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.

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
(*pro hac vice* motion pending)

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

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INTRODUCTION

This case raises a critical yet unresolved question of federal constitutional law: whether a state may compel a presidential elector legally to vote for a particular candidate for president. The Constitution's text, confirmed by Supreme Court authority and uncontradicted evidence from the founding era, indicates that presidential electors must be given the legal freedom to cast electoral votes as they please. Although a state is free to limit its choice of electors to those willing to pledge to vote for the candidate of their political party (as Washington does), such loyalty oaths cannot impose any legally enforceable obligation on electors for President of the United States.

Appellants Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John, three of Washington's nine Democratic presidential electors in 2016, were each pledged to vote for Hillary Clinton, the winner of the popular vote in Washington. When they did not vote for Clinton, they were fined $1,000 each. These fines are unprecedented in American history. Though electors throughout our history have cast their ballot contrary to a pledge, never before has an elector been legally sanctioned for exercising his or her discretion. This history confirms that no state can do what Washington has done here: constrain an elector's choice through legal coercion.

ASSIGNMENT OF ERROR

1. The trial court erred by entering an order on December 8, 2017 denying Appellants' petitions that contested the fines issued to them under RCW 29A.56.340. CP 116–17. The petitions should have been granted and the fines held unconstitutional.

The single issue presented for review is:

1. Whether RCW 29A.56.340—which permits the State to fine a Presidential Elector for failing to cast an electoral vote for a particular candidate—is unconstitutional, because it interferes with electors' federally created right to vote for President and Vice President and violates their First Amendment rights.

STATEMENT OF THE CASE

A. Petitioners Are Nominated As Electors And Perform Their Duties Under The Constitution.

In the summer of 2016, Appellants Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John were nominated as presidential electors for the Washington Democratic Party for the 2016 Presidential Election. AR

000289.[1] On November 8, 2016, Hillary Clinton and Tim Kaine, the Democratic nominees for President and Vice President, received the most popular votes in the State, which meant that Appellants and their fellow Democratic electors were appointed to serve as Presidential Electors for the State of Washington. *See* Wash. Sec'y of State, *November 8, 2016 General Election Results* (Nov. 30, 2016, 8:19 AM), http://results.vote.wa.gov/results/20161108/President-Vice-President.html.

Between Election Day and the day that presidential electors were to cast electoral votes (December 19, 2016), certain facts came to light that made many presidential electors, including Appellants, question whether members of the Electoral College should in fact cast a majority of their votes for Donald Trump for President, as was widely expected based on the outcome of the election. This led some electors who were expected to vote for either Trump or Clinton to announce that they would not vote for either major party candidate, but instead would attempt to deny any candidate a majority of electoral votes. Under Article II and the Twelfth Amendment to

[1] References to "AR" are to the Administrative Record designated in the underlying appeal to Thurston County Superior Court at CP 19–21. The referenced documents were not numbered separately with the designation "CP" as Clerk's Papers and Appellants have submitted a supplemental designation to supply the June 1, 2017 Administrative Record docket entry from the Thurston County Superior Court to address that issue.

the Constitution, the House of Representatives would then determine the next president, as last occurred following the election of 1824.

On December 19, 2016, presidential electors across the country met in their respective states to cast their electoral votes for President and Vice President. *See* 3 U.S.C. § 7 (setting day for meeting of presidential electors). Washington's presidential electors met in Olympia.

State law instructs Washington's presidential electors to "perform the duties required of them by the Constitution and laws of the United States." RCW 29A.56.340; *see also* 3 U.S.C. § 8 (elector voting must occur "in the manner directed by the Constitution"). Yet despite the State's recognition that presidential electors perform a federal function under the "Constitution and laws of the United States," Washington law also attempts to control the electors' votes. Specifically, State law provides 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."[2] RCW 29A.56.340.

[2] In connection with their nomination as electors, each Appellant was also required to sign and file with the Secretary of State an unenforceable pledge to cast an electoral vote for the nominees of the Democratic Party. AR 000289. They fulfilled this obligation on August 8, 2016. *Id*.

Although each Washington presidential elector was a member of the Democratic Party, Appellants did not vote for the nominee of their party. Instead, each Appellant voted for Colin Powell for President, and for Maria Cantwell (Guerra), Susan Collins (John), or Elizabeth Warren (Chiafalo) for Vice President. The State transmitted these votes to Congress, which accepted Appellants' votes in the official tally of electoral votes. 163 Cong. Rec. H185–89 (daily ed. Jan. 6, 2017) (counting and certifying election results).

Ultimately, Donald Trump received a majority of electoral votes and was inaugurated as President on January 20, 2017.

