No. 18-1173

IN THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,

Plaintiffs-Appellants,

v.

COLORADO DEPARTMENT OF STATE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
NO. 1:17-CV-01937-WYD-NYW (Hon. Wiley Y. Daniel)

AMICUS CURIAE BRIEF OF ROBERT M. HARDAWAY, PROFESSOR OF LAW, UNIVERSITY OF DENVER STURM COLLEGE OF LAW

FILED IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMING THE DISTRICT COURT

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Pursuant to Federal Rule of Appellate Procedure 29, Professor Robert M. Hardaway files this *amicus curiae* brief in support of the defendant-appellee and in support of affirming the District Court.[1]

INTEREST OF AMICUS CURIAE

Amicus Curiae Robert M. Hardaway is Professor of Law at the University of Denver Sturm College of Law and is the primary author of this brief.

Professor Hardaway has taught election law, constitutional law, civil procedure, and evidence, and written extensively on the Electoral College in both books and numerous articles, including Robert M. Hardaway, *The Electoral College and the Constitution: The Case for Preserving Federalism* (Praeger Publishers 1994); Robert M. Hardaway, *Crisis at the Polls: An Electoral Reform Handbook* (Greenwood Press 2008); Robert M. Hardaway and Tara Ross, *The Compact Clause and*

[1] All parties have granted consent under Fed. R. App. P. 29(a)(2) for filing this *amicus* brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), Professor Hardaway states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person has contributed money to fund preparing and submitting this brief.

National Popular Vote: Implications for the Federal Structure, 44 N.M. L. Rev. 383 (2014); Robert M. Hardaway, *Should the Electoral College be Abolished*, New York Times Upfront, Oct. 11, 2004, at 22; Robert M. Hardaway, *A Tie in the Electoral College: Ready for an Obama / Palin Administration?* Chicago Tribune, Oct. 2007; Robert M. Hardaway, *The Electoral College and the Constitution: The Case for Preserving Federalism*, San Diego Union-Tribune, May 17, 2009; Robert M. Hardaway, *Electoral College Essential to Our System*, Rocky Mountain News, Dec. 8, 2000; Robert M. Hardaway, *Keep the College for Good Reasons: Keep the College's Protections*, Detroit Free Press, July 20, 2008; Robert M. Hardaway & Jim Riley, *Hands Off Electoral College*, The Denver Post, Feb. 11, 2007; Robert M. Hardaway, *The French Election Shows the Risk of Abolishing the Electoral College*, History News Network, May 2, 2017.

SUMMARY OF THE ARGUMENT

Article II, § 1, Clause 2 of the U.S. Constitution grants plenary power to the states to appoint electors in the manner that their legislatures direct. In exercising that power, the State of Colorado has delegated the task of appointing its allocated electors to the people of

Colorado in free and open popular vote elections under the 14th and 15th Amendments to the U.S. Constitution.

To ensure that the citizens' choice of president and vice president is properly reflected in the choice of electors, the Colorado legislature has set forth the manner and role of said electors in Section 1-4-301 and following of the Colorado Revised Statutes. These statutory provisions include the requirement that electors cast their vote in the Electoral College in accordance with the will of the citizens who elected them. Colo. Rev. Stat. § 1-4-304(5).

No Constitutional Amendment disenfranchises the voters of Colorado by superseding or abrogating the plenary power the state enjoys under Article II. Holding otherwise would nullify the Colorado legislature's power to delegate to the people of Colorado the right, through the electoral process, to vote for the presidential and vice-presidential candidates of their choice. Doing so would also mean reverting to the undemocratic pre-1876 process in some states of substituting the will of an elite handful of persons for the popular votes cast by the citizens of the state in a free and open election.

The constitutional framers expressed a variety of views on the roles of electors, but achieved no consensus on the question. The absence of any consensus explains why the framers did not impose upon the states any particular view of the electors' roles, but instead left it to each state to make that determination consistent with its Article II plenary power.

ARGUMENT

I. THE ARTICLE II GRANT OF POWER TO THE STATES TO DETERMINE THE MANNER AND ROLE OF ELECTORS HAS NOT BEEN SUPERSEDED, ABROGATED, OR ABOLISHED BY CONSTITUTIONAL AMENDMENT; COLORADO'S PRESIDENTIAL ELECTORS STATUTE IS THEREFORE CONSTITUTIONAL.

Article II provides that "[e]ach state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST art. II, § 1 (emphasis added). The import of this grant of power to states to determine the manner and role of electors can only be understood in the context of the framers' federalist vision.

The constitutional institution of the Electoral College was created by the framers as a result of the "Great Compromise" that bound the

then-fractious states into a cohesive union. Robert M. Hardaway, *The Electoral College and the Constitution: The Case for Preserving Federalism* 78-80 (1994). Without this compromise, the many smaller states were determined not to engage in a union with the larger states which did not preserve the bedrock principle of "equal state representation" in the legislature. *See generally* William Peters, *A More Perfect Union: The Making of the United States* Constitution (1987); *see also* Burton J. Hendrik, *Biography of the Constitution* (1937).

