SUPREME COURT NO. 95347-3

Thurston County Superior Court No. 17-2-02446-34

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John,
Appellants,

v.

State of Washington,
Respondent.

REPLY BRIEF OF APPELLANTS

IMPACT LAW GROUP PLLC

/s/ Jonah Harrison
Jonah O. Harrison, WSBA #34576
Sumeer Singla, WSBA #32852
1325 Fourth Avenue, Suite 1400
Seattle, WA 98101
T: (206) 792-5230
F: (206) 452-0655
jonah@impactlawgroup.com
sumeer@impactlawgroup.com

L. Lawrence Lessig
lessig@law.harvard.edu
(admitted *pro hac vice)*

Jason Harrow
jason.harrow@gmail.com
(admitted *pro hac vice*)

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REPLY BRIEF OF APPELLANTS

Presidential electors must be permitted to exercise their best judgment in casting their votes for President and Vice President. This constitutional principle derives from the general prohibition on state interference with federal functions and from the specific text of Article II and the Twelfth Amendment. The principle is also supported by the two centuries of practice of the states and the Congress to permit presidential electors to freely choose candidates for President and Vice President. And the principle is independently buttressed by the prohibition on viewpoint discrimination of political speech imposed by the First Amendment.

Washington law contravenes this federal principle. In 2016, the State took the unprecedented step of fining presidential electors for voting for the "wrong" presidential candidates. It now attempts to justify its action based on a dubious policy argument unmoored from constitutional text, structure, and historical practice. But this case cannot be decided on the basis of the Constitution the State wishes we had. Instead, this Court must apply the United States Constitution and laws that we actually do have. That Constitution and those laws, buttressed by binding precedent and more than 225 years of experience, support Appellants' appeal.

ARGUMENT

WASHINGTON'S UNPRECEDENTED FINES ARE UNCONSTITUTIONALLY IMPOSED.

A. Presidential Electors Have A Constitutional Freedom To Cast Their Own Electoral Votes For Candidates Of Their Choice.

The Constitution—and 225 years of experience—mandates that Appellants be free to exercise judgment in casting their ballot for President and Vice-President. As described in Appellants' Opening Brief, the Constitution creates two kinds of "electors": **legislative electors**, who are the subset of citizens qualified to vote for legislators in "the most numerous branch of the State Legislature," and **presidential electors**, who are a smaller subset of citizens that are appointed by states to cast electoral votes for President and Vice-president. Opening Br. 14–15. The State concedes that at least one of these "electors" must be permitted to cast votes free from state coercion: the legislative electors who cast their votes for federal officers. *See* State Br. 21 (acknowledging that legislative electors "exercised [their] fundamental right" to vote "when they cast a ballot in the general election on November 8, 2016"). Yet the State repeatedly claims that presidential electors have not been granted the same electoral freedom. Instead, on the State's view, presidential "electors" are electors not free to "vote" by "ballot" for the candidate of their own choice, but instead are

"electors" obligated to "vote by ballot" for a candidate chosen elsewhere. State Br. 11–15.

The State offers no argument to support this Orwellian double-talk. In particular, it offers no argument about how one word—"elector"—can be interpreted fundamentally differently within the same constitutional clause. Specifically, it has offered no reason why the ordinary presumption that identical language be given the same meaning should not apply to this constitutional text. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (finding that the phrase "the people" had the same meaning in both the original Constitution and several amendments in the Bill of Rights). Instead, the State resists this equivalence by contorting the language, history, and structure of our Constitution beyond all recognition.

On the State's theory, presidential electors do not do any choosing of their own. Instead, they "cast their electoral ballots . . . on behalf of the State and its people." State Br. 13–14; *see also id.* at 12 (section heading stating that "Electors act on behalf of the State when they cast electoral ballots"). Thus, according to the State, fining presidential electors for voting for the "wrong" candidate is merely one of many permissible ways that the State "sets the mode and method by which [presidential] electors act to fulfill the *State's obligation* in the Electoral College." State Br. 11 (emphasis added).