B. Appellants Are Fined Because Of Their Votes, And They Appeal The Fines.

On December 29, 2016, the Washington Secretary of State fined Appellants $1,000 each under RCW 29A.56.340 for failing to vote for the nominee of their party. Appellants believe this to be the first time in U.S. history that a state has fined a presidential elector for an elector's failure to vote as state law required.

Appellants appealed their fines to an Administrative Law Judge. Appellants contended that the fine was unconstitutional, but the ALJ was without power to consider the constitutional objection, and accordingly upheld the imposition of the fine. AR 000609–16.

Appellants then appealed the administrative determination to Thurston County Superior Court (Murphy, J.). The Superior Court held a lengthy oral argument during which it recognized the importance of the constitutional issues presented by this case, RP at 1–47, but the court ultimately issued a brief oral decision rejecting Appellants' appeal, RP at 47–49.

The opinion lacked detailed reasoning regarding the basis of the decision. *See id.* Instead, the Superior Court said only that the fine was "constitutionally permissible" because "[t]he State is not adding a qualification [to the office of presidential elector], nor is the State here requiring specific performance of the pledge." RP at 49. The court did not explain why, under the Constitution, the State's imposition of a fine did not violate Appellants' constitutional right to cast electoral votes free from coercion or penalty.

The Superior Court entered an order on December 8, 2017 that finally disposed of the case in Superior Court, and Appellants filed a notice of appeal on December 21, 2017. CP 118–23. Appellants filed a motion for direct review in this Court. On January 26, 2018, the State agreed that this Court should hear this appeal directly.

ARGUMENT

THE UNPRECEDENTED FINES MUST BE REVERSED BECAUSE THEY WERE UNCONSTITUTIONALLY IMPOSED.

The text, structure, and history of the Constitution, as well as clear United States Supreme Court authority, make one conclusion clear: once appointed by a state, presidential electors cannot be controlled by a state. That is, they may not be punished on the basis of a vote contrary to that which the state attempts to direct. Punishing electors for exercising their constitutional independence, as the State has done here, violates Article II, as amended by the Twelfth Amendment.

Under those constitutional provisions, presidential electors perform a "federal function" which shields them from state interference. Elector independence also derives from the plain and original meaning of the constitution's text and structure. And independence is reinforced by the practice of every state since the beginning of the Republic: Congress has counted every such vote, and, until this very case, no state has ever punished a presidential elector on the basis of the elector's vote.

The State's argument that it may exercise ultimate control over its presidential electors as a function of its power to appoint them ignores that the power to appoint electors does not come with the power to control electors. Rather, when it comes to independent decision-makers, precisely

the opposite is true: the power to appoint is where the State's power over electors ends, not where it begins.

Punishing Appellants also violates the First Amendment because it discriminates against them on the basis of their political viewpoints. Had Appellants supported the national nominee of the Democratic Party, they would have escaped sanction, but by voting for another politician, they were penalized. Punishment on the basis of expressed political preference is at the core of what the First Amendment prevents.

Finally, the Superior Court's distinction between the alternative sanction of "specific performance" of Appellants' unenforceable pledge and the imposition of the fine here incorrectly lets the State off the hook merely because the penalty imposed was not severe. But the State is not permitted to enforce an unconstitutional law merely because the accompanying sanction is relatively light. Instead, because the right to vote is fundamental and electors are constitutionally vested with discretion, the State may not use *any* form of legal coercion to control the votes of electors.

A. Washington's Fines Unconstitutionally Interfered With Appellants' Rights To Vote for a Federal Officer.

Washington's scheme for regulating federal electors is inconsistent with United States Supreme Court precedent regarding state interference with federal functions, inconsistent with the plain text and original meaning

of the Constitution, inconsistent with historical practice, and inconsistent with Supreme Court precedent interpreting the power of adding qualifications to officers or appointees under the constitution.

1. Electors perform a "federal function" that cannot be interfered with by a state.

Under clear Supreme Court authority, presidential electors perform a "federal function" when they cast their votes for President and Vice President. *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (presidential electors "exercise federal functions under . . . the Constitution"). Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been a bedrock principle of constitutional law that states may not interfere with or directly control the performance of federal functions. Washington's imposition of a fine upon presidential electors that do not vote as the State directs violates this bedrock principle. This Court must therefore hold unconstitutional the penalty imposed under RCW 29A.56.340 and reverse the fine imposed upon Appellants.

