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

OPENING BRIEF OF APPELLANTS - APPENDIX

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, Glary Utilities 5, 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.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this **Opening Brief of Appellants – Appendix** complies with 10th Cir. R. 25.5 and all privacy redactions required have been made.

The undersigned counsel certifies that paper copies submitted are or will be exact copies of the electronic version.

Respectfully Submitted this 25th day of June, 2018

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ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF SERVICE

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1:17-cv-01937-WYD-NYW Baca et al v. Colorado Department of State
Wiley Y. Daniel, presiding
Nina Y. Wang, referral
Date filed: 08/10/2017
Date terminated: 04/10/2018
Date of last filing: 05/11/2018

History

Doc. No.	Dates	Description
1	*Filed & Entered:* 08/10/2017	Complaint
2	*Filed & Entered:* 08/10/2017	Case Assigned to Judge
3	*Filed & Entered:* 08/10/2017	Summons Issued
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58	*Filed & Entered:*	05/11/2018	Transcript Order Form
59	*Filed:* *Entered:*	05/11/2018 05/14/2018	Letter re Record Complete

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JS 44 (Rev. 11/15) District of Colorado Form

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

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Wayne W. Williams

County of Residence of First Listed Defendant El Paso
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

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V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
48 U.S.C. sec. 1983, 52 U.S.C. secs. 10101(b) and 20510(b)

Brief description of cause:
Violation of voting rights presidential Electors

❒ AP Docket

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ❒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
08/10/2017

SIGNATURE OF ATTORNEY OF RECORD
/s/ Jason B. Wesoky /s/ Lawrence Lessig

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01937-NYW

POLLY BACA and ROBERT NEMANICH,

Plaintiffs,

v.

WAYNE W. WILLIAMS, Colorado Secretary of State, in his individual capacity,

Defendant.

NOTICE OF RELATED CASE

Defendant, Colorado Secretary of State Wayne W. Williams submits this Notice of Related Case under D.C.COLO.LCivR 3.2.

The Secretary gives notice that *Baca v. Hickenlooper ("Baca I")*, No. 16-cv-2986-WYD-NYW (D. Colo.), is related to the instant case because it contains "common facts and claims" and has "at least one party in common." D.C.COLO.LCivR 3.2(b). Specifically, the plaintiffs in both cases are identical and the Secretary is a defendant in both cases. Both cases also contain common facts and claims. Plaintiffs in both cases allege that the Secretary violated their rights as presidential electors by attempting to enforce COLO. REV. STAT. § 1-4-304(5), a state statute that requires presidential electors to cast ballots in the Electoral College for the presidential and vice-presidential candidates who received the highest number of votes in Colorado's preceding general election. Plaintiffs in both cases claim that COLO. REV. STAT. § 1-4-304(5) is unconstitutional.

Baca I, No. 16-cv-2986, was voluntarily dismissed by Plaintiffs on August 1, 2017, without objection by the defendants or intervenors. It is thus no longer pending. The Secretary is

unaware of Plaintiffs' reasons for voluntarily dismissing *Baca I* and then re-filing a substantially identical case a mere nine days later.

Respectfully submitted this 6th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, I served a true and complete copy of the foregoing **NOTICE OF RELATED CASE** upon all parties through ECF:

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Cambridge, MA 01238

Attorney for Plaintiffs

s/ Xan Serocki

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-1937-NYW

MICHEAL BACA, POLLY BACA and ROBERT NEMANICH,

Plaintiffs

v.

COLORADO DEPARTMENT OF STATE,

Defendant.

SECOND AMENDED COMPLAINT

The Colorado Department of State, acting through its Secretary, Wayne Williams, and under color of state law, specifically C.R.S. § 1-4-304, threatened and intimidated Plaintiffs Micheal Baca, Polly Baca, and Robert Nemanich in the exercise of their federally protected rights as presidential Electors. This complaint seeks nominal damages for this infringement of a fundamental federal right and a declaration that Colorado's law that purports to bind Electors by requiring them vote for the Presidential and Vice Presidential candidates that received the highest number of votes at the preceding general election, C.R.S. § 1-4-304(5), is unconstitutional.

INTRODUCTION

1. The United States Constitution secures to "Electors" the power to vote to select the President and Vice President of the United States.

2. Colorado purports to control how an Elector exercises her franchise, by binding her, with the force of law, to vote for a particular candidate. *See* C.R.S. § 1-4-304(5) ("Binding Statute").

3. Colorado's Binding Statute is unconstitutional on its face and as applied to Electors because it infringes on their right to vote as they see fit without coercion.

4. Defendant, in seeking to enforce the Binding Statute, violated Plaintiffs' rights as Electors.

5. Plaintiffs seek to correct the violations of their rights as Electors under Article II and Amendment XII of the U.S. Constitution.

6. The U.S. Constitution gives Colorado no power to restrict the legal freedom of federal Electors to vote as they deem fit. The actions of the Colorado Department of State to enforce that unconstitutional law thus violated Plaintiffs' federally protected rights. Plaintiffs seek damages for the violation of their rights, and a declaration that C.R.S. § 1-4-304(5) is unconstitutional.

PARTIES

7. Micheal Baca is a resident of the State of Nevada at the current time. At all times pertinent to this complaint, he was a resident of Denver County and the State of Colorado and, pursuant to C.R.S. § 1-4-302, was a Democratic Elector for the 2016 presidential election.

8. Polly Baca is a resident of the City and County of Denver, Colorado and, pursuant to C.R.S.§ 1-4-302, was a Democratic Elector for the 2016 presidential election.

9. Robert Nemanich is a resident of El Paso County, Colorado and, pursuant to C.R.S. § 1-4-302, was a Democratic Elector for the 2016 presidential election.

10. Defendant Colorado Department of State is a state agency.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201 because the case arises under the Constitution and laws of the United States.

12. This Court has personal jurisdiction over Defendant Colorado Department of State.

13. Venue is properly laid in this District under 28 U.S.C. § 1391(b), because Defendant is a state agency operating in this District, and events giving rise to this action also occurred in this District.

BACKGROUND

14. Under the Constitution of the United States, the President and Vice-President are selected by "Electors," not by popular vote. Each state has two Electors plus an additional Elector for each member of the House of Representatives from that state. The District of Columbia also has three Electors.

15. On a date set by Congress, at a place specified by state law, presidential Electors meet in each state and cast one ballot for President and one ballot for Vice President. Those votes are then sent to Congress.

16. If any candidate receives a majority of the electoral college votes, that candidate is selected for that office. If no candidate in a race receives a majority of the electoral college votes, then that election is determined in Congress — by the House for the President, by the Senate for the Vice-President.

17. States have plenary power to select their Electors. That power includes the freedom to discriminate in the selection of Electors against an Elector who refuses to pledge support to one candidate or another. States cannot select Electors who have engaged in insurrection or rebellion or have given aid or comfort to the enemies of the United States. *See* U.S. Const. amend. XIV, § 3. Nor can an Elector be a Senator or Representative or a person holding an office of trust or profit under the United States. U.S. Const. art. II, § 1.

18. In every state, the Electors are chosen according to the popular vote for President and Vice-President in that state. Most states appoint the Electors who have pledged to support, or were slated by the party of, the presidential candidate who received the most votes in that state. In two states, the two at-large Electors are appointed in this way, and the other Electors are appointed according the popular vote in each congressional district in the state.

19. Once an Elector is selected, the Constitution imposes just a single restriction on how that Elector may vote. Under the 12th Amendment, electors may not vote for two candidates from their own state.

20. The Constitution does not expressly or implicitly give the states any power to restrict the Electors' freedom beyond the 12th Amendment's single limitation. The power of voting resides entirely with the Electors. Because the Constitution states "the Electors" shall vote by ballot, not the states, the states cannot control how Electors vote. U.S. Const. amend. XII.

21. Beyond the single restriction expressed in the 12th Amendment prohibiting Electors from voting for a President and Vice President from the same state as the Elector, Electors are free to vote as their conscience determines.

22. This protected freedom of presidential Electors makes sense of the framers' purpose in establishing the electoral college itself. As Alexander Hamilton described in Federalist 68, while it was "desirable that the sense of the people should operate in the choice of" the President, it was "equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice." If Electors could simply be directed how to vote, there would be no need for "men" who would "possess the information and discernment requisite

to such complicated investigations," Federalist No. 68, as there is nothing especially "complicated" about identifying the "candidate who received the highest number of votes at the preceding general election in this state." C.R.S. § 1-4-304(5).

23. Consistent with this freedom, twenty states impose no restriction on how Electors may vote at all. Thirty states, however, require that presidential Electors cast their vote for the presidential candidate of the party they were selected to represent. Five states purport to apply a penalty to an Elector who votes contrary to the popular vote. Six states purport to cancel the vote of an Elector who votes contrary to the popular vote.

24. Though Electors throughout our history have typically exercised their franchise consistent with their pledge or their state's popular vote, Electors for both President and Vice President have exercised their judgment to vote against their pledge or the popular vote of their state 167 times before 2016. In 2016, a record number of Electors voted for persons for president who did not receive the majority of the popular vote in their state.

25. These votes contrary to a pledge or the popular vote of a state have never prevented a presidential candidate from receiving a majority of the Electors' votes. They have affected the process of choosing the Vice President. In 1836, 23 Virginia Electors abstained rather than voting for vice presidential nominee Richard Johnson because he was alleged to be living with a black woman. Those defections forced the decision into the Senate, where Johnson was selected nonetheless.

26. Before this election, no Elector who voted against her pledge or the popular vote in her state has been penalized legally.

EVENTS UNDERLYING PLAINTIFFS' INJURIES

A. The Election of 2016

27. In April 2016, Plaintiffs Micheal Baca, Polly Baca and Robert Nemanich were nominated as Presidential Electors. Micheal Baca was nominated at the First Congressional District Assembly in Denver, Colorado, and Polly Baca and Robert Nemanich were nominated at the Colorado Democratic Convention in Loveland, Colorado.

28. Upon becoming an Elector, Plaintiff Micheal Baca executed a pledge to vote for Bernie Sanders for President.

29. Upon becoming an Elector, Plaintiff Polly Baca executed a pledge to vote for the Democratic Party's nominee for President and Vice-President.

30. Upon becoming an Elector, Plaintiff Robert Nemanich executed a pledge to vote for Bernie Sanders for President.

31. On November 8, 2016, Colorado, and every other state, held an election to select the Electors who would later vote for President and Vice-President.

32. In that election, Hillary Clinton received close to 3 million more votes than Donald Trump did nationally, and almost 72,000 more votes than Trump did in Colorado.

33. Despite losing the popular vote nationally, Donald Trump was expected to receive enough votes in the Electoral College to become the 45th President of the United States.

34. The election of Donald Trump raised grave concerns among many, including Plaintiffs.

35. No candidate for President in modern history has ever lost the popular vote by such a large margin yet been selected as President by the electoral college.

36. No candidate for President in modern history so openly flouted the requirements of the Foreign Emoluments Clause, by refusing both to disclose his foreign holdings and to divest himself from any beneficial interest in those holdings.

37. Neither had any election of any candidate for President in the history of the United States been so credibly alleged to have been affected by the conspiracy of a foreign nation intent on securing the election of the presumptive president.

38. During the time between the national election day and the date for the Electoral college voting to occur, U.S. intelligence agencies confirmed that they possessed evidence showing foreign interference in the presidential election with the purpose of favoring Donald J. Trump and undermining Hillary R. Clinton in that election.

39. Plaintiffs and many other Presidential Electors considered this information of foreign influence in the election to be a matter of grave concern. Some Electors, including Plaintiffs, took affirmative steps to obtain more information from the then current President, Barack Obama, intelligence agencies, or Congress and specifically requested an intelligence briefing. Their requests were denied. It was later learned that U.S. Intelligence agencies knew Donald J. Trump's top campaign officials and one of his sons met with Russians in June 2016 at Trump Tower in New York City after being told the Russians had "dirt" on Secretary Clinton that could help the Trump Campaign.

40. The 2016 election, in the view of many, was thus unprecedented, and it focused attention upon the framers' purpose in establishing an electoral college with Electors with discretion who meet and vote separately from their own selection.

B. The determination of Electors to exercise their constitutional freedom

41. These concerns led many to consider whether Electors should exercise their constitutional discretion to vote contrary to their pledge or the popular vote in their state.

42. A number of Electors, referred to as the "Hamilton Electors," began to discuss the possibility of pledging to support a compromise candidate, at first with the purpose of changing the result in the Electoral College, and ultimately with the purpose of giving the House of Representatives the chance to select that candidate rather than Donald Trump.

43. In early December, 2016, the Hamilton Electors announced that their preferred candidate was Ohio Governor John Kasich.

44. Acting on that recommendation, Plaintiffs determined finally that they wanted to vote for John Kasich rather than Hillary Clinton.

C. Colorado's restriction of Plaintiffs' freedom

45. Colorado law purports to control how Electors may exercise their vote. Section 1-4-304(5) of the Colorado Revised Statutes provides that "[e]ach presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state." Section 1-13-723 of the Colorado Revised Statutes gives the state the power to punish criminally any "officer upon whom any duty is imposed by any election law who violates his duty."

46. On November 18, 2016, Plaintiff Nemanich emailed Colorado's Secretary of State, Wayne Williams, to ask "what would happen if" a Colorado state Elector "didn't vote for . . . Clinton and . . . Kaine." Williams, through surrogates, responded by email, stating that "if an elector failed to follow th[e] requirement" outlined in C.R.S. § 1-4-304(5), his "office would likely remove the elector and seat a replacement elector until all nine electoral votes were cast for the winning candidates."

47. Subsequent to that email, Secretary Williams also stated that if an Elector violates C.R.S. § 1-4-304(5), they would likely face either a misdemeanor or felony perjury charge.

48. On December 6, 2016, so as to secure their constitutional freedom to vote as their conscience determined, Plaintiffs Polly Baca and Nemanich filed suit in United States District Court for the District of Colorado, asking the Court to enjoin Secretary Williams from enforcing Colo. Rev. Stat. § 1-4-304(5).

49. On December 12, 2016, the district court denied Plaintiffs' injunction.

50. The following day, Plaintiffs filed an emergency motion for an injunction pending appeal in the 10th Circuit.

51. On December 16, 2016, the 10th Circuit denied Plaintiffs' emergency motion. The Court of Appeals was not persuaded that the Colorado Secretary of State would in fact restrict the freedom of Electors. Specifically, the Court did not credit Plaintiffs' concern that Secretary Williams would actually remove an Elector if an Elector voted contrary to the state statute. As the Court noted, C.R.S. § 1-4-304(1) gave the Secretary power to remove Electors "prior to the start of voting." The Court did not read the statute to give the Secretary any such power "after voting has begun." Indeed, as the Court expressly noted, such an act by the Secretary of State was "unlikely in light of the text of the Twelfth Amendment."

52. The predictions of the Court of Appeals proved mistaken.

53. On December 19, 2016, after a hearing in state court on a related matter, Secretary Williams, acting on behalf of Defendant Department of State, and under his emergency rule making authority, changed the oath of the Electors to put further pressure on them to vote consistent with Colorado's popular vote. At a meeting with the Electors in advance of their vote, the new oath was administered over objections from Plaintiffs. In the press before the vote, Secretary Williams, both personally and through surrogates, stated that anyone who violated their oath may be subject to felony perjury charges for intentionally violating the oath. The new

oath, created just moments before the Electors' vote, increased the pressure on Plaintiffs to vote for Hillary Clinton and Tim Kaine regardless of Plaintiffs' determined judgment.

