No. 18-1173

In the United States Court of Appeals for the Tenth Circuit

MICHAEL BACA, POLLY BACA, AND ROBERT NEMANICH,
Plaintiffs-Appellants,

v.

COLORADO DEPARTMENT OF STATE,
Defendant-Appellee

On Appeal from the U.S. District Court for the District of Colorado, No. 1:17-CV-01937-WYD-NYW (Daniel, J.)

Amicus Curiae Brief of Derek T. Muller In Support of Neither Party

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Table of Contents

Table of Authorities

Page

Cases

Other Authorities

Table of Authorities

Page

Constitutional Provisions

Interest of Amicus Curiae

Amicus Curiae Professor Derek T. Muller is an associate professor of law at Pepperdine University School of Law.[1] He has taught and written about election law, and he has written extensively on the Electoral College and presidential electors, including Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 Election L.J. 372 (2007), Derek T. Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 Election L.J. 227 (2008); Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237 (2012), Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559 (2015), and Derek T. Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097 (2016).

This topic lies within the research area of Professor Muller and is the subject of pending litigation in other states. *See Abdurrahman v. Dayton*, 16-4551 (8th Cir. submitted Feb. 13, 2018) (elector replaced for casting a vote for candidate other than pledged candidate); *Guerra v. State Office of Administrative Hearings*, 17-2-02446034 (Wash. notice of appeal filed Dec. 21, 2017) (electors fined for casting votes for candidates other than pledged candidate). A federal court also dismissed a case involving a presidential elector in California. *See Koller v. Harris*, ___ F.Supp. 3d ___, 2018 WL 1900116 (N.D. Cal. Apr. 20, 2018).

[1] University affiliation is for identification purposes only.

Summary of Argument

The text of the Constitution offers little about the scope of state authority to regulate presidential electors. And there is little judicial precedent about the proper scope of authority of states regulating presidential electors. *See, e.g.*, *Ray v. Blair*, 343 U.S. 214 (1952). But there are extensive practices in states and in Congress—including practices at the time of the ratification of the Twelfth Amendment—that may help this Court determine the liquidated meaning of these constitutional provisions. *Cf.* THE FEDERALIST No. 37, at 236 (James Madison) (J.E. Cook ed., 1961).

These state and congressional practices reveal three conclusions. First, presidential electors have no right to anonymity when casting their ballots. Second, states have the power to replace presidential electors and levy fines on presidential electors, even after those electors have been selected. Third, Congress holds the power to scrutinize and even reject the electoral votes. In 2017, however, Congress counted Colorado's electoral votes, and this Court has been asked to revisit a decision reserved to the judgment of Congress. When this Court decides this case, it should interpret the Twelfth Amendment through the practices of the states and of Congress.

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ARGUMENT

I. Presidential electors have no expectation of anonymity when casting ballots.

Presidential electors cast their votes "by ballot" according to the text of the Twelfth Amendment. *See* U.S. Const. amend. XII. That may lead one to believe that the ballot is anonymous, given today's common understanding that ballots are often anonymous. And if presidential electors have an expectation of anonymity in casting their ballots, it would strengthen Appellants' argument that presidential electors have discretion to cast votes for whomever they like. But by the very terms of the Twelfth Amendment, the ballot cannot be anonymous. Indeed, state practices and congressional understanding of electors' ballots show that ballots are cannot be anonymous.

A. As a matter of pure logic, ballots cast under the Twelfth Amendment cannot be anonymous.

The original Constitution required electors to "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. The top vote-getter would become president, and the second place vote-getter would become vice president. Shortly after ratification, the system did not operate as anticipated. First, political parties arose, with distinct factions vying to win these two offices. Second, parties ran pairs of candidates, one considered the presidential candidate and the other the vice presidential candidate. *See generally* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 336–44 (2005).

The Twelfth Amendment accommodated these practices. Presidential electors would now "name in their ballots the person voted for as President." Then, they would "in distinct ballots" vote for a vice president. The Twelfth Amendment still dictated that electors "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.

