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 INTERESTED LEGAL SCHOLAR ROBERT M. HARDAWAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Robert M. Hardaway is a legal scholar and Professor of Law at the University of Denver Sturm College of Law. For the past forty years, he has researched, studied, analyzed, and written about the Electoral College. He is particularly concerned about the 2-1 U.S. Tenth Circuit Court of Appeal's decision that allows an elector to disregard a majority of the state's voters in a general presidential election in favor of an individual elector's fancy.

In this instance, elector Micheal Baca's ballot, if allowed to be cast, would have effectively disenfranchised 148,673 of the Colorado voters—one-ninth of the total 1,338,870 votes cast for the slate of electors delegated to cast their ballots for Democratic presidential candidate Hillary Clinton. Those citizens relied on a Colorado statute that requires electors to vote for the presidential candidate to whom the elector is pledged. When those voters cast their ballot for the Democratic presidential candidate's slate, they could not have known or expected Baca would attempt to instead deliberately and unilaterally violate Colorado law by writing on his ballot the name of another candidate from an entirely different party.

Although only a handful of electors have violated their oath of office in the past 150 years, with no effect on the final outcome of any presidential election, that

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[1] All parties have provided written blanket consent to the filing of *amicus* briefs. In accordance with rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus* or his counsel made a monetary contribution to fund the brief's preparation or submission.

changed in 2016. At least seven presidential electors violated their oath of office in that single election and cast a ballot that was tallied in the final count for someone other than the candidate for whom they pledged to vote.

The *amicus* fears civil commotion and unrest if an upcoming election results in a presidential appointment in defiance of citizens' votes because a handful of electors choose to refute their duty and cast their ballots without regard for the people who elected the slate. Particularly alarming is the notion, adopted by the Tenth Circuit below, that states are totally powerless under the Constitution to enact legislation that ensures electors' ballots accurately reflect the popular will of the voters who elected them.

Such a notion abrogates more than two hundred years of state law evolution, allocated to the states in the manner they choose under the Constitution as part and parcel of the federalist compact between those states and the federal government. States have largely agreed that they may impose certain restrictions on electors, including that the elector shall represent the majority of the state population's presidential choice. Notably, state laws since 1876 have delegated to the people directly the power to appoint electors. Unraveling that understanding could unwind the fabric of this nation.

SUMMARY OF THE ARGUMENT

The Framers established the Electoral College as a compromise to permit states to determine the method of appointing electors and apportioning the

electors' ballots absent any consensus at the 1787 Constitutional Convention. The respondents would have this Court hold electors maintain an unbridled right to choose the candidate of their preference following a popular election. However, the method of appointing an elector, including restrictions and appointments in light of vacancies, was left to the states.

With this directive in place, the states developed different methods of appointment and apportionment. Some allocated electoral votes by congressional district, some by the winner-take-all approach most common today. Certain states required oaths, while others still do not. Regardless of the variety of methods, each state action was approved by this Court when challenged. The constitutional right of the states to develop their own appointment and replacement practices, ensuring their citizens' votes are represented, has been affirmed.

The Tenth Circuit Court of Appeals' holding contradicts the Constitution and this Court's precedent by stripping the states of their constitutional right to place certain restrictions on elector preference. In so doing, the decision fails to account for the constitutional mandate to the states and the ensuing body of laws that have developed in accord with Article II, § 1, cl. 2. The better approach recognizes that states are free to adopt constitutional limits on electors' unmitigated choice.

If states are not permitted to place reasonable restrictions on their electors, an entire election could

be turned by one or two unfaithful electors. Electors could also be the subject of bribery or threat to capture their votes, leaving the election to caprice. A very real danger of tumult or unrest could result if electors thwarted the will of the citizens who elected them in favor of an elector's whim.

As Colorado's statute and similar statutes across the country are constitutional, this result can and should be avoided. The Tenth Circuit Court of Appeals' decision should be reversed.