Burroughs v. United States states the principle most directly. In that case, the Supreme Court affirmed the federal government's authority to regulate campaign contributions in elections for presidential electors. 290 U.S. at 545. The Court reasoned that Congress could regulate in this area because presidential electors "exercise federal functions under, and

discharge duties in virtue of authority conferred by, the Constitution of the United States." *Id.* Later decisions confirm that same understanding of the nature of a presidential elector's duty. *See Ray v. Blair*, 343 U.S. 214, 224 (1952) ("presidential electors exercise a federal function in balloting for President and Vice President" and comparing the "federal function" of a presidential elector to "the state elector who votes for congress[persons]"); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (same, quoting *Burroughs*, 290 U.S. at 545).

A state cannot interfere with the performance of a "federal function." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988) (noting that, regardless of the precise nature of a regulation, a state may not "dictate the manner in which the federal function is carried out.") This principle derives from the Supremacy Clause, and its judicial enforcement dates back to *McCulloch v. Maryland*. In that landmark case, the Supreme Court held the Bank of the United States was immune from state taxation because the "[C]onstitution, and the laws made in pursuance thereof, shall be the supreme law of the land" and cannot be interfered with by a state. 17 U.S. at 433. Courts have subsequently applied this same principle in many contexts—including, and as directly relevant here, to state-appointed decision-makers that perform federal functions.

In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court held that the people of Ohio could not use a popular referendum to override the votes of state legislators to ratify the Eighteenth Amendment, which prohibited the sale of alcohol. *Id.*at 230. The Court reasoned that "the act of ratification by the State derives its authority from the Federal Constitution" and is therefore a federal function that is immune from state control. *Id*; *see also id.* (noting that "the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution.").

Two years later, the Supreme Court reaffirmed this principle with respect to state legislators' ratification of the Nineteenth Amendment, which granted women the right to vote. In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court rejected the claim that a state constitution could render inoperative state legislators' votes to ratify the amendment because "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution." *Id.* at 137. The performance of that function "transcends any limitations sought to be imposed by the people of a state." *Id.* The rule of these cases is straightforward: a state may not interfere with an individual's performance of a federal function, *even if the relevant individual is appointed under state law*.

Subsequent cases have made clear that the same noninterference rule applies not only to federal employees but also to federal contractors, because "'the federal function must be left free of state regulation.'" *Goodyear Atomic Corp.*, 486 U.S. at 181 (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)). Thus, private federal contractors cannot be forced to submit to state licensing procedures that would add to a contractor's qualifications required to receive the federal contract, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956); federal postal officials may not be required to get a state driver's license to perform their duties because that would "require[] qualifications in addition to those that the [Federal] Government has pronounced sufficient," *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); and federal facilities need not obtain state permits to emit air pollutants because federal installations have an "immunity" from state regulation in light of "the fundamental importance" of "shielding federal . . . activities from regulation by the States," *Hancock*, 426 U.S. at 179.[3]

[3] This same principle also prohibits states from punishing federal officials under state criminal law. *See, e.g.*, *In re Neagle*, 135 U.S. 1, 75 (1890) (federal official may not be "held in the state court to answer for an act which he [or she] was authorized to do by the law of the United States"); *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977) ("where . . . a federal officer does no more than is necessary and proper in the performance of his

This Court, too, has recognized a variant of this doctrine. In *Dep't of Labor & Indus. v. Dirt & Aggregate, Inc.*, 120 Wn.2d 49 (1992), this Court held that Washington state law could not be enforced against a subcontractor of the federal government operating in a national park because "'the federal function must be left free of regulation.'" *Id.* at 53 (quoting *Hancock*, 426 U.S. at 179). Earlier, in *Sohol v. Clark*, 78 Wn.2d 813 (1971), this Court rejected the state's attempt to levy a tax on the property an American Indian obtained with assistance from a federal program because the state tax would "constitute an interference with established federal policy." *Id.* at 817.[4]

The State's imposition of fines here fails that test for unconstitutional state interference. Regardless of whether Appellants are formally designated as state officials, it is undisputed that when presidential electors actually perform the crucial act of casting their votes for President,

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[or her] duty, the state should not be allowed to review the exercise of federal authority").

[4] *See also Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (invalidating a state law that purported to create specific rules for cleanup of a federal nuclear by a contractor because the regulation "directly interfere[d] with the functions of the federal government"); *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 438 (9th Cir. 1991) (invalidating statute that purported to preclude a contractor from performing services on a federal construction project without first obtaining a license from the state because a state action is invalid if it "results in interference with federal government functions").

they derive their authority from the federal Constitution. *Burroughs*, 290 U.S. at 545. And it is beyond dispute that RCW 29A.56.340, which forces presidential electors to vote for a particular person for president and imposes a penalty for choosing the "wrong" candidate, is an attempt by the State to control the presidential electors' performance of their federal function. Thus, because the electors' federal function "'must be left free of regulation,'" *Dep't of Labor & Indus.*, 120 Wn.2d at 53 (quoting *Hancock*, 426 U.S. at 179), the imposition of the fines must be reversed. The plain text of the Constitution confirms that presidential electors are free to exercise judgment.

