Case No. 18-1173

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.

On Appeal from the United States District Court for the District of Colorado, Civil Action No.17-cv-01937, Senior Judge Wiley Y. Daniel presiding

BRIEF FOR *AMICUS* INDEPENDENCE INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

David B. Kopel
Counsel of Record
Independence Institute
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536 ext. 112
david@i2i.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Independence Institute, a Colorado 501(c)(3) nonprofit corporation, makes the following disclosure: Amicus is not a publicly held corporation or other publicly held entity. It has no parent corporations, and 10% or more of its stock is not owned by a publicly held corporation or other publicly held entity. There is no other publicly held corporation or other publicly held entity with a direct financial interest in the outcome of this litigation.

/s/ *David B. Kopel*
Dated: June 27, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Supreme Court Cases

Books

Law Review Article

STATEMENT OF AMICUS INTERESTS

The Independence Institute is a non-profit Colorado public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute supports the rule of law, which includes application of the plain meaning of the U.S. Constitution. The Institute has participated in many constitutional cases, and its amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead amicus ILEETA, International Law Enforcement Educators and Trainers Association).

The Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, served as a contributing author of this brief. Professor Natelson is Professor of Law (ret.) at the University of Montana. His writings on constitutional issues have been relied on by Justices of the U.S. Supreme Court in six cases, and by Justice

(then Judge) Gorsuch in *Kerr v. Hickenlooper*, 754 F.3d 1156, 1195 (10th Cir. 214) (Gorsuch, J. dissenting).[1]

---

[1] This brief is filed with the consent of Appellant and Appellees. No counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. The Independence Institute acknowledges monetary support toward the brief from the Marin Community Foundation of Novato, California, and from Andrew J. Dhuey, Esq., of Berkeley, California.

SUMMARY OF ARGUMENT

The United States Constitution permits, in fact requires, presidential electors to exercise their best discretion and judgment when casting their votes for President and Vice-President. The governing constitutional text is the Twelfth Amendment, whose relevant language is substantively identical to its predecessor in the original Constitution. Elector discretion inheres in the plain meaning of that text, as shown by the definitions of key words in contemporaneous dictionaries and other sources.

Further, the Constitution does not grant persons who *appoint* electors the power to *control* electors—just as the presidential power to *appoint* judges does not include the separate power to *control* how judges vote.

The 1787 Constitutional Convention knowingly copied existing electoral models in which elector discretion was protected. The delegates stated repeatedly that they wished to ensure that presidential election was kept free of state control. The Convention specifically and overwhelming rejected a proposal to allow the states to elect the president. During the constitutional ratification debate, advocates and opponents of

ratification alike repeatedly stated that presidential electors would exercise full discretion.

The Twelfth Amendment did not change electors' discretion. The drafters of the Amendment—some of whom had been leading Founders—retained the original Constitution's relevant language. The debates in the Congress proposing the Amendment show broad agreement the presidential electors would retain the right to exercise their best judgment and, indeed, would have a duty to do so. The new rule by which electors would henceforth designate their choices separately for President and Vice-President was debated and adopted with this discretion in mind.

ARGUMENT

I. Standard sources used to interpret the Constitution tell us that presidential electors are free to exercise discretion.

In threatening presidential electors with prosecution and purporting to remove and replace one elector, the Colorado Secretary of State was attempting to enforce Colo. Rev. Stat. §1-4-304(5). That statute requires each Colorado elector to vote for the state's popular vote winner. The issue in this case is whether this statute is consistent with the U.S. Constitution.

The relevant constitutional language appears in the Twelfth Amendment: "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . ." U.S. Const. amend. XII. Evidence of this provision's meaning can be gleaned from the debates in the Eighth Congress, which proposed the Twelfth Amendment. That evidence is discussed below.

But evidence of the Constitution's original meaning is useful as well. The Twelfth Amendment was ratified in 1804, only a few years after the thirteenth state, Rhode Island, ratified the Constitution (1790). *See* 2 *The Documentary History of the Ratification of the Constitution* 19, 25 (eds. John P. Kaminski, et al., 2011) [hereinafter *Documentary History*][2] (ratification chronology). The portion of the Twelfth Amendment at issue here is almost identical to the corresponding language in the original Constitution, which read as follows: "The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. . . ." U.S. Const. art. II, §1, cl. 3.

