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

BRIEF OF *AMICI CURIAE* PRESIDENTIAL ELECTORS MARY BETH CORSENTINO, STRATTON ROLLINS HEATH, JR., AND CELESTE LANDRY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are three individuals who served as presidential electors in Colorado in 2016.

Mary Beth Corsentino. Born and raised in Pueblo, Colorado, Ms. Corsentino has served as a presidential elector twice, in 1992 and in 2016. She attended the Electoral College in 2016 and, like every other presidential elector in Colorado, took an oath to cast her ballot for the candidate who received the most votes in the State in the last election. She followed through on that promise and witnessed first-hand the chaos that ensued when a fellow elector refused to abide by his oath or Colorado law.

Stratton Rollins Heath, Jr. Mr. Heath is an attorney and former Colorado State Senator, serving from 2009 to 2017. He also attended the 2016 Electoral College as a presidential elector, and he abided by both his oath and state law in casting his ballot. When Respondent Micheal Baca was removed from office, Mr. Heath nominated Celeste Landry to fill that vacancy.

Celeste Landry. Ms. Landry, a resident of Boulder, Colorado, ran as a candidate for elector in 2004 and again in 2016. At the 2016 Electoral College

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[1] The parties have provided written consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission.

meeting in Denver, she was chosen by a majority vote of the Colorado presidential electors after Micheal Baca was removed from office. Upon her appointment, she took an oath to vote for the candidate who won the statewide popular vote; after taking office, she fulfilled her duty and cast her ballot consistent with that oath.

SUMMARY OF ARGUMENT

This Court should reverse the Tenth Circuit's decision. The Nation's longstanding practice confirms that presidential electors have a circumscribed role in the electoral process: their sole function is to register the will of their appointing power. In Colorado, that requires electors to vote for the winner of the statewide popular vote. The three *amici*'s personal experience as presidential electors confirms this practice. The *amici* have always understood that as presidential electors, they were required to follow state law in casting their ballots, and they have exercised the powers of their office accordingly.

The decision below is also inconsistent with the democratic principles laid out in our country's founding documents. If affirmed, that decision would cast aside millions of votes in the next presidential election and consolidate all electoral power into the hands of a few people. It would also bar the States *and* the Federal Government from protecting the integrity of the electoral process, leaving them powerless to prevent the most obscene forms of fraud.

ARGUMENT

I. The Nation's longstanding practice confirms that presidential electors have a limited role in the electoral process.

The Nation's nearly unbroken practice over the last two hundred years has evinced a recognition that presidential electors play a circumscribed role in selecting the President and Vice President. The States may constitutionally impose limits to ensure electors vote the will of the power that appointed them.

A. This Court has consistently used historical practice as a guide in its constitutional interpretation.

Beginning with Chief Justice Marshall's seminal opinion in *McCulloch v. Maryland*, this Court has recognized that questions of constitutional interpretation may be "adjusted[] if not put to rest by the practice of government . . . ." 4 Wheat. 316, 401 (1918). Since then, the Court has "put significant weight upon historical practice" when interpreting the Constitution and its amendments. *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014).[2]

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[2] The Court has also endorsed James Madison's view that "it 'was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms [and] phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.'" *Noel Canning*, 573 U.S. at 525 (quoting Letter to Spencer Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)).

While the Court has noted "that no one acquires a vested or protected right in violation of the Constitution by long use," it has been quick to point out that "an unbroken practice . . . is not something to be lightly cast aside." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 677–78 (1970). For that reason, "'[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.'" *Noel Canning*, 573 U.S. at 524 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see also Schick v. Reed*, 419 U.S. 256, 266 (1974) ("[A]s observed by Mr. Justice Holmes: 'If a thing has been practiced for two hundred years by common consent, it will need a strong case' to overturn it.") (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). This principle has been affirmed again and again by the Court. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 743–44 (1999) ("Our historical analysis is supported by early congressional practice, which provides "contemporaneous and weighty evidence of the Constitution's meaning.") (citing *Printz v. United States*, 521 U.S. 898, 906 (1997)); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by s 1 of Art. II.").

The Court has relied on historical practice in a variety of contexts. It has done so in interpreting the Copyright Clause, *Golan v. Holder*, 565 U.S. 302, 320–24 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003); in interpreting the Census Clause, *Wisconsin v. City of New York*, 517 U.S. 1, 21 (1996); in examining the doctrine of preemption, *Jones v. Rath Packing Co.*, 430 U.S. 519, 524 (1977); and in defining the scope of the Pardon Clause, *Schick*, 419 U.S. at 266. The Court has done the same in interpreting amendments to the Constitution. Even in *District of Columbia v. Heller*, the Court relied on the history and understanding of the Second Amendment both before and after its ratification by analyzing post-ratification commentary, pre-Civil War case law, post-Civil War legislation, and post-Civil War commentators. 554 U.S. 570, 605–20 (2008) ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century."). The Establishment Clause has been given similar treatment. *E.g.*, *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

In short, the Court has long used historical practice as a guide in interpreting the text and structure of our Constitution.