2. The Constitution's text mandates that presidential electors be given discretion to vote for the eligible person of their choice.

The Constitution creates two kinds of "Electors." Article I, § 2 provides that House Members are selected every two years by "Electors," and the Seventeenth Amendment expanded the power of those "Electors"—that is, voters, or "legislative electors"—to include selection of Senators. States have the power to define legislative electors' qualifications, because legislative electors may vote only if they have the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. But once qualified, the voters perform a federal

function—selecting Members of the House and Senate—which the states have no power to direct. *See Ray*, 343 U.S. at 224 (comparing the "federal function" of a presidential elector to "the state elector who votes for congress[person]). No state has ever tried by law to specify how its legislative electors must vote in congressional elections. The very idea of state control over voters is anathema to the liberty of voting.

Article II, § 1 provides that a second set of "Electors" are "appoint[ed]" by each state, as the state legislature "may direct," to vote for the President and Vice President once every four years. U.S. Const. art. II, § 1, cl. 2. These are presidential electors. The State has plenary power to select these electors, except that no "Senator or Representative, or Person holding an Office of Trust or Profit under the United States" may serve as a presidential elector. *See id.* Like legislative electors, presidential electors also exercise a federally protected power in performing their duties. *See supra* at 12.

The Constitution's use of the term "elector" is significant. At the Founding, as is true today, that term names a person vested with judgment and discretion. Electors, by definition, make free choices: Samuel Johnson defined the term "elector" in 1768 as one "that has a vote in the choice of any officer." Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1768. Alexander Hamilton reinforced this usage when he wrote that

presidential electors would likely have the "information and discernment" necessary to choose a wise President. *The Federalist* No. 68 (Alexander Hamilton). Indeed, Hamilton explicitly drew the analogy between legislative and presidential electors when he said that the Electoral College would form an "intermediate body of electors" who would be "detached" from "cabal, intrigue, and corruption." *Id.*

This protection of independent judgment is confirmed by other parts of the constitutional text. The Constitution states that presidential electors must vote "by Ballot," U.S. Const. art II, § 1, cl. 3, a phrase that requires electors to vote by personal, secret ballot to insulate electors from the "cabal and intrigue" that concerned the framers. *See* Speech of Charles Pinckney in the United States Senate, March 28, 1800, *reprinted in* 3 *Records of the Federal Convention of 1787*, at 390 (Max Farrand ed., 1911) ("The Constitution directs that the Electors shall vote *by ballot* . . . It is expected and required by the Constitution, that the votes shall be secret and unknown."). The use of a secret ballot is inconsistent with the ability to fine individual presidential electors on the basis of their votes, since how an elector voted could not be known if the ballot was secret.[5]

[5] Given the secret ballot requirement, Washington appears to have violated federal law governing electoral college procedure when it took

This understanding of the text is confirmed by history. The Supreme Court has repeatedly recognized that presidential electors were intended by the Framers to exercise judgment. In 1892, for instance, the Court stated that "it was supposed [by the Framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive." *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). Justice Jackson later agreed that "[n]o one faithful to our history can deny that the plan originally contemplated . . . that electors would be free agents, to exercise an independent and nonpartisan judgment." *Ray*, 343 U.S. at 232 (Jackson, J., dissenting).

Congress, too, has long recognized the right of electors to vote contrary to their pledge or expectation. In 1969, for example, Congress counted the vote of one such 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." 115 Cong. Rec. 148 (1969) (statement of Rep. McCulloch).

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inventory of Appellants' individual votes and imposed the fines at issue. *See* 3 U.S.C. §§ 8–11 (requiring electoral votes to be cast "in the manner directed by the Constitution," *id.* § 8, and providing that the "*electors* shall make and sign six certificates of all the votes given by them," *id.* § 9, without any interference from the State (emphasis added)). Although that violation is not directly at issue, it further supports the conclusion that the State was without power to levy the fines on Appellants.

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 203–04 (statement of Sen. Ervin).

