SUPREME COURT NO. _____

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.

APPELLANTS' STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT

PRELIMINARY STATEMENT

This case raises a critical question of federal constitutional law relating to the system of electing the President of the United States that this Court should address as soon as possible. It is a question that this Court will address eventually. There is no benefit to further appellate review below. But this Court's decision needs to be rendered as quickly as possible, so that the ultimate resolution of this important federal question may be achieved before the next Presidential election.

In 2016, an unprecedented number of Presidential Electors cast their ballot contrary to the pledge to support the nominee of their political party that they had made when selected as an Elector. That number included three electors from the State of Washington, who are the Petitioners-Appellants

("Petitioners") in this case. Petitioners here, like others across the country, acted on the belief that they were constitutionally privileged to vote their conscience, their pledge notwithstanding. That belief is supported by a wide range of legal and scholarly opinion. *See Op. of Justices*, 250 Ala. 399, 401 (1948) (invalidating state law that "dictate[s] to the electors the choice which they must make for president and vice-president," because it "invade[s] the field set apart to the electors by the Constitution of the United States."); *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896) ("In a legal sense the people of this State vote for no candidate for President or Vice President, that duty being delegated to 10 citizens who are authorized to use their own judgment as to the proper eligible persons to fill those high offices.").[1]

It is, however, contrary to the law of Washington. Under the law of this state, a federal elector can be fined for voting differently from how he or she has pledged. Pursuant to that law, Petitioners in this case were fined $1,000 each by the State of Washington for their vote as a federal elector.

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[1] For recent scholarship supporting this view, *see* 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."); Robert J. Delahunty, *Is The Uniform Faithful Presidential Electors Act Unconstitutional?*, 2016 Cardozo L. Rev. De Novo 129, 153 ("[T]he Constitution protects the elector's discretion against efforts at legal compulsion.").

It is critically important that the question of whether federal electors may vote their conscience, state law notwithstanding, be decided before such a vote creates a constitutional crisis. Had the same number of electors voting contrary to their pledge in 2016 done so in 2000, that would have flipped the result from George W. Bush to Al Gore—assuming those electors were in fact permitted to vote contrary to their pledge. That question should be answered now, before it presents a constitutional crisis.

This case is the perfect vehicle for resolving that claim. Petitioners have suffered a significant fine for acting on their belief about the freedoms that they possessed when performing the federal function of voting as an elector. This Court should decide whether they were correct in their belief. In doing so, this Court can resolve whether Petitioners can properly be fined and clarify whether the State has legal means to enforce a federal presidential elector's pledge.

I. NATURE OF THE CASE AND DECISION

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

Petitioners 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. 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 Petitioners and their fellow Democratic electors were selected to serve as Presidential Electors for the State.

On December 19, 2016, the Presidential Electors met in Olympia to cast their ballots for President and Vice President. In casting their ballots, state law instructs 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 express recognition that electors perform a federal function under the Constitution, Washington law also attempts to control the electors' votes. Accordingly, Washington law also 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.

Petitioners did not vote for the nominee of their party. Instead, each cast their ballot for Colin Powell for President, and a candidate other than Tim Kaine for Vice President. The State transmitted these votes to Congress, which counted the votes for Colin Powell for President. Nonetheless, Donald Trump received a majority of electoral votes and was inaugurated as President on January 20, 2017.

B. Prior Proceedings.

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

Petitioners appealed their fines to an Administrative Law Judge. While Petitioners contended that the fine was unconstitutional, the ALJ was without power to consider the constitutional objection, and he accordingly upheld the imposition of the fine.

Petitioners then appealed the administrative determination to the Superior Court. The Superior Court held a lengthy oral argument during which it recognized the importance of the constitutional issues presented by this case, but the court ultimately issued a brief oral decision rejecting Petitioners' appeal. The opinion lacked detailed reasoning and failed to cite any authority from this Court or the U.S. Supreme Court.

The Thurston County Superior Court entered an order on December 8, 2017 that finally disposed of the case in Superior Court, and Petitioners filed a notice of appeal on December 21, 2017.

II. ISSUE PRESENTED FOR DIRECT REVIEW

The single issue presented for review is:

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.

