeit One of Short Duration.

The position of presidential elector is an "office." *See* Colo. Rev. Stat. § 1-4-304, Presidential electors ("If any vacancy occurs in the office of a presidential elector. . . ."); *Ray v. Blair*, 343 U.S. 214, 221 n.8 (1952) (discussing pledges "directed toward primary candidates for the office of presidential elector"). The typical elector will hold their office for the six to seven weeks between their appointment and the convening of the Electoral College. *See* 3 U.S.C. §§ 1, 7. Despite the brevity of the office, it is of vital importance to our country. *See Burroughs v. United States*, 290 U.S. 534, 545 (1934) (in analyzing the "federal functions" and "duties in virtue of authority conferred by" the Constitution exercised by presidential electors, noting that the "importance of [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated").

The office's brevity has no bearing on the question of whether its deprivation suffices for standing purposes. The fact that a plaintiff's injury is small or,

similarly, that the thing lost was of brief duration, does not preclude standing.

> "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote; a $5 fine and costs; and a $1.50 poll tax. . . . [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." . . . The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

SCRAP, 412 U.S. at 689 n.14 (internal citations and quotation marks omitted); *see also Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243, 1248, 1252 (10th Cir. 2017) ("We find no support in our jurisprudence for the proposition that an injury must meet some threshold of pervasiveness to satisfy Article III," citing *SCRAP*, 412 U.S. at 689 n.14; an injury of brief duration can suffice for standing).

Indeed, the office of elector is of "transient existence" by design. *See* The Federalist No. 68 (Alexander Hamilton). Its brevity is a means of "not ma[king] the appointment of the President to depend on preexisting bodies of men, who might be tampered with

beforehand to prostitute their votes. . . ." *Id.* This transience does not diminish the importance of the office or of the injury created by removal from it.

Moreover, it is not accurate to say that electors have no "ongoing duties" during the relatively brief period of their service. *Cf.* Colo. Reply Br. 4. In the weeks before the Electoral College convenes, they have the opportunity to learn and analyze information important to their roles. For example, Mr. Koller "and other electors learned that the CIA [had] concluded with high confidence that Russia [had] sought to influence the [2016] U.S. election. . . ." *Koller v. Brown*, 224 F.Supp.3d at 874 (internal quotation marks omitted). This information was relevant to Mr. Koller as an elector because he was duty-bound to ensure "that no one be put into the office of the President or Vice-President that might be subject to foreign influence. . . ." *Id.* (internal quotation marks omitted); *see also* Colo. Pet. 213a-214a (Mr. Baca had "grave concerns" regarding Donald Trump's open flouting of "the requirements of the Foreign Emoluments Clause," as well as about evidence of "foreign interference in the presidential election" that came to light during "the time between the national election day and the date for the Electoral college voting").

Even the drafters of the Uniform Faithful Presidential Electors Act acknowledge that information and events that are relevant to the execution of the office of presidential elector can transpire or come to light during the electors' brief service:

> The Constitution is silent on a variety of other problems caused by deaths or, indeed, other sorts of arguably *disqualifying developments*. This is particularly notable *in the period after election day but before the electors have met and voted*. . . . This Act does not deal with the possibilities of death, disability or disqualification of a presidential or vice-presidential candidate before the electoral college meetings.

Uniform Faithful Presidential Electors Act (2010) at 4 (emphasis added).[6]

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[6] This Act was drafted in order "to foreclose the possibility of [elector] faithlessness" and "proposes a state-administered pledge of faithfulness . . . , with any attempt by an elector to submit a vote in violation of that pledge effectively constituting a resignation from the office of elector (section 7(c)). The draft Act provides a mechanism for filling a vacancy created for that reason. . . ." Uniform Faithful Presidential Electors Act (2010) at 4, https://www.uniformlaws.org/viewdocument/final-act-no-comments-31?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d&tab=librarydocuments (last visited on March 2, 2020).

