SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES COLORADO DEPARTMENT OF STATE,) Petitioner,) v.) No. 19-518 MICHEAL BACA, ET AL.,) Respondents.)

Pages: 1 through 62 Place: Washington, D.C. Date: May 13, 2020

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1 THE SUPREME COURT OF THE UNITED STATES 2 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 3 COLORADO DEPARTMENT OF STATE,) 4 Petitioner,) 5) No. 19-518 v. 6 MICHEAL BACA, ET AL.,) 7 Respondents.) 8 - - - - - - -_ _ _ _ _ _ _ _ 9 10 Washington, D.C. 11 Wednesday, May 13, 2020 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 11:18 a.m. 16 17 **APPEARANCES:** 18 19 GEN. PHILIP J. WEISER, Attorney General, Denver, Colorado; 20 on behalf of the Petitioner. 21 22 JASON HARROW, Esquire, Los Angeles, California; 23 on behalf of the Respondents. 24

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1 PROCEEDINGS 2 (11:18 a.m.) CHIEF JUSTICE ROBERTS: We'll hear 3 4 argument next in Case Number 19-518, the 5 Colorado Department of State versus Micheal Baca. I note at the outset that Justice 6 7 Sotomayor is recused in this case. General Weiser. 8 9 ORAL ARGUMENT OF GEN. PHILIP J. WEISER 10 ON BEHALF OF THE PETITIONER 11 MR. WEISER: Thank you, Mr. Chief 12 Justice, and may it please the Court: 13 The Constitution authorizes states to 14 use their plenary authority to remove a bribed 15 elector, one who engages in a rebellion, or one 16 who would perpetrate a bait and switch on the 17 people of their state by voting contrary to a 18 binding pledge. By contrast, if a state wishes 19 to treat electors as free agents, rather than as 20 proxy voters, it is free to do so. 21 In short, states determine how to 2.2 select electors and ensure that they meet the 23 relevant requirements and perform their duties 24 as assigned. This means, under Green, that 25 states can oversee bribery as an incident as a

power to appoint. This must include the power 1 2 to remove an elector without requiring a full criminal trial. Under my friend Mr. Lessig's 3 4 position, as a practicality, bribed electors 5 would cast ballots and illegal votes. In this case, the State prevented 6 7 Mr. Baca from casting a legal ballot, just like it's an illegal ballot if you don't sign it here 8 9 in Colorado. 10 As this Court explained in Ray, the purpose and history of the Twelfth Amendment 11 reflected the reality that electors acted as 12 13 pledged agents for their political parties. And 14 the history of such pledges should be given great weight. 15 16 As to Justice Ginsburg's point about 17 the importance of enforcing a pledge 18 requirement, it's worth noting people rely on 19 such pledges, which are taken voluntarily. And 20 as Justice Scalia explained in the Inter Tribal 21 Council case, voting requirements would be of 2.2 little value if not enforced. In the almost 70 years since Ray, 23 states have continued to enact laws to enforce 24 25 elector pledges. Congress has consistently

deferred to the states' plenary authority, and 1 2 no court other than the Tenth Circuit below has 3 invalidated a pledge binding law. 4 Mr. Chief Justice, I would welcome 5 your questions. CHIEF JUSTICE ROBERTS: Well, my first 6 7 question is to ask if there is anything that General Purcell said on behalf of the State of 8 Washington with which you disagree? 9 10 MR. WEISER: Thank you so much, 11 Mr. Chief Justice. I would only add a slight wrinkle. He did, indeed, endorse our Tenth 12 13 Amendment argument. What I would say on that is 14 the Tenth Amendment is an important interpretive 15 principle because the Constitution gave the 16 states authority over elections. The Tenth 17 Amendment underscores that point. 18 CHIEF JUSTICE ROBERTS: Would you 19 state for me exactly what you think the limits 20 on the state power to replace electors are? 21 MR. WEISER: Your Honor, here, I would 22 echo my colleague from Washington. It governs whether or not another constitutional provision 23 24 is violated. The Fourteenth Amendment quite 25 notably means a state could not remove an

elector based on race or religion. Also, the 1 2 Qualifications Clause means you can't remove 3 electors for the purpose of adding 4 qualifications for who can be President. 5 CHIEF JUSTICE ROBERTS: So, if you selected electors, one of the requirements is 6 7 they had to be relatives of the legislators, that would be all right? 8 9 MR. WEISER: Your Honor, here in 10 Colorado, we picked electors in 1976. The state 11 legislature did it directly. As long as that choice doesn't violate a constitutional 12 13 provision, they can pick whoever they want. 14 CHIEF JUSTICE ROBERTS: What if the 15 rule is, you know, the electors are chosen pursuant to slates, but anyone who says anything 16 17 disloyal to the State between the time they're 18 selected and the time they cast their vote will 19 be replaced? 20 MR. WEISER: Your Honor, as my 21 colleague from Washington noted, once people are voting to make a choice, people have a right for 22 23 their ballots to be counted. And, here, in the 24 hypothetical you just noted, the ballots of 25 people would be invalidated after the fact.

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1 That implicates Gray versus Sanders and this 2 Court's line of right-to-vote cases. 3 CHIEF JUSTICE ROBERTS: Any other 4 limitations on the power of the State? What 5 about the bribery cases that have been -- or 6 bribery hypotheticals that have been discussed? 7 MR. WEISER: Thank you, Mr. Chief 8 Justice. The ability to remove bribed electors 9 is crucial for the states to have and not only 10 after a criminal trial but after there's a basis 11 for this concern. To your point, if a state failed to 12 13 remove a bribed elector, the state would not 14 have violated a constitutional provision per se, 15 it would have violated its duty as a sound 16 overseer of presidential elections. 17 CHIEF JUSTICE ROBERTS: That's even 18 after the electors have been chosen? In -- in other words --19 20 MR. WEISER: The State is --21 CHIEF JUSTICE ROBERTS: Go ahead. MR. WEISER: Mr. Chief Justice, the 2.2 23 State is indeed authorized to remove electors 24 who have taken a bribe, if that's your question. 25 CHIEF JUSTICE ROBERTS: Yes. What

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

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

MR. WEISER: Your Honor, we disagree.
The Constitution clearly gives states plenary
power over electors and as -- acting as a
steward of the presidential election system.
That means, if electors were to take a

bribe, for example, or not to show up, it's on the State to address that point. If you only left this to Congress in the final instance, that would mean that all Congress could do is remove the elector, not have it be counted.
What the states can do is replace an

24 elector and make sure that the state has the 25 constitutionally authorized votes in the

