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

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

I. Introduction

The sole issue presented by this appeal is whether the State of Washington may, constitutionally, compel its Presidential Electors to vote for a particular presidential and vice-presidential candidate.

The parties agree that Washington has "plenary" authority to select the electors it wants. They agree that Washington may require those electors to pledge to a particular candidate. And they agree that Appellants in this case had pledged to support the Democratic nominees for President and Vice-President, but in fact voted for candidates other than those nominees. The only question that the parties disagree about is whether Washington may penalize an elector who votes contrary to her pledge, by imposing a civil fine or other penalty.

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This is a critically important question that deserves expedited review by this Court. While hundreds of electors throughout history have voted contrary to their pledge, 2016 saw the largest number vote independently in the history of the electoral college. Most of these electors cast their ballots based on the good faith belief that the Constitution entitled them to depart from their pledge. Appellants share that belief. But regardless of whether that belief is correct, the nation needs a clear resolution on the constitutional power of electors, before the action of any elector creates a constitutional crisis.

II. FACTS

Appellants Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John were duly selected electors for the Democratic Party in the 2016 Presidential Election. AR000289. In early August, 2016, each signed a pledge that stated "I will vote for the candidate nominated by the Democratic Party for President of United States and Vice President of the United States." AR000289. The Washington State Democratic Party certified a slate of electors that included Appellants, and submitted that list to the Washington Secretary of State. AR000289. In November, the people of Washington State voted overwhelmingly to elect the Democratic Nominee, Hillary Clinton, as President. AR000289-90. Under Washington law, the slate of Democratic electors was thus selected as the electors to represent Washington. AR000290.

At noon on December 19, 2016, and pursuant to 3 U.S.C. §7 and RCW 29A.56.340, Washington's electors convened at the state capitol in Olympia to cast their ballots for President and Vice President. Appellants did not vote for the Democratic nominee. Instead, each cast their ballot for Colin Powell for President, and a candidate other than Tim Kaine for Vice President. AR000290.

Washington 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." RCW 29A.56.340. Pursuant to this statute, on December 29, 2016, and

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for what Appellants believe is the first time in American history, a state official, the Washington Secretary of State, imposed a $1,000 fine on each Appellant for violating their pledge. AR000290.

Appellants timely appealed their fines. AR000290. Their appeal was heard by Administrative Law Judge Robert Krabill on March 3, 2017. AR000288. Judge Krabill accepted the stipulation of the parties that the Secretary of State followed the appropriate procedures in finding that Appellants had voted contrary to their pledge, and were therefore liable to penalty under RCW 29A.56.340. The Judge noted that Appellants had raised a constitutional objection to this penalty, but recognized that he had no jurisdiction to review the constitutionality of RCW 29A.56.340. AR000291. Judge Krabill thus upheld the Secretary's penalty, and Appellants timely appealed his judgment to this Court. AR000291.

III. ARGUMENT

The federal Constitution creates the role of a presidential "Elector," charged with the duty to vote for both President and Vice President. States have "plenary" authority to select those electors. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Yet once chosen, that elector is free to exercise his or her judgment, subject only to explicit constitutional limitations.

The State of Washington purports to interfere with that constitutional freedom, by imposing a civil penalty on any elector who votes contrary to how Washington law prescribes. RCW 29A.56.340. This restriction upon a federal Elector's protected freedom to exercise choice as an elector, and violates the First Amendment rights of an Elector.

A. The Constitution Establishes "Electors" With A Constitutional Freedom to Exercise Judgment

The Constitution creates two kinds of "Electors" critical to the representative democracy the Framers created. The reach — and limits — of the states' role with each is similar.

The first type is the "Electors" that select the House, and eventually, the Senate ("Legislative Electors"). Article I, §2, provides that "Members" of the House of

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Representatives will be selected every two years by "Electors." The Seventeenth Amendment expanded the power of those "Electors" to include the Senate. In both cases, the states have the power to define the qualifications of those "Electors." Those "Electors," the Constitution prescribes, have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." But once established, those "Electors"— that is, eligible voters throughout the country—perform a federal function which the states have no power to direct or control. No state has ever tried by law to specify how its "Electors" for Congress must vote. The very idea is anathema to the liberty of voting.

