

# THE NATIONAL POPULAR VOTE VIOLATES THE COLORADO CONSTITUTION

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According to the Colorado Constitution: “The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.”<sup>3</sup> The Colorado Constitution is the only state constitution that guarantees the right to the people to direct election of presidential electors.

In 2019, the general assembly enacted a statute to violate that right. Under the statute, Colorado’s presidential electors would not be directly elected by the people of the Colorado. Instead, they would be appointed by a state official. The state official would make the appointment based on votes in other states, rather than on the direct vote of Coloradans.

In other words, even if the majority of the Colorado voters voted for electors pledged to candidate A, the Secretary of State would nevertheless appoint electors pledged to candidate B if candidate B had a plurality of votes nationwide.

Part I of this Article describes constitutional rules for choosing presidential electors, as provided by the U.S. Constitution and the Colorado Constitution.

The Colorado Constitutional rules for electors are contained in the Constitution’s Schedule. Part II explains that the Schedule is and always has been a legally enforceable element of the Colorado Constitution. The Schedule’s text says so, and so has the Colorado Supreme Court.

Part III examines whether the National Popular Vote Interstate Compact (by which Colorado electors would be appointed by a state official) violates the Colorado Constitution guarantee of “direct election of the presidential electors.” This Article argues the National Popular Vote Compact plainly violates the text of the Colorado Constitution.

## I. U.S. AND COLORADO CONSTITUTION RULES FOR ELECTORS

Under the U.S. Constitution, the President of the United States is chosen by the Electoral College.

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<sup>3</sup> COLO. CONST. sched., § 20.

Each 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...<sup>4</sup>

The Electors shall meet in their respective states and vote by ballot for President and Vice-President,...<sup>5</sup>

Pursuant to congressional statute, the presidential electors cast their ballots on the second Wednesday in December.<sup>6</sup>

The U.S. Constitution grants “far-reaching authority” to a State to appoint presidential electors “in whatever way it likes” as long as the procedure does not violate other constitutional constraints.<sup>7</sup> In the eighteenth and nineteenth centuries, some states used direct election for presidential electors, while in other states, presidential electors were chosen by the state legislature. Some states varied election-to-election in the presidential elector appointment process they employed.

Since the 1880 presidential election, every state has used direct election to choose presidential electors.<sup>8</sup> Most states enable the process by statute.<sup>9</sup> Within the limits of the U.S. Constitution, states are free to change their systems. For example, if the State of California enacted a statute for California’s presidential electors to be chosen by the California state legislature or by the Governor of California, there would be no violation of the U.S. Constitution. Arguably, the California legislature could delegate the choice of electors to the Security Council of the United Nations—although one scholar argues that the U.S. Constitution’s Article II implicitly forbids electors being chosen by votes from outside the state.<sup>10</sup>

Colorado, however, is unique. The Colorado Constitution requires that the state’s presidential electors be chosen by direct vote of the people.<sup>11</sup>

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<sup>4</sup> U.S. CONST. art. II, § 1.

<sup>5</sup> U.S. CONST. amend. XII.

<sup>6</sup> 3 U.S. CODE § 7.

<sup>7</sup> *Chiafalo v. Washington*, 140 S.Ct. 2316, 2324 (2020). For example, a State could not require that presidential electors must be of a certain race, because racial discrimination would violate the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

<sup>8</sup> Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the Federal Structure*, 44 N.M. L. REV. 383, 383 (2014).

<sup>9</sup> *Id.* See, e.g., NEV. REV. STAT. § 298.065 (“the nominees for presidential elector whose candidates . . . receive the highest number of votes in this State . . . are the presidential electors”); N.D. CENT. CODE § 16.1-14-01 (“the group of electors having the greatest number of votes is declared elected”); OKLA. STAT. tit. 26, § 10-103 (“the registered voters of this state shall elect a number of electors for President”).

<sup>10</sup> See Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U.L. REV. 1523, 1570.

<sup>11</sup> COLO. CONST. sched., § 20 (“The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people”).

As discussed below, the Colorado right to a direct vote was probably added because the Constitution had also provided for the 1876 presidential electors to be chosen by the state legislature—a mode of selection that was falling out of favor nationwide by 1876.<sup>12</sup>

The Colorado Constitution was adopted by a vote of the people of Colorado on July 1, 1876. The proposed Constitution that the people adopted contained three main sections: First, a Preamble.<sup>13</sup> Second, 19 Articles that created the different branches of government, provided a Bill of Rights, and so on. Third, a Schedule.<sup>14</sup>

The Schedule focused on the transition from the Territory of Colorado to the State of Colorado. For example, laws enacted by the Territorial Legislature would remain in effect unless repealed or inconsistent with the new Constitution.<sup>15</sup> Contracts and obligations of the territory and of local governments would continue to be enforceable.<sup>16</sup> Property belonging to the Colorado Territory would become property of the State of Colorado.<sup>17</sup> Some of the Schedule sections would, by their own terms, become obsolete; for example, once the State of Colorado had acquired title to the property of the Territory of Colorado, there was nothing left for the property transition to accomplish. Other sections of the Schedule would have permanent effect; for example, territorial laws would remain in force unless and until changed by the state legislature.

For the 1876 presidential election, there was a one-time-only provision. Under section 19 of the Schedule, Colorado's presidential electors for 1876 would be chosen by the general assembly (the state legislature):

The general assembly shall, at their first session, immediately after the organization of the two houses and after the canvass of the votes for officers of the executive department, and before proceeding to other business, provide by act or joint resolution for the appointment by said general assembly of electors in the electoral college, and such joint resolution or the bill for such enactment may be passed without being printed or referred to any committee, or read on more than one day in either house, and shall take effect immediately after the concurrence of the two houses therein, and the approval of the governor thereto shall not be necessary.<sup>18</sup>

The next section created a different, permanent rule for presidential elections, commencing in the presidential election of 1880. According to section 20, for all

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<sup>12</sup> See text at notes 65-85, *infra*.

<sup>13</sup> COLO. CONST. pmb.

<sup>14</sup> COLO. CONST. sched.

<sup>15</sup> COLO. CONST. sched., § 1.

<sup>16</sup> § 2.

<sup>17</sup> § 3.