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Electoral College. As such, the states play a 1 2 critical role, and that role includes the power 3 to remove. 4 CHIEF JUSTICE ROBERTS: Thank you, 5 General. Justice Thomas? 6 7 JUSTICE THOMAS: Thank you, Mr. Chief Justice. 8 9 General, you start your brief 10 questioning standing in this case. I wonder if you think, under our precedent, there's standing 11 when a person is removed from an elected office? 12 13 MR. WEISER: Your Honor, the past 14 cases involving removal from an elected office, 15 like Powell, for example, involve an official with a salary. What's unique here is there's no 16 17 salary or other personal injury. What's at issue here is the 18 institutional role itself. And as this Court 19 20 made clear in Smith and a line of cases, an 21 individual doesn't have standing to challenge an 22 institutional role that he or she may believe is 23 unconstitutional. 24 JUSTICE THOMAS: So, in -- in a 25 removal case, at what point do you think there

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would be an injury in fact? 1 2 MR. WEISER: Justice Thomas, insofar 3 as someone gives up a salary, like in Humphrey's 4 Executor, you have injury in fact. If it is a 5 honorary position, a volunteer position, there's 6 no personal injury, there's merely a guarrel 7 with the institutional role. 8 JUSTICE THOMAS: On -- on a separate 9 issue, you know, throughout, I guess, our 10 history, there have been not pledges among 11 electors. But can you point to me -- point out the first state law that required pledges in our 12 13 history? 14 MR. WEISER: I can, Justice Thomas. 15 It was Oregon. It did so in the late 19-teens. And what I want to underscore is that wasn't the 16 17 first time an elector was removed for violating 18 a pledge. In 1912, Nebraska, without any elector 19 20 binding law, did remove an elector who had 21 promised to violate the pledge because the 22 court, in that case, the Nebraska Supreme Court, 23 said it would have been a fraud on the people of 24 Nebraska. 25 JUSTICE THOMAS: You attach yourself

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to the arguments of General Purcell, so I do want you to -- I understood his comments on -on the federal -- scope of the federal function concept or argument. Could you give me what your take is on that? MR. WEISER: With pleasure, Justice Thomas. Our view is that doctrine doesn't really fit here. Under the Constitution, it's the role of the states as stewards overseeing the presidential election process. The typical federal function case, like McCulloch versus Maryland, you're worried about a state interfering with a federal official. Here, as this Court has made clear multiple times, electors are not federal officials. They are appointed by and oversee and transmit the vote of the states. JUSTICE THOMAS: Thank you, General. CHIEF JUSTICE ROBERTS: Justice Ginsburg? JUSTICE GINSBURG: Can you give us an idea of the practical consequences of a ruling one way or another? How would a ruling against you actually alter our democratic processes?

25 Most states already require elector

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pledges. And faithless voting throughout the 1 2 years has always been rare. But how much difference does it make? 3 MR. WEISER: Your Honor, the chaos 4 5 that could result from upholding the Tenth Circuit's ruling is one that could occasion a 6 7 constitutional crisis, as was noted by my 8 colleague from Washington. 9 If states have no ability to remove 10 bribed electors and all that's left is 11 Congress's ability to choose to count or not count, the mere fact of bribing electors in an 12 13 open enough way would knock out electors, would 14 limit who could vote, and ultimately could sway 15 the outcome of a presidential election. 16 It's the role of the states to oversee 17 confidence in our election systems, to ensure 18 that the public's voice is heard. And all of those values, the integrity of our elections, 19 20 are at stake in this case. 21 JUSTICE GINSBURG: Returning to the standing question, Baca was removed from his 22 23 post. Isn't that a stigma at least? Why isn't 24 it -- it may -- may not have economic 25 consequences, but isn't it a blot on his

reputation? And -- and wouldn't that constitute 1 2 a cognizable injury? 3 MR. WEISER: Your Honor, the auditor 4 in Smith believed that he suffered a stigma, 5 having to implement an unconstitutional statute. And that concern of his stigma was not 6 7 sufficient to give him standing. I would submit the same rule holds here. 8 9 JUSTICE GINSBURG: Thank you. 10 CHIEF JUSTICE ROBERTS: Justice 11 Breyer? 12 JUSTICE BREYER: Good morning. 13 A technical question. The -- Smith is 14 a lawsuit brought against you, the State, under 15 Section 1983. The Court's opinions, I take it, 16 have made clear that a State isn't a person 17 under 1983. 18 Now everybody's waived that argument. Both sides would like us to rule. But can they? 19 20 If someone sues a foreign country under 1983, 21 and a foreign country can't be a defendant under 22 1983, can the party simply get an opinion from 23 this Court by waiving the question? 24 MR. WEISER: Your Honor, I would start 25 with Justice Ginsburg's opinion in the Northwest

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Airlines case, where she made plain that whether 1 or not there's a claim for relief in a statute 2 3 is not a jurisdictional question. 4 What we're dealing with here, both 5 under Section 1983 and Eleventh Amendment 6 immunity, is strategic decisions made by our 7 state in the course of litigation. We made those decisions because we 8 9 wanted to litigate this case on the merits. We 10 believe we have a case on the merits and 11 standing, and that's how we've chosen to 12 proceed. 13 JUSTICE BREYER: Well, yes, but that 14 isn't my question. My question is, of course, 15 you want a decision from this Court. But Mr. 16 Smith might want a decision about how the 17 Constitution applies to someone in Mexico or to 18 someone in Russia. 19 I mean, can the parties get that 20 advisory decision by simply saying: Oh, we 21 waive all the jurisdictional problems or all the non-jurisdictional problems, all the problems 22 23 that say this statute doesn't apply? 24 MR. WEISER: Justice Breyer, this 25 Court will opt for whatever ground it chooses.

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With respect to whether the Court has to rule on 1 2 this issue, the answer is no. This is not a jurisdictional question. For us, this was one 3 4 of several strategic questions on what grounds 5 to litigate. 6 JUSTICE BREYER: Got it. The other 7 question I have is, I take it that it's only in 8 1960 that the first state passed a statute that 9 actually removed or punished a person for voting 10 the wrong way, an elector. 11 So were there cases of bribery that went unpunished before 1960? And was there a 12 13 single case? If so, how many? And what 14 happened? Were their votes counted, although 15 they were bribed? 16 MR. WEISER: Justice Breyer, the first 17 statute was in the late 19-teens in Oregon, but 18 before that, there were --19 JUSTICE BREYER: I thought that was a 20 statute which required a pledge that didn't 21 punish people for how they voted, but, regardless, same point. 22 23 MR. WEISER: Your Honor, we don't have 24 a history of what types of changes were made. 25 What we know is they happened all the time. As