Here arises a logical difficulty. Under the original Constitution, electors would cast ballots with two names on them. It would be easy to ascertain whether an elector voted for two candidates who were inhabitants of the same state as the elector. But now that the elector is casting a vote for president and a vote for vice president on "distinct ballots," how can Congress determine whether the elector has voted for at least one candidate who is not an inhabitant of the same state as the elector?

Consider this problem with the example of New York's nineteen presidential electors in the Election of 1808. The results of that election seem straightforward when viewed in a generic table:

President	Votes received	Vice president	Votes received
James Madison of Virginia	13	George Clinton of New York	13
George Clinton of New York	6	James Madison of Virginia	3
		James Monroe of Virginia	3

But this table makes a particular assumption—an assumption that is only obvious when one casts ballots in a manner consistent with the Twelfth Amendment. This table makes it appear that the James Madison's thirteen electors then voted for George Clinton for vice president. But how would we know? Only if the ballots were not anonymous—that is, only if we had a way of linking the presidential votes with the vice presidential votes, cast on "distinct ballots."

True, it would make little sense for one elector to vote for James Madison of Virginia for president and then James Madison of Virginia for vice president.[2] And then it would be odd if another elector had voted for George Clinton of New York for president and then George Clinton of New York for vice president. The Twelfth Amendment, however, expressly forbids that latter example, absurd as it might be.

This example demonstrates that ballots must have distinct marks identifying them to ensure that electors cast at least one vote for a candidate who is not an inhabitant of their state. Electors' ballots could be pseudonymous. They could also include the electors' names on both the presidential and vice presidential ballots. In any event, they cannot be anonymous. Otherwise, the Twelfth Amendment's requirement that at least one candidate "shall not be an inhabitant of the same state with themselves" would be unenforceable.

B. State practices show that ballots are not anonymous.

The internal logic of the Twelfth Amendment dictates that ballots cannot be anonymous. State practices immediately after the ratification of the Twelfth Amendment bear this out.

The Twelfth Amendment requires that electors "shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States." U.S. Const. amend. XII.

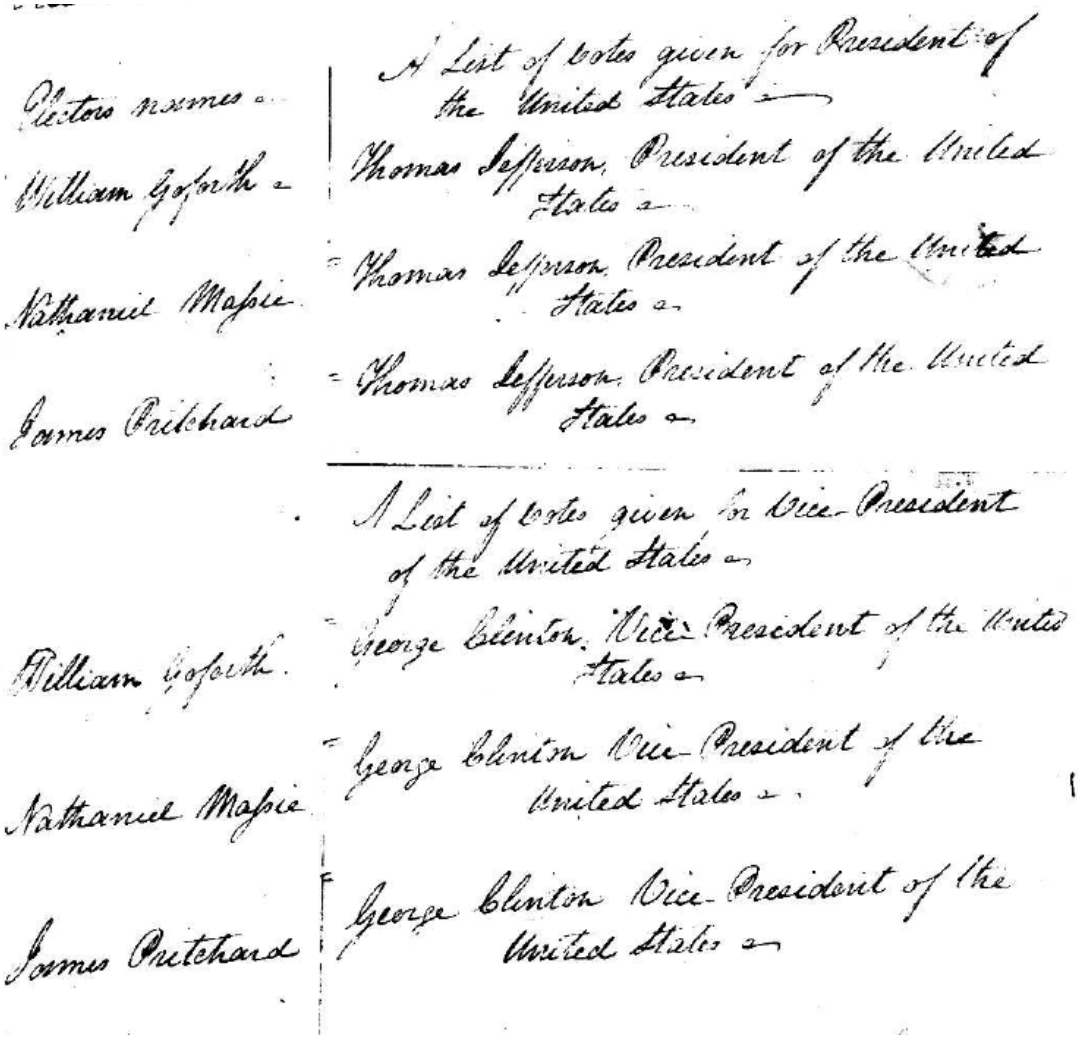
[2] Such an event occurred in 2005, when Congress counted an electoral vote in Minnesota cast for John Edwards of North Carolina for president and for John Edwards of North Carolina for vice president. *See* 151 Cong. Rec. 198, 243 (2005).