Minnesota and several other States have adopted this uniform act. *See Abdurrahman v. Dayton*, 903 F.3d 813, 815 (8th Cir. 2018) ("Contrary to Minnesota's Uniform Faithful Presidential Electors Act, Minn. Stat. §§ 208.40-208.48, Abdurrahman attempted to vote for candidates other than those to whom he was pledged. By operation of law, Minnesota deemed Abdurrahman to have vacated his position as an elector and appointed a substitute elector."); Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, 2016 Cardozo L. Rev. 129, 130 n.1, 153-54, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868217 (last visited March 2, 2020).

B. Presidential Electors Typically Are Not Elected by Name.

Colorado contends that because its "voters did not elect Mr. Baca" by name, he has "no personal entitlement to his former position as an elector." Colo. Reply Br. 5. As is true in most States, the names of individual presidential electors do not appear on the ballot in Colorado – only the names of the presidential and vice-presidential candidates appear. There is no federal constitutional requirement that a State select electors in this fashion. *See Ray*, 343 U.S. at 227, 229 (a State has the "right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose" and noting the common practice of not printing "the names of the candidates for electors on the general election ballot"). The fact that Colorado chose to select Mr. Baca and other electors in this way did not eliminate his standing to challenge his removal from office.

The only authority Colorado cites in connection with its contention is *Raines v. Byrd*, 521 U.S. 811 (1997). *See* Colo. Reply Br. 4-5. Neither that case nor any other legislator standing case hinges on the fact that a legislator was personally elected (in the sense that they were elected by name). Those cases instead hinge on whether the legislator had alleged a *personal injury* as opposed to an institutional one.

The issue in *Raines* was whether six members of Congress had standing to challenge the constitutionality of the Line Item Veto Act. *Raines*, 521 U.S. at

813-14. The Court concluded that they lacked standing because they failed to allege "injury to themselves as individuals" and "the institutional injury they alleg[ed was] wholly abstract and widely dispersed. . . ." *Id.* at 829. In contrast, Mr. Baca does not rely on institutional injury, *i.e.*, on injury to the position of presidential elector or to the Electoral College as a whole. Unlike the members of Congress in *Raines*, Mr. Baca was "singled out for specially unfavorable treatment," to wit, removal from office, cancelation of his votes, and referral for possible felony prosecution. *Cf. Raines*, 521 U.S. at 821.

Similarly, Mr. Baca was "deprived of something to which [he] *personally* [was] entitled –" his office as elector after his appointment thereto, and his right to cast his votes as he saw fit. *Cf. Raines*, 521 U.S. at 821 (emphasis in original). Most tellingly, Mr. Baca's claim against Colorado would *not* be possessed by the elector who replaced him or by any other elector. *Cf. id.* (the alleged injury was institutional because it ran "with the Member's seat"; if "one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead.").

To the extent that the Court's legislator standing cases are applicable, Mr. Baca is in all pertinent respects in the same position as the legislator in *Powell v. McCormack*, 395 U.S. 486 (1969): both were removed from their federal positions, allegedly in violation of their constitutional rights.

The key difference between *Raines* and *Powell* on standing is that the legislators in *Raines* never lost their jobs but Representative Powell lost his. *Id.* at 489. That is precisely what Mr. Baca lost after he voted contrary to Colorado law – his position as elector. *See also Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968) (school board members had the requisite personal stake in the outcome of the litigation because they were "in the position of having to choose between violating their oath and taking a step – refusal to comply with [the statute] – that would be likely to bring their expulsion from office").[7]

C. Electors Do Not Receive Pay or Employee Benefits for Their Service.

Colorado makes much of the fact that electors are not employees, and thus they typically do not receive any renumeration or employee benefits for their important service. Colo. Reply. Br. 4. According to Colorado, the lack of employee-type benefits means that the position "comes with no meaningful benefit that might generate Article III standing if removed." Colo. Reply

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[7] Colorado attempts to distinguish *Powell* based on that legislator's loss of salary (Colo. Pet. 15), but the importance of congressional salary in *Powell* related to mootness, not standing. 395 U.S. at 496 ("We conclude that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress and thus find it unnecessary to determine whether the other issues have become moot."). The Court in *Raines* mentioned the legislator's loss of salary in *Powell*, but it never suggested that being excluded from the House was itself insufficient to establish Rep. Powell's standing. *Raines*, 521 U.S. at 821.

