IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

In the matter of: Levi Guerra, Esther V. John, and Peter B. Chiafalo, Petitioners, v. Washington State Office of Administrative Hearings Respondent	Cause No. 17-2-02446-34 OFFICE OF ADMINISTRATIVE HEARINGS, Docket Nos. 010424 010422 010421 PETITIONERS' REPLY BRIEF

I. Introduction

Petitioners Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John were each fined by the State of Washington solely for exercising their constitutional rights as presidential electors to "vote by Ballot" for presidential candidates of their choosing. See U.S. Const. art. II. As Petitioners explained in their opening brief, the imposition of these unprecedented fines—the first ever issued to presidential electors on these grounds in our Nation's history—violate the Constitution, because the text and history of the Constitution make clear that presidential electors must be given the freedom to cast votes for whomever they please, subject only to the narrow constraints contained in the Constitution itself.

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

The State does not meaningfully dispute this original purpose. Nor could it: as the Supreme Court said over a century ago, "it was supposed [by the Framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive." *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). No constitutional amendment has altered that freedom. Nor has any Supreme Court opinion. It therefore still exists.

Lacking support in either the constitutional text or original understanding, the State defends its fine on the grounds that a state's power to select presidential electors necessarily includes the power to control presidential electors. State Br. 5–10. But the entire premise of the argument rests on a fallacy. The power to appoint does not imply a power to direct. To the contrary: the President cannot dictate the decision making of a federal judge, state legislators who chose U.S. Senators prior to the adoption of the Seventeenth Amendment could not control the votes of the Senators they appointed, and elected officials cannot dictate the vote of the everyday "legislative electors" that choose them in general elections. By the same reasoning, once the State has selected its presidential electors, its authority ends, and presidential electors must be permitted to cast their presidential "[b]allots" as they see fit.

Next, the State justifies the fine on the grounds that the penalty of $1,000 per elector was not particularly harsh. But no penalty at all is constitutionally permissible, because the State may not punish Petitioners for the exercise of a constitutional right that they hold without qualification.

Finally, the State contends that its law does not burden Petitioners' First Amendment rights because the law is part of a general scheme to regulate elections. Not so. Dictating the vote of a presidential elector is not a permissible regulation of the "electoral process" itself, but is instead an infringement on a fundamental right that is personal to each elector. That right may not be infringed, and the imposition of the fines must be reversed.

//

//

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

II. ARGUMENT

A. Presidential Electors' Freedom To Cast A Ballot For An Eligible Candidate Of Their Choice May Not Be Restricted.

The U.S. Constitution provides that the President and Vice-President are selected by the votes of a specified number of electors from each state. U.S. Const. art. II, amd. XII. It is undisputed that a state has the "plenary power" to select its presidential electors, and, in exercising that power, a state may enforce a requirement that certain electors make personal pledges to vote for a particular candidate. *See, Ray v. Blair*, 343 U.S. 214 (1952). But that is where a state's power ends. A state may not dictate the vote of an elector because doing so (1) conflicts with the meaning of the term "elector," which implies personal choice; (2) conflicts with the requirement that presidential electors vote by "Ballot," which means secret ballot; and (3) adds an unconstitutional additional restriction to the limited set of restrictions on elector voting provided in the Constitution. *See*, Opening Br. 5–13.

The State hardly disputes this reading of the constitutional text, nor does it contend that Petitioner's historical account is inaccurate. Instead, it argues that the entity empowered to appoint an elector has the power to punish that elector with legal force if she does not obey the directions of the appointing entity. State Br. 5–10. But this view negates the essence of separated powers. While an appointing entity may, in some circumstances, have the power to remove someone it appointed, it has no power to direct the functions of the officer it appoints.

This independence rule inheres at essentially every level of government, both throughout history and in the modern era. Before the Senate was popularly elected, for instance, state legislatures selected United States Senators. Subject to the requirements of the Constitution, the State's power of selection was plenary. But once a Senator was selected, the state legislature had no authority to direct how the Senator voter. To be sure, many legislatures tried to "instruct" Senators about how to vote. But, while those instructions may have had moral sway, they were not legally binding. *See,* Saul Levmore, *Precommitment*

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

Politics, 82 Va. L. Rev. 567, 592 (1996) ("[A]ttempts by state legislatures to instruct senators have never been held to be legally binding."); *see also*, Jay Bybee, *Ulysses at the Mast*, 91 Nw. U. L. Rev. 500, 524 (1997) (noting one framer's view that instructions to federal senators "amounted to no more than a wish and ought to be no further regarded"). Thus, not a single Senator in the history of the Senate was ever fined by his state for failing to follow an instruction, despite the strong view of state legislators that Senators worked for them.

