

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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COLORADO DEPARTMENT OF STATE,)
 Petitioner,)
 v.) No. 19-518
MICHEAL BACA, ET AL.,)
 Respondents.)
- - - - -

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Place: Washington, D.C.
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9
10 Washington, D.C.
11 Wednesday, May 13, 2020
12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:18 a.m.
16
17 APPEARANCES:
18
19 GEN. PHILIP J. WEISER, Attorney General,
20 Denver, Colorado;
21 on behalf of the Petitioner.
22 JASON HARROW, Esquire, Los Angeles, California;
23 on behalf of the Respondents.
24
25

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P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case Number 19-518, the Colorado Department of State versus Micheal Baca. I note at the outset that Justice Sotomayor is recused in this case.

General Weiser.

ORAL ARGUMENT OF GEN. PHILIP J. WEISER

ON BEHALF OF THE PETITIONER

MR. WEISER: Thank you, Mr. Chief Justice, and may it please the Court:

The Constitution authorizes states to use their plenary authority to remove a bribed elector, one who engages in a rebellion, or one who would perpetrate a bait and switch on the people of their state by voting contrary to a binding pledge. By contrast, if a state wishes to treat electors as free agents, rather than as proxy voters, it is free to do so.

In short, states determine how to select electors and ensure that they meet the relevant requirements and perform their duties as assigned. This means, under Green, that states can oversee bribery as an incident as a

1 power to appoint. This must include the power
2 to remove an elector without requiring a full
3 criminal trial. Under my friend Mr. Lessig's
4 position, as a practicality, bribed electors
5 would cast ballots and illegal votes.

6 In this case, the State prevented
7 Mr. Baca from casting a legal ballot, just like
8 it's an illegal ballot if you don't sign it here
9 in Colorado.

10 As this Court explained in Ray, the
11 purpose and history of the Twelfth Amendment
12 reflected the reality that electors acted as
13 pledged agents for their political parties. And
14 the history of such pledges should be given
15 great weight.

16 As to Justice Ginsburg's point about
17 the importance of enforcing a pledge
18 requirement, it's worth noting people rely on
19 such pledges, which are taken voluntarily. And
20 as Justice Scalia explained in the Inter Tribal
21 Council case, voting requirements would be of
22 little value if not enforced.

23 In the almost 70 years since Ray,
24 states have continued to enact laws to enforce
25 elector pledges. Congress has consistently

1 deferred to the states' plenary authority, and
2 no court other than the Tenth Circuit below has
3 invalidated a pledge binding law.

4 Mr. Chief Justice, I would welcome
5 your questions.

6 CHIEF JUSTICE ROBERTS: Well, my first
7 question is to ask if there is anything that
8 General Purcell said on behalf of the State of
9 Washington with which you disagree?

10 MR. WEISER: Thank you so much,
11 Mr. Chief Justice. I would only add a slight
12 wrinkle. He did, indeed, endorse our Tenth
13 Amendment argument. What I would say on that is
14 the Tenth Amendment is an important interpretive
15 principle because the Constitution gave the
16 states authority over elections. The Tenth
17 Amendment underscores that point.

18 CHIEF JUSTICE ROBERTS: Would you
19 state for me exactly what you think the limits
20 on the state power to replace electors are?

21 MR. WEISER: Your Honor, here, I would
22 echo my colleague from Washington. It governs
23 whether or not another constitutional provision
24 is violated. The Fourteenth Amendment quite
25 notably means a state could not remove an

1 elector based on race or religion. Also, the
2 Qualifications Clause means you can't remove
3 electors for the purpose of adding
4 qualifications for who can be President.

5 CHIEF JUSTICE ROBERTS: So, if you
6 selected electors, one of the requirements is
7 they had to be relatives of the legislators,
8 that would be all right?

9 MR. WEISER: Your Honor, here in
10 Colorado, we picked electors in 1976. The state
11 legislature did it directly. As long as that
12 choice doesn't violate a constitutional
13 provision, they can pick whoever they want.

14 CHIEF JUSTICE ROBERTS: What if the
15 rule is, you know, the electors are chosen
16 pursuant to slates, but anyone who says anything
17 disloyal to the State between the time they're
18 selected and the time they cast their vote will
19 be replaced?

20 MR. WEISER: Your Honor, as my
21 colleague from Washington noted, once people are
22 voting to make a choice, people have a right for
23 their ballots to be counted. And here, in the
24 hypothetical you just noted, the ballots of
25 people would be invalidated after the fact.

1 That implicates Gray versus Sanders and this
2 Court's line of right-to-vote cases.

3 CHIEF JUSTICE ROBERTS: Any other
4 limitations on the power of the State? What
5 about the bribery cases that have been -- or
6 bribery hypotheticals that have been discussed?

7 MR. WEISER: Thank you, Mr. Chief
8 Justice. The ability to remove bribed electors
9 is crucial for the states to have, and not only
10 after a criminal trial but after there's a basis
11 for this concern.

12 To your point, if a state failed to
13 remove a bribed elector, the state would not
14 have violated a constitutional provision per se,
15 it would have violated its duty as a sound
16 overseer of presidential elections.

17 CHIEF JUSTICE ROBERTS: That's even
18 after the electors have been chosen? In -- in
19 other words --

20 MR. WEISER: The State is --

21 CHIEF JUSTICE ROBERTS: Go ahead.

22 MR. WEISER: Mr. Chief Justice, the
23 State is indeed authorized to remove electors
24 who have taken a bribe, if that's your question.

25 CHIEF JUSTICE ROBERTS: Yes. What

1 about your -- your power-to-appoint argument?
2 It does seem -- certainly, our cases involving
3 the power to appoint by executive officials or
4 the President do say that it carries with it the
5 power to remove.

6 But that has always been with respect
7 to inferior officers. And the electors here, it
8 seems to me, are not inferior in any way to the
9 state legislator. They carry rights as
10 appointees carrying out federal responsibilities
11 as well. So I don't see how those authorities
12 support your position.

13 MR. WEISER: Your Honor, we disagree.
14 The Constitution clearly gives states plenary
15 power over electors and as -- acting as a
16 steward of the presidential election system.

17 That means, if electors were to take a
18 bribe, for example, or not to show up, it's on
19 the State to address that point. If you only
20 left this to Congress in the final instance,
21 that would mean that all Congress could do is
22 remove the elector, not have it be counted.

23 What the states can do is replace an
24 elector and make sure that the state has the
25 constitutionally authorized votes in the

1 Electoral College. As such, the states play a
2 critical role, and that role includes the power
3 to remove.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General.

6 Justice Thomas?

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 General, you start your brief
10 questioning standing in this case. I wonder if
11 you think, under our precedent, there's standing
12 when a person is removed from an elected office?

13 MR. WEISER: Your Honor, the past
14 cases involving removal from an elected office,
15 like Powell, for example, involve an official
16 with a salary. What's unique here is there's no
17 salary or other personal injury.

18 What's at issue here is the
19 institutional role itself. And as this Court
20 made clear in Smith and a line of cases, an
21 individual doesn't have standing to challenge an
22 institutional role that he or she may believe is
23 unconstitutional.

24 JUSTICE THOMAS: So, in -- in a
25 removal case, at what point do you think there

1 would be an injury in fact?