Moreover, several members of the Congress that proposed the Twelfth Amendment also had been key Founders: Senators Pierce Butler, Abraham Baldwin, and Jonathan Dayton all had been delegates to the Constitutional Convention. Others—such as Representatives William

---

[2] The *Documentary History* is not generally available online. Hardcopy volumes are available in the William A. Wise Law Library at the University of Colorado-Boulder, call no. KF 4502.D63.

Findley and John Smilie of Pennsylvania and Thomas Sumter of South Carolina—had been delegates to state ratifying conventions.

As explained below, both the evidence from the ratification of the Constitution and the congressional debates over the Twelfth Amendment point to the same conclusion: The Constitution requires that presidential electors exercise their best judgment when voting. True, presidential electors are representatives of the states and people. But they are not mere puppets. They represent the people in the same way legislators and convention delegates do: by exercising their best judgment. The results of their deliberations may not always comport with pre-campaign pledges. However, for constitutional purposes, their votes are "presumed to be the will of the people." 8 *Annals of Congress* 720 (1803) (Joseph Gales ed., 1852) [hereinafter *Annals*][3] (remarks by Rep. G.W. Campbell during the congressional debates on the Twelfth Amendment).

In creating a system by which presidential electors were allowed—indeed required—to exercise their best judgment, the Founders and

---

[3] The *Annals of Congress* are available online at the Hein Online database, in the "U.S. Congressional Documents" library.

proposers of the Twelfth Amendment were merely following the rule that prevailed in legislatures and conventions during their own time. 8 *Annals of Cong.* at 142-43, 199 (quoting Senator White and Senator Pickering during the debates over the Twelfth Amendment on Senators' duty to consider more than immediate public opinion).

During the debates over the Constitution, for example, many candidates for election to the state ratifying conventions announced stands, even pledges, to vote one way or another. Yet they remained free to change their minds after considering the debate at the conventions themselves. Indeed, if convention delegates had lacked the right to vote according to their best judgment, the battle to ratify the Constitution would have been lost! In several states the Constitution was ratified only because former opponents changed their minds. 23 *Documentary History* 2501-09 (editor's notes, describing votes at the New York and Virginia ratifying conventions).

II. The definitions of key words in the Constitution require that presidential electors be free to exercise discretion.

A. "Ballot"

In both the original and Twelfth Amendment versions of the text, the electors vote *by ballot*. When the Constitution and the Twelfth Amendment were adopted, "ballot" invariably meant secret ballot—secrecy being the crucial distinction between that method of voting and the other methods, such as *viva voce*. 1 William Blackstone, *Commentaries on the Laws of England* *175 (1st ed., 1765) (distinguishing public voting from voting "privately or by ballot"). Hence in 1800, Senator (and former Framer) Charles Pinckney could say on the floor of the Senate, "[T]he Constitution expressly orders that the Electors shall vote by ballot; and we all know, that to vote by ballot is to vote secretly." *Charles Pinckney in the United States Senate*, Mar. 28, 1800, in 3 Max Farrand, *The Records of the Federal Convention of 1787* 385, 390 (1937) [hereinafter *Farrand's Records*].[4]

---

[4] *Farrand's Records* are online at the Library of Congress' "American Memory" website, at https://memory.loc.gov/ammem/amlaw/lwfr.html.

Of course, the whole point of a secret ballot is to hide the elector's choice to ensure that choice is free. But laws such as Colo. Rev. Stat. §1-4-304(5) deny that freedom of choice.

