Nos. 19-465 & 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 Professor Michael T. Morley as *Amicus Curiae* in Support of Neither Party

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INTERESTS OF *AMICUS CURIAE*[1]

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

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the U.S. Court of Appeals for the Tenth Circuit in *Colorado Dep't of State v. Baca*. The Tenth Circuit abused its discretion in reaching the merits of Respondent

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. CT. R. 37.6, *amicus curiae* certifies that no counsel for a party authored the brief in whole or part, and no party, counsel for a party, or person other than *amicus*, its members, or its counsel made any monetary contributions to fund the preparation or submission of this brief. Florida State University College of Law provides financial support for faculty members' research and scholarship activities, which will help defray the cost of printing and filing this brief; the school is not a signatory to the brief and the views expressed here are those of *amicus curiae* alone.

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

Micheal Baca's constitutional challenge to Colorado's faithless elector law, since he lacked a valid cause of action under 42 U.S.C. § 1983. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The constitutional avoidance doctrine requires federal courts to avoid adjudicating unsettled constitutional issues when a case can be fully resolved on other, non-constitutional grounds. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). This principle applies even where the parties themselves have not raised the alternate, non-constitutional issue. *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam). The Tenth Circuit erred by adjudicating the merits of Respondent Baca's constitutional claim rather than dismissing it under § 1983.

Additionally, this Court has recognized that Congress has primary constitutional authority for creating damages remedies for constitutional violations. *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983). In *FDIC v. Meyer*, 510 U.S. 471, 486 (1994), this Court refused to create a cause of action to allow plaintiffs to sue federal agencies for damages for constitutional violations. By allowing Respondent Baca's claim to proceed, the Tenth Circuit allowed such a suit to proceed against a state agency, despite the lack of statutory authorization. Finally, by adjudicating Respondent Baca's constitutional challenge based on a non-existent cause of action, the Tenth Circuit issued a gratuitous advisory opinion. *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993); *see, e.g.*, *California v. San Pablo &*

T.R. Co., 149 U.S. 308, 314 (1893); *cf. Muskrat v. United States*, 219 U.S. 346, 348-51 (1911).

For these reasons, this Court should conclude that the Tenth Circuit abused its discretion in reaching the merits of Respondent Baca's constitutional claim. With the Tenth Circuit's ruling set aside, this Court should dismiss the writ of certiorari in *Chiafalo v. Washington* as improvidently granted, since there would no longer be a split in authority requiring resolution by this Court.

In the alternative, this Court should vacate both lower courts' judgments under the political question doctrine. The Constitution assigns Congress responsibility for counting electoral votes. *See* U.S. CONST. amend. XII; 3 U.S.C. § 15. As part of that authority, Congress is entitled to determine for itself the validity of electoral votes cast pursuant to states' faithless elector laws. *Cf. Nixon v. United States*, 506 U.S. 224 (1993); *Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972). Moreover, due to Congress' constitutional power to count electoral votes, a judicial ruling on the merits in this case creates the possibility that different branches of the federal government will reach different conclusions concerning the constitutionally required outcome of future presidential elections. The identity of the duly elected President, however, is an issue on which the nation has a compelling need to avoid "multifarious pronouncements by various departments." *Baker v. Carr*, 369 U.S. 186, 216 (1962).

Should this Court reach the merits of the faithless elector issue, however, it should affirm the Supreme Court of Washington's judgment in *Chiafalo* and

reverse the Tenth Circuit's judgment in *Baca*. Faithless elector laws are a valid implication of this Court's holding that a state legislature's decision to appoint presidential electors based on the outcome of a statewide popular vote triggers voters' fundamental constitutional right to vote. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Recognizing a "fundamental" constitutional right to vote for President would be a hollow formality if a state's electors could assert a constitutional prerogative to cast their electoral votes for a candidate who had lost the popular vote within that state—or potentially did not even participate in that state's presidential election at all.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TENTH CIRCUIT'S JUDGMENT IN *BACA* AND DISMISS ITS WRIT OF CERTIORARI IN *CHIAFALO* AS IMPROVIDENTLY GRANTED.

