No. 19-518

In the Supreme Court of the United States

Colorado Department of State, *Petitioner*

v.

Micheal Baca et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Amicus Curiae National Conference of Commissioners on Uniform State Laws Supporting Petitioner

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Question Presented

Amicus curiae National Conference of Commissioners on Uniform State Laws ("NCCUSL"), also known as the Uniform Law Commission ("ULC"), addresses Petitioner's ("Colorado's") second question presented:

> Does Article II or the Twelfth Amendment forbid a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots?

Brief for Petitioner i ("Colo. Br.").

Amicus ULC focuses on this question from the perspective of its Uniform Faithful Presidential Electors Act ("UFPEA"). Colorado suggests that the UFPEA could be jeopardized by the Tenth Circuit decision. Colo. Br. 18-19; *see also* Colo. Pet. 35 ("throws into doubt"). The ULC agrees and urges the Court to uphold Colorado's "faithless elector" statute as constitutional under both Article II and the Twelfth Amendment.

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Interest of Amicus Curiae[1]

ULC History

In 1892, a group of distinguished lawyers established The State Boards of Commissioners for Promoting Uniformity of Law in the U.S. By 1905, the Commission had changed its name to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and adopted a constitution and bylaws. Today, it is commonly called the "Uniform Law Commission" or "ULC." Louis Brandeis, Wiley Rutledge, William Rehnquist, and David Souter served as ULC Commissioners and were later appointed to the U.S. Supreme Court. Members of the ULC also include legal luminaries Karl Llewellyn and William Prosser.

ULC Structure

The ULC is composed of approximately 425 Commissioners, representing each State, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each State determines the method and number of Commissioners appointed, with state officials, often the Governor, making appointments. Some Commissioners are state legislators, but most are practitioners, judges, or law professors—all are licensed to practice law. Commissioners receive no compensation for work with the ULC, volunteering

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[1] Rule 37 statement: All parties consented to filing this brief; no counsel for any party authored it in whole or in part; no party counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amicus or its counsel funded it.

their time.[2] The ULC receives most of its financial support from state appropriations, supplemented by publisher revenue and foundation and federal-government grants.

The ULC's purpose is to provide non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. The ULC strengthens federalism by recommending state statutes and procedures that, if adopted, would be consistent from state to state, but that also reflect the diverse experience of the states. As Justice Sandra Day O'Connor noted, "[t]he [ULC] plays an integral role in both preserving our federal system of government and keeping it vital." Robert A. Stein, *Forming a More Perfect Union: A History of the Uniform Law Commission* Foreword (2013).

ULC Process

The ULC offers a deliberative, intensive, and uniquely open drafting process that not only draws on the expertise of Commissioners, but also utilizes input from legal experts, advisors, and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

The ULC receives proposals for new acts from state bars, state government entities, private groups, ULC Commissioners, and private individuals. A proposal is generally assigned to a Study Committee, which researches the topic and decides whether to recommend

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[2] When state law allows, some travel expenses that Commissioners incur are reimbursed, including state reimbursement for annual-meeting attendance and reimbursement for costs associated with participation in the ULC committee meetings.

drafting an act. The ULC's Executive Committee typically reviews these recommendations. An approved recommendation leads to the creation of a Drafting Committee.

An expert in the relevant legal field is chosen as the drafter ("Reporter"). Advisors from the American Bar Association, as well as other interested stakeholders, are invited to assist the Drafting Committee. Each draft act normally receives a minimum of two years of consideration,[3] and all committee drafts are available for review and comment by all ULC Commissioners.

The Committee of the Whole at the ULC's annual meeting debates draft acts from Drafting Committees. Each must be considered section by section at no fewer than two annual meetings.[4] Thereafter, the states vote on the act's approval. Unless a rare exception is granted, a majority of states present, and no fewer than twenty states, must approve an act before it is officially approved. Upon final approval, ULC Uniform Acts are submitted to state legislatures for enactment.[5]

Many ULC acts have been widely adopted by states, including the Uniform Commercial Code,[6] Uniform

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[3] *But see* ULC Const. § 8.1(b) and (c) (allowing rarely used waivers), *available at* https://www.uniformlaws.org/aboutULC/constitution.

[4] *But see supra* note 3 (waivers).

[5] ULC Commissioners have a duty to seek introduction/enactment of uniform acts in their states. ULC Const. § 6.1(6).

[6] The UCC is a joint project with the American Law In-

(continued...)