2 MR. WEISER: Justice Thomas, insofar
3 as someone gives up a salary, like in Humphrey's
4 Executor, you have injury in fact. If it is an
5 honorary position, a volunteer position, there's
6 no personal injury, there is merely a quarrel
7 with the institutional role.

8 JUSTICE THOMAS: On -- on a separate
9 issue, you know, throughout, I guess, our
10 history, there have been not pledges among
11 electors. But can you point to me -- point out
12 the first state law that required pledges in our
13 history?

14 MR. WEISER: I can, Justice Thomas.
15 It was Oregon. It did so in the late 19-teens.
16 And what I want to underscore is that wasn't the
17 first time an elector was removed for violating
18 a pledge.

19 In 1912, Nebraska, without any elector
20 binding law, did remove an elector who had
21 promised to violate the pledge because the
22 court, in that case, the Nebraska Supreme Court,
23 said it would have been a fraud on the people of
24 Nebraska.

25 JUSTICE THOMAS: You attach yourself

1 to the arguments of General Purcell, so I do
2 want you to -- I understood his comments on --
3 on the federal -- scope of the federal function
4 concept or argument. Could you give me what
5 your take is on that?

6 MR. WEISER: With pleasure, Justice
7 Thomas. Our view is that doctrine doesn't
8 really fit here. Under the Constitution, it's
9 the role of the states as stewards overseeing
10 the presidential election process.

11 The typical federal function case,
12 like McCulloch versus Maryland, you're worried
13 about a state interfering with a federal
14 official. Here, as this Court has made clear
15 multiple times, electors are not federal
16 officials. They are appointed by and overseen
17 and transmit the vote of the states.

18 JUSTICE THOMAS: Thank you, General.

19 CHIEF JUSTICE ROBERTS: Justice
20 Ginsburg?

21 JUSTICE GINSBURG: Can you give us an
22 idea of the practical consequences of a ruling
23 one way or another? How would a ruling against
24 you actually alter our democratic processes?

25 Most states already require elector

1 pledges. And faithless voting throughout the
2 years has always been rare. But how much
3 difference does it make?

4 MR. WEISER: Your Honor, the chaos
5 that could result from upholding the Tenth
6 Circuit's ruling is one that could occasion a
7 constitutional crisis, as was noted by my
8 colleague from Washington.

9 If states have no ability to remove
10 bribed electors and all that's left is
11 Congress's ability to choose to count or not
12 count, the mere fact of bribing electors in an
13 open enough way would knock out electors, would
14 limit who could vote, and ultimately could sway
15 the outcome of a presidential election.

16 It's the role of the states to oversee
17 confidence in our election systems to ensure
18 that the public's voice is heard. And all of
19 those values, the integrity of our elections,
20 are at stake in this case.

21 JUSTICE GINSBURG: Returning to the
22 standing question, Baca was removed from his
23 post. Isn't that a stigma at least? Why isn't
24 it -- it may -- may not have economic
25 consequences, but isn't it a blot on his

1 reputation? And -- and wouldn't that constitute
2 a cognizable injury?

3 MR. WEISER: Your Honor, the auditor
4 in Smith believed that he suffered a stigma,
5 having to implement an unconstitutional statute.
6 And that concern of his stigma was not
7 sufficient to give him standing. I would submit
8 the same rule holds here.

9 JUSTICE GINSBURG: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer?

12 JUSTICE BREYER: Good morning.

13 A technical question. The -- this is
14 a lawsuit brought against you, the State, under
15 Section 1983. The court's opinions, I take it,
16 have made clear that a State isn't a person
17 under 1983.

18 Now everybody's waived that argument.
19 Both sides would like us to rule. But can they?
20 If someone sues a foreign country under 1983,
21 and a foreign country can't be a defendant under
22 1983, can the party simply get an opinion from
23 this Court by waiving the question?

24 MR. WEISER: Your Honor, I would start
25 with Justice Ginsburg's opinion in the Northwest

1 Airlines case, where she made plain that whether
2 or not there's a claim for relief in a statute
3 is not a jurisdictional question.

4 What we're dealing with here, both
5 under Section 1983 and Eleventh Amendment
6 immunity, is strategic decisions made by our
7 state in the course of litigation.

8 We made those decisions because we
9 wanted to litigate this case on the merits. We
10 believe we have a case on the merits and
11 standing. And that's how we've chosen to
12 proceed.

13 JUSTICE BREYER: Well, yes, but that
14 isn't my question. My question is, of course,
15 you want a decision from this Court. But Mr.
16 Smith might want a decision about how the
17 Constitution applies to someone in Mexico or to
18 someone in Russia.

19 I mean, can the parties get that
20 advisory decision by simply saying: Oh, we
21 waive all the jurisdictional problems or all the
22 non-jurisdictional problems, all the problems
23 that say this statute doesn't apply?

24 MR. WEISER: Justice Breyer, this
25 Court will opt for whatever ground it chooses.

1 With respect to whether the Court has to rule on
2 this issue, the answer is no. This is not a
3 jurisdictional question. For us, this was one
4 of several strategic questions on what grounds
5 to litigate.

6 JUSTICE BREYER: Got it. The other
7 question I have is, I take it that it's only in
8 1960 that the first state passed a statute that
9 actually removed or punished a person for voting
10 the wrong way, an elector.

11 So were there cases of bribery that
12 went unpunished before 1960? And was there a
13 single case? If so, how many? And what
14 happened? Were their votes counted, although
15 they were bribed?

16 MR. WEISER: Justice Breyer, the first
17 statute was in the late 19-teens in Oregon, but
18 before that, there were --

19 JUSTICE BREYER: I thought that was a
20 statute which required a pledge that didn't
21 punish people for how they voted, but,
22 regardless, same point.

23 MR. WEISER: Your Honor, we don't have
24 a history of what types of changes were made.
25 What we know is they happened all the time. As

1 Professor Hardaway notes in his brief, for
2 example, in Michigan, there were electors who
3 just didn't show up, who then were replaced on
4 the day that the Electoral College had to meet.

5 We haven't had electors who are upset
6 about having been replaced or not counted --

7 JUSTICE BREYER: That isn't --

8 MR. WEISER: -- until --

9 JUSTICE BREYER: -- my question. My
10 question has to do with bribery. And before the
11 first statute was passed more than 200 years
12 after the Constitution was first created, were
13 there instances of an elector being bribed and,
14 if so, how was it handled?

15 MR. WEISER: We don't know of any such
16 instances, Your Honor.

17 JUSTICE BREYER: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: In past elections,
20 were there concerted campaigns to influence
21 electors after the popular vote was cast for the
22 purpose of either reversing the result that was
23 produced in the Electoral College by the popular
24 vote or throwing the case into Congress?

25 MR. WEISER: Justice Alito, the most

1 famous such case would have been in 1876
2 involving the Tilden/Hayes disputed election.

3 JUSTICE ALITO: My other question is
4 essentially the same one I -- I -- that concerns
5 me with respect to the positions of all the
6 counsel in these two cases, and that is
7 limitation, if any, on the arguments that are
8 being made.

9 So is it your position that a state
10 has plenary power to remove an elector? If not,
11 what -- under what circumstances can an elector
12 not be removed?