1. This Court should reverse the Tenth Circuit's judgment in *Baca*. The Tenth Circuit abused its discretion in adjudicating Respondent Micheal Baca's constitutional challenge to Colorado's faithless elector law, COLO. REV. STAT. § 1-4-304, because it is undisputed that he lacked a valid cause of action under 42 U.S.C. § 1983.

In *Baca*, Respondents' sole cause of action in the Second Amended Complaint—the operative pleading—was a claim under 42 U.S.C. § 1983 against

Petitioner Colorado Department of State. Baca Pet.App. 208, 218-20.[3] The complaint alleges that the Colorado Secretary of State violated Article II and the Twelfth Amendment of the U.S. Constitution by removing Respondent Baca "as an Elector when he voted for a candidate other than Hillary Clinton," who had received a plurality of the vote in Colorado during the 2016 Presidential Election. *Id*. at 219. The only Defendant in the case, the Colorado Department of State, is a "state agency." *Id*. at 208.

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

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

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

[3] "Baca Pet.App." refers to the Appendix accompanying the Petition for Certiorari in *Colorado Dep't of State v. Baca*.

Regents, 535 U.S. 613, 617 (2002) ("[A] State is not a 'person' against whom a § 1983 claim for money damages might be asserted.").[4]

The reach of § 1983 is not merely—as the Colorado Department of State characterizes it—a "defense." Baca Pet. at 5.[5] Rather, "the State and arms of the State . . . *are not subject to suit* under § 1983 in either federal court or state court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990) (emphasis added); *Morse v. Republican Party*, 517 U.S. 186, 221 n.34 (1996) (plurality op.) ("§ 1983 does not reach . . . the States themselves."); *Hilton v. S. Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 201 (1991) ("[A] State is not a 'person' as that term is used in § 1983, and is not suable under the statute . . . ."); *accord Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 708 (2003). Accordingly, a § 1983 suit "does not present a valid federal claim against the State." *Lapides*, 535 U.S. at 617. Even if a state waives its sovereign immunity, a plaintiff cannot use § 1983 "as a vehicle for redress" against a state. *Haywood v. Drown*, 556 U.S. 729, 734 n.4 (2009).

The Court emphasized the bounds of § 1983 in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), a strikingly similar case. The plaintiff was an Arizona state employee who alleged that an

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

[5] "Baca Pet." refers to the Petition for certiorari in *Colorado Dep't of State v. Baca*.

amendment to the state constitution declaring English to be the state's official language violated the U.S. Constitution. *Id*. at 48. Although earlier pleadings had named a range of defendants, *id*. at 49-50, the case was ultimately reduced to a § 1983 claim only against the Governor in her official capacity, *id*. at 68-69.

After filing her complaint, the plaintiff quit her job with no intent of returning to public service. *Id*. The Ninth Circuit held that her claim was not moot because the complaint could be read as seeking nominal damages. *Id*. at 60. This Court reversed, declaring, "The Ninth Circuit had no warrant to proceed as it did." *Id*. at 49. Once the plaintiff left her state job for the private sector, the state constitution's English-only provision no longer regulated her speech, mooting her claim for prospective relief. *Id*. at 68. This Court went on to hold that the plaintiff's claim for nominal damages could not save the case. Although the state had waived its sovereign immunity defense, "§ 1983 actions do not lie against a State." *Id*. at 69 (citing *Will*, 491 U.S. at 71). Consequently, this Court concluded that "the claim for relief the Ninth Circuit found sufficient to overcome mootness was *nonexistent*. . . . The stopper was that § 1983 creates no remedy against a State." *Id*. (emphasis added).