Anatomical Gift Act, Uniform Trade Secrets Act, and Uniform Interstate Family Support Act. This Court has recognized the ULC's influence over many areas of law, including tax policy, tort law, and criminal law. *See, e.g.*, *Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 310 n.3 (1982); *McDermott, Inc. v. Amclyde*, 511 U.S. 202, 209 n.8 (1994); *Ponte v. Real*, 471 U.S. 491, 520 (1985).

The UFPEA

Presidential-Electors law is another area the ULC has long sought to influence because of its foundation in state law and importance to the nation. In 1893, the ULC established a committee on the Uniformity of State Action in Appointing Presidential Electors after a federal law requiring states to provide for "ascertainment" of electors was enacted. 24 Stat. 373 (1887) (repealed and replaced by 3 U.S.C. § 1 et seq. (1948).

The ULC's interest in Presidential-Electors law was cemented into a uniform law in 2010. Drafting began on the UFPEA in 2009, with Robert Bennett[7] serving as the Act's Reporter.[8] Throughout 2009, multiple

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[6] (...continued)
stitute. This Court considered a constitutional challenge to a provision of the UCC, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), upholding it.

[7] Robert Bennett is the former dean of the Northwestern University School of Law and the author of *Taming the Electoral College* (2006).

[8] Amicus's counsel of record, James Bopp, Jr. (Indiana) is a ULC Commissioner who served on the UFPEA's Draft-
(continued...)

drafts as well as supporting legal memos and comments were considered, resulting in the 2010 Interim Draft. After further review and comment at the 2010 annual meeting,[9] the UFPEA was approved by a vote of the States, forty-four in favor, one opposed, four abstaining, and four not voting.

Summary of the Argument

Faithless electors, who vote for a candidate other than those for whom the popular electoral majority (or plurality) assumed it was casting its votes, hold the potential for serious damage to our democratic process. Voters today are entirely reasonable in thinking they are voting for the candidates whose names appear, either solely or predominantly, on the ballot—not for little-known individuals named by the political parties or candidates. The public outrage that would arise if a faithless elector could determine the outcome of a presidential election would cause a constitutional crisis that this Court would undoubtedly be asked to decide.

The ULC's solution, the UFPEA, requires electors to pledge to mark their ballots in compliance with the

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[8] (...continued)
ing Committee. Of Counsel to Amicus ULC are also prominent ULC Commissioners: Carl H. Lisman (Vermont) is its President, Daniel Robbins (California) is Chairman of its Executive Committee, Susan Kelly Nichols (North Carolina) was the Drafting Committee's Chair, and Peter F. Langrock (Vermont) was its former Vice President and a ULC member for over fifty years.

[9] This process complied with the ULC's standard practice of considering an act for two annual meetings. *See supra* at 3.

voters' wishes and removes and replaces electors breaking that pledge before they cast their ballot. Several states have adopted the UFPEA, and a case in Minnesota demonstrated its function. The UFPEA is substantially similar to Colorado's remove-and-replace system, while Washington's previous provision (in No. 19-465) differs by imposing a civil penalty for casting a faithless ballot as the means of attempting to enforce compliance.[10] (Part I.)

The UFPEA complies with controlling constitutional provisions, statutory provisions, and this Court's precedent. It is a practical, elegant solution to the problem. Given the similarity between Colorado's law and the UFPEA, the Tenth Circuit decision jeopardizes the UFPEA and is inconsistent with controlling provisions and precedent. This Court should reverse the Tenth Circuit's decision and hold Colorado's faithless Presidential Elector statute constitutional. (Part II.)

Furthermore, the ULC supports a holding by this Court that Colorado's provision is constitutional in light of the vital governmental and public interests at stake. (Part III.)

Argument

I.
The UFPEA Is a Remove-and-Replace Provision, Like Colorado's.

Colorado earlier said the decision below "throws into doubt the automatic-resignation provision in [the UFPEA], promulgated by the [ULC] and enacted in six states." Colo. Pet. 35 (citing UFPEA § 7(c)). The ULC

[10] In 2019, Washington replaced its after-the-fact, civil penalty with the UFPEA.

agrees and discusses here (**A**) the UFPEA, (**B**) its application, and (**C**) how it compares to the faithless-elector provisions of Colorado and Washington.

A. The UFPEA Removes Faithless Electors Before They "Cast" a Ballot.

The UFPEA with comments is appended.[11] In the Prefatory Note, the ULC identifies the problem and includes a solution.

