IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH, Plaintiffs-Appellants, v. COLORADO DEPARTMENT OF STATE, Defendant-Appellee.	Case No. 18-1173

On Appeal from the United States District Court
For the District of Colorado

The Honorable Wiley Y. Daniel, Senior District Court Judge
D.C. No. 1:17-cv-01937-WYD-NYW

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PRIOR OR RELATED APPEALS

- *Baca v. Hickenlooper*, 10th Cir. No. 16-1482 (10th Cir. Dec. 16, 2016) (unpublished).

- *Baca v. Williams*, Colo. Supreme Court No. 2016SA318 (Colo. Dec. 16, 2016) (unpublished).

INTRODUCTION

Colorado, like 28 other States and the District of Columbia, requires its presidential electors cast their Electoral College ballots for the presidential and vice-presidential candidates who won the State's popular vote. COLO. REV. STAT. § 1-4-304(5) (2018). This is the second federal lawsuit that Appellants Polly Baca and Robert Nemanich have filed related to their roles as presidential electors in the 2016 Electoral College. *See Baca v. Hickenlooper ("Baca I")*, No. 16-cv-02986-WYD-NYW (D. Colo.).

In the first suit, the district court characterized their challenge as a "political stunt" that improperly sought to alter the outcome of the 2016 presidential election. Aplee. Supp. Appx. 72. It thus rejected their eleventh-hour request for a preliminary injunction to enjoin enforcement of Colorado's statute. This Court declined to disturb that decision, holding that Ms. Baca and Mr. Nemanich had not demonstrated a likelihood of success on the merits.

Having failed to obtain a preliminary injunction, Ms. Baca and Mr. Nemanich proceeded to follow Colorado law by casting their Electoral College ballots for the presidential and vice-presidential candidates who won Colorado's popular vote—Hillary Clinton and Timothy Kaine. But a third elector, Micheal Baca, violated Colorado law by attempting to cast his ballot for an alternative candidate who appeared on no ballot in the general election. Consistent with state law, Mr. Baca's ballot was not counted and he was replaced with a substitute elector. Appellants contend these actions—which they acknowledge are fully consistent with Colorado law—violated their federal constitutional rights.

This Court should affirm the district court's order of dismissal. As an initial matter, Appellants lack Article III standing to bring their claim, depriving the federal courts of subject matter jurisdiction. As former subordinate state officials, Appellants are precluded by the political subdivision doctrine from suing their parent State in federal court to challenge the constitutionality of a state statute.

But even assuming Appellants can overcome the political subdivision doctrine, they have failed to state a claim as a matter of law. Article II of the Constitution grants the States exclusive and plenary authority over the appointment of their presidential electors, allowing them to attach conditions to the appointment and, if necessary, remove an elector for failing to comply with the State's conditions. Nothing in the Constitution abrogates this state power or affords former electors Article III standing to challenge the State's lawful conditions. As the district court found, any other interpretation risks sanctioning a new electoral system that would render the people's vote merely advisory. This Court should reject Appellants' attempt to deprive Coloradans of their fundamental right to cast a meaningful and effective vote for President, not an advisory vote. This Court should affirm.

ISSUES ON APPEAL

Article II of the U.S. Constitution affords the States plenary authority to appoint their respective presidential electors to the

Electoral College "in such manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1. The case implicates the following issues:

1. Under the political subdivision doctrine, are presidential electors subordinate state officers who lack Article III standing to challenge the constitutionality of a duly-enacted state law?

2. Even if standing exists, does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to honor the outcome of the State's popular vote when casting their ballots in the Electoral College?

STATEMENT OF THE CASE AND FACTS

I. Colorado, like most other States, binds its presidential electors to the outcome of the popular vote.

Colorado, like the majority of States, binds its presidential electors to the outcome of the State's popular vote for President and Vice President.[1] Colorado's binding statute provides, "Each presidential elector shall vote for the presidential candidate and, by separate ballot,

[1] National Conference of State Legislatures, *The Electoral College* (Aug. 22, 2016) ("NCSL"), https://tinyurl.com/h5ceupw (last visited Aug. 2, 2018).

vice-presidential candidate who received the highest number of votes at the preceding general election in this state." COLO. REV. STAT. § 1-4-304(5) (2018). This binding statute has been on the books for more than half a century. *See* 1959 COLO. SESS. LAWS, p. 415.

Colorado statute also prescribes certain logistical requirements for casting ballots in the Electoral College. The statute instructs the electors to convene "in the office of the governor" at noon on "the first Monday after the second Wednesday in the first December following" the previous presidential election. COLO. REV. STAT. § 1-4-304(1). The electors must "take the oath required by law for presidential electors," *id.*, and the Secretary of State provides them with the "necessary blanks, forms, certificates, [and] other papers or documents required to enable them to properly perform their duties." *Id.* at § 1-4-304(3). The electors' ballots for President and Vice President "shall be taken by open ballot." *Id.* at § 1-4-304(1).

Colorado statute also provides a mechanism to remove electors who refuse to comply with their obligation to follow the will of

Colorado's voters. The statute states, "If any vacancy occurs in the office of a presidential elector because of death, *refusal to act*, absence, or other cause, the presidential electors present shall immediately proceed to fill the vacancy in the electoral college." *Id.* (emphasis added). As explained *infra*, Colorado's state courts have interpreted "refusal to act" to include an elector's decision to cast a ballot for someone *other* than the presidential and vice-presidential candidates who won the popular vote in Colorado. Appx. 35–36.

II. *Baca I*: Appellants are denied preliminary injunctive relief.

Federal Court Proceedings. In *Baca I*, two presidential electors, Polly Baca and Robert Nemanich, sought a preliminary injunction barring enforcement of Colorado's binding statute just 13 days before the 2016 Electoral College meeting. Appx. 70–71. The district court denied their motion, finding they had not established any of the

required elements for a preliminary injunction.[2] *Baca I*, No. 16-cv-02986-WYD-NYW, 2016 WL 7384286 (D. Colo. Dec. 21, 2016) (written order memorializing verbal ruling found at Aplee. Supp. Appx. 43–55). Most importantly, the district court found that Ms. Baca and Mr. Nemanich were unlikely to succeed on the merits of their claims because Colorado's statute binding its electors to the presidential and vice-presidential candidates who won the State's popular vote is "legally enforceable." Aplee. Supp. Appx. 54. The district court reasoned that granting Ms. Baca and Mr. Nemanich a preliminary injunction to permit them to vote their individual preferences in the Electoral College "would undermine the electoral process and unduly prejudice the American people by prohibiting a successful transition of power." *Id.* The district court did not address whether Colorado's presidential

[2] This Court may take judicial notice of the proceedings in *Baca I* and the related Colorado state court proceedings because they have a "direct relation" to the matters at issue here. *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). Relevant pleadings from *Baca I* are included in the Supplemental Appendix for the Court's convenience.

electors possess Article III standing to challenge the State's binding statute.

Ms. Baca and Mr. Nemanich filed an emergency appeal, but a panel of this Court declined to disturb the district court's decision. *Baca I*, 10th Cir. No. 16-1482 (10th Cir. Dec. 16, 2016) (order at Aplee. Supp. Appx. 28–42). The *Baca I* panel agreed that Ms. Baca and Mr. Nemanich failed to satisfy their burden, stating they had not "point[ed] to a single word" in the Constitution that "requires electors be allowed the opportunity to exercise discretion in choosing who to cast their votes for." Aplee. Supp. Appx. 37.