The Tenth Circuit attempted to distinguish *Arizonans for Official English* by construing it to mean that a plaintiff cannot prevent a case from becoming moot by belatedly adding an invalid statutory claim for damages. Baca Pet.App. 56. It pointed out that, unlike the plaintiff in *Arizonans for*

Official English, Respondents' complaint had always sought retrospective damages, including nominal damages. *Id.* at 57. Regardless of the timing of Respondents' § 1983 claims against the Colorado Department of State, however, the unavoidable fact is that Respondent Baca's cause of action is simply "nonexistent," *Arizonans for Official English*, 520 U.S. at 69, and "not . . . valid," *Lapides*, 535 U.S. at 617. As the Tenth Circuit's judgment in this case was premised solely on an invalid § 1983 claim against a state agency, this Court should reverse it.

2. The Tenth Circuit abused its discretion in adjudicating Respondent Baca's constitutional challenge despite his lack of a valid cause of action. The court ignored § 1983's limitations on the grounds that the Colorado Department of State had "expressly waived the argument" that the statute does not create a cause of action against states or state agencies. Baca Pet.App. 58, 69-70. The court explained that, since the "personhood" issue is non-jurisdictional, it could ignore Respondent Baca's admitted failure to satisfy that element of a § 1983 claim.

The Tenth Circuit's decision to gratuitously adjudicate an unsettled constitutional issue of national importance, despite having an undisputedly valid statutory basis for disposing of Respondent Baca's claim, flies in the face of the constitutional avoidance principle. A federal court has a special obligation to dispose of a case on statutory grounds when necessary to avoid "pass[ing] on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see also Alma*

Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136 (1946). Federal courts must "refus[e] to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties." *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam).

The Colorado Department of State's waiver of what it characterized as its § 1983 "personhood" defense is immaterial. "The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction. . . .'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1258 (2018) (Thomas, J., dissenting) ("[W]e cannot permit the Government's concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coordinate branch."). This Court has even invoked affirmative defenses such as collateral estoppel *sua sponte* when they offered a way to avoid reaching a constitutional issue. *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 386-87 (1960).

In addition to violating the constitutional avoidance principle, *see Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."), the Tenth Circuit's judgment also contravened separation-of-powers principles.

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

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

In *FDIC v. Meyer*, this Court refused to recognize an implied cause of action for damages against federal agencies for constitutional violations. 510 U.S. 471, 486 (1994) ("An extension of *Bivens* [*v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)] to agencies of the Federal Government is

not supported by the logic of *Bivens* itself."). *Meyer* held that the purpose of a *Bivens* claim was to deter individual federal officers. If plaintiffs could sue federal agencies directly, thereby avoiding individual officers' qualified immunity defenses, "the deterrent effects of the *Bivens* remedy would be lost." *Id*. at 485. Additionally, recognizing *Bivens* liability for federal agencies would "creat[e] a potentially enormous financial burden for the Federal Government" that only Congress may authorize. *Id*.

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

3. Yet another reason the Tenth Circuit erred in adjudicating the merits of Respondent Baca's claim is that it resulted in an unconstitutional advisory opinion in violation of Article III. Litigants may not stipulate to an incorrect interpretation of a federal statute to obtain a constitutional ruling, because it "would be difficult to characterize [such an opinion] as

anything but advisory." *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993); *see, e.g.*, *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893) (holding that "[n]o stipulation of parties or counsel" can empower a federal court to "decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules which cannot affect the result . . . in the case before it"); *cf. Muskrat v. United States*, 219 U.S. 346, 348-51 (1911).

Here, the Tenth Circuit allowed the litigants to extract a ruling on the constitutionality of Colorado's faithless elector law, even though Respondent Baca had undisputedly failed to bring a legally valid claim requiring the issue to be adjudicated. *Cf. Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (holding that a federal court "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies"). The Tenth Circuit's main rationale for adjudicating Respondent Baca's constitutional claim is that the Colorado Department of State "expressly waive[d] any argument in this case that it is not a person under § 1983." Baca Pet.App. 68.