The ULC explains the problem that the realities of the selection process have changed dramatically over the years, so that how the Electoral College actually functions could hardly have been imagined by those who promulgated the constitutional provisions regarding it. The dissonance between formality and reality has opened room for "faithless electors." Faithless electors hold the potential for serious damage to our democratic processes, making advisable a uniform law to minimize the dangers posed. ULC App. 6a-9a.[12]

Regarding the solution, the Prefatory Note shows how the UFPEA resolves the problem. The UFPEA requires a state-administered pledge of faithfulness (§§ 4 and 6(c)), with the presentation[13] of a ballot

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[11] *Available at* https://www.uniformlaws.org/acts/catalog/current (search "Faithful Presidential Electors Act").

[12] For readability, some language from the UFPEA comments is used herein without quotation marks but with citations.

[13] Presenting a marked ballot is not "casting" a vote because "cast" is defined to require acceptance of a ballot compliant with the pledge. UFPEA § 2(1) ("cast" defined); § 7(b)

(continued...)

marked by the elector in violation of that pledge being deemed a resignation from the office of elector (§ 7(c)) and the vacancy so created being filled by a substitute elector taking a similar pledge (§ 6(b) and (c)). After a full set of faithful elector votes is obtained, the UFPEA provides that the official notification of the identity of the state's electors ("certificate of ascertainment," *see* 3 U.S.C. § 6) be officially amended by the Governor, so the state's official list of electors contains the names of only faithful electors (§ 8). ULC App. 7a-9a.

The applicable provisions of the UFPEA are set forth next. Some sections are described. Critical ones are stated in full.

Section 2, "**Definitions**," defines "cast" as "accepted by the [Secretary of State] in accordance with Section 7(b)." ULC App. 10a.[14]

Section 3 provides for "**Designation of State's Electors**." It provides for political parties to designate an "elector nominee" and an "alternate elector nominee." "Except as otherwise provided in Sections 5 through 8, this state's electors are the winning elector nominees under the laws of this state." Elected alternates are a convenient vehicle to facilitate filling elector vacancies, dealt with under Section 6. ULC App. 11-12a.

Section 4 mandates the "**Pledge**" by electors "to serve and mark my ballots for President and Vice Pres-

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[13] (...continued)
(only compliant ballots are accepted and counted).

[14] Brackets indicate where the proper state official is to be inserted or optional text is provided. ULC App. 11a (Comment).

ident for the nominees for those offices of the party that nominated me." ULC App. 13a-14a.[15]

Section 6 provides for "**Presiding Officer; Elector Vacancy**." Section 6(a) provides that a designated public official shall preside at the meeting of electors, and Section 6(b) provides a means of filling vacancies among electors. ULC App. 17a-19a.

Section 7 provides for "**Elector Voting**":

> (a) At the time designated for elector voting and after all vacant positions have been filled under Section 6, the [Secretary of State] shall provide each elector with a presidential and a vice-presidential ballot. The elector shall mark the elector's presidential and vice-presidential ballots with the elector's votes for the offices of President and Vice President, respectively, along with the elector's signature and the elector's legibly printed name.
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> (b) Except as otherwise provided by law of this state other than this [act], each elector shall present both completed ballots to the [Secretary of State], who shall examine the ballots and accept as cast all ballots of electors whose votes are consistent with their pledges executed under Section 4 or 6(c). Except as otherwise provided by law of this state other than this [act], the [Secretary of State] may not accept and may not count either an elector's presidential or vice-presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector's pledge.

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[15] Note the use of "mark" instead of "cast," the distinction and significance of which is discussed herein.

> (c) An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge executed under Section 4 or 6(c) vacates the office of elector, creating a vacant position to be filled under Section 6.
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> (d) The [Secretary of State] shall distribute ballots to and collect ballots from a substitute elector and repeat the process under this section of examining ballots, declaring and filling vacant positions as required, and recording appropriately completed ballots from the substituted electors, until all of this state's electoral votes have been cast and recorded.

ULC App. 20a-22a. This section describes the conditions under which the Secretary of State "accepts" ballots for purposes of the "cast" definition. Ballots not accepted (for noncompliance with legal requirements as to marking or pledge) are not "cast." Electors proffering noncompliant, unaccepted ballots immediately—by action of law—"vacate[] the office of elector, creating a vacant position to be filled under Section 6." ULC App. 21a-22a.[16]

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[16] In light of the foregoing, Colorado's two references to the UFPEA, Colo. Br. 2 and 19 n.6, are clarified as follows.

First, Colorado says the UFPEA "automatically creates an elector vacancy if any elector *attempts to cast a ballot* inconsistent with their pledge," Colo. Br. 2 (emphasis added). That description must be understood in light of the definition of "cast" (§ 2) as "*accepted* by the [Secretary of State] in accordance with Section 7(b)" (emphasis added) and the permitted elector action as "*present[ing*] both com-

(continued...)

