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

RESPONDENTS' BRIEF IN SUPPORT OF CERTIORARI

JASON B. WESOKY
1331 17th St., Suite 800
Denver, CO 80202

DAVID H. FRY
J. MAX ROSEN
MUNGER, TOLLES & OLSON LLP
560 Mission Street,
Twenty-Seventh Floor
San Francisco, CA
94105-2907
(415) 512-4000

L. LAWRENCE LESSIG
Counsel of Record
JASON HARROW
EQUAL CITIZENS
12 Eliot Street
Cambridge, MA 02138
(617) 496-1124
lessig@law.harvard.edu

Attorneys for Respondents

QUESTIONS PRESENTED

A Colorado state law purportedly requires presidential electors to vote for specific candidates and permits state officials to cancel any votes cast contrary to law. Colo. Rev. Stat. § 1-4-304. Respondent Micheal Baca's vote was cancelled during the 2016 vote of the presidential electors. The Tenth Circuit—in direct conflict with a decision of the Washington Supreme Court that is also the subject of a pending cert. petition (No. 19-465)—held the State's action was unconstitutional.

The questions presented are:

(1) Whether the Tenth Circuit correctly held that the enforcement of this law is unconstitutional because a State has no power to legally enforce how a presidential elector casts his or her ballot; and

(2) Whether an elector has standing to pursue this action because he was personally injured, and may maintain this suit against the State because the State interfered with his exercise of a "federal function."

Respondents agree with Petitioner Colorado Department of State that this Court should grant certiorari to resolve the core issue of elector freedom.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS
(Continued)

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(Continued)

PAGE

STATUTES

TABLE OF AUTHORITIES
(Continued)

PAGE

BOOKS AND ARTICLES

TABLE OF AUTHORITIES
(Continued)

PAGE

INTRODUCTION

Respondents agree with Petitioner Colorado Department of State that certiorari should be granted in this case.

First, and most importantly, Respondents agree that this Court should grant certiorari to resolve the clear split in authority on the question of presidential electors' discretion, as provided by the United States Constitution, and the validity of any state law that infringes it. Respondents' primary counsel is also counsel to the presidential elector petitioners in the pending petition *Chiafalo v. Washington*, No. 19-465, which presents the same constitutional question. Respondents agree with Colorado that the "conflicting opinions cause significant disruption in the electoral process," Pet. 8, and that the issue is of "utmost national importance," Pet. 34. The regularity and predictability of presidential elections is at stake. This Court should grant certiorari to provide a definitive resolution of the issue of presidential elector discretion before the next presidential election.

Second, Respondents agree that the decision below by the Tenth Circuit is in "direct conflict" with the decision of the Washington Supreme Court that is the subject of the *Chiafalo* petition, as well as prior decisions of the highest courts of Alabama, Kansas, and Ohio. Pet. 10–11. It is true that the specific facts of those cases, including the Washington case that is the subject of the *Chiafalo* petition, differ slightly from the facts here because this case involves Colorado's

extraordinary and unprecedented decision to actually cancel the vote of a presidential elector. But there is no meaningful legal distinction in the question at the heart of each of those cases: whether the Constitution provides that electors, once appointed by the state, have discretion to cast their votes for whichever eligible candidate for President they believe is most qualified. Each case hinges on the answer to that question, and each case involves the same material fact-pattern: a state restricting an elector's discretion to cast that vote, either by removing the elector altogether or by intimidating and penalizing them for fulfilling their constitutionally-prescribed role.

Third, Respondents agree that this case—like the Washington case—is an appropriate vehicle to resolve this critical question. The issue is directly presented in both cases, albeit with different penalties for voting contrary to the State's expectation: in Washington, three presidential electors were fined for their votes; in Colorado, one was removed. In fact, because this difference in penalty is mirrored in the dozens of state laws that also attempt to cabin elector discretion in different ways, it may be appropriate to grant certiorari in both cases to ensure that this Court's decision will eliminate the legal uncertainty about any state's ability to enforce any sort of elector binding law.