But the "State's obligation" under the Constitution is to "appoint" electors, not to do the electors' work, and nothing in the Constitution's text will bear the State's contrary reading. *See* U.S. Const. art. II. "Electors" elect. In that act, they perform the federal function of "vot[ing] by ballot" under the Constitution. *See* U.S. Const. art. II, *amended by* U.S. Const. amd. XII. Electors do not, as the State asserts, "cast electoral ballots"—whatever those may be—on behalf of a state. They instead exercise a federal power secured to them by their appointment by the state. The state can no more control that federal power than can the President control how a Supreme Court Justice exercises his or her power, merely because the President has "appoint[ed]" the Justice. *See* Opening Br. 26–27.

1. Washington's Theory of Complete Control Is Contradicted by Two Hundred Years of Constitutional Law.

The State accepts the proposition that presidential "electors serve a federal function." State Br. 12–13. That concession decides this case. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been clear that a state may not "dictate the manner in which the federal function is carried out." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). That two-step sequence of logical reasoning is dispositive. *First*, the casting of an electoral vote by a presidential elector is a federal function;

second, a state may not dictate how a federal function is performed; *therefore*, a state may not dictate how a presidential elector casts an electoral vote.

The State's attempt to evade this reasoning is contradictory. The State tries to escape the limits of federalism by declaring that it has "plenary authority over the . . . regulation of electors." State Br. 15. But the Constitution nowhere gives the state the power to "regulat[e] electors." Its only power is to "appoint." U.S. Const. art. II. Once appointed, because electors serve a federal function, by the very nature of a federal constitution as described in *McCulloch*, states have no "plenary authority" over that federal function.

Indeed, if it were otherwise, then a state could use its supposed "plenary authority" to overrule the votes of state legislators voting to ratify constitutional amendments. Yet the Supreme Court has expressly held that they may not. *See* Opening Br. 11 (discussing *Hawke v. Smith*, 253 U.S. 221 (1920) and *Leser v. Garnett*, 258 U.S. 130 (1922)). Likewise, if the State were correct, then a state could use its "plenary authority" to apply state law to a federal contractor performing a federal function. Yet this Court has held that it cannot do that either. *Dep't of Labor & Indus. v. Dirt & Aggregate, Inc.*, 120 Wn.2d 49, 53 (1992). *See also* Opening Br. 9–14. For a function

to be deemed a "federal function" *means* that any power the state might have must be incidental, and unrelated to the core purpose of that function.

The State, understandably, has little to say about this constitutional doctrine. Indeed, the State's brief ignores the multiple cases decided by this Court that support the proposition that the State cannot interfere with the performance of a federal function. *See* Opening Br. 13–14 (discussing *Dep't of Labor & Indus.* and *Sohol v. Clark*, 78 Wn. 2d 813 (1971)). And it dismisses various on-point federal cases as "inapt," State Br. 15, yet for reasons that are without merit.

For instance, the United States Supreme Court has *twice* held that state legislators—actors who are plainly officers of the state—cannot be directed by the state when performing the federal function of voting whether to ratify an amendment to the federal constitution. *See Leser*, 258 U.S. at 137; *Hawke*, 253 U.S. at 230 (discussed at Opening Br. 11). The State denies the relevance of this authority. According to the State, "[w]hen state legislators vote to ratify a proposed constitutional amendment, they are exercising an elective franchise personal to them under article V of the Constitution," State Br. 15, while presidential electors, according to the State's theory, act merely "on behalf of the State," State Br. 12.

Yet the State's argument has no basis in the Supreme Court opinions denying state control over state legislators ratifying a federal amendment.

As the Court explained in *Hawke*, 253 U.S. at 229, the reason the state has no power over state legislators voting whether to ratify constitutional amendments is that those legislators are exercising a "federal function"—precisely as, the State has conceded, presidential electors do when casting their ballot for President and Vice President.

The State thus has no authority for its distinction between federal functions that the state may control and federal functions it may not control. Moreover, no such distinction could be grounded in any "personal franchise" that state legislators are said to have when ratifying a constitutional amendment, since that franchise is identical to the franchise presidential electors have when voting for President and Vice President.

The State, though, asserts that the unique "personal franchise" of state legislators can be found in Article V of the Constitution. State Br. 15. In fact, that Article merely provides that a constitutional amendment is valid if adopted by "two thirds of both houses" and once it is "ratified by the legislatures of three fourths of the several states." U.S. Const. art. V. The Clause thus secures to legislators a right to vote on amendments. But that right is no different—either in text or structure—from the right secured to presidential electors. In both cases, the Constitution secures to an individual the right to vote on a federal matter—and the individual right to vote is even more clear with respect to presidential electors, who are individually

directed to "vote by ballot" free from state interference. U.S. Const. amd. XII.