But even putting aside that failure, the *Baca I* panel explained, Ms. Baca and Mr. Nemanich raised "at best" a debatable argument. *Id.* at 37–38. The *Baca I* panel noted that Article II expressly grants to the States the right to appoint their electors "in such [m]anner as the Legislature thereof may direct," and that the U.S. Supreme Court has described such power as "plenary." *Id.* at 38 (quoting U.S. CONST. art. II, § 1, and *McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892)). Accordingly,

the *Baca I* panel concluded that Ms. Baca and Mr. Nemanich had not demonstrated a likelihood of success on the merits that would justify preliminary injunctive relief.

Like the district court, the *Baca I* panel did not address the electors' standing at any length, stating only that it was satisfied "[a]t this stage of the proceedings," and based on "the preliminary record," that it was "sufficient to provide [the electors] with standing" to challenge Colorado's binding statute. Aplee. Supp. Appx. 34. The *Baca I* panel also declined to address whether Colorado's binding statute allows the State to remove an elector after voting has begun, observing that the issue was not raised by Ms. Baca or Mr. Nemanich in either the district court or on appeal. *Id.* at 39. In a footnote, however, the *Baca I* panel suggested that a State's attempt to remove an elector after voting had commenced would be "unlikely in light of the text of the Twelfth Amendment." *Id.* at 39 n.4. The *Baca I* panel's footnote did not identify which text in the Twelfth Amendment it was relying on for its statement.

Baca I was not the only recent case to confront the issue of so-called "faithless electors." In the run-up to the Electoral College vote on December 19, 2016, several other federal courts similarly declined to enjoin other state laws binding electors, finding the challengers were unlikely to succeed on the merits. *See Chiafalo v. Inslee*, No. 16-36034, 2016 U.S. App. LEXIS 23392 (9th Cir. Dec. 16, 2016); *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140 (W.D. Wash. Dec. 15, 2016); *Koller v. Brown*, 224 F. Supp. 3d 871 (N.D. Cal. Dec. 16, 2016); *Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193 (D. Minn. Dec. 23, 2016).

State Court Proceedings. Despite Ms. Baca and Mr. Nemanich's failure to obtain injunctive relief in federal court, the Colorado Department of State remained concerned that they or other presidential electors might nonetheless choose to violate Colorado's binding statute at the 2016 Electoral College meeting. The Department thus took action to develop a plan of succession in the event one or more of the electors refused to follow Colorado law.

Seeking to ensure that its succession plan comported with state law, the Colorado Secretary of State initiated a separate lawsuit against Ms. Baca and Mr. Nemanich in the District Court for the City and County of Denver. The court ruled that a presidential elector who fails to cast his or her Electoral College ballot for the presidential and vice-presidential candidates who won the State's popular vote would, as a matter of Colorado law, be deemed to have "refus[ed] to act," thereby creating a vacancy in that elector's office. COLO. REV. STAT. § 1-4-304(1); *see Williams v. Baca*, Denver Dist. Court No. 2016CV34522 (Dec. 13, 2016) (ruling at Appx. 35). The state district court ruled that any such vacancy must be immediately filled by a majority vote of the presidential electors present, and that the Colorado Democratic Party (the party whose candidates won Colorado's popular vote) shall provide the electors with nominations to fill any such vacancy. Appx. 35.

The state district court's order became "final and not subject to further appellate review" when the Colorado Supreme Court declined to consider the electors' expedited appeal under COLO. REV. STAT. § 1-1-

113(3). *See Baca v. Williams*, Colo. Supreme Court. No. 2016SA318 (Dec. 16, 2016) (order at Appx. 36).

The 2016 Electoral College. On the day of the Electoral College, December 19, 2016, the Appellants each took an oath to cast their Electoral College ballots for the presidential and vice-presidential candidates who received the highest number of votes in Colorado in the preceding election. Appx. 16–17. Ms. Baca and Mr. Nemanich cast their Electoral College ballots for the candidates who received the most votes in Colorado, Hillary Clinton and Timothy Kaine. Appx. 17–18; Aplee. Supp. Appx. 59. But a third elector, Micheal Baca, immediately violated his oath by attempting to cast his ballot for John Kasich, the putative alternative candidate who did not appear as a presidential candidate on any general election ballot anywhere in the country. Appx. 17, 23. Consistent with the state district court's order, Mr. Baca's office was deemed vacant and he was replaced with another elector via a majority vote of the remaining electors. Appx. 17; Aplee. Supp. Appx. 59. The

replacement elector properly cast her Electoral College ballot for Hillary Clinton. Appx. 17.

Congress counted the Electoral College ballots on January 6, 2017, and announced Donald Trump and Michael Pence as the persons elected President and Vice President. 163 CONG. REC. H189–H190 (daily ed. Jan. 6, 2017). They took office on January 20, 2017.

III. *Baca II*: Appellants refile their federal complaint but are again denied relief.

When the dust from the 2016 election settled, Ms. Baca and Mr. Nemanich voluntarily dismissed their complaint in *Baca I* without prejudice. Aplee. Supp. Appx. 66–68. But a mere nine days after the dismissal, they refiled substantially the same federal complaint against the Colorado Secretary of State. *See Baca v. Williams* ("*Baca II*"), No. 17-cv-01937-WYD-NYW (D. Colo.) (complaint at Aplee. Supp. Appx. 85–96). Ms. Baca and Mr. Nemanich later amended their *Baca II* complaint to add Micheal Baca as a third plaintiff. Aplee. Supp. Appx. 97–99.

After negotiations among the parties and with the district court's approval, Appellants submitted a second amended complaint in *Baca II* that substantially narrowed their claims and replaced the Secretary with the Department as the sole-named defendant. Appx. 8–19; Aplee. Supp. Appx. 114–15. Although Appellants had initially pleaded a voter intimidation claim under 52 U.S.C. § 10101, they abandoned it; instead, they asserted a single constitutional claim under 42 U.S.C. § 1983 that challenged Colorado's binding statute as unconstitutional under Article II and the Twelfth Amendment. *See id.*; Appx. 17–19. In addition to declaratory relief, Appellants sought nominal damages of $1 each for the alleged violation of their rights in the 2016 Electoral College. Appx. 19.

The Department moved to dismiss for both lack of standing under FED. R. CIV. P. 12(b)(1), and for failure to state a claim under FED. R. CIV. P. 12(b)(6). Appx. 20–33. The district court agreed with the Department on both grounds, dismissing the case in a thorough, 27-page opinion. Appx. 68–97.

On standing, the district court concluded that presidential electors are subordinate state officers who lack standing under the political subdivision doctrine to challenge the constitutionality of Colorado's binding statute. Appx. 73–80. The "plaintiffs lose nothing by their having to vote in accordance with the state statute," the district court explained, "'save an abstract measure of constitutional principle.'" Appx. 77 (quoting *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009)). It thus concluded that Appellants' "role as subordinate state officials subjects them to the political subdivision standing doctrine." Appx. 80.

Despite Appellants' lack of standing, the district court nonetheless proceeded to address the Department's alternative argument for dismissal—that the complaint failed to state a claim upon which relief could be granted. Appx. 81–93. The district court concluded that the States may properly bind their presidential electors to the outcome of the State's popular vote without running afoul of Article II or the Twelfth Amendment. The lower court explained that Article II, § 1,

commits to the States the exclusive power to appoint their presidential electors, which authority carries with it the attendant power to attach conditions and, if necessary, the power to remove electors. Appx. 81, 92.

The district court also relied on Supreme Court precedent that approved a similar exercise of state authority to bind presidential electors. *See Ray v. Blair*, 343 U.S. 214 (1952). The district court explained that the *Ray* Court upheld a pledge requirement for presidential electors, finding that the Twelfth Amendment does not demand "'absolute freedom for the elector to vote his own choice.'" Appx. 84 (quoting *Ray*, 343 U.S. at 228). The district court also explained that longstanding historical practice is consistent with electors being bound or pledged to follow the will of the voting public. It thus rejected Appellants' argument that the Framers' original understanding of the Electoral College should override either longstanding historical practice or the Supreme Court's holdings. Appx. 85–88.