13 MR. WEISER: Your Honor, from
14 McPherson, we do see plenary authority,
15 oversight, and removal power of electors. And
16 the constraint on that is other independent
17 constitutional conditions, such as ones we
18 discussed previously under the Fourteenth
19 Amendment, for example.

20 JUSTICE ALITO: So suppose the
21 legislature is in the hands of a political party
22 other than the party of the candidate who wins
23 the popular vote in the state.

24 Can the legislature simply remove all
25 of the electors who were pledged to vote for

1 that candidate and replace them with other
2 electors?

3 MR. WEISER: Justice Alito, this is an
4 important point. Let me first answer your
5 question, then get to a slightly different one
6 that raises the same concern.

7 If the legislature announces the
8 procedure in advance and gives people the right
9 to vote and they exercise that right, the
10 legislature cannot undo the public's right to
11 vote without violating the right-to-vote line of
12 cases.

13 However, if the legislature acted
14 earlier, say the prior spring, to change the
15 process to give itself the power to appoint
16 electors, not the power in the hands of the
17 people, that's a choice state legislatures could
18 make.

19 In McPherson, it was litigated whether
20 or not a legislature could move from a
21 winner-take-all to a districting system. There
22 was a partisan motivation for that change, and
23 the Court said the legislature's power was
24 plenary.

25 JUSTICE ALITO: Well, if we agree with

1 you that the legislature has plenary power to
2 remove electors, then won't the people of your
3 state understand when they cast their vote for
4 President that the legislature has the power to
5 remove the electors pledged to the candidate
6 they favor and replace those electors with other
7 electors?

8 MR. WEISER: Justice Alito --

9 JUSTICE ALITO: Won't they be without
10 --

11 MR. WEISER: -- what we're asking for,
12 what we believe the right to vote cases require,
13 is that the public be told what they're voting
14 on. Per the Chief Justice's earlier question,
15 if the public is told you are merely casting an
16 advisory vote, as opposed to a binding one that
17 you can expect will be followed, that's a
18 different case. The cases before --

19 JUSTICE ALITO: But what is the --
20 what is your best -- what is the best
21 right-to-vote case that stands for that
22 principle?

23 MR. WEISER: In Gray versus Sanders,
24 it says the public has a right for their ballots
25 to be counted.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Kagan?

4 JUSTICE KAGAN: General Weiser, first,
5 on your Tenth Amendment point, why doesn't
6 Thornton foreclose that argument? Thornton said
7 that the Tenth Amendment reserves only those
8 powers that the states held prior to the
9 ratification of the Constitution.

10 I would think that the power we're
11 talking about here is -- is -- is not such a
12 power but, instead, was created by the
13 Constitution in the first instance.

14 So how can the Tenth Amendment support
15 you consistent with Thornton?

16 MR. WEISER: Thank you, Justice Kagan.

17 What I would suggest here is a similar
18 principle to what Justice Kavanaugh articulated
19 earlier. Justice Kavanaugh noted the chaos
20 principle means, if you have a close case, you
21 avoid creating chaos. We would say, if you have
22 a close case, you avoid intruding on federalism
23 concerns. And that's grounded and represented
24 by the Tenth Amendment.

25 JUSTICE KAGAN: But, again, I thought

1 that that was only as to the powers that the
2 states held prior to the ratification of the
3 Constitution.

4 MR. WEISER: Your Honor, as a strict
5 matter, that is what the Tenth Amendment does,
6 but there's also the interpretive principle
7 picked up, for example, in Gregory versus
8 Ashcroft that says, when looking at intrusions
9 on state power, limits on state power, given to
10 the feds, you do so lightly.

11 JUSTICE KAGAN: Okay. Mr. Lessig
12 ended his argument by giving a number of
13 hypotheticals. He said, you know, if a state
14 can do what you're doing, a state can also, say,
15 enforce pledges to vote only for candidates who
16 have visited the state or who release their tax
17 returns or who take a position on certain
18 issues. Is that right?

19 MR. WEISER: Not necessarily, Your
20 Honor. The tax -- tax returns issue has been
21 litigated under the Qualifications Clause in
22 California, and the court there said that did
23 constitute adding a qualification to be
24 President.

25 But, moreover, I would note there's

1 also an independent question about whether or
2 not you could have a state saying we won't allow
3 someone to be on our ballot in the state at all
4 if they haven't done X, Y, and Z, and, indeed,
5 in the California case, it was not in the
6 elector context but in the access-to-the-ballot
7 context that the issue arose.

8 JUSTICE KAGAN: And -- and if you're
9 relying on the Qualifications Clause, couldn't
10 you be said to be imposing a qualification too?
11 In other words, that the candidate actually have
12 received more votes than anybody else in your
13 state?

14 MR. WEISER: Respectfully, Your Honor,
15 I wouldn't interpret that as a qualification to
16 be President, particularly because the right of
17 the states to have a system where the people
18 could be heard is part of the original
19 constitutional design and then again confirmed
20 in the Twelfth Amendment itself.

21 JUSTICE KAGAN: Well, it sort of
22 assumes the conclusion. I mean, it's obviously
23 a pretty normal understanding of -- of what
24 elections do. But, if you assume that these
25 electors were meant to -- to use their own

1 discretion, then the popular vote was not
2 required and -- and it would be imposing a
3 qualification.

4 MR. WEISER: Your Honor, if you assume
5 electors have this discretion, you've assumed
6 the answer to this case. We would say they
7 don't have that discretion at all. And --

8 JUSTICE KAGAN: Exactly. But -- but
9 you're assuming the answer in the exact same
10 way, aren't you? What is or is not a
11 qualification sort of depends on this case. So
12 I don't think that you can get rid of Mr.
13 Lessig's so easily as you would like to.

14 MR. WEISER: Your Honor, our position
15 is that the Constitution is silent on whether or
16 not you can have electors representing how the
17 public votes. That is inherent in this design,
18 and, thus, we say what's inherent in the design
19 couldn't be an additional qualification.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Gorsuch?

23 JUSTICE GORSUCH: Counsel, I'd like to
24 continue the same line of questioning that
25 Justice Kagan raised with you and -- and

1 Mr. Lessig suggested.

2 If -- if states enjoy plenary power to
3 remove electors, what would prohibit them from
4 passing a law to say -- for example, to say that
5 -- that all electors have to -- have to vote for
6 presidents -- presidential candidates who
7 support certain positions or who have done
8 certain things or who have visited the state.

9 Now I understand your ex post
10 argument; that is, states can't change the rules
11 of the election after the election and have to
12 provide voters notice. But, if they did it well
13 in advance, what would prohibit them from doing
14 so, if anything, on your view?

15 MR. WEISER: Your Honor, I'm trying to
16 square how this fits with a popular vote system
17 because, if you give people the power to vote
18 and they exercise the power, then our argument
19 is you count their votes.

20 What I believe you'd be getting at
21 would then be a preclearance process where you'd
22 have to preclear what electors could be on the
23 ballot before people could vote on them. In
24 that system --

25 JUSTICE GORSUCH: Well --

1 MR. WEISER: Yes.

2 JUSTICE GORSUCH: -- just to interrupt
3 you, I'm sorry, counsel, but you've -- you've
4 indicated it would be fine for people to have an
5 advisory vote to 12 wise people who would then
6 make the final decision.

