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

REPLY BRIEF FOR PRESIDENTIAL ELECTORS

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INTRODUCTION

On December 19, 2016, Colorado took the unprecedented step of rejecting the vote of a duly-appointed presidential elector, removing him from office, declaring a vacancy in its college of electors, and ordering the appointment of a different elector who would vote as the Colorado Secretary of State wished. This was unconstitutional.

Colorado's defense of its actions eliminates any role for presidential electors. It ignores their purpose and claims they are subordinate state officers who may be controlled at the whim of (unspecified) state superiors and therefore lack standing to litigate this important issue. But electors are not state officers, and they are "subordinate" to no one. Instead, electors hold positions of public trust under the United States, and may vindicate the denial of their right to vote when it is infringed.

On the merits, Micheal Baca's rights were infringed. Colorado relies on the Twelfth Amendment to support its view that presidential electors play no meaningful role within our Constitution. But the Twelfth Amendment preserved the indirect method of presidential selection that Colorado would abolish, and the Twentieth Amendment, which preserves an important role for electors in the event of the death of a candidate between the popular vote and the Electoral College vote, presupposes elector discretion. Because of the Twentieth Amendment, Colorado's attempt to remake the constitutional scheme could risk the very chaos Colorado claims it seeks to avoid.

ARGUMENT

I. Micheal Baca Has Standing To Vindicate His Constitutional Right To Vote.

Micheal Baca has standing to proceed in this case. After he voted "by Ballot" for President and before he and his fellow electors could "make distinct lists of all persons voted for," *see* U.S. Const. amend. XII, Baca's vote was rejected by a member of the Colorado Department of State, he was removed from office, and he was later referred to the Colorado Attorney General for perjury. Pet. App. 217–18. As the Tenth Circuit correctly held, "Mr. Baca's loss of his office—however brief its existence—is an injury in fact" that gives him standing here. Pet. App. 36.

Colorado resists this conclusion with what it takes to be an uncontroversial legal proposition: this "Court has long held that state officials lack Article III standing to challenge the constitutionality of a state statute prescribing their duties when they are not personally affected." Colo. Br. 10. But that principle does not apply here. Presidential electors are not "subordinate state officers," and, even if they were, Baca was "personally affected" by Colorado's unconstitutional actions and so has standing here.

A. Presidential Electors Hold Positions Of Public Trust Under The United States.

Presidential electors are not "subordinate state officers," Colo. Br. 10, because they are neither subordinate to any executive official nor officers of any state. Presidential electors are "appointed and act under and pursuant to the Constitution of the United States." *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). As such, presidential electors have a status equivalent

to U.S. Senators or Representatives: individuals who hold positions of "public trust" under the United States but who are not "Officers" under the United States or any single state.[1]

Colorado resists this conclusion with a logic that the Framers did not employ. Citing this Court's prior statements that presidential electors are not "federal officers or agents," Colorado leaps to the conclusion that electors must therefore be "officers of the state" or "state officers." Colo. Br. 12–13. But the text of the Constitution—especially text from Amendments written well after the two-party, winner-take-all system of presidential selection became commonplace—reveals Colorado's error.

The Fourteenth Amendment, for example, names presidential electors in contra-distinction to state and federal officers—and, indeed, in contra-distinction to Senators and Representatives too. *See* U.S. Const.

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[1] The text of the Constitution makes this point clear. The Elector Ineligibility Clause says that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1. From this passage, we know that neither Senator nor Representative nor Elector is considered an "Office of Trust or Profit under the United States." Yet in virtue of their exercise of sovereign powers delegated by the Constitution, all must hold a "public trust" under the Constitution and so cannot, for instance, be subjected to religious tests. *See* U.S. Const. art. VI, § 3 ("[N]o religious test shall ever be required as a qualification to any office or public Trust under the United States."); Vasan Kesavan, *The Very Faithless Elector?*, 104 W. Va. L. Rev. 123, 133 (2001) ("Electors, like Members of Congress, hold a 'public Trust under the United States.'"); Seth Barrett Tillman, *Interpreting Precise Constitutional Text*, 61 Clev. St. L. Rev. 285, 346 (2013) (the "public trust language accommodated the presidency, vice presidency, and members of Congress (and, perhaps, federal electors)").

amend. XIV §§ 2, 3. In § 2, the Amendment separately mentions "the right to vote at any election for the choice of electors for President and Vice President of the United States" as distinct from the right to vote for state officials—specifically, "Executive and Judicial officers of a State, or the members of the Legislature thereof." Therefore, presidential "electors" cannot be considered "officers of a state." *See* Electors' Br. 41.