Finally, the district court determined that Colorado's binding statute does not frustrate or interfere with any identifiable federal

policy. To the contrary, it found that Congress's decision to bind the District of Columbia's electors to the outcome of the District's popular vote reveals a federal policy *consistent* with Colorado's binding statute. Appx. 93. It therefore rejected Appellants' reliance on federal preemption principles and dismissed Appellants' challenge under both FED. R. CIV. P. 12(b)(1) and 12(b)(6). Appx. 90–93.

Appellants now appeal.

STANDARD OF REVIEW

Appellants' lawsuit challenges the facial constitutionality of Colorado's binding statute. Facial constitutional challenges are "generally disfavored as '[f]acial invalidation is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort.'" *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)) (alterations in original). A plaintiff can succeed on a facial challenge only "by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional

in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotations omitted; alteration in original). Thus, a plaintiff bears a particularly "heavy burden" in raising a facial constitutional challenge. *Golan*, 609 F.3d at 1094 (internal quotations omitted).

This case is on review following the district court's grant of the Department's Motion to Dismiss under both FED. R. CIV. P. 12(b)(1) and 12(b)(6). This Court reviews *de novo* an order dismissing a complaint for lack of jurisdiction under FED. R. CIV. P. 12(b)(1). *Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995). Lack of standing is a jurisdictional defense that is properly presented in a motion to dismiss under FED. R. CIV. P. 12(b)(1). *See, e.g., Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1188–89 (10th Cir. 2000). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

A district court's order dismissing a complaint for failure to state a claim under FED. R. CIV. P. 12(b)(6) is similarly reviewed *de novo*. *Van Zanen v. Qwest Wireless, L.L.C.*, 522 F.3d 1127, 1129 (10th Cir. 2008). To withstand a FED. R. CIV. P. 12(b)(6) motion to dismiss, "a complaint must contain enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Khalik v. United Airlines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2009)). A claim should be dismissed under FED. R. CIV. P. 12(b)(6) if it "asserts a legal theory not cognizable as a matter of law." *Bd. of Cnty. Comm'rs of La Plata v. Brown Retail Group, Inc.*, 598 F. Supp. 2d 1185, 1191 (D. Colo. 2009).

SUMMARY OF THE ARGUMENT

The district court's cogent and detailed opinion provides this Court with two independently sufficient grounds to affirm.

I. Appellants lack Article III standing under the political subdivision doctrine to challenge Colorado's binding statute. The political subdivision doctrine deprives subordinate state officers of

standing to challenge the constitutionality of a state statute when they are not personally affected by the statute and their interest in the litigation is official rather than personal. This rule squarely applies here. Presidential electors are state officers and Appellants' own complaint makes clear that their grievance is not a personal one, but rather an institutional injury grounded in the diminution of power that Colorado's binding statute allegedly causes to the electors' official role. Appellants therefore lack standing, depriving the federal courts of subject matter jurisdiction.

Appellants' reliance on cases where the Supreme Court and this Court found standing in unrelated contexts is misplaced. The concept of legislator standing does not apply because presidential electors do not legislate and, even if they did, Appellants here make up only a small minority of Colorado's 2016 Electoral College delegation. The delegation as a whole did not authorize Appellants' lawsuit, rendering legislator standing inapplicable. Nor do Appellants possess standing based on a purported interest in maintaining their role as former electors. The one-

day ministerial role is not analogous to ongoing public employment or similar positions involving continuous state funding. The Supreme Court's precedent finding standing in these types of situations, to the extent it remains binding precedent at all, is therefore not instructive here.

Moreover, contrary to Appellants' argument, this Court has not created an exception to the political subdivision doctrine that applies in this case. If anything, this Court's precedent *strengthens* the doctrine where, as here, the challengers' claim is brought directly under the federal Constitution rather than a federal statute.

II. Assuming Appellants are able to overcome their lack of Article III standing, this Court should nonetheless affirm because Appellants' complaint fails to state a claim upon which relief can be granted. This district court correctly determined as a matter of law that Colorado's binding statute does not run afoul of Article II or the Twelfth Amendment. Its legal conclusion is solidly grounded in the Constitution's text, Supreme Court and lower court precedent, and

longstanding historical practice. These sources demonstrate that each of the dozens of state statutes that bind presidential electors is fully consistent with the Constitution.

Finally, the district court properly rejected Appellants' reliance on federal preemption principles. As shown by Congress's action in passing a law binding the District of Columbia's electors, state statutes that bind electors do not frustrate or interfere with federal objectives involving the Electoral College. To the contrary, state binding statutes *promote* federal objectives. This Court should affirm.

ARGUMENT

I. The district court properly dismissed Appellants' lawsuit for lack of standing under Rule 12(b)(1).

Here, as in every case, the plaintiff bears the burden of demonstrating Article III standing. *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006). The district court below dismissed Appellants' suit because they failed to satisfy that burden. The district court's decision was correct. Just like other subordinate state officers,

presidential electors cannot sue their parent States to challenge the constitutionality of state law. The Supreme Court's decisions finding Article III standing in unrelated contexts—including lawsuits by legislators and public servants seeking to retain ongoing employment and state funding—do not abrogate the political subdivision doctrine. Nor has this Court created an exception to the doctrine where, as here, the plaintiff asserts a federal claim directly under the Constitution rather than a federal statute. This issue was raised and ruled on below. Appx. 25–27, 73–80. This Court should affirm for lack of standing.

A. As former subordinate state officials, Appellants lack standing under the political subdivision doctrine.

"Under the doctrine of political subdivision standing, federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states." *City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011). "This doctrine is an important limitation on the power of the federal government. It guarantees that a federal court will not resolve certain disputes between a state and local government."

Cooke v. Hickenlooper, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, *10 (D. Colo. Nov. 27, 2013). A "political subdivision cannot invoke (nor can a federal court impose) the protections of the United States Constitution for individuals against a state." *Id.* (citing *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933)); *see also Kerr v. Hickenlooper*, No. 11-cv-01350-RM-NYW, 2017 WL 1737703, *7–11 (D. Colo. May 4, 2017) (finding political subdivisions—boards of county commissioners, education, and special districts—lacked standing to sue the State for violating the federal "Guarantee Clause").

The doctrine applies not only to artificial political subdivisions, such as municipalities, but also to state officers who attempt to sue the State to challenge a state law. *City of Hugo*, 656 F.3d at 1255 n.3; *accord Columbus & Greenville Railway v. Miller*, 283 U.S. 96, 99–100 (1931) (tax collector); *Smith v. Indiana*, 191 U.S. 138, 148–49 (1903) (county auditor); *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 566–67 (5th Cir. 2008) (state insurance commissioner); *Finch*

v. Miss. State Med. Ass'n, Inc., 585 F.2d 765, 774 (5th Cir. 1978) (governor); *Cooke*, 2013 WL 6384218, *10–13 (county sheriffs).

State officers lack Article III standing to challenge the constitutionality of state statutes when they are not personally affected by those statutes and their interest in the litigation is official rather than personal. *Donelon*, 522 F.3d at 566–67 (citing *Cty. Court of Braxton Cty. v. West Virginia ex rel. Dillon*, 208 U.S. 192, 197 (1908)). As stated by one circuit court, "a public official's personal dilemma in performing official duties that he perceives to be unconstitutional does not generate standing." *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009) (internal quotations omitted).

