No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF AMICUS CURIAE PEARL O. MADRIAL IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Amicus Curiae PEARL O. MADRIAL is a citizen of the United States of America, and a resident of the State of North Carolina. She is a registered voter for national, state and local offices. Amicus seeks to uphold the Constitution's guarantee of free and fair elections for all Americans. Amicus also seeks to uphold the rights of all American citizens, herself included, to vote for, and of political parties to nominate, the candidate of their choice in federal elections. Amicus has a great interest in this case, to prevent the dilution of her vote, and of others, for the Electors and popular vote for the Presidency of the United States in which the Colorado Supreme Court has unconstitutionally excluded a candidate for the Presidency from the ballot in the Republican Party's upcoming primary election and in the State's general election.[1]

She has an associational interest in this case. The Equal Protection Clause prohibits any state from diluting the weight of the votes of certain voters merely because of where they reside. Coupled with the over-riding federal exclusivity of federal Electors under the Twelfth Amendment to the U.S. Constitution, the Colorado Supreme Court is attempting to hinder and impair the rights of the upcoming federal presidential election national voters and the Electors

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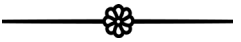
[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from the amicus curiae and her counsel, made any monetary contribution toward the preparation or submission of this brief. All parties were notified of amicus' intent to file this brief at least 7 days before its due date.

to vote at their constitutional discretion, to unjustly impact the weight of all American voters in the upcoming presidential election thereby causing an entire state to impermissibly affect the national "majority of all of the states to make the choice for the Presidency."



REASONS FOR REVERSING THE DECISION OF THE COLORADO SUPREME COURT

I. The Constitution Provides the Fundamental Right to Vote in Federal Elections and That Right Is Protected Against Dilution Involving Any State's Action.

The Amicus argues that her vote for both her chosen candidate on her local level and the vote of the total number of national Electors for her candidate of choice is now at a decided disadvantage. This is an impermissible alienation of a candidate's constituency. "[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Shaw v. Reno*, 509 U.S. 630, 640-41 (1993), quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (emphasis added). The Constitution provides the right to vote in federal elections and that right is protected against dilution involving state action, as here, under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment to the U.S. Constitution, Section 1, provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; (and Clause 5) . . . nor deny to any

person within its jurisdiction the equal protection of the laws." As Justice Stewart observed in *United States v. Guest*, 383 U.S. at 755, 86 S.Ct. at 1176, "[i]t is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority." There is an involvement in the national election for the President with which this action is concerned by a group acting "under color" of state law. "Under color" of law has been construed as identical with and as representing state action. *United States v. Price*, 383 U.S. at 794, n. 7, 86 S.Ct. 1152. It may be represented by action taken directly under a state statute or by a state official acting "under color" of his office. *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031 (1941); *Screws v. United States*, 325 U.S. 91, 107-113, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). In this matter, the Colorado Supreme Court is certainly acting under color of state law.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), this Court decided that the right to vote for national officers is a fundamental right. The "vote" has best been described statutorily in 52 U.S.C. § 10101(e) in relevant part, as including:

> all action necessary to make a vote effective including, but not limited to, registration or other action required by State law pre-requisite to voting, casting a ballot, and having such ballot counted and <u>included in the appropriate totals of votes cast with respect to candidates for public office</u> and propositions for which votes are received in an election;

[emphasis added].

> There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from that one has under the other.

Cruikshank, *supra*, at para. 2. The Court continues that [the Fourteenth Amendment] "simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." *Cruikshank*, *supra*, at para. 8.

Colorado does not have a compelling state interest to 1) destroy the impact of voters in Colorado not having their candidate of choice on the ballot and to 2) impact voters in other states through the cumulative effect of national presidential voting and on the total number of Electors to dilute the weight of the national voters. This Court should apply strict scrutiny to Colorado's claim.

II. It Is No Obstacle That the Amicus Curiae Lives in Another State.

It is of no consequence that the Amicus lives in another state. She has a weighted associational interest in this case. *See, Clingman v. Beaver*, 544 U.S. 581, 611 n.1 (2005). The Amicus's right to vote encompasses both the right to cast her vote and the right to have the weight of that vote counted without dilution.

There is the fact that her vote for the Party Electors of her state must be tallied along with, or against, the Electors of the other States to form a majority of "all of the states" if her candidate is to win the national election. This is how our representative government works. This Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] . . . the weight of the votes of certain . . . voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). "[T]he right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The right to vote, whether in the primary or the general election, is the right to vote "for the candidate of one's choice." *Clingman v. Beaver*, 544 U.S. 581 at 610 citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, *see United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)].