But some states went above and beyond this requirement: they kept track of individual electors' votes for each ballot cast and reported those votes to Congress.

Ohio's electoral report submitted to Congress in 1804 includes two columns: "Electors Names," and beside them "A list of votes given for President of the United States." *See* Figure 1. It lists the names of electors William Goforth, Nathaniel Massie, and James Pritchard, along with each of their votes for "Thomas Jefferson, President of the United States," listed three times, once beside each name. They are also each individually identified as casting votes for George Clinton for vice president.[3]

[3] Records of the United States Senate, Electoral Vote Records of the 8th Congress (1804), The National Archives and Records Administration.

Figure 1.

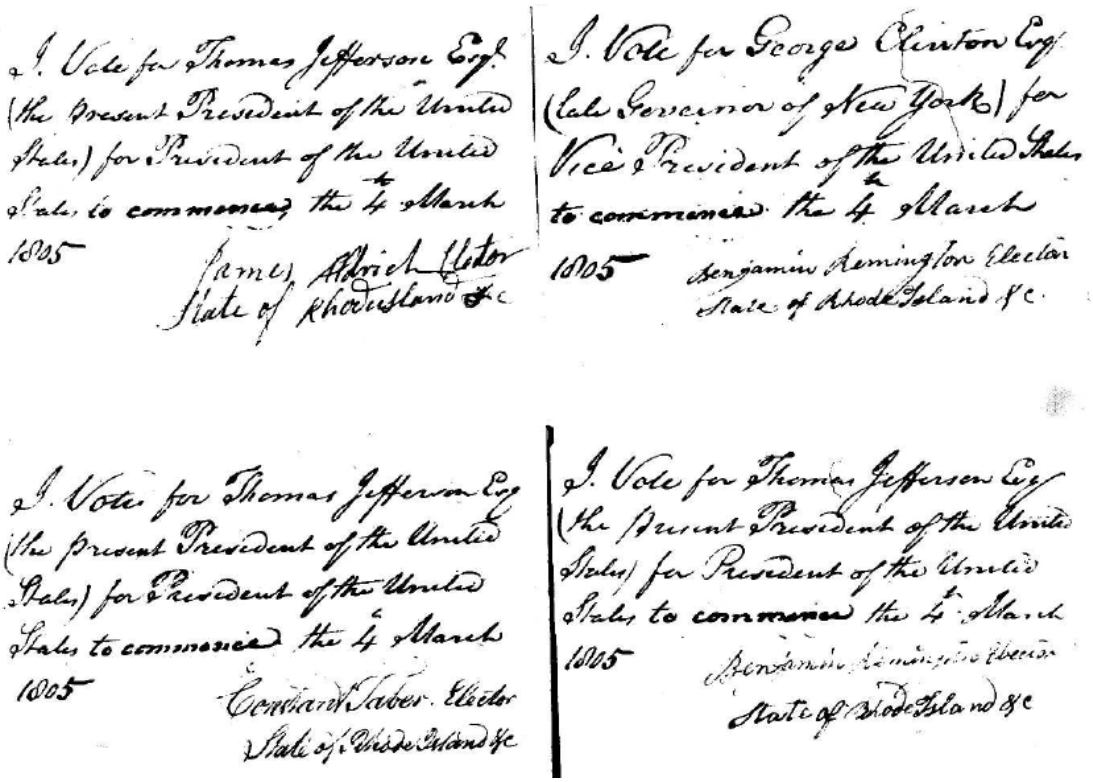


In 1804, Rhode Island's four electors each individually completed ballots with their names attached. *See* Figure 2. One ballot signed by James Aldrich read, "I Vote for Thomas Jefferson Esq. (the present President of the United States) for President of the United States to commence the 4th [of] March 1805."[4] Electors Constant Taber, James Helme, and Benjamin Remington signed similar ballots. Each also filled out similar individual ballots revealing votes for "George Clinton Esq. (late Governor

[4] *Id.*

of New York) for Vice President." These individual ballots were submitted to Congress.

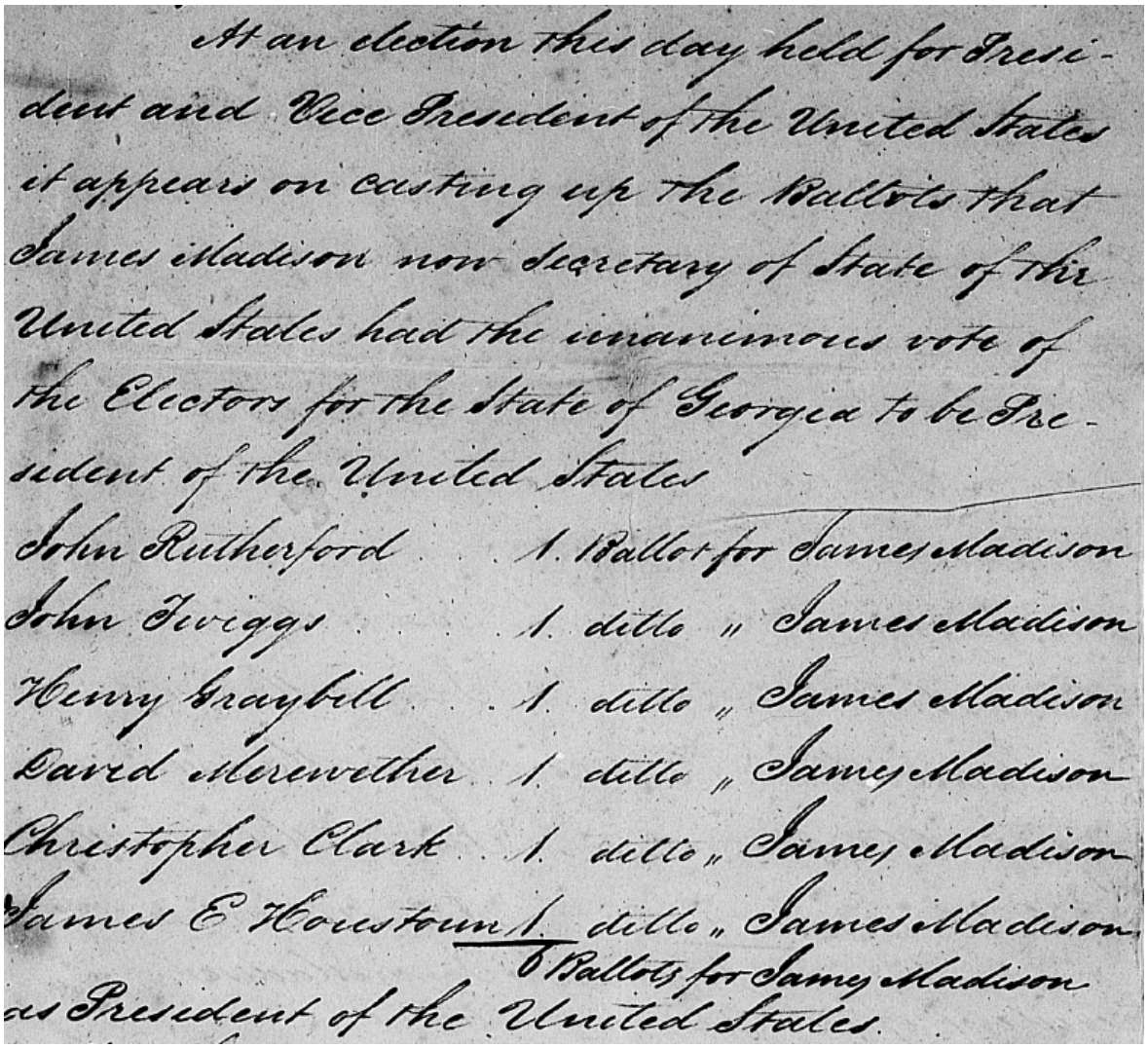
Figure 2.