A similar conclusion can be drawn from § 3 of the Fourteenth Amendment. That clause bans anyone previously engaged in insurrection or rebellion from becoming an "elector of President and Vice President" or "Senator or Representative," or from holding "any office, civil or military, under the United States, or under any State." *See* U.S. Const. amend. XIV § 3. This text again describes Senators, Representatives, and presidential electors separately, while distinguishing all three from those who hold offices "under the United States" or "any State."

Colorado ignores § 2. As to § 3, Colorado claims that "specifically mentioning electors does not mean they fall outside the category of state offices, just as mentioning Senators and Representatives does not remove them from the category of federal offices." Colo. Br. 13. But Colorado's imprecise language and evasion of § 2 present two problems.

First, if Colorado means to suggest that Senators and Representatives hold offices "under the United States," it is wrong, just like it is wrong that electors hold "offices under any State." This Court has held that Senators and Representatives are not "Officers of the United States." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010)

("The people do not vote for the 'Officers of the United States.'"); *United States v. Mouat*, 124 U.S. 303, 307 (1888) (an elected official is not, "strictly speaking, an officer of the United States."); *see also* U.S. Const. art. I, § 6 (providing that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," which makes it impossible for a Member of Congress to hold any "Office under the United States"); Tillman, *supra*, at 313 n.48 (noting that "Officers of the United States" and "Officers under the United States" are "related terms of art," and neither extends to Members of Congress).

Second, if Colorado means to take the subtler position that Senators and Representatives hold "federal office" but are not "officers under the United States" under the Fourteenth Amendment—and, by analogy, that presidential electors hold "state office" but are not "officers under any State" by that same provision—then its position is contradictory. For Colorado consistently refers to presidential electors as "subordinate state officers" or "officials" that would count as "officers under any State" under the Fourteenth Amendment. Colo. Br. 8, 9, 10, 14, 44. Colorado cannot pick and choose which constitutional text it wishes to follow.

Colorado's conclusion also conflicts with the Twenty-Fourth Amendment. That amendment was intentionally limited to federal elections, and it lists elections for presidential elector among the four for which a poll tax was prohibited. *See* U.S. Const. amend. XXIV; *see also Oregon v. Mitchell*, 400 U.S. 112, 118, 134 (1970) (holding that "elections for presidential and vice-presidential electors" are "na-

tional elections"). Colorado ignores this feature of the Amendment and instead claims its only impact is to impose a "specific limitation[]" on a state's appointment authority: namely, if a state decides to hold a popular vote for electors, it may not implement a poll tax in that election. Colo. Br. 14. But that ignores the intended scope of the Amendment, which was to *not* affect state elections or state officers. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting) (noting that "poll taxes" were "totally proscribed by the Twenty-Fourth Amendment with respect to federal elections" only); *see also* 108 Cong. Record 4199 (1962) (Senator Spessard Holland, the Amendment's primary advocate, stating that the Amendment "does not prohibit the imposition of a poll tax as a prerequisite to voting in State and local elections").

B. Micheal Baca's Independent Status Gives Him Standing To Vindicate The Denial Of His Constitutional Right To Vote.

Micheal Baca was validly appointed to a position of "public trust under the United States" to carry out the constitutional obligation to "vote by Ballot" for President and Vice President. He was denied that right, removed from his position, and illegally replaced. He has standing because he had his individual right to vote denied, *Baker v. Carr*, 369 U.S. 186, 206 (1962) (electors for state representative "who allege facts showing disadvantage to themselves as individuals have standing to sue"), and he also has standing because he was unlawfully removed from a

position to which he was entitled.[2] Electors' Br. 53–54 (collecting cases); Pet. App. 36 (Tenth Circuit's reasoning).