ARGUMENT

I. The manner of appointing electors lies with the states, including replacing those electors.

Article II of the United States Constitution grants to each state in the union the plenary power to direct and provide by law the manner in which presidential electors are to be appointed: "[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors" equal to the total number of representatives and senators for that state. U.S. CONST. art. II, § 1, cl. 2. (emphasis added). The only restriction placed on the states' powers is that the elector cannot simultaneously be a senator, representative, or person holding an office of trust or profit for the United States. *Id.*

A. The Framers did not limit a state's appointment power.

Absent directing the question to the state legislature, the U.S. Constitution is entirely silent on the appointment of electors, and deliberately so. The Framers never achieved consensus regarding the role of electors during the Constitutional Convention. *See* 4 *The Writings of James Madison: The Journal of the Constitutional Convention* (G. Hunt ed. 1902). Thus, they wisely chose to leave that important question to state resolution.

James Madison believed that, at least in the absence of state regulation, the executive as the guardian of the people should be appointed by the people, which by 1876 every state had adopted. *Id.* at 3. Hamilton expressed his opinion in The Federalist No. 68 that the election might be made by "men most capable of analyzing the qualities adapted to the nation." The Federalist No. 68, 435 (Scigliano ed. 2000). However, Hamilton later clarified that he thought the "sense of the people should operate in the choice of the person to whom so important a trust was to be confided." Lucius Wilmerding, Jr., *The Electoral College*, 19 (1958).

The diversity of opinions highlights the open interpretation of electors' roles following the enactment of the U.S. Constitution. Historical abstracts citing various Framers' opinions as to what might be the best role for electors are therefore irrelevant to the issue at hand. The Framers may have had preferences, but those preferences were

intentionally omitted from the drafted language in the Constitution.

Hamilton and Madison did agree on one point with regard to the Electoral College: the bedrock principle of federalism. Madison proclaimed that "without the intervention of the state legislatures, the President of the United States *cannot be elected at all*." The Federalist No. 45, at 259 (James Madison) (Kesler Rossiter ed., 1999) (emphasis added). In his 1956 marathon oration before the U.S. Senate, future president John F. Kennedy cited Madison: "(T)his Government is not completely consolidated, nor is it entirely Federal. Who are the parties to it? The people—not the people comprising one great body, but the people composing 13 sovereignties." 102 Cong. Rec. 12, 5162 (1956) (comment of Sen. John F. Kennedy).

Hamilton also observed that in the Electoral College the Framers "have referred (the appointment of the President of the United States) in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment." The Federalist No. 68, at 381 (Alexander Hamilton) (Kesler Rossiter ed., 1999). In so doing, Hamilton noted one aspect of this system was "to afford as little opportunity as possible to tumult and disorder." *Id.* at 380.

B. This Court has confirmed the exclusive power of the states in the manner of appointment, including filling vacancies.

Since the adoption of the U.S. Constitution, all states have exercised their plenary powers to regulate the appointment of electors by appointing the people of their respective states to choose their electoral representation in the Electoral College. U.S. CONST. art. II, § 1, cl. 2. This Court reaffirmed that right in *McPherson v. Blacker*, 146 U.S. 1 (1892). Facing a challenge to Michigan's electoral appointment law, this Court affirmed that the appointment "power of the state is exclusive." *McPherson*, 146 U.S. at 35. That power includes the ability to fill any vacancy that may occur among a state's electors. *Id.* at 42.

The states have developed varied methods for appointing electors, filling vacancies, requiring an oath or pledge, and remedying rogue elector ballots. *Summary: State Laws Regarding Presidential Electors*, National Association of Secretaries of State (Nov. 2016). As electors rarely violate their pledges, and have yet to impact the ultimate outcome of a presidential election, some states have not felt it necessary to enact laws requiring the appointed electors to vote for a pledged candidate. Tara Ross, *The Indispensable Electoral College: How the Founders' Plan Saves Our Country From Mob Rule*, 118 (2017) (finding no more than 17 of 21,291 elector ballots from 1796 to 1996 were cast against instruction). In states that have not yet found it necessary to pass laws that require an elector abide the will of the people when casting his or her ballot,

electors are of course free to cast their ballots for whomever they please.

However, the majority of states have promulgated procedures or sanctions governing electors in order to protect their populace's right to choose the nation's executive, and the states may do so under the U.S. Constitution as part of that document's directive to them to manage the manner of selection. *See* U.S. Const. art. II, § 1, cl. 2. For example, Colorado provides an elector who violates his or her pledge will be removed and replaced with an alternate. COLO. REV. STAT. § 1-4-304(1). In Washington, the elector's vote will be counted, but he or she is subject to a $1,000 penalty for failing to fulfill his obligation under state law. WASH. REV. CODE § 29A.56.340. *McPherson* condones this under the power left to the states by the Constitution to choose the remedy for absent or violative electors.