7 Why -- why couldn't you also have a
8 system in which the people provide advice within
9 certain parameters set by the legislature?

10 MR. WEISER: Your Honor, I think
11 that's the same context I had in mind, which is
12 you would basically give people an advisory vote
13 and then, after the fact, you'd have to ask
14 whether the --

15 JUSTICE GORSUCH: No, not after the
16 fact. They've been alerted prior to the fact,
17 counsel. That's my hypothetical. I -- I -- I
18 understand your point about after the fact.

19 In advance, they've been notified that
20 there are -- they are free to provide advice to
21 -- to -- to -- to 12 electors, whatever the
22 number may be, and their advice, though, is
23 going to be bounded and there are certain things
24 that the electors have to -- have to, because
25 the legislature says, abide by or else they'll

1 be removed. And those are, again, you know, has
2 the presidential candidate visited the state,
3 has he taken this or that position, has he or
4 she, you know, turned over her tax returns?
5 Whatever -- whatever the conditions may be.
6 It's a bounded choice.

7 You've been arguing that choice can be
8 bounded. And this is just another bounds. What
9 prohibits the State from doing that?

10 MR. WEISER: In this situation, the
11 State can add limitations as long as they comply
12 with other constitutional provisions.

13 JUSTICE GORSUCH: And do those?

14 MR. WEISER: The requirement to visit
15 a state I don't believe clearly violates any
16 constitutional provision. The tax return issue,
17 we've noted, raises a Qualification Clause
18 question that could be a real concern. And the
19 --

20 JUSTICE GORSUCH: So the presidential
21 candidate is on the ballot. It's who the
22 electors can vote for. Is that a qualifications
23 problem in the State's view?

24 MR. WEISER: Yes, it would be because,
25 if you tell electors they can only vote for --

1 pick whatever the concern would be -- tax
2 returns, people over 50, the concern is you
3 could be adding a new qualification to be
4 President and thereby disqualify, in effect,
5 someone from being President who the
6 Constitution would qualify to be President.

7 JUSTICE GORSUCH: How about other --
8 how about political positions or -- you -- you
9 say visiting the state, that's permissible, that
10 condition would be permissible in your view?

11 MR. WEISER: Your Honor, I don't see
12 off the top of my head any other constitutional
13 constraint that would address that issue. Our
14 position is the power is plenary or exclusive,
15 as this Court said in McPherson. The State can
16 oversee electors and remove them who don't
17 follow requirements the State deems appropriate.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: Thank you, Chief
23 Justice.

24 Good morning, General. What is the
25 purpose of having electors?

1 MR. WEISER: Thank you for that
2 question, Justice Kavanaugh. When electors are
3 set up in the constitutional design, that allows
4 for states to make a choice. Electors can
5 either vote as proxy voters on behalf of the
6 public, as we do here in Colorado, or they can
7 be free agents.

8 By having this structure uniform
9 across the several states, you give states the
10 ability to choose which model they want.

11 JUSTICE KAVANAUGH: But wouldn't -- if
12 that were the design, why not just leave it to
13 the states, as opposed to going through all
14 these details about how the electors are
15 supposed to operate?

16 As you know, Justice Jackson in Ray,
17 looking at that history, said no one faithful to
18 our history can deny that the plan originally
19 contemplated was that electors would be free
20 agents to exercise an independent and
21 nonpartisan judgment as to the people best
22 qualified for the nation's highest offices.
23 That's the end quote from Justice Jackson.

24 So that implies not a choice but
25 actually a requirement that the states give this

1 kind of independence, free agent status, to
2 electors. And why -- why go through all the
3 details if it's -- if it's the way -- I guess
4 what I'm asking more broadly is the text has all
5 these details to set up a design that seems
6 closer to what Justice Jackson articulates.

7 Where in the text do you hang your
8 hat?

9 MR. WEISER: Your Honor, our text --
10 textual hook is the delegation of the authority
11 to the states. By contrast to what Justice
12 Jackson said, James Madison said the Electoral
13 College was all about giving the states
14 authority to oversee presidential elections as
15 they saw fit.

16 And as the majority in Ray noted,
17 contemporaries of the founders did, indeed, see
18 electors as proxy voters on behalf of the
19 public. And that was absolutely the backdrop to
20 the Twelfth Amendment, so I would also point you
21 to the Twelfth Amendment, as effectively
22 confirming and accepting the fact that electors
23 can be, indeed, most often are, proxy voters,
24 not free agents.

25 JUSTICE KAVANAUGH: Why do you think

1 the founders did not leave it up to the states
2 to decide whether they wanted their members of
3 Congress to be electors?

4 MR. WEISER: Your Honor, the
5 Constitution had a series of compromises between
6 separating powers between the states and the
7 federal government and between the states. This
8 was one of those compromises that was reached at
9 the final days of the Constitutional Convention.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. You have a minute to wrap up if you'd
13 like.

14 MR. WEISER: Yes, Mr. Chief Justice.

15 As we've noted, this case is all about
16 State authority. And on the theory of my
17 friends on the other side, states have no
18 authority even to remove bribed electors short
19 of a full criminal trial.

20 Our founders gave the states this
21 authority, expected them to exercise it in ways
22 that were sound. That's what has been the
23 history of our presidential elections.

24 We would urge the Tenth Circuit
25 decision to be reversed.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Harrow.

4 ORAL ARGUMENT OF JASON HARROW
5 ON BEHALF OF THE RESPONDENTS

6 MR. HARROW: Mr. Chief Justice, and
7 may it please the Court:

8 This case is about a tradeoff between
9 flexibility and rigidity. The State's rule is
10 too rigid, and that rigidity could come at a
11 steep cost. The State's binding law has no
12 exception. If a candidate dies between the
13 popular vote and the vote of the electors, there
14 is no exception.

15 If a candidate has a stroke, there is
16 no exception. If there's widely recognized
17 fraud or bribery by the candidate, no exception.
18 If there will be a tied electoral vote and a
19 potentially deadlocked House, no exception. The
20 law is rigid.

21 Electors vote for the winner of the
22 popular vote in the State or -- well, there is
23 no or, Your Honors. That's the only option.

24 That rigidity has no place in our
25 constitutional universe. If something goes awry

1 in this coming election or any other, the
2 Framers thought that electors could vote with
3 discretion, and the Twelfth Amendment didn't
4 change that.

5 More recently, the Twentieth
6 Amendment's framers, when they analyzed these
7 contingencies, recognized even 150 years after
8 the framing that electors still had discretion
9 and electors could and should use it in the case
10 of death of a candidate. This shows that, given
11 the current system of presidential selection by
12 an Electoral College, there must be times when
13 electors and only those electors are best placed
14 to act in the interest of country.

15 Your Honors, the states have a problem
16 with the idea of an Electoral College and they
17 want to write it out. They make no bones about
18 it. They haven't so far today. And perhaps we
19 would be better off without indirect election,
20 because its months-long, multi-step process of
21 presidential selection presents some risk of
22 instability no matter who wins this case. But
23 until we have an Article V amendment, the vote
24 of real humans called presidential electors
25 isn't going away.