Colorado's attempt to deny standing requires the Court to accept an idea rejected at the founding: that electors are under the complete control of the existing authorities of state governments. The Framers found direct selection by state legislatures "objectionable in many points" because the "Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures." 2 *Farrand's Records of the Federal Convention* 109–10. Likewise, they thought selection by the state executive liable to the "insuperable" objection that executives "could & would be courted, and intrigued with by the Candidates, by their partizans [*sic*], and by the Ministers of foreign powers." *Id.* at 110; *see also McPherson v. Blacker*, 146 U.S. 1, 28 (1892) (listing several rejected alternative modes of presidential selection). As a consequence of these risks, presidential selection was left to "the body of electors interposed between the state legislatures and the presidential office." Justice Samuel Freeman Miller, *Lectures on the U.S. Constitution* 149 (1891).

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[2] Colorado suggests that electors have no standing because their term is so brief. But under 3 U.S.C. § 1, Baca was "appointed" on November 8, 2016, even though the results were not certified on that date. The certificate of ascertainment was transmitted to the Archivist on December 9, 2016. Baca did not attempt to cast his electoral vote until December 19, 2016. In that time, he was free to take whatever steps he wished as an elector, including deliberating about what to do or even consulting the state Attorney General for legal advice about his official duties. *See* Colo. Rev. Stat. § 1-4-304(4); *see also* Vinz Koller Br. 12–14 (explaining that, while the office of elector is "transient" by design, there are ongoing duties from the time of appointment to electoral vote).

Electors "interposed" between the state legislatures and the president are subordinate to neither. Electors therefore have standing to sue state officials when their rights are denied—and they should succeed on the merits, precisely because their independent status confers them a right to vote with discretion.

Faced with this difficulty, Colorado is evasive about electors' particular place in state government. It calls electors "subordinate state officials," presumably to fit this case within the authority denying standing to state officials who have merely abstract grievances about state law and attempt to sue their parent states. *See* Colo. Br. 10–11 (citing *Columbus & Greenville Ry. Co. v. Miller,* 283 U.S. 96 (1931) (state tax collector); *Braxton Cty. Ct. v. W. Va.*, 208 U.S. 192 (1908) (county court); *Smith v. Indiana*, 191 U.S. 138 (1903) (county auditor)). But, unlike the inferior officials in those cases, Colorado never identifies a superior to presidential electors, and it cannot claim that the office of presidential elector is created by state law. That is because there is no "superior state officer" to whom Micheal Baca was ever "subordinate."[3]

[3] Elector independence is enshrined in Colorado law, though Colorado ignores its own statutes. Under Colorado Rev. Stat. § 1-4-304, the presidential electors are to take their own oath, not one applicable to those serving in any other branch of government, and if a vacancy occurs, electors are to fill it themselves, without intervention from any other official. *Id.* at § 1-4-304(1), (4). Colorado is not unique. As Colorado's amicus catalogues, some states go farther and require electors to designate their own presiding officers, secretaries, or chairpersons. *See* Campaign Legal Center Br. 17–18. These laws make sense only if electors constitute independent decisionmaking bodies.

C. Even If Micheal Baca Were A "Subordinate State Officer," He Still Has Standing.

The injuries that Micheal Baca suffered in 2016 and 2017 were real. Colorado does not dispute that his vote was not counted, or that he was investigated for, though ultimately not charged with, perjury. Colo. Br. 5. Thus, even if this Court does not agree that electors hold positions of trust under the United States, the personal injuries Baca sustained are nonetheless sufficient to confer standing.

Where a "refusal to comply with [state law is] likely to bring . . . expulsion from office," then "there can be no doubt" that the plaintiff has a "personal stake in the outcome of th[e] litigation" sufficient to confer standing. *Bd. of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968) (citation and internal quotation marks omitted) (New York local school board officials had standing against state education commissioner where plaintiffs were threatened with termination for refusing to comply with state law requiring free textbooks be furnished to parochial schools). Baca has standing under *Allen*'s reasoning.

Colorado does not dispute that conclusion. Instead, Colorado urges this Court to overrule that aspect of *Allen* because the case's short discussion of standing—it was in a footnote—"does not necessarily mean that standing actually existed." Colo. Br. 17. But this Court has never adopted a "forget the footnotes" doctrine. In any case, Colorado ignores the possibility that the discussion of standing was brief because the Court said there could "be no doubt" about the *Allen* plaintiffs' personal stake. And while Colorado claims that

"this Court has since cabined *Allen*'s reach by preventing 'generalized grievance' suits," Colo Br. 17, it never explains why this case can be considered a "generalized grievance." To the contrary: Micheal Baca's grievance is so specific that he is one of a small handful people in the country who could have brought this particular claim following the 2016 election. He thus has standing here.

