

***IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT***

Micheal Baca, Polly Baca, and  
Robert Nemanich, Appellants,

Case No. 18-1173

v.

Colorado Department of State,  
Appellees.

*On Appeal from the U.S. District Court for the District of Colorado  
No. 17-cv-1937, The Hon. Wiley Y. Daniel presiding*

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**OPENING BRIEF OF APPELLANTS**

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**ORAL ARGUMENT REQUESTED**

Dated the 25<sup>th</sup> day of June, 2018

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## **PRIOR AND RELATED APPEALS**

A Colorado statute requires its presidential electors to “vote for the presidential candidate and . . . vice-presidential candidate who received the highest number of votes at the preceding general election in this state.” CRS § 1-4-304(5). This appeal presents the question whether that law may constitutionally be enforced by discarding presidential electors’ votes for candidates other than the ones that received the most popular votes and then dismissing and replacing the presidential electors who cast those purportedly unlawful votes.

The same underlying issue was presented to this Court by two of the plaintiffs in this case in an emergency proceeding decided three days before Colorado’s presidential electors cast their electoral votes. That appeal was *Baca v. Hickenlooper*, No. 16-1482 (10th Cir. Dec. 16, 2016). The Court did not conclusively determine the merits of the constitutional question in that emergency proceeding but instead denied relief on prudential grounds.

## PRELIMINARY STATEMENT

Plaintiff-Appellants Micheal Baca, Polly Baca, and Robert Nemanich (“Plaintiffs”) were three of Colorado’s nine Democratic presidential electors in the most recent presidential election. Leading up to the electoral college vote on December 19, 2016, they were considering voting for a candidate other than Hillary Clinton, who won the popular vote in Colorado and the country but was predicted to lose the nationwide electoral college vote.

Before the vote, the Colorado Secretary of State threatened to unconstitutionally interfere with Plaintiffs’ right to vote for candidates of their choice. Thus, two of the same Plaintiffs here brought an emergency proceeding in December 2016 to prevent the Secretary from removing them from office and discarding their votes. A panel of this Court denied emergency relief because it thought that removal of Plaintiffs after voting began would be “unlikely in light of the text of the Twelfth Amendment.” *Baca v. Hickenlooper*, No. 16-1482 (10th Cir. Dec. 16, 2016), Slip Op. at 12 n.4 (“*Baca I*”).

Three days after this Court’s decision, the unlikely occurred. When the presidential electors convened to cast their electoral votes, Plaintiff

Micheal Baca voted for John Kasich for President. His vote was not counted. Instead, he was dismissed as an elector on the grounds that he did not vote for Hillary Clinton, the only candidate the Secretary said Baca could legally vote for. *See* Appendix (hereinafter “A.”) 17. After Baca was dismissed, his replacement voted for Clinton. Under a threat of similar sanction, the other two Plaintiffs also voted for Clinton.

Plaintiffs brought this action under 42 U.S.C. § 1983, charging the Secretary’s actions violated Plaintiffs’ constitutional rights to cast an electoral vote. The district court granted the State’s motion to dismiss for failure to state a claim. This Court should reverse.

*First*, Plaintiffs have standing to maintain this suit. Indeed, this Court previously decided that Plaintiffs have “standing to challenge” the Secretary’s actions because their removal “infringes upon their own personal constitutional rights.” *Baca I*, Slip Op. at 7. And this Court’s prior holding on standing was correct: the office of presidential elector is not a creature of state law, so this is not an “intramural” dispute between a state and one of its subdivisions. Anyway, where, as here, plaintiffs have “a plain, direct and adequate interest in maintaining the effectiveness of their votes,” and where their “refusal to comply with [a]

state law” is “likely to bring their expulsion from office,” then they have standing to bring a constitutional claim. *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Bd. of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968).

*Second*, on the merits, Plaintiffs’ constitutional rights were violated. A State may not constitutionally enforce a requirement that presidential electors vote for a specific person. Presidential electors perform a “federal function,” *Burroughs v. United States*, 290 U.S. 534, 545 (1934), and the Twelfth Amendment and the Supremacy Clause prohibit any state interference with the performance of that core function. Elector independence also derives from the plain and original meaning of the constitution’s text and structure. And historical practice supports this conclusion because Congress has counted every so-called “faithless” vote, including those cast in purported violation of state law. Plaintiffs have thus stated a winning constitutional claim—and one that is important for this Court to officially recognize before the legal uncertainty creates a constitutional crisis in the middle of an actual election.

## **STATEMENT OF JURISDICTION**

The district court had subject-matter jurisdiction according to 28 U.S.C. §§ 1331 and 2201 because the case arises under the Constitution and laws of the United States. The sole cause of action was brought under 42 U.S.C. § 1983.

The district court's order dismissing the complaint was entered on April 10, 2018. A. 94. The district court's judgment for the defendant was entered on the same day. A. 95–96. The notice of appeal was timely filed on April 26, 2018. A. 97–98. This Court has appellate jurisdiction to review a final decision of the district court under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

Plaintiffs, presidential electors in 2016, were either dismissed and referred for criminal prosecution (M. Baca) or threatened with dismissal and criminal prosecution (P. Baca and Nemanich) because they voted for, or contemplated voting for, a presidential candidate other than the one that won Colorado's popular vote. This appeal presents two issues:

1. Do Plaintiffs have standing to bring this § 1983 action against defendant for violating Plaintiffs' constitutional rights?

The district court held that Plaintiffs lacked standing. A. 73–80. That decision should be reversed.

2. Were Plaintiffs’ constitutional rights violated by their actual or threatened removal?

The district court held that Plaintiffs’ constitutional rights were not violated. A. 80–89. That decision should also be reversed.

## STATEMENT OF THE CASE

### I. Legal Background

#### 1. The selection of electors

The Constitution does not provide for direct election by the people of the President and Vice-President. Instead, each State “appoint[s]” a number of electors equal to the total number of the State’s Members of the House and Senate. *See* U.S. Const. art. II & amd. XII. While the state’s power over appointment is “plenary,” *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), the state’s power is constrained by other constitutional provisions, *Williams v. Rhodes*, 393 US 23, 29 (1968). Further, unlike other provisions of the Constitution (like the Opinions Clause) that give an entity appointing an officer power over that officer once appointed, *see* U.S. Const. art. II § 2 (“The President . . . may require the Opinion, in

writing, of the principal Officer in each of the executive Departments”), the Constitution gives the states no power over electors once electors are elected or appointed. *See Burroughs*, 290 U.S. at 545 (presidential electors “exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.”).

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

## **2. Casting and counting electoral votes**

The federal constitution specifies precisely how the electors are to do their work. When the electors meet around the country at the

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



appointed time, the Twelfth Amendment directs how presidential electors are to cast, tabulate, and transmit their votes.

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

Federal law requires presidential electors to vote “in the manner directed by the Constitution,” 3 U.S.C. § 8, and then adds additional detail to what must occur after the electors vote. In particular, federal law provides that the “electors shall make and sign six certificates of all

the votes given by them.” *Id.* § 9. As in the Twelfth Amendment, the electors themselves are then required to certify their own vote, seal up the certificates, and send one copy to the President of the Senate; two copies to the Secretary of State of their state; two copies to the Archivist of the United States; and one copy to a judge in the district in which the electors voted, *id.* § 11. The “executive of the State” is to furnish to the electors a list of electors that must be attached to their certificates of vote. *Id.* The only active role mentioned for a state’s Secretary of State is to transmit to the federal government one of the Secretary’s copies of the certificate of vote, but that transmission should occur only if the electors themselves fail to send one and a federal official requests a copy. *Id.* § 12. Thus, in the ordinary case, neither the Constitution nor federal law envision *any* role for *any* state official in the balloting by electors.