B. "Elector"

A second key word in both the original Constitution and the Twelfth Amendment is *Elector*. Contemporaneous dictionaries tell us that *by definition* an "elector" is someone who exercises free choice. Nathan Bailey's 1783 dictionary defined an elector as "a chuser." Nathan Bailey, *An Universal Etymological English Dictionary* (Edinburgh, 1783) (unpaginated). The first entry for "elector" in the 1785 edition of Samuel Johnson's dictionary was, "He that has a vote in the choice of any officer." 1 Samuel Johnson, *A Dictionary of the English Language* (London, 6th ed. 1785) (unpaginated). Chamber's *Cyclopaedia* described an "elector" as "a person who has the right to *elect*, or choose another to an office, honour, &c. The word is formed of the Latin *eligere, to choose."* 2 E. Chambers, *Cyclopaeda; or, an Universal Dictionary of Arts and Sciences* (London, 1779) (unpaginated) (italics in original).

A definition in a leading law dictionary confirms the foregoing. Giles Jacob's *New Law-Dictionary* was the most popular of its kind in America. Herbert A. Johnson, *Imported 18th Century Law Treatises in American Libraries 1700-1799* at 61 (1978) (Jacob's dictionary was in 12 of 22 surveyed libraries, more than any other law dictionary). Although Jacob's law dictionary did not define "elector," it defined "Election" as "when a man is left to his own free will to take or do one thing or another, which he pleases." Giles Jacob, *A New Law-Dictionary* (London, 10th ed. 1783) (unpaginated).

All these definitions are consistent with the Constitution's use of the same word—"Electors"—to designate voters for the U.S. House of Representatives. U.S. Const. art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). The constitutional definitions are *inconsistent* with Colo. Rev. Stat. §1-4-304(5), which purports to create "electors" who cannot choose.

III. Analogous parts of the constitutional text tell us that presidential electors, once appointed, are free to exercise discretion.

The freedom of choice inherent in the constitutional terms "ballot" and "elector" is confirmed by other parts of the Constitution's text. First, the text tells us when an appointer may—or may not—control the subsequent conduct of appointees. Second, the Same Day Clause necessarily means that once Congress has designated a day for choice of electors, the states may not shuffle electors in and out of their positions.

A. When the Constitution does not give an appointer power to control appointees, that power does not exist.

The Constitution grants the States power to determine how electors are appointed. U.S. Const. art. II, §1, cl. 2. It does not follow, however, that because states may *appoint* electors they later may *control* electors. Quite the contrary.

The Constitution does not leave the issue to speculation. It informs us when an appointer may control the conduct of appointees. In the case of executive functions, the Constitution both authorizes the President to *appoint* executive branch officials, U.S. Const. art. II, §2, cl. 2, and to *control* their subsequent conduct. *Id.*, art. II, §3 (power to "take Care that

the Laws be faithfully executed"); *id.* art. II, §2, cl. 1 (power to require opinions from heads of departments); *id.*, art. II, §2, cl. 1 (vesting the executive power in the president). *See Myers v. United States,* 272 U.S. 52, 117-18 (1925) (explaining that president must have authority to remove officers because of the power granted by the Executive Vesting Clause and Take Care Clause); *id.* at 119 (explaining that "the express recognition of the power of appointment" in the Constitution reinforces the view that the Executive Vesting Clause granted executive power to the president). In addition, art. II, §3 provides that the president commissions officers; the Founders understood this commissioning power to carry with it authority to supervise because at the time the same person granting a commission generally issued instructions. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice,* 31 Whittier L. Rev. 1, 14 (2009).

Thus, these express textual grants—not the appointment power alone—are why the President's authority to remove executive branch officials is incident to appointment.

On the other hand, the Constitution's other grants of appointment power do *not* include authority to supervise or remove. *Cf. Myers, supra*, 272 U.S. at 119 (stating that "the power of removal of *executive* officers [is] incidental to the power of appointment.") (italics added); *id.* at 117-18 (identifying removal as an exercise of the "executive power" and not of other powers).

This difference is clear from the constitutional text. For example, the President's power to "appoint . . . Judges of the supreme Court," is not accompanied by a prerogative to remove or control them. U.S. Const. art. II, §2, cl. 2. Similarly, before adoption of the Seventeenth Amendment, the Constitution provided that state legislatures would appoint Senators, but did not grant the separate power to dictate how they voted. U.S Const. art. I, §3, cl. 1.