The second type of "Electors" created by the Constitution have the opportunity to select the President and Vice President ("Presidential Electors"). The qualifications of those "Electors" are established by the states as well. Article II, § 1 provides they be "appoint[ed]" by the State, as the legislature "may direct." Subject only to the exclusion of any "Senator or Representative, or Person holding an Office of Trust or Profit under the United States," the state has the power to choose its Presidential Electors. But as with Legislative Electors, Presidential Electors exercise a federally protected power. The states can't control the exercise of that power any more than the states can control the power of Legislative Electors in House and Senate elections.

This is the essence of Appellants' argument before this Court. While the state's power to select presidential electors is almost unlimited, once appointed, the state's power over how the electors perform their function is precisely non-existent. Just as the power of a judge is independent of the body that appoints her, or the power of a President is independent of the "Electors" who select him, the power of Presidential Electors, once appointed, is independent of the state that appointed them. And if the state has no power to direct how a Presidential Elector may vote, then the state cannot impose a civil penalty upon an elector who does not follow the state's directive.

This conclusion follows (a) from the nature of an "Elector," (b) from the interpretive

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consequence of the constitutional restriction that is imposed upon how Presidential Electors may vote, and (c) from the intent of the Framers with respect to how Presidential Electors would function specifically.

1. "Electors" are vested with a constitutional freedom of choice

The very idea of an "Elector" within our constitutional system—indeed within any system that takes seriously the liberty protected by a right to vote—denotes an individual with a protected liberty to exercise his or her judgment however she chooses. As Samuel Johnson defined the term in 1768, an elector is "he that has a vote in the choice of any officer." Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1768). That vote is "the right," as James Madison described in Federalist 57, "of electing" a legislature, or any officer. The Federalist No. 57 (J. Madison); *see also* The Federalist No. 10 (J. Madison) (equating the "qualifications of the electors" for elected representatives with "the definition of the right of suffrage").

Yet that "right to choose" means nothing if a legislature can coerce an "Elector" to exercise his or her power as the legislature has chosen. As Justice Jackson explained in his opinion in *Ray v. Blair*, 343 U.S. 214 (1952),

> No 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 as to the men best qualified for the Nation's highest offices. 343 U.S. at 232 (Jackson, J., dissenting).

Any "elector" is a free agent, or else he or she is not an "elector."

History confirms this understanding. Appellants believe this is the first time in American history in which a state has tried to fine an elector because of how that elector exercised his or her vote. While our tradition, and the Supreme Court, has recognized the states have substantial power in selecting electors, never has a state punished an elector because of how that elector voted. Hundreds of electors, in 20 of the 55 presidential elections in our history, have voted contrary to how they were pledged before 2016. Never before has any of them been legally penalized for their decision.

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This fact alone should suggest how fundamentally misconceived Washington's understanding of the idea of an "Elector" is. No doubt, a custom has developed in America for "Electors" to follow the will of the people of their state. No doubt, that custom makes sense in a representative democracy. But custom does not convert into legal power merely because of its longevity. It certainly doesn't amend the Constitutional scheme just because that scheme is not popularly understood. As Justice Jackson noted in *Ray v. Blair*,

> Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions. *Id.*, at 233 (Jackson, J., dissenting).

This point is crucial for understanding the nature of any limits on the constitutional freedom of an "Elector." No doubt, an "Elector" can be asked to make a pledge. Neither is there any Constitutional problem with a political party asking voters to pledge support for that party. But such pledges can only be enforced normatively, not legally. It may well be that most voters vote according to the party to which they are pledged. It may well be that a particular voter is scorned within her community because she defects from the party to which she is pledged. But the custom of voting for your party is not a predicate for a legal requirement of voting for your party. The choice of who to vote for is an essential and protected liberty, core to the very idea of a voter, or, as the Constitution speaks of them, "Electors."

2. The Constitution's Specification that Votes Shall Be By "Ballot" Reinforces This Conclusion

The Constitution and the Twelfth Amendment require that Presidential Electors vote "by ballot." In the language of the Framers, "by ballot" meant by secret ballot. The Constitution speaks of "ballot" only twice — once in reference to Presidential Electors, and once in reference to contingency election procedures in the House and Senate. Every other

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time the Constitution speaks of elections, it uses the word "choose" or "elect." Early Congresses understood the contingency election by ballot to be a secret ballot. CONG. DEB. 430, 512, 514 (1825). See William Josephson & Beverly J. Ross, Repairing the Electoral College, 22 J. Legis. 145, 172-73 (1996). The plain intent of the Framers in using this distinct language was to assure that Presidential Electors could exercise their judgment.