This Great Compromise consisted of two key prongs: the first, reflected in Article I, provided for both a Senate in which every state regardless of its population retained the right of equal representation, and a House of Representatives based on population within a state. The equally important second prong, reflected in Article II, allocated electors to states based on the number of representatives in the House *and* in the Senate (the latter, again, giving small states the right of equal representation).

So important was this second prong to the smaller states that, wary of the amendment process by which they might lose their right to a minimum of three electors—*i.e.*, two senators plus at least one

representative—the small state representatives at the Constitutional Convention insisted upon the inclusion in the Constitution of Article V. This Article requires that the right of equal state representation in the Senate can only be effectively amended by *unanimous* consent of all the states ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate"). U.S. CONST. art. V.

The elements of the Great Compromise, which included giving the small states the plenary power to appoint a minimum of three electors regardless of population—thereby giving them a greater influence on the election of a president relative to their size—presumed each state's ability to direct the manner in which electors are appointed. Circumscribing or undermining the power of the states to determine the terms of elector appointment thus would infringe not only upon the states' Article II powers, but also undermine that Great Compromise that unified the country.

As John F. Kennedy said in defending the Electoral College, "[i]f it is proposed to change the balance of power of one of the elements of the solar system [of government power], it is necessary to consider the others" (such as equal state representation in the U.S. Senate). *See*

Hardaway, *supra*, at 1 (*citing* 102 Cong. Rec. 5150 (1956) (statement of Sen. John F. Kennedy)). In other words, taking away the right of the states to determine the manner in which they wish to express their choice for president would necessitate looking at every other element of the "solar system" of government power—including the concept of equal state representation in the U.S. Senate.

It now appears that the insistence of the small states on this provision was prescient, particularly in light of the present challenge to the constitutionality of Colorado's presidential elector statute. The challenge comes despite the language of Article II, which plainly provides that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." Appellants acknowledge (App. Br. at 5) that such state power is indeed "plenary" under *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), but then claim that the state power is really not plenary at all. In effect they assert that Article II's plain language has been somehow superseded or compromised.

To support this proposition, Appellants cite the Twelfth Amendment. But this amendment simply ensures that candidates of different parties are not elected to the same ticket, and provides for

various bookkeeping rules relating to the counting of electoral ballots. *See* U.S. CONST. amd. XII; *see also* Hardaway, *supra,* at 89-92.

For one of the longest and most detailed of the constitutional amendments, it would be remarkable if the Twelfth Amendment's drafters intended to supersede or abrogate Article II, § 1, Clause 2, without so much as mentioning or referring to that power. Citing the Twelfth Amendment as authority for abrogating Article II without either precedent or clear wording in the Twelfth Amendment itself is insufficient to establish the unconstitutionality of Colorado's presidential elector statute.

Appellants' argument that the Twelfth Amendment abrogated Article II falls within the realm of similar questionable arguments, such as the claim that Article I § 3's provision for equal state representation in the Senate is itself "unconstitutional" or has been "superseded" or abolished by the Fourteenth Amendment's provision for "equal protection of the laws." (This claim is apparently based on the fact that Article I gave voters in small states greater voting power due to their disproportionate representation in the Senate.) It was indeed fear of such extraordinary claims that compelled the small states to demand inclusion

of Article V, protecting them from such legal machinations depriving them of their rights of representation under the Constitution.

A claim that a clear provision of the Constitution is itself "unconstitutional" requires nothing less than a reference to clear wording to such effect, such as the Twenty-First Amendment's specific abrogation of the Eighteenth Amendment.

The plenary power of the states to direct the manner and terms under which electors are appointed has not been either undermined or "superseded" by bookkeeping provisions set forth in the Twelfth Amendment, or by any other amendment or provision in the Constitution. Indeed, the power of the states to determine the manner in which electors are chosen is fundamental to both federalism and the clear intent of the Tenth Amendment to ensure the integrity of the federalist structure envisioned by the framers. The Tenth Amendment provides that unless a power is specifically delegated to the federal government, the state reserves all the residual powers of a sovereign state. Since Article II specifically grants to the states the power to appoint electors, there exists no basis for the federal government to infringe upon that grant of power to the states.

II. ARTICLE II GIVES POWER TO EACH STATE LEGISLATURE TO DETERMINE THE ROLE OF ELECTORS.

No provision in either Article II or elsewhere in the Constitution purports to set forth the role of an elector. Since it would be remarkable that such an important question would not be addressed in the Constitution itself had there been any firm opinion or consensus among the framers on this issue, it is reasonable to assume that there was no such consensus. This goes far in explaining why the framers decided to leave that very question for each state to decide.