Of course, there is one distinction between the two voters exercising federal functions, but it is a distinction that cuts in favor of Appellants, not the State: in the case of constitutional amendments, the voter happens also to be an employee of the state, but it is not a state official in the case of presidential electors. But nothing in the text or structure distinguishes these two personal rights, and it is illogical to think that the right to vote exercised by independent actors (electors) could be subject to *more* state control than the one exercised by state officials (legislators).

This conclusion of independence is buttressed by considering the source of the authority purporting to bind state legislators in *Hawke*. In that case, state law had directed that state legislators could be overruled by "the People" voting in a state referendum. 253 U.S. at 225–26. Yet even the expression of the presumptive sovereign within a state could not overrule state legislators when exercising their federal function. Nothing in *Hawke* suggests why the conclusion would be any different for presidential electors exercising their federal function.

2. Washington's Theory of Complete Control Is Contradicted by Constitutional Text.

The State seemingly acknowledges that neither the constitutional text nor the Framers' understanding supports its argument when it recognizes—with some understatement—that "[i]t may be true that some of the framers of the Constitution intended for presidential electors to be independent and free to vote for the candidate of their choice." State Br. 16. Yet it is not just "some" framers who thought presidential electors would cast votes in a way that was "free and independent to vote for the candidate of their choice." Rather, that view is reflected in the Constitution's text: an "elector" means someone who chooses, the phrase "by ballot" implied a secret ballot, and the very word "vote" of course implies exercising a right of suffrage free of coercion. *See* Opening Br. 14–21.[1] This language is fundamentally inconsistent with the idea of state control.

That constitutional meaning has not been amended. Instead, a generation after Article II was adopted, it was reinforced by the Twelfth Amendment's clear language of presidential elector personal choice. Not only does the Twelfth Amendment use the same key language by referring

[1] For a definition of the word "vote," *see Oxford English Dictionary* (2d ed. 1989) ("3a. To give a vote; to exercise the right of suffrage; to express a choice or preference by ballot or other approved means."). Additional definitions of key words can be found at Opening Br. 14–21.

to "electors" who must "vote by ballot," but the Twelfth Amendment goes further than Article II and specifically excludes state officials from the entire process of electoral voting. That is, the text of the Amendment requires electors *themselves* to "make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each." U.S. Const. amd. XII. Electors *themselves* then must then "sign and certify" those lists and transmit the list directly to the federal government. *Id*. There is scant involvement from any state official contemplated anywhere in this Constitutional text.

Despite the text of the Twelfth Amendment, the State nonetheless contends that early legislators and commentators thought the Twelfth Amendment changed the role of electors and permitted states to control them. *See* State Br. 16–17. But the Amendment did no such thing, and the State's argument for a change is misleading.

The State's argument relies first upon a misreading of a single snippet of legislative history. Pointing to a portion of the statement of just one legislator—Representative Mitchill—the State argues the framers of the Twelfth Amendment understood it to give states additional legal authority to control presidential electors. State Br. 17.

Not so. Not only is the quotation based on an early version of an amendment that failed in Congress[2]—and not the actual Twelfth Amendment—but the State twists the meaning of Representative Mitchill's statement. Mitchill had noted that prior to the Twelfth Amendment, "people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President," and then said "the very thing is adopted, intended by the Amendment." State Br. 17. Yet this language supports Appellants, not the State: Representative Mitchill mentioned presidential electors' "intention" to vote for a candidate, not a "requirement" to do so. Appellants have never disputed that presidential electors often have an intention to vote for a particular candidate, and that popular voters are aware of that intention when they cast their votes for electors.[3]

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[2] *See* William Josephson & Beverly Ross, *Repairing the Electoral College*, 22 J. of Legis. 145, 156 n.67 (1996) ("The Supreme Court's opinion in *Ray v. Blair* . . . quotes this 1802 statement as if it were controlling legislative history of the Twelfth Amendment, but that Amendment was not adopted until December 1803, after much debate and change.").