Colorado has also asked this Court to grant certiorari on the related question of whether presidential electors lack standing to litigate this question "because they hold no constitutionally protected right to exercise discretion." Pet. i. This Court should not separately grant certiorari on that question. The State's theory "conflates standing with the merits," App. 36, because it would require this

Court to answer the core question of a presidential elector's constitutionally-protected discretion—the substantive constitutional question at issue—before determining whether Respondents have standing.

On the merits, this Court should affirm the Tenth Circuit's well-reasoned and impeccably-researched opinion. Colorado needs to distort the Constitution to get to the result it seeks. The State posits that "[t]he Constitution commits to the States' respective legislatures the exclusive right to decide how their presidential electors are selected and, if necessary, removed." Pet. 19. But this gets the Constitution only half right. Article II expressly grants a legislature the power to appoint electors, but the legislature is nowhere granted the power to remove. And to grant a state this atextual power to interfere with and remove an individual elector performing a federal function would undermine fundamental principles of our constitutional structure. This Court should grant certiorari and affirm the Tenth Circuit.

STATEMENT OF THE CASE

I. Legal Background

A. The selection of electors

The Constitution does not provide for direct election by the people of the President and Vice-President. Instead, each state "appoint[s]" a number of electors equal to the total number of the state's Members of the House and Senate. *See* U.S. Const. art. II & amend. XII. While the state's power over appointment is "plenary," *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), the state's power is constrained by other constitutional provisions, *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (specifically addressing the

Fourteenth Amendment). Further, unlike other provisions of the Constitution (like the Opinions Clause) that give an entity appointing an officer power over that officer once appointed, *see* U.S. Const. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments"), the Constitution gives the states no power over electors once electors are elected or appointed because they "exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States," *Burroughs v. United States,* 290 U.S. 534, 545 (1934).

Colorado, like 47 other states, appoints a slate of electors that are selected by the political party of the candidates for President and Vice President who receive the most popular votes in the entire state.[1] *See* Colo. Rev. Stat. § 1-4-301, *et seq*. Once appointed, electors meet in the respective states "on the first Monday after the second Wednesday in December next following their appointment," which, in the most recent election, was December 19, 2016. 3 U.S.C. § 7.

B. Casting and counting electoral votes

The federal constitution specifies the precise procedure by which electors cast their votes. When the electors meet around the country at the appointed time, the Twelfth Amendment directs how presidential electors are to cast, tabulate, and transmit their votes. There is no place for state executive officials to control the vote.

---

[1] Maine and Nebraska use a hybrid system under which they award one elector to the winner of each congressional district in the state and two electors to the statewide winner.

In particular, the Twelfth Amendment requires electors to "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." U.S. Const. amend. XII. The electors themselves are then required to "make distinct lists" of the "persons voted for as President" and "Vice-President," to which the electors then add the "number of votes for each." *Id.* The electors then "sign and certify" the lists and "transmit" them "sealed to the seat of the government of the United States, directed to the President of the Senate." *Id.* The President of the Senate is then required to open and count all of the certificates in the presence of the House and the Senate. *Id.* There is no constitutional role for any appointed or elected state official from the start to the end of the voting process. Instead, once appointed, the electors' conduct—other than their actual vote—is determined by the Constitution directly.

Federal statutory law mirrors the Twelfth Amendment. First, "as soon as practicable after the conclusion of the appointment of the electors," state executives must tell the Archivist of the United States who the electors are. 3 U.S.C. § 6. Next, at the appropriate place and time, the law requires presidential electors to vote "in the manner directed by the Constitution," *id.* § 8, and then adds additional detail as to what must occur after the electors vote. In particular, federal law provides that the "electors shall make and sign six certificates of all the votes given by them." *Id.* § 9. As in the Twelfth Amendment, the electors themselves are then required to certify their own vote, seal up the certificates, and send one copy to the President of the Senate; two copies to the Secretary of State of their state; two copies to the Archivist of the

United States; and one copy to a judge in the district in which the electors voted, *id.* § 11. The only active role mentioned for a state's Secretary of State is to transmit to the federal government one of the Secretary's copies of the certificate of vote. Even that role, however, is conditional: only if the electors themselves fail to send a copy, and a federal official requests a copy, does the Secretary of State then have a role to play. *Id.* § 12.