Contrary to Appellants' argument, presidential electors are without doubt state officers, not federal officers. The Supreme Court has repeatedly said as much. *See Ray*, 343 U.S. at 224 (stating electors "are not federal officers or agents" and that they "act by authority of the state" that appoints them); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (stating "presidential electors are not officers or agents of the

federal government"); *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (holding that presidential electors "are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress").

The vast majority of lower courts agree that presidential electors are state officers. *See, e.g., Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937) (dismissing federal indictment because "presidential electors are officers of the state and not federal officers"); *Chenault v. Carter*, 332 S.W.2d 623, 626 (Ky. 1960) (holding that presidential electors are state officers under Kentucky law); Elizabeth D. Lauzon, Annotation, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. Fed. 2d 183, § 5 (2007) (collecting cases); *but see* Op. Br., p. 20.[3] This of course makes good sense because the States are solely

[3] Appellants wrongly rely on two outdated state cases to suggest otherwise. Op. Br., p. 20 (citing *Stanford v. Butler*, 181 S.W.2d 269 (Tex. 1944) and *State v. Gifford*, 126 P. 1060 (Idaho 1912)). Both cases arise

responsible for appointing their respective electors and exercise plenary authority over their appointment. U.S. CONST. art. II, § 1; *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

Appellants attempt to cast doubt on these holdings by suggesting that, unlike most state officials, presidential electors exercise a "federal function" that Congress possesses authority to regulate. Op. Br., p. 20. This argument fails for two reasons. *First*, although Congress certainly could attempt to pass legislation that protects electors' independence, to date it has not done so. In fact, it has done the opposite. *See infra*, pp. 66–67 (discussing Congressional act binding District of Columbia's electors to the outcome of the District's popular vote).

Second, merely exercising a "federal function" does not immunize a state official from the political subdivision doctrine. Take the example

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from States that lack state binding statutes and neither discusses the requirements for federal Article III standing. In any event, both cases have been abrogated by more recent federal precedent establishing that, at least as far as the federal government is concerned, presidential electors are state officers, not federal officers. *See Ray*, 343 U.S. at 224.

of a state insurance commissioner. He or she exercises important federal functions when administering complementary state and federal insurance programs like Medicaid and Medicare. *See FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (recognizing "the Federal Government has some power to enlist a branch of state government . . . to further federal ends"). And no one seriously doubts that Congress can pass federal legislation that regulates state insurance commissioners. *See, e.g.*, 42 U.S.C. § 18023(b)(2)(E)(i) (requiring state insurance commissioners to ensure segregation of certain plan funds so they are not used for abortion services). With that said, state insurance commissioners are nonetheless barred by the political subdivision doctrine from maintaining federal litigation against their parent State. *See Donelon*, 522 F.3d at 566–67.

Or take the example of a State's governor. Just like presidential electors, each state governor performs important federal functions that have their root in the federal Constitution. By way of example, each governor is required by the Constitution to issue "writs of election" to

fill vacancies that that occur in both the Senate and the House of Representatives. U.S. CONST. art. I, § 2(4), & amend. XVII. They also make "temporary appointments" to fill vacancies in the Senate when permitted to do so by the state legislature. U.S. CONST. amend. XVII. Despite this, governors are no less subject to the political subdivision doctrine than any other state official. *See Finch*, 585 F.2d at 774 (stating governor's belief that state statute is unconstitutional is insufficient to confer standing and that he possessed "no personal stake in the outcome" of the case).

The same analysis applies here. Although their tenure was brief and their "federal function" purely ministerial, Appellants' role as former subordinate state officials subjects them to the political subdivision doctrine, precluding them from bringing this suit. This is the case even though electors are subject to federal constitutional and

statutory provisions that regulate the performance of their duties.[4] Appellants offer no authority to support their claim that the political subdivision doctrine is limited to state officers performing exclusively "state functions." The district court thus properly concluded that Appellants' suit is barred by the political subdivision doctrine.

B. Neither *Coleman v. Miller* nor *Board of Education v. Allen* confers standing on Appellants.

Appellants contend that they possess standing under both *Coleman v. Miller*, 307 U.S. 433 (1939), and *Board of Education v.*

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[4] Importantly, the constitutional provisions relied on by Appellants are not privately enforceable under 42 U.S.C. § 1983. Merely exercising a "federal function" under the cited provisions does not, by itself, confer constitutional rights that may be vindicated in federal court. More is required. The federal law that a plaintiff seeks to vindicate under § 1983 must clearly and unambiguously confer an individual federal entitlement by using rights-creating language. Vague "benefits" or "interests" will not do. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 282–87 (2002 *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Nothing in Article II or the Twelfth Amendment fits that bill. *Cf. Jones v. Bush*, 122 F. Supp. 2d 713, 716–18 (N.D. Tex. 2008) (holding Twelfth Amendment did not confer standing on voters to enforce requirement that President and Vice President be inhabitants of different states).

Allen, 392 U.S. 236 (1968), notwithstanding the clear bar of the political subdivision doctrine. Op. Br., pp. 21–25. When taken together, Appellants assert, these two cases demonstrate that they "have something meaningful at stake" that grants them standing. *Id.* at 21. Appellants' reliance on *Coleman* and *Allen* is misplaced.

In *Coleman*, a legislator standing case, the Supreme Court determined that 20 of 40 Kansas state senators had standing to sue in an effort to maintain the effectiveness of their votes. 307 U.S. at 438. It deals only with legislator standing and contains no discussion of the political subdivision doctrine. *Coleman* is therefore uninstructive in this case because presidential electors do not legislate and, even if they did, Appellants no longer hold their positions as electors. *See Karcher v. May*, 484 U.S. 72, 81 (1987) (holding former legislators "lack authority to pursue" appeal because "they no longer hold those offices"); *Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) ("Even if these appellants might have had legislator standing at some point, such standing would have terminated when they left office.").

Even assuming *Coleman* were relevant, its holding has since been narrowly cabined by *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). There, the Supreme Court concluded that the Arizona State Legislature had standing to challenge a voter initiative because it was "an institutional plaintiff asserting an institutional injury" in a suit authorized by votes taken in both the Arizona House and Senate. *Id.* at 2664. But the Court cautioned that the same is not true for individual legislators—they *lack* standing in part because they are not authorized to represent the legislature as a whole in litigation. *Id.* (citing *Raines v. Byrd*, 521 U.S. 811 (1997)).

Here, Appellants made up only three of Colorado's nine presidential electors in 2016. They were not authorized to represent Colorado's Electoral College as a whole, and no vote was taken by the members to authorize Appellants' lawsuit against the Department. Appellants are therefore mere "individual [m]embers" who lack standing to challenge Colorado's binding statute. *Arizona State*

Legislature, 135 S. Ct. at 2664; *see also Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016) (individual state legislators lack standing to challenge Colorado's Taxpayer Bill of Rights).

Appellants' claim fares no better under *Allen*. In that case, the Supreme Court (in a footnote) found standing for certain local government board members because they held a "personal stake" in retaining both their jobs and state funding. 392 U.S. at 241 n.5. But *Allen* did not discuss either the political subdivision doctrine or the bedrock principle that a plaintiff seeking to secure Article III standing must advance more than a "generalized grievance" or "abstract injury." *Schlesinger v. Reservists Cmte. to Stop the War*, 418 U.S. 208, 217 (1974). The lack of such discussion is perhaps unsurprising since the appellees in *Allen* did not contest the appellant's standing. 392 U.S. at 241 n.5.