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Professor Hardaway notes in his brief, for 1 2 example, in Michigan, there were electors who 3 just didn't show up, who then were replaced on 4 the day that the Electoral College had to meet. 5 We haven't had electors who are upset 6 about having been replaced or not counted --7 JUSTICE BREYER: That isn't --MR. WEISER: -- until --8 9 JUSTICE BREYER: -- my question. Mv 10 question has to do with bribery. And before the 11 first statute was passed more than 200 years after the Constitution was first created, were 12 13 there instances of an elector being bribed and, 14 if so, how was it handled? 15 MR. WEISER: We don't know of any such instances, Your Honor. 16 17 JUSTICE BREYER: Thank you. 18 CHIEF JUSTICE ROBERTS: Justice Alito? 19 JUSTICE ALITO: In past elections, 20 were there concerted campaigns to influence 21 electors after the popular vote was cast for the purpose of either reversing the result that was 22 produced in the Electoral College by the popular 23 24 vote or throwing the case into Congress? 25 MR. WEISER: Justice Alito, the most

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famous such case would have been in 1876 1 2 involving the Tilden/Hayes disputed election. 3 JUSTICE ALITO: My other question is 4 essentially the same one I -- I -- that concerns 5 me with respect to the positions of all the 6 counsel in these two cases, and that is 7 limitation, if any, on the arguments that are 8 being made. 9 So is it your position that a state 10 has plenary power to remove an elector? If not, 11 what -- under what circumstances can an elector not be removed? 12 13 MR. WEISER: Your Honor, from 14 McPherson, we do see plenary authority, 15 oversight, and removal power of electors. And 16 the constraint on that is other independent 17 constitutional conditions, such as ones we 18 discussed previously under the Fourteenth Amendment, for example. 19 20 JUSTICE ALITO: So suppose the 21 legislature is in the hands of a political party other than the party of the candidate who wins 22 23 the popular vote in the state. 24 Can the legislature simply remove all 25 of the electors who were pledged to vote for

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that candidate and replace them with other 1 2 electors? MR. WEISER: Justice Alito, this is an 3 4 important point. Let me first answer your 5 question, then get to a slightly different one that raises the same concern. 6 7 If the legislature announces the 8 procedure in advance and gives people the right to vote and they exercise that right, the 9 10 legislature cannot undo the public's right to 11 vote without violating the right-to-vote line of 12 cases. 13 However, if the legislature acted 14 earlier, say the prior spring, to change the 15 process to give itself the power to appoint electors, not the power in the hands of the 16 17 people, that's a choice state legislatures could 18 make. In McPherson, it was litigated whether 19 20 or not a legislature could move from a 21 winner-take-all to a districting system. There was a partisan motivation for that change, and 22 23 the Court said the legislature's power was 24 plenary. 25 JUSTICE ALITO: Well, if we agree with

1 you that the legislature has plenary power to 2 remove electors, then won't the people of your 3 state understand when they cast their vote for 4 President that the legislature has the power to 5 remove the electors pledged to the candidate 6 they favor and replace those electors with other 7 electors? MR. WEISER: Justice Alito --8 9 JUSTICE ALITO: Won't they be without 10 11 MR. WEISER: -- what we're asking for, 12 what we believe the right to vote cases require, 13 is that the public be told what they're voting 14 Per the Chief Justice's earlier question, on. 15 if the public is told you are merely casting an 16 advisory vote, as opposed to a binding one that 17 you can expect will be followed, that's a 18 different case. The cases before --JUSTICE ALITO: But what is the --19 20 what is your best -- what is the best 21 right-to-vote case that stands for that 22 principle? 23 MR. WEISER: In Gray versus Sanders, 24 it says the public has a right for their ballots 25 to be counted.

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1 CHIEF JUSTICE ROBERTS: Thank you, 2 counsel. 3 Justice Kagan? JUSTICE KAGAN: General Weiser, first, 4 5 on your Tenth Amendment point, why doesn't 6 Thornton foreclose that argument? Thornton said 7 that the Tenth Amendment reserves only those powers that the states held prior to the 8 ratification of the Constitution. 9 10 I would think that the power we're 11 talking about here is -- is -- is not such a power but, instead, was created by the 12 13 Constitution in the first instance. 14 So how can the Tenth Amendment support 15 you consistent with Thornton? 16 MR. WEISER: Thank you, Justice Kagan. 17 What I would suggest here is a similar 18 principle to what Justice Kavanaugh articulated earlier. Justice Kavanaugh noted the chaos 19 20 principle means, if you have a close case, you 21 avoid creating chaos. We would say, if you have a close case, you avoid intruding on federalism 22 23 concerns. And that's grounded and represented 24 by the Tenth Amendment. 25 JUSTICE KAGAN: But, again, I thought

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

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

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

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

25 But, moreover, I would note there's

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

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

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

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

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

4 MR. WEISER: Your Honor, if you assume 5 electors have this discretion, you've assumed 6 the answer to this case. We would say they 7 don't have that discretion at all. And --8 JUSTICE KAGAN: Exactly. But -- but

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, 21 counsel.

22 Justice Gorsuch?

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

1 Mr. Lessig suggested.

2	If if states enjoy plenary power to
3	remove electors, what would prohibit them from
4	passing a law to say for example, to say that
5	that all electors have to have to vote for
6	presidents presidential candidates who
7	support certain positions or who have done
8	certain things or who have visited the state.
9	Now I understand your ex post
10	argument; that is, states can't change the rules
11	of the election after the election and have to
12	provide voters notice. But, if they did it well
13	in advance, what would prohibit them from doing
14	so, if anything, on your view?
15	MR. WEISER: Your Honor, I'm trying to
16	square how this fits with a popular vote system
17	because, if you give people the power to vote
18	and they exercise the power, then our argument
19	is you count their votes.
20	What I believe you'd be getting at
21	would then be a preclearance process where you'd
22	have to preclear what electors could be on the
23	ballot before people could vote on them. In
24	that system
25	JUSTICE GORSUCH: Well

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1 MR. WEISER: Yes. 2 JUSTICE GORSUCH: -- just to interrupt 3 you, I'm sorry, counsel, but you've -- you've 4 indicated it would be fine for people to have an 5 advisory vote to 12 wise people who would then make the final decision. 6 7 Why -- why couldn't you also have a 8 system in which the people provide advice within 9 certain parameters set by the legislature? 10 MR. WEISER: Your Honor, I think 11 that's the same context I had in mind, which is 12 you would basically give people an advisory vote 13 and then, after the fact, you'd have to ask 14 whether the --15 JUSTICE GORSUCH: No, not after the 16 fact. They've been alerted prior to the fact, 17 counsel. That's my hypothetical. I -- I -- I 18 understand your point about after the fact. 19 In advance, they've been notified that 20 there are -- they are free to provide advice to -- to -- to -- to 12 electors, whatever the 21 number may be, and their advice, though, is 22 23 going to be bounded and there are certain things 24 that the electors have to -- have to, because 25 the legislature says, abide by or else they'll

be removed. And those are, again, you know, has 1 2 the presidential candidate visited the state, 3 has he taken this or that position, has he or 4 she, you know, turned over her tax returns? 5 Whatever -- whatever the conditions may be. It's a bounded choice. 6 7 You've been arguing that choice can be bounded. And this is just another bounds. What 8 9 prohibits the State from doing that? 10 MR. WEISER: In this situation, the 11 State can add limitations as long as they comply with other constitutional provisions. 12 13 JUSTICE GORSUCH: And do those? 14 MR. WEISER: The requirement to visit 15 a state I don't believe clearly violates any constitutional provision. The tax return issue, 16 17 we've noted, raises a Qualification Clause 18 question that could be a real concern. And the 19 _ _ 20 JUSTICE GORSUCH: So the presidential 21 candidate is on the ballot. It's who the electors can vote for. Is that a qualifications 22 23 problem in the State's view? 24 MR. WEISER: Yes, it would be because, 25 if you tell electors they can only vote for --