[3] The State also misunderstands the context of the quote, so the evidence is even less probative than it may sound to modern ears. Recall that under the original Constitution, presidential electors did not distinguish between votes for President and Vice President; instead, they cast two electoral votes, and the person who got the most votes became President. *See* U.S. Const. art. II. So when Representative Mitchill referred to an

The State also offers as evidence a lengthy quotation from Joseph Story's *Commentaries of the Constitution*, State Br. 17 n.4. Yet again, Story's argument supports Appellants' position. Story believed that electors had the legal right to cast votes as they wished. Thus, he lamented the reality that "electors are now chosen wholly with reference to particular candidates" and noted that "an exercise of an independent judgment" would be treated as "a political usurpation, dishonourable to the individual, and a fraud upon his constituents." *Commentaries on the Constitution* at § 1457. A "political usurpation," however, is different from a "legal violation."

That difference is the key to this whole case. Appellants have never denied that an elector may have a *moral* obligation to vote for one candidate over another, just as, say, a promisor of a gift without consideration or reliance may have a moral obligation to deliver the gift. But the issue in this

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elector's intention to vote for a particular person "as President," he was not making a point about elector independence but was likely noting that the proposed amendment would permit an elector to cast an electoral vote *for President*, rather than cast an undifferentiated vote for President *or* Vice President. In any event, there is more to the ratification debates than just Representative Mitchill, and the great weight of authority regarding the Twelfth Amendment affirms elector independence. *See* Brief of Independence Inst. as Amici Curiae Supporting Plaintiffs-Appellants, *Baca v. Hickenlooper* at 21-28, No. 18-1173 (10th Cir.) (Filed June 27, 2018), http://bit.ly/IndInstAmicus.

case is whether that moral obligation may be enforced legally. Plainly, it cannot—and until the fine imposed in this case, has never been.[4]

In the final analysis, the State offers no legal authority that contradicts the plain reading of an elector's power to exercise his or her federal function free of state control. No doubt, a state has plenary power to appoint whatever elector it wants, so long as no "Senator or Representative, or Person holding an Office of Trust or Profit under the United States" is appointed. U.S. Const. art. II, § 1. No doubt, in exercising that power to appoint, it may condition its appointment upon a pledge to support a particular candidate. *See Ray v. Blair*, 343 U.S. 214, 227 (1952). But just as a President or a Governor could not enforce a public pledge of a judge that the Executive appointed, there is scant textual or historical authority to support the argument that a state may enforce the pledge of a presidential elector. Such a power would instead violate what the United States Supreme

[4] The State also ignores the federal statutes implementing the Twelfth Amendment, which similarly bar any interference by state officials with electors' performance of their federal functions. *See* 3 U.S.C. §§ 9–11. Appellants cited these portions of the U.S. Code in pointing out that the State's entire process for publicly recording, tabulating, and transmitting electoral votes likely violated this federal law. *See* Opening Br. 16-17 n.5. Remarkably, the State's brief fails to address this issue and declines to represent that its process complies with the Twelfth Amendment or federal statutes. This silence only reinforces that the State wishes to run presidential elections on its own terms—which are different than those provided by the Constitution and federal law.

Court has called the "assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he [or she] may choose in the electoral college." *Id.* at 230.

3. Washington's Theory of Complete Control Is Contradicted by The History Of "Faithless" Electoral Votes.

The State does not directly address Appellants' evidence that its fines conflict with two centuries of history. The State does not dispute that its fines are the first in the Nation's history on *any* presidential elector based on his or her vote. Opening Br. 7. It does not dispute that Congress has always counted electoral votes cast in violation of popular expectation. *See* Opening Br. 17–19. It does not dispute that, in the one formal Congressional debate over the practice, the majority of legislators adopted the position that '"electors are constitutionally free and independent in choosing the President and Vice President.'" *See* Opening Br. 17 (quoting 115 Cong. Rec. 148 (1969)). And it does not dispute that legal scholarship is—for once—in nearly unanimous agreement that '"the Constitution protects the elector's discretion against legal efforts at compulsion.'" Opening Br. 19 (quoting Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Constitutional?*, 2016 Cardozo L. Rev. De Novo 129, 153). These sources matter. They all support Appellants' claim.

Yet instead of responding to these points, the State declares them irrelevant in light of its claim that the Supreme Court has "already implicitly dismissed [Appellants'] arguments as inconsistent with the operation of the Electoral College." State Br. 17–18. But the State's own search for this "implicit" dismissal is empty—indeed, it expressly walks back from its earlier discovery and acknowledges that, in truth, the Supreme Court has "left open the question of whether pledges are enforceable." State Br. 19.