<sup>18</sup> COLO. CONST. sched., § 19.

presidential elections after 1876, Colorado’s presidential electors would always be chosen directly by the people: “The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.”<sup>19</sup>

Until 2019, the Colorado legislature complied with the Colorado Constitution, and enacted statutes effectuating the right of Coloradans to vote directly for their presidential electors.<sup>20</sup>

But in 2019, the legislature enacted a statute purporting to join Colorado to the National Popular Vote (NPV) Interstate Compact.<sup>21</sup> The compact requires Colorado’s “chief election official” (the Secretary of State) to appoint the state’s electoral college members; the appointments must be based on which candidate comes in first in the national popular vote, regardless of the candidate chosen by Colorado voters.<sup>22</sup> Specifically, the compact requires that

[t]he chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner” . . . [and] the presidential elector certifying official shall certify the appointment . . . of the elector slate nominated in that state in association with the national popular vote winner.<sup>23</sup>

The compact takes effect when states cumulatively holding half of the electoral college votes have joined.<sup>24</sup>

In Colorado, a statute enacted by the legislature is subject to referendum if at least five percent of Colorado voters sign a petition requesting a referendum.<sup>25</sup> In August 2019, state officials certified that over five percent of eligible voters signed a petition to refer the National Popular Vote Compact statute to Colorado voters.<sup>26</sup> Thus, the November 2020 Colorado ballot will include the question: “Shall the following Act of the General

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<sup>19</sup> *Id.* § 20.

<sup>20</sup> Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1335 n. 472 (2007). See also COLO. REV. STAT. § 1-4-301 (“At the general election in 1984 and every fourth year thereafter, the number of presidential electors to which the state is entitled shall be elected”); GEN’L LAWS COLO. § 933 (1877) (“At the general election, [1880], and every fourth year thereafter, there shall be elected such a number of electors . . . as the state may be entitled to in the electoral college”).

<sup>21</sup> COLO. REV. STAT. § 24-60-4002.

<sup>22</sup> See Ross & Hardaway, *supra* note 8, at 384.

<sup>23</sup> COLO. REV. STAT. § 24-60-4002, art. III.

<sup>24</sup> *Id.* at art. IV (the agreement “shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement”).

<sup>25</sup> COLO. CONST., art. V, § 3.

<sup>26</sup> *Referendum Petitions*, COLORADO SECRETARY OF STATE, <https://www.sos.state.co.us/pubs/elections/referendumPetitions.html> (last accessed Aug. 30, 2020).

Assembly be approved: An Act concerning adoption of an agreement among the states to elect the President of the United States by national popular vote, being Senate Bill No. 19-042?”

Even if the NPV statute were to be validated by the people in November, the statute is just a statute; it cannot override the Colorado Constitution.<sup>27</sup> In Colorado, the only way to remove the right of Coloradans to choose electors by direct vote would be by amending the state Constitution. Unless and until there is an amendment, no statute can deprive Coloradans of their constitutional right to directly elect presidential electors. Courts must enjoin an unconstitutional statute from operating or being enforced.<sup>28</sup>

If Colorado courts wait to address the problem until it arises as a case or controversy amidst a disputed presidential election, grave damage to public confidence in our republican form of government would be inevitable.

Fortunately, the Colorado Constitution gives the Colorado Supreme Court the authority to “give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives. . . .”<sup>29</sup> In other words, the governor, the state house, or the state senate can send an interrogatory to the Colorado Supreme Court, even no case has arisen in which a plaintiff has standing. If the 2020 November election results in the NPV still being on Colorado’s statute books, it would be prudent for the governor, house, and senate to work together to send an interrogatory to the court.

## **II. Section 20 of the schedule is an enforceable constitutional mandate.**

The Colorado Constitution’s Schedule contains many “plainly obsolete” transitional measures—such as procedures for the 1876 elections.<sup>30</sup> Although some sections of the Schedule had become irrelevant by 1877, the Schedule remains an enforceable part of the Colorado Constitution.

### **A. The Colorado Supreme Court has ruled that the Constitution Schedule is part of the Constitution and is enforceable.**

As University of Colorado law professor Richard Collins observes, the Colorado Supreme Court has always treated the Schedule as constitutional law.<sup>31</sup> For example, in 1885, the court heard a criminal appeal by the infamous Colorado cannibal Alferd Packer.<sup>32</sup> Back in the winter of 1874, when Colorado was still a territory, Packer was part of a six-

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<sup>27</sup> See *Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (“where a statute and the constitution are in conflict the constitution is paramount law.”).

<sup>28</sup> *Id.*

<sup>29</sup> COLO. CONST., art. VI, § 3.

<sup>30</sup> Collins, *supra* note 20, at 1334. See, e.g., COLO. CONST. sched., § 13 (describing one-time contest procedures for the “first general election”); *id.* § 3 (describing unique procedures for the “first session of the general assembly”).

<sup>31</sup> Collins, *supra* note 20, at 1334.

<sup>32</sup> *Packer v. People*, 8 Colo. 361 (1885).

man expedition that became lost in the San Juan Mountains.<sup>33</sup> Only Packer came out alive; he confessed to having survived by eating the flesh of another member of the party.<sup>34</sup> He escaped from jail, fled, and was recaptured in 1883.<sup>35</sup> Thereupon he was tried and convicted of premeditated murder.<sup>36</sup>

The court held that Packer could not be convicted of murder because the state legislature had changed the murder statute in a way that made it inapplicable to Packer.<sup>37</sup> However, at a new trial, the court held that Packer could be charged with voluntary manslaughter. The territorial legislature had enacted a statute against manslaughter, and state legislature had not amended the manslaughter statute. The territorial manslaughter statute was still good law pursuant to the Colorado Constitution Schedule.<sup>38</sup> According to the Schedule, territorial laws remained in effect unless changed by the legislature. Section 1 of the Schedule provides:

That all laws in force at the adoption of this constitution shall, so far as not inconsistent therewith, remain of the same force as if this constitution had not been adopted, until they expire by their own limitation or are altered or repealed by the general assembly; and all rights, actions, prosecutions, claims and contracts of the territory of Colorado, counties, individuals or bodies corporate (not inconsistent therewith) shall continue as if the form of government had not been changed and this constitution adopted.<sup>39</sup>

Moreover, section 2 of the Schedule specifically provided that crimes committed before statehood could still be prosecuted after statehood.<sup>40</sup>

The court characterized Schedule sections 1 and 2 as “necessary saving clauses, and proper to be inserted in a constitution.”<sup>41</sup> Later in the opinion, in further discussion of section 2, the court described section 2 as “proper to be inserted into a constitution.”<sup>42</sup>

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<sup>33</sup> HAROLD SCHECHTER, *MAN-EATER: THE LIFE AND LEGEND OF AN AMERICAN CANNIBAL* (2015).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Packer, *supra* note 32.