In the case of presidential electors, the Constitution grants states power to appoint them, U.S. Const. art. II, §1, cl. 2, but not to direct their decisions after appointment.

The natural reading of the text is buttressed by the constitutional enumerated-power doctrine. The Constitution is, of course, a document

of enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). A power not expressly listed is granted only if incidental to an enumerated power. *Id.* at 406. To be incidental to an enumerated power, however, it must be of lesser importance than the enumerated power. For example, Congress's authority to "regulate" interstate commerce does not include the "great substantive and independent power" to compel individuals to engage in commerce. *N.F.I.B. v. Sebelius*, 567 U.S. 519, 560 (2012); *see also* Robert G. Natelson, "The Legal Origins of the Necessary and Proper Clause," in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy Seidman, *The Origins of the Necessary and Proper Clause* 52, 61 (2010) (under the legal doctrine of the Founding Era, a power cannot be incidental to a principal [enumerated] power unless it is of lesser importance than the principal).

Authority to dictate subsequent behavior is at least as important as authority to appoint in the first instance. That is why the Constitution expressly grants the president authority over the executive branch. The decision *not* to grant the States like authority over presidential electors confirms that the States have no such authority.

B. The Same Day Clause for appointment of electors necessarily means that states may not shuffle electors in and out of their positions as a way to control their votes.

The Same Day Clause provides: "The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, §1, cl. 4.

The Same Day Clause was designed allow Congress to reduce the risk of external "undue influence." 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 105 (1941) [hereinafter *Elliot's Debates*][5] (reproducing remarks of James Iredell at the North Carolina ratifying convention).

Of course, allowing states to shuffle electors in and out of their positions because of their votes or anticipated votes enables, and encourages, state authorities to exert the kind of external "undue influence" the uniform day of appointment is designed to mitigate.

---

[5] *Elliot's Debates* are online at the Library of Congress' "American Memory" website, https://memory.loc.gov/ammem/amlaw/lwed.html.

The events leading to this lawsuit illustrate the problem. All three electors who are parties to this suit were appointed presidential electors on the day prescribed by Congress. 3 U.S.C. §1. Then state officials pressured them to vote a certain way. When Micheal Baca refused to comply, state officials purported to remove him from his position, "declare a vacancy," and appoint another elector in his stead—merely because he attempted to vote "wrong." That is conduct of the kind the uniform day for appointment is designed to forestall.

IV. The Constitutional Convention debates show that presidential electors, once appointed, are to exercise discretion.

The first Constitutional Convention delegate to propose a system of presidential electors was James Wilson of Pennsylvania. 1 *Farrand's Records* 77 (June 2, 1787). Wilson was born, raised, and educated in Scotland, 2 *Documentary History* 733, and his proposal likely was based on the Scottish method for choosing members of the British House of Commons. Unlike in England, where members were elected directly, Scotland members of parliament were chosen by "commissioners"; the

commissioners were elected by voters or by local governments. Alexander Wight, *A Treatise on the Laws Concerning the Election of the different Representatives sent from Scotland to the Parliament of Great Britain* 115 (Edinburgh, 1773)[6] (discussing qualifications of freeholders who elect commissioners); *id* at 277-300 (outlining method of election of commissioners by freeholders); *id.* at 347-70 (describing election of members of Parliament by commissioners); *id* at 318-19 (describing election of some members of Parliament by local government councils).

Free choice was inherent in the Scottish process. To insure free choice, officials could require commissioners/electors to swear that they had not received anything of value—apparently including their position as commissioner/elector ("Office, Place, Employment")—in exchange for their votes. *Id.* at 359-60; 16 Geo. 2, ch. 11, §34 (1743). A Scottish elector's choice was not to be dictated by the locality choosing him.

---

[6] Available at the Eighteenth-Century Collections Online database; enter "Wight" and 1773 in the "Advanced Search" feature. https://quod.lib.umich.edu/e/ecco/.

The Scottish system was not the framers' only model. Another was the process prescribed by the 1776 Maryland constitution. It provided for the state senate to be chosen by special electors elected by the voters. Md. Const. art. XVIII (1776). At the Constitutional Convention Alexander Hamilton noted that the Maryland model had been "much appealed to." 1 *Farrand's Debates* 289 (June 18, 1787). *See also id.* at 218 (June 12, 1787, reporting that Madison also discussed the Maryland system).

