

1  EXPEDITE

2  No Hearing Set

3  Hearing is Set:

4 Date: December 08, 2017

5 Time: 1:30 p.m.

6 The Honorable Carol Murphy

7 **STATE OF WASHINGTON**  
8 **THURSTON COUNTY SUPERIOR COURT**

9 IN THE MATTER OF:

NO. 17-2-02446-34

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

SECRETARY OF STATE'S  
RESPONDING BRIEF

12 Petitioners.

13 **I. INTRODUCTION**

14 Petitioners Levi Guerra, Esther V. John, and Peter B. Chiafalo each violated  
15 RCW 29A.56.340 when they cast a presidential and vice-presidential electoral ballot for a person  
16 not nominated by the Democratic Party, the party whose candidates won the popular vote in  
17 Washington. As a condition of their selection as a presidential elector, each of the Petitioners  
18 pledged to cast an electoral ballot for that party's nominees. RCW 29A.56.320. By the plain  
19 terms of RCW 29A.56.340, Petitioners are each subject to a civil penalty of \$1,000 for their  
20 respective violations. None of the Petitioners contest that the State did not prevent them from  
21 casting these electoral ballots or that the Secretary of State followed the correct procedures in  
22 issuing a Notice of Violation under RCW 29A.56.340 to each of them. Instead, Petitioners  
23 contest the constitutionality of RCW 29A.56.340 under the First and Twelfth Amendments of  
24 the United States Constitution. Their claims fail.

25 Article II, section 1 of the United States Constitution firmly places control over the  
26 appointment of presidential electors with the states. RCW 29A.56.340 falls squarely within the

1 State’s constitutional power. It provides a means to hold electors to the pledge required for their  
2 electoral appointment and facilitates assurance that electors cast their electoral ballots consistent  
3 with the will of Washington’s voters. Washington also struck a balance that is more generous to  
4 so-called faithless presidential electors than other states that remove their presidential electors if  
5 they refuse to vote according to their pledge.

6 Contrary to Petitioners’ assertions, nothing in RCW 29A.56.340 mandates that electors  
7 cast their ballots in a particular way. While it is true that state law requires each elector to submit  
8 a pledge that they will vote for the candidates nominated by their party, RCW 29A.56.320, and  
9 that the law provides a mechanism to penalize electors who fail to do so, RCW 29A.56.340,  
10 nothing in state law prevents electors from actually casting a ballot for the candidate of their  
11 choosing. Indeed, Petitioners did so here. And, while Petitioners assert that electors have a  
12 constitutional right to vote for the candidate of their choice, no court, anywhere, has adopted  
13 their view. Rather, the courts have consistently recognized that, when electors cast their ballots,  
14 they do so on behalf of the state that appointed them.

15 In sum, RCW 29A.56.340 easily withstands constitutional scrutiny. Petitioners have not  
16 met their burden in this judicial review of showing otherwise. The Secretary of State respectfully  
17 asks that the Petitioners’ Notices of Violations be affirmed.

## 18 **II. STATEMENT OF THE CASE**

19 In the administrative hearing, Petitioners stipulated to the facts and exhibits set forth in  
20 the Notices of Violation issued against them and that the Secretary of State followed all  
21 applicable procedures in issuing the Notices of Violation. AR 376-77. The statement here sets  
22 forth those uncontested facts and procedures.

23 Under the authority granted to the states in article II, section 1 of the United States  
24 Constitution, the Legislature adopted statutes governing Washington’s presidential electors.  
25 RCW 29A.56. In a presidential election year, each major and minor political party that nominates  
26 candidates for president and vice president “shall [also] nominate presidential electors for this

1 state.” RCW 29A.56.320. The party or convention must submit to the Secretary of State a  
2 certificate listing the names and addresses of the party’s presidential electors. *Id.* The Democratic  
3 Party submitted to the Secretary of State the names and contact information of their nominated  
4 electors, which included all three Petitioners. AR 10-11.<sup>1</sup> RCW 29A.56.320 also requires that  
5 “[e]ach presidential elector shall execute and file with the secretary of state a pledge that, as an  
6 elector, he or she will vote for the candidates nominated by that party.” *Id.* All three Petitioners  
7 signed and submitted pledges to “vote for the candidates nominated by the Democratic Party for  
8 President of the United States and Vice President of the United States.” AR 14 (John); AR 334  
9 (Guerra); AR 653 (Chiafalo).

