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 United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. 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.

2. Does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Rule

Other Authorities

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") has long advocated and filed *amicus curiae* briefs in support of state sovereignty and election integrity. Eagle Forum ELDF has a direct and vital interest in this case to defend the integrity of our presidential elections using the Electoral College.

[1] All the parties have filed blanket consents with this Court to allow the submission of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The potential for improper influence would be overwhelming if electors were allowed to be faithless and States were powerless to prohibit switching votes in the Electoral College. In a world of wealthy Super PACs, trillion-dollar legislation, and potential foreign influence on elections, it would be naïve to think that corrupt attempts to influence electors would not occur in close presidential elections. A few faithless electors could have changed the outcome in 2000 from George W. Bush to Al Gore, and that episode was harrowing enough without the added uncertainty of whether electors might vote differently from what they pledged to do when they agreed to become electors.

The decision below mentions this glaring issue of corruption only once, in quoting Alexander Hamilton on the need to thwart it in every way possible. "[E]very practicable obstacle should be opposed to cabal, intrigue, and corruption." *Baca v. Colo. Dep't of State*, 935 F.3d 887, 953 (10th Cir. 2019) (quoting *Federalist No. 68*). Many trillions of dollars, not merely billions, ride on the outcome of a presidential election today, and the temptation would be too great and too easy for monied or foreign interests to attempt to sway electors in a close presidential election.

If affirmed, the decision below would destroy the Electoral College, as Respondent Micheal Baca publicly acknowledges. Surely such a fundamental change in how we elect our president would require a constitutional amendment, rather than be a secondary effect of litigation. The Tenth Circuit relies heavily on semantic arguments, 935 F.3d at 943-47, but logic compels that authority to require a pledge by electors implies an authority to enforce the pledge.

ARGUMENT

I. Allowing States to Bind Their Electors Is a Safeguard Against Improprieties in Electing the President.

"[A] page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). If there were ever a case which fits that oft-quoted observation to the T, it is this one.

The presidential election of 2000 is not too far in the past to forget the alarming chaos caused by its uncertainty. Backed up against the deadline for the Electoral College to meet, this Court put out the raging fire with a divided decision that held, *inter alia*, that the time had expired due to the deadlines of finalizing the selection of the next president. *Bush v. Gore*, 531 U.S. 98, 110 (2000). The constitutionally mandated process for our presidential elections is too time-sensitive to add another moving part of electors changing or swapping their votes contrary to their pledges.

An analogy to juries is apt. Improper influencing of juries occurs and new trials are ordered based on it. States should and do strictly limit improper influences on jurors. While jurors can vote their consciences to some extent, a full remedy is available if there is an improper influence: the verdict is vacated, and litigants obtain a new trial. This remedy is time-consuming but obviously necessary. *See, e.g.*, *Remmer v. United States*, 347 U.S. 227, 229-30 (1954) (vacating a jury verdict and ordering a hearing on the issue of an improper influence on a juror by the government by investigating him).

But no such remedy exists for an improper influence on electors in a presidential election. The winning candidate is sworn into office in roughly a month, which is virtually immediately in a legal timetable. There is no time to investigate, prosecute, convict, and correct. Any allegation of an improper influence would be strenuously opposed by the ostensibly victorious side, which could simply run out the clock and render the issue moot.

Essential to our continued political prosperity is the lack of an ongoing dispute about the legitimacy of a president after his inauguration. Everything that a president does which requires finality, such as signing legislation, commanding our military, and issuing pardons, depends on procedural finality to the Electoral College without any cloud of lingering suspicion. Allowing electors to vote however they like would increase the likelihood of improper influence of electors to alter the outcome.

In our two-party system, one side to a presidential election is inevitably the incumbent party in the White House, which has a vested interest in the outcome. The federal government is in no objective position to argue for or against the undoing of a close presidential election decided by electors. The States are ill-equipped to track the possibility of foreign influence on electors, or other kinds of corruption.

The result is an absence of a meaningful deterrent to improper influence of the Electoral College if States are unable to bind their electors. Future electors may expect, rightly or wrongly, that by switching to the winning side then they have nothing to fear from any investigation afterwards. Even if there were laws limiting the lobbying or conferring of benefits on

electors, some may expect that such laws would not be enforced by the winning candidate since it would only cast doubt on his legitimacy.

Experience provides an example of a group of legislators choosing the president in the election of 1824, when Andrew Jackson accused John Quincy Adams of benefiting from a "corrupt bargain" with Henry Clay to influence the voting by congressmen, a group comparable in size of the Electoral College. Robert E. Shapiro, "What Price Glory?", 42 Litigation 59, 61 (2016) ("[A]ll the supposed participants denied the deal, but it was undeniable that Clay's support for Adams in the House was decisive for Adams's victory, and Clay did become secretary of state."). But that was tame compared to the bargains which have occurred today. A mere U.S. Senate seat was allegedly thought to be worth millions by the person filling a vacancy, Illinois Governor Rod Blagojevich, who was convicted of bargaining for millions of dollars for his decision. *United States v. Blagojevich*, 794 F.3d 729, 733-34 (7th Cir. 2015). Picking a president would be worth more than a thousand times that in the eyes of some.