The final step in the formal process of presidential election occurs on January 6 following each presidential election. On that day, Congress assembles in a joint session to open the certificates and count the electoral votes. *Id.* § 15. If a vote is questioned, congresspeople from each House can initiate a formal debate and then vote on the validity of any electoral vote. *Id.* This provision has been invoked only once, in 1969,

and, in that instance, Congress decided that the vote of a so-called “faithless elector” from North Carolina should be counted. *See* 115 Cong. Rec. 246 (Senate vote of 58-33 to count the electoral vote); *id.* at 170 (House vote of 228-170). In fact, Congress has accepted the vote of every “faithless” vote in the Nation’s history—a total of 167 electoral votes. *See* FairVote, “Faithless Electors,” (last visited June 19, 2018), [http://www.fairvote.org/faithless\\_electors](http://www.fairvote.org/faithless_electors).

## **II. This Case**

### **1. Plaintiffs are appointed and ask about their right to vote.**

Plaintiffs were nominated in April 2016 as three of nine Democratic electors in the State of Colorado. A. 13. Because Hillary Clinton and Tim Kaine received the most popular votes in the state of Colorado in the general election on November 8, 2016, Plaintiffs and the other Democratic electors were appointed as the State’s electors. A. 13.

After learning of what many deemed to be credible allegations of foreign interference in the popular election, A. 14, Plaintiff Nemanich asked Colorado Secretary of State Wayne Williams “what would happen if” a Colorado elector did not vote for Clinton and Kaine, A. 15. The Secretary, through the Colorado Attorney General’s office, responded

that Colorado law requires electors to vote for the ticket that received the most popular votes in the state, *see* CRS § 1-4-304(5), and an elector who did not comply with this law would be removed from office and potentially subjected to criminal perjury charges. A. 15–16.

**2. Plaintiffs sue, and this Court maintains the status quo because it finds it “unlikely” that Plaintiffs would be removed.**

In light of the Secretary’s response, two of the Plaintiffs brought suit in the District of Colorado and requested a preliminary injunction to prevent their removal or any interference with their votes. The district court (Daniels, J.) denied the request. *Baca v. Hickenlooper*, No. 16-cv-2986, 2016 U.S. Dist. LEXIS 177991, at \*1 (D. Colo. Dec. 21, 2016).<sup>2</sup>

Plaintiffs appealed and requested emergency relief, but a panel of this Court denied the request for an injunction. In denying the request, this Court did not need to answer the question of whether the Secretary could remove electors from office after electoral voting had begun because it thought that “such an attempt by the State” was “unlikely in light of

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<sup>2</sup> The district court’s first written ruling is dated December 21, 2016, but it issued an oral ruling on December 12, 2016 denying Plaintiffs’ request for relief. *See id.*

the text of the Twelfth Amendment,” which grants electors the constitutional power to vote by ballot for candidates for President and Vice-President. *See Baca I*, Slip Op. at 12 n.4; *see also id.* at 10 n.3 (noting that there is “language in the Twelfth Amendment that could arguably support the plaintiffs’ position” that they have constitutional discretion to vote for the candidates of their choice).

**3. The “unlikely” occurs and the Secretary removes M. Baca for casting a vote for Kasich.**

Three days after the Tenth Circuit’s order was released, the electors convened to cast their votes. After voting began, Plaintiff Micheal Baca crossed out Hillary Clinton’s name on the pre-printed ballot and voted for John Kasich for President. A. 17. The Secretary, after reading the non-secret ballot, removed Baca from office, refused to count the vote, referred him for criminal investigation, and replaced him with a substitute elector who cast a vote for Clinton. A. 17. Two other Plaintiffs, Polly Baca and Robert Nemanich, had indicated their desire to vote for a candidate other than Clinton, but felt “intimidated and pressured to vote against their determined judgment” in light of the Secretary’s actions and prior statements, including the Secretary’s efforts to change the text of the

Electors' oath just minutes before they took it. A. 17. After this coercion, they ultimately cast their electoral votes for Clinton and Kaine.

#### **4. This proceeding**

Plaintiffs' earlier injunctive action was dismissed. Plaintiffs then filed this suit, which has one operative cause of action: that the State's actions violated 42 U.S.C. § 1983 because they deprived Plaintiffs of their federal constitutional rights to vote. The Complaint requests that a court declare that Plaintiffs' rights were violated and that the relevant statutory provision requiring presidential electors to vote for certain candidates, CRS § 1-4-304(5), is unconstitutional and unenforceable. Plaintiffs also seek nominal damages. A. 8–19.

The case was assigned to the same district court (Daniels, J.) that heard the prior action. After some amendments to the original pleadings, the State moved to dismiss the operative Second Amended Complaint for failure to state a claim, and the district court granted the motion on April 10, 2018. A. 94. This appeal follows.

## SUMMARY OF ARGUMENT

I. *First*, as this Court previously—and correctly—recognized, Plaintiffs have standing to maintain this action. As its name suggests, the political subdivision doctrine has no place in this case: presidential electors are not creatures of state law and work for no subdivision of the State. Instead, their position is created by the federal constitution. This litigation is therefore not an “intramural,” intrastate dispute that the doctrine prohibits.

In any event, even if the political subdivision doctrine could somehow be applied to prohibit certain suits brought by presidential electors, it does not do so here. That is because Plaintiffs here have standing to vindicate their rights to vote under *Coleman v. Miller* and they have standing under *Board of Education v. Allen* because they were actually dismissed or threatened with dismissal. Moreover, even if this Court were to attempt to apply the inapt political subdivision doctrine, this case fits within a recognized exception that permits Supremacy Clause claims like the one here.

II. *Second*, Plaintiffs have not only stated a valid claim, but it is a winning one. Constitutional text, structure, and history show that states cannot compel presidential electors to vote for a specific candidate.

Presidential electors exercise a “federal function” that is insulated from state interference by the specific text of the Twelfth Amendment and the more general principles of the Supremacy Clause. Also, the meaning of the word “elector” as a “chooser” and the requirement to vote “by ballot”—that is, by secret ballot—likewise provide textual support for elector independence.

History and structure support this conclusion. There is an unbroken history of Congress respecting elector choice: Congress has counted 167 so-called “faithless votes,” dating from 1796 to 2016; it affirmed the constitutional right of an elector to depart from a pledge the only time it specifically debated and voted on the issue; and when it created a statute related to electors for Washington, D.C., it notably left out any mechanism for requiring electors to carry out their pledge. And independence makes sense not only of direct constitutional text but also other provisions that prohibit adding new requirements for office and



that provide for executive control of certain appointees—but not presidential electors.

## **STANDARD OF REVIEW**

This Court “review[s] the grant of a Rule 12(b)(6) motion to dismiss de novo.” *M.A.K. Inv. Grp., Ltd. Liab. Co. v. City of Glendale*, 889 F.3d 1173, 1178 (10th Cir. 2018) (quotation marks omitted). In doing so, the Court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *Id.* (quotation marks omitted).

## **ARGUMENT**

### **THE JUDGMENT FOR DEFENDANT SHOULD BE REVERSED**

#### **I. Plaintiffs Have Standing To Vindicate Their Personal Rights To Vote.**

At the threshold, Plaintiffs have standing to proceed on their complaint under 42 U.S.C. § 1983. Their sole cause of action alleges they were personally injured by having their votes discarded and being removed as a presidential elector and referred for criminal prosecution (Micheal Baca) or by being threatened with the same consequence (Polly

Baca and Robert Nemanich) for exercising their constitutional rights. Plaintiffs have thus sufficiently alleged an injury-in-fact, that the injury is traceable to the defendant's conduct, and that the injury can be redressed through this action. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) (reciting familiar three-part standing test); *Faustin v. City & Cty. of Denver*, 268 F.3d 942, 950 (10th Cir. 2001) (nominal damages sufficient to confer standing in § 1983 suit).