C. Elector freedom of choice is properly limited by state law.

States may define the method of appointment, which includes the state's power under Article II to enact and enforce a law requiring an elector pledge to reflect the vote of the state's popular election. *Ray v. Blair*, 343 U.S. 214, 231 (1952). *Blair*, faced with the same Twelfth Amendment argument for complete elector discretion advocated by Baca, found "(n)either the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from a candidate in its primary a pledge of political conformity with the aims of the party." 343 U.S. at

225. *Blair* did not merely confirm the states' plenary power to define the method of appointing electors, but also debunked the Respondent's claim that the Twelfth Amendment, promulgated for the sole purpose of ensuring that both the president and vice president were elected on the same ticket, somehow accidentally deprived states of their Article II plenary powers to regulate the manner of appointing electors. *See id.*

Blair also settled the question of whether electors were state officers subject to state regulation, or federal officers subject to federal regulation. While conceding that electors do perform a federal function in the narrow sense of casting a vote for president, just as every citizen performs a federal function by voting for an electoral slate, presidential electors "are not federal officers or agents . . . ." *Id.* at 224. They are state officers subject to Article II regulation by the states. *Id.* Baca was required to comply with state law when he cast his ballot.

II. The power to fill a vacancy includes the power to replace an elector who refuses to act under state law.

A. Historical implementation underscores the power left to the states to implement electoral appointment and replacement.

States have regularly created their own practices to resolve electoral appointment and vacancies. For example, Michigan was left scouring the vicinity of its capital when six of its nineteen electors failed to appear on the appointed date and time to cast their

ballots in 1948. *Election of President and Vice President: Hearing on S.J. Res. 2 Before a Subcomm. of the Comm. on the Judiciary*, 81st Cong. 118-119, 119 n.6 (1949) (article of Prof. Joseph E. Kallenbach, associate professor, University of Michigan) (citing *Ann Arbor News*, Dec. 14, 1948, p. 3). The state hastened to replace the absentee electors with six people found wandering the immediate area. *Id.* One replacement elector had to be corrected when he inadvertently attempted to cast his ballot for Harry S. Truman, believing he was to adopt the winner of the *national* presidential election as opposed to the winner of the *state's* popular vote for that position, Thomas E. Dewey. *Id.*

There are rare instances throughout U.S. history of electors nullifying the votes of the state's general population. Also in the 1948 presidential election, one Tennessee elector determined to cast his ballot for Strom Thurmond instead of the Truman ticket, the slate on which he had been elected. 102 Cong. Rec. 12, 5147 (1956) (comment of Sen. John F. Kennedy). However, Tennessee did not have in 1948 any state statute requiring an elector to vote for the candidate of the party that nominated him, something it has since remedied. TENN. CODE § 2-15-104(c)(1); *see* 102 Cong. Rec. 12, 5157 (comment of Sen. John F. Kennedy).

Mississippi innovated its own method of appointing electors, allowing voters in the primary to select from a slate of electors pledged to vote for the national party candidate and another slate that was unpledged. *Gray v. Mississippi*, 233 F. Supp. 139, 141

(N.D. Miss. 1964). That method was constitutional because it did not violate the "unqualified language" of Article II, § 1. *Id.* at 142.

No electoral or democratic crisis has ever arisen in such circumstances because it has always been recognized that states have the power to adopt their own means and methods for filling electoral vacancies when an elector either fails to show up or to vote in accordance with state law. The state regulation of electors tempers the danger of a faithless elector abdicating his or her state agency. 2 Story on the Constitution, § 1463 (5th ed., 1891). Removal and replacement does not violate an elector's choice because the elector has not legally made a choice until the vote is registered and tabulated by the U.S. Senate and House of Representatives on January 6 of the year following a presidential election. 3 U.S.C. § 15.