54. Despite the new oath, Plaintiff Micheal Baca cast his ballot for John Kasich. Mr. Baca noted that the ballot was pre-printed with Hillary Clinton's name, he requested a new ballot, but his request was denied. Mr. Baca then crossed out Mrs. Clinton's name and wrote in Mr. Kasich's name with the undisputed intention that his ballot be counted for purposes of the final tally of Electoral College votes.

55. Despite the clear language of the 10th Circuit Court of Appeals indicating that Secretary Williams had no authority to remove an Elector once the Elector was seated — either because the statute did not so empower him or because the 12th Amendment would not permit it even if the statute did so empower him — Secretary Williams, acting on behalf of the Colorado Department of State, willfully removed Plaintiff Micheal Baca as an Elector, refused to count Mr. Baca's vote, and referred him to Colorado's Attorney General for criminal investigation and prosecution. Mr. Baca was replaced by a substitute Elector who cast her ballot for Mrs. Clinton. When the vote for Vice President was held, Mr. Baca cast a ballot for Mr. Kaine by writing Mr. Kaine's name on a pen box, which the Secretary, through a surrogate, retained but did not count.

56. Because of the actions of the Defendant Department of State, through Secretary Williams, changing the oath and removing Plaintiff Micheal Baca, Plaintiffs Polly Baca and Nemanich felt intimidated and pressured to vote against their determined judgment.

COUNT 1
(42 U.S.C. §1983)

57. Plaintiffs repeat and reallege all prior paragraphs.

58. 42 U.S.C. § 1983 provides a civil cause of action to any person who is deprived of rights guaranteed by the United States Constitution or federal law, by another person, acting under color of State law.

59. Article II and Amendment XII of the U.S. Constitution prohibit any person or any state from interfering with members of the Electoral College's votes for President and Vice President of the United States.

60. Article II and Amendment XII of the U.S. Constitution prohibit any person or any state from requiring members of the Electoral College to vote for specific candidates for President and Vice President of the United States.

61. The only limits on Electors' vote for President and Vice President of the United States are set forth in Article II and Amendment XII of the U.S. Constitution, and those limits cannot be expanded or contracted absent an amendment to the Constitution.

62. The U.S. Constitution permits Electors to vote for whomever they see fit for President and Vice President of the United States, subject only to the limitations set forth in the U.S. Constitution.

63. Defendant Department of State, acting through its Secretary Wayne Williams, deprived Plaintiffs Micheal Baca, Polly Baca, and Nemanich of a federally protected right when it threatened to remove them as Electors, and refer them for criminal prosecution, if they voted for a candidate other than Hillary Clinton.

64. Defendant Department of State, acting through its Secretary Wayne Williams, deprived Plaintiffs Micheal Baca of a federally protected right when it removed him as an Elector when he voted for a candidate other than Hillary Clinton.

65. At all times, Defendant, through its Secretary, was acting under color of state law.

66. At all times, Defendant, through its Secretary, was acting in its official capacity.

67. As a result of Defendant's conduct, Plaintiffs are entitled to damages.

68. As a consequence of the state statute, declaratory relief is necessary to stop Defendants' enforcement of the unconstitutional statute; without such relief the enforcement of this statute will continue unlawfully. Declaratory relief is necessary to stop enforcement of the unconstitutional statute and without such relief enforcement will continue unlawfully.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request this Court enter judgment:

1. Finding Defendant Department of 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;

2. Declaring C.R.S. § 1-4-304(5) unconstitutional; *and*

2. Awarding Plaintiffs nominal damages of $1 each for the violation of their rights.

Respectfully submitted this 25th day of October 2017.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01937-WYD-NYW

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH,
Plaintiffs,
v.

COLORADO DEPARTMENT OF STATE,
Defendant.

DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

Defendant, the Colorado Department of State ("Department"), moves to dismiss the Second Amended Complaint (Doc. 39) under FED. R. CIV. P. 12(b)(1) and 12(b)(6).

INTRODUCTION

This is the second federal lawsuit that Plaintiffs Polly Baca and Robert Nemanich have filed related to their ministerial roles as presidential electors in the 2016 Electoral College. Now joined by a third former elector, Micheal Baca, they again claim that their rights were violated in the days leading up to the 2016 Electoral College when the Colorado Secretary of State sought to enforce § 1-4-304(5), C.R.S. (2017), which binds presidential electors to the Presidential and Vice-Presidential candidates who won Colorado's popular vote. *See Baca v. Hickenlooper ("Baca I")*, No. 16-cv-02986-WYD-NYW, 2016 WL 7384286 (D. Colo. Dec. 21, 2016). In *Baca I*, this Court characterized the plaintiffs' suit as a "political stunt." *Baca I*, P.I. Hr'g Tr. 28:19, Dec. 12, 2016 (ECF No. 23). It thus rejected their eleventh hour request for a preliminary injunction barring enforcement of Colorado's binding statute in the 2016 Electoral College. *See Baca I*, 2016 WL 7384286.

Having failed to obtain a preliminary injunction, Ms. Baca and Mr. Nemanich followed Colorado law by casting their Electoral College ballots for the Presidential and Vice-Presidential

candidates who won Colorado's popular vote, Hillary Clinton and Timothy Kaine. Mr. Baca, however, attempted to cast his Presidential ballot for John Kasich—a person who appeared on no ballot, anywhere, as a presidential candidate in the November 8, 2016 general election. Consistent with state law, Mr. Baca's ballot was not counted, he was removed due to his failure or refusal to act, and he was replaced with a substitute elector. Plaintiffs contend these actions—which they acknowledge are fully consistent with Colorado state law—violated their federal constitutional rights.

Plaintiffs' Second Amended Complaint should be dismissed under both Rule 12(b)(1) and 12(b)(6). This Court lacks subject matter jurisdiction under Rule 12(b)(1) because Plaintiffs are former state officers who lack standing to challenge Colorado law. But even if that Article III hurdle is overcome, their argument fails as a matter of law under Rule 12(b)(6). Nothing in the U.S. Constitution bars a state from binding its presidential electors to the outcome of that state's popular vote for President and Vice President. To the contrary, the Constitution's text, United States Supreme Court precedent, and this country's longstanding historical practice all contemplate that the states may attach conditions to the office of a presidential elector. Because Colorado and 28 other states have done so lawfully, this case should be dismissed with prejudice.

FACTS AND PROCEDURAL BACKGROUND

In *Baca I*, Ms. Baca and Mr. Nemanich sought a preliminary injunction barring enforcement of Colorado's binding statute just 13 days before the 2016 Electoral College vote. *Baca I*, ECF No. 1. This Court denied their motion, finding that they were unlikely to succeed on the merits of their claims and that Colorado's statute binding presidential electors to the Presidential and Vice-Presidential candidates who won the State's popular vote was "legally enforceable." *Baca I*, 2016 WL 7384286, *6. The Court reasoned that granting Plaintiffs a

preliminary injunction to permit them to vote their individual preferences in the Electoral College "would undermine the electoral process and unduly prejudice the American people by prohibiting a successful transition of power." *Id.* The Tenth Circuit declined to disturb this Court's decision. *Baca I*, ECF No. 26. In the run-up to the Electoral College vote, several other courts also declined to enjoin similar state laws governing electors, finding the challengers were unlikely to succeed on the merits. *See Chiafalo v. Inslee*, No. 16-36034, 2016 U.S. App. LEXIS 23392 (9th Cir. Dec. 16, 2016); *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140 (W.D. Wash. Dec. 15, 2016); *Koller v. Brown*, 224 F. Supp. 3d 871 (N.D. Cal. Dec. 16, 2016); *see also Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193 (D. Minn. Dec. 23, 2016).

Despite Plaintiffs' failure to obtain injunctive relief in federal court, the Department remained concerned that Plaintiffs or other presidential electors would nonetheless choose to violate Colorado's binding statute at the 2016 Electoral College meeting. The Department thus took action to develop a plan of succession in the event one or more of the electors refused to follow Colorado law. The Secretary of State initiated a separate lawsuit against Ms. Baca and Mr. Nemanich in the District Court for the City and County of Denver, which ruled that a presidential elector who failed to cast their Electoral College ballot for the Presidential and Vice-Presidential candidates who won the State's popular vote would, as a matter of Colorado law, be deemed to have "refus[ed] to act," thereby creating a vacancy in that elector's office.[1] § 1-4-304(1); *see Williams v. Baca*, Denver District Court No. 2016CV34522 (Dec. 13, 2016) (attached as *Exhibit A*); *Baca I*, ECF No. 28, p. 9. The state district court ruled that any such vacancy shall be immediately filled by a majority vote of the presidential electors present, and

[1] This Court may take judicial notice of the proceedings in the state court case and the *Baca I* suit because they have a "direct relation" to the matters at issue here. *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

that the Colorado Democratic Party shall provide the electors with nominations to fill any such vacancy. *Exhibit A.* The district court's order became "final and not subject to further appellate review" when the Colorado Supreme Court declined to consider the electors' appeal under § 1-1-113(3), C.R.S. (2017). *See Baca v. Williams*, Colo. Sup. Ct. No. 2016SA318 (Dec. 16, 2016) (attached as *Exhibit B*).

On the day of the Electoral College, December 19, 2016, Plaintiffs took an oath to cast their Electoral College ballots for the Presidential and Vice-Presidential candidates who received the highest number of votes in Colorado in the preceding election. Doc. 39, pp. 9–10. Ms. Baca and Mr. Nemanich cast their Electoral College ballots for the candidates who received the most votes in Colorado, Hillary Clinton and Timothy Kaine. *Baca I*, ECF No. 28, p. 10. But Mr. Baca attempted to cast his ballot for John Kasich. Doc. 39, p. 10. Consistent with the state district court's order, his office was deemed vacant and he was replaced with another elector via a majority vote of the remaining electors. *Baca I*, ECF No. 28, p. 10. Congress counted the Electoral College ballots on January 6, 2017, and announced Donald Trump and Michael Pence as the persons elected President and Vice President. 163 CONG. REC. H189–H190 (daily ed. Jan. 6, 2017). They took office on January 20, 2017.

The plaintiffs in *Baca I* voluntarily dismissed their case without prejudice in early August 2017. *Baca I*, ECF Nos. 57, 58. Nine days later, Ms. Baca and Mr. Nemanich—the same plaintiffs in *Baca I*—refiled substantially the same case against the Secretary of State. Doc. 1. Plaintiffs amended their complaint on September 20, 2017 to add Mr. Baca as a plaintiff. Doc. 13-1. After negotiations among the parties and with the Court's approval, Doc. 37, Plaintiffs submitted a Second Amended Complaint on October 25, 2017 that substantially narrows their claims and replaces the Secretary with the Department as the sole-named defendant. Doc. 39.

STANDARD OF REVIEW

Rule 12(b)(1). Lack of standing is a jurisdictional defense that is properly presented in a motion to dismiss under Rule 12(b)(1). *See, e.g., Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1188–89 (10th Cir. 2000). A motion to dismiss under Rule 12(b)(1) admits all well-pleaded facts in the complaint as distinguished from conclusory allegations. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). The moving party may either facially attack the complaint's allegations as to the existence of subject matter jurisdiction or go beyond the allegations by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests. *Stuart v. Colo. Interstate Gas Co*., 271 F.3d 1221, 1225 (10th Cir. 2001). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974).

Rule 12(b)(6). A claim must be dismissed under Rule 12(b)(6) if it asserts a legal theory not cognizable as a matter of law or if the complaint fails to allege sufficient facts to support a cognizable legal claim. *Bd. of Cnty. Comm'rs of La Plata v. Brown Retail Group, Inc.*, 598 F. Supp. 2d 1185, 1191 (D. Colo. 2009). Under the former, a complaint fails if it appears beyond doubt that the plaintiff can plead no set of facts in support of his claim which would entitle him to relief. *Id.* Under the latter, a complaint must be dismissed if the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

Plaintiffs' Second Amended Complaint challenging Colorado law should be dismissed at the outset because a fatal defect deprives this Court of subject matter jurisdiction—Plaintiffs are

former state officers who lack standing to challenge Colorado law. But even putting aside this jurisdictional defect, dismissal is alternatively required because Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6). The U.S. Constitution, backed by longstanding interpretations from the United States Supreme Court and historical practice, permits states to bind presidential electors to the Presidential and Vice-Presidential candidates who won the State's popular vote. Nothing in Article II or the Twelfth Amendment abrogates this state power.

I. Presidential electors lack standing to challenge the constitutionality of Colorado law.

Plaintiffs' prayer for relief asks that this Court declare § 1-4-304(5) unconstitutional. Doc. 39, p. 12. But Plaintiffs lack standing to challenge § 1-4-304(5)—that necessary "personal injury fairly traceable to the defendant's allegedly unlawful conduct [that is] likely to be redressed by the requested relief." *DaimerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Specifically, the political subdivision standing doctrine bars Plaintiffs' lawsuit against the Department. *See City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011).

"Under the doctrine of political subdivision standing, federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states." *Id.* "This doctrine is an important limitation on the power of the federal government. It guarantees that a federal court will not resolve certain disputes between a state and local government." *Cooke v. Hickenlooper*, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, *10 (D. Colo. Nov. 27, 2013). A "political subdivision cannot invoke (nor can a federal court impose) the protections of the United States Constitution for individuals against a state." *Id.* (citing *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933)); *see also Kerr v. Hickenlooper*, No. 11-cv-01350-RM-NYW, 2017 WL 1737703, *7–11 (D. Colo. May 4, 2017) (finding political subdivisions—boards of county

commissioners, education, and special districts—lacked standing to sue State for violating the federal "Guarantee Clause," U.S. CONST. art. IV, § 4).

The doctrine applies not only to artificial political subdivisions, such as municipalities, but also to state officers who attempt to sue the State to challenge a state law. *City of Hugo*, 656 F.3d at 1255 n.3; *accord Columbus & Greenville Railway v. Miller*, 283 U.S. 96, 99–100 (1931) (tax collector); *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 566–67 (5th Cir. 2008) (state insurance commissioner); *Cooke*, 2013 WL 6384218, *10–13 (county sheriffs). State officers lack Article III standing to challenge the constitutionality of state statutes when they are not personally affected by those statutes and their interest in the litigation is official rather than personal. *Donelon*, 522 F.3d at 566–67 (citing *Cnty. Court of Braxton Cnty. v. West Virginia ex rel. Dillon*, 208 U.S. 192, 197 (1908)).

Presidential electors are without doubt state officers. *See Walker v. United States*, 93 F.2d 383 (8th Cir. 1937) (dismissing federal indictment because "presidential electors are officers of the state and not federal officers"); *Chenault v. Carter*, 332 S.W.2d 623 (Ky. 1960) (holding that presidential electors are state officers under Kentucky law); *see also Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (holding that presidential electors "are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress"). Nor is there any question that Plaintiffs' stake in this case is official rather than personal. In *Smith v. Indiana*, 191 U.S. 138 (1903), a county auditor argued that an Indiana property tax statute violated the Fourteenth Amendment. The U.S. Supreme Court held that "the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was

equally so." 191 U.S. at 149. Simply "testing the constitutionality of the law purely in the interests of third persons," like the taxpaying public, is not a sufficient "personal" stake to confer Article III standing. *Id.*

So too here. While a narrow group of former presidential electors may believe that it was their constitutional responsibility to exercise discretion when casting their Electoral College ballots—thus violating state law—a "public official's personal dilemma in performing official duties that he perceives to be unconstitutional does not generate standing." *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009); *see also Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 831 P.2d 482, 484 (Colo. 1992) (holding that "political subdivisions of the state or officers thereof . . . lack standing to assert constitutional challenges to statutes defining their responsibilities"). As former state officers whose official duties are prescribed by Colorado law, Plaintiffs lack Article III standing to challenge the constitutionality of the state statute that prescribes those official duties.