B. Longstanding practice by electors affirms that they have always been bound by the power that appointed them.

It's undisputed that the Constitution grants plenary power to the States in the appointment of their electors. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."). To be sure, the States' practices have changed over the years, and "various modes of choosing the electors were pursued," but "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *McPherson v. Blacker*, 146 U.S. 1, 29 (1892).

But the States have long exercised authority over presidential electors beyond their mere appointment. In *Ray v. Blair*, this Court noted that "presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act *by authority of the state* that in turn receives its authority from the federal constitution." 343 U.S. 214, 224–25 (1952) (emphasis added). Moreover, "[h]istory teaches that the electors were expected to support the party nominees." *Id.* at 228. When the Constitution was first ratified, "[d]oubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive," but that understanding didn't last; the practice immediately shifted in response to the formation of political parties, and "experience soon demonstrated that, whether chosen

by the legislatures or by popular suffrage on general ticket or in districts, [electors] were so chosen *simply to register the will of the appointing power* in respect of a particular candidate." *Id.* at 228–29 & n.16 (citation omitted) (emphasis added); *see also* Note, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696, 700 (1065) ("Usage and a sense of moral coercion have reinforced the pressures of the political system to deny presidential electors any private choice in the casting of their electoral votes."). Confronted with the question of whether a state legislature could require electors to take a loyalty pledge, the *Ray* Court looked to historical practice and concluded that States are free to do so. "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party." *Ray*, 343 U.S. at 225. "Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge." *Id.* at 231.

Other courts around the country have likewise recognized the plenary authority of state legislatures to direct their electors. For example, California's supreme court held that electors "have no duties to perform which involve the exercise of judgment or discretion in the slightest degree," and that "[t]heir sole function is to perform a service which has come to be nothing more than clerical—to cast, certify, and transmit a vote already predetermined." *Spreckels v.*

Graham, 228 P. 1040, 1045 (Cal. 1924). The California court believed that "[i]t was originally supposed by the framers of our national Constitution that the electors would exercise an independent choice," but "in practice *so long established as to be recognized as part of our unwritten law*," they are now selected "simply to register the will of the appointing power in respect of a particular candidate. They are in effect no more than messengers whose sole duty it is to certify and transmit the election returns." *Id.* (citations omitted) (emphasis added).

Similarly, in the early twentieth century the Nebraska Supreme Court required the secretary of state to print the names of a new slate of elector candidates after the first slate declared that they would not vote for their party's candidates. *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912). In more recent years—with electors seeking unprecedented autonomy in the 2016 election—state and federal courts have looked to history and refused to grant electors the unfettered discretion they demand. *See, e.g.*, *Abdurrahman v. Dayton*, No. 16-CV-4279 (PAM/HB), 2016 WL 7428193, at *4 (D. Minn. Dec. 23, 2016) ("[S]ince the inception of the Electoral College, the elector's role has been severely limited."), *aff'd*, 903 F.3d 813 (8th Cir. 2018); *Lyman v. Baker*, 352 F. Supp. 3d 81, 88 (D. Mass. 2018) ("The Supreme Court long ago observed that 'from the formation of the government until now the practical construction of [this] clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.' ").

The Respondents do not dispute that the overwhelming practice of electors has been to transmit the will of their appointing power. Indeed, they note in their brief that "[b]y the end of the [nineteenth] century, practically everyone viewed electors as mere delegates." Op. Br. 49 (citation omitted). They instead point to a few limited exceptions where faithless electors were able to cast their ballot. *Id.* at 46–47. But these limited exceptions cannot swallow the rule. To begin with, none of these cases ever put into doubt the ultimate outcome of the election. But more importantly—and as the Colorado Department of State points out in its petition for writ of certiorari—before 2016, no elector had attempted to cast a faithless ballot in a jurisdiction that had a law authorizing the removal of such an elector. Pet. 31.

* * *

The *amici* would add their voices to this chorus. Importantly, their perspective isn't just that of another citizen, voter, or member of the general public; it's the perspective of three individuals who actually held the office and exercised those powers accordingly. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 610. As presidential electors, Ms. Corsentino, Mr. Heath, and Ms. Landry always felt an obligation, both legal and ethical, to represent the will of their fellow citizens and vote for the winner of the statewide popular vote. That sense of duty was only magnified when in 2016 they and their fellow Colorado electors swore an oath to abide by state law *mere minutes* before taking office.

