IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Micheal Baca, Polly Baca, and Robert Nemanich, Appellants, v. Colorado Department of State, Appellees.	Case No. 18-1173

On Appeal from the U.S. District Court for the District of Colorado
No. 17-cv-1937, The Hon. Wiley Y. Daniel presiding

REPLY BRIEF OF APPELLANTS

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

Lawrence Lessig
Jason Harrow
EQUAL CITIZENS
12 Eliot St.
Cambridge, MA 02138
lessig@law.harvard.edu
jason@equalcitizens.us
Attorneys for Plaintiff-Appellants

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

Plaintiff-Appellants Micheal Baca, Polly Baca, and Robert Nemanich ("Plaintiffs"), three of Colorado's presidential electors in 2016, were punished or threatened with punishment by the State solely for voting for the presidential candidate of their choice. This violated Article II and the Twelfth Amendment of the Constitution, which grant to presidential electors the absolute right to vote for their preferred candidates. That principle reigns supreme over any contrary state law or state action.

The State asks this Court to condone its interference so that Coloradans are not deprived of their "fundamental right to cast a meaningful and effective vote for President." State Br. 3. But the Constitution does not give citizens any right to vote directly for President. On election day, citizens cast "advisory" votes for President, *see* State Br. 3, because "citizens themselves vote for *Presidential electors*," not for President. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). Indeed, the State overlooks even its own Constitution, which provides that "the *electors of the electoral college* shall be chosen by direct vote of the people." Colo. Const. sched. § 20 (emphasis added).

To further its unconstitutional goal of controlling presidential electors, the State is forced to distort many areas of constitutional law. The State recognizes that it interfered with electors' performance of their "federal function," yet it ignores key constitutional text prohibiting such interference. And the State's argument for control blurs two key distinctions: first, between the power to appoint (which the State has over electors) and the power to control (which it lacks); and second, between electors pledging to support a presidential candidate (which is rooted in history) and a state's power to legally enforce those pledges (which is without precedent).

Also, this Court has jurisdiction to decide this important case. In the earlier litigation involving two of the Plaintiffs, this Court rejected the application of the so-called political subdivision doctrine to deny standing. And with good reason: that doctrine does not apply to cases brought by independent constitutional actors like presidential electors, especially when they are personally injured. The State's argument to the contrary points to no facts not before this Court when it affirmed standing in 2016, overlooks key allegations of personal injury, and tries to cabin or ignore relevant precedent.

ARGUMENT

THE JUDGMENT FOR DEFENDANT SHOULD BE REVERSED

I. The State Violated Plaintiffs' Constitutional Right To Vote.

Plaintiffs have stated a claim that the State unconstitutionally interfered with Plaintiffs' performance of their federal duties by either discarding their vote, removing them as electors, and referring them for criminal prosecution (M. Baca) or threatening them with those actions (P. Baca and R. Nemanich).

1. The State's actions are unconstitutional because the State interfered with Plaintiffs' performance of a federal function.

The State acknowledges that electors perform a federal function in voting for President and Vice President. *See* State Br. 29. That admission decides this case. It is bedrock law in our federal system that a state may not "dictate the manner in which the federal function is carried out." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). Yet Colorado law purports to "dictate" the performance of a "federal function" by requiring electors to vote in a particular way. The Supremacy Clause, along with other constitutional and statutory provisions, prohibit the State's interference. Moreover, even assuming the State were correct that

Congress could set a policy permitting State interference, Congress has not done so.

a. The State's actions were inconsistent with the Constitution and Federal Law.

Colorado's law, and the Secretary's behavior, are inconsistent with both the Twelfth Amendment and federal law.

In particular, all parties acknowledge that Article II and the Twelfth Amendment provide detailed instructions about how the electoral vote must proceed: the electors *themselves* must "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," and electors *themselves* must then "sign and certify" those lists and transmit the list directly to the federal government. *See* U.S. Const. amd. XII. The federal statutes implementing the Amendment likewise bar any interference by state officials with electors' performance of their federal functions. *See* 3 U.S.C. §§ 9, 12; *see also* Opening Br. 29–32. The constitutional policy is clear: to maintain elector independence, state officials are not to interfere with the vote of presidential electors.