Accordingly, Plaintiffs' challenge to § 1-4-304(5) should be dismissed for lack of standing.

II. Plaintiffs' complaint suggesting Colorado may not bind its presidential electors fails to state a claim upon which relief can be granted.

Even if Plaintiffs overcome the Article III deficiencies in their Complaint, dismissal is still required under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs contend that § 1-4-304(5) violates Article II of the U.S. Constitution and the Twelfth Amendment. Doc. 39, p. 11. Because these theories are not cognizable as a matter of law, Rule 12(b)(6) requires dismissal.

A. The text of the U.S. Constitution permits binding of presidential electors.

The U.S. Constitution reserves to the States the right to decide for themselves how their presidential electors are selected and, if necessary, removed. 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). Nothing in the Twelfth Amendment, or any other amendment, abrogates this state power. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (confirming the States' power under Article II, § 1 is "plenary"). Thus, because the States alone have the power to appoint their presidential electors, they necessarily possess the power to attach conditions to that appointment and provide for removal. Binding them to the outcome of the State's popular vote is one such permissible condition.[2] *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & POLITICS 665, 678 (1996) ("The states' constitutional power to appoint electors would appear to include the power to bind them"). And it is the most popular condition, with 29 states and the District of Columbia opting to do so.[3] In the same vein, no constitutional provision bars a state from removing electors who refuse to comply with state law. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.47 (2017) (stating that refusal or failure to vote for the Presidential and Vice-Presidential candidates appearing on the ballot of the political party that nominated the elector constitutes "a resignation from the office of the elector").

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[2] Even Congress agrees that electors may be bound. It enacted legislation pursuant to the Twenty-third Amendment that binds the District of Columbia's presidential electors to the candidates who won the District's popular vote. *See* D.C. CODE ANN. § 1-1001.08(g)(2) (2017) (originally enacted in 1961, Pub L. No. 87-389, 75 Stat. 818).

[3] National Conference of State Legislatures, *The Electoral College* (Aug. 22, 2016) ("NCSL"), *available at*: http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx (last visited Nov. 5, 2017).

At best, Plaintiffs' position boils down to an argument that electors cannot be bound because the U.S. Constitution is silent on the question. But if the Constitution is silent, the power to bind or remove electors is properly reserved to the States under the Tenth Amendment. U.S. CONST. AMEND. X; *see McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892) (stating "exclusive" State power over "mode of appointment" of electors "cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way"); *cf.* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2145 (2001) ("[A]ny legislation that impinges on the states' discretion to use the [winner-take-all allocation of electoral votes] would seem to run into this very same Tenth Amendment problem"). Colorado has chosen to exercise that power and bind its presidential electors to the candidates who won the State's popular vote. § 1-4-304(5). Plaintiffs cite no case, and the Department is aware of none, striking down that choice as unconstitutional.

B. The U.S. Supreme Court and multiple lower courts permit binding of electors.

The U.S. Supreme Court has upheld measures that bind presidential electors in circumstances that, while not identical, are similar to this case. *See Ray v. Blair*, 343 U.S. 214 (1952). In *Ray*, the Alabama legislature delegated to the political parties the authority to nominate electors. *Id.* at 217 n.2. Alabama's Democratic Party required its nominees for electors to pledge "aid and support" to the nominees of the National Convention of the Democratic Party for President and Vice President. *Id.* at 215. The Court upheld this pledge requirement, finding "no federal constitutional objection" when a state authorizes a party to choose its nominees for elector and to "fix the qualifications for the candidates." *Id.* at 231. Thus, the Court refused to recognize a constitutional right for presidential electors to vote their individual preferences.

Plaintiffs in *Baca I* asserted that *Ray* left open the question of enforcement of statutes that bind presidential electors. But that argument splits the hair too finely. Under *Ray*, if a state has the power to delegate its power to bind electors, it necessarily must have the authority to bind them itself and to enforce that binding. *See* Ross & Josephson, 12 J. L. & POLITICS at 696 ("[T]he Court's language and reasoning in *Ray v. Blair* strongly imply that state laws directly binding electors to a specific candidate are constitutional"). As such, Plaintiffs have not overcome the strong presumption favoring the constitutionality of Colorado's binding statute. *See Gilmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007). This Court in *Baca I* concluded as much when it denied Plaintiffs' request for a preliminary injunction. [4] 2016 WL 7384286, *3.

To the extent that Plaintiffs challenge the Department's past enforcement of § 1-4-304(5), their arguments likewise fail as a matter of law. Multiple lower courts have found state elector statutes like Colorado's to be enforceable. *See Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) ("Though the [*Ray*] Court was not in a position to decide whether the pledge was ultimately enforceable, the opinion's reasoning strongly suggested that it would be"); *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (Sup. Ct. 1933) ("The elector who attempted to disregard that duty could, in my opinion, be required by mandamus to carry out the mandate of the voters of his State"); *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912) (affirming writ of mandamus requiring the Secretary of State to print on the Republican

[4] Plaintiffs here do not assert a First Amendment claim as they did *Baca I*, instead opting to narrowly confine their claim to Article II of the U.S. Constitution and the Twelfth Amendment. Doc. 39. Nor would a First Amendment claim be successful. Only "inherently expressive" conduct is extended First Amendment protection. *Rumsfeld v. Forum for Academic & Instit. Rights, Inc*., 547 U.S. 47, 66 (2006). Casting an Electoral College ballot is "purely ministerial," *Thomas*, 262 N.Y.S. at 326, not inherently expressive. Moreover, as this Court previously found, conduct made illegal by a state is not unconstitutional simply because the activity purportedly involves elements of free speech. *Baca I*, 2016 WL 7384286, *4.

line of the ballot the names of six replacement electors when the original Republican electors "openly declare[d]" they would vote in the Electoral College for another party's candidates).

Each of these cases underscores the "bounden duty" imposed on electors to vote in the Electoral College for the candidates who won the State's popular vote. *Thomas*, 262 N.Y.S. at 326. So "sacred and compelling" is that duty—and so "unexpected and destructive of order in our land" would be its violation—that courts have recognized its performance amounts to a "purely ministerial" duty that may be compelled through a writ of mandamus. *Id*. Electors do not "exercise judgment or discretion in the slightest degree"; they "are in effect no more than messengers whose sole duty it is to certify and transmit the election returns." *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924).

Accordingly, because the courts have uniformly recognized the constitutionality and enforceability of binding electors through statute, Plaintiffs' challenge to § 1-4-304(5) fails to state a claim upon which relief can be granted.

C. History and longstanding practice confirm that Colorado's binding statute is consistent with the Constitution.

The history of the Electoral College and longstanding practice confirm that presidential electors hold no constitutional right to vote their conscience. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (stating "long settled and established practice" deserve "great weight" in constitutional interpretation); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) (stating "no one acquires a vested or protected right in violation of the Constitution by long use … [y]et an unbroken practice … is not something to be lightly cast aside."); *Ray*, 343 U.S. at 228 (citing to "longstanding practice" to uphold pledge requirement).

As early as the first election held under the Constitution, the voting public "took pledges" from the elector candidates, who promised to "obey their will." *Ray*, 343 U.S. at 228 n.15

(quoting S. Rep. No. 22, 19th Cong., 1st Sess., p. 4 (1826)). "In every subsequent election, the same thing has been done." *Id.* The electors "are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents." *Id.* The reason is that "the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President." *Id.* (quoting 11 Annals of Congress 1289–90, 7th Cong., 1st Sess. (1802)). As Justice Story put it, "an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1457 (1833).

The history of the Twelfth Amendment is consistent with this understanding. Under the original Constitution, "the electors ... did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill." *Ray*, 343 U.S. at 224 n.11. But that system quickly proved unworkable; in 1800, for example, the election ended in a tie because Democratic-Republican electors had no way to distinguish between Presidential nominee Thomas Jefferson and Vice-Presidential nominee Aaron Burr when they each cast two votes for President. *See* Robert M. Hardaway, *The Electoral College and the Constitution*, 91–92 (1994). Because that situation was "manifestly intolerable," *Ray*, 343 U.S. at 224 n.11, the Twelfth Amendment was adopted, allowing the electors to cast "distinct ballots" for President and Vice-President. U.S. CONST. AMEND. XII. The Twelfth Amendment thus permitted electors to be chosen "to vote for party candidates for both offices," allowing them "to carry out the desires of the people, without confronting the obstacles which confounded the election[ ] … 1800." *Ray*, 343 U.S. at 224 n.11. In short, the Twelfth Amendment was the solution to the unique problems posed when electors are pledged and bound

to the candidates of their declared party. Without that historical practice, dating back to at least 1800, the Twelfth Amendment would not have been necessary.

Today, 29 states and the U.S. Congress have enacted legislation that codifies this historical understanding and longstanding practice. *See* NCSL, *supra* note 3; D.C. CODE ANN. § 1-1001.08(g)(2). Plaintiffs ask this Court to strike down those legislative choices, and ignore more than 200 years of history, to sanction a new system that would render the People's vote merely advisory. This Court should reject Plaintiffs' invitation.

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Amended Complaint should be dismissed in its entirety with prejudice.

Respectfully submitted this 8th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, I served a true and complete copy of the foregoing **DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)** upon all parties through ECF:

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DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	
Plaintiff(s) WAYNE WILLIAMS v. **Defendant(s)** POLLY BACA et al.	DATE FILED: December 13, 2016 5:26 PM CASE NUMBER: 2016CV34522 ⚠ **COURT USE ONLY** ⚠
	Case Number: 2016CV34522 Division: 376 Courtroom:

Order

After hearing, the Court rules as follows:

1. This Court has jurisdiction pursuant to §1-1-113, C.R.S.

2. Colorado presidential electors are required to vote for Hillary Clinton and Tim Kaine, pursuant to §1-4-304(5).

3. A presidential elector's failure to comply with §1-4-304(5), is a "refusal to act" as that term is used in §1-4-304(1), and causes a vacancy in the electoral college.

4. A vacancy in the electoral college shall be immediately filled by a majority vote of the presidential electors present. A quorum of presidential electors is not required to fill this vacancy.

5. The Colorado Democratic Party shall provide the presidential electors with nominations to fill any vacancy which occurs.

The Court takes under advisement the issue of how to proceed in the event of a tie in the electoral college regarding filling a vacancy. The parties have 24 hours to provide the Court with law and/or argument regarding this issue.

The Court incorporates by reference its oral ruling made from the bench on December 13, 2016.

Issue Date: 12/13/2016

ELIZABETH ANNE STARRS
District Court Judge

EXHIBIT A

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 16, 2016 CASE NUMBER: 2016SA318
Appeal Pursuant to C.R.S. 1-1-113 District Court, City and County of Denver, 2016CV34522	
Respondents-Appellants: Polly Baca and Robert Nemanich, in their official capacities as presidential electors, and others so similarly situated, **v.** **Petitioner-Appellee:** Wayne Williams, in his official capacity as Colorado Secretary of State.	Supreme Court Case No: 2016SA318
ORDER OF COURT	

Upon consideration of the Petition For Immediate Review Under § 1-1-113, C.R.S. filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the Supreme Court DECLINES to exercise jurisdiction.

BY THE COURT, EN BANC, December 16, 2016.
CHIEF JUSTICE RICE and JUSTICE EID do not participate.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01937-WYD-NYW

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH,

Plaintiffs

v.

COLORADO DEPARTMENT OF STATE,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Micheal Baca, Polly Baca, and Robert Nemanich were appointed as three of Colorado's presidential electors in the most recent presidential election. They were thus required to perform the federal function of casting electoral votes for President and Vice-President.

During the electoral vote, the Colorado Secretary of State unconstitutionally interfered with Plaintiffs' constitutional right to vote for candidates of their choice. Plaintiff Micheal Baca voted for John Kasich, but his vote was not counted. Instead, he was removed from office, on the grounds that he did not vote the way the Secretary contended he was required to under state law. *See* Compl. ¶¶ 54–55. The two other plaintiffs were unconstitutionally intimidated from casting votes according to their discretion. The Secretary's actions violated Plaintiffs' constitutional rights. Plaintiffs have brought this action under 42 U.S.C. § 1983 to address that violation.

BACKGROUND

A. The Mechanics Of The Electoral College: The State Appoints, And The Electors Perform The "Federal Function" Of Voting For President.

The Constitution does not provide for direct election of the President and Vice-President. Instead, each State "appoint[s]" a number of electors equal to the total number of the State's Members of the House and Senate. *See* U.S. Const. art. II & amd. XII. The Constitution gives states "plenary" power to select electors, *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), subject to the limits of the Constitution, *Williams v. Rhodes*, 393 US 23, 29 (1968). Colorado appoints a slate of electors that are chosen by the political party of the candidates for President and Vice-President that receive the most popular votes in the state. *See* CRS § 1-4-301 *et seq.*

Once appointed, electors meet in the respective states "on the first Monday after the second Wednesday in December next following their appointment," which, in the most recent election, was December 19, 2016. 3 U.S.C. § 7. Both Congress and Colorado law require electors

to "perform the duties required of them by the constitution and laws of the United States." CRS § 1-4-304(1); *see also* 3 U.S.C. § 8 (electors vote "in the manner directed by the Constitution").

B. Plaintiffs Are Selected As Electors And Consider Their Votes.

Plaintiffs were nominated in April 2016 as three of nine Democratic electors in the State of Colorado. Compl. ¶ 27. Because Hillary Clinton and Tim Kaine received the most popular votes in the state of Colorado in the general election on November 8, 2016, Plaintiffs and the other Democratic electors were appointed as the State's electors. Compl. ¶ 32.

After learning of what many deemed to be credible allegations of foreign interference in the popular election, Compl. ¶¶ 37–38, Plaintiff Nemanich asked Colorado Secretary of State Wayne Williams "what would happen if" a Colorado elector did not vote for Clinton and Kaine. Compl. ¶ 46. The Secretary, through the Colorado Attorney General's office, responded that Colorado law requires electors to vote for the ticket that received the most popular votes in the state, *see* CRS § 1-4-304(5), and an elector who did not comply with this law would be removed from office and potentially subjected to criminal perjury charges. Compl. ¶¶ 46–47.

C. The Tenth Circuit Maintains The Status Quo Because It Finds It "Unlikely" That Any Elector Will Be Removed From Office.

In light of the Secretary's response, two of the Plaintiffs brought suit in this Court and requested a preliminary injunction to prevent their removal or any interference with their votes. This Court denied the request, and the Tenth Circuit affirmed. The Tenth Circuit noted, however, that it did not need to answer the question of whether the Secretary could remove electors from office after electoral voting had begun because it thought that "such an attempt by the State" was "unlikely in light of the text of the Twelfth Amendment," which grants electors the constitutional power to vote by ballot for candidates for President and Vice-President. *See Baca v. Hickenlooper* ("*Baca II*"), 10th Cir. No. 16-1482, Slip Op. at 12 n.4 (Dec. 16, 2016); *see also id.*

at 10 n.3 (noting that there is "language in the Twelfth Amendment that could arguably support the plaintiffs' position" that they have constitutional discretion in voting).

D. The Secretary Removes Baca From Office For Casting A Vote For Kasich, And Refuses To Count The Vote.

Three days after the Tenth Circuit's order was released, the electors convened to cast their votes. When voting began, Micheal Baca crossed out Hillary Clinton's name on the pre-printed ballot and voted for John Kasich for President. Compl. ¶ 54. The Secretary, after reading the non-secret ballot, removed Baca from office, refused to count the vote, referred him for criminal investigation, and replaced him with a substitute elector who cast a vote for Clinton. *Id.* at ¶ 55. Two other Plaintiffs, Polly Baca and Robert Nemanich, felt "intimidated and pressured to vote against their determined judgment" in light of the Secretary's actions and prior statements, including the Secretary's efforts to change the text of the Electors' oath just minutes before they took it. *Id.* at ¶ 56. They thus ultimately cast their electoral votes for Clinton and Kaine.