Despite acknowledging that the question is open, the State nonetheless contends that *Ray* makes this case a forgone conclusion. In the State's view, "had the [Supreme] Court understood electors to have the constitutional right that [Appellants] assert here, it would not have made sense for the Court to uphold a requirement that electors sign a pledge in the first instance." State Br. 19.

The State's view is flawed. The line the Supreme Court drew not only makes good legal sense, but is consistent with the practice throughout history: there has always been a key difference between a public pledge by a public official to vote in a particular way—a pledge made by a candidate to public office, by a Senator (when appointed by the state legislature), by a judge, and by presidential electors—which places an obvious ethical obligation on the person making the pledge, and the power of the state to

enforce that pledge. The State's attempt to collapse the distinction between moral authority and legal obligation fails.

Indeed, the federal government has drawn the same distinction with regard to presidential electors in the District of Columbia. The D.C. elector law, enacted in 1961, provides that electors must pledge to vote for the candidate of their party, and goes on to say that it shall be an elector's "duty" to follow through on that pledge. D.C. Code Ann. § 1-1001.08(g)(2). But there are no penalties or enforcement mechanisms, nor is there any evidence any Member of Congress thought there would or could be. Indeed, the topic of whether the government could legally compel electors to vote for a particular candidate came up in hearings on the legislation, and the majority view was that the Constitution did not permit legal compulsion. Thus, as one lawmaker put it, the provision regarding electors' "duty" "has no legal effect" but instead "has a moral suasion." *Hearings on H. R. 5955 Before Subcomm. 3 of the H. Comm. on the District of Columbia*, at 34 (May 15 & 16, 1961) (statement of Rep. Huddleston).

Decades later, Congress proved that it lacked the ability to legally enforce the "duty" mentioned in the D.C. elector statute following the 2000 election. That year, a D.C. elector who was pledged to Al Gore failed to follow through on her pledge and voted for no candidate for President. David Stout, *The 43rd President: The Electoral College; The Electors Vote,*

and the Surprises Are Few, N.Y. Times (Dec. 19, 2000). That elector was not penalized or removed from office. Rather, her action was legally valid, and Congress in Joint Session respected her choice and counted only two of D.C.'s three electoral votes that year. 147 Cong. Rec. 103–04 (Jan. 6, 2001). This is just one of the dozens of uncontradicted instances of electors voting contrary to their pledge that affirm the distinction between a non-binding pledge and an enforceable legal obligation. *See* Opening Br. 18 (noting that Congress has counted 167 electoral votes that were cast against public expectations, and has never rejected a vote cast that way).

4. Washington's Theory of Complete Control Is Contradicted by The Qualifications Clause

The State's action here also contravenes the Qualifications Clause by adding new requirements for both electors and Presidential candidates that do not appear in the Constitution. *See* Opening Br. 21–25. If the State has the power to levy a fine in this case, then there is nothing to prevent the State from penalizing electors on the basis of votes for, say, a socialist, a veteran, a Portland Timbers soccer fan, or even a candidate who does not visit a state or release his or her recent tax returns. The Constitution, though, prevents this undemocratic meddling. *See* Opening Br. 23–25.

The State fails to address this point and instead attempts to dismiss the Qualifications Clause argument in a single sentence. According to the

State, "while the states have never possessed the ability to set qualifications for members of Congress, the Constitution explicitly grants states that power with respect to electors." State Br. 16 (citing U.S. Const. art. II). But where the power of the State to set "elector qualifications" is "explicitly" granted in the Constitution is left unspecified by the State.

The only constitutional provision the State cites in support is Article II. Yet Article II says nothing of the sort. Instead, it simply permits the state to "appoint" electors. It is entirely silent about the State's ability to add qualifications to electors over and above those in the Constitution. *See* U.S. Const. art. II. The Constitution is likewise silent on the ability of the State to add limitations on the type of people for whom presidential electors may vote beyond those expressed in the Constitution itself. *See* U.S. Const. amnd. XII ("one of whom, at least, shall not be an inhabitant of the same state with themselves"). As the United States Supreme Court has repeatedly held, where the Constitution sets the floor on qualifications, the State is not permitted to add a ceiling. *See* Opening Br. 21–25 (discussing *Powell v. McCormack*, 395 U.S. 486 (1969), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

5. Washington's Theory of Complete Control Relies On A Single Phrase Of Misleading Supreme Court Dicta.

Because the State's argument conflicts with constitutional text, structure, and history, as well as the holdings of on-point Supreme Court cases, the State's crucial assertion that electors are mere robots who "cast their electoral ballots . . . on behalf of the State and its people," State Br. 13–14, is supported nearly entirely by a single phrase of dicta from an 1890 Supreme Court case, *Fitzgerald v. Green*, 134 U.S. 377 (1890). But that single phrase does not imply the great sea change in the conception of an "elector" that the State wishes it does.