Congress has stuck to this principle and has continued to count electoral votes of these so-called faithless electors through the most recent election. In January 2017, Congress certified as valid the votes of seven such electors, including the three votes for Colin Powell cast by Appellants. *See* 163 Cong. Rec. H185–89 (Jan. 6, 2017) (counting and certifying election results). Congress's recent actions are in line with its unbroken history of accepting the votes of electors who have exercised the freedom to vote contrary to their pledge or expectation of party loyalty. *See* FairVote, *Faithless Electors* (last visited May 9, 2018), http://www.fairvote.org/faithless_electors (counting 167 faithless electors whose votes were accepted by Congress). This history is further evidence that the Supreme Court correctly spoke of an "assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college." *Ray*, 343 U.S. at 230 (citation omitted).

Important scholarship also confirms this longstanding practice. Leading constitutional historian Rob Natelson recently reviewed a cornucopia of founding-era evidence and concluded that "the ratifiers [of

the Constitution] understood presidential electors were to exercise their own judgment when voting." Rob Natelson, *What Does the Founding Era Evidence Say About How Presidential Electors Must Vote? — Part 5*, Independence Inst. (Dec. 3, 2017), https://perma.cc/SL3F-EPKR; *see also Part 4 in the series* (Dec. 9, 2017), https://perma.cc/DDW2-MDUV. Fellow scholar Robert Delahunty similarly concluded that "the Constitution protects the elector's discretion against efforts at legal compulsion." Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Constitutional?,* 2016 Cardozo L. Rev. De Novo 129, 153; *see also* Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, Public Discourse, (Nov. 21, 2016) ("[C]onstitutionally, the electors may vote for whomever they please.").

Finally, although court decisions in this area are sparse and in some conflict, 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 the 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."); *see also Baca v. Hickenlooper (Baca I)*, No. 16-

1482, 2016 U.S. App. LEXIS 23391, at *15 & n.4 (10th Cir. Dec. 16, 2016) (deeming it "unlikely in light of the text of the Twelfth Amendment" that, when Colorado's electoral college delegation met on December 19, the state would attempt to invalidate the vote of a presidential elector because it was not cast for Clinton).[6] These decisions are persuasive and should be followed.

The Constitution vests presidential electors with a legal discretion to vote for the candidates of their choice, and no amendment or court opinion has altered the constitutional freedom that the Framers created. The State's vote restriction is invalid.

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[6] The events following the Tenth Circuit's decision in *Baca I* are instructive. Three days after the Tenth Circuit deemed it "unlikely" that Colorado would defy the Constitution and remove electors on the basis of their electoral votes, the Colorado Secretary of State did just that by invalidating an electoral vote for John Kasich and replacing the elector who cast it. Remarkably, the federal district court in Colorado recently dismissed that elector's resulting suit claiming his constitutional rights were violated by this removal. *See* Order on Mot. to Dismiss, *Baca v. Colo. Dep't of State*, No. 17-cv-1937 (D. Colo. Apr. 10, 2018), ECF No. 53. In its opinion, the district court claimed the Tenth Circuit's statement that the Constitution likely did not permit a state to interfere with the vote of a presidential elector was mere "dicta" and refused to follow it. *Id.* at 17. That district court decision is now on appeal.

3. Forcing electors to vote for a particular candidate impermissibly adds a new requirement for office that does not appear in the Constitution.

The State's punishment of electors based on their votes also violates the structural provisions that prevent states from adding qualifications to elected positions above those specified in the Constitution. As the Supreme Court has explained in recent decades, the qualifications for office listed in the Constitution do more than merely set out certain minimum age and residency standards for office; they also operate as a check against state officials who would restrict the freedom of voters to elect representatives of their choice by adding qualifications over and above those in our Nation's founding document. Here, the State has imposed an additional qualification for holding the office of presidential elector—that they vote for a particular candidate or face sanction—but the only restrictions on elector voting the State may enforce are those found in the Constitution itself.

The Constitution specifies three substantive restrictions on the selection and the vote of presidential electors. First, Article II states that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2. Second, the Twelfth Amendment specifies that when electors vote "by ballot" for President and Vice President, one of the two "at least, shall

not be an inhabitant of the same state with themselves." U.S. Const. amend. XII. Finally, presidential electors must vote for an eligible candidate for the office of President—that is, for a natural-born citizen over age 35, who has resided in the U.S. for 14 years. U.S. Const. art. II, § 1, cl. 5. Because these are the only restrictions and qualifications the Constitution itself specifies, states are not free to add additional restrictions, such as that electors vote for the candidates nominated by their own political parties.