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

19 Hillary Clinton and Tim Kaine, candidates for the Democratic Party, won the  
20 Washington popular vote for president and vice president by more than 500,000 votes. *See*  
21 AR 16, 27-30. The Democratic Party’s slate of electors thus served in the Electoral College for  
22  
23

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24 <sup>1</sup> The Certification of the Clerk and Index to the Administrative Record contains the Secretary of State’s  
25 administrative files for each of the Petitioners. Many of the documents are identical due to the nature of this case  
26 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.

1 Washington. *See* AR 31-32. Petitioners were each included in the Democratic Party’s slate of  
2 electors for the State of Washington. *Id.*

3 Prior to the meeting of the presidential electors, Petitioners Guerra and Chiafalo asked  
4 the federal district court to issue an injunction and argued that RCW 29A.56.340 violated the  
5 United States Constitution. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1144 (W.D. Wash. 2016).  
6 After clarifying that Washington does not preclude presidential electors from voting as they  
7 choose, the federal district court concluded that Chiafalo and Guerra were unlikely to prevail on  
8 their constitutional claims, nor did they show serious questions going to the merits. *Id.* at 1144.  
9 The U.S. Supreme Court has implied that article II and the Twelfth Amendment do not give  
10 electors absolute freedom to vote for the elector of their choice. *Id.* And because an electoral  
11 college vote is akin to an official duty, and the electors chose to seek nomination subject to  
12 Washington’s rules and limitations, their First Amendment rights were not likely implicated. *Id.*  
13 Finally, the district court concluded that, even if there were a First Amendment right, a financial  
14 penalty imposes only a minimal burden and there were several compelling state interests at play.  
15 *Id.*

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

1 by the Democratic Party for President or Vice President: Hilary Clinton and Tim Kaine,  
2 respectively. *See* AR 16. Further, none of these individuals was on the general election ballot  
3 and none was a winner of Washington’s popular vote. *Id.*

4 On December 29, 2016, Secretary of State Kim Wyman, in her capacity as Chief  
5 Elections Officer for the State of Washington, issued Notices of Violation to each of the  
6 Petitioners apprising them of their violation of RCW 29A.56.340, issuing a civil penalty of  
7 \$1,000 under the statute, and informing them of their administrative appeal rights. AR 5-34 (John  
8 Notice of Violation (Not.)); AR 325-54 (Guerra Not.); AR 644-73 (Chiafalo Not.).

9 Each of the Petitioners appealed and requested an adjudicative proceeding. AR 4 (John);  
10 AR 324 (Guerra); AR 642-43 (Chiafalo). The matters were later consolidated before the Office  
11 of Administrative Hearings. *See* AR 47 (noting consolidation). The administrative law judge  
12 issued an initial order affirming the Secretary of State’s Notices of Violations for each of the  
13 Petitioners. AR 288-95. The parties stipulated to making the Initial Order the Final Order.  
14 AR 296-97. Petitioners then timely sought judicial review before this Court.