A civil penalty for voting contrary to a pledge conflicts with a secret ballot. While an Elector is obviously free to report his or her vote, any state procedure that makes the vote transparent conflicts with the Constitution's design. State law must allow Electors to perform their function consistent with the Constitution.

3. Except for one restriction, the Constitution leaves presidential electors free to exercise their discretion, and neither the States nor Congress has any power to add to the one substantive restriction that the Constitution imposes upon Electors

The Supreme Court has been clear about the power of the states or Congress to modify the qualifications or restrictions upon any federal officer or function. As the Court has indicated in multiple contexts, when the Constitution describes a floor, it is also describing a ceiling.

Thus, in *Powell v. McCormack,* 395 U.S. 486 (1969), the Court held that Congress has no power to add to the qualifications necessary to serve in Congress. The Constitution specifies certain qualifications — citizenship, residency in the state, an age limit. Congress, the Court held, had no power to add to those, by refusing to seat an elected representative because of pending corruption charges against that representative. The Constitution had set the floor. That floor was also the constitutional ceiling. However compelling the interest in excluding purportedly corrupt politicians, *Powell* held that Congress could not supplement the limits the Constitution established.

The Court reinforced the principle in *U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995). In that case, the Court rejected an effort by Arkansas to impose term limits on its

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federal representatives. The Arkansas Constitution had denied ballot access to any representative who had served three terms in the House, or two terms in the Senate. The Supreme Court invalidated those restrictions because they infringed on the freedom of choice of Legislative Electors—that is, the voters. As the Court held, "the right to choose representatives belongs not to the States, but to the people." *Id.* at 821. The state had no power to restrict the freedom of "the people" — acting as Legislative Electors — because the Constitution had already specified the only qualifications that might constrain the freedom of "the People." But beyond the restrictions created by the Constitution, neither the states nor Congress can further restrict the freedom of Legislative Electors. *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)).

This same principle applies to Presidential Electors too. The Constitution specifies the duties of presidential electors. It also specifies one substantive restriction on their freedom to vote. Specifically, Article II and the Twelfth Amendment impose eight separate duties on electors:

(1) to meet in their respective states;

(2) to vote by ballot for President and Vice President;

(3) to name in their ballots the person voted for as President;

(4) to name in a distinct ballot the person voted for as Vice-President;

(5) to make distinct lists of all the persons voted for;

(6) to report the number of votes for each;

(7) to "sign and certify" both lists; and

(8) to transmit such lists to the President of the Senate at the seat of government.

The Twelfth Amendment adds a single substantive constraint upon the electors' freedom to vote: Electors must cast at least one of their ballots for a candidate from a state

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other than their own. The Constitution does not otherwise constrain or direct how the electors may vote. Specifically, the Constitution does not direct electors to vote for the candidate of their party. It does not direct electors to vote for the winner of the popular vote in their state. Beyond the single requirement of voting for at least one candidate not from the elector's own state, the Constitution allows Presidential Electors to vote as they deem appropriate.

The principle behind *Powell* and *Thornton* compels the conclusion that the states have no power to supplement these duties or these restrictions. A state could not direct Presidential Electors to provide reasons for their vote. Nor could a state further restrict the freedom an elector has to vote as he or she wishes. Just as the Court instructed in *Thornton*, that "the right to choose representatives belongs not to the States, but to the people," where "the people" meant the Legislative Electors, so too should this Court hold that "the right to choose Presidents and Vice Presidents belongs not to the States, but to the Presidential Electors." In both cases, the state may have enormous power in defining the qualifications of "Electors." But beyond the limits in the Constitution, the state has no power to further restrict the franchise of these "Electors," by controlling how they may vote.

4. Presidential Electors were meant to exercise a discretion that is inconsistent with any state's power to direct a particular result

According to the State of Washington, the state legislature has not only the power to select Electors, but also the power to control how Electors vote. The significance of that latter power is muted today, because the state's direction is to follow the vote of the People. But on the theory the state advances, there is no reason that the state is limited to directing its electors to vote as the People have. On the State of Washington's theory, the legislature could direct Presidential Electors to vote however the legislature wanted.

This idea makes no sense of the Framers' purpose in establishing the Electoral College. If the Electors could simply be compelled as the legislature directed, then there was no reason to add the extra step of citizens serving in an Electoral College.

But it is clear from founding authority that the Framers imagined the Electors acting as

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more than potted plants. As Alexander Hamilton famously described the College,

> It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station [of President], and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. The Federalist No. 68 (A. Hamilton).