Br. 6. But there is no authority for the proposition that the sufficiency of an alleged injury in fact turns on whether it involves the loss of employee benefits or the like. Indeed, it is well established that pecuniary harm is not a prerequisite for standing. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-63 (1976) ("It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing."); *SCRAP*, 412 U.S. at 686 (for purposes of injury in fact, economic harm is not required).

D. Electors and Jurors Share Many of the Same Characteristics; Both Can Establish Standing to Challenge Removal.

Although a presidential elector is not completely analogous to any other State or federal official position or role, the role of a juror in a State court criminal trial is a close analog. In *Carter v. Jury Comm'n*, the Court held that persons alleging denial of the opportunity to serve on juries because of their race have standing in federal court to challenge that exclusion. 396 U.S. 320, 329-30 (1970). The Court should apply the rationale of *Carter* in holding that an elector removed from their position has a cognizable injury and Article III standing to seek redress for that removal.

Nearly all of the Court's cases concerning standing and jury service have concerned whether a criminal defendant has standing to challenge the exclusion of potential jurors in an indictment, conviction or both.

See Powers v. Ohio, 499 U.S. 400, 417-31 (1991) (Scalia, J., dissenting) (recounting the history of the Court's standing jurisprudence regarding jury service). Debate persists within the Court over the circumstances in which a criminal defendant has standing to challenge particular jurors' exclusion via peremptory challenges. *See*, *e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2273 (2019) (Thomas, J., dissenting) ("*Batson* [*v. Kentucky*, 476 U.S. 79 (1986)]'s focus on individual jurors' rights is wholly contrary to the rationale underlying peremptory challenges."). Still, in *Carter* itself, and since 1970, no justice of the Court has questioned whether a person can have Article III standing to challenge the wrongful denial of the opportunity to serve as a juror.

Electors and criminal trial jurors are appointed by States, but they both perform vital functions under the federal Constitution. An elector selects the President and Vice President. Art. II, sec. 1; Amend. XII. A juror in a criminal case helps fulfill the accused's "right to a speedy and public trial, by an impartial jury". Amend. VI.

Other similarities include the relatively brief duration of service and the lack of renumeration. An elector in 2020 will serve in that role for a period of 41 days. *See* 3 U.S.C. §§ 1, 7. Jury service varies greatly from case to case, but many jury trials are of similar duration. Electors and jurors typically receive only nominal pay, if any, for their service.

As is (or should be) the case with an elector removed from office on unconstitutional grounds, a

person unlawfully denied the opportunity to serve on a jury has suffered an injury sufficient to establish standing in federal court.

> People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here.

Carter, 396 U.S. at 329-30 (footnote omitted). The plaintiffs in *Carter* were African-Americans who alleged that they were excluded from jury rolls due to their race. *Id.* at 321-22. They claimed no injury apart from the loss of the opportunity to serve on a jury, and they sought only injunctive and declaratory relief. *Id.* at 322.

There can be no serious doubt that under *Carter*, a person removed from jury service *after being empaneled* and based on their race, would also have Article III standing to seek redress for that constitutional violation. Indeed, a removed juror would have an even greater injury in fact than the plaintiffs in *Carter*, who were denied the initial opportunity to serve as jurors. The time a removed juror would have spent in court would have been for naught, and the juror would suffer the indignity of removal, on racial grounds, in a public trial.