If the incumbent party is the beneficiary of an allegedly improper influence, then it has no incentive to swiftly investigate, and the wrongdoers may not see a meaningful deterrent. States other than that of the electors who switch their votes would lack jurisdiction to thoroughly investigate such wrongdoing. Some may genuinely dispute what would constitute an improper influence or bargain. *See id.* at 737-38 (noting the confusion about whether bargaining an appointment to a vacant Senate seat in exchange for a president's promise to appoint to the Cabinet would somehow be

improper). States need to be able to prohibit in an effective way even the possibility of such bargains.

The current system of State laws against the switching of votes by electors is an optimal approach for minimizing corrupt influences on such electors. Allowing electors to vote their consciences, as euphemistically described, means allowing them to be lobbied, pressured, and influenced. No amount of lawmaking could prevent all the devious ways that wrongdoing could be perpetrated to change the outcome of an American presidential election.

Electors who cast ballots in the presidential election are under jurisdiction in the United States at the time they vote, but they may not be the following day and many of their family members, friends, significant others, and business partners may not be under American jurisdiction either. It is impossible for an American prosecutor to uncover and bring to justice all the forms of corruption which could occur in influencing an elector who changes his vote for president, and to prove allegations soon enough.

The potential for misconduct opens like a floodgate if electors may vote however they like and accordingly be influenced by others in the process. Yet the tight schedule leaves too little time to prove any misconduct if it did occur. Suppose several electors switched their votes and the outcome, and were then investigated and found to have been improperly influenced? Would the president then become illegitimate a year or two into a presidency? Would "doxing" (publicizing personal information, including residential locations) of electors to influence or harass them be considered protected free speech under the First Amendment?

"If men were angels, no government would be necessary," James Madison famously wrote in *Federalist No. 51.* He continued:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id. (quoted by *Coleman v. Balkcom*, 451 U.S. 949, 962 (1981) (Marshall, J., dissenting)). States should safeguard against improper influences on electors, and the Constitution does not prevent States from doing so.

II. The Decision Below, if Affirmed, Would Destroy the Electoral College.

The aberrational faithless electors in the past were casting protest votes known by all not to affect the outcome. They were akin to a harmless form of civil disobedience, like spontaneously protesting without a permit. A lack of enforcement against such acts in no way supports a right to cast faithless votes which could change the outcome. Creation of such a right would destroy the Electoral College itself as we know it, and could destroy the significance of Election Day too, as organized, well-funded efforts to flip electors' votes would emerge.

Multiple lawsuits including this one, having undisclosed funding sources, have already proceeded in different jurisdictions in an apparent attempt to change by judicial activism our constitutional tradition for selecting our president.

Respondent Micheal Baca has been outspoken about his goals, which are contrary to the Electoral College itself. A Democrat, Baca said that "[i]t would have been an honor to vote for Clinton," so his vote for Republican John Kasich rather than Hillary Clinton was not really a vote of conscience, but something else. Adam Edelman, "A 'faithless elector' betrayed his state's voters. You won't believe why." NBC News (Jan. 23, 2020).[2] Respondent Micheal Baca was part of an organized effort to change the outcome of the election, and he contacted "dozens of other electors." *Id.*

Respondent Micheal Baca explained that:

> If we get the ruling [for elector freedom], I think it would have to result in a constitutional amendment. I won't be writing it, but maybe it'd be called the 'One Person, One Vote Amendment. A president elected purely by popular vote."

Id. (brackets in original).

Respondent Micheal Baca is correct that a ruling in his favor would, in effect, destroy the Electoral College. But surely such a major change in the Constitution and how we elect presidents would require a constitutional amendment on this issue, for which there has never been two-thirds support in Congress or three-fourths support among the States.

Far from a mere attempt to establish a right to vote one's conscience, this lawsuit is part of an elaborate scheme led by self-described "Hamilton Electors,"

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[2] https://www.nbcnews.com/politics/supreme-court/faithless-elector-betrayed-his-state-s-voters-you-won-t-n1120551 (viewed Apr. 6, 2020).

about whom much has been written. In 2016 they aspired to "unit[e] 135 Republican and 135 Democratic electors behind a moderate Republican candidate, thus securing that person's position as president with the required 270 votes." Lilly O'Donnell, "Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt," *The Atlantic* (Nov. 21, 2016).[3]

The more than 100 million Americans who voted for Donald Trump or Hillary Clinton in 2016 would surely be astounded to learn that a side deal among obscure electors could pick someone else to be president, who was not even on the ballot. Needless to say, it is unlikely that there would be any credibility or a smooth transition of power to a different candidate declared the winner by a small group of electors.

No amount of semantic argumentation can alter the logic that the recognized power by the States to require a pledge by electors necessarily implies the power to enforce the pledge. Stated another way, there is no constitutional right to break a pledge of this sort, and this Court should reject the attempt by Respondents to create a new constitutional right for them as electors to barter and switch their votes. "The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Moore v. E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

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[3] https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/ (viewed Apr. 7, 2020).

This Court has already upheld the constitutionality of requiring a pledge by electors:

> We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. 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.

Ray v. Blair, 343 U.S. 214, 231 (1952). Establishing the constitutionality of a pledge inherently supports the constitutionality of enforcing a pledge, and the Tenth Circuit committed reversible error in ruling otherwise. *Baca*, 935 F.3d at 933-36.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision below by the court of appeals should be reversed.

Respectfully submitted,

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