Thus, in the ordinary case, the appointment of electors is "conclu[ded]" well before the electoral vote, 3 U.S.C. § 6, and neither the Constitution nor federal law envisions *any* role for *any* state official during the balloting by electors. In this case, Colorado's appointment of its presidential electors was "finalized" before the electoral voting began. App. 10 n.1. After that appointment, there is no mechanism for state officials to monitor, control, or dictate electoral votes. Instead, the right to vote in the Constitution and federal law is personal to the electors, and it is supervised by the electors themselves.

The final step in the formal process of presidential election occurs on January 6 following each presidential election. On that day, Congress assembles in a joint session to open the certificates and count the electoral votes. 3 U.S.C. § 15. If an electoral vote is questioned, members of each House can initiate a formal debate and then vote on the validity of any electoral vote. *Id.*

A formal challenge to an independent electoral vote has been debated only once in the Nation's history, in 1969. In that instance, Congress decided that the anomalous vote for George Wallace, rather than Richard Nixon, should be counted, even though the

elector was a Republican elector. *See* 115 Cong. Rec. 246 (Senate vote of 58-33 to count the electoral vote); *id*. at 170–71 (House vote of 228-170). In fact, Congress has accepted every vote contrary to a pledge or expectation in the Nation's history that has been transmitted to it—a total of more than 150 votes across twenty different elections from 1796 to 2016. *See* FairVote, "Faithless Electors," at https://perma.cc/CL6W-HGQ5.

II. This Case

A. Respondents are appointed and ask about their right to vote.

Respondents were nominated as three of nine Democratic electors in the State of Colorado. App. 10. Because Hillary Clinton and Tim Kaine received the most popular votes in the State of Colorado in the general election on November 8, 2016, Respondents and the other Democratic electors were appointed as the State's electors. App. 10.

Before the vote of the electors, Respondent Nemanich asked Colorado's then-Secretary of State Wayne Williams "what would happen if" a Colorado elector did not vote for Clinton and Kaine. App. 10. The Secretary, through the Colorado Attorney General's office, responded that Colorado law requires electors to vote for the ticket that received the most popular votes in the state, *see* Colo. Rev. Stat. § 1-4-304(5), and an elector who did not comply with this law would be removed from office and potentially subjected to criminal perjury charges. App. 10.

B. The Tenth Circuit maintains the status quo because it finds it "unlikely" that Plaintiffs would be removed.

In light of the Secretary's response, two of the Respondents brought suit in the District of Colorado and requested a preliminary injunction to prevent their removal or any interference with their votes. The district court denied the request. App. 168–82.

Respondents appealed and requested emergency relief, but a Tenth Circuit panel denied the request for an injunction. In denying the request, the panel did not answer the question of whether the Secretary could remove electors from office after electoral voting had begun, though it thought that "such an attempt by the State" was "unlikely in light of the text of the Twelfth Amendment." App. 197 n.4.

C. The "unlikely" occurs and the Secretary removes M. Baca for casting a vote for Kasich.

Three days after the Tenth Circuit's order, the electors convened to cast their votes. After voting began, Respondent M. Baca crossed out Hillary Clinton's name on the pre-printed ballot and voted for John Kasich for President. App. 12–13. The Secretary, after reading the non-secret ballot, removed M. Baca from office, refused to count the vote, referred him for criminal investigation, and replaced him with a substitute elector who cast a vote for Clinton. App. 13.[2]

---

[2] Two other nominal Respondents, P. Baca and Nemanich, felt "intimidated and pressured to vote against their determined judgment" and ultimately cast their electoral votes for Clinton

D. Respondents file this suit.

After the emergency proceedings had concluded Respondents filed this new suit, which has one operative cause of action. Respondents allege that the State's actions, as carried out by the Colorado Department of State through its Secretary, violated 42 U.S.C. § 1983, because Plaintiffs were deprived of their federal constitutional rights under Article II and the Twelfth Amendment to vote for the presidential candidate of their choice.[3] The Complaint requests that a court declare that Respondents' rights were violated and that the relevant state statutory provision requiring presidential electors to vote for certain candidates, Colo. Rev. Stat. § 1-4-304(5), is unconstitutional and unenforceable. They also seek nominal damages. App. 218–220.