The State fails to grapple with this straightforward point, and it does not represent that its procedures for counting and tallying votes

complied with the Twelfth Amendment. That is because it cannot do so: Secretary of State Williams did not let the electors themselves make their own list of presidential votes; he did not let the electors themselves sign and certify the lists; and he did not let them transmit anything to the federal government. Instead, upon seeing that Plaintiff M. Baca voted for John Kasich, the Secretary directly and personally interfered with the vote, deemed the position of presidential elector "vacant," and replaced M. Baca with another elector. State. Br. 12. The Secretary's actions thus conflicted with federal law and constitutional text.

This Court referred to that clear text in the prior iteration of this litigation. Before the Secretary interfered, this Court speculated that such interference would be "unlikely in light of the text of the Twelfth Amendment." Supp. Appx. 39 n.4. Yet this Court's prediction proved incorrect because the Secretary ignored the constitutional bar and interfered with the electors' performance of their duty.

The State contends this Court was wrong in 2016 because it did not "cite any text in the Twelfth Amendment" and did not "analyze the Twelfth Amendment's text or the historical reasons for its ratification." State Br. 45, 46 n.7. Yet the State provides no citation of the overlooked

constitutional text or explanation of how the Secretary's actions complied with each provision in the Amendment.

Instead, the State ignores the text and dismisses the Amendment as a "bookkeeping provision" that addresses one problem: the so-called "designation" problem that arose because Article II does not permit electors to distinguish between presidential and vice-presidential votes. State Br. 45. According to the State, the Twelfth Amendment solves this problem—and only this one. State Br. 45.

But the Twelfth Amendment makes more than one change to Article II and thus reveals multiple purposes. An earlier version of the amendment had addressed only the "designation" problem, but that version failed. 11 *Annals of Cong.* 303–04 (1802). The next Congress drafted a longer amendment that did more: for instance, it reduced the number of candidates from which the House may choose in an election with no Electoral College victor, and, as relevant here, it provides for a detailed mechanism to administer the electoral college vote free from interference by state officials. *See* U.S. Const. amd. XII. The longer Amendment was adopted, and it must be followed.

The State also avoids the Amendment's details by claiming that Plaintiffs have made only a facial challenge to the binding statute and are not challenging what occurred on December 19, 2016. State Br. 17–18. The State is wrong: the Complaint challenges both the statute and the Secretary's actions. Appx. 17–19 (¶¶ 57–68). And the Complaint requests both that this Court "declare C.R.S. § 1-4-304(5) unconstitutional" and find that the State "violated Plaintiffs' federally protected rights by depriving Micheal Baca of his federal right to act as an Elector and by threatening and intimidating Plaintiffs Micheal Baca, Polly Baca and Robert Nemanich." Appx. 19. Thus, even if the statute were facially constitutional, this Court must still reverse because removing an elector from office once voting began violated Plaintiffs' rights.

b. There is no "federal policy" that favors state interference with electors' performance of a federal function.

The State confuses the non-interference principle with the law of preemption and then purports to find a "federal policy" that supports its interference. State Br. 63–67. But Plaintiffs have not contended that Congress has expressly or impliedly preempted state power. Instead,

Plaintiffs argue that the State cannot act because electors perform a federal function insulated from state interference under the Supremacy Clause and the Twelfth Amendment. *See* Opening Br. 27–40. The Constitution grants states no power to control electors other than in their appointment.

But even accepting the State's argument that Congress could grant states the power to control presidential electors, it has not done so. To the contrary: the State's two attempts to find federal authority for its actions prove Plaintiffs' case. The State first invokes 3 U.S.C. § 5, which provides that States have power to make a "final determination" regarding any "controversy or contest" over the "appointment of electors." State Br. 65–66. From this, it concludes that Congress intended to "leave to the States all decisions regarding the manner of appointing electors and resolution of disputes involving the performance of their duties." State Br. 65–66.

But the State has made an extraordinary leap from "the manner of appointing electors," which federal law addresses, to "disputes involving the performance of [electors'] duties," about which the law is silent. The former power does not entail the latter: the President may not direct

federal judges in "the performance of their duties" merely because the Constitution gives the President the power of their "appointment." *See infra* § I.3. Worse, the State ignores critical language in the very statute it relies upon: a state's resolution of a selection controversy is conclusive only if made *six days before the electoral vote*. 3 U.S.C. § 5. That did not happen here, as M. Baca was replaced after elector voting began.