### 15 III. ARGUMENT

#### 16 A. The United States Constitution Provides Washington with Plenary Power to 17 Appoint the State’s Presidential Electors

18 Article II, section 1, clause 2 of the United States Constitution provides states with  
19 plenary power, subject only to other possible constitutional limitations, over the appointment of  
20 electors and the mode by which electors carry out their appointment. U.S. Const. art. II, § 1, cl. 2  
21 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of  
22 Electors, equal to the whole Number of Senators and Representatives to which the State may be  
23 entitled in the Congress . . . .”); *Ray v. Blair*, 343 U.S. 214, 228, 72 S. Ct. 654, 96 L. Ed. 894  
24 (1952) (subject to possible other constitutional limitations, states have a right to appoint electors  
25 in such manner as they choose); *McPherson v. Blacker*, 146 U.S. 1, 35, 13 S. Ct. 3, 36 L. Ed.  
26 869 (1892) (“from the formation of the government until now the practical construction of the

1 clause has conceded plenary power to the state legislatures in the matter of the appointment of  
2 electors”); *cf. William v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (states’  
3 “broad powers” to regulate voting may include “laws relating to the qualification and functions  
4 of electors”).

5 RCW 29A.56.340 falls squarely within the State’s constitutional power. It sets the time  
6 and location at which the State’s electors of president and vice president convene on the day  
7 fixed by Congress. RCW 29A.56.340. It sets the method by which vacancies in the office of  
8 elector are fulfilled. *Id.* It orders electors to “proceed to perform the duties required of them by  
9 the Constitution and laws of the United States.” *Id.* It also, while not mandating a particular vote,  
10 provides a discretionary penalty against an elector who votes in a manner inconsistent with his  
11 or her party pledge. *Id.* Each of these provisions sets the mode and method by which electors act  
12 to fulfill the State’s obligation in the Electoral College. *See Ray*, 343 U.S. at 224-25, 228.  
13 Moreover, the latter provision fulfills the State’s legitimate legislative objective of facilitating  
14 the effective operation of democratic government. It provides a means to hold electors to their  
15 pledged party affiliation, a requirement of their electoral appointment, that is certainly less  
16 drastic than the removal provision of other states, but it nevertheless makes it more likely an  
17 elector will vote consistent with the will of Washington’s electorate. *See Ray*, 343 U.S. at 226  
18 n.14, 228 n.15. Nothing in the plain language of article II or the Twelfth Amendment prevents  
19 the State from placing conditions on presidential electors as part of the State’s plenary power,  
20 and then selecting electors subject to those conditions. Accordingly, RCW 29A.56.340 falls  
21 within the State’s constitutional power to appoint presidential electors in such manner as the  
22 Legislature directs. Petitioners are wrong to suggest otherwise.

23 **B. Petitioners Do Not Have a Constitutional Right to Ignore the Will of the Voters in**  
24 **Casting Their Electoral Ballots**

25 Petitioners’ claims revolve around one fundamentally incorrect premise: that  
26 Washington law requires or prevents presidential electors from casting electoral votes in a

1 particular way. They are simply wrong. Petitioners' electoral votes for individuals other than  
2 Hillary Clinton and Tim Kaine were submitted to Congress. In fact, there is nothing in  
3 RCW 29A.56.340 or any other statute that directs the State to reject an elector's vote if it is  
4 contrary to the elector's pledge. Unlike 25 other states, Washington has not adopted a state law  
5 that mandates a particular electoral vote, or automatic resignation or forfeiture of the elector's  
6 office when an elector votes contrary to his or her pledge. *See, e.g.*, Mich. Comp. Laws § 168.47<sup>2</sup>;  
7 Minn. Stat. § 208.46<sup>3</sup>; N.C. Gen. Stat. § 163-212<sup>4</sup>; Okla. Stat. § 26-10-108.<sup>5</sup> But even if, for the  
8 sake of argument, RCW 29A.56.340 did require Petitioners to cast their electoral ballots in a  
9 specific manner, such a requirement would not violate the First or Twelfth Amendments.

10 First, Petitioners are incorrect to suggest that they have a constitutional right to cast their  
11 electoral votes in secret and in accordance with their own political beliefs. Pet'rs' Br. at 5-7.  
12 Petitioners attempt to compare the role of the congressional "electors" in article I, section 2 with  
13 the role of the presidential electors in article II, section 1. But congressional electors are  
14 exercising an elective franchise that is personal to them, while presidential electors are acting on  
15 behalf of the State. In serving as presidential electors, Petitioners are not exercising their own  
16 individual right to vote, nor are they speaking on their own behalf or on behalf of a political  
17 party. Instead, when Petitioners convened as part of Washington's Electoral College, they acted

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19 <sup>2</sup> Mich. Comp. Laws § 168.47 ("Refusal or failure to vote for the candidates for president and vice-  
20 president appearing on the Michigan ballot of the political party which nominated the elector constitutes a  
21 resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill  
22 the vacancy.").