<sup>37</sup> *Id.* at 363.

<sup>38</sup> *Id.* at 364.

<sup>39</sup> COLO. CONST. sched, § 1. For a brief history of the case in light of the saving clause of the Schedule, see Dale Oesterle & Richard Collins, *The Colorado State Constitution* 18 (2011).

<sup>40</sup> Packer, *supra* note 32, at 364, quoting COLO. CONST. sched., § 2: “all indictments which have been found or hereafter may be found, and all informations which have been filed or may hereafter be filed, for any crime or offense committed before this constitution takes effect, may be proceeded upon as if no change had taken place, except as otherwise provided in the constitution.”

<sup>41</sup> *Id.* at 364.

<sup>42</sup> *Id.*

Similarly, in an 1877 case, the Colorado Supreme Court applied the Schedule's section 1 (territorial laws remain in force) and section 5 (transition procedures for territorial judges).<sup>43</sup> Three other Colorado Supreme Court decisions also relied on the continuing legal force of the Schedule. An 1879 case applied section 9's rules for the post-statehood county courts.<sup>44</sup> An 1889 case pointed out that Schedule section 1 "continued in force" certain territorial statutory laws.<sup>45</sup> So did a 1914 case.<sup>46</sup>

Courts in other states explicitly give their schedule full constitutional deference. Delaware courts hold its schedule as "part and parcel of the Constitution . . . [to] be accorded full force and effect."<sup>47</sup> Virginia courts hold that if a schedule's provision was clearly drafted to insulate it from legislative control, it "would be as effectual and binding as if [it was] embodied in the Constitution itself."<sup>48</sup> Other state courts have also based decisions on their constitution's Schedule.<sup>49</sup>

The effect of a schedule in a state constitution depends on text and intent. In Pennsylvania, "Nothing was further from the purpose of the convention than to make anything contained in it [the schedule] a matter of permanent regulation. Its uses were temporary and auxiliary."<sup>50</sup> If a poorly drafted provision in a schedule were to conflict with another part of a state constitution, then the schedule must give way.<sup>51</sup>

In the Colorado Constitution, there is no conflict. The Schedule's section 20 provides how presidential electors are to be chosen, and no other provision of the Constitution addresses the issue.

## **B. The text of the Schedule shows that some provisions were to have temporary effect, and others were to be permanent.**

The Colorado Convention used plain language to distinguish sections that would have temporary effect from those that would have permanent effect. One of the temporary

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<sup>43</sup> *Wilson v. People*, 3 Colo. 325 (1877).

<sup>44</sup> *Keystone Mining Co. v. Gallagher*, 5 Colo. 23, 27 (1879) (explaining that Section 9 "immediately clothed" county courts with "all the powers theretofore possessed by the probate courts").

<sup>45</sup> *People ex rel. Barton v. Londoner*, 22 P. 764, 766 (Colo. 1889) (noting a statute was "saved by section 1 of the schedule").

<sup>46</sup> *State Bd. of Equalization v. Bimetallic Inv. Co.*, 56 Colo. 512, 514 (1914).

<sup>47</sup> *Opinion of the Justices*, 330 A.2d 764, 766 (Del. 1974).

<sup>48</sup> *Willis v. Kalmback*, 64 S.E. 342, 345 (Va. Ct. App. 1909).

<sup>49</sup> *See Bowman v. Bilby*, 104 P. 1078, 1079 (Okla. 1909) (noting the enactment of a section of the schedule "had precisely the same effect as if the legislative assembly had convened immediately after statehood and passed a statute on the subject"); *First Nat. Bank of St. Joseph v. Buchanan Cnty.*, 205 S.W.2d 726 (Mo. 1947) (generally treating the saving clause of schedule as law); *Marsh v. Bartlett*, 121 S.W.2d 737 (Mo. 1938) (same).

<sup>50</sup> *Commonwealth v. Clark*, 7 Watts & Serg 127, 133 (Penn. 1844).

<sup>51</sup> *See, e.g., State v. Esser*, 115 N.W.2d 505, 512 (Wis. 1962); *City of Newark v. Charles Realty*, 74 A.2d 630, 639 (N.J. 1950); *State ex rel. Aquamsi Land Co. v. Hostetter*, 336 Mo. 391, 401 (1934).

provisions was section 19.<sup>52</sup> By its own terms, it applied only to how the “first session” of the Colorado legislature, which would select electors for the 1876 election.<sup>53</sup>

Likewise, Article V of the Constitution (describing legislative power) prohibited bills from being introduced more than twenty-five days after the beginning of a legislative session.<sup>54</sup> But section 17 of the Schedule changed the time limit to fifty days, solely for “the first session of the general assembly.”<sup>55</sup>

Other provisions of the Schedule were, as indicated by text, to have enduring effect. Schedule section 1 provides that the territorial statutes shall continue in effect unless and until modified by the state legislature.<sup>56</sup> There is no time limit on section 1, which is why the Colorado Supreme Court applied the 1876 provision in a 1914 case.<sup>57</sup>

Likewise, section 2 of the Schedule provided for the post-statehood prosecution of crimes committed during territorial days.<sup>58</sup> There was no statute of limitations barring when the state could charge voluntary manslaughter, so the state could prosecute Alferd Packer at his second trial, in 1886, for the actions he perpetrated in 1874. The only time limit of section 2 was the fact that eventually, there would be no individuals in Colorado who were alive before 1876 statehood.

Section 4 of the Schedule creates a permanent duty of the state legislature: “The general assembly shall pass all laws necessary to carry into effect the provisions of this constitution.”<sup>59</sup> There is no time limit when this duty expires. Similar language in another provision of the Colorado Constitution (Article IX, education) was held by the Colorado Supreme Court in 1889, 2009, and 2011 to impose a legally binding mandate on “each and every general assembly.”<sup>60</sup>

Section 20 guarantees the right of direct election of presidential electors in all presidential elections “after the year eighteen hundred and seventy-six.” As dictionaries of

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<sup>52</sup> COLO. CONST. sched, § 19.