B. The UFPEA Has Been Adopted by States and Successfully Functioned.

The UFPEA has been adopted in Washington,[17] Indiana, Nebraska, Nevada, Montana, and Minnesota.[18]

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[16] (...continued)
pleted ballots to the [Secretary of State], who shall examine the ballots and *accept* as cast all ballots of electors whose votes are consistent with their pledges" (§ 7(b) (emphasis added)). So Colorado's use of "attempt[] to cast" is in a non-technical sense, with the actual statutory language saying electors only *present*, not *cast*, and casting only happens by compliance with the pledge and rules upon inspection and acceptance by the presiding state official.

Second, Colorado says "ballots are 'cast' only after a 'full set of faithful elector votes is obtained.'" Colo. Br. 19 n.6. To be clear, compliant ballots are provided by electors and cast by acceptance *seriatim* (§ 7(b)) "until all of this state's electoral votes have been cast and recorded" (§ 7(d)). Then, "[a]fter a full set of faithful elector votes is obtained," the presiding official amends the "certificate of ascertainment" (if required) with the names of only faithful electors (§ 8).

[17] In 2019, Washington adopted the UFPEA. *See* Wash. Rev. Code §§ 29A.56.080-092. The provision at issue in the Washington case (No. 19-465) has been replaced; the Washington Supreme Court reviewed the former statute.

[18] *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d. Other states, while not adopting the UFPEA, have adopted statutes providing that an elector's faithlessness constitutes resignation from the office of elector, with the vacancy to be filled by a designated process. *See, e.g.*, N.C. Gen. Stat. § 163-212 (2019) (also provides a fine for (continued...)

In 2016, a Minnesota "faithless elector" challenged that state's adoption of the UFPEA. (Minn. Stat. § 208.40 et seq.). The elector had pledged to mark his ballot for the Democratic nominees for President and Vice President, if they won the popular vote. *See Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 U.S. Dist. LEXIS 178222, at *2 (D. Minn. Dec. 23, 2016), *aff'd on mootness grounds*, 903 F.3d 813 (8th Cir. 2019). When he presented a ballot in noncompliance with his pledge, the Secretary of State refused to accept and count his ballot and appointed an alternate to replace him, per the statute. *Id.*

The court found the faithless elector unlikely to succeed on the merits and denied his requested preliminary injunction, reasoning that, under the Constitution and the arc of history, electors are not independent and not "left to the exercise of their own judgment." *Id.* at *11. Instead, the court said electors have "'degenerated into mere agents,'" and these agents must be faithful, lest they be "'dangerous.'" *Id.* (quoting *Ray v. Blair*, 343 U.S. 214, 230 n. 15 (1952) (internal citations omitted)). The court emphasized that this Court has reiterated that "'[h]istory has now favored the voter'" by allowing *citizens,* rather than legislators, to vote for electors. *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). The court's initial constitutional analysis upheld Minnesota's UFPEA and provides insight here.

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[18] (...continued)
faithless electors); Mich. Comp. Laws Serv. § 168.47 (LexisNexis 2019); Utah Code Ann. § 20A-13-304(3) (LexisNexis 2019).

C. Colorado's Provision Is Similar to the UFPEA, but Washington's Previous Provision Differs.

The UFPEA operates by an automatic remove-and-replace system that functions *before* a vote is "cast," with "cast" meaning "accepted" as legally compliant.

Colorado's remove-and-replace system, as interpreted by Colorado state courts, operates in a similar manner to the UFPEA. *See* Colo. Br. 2. (Colo. Rev. Stat. § 1-4-304). Under § 1-4-304(5), "[e]ach presidential elector shall vote for the presidential [and vice-presidential] candidate . . . who received the highest number of votes at the preceding general election in this state." Under § 1-4-304(1), "refusal to act" requires that "the presidential electors present shall immediately proceed to fill the vacancy." The district court in the Colorado case held that "[a] presidential elector's failure to comply with § 1-4-304(5)[] is a 'refusal to act' . . . and causes a vacancy" that "shall be immediately filled." Colo. Pet. App. 201-02. "Colorado's courts have interpreted 'refusal to act' to include an elector's *decision* to cast a ballot for someone other than the presidential candidate who won the State's popular vote." Colo. Pet. App. 2 (emphasis added; original emphasis removed).

According to the facts alleged in the Colorado case, when Mr. Baca's decision to cast a noncompliant ballot was revealed, he was removed and his noncompliant ballot was not accepted and so was not cast. *See* Colo. Br. 4.