Because of *Allen*'s short shrift treatment of standing, other circuit courts evaluating intervening Supreme Court decisions have concluded that its footnote is "'not properly . . . considered as binding Supreme

Court precedent.'"[5] *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (quoting *City of S. lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980)); *see also Finch*, 585 F.2d at 773 (stating *Allen* is undermined by "more recent pronouncements"); 13B Charles Alan Wright, Arthur R. Miller, et al., FEDERAL PRACTICE & PROCEDURE § 3531.11.3 (3d ed. 2008) (explaining that federal circuit courts have recognized that *Allen*'s footnote has been undermined by the Court's more recent decisions).

The Supreme Court, too, has backed away from *Allen*'s footnote, suggesting it found standing in that case only because a *majority* of the local board members faced expulsion and monetary loss. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986). That is not the case here, where only a *minority* of Colorado's former electors sought to vote their conscience in the 2016 Electoral College.

[5] Indeed, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

Still other authorities resolve the oddity of *Allen*'s footnote by looking to state law on standing, observing that *Allen* itself arose out of New York's state courts where the local board members undisputedly possessed standing. *See* 13B Wright & Miller, *supra*, § 3531.11.3. "If state courts would recognize standing to challenge the state law, as happened in the *Allen* case, there is no apparent reason of Article III concern to . . . close the doors of the lower federal courts." *Id.* "If state courts would deny standing, on the other hand, federal courts should deny standing as a matter of sound relations to state governments." *Id.*

Under this approach, Appellants lack standing to proceed in federal court because Colorado's highest court vigorously enforces its own version of the political subdivision doctrine. *See Mesa Verde Co. v. Montezuma Cty. Bd. of Equalization*, 831 P.2d 482, 484 (Colo. 1992) (holding that "political subdivisions of the state or officers thereof . . . lack standing to assert constitutional challenges to statutes defining their responsibilities"); *accord Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 39–40 (Colo. 1995); *Denver Urban Renewal Auth. v. Byrne*, 618

P.2d 1374, 1379–80 (Colo. 1980); *Bd. of Cty. Comm'rs v. Fifty-First Gen. Assembly*, 599 P.2d 887, 888–89 (Colo. 1979); *Martin v. Dist. Court*, 550 P.2d 864, 865–66 (Colo. 1976).

Even if *Allen*'s footnote remained controlling (it does not, as explained above), it offers no help to Appellants in this case. Unlike the board positions in *Allen*, serving as an elector in the Electoral College is not an ongoing job that confers any meaningful pecuniary interest on Appellants. Under Colorado law, electors have limited, temporary rights and duties: they are reimbursed for their mileage, given a nominal five dollars for their attendance at the one-day meeting, and must cast their ballots for the candidates who won Colorado's popular vote. COLO. REV. STAT. §§ 1-4-304(5) & 305. And as their complaint makes clear, Appellants' alleged injury is not an individual one based on the possible loss of this nominal compensation, but rather an institutional injury grounded in the diminution of power that Colorado's binding statute

allegedly causes to the electors' official role.[6] Appx. 9, 14 (identifying Appellants in their capacities as Electoral College members and stating they determined to "exercise their constitutional discretion to vote contrary to their pledge or the popular vote in their state"); *cf. Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993) (stating courts should "look to the substance of the pleadings and course of the proceedings" to determine if government official is named in their individual or official capacity).

Accordingly, *Allen*'s footnote based on a government official's personalized stake in a dispute does not confer standing on Appellants. *See Cooke*, 2013 WL 6384218, *11 (concluding county sheriffs lacked

[6] Appellants' speculative fear of being criminally prosecuted for violating their oath similarly does not confer standing. *See Drake*, 664 F.3d at 780. Moreover, Appellants wrongly characterize their claim as a voter intimidation claim. Op. Br., p. 59. Appellants affirmatively abandoned their voter intimidation claim under 52 U.S.C. § 10101 when they filed their Second Amended Complaint. Aplee. Supp. Appx. 114–15. The *only* claim they advanced below is that Colorado's binding statute is facially unconstitutional. Appx. 17–19; *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007) (stating amended complaint supersedes original complaint).

standing to challenge state gun law because they failed "to bring claims in their individual capacities like that asserted in *Allen*").

C. No exception to the political subdivision doctrine applies here.

Appellants round out their standing argument by relying on this Court's decision in *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). *See* Op. Br., pp. 25–26. They assert *Branson* creates an exception to the political subdivision doctrine that permits a subordinate state officer to sue his or her parent State "when the suit alleges a violation by the state of some controlling federal law." 161 F.3d at 630. Appellants purport to fall within this exception because they bring their federal claim under the Supremacy Clause and other "structural provisions" of the Constitution, presumably Article II and the Twelfth Amendment. Op. Br., p. 26.

Appellants' argument under *Branson* has things exactly backwards. Appellants lack standing precisely because their claim is brought directly under the federal Constitution, not a federal statute.

See Hugo, 656 F.3d at 1258. Following the "trend" of other federal courts, this Court in *Hugo* stated that it will permit a lawsuit by a political subdivision against its parent State in the rare circumstance that the suit is "based on federal *statutes* that contemplate the rights of political subdivisions." *Id.* (emphasis added). But this Court also warned that there is not a "single case where a court of appeals or the Supreme Court has expressly allowed . . . a claim by a municipality against its parent state premised on a substantive provision of *the Constitution*." *Id.* (emphasis added). The *Hugo* panel thus refused to depart from the "historic understanding of the Constitution as not contemplating political subdivisions as protected entities vis-a-vis their parent states." *Id.* at 1259.

Unlike *Branson* where a federal statute granted certain rights to Colorado school districts that were enforceable in federal court, Appellants' complaint in this case identifies no comparable federal statute. Appx. 8–19. In fact, Appellants stipulated below that they affirmatively waived their prior statutory claims in favor of asserting a

single constitutional claim. Aplee. Supp. Appx. 114–15. Based on that stipulation and this Court's holding in *Hugo*, Appellants lack standing to challenge Colorado's binding statute. This Court should therefore affirm the district court's order of dismissal.

II. The district court properly dismissed Appellants' challenge to Colorado's binding statute for failure to state a claim under Rule 12(b)(6).

Even if Appellants' standing defect were put aside, the district court properly dismissed their constitutional challenge on an alternative ground: Appellants failed to state a claim upon which relief can be granted. The U.S. Constitution, backed by longstanding interpretations from the U.S. Supreme Court and settled historical practice, permits the States to bind their presidential electors to the presidential and vice-presidential candidates who won the State's popular vote. No federal policy or objective is thwarted when States like Colorado bind their presidential electors. To the contrary, federal objectives are promoted when States bind their electors. This issue was raised below, Appx. 11–19, and the district court correctly determined

that Appellants' claim under Article II and the Twelfth Amendment fails as a matter of law. Appx. 81–93

A. The text of the U.S. Constitution permits the State to bind its presidential electors.

The U.S. Constitution commits to the States' respective legislatures the exclusive right to decide how their presidential electors are selected and, if necessary, removed. Article II provides that "[e]ach state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1 (emphasis added). Nothing in the Twelfth Amendment, or any other constitutional provision, abrogates this state power. Indeed, this state power over its electors has been described as "plenary," *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), "exclusive," *id.*, and "comprehensive," *id.* at 27.

Consistent with this foremost power, every State in the Union, including Colorado, has delegated to its people the task of appointing its

electors via free and open democratic elections. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) ("History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors."). Although a state legislature is free to choose another method of appointing its electors, such as choosing them itself, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Id.*

Some States, including Colorado, have gone further, granting the people the right to appoint electors who they know will be bound to follow their popular will when casting their Electoral College ballots for President and Vice President. *See* COLO. REV. STAT. § 1-4-304. Again, nothing in the text of the U.S. Constitution prohibits a State from attaching this type of condition to the appointment of its electors. Because the States alone have the power to appoint their presidential electors, they necessarily possess the power to attach conditions. *Cf. South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (stating Congress's power to spend money includes the power to "attach conditions").