In 2018, the district court granted the State's motion to dismiss, and Respondents timely appealed. App. 138–167.

---

and Kaine. App. 13. The Tenth Circuit held they lacked standing because they carried out their pledge and were not removed, App. 48–52, and Respondents have not asked this Court to grant certiorari to review that determination.

[3] Complaints against state agencies brought under § 1983 are frequently dismissed for failure to state a claim, on the ground that a state agency is not a "person" in the relevant sense. But Petitioner Colorado Department of State here has waived the argument that it is not a person, and it did not move for dismissal on such grounds. App. 58. It also expressly waived any immunities that could insulate the State from money damages. App. 59. Thus, as the Tenth Circuit correctly held—and as the State agrees in its petition—nothing about the posture of this case "preclude[s] this Court from reaching the questions presented" as to elector discretion under the United States Constitution. Pet. 33.

E. The Tenth Circuit vindicates elector discretion, in conflict with the Washington Supreme Court.

Several months after oral argument in this case, the Washington Supreme Court decided a nearly identical case and held that "nothing in article II, section 1 [of the Constitution] suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." *Chiafalo v. Washington*, No. 19-465, Pet. App. 19a. But the Tenth Circuit's decision in this case reversing the grant of the State's motion to dismiss expressly disagreed with the Washington Supreme Court's reasoning when it held that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion." App. 127.

The Tenth Circuit reached its decision after canvassing constitutional text, structure, and history. The court analyzed dictionary definitions of the key constitutional text from at least five early dictionaries and observed that words like "vote" and "elector" "have a common theme: they all imply the right to make a choice or voice an individual opinion." App. 103. The court also recognized that electors perform a "federal function" that must be insulated from control or interference by a state. App. 95. And the court noted that history—from the enactment of Article II, its alteration by the Twelfth Amendment, and beyond—"provides additional support for [the court's] conclusion that presidential electors are free to exercise discretion in casting their votes." App. 107.

On October 7, 2019, the same primary counsel for Respondents filed a petition asking the Court to grant

certiorari to resolve the split and answer the question of elector discretion in *Chiafalo v. Washington*, No. 19-465. Colorado's petition in this case followed nine days later.

REASONS THE PETITION SHOULD BE GRANTED

Respondents agree with Colorado that Certiorari should be granted in this case to resolve the critical question of whether presidential electors have constitutional discretion to cast a vote for whomever they wish.

I. The Primary Question Presented Is Exceptionally Important And Warrants Review Now.

Respondents agree with Colorado, the amici here, and amici in *Chiafalo* that the issue of elector discretion is of exceptional importance and warrants review this Term, before any future, potentially chaotic presidential election.

Resolving the question would put to rest the uncertain constitutionality of laws in more than half the states. Thirty-two states, plus the District of Columbia, have laws that attempt to restrict electors in the exercise of their discretion. FairVote, "State Laws Binding Electors," at http://bit.ly/StateBindingLaws. Consequences for voting inconsistent with an elector's pledge range from a mere penalty without vote cancellation, *see Chiafalo*, No. 19-465, Pet. App. 4a, N.M. Stat. § 1-15-9; to the removal of an elector, cancellation of the vote, and potential prosecution for perjury, as in Colorado and elsewhere, App. 10; to up to three years in jail, *see* Cal. Elec. Code §§ 6906, 18002, Brief of Amicus Curiae Vinz

Koller in Support of Petitioners in *Chiafalo v. Washington*, No. 19-465, at 1, 7. Some jurisdictions have no express penalty or enforcement mechanism, but those laws were nonetheless recently used to discard an electoral vote and require electors to vote for the candidates to whom the electors had pledged. *See* Christopher Cousins, "Sanders vote thwarted, but Maine still makes history with Electoral College vote," *Bangor Daily News* (Dec. 19, 2016) (noting that a Maine elector's vote was ruled "out of order" because it was cast for Bernie Sanders in state with elector pledge requirement but no express enforcement mechanism). The constitutionality of these laws is currently unsettled given the clear split in lower court authority. Only this Court can resolve the question conclusively.