The Washington provision in No. 19-465 provides that: "Any elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." Wash. Rev. Code § 29A.56.340. The Washington

Supreme Court upheld that provision. *In re Guerra*, 441 P.3d 807 (Wash. 2019). Thus, the critical difference between that Washington provision and Colorado's (and the UFPEA) is that the Washington provision relies on the prospect of a civil penalty to attempt to force compliance while Colorado (and the UFPEA) provides a pre-vote-replacement mechanism to ensure compliance.

Holding that the Colorado provision is constitutional allows this Court to resolve that provision in light of other removal-and-replacement systems, including the UFPEA. This Court's rationale in the decision in the present case would not only govern the Washington case, but would provide controlling precedent regarding the UFPEA as well.

II.

The UFPEA Complies with Controlling Federal Constitutional and Statutory Provisions and Precedent.

Of course, the UFPEA is subject to federal constitutional and statutory provisions. The UFPEA complies with applicable federal law: the U.S. Constitution's Article II, § 1 and Twelfth Amendment and 3 U.S.C. Chapter 1. Since Colorado's provision operates similarly, it also complies with applicable federal law.

Article II, § 1 authorizes states to appoint their electors "*in such Manner as the Legislature thereof may direct* . . . ." (emphasis added). Colo. Br. 18. Thus, state legislatures have a broad mandate to control the *manner* of appointing electors, i.e., *who* may be an elector (e.g., by setting qualifications) and *how* individuals become and be electors. For example, the legislature itself might appoint electors, establishing its own qual-

ifications and applying its own procedural rules for becoming and being an elector. That broad who-and-how authority remains if the legislature allows electors to be chosen by election. This authority includes whether to mention electors on ballots (and if so, how prominently). If a state does not mention electors on the ballot, it leads voters to believe they are voting directly for candidates. Then, the state has a strong interest in ensuring that the voters' choice is followed, and it may impose who-and-how measures to avoid voters believing they have been defrauded.

The Twelfth Amendment mandates (inter alia) that electors (i) vote by casting ballots and (ii) cast separate ballots for President and Vice President. Colo. Br. 30. The Twelfth Amendment does not vitiate the who-and-how "manner" authority over electors in Article II, § 1, except to specify separate votes by ballot. Since the *manner* of casting ballots is not specified, that is left to state regulation as before—unless otherwise governed by federal statute.

The provisions at 3 U.S.C. Chapter 1 ("Presidential Elections and Vacancies") generally codify constitutional provisions (with some added specifics) and recognize broad state "manner" authority:

- Section 1 requires appointment of electors on an appointed day, but it provides no restriction on the broad who-and-how "manner" authority of appointing electors under Article II, § 1, cl. 2—so the states retain that broad, plenary authority (apart from the limited requirements in Chapter 1 as to the day of appointment and number of electors);
- Section 2 recognizes state authority to select a "subsequent day *in such manner as the legislature of such State may direct*" (emphasis added) to appoint

electors if a state failed to do so on the appointed day—so that the choice of that day is left to the states' "manner" authority;

- Section 4 recognizes state authority to "*by law*, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote" (emphasis added)—so vacancies are left to the states' "manner" authority;
- Section 5 recognizes state authority to "*provid[e] . . . for . . . final determination of any controversy or contest* concerning the appointment of . . . electors . . . [which determination] shall be conclusive, and shall govern the counting of the electoral votes . . . so far as the ascertainment of the electors appointed by such State is concerned" (emphasis added)—so states retain their "manner" authority over controversies and contests about the who-and-how of electors' appointment;
- Section 6 recognizes state authority to determine and certify the "final ascertainment," done "*under and in pursuance of the laws of such State* providing for such ascertainment" (emphasis added)[19]—so states retain their who-and-how "manner" authority over the final determination and certification of who is an elector;

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[19] The "certificate of ascertainment" certifies "the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast . . . ." *Id.* (emphasis added). "[C]anvass or other ascertainment" refers to the number of popular votes obtained by all elector candidates in the state. ULC App. 15a (Comment).

- Section 7 requires electors to cast their ballots on the appointed day "at such place in each State as the legislature of such State shall direct"—so states retain their authority over *how* electors vote that was left to states by the Twelfth Amendment; and
- Section 8 requires that "[t]he electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution"—so given the lack of other restrictions imposed by statute, states retain their authority over *how* electors vote (except that there must be two votes by ballot).