The State thus has the statute backwards. Federal policy favors confirming the identity of electors before they cast their ballots; it disfavors interference with elector voting. *See Bush*, 531 U.S. at 110 (halting a proposed recount in 2000 because 3 U.S.C. § 5 "requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by" six days before the electoral college vote and the date of the Court's decision).

The State next invokes a D.C. law, passed by Congress, providing that District electors have a "duty" to vote for their party's candidates. State Br. 66–67 (citing D.C. Code Ann. § 1-1001.08(g)(2)). But, as explained both in the Opening Brief and in the Amicus Brief of Post and Rosin, the legislators who passed that law thought legally binding electors was unconstitutional, so the law has no enforcement mechanism

and no way to discard an electoral vote. *See* Opening Br. 47–48; Post and Rosin Amicus Br. 17–21. This omission was illustrated in 2000, when a D.C. elector violated her "duty" with no legal consequence. *Id.* Federal policy thus opposes legal compulsion of presidential electors.[1] *See* Opening Br. 33–40.

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[1] The State also claims that legislative history "makes clear the District's binding statute . . . is enforceable through criminal penalties and fines." State Br. 66 n.11. The State is wrong.

In support of its unusual claim that legislative history adds an enforcement mechanism not in the law's text, it cites two pages of legislative history without providing quotations. *Id.* (citing Subcommittee 3 of the House Committee on the District of Columbia, "Hearings on H. R. 5955," May 15, 1961, at 38–39). The cited pages do not support the proposition. In the cited exchange, a legislator asks whether there are penalties for *any* violation of the D.C. election law, because the proposed legislation did more than govern the pledge of presidential electors. "Hearings" at 38; 4–7 (detailing law's other provisions). The responding legislator reads the penalties for certain election law violations, such as for false registration, voter intimidation, and other common voter fraud crimes, and then says that those penalties apply to the proposed amendments. *Id.* The list of violations does not include a presidential elector's violating a moral duty to support a candidate. *Id.*

2. Constitutional text and original meaning vest electors with discretion to vote for the candidates of their choice.

The Constitution's text requires elector discretion: an "elector" means someone who chooses, the phrase "by ballot" implied a secret ballot, and the word "vote" means exercising a right of suffrage free of coercion. *See* Opening Br. 41–44.[2] This language is inconsistent with state control. In response, the State ignores the meaning of key words like "elector" and invokes the Tenth Amendment where it has no application.

First, the State does not contest that "elector" means "chooser." Nor does it grapple with the obvious proposition that the other type of "electors" mentioned in the Constitution—that is, the citizen-voters who select the House of Representatives, and, after the Seventeenth Amendment, the Senate—cannot have their votes directed by the State. *See United States Term Limits v. Thornton*, 514 U.S. 779, 834 (1995) (government has no power to "dictate electoral outcomes" in elections in

[2] For a definition of the word "vote," *see Oxford English Dictionary* (2d ed. 1989) ("3a. To give a vote; to exercise the right of suffrage; to express a choice or preference by ballot or other approved means."). Additional definitions can be found at Opening Br. 41–44.

which legislative electors vote for federal legislators). Identical language should be given identical meaning, *see, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (finding that the phrase "the people" had the same meaning in both the original Constitution and several amendments in the Bill of Rights), and state control of one kind of elector therefore entails state control of the other. Yet no one believes the state could direct the vote of the citizens who elect Congress. State direction of presidential electoral votes is likewise prohibited.

Second, the State contends that the Tenth Amendment provides it authority, because "if the Constitution is silent, the power to bind or remove electors is properly reserved to the States." State Br. 47–48. As explained above, the Constitution is not silent with respect to the discretion granted electors in our system of separated powers. But anyway, the Tenth Amendment does not authorize the State's actions. As explained in *Thornton,* the State's argument "misconceives the nature of the right at issue because that Amendment could only 'reserve' that which existed before." 514 U.S. at 802. Thus, "the states can exercise no powers whatsoever [that] exclusively spring out of the existence of the national government." *Id.*; *see also* Ind. Inst. Amicus Br. 28–30. It is

undisputed that the existence of presidential electors and the Electoral College "exclusively spring out of the existence of the national government," so the State has "no powers whatsoever" under the Tenth Amendment to control them.