This Court applies different standards to determine the validity of litigants' waivers of legal arguments than it does to stipulations of law. *Compare* Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 299-301 (2014) (discussing this Court's precedents regarding

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

In *U.S. Nat'l Bank v. Independent Insurance Agents of America*, 508 U.S. at 443, an Oregon bank had applied to the Comptroller of the Currency for permission to sell insurance nationwide. The Comptroller approved the request, citing 12 U.S.C. § 92 (1926 ed.). *U.S. Nat'l Bank*, 508 U.S. at 441. Section 92 had been enacted in 1916 and appeared in printed copies of the U.S. Code through 1946. *Id.* Starting in 1952, however, printed editions of the U.S. Code omitted § 92, stating that Congress had repealed the provision in 1918. *Id.* at 441-42. The Comptroller had nevertheless continued to "act[] on the

understanding that [§ 92] remain[ed] the law." *Id.* at 442.

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

This Court held that, even though none of the litigants had contested § 92's existence, the D.C. Circuit acted properly in *sua sponte* considering the issue. *Id.* at 446-47. While declining to address whether the court had an absolute duty to confirm the statute's continued validity, this Court ruled that "the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law." *Id.* at 448 (citing *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289 (1917)); *see also* Morley, *Avoiding Adversarial Adjudication*, *supra* at 304. Here, Respondent Baca's constitutional claim was predicted upon a statute which was indisputably inapplicable, since it does not authorize constitutional actions for damages against state agencies. As in *U.S. Nat'l Bank*, the Tenth Circuit should have exercised its discretion to refuse to "render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply

because the parties agree on it." *Id.* at 447 (quoting *Burke*, 504 U.S. at 246 (Scalia, J., concurring)).

In short, the only way the Tenth Circuit was able to address the constitutionality of Colorado's faithless elector law was by disregarding the constitutional avoidance principle, the separation-of-powers concerns that counsel against authorizing new constitutional causes of action, and Article III's prohibition on advisory opinions. Rather than exacerbating these problems by adjudicating the merits of Respondent Baca's claim, this Court instead should reverse the Tenth Circuit's judgment on § 1983 grounds.

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

Nor could Baca and his co-Respondents have saved this lawsuit by seeking a prospective injunction

against the Secretary in his official capacity under Ex Parte *Young*, 209 U.S. 123, 159-60 (1908). Any request for injunctive or declaratory relief concerning the 2016 election would have been moot as the election was over, Colorado's electoral votes have been cast, and Donald Trump was inaugurated as President. Moreover, the State ultimately decided not to prosecute Baca for violating the Faithless Elector Law, eliminating any "credible threat of future enforcement against him" based on his past actions. Baca Pet.App. 31. And neither Baca nor his co-Respondents could invoke the exception to the mootness doctrine for claims that are "capable of repetition, yet evading review." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). As the Tenth Circuit correctly found, they never alleged an intent to either run for the position of presidential elector again or cast their electoral votes in violation of the faithless elector law. Baca Pet.App. 30.

Consequently, Article III limited Respondent Baca to retrospective relief: damages. *Id.* at 38. Because § 1983 does not create a cause of action against the Colorado Department of State for damages, and Respondent Baca lacked a comparable alternate way of pursuing his constitutional challenge, this Court should reverse the Tenth Circuit's literally baseless ruling.

5. If this Court reverses the Tenth Circuit's ruling in *Baca*, it may then dismiss the writ of certiorari in *Chiafalo* as improvidently granted. This Court grants writs of certiorari primarily to resolve conflicts between different jurisdictions concerning important legal issues. *See* SUP. CT. R. 10; *Braxton v.*

United States, 500 U.S. 344, 347 (1991); *see, e.g.*, *Seling v. Young*, 531 U.S. 250, 260 (2001). Reversing the Tenth Circuit's ruling concerning Colorado's faithless elector law would eliminate its conflict with the Washington Supreme Court's ruling in *Chiafalo*, and thereby the need for this Court to review *Chiafalo*.