In 1808, Georgia's six electors were John Rutherford, John Twiggs, Henry Graybill, David Meriwether, Christopher Clark, and James E. Houstoun. *See* Figure 3. Each elector's individual ballot was recorded. The first elector is identified as casting "1. Ballot for James Madison."[5] The remaining five are each identified as casting "1. ditto " James Madison," with a sum total below them, "6 Ballots for James Madison as President of the United States." Individual votes for electors for George Clinton for Vice President were also listed.

[5] Unbound Records of the U.S. Senate, 10th Congress, 1807–1809 – Records of Legislative Proceedings, Electoral Votes, The National Archives and Records Administration.

Figure 3.



At an election this day held for President and Vice President of the United States it appears on casting up the Ballots that James Madison now Secretary of State of the United States had the unanimous vote of the Electors for the State of Georgia to be President of the United States

John Rutherford . . 1 Ballot for James Madison
John Treggs . . . 1 ditto " James Madison
Henry Graybill . . 1 ditto " James Madison
David Meriwether . 1 ditto " James Madison
Christopher Clark . 1 ditto " James Madison
James E Houston 1 ditto " James Madison.
6 Ballots for Jamey Madison
as President of the United States.

Consider also contemporaneous newspaper reports. In 1804, Maryland's presidential electors voted for multiple presidential and vice presidential candidates. The *Republican Star* reported by name the nine electors who that cast their votes for Thomas Jefferson for President and George Clinton for Vice President.[6] It also

[6] *Republican Star*, Dec. 11, 1804 (naming Joseph Wilkinson, John and Edward Johnson, John Tulre and Frisby Tilghman, Tobias E. Stansbury, John Gilpin, William Gleaves, and Perry Spencer).

reported by name the two electors who cast their votes for Charles Coatsworth Pinckney for President and Rufus King for Vice President.[7]

And in 1808, newspapers in New York identified individual electors' ballots. The *Public Advertiser* named thirteen electors who voted for James Madison, and six who voted for George Clinton—editorializing that Madison was "the legitimate candidate" and Clinton "the spurious candidate," a shot at those six electors.[8]

In New York, the loyalties of these electors were not known before the Electoral College convened. There was vociferous debate about how these electors might cast their votes. A report of November 5, 1808 suggested that the slate might go 12-7 in favor of Madison, and that "[i]t is generally believed . . .that the whole ticket will vote for Madison."[9] A month before the electors met, the reported electors were believed to be 16-3 in favor of Clinton on the understanding that "Madisionianism is unknown" in most of New York.[10]

Contemporaneous state activity immediately following the ratification of the Twelfth Amendment includes many examples of the individual votes of electors collected with their names attached and publicly disclosed. Some submitted those individual votes to Congress; others had processes that permitted media outlets at the

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[7] *Id.* (naming John Parnham and Ephraim K. Wilson).