Colorado's arguments on a replaced elector's standing are in great tension with the rationale of

Carter. Nearly all of the characteristics of a presidential elector relied upon by Colorado in support of no standing are also true of a juror: an elector receives at most nominal compensation; carries out a singular duty; takes an oath; casts a ballot; possesses no physical office; serves no constituents; receives no employment benefits or training; and after completing their allotted task, their work is done. *See* Colo. Reply Br. 5-6.

A disturbing implication of Colorado's blanket rejection of elector standing is that persons denied the opportunity to serve as electors, or who are removed from their position, on account of race, would have no standing to challenge such racial discrimination. How anomalous it would be if a juror removed on account of race had a cognizable injury, but an elector who endures the very same racial injustice had no injury in fact. Of course, no individual person is entitled to serve on a particular jury (*Powers*, 499 U.S. at 409) or to be appointed an elector (*see Ray*, 343 U.S. at 227), but a person removed from serving in either role based on allegedly unconstitutional grounds endures a cognizable injury that the federal courts can redress. In both cases, the person so removed has lost the honor and privilege of performing a vital civic duty. *See Carter*, 396 U.S. at 330 (jury service may "be deemed a right, a privilege, or a duty"); *Powers*, 499 U.S. at 407-08 (jury service is "a valuable opportunity to participate in a process of government" and is an "honor and privilege").

Imagine if a court, county or State were to *replace* a juror based on a vote of guilty/not or liable/not. Of course, the litigant on the wrong side of that would have Article III standing to challenge the replacement. *But so would the replaced juror*. Their *jury service* would be nullified. They would have had no more practical opportunity to serve on a jury than the excluded plaintiffs in *Carter*. If you can lawfully be replaced based on your vote – whether elector or juror – then you were never really an elector or juror in any practical sense.

E. Determining Whether Electors Are State Officers Is Not Necessary for Assessing Standing Here.

The office of presidential elector defies categorization. The "men and women acting as presidential electors are selected by the people of [a particular State] to cast their votes, together with electors from the other States in the Union, for the highest elected Federal office, the presidency" and thus "presidential electors arguably serve both a State and a national purpose, and do not fit neatly within the construct of a 'state . . . office.'" *Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth*, 462 Mass. 538, 551 (2012) (quoting the Massachusetts election law at issue). Although particular electors are selected by the States, once selected, they indisputably exercise a vital *federal function* for our country as a whole. *See Burroughs*, 290 U.S. at 545 ("While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377,

379 [(1890)]), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States."); *Ray*, 343 U.S. at 224 ("The presidential electors exercise a federal function in balloting for President and Vice-President").

But Colorado insists that "determining whether a presidential elector is a state officer is an inherent component of assessing their standing to challenge state law." Colo. Reply Br. 3. Not so.[8] As discussed throughout this brief, the relevant inquiry is whether Mr. Baca has *personally* suffered the requisite injury in fact.

The case Colorado cites in support of its contention is *Smith v. Indiana*, 191 U.S. 138 (1903). Colo. Reply Br. 3. However, *Smith* makes clear that the issue is whether the party seeking to invoke federal jurisdiction has a "personal interest" in the litigation because he or she has *personally* suffered an injury in fact due to a State's enforcement of its laws. In *Smith*, the county auditor, undoubtedly a State officer, refused to allow "relators their exemption upon the ground of the unconstitutionality of" an "exemption law of Indiana." *Id.* at 148. The county auditor brought the lawsuit "for

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[8] Colorado asserts that Mr. Baca and fellow electors Polly Baca and Robert Nemanich "agree that the lower court split over whether electors qualify as state officers is 'real' and 'important' " (Colo. Reply Br. at 3), but Colorado neglects to clarify that this was in the context of a *merits* discussion regarding whether electors "are vested with individual discretion." Resp. Br. in Support of Cert. 14-15.

the purpose of testing the constitutionality of the law, and . . . the litigation was at least not an unfriendly one." *Id.* The auditor in *Smith* lacked standing not because he was a State officer, but because he had "no personal interest in the litigation" and was instead "testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers. . . ." *Id.* at 149. "He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take." *Id*.