<sup>53</sup> *Id.*

<sup>54</sup> Colo. Const., art. V, § 19 (1876) (later revised).

<sup>55</sup> COLO. CONST. sched, § 17.

<sup>56</sup> COLO. CONST. sched, § 1.

<sup>57</sup> *See State Bd. of Equalization v. Bimetallic Inv. Co.*, 56 Colo. 512, 514 (1914).

<sup>58</sup> COLO. CONST. sched, § 2.

<sup>59</sup> COLO. CONST. sched, § 4.

<sup>60</sup> *See* COLO. CONST. art. IX, §§ 2, 15 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance” of a public school system; “[t]he general assembly shall, by law, provide for organization of school districts of convenient size”); *Opinion of the Judges*, 22 P. 464, 466 (Colo. 1889) (quoted language above); *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (determining whether the legislature met its constitutional obligation that “[t]he general assembly shall . . . provide” for the establishment and maintenance of a uniform public school system); *Lobato v. State*, 304 P.3d 1132 (Colo. 2011) (analyzing whether the legislature met its obligation that “[t]he general assembly shall . . . provide for organization of school districts of convenient size”).



the time indicate, the word “after” means “later in time”<sup>61</sup> or “posterior in time.”<sup>62</sup> The definition has not changed today.<sup>63</sup> Finally, the section does not contain conditional verbiage or an expiration date.

### C. Legislative history confirm the Schedule’s enduring and binding effect.

The Schedule was part of Constitution voted on at the Constitutional Convention and adopted by the people of the Colorado Territory.<sup>64</sup> The Schedule was drafted and ratified with the same conditions and process as the rest of the Constitution. No historical evidence had been found to indicate that the Colorado Convention or the people of Colorado intended the Schedule to be of lesser legal authority than the other text.

The Colorado Convention’s decision to set up the system for choosing presidential electors is recorded in the *Proceedings of the Constitutional Convention*.<sup>65</sup> The *Proceedings* include the legal action of the Convention, but not all the debates. On March 13, 1876, The Convention’s Judiciary Committee recommended that the Schedule itself set up the methods for choosing presidential electors in the first election.<sup>66</sup> According to the Committee, which was chaired by future Colorado Supreme Court Justice Wilbur Fiske Stone, Nevada had done the same, with a schedule in its 1864 statehood constitution.<sup>67</sup> According to the Committee, the new state legislature might not have time to enact the laws needed to set up the first election for presidential electors, so the Constitution should do the job itself.<sup>68</sup>

The Judiciary Committee report had recommended that Colorado’s first electors be chosen by direct vote of the people:

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<sup>61</sup> NOAH WEBSTER, WEBSTER’S HANDY DICTIONARY 11 (1877) (defining “after” as “later in time; behind”).

<sup>62</sup> SAMUEL JOHNSON, ENGLISH DICTIONARY 73 (1859) (defining “after” as “posterior in time”).

<sup>63</sup> *after*, preposition, 1.b(1) “subsequent to in time or order.” MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/after?src=search-dict-hed>.

<sup>64</sup> *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875, To Frame A Constitution for the State of Colorado* 660, 703-07; 736 (1907) (submitting Schedule to be signed by convention members; proclamation by President Grant certifying ratification by “a majority of the legal voters” of Colorado in accordance with the state enabling act). *See also* Collins, *supra* note 20, at 1334.

<sup>65</sup> PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875 TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO TOGETHER WITH THE ENABLING ACT PASSED BY THE CONGRESS OF THE UNITED STATES AND APPROVED MARCH 3. 1875 THE ADDRESS TO THE PEOPLE THE CONSTITUTION AS ADOPTED AND THE PRESIDENT’S PROCLAMATION (1907),

[https://www.colorado.gov/pacific/sites/default/files/PROCEEDINGS%20OF%20THE%20CONSTITUTIONAL%20CONVENTION\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/PROCEEDINGS%20OF%20THE%20CONSTITUTIONAL%20CONVENTION_0.pdf). The book was prepared under the authority of Colorado Secretary of State Timothy O’Connor. *Id.* at 8 (unnumbered page) (reprinting Apr. 5, 1907, general assembly act for publication of 1,000 copies).

<sup>66</sup> *Id.* at 655.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

This will obviate the necessity of the appointing of such electors by the General Assembly directly, as has been proposed—a course which would indirectly lead to inconvenience, wrangling and discord, and, very likely, to such party feeling in the General Assembly as would defeat the chance of electors altogether by that body.<sup>69</sup>

As the judiciary report indicates, the Convention had already heard of the idea that the first presidential electors be chosen by the new state legislature.<sup>70</sup> The report included concern that leaving the choice to the legislature might cause so much partisan discord that the legislature would be unable to agree on selecting the electors.<sup>71</sup>

The next morning, on March 14, the Convention took up the judiciary report. Henry C. Thatcher, a delegate from Pueblo County,<sup>72</sup> offered a resolution that took a different approach. The Thatcher resolution instructed the Committee upon revision to add new material to the Schedule to fast-track the selection of presidential electors by the new state legislature.<sup>73</sup> The legislature would first convene on the first Wednesday in November, rather than the fourth Wednesday of that month.<sup>74</sup> The selection of presidential electors would be expedited, without need to comply with the usual constitutional rules for General Assembly action: no need for committee hearings, no requirement that the bill be read on three separate days in each house, and no need for printing the bill before consideration ban.<sup>75</sup> The Thatcher resolution passed 23 to 1.<sup>76</sup> The Convention then adjourned until noon of the same day.<sup>77</sup>

When the Convention reconvened at noon, E.T. Wells—chair of the Committee on Revisions and Adjustments, and a future Colorado Supreme Court Justice—reported the Committee’s actions on the Thatcher resolution.<sup>78</sup> Article V, section 7, would be revised to start the new legislature on the first Wednesday in November.<sup>79</sup> Four new sections would be added to the Schedule: section 18 (procedures for county clerks to report the October 3 state office election results), section 19 (expedited procedures for the new state legislature

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 16.