A State's decision to bind its electors to the outcome of its popular vote is one such permissible condition. *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & POLITICS 665, 678 (1996) ("The states' constitutional power to appoint electors would appear to include the power to bind them"). In fact, it is the most popular condition, with 29 states and the District of Columbia opting to do so. *See* NCSL, *supra*. In the same vein, no constitutional provision bars a State from removing an elector who refuses to comply with the conditions of his or her appointment. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.47 (2018) (stating that refusal or failure to vote for the presidential and vice-presidential candidates appearing on the ballot of the political party that nominated the elector constitutes "a resignation from the office of the elector").

Contrary to Appellants' argument, the power to appoint necessarily encompasses the power to remove. *See Burnap v. United States*, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power

to appoint."); *Myers v. United States*, 272 U.S. 52, 175–76 (1926) (invalidating Tenure of Office Act that attempted to prevent President from removing executive officers). Were it otherwise, the States' plenary, exclusive, and comprehensive authority over their electors would be hollow, rendering them powerless to vindicate their rights under Article II. *Cf. Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("[E]very right, when withheld, must have a remedy"). Nothing in the Constitution demands that type of anomalous interpretation.

Appellants resist this understanding of the electors' constitutional role by analogizing to federal judges. They suggest that the appointing State has "no power to control" its electors, just as the President that appoints a federal judge has no authority to dictate case outcomes. Op. Br., p. 58. But this argument ignores key constitutional differences between these two offices. The *state* office of presidential elector, unlike a federal judge or other federal official, enjoys no constitutional protection against removal or the attachment of conditions by the appointing authority. *Compare* U.S. CONST. art. II, § 4 (stating "civil

officers of the United States" may be impeached only for "high crimes and misdemeanors"), *and* U.S. CONST. art. III, § 1 (federal judges shall hold their offices during "good behavior"), *with Ray*, 343 U.S. at 224 (stating electors "are not federal officers or agents" and that they "act by authority of the state" that appoints them). The district court thus properly rejected Appellants' analogy to federal judges. Appx. 92.

Appellants also attempt to rely on the text of the Twelfth Amendment to support their argument that electors are free agents imbued with discretion. Op. Br, p. 43. They lean heavily, for instance, on the footnote in *Baca I* where a panel of this Court suggested that a State's attempt to remove an elector after voting had begun would be "unlikely in light of the text of the Twelfth Amendment." Aplee. Supp. Appx. 39 n.4. But neither Appellants nor the *Baca I* panel cite any text in the Twelfth Amendment that lends support to this view. As others have indicated, the Twelfth Amendment is a mere bookkeeping provision that solved the "intolerable" problem of electing a President and Vice President from different political parties. *Ray*, 343 U.S. at 224

n.11; Br. of Derek T. Muller as Amicus Curiae, pp. 3–11. Nowhere does it purport to circumscribe the States' plenary authority over their electors. Given the extensive debate on the amendment before its ratification, it would have been strange for the drafters to have imposed, *sub silentio*, that type of major restriction on the States' otherwise comprehensive power over their electors.[7] *See United States v. Sprague*, 282 U.S. 716, 732 (1931) ("The fact that an instrument drawn with such meticulous care and by men who so well understood [h]ow to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended").

[7] At most, the *Baca I* panel's footnote regarding the Twelfth Amendment is nonbinding *dicta*. As noted by the district court, the *Baca I* panel did not actually decide whether Colorado's binding statute runs afoul of the Twelfth Amendment. Appx. 84. Nor did it analyze the Twelfth Amendment's text or the historical reasons for its ratification. *Id.* "[T]his is not surprising," the district court explained, "given the fact that the [*Baca I* panel's] Order was issued on an extremely expedited schedule to avoid delaying the scheduled meeting of the 2016 Electoral College." *Id.*

While Appellants point to the requirement that electors "vote by ballot," U.S. CONST. amend. XII, nothing in this phrase mandates a "secret" or "anonymous" ballot. To the contrary, as Professor Muller has shown, secret ballots would be inconsistent with other parts of the Twelfth Amendment, namely (1) the requirement that electors vote by "distinct ballots" for President and Vice President, one of whom "shall not be an inhabitant of the same state" as the other, and (2) the requirement that the electors, as a group, "make distinct lists of all persons voted for . . . ." *Id.*; Br. of Derek T. Muller as Amicus Curiae, pp. 3–11. Complying with these bookkeeping provisions in the Twelfth Amendment would be impossible if each elector's ballot remained secret. *See* Robert M. Hardaway, *The Electoral College and the Constitution* 57–58 (1994) (concluding the Constitution does not mandate that Electoral College ballots remain secret).

At best, Appellant's position boils down to an argument that electors cannot be bound because the U.S. Constitution is silent on the question. But if the Constitution is silent, the power to bind or remove

electors is properly reserved to the States under the Tenth Amendment. U.S. CONST. amend. X; *see McPherson*, 146 U.S. at 35–36 (stating "exclusive" state power over "mode of appointment" of electors "cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way"); *cf.* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2145 (2001) ("[A]ny legislation that impinges on the states' discretion to use the [winner-take-all allocation of electoral votes] would seem to run into this very same Tenth Amendment problem"). Colorado has chosen to exercise that power and bind its presidential electors to the candidates who won the State's popular vote.[8] COLO. REV. STAT. § 1-4-304(5). Appellants cite no case striking down that choice as unconstitutional.

[8] Appellants' supporting *amici* suggest that the Tenth Amendment did not reserve this type of power to the States because "presidential election functions did not exist before the Constitution was ratified." Br. of Indep. Inst. at Amicus Curiae, p. 29. But this argument ignores that the government's common law power to exercise control over its

Accordingly, because the text of the U.S. Constitution is consistent with the States exercising plenary authority over their presidential electors, this Court should affirm.

B. The U.S. Supreme Court and multiple lower courts permit the States to bind their presidential electors.

The U.S. Supreme Court has upheld measures that bind presidential electors in circumstances that, while not identical, are similar to this case. *See Ray v. Blair*, 343 U.S. 214 (1952).

In *Ray*, the Alabama legislature delegated to the political parties the authority to nominate electors. *Id.* at 217 n.2. Alabama's Democratic Party required its nominees for electors to pledge "aid and support" to the nominees of the National Convention of the Democratic Party for President and Vice President. *Id.* at 215. The Court upheld

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subordinate officers existed long before the Constitution was ratified. *See, e.g.*, *Wentz v. Thomas*, 15 P.2d 65, 86 (Okla. 1932) ("Every officer was the deputy of the sovereign") (internal quotations omitted). The States today continue to retain this power as part of their plenary authority over their presidential electors.

this pledge requirement, finding "no federal constitutional objection" when a State authorizes a party to choose its nominees for elector and to "fix the qualifications for the candidates." *Id.* at 231. The Court thus rejected the argument that the Twelfth Amendment demands "absolute freedom" for the elector to "vote his own choice." *Id.* at 228. Had the Court been inclined to recognize a constitutional right for presidential electors to vote their individual preferences, it would have done so in *Ray*. It did not.

In a footnote, Appellants assert that *Ray* left open the question of whether state statutes that bind presidential electors are enforceable. Op. Br., p. 56 n.12. But that argument splits the hair too finely. Under *Ray*, if a State has the power to delegate its power to bind electors, it necessarily possesses the authority to bind them itself and to enforce that binding. To be sure, "the Court's language and reasoning in *Ray v. Blair* strongly imply that state laws directly binding electors to a specific candidate are constitutional." Ross & Josephson, 12 J. L. & POLITICS at 696; *cf. Koller v. Brown*, 224 F. Supp. 3d 871, 879 (N.D. Cal.