Elector discretion was part of the Maryland model. Electors were required to swear that they would "elect without favor, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." Md. Const. art. XVIII.

Madison reported in his convention notes that one of Wilson's goals was to ensure the president was "as independent as possible of . . . the States." 1 *Farrand's Debates* at 69 (June 1, 1787). Most other framers shared the same goal. We know this because when Elbridge Gerry proposed that the president to be chosen by "the suffrages of the States, acting though their executives, instead of Electors," *id.* at 80 (June 2,

1787), the convention trounced the motion by a margin of ten states to zero, with one state delegation divided. 1 *Id.* at 80 (June 2, 1787); *id.* at 174-175 (June 9, 1787). As Edmund Randolph observed, "A Natl. Executive thus chosen will not be likely to defend with becoming vigilance & firmness the national rights agst. State encroachments." *Id.* at 176 (June 9, 1787).

The Constitution's system for electing the president was the product of extensive convention deliberation. The state governments were not to hijack it. That is why the delegates overwhelmingly rejected the Gerry proposal.

V. The debates over the Constitution's ratification confirm that presidential electors, once appointed, are to exercise discretion.

The debates over whether to ratify the Constitution began when the Constitution became public on September 17, 1787. They continued until May 29, 1790, when the thirteenth state, Rhode Island, ratified the document. 2 *Documentary* History 19, 26 (chronology). The debates were carried on in speeches, pamphlets, broadsides, letters, and newspapers—

as well as in the state ratifying conventions themselves. The records of the ratification debates show clearly that participants understood that presidential electors were to exercise their own judgment when voting.

The most-quoted ratification-era statement on the subject is Alexander Hamilton's *Federalist* No. 68:

> A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. . . .

16 *Documentary History* 376, 377.

Federalist No. 68 elaborated a point that Hamilton had made in *Federalist* No. 60:

> The House of Representatives being to be [*sic*] elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

Id. at 195, 196.

In *Federalist* No. 64, John Jay likewise implied elector choice and independence:

> The convention . . . have directed the President to be chosen by select bodies of electors, to be deputed by the people for that

> express purpose . . . As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.

16 *Id.* at 309, 310.

There is also a wealth of evidence outside the pages of *The Federalist*. John Dickinson had represented Delaware at the Philadelphia convention, and later supported ratification in his *Fabius* letters, which were widely published. 15 *Id.* at 74-80. In his second letter, Dickinson described elector conduct in a way consistent only with free choice:

> When these electors meet in their respective states, utterly vain will be the unreasonable suggestions derived for partiality. The electors may throw away their votes, mark, with public disappointment, some person improperly favored by them, or justly revering the duties of their office, dedicate their votes to the best interests of their country.

Fabius II, 15 April 1788, in 17 *Id.* at 120, 124-5.

Roger Sherman, another former Philadelphia delegate (and later a leading U.S. Representative and Senator) wrote that the president would be "re eligible as often as the electors shall think proper." Letter of Dec.

8, 1787, in 14 *id.* at 386, 387. An essayist signing his name *Civis Rusticus* wrote that choice of "the president was by electors." Va. Independent Chron., Jan. 30, 1788, in 8 *id.* at 331, 335 (1988).

Other advocates of ratification emphasized that electors would remain independent because the Constitution would protect them from outside influence. In explaining the importance of the Same Day Clause, James Iredell, later a Justice of the U.S. Supreme Court, told the North Carolina ratifying convention:

> Nothing is more necessary than to prevent every danger of influence. Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But by this provision, the electors must meet in the different states on the same day, and cannot confer together. They may not even know who are the electors in the other states. There can be, therefore, no kind of combination. It is probable that the man who is the object of the choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in a high degree, the confidence and respect of his country.

4 *Elliot's Debates* 105. *See also* Caroliniensis, Charleston City Gazette, April 1, 1788, in 27 *Documentary History* 235, 238 (pointing out that the

presidential electors are not subject to popular tumult because they meet in different states).