23 <sup>3</sup> Minn. Stat. § 208.46 ("Except as otherwise provided by law of this state other than this chapter, the  
24 secretary of state may not accept and may not count either an elector's presidential or vice-presidential ballot if the  
25 elector has not marked both ballots or has marked a ballot in violation of the elector's pledge.").

26 <sup>4</sup> N.C. Gen. Stat. § 163-212 ("refusal or failure to vote for the candidates of the political party which  
nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and  
the remaining electors shall forthwith fill such vacancy as hereinbefore provided").

<sup>5</sup> Okla. Stat. § 26-10-108 ("In the event any Presidential Elector fails to meet at the Governor's office at  
the prescribed time or refuses or fails to vote for the persons nominated for the offices of President and Vice  
President by the political party which nominated the Presidential Elector, it shall be the duty of the Electors present  
at the time and place aforesaid to appoint a person to fill such vacancy.").

1 on behalf of the State of Washington and its people. *Fitzgerald v. Green*, 134 U.S. 377, 379, 10  
2 S. Ct. 586, 33 L. Ed. 951 (1890) (Electors’ “sole function” is to “to cast, certify, and transmit *the*  
3 *vote of the state* for president and vice-president of the nation.” (Emphasis added.)); *see also*  
4 *Ray*, 343 U.S. at 224-25 (“[Electors] act by authority of the state that in turn receives its authority  
5 from the federal constitution.”).

6 Second, the U.S. Supreme Court has already implicitly dismissed the Hamiltonian notion  
7 that states cannot regulate how electors vote. The Court in *McPherson* affirmed Michigan’s  
8 power to elect presidential electors by congressional district rather than popular vote under  
9 article II, section 1 and the Twelfth Amendment of the United States Constitution. *McPherson*,  
10 146 U.S. at 42. In doing so, the Court summarized the history of the constitutional provisions,  
11 noting that the founders ultimately reconciled all countervailing views by leaving the power to  
12 the states. *Id.* at 27-29. And, in rejecting the idea that Michigan’s method of election was contrary  
13 to the original object and purpose of the electoral system, the Court noted:

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

24 *McPherson*, 146 U.S. at 36 (emphasis added) (citations omitted).

25 Similarly, the Court in *Ray* affirmed that neither article II, section 1 nor the Twelfth  
26 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.” *Id.* at 228. The Court noted:



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

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

18 While the Court ultimately left open the question of whether such pledges are  
19 enforceable, *id.* at 230, nothing in the opinion suggests that they would not be. More importantly,  
20 nothing in the opinion suggests that electors have the constitutional right to operate  
21 independently from the will of the state’s voters. *See id.* at 224-25 (“[Electors] act by authority  
22 of the state that in turn receives its authority from the federal constitution.”). In fact, had the  
23 Court understood electors to have the constitutional right they assert, it would not have made  
24 sense for the Court to have upheld a requirement that electors sign a pledge in order to serve.<sup>6</sup>

25 Third, Petitioners’ assertion that states cannot add qualifications or conditions to effect  
26 the electors’ appointment is simply wrong. To make their argument, Petitioners point to two  
cases concerning qualifications for members of Congress: *Powell v. McCormack*, 395 U.S. 486,  
89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) and *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.  
Ct. 1842, 131 L. Ed. 2d 881 (1995). Pet’rs’ Br. at 7-9. In those cases, the Supreme Court found  
that neither Congress itself nor the states could add restrictions *on members of Congress* when  
the Constitution explicitly set the qualifications. Petitioners try to analogize those circumstances

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<sup>6</sup> Nor does it make sense to suggest as Petitioners do here that the Court in *Ray* only gave states the ability to create a “moral obligation” on electors.