<sup>73</sup> *Id.* at 657.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* Eight delegates were absent. *Id.* Stone voted for the resolution. *Id.* Apparently, seven of the 39 delegates abstained; there were 39 delegates, of whom 24 voted on the resolution, and eight had been recorded as absent. If there were abstentions, they were not recorded in the *Proceedings*.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 658.

<sup>79</sup> *Id.* 658–59.

to choose the first presidential electors), section 20 (for Colorado presidential electors after 1876 to “be chosen by direct vote of the people”), and section 21 (first General Assembly will have the power to provide for payment of unpaid expenses of the Convention, if any).<sup>80</sup>

The Convention adopted the proposed Schedule sections 18, 19, and 21 without a recorded vote.<sup>81</sup> Section 20, for direct votes for presidential electors after 1876, was adopted 17 to 4.<sup>82</sup>

Despite the reason the Convention decided for legislative selection process of electors in 1876, the decision was not partisan. Democrat delegates who voted for the Thatcher resolution included Casimiro Barela and Wilbur Fiske Stone, who apparently had decided that the Judiciary Committee’s proposal for direct election in 1876 was untenable.<sup>83</sup>

However, the Convention’s decision for the 1876 presidential election was out of step with the national mood. By 1876, the ever-growing power of Jacksonian populism, coupled with increasing popular distrust of state legislatures, had already pressured most state legislatures to give up their power to appoint electors and instead to authorize direct elections.<sup>84</sup> Indeed, the election of 1876 was the last time *any* state legislature appointed a state’s presidential electors.<sup>85</sup>

Accordingly, the Committee on Revisions apparently felt the need to guarantee to Colorado voters that 1876 would be the last time that Colorado’s electors were chosen by anyone other than the people of Colorado. The Committee drafted section 20 without being specifically asked to do so by the Convention as a whole. And hence the easy approval of section 20 by a vote of 17 to 4.

### **III. The national popular vote compact violates Colorado Constitution Schedule section 20.**

The Colorado General Assembly has a “duty . . . to obey a constitutional mandate, and where a statute and the constitution are in conflict the constitution is paramount law.”<sup>86</sup> As explained in Part II above, section 20 of the schedule is an enforceable constitutional

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 658.

<sup>82</sup> *Id.*

<sup>83</sup> Ayes for the Thatcher resolution came from delegates Barela, Bromwell, Carr, Crank, Cooper, Douglas, Ellsworth, Elder, Felton, Hurd, James, Marsh, Plumb, Pease, Stone, Stover, Thatcher, Wells, Wilcox, Wheeler, Widderfield, and Yount. *Id.* at 657.

<sup>84</sup> Williams, *supra* note 10, at 1570. See also David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1079–80 (2014) (discussing populist movement towards direct election of senators).

<sup>85</sup> Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 11 (2002).

<sup>86</sup> *Passarelli*, 742 P.2d at 872.

mandate. If the statute joining Colorado to the National Popular Vote Interstate Compact conflicts with section 20, the statute is invalid.

a. **The text of section 20**

As of date of publication, no reported decision has discussed section 20. After all, the Colorado General Assembly perfectly obeyed section 20 from 1876 until 2019.

“The intent of a constitutional provision is to be ascertained from the words thereof when its language is explicit.”<sup>87</sup> This section examines each phrase of section 20:

The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.

*“The general assembly”*

“The general assembly” refers to the state legislature as a continuous entity. The usage is the same throughout the Colorado Constitution.<sup>88</sup> When a constitutional provision is meant to apply to only a particular general assembly, the Constitution indicates as such. For example, the original 1876 article V, section 6, provided: “No session of the General Assembly, after the first, shall exceed forty days.”<sup>89</sup> Likewise, section 17 of the Schedule applied only to “the first session of the general assembly.”<sup>90</sup>

*“shall provide”*

The phrase “shall provide” means to provide by law and, to the extent necessary, to provide sufficient appropriations.<sup>91</sup> “Shall provide” and variations thereof (e.g., “shall provide by law”<sup>92</sup>) are found throughout the Colorado Constitution. The simple “shall provide” appears in article XVII, § 4 (“The general assembly shall provide for the

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<sup>87</sup> *Cty. and Cnty. of Denver v. Sweet*, 329 P.2d 441, 447 (Colo. 1958).

<sup>88</sup> See, e.g., COLO. CONST. Art. V § 45 (requiring that “[t]he general assembly shall consist of not more than thirty-five members of the senate and of not more than sixty-five members of the house of representatives”); COLO. CONST. Art. IV § 10 (permitting the governor to “adjourn the general assembly to a day not later than the first day of the next regular session”); COLO. CONST. Art. XIV § 17 (requiring that “the general assembly shall provide by statute” for the organization of service authorities”).

<sup>89</sup> COLO. CONST. art. V § 6 (1876) (later amended, and currently “120 calendar days”).

<sup>90</sup> COLO. CONST. sched. § 17. The fact that special rules for the first session were contained in an Article and in the Schedule reinforces the conclusion that both the Articles and the Schedule are binding constitutional law.

<sup>91</sup> See MERRIAM-WEBSTER, *supra* note 63, (“to supply or make available (something wanted or needed)”) <https://www.merriam-webster.com/dictionary/provide>; WEBSTER, *supra* note 61, at 218 (“to procure beforehand”).

<sup>92</sup> E.g., Colo. Const. art. X, § 2 (stating that “[t]he general assembly shall provide by law for an annual tax”); Colo. Const. art. XVI, § 2 (“[t]he general assembly shall provide by law for the proper ventilation of mines”); Colo. Const. art. V, § 25a (“[t]he general assembly shall provide by law” for an eight hour workday for workers in certain industrial jobs).

safekeeping of the public arms, military records, relics and banners of the state.”),<sup>93</sup> and in article XVIII, § 8 (“The general assembly shall provide for the publication of the laws passed at each session...”).<sup>94</sup> As these phrases indicate, “shall provide” creates a duty to enact appropriate statutes, and to provide funding necessary to effectuate them.

As the Colorado Supreme Court has explained, “shall provide” creates an affirmative duty.<sup>95</sup> The language “mandates action by the General Assembly.”<sup>96</sup>

*“that after the year eighteen hundred and seventy-six the electors of the electoral college”*

“[T]he year eighteen hundred and seventy-six” means the 1876<sup>th</sup> year in the calendar system that is used today in the United States and Colorado, and which was in use in the year of Colorado statehood.<sup>97</sup>

“The electors of the electoral college” means the presidential electors who are described in the United States Constitution’s article II, § 1, and the Twelfth Amendment.