The independence principle also applies to judges and legislative electors. Regardless of whether judges are appointed or elected, and regardless of whether they make a vow to act in a certain way upon election or confirmation, the judiciary alone must exercise the judicial function on a case-by-case basis: particular outcomes may not be ordained by others, and findings of fact may not be directed by a legislature or an executive official. *See, United States v. Klein*, 80 U.S. 128, 146 (1872) (under federal law, the outcome of a case may not be dictated to the judiciary); *Tacoma v. O'Brien*, 85 Wn. 2d 266, 272 (1975) (under Washington law, "a determination of economic impossibility" of the performance of specific, pre-existing contracts "is a function exclusively judicial" and may not be directed to a court). The principle also applies with special force to voters—or legislative electors, in the Constitution's parlance—who cannot be intimidated, bribed, or coerced into voting in a particular manner. *See, e.g.*, 42 U.S.C. § 1973i (federal law); RCW 29A.84.610–680 (state law). Indeed, the very idea of a state law directing individual votes for Governor or Senator is so repugnant to the Constitution that it is unclear if it has ever even been attempted.

The State has no coherent way to distinguish legislative electors, judges, senators, or any other independent actors from presidential electors. Instead, it points to the historical proposition that "'electors were expected to support the party nominees.'" State Br. 9 (quoting *Ray*, 343 U.S. at 229). That is true but irrelevant. The expectations of voters, parties, or elected officials are not at issue, because no one doubts that presidential electors are expected to support the nominees of their party. The question here, though, is whether the State may

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

require, under penalty of fine, an elector to fulfill that expectation. It may not. As the Supreme Court has held in a different context — "[p]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); see also *Ray*, 343 U.S. at 253 (Jackson, J., dissenting) (noting that "custom" is not "sufficient authority for amendment of the Constitution by Court decree"). There is nothing in the Constitution that gives Washington the power to issue the punishment it has issued, and historical expectations do not change the Constitution's text, history, or structure.

Congress has long recognized the right of electors to vote contrary to their pledge. In 1969, for example, Congress counted the vote of such an elector from North Carolina, because, as one Representative noted on the floor of the House, "electors are constitutionally free and independent in choosing the President and Vice-President." 145 Cong. Rec. 148 (1969) (Rep. McCulloch). Senator Sam Ervin agreed and stated that the "Constitution is very clear on this subject": Congress may not "take what was an ethical obligation and convert it into a constitutional obligation." *Id*. at 203. (Sen. Ervin).

Congress has continued to count electoral votes of these so-called faithless electors through the most recent election. Earlier this year, Congress certified the votes of seven such electors, including four from this state. *See*, 163 Cong. Rec. H185–189 (Jan. 6, 2017) (counting and certifying election results). And, though court decisions in this area are sparse, several that have directly confronted the question have concluded that the "legislature cannot . . . restrict the right [to vote] of a duly elected elector." *Op. of Justices*, 250 Ala. 399, 401 (1948) (rejecting Alabama state law that bound electors); *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896) ("In a legal sense the people of this State vote for no candidate for President or Vice President, that duty being delegated to 10 citizens who are authorized to use their own judgment as to the proper eligible persons to fill those high offices.").[1]

1 Recent scholarship on this topic also supports the view that presidential electors may not be bound to vote for a particular candidate. *See* Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, Public Discourse (Nov. 21, 2016) ("[C]onstitutionally, the

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

The above history demonstrates the inescapable axiom that the power to appoint does not imply the power to control. Instead, the Constitution contemplates a balanced scheme where multiple actors all exercise judgment: the Legislature in choosing how electors are to be selected; the voters, who vote express their preference in all states; and the presidential electors themselves, who have the ultimate duty to cast their electoral votes. The State's attempt to cut out a step, and write electors with discretion out of the Constitution, is not allowed.