3. The power to appoint does not imply the power to control.

The State repeatedly invokes the passage in Article II giving states the power to "appoint in such manner as the Legislature thereof may direct, a number of electors." U.S. Const. art. II. From this grant of power, the State claims the additional power to control the appointed electors. State Br. 41–44. But the State confuses the power to appoint electors, which it has, with the power to control and then remove them, which it lacks. *See* Opening Br. 57–61.

First, in the parallel context of Senators, the State never had the power to control or remove its appointees. Until the Seventeenth Amendment was adopted, state legislatures had the power to "appoint" United States Senators. *See* U.S. Const. art. I § 3. That power, however, did not include the power to remove a Senator, nor did it include the power to direct how Senators could perform their duties. Opening Br. 57–58. Doubtless the State could "instruct" a Senator, and a Senator ignoring

those instructions was unlikely to be reappointed. But never in the history of the Senate did a state punish a Senator for refusing to follow the instructions of the state legislature—even though the state had "plenary power" over the appointment. Opening Br. 57–58.

The State ignores this analogy and instead attempts to turn the power to appoint into the power to control by relying on three adjectives from the Supreme Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892). Quoting *Blacker*, the State claims that its "power over its electors has been described as 'plenary,' 'exclusive,' and 'comprehensive,'" and it infers from these adjectives that it therefore has the power to control how its appointees perform their duty. State Br. 41.

But this reading of *Blacker* is incorrect, as the full sentences from which those words were chosen reveals. In each instance, the Court described a state's power *to appoint electors* as "plenary," "exclusive," or "comprehensive"—not a state's "power over its electors" from beginning to end, as the State implies:

- "Plenary": "It is seen that from the formation of the government until now the practical construction of the clause has conceded

plenary power to the state legislatures *in the matter of the appointment of electors*." 146 U.S. at 35.

- "Exclusive": "In short, the *appointment and mode of appointment* of electors belong exclusively to the States under the Constitution of the United States. . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive." *Id.*
- "Comprehensive": **"**It has been said that the *word 'appoint' is not the most appropriate word to describe the result of a popular election*. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest *power of determination*." *Id.* at 27 (all emphases added).

Nor is the State correct that "the power to appoint necessarily encompass[es] the power to remove" and to control. State Br. 43. In fact, appointment, control, and removal are separate concepts, so the power to appoint typically does *not* come with the power to control or remove actors in a system of separated powers: consider judges, Senators appointed

before the Seventeenth Amendment, or state and federal legislators appointed by executive officials when vacancies arise, all of whom can be appointed by authorities that cannot unilaterally control or remove them for failing to obey instructions.[3] *See* Opening Br. 57–59.

The State invokes several cases in which the Supreme Court found that the removal of a subordinate executive branch official was incident to the appointment power, but the analogy is inapt. *See* State Br. 44 (citing *Myers v. United States*, 272 U.S. 52 (1926)). An appointing officer has the power to remove a subordinate officer *when the Constitution or laws give the appointing officer control* over the appointed office. Thus, as *Myers* makes clear, the Take Care Clause and other provisions give the President the power to control and remove members of the executive branch. *See Myers*, 272 U.S. at 163–64 ("Article II grants to the President the executive power of the Government . . . including the power of appointment and removal of executive officers—a conclusion confirmed

[3] As the State points out (State Br. 43–44), federal judges are provided with life tenure absent impeachment. But that is beside the point: just because the Constitution gives some appointees job protections does not mean that the power to remove and control is *necessarily* incident to the power to appoint. The State provides no authority supporting that extraordinary proposition.

by [the] obligation to take care that the laws be faithfully executed [and other parts of the Constitution]."). But there is no Take Care Clause for presidential electors, nor any other textual basis for asserting that the State has unfettered power over electors once appointed.