None of this discretion or "discernment" makes any sense if the states can direct the Electors to vote as the legislature prefers. If the "Electors" are subject to legislative direction, then there would be no need for deliberation or for the College itself. But then if, as Hamilton believed, there was need for deliberation, that means the Electors were not simply to be the agent of the legislature. The legislature selects them; it may well require a pledge from them; but they remain free to deliberate and exercise judgment as they perform their function as electors.

5. Washington's law purporting to penalize an elector who votes independently conflicts with this constitutional design

Washington law purports to create a legal obligation, enforced through a civil penalty, to compel an elector to reveal his or her vote, and vote according to his or her pledge. RCA 29A.56.340 authorizes the Secretary of State to issue a penalty against an elector who votes his or her conscience. That penalty effectively compels an elector to forgo any independent judgment about how to cast his or her ballot, and forgo the right to secret ballot.

Whether or not such a system is desirable, it is not the system created by the Constitution. The Constitution gives states the freedom to select electors only. It does not give states the power to dictate Electors' votes, or to deviate from the Constitution's requirement of voting by secret ballot. While the Supreme Court has expressly upheld the freedom of a state to condition its selection of an elector upon a pledge to vote in a particular way, *Ray v. Blair*, 343 U.S. 214 (1952), no court has ever held that states can compel an Elector to vote

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for a specific candidate, or penalize them if they do not. Just as a promise by an ordinary voter to vote for one candidate or another cannot be enforced by law, the pledge of an elector to vote one way or another cannot be enforced through civil penalty. The system the Framers established secured to all electors — whether legislative or presidential — a discretion which the state of Washington has no power to compromise.

Nothing in either *Ray v. Blair*, 343 U.S. 214 (1952), or *McPherson v. Blacker*, 146 U.S. 1 (1892), supports any conclusion to the contrary.

Ray confirmed the freedom of the states to select whatever electors they want. That freedom included the freedom to select electors who would give a pledge to vote for the nominee of their party. No doubt, that pledge creates a moral obligation within an elector. That moral obligation should not be violated casually. But like a promise to give a gift, that moral obligation cannot be enforceable if the discretion that electors were meant to have is to be preserved.

No justice in *Ray* presumed that the states could control how an elector voted. As Justice Reed wrote for the Court, referring to the requirement of a pledge to support a party's candidate:

> even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, s 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. 343 U.S., at 230.

That "would not follow," the Court explained, because the pledge was part of the process for *selecting* electors. Nothing bars the state, in exercising its power to select electors, to choose only electors who the party is confident of, because they are willing to make a pledge to support the party nominee.

The same is true of *McPherson v. Blacker*, 146 U.S. 1 (1892). The only issue in *Blacker* was "the manner of the *appointment* of electors." *Id.* at 27 (emphasis added). Michigan had decided to appoint electors by Congressional district. That decision was

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challenged by nominees for presidential electors who believed "it was not competent for the legislature to direct this manner of appointment." *Id.* at 24. The Supreme Court rejected this argument. As the Court held, the "legislature possesses plenary authority to direct the manner of appointment." *Id.* at 25. Chief Justice Fuller's opinion is expansive and historical, but in no place does he even *suggest* that the legislature's power extends beyond the power of "appointment." *Blacker* thus establishes the legislature's discretion in appointment. It does not extend the reach of the legislative power to the exercise of that power by the "Electors." Appellants thus have no objection to the claim that "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *Id.* at 35. But that principle says nothing about any state power to control how electors so appointed must vote.

This conclusion is confirmed in a recent decision by the 10th Circuit Court of Appeals. In *Baca v. Hickenlooper,* 10th Cir. No. 16- 1482 (Dec. 16, 2016), the Court was asked to declare that "Electors" were free to vote their conscience, a state statute to the contrary notwithstanding. The Court refused the injunction, because it viewed the state statute as not creating any power in the Secretary of State over electors once they were seated. As the 10th Circuit wrote,

> Whether that statute also affords the State with authority to remove an elector after voting has begun is not a question that has been posed by plaintiffs to either the district court or this court. … And we deem such an attempt by the State unlikely in light of the text of the Twelfth Amendment. *Slip op. 12.*

In the Court's view, the "text of the Twelfth Amendment" limited any power by the Secretary of State to the appointment of an elector only; once that was complete, there was no "authority to remove an elector," the language of the statute notwithstanding.