The Colorado Supreme Court, by taking President Trump off the Colorado ballot, has diluted the votes of all his party's voters and more especially, the Electors. "The right to vote . . . includes the right to

have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted." *Reynolds*, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

In Colorado, only Democratic candidates for President will likely remain on the presidential ballots. The favored group has full voting strength to support their Electors and the total popular vote unfairly adds to the national total of the Democratic candidate. The Colorado Supreme Court's ruling impairs the right of legitimate voters to vote by diluting their votes (and the votes of that parties' Electors)—dilution being recognized to be an impairment of the right to vote. *Purcell v. Gonzalez*, *supra*, 127 S.Ct. at 7; *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Because the Amicus's preferred candidate is a member of a different party, she is absolutely precluded from having the weight of her vote for her candidate equal to another voter of a different party in her own State but also the impact of that vote to the Electors in the State of Colorado. Therefore, the cumulative vote may be decided by one state that might not be counted for the leading candidate of her vote. This is an unconstitutional interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance.

III. The Twelfth Amendment Provides Presidential Electors the Constitutional Right to Vote for the Candidates of Their Choice.

> But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

U.S. Constitution, Amendment XII.

Counsel can find no case wherein the exact issue of the constitutional language regarding "all the states shall be necessary to a choice" is examined. Could it mean that all states must fully participate? If a major party's candidate of choice is not on the state ballot, is that full participation from "all states?" Does that mean that if the citizens of one state do not get to fully vote for their candidate of choice that the constitutional numerical necessity has not been reached for a national choice to be made? Colorado may not deny voters or Electors participation in a primary of a party that seeks their participation absent a state interest of overriding importance. *Clingman*, 544 U.S. at 611-12.

The Colorado Supreme Court has not shown the requisite compelling reason that overrides the citizens' fundamental right to vote, as that process is defined. In the event of a tie, of what comport is it that President Trump is not on the ballot anywhere in the state of Colorado? What if this situation existed in 15 states? Would not the Democratic candidate start the election with a highly decided national advantage, certainly not the intention of the framers of the Twelfth

Amendment? Could all of the Electors in all 15 states vote for someone who, because they were not on the ballot, did not receive a single vote? What happens to the millions of popular votes that were cast. Have they no meaning in that instance? The Twelfth Amendment provides presidential electors the constitutional right to vote for the candidates of their choice for President and Vice President. What would happen if, as a result of the Colorado Supreme Court's actions, no vote was counted for President Trump? Would the federal Electors then still cast their vote for President Trump, or *any* candidate that had not received a single vote from any state ballot, because they were not on the ballot? It is highly unlikely.

It is quoted in FEDERALIST 68 that it was

> . . . desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

Federalist 68 cannot be read to require the electors to vote according to the dictates of a "preestablished body." The Supreme Court of Colorado is a "preestablished body." It has not shown the "overriding importance" required to deny any voter who wishes to vote the right to participate in a primary of a party that seeks their participation. *See, Clingman*, 544 U.S. at 611-12.

Colorado is interfering with the presidential Electors, and the weight of the votes of all voters, prohibited under the Twelfth Amendment. Colorado's own federal Circuit recently found that "states have no authority over the electors' performance of their federal function to select the President and Vice President of the United States." *Baca v. Colo. Dep't of State*, 935 F.3d 887, 946 (10th Cir. 2019).

Tangentially, in a case that, although did not involve a presidential election, but did involve an election for a federal Article I representative, this Court stated that "Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice." *United States v. Classic*, 313 U.S. 299, 314 (1941).

Here, we have the Colorado Supreme Court interfering with the effective choice of the voters at the only stage of the election procedure where their choices are of great significance. It is the only stage of the presidential election where their choice has any effect upon the ultimate result, who becomes the future President of these United States of America.

CONCLUSION

The power of a state to restrict the right of qualified electors to vote for candidates of their choice and the right of candidates to run for office is severely circumscribed by the Constitution. Restrictive measures are constitutionally suspect.

The acts of the Colorado Supreme Court in removing President Donald Trump from the Republican Primary and General ballot is an unconstitutional usurpation of the Amicus's right to her vote for President, without dilution, under the Equal Protection Clause of Amendment Fourteen of the U.S. Constitution and is contraindicated by Amendment Twelve of the U.S. Constitution in that it is an encroachment by the State upon the fundamental right which belong to every citizen as a member of society. This Court should subject this law to strict scrutiny, reverse the opinion of the Colorado Supreme Court and strike it down as an undue burden on the fundamental right to vote.

Respectfully submitted,

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