To the contrary: Presidential electors have independence from state executive officials because electors are not executive branch officials or state officers. Instead, electors occupy an independent branch of government immune from direct control by the State. *See* Opening Br. 19–21. According to one of the State's amici, presidential electors occupy one of "two separate congresses" created by the Constitution: "one to enact legislation, and the other to convene only once every four years for the sole purpose of electing a president." Robert M. Hardaway, *The Electoral College and the Constitution*, San Diego Union-Tribune, May 17, 2009, https://perma.cc/VR2D-268K?type=image; *see also infra* § II.1 (discussing text of the Fourteenth Amendment making clear that electors are neither state nor federal officers). There is thus no principle of constitutional law—or text within the Constitution—that ties the power to appoint electors to the power to remove them.

Ray v. Blair, upon which the State frequently relies, supports this distinction. In *Ray*, the Court affirmed that a state is free to refuse to appoint electors who do not pledge to support a party nominee. That determination is within the scope of an appointment power, just as the President is free to exclude potential judges who fail to pledge as the President requires. But the Court in *Ray* separated a pledge from its enforcement and declined to decide whether "promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution." 343 U.S. at 230. The Court thus recognized the distinction between appointment and performance of an elector's function, and it made clear that resolution of the appointment question did not resolve the question about performance.

4. Over two centuries of history confirm that the State lacks the power to remove electors on the basis of their votes.

Before this last election, never in the history of the Republic did a state remove or punish an elector who did not vote as the State expected. In fact, the State does not dispute that over 167 so-called "faithless" or rogue electoral votes have been cast in twenty separate elections, from

the very earliest presidential elections and running through 2016. *See* Opening Br. 46. And it does not dispute that Congress has counted every such vote, and, when the issue came to a debate following the 1968 election, affirmed the right of electors to cast them. Opening Br. 46–48. History vividly supports Plaintiffs' right to cast votes for the candidates of their choice.

Instead of grappling with Plaintiffs' evidence, the State claims that the record "reveals, at best, an inconsistent and largely conflicting paper trail of opinions by the Framers regarding the electors' proper role." State Br. 56. Yet the State fails to invoke a single primary source that actually supports its position. Instead, it relies on a misleading quotation from Hamilton's Federalist No. 68 and on modern, secondary sources of dubious accuracy and relevance.

The State claims that "Hamilton himself expressed contradictory positions on whether electors were to exercise discretion." State Br. 55. In support, the State cites Federalist 68, in which Hamilton wrote that "[i]t was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided." But the State omits Hamilton's continuation of the thought: "It was

equally desirable, that the immediate election [of President] should be made by [people] most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation." *The Federalist* No. 68. In other words, the "sense of the people" should influence the choice of who becomes President, but it was clear that the actual election would be up to "[a] small number of persons, selected by their fellow-citizens from the general mass." *Id.* Hamilton thus reveals no ambiguity about the role of electors.

Nor has the State offered meaningful evidence that James Madison harbored conflicting views. The State claims that Madison held the view that the "Electoral College . . . permitted the President 'to be elected by the People' or the 'people at large,'" State Br. 55, but it never directly quotes Madison and instead cites modern secondary sources. That is a problem, because the primary sources themselves say something quite different than what the State offers.

During a debate at the Convention about the method of presidential selection, Madison said that presidential election by "the people at large" would have been ideal. 2 *Farrand's Records of the Federal Convention* 56–57 (July 19, 1787). But then Madison recognized a potential problem

with "an immediate choice by the people": "[t]he right of suffrage was much more diffusive in the Northern than the Southern States," so it would not be feasible to elect the president by the "people at large." *Id.* Madison concluded the thought by noting that the "substitution of electors obviated this difficulty." *Id.* Thus, contrary to the State's implication, Madison did not equate election by the "people at large" with election by electors, but instead contrasted the two. Separately, in the course of a discussion of the veto power, Madison said the President was "elected by the people" only to contrast that idea with the prior suggestion of presidential selection by the Legislature. 2 *Farrand's Records of the Federal Convention* 586–87 (Sept. 12, 1787). Madison was not making a point about the role of electors, as the State contends.[4] State Br. 55.

Nor do any more recent developments support the State's case. For most of the Nation's history, no states had formal pledges or legal instructions for their electors; as late as 1948, only two states had laws that formally instructed electors how to vote. Ruth Silva, "State Law on

[4] The State also introduces evidence that some Framers "advocated for direct popular election of the President." State Br. 55. That evidence is irrelevant, because that view was not adopted.

the Nomination, Election, and Instruction of Presidential Electors," 42 *American Pol. Sci. Rev.* 523, 527–28 (1948). Colorado's law was adopted in 1959, State Br. 5, meaning that, in nearly 60% of presidential elections since Colorado entered the Union, Colorado's electors had legal freedom to vote for any candidate. Thus, the supposed "longstanding practice" of elector compulsion is not only not longstanding, but, before 2016, it had never been practiced.