This federal statute does not restrict the states' generally broad authority under Article II, § 1 and the Twelfth Amendment, other than appointing a day and prescribing the number of electors. Congress understood states' authority to be broad—over activities ranging from elector selection to the manner of casting ballots—and Congress affirmed that broad authority by a statute authorizing particular state laws. Congress authorized states to enact laws to govern (i) *who* is an authorized elector, (ii) *how* individuals may become and be electors, and (iii) *how* electoral ballots are cast and counted. The necessity of the states regulating the *how* of voting is clearly implicit because otherwise electors could, e.g., refuse to use provided ballots and instead text or email their preferences, or, as Mr. Baca did, "by writing Mr. Kaine's name on a pen box." Colo. Pet. App. 218 (¶ 55). So the Electoral College is a *joint* state-federal process, and states have a vital authorized role.

The UFPEA is entirely consistent with the foregoing provisions under the states' authority to regulate *who* may become and be an elector, *how* electors are

selected, and *how* they cast ballots. The UFPEA permissibly governs the who and how of *electors* in several ways:

- Section 3 provides for the designation of elector and alternate-elector nominees;
- Section 4 requires a faithfulness pledge as a condition of being an elector;
- Section 5 provides that the certificate of ascertainment state that the electors will serve unless a vacancy occurs, in which case a replacement will fill it and an amended certificate will follow;
- Section 6 governs filling elector vacancies;
- Section 7 governs elector voting and establishes function-of-law vacancies (to be filled under § 6), which include a vacancy caused by presenting a ballot to the presiding official in violation of the pledge; and
- Section 8 provides for amended certification of the list of electors to be substituted for the prior certificate.

And the UFPEA permissibly governs the how of *casting ballots* in several ways:

- Section 2(1) defines "cast" as "accepted . . . in accordance with Section 7(b)";
- Section 7(a) and (b) distinguish between (i) "mark[ing]" ballots, (ii) "present[ing]" them, and (iii) a ballot's "accept[ance] as cast"; and
- Under § 7(b), only after an elector presents a ballot consistent with the pledge and the official examiner confirms compliance and accepts the ballot as cast is the ballot actually cast. Presenting a noncompliant ballot does not cast a ballot but rather—by operation of law—immediately removes the former

elector and creates a vacancy to be filled by a faithful elector.

The analytical distinction between marking the ballot, proffering it to the appropriate official, and casting the vote is readily seen in two other voting contexts. First, a voter at the polls receives a paper ballot.[20] She goes to a booth and marks the ballot. Then she goes to the ballot box and casts the ballot. Marking and casting are distinct acts, both physically and conceptually. Were she to do anything other than deposit the marked ballot in the ballot box, no ballot would be cast. And if she deposits in the ballot box a ballot that is unmarked or improperly marked under governing law, no vote is cast. Thus, compliance with legal requirements is necessary for a vote to be legally cast.

The second context involves absentee voting.[21] If the ballot is unmarked or improperly marked under governing law or if other legal requirements for absentee ballot voting are not complied with, no vote is cast. Thus, marking, submitting for approval, and casting of a ballot are clearly distinct factually and conceptually. Casting a ballot and actually voting both require compliance with controlling law.

The UFPEA merely applies these ordinary, practical, and conceptual distinctions to define "cast" as being *accepted as legally compliant*. It distinguishes (i) marking a ballot, (ii) proffering it to the presiding offi-

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[20] In non-paper-ballot systems, voters still "mark" candidates then "cast" the ballot after reviewing their marks.

[21] Both Washington and Colorado offer broad-based vote-by-mail processes that resemble the absentee voting process analyzed here.

cial for compliance inspection, and (iii) acceptance of the ballot as compliant. Only the third step constitutes casting the ballot. This recognition of the ordinary, practical, and conceptual voting acts that are also inherent in elector voting allows an automatic-elector-removal provision (§ 7(b)) to prevent a proffered noncompliant ballot from being *cast* and to substitute a faithful voter who casts a faithful ballot. Note that the pledge is to "mark" the ballot as prescribed (§ 4), not to "cast" it as prescribed. So the presiding official is able to review the ballot after marking, and a noncompliant elector is removed for breaking the pledge before any ballot is "cast." And the faithless former elector is replaced by an elector who is faithful to the pledge or is in turn replaced—until compliance with the pledge is achieved by all electors.

The UFPEA's approach is a constitutional, lawful, practical, and elegant solution to the possibility of a faithless elector by preventing faithless votes from being cast. It does not impose civil or criminal penalties on electors after the fact, which may not be effective, by avoiding the possibility of electors accepting the consequences (e.g., a $1,000 civil penalty in Washington) and casting a faithless vote.[22]

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[22] The ULC does not address here Colorado's Tenth Amendment argument (Colo. Br. 43-47), since the ULC deems UFPEA-type provisions fully consistent with Article II, § 1, cls. 2-3, the Twelfth Amendment, and 3 U.S.C. Chapter 1. The ULC agrees that "[t]he public's post-enactment understanding and longstanding historical practice confirm that States may control their electors" (Colo. Br. 33), and the UFPEA is part of that understanding and practice.