Moreover, Respondents agree with Colorado that "this important question should be decided by this Court now, not in the heat of a close presidential election." Pet. 36. The uncertainty in Colorado in 2016 led to lawsuits in state and federal court in this case, and similar litigation or disputes occurred in California, Washington, Maine, and Minnesota. *See Chiafalo*, No. 19-465, Pet. 27. These disputes were significant, but they did not purport to decide the outcome of the election. This uncertainty cannot continue: in the future, it may well be that the electoral college vote is even closer than it was in 2016, creating the possibility that an elector's exercise of discretion could decide the outcome of a presidential vote. Uncertainty about the constitutional contours of that discretion could well create chaos, and it could require that the federal courts decide the outcome of a close election. *Cf. id.* 26–27 (describing constitutional

"crisis" that followed the disputed election of 1876, which was decided by a single electoral vote).

The 2016 election made clear that there is a need for a uniform application of the quintessentially federal question of whether electors have discretion that derives from the federal constitution. It is critical that this Court grant certiorari and conclusively resolve the question now, outside of a contested presidential election. *See also Chiafalo*, No. 19-465, Pet. 25–30.

II. The Decision Below Directly Conflicts With That Of The Washington Supreme Court And Other Courts.

Colorado is also correct that the decision below not only conflicts directly with the Washington Supreme Court's decision in the *Chiafalo* case, but also that it entrenches a pre-existing split on the issue of elector discretion that extends beyond these two cases. *See* Pet. 10–13; *see also Chiafalo*, No. 19-465, Pet. 14–25.

First, as Colorado observes, there is no way to reconcile the Tenth Circuit's decision with that of the Washington Supreme Court. It is true that Washington transmitted the electors' votes but fined them $1,000, in contrast to here, where Colorado canceled the votes and replaced an elector. But that is a distinction without a difference. Analysis of the decisions makes clear they are in "direct conflict," Pet. 11: the Washington Supreme Court held that nothing in the Constitution "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature" but the Tenth Circuit held exactly the opposite. *See Chiafalo*, No. 19-

465, Pet. App. 19a. The two decisions cannot be reconciled. *See Chiafalo*, No. 14-965, Pet. 14–25.

Second, the Tenth Circuit's decision contributes to and exacerbates another important, related split in authority on whether presidential electors are state officials who perform mere ministerial functions or whether they are vested with individual discretion. Pet. 8–10. That split is real and is a further reflection of courts' differing attitudes toward elector discretion.

Under one view, for instance, the role electors fulfill is purely "clerical." *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924). Some courts espousing this view even candidly admit that the Constitution originally granted electors discretion, but they reason that historical practice has "evolved" the meaning of the constitution, and that the understanding that electors have a "bounden duty" to vote for a particular candidate has now "ripened" within the Constitution. *Thomas v. Cohen*, 262 N.Y.S. 320, 324, 326 (N.Y. Sup. Ct. 1933). By contrast, this Court has recognized that electors perform a "federal function[]," which implies that they are not mere ministers of the state, *Burroughs*, 290 U.S. at 545, and some state courts have relied on this principle to conclude that certain state election laws do not apply to the office of presidential elector, *see* Pet. 9 (collecting cases).

This split has been exacerbated by some language from this Court that has proved susceptible to multiple interpretations. As Colorado points out, this Court has said that electors "are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators." *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890); *see* Pet. 9. But merely *not* being a formal officer

or agent of the United States does not make an elector a ministerial state official. Instead—just like the analogous members of state legislators who previously elected federal Senators—presidential electors are state-appointed officers with constitutional discretion to perform their federal function. *See also infra* at 22–24, (noting that this is the only way to reconcile electors' role with this Court's "federal function" language and electors' characterization as federal officeholders in both the Fourteenth and Twenty-Fourth Amendments). Granting certiorari and resolving the merits of elector discretion would thus provide certainty for state officials and courts by making clear that electors perform this nuanced role in our federal system.

III. This Case Is An Appropriate Vehicle To Resolve The Question Conclusively.

Respondents agree with Colorado that this case—like the Washington case—is an appropriate vehicle to resolve the critical question of the discretion of presidential electors. Pet. 32–34.