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pick whatever the concern would be -- tax 1 2 returns, people over 50, the concern is you could be adding a new qualification to be 3 4 President and thereby disgualify, in effect, 5 someone from being President who the 6 Constitution would qualify to be President. 7 JUSTICE GORSUCH: How about other -how about political positions or -- you -- you 8 9 say visiting the state, that's permissible, that 10 condition would be permissible in your view? 11 MR. WEISER: Your Honor, I don't see 12 off the top of my head any other constitutional 13 constraint that would address that issue. Our position is the power is plenary or exclusive, 14 15 as this Court said in McPherson. The State can oversee electors and remove them who don't 16 17 follow requirements the State deems appropriate. 18 JUSTICE GORSUCH: Thank you. 19 CHIEF JUSTICE ROBERTS: Thank you, 20 counsel. 21 Justice Kavanaugh? 2.2 JUSTICE KAVANAUGH: Thank you, Chief 23 Justice. 24 Good morning, General. What is the 25 purpose of having electors?

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MR. WEISER: Thank you for that 1 2 question, Justice Kavanaugh. When electors are set up in the constitutional design, that allows 3 for states to make a choice. Electors can 4 5 either vote as proxy voters on behalf of the 6 public, as we do here in Colorado, or they can 7 be free agents. By having this structure uniform 8 9 across the several states, you give states the 10 ability to choose which model they want. 11 JUSTICE KAVANAUGH: But wouldn't -- if that were the design, why not just leave it to 12 13 the states, as opposed to going through all 14 these details about how the electors are 15 supposed to operate? 16 As you know, Justice Jackson in Ray, 17 looking at that history, said no one faithful to 18 our history can deny that the plan originally contemplated was that electors would be free 19 20 agents to exercise an independent and 21 nonpartisan judgment as to the people best 22 qualified for the nation's highest offices. 23 That's the end quote from Justice Jackson. 24 So that implies not a choice but 25 actually a requirement that the states give this

kind of independence, free agent status, to 1 2 electors. And why -- why go through all the details if it's -- if it's the way -- I quess 3 4 what I'm asking more broadly is the text has all 5 these details to set up a design that seems closer to what Justice Jackson articulates. 6 7 Where in the text do you hang your 8 hat? 9 MR. WEISER: Your Honor, our text --10 textual hook is the delegation of the authority 11 to the states. By contrast to what Justice Jackson said, James Madison said the Electoral 12 13 College was all about giving the states 14 authority to oversee presidential elections as 15 they saw fit. 16 And as the majority in Ray noted, 17 contemporaries of the founders did, indeed, see electors as proxy voters on behalf of the 18 19 public. And that was absolutely the backdrop to 20 the Twelfth Amendment, so I would also point you 21 to the Twelfth Amendment, as effectively confirming and accepting the fact that electors 22 23 can be, indeed, most often are, proxy voters, 24 not free agents. 25 JUSTICE KAVANAUGH: Why do you think

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the founders did not leave it up to the states 1 2 to decide whether they wanted their members of 3 Congress to be electors? MR. WEISER: Your Honor, the 4 5 Constitution had a series of compromises between 6 separating powers between the states and the 7 federal government and between the states. This was one of those compromises that was reached at 8 9 the final days of the Constitutional Convention. 10 JUSTICE KAVANAUGH: Thank you. 11 CHIEF JUSTICE ROBERTS: Thank you, 12 counsel. You have a minute to wrap up if you'd 13 like. 14 MR. WEISER: Yes, Mr. Chief Justice. 15 As we've noted, this case is all about State authority. And on the theory of my 16 17 friends on the other side, states have no 18 authority even to remove bribed electors short of a full criminal trial. 19 20 Our founders gave the states this 21 authority, expected them to exercise it in ways that were sound. That's what has been the 2.2 23 history of our presidential elections. 24 We would urge the Tenth Circuit 25 decision to be reversed.

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1 CHIEF JUSTICE ROBERTS: Thank you, 2 counsel. 3 Mr. Harrow. 4 ORAL ARGUMENT OF JASON HARROW 5 ON BEHALF OF THE RESPONDENTS MR. HARROW: Mr. Chief Justice, and 6 7 may it please the Court: This case is about a tradeoff between 8 flexibility and rigidity. The State's rule is 9 10 too rigid, and that rigidity could come at a 11 steep cost. The State's binding law has no exception. If a candidate dies between the 12 13 popular vote and the vote of the electors, there 14 is no exception. 15 If a candidate has a stroke, there is 16 no exception. If there's widely recognized 17 fraud or bribery by the candidate, no exception. If there will be a tied electoral vote and a 18 19 potentially deadlocked House, no exception. The 20 law is rigid. 21 Electors vote for the winner of the 22 popular vote in the State or -- well, there is 23 no or, Your Honors. That's the only option. 24 That rigidity has no place in our 25 constitutional universe. If something goes awry

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

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

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

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1	To make sure the system we have works
2	sensibly, given the Constitution we have now,
3	when those human electors do vote by ballot,
4	they must be permitted to do so with discretion,
5	Your Honors.
6	CHIEF JUSTICE ROBERTS: Thank you,
7	counsel. I'll begin by asking you the flip side
8	of the question I asked General Weiser. Is
9	there anything that Mr. Lessig said with which
10	you disagree?
11	MR. HARROW: No, Your Honor, we filed
12	an an opening brief, and I'll I'll sign on
13	to exactly what he said in the first hour.
14	CHIEF JUSTICE ROBERTS: Thank you.
15	You gave a number of examples there of
16	situations that have gone awry and there was no
17	way to take account of them. But I'm not sure
18	your position has any limits either. What
19	what are the limits to your position?
20	MR. HARROW: The limits, Your Honor,
21	are that electors must be permitted to vote with
22	discretion. And so, as Your Honor notes,
23	there there is a choice. There is always the
24	possibility of bribery, always the possibility
25	of corruption, and the framers considered all