1 here, arguing that states similarly have no power to supplement electors’ duties or add  
2 restrictions. Pet’rs’ Br. at 9. But while the states have never possessed the ability to set  
3 qualifications for members of Congress, the Constitution explicitly grants states that power with  
4 respect to the manner in which electors carry out their appointments. U.S. Const. art. I, § 2;  
5 *McPherson*, 146 U.S. at 27 (state legislatures have exclusive power to “define the method of  
6 effecting the object” of appointing electors).

7 Petitioners’ reliance on *Baca v. Hickenlooper*, No. 16-1482, slip op. (10th Cir. Dec. 16,  
8 2016) (attached), is similarly in error. Petitioners describe *Baca* as finding that states have no  
9 authority to interfere with electors once voting begins. Pet’rs’ Br. at 12. But that description  
10 mischaracterizes the Court’s discussion, which was based on specific provisions found in  
11 Colorado state law that had not yet been acted upon and which are unlike any found in  
12 Washington. *See Baca*, slip op. at 12; *Chiafalo*, 224 F. Supp. 3d at 1144 (“Washington has no  
13 law precluding Plaintiffs from voting as they choose—and having those votes counted—in the  
14 Electoral College.”). Moreover, Petitioners ignore that the Circuit Court in *Baca* ultimately  
15 found that the electors—like those here—failed to “point to a single word [in article II and the  
16 Twelfth Amendment] that support their position that the Constitution requires that electors be  
17 allowed the opportunity to exercise their discretion in choosing who to cast their votes for.”  
18 *Baca*, slip op. at 10. The few cases that the Petitioners cite fail to support their arguments.

19 **C. RCW 29A.56.340 Does Not Burden Any First Amendment Right**

20 Petitioners’ references and arguments asserting constitutional burdens to their “federally  
21 protected right” to cast an electoral ballot are significantly misplaced. *See* Pet’rs’ Br. at 13-14.  
22 Petitioners offer no authority for the proposition the First Amendment extends to the casting of  
23 an electoral vote. *Cf. McPherson*, 146 U.S. at 38-39 (“The first section of the fourteenth  
24 amendment does not refer to the exercise of the elective franchise . . . . The right to vote intended  
25 to be protected [by the second section] refers to the right to vote as established by the laws and  
26 constitution of the state.”). Like the legislators referenced in *Nevada Commission on Ethics v.*

1 *Carrigan*, 564 U.S. 117, 125, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011), the electors are not  
2 casting ballots personal to them, but as representatives of the people of the State of Washington.  
3 *Fitzgerald*, 134 U.S. at 379; *Ray*, 343 U.S. at 224-25. No court has found that presidential  
4 electors’ electoral vote implicated First Amendment rights. Instead, courts have characterized  
5 the electors’ role as “ministerial,” emphasizing that the electors are carrying out a governmental  
6 duty. *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (App. Div. 1933); *see also, e.g., Gacetti v.*  
7 *Ceballos*, 547 U.S. 410, 421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (performance of a  
8 governmental duty does not implicate First Amendment rights). Moreover, the Petitioners were  
9 not forced to serve as electors—they willingly sought appointment to the position and they were  
10 free to step down without penalty up until the moment of their vote. RCW 29A.56.340. But  
11 even if the First Amendment did extend to electoral balloting—which no court has found—the  
12 minimal burden of a \$1,000 civil penalty for electors choosing to vote against their pledge  
13 furthers the State’s significant interest in ensuring that the will of the people in casting their votes  
14 for president and vice president is followed. The First Amendment requires nothing further from  
15 a state election law. *Burdick v. Takushki*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245  
16 (1992).