Indeed, Respondents believe it makes sense to grant certiorari in both this case and *Chiafalo*. The sanction in each case was different: in Washington, three presidential electors were fined for their votes, but their votes were transmitted to Congress, *Chiafalo*, No. 19-465, Pet. 11; here, M. Baca's vote was not transmitted and he was replaced as an elector, App. 7. And this difference in penalty is mirrored in the variability of state laws in thirty-two states that also attempt to cabin elector discretion in different ways. *See* FairVote, "State Laws Binding Electors," http://bit.ly/StateBindingLaws. That means it would be appropriate to grant certiorari in both this case and

Chiafalo to ensure that this Court's decision will eliminate the legal uncertainty about *any* state's ability to enforce any sort of elector binding law.[4]

Moreover, it would be both inefficient and risky to grant certiorari in this case only or in *Chiafalo* only, and then hold one case pending disposition of the other. That is because if the Court does not resolve the core issue of elector discretion in the sole case granted in a way that provides conclusive resolution, there would not be time for the issue to percolate down to lower courts and back up to this Court in time for a more conclusive determination before the 2020 presidential election.

Granting both cases gives this Court two proverbial bites at the apple, and yet would add little to the Court's substantive burden, because the core constitutional issue is identical in each. Thus, granting both cases is the best way to ensure a speedy, efficient, and complete resolution of this critical issue.[5]

IV. This Court Should Not Grant Certiorari On The Standing Question.

Colorado's petition contains two distinct questions presented: one about presidential electors' standing to bring this case, and the second about the core issue of

---

[4] Respondents' primary counsel are also counsel to Petitioners in *Chiafalo*. The cases could therefore be consolidated to resolve the distinct issues efficiently.

[5] If the Court wishes to grant certiorari in only one case and is concerned about the non-merits issues mentioned in the dissent below, then *Chiafalo* would be the preferred vehicle. There is no question that this Court can reach the merits in *Chiafalo* given the posture of that case. Colorado's knowing and voluntary waivers, however, would make both cases appropriate vehicles for review.

presidential electors' constitutional discretion. Pet. i. Colorado confuses standing with the merits. Properly understood, there is no question that presidential electors have standing here. And in any case, there is no split on the issue.

Colorado asks this Court to decide whether presidential electors "lack[] standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion." Pet. i. But that is not a question of standing. That is the very substantive constitutional question that is at the heart of this case: if electors have a "constitutionally protected right to exercise discretion," then, on the State's framing, they have standing to vindicate it. If they do not have such a right, they do not have standing. There is no question of standing independent of the question on the merits.

The Tenth Circuit reached the same conclusion below. As the court wrote, the framing of the standing issue in this manner "conflates standing with the merits." App. 36. That is, if standing turns entirely on the existence of the substantive right at issue, it is not an independent requirement and is not properly categorized as standing. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) ("[O]ne must not confus[e] weakness on the merits with absence of Article III standing." (second alteration in original) (quotation marks omitted)); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989) ("[A]lthough federal standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the [claim]." (second alteration in original) (quotation marks omitted)).

Once standing is analyzed separately from the merits—as it must be—then M. Baca plainly has standing under the familiar three-part test. He has sufficiently alleged that he suffered actual injury (the denial of his right to vote, removal from office, and subsequent referral for perjury prosecution); that the injury is traceable to the defendant's conduct (the Secretary of the Department of State is the one that inflicted these injuries), and that the injury can be redressed through this action (nominal damages). *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (reciting familiar three-part test for Article III standing); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (nominal damages available in § 1983 action).

Traceability and redressability are not disputed, and the Tenth Circuit correctly held that M. Baca's dismissal from the office of presidential elector after his appointment had been concluded was a personal injury sufficient to confer standing. Indeed, this Court has frequently found that standing to sue exists where, like here, plaintiffs allege that they were unlawfully dismissed from, or prevented from serving in, governmental roles. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 106, 176 (1926) (postmaster who claimed the President unlawfully dismissed him had standing to allege deprivation, even though Court said postmaster legally could be terminated); *Powell v. McCormack*, 395 U.S. 486, 496, 512–14 (1969) (plaintiff had standing to challenge alleged deprivation of right to be seated as a member of Congress); *Bd. of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968) (school board officials' "refusal to comply with [a state law that is] likely to bring their expulsion

from office" gave them a "personal stake in the outcome of this litigation" that conferred standing) (quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (citing *Powell* and noting that officials could have standing if they had alleged that they had "been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*").