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the possibilities and placed the ultimate 1 2 selection of President in the hands of a group 3 of presidential electors that were appointed by 4 _ _ 5 CHIEF JUSTICE ROBERTS: So I take --6 MR. HARROW: -- the State. 7 CHIEF JUSTICE ROBERTS: -- I take your 8 -- I take your answer when I ask for limits to 9 be that they must be allowed to vote in their 10 discretion that you don't have any limits? 11 MR. HARROW: Your Honor, there are no 12 limits in that voting by ballot so long as the 13 ballot is for a person. The Twelfth Amendment 14 says they must vote for a person. You can imagine -- indeed, you don't --15 16 CHIEF JUSTICE ROBERTS: But, 17 literally, as opposed to, say --18 MR. HARROW: -- have to imagine --19 CHIEF JUSTICE ROBERTS: -- not a 20 giraffe? I mean, of course, they have to vote 21 for a person. 2.2 MR. HARROW: Your Honor, Congress 23 concluded in 1872 that the Greeley vote wasn't a 24 vote for a person because it was a vote for a 25 non-living person. I'm -- I'm sorry if I was

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unclear. That's the situation that I meant. 1 2 But -- but those are really the limits 3 of the discretion there. There's great 4 discretion in appointment. There's --5 there's -- you know, the -- the State can 6 absolutely discriminate between all kinds of people, and they do on the basis of political 7 party, for instance, but, once the vote begins, 8 9 that vote by ballot is the electors. 10 CHIEF JUSTICE ROBERTS: So the elector can decide, I am going to vote -- I'm going to 11 12 flip a coin and however it comes out, that's how 13 I'm going to vote? 14 MR. HARROW: Yes, Your Honor, that's 15 the same discretion that U.S. senators have, representatives have, congressional electors 16 17 have. These too are elected officials and they 18 have that same discretion. 19 CHIEF JUSTICE ROBERTS: Well, that 20 sounds pretty limitless to me. Let's say that 21 an elector has a contract -- the different parties insist that electors sign a contract 22 that you will vote -- if we win the popular 23 24 vote, you will vote for our party's candidate. 25 And if you don't, there'll be

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liquidated damages of a thousand dollars, an 1 2 elector is selected and breaks that contract, votes for the other individual even though that 3 4 individual didn't win the popular vote. 5 Can that contractual commitment be 6 enforced by the State? 7 MR. HARROW: Not legally, no, Your 8 Honor. And that shouldn't be surprising because 9 that's the same prohibition that applies to 10 congressional electors, who cannot sell their votes, even though, as a condition of 11 12 participating in a primary -- and we cite these 13 cases extensively in our reply briefs -- there 14 you can force regular voters to take pledges and 15 oaths to support a party. You just can't cross 16 that line and enforce them. 17 CHIEF JUSTICE ROBERTS: Thank you, 18 counsel. Justice Thomas? 19 20 JUSTICE THOMAS: Yes, thank you, Mr. 21 Chief Justice. 2.2 Counsel, you mentioned that senators 23 are free to vote or members of the House of 24 Representatives, but there's some degree of 25 accountability for them when they vote a

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1 particular way.

2 What's the accountability here for an 3 elector who strays from what is expected? 4 MR. HARROW: There are several forms 5 of accountability, Justice Thomas. The first, 6 of course, is the selection process, because 7 they are party people and, in all 50 states, 8 they're selected by the political parties. 9 From there, after the vote, they can 10 be kicked out of the political party. They cannot win election. They -- they can have 11 12 negative political consequences. And that's the 13 exact same thing with senators, right? 14 Senators do have accountability, but 15 that accountability comes six years later. So, if a U.S. Senator, Justice Thomas, promises to 16 17 support only low taxes and then at every 18 opportunity raises taxes, their only accountability is six years later. That's the 19 20 nature of political discretion, and that's the 21 discretion electors have here. 2.2 JUSTICE THOMAS: But there's also accountability in chambers -- within the Senate, 23 24 there's accountability as far as removal from 25 office.

But you're saying that with an

2 elector, that those other forms of 3 accountability are not available? 4 MR. HARROW: They are, Your Honor. 5 There is absolutely party discretion, party 6 meetings, just like any other representative 7 body.

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And -- and just to -- to quibble 8 9 slightly, Justice Thomas, with what you said in 10 terms of removal of a U.S. Senator, there's no 11 precedent that we have found of a U.S. Senator 12 being removed, perhaps even by an appointing 13 governor in the case of a vacancy, on the basis 14 of a vote. Certainly, some sort of criminal 15 misconduct, sure, but not on the basis of a 16 vote. And that's the -- really the same analogy 17 here.

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

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

1 similar problem because the elector, who had 2 promised to vote for the winning candidate, could suddenly say, you know, I'm going to vote 3 4 for Frodo Baggins, and that's -- I really like 5 Frodo Baggins. And you're saying, under your 6 system, you can't do anything about that. 7 MR. HARROW: Your Honor, I -- I think 8 there is something to be done because that would 9 be the vote for a non-person, you know, no -- no 10 matter how big a fan many people are of Frodo 11 Baggins. 12 That -- that said, I do think the 13 important point is that the framers hashed out 14 these competing concerns. They hashed it out in 15 Philadelphia in 1787. They understood the 16 stakes, and they said, among these competing 17 hypotheticals, electors are best placed to make 18 the ultimate selection. That hasn't changed, Justice Thomas. 19 20 JUSTICE THOMAS: Thank you. 21 CHIEF JUSTICE ROBERTS: Thank you, 2.2 counsel. Justice Ginsburg? 23 24 JUSTICE GINSBURG: I don't understand 25 your point about rigidity, because, as I

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

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

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

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

instance, forbidding poll taxes, and noted that 1 2 it needed to bar poll taxes for elections for presidential electors, because they still exist 3 4 in our system. So that's the rigidity I'm 5 talking about, Justice Ginsburg. 6 JUSTICE GINSBURG: And how do you 7 answer the standing question, that you have no 8 economic -- Baca has no economic injury, so he 9 has no standing to complain? 10 MR. HARROW: There is standing, 11 Justice Ginsburg. I will say there's a very 12 small economic injury. We've asked for one 13 dollar in nominal damages. 14 Mr. Baca gave up an additional five 15 dollars of salary. I'd just like to correct the 16 record, where Attorney General Weiser said there's no salary. Colorado Statute 1-4-305 17 18 provides electors with five dollars. That's at Pet. App. 10. 19 20 But the -- so the stakes financially 21 are small, but the stakes constitutionally and personally for Mr. Baca are large and they are 22 sufficient to confer standing. 23 24 JUSTICE GINSBURG: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