This conclusion makes sense because it ensures that states give voters and presidential electors maximum choice. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), for instance, the Supreme Court applied the principle of choice to reject Arkansas's attempt to deny ballot access to any representative who had served three terms in the U.S. House or two in the Senate. The Court held such restrictions infringed legislative electors' freedom of choice because "sovereignty confers on the people the right to choose freely their representatives to the National Government," and limiting ballot access to those representatives who had not exceeded the state-imposed term limit ceiling would restrict electors' freedom at the ballot box. *Id.* at 794. Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court held that Congress had no power to refuse to seat an elected representative who met all constitutional requirements for congressional service because such a denial would again impinge on voters'

freedom to choose elected representatives. *Id.* at 547. The principle of *Powell* and *Thornton* is that voters must be given freedom to vote into office anyone that meets the constitutional requirements of age, residency, and citizenship. *Thornton*, 514 U.S. at 783; *see also Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000) (invalidating California's attempt to impose certain residency requirements on candidates for the House because a state "does not possess the power to supplement" the constitutional requirements for office (quotation marks omitted) (quoting *Thornton*, 514 U.S. at 827)).

Under the principle of these cases, Washington's restriction on the freedom of presidential electors works as a kind of double constitutional violation. On the one hand, the law restricts the freedom of the State's popular voters to select electors who may wish, in extraordinary circumstances, to deviate from the popular vote of the state. And on the other hand, the law restricts the freedom of presidential electors to cast a vote for any person who meets the requirements for office in the Constitution itself. Both restrictions are invalid.

Moreover, although the restriction here appears to be a benign exception to the rule of elector independence, it is anything but. That is because if states may impose restrictions on presidential electors' votes beyond those in the Constitution, then, as Justice Douglas said in *Powell*, nothing prevents the passage of laws that would nullify electoral votes for

a "Communist," a "Socialist," or anyone who "spoke[] out in opposition to the war in Vietnam." 395 U.S. at 553 (Douglas, J., concurring). And if the State can require an elector to vote for the candidate of the electors' own political party, then nothing stops state legislators from requiring presidential electors to vote for the *legislators'* own political party, not the electors' party. But that restriction would nullify the popular vote and undermine the constitutional structure that creates an independent, intermediate body of electors.

In today's polarized climate, such politically charged restrictions are no longer just hypothetical. In a move transparently meant to force the current President to release his tax filings, state legislatures in New York and New Jersey have introduced bills that would prevent presidential electors in those states from voting for candidates who do not release copies of their recent tax returns. *See* S. 26, § 3, Assemb. Reg. Sess. 2017-2018 (N.Y. 2017); A. 1230, § 2(b), 218th Leg., Reg. Sess. (N.J. 2018) ("The bill also provides that an elector shall not vote for a candidate for President or Vice-President unless the candidate submits federal income tax returns to the [State]").[7] Thankfully, a court would likely find these restrictions invalid

[7] California passed a similar bill that would deny ballot access to candidates that did not release their tax returns, but Governor Jerry Brown

under *Thornton* and *Powell*. But there is no principled difference between those dangerous, politically motivated restrictions on electors and the seemingly less dangerous but equally unconstitutional restrictions at issue here. Both unconstitutionally restrict the freedom of presidential electors to vote for any constitutionally eligible presidential candidate. The tax-return example provides a vivid illustration of why the Constitution requires voters and electors to be free from any such tight control.[8]

4. The State may not control electors' votes simply because it has plenary power to appoint electors.

The text, history, and structure of the Constitution show that presidential electors must be given discretion to vote for the eligible persons of their choice. Nonetheless, the State has claimed that presidential electors are subject to ultimate state control because the states have plenary power

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vetoed it because he found it "may not be constitutional." Veto Message on S.B. 149 from Gov. Jerry Brown to Members of the California State Senate (Oct. 15, 2017).

[8] The Supreme Court's decision in *Ray v. Blair* upholding a state's ability to require presidential electors to pledge to vote for a particular candidate does not change this analysis. Because the Supreme Court expressly left open the possibility that the pledge was legally unenforceable, nothing in *Ray* actually restricted the ability of presidential electors to vote for the candidate of their choice. To the contrary, *Ray* simply affirms a legislature's constitutional prerogative to select whatever electors it wants—including just those who are willing to make a pledge.

to appoint electors, and it claims the appointment power comes with the power to control electors' votes. But the power to appoint is a fundamentally different power than the power to control in our system of separated powers.