[8] *The Public Advertiser*, Dec. 12, 1808 (naming Ambrose Spencer, John W. Seaman, Henry Rutgers, Ebenezer White, Thomas Lawrence, Johnathan Rouse, Micajah Petit, Benjamin Mooers, Thomas Shankland, William Hallock, Joseph Simonds, Hugh Jamison, and Mathew Carpenter as the thirteen electors who cast votes for James Madison; and James Garretson, James Tallmudge, Henry Yates Jr., Adam B. Vicoman, Russel Atwater, and Henry Huntington as the six electors who cast votes for George Clinton).

[9] *The Monitor*, Nov. 17, 1808 (reporting "Copy of a letter, dated Albany, November 5, 1808").

[10] *The Republican Watch-Tower*, Nov. 8, 1808.

time to report on individual electors' votes. States need not publicize individual electors' votes, but, given their past practice, they have the authority to do so.

C. Congress understands that ballots cannot be anonymous.

Congress recognized the conundrum of the Twelfth Amendment when considering the results of the Election of 1872. Congress was unusually involved in the counting of electoral votes. The South was in the thick of Reconstruction under federal supervision, and Congress scrutinized election returns with care. A vice presidential candidate, Horace Greeley, died between Election Day and the day the members of the Electoral College met, which resulted in electors scattering their electoral votes among various alternative candidates. *See* Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. at 586–87.

Georgia's eleven electors cast six votes for Benjamin Gratz Brown for President, three votes for the late Horace Greeley, and two votes for Charles L. Jenkins of Georgia. They then cast five votes for Brown for Vice President, five votes for Alfred H. Colquitt of Georgia, and one vote for Nathanial D. Banks. Theoretically, two Georgia electors could have cast votes for two Georgians, Jenkins and Colquitt, which would have been prohibited under the Twelfth Amendment. A member of Congress tried to object, but he did so too late, and Congress did not consider the merits of this issue. *See* Cong. Globe, 42d Cong., 3d Sess. 1299–1300 (1873).

Another member of Congress objected to Missouri's electoral votes for the same reason. Brown was a Missouri native. Missouri's fifteen electors cast eight votes for Brown for president, six votes for Thomas Hendricks, and one vote for David Davis. They then cast six votes for Brown for vice president, five votes for George Julian, three votes for John M. Palmer, and one vote for William Groesbeck. In theory, up to

six electors could have cast votes for Brown for both president and vice president. Because Brown was a Missouri inhabitant, those votes would have been invalid.

But Missouri submitted an explanation with its list of electoral votes: "And it is hereby further certified, that none of said electors, who voted for B. Gratz Brown for President, voted for him, for Vice President." *See* Cong. Globe, 42d Cong., 3d Sess., 1300 (1873). Upon learning of this certification, the objection was dropped, and Congress counted Missouri's electoral votes. Missouri could have only offered this certification if it knew the identity of those who cast ballots for president and vice president. They could not have been anonymous.

II. At the time of the ratification of the Twelfth Amendment, States replaced and fined presidential electors who failed to carry out their duties.

The Constitution provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors …" U.S. Const. art. II, § 1, cl. 2. Longstanding practices of the states suggests that the power to control the "manner" of appointment extends after the electors have been chosen. (It is important to qualify that this provision—the "manner" of appointment—was not amended by the Twelfth Amendment. But it demonstrates that these practices existed at the time of the Founding, and at the time of the ratification of the Twelfth Amendment, a time when Congress proposed amending other aspects of the Electoral College.)

Ever since the very first presidential election, presidential electors have never had unfettered independence after they have been selected. States regularly imposed restrictions and obligations upon them. First, states imposed rules that would replace presidential electors in the event those electors were absent at the time the electors met. Second, states imposed fines on presidential electors if they failed to carry out their duties.