The UFPEA is also consistent with the rationale of *Ray*, 343 U.S. 214, which upheld a provision requiring electors to pledge "aid and support" for a political party's nominee, *id.* at 215. Against an argument for absolute liberty of choice for electors, this Court held that there is "no federal constitutional objection" where a system of choosing electors "fix[es] the qualifications for the candidates" because the Twelfth Amendment does not mandate such "absolute freedom" for electors." *Id.* at 231. The *Ray* dissent advocated for such complete liberty of choice, but that was of course in *dissent*. *Id.* at 232 (Jackson, J., dissenting). As the Colorado Brief elaborates, the Twelfth Amendment does not grant electors such absolute freedom. Colo. Br. 29-33. Moreover, *Ray* is consistent with the view that regulating electors up until their ballot is formally cast under state law is a state function, not a federal function, so that states are free to regulate within their own sphere up until that time, as allowed by the governing constitutional and statutory provisions.

Upholding the Tenth Circuit's decision would be tantamount to ignoring the *stare decisis* effect of *Ray*, without the justification this Court has stated is critical to doing so. *Stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has approached reconsideration of precedential holdings with caution, generally requiring both a determination that the previous case was wrongly decided and that other "strong grounds" exist that support its reconsideration. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018). Some of

these other "strong grounds" factors to be considered include: the quality of the precedent's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. *Id.* Even Court opinions that don't support a "strong grounds" factors analysis before reconsideration of precedent require first that the precedential holding be "demonstrably erroneous." *Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring). Neither the "strong grounds" factors analysis nor the "demonstrably erroneous" standard applies to *Ray*.

This Court has cited *Ray* seven times—not once suggesting that it was wrongly reasoned, let alone demonstrably erroneous. *See generally*, *Clingman v. Beaver*, 544 U.S. 581, 594-95 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 576 n.7 (2000); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *Republican State Cent. Comm. v. Ripon Soc'y*, 409 U.S. 1222, 1226-27 (1972); *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 211 n.89 (1970). In all seven cases citing *Ray*, this Court ruled in a manner consistent with *Ray*. *See, e.g.*, *Democratic Party of United States*, 450 U.S. at 122 (holding political parties can protect themselves from 'intrusion by those with adverse political principles'). Both Colorado's statutory scheme and the UFPEA rely on *Ray*'s precedential effect, which would be lost if this Court upholds the Tenth Circuit's decision.

The Tenth Circuit adopted the *Ray* dissent's rationale, instead of the *Ray* controlling rationale and interpreted the Twelfth Amendment as mandating absolute

elector discretion. This reasoning jeopardizes *all* efforts to rein in faithless electors, including the UFPEA's solution to the faithless-elector problem. Further, the Tenth Circuit decision even casts doubt on the ballot designs used by many states because (i) many make no mention of electors, (ii) some do so only in small print, and (iii) no choice of individual electors in a slate is possible—which makes the ballots deceitful unless electors are faithful. Most voters do not contemplate that they are voting for electors instead of candidates for office. If the results of a November election were overturned some forty days later, based on what many voters would deem deception, "the potential is great for harm to our democracy," as the UFPEA's Prefatory Note explains. ULC App. 9a.

This Court should hold that Colorado's removal-and-replacement system, which is similar in application to the UFPEA, is constitutional.

III.
Important Principles of Individual Political Empowerment and Federalism Favor the Constitutionality of Colorado's Faithless-Elector Statute.

Colorado's law is constitutional. By reversing the Tenth Circuit decision and holding Colorado's faithless-elector law constitutional, this Court can settle critical issues of law before they arise in a crisis. In particular, the case implicates states' interests in bolstering individual political empowerment and protecting popular election results from manipulation. Obtaining clarity on these issues is vital.

Individual political empowerment is at the core of our nation's founding—as "no taxation without repre-

sentation" was a recognition that the governed control, via representation, those charged with governance. *See* Patrick Henry, The Virginia Stamp Act Resolutions, House of Burgesses, May 30, 1765. The mid-twentieth-century civil-rights movement illustrates the resulting political division when many reasonably believe their votes for representatives are ignored or they are disenfranchised by those in power. The UFPEA and similar statutes represent efforts to bolster individual political empowerment and the sense that presidential elections are conducted in an orderly, fair manner, thus yielding "greater stability of and confidence in our government." Beverly J. Ross and William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & Politics 665, 747 (1996).