Similarly, jurors are subject to certain requirements for service, and it is incumbent on that judge to immediately dismiss a juror that fails to meet those requirements and replace him or her with an alternate juror. *See* FED. R. OF CRIM. PRO. 24(c). If an ineligible juror has already submitted a guilty verdict, that conviction is invalid and unenforceable. *See Turner v. Louisiana*, 379 U.S. 466, 473-474 (1965) (reversing conviction rendered by ineligible jury). Replacing an elector who submits an invalid ballot is no different.

B. Colorado's replacement of Baca with an alternate elector complied with state and federal law.

A Colorado presidential elector must agree to "vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state" as a condition of service. COLO. REV. STAT. § 1-4-304(5). When an elector fails to meet this eligibility requirement, Colorado has the power to fill any vacancy that arises from "death, refusal to act, absence, or other cause . . . ." COLO. REV. STAT. § 1-4-304(1).

Despite the formal delegation of the appointment power to the states, and Colorado's requirement pursuant to that delegation that an elector cast his or her ballot for the candidate who has received the most votes in the popular election, Baca chose to ignore his legal obligation to the Colorado voters during the 2016 presidential election. An appointed elector to Colorado's Democratic slate, Baca decided unilaterally to betray the Colorado voter's public trust. Apparently believing the violation would have no repercussions, Baca refused to cast his ballot in accord with the majority of the state's voters, as he had pledged to do.

His faithlessness, if permitted, would have nullified and effectively disenfranchised one-ninth of the Colorado voters who had cast their votes for the electoral slate pledged to Clinton—a total of 148,763 popular votes cast for her in reliance on both the U.S.

Constitution and Colorado law. The result would have been unequal suffrage, not condoned by a Constitution that compels equality among voters. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court's] decisions.").

III. The Tenth Circuit departed from this Court's precedent when it constrained the state's power to replace an elector who violated state law.

The Tenth Circuit held that the Constitution limits a state's right to replace an elector who casts a ballot in violation of state law, declaring that even when an elector refuses to meet the state qualifications for that position "there is nothing in the federal Constitution that allows the State to remove that elector or to nullify his votes." Pet. App. 131. The decision conflicts with this Court's precedent. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-795 (1995) (collecting relevant historical materials supporting the protection of the people's right to select the person governing them); *Blair*, 343 U.S. at 230 ("Surely one may voluntarily assume obligations to vote for a certain candidate"); *McPherson*, 146 U.S. at 25 (state's appointment power under the Constitution "cannot be held to operate as a limitation on that power itself"); *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) ("Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more

officers or agents of the United States than . . . the people of the States when acting as electors of representatives in congress.").

The Tenth Circuit Court of Appeal's broke from this precedent when it held the state could not assure an elector's ballot complied with a constitutional state legislative requirement. To deny Colorado, or any other state, the right to safeguard the populace's selection in favor of an elector's caprice unconstitutionally disenfranchises the voters in that election. *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws . . . .").

A. The Washington Supreme Court's decision—at odds with the 10th Circuit—held legislation providing recourse against rogue electors constitutional.

In *In re Guerra, et al.*, 441 P.3d 807 (Wash. 2019), the Supreme Court of Washington rejected the supposition that the states hold no rights to affix obligations to an elector's ballot in accordance with his or her sworn pledge. *In re Guerra*, 441 P.3d at 815-16. That decision held that an elector's power to cast a ballot comes from the state, and the federal constitutional provisions stated in art. II, § 1, the First Amendment, and the Twelfth Amendment did not prohibit the state from imposing a fine if an elector violated the pledge. *Id.* at 816-817.

In so doing, Washington rejected similar arguments to those adopted by the Tenth Circuit. *See*

id. It also rejected the Tenth Circuit's holding that an elector is a free agent, able to select whomever he or she chooses regardless of state law. Washington's highest court repudiated the incongruous notion that a state could constitutionally enact laws regulating appointment and replacement of electors, while simultaneously rendering the states toothless to enforce such laws. *Id.* at 817. Like *Blair*, Washington refuted the notion that the Twelfth Amendment, the purpose of which was nothing more than to require that electors vote for the president and vice president separately, somehow abrogated a state's plenary power under Article II to regulate the qualifications of electors and enforce those regulations. *Id.* at 815-816; *see* U.S. CONST. am. XII; *Blair*, 343 U.S. at 228.