Some participants in the ratification debates discussed how presidential electors would be appointed. *E.g.*, A Democratic Federalist, Independent Gazetteer, Nov. 26, 1787, in 2 *id.* at 294, 297 (observing that state laws could allow the people to vote for them). Notably, however, none claimed the appointers would dictate their electors' votes. In the minds of the participants, appointment of electors and their subsequent conduct were distinct subjects. That is why Thomas Thacher asserted at the Massachusetts ratifying convention that "The President is chosen by the electors, who are appointed by the people." 2 *Elliot's Debates* 145. It is why James Iredell said at the North Carolina convention "the President . . . is to be chosen by electors appointed by the people." 4 *Id.* at 74.

Opponents of the Constitution agreed that electors would have discretion. The essayist *Centinel* asserted that the state legislatures would "nominate the electors who choose the President of the United States." Centinel II, Pa. Freeman's J., Oct. 24, 1787, in 13 *Documentary*

History 457, 459. "Candidus" feared "the choice of President by a detached body of electors [as] dangerous and tending to bribery." Candidus I, Indep. Chronicle, Dec. 6, 1787, in 4 *id.* 392, 395 (1997).

VI. The congressional debates on the Twelfth Amendment confirm that presidential electors, once appointed, are to exercise discretion.

The District Court below concluded that the Twelfth Amendment forbids electors' discretion: "[W]hatever the Framers' original understanding or intent was, the electors' role was 'materially chang[ed]' by the Twelfth Amendment's plain language." Op. at 19. The Amendment "was the solution to the unique problems posed when electors are pledged and bound to the candidates of their declared party." *Id.* at 20. The assertion is not correct.

To begin with, as noted above, the relevant language in the Twelfth Amendment is almost identical to the language in the original Constitution. There is no satisfactory explanation of why, if the standards of elector discretion were altered, the Constitution's language was not.

Furthermore, the debates in the Eighth Federal Congress demonstrate that *no* change in elector discretion was contemplated. The debates do show that the electors would represent the voters and states in a general way. Senator Tracy observed that "the public will, in the choice of a President, should be expressed by Electors, if they could agree, and if not, the public will should be expressed by a majority of the States [in a run-off election in the House of Representatives]." *Annals* at 164. *See also id.* at 421 (quoting Rep. G.W. Campbell on the popular "will as expressed by Electors").

However, as Senator Tracy's statement implies, electors would represent the states and people in the same manner as members of Congress and convention delegates represent the people: They would consider the wishes of their constituents but rely ultimately on the evidence before them and on their best judgment. *See id.* at 709 (quoting Rep. Gregg to the effect that if election were thrown into the House, it could represent the people's will as much as the Electors would). Senators White and Senator Pickering expressed exactly those sentiments about their own positions during the Twelfth Amendment debates. White

pointed noting Senators' duty to consider more than immediate public opinion. *Id.* at 142-43. Pickering, referred to members' duty "to act independently, according to the dictates of their own minds; and thus secure the real and permanent interests of the people". *Id.* at 199.

The congressional debates are filled with comments and phases showing that the members of Congress who proposed the Twelfth Amendment took for granted that electors could exercise discretion. Thus, members referred to "the intent of the Electors," *id.* at 736 (Rep. Holland) and presidential candidates being "intended by a majority of the Electors," *id.* at 739 (Rep. Holland); "preferred by the majority of Electors," *id.* at 740 (Rep. Holland); and "selected by the Electors." *Id.* at 696 (Rep. Purviance). *Cf. id.* 535 (Rep. Hastings, "the Electors . . . will be induced"). Even Rep. Clopton, a professed advocate of direct popular election, *id.* at 422, used similar language acknowledging that the electors would choose. *Id.* at 491 ("intended . . . by a majority of the Electors") & *id.* at 495 ("contemplated for President by any of the Electors").