The chaos caused by these faithless electors' attempts to go rogue extended far beyond the few fraught minutes it took for Micheal Baca to be removed and replaced by Ms. Landry. For weeks beforehand, the *amici* watched first-hand as state officials scrambled to deal with this unprecedented crisis. This only reinforced their view, formed through their own experience holding the office, that presidential electors must respect the will of the voters, and that the States may constitutionally require them to do so.

II. The Tenth Circuit's decision may destabilize our electoral system.

A. The decision is inconsistent with democratic principles.

This Court has recognized for decades that the right to vote, once granted, cannot be taken away. "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; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). Nor may the States or the Federal Government dilute or debase anyone's vote. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555–56 (1964); *United States v. Mosley*, 238 U.S. 383, 386 (1915). That is, the right to vote may be infringed upon "by wholly prohibiting the free exercise of the franchise," but it can be just as effectively "denied by a debasement or dilution of the weight of a citizen's vote." *Reynolds*, 377 U.S. at 555.

In *Reynolds* and its progeny, this Court has given life to the principle laid out in our founding document that governments derive "their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). This principle cannot be squared with the Tenth Circuit's decision, which would allow Colorado's nine individuals to independently decide, without consequence, which candidate receives the State's electoral votes. This system transmogrifies the popular vote into a mere advisory opinion and consolidates the electoral power of millions into a few (mostly unknown) individuals. The effect is even more striking if extended to all fifty States. In November 2016, nearly 137 million Americans cast a vote in the presidential election. *See 2016 November General Election Turnout Rates*, ELECT PROJECT (last updated Sept. 5, 2018), http://www.electproject.org/2016g. If affirmed, the Tenth Circuit's decision would permit 538 presidential electors, or a mere 0.00042 percent of all 2016 voters, to decide the election. For better or worse, most Americans don't believe that a few hundred people have the power to unilaterally appoint the President and Vice President. *See* Op. Br. 49 ("The Presidential Electors concede that our current political culture views the power of presidential electors differently . . . ."). The Court shouldn't ratify such an antidemocratic process.

B. The decision threatens the integrity of our federal elections.

The Tenth Circuit's decision also threatens the integrity of future elections, leaving the States and the Federal Government powerless to prevent the most obscene forms of fraud.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Dem. Central Comm.*, 489 U.S. 214, 231 (1989). Election integrity is vital to sustaining a strong democracy: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

If the Respondents' position is credited by this Court, the States will be constitutionally prohibited from preventing fraud or outright bribery at the next Electoral College. The Respondents make clear in their brief that in their view, presidential electors' discretion is unconstrained by any authority. They argue that "the Constitution vests in 'Electors' the judgment of how they will 'vote by Ballot,'" and that state officials are "exclud[ed] from the entire process of elector voting." Op. Br. 17, 38; *see also id.* at 41 ("[A] state may not interfere with an individual's performance of a federal function . . . ."). Lest there be any doubt, the Respondents go on to claim that electors have an "*unqualified core freedom of choice*," and that "neither

the states nor Congress has *any* power to constrain electoral freedom." *Id.* at 43–44 (citation omitted) (emphasis added). While the Respondents concede that the Constitution "denies presidential electors the freedom to vote for ineligible candidates" like those under 35 years of age, *id.* at 44, they do not make any other exception, including for fraud or bribery. That is, if the Respondents are right that "there can be no elector removal" at all, *id.* at 38, then the States could not remove an elector even if she publicly declared that she will trade her vote for a substantial cash payment; indeed, both the Federal Government and the States would be precluded from interfering with this "unqualified core freedom of choice," whether through removal beforehand or by meting out punishment after the fact. *Id.* at 43 (states are prohibited even from fining electors "any amount, large or small").

No other federal or state official has this kind of blanket security. Jurors may be removed. *E.g.*, *Remmer v. United States*, 347 U.S. 227, 229 (1954); *United States v. Brown*, 847 F.3d 655, 672 (11th Cir. 2020) ("Due process also requires 'a jury capable and willing to decide the case solely on the evidence before it . . . .' ") (citation omitted).[3] Members of Congress may be punished and expelled. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member.").

[3] Indeed, Federal and State laws prohibit jury tampering and jurors may be charged with perjury if they lie during *voir dire*. *See, e.g.*, 18 U.S.C. § 1503; § 18-8-609, C.R.S.

Other federal officials, from Article III judges to the President, may be impeached. U.S. CONST. art. I, § 3, cls. 6–7. At bottom, the Respondents are advocating for protections that aren't given to any other office in United States.

CONCLUSION

The Respondents' position in this case is an extreme one. They would strip the States of a necessary component of their Article II powers and give all presidential electors the discretion—unbounded and unchecked by any other person or institution—to vote however they please. To preserve the integrity of our electoral system, the States must have the power to ensure that presidential electors execute the will of the people who voted them into office. The Tenth Circuit's decision should be reversed.

Respectfully submitted,

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