Further, as Amicus Vinz Koller points out, not only does Baca have standing under *Allen*, he also must have it under *Ray*. If there was standing in *Ray* to sue for the denial of a place on the ballot as an elector, then it follows that there must also be standing if the occupant of that office is unlawfully denied the right to perform the duties. *See* Koller Br. 25–27.[4]

Ultimately, even assuming that electors are state officials of some sort, Colorado cites no case denying standing where the plaintiff exercised power that derives from the federal Constitution and suffered the personal injury of job loss for the performance of that exercise. Micheal Baca has standing here.

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[4] Even assuming this Court were to find that electors are state officers, and the Court were inclined to reconsider or cabin *Allen*—though electors are not, and this Court should not—there would still be standing because there is standing in an intra-state dispute where a plaintiff is a "substantially independent state officer" suing the state. *Lassen v. Arizona*, 385 U.S. 458, 459 n.1 (1967) (plaintiff's independence permitted the Court to hear an action that was "in form and substance" a controversy between independent state entities).

II. The Constitution Requires That Duly Appointed Presidential Electors Be Free To Vote By Ballot Without Interference.

The plain text, structure, and history of the Constitution deny a state the extraordinary power that Colorado claims here: the power to declare the position of "elector" vacant because of the substance of an elector's vote, and then to replace the elector with one who will vote as directed.

Colorado does not dispute that it is asking this Court to sanction such an intervention for the first time in American history. This Court should decline the invitation. To accept it would not only violate the text and structure of the Constitution, it would also subvert a fundamental check on the power of "existing authority" as James Madison described it—including the branches of state government. 2 *Farrand's Records* 110. The drafters of the Twelfth Amendment knowingly left this check within our Constitution.

A. The Constitution's Text, Which Requires "Electors" To "Vote By Ballot," Demands Elector Independence.

The Constitution's text and structure reflect the Framers' choice that electors were to be independent. Colorado does not challenge that this was the expectation of the drafters of Article II originally. But Colorado argues that the original text is ambiguous enough to allow a state to exert total authority over how presidential electors vote.

Such an ambiguity is only suggested when Colorado changes the Constitution's actual words. The Constitution gives the states the power to appoint electors. It gives "Electors" the duty to "vote by Ballot."

Colorado denied Baca that right when, despite the Twelfth Amendment's text requiring electors to vote, make lists, and send those lists to the federal government, the State intervened once balloting had begun and rejected Baca's vote.

Colorado and the drafters of the Uniform Faithful Presidential Electors Act remake the Twelfth Amendment by declaring that electors are not "appointed" until they cast their votes according to a state's direction. For Colorado, although Micheal Baca was elected at the "Time of chusing" that Congress had set and had his appointment certified by the state prior to the vote, the "appointment process does not end" until he "cast [his] electoral ballot[]" in the manner Colorado law had directed. Colo. Br. 18–19. When he failed to do that, Baca "vacate[d]" his position, and a new elector was chosen. Colo. Br. 19 n.6. This scheme is not the Constitution's.[5]

Under the Constitution, electors do not "cast ballots" that Colorado then determines to accept or reject. Instead, under the Constitution, it is only *after the state has completed its appointment* that electors then "vote by Ballot," for President and Vice President, and, as expressly directed by the Twelfth Amendment, sign and certify the list of persons "voted for as President" and Vice President. U.S. Const. amend. XII. The requirement that electors themselves vote and then oversee the tallying and transmitting process ensures that they each have independence and dis-

[5] The authors of the Uniform Act claim that Baca did not attempt to vote but merely "present[ed] a marked ballot" that was invalid. Nat'l Conf. of Comm'rs on Uniform State Laws Br. 7 n.13. This reveals the absurdity that follows when states try to avoid the use of the word "vote."

cretion in carrying out their federal function. *See* Electors' Br. 26. Colorado would never claim that *congressional* electors merely "cast" or "present" ballots that may be accepted or rejected by state officials based on the state's own political preference. But, to Colorado, the normal rules of constitutional interpretation do not apply to presidential electors.