Following dismissal of Plaintiffs' earlier injunctive action, Plaintiffs filed this suit, which alleges a deprivation of their constitutional rights under § 1983 and requests damages.

ARGUMENT

THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFFS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO VOTE

The federal Constitution creates the role of a presidential "Elector," charged with the duty to vote for both President and Vice President. States have "plenary" authority to select those electors. *McPherson*, 146 U.S. at 35. But once chosen, an elector performs a "federal function under . . . the Constitution," *Burroughs v. United States*, 290 U.S. 534, 545 (1934), and is thus free to exercise his or her judgment without state interference. By removing Micheal Baca from office and threatening others with removal, the Secretary violated Plaintiffs' constitutional right to cast an electoral vote for president. Thus, the State's motion to dismiss must be denied.

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

Plaintiffs have standing. Their lone cause of action alleges they were personally injured by being either removed from office (Micheal Baca) or threatened with removal (Polly Baca and Rob Nemanich) for exercising their constitutional rights. They thus meet the elements for standing in federal court. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) (reciting familiar three-part standing test); *Faustin v. City & Cty. of Denver*, 268 F.3d 942, 950 (10th Cir. 2001) (nominal damages sufficient to confer standing in § 1983 suit).

The State claims that the so-called "political subdivision standing" doctrine bars this case on the grounds that plaintiffs may not "challenge the constitutionality of state statutes when they are not personally affected by those statutes and their interest in the litigation is official rather than personal." State Br. 7. But this Court implicitly, and the Tenth Circuit explicitly, have already rejected the same standing argument, and for good reason: as the Court of Appeals understood, Plaintiffs here allege that the Secretary's actions "infringe[d] upon their *own personal constitutional* rights," and they thus have more than an abstract or official stake in the outcome. *Baca II,* Slip Op. at 7 (emphasis added). Like every person whose "own personal constitutional rights" have been infringed, plaintiffs have standing to challenge that infringement through a "civil action for deprivation of [constitutional] rights." 42 U.S.C. § 1983.

Indeed, the Tenth Circuit recognized that Plaintiffs have standing under *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, state legislators had standing to prohibit the state from interfering with a legislative vote. The Court held the legislators could proceed because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. Plaintiffs' interest here is similar to that of the state legislators in *Coleman*: as appointed electors for Colorado, they were entitled to have their votes cast and counted once voting began.

Moreover, even if the *Coleman* principle were insufficient to confer standing, Plaintiffs have standing under the State's proposed test. The State acknowledges that Plaintiffs have standing if they can show they were "personally affected" by unconstitutional actions. State Br. 7. But Plaintiffs were removed from office or threatened with removal, and the Supreme Court has held the threat of or actual removal from office confers standing. That is because state officials' "refusal to comply with [a] state law [that is] likely to bring their expulsion from office" gives them a "personal stake" sufficient to confer standing. *Bd. of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968); *see also City of Hugo v. Nicholas*, 656 F.3d 1251, 1260 (10th Cir. 2011) (government officials have standing against state government defendants "based on the individual [plaintiffs'] personal stake in losing their jobs").

This principle applies here with special force because Plaintiffs are not ordinary "state officials" subject to state control, which is the fact that triggers the "political subdivision doctrine" in the first place. Though appointed by the state, Plaintiffs exercise a "federal function" in voting for President. *Burroughs*, 290 U.S. at 545. Thus, Plaintiffs have standing to challenge any action that interferes with the performance of that federal function.[1]

[1] The case law upon which the State relies is inapplicable. *See* State Br. 6–8. Some of the inapt citations involved claims by political subdivisions, which, by definition, cannot have "personal stakes" in a case. *See City of Hugo*, 656 at 1253 (plaintiff was a city in Oklahoma). Other inapt cases involved plaintiffs who did not suffer any personal loss but instead wished only to vindicate a purely abstract principle. In contrast, here, Plaintiffs here were actually removed from office (or threatened with removal) as a result of the Secretary's unconstitutional actions. *Compare Columbus & G. R. Co. v. Miller*, 283 U.S. 96, 100 (1931) (tax collector would not be personally affected by allegedly invalid tax provision); *Cooke v. Hickenlooper*, No. 13-cv-1300, 2013 U.S. Dist. LEXIS 168806, at *38 (D. Colo. Nov. 27, 2013) (county sheriffs not personally affected by allegedly unconstitutional new gun regulations and did not allege potential job loss).

B. Plaintiffs Have Stated A Claim That The Secretary Unconstitutionally Interfered With Plaintiffs' Right To Vote.

On the merits, Plaintiffs have stated a claim for damages based on the Secretary's interference with Plaintiffs' performance of their federal duties. The text, history, and structure of the Constitution are clear: presidential electors exercise a "federal function," and, once appointed, may not be controlled in the exercise of their duties by either state or federal officials. Because the Secretary unconstitutionally interfered with that protected federal constitutional right, this Court must deny the State's motion to dismiss.

1. Colorado May Not Interfere With Electors' Performance Of Their Federal Function.

The Secretary's actions were unconstitutional because they violate the long-established prohibition on state interference with the exercise of a "federal function." The federal nature of Plaintiffs' duty, already clear from the Constitution, has been repeatedly confirmed by the Supreme Court. In *Burroughs v. United States*, 290 U.S. 534 (1934), the Supreme Court held that presidential electors "exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States," and thus are not mere creatures of state law. *Id.* The Court later reaffirmed that "presidential electors exercise a federal function in balloting for President and Vice-President." *Ray v. Blair*, 343 U.S. 214, 224 (1952); *see also Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (same, quoting *Burroughs*).[2]

Because casting an electoral vote for president is a federal duty, Colorado may not interfere with or impede the performance of that duty. The bedrock principle that states cannot

[2] As mentioned *supra* pp. 1–2, state and federal statutes mirror the Supreme Court's conclusion. *See* 3 U.S.C. § 8 ("[E]lectors shall vote for President and Vice President, respectively, in the manner directed by the Constitution."); CRS § 1-4-304(1) ("[P]residential electors shall proceed to perform the duties required of them by the constitution and laws of the United States.").

interfere with federal functions was first described in *McCulloch v. Maryland*, 17 U.S. 316 (1819), which rejected a state's ability to tax the Bank of the United States because the "Constitution and the laws made in pursuance thereof shall be the supreme law of the land" and cannot be interfered with by a state. *Id.* at 433. Since then, courts have held that federal postal officials may not be required to get a state driver's license to perform their duties because that would "require qualifications in addition to those that the [Federal] Government has pronounced sufficient," *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); that private federal contractors cannot be required to submit to state licensing procedures that would add to a contractor's qualifications to receive the federal contract, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956); and that federal employees and contractors cannot be prosecuted for trespass when performing "federal duties," *Wyoming v. Livingston*, 443 F.3d 1211, 1230 (10th Cir. 2006).

Here, the State implies presidential electors work for or on behalf of the state, calling them "state officers." State Br. 7. But electors are employees of no one. Unlike state employees, electors perform federal functions, are appointed pursuant to the U.S. Constitution, are elected to office, and receive only a nominal stipend and travel allowance as compensation. *See* CRS 1-4-304–305. Instead, as Hamilton noted, the Electoral College occupies a "branch" of government analogous to the House and Senate. *See* The Federalist No. 60 (A. Hamilton).

Even if Plaintiffs were nominally "state officials," the analysis would not change. Courts have granted immunity not just to federal employees but also to private contractors performing federal functions, *Leslie Miller*, 352 U.S. at 189–90; *Wyoming*, 443 F.3d at 1217; to private banks, *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1870) (national banks must be free from any "State law [that] incapacitates the banks from discharging their duties to the government"); and, as particularly relevant here, to state legislative officials, whose votes to ratify a

constitutional amendment are not subject to overrule by popular referendum because the "act of ratification by the State derives its authority from the Federal Constitution." *Hawke v. Smith*, 253 U.S. 221, 230 (1920). Thus, Plaintiffs' performance of their federal function renders them immune from state control—not their employment status.

2. The Power To Appoint Does Not Imply The Power To Control.

The State also errs when it confuses its power to *appoint* electors with the power to *control* them. State Br. 9–12. The President "appoints" federal judges; he has no power to control federal judges. The same is true here: while the Constitution expressly grants states the power to "appoint" electors, the Constitution gives states no power to control how electors perform their "federal function." *See Hawke*, 253 U.S. at 230 (federal rules govern state ratification of constitutional amendments).

The difference between the power to appoint and the power to control is fundamental in our system of separated powers. Before the Senate was popularly elected, for instance, state legislatures had plenary power to select U.S. Senators. But, while any instructions on voting from a Senator's state may have had moral and political sway, "attempts by state legislatures to instruct senators have never been held to be legally binding." Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 592 (1996). Thus, no Senator was ever punished by a state for failing to follow an instruction, despite state legislators believing Senators worked for them.

The same principle also applies to legislative electors—that is, voters—who are the other type of "electors" mentioned by the Constitution. *See* U.S. Const. art. I, § 2; *see also infra* at 10. Legislative electors cannot be intimidated or coerced into voting in a particular way. *See*, *e.g.*, 42 U.S.C. § 1973i. Indeed, the idea of a state law directing individual votes for Governor or Senator is so repugnant to the Constitution that it is unclear if it has ever even been attempted. Yet that is

exactly what the State did here. The interference would have been unconstitutional if Plaintiffs were legislative electors, and it is equally unconstitutional with respect to presidential electors.

Ray v. Blair, 343 U.S. 214 (1952), upon which the State relies, confirms the distinction between the State's power to appoint (which it has) and its power to control (which it lacks). In permitting the state to require electors to pledge to vote for the nominee of their party, *Ray* affirmed the plenary power of states to *appoint* electors. *Id.* at 231. But the Court also noted that electors' "promises" may be "legally unenforceable" because they could be "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he may choose in the electoral college." *Id.* at 230 (citation omitted). This passage recognizes the key distinction between the state-regulated appointment process and the federal function of casting a vote for president that must be free from state interference.

3. The Constitution's Text Gives Electors Discretion To Choose Their Preferred Candidates.

The Constitution's text also demonstrates that states may not dictate electors' votes, as the Tenth Circuit seemingly recognized earlier in this dispute. In *Baca II*, the court stated that any attempt "to remove an elector after voting ha[d] begun" would be "unlikely in light of the text of the Twelfth Amendment," which gives "Electors" freedom to cast a "vote by ballot" without restriction. Slip Op. at 12 n.4, U.S. Const. amd. XII. The court's reliance on Constitutional text was well-founded.

The Constitution creates two kinds of "Electors." First, Article I, § 2 provides that House Members are selected every two years by "Electors," and the Seventeenth Amendment expanded the power of those "Electors" (hereinafter, "Legislative Electors") to include selection of Senators. States have the power to define Legislative Electors' qualifications, because Legislative Electors may cast votes only if they have the "Qualifications requisite for Electors of

the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2. But once qualified, Legislative Electors perform a federal function—selecting Members of the House and Senate—which the states have no power to direct or control. *See Ray*, 343 U.S. at 224 (comparing the "federal function" of a presidential elector to "the state elector who votes for congressmen"). Thus, no state has ever tried by law to specify how its Legislative Electors must vote in Congressional elections. The very idea is anathema to the liberty of voting.

Second, Article II, § 1 provides that a second set of "Electors" are "appoint[ed]" by the State, as the legislature "may direct," to select the President and Vice President once every four years. These are the Presidential Electors. The State has plenary power to select these Electors, except that no "Senator or Representative, or Person holding an Office of Trust or Profit under the United States" may serve as a Presidential Elector. As with Legislative Electors, Presidential Electors exercise a federally-protected power in performing their duties. *Burroughs*, 290 U.S. at 545 (presidential electors "exercise a federal function under . . . the Constitution").

The plain meaning of the constitutional text is that all "electors" are vested with judgment and discretion. The word "elector" implies choice: Samuel Johnson defined the term in 1768 as "he that has a vote in the choice of any officer." Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1768). Further, in Federalist 57, Madison notes Legislative Electors "are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State," The Federalist No. 57 (J. Madison). Presidential Electors have the same right because, as Alexander Hamilton said, Presidential Electors would likely have the "information and discernment" necessary to choose the President. The Federalist No. 68 (A. Hamilton). Indeed, Hamilton explicitly drew the analogy between Legislative and Presidential

Electors when he said that the Electoral College would form an "intermediate body of electors" who would be "detached" from "cabal, intrigue, and corruption." *Id.*

Other constitutional text confirms Electors' must exercise independent judgment. The Constitution requires Presidential Electors vote "by ballot," meaning Presidential Electors must vote by secret ballot to further insulate electors from the "cabal and intrigue" that concerned the framers. *See* Speech of Charles Pinckney in the United States Senate, March 5, 1800, *reprinted in* 3 Records of the Federal Convention 1787, at 390 ("The Constitution directs that the Electors shall vote by ballot . . . It is expected and required by the Constitution, that the votes shall be secret and unknown."). Secret ballots are inconsistent with the ability to control electors' votes, as illustrated dramatically here, where the Secretary removed Micheal Baca purely on the basis of his vote.[3] Compl. ¶ 55.

In line with this history, the Supreme Court has recognized that Presidential Electors were originally vested with judgment. In 1892, the Court stated that "it was supposed [by the Framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive." *McPherson*, 146 U.S. at 36. Justice Jackson later agreed that "[n]o one faithful to our history can deny that the plan originally contemplated . . . that electors would be free agents, to exercise an independent and nonpartisan judgment." *Ray*, 343 U.S. at

[3] Indeed, when the Secretary refused to permit Plaintiffs to vote by secret ballot and interfered with electors' ability to certify and seal their own votes, he may have violated federal law governing electoral procedure. *See* 3 U.S.C. §§ 8–11 (requiring electoral votes be cast "in the manner directed by the Constitution," and providing "*electors* shall make and sign six certificates of all the votes given by them," without any interference from the State) (emphasis added).

232 (Jackson, J., dissenting).[4] No amendment or court opinion has altered the freedom that the Supreme Court has recognized, nor has any Supreme Court opinion. It therefore still exists.

4. Constitutional Structure Reinforces Elector Independence.

The Supreme Court has also made clear that the Constitution prohibits states from adding restrictions to electors' freedom to vote for candidates who meet constitutional qualifications. In *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), for instance, the Court rejected Arkansas's attempt to deny ballot access to any representative who had served three terms in the U.S. House or two in the Senate. The Court held such restrictions infringed Legislative Electors' freedom of choice because "sovereignty confers on the people the right to choose freely their representatives to the National Government." *Id.* at 794. Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court held that Congress had no power to fail to seat an elected representative who met all constitutional requirements for congressional service. *Id.* at 547. Thus, under *Powell* and *Thornton*, Legislative Electors must be given freedom to vote into office anyone that meets the constitutional requirements of age, residency, and citizenship. *Thornton*, 514 U.S. at 783.

Presidential Electors have the same freedom of choice as Legislative Electors. The Constitution imposes only a few restrictions on Presidential Electors' choices: for example, at least one of an elector's choices for president and vice-president must not be from the elector's state, U.S. Const. amd. XII, and the elector's choice for president must be at least 35 years old, *id.* art. II, § 1. But the constitutional limits are the *only* limits on elector discretion, because to permit States to add additional restrictions would undermine "'the right of the electors to be

[4] Leading constitutional historian Rob Natelson recently reviewed additional founding-era evidence that electors were meant to exercise discretion in blog posts that can be found at https://perma.cc/SL3F-EPKR and https://perma.cc/DDW2-MDUV.

represented by men of their own choice," which is "so essential for the preservation of all their other rights.'" *Powell*, 395 U.S. at 534 n.65 (quoting 16 Parl. Hist. Eng. 589–90 (1769)). The restriction on voting here—which gave Presidential Electors one and only one choice for President, *see* Compl. ¶¶ 54–55—is thus unconstitutional.