1 To make sure the system we have works
2 sensibly, given the Constitution we have now,
3 when those human electors do vote by ballot,
4 they must be permitted to do so with discretion,
5 Your Honors.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 I'll begin by asking you the flip side
9 of the question I asked General Weiser. Is
10 there anything that Mr. Lessig said with which
11 you disagree?

12 MR. HARROW: No, Your Honor, we filed
13 an -- an opening brief, and I'll -- I'll sign on
14 to exactly what he said in the first hour.

15 CHIEF JUSTICE ROBERTS: Thank you.
16 You gave a number of examples there of
17 situations that have gone awry and there was no
18 way to take account of them. But I'm not sure
19 your position has any limits either. What --
20 what are the limits to your position?

21 MR. HARROW: The limits, Your Honor,
22 are that electors must be permitted to vote with
23 discretion. And so, as Your Honor notes,
24 there -- there is a choice. There is always the
25 possibility of bribery, always the possibility

1 of corruption, and the Framers considered all
2 the possibilities and placed the ultimate
3 selection of President in the hands of a group
4 of presidential electors that were appointed by
5 --

6 CHIEF JUSTICE ROBERTS: So I take --

7 MR. HARROW: -- the State.

8 CHIEF JUSTICE ROBERTS: -- I take your
9 -- I take your answer when I ask for limits to
10 be that they must be allowed to vote in their
11 discretion that you don't have any limits?

12 MR. HARROW: Your Honor, there are no
13 limits in that voting by ballot so long as the
14 ballot is for a person. The Twelfth Amendment
15 says they must vote for a person. You can
16 imagine -- indeed, you don't --

17 CHIEF JUSTICE ROBERTS: But,
18 literally, as opposed to, say --

19 MR. HARROW: -- have to imagine --

20 CHIEF JUSTICE ROBERTS: -- not a
21 giraffe? I mean, of course, they have to vote
22 for a person.

23 MR. HARROW: Your Honor, Congress
24 concluded in 1872 that the Greeley vote wasn't a
25 vote for a person because it was a vote for a

1 non-living person. I'm -- I'm sorry if I was
2 unclear. That's the situation that I meant.

3 But -- but those are really the limits
4 of the discretion there. There's great
5 discretion in appointment. There's --
6 there's -- you know, the -- the State can
7 absolutely discriminate between all kinds of
8 people and they do on the basis of political
9 party, for instance, but, once the vote begins,
10 that vote by ballot is the electors.

11 CHIEF JUSTICE ROBERTS: So the elector
12 can decide, I am going to vote -- I'm going to
13 flip a coin and however it comes out, that's how
14 I'm going to vote?

15 MR. HARROW: Yes, Your Honor, that's
16 the same discretion that U.S. senators have,
17 representatives have, congressional electors
18 have. These too are elected officials and they
19 have that same discretion.

20 CHIEF JUSTICE ROBERTS: Well, that
21 sounds pretty limitless to me. Let's say that
22 an elector has a contract -- the different
23 parties insist that electors sign a contract
24 that you will vote -- if we win the popular
25 vote, you will vote for our party's candidate.

1 And if you don't, there'll be
2 liquidated damages of a thousand dollars, an
3 elector is selected and breaks that contract,
4 votes for the other individual even though that
5 individual didn't win the popular vote.

6 Can that contractual commitment be
7 enforced by the State?

8 MR. HARROW: Not legally, no, Your
9 Honor. And that shouldn't be surprising because
10 that's the same prohibition that applies to
11 congressional electors, who cannot sell their
12 votes, even though, as a condition of
13 participating in a primary -- and we cite these
14 cases extensively in our reply briefs -- there
15 you can force regular voters to take pledges and
16 oaths to support a party. You just can't cross
17 that line and enforce them.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 JUSTICE THOMAS: Yes, thank you, Mr.
22 Chief Justice.

23 Counsel, you mentioned that Senators
24 are free to vote or members of the House of
25 Representatives, but there's some degree of

1 accountability for them when they vote a
2 particular way.

3 What's the accountability here for an
4 elector who strays from what is expected?

5 MR. HARROW: There are several forms
6 of accountability, Justice Thomas. The first,
7 of course, is the selection process, because
8 they are party people and, in all 50 states,
9 they're selected by the political parties.

10 From there, after the vote, they can
11 be kicked out of the political party. They
12 cannot win election. They -- they can have
13 negative political consequences. And that's the
14 exact same thing with Senators, right?

15 Senators do have accountability, but
16 that accountability comes six years later. So,
17 if a U.S. Senator, Justice Thomas, promises to
18 support only low taxes and then at every
19 opportunity raises taxes, their only
20 accountability is six years later. That's the
21 nature of political discretion and that's the
22 discretion electors have here.

23 JUSTICE THOMAS: But there's also
24 accountability in chambers -- within the Senate,
25 there's accountability as far as removal from

1 office.

2 But you're saying that with an
3 elector, that those other forms of
4 accountability are not available?

5 MR. HARROW: They are, Your Honor.
6 There is absolutely party discretion, party
7 meetings, just like any other representative
8 body. And -- and just to -- to quibble
9 slightly, Justice Thomas, with what you said in
10 terms of removal of a U.S. Senator, there's no
11 precedent that we have found of a U.S. Senator
12 being removed, perhaps even by an appointing
13 governor in the case of a vacancy, on the basis
14 of a vote. Certainly, some sort of criminal
15 misconduct, sure, but not on the basis of a
16 vote. And that's the -- really the same analogy
17 here.

18 JUSTICE THOMAS: But let's say the --
19 you know, you mentioned with respect to the
20 State that the State could not -- that after
21 someone dies, that their system is so rigid that
22 you can't make changes because of the -- the
23 death of the candidate.

24 But I think that, on your side, you --
25 as the Chief Justice alluded to, you have a

1 similar problem because the elector, who had
2 promised to vote for the winning candidate,
3 could suddenly say, you know, I'm going to vote
4 for Frodo Baggins, and that's -- I really like
5 Frodo Baggins. And you're saying, under your
6 system, you can't do anything about that.

7 MR. HARROW: Your Honor, I -- I think
8 there is something to be done because that would
9 be the vote for a non-person, you know, no -- no
10 matter how big a fan many people are of Frodo
11 Baggins.

12 That -- that said, I do think the
13 important point is that the Framers hashed out
14 these competing concerns. They hashed it out in
15 Philadelphia in 1787. They understood the
16 stakes, and they said, among these competing
17 hypotheticals, electors are best placed to make
18 the ultimate selection. That hasn't changed,
19 Justice Thomas.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Ginsburg?

24 JUSTICE GINSBURG: I don't understand
25 your point about rigidity, because, as I

1 understand, the State's position is it's the
2 states have a choice. They can say electors
3 have an independent vote, or they can say the
4 electors must follow the parties' orders.

5 So the states are not -- the states
6 are being given leeway to do it one way or the
7 other way. So why do you say it's rigid when it
8 seems to me it could be described as supple
9 because states can have it either way?

10 MR. HARROW: Justice Ginsburg, the
11 states do have great flexibility, as you
12 mentioned, in choosing the mode and method of
13 appointment, but the laws that they've written
14 here, the laws that were enforced against my
15 client, Mike Baca, were -- are very rigid. They
16 are rigid in the sense that there are no
17 exceptions once passed.