In addition to *Baca*, the Petitioners in *Chiafalo* claimed that the Washington Supreme Court's ruling conflicted with three state supreme court cases ranging from 72 to 124 years old. Chiafalo Pet. at 20-21. The first is an advisory opinion of the Alabama Supreme Court, *Opinion of Justices*, 34 So. 2d 598 (Ala. 1948) (cited by Chiafalo Pet. at 20-21). The Alabama Supreme Court later adopted that advisory opinion as an official judgment in *Ray v. Blair*, 57 So. 2d 395 (Ala. 1952), *rev'd*, 343 U.S. 214 (1952). This Court overturned that judgment in *Ray v. Blair*, 343 U.S. 214, 217-18, 231 (1952), holding that a state could require a nominee for presidential elector to pledge to support her party's nominees for President and Vice President. Thus, this Court has already rejected the legal underpinnings of *Opinion of Justices*.

The second case the *Chiafalo* Petitioners cite is *State* ex rel. *Beck v. Hummel*, 80 N.E.2d 899 (Ohio 1948) (cited by Chiafalo Pet. at 21). In that case, the State had excluded a slate of independent presidential electors from the general election ballot on the grounds they were Communists who supported the violent overthrow of the U.S. Government. *Id.* at 904. The Ohio Supreme Court reversed, holding that, although the electors were Communists, the

state had failed to establish that they sought to promote Communism through unlawful, violent means. *Id*. at 905.

The court further held that Ohio law required independent electors' names to be printed on the ballot, even though they had not held a national convention to nominate the presidential candidates they would support. *Id*. at 909. In the course of reaching this ruling, the Court mentioned in passing that, under the Constitution, "a presidential elector may vote for any person he pleases for president or vice-president" who meets the Constitution's qualifications. *Id*. at 908. It did not cite any authority or provide any explanation for this assertion; nor did it consider any counterarguments. No subsequent court has ever cited or reaffirmed this *dicta*, which pre-dates this Court's ruling in *Ray*. Perhaps most importantly, this ruling does not even appear to remain good law within the state of Ohio, as that state has adopted a faithless elector law. *See* OHIO REV. CODE § 3505.40 ("A presidential elector . . . shall . . . cast his electoral vote for the nominees for president and vice-president of the political party which certified him to the secretary of state as a presidential elector . . . ."). There is no need to resolve a conflict between the Washington Supreme Court's ruling in *Chiafalo* and a single, unsupported sentence of *dicta* from a 70-year-old opinion that does not even reflect current law within that state.

Finally, the *Chiafalo* Petitioners invoke *Breidenthal v. Edwards*, 46 P. 469 (Kan. 1896) (cited by Chiafalo Pet. at 21). That case also involved an issue of statutory interpretation. The Kansas

Supreme Court held that state law required the Secretary of State to forward the names of candidates for both President and presidential elector positions to county clerks to be printed on general election ballots. *Id.* at 470. In reaching this conclusion, the court declared that electors were "under no legal obligation" to vote for a particular presidential candidate, but instead could "vote for any eligible citizen of the United States." *Id.* That assertion was an accurate statement of Kansas law; the state did not (and does not) have a faithless elector provision.

While *Breidenthal* held that neither the Secretary of State nor a court could interfere with electors' "performance of their duties," *id.*, it did not address whether the state legislature could pass a faithless elector law, requiring electors to vote in accordance with the statewide popular vote. Moreover, in the century-and-a-quarter since the Kansas Supreme Court issued this opinion, no Kansas court has ever cited, reaffirmed, or even mentioned the case. Thus, there is no conflict between *Chiafalo* and *Breidenthal*, and certainly no need to address any potential latent tension that may exist between them.

Thus, if this Court reverses the Tenth Circuit's judgment in *Baca* due to Respondent Baca's lack of a valid cause of action, it may dismiss the writ of certiorari in *Chiafalo* as improvidently granted.

II. ALTERNATIVELY, THIS COURT SHOULD VACATE BOTH JUDGMENTS UNDER THE POLITICAL QUESTION DOCTRINE

This Court should vacate both the Washington Supreme Court's judgment in *Chiafalo* and the Tenth Circuit's judgment in *Baca* under the political question doctrine. The political question doctrine precludes courts from adjudicating an issue where, among other things, there exists either "a textually demonstrable constitutional commitment of the issue to a coordinate political department," or "the potential for embarrassment from multifarious pronouncements by various departments on the issue." *Baker v. Carr*, 369 U.S. 186, 216 (1962). Both of those considerations apply here.