This is precisely the distinction Appellants insist upon in this case. Appellants maintain that the state's authority over "Electors" is exhausted in the appointment. Once the appointment has been made, the state has no further power to control. Thus the state has no

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constitutional authority to punish an elector who votes in a way contrary to how the state directs. Because that vote is, necessarily, after the appointment.

An analogy to judicial power will make this point even clearer. Federal judges are appointed by Congress. In the tradition of that appointment, judges are asked by Members of the Senate to express their views. Sometimes a judge might make a pledge with respect to a certain legal issue. Most judges view such a pledge as unethical, but it is certainly within Congress's power to ask for it, and certainly within a nominee's right to comply.

But no one could believe that Congress has the power to fine a judge who votes against his or her pledge. Congress has no power over the exercise of judicial power, even if the Senate has absolute power over whether a judge gets appointed.

That is the same line here. Whatever is done in the appointment stays with the appointment. It does not provide any legitimate basis for further action by the appointing body, whether through civil penalty or through a power to remove.

B. The Civil Penalty imposed by the Secretary of State is beyond the power of the State of Washington, and violated a federally protected right of Appellants

If the power of the State of Washington over Presidential Electors is exhausted in their appointment, then the state has no power to demand an Elector reveal his or her vote, or to impose a civil penalty upon an Elector who votes contrary to how he or she might have pledged. The Secretary might scorn an elector as "faithless." The party might well choose not to select such an elector again in the future. But the state cannot punish behavior that it has no power to control.

This conclusion is especially strong when it interferes with a federally protected right. Appellants were duly appointed Presidential Electors under the Constitution of the United States. The threat of a penalty interfered with their exercise of a federally protected right. Appellants no doubt withstood the force of that threat, and voted their conscience nonetheless. But their willingness to accept the risk of a fine does not negate the impropriety of the fine.

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Washington has no power to require that ballots are public, or to interfere with Appellants federally protected right, either directly — by removing them as electors — or indirectly — by punishing them with a fine.

1. The Civil Penalty Imposed by the Secretary of State Violates the First Amendment

Voting is an expressive act, *Miller v. 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. St. Paul*, 505 U.S. 377 (1992). Thus, a fine based on the viewpoint of a Presidential Elector expressed through voting is plainly state action that triggers heightened judicial scrutiny. The State of 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 — especially when the Constitution itself secure the right to Electors to vote anonymously.

The First Circuit reached an identical conclusion in *Miller v. Hull*. In that case, a municipal governing board removed independently elected members of a public agency solely because the agency members did not vote the way the board wanted. *Id.* at 525-29. The First Circuit found this to be a constitutional violation, because "elected members of a public agency may not be removed from office for voting contrary to the wishes of the Board." *Id.* at 523. The Supreme Court has specifically approved of the outcome in *Miller* because the Court, too, found this variety of "retaliation amounting to viewpoint discrimination" to be unconstitutional. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011).[1]

The State has no interest that could overcome the impermissible viewpoint discrimination. For instance, it obviously cannot invoke the protection against corruption.

[1] *Carrigan* is not to the contrary. While the Court held in that case that the vote of a legislator was not protected speech, the Court grounded that view upon the recognition that the vote of a representative was not personal to the representative. The vote of a "voter," the Court noted, was different. "[A] voter's franchise is a personal right," the Court observed. *Id.*, at 126. A viewpoint-based restriction of the vote of a citizen would therefore certainly trigger heightened judicial scrutiny. In the same way, the vote of a Presidential Elector should be viewed not as the vote of a representative, but, like a Legislative Elector (aka, a voter), as personal to the Elector. Imposing a fine based on the viewpoint of the vote violates the First Amendment.

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There is no suggestion that Appellants acted corruptly in casting their ballot contrary to their pledge. The line of authority that justifies restrictions on political speech to avoid corruption, see, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976), therefore cannot validate this restriction on Appellants' ability to cast their vote according to their constitutional duty and good judgment.

Likewise, if the state has no authority to compel electors to vote one way or another, it could have no compelling interest beyond corruption that could justify its civil penalty. The state's penalty is ultra vires; its restriction on protected expressive activity thus violates the First Amendment.

IV. Conclusion

For the foregoing reasons, Appellants ask this Court to declare RCW 29A.56.340 unconstitutional, and reverse the fines imposed against Appellants.

DATED this 24th day of October 2017.

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CERTIFICATE OF SERVICE

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

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

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

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

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DATED this 24th day of October 2017.

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