B. The Modesty of an Improper Penalty Does Not Render the Penalty Proper.

Next, the State contends that its penalty was permissible because it could have imposed more severe penalties upon Petitioners for their vote of conscience. It cites the example of Michigan, Minnesota, North Carolina, and Oklahoma as states that purport to regulate electors more harshly than this State. State Br. 7.

But this is the thief defending his taking the TV by pointing out he didn't also steal the stereo. The State's self-professed restraint in its constitutional infringement cannot save RCW 29A.56.340 from unconstitutionality. The purpose of the fine is to attempt to control the vote of a presidential elector, and that is an end that Washington may not pursue. The fact that Petitioners were "only" subject to a fine is of no moment. An elector, like anyone else, "cannot be punished merely because he or she chose to exercise his or her constitutional rights." *United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989); *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (stating that the government imposition of a fine for observation of Saturday Sabbath would be an unconstitutional penalty on the exercise of constitutional right); *In re Pers. Restraint of Addleman*, 139 Wn. 2d 751, 754 (2000) (state prisoner may not be "punish[ed] [for the] exercise of constitutional rights").

---

electors may vote for whomever they please."); Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Unconstitutional?* 2016 Cardozo L. Rev. De Novo 129, 153 ("[T]he Constitution protects the elector's discretion against efforts at legal compulsion.").

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

Moreover, while the State claims that its punishment here is not particularly severe, it is in fact the most severe penalty ever imposed upon a presidential election in the history of the Republic. In any case, a fine of $1,000 per person is far from de minimis in any context. And the fine's unprecedented nature magnifies both the stigma and effect of the penalty.

C. The State's Fine Also Violates Petitioners' First Amendment Rights.

By punishing Petitioners for casting their ballots according to their best judgment, the State independently engaged in viewpoint discrimination and violated Petitioners' First Amendment rights. *See* Opening Br. 14–15. In its opposition, the State mischaracterizes the nature of Presidential Electors, and it misstates the nature of its own regulation.

The State begins by suggesting *McPherson v. Blacker*, 146 U.S. 1, establishes that Plaintiffs have no First Amendment interest in casting their ballot as they see fit. *See* State Br. 10. But the First Amendment was not at issue in that case, and the state there did not suppress the votes of individual electors based on their viewpoint. Yet that is exactly what the State has done here.

The State next tries to minimize the burden placed on Petitioners' First Amendment interests by comparing the suppression of votes here to Nevada's constitutionally permissible requirement that its legislators abstain from voting on matters of potential conflicts of interest. State Br. 10–11 (citing *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011). But Carrigan in fact supports Petitioners' case here, for at least two reasons.

First, *Carrigan* involved the votes of established state officials, not of electors who exercise a very different kind of duty from state representatives or city councilors. Indeed, the Court in *Carrigan* expressly distinguished its rule from the rule applicable to Legislative Electors—that is, "voters"—who do have First Amendment interests in their votes. *Id*. at 126. Presidential electors are electors too, and their votes are personal as well. Indeed, this must be the case under the State's own reasoning: if electors were equivalent to state legislators or city councilors, the State would never be able to argue that electors' votes would be subject to

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

control by state law. Yet, by treating the votes here as identical to the votes of a state legislator, the State seems to imply that it can exercise control over the actual votes of legislators at any level. That is an extraordinary implication that should be rejected by this Court. *See, supra* § 1.

Second, even assuming that presidential electors are similarly situated to state legislators (though they are not), a law preventing a potentially conflicted legislator from casting a vote is neutrally-applicable and therefore a permissible First Amendment restriction in this context. But a law that penalizes an elector for voting for a particular candidate discriminates on the basis of viewpoint. The *Carrigan* Court drew just this distinction when it cited with approval other cases finding a constitutional violation that "amount[ed] to viewpoint discrimination" against local legislators. *Id*. at 125 (citing, among others, *Miller v. Hull*, 878 F.2d 523 (1st Cir. 1989) and *Camacho v. Brandon*, 317 F.3d 153 (2d Cir. 2003)). The fine against Petitioners here makes this case much more like *Miller*, in which the First Circuit concluded that agency officials were unconstitutionally removed from office for voting in a particular manner, than like *Carrigan*, where a City Council member was sanctioned for participating in a vote in which he had a personal conflict—not for casting a particular vote. The State fails to reckon with this critical distinction.