The Constitution expressly commits responsibility for counting electoral votes to Congress. *See* U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President . . . ."); *cf. id.* art. II, § 1, cl. 3. The Electoral Count Act implements this constitutional responsibility, setting forth procedures through which the chambers of Congress may determine each electoral vote's validity. 3 U.S.C. § 15 (specifying that, if an objection is raised to certain electoral votes, the chambers of Congress must determine whether those votes were "regularly given by electors whose appointment has been lawfully certified"). Both the Constitution and the Electoral

Count Act designate Congress, rather than federal or state courts, as the ultimate judge of the validity of a state's electoral votes.

In *Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972), this Court held that Article I, § 5 of the Constitution grants each chamber of Congress authority to "make an independent final judgment" about the outcomes of congressional elections. Each chamber has the sole constitutional prerogative to "independently evaluat[e]" its elections, and is "free to accept or reject the apparent winner[s]" as determined by a state. *Id.* Congress' power to review and determine the validity of electoral votes under Article II is comparable. *Cf. Burroughs v. United States*, 290 U.S. 534, 545 (1934) (holding that Congress' power with regard to presidential elections is equivalent to its power over congressional elections); *see also Buckley v. Valeo*, 424 U.S. 1, 90, 131-32 (1976) (per curiam); *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.). A federal or state judicial ruling precluding enforcement of a state's faithless elector laws would interfere with Congress' ability to exercise its constitutional authority to independently evaluate the validity of electoral votes cast pursuant to such laws.

In *Nixon v. United States*, 506 U.S. 224 (1993), this Court declined to consider whether the Senate's procedure for removing a federal judge from office amounted to a trial under the Impeachment Trial Clause. It recognized that the clause grants the Senate "sole Power to *try* all Impeachments." *Id.* at 226 (quoting U.S. CONST. art. I, § 3, cl. 6 (emphasis

added)). The Court held that this provision textually commits the power to determine what procedures to use in trying impeachment cases to the Senate's sole discretion. It explained, "If the courts may review the actions of the Senate in order to determine whether that body 'tried' an impeached official, it is difficult to see how the Senate would be functioning . . . independently and without assistance or interference." *Id.* at 231 (quotation marks omitted). Likewise, here, a judicial ruling concerning the constitutionality of a state's faithless elector law would interfere with Congress' constitutional authority to independently count electoral votes. *Cf. Powell v. McCormack*, 395 U.S. 486, 548 (1969) (holding that Article I, § 5 reflects a "'textually demonstrable commitment' to Congress to judge only the qualifications [for Members of Congress] expressly set forth in the Constitution," but not create new ones).

The Constitution of 1789, even as amended by the Twelfth Amendment, reflects a pervasive structural commitment of ultimate responsibility for federal elections to politically accountable legislative entities: Congress and state legislatures. *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 90-92 (2016). This power includes the authority to determine the validity of electoral votes cast pursuant to states' faithless elector laws.

Moreover, allowing courts to adjudicate the constitutionality of such statutes raises a serious risk of "multifarious pronouncements by various departments" concerning the proper outcomes of presidential elections. *Baker*, 369 U.S. at 216.

However this Court rules concerning the validity of faithless elector laws, Congress may choose to adopt a contrary interpretation of the Constitution when exercising its authority to count electoral votes under the Twelfth Amendment and Electoral Count Act. Applying these different approaches, the legislative and judicial branches could reach different conclusions about the validity of certain electoral votes and, consequently, the candidate entitled to serve as President of the United States. Disagreement between the branches concerning the identity of the duly elected President would have profoundly destabilizing domestic, military, and foreign affairs implications. The "practical need for the United States to speak with one voice and ac[t] as one is particularly important" when it comes to announcing which presidential candidate is entitled to become the leader of the free world. *Zivotofsky v. Clinton*, 566 U.S. 189, 214 (2012) (Breyer, J., dissenting) (quotation marks omitted).