Indeed, if states could restrict Presidential Electors' votes beyond express constitutional limits, then, as Justice Douglas said in *Powell*, nothing prevents the passage of laws that would nullify votes for a "Communist," a "Socialist," or anyone who "spoke[] out in opposition to the war in Vietnam." 395 U.S. at 553 (Douglas, J., concurring). Such politically-charged restrictions are not hypothetical: the New York legislature recently introduced a bill that would prevent its Presidential Electors from voting for a candidate who did not release copies of his or her five most recent years of tax returns. *See* N.Y. Senate Bill S26, § 3 (2017–18 Legislative Session). On the State's view here, that condition on elector voting is a valid component of the state's appointment power. But the Constitution's text and structure reveal that this extra-constitutional restriction on who Presidential Electors can select is invalid, just like the one at issue here.

5. Longstanding Practice Recognizes The Existence Of A Constitutional Freedom To Choose.

Finally, the State contends that "longstanding practice" justifies its deviation from the text and history of the Constitution. State Br. 12–14. But the State's argument confuses ethical norms with constitutional law. Of course the norm is for electors to vote consistent with the expectations of the public and political parties. Yet, as Senator Sam Ervin recognized on the floor of the Senate, the "Constitution is very clear on this subject" of the binding of Presidential Electors: the government may not "take what was an ethical obligation and convert it into a constitutional obligation." 145 Cong. Rec. 203 (1969). For that very reason, Congress has never wavered from its view that Presidential Electors' votes must be counted even if contrary to the

popular vote. Thus, in the most recent election, Congress certified seven such votes, including several from states with binding statutes like Colorado's that attempted to require Presidential Electors to vote for a particular ticket, *see* 163 Cong. Rec. H185–189 (Jan. 6, 2017) (counting and certifying election results). Congress has never done otherwise.

The State also claims that "courts have uniformly recognized the constitutionality of binding electors through statute." State Br. 12. The State is wrong. In fact, the Alabama Supreme Court invalidated a binding statute because, when the state "dictate[s] to the electors the choice which they must make for president and vice-president, it has invaded the field set apart to the electors by the Constitution of the United States." *Op. of Justices*, 250 Ala. 399, 401 (1948). The Kansas Supreme Court has likewise recognized that "[i]n a legal sense the people of this State vote for no candidate for President or Vice President, that duty being delegated to 10 citizens who are authorized to use their own judgment as to the proper eligible persons to fill those high offices." *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896).[5]

Moreover, cases on which the State relies incorrectly conclude the Constitution can be changed or amended based on prior practice. One trial court decision relied on by the State, *Thomas v. Cohen*, 146 Misc. 836 (N.Y. Sup. Ct. 1933), acknowledged that "the exact language of the Constitution" vests electors with discretion, but the judge departed from the "apparent meaning" of the Constitutional text because, in the court's view, common practice had "ripened" into a "bounden duty" of an elector to vote for a particular candidate. *Id.* at 839, 841. But

[5] Recent scholarship on this topic also supports the view that presidential electors may not be bound to vote for a particular candidate. *See* Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, Public Discourse (Nov. 21, 2016) ("[C]onstitutionally, the electors may vote for whomever they please."); Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Unconstitutional?*, 2016 Cardozo L. Rev. De Novo 129, 153 ("[T]he Constitution protects the elector's discretion against efforts at legal compulsion.").

federal law is now clear that "'[p]ast practice does not, by itself, create power.'" *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); *see also Ray*, 343 U.S. at 253 (Jackson, J., dissenting) (noting that "custom" is not "sufficient authority for amendment of the Constitution by Court decree"). The clear language of the Constitution has not been amended. Under it, Plaintiffs' constitutional rights were violated.

* * *

This Court earlier expressed concern that Presidential Electors who fail to vote in accord with the popular vote of their state "undermine the electoral process and unduly prejudice the American people." *Baca v. Hickenlooper*, D. Colo. No. 16-2986, Slip Op. at 16 (Dec. 21, 2016). Plaintiffs recognize that departing from the popular vote and an elector's pledge should be an extraordinary act. But the greater prejudice to the American people would be to ignore the Constitution. The Framers created an intermediate body of electors, imbued with the discretion to cast votes for the persons they viewed as best able to serve as President and Vice-President, in the hope that this hybrid system would produce excellent results. Until the Constitution is amended, the State must permit the system to operate as designed.

CONCLUSION

The Motion to Dismiss should be denied.

Dated: December 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December, 2017, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS** was filed with the Court via **CM/ECF** and served upon counsel for Defendant via method indicated:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01937-WYD-NYW

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH,
Plaintiffs,
v.

COLORADO DEPARTMENT OF STATE,
Defendant.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

Defendant, the Colorado Department of State ("Department"), submits this Reply in support of its Motion to dismiss the Second Amended Complaint under FED. R. CIV. P. 12(b)(1) and 12(b)(6).

REPLY ARGUMENT

I. As former subordinate state officials, Plaintiffs lack standing under the political subdivision standing doctrine.

Plaintiffs contend that the doctrine of political subdivision standing—which provides that federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states—is no hurdle to this Court's jurisdiction, because their "own personal constitutional rights" were infringed by the Department's enforcement of Colorado's binding statute. Doc. 46, p. 4. In support, Plaintiffs rely on *Coleman v. Miller*, 307 U.S. 433 (1939), where the Supreme Court determined that 20 of 40 Kansas state senators had standing to sue in an effort to maintain the effectiveness of their votes.

Plaintiffs confuse two discrete strands of standing jurisprudence: the political subdivision standing doctrine, which acts as an independent bar to Plaintiffs' suit, and the requirements for legislator standing. *Coleman* deals only with legislator standing and contains no discussion of the political subdivision standing doctrine. Because Presidential Electors do not legislate, *Coleman*

has no bearing on the Department's Motion to Dismiss. Moreover, even if *Coleman* were relevant, its holding has since been cabined by the Supreme Court in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). There, the Court concluded that the Arizona State Legislature had standing to challenge a voter initiative because it was "an institutional plaintiff asserting an institutional injury" in a suit authorized by votes taken in both the Arizona House and Senate. *Id.* at 2664. But the Court cautioned that the same is not true for individual legislators—they lack standing in part because they are not authorized to represent the legislature as a whole in litigation. *Id.* at 2664 (citing *Raines v. Byrd*, 521 U.S. 811 (1997)). The Tenth Circuit, applying *Arizona State Legislature*, has also held that individual state legislators lack standing to challenge state law. *See Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016) (no standing to challenge TABOR). Plaintiffs' reliance on legislator-standing cases is thus misplaced. But this Court need not go down this legislator-standing rabbit hole. As discussed below, the political subdivision standing doctrine operates as an independent bar to Plaintiffs' standing.

Plaintiffs' response to the political subdivision standing doctrine is two-fold. *First*, Plaintiffs argue they are not "ordinary 'state officials'" that might otherwise trigger the doctrine because they exercise a "federal function." Doc. 46, p. 5. But merely exercising a "federal function" does not remove a state official from the political subdivision standing doctrine. After all, a county sheriff exercises a federal function when he or she assists in enforcing any number of federal laws; a state insurance commissioner exercises a federal function when he or she administers complementary state and federal insurance programs like Medicaid and Medicare; and a city government exercises a federal function when it applies for and receives federal dollars for local social programs and improvement projects. *See FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (recognizing "the Federal Government has some power to enlist a branch of state government … to further federal ends."). Yet each of these subordinate officials and entities is barred by the political subdivision standing doctrine from maintaining federal litigation against their parent state. *See Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 566–67 (5th

Cir. 2008); *City of S. Lake Tahoe v. Calif. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233–34 (9th Cir. 1980); *Cooke v. Hickenlooper*, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, *8–12 (D. Colo. Nov. 27, 2013). The same analysis applies here. Although their tenure was brief and their function purely ministerial, Plaintiffs' role as former subordinate state officials subjects them to the political subdivision standing doctrine, requiring dismissal for lack of standing.[1]

Second, Plaintiffs rely on a footnote in *Bd. of Educ. v. Allen* that found standing for certain local government board members because they held a "personal stake" in retaining their jobs. Doc. 46, p. 5 (citing 392 U.S. 236, 241 n.5 (1968)). But *Allen* did not discuss the political subdivision standing doctrine, perhaps because the appellees in that case did not contest the appellant's standing. *See id.* Moreover, serving as an elector in the Electoral College is not "a job" that confers any meaningful pecuniary interest or autonomous power on Plaintiffs. Under Colorado law, electors are reimbursed for their mileage, given a nominal five dollars for their attendance at the one-day meeting, and must cast their ballots for the candidates who won Colorado's popular vote. §§ 1-4-304(5) & 305, C.R.S. (2017). That's it. And as their Complaint makes clear, Plaintiffs' alleged injury is not an individual one based on the possible loss of this nominal compensation, but rather an institutional injury grounded in the diminution of power that Colorado's binding statute allegedly causes to the electors' official role. Doc. 39, ¶¶ 7–9, 41 (Plaintiffs' Complaint, identifying Plaintiffs in their capacities as Electoral College members and stating they determined to "exercise their constitutional discretion to vote contrary to their pledge

[1] Even putting aside Plaintiffs' positions as former state officials, exercising a "federal function" does not, by itself, confer federal constitutional rights that may be vindicated in federal court under 42 U.S.C. § 1983. More is required. The federal law that a plaintiff seeks to vindicate under § 1983 must clearly and unambiguously confer an individual federal entitlement by using rights-creating language. Vague "benefits" or "interests" will not do. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282–87 (2002) (holding that nothing short of an "unambiguously conferred right" will support a cause of action under § 1983); *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (stating that a plaintiff seeking redress under § 1983 "must assert a violation of a federal *right*, not merely a violation of federal *law*." (emphasis in original)). Nothing in Article II or the Twelfth Amendment fits that bill. *Cf. Jones v. Bush*, 122 F. Supp. 2d 713, 716–18 (N.D. Tex. 2008) (holding Twelfth Amendment did not confer standing on voters to enforce requirement that President and Vice President be inhabitants of different states).

or the popular vote in their state"); *cf. Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993) (stating courts should "look to the substance of the pleadings and course of the proceedings" to determine if suit is against government official in their individual or official capacity).

Thus, because Plaintiffs do not assert any individual injury, *Allen*'s footnote does not confer standing on Plaintiffs. *See Cooke*, 2013 WL 6384218, *11 (concluding county sheriffs lacked standing to challenge state gun law because they failed "to bring claims in their individual capacities like that asserted in *Allen*.").

One additional facet of the political subdivision standing doctrine merits brief mention. Plaintiffs bring their challenge under Article II and the Twelfth Amendment of the Constitution, not a federal statute. Following the "trend" of other federal courts, the Tenth Circuit has stated that it will permit a lawsuit by a political subdivision against its parent state in the rare circumstance that the suit is "based on federal *statutes* that contemplate the rights of political subdivisions." *City of Hugo v. Nichols*, 656 F.3d 1251, 1258 (10th Cir. 2011) (emphasis added). But the Tenth Circuit warned that there is not a "single case where a court of appeals or the Supreme Court has expressly allowed … a claim by a municipality against its parent state premised on a substantive provision of *the Constitution*." *Id.* (emphasis added). The Tenth Circuit thus refused to depart from the "historic understanding of the Constitution as not contemplating political subdivisions as protected entities vis-a-vis their parent states." *Id.* at 1259. This Court should do the same, finding that Plaintiffs lack standing to assert constitutional claims against the Department.

II. Plaintiffs' federal preemption argument fails; Colorado's binding statute is fully consistent with federal law.

Plaintiffs also resist dismissal by invoking federal preemption principles, asserting that Colorado's binding statute interferes with electors' performance of a "federal function." Doc. 46, pp. 6-8. In the cases Plaintiffs cite, a federal law or policy conflicted with, or was frustrated by, the operation of an incompatible state law. These are classic examples of conflict preemption. *See Leslie Miller, Inc. v. State of Arkansas*, 352 U.S. 187, 190 (1956) (stating Arkansas

contractor licensing law conflicted with "federal policy of selecting the lowest responsible bidder" for federal contractors); *Hawke v. Smith*, 253 U.S. 221, 225 (1920) (answering in the affirmative the question whether Ohio's law providing for ratification of constitutional amendments by referendum "is in conflict with article 5 of the Constitution of the United States"); *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006) (affirming dismissal of state prosecution against federal contractor because "the use of state prosecutorial power [would] frustrate the legitimate and reasonable exercise of federal authority").[2]

But the 29 state statutes that bind electors do not conflict with or frustrate any federal objective. To the contrary, state binding statutes *advance* federal objectives involving the Electoral College. *See N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (rejecting federal preemption where "coordinate state and federal efforts" in a complementary framework pursue "common purposes"). Congress itself has passed a law binding the District of Columbia's electors to the result of the popular vote in the District. D.C. CODE ANN. § 1-1001.08(g)(2) (2017). The reason is straightforward and succinctly stated by Plaintiffs themselves: "sovereignty confers on *the people* the right to choose freely their representatives to the National Government." Doc. 46, p. 12 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 794 (1995)) (emphasis added). Thus, as far as Congress is concerned, binding electors to the outcome of a jurisdiction's popular vote promotes federal objectives. It does not impede them. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (stating courts "have a duty to accept the reading that disfavors pre-emption" when two plausible alternative readings exist).

The Constitution likewise embraces the notion that states may bind their electors and, if necessary, remove them. Article II provides that electors of each state shall be appointed "in such

[2] *Nat'l Bank v. Commonwealth*, 76 U.S. 353 (1870), cited in Plaintiffs' Response on page 7, supports the Department, not Plaintiffs. There, the Court affirmed the constitutionality of a Kentucky tax on shares of a national bank, stating that the tax "in no manner hinders [the bank] from performing all the duties of financial agent of the government." *Id.* at 363. Similarly here, Colorado's binding statute does not hinder the duty of presidential electors to act as "messengers" who "transmit the election returns" to Congress. *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924). That is their "sole duty." *Id.*

manner as the legislature thereof may direct[.]" U.S. CONST. art. II, § 1. The State's "power and jurisdiction" over its electors is "plenary," *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), "comprehensive," *id.* at 27, and "exclusive," *id.* at 35. And, contrary to Plaintiffs' argument, the power to appoint necessarily encompasses both the power to remove and to attach conditions. *See Burnap v. United States*, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint."); *Myers v. United States*, 272 U.S. 52, 175–76 (1926) (invalidating Tenure of Office Act that attempted to prevent President from removing executive officers); *cf. South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (stating Congress's power to spend money includes the power to "attach conditions"). The *state* office of presidential elector, unlike a federal judge and other federal official, enjoys no constitutional protection against removal or the attachment of conditions by the appointing authority. *Compare* U.S. CONST. art. II, § 4 (stating "civil officers of the United States" may be impeached only for "high crimes and misdemeanors"), *and* U.S. CONST. art. III, § 1 (federal judges shall hold their offices during "good behavior"), *with Ray v. Blair*, 343 U.S. 214, 224 (1952) (stating electors "are not federal officers or agents" and that they "act by authority of the state" that appoints them).