5. Forcing electors to vote for a particular candidate impermissibly adds a new requirement for office.

In the Opening Brief, Plaintiffs explained how the State's action here contravenes principles derived from the Qualifications Clause, because forcing electors to vote for a particular candidate adds impermissible requirements for the selection of both electors and Presidential candidates. Opening Br. 52–56. If the State has the power it claims, there is nothing to prevent the State from penalizing electors for voting for a socialist, a veteran, a Raiders fan, or a candidate who does not release recent tax returns. The Constitution, though, prevents this parochial meddling. Opening Br. 55–56.

The State does not respond to this argument, nor does it attempt to distinguish *Powell v. McCormack*, 395 U.S. 486 (1969), and *Thornton*, 514 U.S. 779, which Plaintiffs argued further support their argument that the State cannot change the balance struck in the Constitution. That omission should be considered by this Court as it evaluates the strength of any potential response. *See Hernandez v. Starbuck*, 69 F.3d 1089, 1094 n.3 (10th Cir. 1995) (appellee's failure to respond "greatly increases the chances the court of appeals will be persuaded by the appellant's position").

II. Plaintiffs Have Standing To Vindicate Their Personal Rights To Vote.

Plaintiffs have standing to proceed in this important case. Their sole cause of action alleges they were personally injured by having their votes discarded and being removed as a presidential elector and referred for criminal prosecution (M. Baca) or by being threatened with the same consequence (P. Baca and R. Nemanich). The State does not dispute that Plaintiffs have alleged an injury-in-fact, that the injury is traceable to the defendant's conduct, and that the injury can be redressed. Opening Br. 15–16. Plaintiffs thus presumptively have standing.

Moreover, this Court has already affirmed that Plaintiffs have standing in this very dispute. Supp. Appx. 34. Likewise, no federal case brought by a presidential elector plaintiff has been dismissed on the grounds that the political subdivision doctrine defeats standing. State Br. 10 (collecting recent cases by presidential electors). And none of the five amicus briefs in this case question Plaintiffs' standing, regardless of whom the amici support.

Undeterred by all of this, the State persists in its argument that the federal courts lack jurisdiction. State Br. 23. But the State points to nothing new in the record since the 2016 appeal that defeats standing, nor does it cite any new law that would permit this Court to depart from that earlier conclusion. This Court thus should—indeed, must—consider the merits of this case.

1. The "political subdivision" doctrine does not apply to constitutionally independent actors like presidential electors.

The State's attempt to invoke the "political subdivision" doctrine to bar this suit is doomed from the beginning. To Plaintiffs' knowledge, the doctrine has never before been applied to prohibit a suit against a state by those who occupy independent positions created by the federal

constitution, and the State does not cite an example. To the contrary: the State acknowledges that the doctrine applies to disputes between state subdivisions and their "parent states" because federal courts do not "resolve certain disputes between a state and local government." State Br. 23 (quotation marks omitted). If so, then the doctrine does not apply, because presidential electors are not mere creatures of the state, and Colorado is not the "parent state" of its appointed electors. Instead, presidential electors are independent actors in the federal constitutional system. *See supra* § I.

Article II and the Twelfth Amendment make that role clear, and the Fourteenth Amendment explicitly distinguishes between presidential electors and state officers. Section 3 of that Amendment says that "No person shall be a Senator or Representative in Congress, *or elector of President and Vice-President*, or *hold any office*, civil or military, under the United States, *or under any State*," if that person engaged in "insurrection or rebellion." U.S. Const. amd. XIV § 3 (emphases added); *see also id.* § 2 (distinguishing between elections for "the choice of electors for President" and "executive and judicial officers of a state, or the members of the legislature thereof"). Because the Constitution

distinguishes between presidential electors on the one hand and those who hold "any office . . . under any State" on the other, electors do not hold office under a state. If they did, the Amendment's mention of presidential electors would be superfluous. *See Hurtado v. California*, 110 U.S. 516, 534 (1884) ("[W]e are forbidden to assume . . . that any part of this most important amendment [the Fourteenth] is superfluous."). The political subdivision doctrine thus has no application.