A. At the time of the ratification of the Twelfth Amendment, states had laws that permitted absent electors to be replaced.

The Constitution granted state legislatures plenary authority to direct the manner of appointing presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). State legislatures understandably wanted to ensure that presidential electors would meaningfully represent the interests of their state. Legislatures, then, did more than simply choose electors or permit a popular vote for the choosing of electors. They passed laws to ensure that electors would properly participate in the convening of the Electoral College. Electors who failed to act and represent the state legislature's interests would be replaced.

In 1796, the Massachusetts legislature enacted a statute that would permit electors to replace one of their members who had died or resigned before convening.[11] Governor Samuel Adams opposed the measure—not because he believed it was beyond the scope of the legislative power, but because he thought it would be against "the Spirit of our Government" for electors to appoint electors.[12] The Massachusetts legislature in 1800 enacted a law for electors to fill vacancies caused "by death, sickness[,] resignation or otherwise."[13] Vacancies in 1804 "by death or resignation" would be filled by the Massachusetts legislature.[14]

The New Hampshire legislature in 1800 passed a law providing that if electors were not "present" to accept their appointment, the legislature could replace them.[15] Electors could also fill vacancies on the day they convened.[16] The Pennsylvania

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[11] Ch. 9, Mass. Resolves of 1796, at 260.
[12] Mass. Resolves of 1796, Governor's Messages, at 641 & 642.
[13] Mass. Resolves of 1800, Chapter 57, at 172–73.
[14] Mass. Resolves of 1804, Chapter 21, at 298.
[15] Act, Nov. 25, 1800, The Laws of the State of New-Hampshire, 556, 557.
[16] *Id.*

legislature in 1802 took a similar position. If any electors were absent when the Electoral College met, the legislature by joint vote could replace them.[17] And the New York legislature in 1804 did the same. If an elector was absent on the day the Electoral College was to meet, the remaining electors could elect a replacement by majority vote.[18]

These early American state statutes show a common and widely-held understanding. State legislatures had the power to replace a presidential elector, even after that elector had been selected.

B. At the time of the ratification of the Twelfth Amendment, states had laws that fined presidential electors for failing to carry out their duties.

Some state legislatures went beyond simply replacing absentee presidential electors. They would sanction them by imposing fines upon them, another means to ensure that electors carried forth their responsibilities.

In 1788—before the very first presidential election—Virginia enacted a statute that would punish presidential electors who abdicated their responsibilities. "[F]ailing to attend and vote for a President … except in cases of sickness or any other unavoidable accidents" meant that the elector would "forfeit and pay two hundred pounds."[19]

In 1799, Kentucky enacted a statute modeled off Virginia's. It provided that presidential electors who failed "to perform the duties herein required" except in

[17] Act, Chapter MMCXXXI, Section IV, Feb. 2, 1802, at 50, 52, in James T. Mitchell, STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801

[18] Act, Chapter II, Nov. 12, 1804, at 4, in LAWS OF THE STATE OF NEW YORK (1806).

[19] Act of Virginia, Chapter I, Section V, Nov. 17, 1788.

cases of "sickness or unavoidable accident" "shall forfeit and pay one hundred dollars."[20]

C. Early state statutes controlling electors weigh in favor of finding that Colorado's statute is permissible.

These early state practices show that states could replace and punish presidential electors for failing to attend the convening of the Electoral College. Appellants' theory of the case threatens to imperil presidential election statutes that have been on the books since the very first presidential election.

It's true that these cases involve replacing and fining electors who were absent. Appellants asks for autonomy when casting votes. But one is hard-pressed to distinguish the elector who fails to attend and the elector who attends but fails to vote, or, still more, who fails to carry out his duty as demanded by the state legislature. Indeed, the failure to perform "the duties" required of electors in Kentucky was a basis to incur a fine.

After the presidential electors in Colorado had been chosen, they did not have unlimited discretion to act—or refuse to act—however they wanted. They remained subject to the conditions of office placed upon them by the state legislature, as statutes predating the election of George Washington have done.

III. Congress's decision to count all the electoral votes cast in 2016, including Colorado's, should bear upon this Court's decision.