III. GROUNDS FOR DIRECT REVIEW

Direct review is warranted because the case "involv[es] a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). If this Court and, eventually, the U.S. Supreme Court do not conclusively determine whether states may sanction Presidential Electors who vote for a candidate other than the one that received the plurality of votes in a state, then the country faces a very real prospect of uncertainty about the results of the presidential election in 2020 if the vote in the Electoral College is close. This Court should thus accept this appeal for direct review.

A. Whether States May Bind Presidential Electors To Vote For Specific Candidates Is An Important,

Open Question Of Law That Requires National Resolution Before 2020.

The federal Constitution creates the role of a presidential "Elector," charged with the duty to vote for both President and Vice President. U.S. Const. art. II § 1, amd. XII. The U.S. Supreme Court has established that the Constitution gives states "plenary" power in their method of selecting electors, *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), subject to the limits of the Constitution, *Williams v. Rhodes*, 393 US 23, 29 (1968). The Supreme Court has also determined that, pursuant to that plenary power, states may require presidential electors to pledge to vote for their party's ticket as a condition of the elector's appointment. *Ray v. Blair,* 343 U.S. 214 (1952).

Yet despite the right to condition appointment recognized in *Ray*, the Supreme Court has expressly refused to decide the issue presented for review here: whether the "promises of candidates for the electoral college" are "legally unenforceable" because they are "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he may choose in the electoral college." *Id.* at 230 (citation omitted).

Whether Presidential Electors in fact have that "assumed constitutional freedom" has taken on increased importance in the wake of 2016's unprecedented independence in the voting by Presidential Electors. Last December, at least thirteen of the 538 presidential electors either cast

votes for candidates other than the nominees of their party,[2] or attempted to do so and were removed from office.[3]

A swing by thirteen electors has a meaningful chance of determining the outcome of an election with a close margin in the Electoral College. In 2000, for instance, George W. Bush won by only five electoral votes, and Rutherford B. Hayes won by only one electoral vote in 1876.[4] It is thus imperative that the courts determine conclusively whether state efforts to control electors are permissible. Otherwise, courts will have to deal with this constitutional question in the politically-charged environment immediately following a very close election.

This Court should accept this appeal for direct review so that this important issue can be decided well before the 2020 presidential election. Accepting the case for direct review would not only be good for the State

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[2] They were the three electors in this case, another Washington elector, a Democratic elector in Hawaii, and two Republican electors in Texas. *See* "Faithless Electors," at http://www.fairvote.org/faithless_electors.

[3] They were Democratic electors in Colorado, Maine, and Minnesota. *See id.*

[4] A list of presidential elections organized by electoral vote margin is available at https://en.wikipedia.org/wiki/List_of_United_States_presidential_elections_by_Electoral_College_margin. Six of fifty-eight prior elections (10.3%) were decided by a sufficiently slim margin such that a swing of 2.4% of electoral votes (13/538) would have altered the outcome.

of Washington, it would also permit an appeal to the U.S. Supreme Court in time for that court to create a rule of national applicability before the next presidential election. By contrast, if the parties are forced to litigate this issue in the Washington Court of Appeals, it is possible that this Court may not even render a decision on the merits ahead of the 2020 election cycle, and there would be virtually no chance of review by the U.S. Supreme Court before the next election. There is thus no reason for further delay before this Court hears this appeal, which presents a single, urgent issue of statewide—indeed, countrywide—importance. *See* RAP 4.2(a)(4).

B. This Case Is An Ideal Vehicle For An Ultimate Determination Of Whether States May Bind Electors.

There is also no reason to wait for the Court of Appeals to hear an appeal because this case presents a clear vehicle for this Court to determine whether the State infringed Petitioners' constitutional rights by imposing on them an unprecedented fine for failing to vote for the nominees of their party.

First, an appeal in the Court of Appeals would serve little purpose except for delay. Because this case has proceeded on a stipulated administrative record and was first heard in a proceeding before an ALJ, the Superior Court heard this case in its appellate capacity, so it has already

gone through one level of appeal. Indeed, the briefing below focused solely on the single issue of law presented here, and the argument there resembled an appellate oral argument much more than a traditional trial proceeding. It is thus not necessary to perform that exercise again, since the arguments will be similar and, regardless of what side prevails in the Court of Appeals, an appeal to this Court would be essentially certain.