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1 Breyer? 2 JUSTICE BREYER: Thank you. 3 To go back to the technical point, you 4 brought a suit under 1983 and -- against a 5 state. And it's fairly clear in the case law that you can't sue a state under 1983. What are 6 we supposed to do about that? 7 MR. HARROW: Your -- Your Honor, I'll 8 9 echo what Attorney General Weiser said, which is 10 that it's -- and, indeed, I'll cite to the 11 Court's opinion just last week in the 12 Sineneng-Smith case, when the Court said that 13 the courts' job is to resolve disputes as framed 14 by the parties. And so the only way that the Court should look at that issue is if it's 15 16 jurisdictional. And as Attorney General Weiser 17 said, it's not. 18 I'll give you two cites, Mt. Healthy 19 against Doyle --20 JUSTICE BREYER: The problem that I 21 view is that then any two people, a plaintiff and defendant, who would like an issue decided 22 by us, simply have to waive enough matters so 23 24 that it has to come before us because it's not 25 jurisdictional. They interpret the statutes

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differently. They do whatever they have to do. 1 2 What are we supposed to do about that? 3 MR. HARROW: Your Honor, I don't think 4 this case implements something like that because this case is one that courts surely could hear. 5 6 It was initially brought individually against the Secretary of State through a compromise that 7 involved the plaintiffs giving up a right to 8 9 attorneys' fees and other accommodations. It 10 was somewhat reframed in order to be brought 11 against the Department of State. And as the Tenth Circuit said -- I'll 12 13 just point the Court to Pet. App. 53 to 70. It 14 was a really --15 JUSTICE BREYER: Yeah, I'll look --16 I'll look at that. One other question. You 17 didn't mention in terms of accountability what I 18 take it -- why didn't you -- is that Congress doesn't have to count a vote of a faithless 19 20 elector. For at least 125 years, there were 21 faithless electors from time to time, and Congress usually counted them and sometimes they 22 23 didn't. With Horace Greeley, for example, they 24 didn't.

25 So is that not a power that the

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Congress has to make certain that the faithless 1 2 elector does not cause trouble? 3 MR. HARROW: Justice Breyer --4 JUSTICE BREYER: What's your view 5 about that? MR. HARROW: Well --6 7 JUSTICE BREYER: What's your actual 8 view? You didn't mention it, so you don't think 9 it is, probably. 10 MR. HARROW: No -- no, I think, 11 Justice Breyer, to be clear, that the Greeley 12 example supports our side. The Greeley votes 13 that were rejected, Your Honor, were actually 14 faithful. 15 JUSTICE BREYER: I know it's your 16 side. I'm interested in why you don't consider those as significant. I would like your true 17 18 answer to that. MR. HARROW: Your Honor, just so I 19 20 understand, the Greeley votes, the three that 21 were rejected by Congress, were actually faithful. They were electors that pledged to 22 23 Greeley. 24 JUSTICE BREYER: All right. But, I 25 mean, doesn't Congress's power -- there's 3

U.S.C. Section 15, there's the Constitution 1 2 saying count it. Does that act as a significant check on the faithless elector or does it not? 3 MR. HARROW: It -- it can, Your Honor. 4 5 The courts and Congress have never interpreted the Electoral Count Act and what it means for a 6 7 vote to be regularly given. It -- Congress I do think possibly has 8 the power to reject a faithless vote under 9 10 certain circumstances, but we note it has never 11 done so. Those Greeley votes that were rejected 12 were faithful votes for Greeley, who was 13 deceased, and the 63 votes of Greeley electors 14 who voted for other people, who were faithless 15 in some sense, those were all counted. 16 JUSTICE BREYER: Thank you. 17 CHIEF JUSTICE ROBERTS: Thank you, 18 counsel. Justice Alito? 19 20 JUSTICE ALITO: We have to interpret 21 the Constitution to mean what it means, regardless of the consequences, but I am 22 interested in -- at least in understanding what 23 24 the consequences of your position would be. 25 And we are told by experts on

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1 elections that the consequences would be 2 potentially chaotic. I'm thinking in particular of Professor Bennett's brief and there have been 3 4 other writing by experts on elections that 5 acceptance of your position would mean that, 6 after an election where the apparent outcome 7 based on the popular vote is a small margin of 8 victory for one candidate, there would be 9 concerted campaigns to change that result by 10 influencing a few electors, and that could be achieved by influencing just a few electors. 11 12 That's just one of the consequences. 13 There's the fact that in most states the 14 electors are not even listed on the ballots, 15 and, therefore, the voters have no way of trying to ensure that the electors who were chosen are 16 17 electors who really will honor the wishes of the 18 voters. So do you really deny that this is 19 where your argument would lead? 20 MR. HARROW: We -- we do deny it, 21 Justice Alito. And, here, I think, past is prologue. Attorney General Weiser, in -- in a 22 23 response to a prior question on this same issue, 24 noted that there had been campaigns already to 25 affect electors. He mentioned 1876, the

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famously contested election of 1876. But, in 1 2 fact, Robert Alexander, a scholar of presidential electors who we cite on the last 3 page of the reply brief in Chiafalo, Alexander's 4 5 research shows that there have been concerted campaigns in 2016, in 2000, and beyond, that 6 7 some 20 percent of electors have contemplated 8 switching their vote and that 100 percent have 9 been contacted. 10 JUSTICE ALITO: Do you deny that 11 there's a greater --MR. HARROW: And the basis to conclude 12 13 14 JUSTICE ALITO: -- do you deny that 15 there's a greater chance of this happening? And 16 didn't Mr. Lessig support such an effort in 17 2016? 18 MR. HARROW: Your -- Your Honor, 19 Mr. Lessig has been representing these electors 20 from -- from the beginning in 2016. So I --21 JUSTICE ALITO: That -- that wasn't my 22 question. Didn't he advocate that some electors change their votes for the purpose of changing 23 the outcome of the 2016 election? 24 25 MR. HARROW: Your Honor, I believe

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1 that he supported the legal discretion that 2 electors have that we're here today arguing for. 3 And -- and -- and the reason is, A, that that's 4 in the Constitution, but, B, that if we're going 5 back to the chaos point, the center has always 6 held -- the center has always held -- we know 7 that 18 states today, Justice Alito, have no such laws. 8 9 And the -- the states are not about to 10 say that there's some constitutional requirement that they implement them. In fact, they say the 11 12 reverse. They say it's a feature and not a bug 13 _ _ 14 JUSTICE ALITO: I'd like to ask --15 MR. HARROW: -- that there is 16 federalism here. 17 JUSTICE ALITO: -- one more question 18 if I possibly can. Do the states have any power 19 to remove electors? I can't think of any 20 government office holder who cannot be removed 21 from office. 2.2 MR. HARROW: Your Honor, yes, they do 23 have some power to remove elector, just not a 24 removal power that interferes with the core 25 function of voting by ballot.