Washington's well-reasoned approach accounts for the historical development of state legislation regarding the Electoral College and the commensurate implementation. As early as 1788, New Hampshire had promulgated legislation appointing electors by direct election of the state's eligible voters. *Laws, New Hampshire*, 169 (Adopted Nov. 12, 1788, codified 1789). By 1832, all states but North Carolina had adopted similar statues providing for direct popular election of the electors. ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 46 (1994). Later, a Senate committee pronounced in 1874 that "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states." Staff of S. Subcomm. on Constitutional Amends. of the Judiciary, 87th Cong., *The Electoral College,*

Operation and Effect of the Proposed Amends. to the Const. of the U.S., 13 (Comm. Print 1961). The state's power to determine the proper method for elector replacement is also federally codified. 3 U.S.C. § 4.

B. This contradiction should be reconciled in favor of Colorado.

In order to effectuate the popular vote, the majority of states and the District of Columbia require electors to pledge to vote for a party's presidential and vice-presidential nominee as part of the appointment process. Via this method, "[t]he multitude of American citizens speaks through the presidential electors." Herbert W. Horwill, *The Usages of the Am. Const.*, 8 (1925). The electors were not intended to make decisions absent control of the populace. Wilmerding, *The Electoral College*, 19.

When Baca revealed that he did not meet the statutory requirements for electors, he created a vacancy. Colorado acted to correct the violation by replacing an illegal ballot under state law, and the elector who had cast that ballot, with an alternate elector. The alternate elector cast a valid ballot that complied with state law. While the Tenth Circuit found the replacement unconstitutional, the Washington Supreme Court applied the same federal provisions and found state sanctions for an elector's faithlessness were appropriate.

Taken at face value, the Tenth Circuit Court of Appeal's holding would prevent a state from filling a vacancy created by death, disability, or even refusal to serve pursuant to the state law because the

Constitution does not specifically provide for such. Regardless, the Washington Supreme Court pronounced the better understanding: a state is free to place requirements on electors as part of the "plenary power to direct the manner and mode of appointment of electors to the Electoral College." *In re Guerra*, 441 P.3d at 817.

The Tenth Circuit announced a rule that ignores these realities, not leaving room to remove an elector found to be a citizen of a different state, underage, or otherwise ineligible. But the state legislature is within its manner of appointment to establish procedures for filling an electoral vacancy, such as those that occur when an elector fails to fulfill the duties of the appointment. U.S. CONST. art. II, § 1, cl. 2. Unless state law conflicts with a federal constitutional provision, not so here, the state reserves the right to appoint and replace electors. *See* Uniform Faithful Presidential Electors Act, § 7(b) (2010) (unless otherwise established in state law, state may not accept ballot marked in violation of elector's pledge).

IV. The validity of presidential elections is predicated on an understanding that the electors will act for the people.

The United States is "at bottom a government by the people." *Bute v. People of State of Ill.*, 333 U.S. 640, 653 (1948). As early as the 1787 Constitutional Convention, one delegate noted that "[t]he people will not readily subscribe to the National Constitution if it should subject them to be disenfranchised." 4 *The*

Writings of James Madison: The Journal of the Constitutional Convention, 117 (G. Hunt ed. 1902) (comment of delegate Oliver Ellsworth). That has not changed.

A. Certainty in elections and absence of corruption is a paramount concern.

In the aftermath of the 2016 general presidential election, the country experienced the spectacle of electors receiving death threats, being individually campaigned to vote for a candidate not the winner of their state's general election, and collecting offers for monetary compensation in exchange for their faithless ballots. Alexandra King, *Electoral College Voter: I'm getting death threats*, CNN (Nov. 30, 2016, 4:27 PM) https://www.cnn.com/2016/11/30/politics/banerian-death-threats-cnntv/index.html; Ruth Sherlock, *Thousands send letters, death threats, to pressure Electoral College to avert outcome of presidential election*, The Telegraph (Dec. 19, 2016 1:35 AM), https://www.telegraph.co.uk/news/2016/12/19/thousands-send-letters-death-threats-pressure-electoral-college/. In the end, seven electors broke from their state's popular vote to cast a ballot for someone not chosen by the people. Eric M. Johnson, Jon Herskovitz, *Trump wins Electoral College vote; a few electors break ranks*, Reuters (Dec. 18, 2019 11:04 PM) https://www.reuters.com/article/us-usa-election-electoralcollege-idUSKBN1480FQ (four in Washington, two in Texas, and one in Hawaii).