Second, the clear record renders the constitutional issue here unavoidable. The sole purpose of the statutory provision at issue is to ensure that presidential electors vote for the ticket nominated by the elector's political party. *See* RCW 29A.56.340. But that is an unconstitutional goal. After all, as both the U.S. Supreme Court and the State itself recognizes, Plaintiffs exercise a "*federal* function" in casting electoral votes for President. *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (emphasis added); RCW 29A.56.340 (requiring electors to "perform the duties required of them by the Constitution and laws of the United States"). The law is clear that states may not burden the performance of a federal function through assessment of a monetary penalty, like a fine or tax, because they may not interfere with that federal duty. *See McCulloch v. Maryland*, 17 U.S. 316, 433 (1819) (rejecting a state's ability to levy a tax on the federal Bank of the United States because a federal instrumentality cannot be interfered with by a state); *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362

(1870) (national banks must be free from any "State law [that] incapacitates the banks from discharging their duties to the government"); *United States v. Pittsburg*, 661 F.2d 783, 786 (9th Cir. 1981) (invalidating city ordinance that required federal mail carriers to seek residents' permission before crossing their lawns because the ordinance "interfere[d] with postal carriers' federal duty"). Thus, Washington's imposition of a fine that burdens electors' performance of their federal duty is unconstitutional. That would be true whether Washington removed an elector or fined the elector $1 million, $1, or any amount in between.

Indeed, the fact that Petitioners were subject to a monetary sanction purely on the basis of their vote puts the constitutional issue front-and-center. The State has not, and cannot, claim that it imposed the fine for any reason other than Petitioners' failure to vote for a particular candidate. But a Presidential Elector, like anyone else, "cannot be punished merely because he or she chose to exercise his or her constitutional rights." *United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989); *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (stating that a government's imposition of a fine for observation of Saturday Sabbath would be an unconstitutional penalty on the exercise of constitutional right); *In re Pers. Restraint of Addleman*, 139 Wn. 2d 751, 754 (2000) (state prisoner may not be "punish[ed] [for the]

exercise of constitutional rights"). Yet that is exactly what the State has done here.

Finally, by punishing Petitioners for casting their ballots according to their best judgment, the State independently engaged in viewpoint discrimination and violated Petitioners' First Amendment rights. Presidential Electors, like other independent constitutional decision makers, are protected from "retaliation amounting to viewpoint discrimination" on the basis of their votes. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011); *see also Miller v. Hull*, 878 F.2d 523, 532 (1st Cir. 1989) (under the First Amendment, independently elected officials may not be punished "for voting contrary to the wishes" of another government body). By punishing Petitioners for voting for a particular candidate, the State has deprived the Presidential Electors of their First Amendment rights to vote according to their best judgment.

* * *

This country has held 58 presidential elections. Several have been close enough to put the country on the brink of a constitutional crisis. The 1800 election, in which Jefferson and Burr received the same number of electoral votes, was resolved by the House but led to the ratification of the Twelfth Amendment due to the controversy that ensued. The 1876 election had competing slates of electors from multiple states, and, after much

uncertainty, Congress ultimately determined that Rutherford B. Hayes prevailed over his opponent Samuel Tilden by a single electoral vote. More recently, the 2000 election was finally determined only when the U.S. Supreme Court halted a recount in Florida, which led to George W. Bush's prevailing by five electoral votes despite losing the national popular vote.

Thankfully, the Nation has passed through these and other controversies—but not without some difficulty. Yet the unprecedented number of Presidential Electors asserting a constitutional right to vote for the candidate of their choice in 2016, combined with the unprecedented actions of Washington and other states to control those electors, has highlighted an uncertainty in the system that could lead to another major controversy. If in a close presidential election, multiple electors were to exercise the freedom Petitioners insist they have, but certain States tried to constrain that freedom, there would be serious uncertainty about whether such electoral votes should be sent to Congress or counted in determining who won the vote for President and Vice-President.

It is possible to resolve the uncertainty in the calm before the next electoral storm. This Court should therefore accept this case for direct review and decide this important issue in a timely manner.

CONCLUSION

This Court should accept this case for direct review pursuant to RAP 4.2(a)(4).

Dated: This 29th day of December 2017 at Seattle, Washington

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