Ross and Josephson contend that states have the constitutional power to enact statutes to bind electors. It is only if they fail to do so that the elector discretion is unfettered. "[A]s we read *Ray v. Blair*, the Court was correct. The state's constitutional power to appoint electors would appear to include the power to bind them. However, absent such binding, electors retain their constitutional discretion." *Id.* at 678. As this brief explains in Part II, the states have the "authority to regulate *who* may become and be an elector, *how* electors are selected, and *how* they cast ballots." *See supra* at 16. Where states have acted to adopt the UFPEA or a similar statute to bind electors to vote as they pledged to do, the statutes are a constitutional exercise of the authority given the states under Article II, § 1, cls. 2-3 and 3 U.S.C. Chapter 1.

It is true that historical evidence suggests that electors were originally charged with "independence" and expected to debate and consider their votes within the

context of that debate. *See* The Federalist No. 10 (James Madison). But less than a decade after the Constitution was originally adopted and ratified, on the heels of the contentious Presidential election of 1800 and the rise of the political party system, the political reality had shifted enough that the Twelfth Amendment was ratified in 1804.[23]

With the passage of the Twelfth Amendment, it is evident that the elector's "independence" was greatly impacted by the systemic political changes that came in the founding era, immediately following George Washington's decision to not seek reelection after his second term. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 904, 911 (2017). Put another way, the "trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years, ripened into a bounden duty—as binding upon them as if it were written into the organic law." Ross and Josephson*, supra,* at 699 (quoting *Thomas v. Cohen*, 146 Misc. 836, 841 (Sup. Ct. 1933)). Reversing the Tenth Circuit's decision will not only honor the text and structure of the Constitution, but will take into account relevant historical, systemic changes that occurred in our body politic, within a timeframe that can legitimately be considered the founding era.

If the Court upholds the Tenth Circuit's decision, subsequent challenges regarding the constitutionality of ballots making little or no mention of electors are

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[23] *See* https://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=1209 (National Archives information on Twelfth Amendment).

almost certain to follow. *See supra* at 22. During times of high political polarization, the Electoral College is the subject of greater debate and scrutiny, especially when no party achieves sufficient electoral dominance to decrease the likelihood of close electoral votes. Whittington, *supra*, at 904. Presently, key "battleground" states can lead to a tie or a razor-thin electoral victory.

Close votes might increase "as technology and increasing campaign sophistication heighten the competitiveness of presidential elections." Memorandum from Robert Bennett, UFPEA Reporter, to the NCCUSL Drafting Committee on Presidential Electors Act (March 2009).[24] With close votes, "there is ample reason to think that parties and candidates will be tempted to court faithlessness." *Id.*[25] Discussed in the Prefatory Note of the UFPEA are instances in which faithless electors were courted, anticipated, and planned for. ULC App. 6a. Indeed, "one significant motivation for states to adopt [a faithless-voter act is] to avoid the political havoc that would ensue from more deeply embroiling the courts in a controversial election where a candidate might attempt to swing an election with the defection of a faithless elector." Jesse O. Hale Jr., *Reining In Renegade Presidential Electors: A Uniform State Approach*, Baker Ctr. J. of Applied Pub. Pol-

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[24] *Available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8a4d3ae7-90eb-d67f-4c7c-0ee622724148&forceDialog=0.

[25] From 1808 through 2004, there were nineteen faithless electors. In the 2016 election alone, there were seven. *See* https://www.wsj.com/graphics/electoral-college-2016/.

icy, 2010, at 8.[26] Upholding the constitutionality of faithless elector laws now means that the critical issue of the extent to which states can bolster individual political empowerment will be decided outside of the heat of a close presidential election.

Moreover, federalism and the decentralization of presidential elections protect our presidential election system from interference. *See* Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. Sci. & Tech. L. 168, 182 (2018). Under the UFPEA or the Colorado statute at issue here, changing the actual outcome of the election would require somehow changing the number of votes cast for a particular candidate in particular precincts in particular states, which use different types of voting machines and computer systems. *See id.* But if faithless electors are allowed, one need only "tamper" with a few electors in strategic states. Holding faithless-elector laws unconstitutional would vitiate a key method states use to protect the integrity of presidential elections and our democracy.

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[26] Mr. Hale (Tennessee) is also a ULC Commissioner and a member of the Drafting Committee. *Article available at* http://trace.tennessee.edu/utk_bakecentpubs/3.

Conclusion

This Court should reverse the Tenth Circuit's decision by finding Colorado's faithless elector law constitutional.

Respectfully submitted,

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