18 And that rigidity conflicts with the
19 supposition that every single Congress that has
20 looked at the issue of presidential selection
21 has assumed exists, explicitly in 1933 with the
22 Congress drafting the Twentieth Amendment,
23 that's a -- a key oversight of these laws, but
24 even down to the more modern era when Congress
25 was debating the Twenty-Fourth Amendment, for

1 instance, forbidding poll taxes, and noted that
2 it needed to bar poll taxes for elections for
3 presidential electors, because they still exist
4 in our system. So that's the rigidity I'm
5 talking about, Justice Ginsburg.

6 JUSTICE GINSBURG: And how do you
7 answer the standing question, that you have no
8 economic -- Baca has no economic injury, so he
9 has no standing to complain?

10 MR. HARROW: There is standing,
11 Justice Ginsburg. I will say there's a very
12 small economic injury. We've asked for one
13 dollar in nominal damages.

14 Mr. Baca gave up an additional five
15 dollars of salary. I'd just like to correct the
16 record, where Attorney General Weiser said
17 there's no salary. Colorado Statute 1-4-305
18 provides electors with five dollars. That's at
19 Pet. App. 10.

20 But the -- so the stakes financially
21 are small, but the stakes constitutionally and
22 personally for Mr. Baca are large and they are
23 sufficient to confer standing.

24 JUSTICE GINSBURG: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer?

2 JUSTICE BREYER: Thank you.

3 To go back to the technical point, you
4 brought a suit under 1983 and -- against a
5 state. And it's fairly clear in the case law
6 that you can't sue a state under 1983. What are
7 we supposed to do about that?

8 MR. HARROW: Your -- Your Honor, I'll
9 echo what Attorney General Weiser said, which is
10 that it's -- and, indeed, I'll cite to the
11 Court's opinion just last week in the
12 Sineneng-Smith case, when the Court said that
13 the courts' job is to resolve disputes as framed
14 by the parties. And so the only way that the
15 Court should look at that issue is if it's
16 jurisdictional. And as Attorney General Weiser
17 said, it's not.

18 I'll give you two cites, Mt. Healthy
19 against Doyle --

20 JUSTICE BREYER: The problem that I
21 view is that then any two people, a plaintiff
22 and defendant, who would like an issue decided
23 by us, simply have to waive enough matters so
24 that it has to come before us because it's not
25 jurisdictional. They interpret the statutes

1 differently. They do whatever they have to do.
2 What are we supposed to do about that?

3 MR. HARROW: Your Honor, I don't think
4 this case implements something like that because
5 this case is one that courts surely could hear.
6 It was initially brought individually against
7 the Secretary of State through a compromise that
8 involved the plaintiffs giving up a right to
9 attorneys' fees and other accommodations. It
10 was somewhat reframed in order to be brought
11 against the Department of State.

12 And as the Tenth Circuit said -- I'll
13 just point the Court to Pet. App. 53 to 70. It
14 was a really --

15 JUSTICE BREYER: Yeah, I'll look --
16 I'll look at that. One other question. You
17 didn't mention in terms of accountability what I
18 take it -- why didn't you -- is that Congress
19 doesn't have to count a vote of a faithless
20 elector. For at least 125 years, there were
21 faithless electors from time to time, and
22 Congress usually counted them and sometimes they
23 didn't. With Horace Greeley, for example, they
24 didn't.

25 So is that not a power that the

1 Congress has to make certain that the faithless
2 elector does not cause trouble?

3 MR. HARROW: Justice Breyer --

4 JUSTICE BREYER: What's your view
5 about that?

6 MR. HARROW: Well --

7 JUSTICE BREYER: What's your actual
8 view? You didn't mention it, so you don't think
9 it is, probably.

10 MR. HARROW: No -- no, I think,
11 Justice Breyer, to be clear, that the Greeley
12 example supports our side. The Greeley votes
13 that were rejected, Your Honor, were actually
14 faithful.

15 JUSTICE BREYER: I know it's your
16 side. I'm interested in why you don't consider
17 those as significant. I would like your true
18 answer to that.

19 MR. HARROW: Your Honor, just so I
20 understand, the Greeley votes, the three that
21 were rejected by Congress, were actually
22 faithful. They were electors that pledged to
23 Greeley.

24 JUSTICE BREYER: All right. But, I
25 mean, doesn't Congress's power -- there's 3

1 U.S.C. Section 15, there's the Constitution
2 saying count it. Does that act as a significant
3 check on the faithless elector or does it not?

4 MR. HARROW: It -- it can, Your Honor.
5 The courts and Congress have never interpreted
6 the Electoral Count Act and what it means for a
7 vote to be regularly given.

8 It -- Congress I do think possibly has
9 the power to reject a faithless vote under
10 certain circumstances, but we note it has never
11 done so. Those Greeley votes that were rejected
12 were faithful votes for Greeley, who was
13 deceased, and the 63 votes of Greeley electors
14 who voted for other people, who were faithless
15 in some sense, those were all counted.

16 JUSTICE BREYER: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Alito?

20 JUSTICE ALITO: We have to interpret
21 the Constitution to mean what it means,
22 regardless of the consequences, but I am
23 interested in -- at least in understanding what
24 the consequences of your position would be.

25 And we are told by experts on

1 elections that the consequences would be
2 potentially chaotic. I'm thinking in particular
3 of Professor Bennett's brief and there have been
4 other writing by experts on elections that
5 acceptance of your position would mean that,
6 after an election where the apparent outcome
7 based on the popular vote is a small margin of
8 victory for one candidate, there would be
9 concerted campaigns to change that result by
10 influencing a few electors, and that could be
11 achieved by influencing just a few electors.

12 That's just one of the consequences.
13 There's the fact that in most states the
14 electors are not even listed on the ballots,
15 and, therefore, the voters have no way of trying
16 to ensure that the electors who were chosen are
17 electors who really will honor the wishes of the
18 voters. So do you really deny that this is
19 where your argument would lead?

20 MR. HARROW: We -- we do deny it,
21 Justice Alito. And, here, I think, past is
22 prologue. Attorney General Weiser, in -- in a
23 response to a prior question on this same issue,
24 noted that there had been campaigns already to
25 affect electors. He mentioned 1876, the

1 famously contested election of 1876. But, in
2 fact, Robert Alexander, a scholar of
3 presidential electors who we cite on the last
4 page of the reply brief in Chiafalo, Alexander's
5 research shows that there have been concerted
6 campaigns in 2016, in 2000, and beyond, that
7 some 20 percent of electors have contemplated
8 switching their vote and that 100 percent have
9 been contacted.

10 JUSTICE ALITO: Do you deny that
11 there's a greater --

12 MR. HARROW: And the basis to conclude
13 --

14 JUSTICE ALITO: -- do you deny that
15 there's a greater chance of this happening? And
16 didn't Mr. Lessig support such an effort in
17 2016?

18 MR. HARROW: Your -- Your Honor,
19 Mr. Lessig has been representing these electors
20 from -- from the beginning in 2016. So I --

21 JUSTICE ALITO: That -- that wasn't my
22 question. Didn't he advocate that some electors
23 change their votes for the purpose of changing
24 the outcome of the 2016 election?