Colorado's order of operations also violates the Electoral Count Act. 3 U.S.C. § 1, *et seq*. Federal law states that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November." 3 U.S.C. § 1. Contrary to Colorado's scheme, this appointment is not an "ongoing process" that is held open indefinitely; instead, it is "conclud[ed]," and then the identities of the electors are certified. 3 U.S.C. § 6. It is undisputed that Micheal Baca was validly appointed under this process, and that the State of Colorado certified his appointment on December 9, 2016. Certificate of Ascertainment, https://perma.cc/2LRX-KS6H. Yet Colorado now suggests that, on December 9, Baca was both appointed and not appointed, or perhaps appointed under 3 U.S.C. § 1 but somehow not appointed for state purposes until he cast his ballot in the approved way. But there are not two appointments in a federal system with a Supremacy Clause. There is one appointment, which occurred on Election Day.

Colorado and the authors of the Uniform Act insist that Colorado's power to make a late appointment was incidental to its power to fill a vacancy. Micheal Baca "vacated" his position, Colorado claims, because he "refus[ed] to act" as he was directed, and that refusal, under Colorado law, amounted to his resigning his position as elector. Colo. Br. 1.

This idea is positively Orwellian. Baca did not "refuse to act"; it is undisputed that he cast his vote with every other elector.[6] And in no other free election that the Electors know of has the failure to vote in the way a government official directs constituted vacatur of that position.

Colorado cannot explain this special power to evict a presidential elector when it could not do the same in any other circumstances. For example, if authorized by a state legislature, a governor possesses the power to appoint U.S. Senators "[w]hen vacancies happen." U.S. Const. art. I; amend. XVII. But no governor or state legislature could declare that a Senator voting contrary to an instruction automatically "vacates" the office. Even when U.S. Senators have been absent from the Senate for extended periods of time for health reasons, no governor has attempted to exercise the power to "declare the office vacant" and make an appointment when the office plainly is not vacant.[7]

Colorado's argument to the contrary fails. Colorado notes that the Constitution "sets forth a specific process for replacing a Senator when a vacancy arises"

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[6] A short video of the proceedings of the 2016 vote of Colorado's presidential electors is available at https://bit.ly/2znA10U.

[7] Examples of Senators who have been incapacitated for lengthy periods of time include Carter Glass, who was away from the Senate for four years before dying in 1946, and Carl Mundt, who was absent for three years before his term expired in 1972. *See* Cong. Research Serv. RS22556, Incapacity of a Member of Congress 1 (Jan. 18, 2011). There was no serious attempt by state governors in those cases to declare the offices vacant and either appoint a successor or have a new election. *See id.* at unnumbered first page (noting that there is no procedure in the Constitution governing such cases). Yet that is the identical power that Colorado claims here.

but, because the Constitution is silent "on the process for filling a vacancy in the Electoral College," the State must have that power with respect to electors. Colo. Br. 28. But there is no disagreement that Colorado may fill a vacancy *when a vacancy has occurred*. The Electors contest the power of Colorado to declare a vacancy, *ipse dixit*, simply because it doesn't like the vote of an elector after appointment. With interbranch appointments, the power to fill a vacancy is not the power to create one. *See Chiafalo* Reply § III.

B. The Twelfth Amendment Did Not Eliminate Elector Independence.

Unlike Washington, Colorado does not contest that the Constitution of 1787 vested broad discretion in presidential electors. Nonetheless, Colorado insists that the Twelfth Amendment eliminated that discretion. Colo. Br. 29–33. Yet Colorado can point to no language in the Twelfth Amendment that altered elector independence. Electors' Br. 17–32. With no text, Colorado is forced to rely exclusively on snippets of legislative history, though it points to no textual ambiguity the legislative history purports to illuminate. That alone is dispositive that elector independence was maintained.

In any event, Colorado's first argument from history relies on the idea that the Amendment made it easier for political parties to exert control over the selection process by permitting electors to designate choices for President and Vice President. Colo. Br. 29–30. That is true: The requirement that electors designate their choices of President and Vice President prevents electors of a minority party from voting strategically to vault the presumptive Vice President

into the office of President. But this change did not alter the function or freedom of electors themselves. *See* Michael Rosin, Br. at 9–18; Edward Foley Br. 23–31 (detailing history). Nothing indicates that within their choice for each office, electors after the Twelfth Amendment had any less legal discretion than they did before.