The State again resists constitutional text and says that "presidential electors are without doubt state officers." State Br. 25. But the Supreme Court authority on which the State relies for this argument does not support the proposition. Instead, the three quotations the State reproduces all say that presidential electors are not "*federal* officers or agents," which is true, but the cases do not say that electors are state officers either. State Br. 25–26 (citing cases). Nor could they hold that, because it is not correct. Instead, as the State's own amicus recognizes, presidential electors are independent members of one of "two separate congresses" created by the Constitution to "serve[] the same function as the parliament in all the great parliamentary democracies of the world by choosing the chief executive officer." Hardaway, *supra*.

The State refuses to address this possibility and instead miscasts Plaintiffs' argument as claiming that elector independence rests entirely on the "federal function" that presidential electors perform. State Br. 28–30. But as Plaintiffs explained, it is not only their federal function that confirms their independence; it is also the nature of their position. Opening Br. 19–21. After all, the Supreme Court has analogized a presidential elector to "the state elector who votes for congress[person]"—that is, someone with independence who is not answerable to any government official, whether state or federal. *Ray*, 343 U.S. at 224. The political subdivision doctrine thus has no application.

But even if this Court were to determine that Plaintiffs were nominally state officers, it should still conclude that the political subdivision doctrine does not apply. The Supreme Court has held that where a plaintiff is a "substantially independent state officer" suing the state, the political subdivision doctrine does not apply. *Lassen v. Arizona*, 385 U.S. 458, 459 n.1 (1967) (plaintiff's independence permitted the Court to hear an action that was "in form and substance a controversy between two agencies of the State of Arizona"). Following *Lassen*, this Court exercised jurisdiction over a suit by school districts against

Colorado in part because the plaintiffs were "'substantially independent,'" even though the districts "owe their existence as political subdivision to the state." *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998) (quoting *Lassen*, 385 U.S. at 459 n.1). The same reasoning applies here.

2. Even if Plaintiffs are considered subordinate state officers, they have standing under *Allen* and *Coleman*.

Even if Plaintiffs were the kind of state officer to whom the political subdivision standing doctrine could apply (though they are not), the doctrine would not apply here because M. Baca's vote was discarded, he was dismissed as an elector, and then he was referred to the Attorney General for potential criminal prosecution. Opening Br. 21–25. The other Plaintiffs were threatened with identical injury. This is the kind of personal injury that gives Plaintiffs a "personal stake" that confers standing. *See id.*

The State's response to this argument ignores the Complaint and distorts the law. Factually, the State claims that the alleged injury in the Complaint "is not an individual one based on the possible loss of nominal compensation" but instead "an institutional injury grounded in the

diminution of power . . . to the electors' official role." State Br. 36–37. The State is wrong. Actually, the Complaint alleges that M. Baca was injured by being removed from his position and then personally referred for criminal prosecution, and that P. Baca and R. Nemanich were injured by being threatened with the same actions. Appx. 17–18 (¶¶ 55, 56, 63, 64). The State fails to explain how that type of injury can be characterized as "institutional," and it ignores entirely the fact that M. Baca was personally referred for perjury prosecution. If that is not a personal injury, then nothing is.[5]

The State's attempt to cabin or limit *Board of Education v. Allen*, 392 U.S. 236 (1968), is unpersuasive. The State overlooks the fact that this Court's decision in *City of Hugo v. Nichols* recently reaffirmed the continuing validity of *Allen* when it said that state officials have standing "based on the individual [plaintiffs'] personal stake in losing their jobs." *City of Hugo v. Nichols,* 656 F.3d 1251, 1260 (2011). The State would have

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[5] After a long investigation that consumed M. Baca's time and money, the Attorney General decided not to prosecute. Brian Eason, *Colorado's Faithless Elector Won't Be Prosecuted*, Denver Post, Aug. 21, 2017, http://bit.ly/mbaca821. Secretary Williams said he was "disappointed" that M. Baca would not face criminal charges. *Id.*

this Court ignore binding precedent and rely instead on secondary sources claiming that *Allen* has been "undermined," and it also cites an outlier, out-of-circuit case that this Court has expressly rejected. *See* State Br. 34–35 (quoting *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980), *rejected in the 10th Circuit by Branson*, 161 F.3d at 630). The State's argument may make for an interesting law review article, but it should find no purchase here.