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

Likewise, Presidents appoint federal judges, but they obviously have no power to control federal judges. Rather, under federal law, the outcome of a case may not be dictated to the judiciary. *See United States v. Klein*, 80 U.S. 128, 146 (1871). Sensibly, judges in this State have the same insulation from control by the Legislature that the federal judiciary has. *See City of 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 distinction between appointment and control also applies to legislative electors—that is, to everyday voters. *See* U.S. Const. art. I, § 2; *see also supra* at 17. Although states may determine who is eligible to vote in state and federal elections (subject to constitutional and statutory limitations), once eligible to vote, legislative electors cannot be intimidated or coerced into voting in a particular way. *See*, *e.g.*, 52 U.S.C. § 10307 (prohibiting voter intimidation under federal law); RCW 29A.84.610–680 (same, under state law). Indeed, the idea of a state law penalizing individual votes for Governor or Senator is so repugnant to the Constitution that no state has ever attempted it. Yet that is precisely what the State did here: it has punished electors—presidential rather than legislative—on the basis of their votes. The interference would have been unconstitutional if Plaintiffs were legislative electors, and it is equally unconstitutional with respect to presidential electors.

Ray v. Blair further confirms the distinction between the State's power to appoint (which it has) and its power to control (which it lacks). In permitting the state to require electors to pledge to vote for the nominee of their party, *Ray* affirmed the plenary power of states to *appoint* electors. *Id.* at 231. But, as mentioned, the Court also noted that electors' "promises" may be "legally unenforceable" because they could be "violative of an assumed constitutional freedom of the elector under the Constitution to vote

as he [or she] may choose in the electoral college." *Id.* at 230 (citation omitted). This passage recognizes the key distinction between the state-regulated appointment process and the federal function of casting a vote for president that must be free from state interference.

B. Punishing Electors For Voting For The "Wrong" Candidate Independently Violates The First Amendment.

Voting is an expressive act, *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989), and the First Amendment protects expressive activity against viewpoint-based restrictive state action, *e.g.*, *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992). Thus, fining presidential electors for the viewpoint they express through voting is state action that triggers heightened judicial scrutiny. And the law here cannot survive that scrutiny, because Washington has no compelling state interest sufficient to justify its discrimination against Appellants based on the viewpoint they expressed in casting their vote for President.

The First Circuit reached an identical conclusion in *Miller v. Hull*, and the U.S. Supreme Court subsequently endorsed that result; this Court do so as well. In *Miller*, a municipal governing board removed elected members of a public agency solely because the agency members did not vote the way the members of the board preferred. 878 F.2d at 525–29. The court held the board's actions were unconstitutional, because "elected

members of a public agency may not be removed from office for voting contrary to the wishes of the Board." *Id.* at 533. The Supreme Court specifically approved of the outcome in *Miller* and characterized the board's action as unconstitutional "retaliation amounting to viewpoint discrimination." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011); *see also Clarke v. United States*, 886 F.2d 404, 417 (D.C. Cir. 1989) (concluding that congressional legislation that "coerces the [D.C.] Council members' votes" was invalid under the First Amendment).[9]

The identical principle applies here, and, as in those cases, the State has no interest that could overcome the impermissible viewpoint discrimination. For instance, there is no suggestion that Appellants acted corruptly in casting their ballot contrary to their pledge. Nor can the State have a legal interest in coercing the vote of all of its presidential electors to vindicate the popular vote of the State, because requiring *every* presidential elector to vote for a candidate that received only 54.3 percent of the statewide popular vote—as Hillary Clinton did in 2016—distorts rather than reflects the popular vote. Moreover, Appellants were plausibly acting to further the interests of the State and its voters by attempting to deny the

[9] The D.C. Circuit's decision in *Clarke* was vacated as moot after legislative repeal, 915 F.2d 699 (D.C. Cir. 1990), but that case's reasoning is persuasive and should be followed here.

office of the presidency to a person who, in their judgment, was revealed to be unfit for office and who received only 38.1 percent of voter support in Washington.

Nor can the State assert an interest in enforcing the pledge to vote for the nominee of their party that Appellants signed, because that argument assumes the very question at issue: whether the pledge is enforceable by the State. And since the pledge is only an ethical public promise and not a binding legal document, then the State has no interest in its enforcement.

Finally, because presidential electors are not "public employees" of the State—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)—the State has no interest in control over them as they might over state bureaucrats. Rather, presidential electors are individuals appointed by the State to cast a ballot that is personal to them. The State thus violates the First Amendment when it punishes them for expressing a viewpoint with which the State apparently disagrees.

C. The State's Constitutional Violation Is Not Cleansed Because Appellants Were "Merely" Fined.

The Superior Court seemingly recognized the weighty constitutional considerations in this case but denied Appellants' petitions on the grounds

that the State did not "requir[e] specific performance of the pledge" and instead fined Appellants $1,000 each for failing to vote for the nominees of their political party. RP at 49. But this argument is fundamentally flawed because unconstitutional statutes are not immune from judicial scrutiny if they come with light sanctions. To the contrary: the statute here directing presidential electors to vote for particular candidates would be unconstitutional whether its violation was punishable by specific performance, removal from office, a one dollar fine, ten years in jail, or any other sanction.