Colorado then cites several passages from the legislative debates about the Amendment purporting to show that the drafters of the Amendment wished to create a system of election by "the people." Colo. Br. 32–33. But, even if they were relevant, none show that the Amendment fundamentally altered the legal requirement that electors "vote by Ballot."

Four of the five snippets of legislative history came in the context of a debate over the mechanics of a House contingent election, where the excerpted comments contrasted selection of the president by "the people" with "choice by the House of Representatives." Nothing in these comments was intended to state a belief that electors could, after the Twelfth Amendment, be legally coerced to vote for a candidate and so (poorly) replicate a true election "by the people." *See, e.g.*, 13 Annals of Cong. 120 (1803–04) (noting that Senator Smith preferred three candidates to go to the House in the event of a contingent election, and that small number would make election of the President "in the people" more likely while election by the House only the "extreme case"); *see also* Remarks of Sens. Nicholas, *id.* at 103; Campbell, *id.* at 421; Clopton, *id.* at 377, 423 (making similar points). The fifth quotation purports to show that one Representative thought electors would act as mere "agents," but in fact that Representative was using "agent" in a broad

sense to refer to all elected offices in our Republic—none of whom, of course, can be legally instructed—and so fails to provide any insight regarding the role of electors. *Id.* at 735.

In any event, Colorado's interpretive project is misguided. Its argument rests on the premise that a presidential election vested in "the people," as that phrase was used in 1803, implies that state officials can control the vote of electors to ensure all electors vote for the candidate preferred by a plurality of statewide popular voters. That is an anachronism. In the 1800 election, which immediately preceded the Twelfth Amendment, 11 of 16 states used a form of legislative selection of presidential electors; 3 of 16 states chose electors via popular vote by district; and only 2 of 16 states held statewide, at-large popular votes for presidential electors. *See* Electoral College: Historical Note, "A New Nation Votes: Election Returns 1787–1825," https://perma.cc/68NF-LGS3.[8] Thus, Colorado's idea that cabining elector discretion would permit an election for President "by the people" is historically nonsensical. In 1803, Colorado's interpretation would have bound the electors to the will of the state legislatures in a majority of states. That dependence upon an "existing authority," as Madison had described, is precisely what the Framers rejected.

[8] The cited summary of methods lists Tennessee as using district-wide popular vote, but in fact the selection in each district was made by three individuals who were appointed by the legislature. *See* Tennessee 1800 Electoral College, https://perma.cc/84VG-BMNG.

C. The Votes Of Individual Electors Do Not Belong To The State.

In further support of its theory of elector control, Colorado repeatedly cites this Court's statement in *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890), that "[t]he sole function of the presidential electors is to cast, certify, and transmit the *vote of the state* for president and vice president." Colo. Br. 11 (emphasis Colorado's); *see also id.* at 19, 48 (same quotation). Yet this dictum comes at the end of a passage that repeatedly refers to the votes of the electors as "their votes":

> the electors . . . certify and transmit *their votes* to the seat of government of the United States. The only rights and duties, expressly vested by the constitution in the national government, with regard to the appointment or *the votes of presidential electors*, are by those provisions which authorize congress to determine the time of choosing the electors, and the day on which *they shall give their votes*, and which direct that the certificates of *their votes* shall be opened [in Joint Session of Congress].

Green, 134 U.S. at 379 (emphases added). This language emphasizes that the "votes" are "their[s]"—meaning the electors', not a state's; and that the meaning of "the vote of the state" is simply the aggregate of "their votes," not a new and different entity—a state—declared in dicta by this Court.

That reading is confirmed by the 1792 Presidential Election and Succession Act, 1 Stat. 239 (1792):

> That the electors shall meet and give *their votes* on the said first Wednesday in December . . .; and the electors in each state shall make and sign three certificates of *all the votes by them given*, and shall seal up the same certifying on each that a list of the *votes of such state* for President and Vice President is contained therein.

1 Stat. 239–40 (emphases added). Here again, as in *Green*, "votes of such state" is referring to the completed tally of electoral votes. The phrase does not imply that electors' individual votes are not "*their* votes." U.S. Const. art. II, § 1 (emphasis added).