The State's reliance on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), is similarly misplaced. State Br. at 11. Electors are not "public employees" of the State, as in *Garcetti*, but rather are individuals appointed by the State to cast a Ballot personal to them. Indeed, the State does not even attempt to construct an argument that presidential electors are public employees, nor could it: electors occupy no state department, have no civil service protection, are not subject to the direction and control of any manager, and receive no salary. See RCW 29A.56.300–360 (provisions governing presidential electors).

Finally, the State defends this regulation as part of its ability to craft reasonable election procedures, but that power is irrelevant to Petitioners' claim. The State has the power

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

to select electors, and so is permitted to put in place procedures for their selection. But the State's regulation of how the electors cast their vote is not a regulation of an election process; rather, it is an unconstitutional attempt to dictate the outcome of the election itself.

Anderson v. Celebrezze, 460 U.S. 780 (1983), and *Burdick v. Takushki*, 504 U.S. 428 (1992), on which the State rely, support this distinction. State Br. 12. Each of those cases involved a mix of the considerations necessary to craft an election system, such as a deadline to file paperwork to appear on the ballot, *Anderson*, 460 U.S. at 782, or a "politically neutral" ban on casting a write-in vote where state law otherwise provided easy ballot access, *Burdick*, 504 U.S. at 438. The "administrative concerns" that might justify these and other regulations of the voting process itself do not justify controlling the votes of electors who may not constitutionally be bound to cast a ballot for a particular candidate. That is not an administrative matter, but is instead the entire substance of the election.

III. Conclusion

Petitioners are asking this Court to recognize a freedom of the Presidential Electors explicit in the Twelfth Amendment and implicit in the Constitution's design. That freedom is startling. The idea that Electors have a constitutional right to exercise judgment, their pledge notwithstanding, conflicts with the public's expectation that Electors will vote as the public directs.

Yet Petitioners do not claim that Electors have no obligation to vote as they have pledged. Our claim is simply that any such obligation cannot be enforced through law. Never in our history has it been enforced through either fines or other punishments. Yet over 99% of Electors have voted as they were expected to. *See* See FairVote, "*Faithless Electors*," http://www.fairvote.org/faithless_electors (counting 167 so-called "faithless electors" for presidential and vice-presidential elections combined, out of over 46,000 total elector votes cast).

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX

That norm of compliance should of course be the norm. Yet the Constitution was designed with a safety valve. According to that design, like a judge reviewing a jury verdict, Electors were to be the final check on the results of the Presidential and Vice-Presidential election.

Nothing in our history, or within the Supreme Court's jurisprudence, gives this Court any sanction to deviate from that original rule. *Blacker* did not address it; *Ray* was incredibly careful not to negate it. And the jurisprudence that has developed in related contexts simply confirms the understanding that *Ray* effectively protected — that while the State is free to select whomever it wants to serve as electors, including people who pledge to vote one way or another, the State's power over those Electors terminates once they are "Appointed."

Accordingly, this Court should vacate the fines imposed upon Petitioners, and declare RCW 29A.56.340 inconsistent with the Federal Constitution.

DATED this 22nd day of November 2017.

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

CERTIFICATE OF SERVICE

I, Mitchell Polonsky, certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

I am employed by the law firm of Impact Law Group PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the foregoing document in the manner noted on the following:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Office of Administrative Hearings 949 Market Street, Suite 500 Tacoma, WA 98402 Fax (253) 593-2200	☐ Hand Delivery ☐ Certified Mail ☒ Facsimile ☐ E-mail ☒ U.S. Mail
Callie Castillo Rebecca Glasgow Office of the Attorney General PO Box 40100 Olympia, WA 98504 calliec@atg.wa.gov rebeccag@atg.wa.gov *Agency Representatives*	☒ Hand Delivery ☐ Certified Mail ☐ Facsimile ☒ E-mail ☒ U.S. Mail
Mark Neary Office of the Secretary of State PO Box 40229 Olympia, WA 98504 *Department Representative*	☒ Hand Delivery ☐ Certified Mail ☐ Facsimile ☒ E-mail ☒ U.S. Mail

DATED this 22nd day of November, 2017 at Seattle, Washington

IMPACT LAW GROUP, PLLC

/s/ Mitchell Polonsky
Mitchell Polonsky

IMPACT LAW GROUP PLLC
1325 FOURTH AVENUE, SUITE 1400
SEATTLE, WASHINGTON 98101
(206) 792-5230 • (206) 452-0655 FAX