The district court made at least three independent errors in its section denying standing, and the reversal of any of them would be sufficient to proceed to the merits. *First*, the political subdivision doctrine is conceptually inapplicable because this is not an “intramural” dispute between a state and an employee or department of the state acting solely under *state* authority. *Second*, the district court overlooked that Plaintiffs' standing is confirmed by both *Coleman v. Miller*, 307 U.S. 433 (1939), which granted standing to state legislators to vindicate their right to an effective vote, and by *Bd. of Education v. Allen*, 392 U.S. 236 (1968), which held that local officials had standing to sue a state where the injury alleged was actual or threatened removal from office. *Third*, even if the

political subdivision doctrine could theoretically apply to a claim by presidential electors, a “subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law”—which is exactly the case here. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998)

**1. The political subdivision doctrine does not apply to suits by presidential electors.**

At the threshold, the “political subdivision standing” doctrine is not applicable here. As this Court has recognized, the doctrine derives from the principle that a “municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” *Branson Sch. Dist.*, 161 F.3d at 628 (quoting *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933)). Thus, the doctrine has no application in this case, because a state is not the “creator” of the office of presidential elector. Instead, the office is created by the *federal* Constitution. *See* U.S. Const. art. II. While Presidential electors are chosen by Colorado voters, they, like the Senators and Congresspeople

from the State, perform a “federal function under . . . the Constitution,” *Burroughs*, 290 U.S. at 545.

Thus, as even the district court itself acknowledged, the political subdivision doctrine “guarantees that a federal court will not resolve certain disputes between a state and *local government*.” A. 76 (quoting *Cooke v. Hickenlooper*, No. 13-cv-1300, 2013 WL 6384218, at \*10 (D. Colo. Nov. 27, 2013)) (emphasis added). But that doctrine does not apply here, because the office of elector is not a local office. Put differently, the doctrine bars a federal court from refereeing an “intramural” dispute in which “the state is essentially suing itself.” *Donelon v. La. Div. of Amin. Law*, 522 F.3d 564, 568 (5th Cir. 2008) (cited by the District Court at A. 76). This is not such a dispute.

Given that the doctrine is conceptually inapplicable, the district court and the State were forced to rely exclusively on cases where cities, water districts, state insurance commissioners, and similar entities or officials were denied standing in suits against their parent states. A. 75–78. The plaintiffs in *Cooke* were county sheriffs, 2013 WL 6384218; in *Donelon*, it was a state insurance commissioner; 522 F.3d at 565; in *Mesa Verde*, a county tax assessor and the county board of equalization, *Mesa*

*Verde Co. v. Montezuma County Bd. of Equalization*, 831 P.2d 482, 483 (Colo. 1992); and in *City of Hugo*, a city itself and other municipal entities, *City of Hugo v. Nicholas*, 656 F.3d 1251, 1253 (2011). The political subdivision doctrine could theoretically apply in those cases because the plaintiffs were created entirely by state law. But neither the district court nor the State has cited a case where the doctrine prevented a *federal* constitutional officer from having standing to sue a state official. The reason for the omission is that the doctrine does not bar such a suit.

In its attempt to extend the bounds of the political subdivision doctrine, the district court put great weight on its conclusion that Colorado’s presidential electors are “state officials.” A. 76. But that conclusion is both irrelevant (because Plaintiffs have standing anyway, *see infra* at 21–27) and incorrect. In fact, the Supreme Court has held that presidential electors are free agents who are neither officers of the state nor federal government.

In its most recent decision addressing the issue, the Court compared presidential electors to “the state elector who votes for congress[person]”—that is, someone not directly answerable to any state or federal official. *Ray v. Blair*, 343 U.S. 214, 224 (1952). And before *Ray*,

the Supreme Court twice held that elections for presidential electors were within Congress's power to regulate because they are not elections for state officials. *See Burroughs*, 290 U.S. at 545 (Congress could "pass appropriate legislation to safeguard" an election for presidential electors who exercise "federal functions under . . . the Constitution"); *Ex parte Yarbrough*, 110 U.S. 651, 655 (1884) (Congress could pass a law preventing voter intimidation in "the election of any lawfully qualified person as an elector for President or Vice President" because Congress may regulate "an election held under its own authority"). The district court's finding that Plaintiffs were "state officials" cannot be reconciled with these Supreme Court cases.<sup>3</sup>

Indeed, even the district court itself later backed away from its finding on this point. Only a few pages after pronouncing firmly that

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<sup>3</sup> The district court put undue weight on two out-of-circuit cases with language implying that presidential electors are state officials. A. 76 (citing *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937) and *Chenault v. Carter*, 332 S.W.2d 623 (Ky. 1960)). Not only are those cases impossible to reconcile with binding Supreme Court authority, but the court failed to acknowledge conflicting authority on this point. *E.g.*, *Stanford v. Butler*, 142 Tex. 692, 698 (1944) (finding a "material difference between State offices created by State authority and that of presidential elector"); *State ex rel. Spofford v. Gifford*, 22 Idaho 613, 632 (1912) ("It is clear" that presidential electors "are not state officers.").

presidential electors were “state officials,” A. 76, the court stated that “serving as an elector in the Electoral College is not ‘a job’ or ‘an office.’” A. 78–79; *see also id.* at 79 (“There is no ongoing ‘office’ or ‘job’ that the electors have.”). That is correct, but the problem is that the district court did not explain how presidential electors could be “state officials” who lack an “office” and do no “job.” The truth is that the district court got it right the second time: electors are *not* state officials precisely because they hold no formal “office” but instead are citizens selected to perform the “federal function” of casting electoral votes. Regardless, the court cannot have it both ways, and the contradictory reasoning reveals a serious conceptual error.

**2. Plaintiffs have standing under *Coleman v. Miller* and *Bd. of Education v. Allen*.**

Independent of the political subdivision doctrine, Plaintiffs have standing under *Coleman v. Miller* and standing as a result of their personal interest in this litigation under *Bd. of Education v. Allen*. Either principle is independently sufficient to confer standing, but together they further illuminate why this case is not one where a state official is suing a state simply to test an abstract belief that a state law is invalid. Plaintiffs here have something meaningful at stake.

In *Coleman*, the Supreme Court held that state legislators had standing to prohibit the state from interfering with a legislative vote. 307 U.S. at 438. The Court held the legislators could proceed in a suit against their own state's Secretary of State because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* Although Plaintiffs here are not state legislators, they have a voting interest that is similar to that of the legislators in *Coleman*. That is, as presidential electors for Colorado, each Plaintiff was entitled to have his or her votes properly counted once voting began.

The later Supreme Court case of *Board of Education v. Allen* reveals another way in which government officials can have personal stakes in a case sufficient to confer standing in a case against state defendants. In that case, the plaintiffs were local school board officials in New York who claimed that a state law requiring them to lend library books for free to any student, including those in private school, violated the Constitution. 392 U.S. at 238. They claimed they had standing because they had been threatened with removal from office for failure to comply with the law, and a New York appellate court had dismissed the



case because it found the plaintiffs “had no standing to attack the validity of a state statute.” *Id.* at 241.

But the highest court of New York reversed, and the Supreme Court affirmed the standing of the plaintiffs. *Id.* at 241. As the Supreme Court noted, the school board members’ “refusal to comply with [a] state law [that is] likely to bring their expulsion from office” gave them a “personal stake in the outcome of this litigation” that conferred standing upon them. *Id.* at 241 n.5. Recently, this Court in *City of Hugo v. Nicholas* recognized that *Allen* stands for the proposition that state officials may have standing against state government defendants “based on the individual [plaintiffs’] personal stake in losing their jobs.” 656 F.3d at 1260.