In contrast, Mr. Baca did not sue Colorado in the interest of third persons, but in his own interest. He suffered real world negative consequences after he voted his conscience: his votes were nullified, he was removed from office, he was replaced by a new elector (who voted differently than he had), and he was referred for perjury prosecution.

Similarly, it does not follow from any of the cases that have declared electors to be State officers (or not to be federal officers) that Mr. Baca would lack standing in this case. For example, in *In re Green*, 134 U.S. 377 (1890), the Court declared that electors "are no more officers or agents of the United States than are members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress." *Id.* at 379. But the Court in *In re Green* said this in the context of analyzing whether the State of Virginia had the power to punish fraudulent voting *for* presidential electors (not voting *by* presidential electors). *Id.* at 380 (concluding that neither the federal

Constitution nor federal statutes related to electors prohibited the States from punishing such fraudulent voting). The opinion said nothing about presidential elector standing. *See also Walker v. United States* 93 F.2d 383, 388 (8th Cir. 1937) (declaring that electors are "officers of the state and not federal officers" in the context of determining whether the defendants had been charged with a State offense rather than a federal one when charged with conspiracy to injure and oppress citizens in their right to vote for presidential electors).

IV. No Case Has Held that An Appointed Presidential Elector Lacks Standing to Vindicate Their Right to Vote in the Electoral College.

Indeed, no case has held that an appointed presidential elector who has had their votes cancelled or who has been removed lacks standing to vindicate their rights. On the contrary, some cases appear to assume otherwise. In *Ray*, the Court's most recent word on presidential electors, there is no discussion whatsoever regarding standing even though, according to Colorado's position, the aspiring elector in that case should not have been able to clear the standing hurdle.

Edmund Blair, the plaintiff in *Ray*, was never appointed a presidential elector, and thus did not sue based on the loss of that position or based on cancellation of his votes. Instead, he sought to become a *candidate* for presidential elector in the Alabama

Democratic *primary*. 343 U.S. at 215. The Alabama Executive Committee of the Democratic Party would not allow Blair to become a candidate because he refused to take a pledge with particular wording. *Id.* Nowhere in the opinion is Blair's standing to challenge the constitutionality of the pledge discussed or questioned.

It is telling that although Colorado discusses *Ray* at length in its petition-stage briefs, it never does so in the context of its assertion that Mr. Baca lacks standing. But if Colorado is correct that Mr. Baca lacks standing – and, indeed, if Colorado is correct in its broader assertion that no presidential elector would ever have standing to sue their appointing State based on the unconstitutionality of its faithless elector laws – then *Ray* was incorrectly decided. That opinion should have been decided solely on the ground that the wannabe elector lacked standing.

If Mr. Baca has no Article III injury from the loss of his position after his appointment and from the nullification of his votes, then it must be that Blair also lacked standing. Blair had a much weaker claim to standing based on denial of the mere opportunity to be a *candidate* for the position of elector. 343 U.S. at 215. Admittedly, the parties and the Court did not even "drive by" the question of standing in *Ray*; thus, it does not serve as precedent on the question of elector standing. *See*, *e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006). Still, that standing was never even discussed in *Ray* reveals how important the Court and the parties considered the position of elector, and how they never doubted that an allegation of wrongful denial of the

opportunity to be an elector met the threshold Article III standing requirements.[9] *See also Abdurrahman*, 903 F.3d 813 (not discussing whether the plaintiff presidential elector, who had been removed based on his vote, had standing to challenge the constitutionality of Minnesota's Uniform Faithful Presidential Electors Act).