The final 2016 Electoral College result was 304 to 227, with 270 ballots being the necessary tally to

declare victory. *Id.* Yet even with a sizeable margin of electoral votes padding the electoral victory, bribery was attempted. *See* Sherlock, https://www.telegraph.co.uk/news/2016/12/19/thousands-send-letters-death-threats-pressure-electoral-college/.

Bribery constitutes an especially alarming issue during a close presidential election, as it may induce an elector to vote for someone other than the candidate to whom he or she is pledged. Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, PUBLIC CHOICE 123:1, 2 n.6 (2005). An elector could disregard the state's majority in November, instead casting a purchased ballot.

An open season on electors based on the belief they have an uninhibited right to cast a ballot for the candidate of their choosing could nullify the general election in future years. Currently, the executive is believed to be elected on the first Tuesday in November quadrennially. Horwill, *The Usages of the Am. Const.*, 39-40. If electors were not beholden to the state that appoints them and the laws governing that appointment, any election would remain in question until the electors assembled to cast ballots or the final votes were tallied the following January. *See id.*

Clearly Hamilton did not intend this result when he said electors exist to avoid "tumult and disorder" that could result from other methods of election. *See* The Federalist No. 68 (Alexander Hamilton) 435 (Scigliano ed. 2000). In that writing, he envisioned the Electoral College assembly would prevent cabal

and corruption through independent judgment, but the historical reality shows the state's limitation on elector qualifications more effectively circumvents corruption and disorder. *See id.* At 436-37. Political parties generally have few desired attributes for an elector appointed to the electoral slate, with one author and elector noting his intellect and sound judgment had nothing to do with his appointment—the funds he contributed to the party supplied his main credentials. James A. Michener, *Presidential Lottery: The Reckless Gamble in Our Electoral System*, 9 (1969). In light of the potential pitfalls that otherwise could ensnare electors, reasonable measures to ensure Electoral College balloting conforms to election results are appropriate under article II, section 1.

B. But for elector adherence to the popular vote as required by state law, millions of voters would be effectively disenfranchised.

Elector independence in violation of the popular vote could also create its own election cycle. A member of the Electoral College or group of members could agree to nullify the people's vote. The country has already experienced direct campaigning of the electors, as occurred to varying degrees in 2016, with the goal of robbing the people of their preferred candidate. The result would be untenable to the citizens of this country.

The concept is not farfetched. In 2000, the presidential election was decided by a margin of two

electoral votes. Ross, *The Indispensable Electoral College*, 170. Had but one or two electors chosen to cast their ballots for a candidate not selected by the general population of the states that appointed them, no candidate would have had the electoral votes necessary to claim victory. Colorado alone had three electors attempt to exercise prerogative to cast a faithless ballot in 2016, the respondents in this case, which could have turned a close election.

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court held "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has proscribed is fundamental . . . ." *Bush*, 531 U.S. at 104. States may not value the vote of one citizen over another—but that would occur if electors exercise unfettered independence. *See id.* at 104-105. By requiring electors to fulfill their obligation to the public or be replaced, states forbid arbitrary and disparate treatment of the voting public. *See id.* at 105.

The election of 2000 is not alone. The elections of 1876, 1884, 1916, and 2004, all resulted in the president-elect receiving fewer than 55 percent of the Electoral College votes. Ross, *The Indispensable Electoral College*, 159-171. If electors had been free to cast ballots in breach of state legislation that marries electors' ballots to the will of the people, each of these elections could have rewritten history.

Absent state protection, electors and not the general populace would have an outsized influence. The Electoral College would transform from a

formality into the body to which candidates direct their attention and platforms when seeking election or reelection. The voting public's voice would be muffled or muted in order to pander to a slate of men and women whose main purpose previously was to ratify the will of the people.

The Constitution directs states to promulgate legislation regarding the manner of appointing electors. If a state as part of that promulgation imposes reasonable restrictions constricting elector choice, the state is within its rights to do so.

CONCLUSION

The *amicus* respectfully requests that this Court reverse the decision of Tenth Circuit Court of Appeals and hold the Colorado statute at issue constitutional.

Respectfully submitted,

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