Colorado's theory that would prohibit standing—to the extent it differs from the merits—is not independently worthy of consideration. Colorado points to no split on this issue, because there are no cases holding that presidential electors lack standing to vindicate their right to vote. Instead, Colorado points to a split of authority on the issue of whether presidential electors are state officials. As explained *supra* at 13–15, that split goes to the merits, not standing. That is, as the Tenth Circuit recognized, a court "need not resolve the parties' dispute over whether the Presidential Electors were state officials" for purposes of standing. App. 22. The relevant question is whether M. Baca was personally injured—he was—not whether he is considered a state official.

In sum, the only aspect of the standing question worthy of this Court's full consideration is the one that overlaps entirely with the merits: whether presidential electors have constitutionally protected discretion in casting their votes. That is the core issue that this Court must decide and that should be the focus of merits briefing and argument. Granting certiorari only on the substantive question of elector discretion would ensure the cleanest presentation.

V. The Decision Below Is Correct.

On the merits, the Tenth Circuit correctly held that presidential electors who do nothing but cast votes for their preferred candidates may not have their votes discarded and be removed from office. Colorado's contention that its appointment power grants it control of every aspect of elector conduct is inconsistent with constitutional text; upsets the proper balance of power between the states, the federal government, and individual rights; and misinterprets an unbroken line of constitutional history.

It is bedrock law in our federal system that a state may not "dictate the manner in which the federal function is carried out." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). Yet Colorado law purports to "dictate" the performance of a "federal function" by requiring electors to vote in a particular way and penalizing them for their failure to do so. As the Tenth Circuit correctly concluded, the Supremacy Clause, Article II, and the Twelfth Amendment prohibit the State's interference.

In particular, Article II and the Twelfth Amendment provide detailed instructions about how the electoral vote must proceed: the electors themselves must "make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each," and electors themselves must then "sign and certify" those lists and transmit the list directly to the federal government. *See* U.S. Const. amend. XII. The federal statutes implementing the Amendment likewise preclude any interference by state officials with the electors' vote. *See* 3 U.S.C. §§ 9, 12. Thus, to maintain

the federal requirement of elector independence, state officials may not sanction electors for failing to vote in a particular manner.

A. The power to appoint does not necessarily entail the power to control.

Colorado contends that its power to appoint presidential electors encompasses a complete power to also control them in the exercise of their core federal function. Pet. 20. This makes no sense under constitutional principle, precedent, or federal statutory text.

To begin, Colorado blends three distinct constitutional powers into one: the appointment power, which it has over presidential electors, and the powers to control and remove, which it lacks. As the Tenth Circuit recognized, they are distinct constitutional powers, and "[w]hen undertaking that federal function [of casting an electoral vote], presidential electors are not executing their appointing power's function but their own." App. 95. This is in contrast to some lower federal officials, who merely carry out executive functions and are subject to the directive that the head of the executive branch take care that federal laws are faithfully executed. But here, as the Tenth Circuit observed, "neither Article II nor the Twelfth Amendment instructs the states to take care that the electors faithfully perform their federal function." App. 95. State officials thus have no power to control electors' votes, and no power to remove them for casting votes that are allegedly contrary to state law.

In support of its argument, the State erroneously claims that this Court has described a state's power

over electors "as 'plenary,' 'exclusive,' and 'comprehensive,'" Pet. 20 (quoting *McPherson*, 146 U.S. at 27, 35). In fact, the full sentences from which those adjectives were chosen reveals that it is not a state's generalized power to control electors that is broad—it is only a state's power to appoint. In each instance, the Court described a state's power *to appoint* electors as "plenary," "exclusive," or "comprehensive"—not a state's "power over its electors" from beginning to end, as Colorado implies. *E.g.*, *McPherson*, 146 U.S. at 35 ("It is seen that from the formation of the government until now the practical construction of the clause has conceded *plenary* power to the state legislatures *in the matter of the appointment of electors*.") (emphasis added).

