NO. 95347-3

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of

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

Petitioners.

SECRETARY OF STATE'S COMBINED RESPONSE TO AMICI INDEPENDENCE INSTITUTE AND MICHAEL L. ROSIN

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I. INTRODUCTION

For nearly two hundred and thirty years, the United States Constitution has granted states the exclusive and plenary power to appoint and regulate their own presidential electors. Each state, including Washington, has in turn authorized their citizens to decide via popular and democratic election which presidential and vice-presidential candidates should receive the state's electoral votes. Amici Independence Institute and Michael L. Rosin attempt to advance the Petitioners' theory of independent electors in order to take away the people's power to decide who should be president and undermine the states' electoral process. This Court should reject Amici's arguments as not supported by the text of the Constitution, federal authority, or the longstanding practice of the nation.

II. ARGUMENT

Amici reiterate arguments already made by Petitioners and refuted by the Secretary of State: (1) the State's plenary constitutional power to appoint presidential electors does not encompass the power to control their electoral votes; and (2) the Framers' intent for electors to exercise independent judgment should outweigh case law approving the states' longstanding, contemporaneous practice. *See* Secretary of State Br. at 8-20. Such repetition is not helpful to the Court. RAP 10.3(3). Nevertheless, a few of Amici's points warrant correction.

Both Independence Institute and Rosin rely on select words from the Twelfth Amendment and a variety of historical sources to support their theory that the Constitution requires presidential electors to exercise their "best judgment" outside the influence and control of the states. Indep. Inst. Br. at 3; *see also* Rosin Br. at 3 (asserting electors' "independent judgment"). Independence Institute even goes so far as to argue that because the Twelfth Amendment requires "electors" to "vote by ballot" this must mean by "secret ballot," thus ensuring that the elector's "choice is free." Indep. Inst. Br. at 3-5. Amici's postulation, however, ignores other text in the Twelfth Amendment and Supreme Court authority rejecting similar arguments about elector "choice."

As an initial matter, the plain text of the Twelfth Amendment does not support the notion that the electoral votes are to be cast in secret as the provision requires that the electors (1) name at least one candidate who is not an inhabitant of the same state as themselves; (2) name in "distinct ballots" the persons voted for President and Vice President; and (3) make as a group "distinct lists" of all the persons voted for and the number of votes for each, and then transmit those lists to Congress. U.S. Const. amend. XII. It would be impossible to ensure compliance with these constitutional

requirements if the electors' ballots were to remain secret.[1] More importantly, even if the Twelfth Amendment could be read to require some form of ballot secrecy, that notion does not ipso facto expand the text to also require electors to have free choice as to who they should cast their ballots for President. In fact, the Supreme Court explicitly rejected the argument that the Twelfth Amendment "demands absolute freedom for the elector to vote his own choice," finding the constitutional provision silent on that issue. *Ray v. Blair*, 343 U.S. 214, 228, 72 S. Ct. 654, 96 L. Ed. 894 (1954).

Both Amici also point to a number of historical sources suggesting that some constitutional Framers intended for electors to exercise independent judgment. But for every argument for elector discretion there is an equal counterargument in the historical debate that the people of the states should have a say in who should be elected President. *See, e.g.*, *The Federalist* No. 68 (Alexander Hamilton) ("They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of

[1] Congress has also enacted laws requiring further publicity of the electors' votes. *See* 3 U.S.C. § 9 ("The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State."); 3 U.S.C. § 11 (requiring copies of the certificates to be distributed to various federal and states officials and requiring the certificates to be "open to public inspection").

America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.") And, as the Supreme Court has noted, the Framers ultimately "reconciled" all views by leaving the power over the electors to the states. *McPherson v. Blacker*, 146 U.S. 1, 26-29, 13 S. Ct. 3, 36 L. Ed. 869 (1892) (discussing history of article II and the Twelfth Amendment).

Even if that was not the ultimate view of the Framers, the nation's longstanding history and practice confirm that electors have no constitutional right to independently cast their ballots outside the control of the states. *See Ray*, 343 U.S. at 228-30 (looking to the "longstanding practice" of states allowing "a vote for the presidential candidate" to be counted as a vote for the Electoral College to affirm constitutionality of elector pledge requirement); *McPherson*, 146 U.S. at 27 (recognizing the "great[ ] weight" of "contemporaneous history and practical construction" of article II and the Twelfth Amendment). From the very first presidential election to now, every state has exercised its plenary authority under the Constitution by linking in some form the appointment of presidential electors to the will of the people. *Ray*, 343 U.S. at 228 n.15 (quoting 11 Annals of Congress 1289-90, 7th Cong., 1st Sess. (1802) and S. Rep. No. 22, 19th Cong., 1st Sess., p. 4 (1826)).

Washington too has exercised its constitutional power over presidential electors by conditioning their appointment on a pledge to cast their electoral ballots in accordance with the will of the State's electorate and enforcing that condition of appointment through a civil penalty. *See* Secretary of State Br. at 8-11. Yet, unlike some states, Washington has not chosen to exercise its authority by mandating that its presidential electors cast their ballots in a particular way, removing them from office for violating their pledge, or invalidating their ballot. *See* Secretary of State Br. at 11, n.3. But, contrary to Amici's view, even if Washington did exercise its authority to bind its presidential electors' ballots, nothing in the United States Constitution would prohibit the State from doing so.

III. CONCLUSION

Amici seek to upend Washington's electoral process and take away the power of the people to decide whom should be elected President and Vice President. This Court should reject Amici's arguments and affirm the State's authority under the United States Constitution to control the manner of its Electoral College.

RESPECTFULLY SUBMITTED this 8th day of January 2019.

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CERTIFICATE OF SERVICE

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

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