

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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

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3 COLORADO DEPARTMENT OF STATE, )  
4 Petitioner, )  
5 v. ) No. 19-518  
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,  
20 Denver, Colorado;  
21 on behalf of the Petitioner.  
22 JASON HARROW, Esquire, Los Angeles, California;  
23 on behalf of the Respondents.  
24  
25

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P R O C E E D I N G S

(11:18 a.m.)

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

General Weiser.

ORAL ARGUMENT OF GEN. PHILIP J. WEISER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. WEISER: The State is --

21 CHIEF JUSTICE ROBERTS: Go ahead.

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

25 CHIEF JUSTICE ROBERTS: Yes. What



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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 General.

6 Justice Thomas?

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

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

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

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

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

1 would be an injury in fact?

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

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

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

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

25 JUSTICE THOMAS: You attach yourself

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

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

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

18 JUSTICE THOMAS: Thank you, General.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Ginsburg?

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

25 Most states already require elector

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

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

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

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

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

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

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

9 JUSTICE GINSBURG: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Breyer?

12 JUSTICE BREYER: Good morning.

13 A technical question. The -- 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.  
19 Both sides would like us to rule. But can they?  
20 If someone sues a foreign country under 1983,  
21 and a foreign country can't be a defendant under  
22 1983, can the party simply get an opinion from  
23 this Court by waiving the question?

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

7 JUSTICE BREYER: That isn't --

8 MR. WEISER: -- until --

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

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

17 JUSTICE BREYER: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

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

25 MR. WEISER: Justice Alito, the most

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

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

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

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

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

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

1 that candidate and replace them with other  
2 electors?

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

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

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

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

25 JUSTICE ALITO: Well, if we agree with

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

8 MR. WEISER: Justice Alito --

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Kagan?

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

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

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

16 MR. WEISER: Thank you, Justice Kagan.

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

25 JUSTICE KAGAN: But, again, I thought

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

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

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

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

25 But, moreover, I would note there's

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

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Gorsuch?

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



1 Mr. Lessig suggested.

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

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

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

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

25 JUSTICE GORSUCH: Well --

1 MR. WEISER: Yes.

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

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

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

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

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

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

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

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

13           JUSTICE GORSUCH: And do those?

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

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

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

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

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

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

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: Thank you, Chief  
23 Justice.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KAVANAUGH: Why do you think

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

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

10 JUSTICE KAVANAUGH: Thank you.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Harrow.

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

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

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

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

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

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



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

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

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

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

6           CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. 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

1 the possibilities and placed the ultimate  
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  
15 imagine -- indeed, you don't --

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.

22 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

1 unclear. That's the situation that I meant.

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  
7 people, and they do on the basis of political  
8 party, for instance, but, once the vote begins,  
9 that vote by ballot is the electors.

10 CHIEF JUSTICE ROBERTS: So the elector  
11 can decide, I am going to vote -- I'm going to  
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,  
16 representatives have, congressional electors  
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  
22 parties insist that electors sign a contract  
23 that you will vote -- if we win the popular  
24 vote, you will vote for our party's candidate.

25 And if you don't, there'll be

1 liquidated damages of a thousand dollars, an  
2 elector is selected and breaks that contract,  
3 votes for the other individual even though that  
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  
11 votes, even though, as a condition of  
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.

19 Justice Thomas?

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

22 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

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  
11 cannot win election. They -- they can have  
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,  
16 if a U.S. Senator, Justice Thomas, promises to  
17 support only low taxes and then at every  
18 opportunity raises taxes, their only  
19 accountability is six years later. That's the  
20 nature of political discretion, and that's the  
21 discretion electors have here.

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

1           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.

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

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

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

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

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

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

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Ginsburg?

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



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

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

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

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

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

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

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

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

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

24 JUSTICE GINSBURG: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer?

2 JUSTICE BREYER: Thank you.

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

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

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

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

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

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

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

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

25 So is that not a power that the

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

3 MR. HARROW: Justice Breyer --

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

6 MR. HARROW: Well --

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

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

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

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

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

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

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

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

16 JUSTICE BREYER: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Alito?

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

25 And we are told by experts on

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

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

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

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

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

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

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

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

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

25 MR. HARROW: Your Honor, I believe



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

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

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

15 MR. HARROW: -- that there is  
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.

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

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

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

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

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

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

1 vote without a criminal conviction?