Plaintiffs here have standing under *Allen*. Plaintiff Micheal Baca was dismissed as an elector, had his vote invalidated, and then was *personally* referred to the Colorado Attorney General for criminal investigation and potential prosecution. A. 17. And the other two electors were threatened with identical consequences. *Id.* Those unconstitutional actions gave Plaintiffs a “personal stake in losing their [positions]” in exactly the same way the Court approved in *Allen*.

In the prior appeal, this Court invoked both of these concepts. Mirroring the language of *Allen*, this Court previously recognized that Plaintiffs have alleged that the State’s action “infringe[d] upon their own constitutional rights.” *Baca I*, Slip Op. at 7. And this Court also cited *Coleman*’s language that Plaintiffs have a “plain, direct, and adequate interest” in casting effective votes. *Id.* This Court’s reasoning was sound.

Nothing has changed in the facts of this case or the law to undermine that conclusion, and the district court did not even attempt to identify any new facts or law. Instead, it claimed that *Coleman* had been undermined and so did not apply here, but its citation for that proposition was a Tenth Circuit case decided before *Baca I*. A. 75 (citing *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016) (decided June 3, 2016)). It did not explain how it was entitled to overrule this Court’s *later* application of *Coleman* to this very dispute.

Then, to get around *Allen* and this Court’s statement that Plaintiffs were suing to vindicate their own personal constitutional rights, the district court claimed that there was no actual or threatened removal here because there was “no ongoing ‘office’ or ‘job’ that the electors have and risk losing.” A. 79. That is wrong: while presidential elector is not a

formal state office, the Constitution gives to a presidential elector the very important “job” of casting an electoral vote, and, when M. Baca was dismissed as an elector, he lost his ability to do precisely that job. Even the State recognized this reality: in its briefing below, it stated that when the Secretary saw Baca’s vote, Baca’s “office was deemed vacant and he was replaced with another elector.” A. 23; *see also* A. 21 (noting that Baca was “removed” and “replaced with a substitute elector”). The district court’s reasoning that Plaintiffs were not actually prevented from doing anything is impossible to square with even the State’s own account. *Allen* thus confirms Plaintiffs have a personal stake in this dispute.

**3. Even if the political subdivision doctrine could apply, there is a recognized exception that permits this suit.**

Finally, even if the the political subdivision standing doctrine could coherently apply to a suit by presidential electors, and even if the reasoning of *Coleman* and *Allen* do not otherwise confer standing, a recognized exception to the political subdivision doctrine would still allow Plaintiffs to proceed.

In *Branson Sch. Dist. RE-82 v. Romer*, this Court permitted Colorado school districts to proceed in an action against the state

claiming that a state constitutional amendment violated the Supremacy Clause. 161 F.3d at 628–30. In so doing, the Court made “explicit” that “[a] political subdivision has standing to sue its political parent on a Supremacy Clause claim.” *Id.* at 630. This Court explained that its “holding simply allows a political subdivision to sue its parent state when the suit alleges a violation by the state of some controlling federal law.” *Id.*

The *Branson* rule applies here. This case is premised in substantial part on the fact that the Supremacy Clause and other structural provisions prohibit the state from dismissing presidential electors. *See infra* § II. And there is no doubt that this case “alleges a violation by the state of some controlling federal law.” *See Branson*, 161 F.3d at 630. The political subdivision doctrine thus would not bar this suit even if, somehow, it could bar other suits by presidential electors.<sup>4</sup>

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<sup>4</sup> To the extent this Court considers prudential standing factors, it should recognize how critical it is for this Court to reach the merits of the question now. The 2016 election saw an unprecedented wave of “faithless” electors: seven faithless votes were counted, and there were at least an additional three electors that attempted faithless votes but were dismissed as electors. “The ‘Faithless Sixteen,’” *The Green Papers*, <https://www.thegreenpapers.com/Hx/FaithlessElectors.html> (updated (continued on the next page))

## **II. Plaintiffs Have Stated A Claim That The State Violated Plaintiffs' Constitutional Right To Vote.**

On the merits, Plaintiffs have stated a claim that the Secretary unconstitutionally interfered with Plaintiffs' performance of their federal duties. As this Court previously intimated, the text, history, and structure of the Constitution require presidential electors to exercise a "federal function," and, once appointed, they may not be controlled in the exercise of their duties by state officials. The Secretary's actions violated that prohibition.

### **1. A state cannot interfere with electors' performance of their federal duty to vote for President and Vice President.**

Under clear Supreme Court authority, presidential electors perform a "federal function" when they cast their votes for President and Vice President. *Burroughs*, 290 U.S at 545 (presidential electors "exercise federal functions under . . . the Constitution"). Moreover, as this court

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Jan. 10, 2017). If the courts do not resolve the question of elector independence in the course of normal litigation, there will likely be a day when the question must be resolved in politically-charged, emergency litigation immediately following a close, contested election. As this Court seemingly recognized in *Baca I*, that would not be an ideal setting to determine these issues.

previously recognized, the text of the Twelfth Amendment and related federal law specifically insulate electors from state interference with their attempts to cast their votes for President and Vice President. The district court's contrary conclusion must be reversed.

**a. The casting of electoral votes for President and Vice President is a “federal function.”**

The Supreme Court has for nearly a century made clear that presidential electors perform a “federal function,” when they cast, tally, and transmit to the federal government their votes for President and Vice President. *Burroughs v. United States* says this explicitly. In that case, the Supreme Court affirmed the federal government's authority to regulate campaign contributions in elections for presidential electors. 290 U.S. at 545. The Court reasoned that Congress could regulate in this area because presidential electors “exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.” *Id.* Since *Burroughs*, the Supreme Court has repeatedly reaffirmed that electors perform a federal function. *See Ray*, 343 U.S. at 224 (“presidential electors exercise a federal function in balloting for President and Vice President” and comparing the “federal

function” of a presidential elector to “the state elector who votes for congress[persons]”); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (same, quoting *Burroughs*, 290 U.S. at 545).

**b. The Twelfth Amendment directly prohibits state interference with electors’ performance of their federal function.**

In this Court’s ruling denying a preliminary injunction, it recognized that the “text of the Twelfth Amendment” rendered it “unlikely” that a Colorado state official would attempt to remove an elector “after voting ha[d] begun.” *Baca I*, Slip Op. at 12 n.4; *see also id.* at 10 n.3 (stating there is “language in the Twelfth Amendment that could arguably support the plaintiffs’ position” that they have a constitutional right to vote for the candidates of their choice). This Court’s reading of the Constitution was sound: the Twelfth Amendment insulates electors’ performance of their federal function by excluding state officials from the entire process of voting. The Amendment requires electors *themselves* to “make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each.” U.S. Const. amd. XII. Electors *themselves* must then “sign and certify” those lists and transmit the list directly to the

federal government. *See* U.S. Const. amd. XII. The Constitution directs this process to occur by electors *themselves* and without any involvement from any state official.

The federal statutes implementing the Amendment likewise bar any interference by state officials with electors' performance of their federal functions. According to Congress, the sole permissible action by any state official in the entire selection process is to provide a list of the electors that the electors themselves must attach to the certificates of vote. 3 U.S.C. § 9. After the vote has concluded and the votes tallied and certified, a state official may also transmit to the federal government a copy of the certificate by request, but only if the electors themselves fail to send one. 3 U.S.C. § 12.

Thus, this Court, in its prior opinion, naturally assumed that Colorado officials would comply with federal constitutional and statutory law. And those laws provide no way for state officials to interfere with electors' federal duty of casting an electoral vote once the voting has begun. Yet what this Court deemed "unlikely" nonetheless occurred: state officials violated the Twelfth Amendment and federal law and



interfered with the certification of validly given votes for a federal office. That interference violated Plaintiffs' rights.