In *Fitzgerald*, the Supreme Court established the uncontroversial proposition that states may punish citizens for illegally voting in elections for presidential electors. *Id.* at 380. In so doing, the Court recognized that presidential electors "act under and pursuant to the Constitution of the United States," and then stated that electors' "sole function" is "to cast, certify, and transmit the vote of the State for President and Vice President." *Id* at 379. The State apparently contends that, with this phrase, the Supreme Court stripped individual voting rights from presidential electors and re-cast the Electoral College as an aggregation of unnecessary intermediaries whose only constitutional role is to funnel a state's presidential preference to the national government. *See* State Br. 13–14.

Fitzgerald did no such thing. Indeed, elsewhere in that opinion, the Court noted that presidential electors are to "give *their* votes" (not the "State's votes") on a certain day; that the Senate is to open "certificates of *their* votes" (not the "State's votes"); and that electors themselves are to "certify and transmit *their* votes" (not the State's votes) to the national government. *Id.* This confirms that the Court used the phrase "the vote of the State" in a common-sense way to mean "the vote of the electors from the state" or "the electoral vote from a state" and not votes that somehow belong to the State in a legal sense. *Storer v. Brown*, 415 U.S. 724, 744–50 (1974) (interpreting "vote of the state" to refer to the vote of the people in the state); *Hawke*, 253 U.S. at 229 (using the phrase "ratification by a State" to refer to the votes of state legislators who act free of official state control).

Moreover, adopting the State's interpretation of that single phrase in *Fitzgerald* would render otiose the Constitution's design. If, as the State contends, the right to cast electoral votes for President legally belongs to "the State," and not its electors, then electors would be entirely unnecessary; presumably, the state legislature could just transmit the vote of the state directly to Congress. But this is not permitted. The Constitution specifies that *only* individual presidential electors may vote for President, and the State legislature has no power to transmit votes on its own. U.S. Const. amd.

XII; *Bush v. Gore*, 531 U.S. 98, 104 (2000) (discussing the legislature's options for appointing electors).[5]

Likewise, a presidential election cannot legally be turned into a one-step popular referendum. This point was established by the Supreme Court in *Hawke*, which dismissed the idea that a state could hold a binding referendum to choose its U.S. Senators before the Seventeenth Amendment required their direct election. "It was never suggested," wrote the Court, "that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." *Id.* at 228. Instead, that change required an amendment. In this case, Washington seeks to make an end-run around this same principle by turning the selection of presidential electors over to a popular vote, and then legally requiring those presidential electors to select a presidential candidate. The principle of *Hawke*

[5] This limitation on a legislature's power has been relevant in the past: in the 1788 presidential election, for instance, New York's legislature could not decide on a method of selecting electors, and so it had no voice in the selection of the nation's first President. D. Jason Berggren, *Presidential Election of 1789*, Washington Library, http://bit.ly/NY1789. If the State were correct and the presidential electoral vote was a vote "of the State" and not of its appointed electors, then the New York Legislature could simply have transmitted a certain number of electoral votes to the Senate for a particular candidate without the need to actually select presidential electors to cast their own votes. That is not what happened.

establishes that a State may not effectively eliminate the role of presidential electors. Only a constitutional amendment can do that.

B. The State Mischaracterizes The Nature Of The Fine It Imposed By Conflating A Non-Binding Pledge With A Legal Obligation.

To avoid the implication that it penalized presidential electors on the basis of their votes, the State has mischaracterized its own statutory scheme. The State repeatedly claims that it imposed $1,000 penalties on Appellants because they "cast[] their electoral ballots contrary to their pledge" to vote for the nominees of the Democratic Party. State Br. 1; *see also id.* at 7 ("The Secretary of State enforced Washington pledge's requirement by issuing a . . . civil penalty" (capitalization altered)). Indeed, the State even goes so far as to say that the statute does not "mandat[e] that the electors vote in particular manner" but instead "imposes a penalty against an elector who casts his or her ballot in a manner inconsistent with their appointment—their party pledge." State Br. 10.