Although federal courts have waded into constitutional disputes concerning presidential elections in the past, *see, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), they lack any such established tradition of adjudicating the validity of electoral votes or the rules governing the Electoral College. Those issues have been textually committed to the chambers of Congress, and the need to avoid multifarious conclusions as to the identity of the President counsels strongly against judicial involvement.

III. INVALIDATING FAITHLESS ELECTOR LAWS WOULD LIKELY VIOLATE THE CONSTITUTIONAL RIGHT TO VOTE AS DEFINED BY THIS COURT IN THE TWENTIETH CENTURY.

The Tenth Circuit concluded that Colorado's faithless elector law is unconstitutional based primarily on an originalist analysis of Article II of the Constitution. Originalism is generally the appropriate approach to interpreting the Constitution—particularly its concrete, structural provisions. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1988).

The Constitution of 1789 did not create a constitutional right to vote in presidential elections. *See* U.S. CONST. art. II, § 1, cl. 3 (granting states plenary authority to determine the "Manner" in which they would appoint their presidential electors). And the Fourteenth Amendment was not originally understood as creating a judicially enforceable right to vote, either. *See* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2090-97 (2018); *see, e.g.*, *Guinn v. United States*, 238 U.S. 347, 362-63 (1915) (discussing the Fifteenth Amendment's limited original impact); *Pope v. Williams*, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments . . . ."), *abrogated by Dunn v. Blumstein*, 405 U.S. 330 (1972); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875); *United States v. Cruikshank*, 92 U.S. 542, 555

(1876) ("[T]he Constitution of the United States has not conferred the right of suffrage upon any one."); *cf. Colegrove v. Green*, 328 U.S. 549, 556 (1946) (cautioning courts to avoid entering the "political thicket" of congressional gerrymandering claims).

In the mid-Twentieth Century, in a line of cases tracing back to *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963), and culminating in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966), this Court recognized and dramatically expanded the scope of voting rights under the Constitution. *See* Morley, *Prophylactic Redistricting*, *supra* at 2098-2108. In *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam), the Court went on to hold, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . ." This Court has further explained that the right to vote includes not only the right to cast a ballot, but to have it be counted and given full effect. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Baker*, 369 U.S. at 208; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *United States v. Classic*, 313 U.S. 299, 322 (1941).

In many states, presidential electors' names do not even appear on the general election ballot. The billions of dollars devoted to presidential campaigns center around the presidential candidates themselves, not presidential electors. Most voters generally have no idea who the various candidates for presidential elector are, or what presidential candidates they support. Recognizing a "fundamental" constitutional right to vote for President, *Bush*, 531 U.S. at 104, would be a hollow

formality if a state could not prevent its electoral votes from being cast for a candidate who had lost the popular vote within that state—or potentially did not even participate in that state's presidential election.

In short, applying a strict originalist approach to the Electoral College would raise serious tensions with this Court's recognition of the fundamental constitutional right to vote in presidential elections. Rather than destabilizing the system of presidential elections that has evolved since the Founding Era, this Court should uphold the constitutionality of faithless elector laws, including whatever remedial mechanism the legislature, in its plenary authority, *see Bush*, 531 U.S. at 104; *McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892), deems most appropriate.

CONCLUSION

This Court may resolve this case in multiple ways. To avoid unnecessarily adjudicating a controversial constitutional question, it should reverse the judgment of the U.S. Court of Appeals for the Tenth Circuit in *Colorado Dep't of State v. Baca* due to Respondent Baca's lack of a valid § 1983 claim. Having eliminated the split in authority concerning faithless elector laws that *Baca* created, this Court should then dismiss the writ of certiorari in *Chiafalo v. Washington* as improvidently granted.

In the alternative, this Court should vacate both lower courts' judgments under the political question doctrine, on the grounds that the Constitution commits issues concerning the validity of presidential electors' votes to Congress. Should this Court choose

to reach the merits of these cases, however, it should reverse the Tenth Circuit's judgment in *Baca*, and affirm the judgment of the Supreme Court of Washington in *Chiafalo*.

Respectfully submitted,

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