*“shall be chosen”*

The phrase “be chosen” means to be selected.<sup>98</sup> The same phrase appears in six other sections of the Colorado Constitution. In five of those sections, it refers to a direct election process—how legislators, the governor, and the lieutenant governor will be selected by direct vote of the people.<sup>99</sup> The phrase also appears in Article XX, the home rule amendment, which was added in the early twentieth century; as part of the process for Denver to annex territory, three officials must “be chosen by the mayor.”<sup>100</sup>

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<sup>93</sup> COLO. CONST. art. XVII § 4.

<sup>94</sup> COLO. CONST. art. XVIII § 8.

<sup>95</sup> *In re Legislative Reapportionment*, 150 Colo. 380, 385 (1962) (examining whether the general assembly “defaulted in the duty” imposed by article V, § 45, which at the time stated that the “The general assembly shall provide by law for an enumeration of the inhabitants of the state . . .”).

<sup>96</sup> *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982) (en banc) (examining whether the legislature complied with article IX, § 2: “The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . .”).

<sup>97</sup> The system is known as the Gregorian calendar, invented by Pope Gregory XIII in 1582. *See* Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 60 n. 28 (2009).

<sup>98</sup> As a transitive verb, “chosen” is the past tense of “choose.” To “choose” is 1.a “to select freely and after consideration // choose a career” 1.b “To decide on especially by vote : ELECT // chose her as captain.” *See* MERRIAM-WEBSTER, *supra* note 63, <https://www.merriam-webster.com/dictionary/choose>.

<sup>99</sup> *See* COLO. CONST. sched. § 15 (“Senators and members of the house of representatives shall be chosen by the qualified electors of the several . . . districts” as established by law); Art. V, § 4 (requiring a congressman to have resided in “the district in which he shall be chosen” for one year); Art. IV, § 3 (providing that the governor and lieutenant governor “shall be chosen jointly by the casting by each voter of a single vote”); Art. 5, § 5 (permitting one half of the state senators to “be chosen biennially.”

<sup>100</sup> Art. 20, § 1.

*“by direct vote”*

According to *Black’s Law Dictionary* “direct” means “Free from extraneous influence; immediate.”<sup>101</sup> In the context “Of a political action,” “direct” means “effectuated by the public immediately, not through representatives.”<sup>102</sup>

A “direct vote” is a vote that by itself decides the result. For example, in Colorado, voters answer “yes” or “no” as to whether judges “shall be retained office.”<sup>103</sup> Whatever the majority decides is the result.<sup>104</sup> In contrast, judges in Colorado do not attain office by direct vote. Instead, judges are appointed by the Governor or by mayors.<sup>105</sup> Rather than being chosen directly by the people, judges are chosen indirectly, by the people choosing a representative who will have the appointive power.

When electors are chosen “by direct vote of the people,” the people vote, and the people’s vote directly causes the outcome. The people choose the electors themselves; the people do not delegate the power of choosing electors to someone else.<sup>106</sup>

*“the people”*

In isolation, “the people” could mean any group of people—such as “the people of Ireland,” or “the people who practice archery.”

In the Colorado Constitution, “the people” usually means “the people of Colorado.” The Constitution was adopted by “We, the people of Colorado.”<sup>107</sup>

According to the Bill of Rights, “The people of this state have the sole and exclusive right of governing themselves . . .”<sup>108</sup> Here, “the people” is a shorthand for “the people of Colorado.”

Several constitutional amendments have been enacted with the language “The people of the state of Colorado find and declare that:...,” or some variation thereof.<sup>109</sup>

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<sup>101</sup> BLACK’S LAW DICTIONARY (11th ed. 2019) (definitions 3 and 5).

<sup>102</sup> *Id.*

<sup>103</sup> COLO. CONST. art. VI, § 25.

<sup>104</sup> *Id.* (“If a majority of those voting on the question vote ‘Yes’, the justice or judge is thereupon elected to a succeeding full term. If a majority of those voting on the question vote ‘No’, this will cause a vacancy to exist in that office at the end of his then present term of office.”)

<sup>105</sup> COLO. CONST. art. VI, § 20.

<sup>106</sup> If for some reason an elector cannot or will not perform his or her duties, then an alternate elector may take the original elector’s place. In compliance with Section 19, Colorado statutes (until 2019) required that the alternates be elected by direct vote of the people. \_\_\_\_ [see colo AG brief in *Baca*?]

<sup>107</sup> See Colo. Const. preamble. See also Colo. Const. art. VII, § 1 (qualifications of Colorado electors); See also *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (explaining that “the people” as used in the U.S. Constitution “unambiguously refers to all members of the political community”).

<sup>108</sup> Art. II, § 2.

<sup>109</sup> Art. V, §§ 44, 46 (also contain a § 1, “Declaration of the people...”). See also art. X, § 21 (adding “hereby”): art. XXVIII, § 1 (adding “hereby”); art. XXIX, § 1 (adding “hereby”); art. 18, § 16(b), (c), (d) (“the people of the state

Pursuant to Article VI, § 22, of the Colorado Criminal Code, the criminal process “shall run in the name of ‘The People of the State of Colorado’; all prosecutions shall be carried on in the name and by the authority of ‘The People of the State of Colorado’ . . .”<sup>110</sup> Another criminal procedure section of the Constitution simply says “the people,” when discussing prosecutions.<sup>111</sup>

According to the Schedule, debts owed to “the people of the territory of Colorado” will be collected “in the name of the people of the state.”<sup>112</sup>

The Enabling Act, by which Congress set forth the Colorado territory’s path to statehood was titled “An act to enable the people of Colorado to form a constitution and state government . . .” The Act provided for the election of delegates to a constitutional convention; the delegates “shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States.” The proposed state constitution would have to contain certain provisions that could not be changed “without the consent” of “the people of said state.” Further, “the people inhabiting said territory” would have to disclaim all right to unappropriated public lands.<sup>113</sup> “[T]he constitution and state government” were to be “formed for the people of said territory of Colorado.”<sup>114</sup>

When the Colorado Constitution was amended to provide home rule for persons in various political subdivisions, the amendments referred to “the people” in the relevant subdivisions.<sup>115</sup>

In the above uses, “the people” means the people of Colorado, or of a political subdivision in Colorado. The Constitution is the authority by which the people of Colorado distribute political powers to the government they created, and also reserve certain political powers for themselves.