Rep. Elliot referred to the risk of introducing "a person to the Presidency, not contemplated by the people or the Electors." *Id.* 668. Rep. Thatcher worried that "those Electors who are not devoted to the interest of the ruling faction will exercise a preference of great importance, they will select the candidate least exceptionable." *Id.* at 537. Senator Pickering even urged electors to change their recent voting habits, *id.* at 198, something he clearly assumed they were free to do. See also *id.* at 718 (similar exhortation by Rep. Goddard).

At least one member, Senator Hillhouse, suggested that as an alternative to a presidential run-off in the House of Representatives, electors be re-convened to vote again. *Id.* at 132-33. This suggestion assumes, of course, that electors could debate, re-consider, and change their votes—the very process Colo. Rev. Stat. §1-4-304(5) purports to prohibit.

Members of Congress believed electors had a solemn duty to vote for the persons they deemed best qualified. *Id.* at 709 (Rep. Lowndes, referring to electors' "duty" to vote "for none but men of high character"); *id.* at 752 (Rep. Griswold, referring to "the great and solemn duty of

Electors, upon all occasions, to give their votes for two men who shall be best qualified for the office of the President").

Several Members alluded to the risk electors might be corrupted and therefore not vote for the best candidates. *E.g.*, *id.* at 141 (Senator White); *id.* at 155 (Senator Plumer) & *id.* at 170 (Senator Tracy). Senator Tracy also worried that "by the force of intrigue and faction, the Electors may be induced to scatter their votes for both President and Vice President . . . ." *Id.* at 174. Rep. Purviance feared the time might come when Electors were bought "by promises of ample compensation," *id.* at 692. Rep. Griswold worried the electors could be bought by lures of public office. *Id.* at 750; *see also id.* at 170-74 (Senator Tracy, speaking of the danger of corruption among electors and intrigue with them). Of course, the above concerns and wishes *necessarily* rest on the premise that presidential electors have the freedom to choose—for good or ill.

The famous Virginia Senator John Taylor of Caroline thought choice by electors was preferable to choice by Congress: "Would the election by a Diet," he asked, "be preferable or safer than the choice by Electors in

various places so remote as to be out of the scope of each other's influence, and so numerous as not to be accessible by corruption?" *Id.* at 115.

Under the original Constitution, each elector voted for two persons without designating whom the elector favored for president or vice president. U.S. Const. art. II, §1, cl. 3. Much of the debate over the Twelfth Amendment centered whether to replace this double-vote rule with what participants called the *designation principle* or *discriminating principle*. This was the principle embodied in the words, "The Electors shall . . . name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." U.S. Const. amend. XII.

Members of Congress nowhere suggested that the designation principle would be inconsistent with elector discretion. On the contrary, they debated the merits of the double-vote versus designation rules according to how well each alternative would operate in the context of elector discretion. For example, Rep. Randolph defended designation this way:

> When Electors designate the offices and persons, respectively, for whom they vote, after choosing the person

> highest in their confidence for President, they will naturally make choice of him who stands next in their esteem for Vice President; but where they are not permitted to make this discrimination, they will, to secure the most important election, give all their votes to him whom they wish to be President, and scatter the other votes; thus leaving to chance to decide who shall be Vice President.

Id. at 768.

Rep. Holland, another designation advocate, decried the double vote rule because

> The Electors are compelled to put two persons' names in a box, depriv[ing] them of the liberty of exercising their rationality as to the application of either person to any specific office, and must leave the event to blind fate, chance, or what is worse, to intrigue to give him a President.

Id. at 736.

On the other hand, Senator Plumer, who supported the double-vote rule, argued that designation would have "a tendency to render the Vice President less respectable. . . . In electing a subordinate officer, the Electors will not require those qualifications requisite for supreme command . . . ." *Id.* at 155.

Senator White, another double-vote advocate, argued that designation would "render[] the Electors more indifferent about the reputation and

qualification of the candidate [for vice president], seeing they vote for him but as a secondary character." *Id.* at 143. Senator Tracy supported the double-vote because under that system "The Electors are to nominate two persons, of whom they cannot know which President will be; this circumstance . . . induces them to select both from the best men." *See also id.* at 709 (similar argument by Rep. Lowndes).