25 MR. HARROW: Your Honor, I believe

1 that he supported the legal discretion that
2 electors have that we're here today arguing for.
3 And -- and -- and the reason is, A, that that's
4 in the Constitution, but, B, that if we're going
5 back to the chaos point, the center has always
6 held -- the center has always held -- we know
7 that 18 states today, Justice Alito, have no
8 such laws.

9 And the -- the states are not about to
10 say that there's some constitutional requirement
11 that they implement them. In fact, they say the
12 reverse. They say it's a feature and not a bug
13 --

14 JUSTICE ALITO: I'd like to ask --

15 MR. HARROW: -- that there is federal
16 --

17 JUSTICE ALITO: -- one more question
18 if I possibly can. Do the states have any power
19 to remove electors? I can't think of any
20 government office holder who cannot be removed
21 from office.

22 MR. HARROW: Your Honor, yes, they do
23 have some power to remove elector, just not a
24 removal power that interferes with the core
25 function of voting by ballot.

1 JUSTICE ALITO: What is the limit of
2 their power to remove?

3 MR. HARROW: The -- the limit of the
4 power to remove is, again, that -- that
5 interference with the core function. So if an
6 elector does not show up to vote, the states
7 have represented that it's our view that's
8 impossible to remove and replace that elector.
9 That -- that's not true. That's -- that becomes
10 a vacancy. The Electoral Count Act permits it
11 to be filled. History shows that it can be and
12 will be filled.

13 JUSTICE ALITO: Can an elector be
14 removed for bribery, absent conviction by proof
15 beyond a reasonable doubt before the time when
16 the electors meet to vote?

17 MR. HARROW: No, we don't think so,
18 Your Honor. And that's consistent with the
19 treatment of every other elected official.
20 Senators and representatives cannot be removed
21 for a supposition of bribery, a mere whisper of
22 it. They have to be removed for proof it. And
23 the same thing would be true here.

24 JUSTICE ALITO: A member of Congress
25 could not be removed from office by two-thirds

1 vote without a criminal conviction?

2 MR. HARROW: Oh, the -- the Congress
3 certainly has power to remove but it must go
4 through a full process. It -- it -- I -- I took
5 Your Honor to be asking about the sort of
6 instantaneous, you know, removal, I'm -- one --
7 one official, one single state official is going
8 to make a decision to kick someone out based on
9 rumor.

10 That -- no -- no, that -- you know,
11 that would be inappropriate for any sort of
12 elected official and it's inappropriate for --
13 for electors.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Kagan?

17 JUSTICE KAGAN: Mr. Harrow, suppose
18 that I read the Constitution and I find that it
19 just doesn't say anything about this subject,
20 you know, that there is some hints here and
21 there's some hints going the other way and
22 mostly I just read it and I say the Constitution
23 is silent.

24 What should I then -- then do and why?

25 MR. HARROW: Justice Kagan, in that

1 case, I think the original understanding would
2 control. Again, if -- we think there is clear
3 language in the Constitution and I want to
4 return to that, but the original understanding
5 would control because it is so clear and,
6 indeed, Colorado doesn't even necessarily
7 challenge it, that the original expectation --

8 JUSTICE KAGAN: Meaning the --

9 MR. HARROW: -- and the meaning of the
10 word --

11 JUSTICE KAGAN: Sorry, do -- do you
12 mean the original understanding like prior to
13 ratification?

14 MR. HARROW: The -- the --

15 JUSTICE KAGAN: Because I would think
16 that pretty -- pretty quickly, it -- it -- it
17 flipped even if you're right, pretty -- you
18 know, so that from the first, there were these
19 pledges and there has never been a substantial
20 amount, a substantial number of faithless
21 electors, so I would -- I would think that
22 the -- the history, both at the time and since
23 would cut against you. No?

24 MR. HARROW: No, Justice Kagan,
25 because our quibble is not with the pledges and

1 our invocation of history is not with the
2 pledges or the idea of party control and of
3 having two major parties in our system.

4 The idea is with enforcement of the
5 vote. The idea is with what occurred here,
6 removing an elector who actually votes. Mr.
7 Baca actually presented a vote and attempted to
8 vote and place it in the ballot box and that was
9 rejected.

10 That is novel, Justice Kagan. That
11 has only happened in 2016, despite the party
12 control of the selection process. And turning
13 --

14 JUSTICE KAGAN: What would you say if
15 I said that if I think that there's silence, the
16 best thing to do is leave it to the states and
17 not impose any constitutional requirement on
18 them?

19 MR. HARROW: Your Honor, I -- I would
20 push against because I don't think there's
21 silence, especially here in this state --

22 JUSTICE KAGAN: I know, but that's the
23 hypothetical. I -- I just -- if I just think
24 that there's not enough in the same way that Ray
25 thought that there was not enough to provide a

1 -- an answer to the question, and there are all
2 these states doing what Colorado is doing, why
3 not just leave it to them?

4 MR. HARROW: Because, Your Honor,
5 Justice Kagan, when you said there are all these
6 states doing what Colorado is doing, it has
7 actually never been the case that a state has
8 done what Colorado is doing. That is 220 years
9 of unbroken history.

10 I think that speaks very loudly if
11 Your Honor is concerned about how to interpret
12 that silence.

13 JUSTICE KAGAN: And -- and -- so --

14 CHIEF JUSTICE ROBERTS: Justice -- go
15 ahead, please.

16 MR. HARROW: No, no, Your Honor.
17 If -- if -- if you're ready to move on then,
18 fine, I was going to continue making another
19 point.

20 CHIEF JUSTICE ROBERTS: No, that was
21 directed to Justice Kagan.

22 JUSTICE KAGAN: No, I am done, thank
23 you.

24 CHIEF JUSTICE ROBERTS: Okay.
25 Justice Gorsuch?

1 JUSTICE GORSUCH: Counsel, suppose Mr.
2 Baca had asked Congress to count his vote and
3 Congress decided to do so. Would we be here?

4 MR. HARROW: I -- I -- yes, you would,
5 Your Honor. There -- there is no mechanism for
6 Mr. Baca to ask Congress to count his vote under
7 the Electoral Count Act that the State has
8 pointed to any mechanism, other than perhaps
9 making a phone call to a senator, the same --

10 JUSTICE GORSUCH: I believe you're
11 fighting my hypothetical. Let -- let's suppose
12 he had asked Congress. And let's suppose
13 Congress had agreed to count his vote. That's
14 my hypothetical.

15 Would we be here?

16 MR. HARROW: If Congress had counted
17 his vote instead of the vote of the replacement
18 elector, Celeste Landry, then no, perhaps not
19 because in that he wouldn't have lost the
20 office.

21 I will say he didn't get a chance to
22 vote for vice president either, so assuming on
23 Your Honor's hypothetical that he had his
24 ballots fully cast, then no, we -- we probably
25 wouldn't be here.