The Counting Clause of the Twelfth Amendment provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. Const. amend. XII. This

[20] Chapter CCXII, section 20 (1799), in William Little, STATUTE LAW OF KENTUCKY; WITH NOTES, PRAELECTIONS, AND OBSERVATIONS OF THE PUBLIC ACTS at 339, 352 (1809).

power to count electoral votes is one for Congress. Congress has invoked this power to count in deciding not to count electoral votes, such as its 1873 refusal to count three votes cast for the late Mr. Greeley. But it is a power squarely left to Congress, not the courts. And it is a power that Congress is fully capable of exercising, as the Election of 2016 shows.

Congress's historical practices counting electoral votes came under scrutiny after the acrimonious Election of 1876. Some states presented Congress with competing slates of presidential electors, leaving Congress with a bitter dispute to determine which candidate won. *See generally* William H. Rehnquist, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1887 (2004), codified at 3 U.S.C. §§ 1 ff., provides the mechanism that Congress still uses to this day to handle disputes concerning presidential electors. *See Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77–78 (2000) (per curiam).

Congress counts electoral votes every four years, and it occasionally entertains objections under the Electoral Count Act. In 1969, a North Carolina elector cast a presidential vote for George Wallace instead of Richard Nixon. Members of Congress objected under the Electoral Count Act, but they ultimately counted the vote—in part because North Carolina law did not compel an elector to cast a vote for any particular candidate. *See* 115 Cong. Rec. 164 (1969).

In more recent years, members of Congress have been acutely aware of their power to challenge the counting of electoral votes under the Counting Clause and the Electoral Count Act. More than a dozen members of the House of Representatives serially tried to lodge objections to counting Florida's electoral votes in 2001. *See* 147 Cong. Rec. 104–06 (2001). None of these objections were recognized as a reason to

debate the legitimacy of the votes cast. That's because 3 U.S.C. § 15 requires that "at least one Senator and one Member of the House of Representatives" object in writing, and no Senator joined these objections.

In 2005, a member of the House and a member of the Senate objected to counting electoral votes from Ohio "on the ground that they were not, under all of the known circumstances, regularly given." 151 Cong. Rec. 198 (2005). After debate, the objection failed, and the Ohio's votes were counted. *See id.* at 199–242 (objection failing in the House by a vote of 267-31, with 132 not voting); *id.* at 157–73 (objection failing in the Senate by a vote of 74-1, with 25 not voting).

Congress was even more engaged when counting electoral votes in 2017. Members of Congress attempted to object to the electoral votes cast from Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming. *See* 163 Cong. Rec. H186–H189 (daily ed. Jan. 6, 2017). As in 2001, no Senator joined these objections, so Congress engaged in no debate. Despite controversies about the electoral votes cast by electors in California, Colorado, Minnesota, and Washington, no objections were raised about these votes, either. Congress counted all electoral votes—including all the electoral votes cast in Colorado.

If this Court chooses to scrutinize the constitutionality of Colorado's law, it ought to recognize that it will be passing judgment on a matter that Congress has already had the opportunity to consider, and one squarely within its constitutional authority. *See* U.S. Const. amend. XII. Appellants ask this Court to reverse a decision made by Congress, a decision reserved to it under the Twelfth Amendment. *See* Derek T. Muller, *Faithless Electors: Now It's Up to Congress*, Dec. 21, 2016, Wall St. J., A15,

https://www.wsj.com/articles/faithless-electors-now-its-up-to-congress-1482276847. Now that Congress has recognized the validity of Colorado's electoral votes cast in 2016, including those cast under a pledge and those cast by a replacement elector, this Court should not contradict Congress's judgment.

CONCLUSION

In reviewing Colorado's power to replace presidential electors, this Court should interpret the Twelfth Amendment through state and congressional practices and affirm the judgment of the district court.

Respectfully Submitted this 2nd day of July, 2018.

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/s/ Michael Francisco

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/s/ *Michael Francisco*

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/s/ Michael Francisco

July 2, 2018

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I have served this **AMICUS BRIEF** upon all parties through ECF file and serve at

Denver, Colorado, this 2nd day of July, 2018.

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