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Justice Kagan?

17 JUSTICE KAGAN: Mr. Harrow, suppose  
18 that I read the Constitution and I find that it  
19 just doesn't say anything about this subject,  
20 you know, that there 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

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

8 JUSTICE KAGAN: Meaning the --

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

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

14 MR. HARROW: The -- the --

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

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

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

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

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

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

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

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

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

4 MR. HARROW: Because, Your Honor,  
5 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  
8 has done what Colorado is doing. That is 220  
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.  
16 If -- if -- if you're ready to move on, then,  
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.

1 Baca had asked Congress to count his vote and  
2 Congress decided to do so. Would we be here?

3 MR. HARROW: I -- I -- yes, you would,  
4 Your Honor. There -- there is no mechanism for  
5 Mr. Baca to ask Congress to count his vote under  
6 the Electoral Count Act that the State has  
7 pointed to any mechanism, other than perhaps  
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  
16 elector, Celeste Landry, then no, perhaps not  
17 because in that he wouldn't have lost the  
18 office.

19 I will say he didn't get a chance to  
20 vote for vice president either, so assuming on  
21 Your Honor's hypothetical that he had his  
22 ballots fully cast, then no, we -- we probably  
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  
3 Gorsuch. There's no mechanism for it and the  
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.  
11 So it's a one dollar nominal damages.  
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  
16 whether there's a mechanism to do so, and we  
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  
22 decline its -- should -- should -- should bother  
23 with, with using its discretion whether to  
24 decide a case?

25 MR. HARROW: Justice Gorsuch, because



1 once there is jurisdiction -- and, again, I'll  
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  
7 also has some -- some authority to emphasize the  
8 importance of -- of the adversarial process and  
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  
16 important issue and the -- the unique chance  
17 that this Court has to decide this issue of  
18 presidential selection outside the -- the very  
19 contested context of an -- an actively fought  
20 presidential election.

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

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Thank you, Chief  
4 Justice.

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,  
8 including how the Twelfth Amendment interacts  
9 with Article II?

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  
19 words and all of those structural principles  
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  
23 silent. And we've talked about various things  
24 that could fill the gap there, including the  
25 State's authority.

1           Another, of course, under our case law  
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  
8 favoring -- favoring the other side?

9           MR. HARROW: Justice Kavanaugh, in  
10 addition to the historical practices that we've  
11 already discussed, including in the exchange  
12 with Justice Kagan, I'll also point the Court to  
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  
19 starts in 1801 with no less than Thomas  
20 Jefferson saying: Hey, maybe we should get rid  
21 of the office of elector. It can only cause  
22 trouble.

23           And that continues in the 19th and  
24 20th century. For 20 years, such amendments  
25 were introduced by Thomas Hart Benton in

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  
6 discretion. And that would be a lot of wasted  
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  
16 here was extraordinary and unprecedented. And  
17 if Colorado is permitted to undo the human check  
18 that has been baked into this system of  
19 presidential selection, there really could be a  
20 chaotic outcome.

21 By contrast, most electors have been  
22 free in most elections, and here we are today,  
23 Your Honors. Indeed, electors retain legal  
24 discretion in 18 states, as I've said, and a  
25 decision from this Court won't change that.

1           So the question for this Court is  
2 whether to approve of the State's novel  
3 intervention, and it is novel, and be left  
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  
9 with the Constitution until amended and maintain  
10 indirect election, acknowledging that both sides  
11 here, both sides have a vision of presidential  
12 selection that is imperfect, but the various  
13 checks, balances, and separations that our  
14 Constitution's drafters and amenders have put  
15 into the Constitution, all of those should be  
16 given a role in our constitutional universe.  
17 And, Your Honors, I -- I think that all adds up  
18 to elector discretion.

19           Thank you, Mr. Chief Justice.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

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

24

25

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

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

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

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

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

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

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

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

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

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 12:19 p.m., the case  
25 was submitted.)

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<b>6</b>	<b>61</b> <sup>[1]</sup> 2:10 <b>63</b> <sup>[1]</sup> 45:13		
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