The Twelfth Amendment, on which Plaintiffs rely, also supports the State's authority to bind electors. It was enacted for the very purpose of facilitating Electoral College meetings in which electors would be bound to "carry out the desires of the people," without confronting the obstacles of the Electoral College of 1800 that ended in a tie. *Ray*, 343 U.S. at 224 n.11. Put another way, permitting the binding of electors was "the very thing … intended by th[e] [Twelfth] amendment." *Id.* at 229 n.15 (quoting 11 Annals of Congress 1289—1290, 7th Cong., 1st Sess. (1802)).

Accordingly, because Colorado's binding statute does not conflict with federal objectives, but rather advances them, Plaintiffs' preemption argument should be rejected.

III. Plaintiffs' originalist view of Article II ignores both this country's democratic history and the Twelfth Amendment.

Last, Plaintiffs argue that Article II's text, as shown by the Framer's original understanding of the Constitution, imbues electors with discretion to cast their Electoral College ballots for their preferred candidates, even if contrary to the wishes of their State's voters. As historical support, Plaintiffs rely on Alexander Hamilton's 1788 Federalist paper (No. 68), Samuel Johnson's 1768 dictionary definition of elector, and Senator Charles Pinckney's 1800 speech on the Senate floor, among other sources. Doc. 46, pp. 10–11. When coupled with Article II, Plaintiffs contend, these sources establish that electors are "vested with judgment and discretion." *Id.* at 10.

Plaintiffs' historical analysis misses the mark for at least two reasons. *First*, even if the Plaintiffs accurately describe the Framers' original understanding—a point the Department disputes, *see* Doc. 42, pp. 12–14—their contemplated oligarch system never came to pass. Instead, history proves that electors "were so chosen simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U.S. at 36. This view "has prevailed too long and been too uniform" to justify a contrary approach. *Id.*; *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("History has now favored the voter"); Doc. 42, pp. 12–14 (summarizing history of electors being bound and pledged to certain candidates). Moreover, any ostensible tension between the Framers' original understanding and this country's longstanding historical practice cannot diminish the State's plenary power over its electors. As the Supreme Court has explained, there is "no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the [Electoral College] system has not fully realized the hopes of those by whom it was created." *McPherson*, 146 U.S. at 36. As such, the State's plenary, comprehensive, and exclusive power over its electors—bolstered by this country's democratic history and longstanding practice—defeats any conflicting intent held by the Framers.

Second, whatever the Framers' original understanding might have been, the Twelfth Amendment's plain language "materially chang[ed] the mode of election of president" established by Article II. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1460 (1833). Because the Twelfth Amendment was ratified in 1804—years *after* the Framers approved Article II—it supplants the earlier text and historical sources relied upon by Plaintiffs. *See* Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N. U. L. REV. 467, 469 (2007) ("It is the Twelfth Amendment's electoral college system, not the Philadelphia Framers', that remains in place today."); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 407 (1995) (explaining that "the Twelfth Amendment directly changed the method for electing a president described in Article II" because it "change[d] constitutional text directly").[3] And, as already indicated, the Twelfth Amendment's entire purpose was to facilitate Electoral College meetings where electors are pledged and bound to their party's preferred candidates. *See Ray*, 343 U.S. at 224 n.11 & 229 n.15.

Accordingly, Plaintiffs' reliance on the Framers' alleged original understanding of Article II should be rejected.

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Amended Complaint should be dismissed in its entirety with prejudice.

[3] Plaintiffs' reliance on the Tenth Circuit's cursory reference to the Twelfth Amendment in *Baca I* should also be rejected. Doc. 46, pp. 2–3 (citing *Baca v. Hickenlooper*, 10th Cir. No. 16-1482, Slip Op. at 12 n.4 (Dec. 16, 2016)). The Tenth Circuit's footnote is mere *dicta* and contains no analysis of the Twelfth Amendment's text or the historical reasons for its ratification. *See United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n.3 (10th Cir. 2009) (stating *dicta* is not binding). That is unsurprising since the Tenth Circuit's order, and the highly expedited briefing leading up to it, were produced in a matter of hours to avoid delaying the constitutionally-scheduled meeting of the 2016 Electoral College.

Respectfully submitted this 19th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I served a true and complete copy of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)** upon all parties through ECF:

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FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Civil Action No. 17-cv-01937-WYD-NYW

MICHEAL BACA,
POLLY BACA, and
ROBERT NEMANICH,

Plaintiffs,

v.

COLORADO DEPARTMENT OF STATE,

Defendant.

ORDER ON MOTION TO DISMISS

I. INTRODUCTION

This matter is before the Court on Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) filed November 8, 2017. A response in opposition to the motion was filed on December 22, 2017, and a reply was filed on January 19, 2018. Thus, the motion is fully briefed.

II. BACKGROUND

Plaintiffs are three of the nine presidential Electors for the State of Colorado. They allege that the Colorado Department of State ["Defendant"], acting through its Secretary, Wayne Williams ["Secretary"], and under color of state law, specifically Colo. Rev. Stat. § 1-4-304, threatened and intimidated them in the exercise of their federally protected rights as presidential Electors in the 2016 Electoral College. (Second Am.

Compl., ECF No. 39, Introductory Paragraph.) The Complaint seeks nominal damages for the infringement of a fundamental federal right and a declaration that Colorado's law that purports to bind Electors by requiring them to vote for the Presidential and Vice Presidential candidates that received the highest number of votes at the preceding general election, Colo. Rev. Stat. § 1-4-304(5), is unconstitutional. (*Id*.) Plaintiffs allege that the statute is unconstitutional on its face and as applied to Electors because it infringes on their right to vote as they see fit without coercion, citing Article II and the Twelfth Amendment to the United States Constitution. (Second Am. Compl. ¶¶ 3-5.)

As to the facts relevant to the claims, Plaintiffs allege that on the day of the Electoral College, December 19, 2016, they took an oath over objections to cast their ballots for the Presidential and Vice-Presidential candidates who received the highest number of votes in this State in the preceding election. (Second Am. Compl. ¶ 53.) Plaintiffs allege that "before the vote, Secretary Williams, both personally and through surrogates, stated that anyone who violated their oath may be subject to felony perjury charges for intentionally violating the oath." (*Id*.)

Polly Baca and Robert Nemanich followed Colorado law by casting their Electoral College ballots for the Presidential and Vice-Presidential candidates who won Colorado's popular vote, Hillary Clinton and Timothy Kaine. They assert, however, that they felt "intimidated and pressured to vote against their determined judgment" in light of the Secretary's actions and statements. (Second Am. Compl. ¶ 56.)[1] Micheal Baca,

[1] Plaintiffs allege in that regard that after learning of what many deemed to be credible allegations of foreign interference in the popular election (*id*. ¶¶ 37–38), Plaintiff Nemanich asked the Secretary "what would happen if" a Colorado elector did not vote for Clinton and Kaine who had received the most popular

however, crossed out Hillary Clinton's name on the pre-printed ballot and wrote in his vote for John Kasich for President—a person who Defendant notes appeared on no ballot, anywhere, as a presidential candidate in the November 8, 2016 general election. (*Id*. ¶ 54.) The Secretary, after reading Michael Baca's ballot, removed him from office, refused to count his vote, referred him for a criminal investigation, and replaced him with a substitute elector who cast a vote for Clinton. (*Id*. ¶ 55.) Plaintiffs contend that the Secretary's actions—which they acknowledge are fully consistent with Colorado state law—violated their federal constitutional rights.

Defendant argues that this Court lacks subject matter jurisdiction under Rule 12(b)(1) because Plaintiffs are former state officers who lack standing to challenge Colorado law. Even if that Article III hurdle is overcome, Defendant argues that Plaintiffs' argument fails under Rule 12(b)(6) because the United States Constitution does not bar a state from binding its presidential electors to the outcome of that state's popular vote for President and Vice President. To the contrary, Defendant asserts that the Constitution's text, United States Supreme Court precedent, and this country's longstanding historical practice contemplate that the states may attach conditions to the office of a presidential elector. Accordingly, Defendant argues that this case should be dismissed.

I note that this is the second federal lawsuit that Plaintiffs Polly Baca and Robert Nemanich have filed related to their roles as presidential electors in the 2016 Electoral

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votes in Colorado. (*Id*. ¶ 46.) The Secretary, through the Colorado Attorney General's office, responded that Colorado law requires electors to vote for the ticket that received the most popular votes in the state, and an elector who did not comply with this law would be removed from office and potentially be subjected to criminal perjury charges. (*Id*. ¶¶ 46–47.)

College. The first action, *Baca v. Hickenlooper*, 16-cv-02986 ["*Baca I*"], was filed in December 2016, just 13 days before the 2016 Electoral College vote. The plaintiffs argued in *Baca I*, as in this case, that Colorado's binding presidential elector statute, Colo. Rev. Stat. § 1-4-304(5), was unconstitutional because it forced the electors to cast their votes for Hillary Clinton and Timothy Kaine who won the majority of Colorado's votes or to be removed from their position.

The same day the complaint was filed in *Baca I*, the plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction seeking to enjoin the defendants from enforcing Colorado's statute. The motion was denied at a hearing on December 12, 2016 (ECF No. 19), and by Order of December 21, 2017 (ECF No. 27). The Order found that the plaintiffs did not have a substantial likelihood of prevailing on the merits of their claim and could not show that the other three elements required for a preliminary injunction were satisfied. (ECF No. 27 at 5-12.)

The Tenth Circuit on appeal declined to disturb this decision, denying the plaintiffs' emergency motion for injunction pending appeal. (December 16, 2016 Order, ECF No. 26 in *Baca I*.) As Defendant notes, in the run-up to the Electoral College vote, several other courts also declined to enjoin similar state laws governing electors. They found, as in *Baca I*, that the challengers were unlikely to succeed on the merits. *See Chiafalo v. Inslee*, No. 16-36034, 2016 U.S. App. LEXIS 23392 (9th Cir. Dec. 16, 2016); *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1144-45 (W.D. Wash. 2016); *Koller v. Brown*, 224 F. Supp. 3d 871, 878 (N.D. Cal. 2016); *see also Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193, *4 (D. Minn. Dec. 23, 2016).

The plaintiffs in *Baca I* dismissed the case without prejudice in August 2017. The Complaint in this case was filed in December 2017.

III. ANALYSIS

A. Standard of Review

Defendant seeks to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Under Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. A motion to dismiss under Rule 12(b)(1) can be either a facial attack on the sufficiency of the allegations in the complaint as to subject matter jurisdiction or a challenge to the actual facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). A facial attack on the allegations as to subject matter jurisdiction "questions the sufficiency of the complaint." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). The court must "accept the allegations in the complaint as true." *Id*.

As to a Rule 12(b)(6) motion to dismiss, the court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of County Comm'rs of Cnty. of Arapahoe*, 633 F.3d 1022, 1025 (10th Cir. 2011). Plaintiff "must allege that 'enough factual matter, taken as true, [makes] his claim for relief ... plausible on its face.'" *Id*. (quotation and internal quotation marks omitted). "A claim has facial plausibility when the [pleaded] factual content [ ] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quotation omitted).

B. The Merits of the Motion

1. Standing

Defendant first argues that Plaintiffs lack standing to challenge Colo. Rev. Stat. § 1-4-304(5)—it asserts that Plaintiffs lack that necessary "personal injury fairly traceable to the defendant's allegedly unlawful conduct [that is] likely to be redressed by the requested relief." *DaimerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Specifically, Defendant argues that the political subdivision standing doctrine bars Plaintiffs' lawsuit *See City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011).

Plaintiffs argue in response that this Court implicitly, and the Tenth Circuit explicitly, rejected this standing argument in *Baca I* because Plaintiffs alleged that the Secretary's actions "infringe[d] upon their *own personal constitutional* rights." (*See Baca I*, Tenth Circuit Op., ECF No. 26 at 7) (emphasis added). Plaintiffs also contend that the Tenth Circuit recognized that Plaintiffs have standing under *Coleman v. Miller*, 307 U.S. 433 (1939).

I disagree that the Tenth Circuit actually decided the standing issue in *Baca I*, and I did not address standing in that case. While the issue was raised in the motion to dismiss filed by the defendants in that case (*Baca I,* ECF No. 35), the plaintiffs voluntarily dismissed the case before the motion to dismiss was ruled on. As to the Tenth Circuit's decision, it accepted Plaintiffs' allegations that Colo. Rev. Stat. § 1-4-304(5) infringed upon their personal constitutional rights "given the stage of the proceedings" (on an emergency motion for an injunction) and "given the preliminary record before us." (*Baca I*, ECF No. 26 at 7.) While it cited *Coleman* as a basis for

standing, it did not definitively decide the issue of standing due to the stage of the case and lack of a record on the issue.[2] Thus, I must address the standing issue.

I first find that Plaintiffs do not have standing under the *Coleman* decision. In *Coleman*, the Supreme Court found that a group of state legislators had standing to prohibit the state from interfering with a legislative vote. The Court held the senators' "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Coleman*, 307 U.S. at 438. It thus found that the senators had an adequate interest in the case, as they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id*. Plaintiffs assert that their interest here is similar to that of the state legislators in *Coleman*: as appointed electors for Colorado, they were entitled to have their votes cast and counted once voting began.

Coleman, however, was a case involving state legislators, rather than presidential electors as here, and it did not address the political subdivision standing doctrine raised by Defendant. Even if *Coleman* is relevant given that it involved legislators' stating, I find that it does not provide a basis for standing to the individual electors in this case. As Defendant correctly notes, its holding has since been cabined by the Supreme Court in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). There, the Court concluded that the Arizona State Legislature had standing to challenge a voter initiative because it was "an institutional

[2] Defendant notes that the Tenth Circuit's decision, and the highly expedited briefing leading up to it, were produced in a matter of hours to avoid delaying the constitutionally-scheduled meeting of the 2016 Electoral College.

plaintiff asserting an institutional injury" in a suit authorized by votes taken in both the Arizona House and Senate. *Id.* at 2664. But the Court cautioned that the same is not true for individual legislators—they lack standing in part because they are not authorized to represent the legislature as a whole in litigation. *Id.* at 2664 (citing *Raines v. Byrd*, 521 U.S. 811 (1997)). The Tenth Circuit has stated that the "rule of law" from the *Arizona State Legislature* case "materially alters the jurisprudence on legislator standing" and that individual state legislators now lack standing to challenge state law. *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016) (no standing to challenge TABOR). Under this same analysis, individual electors would not have jurisdiction to challenge state law.

Thus, I turn to the political subdivision standing doctrine to determine Defendant's standing argument. Under that doctrine, "federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states." *City of Hugo*, 656 F.3d at 1255. The Tenth Circuit noted in the *City of Hugo* case that it had not found "a single case in which the Supreme Court or a court of appeals has allowed a political subdivision to sue its parent state under a substantive provision of the Constitution." *Id*. at 1257. "Instead, courts have allowed such suits only when Congress has enacted statutory law specifically providing rights to municipalities." *Id*.

The political subdivision standing doctrine has been noted to be "an important limitation on the power of the federal government." *Cooke v. Hickenlooper*, No. 13-cv-1300-MSK-MJW, 2013 WL 6384218, at *10 (D. Colo. Nov. 27, 2013). As Chief Judge Krieger of this court noted in the *Cooke* case:

> It guarantees that a federal court will not resolve certain disputes between a state and local government. A political subdivision may seek redress against its parent state for violation of a state Constitution, but the political subdivision cannot invoke (nor can a federal court impose) the protections of the United States Constitution for individuals against a state.

Id.