2016) ("If that sort of reduction in an elector's independence [in *Ray*] is determined constitutional . . . Plaintiff's argument based on Article II, § 1 collapses"). As such, the district court correctly concluded that Appellants failed to overcome the strong presumption favoring the constitutionality of Colorado's binding statute. Appx. 82; *see Gilmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007).

To the extent that Appellants challenge the Department's past enforcement of Colorado's binding statute, their arguments fail as a matter of law. Consistent with *Ray*'s reasoning, multiple lower courts have concluded that state binding statutes like Colorado's are enforceable. *See Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193, *4 (D. Minn. Dec. 23, 2016) (stating that *Ray* "implied that such enforcement would be constitutional"); *Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) ("Though the [*Ray*] Court was not in a position to decide whether the pledge was ultimately enforceable, the opinion's reasoning strongly suggested that it would be"); *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (Sup. Ct. 1933)

("The elector who attempted to disregard that duty could, in my opinion, be required by mandamus to carry out the mandate of the voters of his State"); *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912) (affirming writ of mandamus requiring the Secretary of State to print on the Republican line of the ballot the names of six replacement electors when the original Republican electors "openly declare[d]" they would vote in the Electoral College for another party's candidates).

Each of these cases underscores the "bounden duty" imposed on electors to vote in the Electoral College for the candidates who won the State's popular vote. *Thomas*, 262 N.Y.S. at 326. So "sacred and compelling" is that duty—and so "unexpected and destructive of order in our land" would be its violation—that courts have recognized its performance amounts to a "purely ministerial" duty that may be compelled through a writ of mandamus. *Id.* Electors do not "exercise judgment or discretion in the slightest degree." *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924). Their "sole function" is "nothing more

than clerical—to cast, certify, and transmit a vote already predetermined." *Id.* They "are in effect no more than messengers whose sole duty it is to certify and transmit the election returns." *Id.*

Accordingly, because the Supreme Court and lower courts have recognized the constitutionality and enforceability of binding electors through statute, this Court should affirm the dismissal of Appellants' lawsuit.

C. History and longstanding practice confirm that Colorado's binding statute is consistent with the Constitution.

Appellants also rely on a myriad of historical documents that purportedly support the notion that the Framers originally intended for presidential electors to exercise discretion when casting their ballots in the Electoral College. They cite, for example, Alexander Hamilton's 1788 Federalist paper (No. 68), Samuel Johnson's 1768 dictionary definition of elector, and Senator Charles Pinckney's 1800 speech on the Senate floor, among other sources. Op. Br., pp. 41–42. When coupled with Article II and the Twelfth Amendment, Appellants assert, these

sources establish that electors are "vested with judgment and discretion." *Id.* at 41.

Appellants' historical analysis misses the mark for at least three reasons. *First*, their approach asks the wrong question. The issue is not, as Appellants contend, whether the Framers originally intended for electors to exercise independent discretion. Rather, the issue is whether the Framers imposed any constitutional bar against the States binding their electors to the outcome of the State's popular vote. On that question, the answer is undisputedly "no." The Framers never considered codifying that type of constitutional restriction against the States for the simple reason that the concept of a faithless elector was entirely foreign to them. *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1658 (2002) ("The Framers and Ratifiers simply did not contemplate the possibilities of unconstitutional or faithless electoral votes."); *cf.* Hardaway, *supra*, at 85 ("[T]he specific role of the electors was never discussed at the Convention"). Because the issue never arose, any attempt to ascribe to

the Framers some unknowable intent regarding the States' authority over their electors is a futile exercise.

Second, even if the Framers' views on elector discretion were the proper inquiry, no consensus emerged among them. While Appellants rely chiefly on Alexander Hamilton's view of elector independence, opposing and equally persuasive opinions came from James Madison, the "Father of the Constitution." In Madison's view, the Electoral College provision in the Constitution permitted the President "to be elected by the people" or the "people at large." Hardaway, *supra*, at 86 (citing Lucius Wilmerding, Jr., *The Electoral College* 19 (Boston: Beacon Press 1958)). Founding Fathers James Wilson (one of the original Supreme Court justices) and Gouverneur Morris (the "Penman of the Constitution") similarly advocated for direct popular election of the President. *See* Note, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696, 705 (1965); Hardaway, *supra*, at 86.

Tellingly, even Hamilton himself expressed contradictory positions on whether electors were to exercise discretion. In the same

federalist paper cited by Appellants, Hamilton stated that "[i]t was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided." THE FEDERALIST No. 68 (A. Hamilton). As commentators have recognized, which of Hamilton's shifting views prevailed at any given time largely "[d]epend[ed] upon the audience that was trying to be persuaded" to ratify the Constitution. Hardaway, *supra*, at 85.

The historical record thus reveals, at best, an inconsistent and largely conflicting paper trail of opinions by the Framers regarding the electors' proper role. *See Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (rejecting as "futile" reliance on "advice of the Founding Fathers" when their "statements can readily be found to support either side of the proposition"). Against this inconclusive backdrop, Appellants cannot meet their heavy burden of proving that Colorado's binding statute is facially unconstitutional.

Third, the post-enactment history of the Electoral College and our Nation's longstanding practice confirm that presidential electors hold

no constitutional right to vote absent constraint by state law or contrary to the will of the voters. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (stating "long settled and established practice" deserve "great weight" in constitutional interpretation); *Ray*, 343 U.S. at 228 (citing "longstanding practice" to uphold pledge requirement).

As early as the first election held under the Constitution, the voting public "took pledges" from the elector candidates, who promised to "obey their will." *Ray*, 343 U.S. at 228 n.15 (quoting S. Rep. No. 22, 19th Cong., 1st Sess., p. 4 (1826)). "In every subsequent election, the same thing has been done." *Id.* The electors "are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents." *Id.* The reason is that "the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President."[9] *Id.*

[9] One famous anecdote from the 1796 Electoral College illustrates this point. Federalist elector Samuel Miles defected from his party by casting his ballot for Thomas Jefferson instead of John Adams, leading

(quoting 11 Annals of Congress 1289–90, 7th Cong., 1st Sess. (1802)). As Justice Story put it, "an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1457 (1833).

Today's practice in the Electoral College is consistent with this longstanding historical understanding. Like the majority of States, Colorado adheres to the "Presidential Short Ballot" and does not print the electors' names on the general election ballot. Note, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. at 699. Instead, voters cast their ballots for the "Presidential Electors" for their preferred presidential and vice-presidential candidates. Aplee. Supp. Appx. 26. A voter thus understandably believes that he or she is casting their ballot

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one of his Federalist contemporaries to declare: "Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think." John A. Zadrozny, *The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection*, 11 COMMLAW CONSPECTUS 165, 168 n.31 (2003).

for actual presidential and vice-presidential candidates, not mere electors. Voters have no basis for judging the prospective electors' qualifications or trustworthiness, let alone uncovering their identities. Thus, recent and historical practice are both incompatible with electors exercising independent discretion.

The history of the Twelfth Amendment is likewise consistent with this evolution of the Electoral College. Under the original Constitution, the electors "did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill." *Ray*, 343 U.S. at 224 n.11. But that system quickly proved unworkable. In 1800, for example, the election ended in a tie because Democratic-Republican electors had no way to distinguish between presidential nominee Thomas Jefferson and vice-presidential nominee Aaron Burr when they each cast two votes for President. *See* Hardaway, *supra*, at 91–92. Because that situation was "manifestly intolerable," *Ray*, 343 U.S. at 224 n.11, the Twelfth Amendment was adopted, allowing the electors to cast "distinct ballots" for President and

Vice President. U.S. CONST. amend. XII. The Twelfth Amendment thus permitted electors to be chosen "to vote for party candidates for both offices," allowing them "to carry out the desires of the people, without confronting the obstacles which confounded the election[ ] of . . . 1800." *Ray*, 343 U.S. at 224 n.11.