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1 JUSTICE ALITO: What is the limit of 2 their power to remove? 3 MR. HARROW: The -- the limit of the 4 power to remove is, again, that -- that 5 interference with the core function. So, if an 6 elector does not show up to vote, the states 7 have represented that it's our view that's 8 impossible to remove and replace that elector. 9 That -- that's not true. That's -- that becomes 10 a vacancy. The Electoral Count Act permits it to be filled. History shows that it can and 11 will be filled. 12 13 JUSTICE ALITO: Can an elector be 14 removed for bribery, absent conviction by proof 15 beyond a reasonable doubt, before the time when 16 the electors meet to vote? 17 MR. HARROW: No, we don't think so, 18 Your Honor. And that's consistent with the 19 treatment of every other elected official. 20 Senators and representatives cannot be removed 21 for a supposition of bribery, a mere whisper of They have to be removed for proof it. And 2.2 it. 23 the same thing would be true here. 24 JUSTICE ALITO: A member of Congress 25 could not be removed from office by a two-thirds

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vote without a criminal conviction? 1 2 MR. HARROW: Oh, the -- the Congress 3 certainly has power to remove, but it must go 4 through a full process. It -- it -- I took 5 Your Honor to be asking about the sort of 6 instantaneous, you know, removal, I'm -- one --7 one official, one single state official is going to make a decision to kick someone out based on 8 9 rumor. 10 That -- no -- no, that -- you know, that would be inappropriate for any sort of 11 elected official, and it's inappropriate for --12 13 for electors. 14 CHIEF JUSTICE ROBERTS: Thank you, 15 counsel. 16 Justice Kagan? 17 JUSTICE KAGAN: Mr. Harrow, suppose 18 that I read the Constitution and I find that it 19 just doesn't say anything about this subject, 20 you know, that there are some hints here and 21 there are some hints going the other way and 22 mostly I just read it and I say the Constitution 23 is silent. 24 What should I then -- then do and why? 25 MR. HARROW: Justice Kagan, in that

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case, I think the original understanding would 1 2 control. Again, if -- we think there is clear 3 language in the Constitution and I want to return to that, but the original understanding 4 5 would control because it is so clear and, 6 indeed, Colorado doesn't even necessarily 7 challenge it, that the original expectation --8 JUSTICE KAGAN: Meaning the --9 MR. HARROW: -- and the meaning of the 10 word --11 JUSTICE KAGAN: Sorry, do -- do you 12 mean the original understanding like prior to 13 ratification? 14 MR. HARROW: The -- the --15 JUSTICE KAGAN: Because I would think that pretty -- pretty quickly, it -- it -- it 16 17 flipped even if you're right, pretty -- you 18 know, so that from the first, there were these 19 pledges and there has never been a substantial 20 amount, a substantial number of faithless 21 electors, so I would -- I would think that the -- the history both at the time and since 22 23 would cut against you. No? 24 MR. HARROW: No, Justice Kagan, 25 because our quibble is not with the pledges and

our invocation of history is not with the 1 2 pledges or the idea of party control and of having two major parties in our system. 3 4 The idea is with enforcement of the 5 vote. The idea is with what occurred here, 6 removing an elector who actually votes. Mr. 7 Baca actually presented a vote and attempted to 8 vote and place it in the ballot box and that was 9 rejected. 10 That is novel, Justice Kagan. That 11 has only happened in 2016, despite the party 12 control of the selection process. And turning 13 _ _ 14 JUSTICE KAGAN: What would you say if 15 I said that if I think that there's silence, the best thing to do is leave it to the states, to 16 17 not impose any constitutional requirement on 18 them? MR. HARROW: Your Honor, I -- I would 19 20 push against because I don't think there's 21 silence, especially here in this state --2.2 JUSTICE KAGAN: I know, but that's the hypothetical. I -- I just -- if I just think 23 24 that there's not enough in the same way that Ray 25 thought that there was not enough to provide a

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-- an answer to the question, and there are all 1 2 these states doing what Colorado is doing, why 3 not just leave it to them? MR. HARROW: Because, Your Honor, 4 5 when, Justice Kagan, when you said there are all 6 these states doing what Colorado is doing, it 7 has actually never been the case that a state has done what Colorado is doing. That is 220 8 9 years of unbroken history. I think that speaks 10 very loudly if Your Honor is concerned about how 11 to interpret that silence. 12 MR. HARROW: And -- and -- and so --13 CHIEF JUSTICE ROBERTS: Justice -- go 14 ahead, please. 15 MR. HARROW: No, no, Your Honor. If -- if -- if you're ready to move on, then, 16 17 fine, I was going to continue making another 18 point. 19 CHIEF JUSTICE ROBERTS: No, that --20 that was directed to Justice Kagan. 21 JUSTICE KAGAN: No, I'm done, thank 22 you. 23 CHIEF JUSTICE ROBERTS: Okay. 24 Justice Gorsuch? 25 JUSTICE GORSUCH: Counsel, suppose Mr.

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Baca had asked Congress to count his vote and 1 2 Congress decided to do so. Would we be here? MR. HARROW: I -- I -- yes, you would, 3 4 Your Honor. There -- there is no mechanism for 5 Mr. Baca to ask Congress to count his vote under the Electoral Count Act that the State has 6 pointed to any mechanism, other than perhaps 7 8 making a phone call to a senator, the same --9 JUSTICE GORSUCH: I believe you're 10 fighting my hypothetical. Let -- let's suppose 11 he had asked Congress and let's suppose Congress 12 had agreed to count his vote. That's my 13 hypothetical. Would we be here? 14 MR. HARROW: If Congress had counted 15 his vote instead of the vote of the replacement elector, Celeste Landry, then no, perhaps not 16 17 because in that he wouldn't have lost the 18 office. I will say he didn't get a chance to 19 20 vote for vice president either, so assuming on 21 Your Honor's hypothetical that he had his ballots fully cast, then no, we -- we probably 22 23 wouldn't be here. 24 JUSTICE GORSUCH: Okay. He didn't 25 seek -- he didn't try to ask Congress to cast

1 his vote, did he? 2 MR. HARROW: He -- he did not, Justice Gorsuch. There's no mechanism for it and the 3 4 State hasn't pointed to one. 5 JUSTICE GORSUCH: Okay. And -- and 6 the damages he seeks are -- is it six dollars? 7 Is -- is that right? 8 MR. HARROW: Justice Gorsuch, it's 9 even less, it's one dollar in nominal damages. 10 JUSTICE GORSUCH: One -- one dollar. So it's a one dollar nominal damages. 11 12 And why -- why should we exercise our discretion 13 to hear this case when the nominal damages are 14 one dollar, he didn't seek Congress to count his 15 vote, though as you point out, it's unclear whether there's a mechanism to do so, and we 16 17 have a cause of action that doesn't exist based 18 -- that -- that -- that we are asked to overlook 19 because of a stipulation by the parties? 20 Why isn't that a sort of manufactured 21 litigation that this Court should -- should decline its -- should -- should -- should bother 22 with, with using its discretion whether to 23 24 decide a case? 25 MR. HARROW: Justice Gorsuch, because

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once there is jurisdiction -- and, again, I'll 1 2 just emphasize that the question of -- of 3 whether --4 JUSTICE GORSUCH: I'm accepting

5 there's jurisdiction, counsel, but this Court 6 has discretion over what to entertain, and it also has some -- some authority to emphasize the 7 importance of -- of the adversarial process and 8 9 its proper uses.