The political subdivision standing doctrine applies both to political subdivisions of states such as cities and counties and to state officers. *See Cooke*, 2013 WL 6384218, at *9 (applying doctrine to county sheriffs). "The Supreme Court has held that state officials lack standing to challenge the constitutional validity of a state statute when they are not adversely affected by the statute and their interest in the litigation is official, rather than personal." *Donelon v. La. Div. of Amin. Law*, 522 F.3d 564, 566–67 (5th Cir. 2008) (citing *Cnty. Court of Braxton Cnty. v. West Virginia ex rel. Dillon*, 208 U.S. 192, 197 (1908)). "In another context, the Supreme Court made it clear that courts should not pass upon the constitutionality of a statute 'upon complaint of one who fails to show that he is injured by its operation .... Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained.'" *Donelon*, 522 F.3d at 566 (quoting *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 348 (1936)).

Here, I find that the Colorado presidential electors are state officials. *See Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937) (finding that "presidential electors are officers of the state and not federal officers"); *Chenault v. Carter*, 332 S.W.2d 623, 626 (Ky. 1960) (holding that presidential electors are state officers under Kentucky law). While presidential electors "exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of United States", they "are not officers

or agents of the federal government." *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *see also Ray v. Blair*, 343 U.S. 214, 224 (1952) ("The presidential electors exercise a federal function in balloting for President and Vice-President but are not federal officers or agents any more than the state elector who votes for congressman.").

Thus, I must address whether Plaintiffs have a personal stake in the litigation, rather than merely an official interest. I note that the substance of their claim is that the State of Colorado violated their constitutional right to cast an electoral vote of their choice for president. (*See* Resp. to Mot. to Dismiss at 3.) Under the political subdivision standing doctrine, this would not confer standing on Plaintiffs, as Plaintiffs are seeking to exercise what they believe are the full extent of their *official* powers under federal and state law. *Donelan*, 522 F.3d at 568.

As the Ninth Circuit aptly noted, "a public official's 'personal dilemma' in performing official duties that he perceives to be unconstitutional does not generate standing." *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009). The plaintiffs lose nothing by their having to vote in accordance with the state statute "'save an abstract measure of constitutional principle.'" *Id*. (quotation omitted). Their injury "is based upon their 'abstract outrage' at the operation" of the state statute they perceive to be unconstitutional. *Id*. at 762; *see also Raines*, 521 U.S. at 829-30 (finding that members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act because they did not have a sufficient "personal stake" in the dispute, even though they argued that the Act caused an unconstitutional diminution of Congress' power, as the injury was "based on a loss of political power, not loss of any private

right"); *Smith v. Indiana*, 191 U.S. 138, 149 (1903) (a county auditor who argued that an Indiana property tax statute violated the Fourteenth Amendment had no personal interest in the litigation; "[h]e had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so."); *Mesa Verde Co. v. Montezuma Cnty. Bd. of Equalization*, 831 P.2d 482, 484 (Colo. 1992) (holding that "political subdivisions of the state or officers thereof . . . lack standing to assert constitutional challenges to statutes defining their responsibilities.").

Plaintiffs argue, however, that they have standing under the political subdivision standing doctrine because they were personally injured by the State's act because they were either removed from office (Mr. Baca) or threatened with removal (Mr. Nemanich and Ms. Baca) for exercising their alleged constitutional rights. Plaintiffs assert that the Supreme Court has held that the threat of or actual removal from office confers standing. *Bd. of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968) (state officials' "refusal to comply with [a] state law [that is] likely to bring their expulsion from office" gives them a "personal stake" sufficient to confer standing); *see also City of Hugo*, 656 F.3d at 1259-60 (citing this ruling in *Allen* but noting that "the sole discussion of the municipal entity's standing was contained in a footnote").

I find that *Allen* does not provide standing. I first note that *Allen* did not discuss the political subdivision standing doctrine, perhaps because the appellees in that case did not contest the appellant's standing. *See Allen*, 329 U.S. at 241 n. 5. Moreover, I agree with Defendant that serving as an elector in the Electoral College is not "a job" or

"an office" that confers any meaningful pecuniary interest or autonomous power on Plaintiffs. Under Colorado law, electors are reimbursed for their mileage, given a nominal five dollars for their attendance at the one-day meeting, and must cast their ballots for the candidates who won Colorado's popular vote. Colo. Rev. Stat. §§ 1-4-304(5) & 305. Once the meeting is done and the votes are cast, the electors' duties are over. There is no ongoing "office" or "job" that the electors have and risk losing.

Moreover, as the Complaint makes clear, Plaintiffs' alleged injury is not an individual one based on the possible loss of this nominal compensation, but rather an institutional injury grounded in the diminution of power that Colorado's binding statute allegedly causes to the electors' official role. (Compl., ¶¶ 7–9, 41.) The "injury" that Plaintiffs allege from being removed (or threatened from being removed) as a Presidential elector is that they would lose the ability to cast their vote; the quintessential duty of their position.

While Plaintiffs argue that they are not ordinary state officials because they exercise a "federal function", this does not remove a state official from the political subdivision standing doctrine. As Defendant notes, a county sheriff exercises a federal function when he or she assists in enforcing any number of federal laws; a state insurance commissioner exercises a federal function when he or she administers complementary state and federal insurance programs like Medicaid and Medicare; and a city government exercises a federal function when it applies for and receives federal dollars for local social programs and improvement projects. *See FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (recognizing "the Federal Government has some power to

enlist a branch of state government … to further federal ends."). Yet each of these subordinate officials and entities is barred by the political subdivision standing doctrine from maintaining federal litigation against their parent state. *See Donelon*, 522 F.3d at 566–67; *City of S. Lake Tahoe v. Calif. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233–34 (9th Cir. 1980); *Cooke*, 2013 WL 6384218, at *8–12. Similarly, while the presidential electors may play a federal function in casting their vote, their role as subordinate state officials subjects them to the political subdivision standing doctrine.

Finally, as Defendant notes, Plaintiffs bring their challenge under Article II and the Twelfth Amendment of the Constitution, not a federal statute. Following the "trend" of other federal courts, the Tenth Circuit has stated that it will permit a lawsuit by a political subdivision against its parent state in the rare circumstance that the suit is "based on federal *statutes* that contemplate the rights of political subdivisions." *City of Hugo*, 656 F.3d at 1258 (emphasis added). But the Tenth Circuit warned that there is not a "single case where a court of appeals or the Supreme Court has expressly allowed … a claim by a municipality against its parent state premised on a substantive provision of the Constitution." *Id*. The Tenth Circuit thus refused to depart from the "historic understanding of the Constitution as not contemplating political subdivisions as protected entities vis-a-vis their parent states." *Id.* at 1259. This also supports my finding regarding lack of standing.

Accordingly, the motion to dismiss is granted as Plaintiffs lack standing to assert their claims.

2. Whether Plaintiff's Complaint Must Be Dismissed for Failure to State a Claim

Even if Plaintiffs have standing to pursue their claim, I find that their claims must be dismissed for failure to state a claim upon which relief can be granted. Presidential electors "act by authority of the State, which receives its authority from the federal constitution." *Blair*, 343 U.S. at 224. The selection of presidential electors is provided for in Article II of the Constitution. Thus, 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, cl. 2 (emphasis added). Nothing in the Twelfth Amendment, or any other amendment, abrogates this state power.

Defendant argues that because the States alone have the power to appoint their presidential electors, they necessarily possess the power to attach conditions to that appointment and provide for removal. Plaintiffs argue, on the other hand, that there is a distinction between the power to appoint presidential electors and the power to control them. I agree with Defendant, and find that States have the power to attach conditions to the electors' appointment. The Supreme Court has held that "the state legislature's power to select the manner for appointing electors is plenary"; they may "select the manner for appointing electors" or "select the electors itself", and may "take back the power to appoint electors." *Bush*, 531 U.S. 98, 104 (2000). Binding electors to the outcome of the State's popular vote would appear to be one such permissible condition. *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*,

12 J. L. & Politics 665, 678 (1996). Indeed, this is the most popular condition, as 29 states and the District of Columbia have chosen to adopt it. In the same vein, no constitutional provision bars a state from removing electors who refuse to comply with state law.

Moreover, the United States Constitution is silent as to Plaintiffs' argument that there is a distinction between the power to appoint presidential electors and the power to control them. When the Constitution is silent, the power to bind or remove electors is properly reserved to the States under the Tenth Amendment. U.S. CONST. amend. X; *see McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892) (stating "exclusive" State power over "mode of appointment" of electors "cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way"); *cf.* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2145 (2001) ("[A]ny legislation that impinges on the states' discretion to use the [winner-take-all allocation of electoral votes] would seem to run into this very same Tenth Amendment problem"). Colorado has chosen to exercise that power and bind its presidential electors to the candidates who won the State's popular vote. Colo. Rev. Stat. § 1-4-304(5). Statutes are given a presumption of constitutionality. *Gillmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007). Plaintiffs have cited no case, and I am aware of none, finding Colorado's statute (or the similar statutes of other states and the District of Columbia), to be unconstitutional.

Notably, the Supreme Court upheld measures that bind presidential electors in circumstances that, while not identical, are similar to this case. In *Ray v. Blair*, the

Alabama legislature delegated to the political parties the authority to nominate electors. 343 U.S. at 217 n.2. Alabama's Democratic Party required its nominees for electors to pledge "aid and support" to the nominees of the National Convention of the Democratic Party for President and Vice President. *Id.* at 215. The Supreme Court upheld this pledge requirement, finding "no federal constitutional objection" when a state authorizes a party to choose its nominees for elector and to "fix the qualifications for the candidates." *Id.* at 231. Thus, the Court refused to recognize a constitutional right for presidential electors to vote their individual preferences. While *Blair*'s holding does not directly address the claims in this case, it strongly implies that state laws directly binding electors to a specific candidate are constitutional. *See* Ross & Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & Politics at 696. Thus, if a state has the power to delegate its power to bind electors, as *Blair* declared, it would appear that it necessarily must have the authority to bind them itself and to enforce that binding.

Plaintiffs note, however, that the Supreme Court stated in *Blair* that electors' "promises" may be "legally unenforceable" because they could be "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he may choose in the electoral college." 343 U.S. at 230 (citation omitted). They argue that this passage recognizes the key distinction between the state-regulated appointment process and the federal function of casting a vote for president that must be free from state interference. Further, they argue that the Constitution's text demonstrates that states may not dictate electors' votes, as the Tenth Circuit seemingly recognized in *Baca I*, wherein it stated that any attempt "to remove an elector after voting ha[d] begun"

would be "unlikely in light of the text of the Twelfth Amendment," which gives "Electors" freedom to cast a "vote by ballot" without restriction. (*Baca I*, ECF No. 26, p. 12 n. 4) (citing U.S. CONST. amend. XII). Plaintiffs assert that the court's reliance on Constitutional text was well-founded in light of the early construction of the Constitution in the Federalist Papers and other sources, wherein the electors were expected to exercise independent judgment. I am not persuaded by Plaintiffs' argument.

First, to the extent that Plaintiffs rely on statements by the Tenth Circuit in *Baca I* that they argue support their position, those statements are dicta and are not binding. *See United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n. 3 (10th Cir. 2009). The Tenth Circuit did not actually decide whether Colorado's elector statute runs afoul of the Twelfth Amendment or the Constitution in general. Moreover, the Tenth Circuit did not analyze the Twelfth Amendment's text or the historical reasons for its ratification. Again, this is not surprising given the fact that the Tenth Circuit's Order was issued on an extremely expedited schedule to avoid delaying the scheduled meeting of the 2016 Electoral College.

Second, the Supreme Court in *Blair* rejected the argument "that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by pledge." *Id*. at 228. It stated that ["[i]t is true that the Amendment says the electors shall vote by ballot" but "it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself." *Id*. It then stated:

> The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in

> the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead in one form or another they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.

Id. at 228-30 (internal footnotes omitted).

Blair then went on to state the passage relied on by Plaintiffs, that "even if promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, s 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional." 343 U.S. at 230. It did not, however, actually decide that promises of candidates for the electoral college regarding a vote are unconstitutional, merely noting that this possibility would not change the result in that case. I find it likely that the Supreme Court would find such promises constitutional in light of its recognition that, historically, the electors are expected to obey the will of the people. 343 U.S. at 230 n. 15.

Thus, *Blair* noted that while it "was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive", "experience soon demonstrated that" regardless of how they were chosen, "they were so chosen simply to register the will of the appointing power in respect of a particular candidate." 343 U.S. at 228-29, n. 16 (quoting *McPherson*, 146 U.S. at 36) (further

quotation and internal quotation marks omitted). *Blair* also noted that historically, beginning even in the first election and continuing thereafter, the electors were "'not the independent body and superior characters which they were intended to. They were not left to the exercise of their own judgment: on the contrary, they gave their vote, or bound themselves to it, "according to the will of their constituents."' *Id*. at 228 n. 15 (quoting 2 Story on the Constitution, 1463 (5th ed., 1891)). The reason is that "'the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President.'" *Id.* (quoting 11 Annals of Congress 1289–90, 7th Cong., 1st Sess. (1802)). As Justice Story put it, "an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1457 (1833). Plaintiffs' analysis focusing on what they claim was the Framers' original understanding of the role of electors under the Constitution ignores this history and the fact that the original understanding of the electors' roles never came to pass.

Moreover, any ostensible tension between the Framers' original understanding and this country's longstanding historical practice cannot diminish the State's plenary power over its electors. As the Supreme Court has explained, there is "no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the [Electoral College] system has not fully realized the hopes of those by whom it was created." *McPherson*, 146 U.S. at 36. The view that the electors were chosen to register the will of the appointing power "has prevailed too long and been too uniform" to justify a contrary approach. *Id*.; *see also Bush v. Gore*, 531

U.S. at 104 ("History has now favored the voter"); *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) ("the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors"). As such, the State's plenary, comprehensive, and exclusive power over its electors—bolstered by this country's democratic history and longstanding practice—defeats any conflicting intent held by the Framers. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (stating "long settled and established practice" deserve "great weight" in constitutional interpretation); *Ray*, 343 U.S. at 228 (citing to "longstanding practice" to uphold pledge requirement).

I also agree with Defendant that whatever the Framers' original understanding or intent was, the electors' role was "materially chang[ed]" by the Twelfth Amendment's plain language. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1460 (1833). Under the original Constitution, "the electors ... did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill." *Blair*, 343 U.S. at 224 n.11. "The Twelfth Amendment was brought about as a result of the difficulties caused by that procedure." *Id*. In 1800, for example, the election ended in a tie because Democratic-Republican electors had no way to distinguish between Presidential nominee Thomas Jefferson and Vice-Presidential nominee Aaron Burr when they each cast two votes for President. *See* Robert M. Hardaway, *The Electoral College and the Constitution*, 91–92 (1994). Because that situation was "manifestly intolerable," *Ray*, 343 U.S. at 224 n.11, the Twelfth Amendment was adopted allowing the electors to cast "distinct ballots" for President and Vice-President. U.S. CONST. amend. XII. The Twelfth Amendment thus

permitted electors to be chosen "to vote for party candidates for both offices," allowing them "to carry out the desires of the people, without confronting the obstacles which confounded the elections of 1796 and 1800." *Blair*, 343 U.S. at 224 n. 11. It was the solution to the unique problems posed when electors are pledged and bound to the candidates of their declared party. Without that historical practice, dating back to at least 1800, the Twelfth Amendment would not have been necessary.