Colorado also ignores this Court's repeated statements that electors exercise a "federal function[]." *See Burroughs v. United States*, 290 U.S. 534, 545 (1934). Thus, while electors may be appointed by a state, and may, incidental to that appointment, be regulated by that state, the state itself may not interfere with or directly control that function. As the Electors explained in their opening brief, this principle was articulated in a pair of cases holding that state legislators have an unconstrained discretion to vote for or against constitutional amendments. *See* Electors' Br. 39–40 (citing *Hawke v. Smith*, 253 U.S. 221 (1920) and *Leser v. Garnett*, 258 U.S. 130 (1922)). Legislators' votes under Article V were *their votes* and could not be directed by state law.

Colorado literally has no response to this argument, as it fails even to cite *Hawke* and *Leser*. Yet in these two cases, individuals who were undoubtedly state officials—state legislators—were nonetheless

immune from control by either the state constitution or the people through referendum because, as *Leser* described it, they performed a "federal function" that was "derived from the federal constitution" and "transcends any limitations sought to be imposed by the people of a state." 258 U.S. at 137. That principle applies to electors, and it bars Colorado's interference with an elector's vote.

D. Colorado's Law Conflicts With A Premise Of The Twentieth Amendment, And Could Thereby Create A Constitutional Crisis.

The Twentieth Amendment was ratified in 1933. That Amendment, among other things, provided for succession in two critical cases: First, if after the presidential electors select a President-Elect, that person "shall have died," and second, if after "the right of choice shall have devolved upon" the House, "any of the persons from whom the House of Representatives may choose" shall have died. In both cases, the Amendment gives Congress power to legislate about those contingencies. U.S. Const. amend. XX.

Unaddressed by the Twentieth Amendment is the case of death of a party nominee before the electors vote. This was no oversight. The Amendment's Framers considered the case of presidential or vice-presidential candidates dying before the presidential electors vote, as happened to Horace Greeley in 1872 and James S. Sherman in 1912. *See* H.R. Rep. No. 72-345 at 5 (1932). The Amendment's Framers saw no need to provide for that case because "the electors would be free to choose a President," so a "constitutional amendment [was] not necessary." *Id.*

The scheme that Colorado, Washington, and the drafters of the Uniform Act ask this Court to sanction could now threaten a constitutional crisis, given the limited scope of the Twentieth Amendment. If a candidate dies before the Electoral College votes, then under both Colorado *and* Washington law, electors pledged to that candidate *must* still vote for that candidate. But under the precedent set in 1873, those votes cannot be counted by Congress, because they would not have been cast for a living person. *See* Rosin Br. 29 n.14. Colorado, Washington, and those states following the Uniform Act would thus register no valid electoral votes if they had been cast for that candidate. *See* Uniform State Laws Br. App. 10a–24a (reproducing Uniform Act); 8a–9a (acknowledging the "particularly notable" possibility of a death or "disqualifying development[]" in the weeks before the electoral vote but stating that the "Act does not deal with the possibilities of death, disability or disqualification of a presidential or vice-presidential candidate before the electoral college meetings").

This could be disastrous. If a candidate won the popular vote and was expected to win the electoral vote, but then died before the vote of the presidential electors, electors in any state following Colorado's law would still be required to vote for that candidate. Those votes, under the Greeley precedent, would be lost when counted in Congress. That loss could deprive the party of the presumptive winner a majority in the college, and send the election to the House. *See* U.S. Const. amend. XII. In that contingent election, there would be no requirement that the party expected to prevail would in fact prevail in the House.

That scenario has never occurred, though there have been more deaths by candidates (two) than electors who have switched their vote to the other side (one). *See supra* 20. But if the electors must do as the mix of state law directs, there could well be a political crisis.

This problem reveals why it is a mistake for states, in a patchwork manner, to try to update or change the Constitution's design. It may make sense for the discretion of electors to be replaced by law, as the Twentieth Amendment has done in the cases after the electors vote. But that change needs to be made at a national level, through an Amendment to the Constitution. Allowing the states to change the rules piecemeal risks crisis. And rather than permit the states to create that risk, this Court should accept—and affirm—the judgment of the Congress that proposed the Twentieth Amendment, until another Congress, or Article V convention, succeeds in proposing an alternative to address this remaining contingency.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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