1 JUSTICE GORSUCH: Okay. He didn't
2 seek -- he didn't try to ask Congress to cast
3 his vote, did he?

4 MR. HARROW: He -- he did not, Justice
5 Gorsuch. There's no mechanism for it and the
6 State hasn't pointed to one.

7 JUSTICE GORSUCH: Okay. And -- and
8 the damages he seeks are, is it 6 dollars; is --
9 is that right?

10 MR. HARROW: Justice Gorsuch, it's
11 even less, it's one dollar in nominal damages.

12 JUSTICE GORSUCH: One dollar. So it's
13 a one dollar nominal damages. And -- and why --
14 why should we exercise our discretion to hear
15 this case when the nominal damages are one
16 dollar, you didn't seek Congress to count his
17 vote, though as you point out, it's unclear
18 whether there's a mechanism to do so, and we
19 have a cause of action that doesn't exist based
20 -- that -- that -- that we are asked to overlook
21 because of a stipulation by the parties?

22 Why isn't that a sort of manufactured
23 litigation that this Court should -- should
24 decline its -- should -- should -- should bother
25 with, with using its discretion whether to

1 decide a case?

2 MR. HARROW: Justice Gorsuch, because
3 once there is jurisdiction -- and again, I'll
4 just emphasize that the question of -- of
5 whether --

6 JUSTICE GORSUCH: I'm accepting
7 there's jurisdiction, counsel, but this Court
8 has discretion over what to entertain. And it
9 also has some -- some authority to emphasize the
10 importance of -- of the adversarial process and
11 its proper uses.

12 MR. HARROW: It -- it does, Justice
13 Gorsuch. And I think the arguments today and
14 the brief show this is highly adversarial on the
15 standing and on the merits.

16 And the discretion here is because
17 there was a conflict in the lower courts on an
18 important issue. And the -- the unique chance
19 that this Court has to decide this issue of
20 presidential selection outside the -- the very
21 contested context of an -- an actively fought
22 presidential election.

23 So to the extent Your Honor is talking
24 about discretion and not jurisdiction, I think
25 it's well exercised here. And -- and, again,

1 Colorado doesn't contest that.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice. And good afternoon, Mr. Harrow.

7 How, if at all, should the quick
8 growth of political parties affect our analysis
9 of this case, including how the Twelfth
10 Amendment interacts with Article II?

11 MR. HARROW: Justice Kavanaugh, the
12 political parties provide the context for
13 nominating electors and the appointment of
14 electors. But they -- the fact that there are
15 political parties now and were emerging
16 political parties when the Twelfth Amendment was
17 passed in 1803 doesn't affect that the word
18 "elector" remains in the Constitution and that
19 electors are people who vote and all of those
20 words and all of those structural principles
21 mean that they can vote with discretion.

22 JUSTICE KAVANAUGH: And Justice Kagan
23 noted a question about what to do if the text is
24 silent. And we have talked about various things
25 that could fill the gap there, including the

1 State's authority.

2 Another, of course, under our case law
3 is historical practice under cases like Noel
4 Canning and Dames and Moore and many others that
5 we looked to historical practice as a gloss on
6 the text.

7 What is your strongest point on why
8 the historical practice favors you rather than
9 favoring the -- the other side?

10 MR. HARROW: Justice Kavanaugh, in
11 addition to the historical practices that we've
12 already discussed, including in the exchange
13 with Justice Kagan, I'll also point the Court to
14 the history of constitutional amendments that
15 have been introduced to try and abolish the
16 office of elector precisely to eliminate the
17 elector discretion that everyone who -- that was
18 introducing the amendment assumed exists.

19 As we point out in our brief, this
20 starts out in 1801 with no less than Thomas
21 Jefferson saying: Hey, maybe we should get rid
22 of the office of elector. It can only cause
23 trouble.

24 And that continues in the 19th and
25 20th century. For 20 years, such amendments

1 were introduced by Thomas Hart Benton in
2 essentially every single Congress. And those
3 amendments were not meaningful. And the people
4 who thought that we ought to eliminate elector
5 discretion were not writing on a blank slate;
6 they were writing knowing there was elector
7 discretion. And that would be a lot of wasted
8 oxygen, Your Honor, if -- if there was already a
9 way to eliminate elector discretion and if they
10 didn't have it in the first place.

11 JUSTICE KAVANAUGH: Thank you very
12 much.

13 CHIEF JUSTICE ROBERTS: Counsel, you
14 have a few minutes for wrap-up if you'd like.

15 MR. HARROW: Sure. Just to conclude
16 briefly, as the Court knows, the intervention
17 here was extraordinary and unprecedented. And
18 if Colorado is permitted to undo the human check
19 that has been baked into this system of
20 presidential selection, there really could be a
21 chaotic outcome.

22 By contrast, most electors have been
23 free in most elections, and here we are today,
24 Your Honors. Indeed, electors retain legal
25 discretion in 18 states, as I've said, and a

1 decision from this Court won't change that.

2 So the question for this Court is
3 whether to approve of the State's novel
4 intervention, and it is novel, and be left
5 wondering how the State's overly rigid
6 interpretation could go haywire in, as we've
7 discussed, the case of death or other unforeseen
8 circumstances, or instead whether the Court
9 should keep faith with the system, keep faith
10 with the Constitution until amended and maintain
11 indirect election, acknowledging that both sides
12 here, both sides have a vision of presidential
13 selection that is imperfect, but the various
14 checks, balances, and separations that our
15 Constitution's drafters and amenders have put
16 into the Constitution, all of those should be
17 given a role in our constitutional universe.
18 And, Your Honors, I -- I think that all adds up
19 to elector discretion.

20 Thank you, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 General Weiser, you have two minutes
24 for rebuttal.

25

1 REBUTTAL ARGUMENT OF GEN. PHILIP J. WEISER
2 ON BEHALF OF THE PETITIONER

3 MR. WEISER: Thank you, Mr. Chief
4 Justice. Let me make three points in response
5 and offer two closing thoughts.

6 First off, on standing, the payment or
7 non-payment of the per diem fee was never before
8 alleged, and any reported non-payment is not in
9 the record.

10 Second, on nominal damages, prior
11 cases like Smith and Bird did not accord
12 standing on nominal damages alone, instead
13 focusing on whether there's an actual personal
14 injury.

15 Second, as to Justice Scalia's
16 important point about congressional removal --
17 removal in the case of bribery, it's worth
18 noting there is a prescribed removal process for
19 senators, as Justice Alito noted. In the case
20 of electors, there's no such process, which
21 means this Court's default rule controls. The
22 power to remove is thus incident to the power to
23 appoint.

24 Third, it's worth noting this is the
25 first time we've seen an elector who violated a

1 state binding law. Up until now, including the
2 2016 election, we've always seen Congress defer
3 and count votes as transmitted by the states.

4 Two closing thoughts. During the
5 course of this entire litigation and this
6 argument today, my friends on the other side
7 have failed to offer any viable theory on how to
8 address the spectacle of a bribed elector, an
9 elector who votes for Frodo Baggins, or one who
10 would perpetrate a bait and switch on the people
11 of our state. Colorado's pledge requirement
12 addresses all such harms.

13 After over 230 years of constitutional
14 tradition, my friends on the other side would
15 toss out our nation's state-centered model of
16 electoral accountability in favor of a
17 treacherous experiment. We urge this Court to
18 reject this dangerous time bomb and avoid a
19 potential constitutional crisis by reversing the
20 Tenth Circuit's judgment.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 12:19 p.m., the case
2 was submitted.)
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Official - Subject to Final Review

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