17 The United States Supreme Court has long recognized a state’s expansive power to  
18 prescribe the election process within broad constitutional bounds. *E.g., Wash. State Grange v.*  
19 *Wash. State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008);  
20 *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, L. Ed. 2d 920 (2005); *Bullock v. Carter*,  
21 405 U.S. 134, 141, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972). Accordingly, “States have significant  
22 flexibility in implementing their own voting systems.” *John Doe No. 1 v. Reed*, 561 U.S. 186,  
23 187, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). “To the extent a regulation concerns the legal  
24 effect of a particular activity in that process, the government will be afforded substantial latitude  
25 to enforce that regulation.” *Id.* at 195-96. This is because the Court recognizes that “as a practical  
26 matter, there must be a substantial regulation of elections if they are to be fair and honest and if

1 some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson v.*  
2 *Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1567, 75 L. Ed. 2d 2010 (1983) (quoting *Storer v.*  
3 *Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

4 Accordingly, the Court rejected resolving challenges to state election laws by “any  
5 ‘litmus-paper test.’” *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730). Instead, the  
6 Court chose to apply a flexible approach that weighs the “character and magnitude of the asserted  
7 injury” against “the precise interests put forward by the State as justifications for the burden  
8 imposed by its rule.” *Anderson*, 460 U.S. at 789. “In passing judgment, the Court must not only  
9 determine the legitimacy and strength of each of those interests; it also must consider the extent  
10 to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* Accordingly, the  
11 appropriate level of scrutiny depends upon the severity of the burden, which the party  
12 challenging the law bears the burden of specifically proving. *Burdick*, 504 U.S. at 434. Only if a  
13 state election law imposes “‘severe’ restrictions” must it also be “narrowly drawn to advance a  
14 state interest of compelling importance” to pass constitutional muster. *Burdick*, 504 U.S. at 434  
15 (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)). If, on  
16 the other hand, the law imposes “only ‘reasonable, nondiscriminatory restrictions,’” then the  
17 requirements will survive review so long as they further a state’s “important regulatory  
18 interests.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

19 Again, Petitioners point to no instance when a court has cast doubt on the strength of the  
20 State’s interest in carrying out the will of its electorate as expressed in the popular vote for  
21 President and Vice President. Washington has chosen a narrowly drawn means of achieving that  
22 goal by adopting a penalty provision, and allowing electors to decide for themselves whether to  
23 risk incurring the penalty. RCW 29A.56.340 easily satisfies the *Burdick* test.

24 Finally, Petitioners’ attempts to invoke a different First Amendment test all fail.  
25 Petitioners’ argument that RCW 29A.56.340 constitutes a viewpoint-based restriction is belied  
26 by its plain text and application. Pet’rs’ Br. at 14. The law does not regulate or compel any

1 speech. Petitioners were free to—and did—cast their electoral ballots as they deemed  
2 appropriate. The law also does not punish the electors' speech per se, as was the situation in  
3 *Miller v. Hull*, 878 F.2d 523, 532 (1st Cir. 1989), where elected members of an association were  
4 removed from office solely because of their stated position on a housing project. Instead,  
5 RCW 29A.56.340 is a reasonable regulation of the unchallenged requirement that all electors  
6 execute and file a pledge that he or she will vote for the candidates nominated by that party.  
7 RCW 29A.56.320. Petitioners willingly chose to stand for nomination as an elector and signed  
8 their pledges accordingly. They cannot now escape the rules and requirements of that position  
9 by claiming a constitutional violation where none exists.

10 **IV. CONCLUSION**

11 For these reasons, the Secretary of State respectfully asks this Court to find  
12 RCW 29A.56.340 constitutional and affirm the Petitioners' Notices of Violation.

13 DATED this 13th day of November 2017.

14  
15 ROBERT W. FERGUSON

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1 **Certificate of Service**

2 I certify, under penalty of perjury under the laws of the State of Washington, that on this  
3 date I served a true and correct copy of the foregoing document via electronic mail and U.S.

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16 DATED this 13th day of November 2017, at Olympia, Washington.

17   
18 KRISTIN D. JENSEN  
19 *Confidential Secretary*