The district court had no valid reason for disregarding this Court's prior order and ignoring the constitutional text. The district court dismissed this Court's interpretation of the Twelfth Amendment as mere "dicta" that it would depart from because this Court "did not analyze the Twelfth Amendment's text or the historical reasons for its ratification."

A. 84. But then the district court proceeded to ignore the text of the Twelfth Amendment: the court's opinion neither quotes nor cites any of the proceeding provisions of the Constitution.

Instead of textual analysis, the district court's reasoning relies crucially on an inaccurate quotation from Joseph Story's 1833 treatise *Commentaries of the Constitution of the United States*. Relying on Story, the district court wrote that, whatever the original understanding of elector independence, "the electors' role was 'materially chang[ed]' by the Twelfth Amendment's plain language." A. 87. But the district court's paraphrase misconstrues the original text. What Story actually wrote was that the Twelfth Amendment "in several respects, materially chang[ed] *the mode of election of president*," and then Story listed a few

of the specific changes in mechanical operation of the electoral vote. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1460 (1833) (emphasis added). Story never said, as the district court claimed, that the “electors’ role” was changed by the Twelfth Amendment, nor could Story have said that. Before the Twelfth Amendment, electors performed a federal function that must be free from state interference, and the detailed text of the Twelfth Amendment only solidified that principle.

In fact, despite the district court’s repeated invocation of *Commentaries on the Constitution*, Story—like essentially every other authoritative early source on constitutional interpretation—*thought that electors had the legal right to cast votes as they wished*. He lamented the reality that “electors are now chosen wholly with reference to particular candidates” and noted that “an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.” *Commentaries on the Constitution* at § 1457. In other words, while unexpected and perhaps even unethical, such independent judgment by electors was not illegal, and such votes were valid. That is Plaintiffs’ argument here.

**c. The Supremacy Clause also prohibits state interference with electors' performance of their "federal function."**

The text of the Twelfth Amendment is not the only constitutional provision that supports the non-interference principle. Indeed, since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been clear that states cannot interfere with the performance of a "federal function," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988) (noting that a state may not "dictate the manner in which the federal function is carried out."). The actual or threatened removal of electors who do not vote the way state law purports to require violates this structural requirement.

This principle derives from the Supremacy Clause, and its judicial enforcement dates back to *McCulloch*. In that landmark case, the Supreme Court held the Bank of the United States was immune from state taxation because the "[C]onstitution, and the laws made in pursuance thereof, shall be the supreme law of the land" and cannot be interfered with by a state. 17 U.S. at 433. Courts have subsequently applied this same principle in many contexts—including, and as directly

relevant here, to state-appointed decisionmakers that perform federal functions.

In *Hawke v. Smith*, 253 U.S. 221 (1920), the Supreme Court held that the people of Ohio could not use a popular referendum to override the votes of state legislators who ratified the Eighteenth Amendment, which prohibited the sale of alcohol. *Id.* at 230. The Court reasoned that “[t]he act of ratification by the State derives its authority from the Federal Constitution” and is therefore a federal function that is immune from state control. *Id.*; *see also id.* (noting that “the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution.”). That is precisely Plaintiffs’ claim in this case: electors “derive[ their] authority from the Federal Constitution” and are therefore immune from state control in the exercise of that authority.

Two years later, the Supreme Court reaffirmed the non-interference requirement with respect to state legislators’ ratification of the Nineteenth Amendment, which granted women the right to vote. In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court rejected the claim that a state constitution could render inoperative state legislators’ votes to ratify the amendment because “the function of a state legislature in

ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution.” *Id.* at 137. The performance of that function “transcends any limitations sought to be imposed by the people of a State.” *Id.* The rule of these cases is straightforward: a state may not interfere with an individual’s performance of a federal function, *even if the relevant individual is appointed under state law.*

Subsequent cases have made clear that the same noninterference rule applies not just to federal employees but also to private federal contractors, because “the federal function must be left free of state regulation.” *Goodyear Atomic Corp.*, 486 U.S. at 181 (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)). Thus, federal contractors cannot be forced to submit to state licensing procedures that would add to the qualifications required to receive the federal contract, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956); federal postal officials may not be required to get a state driver’s license to perform their duties because that would “require[] qualifications in addition to those that the [Federal] Government has pronounced sufficient,” *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); and federal facilities need not obtain state permits to emit

air pollutants because federal installations have an “immunity” from state regulation in light of “the fundamental importance” of “shielding federal . . . activities from regulation by the States,” *Hancock*, 426 U.S. at 179.<sup>5</sup>

This same principle also prohibits states from punishing federal officials under state criminal law. *See, e.g., In re Neagle*, 135 U.S. 1, 75 (1890) (a federal official may not be “held in the state court to answer for an act which he [or she] was authorized to do by the law of the United States”). This Court vindicated that principle when it held that federal employees and contractors cannot be prosecuted by the state for trespass when performing “federal duties.” *Wyoming v. Livingston*, 443 F.3d 1211, 1230 (10th Cir. 2006); *see also Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir.

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<sup>5</sup> Not surprisingly, the Courts of Appeal, including this Court, apply the non-interference principle in the same way. *See Helfrich v. Blue Cross & Blue Shield Ass’n*, 804 F.3d 1090, 1100, fn.7 (10th Cir. 2015) (A “state law” may not “override a provision” in a contract between the federal government and an employee because that would “would permit just the interference with federal functions that courts have refused to countenance.”); *see also, e.g., Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (invalidating a state law that purported to create specific rules for cleanup of a federal nuclear by a contractor because the regulation “directly interfere[d] with the functions of the federal government”).

1977) (“where . . . a federal officer does no more than is necessary and proper in the performance of his [or her] duty, the state should not be allowed to review the exercise of federal authority.”).

The State’s actions fail the Supremacy Clause test for unconstitutional state interference. When presidential electors actually perform the crucial act of casting their votes for President, they derive their authority from the federal Constitution. *Burroughs*, 290 U.S. at 545. It is beyond dispute that forcing presidential electors to vote for a particular person for president lest they be removed from office is an attempt by the State to control the presidential electors’ performance of their federal function. The threatened criminal prosecution of Plaintiffs likewise violates this prohibition. *See* A. 17.

The district court thus erred fundamentally because it misunderstood the nature and source of this non-interference principle. The court, without citing any caselaw in support, reasoned that because “neither the Constitution nor federal law addresses the issues that Plaintiffs complain of, . . . the state law does not interfere either with the Constitution or federal policy.” A. 92. As explained above, *supra* at 29–32, the district court was incorrect: the text of the Twelfth Amendment

and the federal laws implementing it *do* address this issue and specifically provide that electors be immune from state interference.

But even without that factual error, the district court’s legal reasoning would still be faulty, because it applied the wrong test. In neither *Hawke* nor *Leser*—the two constitutional ratification cases described above—did the Supreme Court purport to find specific instructions about whether popular referenda (*Hawke*) or state constitutional amendments (*Leser*) were permitted to overrule the votes of state legislators. Instead, the Court noted that the Constitution commits the relevant decision to a particular set of actors who perform a “federal function” that may not be interfered with or overruled by any means. Replace “state legislators” with “electors” and the identical reasoning applies here. In both instances, the structure of the Constitution prohibits the relevant actors from having votes invalidated after they cast a valid vote, and Congress need not pass a law to that effect for the principle to apply.<sup>6</sup>

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<sup>6</sup> The district court also dismissed this structural argument because it found that “it appears that states play, at least, a coordinate role with the federal government in connection with the electors.” A. 92. Plaintiffs  
(continued on the next page)



The State's reliance on an interpretation of state law is equally misplaced. The State claimed in the district court that that state law permitted it to construe M. Baca's vote for Kasich as a "refusal to act," and that, in turn, enabled the Secretary to discard the vote and replace Baca with another elector. *See* A. 22–23 (citing *Williams v. Baca*, Denver District Court No. 2016CV34522 (Dec. 13, 2016) (A. 35)). But that argument inverts the Supremacy Clause. Both the Constitution and federal law expressly prohibit state interference with the votes of presidential electors, so any construction of state law that purports to permit it is null and void. *McCulloch*, 17 U.S. at 433. The Secretary thus violated Plaintiffs' constitutional rights.