Unfortunately, however, the absence of any constitutional provision addressing the question of the independence or lack thereof regarding any elector's decision process has not stopped some historians and lawyers from speculating as to how the framers *might* have resolved that issue had they been pressed to give a clear opinion on the subject. To support such speculation, anecdotes are sometimes selectively chosen from sources outside the Constitution itself, such as the anonymously written Federalist Papers or newspaper articles of the period. Before reviewing some of these sources it would be appropriate to acknowledge

that they do not come in the form of official committee notes or other legislative materials expressing the drafters' "intent."

Examples of such anecdotal comments include the statement attributed to Alexander Hamilton in Federalist No. 68 to the effect that "the immediate election should be made by men most capable of analyzing the qualities adapted to the nation." *See* Hardaway, *supra*, at 85. While Hamilton was certainly a federalist giant by virtue of his accomplishments in constitutional development and in helping establish the financial stability of the nation, his other views—such as his view that the president should be elected for life—do not form a basis for gleaning the framers' "intent" with regard to the role of electors. This is particularly so when juxtaposed to such comments as those expressed by Madison, who described the Electoral College provision as providing that "(t)he President is now to be elected by the people"; who, at the Virginia ratifying convention, stated that the president was to be chosen by "the people at large"; and who stated at the First Congress that the president was "appointed at present by the suffrages of three million people." *Id.* at 86 (*citing* Lucius Wilmerding, Jr., *The Electoral College* 19-20 (Boston: Beacon Press,1958)).

Indeed, as the monumental 1958 study of the Electoral College by Lucius Wilmerding observed:

> Did [the framers] mean to exclude the people from all participation in the important choice [of President]? Were the Electors to 'make the election according to their own will, without the slightest control from the body of the people?' It is the fashion nowadays . . .to return affirmative answers to these last two questions. The Founding Fathers would have answered them, indeed did answer them, otherwise.

Wilmerding, *supra*, at 19.

This brief only touches upon quotes attributed to various founding fathers, and does so only to show the variety of views on the role of electors. This variety in turn explains why framers did not attempt to foist upon the states their views of the electors' roles, but rather left such questions *to each state* to determine in accordance with the plenary powers granted to them as states under Article II.

Selectively chosen historical quotes have little bearing on how state laws promulgated in accordance with Article II are to be interpreted, particularly with regard to whether such state laws are constitutional. The quotes might have a bearing on discussions conducted in state legislatures on the question of what role a state statute should assign to its electors. At most, though, such quotes could bear on the question of

whether a state legislature might constitutionally *choose* to give electors free independence to cast their vote for anyone they wish, upon their own whim and without regard to the popular vote in their state. The fact that no state legislature since 1876 has ever chosen to do so, however, is telling.

In any case, the issue of what roles electors should play is now moot, inasmuch as since 1876, every state legislature in the union has delegated the appointment of electors to the popular vote of citizens within that state.

Until such time as any state decides by statute to *deprive* its own citizens of the right to choose their own electors who have pledged to cast their vote in the College in accordance with the will of the citizens who elected them, the various comments of framers will remain inapposite to the issue of the role of electors under state law. Under Article II, it is the *state*s, not the federal government, who have been given the power to determine the manner and role of electors.

CONCLUSION

Article II § 1, Clause 2 is constitutional, and has not been abrogated, superseded, abolished, distinguished, or repealed by

subsequent amendments to the constitution. Accordingly, the Colorado legislature acted within the powers granted to it when it promulgated the manner of appointment of electors in its presidential electors statute, Colo. Rev. Stat. 1-4-301 *et seq*. This includes the provision therein requiring elected electors to honor the pledge they made to the voters who elected them, and providing for punishment and/or substitution of their office upon violating either their pledge.

Respectfully submitted this 29th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,650 words, excluding the parts exempted under Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5), (6) and 10th Cir. R. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2018 in 14-point Century Schoolbook.

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CERTIFICATE OF VIRAL SCAN

Undersigned counsel certifies that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, BitDefender Antivirus for Mac, Version 7.0.1.2, last updated August 27, 2018, and, according to the program, are free of viruses.

CERTIFICATE CONCERNING PRIVACY

Undersigned counsel certifies that this brief has been submitted in PDF format to the Tenth Circuit's CM/ECF electronic filing system, and no privacy redactions were necessary under 10th Cir. R. 25.5.

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Undersigned counsel certifies that the hard copies of this brief submitted to the clerk's office are exact copies of the ECF filing.

Dated: August 29, 2018

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CERTIFICATE OF SERVICE

I certify that on August 29, 2018, I electronically filed the foregoing **BRIEF OF ROBERT HARDAWAY, PROFESSOR OF LAW, UNIVERSITY OF DENVER STURM COLLEGE OF LAW AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT AND IN SUPPORT OF AFFIRMING THE DISTRICT COURT** with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I further certify that a true and correct copy of the foregoing was furnished through the CM/ECF system to the following:

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