V. Regardless of How an Elector's Removal Is Characterized, It Creates an Injury in Fact.

Colorado says that removing an appointed elector from office "creates a claimed injury in only one sense

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[9] Had the Court in *Ray* not reached the merits due to lack of standing, the decision under review by the Alabama Supreme Court would have stood. *See Ray v. Blair*, 257 Ala. 151 (1952). That would have forced the Democratic Party of Alabama to accept Mr. Blair as a candidate for its slate of electors, despite his overt refusal to "vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program." *Id.* at 153. Mr. Blair, a Democratic elector in 1948 (*id.* at 157 (Brown, J., dissenting)) was in sympathy with, if not among, the Alabama delegates who walked out of the 1948 Democratic National Convention as Hubert Humphrey spoke of the pressing need "to get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights." Smithsonian Magazine, August 2018, available at https://www.smithsonianmag.com/history/1948-democratic-convention-878284/ (last visited March 2, 2020).

To be clear, Mr. Koller, a Democratic elector in 2008 and 2016, profoundly disagrees with the segregationist policy goals Mr. Blair supported, decades ago. Nonetheless, he agrees that Mr. Blair had standing to challenge his denial of the opportunity to serve as an elector, and had he been appointed, Mr. Blair had a constitutional right to vote his conscience.

– it denie[s the elector] the opportunity to cast an Electoral College ballot for the candidate of [their] choice. Due to this singular characteristic of the position of presidential elector, Mr. Baca's removal resulted in no other alleged injury." Colo. Reply Br. 4. But whether Mr. Baca's removal and the resulting denial of his right to cast his votes in the Electoral College are treated as a singular injury or whether Mr. Baca suffered multiple injuries due to Colorado's unconstitutional acts, only one injury in fact is required to satisfy standing.

The Uniform Faithful Presidential Electors Act also seeks to recharacterize removal by the State, but in a way that frames the elector's removal as voluntary resignation from the office. Under the Act, if an elector "presents a ballot marked in violation of the elector's pledge," then the elector is deemed by the State to have vacated the office, "creating a vacant position to be filled" pursuant to the Act. Section 7(c), Uniform Faithful Presidential Electors Act (2010) at 11; *see* note 6 *supra*. This re-labeling of removal appears to be an improper attempt to eliminate elector standing and/or to shoehorn removal into a State's appointment power under Article II. *See* Art. II, sec. 1, cl. 2.

In an overlapping lawsuit involving two of the 2016 electors from Colorado (Respondents Polly Baca and Robert Nemanich), a Colorado State district court did something very similar: it "ruled that an elector who fails to cast their ballot for the presidential candidate who won the State's popular vote would, as a matter of Colorado law [Colo. Rev. Stat. § 1-4-304(1)], have 'refus[ed] to act,' creating a vacancy in that elector's

office." Colo. Pet. 3. The Tenth Circuit correctly recognized that this recharacterization of removal would not cure the constitutional violation. *See Baca*, 935 F.3d at 903 and n.3 ("But if the Constitution does not allow states to directly remove an elector after voting has commenced, they cannot do so indirectly by statute.").

Lastly and similarly, Colorado makes an absurd argument that Mr. Baca's removal was "self-inflict[ed] harm." By voting his conscience in violation of Colorado's unconstitutional law, he made a "decision to ignore the state law prescribing [his] duties," bringing removal upon himself. *See* Colo. Reply Br. 7 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (respondents could not "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending")). Obviously, it was Colorado who created Mr. Baca's standing. If Colorado had not removed Mr. Baca and had honored his considered votes, he would not have had reason (or standing) to sue Colorado.

CONCLUSION

The Court should hold that Respondent Micheal Baca has Article III standing to challenge his removal and replacement as a presidential elector.

Respectfully submitted,

ANDREW J. DHUEY
Counsel of Record
BRIDGET A. CLARKE
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200
ajdhuey@comcast.net

MELODY A. KRAMER
KRAMER LAW OFFICE, INC.
4010 Sorrento Valley Blvd.,
Ste. 400
San Diego, CA 92121
(855) 835-5520

Counsel for Amicus Curiae

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