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agree that states play a role in appointing electors. But the fact that a state has some role in choosing the decisionmaker does not mean that a state may regulate that person in the performance of a "federal function." *See Hawke*, 253 U.S. at 230 (state legislator immune from state control in performance of a federal function).

**2. The original understanding of the Constitution was that presidential electors must be given discretion to vote for the eligible person of their choice.**

The non-interference principle described here is sufficient grounds to reverse the district court's decision that Plaintiffs' failed to state a claim under 42 U.S.C. § 1983. But the district court was also mistaken because it misinterpreted the constitutional text and history that require electors be given freedom to vote according to their discretion.

**a. The text used by the Framers requires elector discretion.**

The Constitution creates two kinds of "Electors." Article I, § 2 provides that House Members are selected every two years by "Electors," and the Seventeenth Amendment expanded the power of those "Electors"—that is, voters, or "legislative electors"—to include selection of Senators. States have the power to define legislative electors' qualifications, because legislative electors may vote only if they have the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. But once qualified, the voters perform a federal function—selecting Members of the House and Senate—which the states have no power to direct. *See Ray*, 343 U.S. at

224 (comparing the “federal function” of a presidential elector to “the state elector who votes for congress[person]”). No state has ever tried by law to specify how its legislative electors must vote in congressional elections. The very idea of state control over voters is anathema to the liberty of voting.

Article II, § 1 provides that a second set of “Electors” are “appoint[ed]” by each state, as the state legislature “may direct,” to vote for the President and Vice President once every four years. U.S. Const. art. II, § 1, cl. 2. These are the presidential electors at issue in this case. The State has plenary power to select these electors, except that no “Senator or Representative, or Person holding an Office of Trust or Profit under the United States” may serve as a presidential elector. *See id.* Like legislative electors, presidential electors also exercise a federally protected power in performing their duties.

The Constitution’s use of the term “elector” is significant. At the Founding, as is true today, that term names a person vested with judgment and discretion. Electors, by definition, make free choices: Samuel Johnson defined the term “elector” in 1768 as one “that has a vote in the choice of any officer.” Samuel Johnson, *A Dictionary of the English*

*Language* (3d ed. 1768). Alexander Hamilton reinforced this usage when he wrote that presidential electors would likely have the “information and discernment” necessary to choose a wise President. *The Federalist* No. 68 (A. Hamilton). Indeed, Hamilton explicitly drew the analogy between legislative and presidential electors when he said that the Electoral College would form an “intermediate body of electors” who would be “detached” from “cabal, intrigue, and corruption.” *Id.*

This protection of independent judgment is confirmed by other parts of the constitutional text. The Constitution states that presidential electors must vote “by Ballot,” U.S. Const. art. II, § 1, cl. 3, a phrase that requires electors to vote by personal, secret ballot to insulate electors from the “cabal and intrigue” that concerned the framers. *See* Speech of Charles Pinckney in the United States Senate, March 28, 1800, *reprinted in 3 Records of the Federal Convention of 1787*, at 390 (Max Farrand ed., 1911) (“The Constitution directs that the Electors shall vote *by ballot* . . . It is expected and required by the Constitution, that the votes shall be secret and unknown.”). The use of a secret ballot is inconsistent with the ability to fine individual presidential electors on the basis of

their votes, since how an elector voted could not be known if the ballot was secret.<sup>7</sup>

The Twelfth Amendment, adopted after the election of 1800 ended in a tie electoral vote that forced the House of Representatives to select the President, re-affirmed the original understanding of elector independence. That Amendment used the identical language as Article II when it referred to “electors” that would “vote by ballot” for candidates for President and Vice President. U.S. Const. amd. XII. Those words should be given the same meaning, especially since the Twelfth Amendment was passed so soon after the original Constitution was ratified. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (finding that the phrase “the people” had the same meaning in both the original Constitution and several amendments in the Bill of Rights).

Important scholarship also confirms the textual foundation of elector independence. Leading constitutional historian Rob Natelson

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<sup>7</sup> That the Secretary read M. Baca’s vote, revealed it publicly, and then used it to remove M. Baca as an elector further demonstrates the State interfered with Plaintiffs’ performance of their federal voting function and that the method of voting violated the Constitution because the ballots cast were not cast in secret.

recently reviewed a cornucopia of founding-era evidence and concluded that “the ratifiers [of the Constitution] understood presidential electors were to exercise their own judgment when voting.” Rob Natelson, *What Does the Founding Era Evidence Say About How Presidential Electors Must Vote? — Part 5*, Independence Inst. (Dec. 9, 2017), <https://perma.cc/DDW2-MDUV>; see also *Part 4* (Dec. 3, 2017), <https://perma.cc/SL3F-EPKR>. Fellow scholar Robert Delahunty similarly concluded that “the Constitution protects the elector’s discretion against efforts at legal compulsion.” Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Constitutional?*, 2016 Cardozo L. Rev. De Novo 129, 153; see also Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, Public Discourse, Nov. 21, 2016 (“[C]onstitutionally, the electors may vote for whomever they please.”).<sup>8</sup>

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<sup>8</sup> As the district court recognized, court decisions that directly address whether electors can be forced to vote for certain candidates are in conflict. In addition to this Court’s prior decision in this case, the high courts of Alabama, Ohio, and Kansas have held or implied that the Constitution requires elector independence. *Op. of the Justices*, 250 Ala. 399, 401 (1948) (rejecting Alabama state law that bound electors because the “legislature cannot . . . restrict the right [to vote] of a duly elected elector.”); *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 146 (1948) (“According to the federal Constitution a presidential elector may vote for

(continued on the next page)

**b. There is an unbroken history of electors being legally permitted to use their discretion.**

This understanding of the text is confirmed by history. The Supreme Court has repeatedly recognized that presidential electors were intended by the Framers to exercise judgment. In 1892, for instance, the Court stated that “it was supposed [by the Framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive.” *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). Justice Jackson later agreed that “[n]o one faithful to our history can deny that the plan originally contemplated . . . that electors would be free agents, to exercise an independent and nonpartisan judgment.” *Ray*, 343 U.S. at 232 (Jackson, J., dissenting).

Consistent with this understanding, Congress has long recognized the right of electors to vote contrary to their pledge or expectation.

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any person he [or she] pleases for president or vice-president”); *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896) (“In a legal sense the people of this State vote for no candidate for President or Vice President, that duty being delegated to 10 citizens who are authorized to use their own judgment as to the proper eligible persons to fill those high offices.”). The cases to the contrary cited by the district court, A. 88–89, all commit the same fundamental errors as the district court here.

Congress has counted a total of 167 so-called “faithless” electoral votes for either President or Vice President, and no such votes have ever been rejected. See FairVote, *Faithless Electors* (last visited June 4, 2018), [http://www.fairvote.org/faithless\\_electors](http://www.fairvote.org/faithless_electors) (counting 167 faithless electors whose votes were accepted by Congress).