Two sections of the Bill of Rights use “the people” in what may be a broader sense. One of such section guarantees that “The people have the right peaceably to assemble” and petition.<sup>116</sup> Another section instructs that “The enumeration in this constitution of certain

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of Colorado further find and declare”); art. IX, § 1 (“The people of the state of Colorado recognize. . .”); art. XXVII, § 1 (“The people of the State of Colorado intend . . .”). *See also* art. 10, § 3.5 (“the enactment of this section by the people of Colorado constitutes voter approval of a weakening of any such limitation. . .”).

<sup>110</sup> COLO. CONST., art. VI, § 22.

<sup>111</sup> *Id.* art. II, § 17 (“the attorney prosecuting for the people shall have reasonable notice”).

<sup>112</sup> Schedule, § 22.

<sup>113</sup> Enabling Act, § 4. *See also id.* § 5 (“the constitution and state government shall be formed for the people of said territory of Colorado”; the proposed constitution shall be submitted “to the people of said state for their ratification or rejection”).

<sup>114</sup> *Id.* § 5.

<sup>115</sup> “It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right. . . .” COLO. CONST., art. XX, § 6. *See also id.* § 9 (“to afford to the people of all cities, cities and counties, and towns the right to home rule . . .”).

<sup>116</sup> Art. II, § 24.

rights shall not be construed to deny, impair or disparage others retained by the people.”<sup>117</sup> For these sections, the language might encompass more than the people of Colorado. Presumably, visitors from Kansas have a right to participate in a public assembly in Denver. While in Colorado, Kansans have the same unenumerated rights as Coloradans. Putting visitors in an inferior status would violate the U.S. Constitution’s guarantee that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.”<sup>118</sup>

The Colorado Constitution’s enumerated rights to assemble and petition, as well as the exercise of unenumerated rights, can only take place within Colorado. The Colorado Bill of Rights is a limitation on the powers of Colorado state and local governments. Colorado government has no extraterritorial powers; it cannot prohibit or restrict activities, such as assemblies or petition-gathering, that take place in Kansas. When Kansans are physically present in Colorado, or when they send a petition that is received by Colorado government officials, the Colorado Constitution can apply to them; the Bill of Rights sections protecting rights of “the people” can be read to encompass non-Coloradans who engage in activity in Colorado or who communicate with Colorado officials, who exercise governmental power within Colorado.

Can “by direct vote of the people” be interpreted to apply to non-Colorado voters? Not plausibly. New Yorkers are not “the people of Colorado.” New Yorkers may exercise some Colorado constitutional rights when they visit Colorado, and they may send petitions to officials of Colorado. It is impossible for New York voters to cast a “direct vote” for Colorado electors.<sup>119</sup>

When New Yorkers vote for presidential electors, they are voting for electoral slates of New Yorkers. When New Yorkers voted for President in 2016, the majority chose a slate of 29 New Yorkers who were pledged to Hillary Clinton. When Coloradans voted in 2016, they chose a slate of 9 Coloradans pledged to Hillary Clinton. Coloradans and New Yorkers cannot vote for the same slate of electors. The individual electors in each state are different from the electors in every other state.

New Yorkers vote for New York electors and Coloradans vote for Colorado electors. Colorado’s electors must be chosen “by direct vote of the people.”<sup>120</sup> The only people who

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<sup>117</sup> Art. II, § 28.

<sup>118</sup> U.S. CONST., art. IV, § 1.

<sup>119</sup> See COLO. REV. STAT § 1-2-101 (requiring that person reside in Colorado “twenty-two days immediately prior to the election at which the person intends to vote”); COLO. REV. STAT § 1-2-102 (describing rules for determining Colorado residency for purposes of voting eligibility).

<sup>120</sup> COLO. CONST. sched., § 20.



ever do or ever could cast a “direct vote” for Colorado’s electors are the people of Colorado.

**b. The National Popular Vote Interstate Compact.**

The statute executing Colorado’s agreement to the national popular vote compact “governs the appointment of presidential electors.”<sup>121</sup> First, it requires Colorado to hold a statewide popular election for presidential electors, as Colorado has always done since 1880.<sup>122</sup> After the election, Colorado and other compact states must determine a national popular vote total.<sup>123</sup>

In other words, if there is a close election and there are vote-counting problems anywhere in the United States, Colorado must wait until a final count has been determined for every state in the NPV compact.

Once all compact states have determined the national total, the “chief election official” of Colorado must “designate the presidential slate with the largest national popular vote winner.”<sup>124</sup> In Colorado, the chief election official is the Secretary of State.<sup>125</sup>

The Secretary of State must then “certify the appointment . . . of the elector slate nominated in [Colorado] in association with the national popular vote winner.” Under the statute’s definitions, the Colorado Secretary of State is both the “chief election official” and the “presidential elector certifying official.”<sup>126</sup>

The Colorado NPV statute declares that it “supersedes any conflicting provisions of Colorado law.” However, a statute cannot supersede the Constitution.

When the General Assembly was passing the NPV bill in committees on the house and senate floors, no legislator or witness on their side of the issue evinced any awareness of the Colorado Constitution problem.<sup>127</sup> The General Assembly does not appear to have been

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<sup>121</sup> COLO. REV. STAT. § 24-60-4002, Art. III (“This article shall govern the appointment of presidential electors in each member state”); COLO. REV. STAT. § 24-60-4004 (noting that the operative section of the statute “governs the appointment of presidential electors”).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* See also Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 186 (2011).

<sup>124</sup> COLO. REV. STAT. § 24-60-4002 Art. III.

<sup>125</sup> The statute defines “chief election official” as “the state official or body that is authorized to certify the total number of popular votes for each presidential slate.” Colorado assigns that role to the secretary of state. COLO. REV. STAT. § 1-11-107 (requiring the secretary to “prepare a certificate of election for each presidential elector who is elected at any general election” to be signed by the governor); COLO. REV. STAT. § 1-1-107 (outlining the election powers and duties of the secretary of state).