In addition, under federal statutory law, the electors' appointment has already been "concluded" before the vote begins, so the state must somehow resume an appointment power that it already lost. Federal law requires the states to send "a certificate of such ascertainment of the electors appointed" "as soon as practicable after the *conclusion of the appointment of the electors* in such State." 3 U.S.C. § 6 (emphasis added); *see also* App. 10 n.1 (noting that M. Baca's appointment was "finalized"). The State points to no authority that it can resurrect a power that has been "concluded" or "finalized" by the time the vote begins.

B. The mere fact that electors are appointed by a state does not mean the state has the power to control them when they exercise a federal function.

The State separately makes much of the fact that electors are often denominated state officials and so must be under the control of a state executive branch

official like the Secretary of State. But Colorado ignores clear law that, regardless of the fact they are appointed in a manner selected by the state, electors, like other analogous state-appointed officials, are immune from state control when they exercise federal functions.

As the Tenth Circuit recognized, this Court "has held that 'the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a *federal function derived from the federal Constitution*; and *it transcends any limitations sought to be imposed by the people of a state*.'" App. 86 (quoting *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (emphases added by the Tenth Circuit)); *see also Hawke v. Smith*, 253 U.S. 221, 230–31 (1920) (Ohio voters could not override state legislature's ratification of an Amendment because state legislators were exercising a federal function). Similarly, until the Seventeenth Amendment, states had the power to appoint senators and could even issue instructions to senators about how to vote. But "attempts by state legislatures to instruct senators have never been held to be legally binding." Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 592 (1996).

This history reveals that state legislators—quintessential state officials—and federal senators appointed by a state cannot be controlled when they exercise federal functions. The same is true of presidential electors. States (or state voters) may choose who fills these roles. But states may not control what they do.

In addition, two different constitutional amendments make clear that presidential electors are not mere ministerial state officials subject to control by a state but instead are immune from key aspects of state regulation.

First, the Fourteenth Amendment explicitly distinguishes between elections for "the choice of electors for President" and "executive and judicial officers of a state, or the members of the legislature thereof." U.S. Const. amend. XIV, § 2; *see also id.* § 3 ("No person shall be a Senator or Representative in Congress, *or elector of President and Vice President*, or *hold any office . . . under any State*," if that person engaged in "insurrection or rebellion.") (emphasis added). Because the Constitution distinguishes between presidential electors on the one hand and those who hold "any office . . . under any State" on the other, it must be the case that electors are not traditional state officeholders. If they were, the Amendment's mention of presidential electors would be superfluous.

The Twenty-Fourth Amendment too makes clear that elections for presidential elector are not elections for mere state officials. That Amendment banned the payment of poll taxes as a requirement for voting in federal elections, which include elections "for electors for President or Vice President." U.S. Const. amend. XXIV. But this Amendment did not extend to "the right to vote in state elections"; instead, the Supreme Court separately struck down poll taxes for non-federal elections under the Fourteenth Amendment in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). It follows necessarily that elections for presidential electors are not typical elections for state

officials immune from the coverage of that Amendment. Colorado's proposition that presidential electors are ministerial lower state officials subject to complete state control thus makes a hash of considered constitutional structure in several places.

* * *

Respondents agree with Colorado, its amici, and the amici in *Chiafalo* that the time is now to resolve the question of elector discretion under the Constitution. There is a direct, irreconcilable split on a federal question that requires resolution by this Court. And passing on the unique opportunity to resolve the question in an orderly setting, with no electoral stakes, would only increase the chances that this Court becomes embroiled in an electoral emergency down the road. This Court should grant certiorari in this case and in *Chiafalo*, No. 19-465, and resolve the issue once and for all.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to determine whether presidential electors have constitutional discretion to vote for whatever person they choose.

Respectfully submitted,

JASON B. WESOKY
1331 17th St., Suite 800
Denver, CO 80202

DAVID H. FRY
J. MAX ROSEN
MUNGER, TOLLES & OLSON LLP
560 Mission Street,
Twenty-Seventh Floor
San Francisco, CA
94105-2907
(415) 512-4000

L. LAWRENCE LESSIG
Counsel of Record
JASON HARROW
EQUAL CITIZENS
12 Eliot Street
Cambridge, MA 02138
(617) 496-1124
lessig@law.harvard.edu

Attorneys for Respondents

November 20, 2019