In the one instance when such a vote was ever challenged under the procedures of 3 U.S.C. § 15, Congress reaffirmed the principle of legal elector independence and counted the vote. That debate occurred in 1969, when a North Carolina Republican elector voted for George Wallace rather than Richard Nixon, the Republican nominee. Each House independently considered the formal objection. In the Senate, Senator Sam Ervin stated that the “Constitution is very clear on this subject”: Congress may not “take what was an ethical obligation and convert it into a constitutional obligation.” 115 Cong. Rec. at 203–04 (statement of Sen. Ervin). Several Representatives similarly noted that, although possibly unethical, “electors are constitutionally free and independent in choosing the President and Vice President.” 115 Cong. Rec. 148 (1969) (statement of Rep. McCulloch). Ultimately, each House reached the same



result: the faithless vote was valid. *See* 115 Cong. Rec. 246 (Senate vote of 58-33); *id.* at 170 (House vote of 228-170).

Congress continued to count electoral votes of these so-called faithless electors through the most recent election. In January 2017, Congress certified as valid the votes of seven such electors, including three votes for Colin Powell cast by Washington electors in violation of Washington law. *See* 163 Cong. Rec. H185–89 (Jan. 6, 2017) (counting and certifying election results). Congress’s recent actions are unsurprising, because they are in line with its unbroken history of accepting the votes of electors who have exercised the freedom to vote contrary to their pledge or expectation of party loyalty.

Finally, consistent with its longstanding practice, Congress places only an unenforceable ethical duty on the three electors from the District of Columbia. The D.C. elector law, which is unchanged in relevant part since its enactment in 1961, provides that electors must pledge to vote for the candidate of their party, and goes on to say that it shall be an elector’s “duty” to follow through on that pledge. D.C. Code Ann. § 1-1001.08(g)(2). But there are no penalties or enforcement mechanisms, nor is there any evidence that Members of Congress thought there would

be. Instead, as one legislator said in hearings on that bill, the provision regarding electors' "duty" "has no legal effect" but instead "has a moral suasion." Subcommittee 3 of the House Committee on the District of Columbia, "Hearings on H. R. 5955," May 15 and 16, 1961, at 34 (Rep. Huddleston). After all, the bill could not "amend the Constitution." *Id.* (Rep. Tobriner).

Congress proved that it lacked the ability to legally enforce the "duty" mentioned in the D.C. elector statute following the 2000 election. That year, a D.C. elector who was pledged to Al Gore failed to follow-through on her pledge and voted for no candidate for President. David Stout, "The 43rd President: The Electoral College; The Electors Vote, and the Surprises Are Few," *N.Y. Times* (Dec. 19, 2000).<sup>9</sup> She was not sanctioned or removed from office. Rather, her action was legally valid, and Congress in Joint Session counted only two of D.C.'s three electoral votes that year. 147 Cong. Rec. H34 (Jan. 6, 2001).

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<sup>9</sup> Available at <https://www.nytimes.com/2000/12/19/us/43rd-president-electoral-college-electors-vote-surprises-are-few.html>.

**c. The district court incorrectly equated the historical practice of elector pledges with the legal enforcement of those pledges.**

The district court recognized much (though not all) of the forgoing history of presidential elections. But it drew the wrong lessons from the historical record.

The district court repeatedly referred to the “longstanding practice” of elector pledges or expectations—not the legal enforcement of these pledges. A. 86–87. It undisputed that most electors for most of this Nation’s history have been expected to, and did, vote for the nominees of their party. But the key question in this appeal is not one of expectations, it is of enforcement: can a state official compel an elector to vote for a particular candidate and *invalidate an electoral vote* because it was cast for another candidate? The district court failed to identify any history that supports an affirmative answer to that question. That is for good reason: Plaintiffs are aware of no such similar incident before the 2016 election.

This fundamental error also led the district court to draw the wrong lesson from federal enactment of D.C.’s elector statute. The district court claimed that this statute “codifies this historical understanding and

longstanding practice.” A. 88. The district failed to realize that the “historical understanding” and “longstanding practice” supports *Plaintiffs’* position: D.C.’s elector statute provides only “moral suasion” to vote for the nominee of an elector’s party and is legally unenforceable—which is why, when faced with a faithless elector in 2000, Congress did the opposite of what Colorado did here. *See supra* at 48.

After failing to draw the proper legal conclusion from the historical practice, the district court then compounded its error by claiming that its skewed historical analysis could trump clear constitutional text. The district court reasoned that “the State’s plenary, comprehensive, and exclusive power over its electors—bolstered by this country’s democratic history and longstanding practice—defeats any conflicting intent held by the Framers,” but this is an invalid method of constitutional interpretation. A. 87. In fact, clear constitutional text supporting elector independence trumps all else. *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (“[T]he enlightened patriots who framed our

constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”) (Marshall, C.J.). It is thus unsurprising that the case upon which the district court relied does not support the court’s conclusion. Instead, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (cited at A. 87) used historical practice as an aid to interpreting “ambiguous” constitutional text. 134 S. Ct. at 2561; *see also id.* at 2568 (“The question is whether the [Recess Appointments] Clause is ambiguous.”). Where there is ambiguity in the text, historical practice can be dispositive; but where text is clear, the text wins out.<sup>10</sup> Here, the district court identified no ambiguity in Article II or the Twelfth Amendment that would render its atextual interpretation a “permissible reading of a ‘doubtful’ phrase.” *Id.* (quoting *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)). Thus, the

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<sup>10</sup> Moreover, the particular page of *Noel Canning* cited by the district court stated that “long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions *regulating the relationship between Congress and the President*.” 134 S. Ct. at 2559 (emphasis added) (quotations omitted). This case does not involve that particular relationship, so, even if courts do sometimes employ a somewhat different interpretive framework in that context, it does not apply here.

district court should have followed the Constitution, not its own (mis)interpretation of the historical record.

**3. Forcing electors to vote for a particular candidate impermissibly adds a new requirement for office that does not appear in the Constitution.**

The State's removal of electors based on their votes also violates the structural provisions that prevent states from adding qualifications to elected positions above those specified in the Constitution. As the Supreme Court has explained in recent decades, the qualifications for office listed in the Constitution do more than merely set out certain minimum age and residency standards for office; they also operate as a check against state officials who would restrict the freedom of voters to elect representatives of their choice by adding qualifications above those in our Nation's founding document. Here, the State has imposed an additional qualification for holding the office of presidential elector—that they vote for a particular candidate or face dismissal—but the only restrictions on elector voting the State may enforce are those found in the Constitution itself.

The Constitution specifies three substantive restrictions on the selection and the vote of presidential electors. First, Article II states 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, cl. 2. Second, the Twelfth Amendment specifies that when electors vote “by ballot” for President and Vice President, one of the two “at least, shall not be an inhabitant of the same state with themselves.” U.S. Const. amd. XII. Finally, presidential electors must vote for an eligible candidate for the office of President—that is, for a natural-born citizen over age 35, who has resided in the U.S. for 14 years. U.S. Const. art. II, § 1, cl. 5. Because these are the only restrictions and qualifications the Constitution itself specifies, Supreme Court precedent directs that states are not free to add additional restrictions, such as that electors vote for the candidates nominated by their own political parties.

This conclusion makes sense because it ensures that states give voters and presidential electors maximum choice. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), for instance, the Supreme Court applied the principle of choice to reject Arkansas’s attempt to deny ballot access to any representative who had served three terms in the U.S.

House or two in the Senate. The Court held such restrictions infringed legislative electors' freedom of choice because "sovereignty confers on the people the right to choose freely their representatives to the National Government," and limiting ballot access to those representatives under the state-imposed term limit ceiling would restrict electors' freedom at the ballot box. *Id.* at 794. Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court held that Congress had no power to refuse to seat an elected representative who met all constitutional requirements for congressional service because such a denial would again impinge on voters' freedom to choose elected representatives. *Id.* at 547. The principle of *Powell* and *Thornton* is that voters must be given freedom to vote into office anyone that meets the constitutional requirements of age, residency, and citizenship. *Thornton*, 514 U.S. at 783.