As noted earlier, 29 states, including Colorado, and the U.S. Congress have enacted legislation that codifies this historical understanding and longstanding practice. See National Conference of State Legislatures, *The Electoral College,* n. 3 (Aug. 22, 2016), *available at*: http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx (last visited Nov. 5, 2017); D.C. CODE ANN. § 1-1001.08(g)(2). Multiple lower courts have found state elector statutes like Colorado's to be enforceable. *See Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) ("Though the [*Blair*] Court was not in a position to decide whether the pledge was ultimately enforceable, the opinion's reasoning strongly suggested that it would be" and noting that the "constitutional history further supports this conclusion"; the Twelfth Amendment does not require party-ticket voting for President and Vice-President but "left that decision where it had been—with the states" who "have great latitude in choosing electors and guiding their behavior"); *Thomas v. Cohen*, 262 N.Y.S. 320, 324, 326 (Sup. Ct. 1933) (finding that electors may not vote for any qualified person and do not "possess such freedom of action"; "the electors are expected to choose the nominee of the party they represent, and no one else. The elector who attempted to disregard that duty could . . .

be required by mandamus to carry out the mandate of the voters of his State"; "the services performed by the presidential electors are purely ministerial, notwithstanding the language of the Constitution written 100 years ago"); *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912) (affirming writ of mandamus requiring the Secretary of State to print on the Republican line of the ballot the names of six replacement electors when the original Republican electors "openly declare[d]" they would vote in the Electoral College for another party's candidates, and finding that if the electors will not perform their duty, then the electors vacated their places as presidential electors).

The cases cited in the previous paragraph underscore what has been described as the "bounden duty" imposed on electors to vote in the Electoral College for the candidates who won the State's popular vote. *Thomas*, 262 N.Y.S. at 326. The *Thomas* court stated that so "sacred and compelling" is that duty—and so "unexpected and destructive of order in our land" would be its violation—that courts have recognized its performance amounts to a "purely ministerial" duty that may be compelled through a writ of mandamus. *Id*.; *see also Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924) (presidential electors' "sole function is to perform a service which has come to be nothing more than clerical—to cast, certify, and transmit a vote that already predetermined. It was originally supposed by the framers of our national Constitution that the electors would exercise an independent choice, based upon their individual judgment. But, in practice so long established as to be recognized as part of our unwritten law, they have been 'selected under a moral restraint to vote for some

particular person who represented the preferences of the appointing power', 'simply to register the will of the appointing power in respect of a particular candidate' . . . .They are in effect no more than messengers. . . . .the sole public duty to be performed by them after the election involves no exercise of judgment or discretion and no portion of the 'sovereign powers of government' . . . ") (internal quotations omitted). To the extent Plaintiffs have cited cases or authority to the contrary, including *Opinion of the Justices*, 250 Ala. 399 (Ala. 1948) and *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896), I do not find them persuasive for the reasons expressed in this Order.

Finally, I reject Plaintiffs' argument that Colorado's binding electoral statute interferes with the performance of a "federal function", *see Blair*, 343 U.S. at 224. Thus, Plaintiffs argue that because casting a vote for president is a federal duty, Colorado may not interfere with or impede the performance of that duty. Plaintiff cites to cases such as *Leslie Miller, Inc. v. State of Arkansa*s, 352 U.S. 187 (1956). In that case, a contractor in Arkansas was convicted of submitting a bid, executing a contract, and commencing work as a contractor without having obtained a license under Arkansas law for such activity. *Id*. at 188. The contractor and the United States as amicus curiae argued that the Arkansas statute requiring this license interfered with the Federal Government's power to select contractors and schedule construction and was in conflict with the federal law regulating procurement. *Id*. The Supreme Court agreed, noting the requirements of the Armed Services Procurement Act "that awards on advertised bids 'shall be made * * * to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors

considered.'" *Id*. (quotation omitted). The relevant factors for making this determination were set forth in the Act and regulations. *Id*. at 188-89. Arkansas licensing law looked to similar factors to guide the Contractors Licensing Board. *Id*. at 189. The Supreme Court held:

> Mere enumeration of the similar grounds for licensing under the state statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to ensure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the federal policy of selecting the lowest responsible bidder.

Id. at 189-90; *see also Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (holding that federal postal officials may not be required to get a state driver's license to perform their duties because that would "require qualifications in addition to those that the [Federal] Government has pronounced sufficient. . .").

The rationale of those cases is not applicable here. The Federal Government has not taken action to determine the grounds for removal of presidential electors or what restrictions can be placed on electors, such as the requirement that they vote for the candidate who received the highest number of votes in the election as set forth in Colorado Rev. Stat. § 1-4-304(5). The Constitution is silent on these issues. It requires only that the states appoint the electors (which shall not include a senator or representative or person holding an office of trust or profit under the United States) and that the electors must "cast a ballot for President" (who must be at least 35) and Vice-

President, one of whom must not be an inhabitant of the same state as the elector. U.S. CONST. art. II, amend. XII. As neither the Constitution nor federal law addresses the issues that Plaintiffs complain of in Colo. Rev. Stat. § 1-4-304(5), I find that the state law does not interfere either with the Constitution or federal policy. I also find that it does not "frustrate the legitimate and reasonable exercise of federal authority." *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006).

As Defendant notes, the state elector enjoys no constitutional protection against removal by the appointing authority, unlike "civil officers of the United States who may be impeached only for "high crimes and misdemeanors" and federal judges who hold their office during "good behavior." U.S. CONST. art. , § 4; art. III, § 1. And the Supreme Court has held that "[t]he power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint." *Burnap v. United States*, 252 U.S. 512, 515 (1920). The Supreme Court has also held that electors "act by authority of the state" that appoints them. *Blair*, 343 U.S. at 224. And the state's "power and jurisdiction" over its electors is "plenary", "comprehensive", as in "conveying the broadest power of determination", and "exclusive[]". *McPherson*, 146 U.S. at 27, 35. Thus, it appears that states play, at least, a coordinate role with the federal government in connection with the electors. *See N.Y. State Dep't v. Dublino*, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary . . . framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.")

Finally, Congress itself has passed a law binding the District of Columbia's electors to the result of the popular vote in the District. D.C. CODE ANN. § 1-1001.08(g)(2) (2017). Thus, it would appear that as far as Congress is concerned, binding electors to the outcome of a jurisdiction's popular vote promotes federal objectives. And this also appears to be consistent with the history of the Twelfth Amendment, as discussed earlier. As *Blair* noted, the very thing intended by the Twelfth Amendment was to bind an elector to the popular vote, as "the people do not elect a partisan for an elector who, they know, does not intend to vote for a particular person as President." 343 U.S. at 224 n. 15.[3] Accordingly, I reject Plaintiffs' argument that Colorado's binding electoral statute interferes with the performance of a federal function.

IV. CONCLUSION

In conclusion, Plaintiffs ask this Court to strike down Colorado's elector statute that codifies the historical understanding and longstanding practice of binding electors to the People's vote, and to sanction a new system that would render the People's vote merely advisory. I reject this invitation, finding not only that Plaintiffs lack standing but that their claims fail to state a claim upon which relief can be granted. Accordingly, it is

[3] *Nat'l Bank v. Commonwealth*, 76 U.S. 353 (1870), cited in Plaintiffs' Response on page 7, also supports Defendant's argument, not Plaintiffs. There, the Court affirmed the constitutionality of a Kentucky tax on shares of a national bank, stating that the tax "in no manner hinders [the bank] from performing all the duties of financial agent of the government." *Id.* at 363. Similarly here, Colorado's binding statute does not hinder the duty of presidential electors to cast a ballot and perform their constitutional roles. Indeed, the statute requires the presidential electors to "perform the duties required of them by the constitution and laws of the United States." Colo. Rev. Stat. § 1-4-304(1).

ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint Under Rules 12(b)(1) and 12(b)(6) filed on May 1, 2015 (ECF No. 23) is **GRANTED**, and Plaintiffs' claims are **DISMISSED WITH PREJUDICE**.

Dated: April 10, 2018

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01937-WYD-NYW

MICHAEL BACA,
POLLY BACA, and
ROBERT NEMANICH,

Plaintiffs,

v.

COLORADO DEPARTMENT OF STATE,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order on Motion to Dismiss of Senior Judge Wiley Y. Daniel entered on April 10, 2018, it is hereby

ORDERED that judgment is hereby entered in favor of Defendant, Colorado Department of State, and against Plaintiffs, Michael Baca, Polly Baca, and Robert Nemanich, on Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). It is further

ORDERED that Plaintiffs' complaint and action are **DISMISSED WITH PREJUDICE.**

Dated at Denver, Colorado this 10th day of April, 2018.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ Robert R. Keech

Robert R. Keech
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01937-NYW

MICHEAL BACA, POLLY BACA, and ROBERT NEMANICH,
Plaintiffs

v.

COLORADO DEPARTMENT OF STATE,
Defendant.

NOTICE OF APPEAL

NOTICE is hereby given that Micheal Baca, Polly Baca, and Robert Nemanich, Plaintiffs in the above-captioned legal matter, hereby appeal to the United States Court of Appeals for the 10th Circuit from the Order on Motion to Dismiss entered April 10, 2018 and the Final Judgment entered on April 10, 2018.

Respectfully submitted this 26th day of April, 2018.

/s/ Jason B. Wesoky
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of April, 2018, a true and correct copy of the foregoing **NOTICE OF APPEAL** was filed with the Court via **CM/ECF** and served upon counsel for Defendant via method indicated:

Attorneys for Defendant, Colorado Department of State: via CM/ECF
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/s/ Kurt E. Krueger
Kurt E. Krueger, Paralegal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK

Alfred A. Arraj
United States Courthouse
901 19th Street
Denver, Colorado 80294
www.cod.uscourts.gov

Jeffrey P. Colwell
Clerk

Phone: (303) 844-3433

Date: 4/26/2018

☐Pro Se ☒Retained ☐CJA ☐FPD ☐USA or other Federal Agency (Appeal Fee Exempt)

Case No: 17-cv-1937 WYD-NYW

Date Filed: 4/26/2018

Appellant: MICHAEL BACA, POLLY BACA, and ROBERT NEMANICH

☐Amended Notice of Appeal
☐Other pending appeals
☐Transferred Successive §2254 or §2255
☐Supplemental Record

Pro Se Appellant:

☐IFP forms mailed/given ☐Motion IFP pending ☐IFP denied ☐Appeal fee paid ☐Appeal fee not paid

Retained Counsel:

☒Appeal fee paid ☐Appeal fee not paid ☐Motion IFP filed

The Preliminary Record on Appeal is hereby transmitted to the Tenth Circuit Court of Appeals. Please refer to the forms, procedures, and requirements for ordering transcripts, preparing docketing statements and briefs, and designations of the record that are found on the Tenth Circuit's website, www.ca10.uscourts.gov.

If not already completed, either an appeal fee payment for filing this case or filing of a motion to proceed *in forma pauperis* will be made to this District Court.

The transcript order form must be filed in the District Court as well as the Court of Appeals within 14 days after the notice of appeal was filed with the District Court.

If you have questions, please contact this office.

Sincerely,

JEFFREY P. COLWELL, CLERK

by: s/E. Van Alphen
Deputy Clerk

cc: Clerk of the Court, Tenth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

April 26, 2018

Chris Wolpert
Chief Deputy Clerk

Mr. Jason Seth Harrow
Jason Harrow Law Firm
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Mr. Lester Lawrence Lessig
Stanford Law School
Center for Internet & Society
559 Nathan Abbott Way
Stanford, CA 94305-8610

Mr. Jason Wesoky
Darling Milligan Horowitz
1331 17th Street, Suite 800
Denver, CO 80202

RE: **18-1173, Baca, et al v. Colorado Department of State**
Dist/Ag docket: 1:17-CV-01937-WYD-NYW

Dear Counsel:

The court has received and docketed your appeal. Please note your case number above. Copies of the Tenth Circuit Rules, effective January 1, 2018, and the Federal Rules of Appellate Procedure, effective December 1, 2017, may be obtained by contacting this office or by visiting our website at http://www.ca10.uscourts.gov. In addition, please note all counsel are required to file pleadings via the court's Electronic Case Filing (ECF) system. You will find information regarding registering for and using ECF on the court's website. We invite you to contact us with any questions you may have about our operating procedures. Please note that all court forms are now available on the court's web site.

Attorneys must complete and file an entry of appearance form within 14 days of the date of this letter. *See* 10th Cir. R. 46.1(A). Pro se parties must complete and file the form within thirty days of the date of this letter. An attorney who fails to enter an appearance within that time frame will be removed from the service list for this case, and there may

be other ramifications under the rules. If an appellee does not wish to participate in the appeal, a notice of non-participation should be filed via ECF as soon as possible. The notice should also indicate whether counsel wishes to continue receiving notice or service of orders issued in the case.

You are required to file a docketing statement within 14 days of filing the notice of appeal. If you have not yet filed that pleading, you should do so within 14 days of the date of this letter. Please note that under 10th Cir. R. 3.4(B), the appellant is not limited to the issues identified in his docketing statement and may raise other appropriate issues in the opening brief.

In addition to the docketing statement, all transcripts must be ordered within 14 days of the date of this letter. If no transcript is necessary, you must file a statement to that effect.

Appellant is not required to file a designation of record, but will be required to file an appendix with appellant's opening brief. *See* 10th Cir. R. 10.2(B) and 30.1.

Appellant must file an opening brief and appendix within 40 days after the date on which the district clerk notifies the parties and the circuit clerk that the record is complete for purposes of appeal. *See* 10th Cir. R. 31.1(A)(1). Motions for extension of time to file briefs and appendices must comply with 10th Cir. R. 27.1 and 27.5. These motions are not favored.

Briefs must satisfy all requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules with respect to form and content. *See* specifically Fed. R. App. P. 28 and 32 and 10th Cir. R. 28.1, 28.2 and 32, as well as 31.3 when applicable. In addition, we encourage all counsel, as applicable, to be familiar with 10th Cir. R. 46.4(B). Seven hard copies of briefs must be provided to the court within two days of filing via the court's Electronic Case Filing system. *See* 10th Cir. R. 31.5 and the court's CM/ECF User's Manual. Appendices must satisfy the requirements of Fed. R. App. P. Rule 30 and 10th Cir. R. 30.1(A) through (F). Appendix volumes submitted under seal must be accompanied by a separate motion to seal. *See* 10th Cir. R. 30.1(D)(6). As of January 1, 2015, all appendices must be filed electronically, and a single hard copy provided to the court within two days of filing via the court's Electronic Case Filing system. *See* 10th Cir. R. 30 as well as the court's CM/ECF User's Manual. Counsel are encouraged to utilize the court's Briefing & Appendix checklist when compiling their briefs and appendices.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Matthew D. Grove
Grant Sullivan

EAS/na

Kurt Krueger

From: COD_ENotice@cod.uscourts.gov
Sent: Monday, May 14, 2018 7:14 AM
To: COD_ENotice@cod.uscourts.gov
Subject: Activity in Case 1:17-cv-01937-WYD-NYW Baca et al v. Colorado Department of State Letter re Record Complete

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 5/14/2018 at 7:14 AM MDT and filed on 5/11/2018
Case Name: Baca et al v. Colorado Department of State
Case Number: 1:17-cv-01937-WYD-NYW
Filer:
WARNING: CASE CLOSED on 04/10/2018
Document Number: 59(No document attached)

Docket Text:
LETTER TO USCA and all counsel certifying the record is complete as to [55] Notice of Appeal, filed by Robert Nemanich, Micheal Baca, Polly Baca. A transcript order form was filed stating that a transcript is not necessary. (Appeal No. 18-1173) Text Only Entry (evana,)

1:17-cv-01937-WYD-NYW Notice has been electronically mailed to:

Jason Bryan Wesoky jwesoky@dmhlaw.net, adakan@dmhlaw.net, apanicucci@dmhlaw.net, dhowell@dmhlaw.net, jbwlawyer@gmail.com, kkrueger@dmhlaw.net, ljaskiewicz@dmhlaw.net

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1:17-cv-01937-WYD-NYW Notice has been mailed by the filer to: