

NO. 95347-3

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of:

LEVI GUERRA, ESTHER V. JOHN, and PETER B. CHIAFALO,

Appellants.

ANSWER TO STATEMENT OF GROUNDS

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I. INTRODUCTION

Article II, Section 1 of the United States Constitution firmly places control over the appointment of presidential electors with the states. Washington exercised its plenary constitutional power under this provision when it conditioned appointment as a Washington presidential elector on a pledge and enforced the pledge through a civil penalty. RCW 29A.56.320, .340. Washington also struck a balance that is more generous to so-called faithless presidential electors than other states that remove their presidential electors if they refuse to vote according to their pledge.

The Secretary of State properly issued a civil penalty of \$1,000 to Petitioners Levi Guerra, Esther V. John, and Peter B. Chiafalo for violating RCW 29A.56.340. As a condition of their appointment as a presidential elector, each pledged to cast an electoral ballot for their political party's nominees. RCW 29A.56.320. By the plain terms of RCW 29A.56.340, Petitioners are each subject to a civil penalty of \$1,000 for casting presidential and vice-presidential electoral ballots for persons other than Hillary Clinton and Tim Kaine, the candidates who won the popular vote in Washington.

In the administrative and superior court proceedings below, none of the Petitioners disputed that the State allowed them to cast their electoral ballots or that the Secretary of State followed the correct procedures in

issuing a Notice of Violation under RCW 29A.56.340 to each of them. Instead, Petitioners contested the constitutionality of RCW 29A.56.340 under the First and Twelfth Amendments to the United States Constitution.

As the superior court correctly found, RCW 29A.56.340 withstands constitutional scrutiny. It incentivizes electors to comply with their pledge and facilitates adherence to the will of Washington's voters. But nothing in RCW 29A.56.340 mandates that electors cast their ballots in a particular way. Indeed, Petitioners cast their ballots, not in accordance with the will of Washington's voters, but as each saw fit. And, while Petitioners assert that electors have a constitutional right to vote for the candidate of their choice, no court has adopted their view. Rather, the courts have consistently recognized that, when electors cast their ballots, they do so on behalf of the state that appointed them.

The Secretary of State agrees with Petitioners that this Court should accept direct review to affirm the State's authority. The case involves the constitutionality of state law under the United States Constitution, an issue that this Court should ultimately decide. It also involves fundamental issues of first impression in this State that have broad public import for the State's electorate. The Court should grant direct review and affirm the Petitioners' Notices of Violations, concluding that RCW 29A.56.340 is within the

State's constitutional powers under Article II, Section 1 and does not violate the First and Twelfth Amendments to the United States Constitution.

II. STATEMENT OF THE CASE

In the administrative hearing, Petitioners stipulated to the facts and exhibits set forth in the Notices of Violation issued against them and that the Secretary of State followed all applicable procedures in issuing the Notices of Violation. AR 376-77.¹

A. The Selection of Presidential Electors in Washington

Under the authority granted to the states in Article II, Section 1 of the United States Constitution, the Legislature adopted statutes governing Washington's presidential electors. RCW 29A.56.300-.360. In a presidential election year, each major and minor political party that nominates candidates for president and vice president "shall [also] nominate presidential electors for this state." RCW 29A.56.320. The party or convention must submit to the Secretary of State a certificate listing the names and addresses of the party's presidential electors. *Id.* The Democratic Party submitted to the Secretary of State the names and contact information of their nominated electors, which included all three Petitioners. AR 10-11.²

¹ As indicated in the Petitioners' designation of clerk's papers, the Administrative Record will be indexed as CP 9. References to the administrative record will be cited as "AR" followed by the specific page number in the record.

² The Certification of the Clerk and Index to the Administrative Record contains the Secretary of State's administrative files for each of the Petitioners. Many of the

RCW 29A.56.320 also requires that “[e]ach presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by [their] party.” All three Petitioners signed and submitted pledges. AR 14 (John); AR 334 (Guerra); AR 653 (Chiafalo).

The political parties’ slates of presidential electors do not appear on the general election ballot. RCW 29A.56.320. Instead, the votes that Washington voters cast in the general election for candidates for president and vice president of each political party “shall be counted for the candidates for presidential electors of that political party.” RCW 29A.56.320. Once the general election votes are canvassed and certified, the majority of Washington’s popular vote for president and vice president determines the party whose electors will serve in the Electoral College from Washington. RCW 29A.56.320, .330. The Secretary of State signs and submits a list of the winning party’s electors to the Governor for signature. RCW 29A.56.330; *see also* AR 27-30.

documents are identical due to the nature of this case and the consolidation of the administrative hearing. For ease of reference, this brief cites to the John record when referring to a document that is identical for all Petitioners. When necessary, the brief will cite to documents that are specific to the individual Petitioners and will identify each as such.

Hillary Clinton and Tim Kaine, candidates for the Democratic Party, won the Washington popular vote for president and vice president by more than 500,000 votes. *See* AR 16, 27-30. The Democratic Party's slate of electors thus served in the Electoral College for Washington. *See* AR 31-32. Petitioners were each included in the Democratic Party's slate of electors for the State of Washington. AR 31-32.

B. Washington's Meeting of the Electoral College

Prior to the meeting of the presidential electors, Petitioners Guerra and Chiafalo asked the federal district court to issue an injunction and argued that RCW 29A.56.340 violated the United States Constitution. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1144 (W.D. Wash. 2016). After clarifying that Washington does not preclude presidential electors from voting as they choose, the district court concluded that Chiafalo and Guerra were unlikely to prevail on their constitutional claims. *Id.* at 1144. The district court found that the U.S. Supreme Court has implied that Article II and the Twelfth Amendment do not give electors absolute freedom to vote for the candidates of their choice. *Id.* Because an electoral college vote is akin to an official duty, and the electors chose to seek nomination subject to Washington's rules and limitations, their First Amendment rights were not likely implicated. *Id.* Finally, the district court concluded that, even if there were a First Amendment right, a financial penalty imposes only a

minimal burden and there were several compelling state interests at play. *Chiafalo*, 224 F. Supp at 1144. The Ninth Circuit denied Chiafalo and Guerra's emergency motion for a temporary restraining order and injunction pending appeal, finding that they had not "shown a likelihood of success or serious questions going to the merits." Order, *Chiafalo v. Inslee*, No. 16-36034 (9th Cir. Dec. 16, 2016) (Docket. No. 16).

Washington's Electoral College convened on December 19, 2016, at twelve o'clock noon as required by 3 U.S.C. § 7 and RCW 29A.56.340. AR 31. Petitioners were each present as one of the duly elected electors for the State of Washington. AR 31. Petitioner Levi Guerra signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin L. Powell for President and a ballot casting an electoral vote for Maria Cantwell for Vice President. AR 353-54. Petitioner Esther V. John signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin Powell for President and a ballot casting an electoral vote for Susan Collins for Vice President. AR 33-34. Petitioner Peter B. Chiafalo signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin Powell for President and a ballot casting an electoral vote for Elizabeth Warren for Vice President. AR 672-73. None of the individuals for whom Petitioners cast an electoral vote were nominated by the Democratic Party for President or Vice President: Hillary

Clinton and Tim Kaine, respectively. *See* AR 16. Further, none of these individuals was on the general election ballot and none was a winner of Washington's popular vote. AR16.

On December 29, 2016, Secretary of State Kim Wyman, in her capacity as Chief Elections Officer for the State of Washington, issued Notices of Violation to each of the Petitioners apprising them of their violation of RCW 29A.56.340, issuing a civil penalty of \$1,000 under the statute, and informing them of their administrative appeal rights. AR 5-34 (John Notice of Violation (Not.)); AR 325-54 (Guerra Not.); AR 644-73 (Chiafalo Not.). Each of the Petitioners appealed and requested an adjudicative proceeding. AR 4 (John); AR 324 (Guerra); AR 642-43 (Chiafalo). The matters were later consolidated before the Office of Administrative Hearings. *See* AR 47 (noting consolidation). The administrative law judge issued an initial order affirming the Notices of Violations for each of the Petitioners based solely on the statute's plain language. AR 288-95. The parties stipulated to making the Initial Order the Final Order. AR 296-97.

Petitioners sought judicial review before the superior court, which also affirmed the Notices of Violations and found that Petitioners had not met their burden of showing that RCW 29A.56.340 is unconstitutional. Petitioners timely appealed.

III. STATEMENT OF THE ISSUES

If this Court were to grant review, the issues would be:

1. Article II, Section 1 of the United States Constitution provides states with plenary power over the appointment of presidential electors. Does RCW 29A.56.340 violate the Constitution when it provides a means for the State to hold electors to their pledge, which the United States Supreme Court has already held is a valid condition of appointment?

2. Does RCW 29.56A.340 violate the First and Twelfth Amendments when the statute does not mandate that the State's presidential electors cast their ballots for a particular candidate?

IV. ANSWER TO STATEMENT OF GROUNDS

The Secretary of State agrees that the issue of whether Washington can hold its presidential electors accountable to the conditions of their appointment is an issue of broad public import warranting this Court's review. The Court should uphold RCW 29A.56.340 as falling squarely within the State's constitutional power under Article II, Section 1 of the United States Constitution. The statute provides a legitimate means for the State to hold its presidential electors to their pledged party affiliation, a requirement of their electoral appointment. And, unlike other states, Washington does not go so far as invalidating an elector's vote that is contrary to their pledge. Nevertheless, even if it did, presidential electors do not have a constitutional right to vote for whom they choose. Rather when presidential electors cast their ballots they do so not on their own behalf, but on behalf of the state that appoints them. This Court should affirm.

Article II, Section 1, Clause 2 of the United States Constitution provides states with plenary power, subject only to other possible constitutional limitations, over the appointment of electors and the mode by which electors carry out their appointment. U.S. Const. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of”); *Ray v. Blair*, 343 U.S. 214, 228, 72 S. Ct. 654, 96 L. Ed. 894 (1952) (subject to possible other constitutional limitations, states have a right to appoint electors in such manner as they choose); *McPherson v. Blacker*, 146 U.S. 1, 35, 13 S. Ct. 3, 36 L. Ed. 869 (1892) (“from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors”); *cf. William v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (states’ “broad powers” to regulate voting may include “laws relating to the qualification and functions of electors”).

RCW 29A.56.340 falls within Washington’s plenary constitutional power. It sets the time and location at which the State’s electors of president and vice president convene on the day fixed by Congress. RCW 29A.56.340. It sets the method by which vacancies in the office of elector are filled. *Id.* It orders electors to “proceed to perform the duties required of them by the Constitution and laws of the United States.” *Id.* It

also, while not mandating a particular vote, provides a discretionary penalty against an elector who votes in a manner inconsistent with his or her party pledge. RCW 29A.56.340. Each of these provisions sets the mode and method by which electors act to fulfill the State's obligation in the Electoral College. *See Ray*, 343 U.S. at 224-25, 228. Moreover, the latter provision fulfills the State's legitimate legislative objective of facilitating the effective operation of democratic government. It provides a means to hold electors to their pledged party affiliation, a requirement of their electoral appointment that is certainly less drastic than the removal or invalidation provisions of other states,³ but that nevertheless makes it more likely an elector will vote consistent with the will of Washington's electorate. *See Ray*, 343 U.S. at 226 n.14, 228 n.15. Nothing in the plain language of Article II or the Twelfth Amendment⁴ prevents the State from placing conditions on presidential electors and then holding electors to those conditions in accordance with the State's plenary power.

Contrary to the Petitioners' suggestion, Statement of Grounds (SOG) at 7-8, the United States Supreme Court has already implicitly dismissed the notion that states cannot regulate how electors vote under

³ *See, e.g.*, Mich. Comp. Laws § 168.47; Minn. Stat. § 208.46; N.C. Gen. Stat. § 163-212; Okla. Stat. § 26-10-108.

⁴ The Twelfth Amendment sets forth the specific process for how presidential electors are to cast ballots in their respective states. It also sets forth how the ballots are to be counted by Congress and what happens if there is a tie. U.S. Const. amend. XII.

Article II, Section 1 and the Twelfth Amendment to the United States Constitution. The Court in *McPherson* affirmed Michigan's power to elect presidential electors by congressional district rather than popular vote under these provisions. *McPherson*, 146 U.S. at 42. In doing so, the Court summarized the history of the constitutional provisions, noting that the founders ultimately reconciled all countervailing views by leaving the power to the states. *Id.* at 27-29. And, in rejecting the idea that Michigan's method of election was contrary to the original object and purpose of the electoral system, the Court noted:

Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated. *But we can perceive no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created.*

Id. at 36 (emphasis added) (citations omitted).

Similarly, the Court in *Ray* affirmed that neither Article II, Section 1 nor the Twelfth Amendment forbids a state from authorizing a political party to choose its nominees for elector and to set the elector qualifications in the form of a pledge to vote for the party's nominee. *Ray*, 343 U.S. at 231.

In answering the question, the Court considered “the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by the pledge.” *Ray*, 343 U.S at 228. The Court noted:

It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector’s announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. *History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice.* Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead in one form or another they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party’s nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weights heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.

Id. at 228-30 (emphasis added) (footnotes omitted).

While the Court ultimately left open the question of whether such pledges are enforceable, *id.* at 230, nothing in the opinion suggests that they would not be. More importantly, nothing in the opinion suggests that electors have the constitutional right to operate independently from the will of the state’s voters. *See id.* at 224-25 (“[Electors] act by authority of the

state that in turn receives its authority from the federal constitution.”). In fact, had the Court understood electors to have the constitutional right they assert, it would not have made sense for the Court to have upheld a requirement that electors sign a pledge in order to serve.

Petitioners are also wrong to assert that they have a constitutional right to cast their electoral ballots in any way they deem appropriate. SOG at 10-12. In serving as presidential electors, Petitioners were not exercising their own individual right to vote, nor were they speaking on their own behalf or on behalf of a political party. Instead, when Petitioners convened as part of Washington’s Electoral College, they acted on behalf of the State of Washington and its people. *Fitzgerald v. Green*, 134 U.S. 377, 379, 10 S. Ct. 586, 33 L. Ed. 951 (1890) (Electors’ “sole function” is to “to cast, certify, and transmit *the vote of the state* for president and vice-president of the nation.” (Emphasis added.)); *see also Ray*, 343 U.S. at 224-25 (“[Electors] act by authority of the state that in turn receives its authority from the federal constitution.”). No court has found that an electoral vote implicates any First Amendment right. Instead, courts have characterized the electors’ role as “ministerial,” emphasizing that the electors are carrying out a governmental duty. *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (App. Div. 1933); *see also, e.g., Gacetti v. Ceballos*, 547 U.S. 410,

421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (performance of a governmental duty does not implicate First Amendment rights).

Moreover, the Petitioners were not forced to serve as electors—they willingly sought appointment to the position and they were free to step down without penalty up until the moment of their vote. RCW 29A.56.340. But even if the First Amendment did extend to electoral balloting—which no court has found—the minimal burden of a \$1,000 civil penalty for electors choosing to vote against their pledge furthers the State’s significant interest in ensuring that the will of the people in casting their votes for president and vice president is followed. The First Amendment requires nothing further from a state election law. *Burdick v. Takushki*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

Finally, Petitioners’ suggestion that RCW 29A.56.340 constitutes a viewpoint-based restriction is belied by the statute’s plain text and application. SOG at 12. The law does not regulate or compel any speech. Petitioners were free to—and did—cast their electoral ballots as they deemed appropriate. The law also does not punish the electors’ speech per se, as was the situation in *Miller v. Hull*, 878 F.2d 523, 532 (1st Cir. 1989), where elected members of an association were removed from office solely because of their stated position on a housing project. Instead, RCW 29A.56.340 is a reasonable regulation of the requirement that all

electors execute and file a pledge that he or she will vote for the candidates nominated by that party. RCW 29A.56.320. Petitioners willingly chose to stand for nomination as an elector and signed their pledges accordingly. They should not now be able escape the rules and requirements of that position by claiming a constitutional violation where none exists.

V. CONCLUSION

Whether Washington may hold its presidential electors to the conditions of their appointment is a matter of great public importance that should be resolved by this Court. Nevertheless, RCW 29A.56.340 is soundly within the State's constitutional powers, and therefore the Petitioners' Notices of Violations for violating their electoral pledges should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of January 2018.

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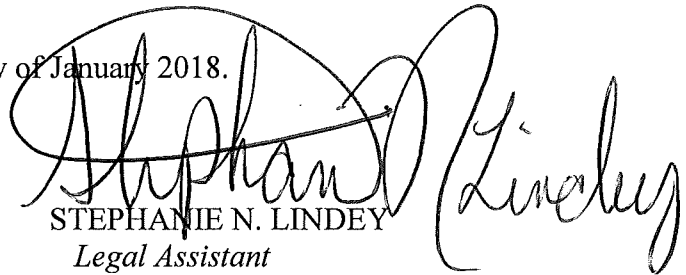
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document via the electronic mail upon the following:

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