Under the principle of these cases, Colorado's restriction on the freedom of presidential electors works as a kind of double constitutional violation. On the one hand, the law restricts the freedom of the State's popular voters to select electors who may wish, in extraordinary circumstances, to deviate from the popular vote of the state. And on the other hand, the law restricts the freedom of presidential electors to cast



a vote for any person who meets the requirements for office in the Constitution itself. Both restrictions are invalid.

Moreover, although the restriction here appears to be a benign exception to the rule of elector independence, it is anything but. That is because if states may impose restrictions on presidential electors' votes beyond those in the Constitution, then, as Justice Douglas said in *Powell*, nothing prevents the passage of laws that would nullify electoral votes for a "Communist," a "Socialist," or anyone who "spoke[] out in opposition to the war in Vietnam." 395 U.S. at 553 (Douglas, J., concurring). And if the State can require an elector to vote for the candidate of the electors' own political party, then nothing stops state legislators from requiring presidential electors to vote for the *legislators'* own political party, not the electors' party. But that restriction would nullify the popular vote and undermine the constitutional structure that creates an independent, intermediate body of electors.

In today's polarized climate, such politically charged restrictions are no longer just hypothetical. In a move transparently meant to force the current President to release his tax filings, state legislatures in New York and New Jersey have introduced bills that would prevent

presidential electors in those states from voting for candidates who do not release copies of their recent tax returns. *See* S. 26, § 3, Assemb. Reg. Sess. 2017-2018 (N.Y. 2017); A. 1230, § 2(b), 218th Leg., Reg. Sess. (N.J. 2018) (“The bill also provides that an elector shall not vote for a candidate for President or Vice-President unless the candidate submits federal income tax returns to the [State]”). Thankfully, a court would likely find these restrictions invalid under *Thornton* and *Powell*.<sup>11</sup> But there is no principled difference between those dangerous, politically motivated restrictions on electors and the seemingly less dangerous but equally unconstitutional restrictions at issue here. Both unconstitutionally restrict the freedom of presidential electors to vote for a constitutionally eligible presidential candidate. The tax-return example provides a vivid illustration of why the Constitution requires voters and electors to be free from any such control.<sup>12</sup>

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<sup>11</sup> Indeed, California passed a bill to deny ballot access to candidates that did not release tax returns, but Governor Brown vetoed it because he found it “may not be constitutional.” Veto Message on S.B. 149 from Gov. Jerry Brown to Members of the California State Senate (Oct. 15, 2017).

<sup>12</sup> The Supreme Court’s decision in *Ray v. Blair* upholding a state’s ability to require presidential electors to pledge to vote for a particular

*(continued on the next page)*

**4. The State may not control electors' votes simply because it has plenary power to appoint electors.**

The text, history, and structure of the Constitution show that presidential electors must be given discretion to vote for the eligible persons of their choice. Nonetheless, the State has claimed that presidential electors are subject to ultimate state control because the states have plenary power to appoint electors, and it claims the appointment power comes with the power to control electors' votes. But the power to appoint is a fundamentally different power than the power to control in our system of separated powers.

Before the Senate was popularly elected, for instance, state legislatures had plenary power to select U.S. Senators. But, while any instructions on voting from a Senator's state may have had moral and political sway, "attempts by state legislatures to instruct senators have

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candidate does not change this analysis. Because the Supreme Court expressly left open the possibility that the pledge was legally unenforceable, nothing in *Ray* actually restricted the ability of presidential electors to vote for the candidate of their choice. To the contrary, *Ray* simply affirms a legislature's constitutional prerogative to select whatever electors it wants—including just those who are willing to make a pledge.

never been held to be legally binding.” Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 592 (1996). Thus, no Senator was ever punished by a state for failing to follow an instruction, despite state legislators believing Senators worked for them.

Likewise, Presidents appoint federal judges, but they obviously have no power to control federal judges. Rather, under federal law, the outcome of a case may not be dictated to the judiciary. *See United States v. Klein*, 80 U.S. 128, 146 (1871); *Shawnee Tribe v. United States*, 405 F.3d 1121, 1133 (10th Cir. 2005) (“Congress cannot set aside a final judgment of an Article III court by retroactive legislation” or “dictate findings or command specific results in pending cases.”) (internal citations omitted)). Further, presidential electors are fundamentally different from other constitutional positions, like Cabinet officials, where a separate provision of the Constitution gives an appointing officer power over the appointed. *See* U.S. Const. art. II § 2 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments”). This signals that the Constitution treats appointment and control as two separate issues.

The distinction between appointment and control also applies to legislative electors—that is, to everyday voters. *See* U.S. Const. art. I, § 2; *see also supra* at 41–42. Although states may determine who is eligible to vote in state and federal elections (subject to constitutional and statutory limitations), once eligible to vote, legislative electors cannot be intimidated or coerced into voting in a particular way. *See, e.g.*, 52 U.S.C. § 10307 (prohibiting voter intimidation under federal law); C.R.S. § 1-7-113 (prohibiting those who assist “electors” from “seek[ing] to persuade or induce the eligible elector to vote in a particular manner”). Indeed, the idea of a state law penalizing individual votes for Governor or Senator is so repugnant to the Constitution that no state has ever attempted it. Yet that is precisely what the State did here: it has coerced electors—presidential rather than legislative—to vote in a particular manner. The interference would have been unconstitutional if Plaintiffs were legislative electors, and it is equally unconstitutional with respect to presidential electors.

*Ray v. Blair* further confirms the distinction between the State’s power to appoint (which it has) and its power to control (which it lacks). That case upheld an Alabama law requiring presidential electors to

pledge to vote for the nominee of their party. 343 U.S. at 231. That case thus affirmed the plenary power of states to *appoint* electors. But, as mentioned, the Court also noted that electors’ “promises” may be “legally unenforceable” because they could be “violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college.” *Id.* at 230 (citation omitted). This passage recognizes the key distinction between the state-regulated appointment process and the federal function of casting a vote for president that must be free from state interference.

\* \* \*

Plaintiffs recognize that departing from the popular vote and an elector’s pledge should be an extraordinary act. But it was one permitted by the Constitution. After all, the Framers created an intermediate body of electors, imbued with the discretion to cast votes for the persons they viewed as best able to serve as President and Vice-President, in the hope that this hybrid system would produce excellent results. And they specified, in detail, a mechanism that would insulate these independent electors from state control over their votes. Until the Constitution is amended, the State must permit the system to operate as designed.

## REASONS FOR REQUESTING ORAL ARGUMENT

This case presents a complex constitutional question of importance to the entire country. Oral argument will help this Court properly understand and evaluate the arguments and issues involved in this appeal.

## CONCLUSION

The grant of the State's Motion to Dismiss should be reversed and the judgment for the State vacated.

Dated: June 25, 2018

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this Opening Brief of Appellant complies with the word limitation set forth in Rule 32(a)(7)(B)(i). According to the word-processing system used to prepare this brief, Microsoft Word, the word count for this brief, excluding the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities, and the certificates of counsel (*See Fed. R. App. P. 32(a)(7)(iii)*) is 12,308.

### **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of any hard copies that were filed (if any); and 3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, Virus definition version 1.269.1953.0, dated June 25, 2018, and according to the program are free from viruses. I further certify that the information on this form is true and correct to the best of my ability and belief formed after a reasonable inquiry.

/s/ Jason B. Wesoky

Jason B. Wesoky



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 25th day of June, 2018, a true and correct copy of the **OPENING BRIEF OF PLAINTIFFS – APPELLANTS** was filed with the Court and served electronically via CM/ECF on the following:

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