An elector, like anyone else, may not be "punish[ed] [for the] exercise of constitutional rights." *In re Pers. Restraint Petition of Addleman*, 139 Wn.2d 751, 754 (2000). Thus, the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), noted that the government's imposition of a mere fine for observation of Saturday Sabbath would be an unconstitutional penalty on the exercise of constitutional right; it follows that jail time or official coercion in the form of required attendance at a religious service is not required to prove a constitutional violation. *Id.* at 404; *see also United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989) (criminal defendant "cannot be punished merely because he or she chose to exercise his or her constitutional rights"). That bedrock principle

categorically bars the State from coercing the votes of Appellants in any manner.

Although the Superior Court's opinion lacked detailed reasoning, the court may have accepted the State's invalid analogy between the fine imposed here and balancing tests that courts perform in First Amendment cases. *See, e.g.*, Answer to Statement 14 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). But that analysis conflates two entirely distinct questions. When determining whether a neutral law violates the First Amendment, courts often weigh how substantially a right is restricted *assuming compliance with the law at issue*, and then they decide whether the burden *of compliance* outweighs the societal benefit of the law. But here, the court considered the burden on Appellants for their *failure to comply*—that is, it considered the burden of the punishment ($1,000), not the burden of compliance with the law (the deprivation of Appellants' constitutional right to vote). The seriousness of the punishment for the violation of an unconstitutional statute is an independent, and legally irrelevant, inquiry.[10]

[10] Of course, under the Eighth Amendment, courts can consider the gravity of punishments relative to crimes committed, since that amendment prohibits cruel and unusual punishments and excessive fines. *See* U.S. Const. amend. XIII. But appellants do not contend here that their fines are excessive under the Eighth Amendment. Instead, Appellants claim that the State may not punish Appellants *at all* on the basis of their votes.

Thus, in *Burdick v. Takushi*—on which the State has relied—the question was how substantially burdened voters were by Hawaii's refusal to permit write-in votes in certain elections. 504 U.S. at 434 (weighing "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))). That balancing test requires a court to take a nuanced look at how severely a broad constitutional right like the right to free association has been burdened when all actors *comply* with the relevant law that incidentally burdens some individuals. But here, the court looked to a different metric: how badly Appellants were punished for *failing to comply* with a law where compliance infringed Appellants' categorical constitutional rights. To Appellants' knowledge, the Supreme Court has never let stand a blanket ban on a specific constitutional freedom like that here merely because the penalty for violation was not particularly harsh.

Indeed, the Superior Court's novel theory leads to absurd results. It would permit the State to direct schoolchildren to attend weekly religious services so long as the sanction for failure to comply were modest and the State did not physically force children to attend services. It would allow the State to prohibit the display of lawn signs for Libertarian Party candidates so long as the penalty for a violation of the law were a figurative slap on the

wrist. And it would authorize the State to stop its citizens from speaking about climate change on the radio so long as each violation only cost the speaker a nickel. These illustrations reveal that the amount or type of punishment is not part of the inquiry: whether the penalty is a five-cent fine or five weeks in jail is of no constitutional moment. The issue is whether Appellants have been sanctioned at all solely for exercising an unambiguous constitutional right. Here, they have. The fines are thus unconstitutional.

* * *

Appellants here recognize that they were not writing on a blank slate when they cast their electoral votes for President and Vice President. They were appointed as presidential electors in virtue of the result of the State's popular vote, they all signed pledges stating publicly their initial intentions to vote for the nominees of their party, and they each intended to honor that pledge. Each Appellant recognizes that departing from the popular vote and the pledge is an extraordinary act.

But the Constitution permits—indeed, contemplates—these acts. In designing how the President would be selected, the Framers sought to create a "process of election" that would ensure "that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications" for the office. *The Federalist* No. 68 (Alexander Hamilton). And thus they created a body of presidential electors

that were imbued with the discretion to cast votes for the persons each elector viewed as best able to serve as President and Vice President, in the hope that this hybrid system would produce excellent results. That system has not been abolished by constitutional amendment, and, until it is, the State must act in accordance with the Constitution we have, not the one it might wish existed. The imposition of the fines must be reversed.

CONCLUSION

The decision below should be reversed and the fines vacated.

Dated this 10th day of May, at Washington, District of Columbia.

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* motion pending)

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

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

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

IMPACT LAW GROUP PLLC

By: */s/ Tori Harris*
Tori Harris

IMPACT LAW GROUP PLLC

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