This is not an accurate statement of Washington law. The law does not impose a penalty for failing to adhere to a pledge. The provision under which Appellants were fined, RCW 29A.56.340, states that "[a]ny elector who *votes* for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." (emphasis added). There is no mention of a party pledge, and the

State does not, and cannot, contend that the violation of a signed pledge is a sufficient condition for the state to impose a civil penalty.

C. The State Has Failed to Defend The Superior Court's Rationale That Its Actions Were Permissible Because Appellants Were Not Removed From Office.

The State has correctly abandoned the rationale of the Superior Court that its action was permissible because the State did not "requir[e] specific performance of the pledge" but merely imposed a fine on the presidential electors for exercising their constitutional rights. *See* RP at 49. As Appellants noted in their Opening Brief, state interference with a citizen's clear constitutional right is not cleansed merely because the state action is an after-the-fact penalty rather than a before-the-fact act of coercion. *See* Opening Br. 30–34.

In its brief to this Court, the State candidly acknowledges that its action, while "less drastic than ballot invalidation or removal [of electors] . . ., nevertheless makes it more likely an elector will vote consistent with the will of the State's electorate." State Br. 11. Thus, by the State's own admission, the civil penalty here and the removal of electors available in other states are different in degree, not in kind. Both are uses of official state power to interfere with presidential electors' freedom to choose candidates of their choice. And both violate the fundamental

constitutional principle that a state may not interfere with the exercise of a federal function. *See, e.g.*, *Goodyear Atomic Corp.*, 486 U.S. at 181 n.3 (1988) (noting that a state may not "dictate the manner in which the federal function is carried out."). Thus, both cannot stand.

D. The First Amendment Independently Prohibits the State's Action.

Finally, because the State fined Appellants for expressing their dissenting political views, the fines here independently violate Appellants' First Amendment rights. *See* Opening Br. 28–35. The State attempts to minimize Appellants' interest in their votes by, once again, fundamentally mischaracterizing their actions not as personal votes but instead as votes cast "on behalf of the State of Washington and its people." State Br. 21; *see also id.* at 23 (electors' votes are "ministerial" and not "personal"). As already explained, that is a fundamental error that is contradicted by essentially all valid sources of authority.

Yet even granting that Appellants could have a First Amendment interest in their votes—which they do—the State still contends its fine is permissible because no one forced Appellants to become presidential electors, which means that, in the State's view, it can essentially attach any rules and requirements to the position it wishes. State Br. 22–23. That is not how the First Amendment works. Citizens have no obligation to protest

within 500 feet of a foreign embassy; but if they do, the government may not permit signs solicitous of foreign governments but ban those critical of foreign governments. *Boos v. Barry*, 485 U.S. 312, 329 (1988). The same principle is at work here. The State cannot discriminate against Appellants for expressing dissenting political views and then justify its unprecedented action by claiming that Appellants consented to the unconstitutional restriction. No elector in our Nation's history had ever signed up to be sanctioned on the basis of their votes. This Court should not permit Appellants to be the first.

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CONCLUSION

The decision below must be reversed, the enforcement of RCW 29A.56.340 declared unconstitutional, and the fines vacated.

Dated this 10th day of August, at Seattle, Washington.

IMPACT LAW GROUP PLLC

/s/ Jonah Harrison
Jonah O. Harrison, WSBA #34576
Sumeer Singla, WSBA #32852
1325 Fourth Avenue, Suite 1400
Seattle, WA 98101
T: (206) 792-5230
F: (206) 452-0655
jonah@impactlawgroup.com
sumeer@impactlawgroup.com

L. Lawrence Lessig
lessig@law.harvard.edu
(*pro hac vice*)

Jason Harrow
jason.harrow@gmail.com
(*pro hac vice*)

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I hereby certify under penalty of perjury that on August 10, 2018, the attached document was presented to the Clerk of Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of Court will send e-mail notification of such filing to the following persons:

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Rebecca Glasgow, WSBA #32886
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504
calliec@atg.wa.gov
rebeccag@atg.wa.gov

DATED this 10th day of August, 2018 at Seattle, Washington.

IMPACT LAW GROUP PLLC

By: */s/ Tori Harris*
Tori Harris

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