Thus, the framers the Twelfth Amendment, like the framers and ratifiers of the original Constitution, understood that electors could—indeed, were obliged to—exercise their judgment and vote as they thought best.

VII. Because presidential electors receive their authority through enumerated powers granted by the United States Constitution, the Tenth Amendment is irrelevant to those powers.

The District Court held that "the power to bind or remove electors is properly reserved to the states under the Tenth Amendment." Op. at 15; U.S. Const. amend. X ("The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). This statement is erroneous.

It is the Constitution—not State reserved powers—that creates the presidential election system. *Burroughs v. United States*, 290 U.S. 534, 545 (1934) ("While presidential electors are not officers or agents of the federal government . . . they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States."). *Cf. United States v. Sprague*, 282 U.S. 716, 733-34 (1931) (holding the Tenth Amendment irrelevant in the Constitution's grant of Article V amendment functions).

Indeed, even if the Constitution did not grant discretion to electors, the Tenth Amendment still could not "reserve" power to the States to control them because presidential election functions did not exist before the Constitution was ratified. Powers that did not exist before the ratification cannot be "reserved" under the Tenth Amendment. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 802 (1995):

> . . . Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers

> whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . No state can say, that it has reserved, what it never possessed."

Id. at 802.

CONCLUSION

Pursuant to Colo. Rev. Stat. §1-4-304(5), state officials threatened to remove two duly elected presidential electors and did purport to remove one, simply because the state did not agree with their anticipated and actual votes. The officials further threatened to prosecute them. When one elector did not vote "right," state officials purported to cancel his vote and to replace him with an alternate, even though the elector had already voted.

The officials thereby violated the constitutional rights of presidential electors, contrary to the plain text and original meaning of the Constitution. Although there can be policy arguments for and against the constitutional system of electors, the rule of law requires that the system

actually in the Constitution be obeyed. Accordingly, Colo. Rev. Stat. §1-4-304(5) should be declared unconstitutional.

Respectfully submitted,
/s/ *David B. Kopel*
David B. Kopel *Counsel of Record*
Independence Institute
727 E. 16th Ave. Denver, CO 80203
(303) 279-6536 ext. 112
Dated: June 27, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 29.1(e) and 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. Pro. 29 and 32 because this brief contains 5,865 words.

2. This brief complies with the typeface requirements of Fed. R. App. Pro. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with serifs included using Microsoft Word in 14-point Century Schoolbook.

/s/ *David B. Kopel*
Attorney for amicus
Dated: June 27, 2018

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of any hard copies that were filed (if any); and 3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Norton Security Premium, virus definitions updated June 22, 2018, and according to the program are free from viruses. I further certify that the information on this form is true and correct to the best of my ability and belief formed after a reasonable inquiry.

/s/ *David B. Kopel*
Attorney for amicus
Dated: June 27, 2018

CERTIFICATE OF SERVICE

The undersigned, attorney of record for amicus, hereby certifies that on June 27, 2018, an identical electronic copy of the foregoing amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Pursuant to Tenth Circuit Rule 31.5, seven hard copies of this brief will be delivered to the clerk's office within two business days of this electronic filing.

Attorneys for Plaintiffs-Appellants:

Jason B. Wesoky
1331 17th St., Suite 800
Denver, CO 80202
Telephone: 303-623-9133
Fax: 303-623-9129
E-mail: jason.w@hamiltondefenders.org

Jason S. Harrow
3143 La Cienega Blvd.
Los Angeles, CA 90016

Phone: 610-357-9614
Email: jason@equalcitizens.us

L. Lawrence Lessig
1563 Massachusetts Ave.
Cambridge, MA 02138
Phone: 617-496-8853
Email: lessig@law.harvard.edu

Attorneys for Defendant-Appellee:

Grant T. Sullivan
Assistant Solicitor General
Leeann Morrill
First Assistant Attorney General
Matthew D. Grove
Assistant Solicitor General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Phone: 720-508-6349
E-Mail: leeann.morrill@coag.gov
matt.grove@coag.gov
grant.sullivan@coag.gov

/s/David B. Kopel
Attorney for amicus
Dated: June 27, 2018