10 MR. HARROW: It -- it does, Justice 11 Gorsuch. And I think the arguments today and 12 the brief show this is highly adversarial on the 13 standing and on the merits.

14 And the discretion here is because 15 there was a conflict in the lower courts on an important issue and the -- the unique chance 16 17 that this Court has to decide this issue of 18 presidential selection outside the -- the very contested context of an -- an actively fought 19 20 presidential election.

21 So, to the extent Your Honor is 22 talking about discretion and not jurisdiction, I think it's well exercised here. And -- and, 23 24 again, Colorado doesn't contest that. 25

JUSTICE GORSUCH: Thank you.

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1 CHIEF JUSTICE ROBERTS: Justice 2 Kavanaugh? 3 JUSTICE KAVANAUGH: Thank you, Chief Justice. 4 5 And good afternoon, Mr. Harrow. How, 6 if at all, should the quick growth of political 7 parties affect our analysis of this case, including how the Twelfth Amendment interacts 8 with Article TT? 9 10 MR. HARROW: Justice Kavanaugh, the 11 political parties provide the context for 12 nominating electors and the appointment of 13 electors. But they -- the fact that there are 14 political parties now and were emerging 15 political parties when the Twelfth Amendment was 16 passed in 1803 doesn't affect that the word 17 "elector" remains in the Constitution and that 18 electors are people who vote, and all of those words and all of those structural principles 19 20 mean that they can vote with discretion. 21 JUSTICE KAVANAUGH: And Justice Kagan 22 noted a question about what to do if the text is silent. And we've talked about various things 23 24 that could fill the gap there, including the 25 State's authority.

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Another, of course, under our case law 1 2 is historical practice under cases like Noel 3 Canning and Dames and Moore and many others, 4 that we looked to historical practice as a gloss 5 on the text. 6 What is your strongest point on why 7 the historical practice favors you rather than favoring -- favoring the other side? 8 9 MR. HARROW: Justice Kavanaugh, in 10 addition to the historical practices that we've already discussed, including in the exchange 11 with Justice Kagan, I'll also point the Court to 12 13 the history of constitutional amendments that 14 have been introduced to try and abolish the 15 office of elector precisely to eliminate the 16 elector discretion that everyone who -- that was 17 introducing the amendment assumed exists. 18 As we point out in our brief, this starts in 1801 with no less than Thomas 19 20 Jefferson saying: Hey, maybe we should get rid 21 of the office of elector. It can only cause trouble. 2.2 And that continues in the 19th and 23 24 20th century. For 20 years, such amendments 25 were introduced by Thomas Hart Benton in

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1 essentially every single Congress. And those 2 amendments were not meaningful. And the people 3 who thought that we ought to eliminate elector 4 discretion were not writing on a blank slate; 5 they were writing knowing there was elector discretion. And that would be a lot of wasted 6 7 oxygen, Your Honor, if -- if there was already a 8 way to eliminate elector discretion and if they 9 didn't have it in the first place. 10 JUSTICE KAVANAUGH: Thank you very 11 much. 12 CHIEF JUSTICE ROBERTS: Counsel, you 13 have a few minutes for wrap-up if you'd like. 14 MR. HARROW: Sure. Just to conclude 15 briefly, as the Court knows, the intervention here was extraordinary and unprecedented. 16 And 17 if Colorado is permitted to undo the human check 18 that has been baked into this system of presidential selection, there really could be a 19 20 chaotic outcome. 21 By contrast, most electors have been 22 free in most elections, and here we are today, Your Honors. Indeed, electors retain legal 23 24 discretion in 18 states, as I've said, and a 25 decision from this Court won't change that.

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So the question for this Court is 1 2 whether to approve of the State's novel intervention, and it is novel, and be left 3 4 wondering how the State's overly rigid 5 interpretation could go haywire in, as we've 6 discussed, the case of death or other unforeseen 7 circumstances, or instead whether the Court 8 should keep faith with the system, keep faith with the Constitution until amended and maintain 9 10 indirect election, acknowledging that both sides 11 here, both sides have a vision of presidential selection that is imperfect, but the various 12 13 checks, balances, and separations that our 14 Constitution's drafters and amenders have put 15 into the Constitution, all of those should be given a role in our constitutional universe. 16 And, Your Honors, I -- I think that all adds up 17 18 to elector discretion. Thank you, Mr. Chief Justice. 19 20 CHIEF JUSTICE ROBERTS: Thank you, 21 counsel. General Weiser, you have two minutes 2.2 23 for rebuttal. 24 25

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REBUTTAL ARGUMENT OF GEN. PHILIP J. WEISER 1 ON BEHALF OF THE PETITIONER 2 3 MR. WEISER: Thank you, Mr. Chief 4 Justice. Let me make three points in response 5 and offer two closing thoughts. 6 First off, on standing, the payment or non-payment of the per diem fee was never before 7 8 alleged, and any reported non-payment is not in 9 the record. 10 Second, on nominal damages, prior 11 cases like Smith and Bird did not accord 12 standing on nominal damages alone, instead 13 focusing on whether there's an actual personal 14 injury. 15 Second, as to Justice Scalia's 16 important point about congressional remover --17 removal in the case of bribery, it's worth 18 noting there is a prescribed removal process for senators, as Justice Alito noted. In the case 19 20 of electors, there's no such process, which 21 means this Court's default rule controls. The power to remove is thus incident to the power to 22 23 appoint. 24 Third, it's worth noting this is the 25 first time we've seen an elector who violated a

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state binding law. Up until now, including the 1 2 2016 election, we've always seen Congress defer and count votes as transmitted by the states. 3 4 Two closing thoughts. During the 5 course of this entire litigation and this 6 argument today, my friends on the other side 7 have failed to offer any viable theory on how to 8 address the spectacle of a bribed elector, an 9 elector who votes for Frodo Baggins, or one who 10 would perpetrate a bait and switch on the people 11 of our state. Colorado's pledge requirement addresses all such harms. 12 13 After over 230 years of constitutional 14 tradition, my friends on the other side would 15 toss out our nation's state-centered model of electoral accountability in favor of a 16 17 treacherous experiment. We urge this Court to 18 reject this dangerous time bomb and avoid a 19 potential constitutional crisis by reversing the 20 Tenth Circuit's judgment. 21 Thank you. 2.2 CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted. 23 24 (Whereupon, at 12:19 p.m., the case 25 was submitted.)

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