<sup>126</sup> *Id.* The statute defines “presidential elector certifying official” as “the state official or body that is authorized to certify the appointment of the state’s presidential electors.” COLO. REV. STAT. § 24-60-4002 Art. V. It is somewhat unclear whether this definition assigns the duty to the secretary of state or the governor because the secretary of state “prepares” the certificate to be signed by the governor. See *id.*

<sup>127</sup> The National Popular Vote Interstate Compact was enacted as Senate Bill 19-042. The Senate Journal and House Journal record the votes on bills, but do not record the debates. The bill was heard in the Senate State, Veterans, and Military Affairs Committee on Jan. 23, 2019. It passed on Second Reading (the Senate as a Committee of the Whole)

well-served by its nonpartisan staff, which is supposed to identify how proposed bills may conflict with the Constitution or with existing statutes.

**c. The National Popular Vote Interstate Compact violates section 20’s mandate for “direct vote of the people.”**

Under section 20, Colorado’s presidential electors must be chosen “by direct vote of the people.” But under the NPV, presidential electors are appointed by the Secretary of State.

Suppose that in a presidential election, candidate A wins Colorado decisively. But nationally, the popular vote contest is very close. Pursuant to the Colorado Constitution’s “direct vote of the people,” Coloradans will know on election night which slate of presidential electors was chosen by Colorado. The people’s vote was “direct”; it was the decisive act in choosing Colorado’s electors.

But under the NPV, there would be no Colorado decision on election night, even though the people of Colorado voted decisively. Only if and when there is an agreed-upon first place finisher in the national popular vote, will anyone know who the Colorado electors are. For example, in the 2016 presidential primary, California took a month to produce a certified count.<sup>128</sup> The 2018 general election in California likewise took a month to produce final results.<sup>129</sup> California’s 2020 presidential primary was held on March 3, and results were not certified until May 1.<sup>130</sup> In New York, the June 23, 2020, primary still had not

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and Jan. 28, and passed third reading on Jan.29. The bill was heard in the House State, Veterans, and Military Affairs Committee on Feb. 12, 2019. It passed second reading (the House as a Committee of the Whole) on Feb. 20, and third reading in the House on Feb. 21. (The Colorado Constitution requires that each bill be read in each chamber on three separate days; first reading, upon introduction in a chamber, is by title only. Reading at length for second and third reading may be dispensed by unanimous consent. *See* COLO. CONST. art. V, § 22.)

Audio archives for the Senate Committee are available at <https://leg.colorado.gov/committee/granicus/1474851>. Audio archives for the full Senate (second and third reading) are available at <https://leg.colorado.gov/granicus/42>. Audio archives for the House Committee are available at <https://leg.colorado.gov/committee/granicus/1474896>. Audio archives for the full House (second and third reading) are available at <https://leg.colorado.gov/granicus/15>.

<sup>128</sup> Cathleen Decker, *Analysis: It only took a month to count California’s votes. Here’s why, and why it may get better*, L.A. TIMES, July 10, 2016.

<sup>129</sup> Ben Christopher, *Embrace the uncertainty: Waiting for results during California’s “election month,”* CALMATTERS, Mar. 4, 2020, <https://calmatters.org/politics/california-election-2020/2020/03/california-primary-election-results-delayed/>.

<sup>130</sup> California Secretary of State, *California Election Results Certified; Record Number of Ballots Cast in a Primary*, May 1, 2020, <https://www.sos.ca.gov/administration/news-releases-and-advisories/2020-news-releases-and-advisories/ap20044-california-election-results-certified-record-number-ballots-cast-primary/>.

resulted in the declaration of a winner in some congressional races by mid-August.<sup>131</sup> To know who came in first in the popular vote, everyone must wait for the resolution of vote-counting disputes states with histories of election fraud, such as Illinois,<sup>132</sup> New Jersey,<sup>133</sup> and New York.<sup>134</sup>

The NPV's multistage process ends with the "appointment" of electors by the Secretary of State. The Colorado electors will not be the slate chosen "by direct vote of the people." Rather the Colorado electors will be appointed by the Secretary of State, based on her assessment of how people in *other* states voted for non-Colorado electors.

In adopting the Colorado Constitution, the people of Colorado allowed for electors to be selected by appointment, but only for 1876. The people did not give the Secretary of State appointment authority in subsequent elections. Rather, the people forbade any future system of elector appointment. The people guaranteed to themselves the perpetual right to choose electors by direct vote.

### Conclusion

The NPV statute's multistage Secretary of State appointment scheme violates the Colorado Constitution. Colorado's slate of presidential electors must always be chosen "by direct vote of the people."

NPV supporters in the Colorado legislature legally erred when they attempted to adopt the NPV by mere statute. There are good policy arguments for and against the NPV compact. If we presume that the better arguments are in favor of the NPV, the only lawful way to implement NPV for Colorado is to repeal part of the Colorado Constitution.

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<sup>131</sup> Jesse McKinley, Why the Botched N.Y.C. Primary Has Become the November Nightmare, N.Y. Times, Aug. 3, 2020 (updated Aug. 17), <https://www.nytimes.com/2020/08/03/nyregion/nyc-mail-ballots-voting.html>.

<sup>132</sup> See Mary Frances Berry, *Election fraud Chicago style: Illinois' decades-old notoriety for election corruption is legendary*, SALON.COM, Feb. 14, 2016, [https://www.salon.com/2016/02/14/election\\_fraud\\_chicago\\_style\\_illinois\\_decades\\_old\\_notoriety\\_for\\_election\\_corruption\\_isLegendary/](https://www.salon.com/2016/02/14/election_fraud_chicago_style_illinois_decades_old_notoriety_for_election_corruption_isLegendary/).

<sup>133</sup> See, e.g., Assoc. Pr., *New election ordered in NJ race marred by voter fraud charges*, N.Y. POST, Aug. 20, 2020 (Superior Court judge "has ruled that a new election will be held in November for a disputed Paterson City Council seat, just weeks after the race's apparent winner and a sitting councilman were charged with voter fraud.")

<sup>134</sup> See, e.g., Jon Levine, *Confessions of a voter fraud: I was a master at fixing mail-in ballots*, N.Y. POST, Aug. 29, 2020 (describing decades of fraud in New York, New Jersey, and Pennsylvania; also noting the Paterson, N.J., mail ballot fraud was detected only because the fraudsters failed to disperse their fraudulent ballots among a large number of mailboxes).