Coleman v. Miller, 307 U.S. 433 (1939), also supports this Court's earlier decision on standing. The State would essentially erase *Coleman*, even though this Court's reliance on it came after all of the State's relevant citations. State Br. 32–33; Opening Br. 24. In any event, the State's claim that the electors would have had standing under *Coleman* if they constituted a majority of the presidential electors again misunderstands the nature of Plaintiffs' role: unlike a legislature, which makes decisions as a body, each elector has an individual right to vote and then transmit that vote directly to the Congress. U.S. Const. amd. XII. Each elector can thus maintain a suit to vindicate the denial of that personal right.

3. Plaintiffs also have standing because their claim relies on the Supremacy Clause.

Plaintiffs' standing is also validated by this Court's decision in *Branson*, which "made explicit" that "[a] political subdivision has standing to sue its political parent on a Supremacy Clause claim." 161 F.3d at 630. The State argues that *Branson* was essentially overruled by a later panel of this Court in *City of Hugo*, but a three-judge panel is not empowered to do that.[6] In any event, the opposite happened: this Court in *City of Hugo* held that the municipal plaintiff there "lacked standing under *Branson*." *City of Hugo*, 656 F.3d at 1258. Because this appeal involves claims under the Supremacy Clause and "alleges a violation by the state of some controlling federal law"—namely, the Twelfth Amendment, Article II, and the federal statutes that implement them—this Court has jurisdiction. *See Branson*, 161 F.3d at 630.

[6] If there were a conflict between *Branson* and *City of Hugo*, *Branson* would control. *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 918 n.7 (10th Cir. 2012) ("[W]here Tenth Circuit panel decisions conflict, the earliest decision controls.").

4. Prudential standing factors counsel in favor of hearing this case.

Finally, to the extent this Court were to consider prudential standing factors, they counsel in favor of hearing this case. Plaintiffs agree with the State that this case "is a matter of great importance to Coloradans." State Br. 68. Indeed, the case is of great importance to the entire Nation. It is far better for the federal courts to finally resolve the important constitutional issue of elector freedom in this appeal before the issue reaches the federal courts as an emergency in a contested election. Nothing in Article III prevents this Court from issuing a decision here, so this Court should reach the merits.

CONCLUSION

The grant of the State's Motion to Dismiss should be reversed and the judgment for the State vacated.

Dated: September 17, 2018

Respectfully submitted,

/s/ Jason B. Wesoky

Jason B. Wesoky
1331 17th St., Suite 800
Denver, CO 80202
Telephone: 303-623-9133
Fax: 303-623-9129

E-mail:
jason.w@hamiltondefenders.org

Lawrence Lessig
Jason Harrow
EQUAL CITIZENS
12 Eliot St.
Cambridge, MA 02138
lessig@law.harvard.edu
jason@equalcitizens.us

Attorneys for Plaintiff-Appellants

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Reply Brief of Appellant complies with the word limitation set forth in Rule 32(a)(7)(B)(i). According to the word-processing system used to prepare this brief, MSWord 2010, the word count for this brief, excluding the Table of Contents, the Table of Authorities, and the certificates of counsel (*See* Fed. R. App. P. 32(a)(7)(iii)) is 6,399.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of any hard copies that were filed (if any); and 3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot SecureAnywhere, Virus definition version dated September 17, 2018, and according to the program are free from viruses. I further certify that the information on this form is true and correct to the best of my ability and belief formed after a reasonable inquiry.

/s/ Jason B. Wesoky
Jason B. Wesoky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of September, 2018, a true and correct copy of the **REPLY BRIEF OF APPELLANTS** was filed with the Court and served electronically via CM/ECF on the following:

Matthew D. Grove
LeeAnn Morrill
Grant Sullivan
Office of the Solicitor General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6157
720-508-6359
720-508-6349
Facsimile: 720-508-6041
Email: matt.grove@coag.gov
leeann.morrill@coag.gov
grant.sullivan@coag.gov

/s/Kurt E. Krueger
Kurt E. Krueger