In short, the Twelfth Amendment was the solution to the unique problems posed when electors are pledged and bound to the candidates of their declared party. Without that historical practice, dating back to at least 1800, the Twelfth Amendment would have been unnecessary in the first place. The district court thus correctly concluded that our Nation's longstanding historical practice is consistent with electors being bound to a particular presidential candidate. Appx. 84–88.

Appellants suggest that the district court misread this long-settled historical practice, resulting in the erroneous dismissal of their claim. Op. Br., pp. 31–32. They argue, for example, that Justice Story actually believed that electors possessed independence and that the district court took out of context his statement that an elector's faithless vote

would be a "political usurpation." Story, *supra*, § 1457. But Appellants' argument misstates what Justice Story was attempting to convey. Far from espousing elector independence, Justice Story was merely summarizing what has transpired since the Constitution was ratified, namely that electors are now chosen and pledged "with reference to particular candidates," even though that system in practice "frustrate[s]" the design of those Framers who advocated for elector independence. *Id.*

Appellants' argument has been raised and rejected before. As the Supreme Court has explained, even if "it was supposed that the electors would exercise a reasonable independence and fair judgment," there is "no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the [Electoral College] system has not fully realized the hopes of those by whom it was created." *McPherson*, 146 U.S. at 36. This understanding of the Constitution "has prevailed too long and been too uniform to justify . . . any other meaning . . . and it must be treated as decisive." *Id.*

Other courts share this sentiment. The California Supreme Court explained that, although certain Framers may have "originally supposed . . . that the electors would exercise an independent choice," that original understanding quickly dissolved in practice. *Spreckles*, 228 P. at 1045. Today, in a "practice so long established as to be recognized as part of our unwritten law," electors are selected "simply to register the will of the appointing power in respect of a particular candidate." *Id.* (internal quotations omitted); *see also Abdurrahman*, 2016 WL 7428193, *4 (explaining that, "since the inception of the Electoral College, the elector's role has been severely limited").

These court holdings demonstrate that our Nation's longstanding historical practice of requiring electors to follow the popular will of the State's electorate overrides any conflicting intent that allegedly arose from the Framers' back-and-forth drafting at the Constitutional Convention. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (rejecting as "dubious" the "drafting history of the Second Amendment" to determine scope of the right to bear arms and, instead, examining

post-enactment historical understanding). Appellants cite no case, and the Department is aware of none, where a previously unknown constitutional right was newly recognized based solely on the isolated and non-uniform comments of one or two Founding Fathers. That type of thin foundation is not the stuff that constitutional rights are made of.

Accordingly, this Court should reject Appellants' invitation to ignore our Nation's cherished tradition of permitting the voting public, not a handful of electors, to choose how their State's electoral votes for President will be allocated. This Court should affirm.

D. Appellants' reliance on federal preemption principles is misplaced.

Finally, Appellants seek reversal of the district court's well-reasoned decision by invoking federal preemption principles. As with their standing argument, they assert that Colorado's binding statute interferes with electors' performance of a "federal function," rendering it preempted. Op. Br., p. 33. In the cases Appellants cite, a federal law or policy conflicted with, or was frustrated by, the operation of an

incompatible state law. These are classic examples of conflict preemption.[10] *See, e.g., Leslie Miller, Inc. v. State of Arkansas*, 352 U.S. 187, 190 (1956) (stating Arkansas contractor licensing law conflicted with "federal policy of selecting the lowest responsible bidder" for federal contractors); *Hawke v. Smith*, 253 U.S. 221, 225 (1920) (concluding that Ohio's law providing for ratification of constitutional amendments by referendum "is in conflict with article 5 of the Constitution of the United States"); *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006) (affirming dismissal of state prosecution against federal contractor because "the use of state prosecutorial power

[10] Appellants do not rely on either express preemption or field preemption. *See US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010). Nor could they. Despite enacting legislation bearing on the Electoral College, 3 U.S.C. § 1, *et seq*., Congress has never expressed any intent to either preempt complementary state statutes or to occupy the field. To the contrary, federal law affirmatively contemplates complementary state legislation. *See, e.g*., 3 U.S.C. § 5 (providing for state laws to resolve any controversy over electors' appointment); 3 U.S.C. § 7 (stating electors shall meet "at such place in each State as the legislature of such State shall direct").

[would] frustrate the legitimate and reasonable exercise of federal authority").

But the 30 state statutes that bind electors do not conflict with or frustrate any federal objective. Rather, state binding statutes *advance* federal objectives involving the Electoral College. *See N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (rejecting federal preemption where "coordinate state and federal efforts" in a complementary framework pursue "common purposes"). Congress itself has passed federal legislation giving the States the power to make a "final determination" regarding "any controversy or contest" over the appointment of the States' electors, provided the determination is made at least six days before the Electoral College meeting, as here. 3 U.S.C. § 5. When a State exercises this authority, its determination is "conclusive" regarding the "ascertainment of the electors appointed by such State . . . ." *Id.* This federal statute demonstrates Congress's intent to leave to the States all decisions regarding the manner of appointing

electors and the resolution of disputes involving the performance of their duties.

Moreover, Congress has passed a law under the Twenty-third Amendment that binds the District of Columbia's electors to the result of the District's popular vote.[11] D.C. CODE ANN. § 1-1001.08(g)(2) (2018). The federal objective sought by Congress when enacting the District of Columbia's binding statute is straightforward and was even recognized by Appellants below in their briefing: "'sovereignty confers on *the people* the right to choose freely their representatives to the National

[11] This Court should reject Appellants' reliance on Congressional committee hearings that purport to reveal a legislative intent *not* to bind the District's electors. Op. Br., pp. 47–48. The statutory language binding the District's electors is clear and unambiguous. *See* D.C. CODE ANN. § 1-1001.08(g)(2) (stating "it shall be his or her duty" to vote consistently with the District's popular vote). Resort to legislative history is therefore unnecessary. *See United States v. Woods*, 571 U.S. 31, 46 n.5 (2013). Even if the legislative history were considered, it makes clear the District's binding statute is not merely a "moral suasion," but rather is enforceable through criminal penalties and fines. *See Hearings on H.R. 5955 Before Subcomm. 3 of the House Cmte. on the Dist. of Columbia*, 87th Cong. 38–39 (May 15, 1961).

Government.'" Appx. 53 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 794 (1995) (emphasis added)).

Thus, as far as Congress is concerned, binding electors to the outcome of a jurisdiction's popular vote promotes federal objectives. It does not impede them. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (stating courts "have a duty to accept the reading that disfavors pre-emption" when two plausible alternative readings exist). Appellants cite no authority suggesting that the States are precluded from pursuing a common objective that is shared by Congress itself.

Accordingly, this Court should reject Appellants' reliance on federal preemption principles.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal order.

STATEMENT REGARDING ORAL ARGUMENT

The Department requests oral argument. This case implicates the constitutionality of a Colorado statute and the manner of allocating Colorado's electoral votes for U.S. President and Vice President. It thus is a matter of great importance to Coloradans. Oral argument will assist the Court in deciding the multiple constitutional issues at stake.

Dated: August 22, 2018

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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CERTIFICATE OF SERVICE

This is to certify that I have electronically served the foregoing **APPELLEE'S RESPONSE BRIEF** upon all parties herein via CM/ECF on this 22nd day of August, 2018, addressed as follows:

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