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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In the Matter of

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

Petitioners.

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**BRIEF OF RESPONDENT  
KIM WYMAN, SECRETARY OF STATE**

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## I. INTRODUCTION

Washington citizens voted in the 2016 general election with the expectation that their votes for United States President and Vice President would be honored by the twelve men and women appointed to act on their behalf in the State's Electoral College. Petitioners Levi Guerra, Esther V. John, and Peter B. Chiafalo dishonored that expectation when they cast their presidential and vice-presidential electoral ballots for persons not nominated by the Democratic Party, the party whose candidates won the popular vote in Washington.

As a condition of their appointment as presidential electors, each of the Petitioners pledged to cast their electoral ballots for their political party's nominees. Under RCW 29A.56.340, Petitioners are each subject to a civil penalty of \$1,000 for casting their electoral ballots contrary to their pledge. Petitioners do not contest that the State allowed them to cast their electoral ballots and did not invalidate their ballots, as some states did. Instead, Petitioners assert that the State cannot, under the First and Twelfth Amendments to the United States Constitution, enforce the terms of their appointment through RCW 29A.56.340's civil penalty. Their claims fail.

Article II, section 1 of the United States Constitution places plenary control over the appointment and regulation of presidential electors with the states. RCW 29A.56.340 falls squarely within Washington's constitutional power. It provides a means to hold electors to the pledge required for their electoral appointment and facilitates adherence to the will of Washington's voters. But nothing in RCW 29A.56.340 mandates that electors cast their

ballots in a particular way. Even if it did, nothing in the Constitution prevents the State from placing conditions on presidential electors and then holding them to those conditions. And no court—anywhere—has adopted Petitioners’ view that presidential electors have a First Amendment right to cast their ballots free of influence by the State. Rather, courts have consistently recognized that, when presidential electors cast their ballots, they do so on authority of the state that appointed them.

In sum, RCW 29A.56.340 is firmly within the State’s constitutional power. This Court should affirm.

## **II. STATEMENT OF THE ISSUES**

1. Article II, section 1 of the United States Constitution provides states with plenary power over the appointment of presidential electors. Does RCW 29A.56.340 violate the Constitution when it provides a means for the State to hold electors to their pledge, which the United States Supreme Court has already held is a valid condition of appointment?

2. Does RCW 29A.56.340 violate the First or Twelfth Amendment to the United States Constitution when the statute does not mandate that the State’s presidential electors cast their ballots for a particular candidate?

## **III. STATEMENT OF THE CASE**

### **A. Petitioners Are Selected as Electors After Pledging to Vote for the Democratic Party’s Presidential Nominees**

Under the authority granted to the states in article II, section 1 of the United States Constitution, the Legislature adopted statutes governing

Washington's presidential electors. RCW 29A.56.300-360. In a presidential election year, each major and minor political party that nominates candidates for President and Vice President "shall [also] nominate presidential electors for this state." RCW 29A.56.320. The party or convention must submit to the Secretary of State a certificate listing the names and addresses of the party's presidential electors. *Id.* For the 2016 election, the Democratic Party submitted to Secretary of State Kim Wyman the names and contact information of their nominated electors, which included all three Petitioners. AR 10-11.<sup>1</sup>

RCW 29A.56.320 also requires that "[e]ach presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by [their] party." "Any 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. All three Petitioners signed and submitted pledges stating that they would "vote for the candidates nominated by the Democratic Party for the President of the United States and Vice President of the United States." AR 14 (John); AR 334 (Guerra); AR 653 (Chiafalo).

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<sup>1</sup> The administrative record is separately indexed without a corresponding "CP" number. *See* Supplemental Clerk's Papers Index, dated May 09, 2018. All references to the administrative record will be cited as "AR" followed by the page number. The administrative record contains the individual administrative files for each of the Petitioners. Many of the documents are identical due to the nature of this case and the consolidation of the administrative hearing in the proceedings below. For ease of reference, this brief cites the John record when referring to a document that is identical for all Petitioners. When necessary, the brief identifies and cites documents that are specific to the individual Petitioners.

The political parties' slates of presidential electors do not appear on the general election ballot. RCW 29A.56.320. Instead, the votes that Washington voters cast in the general election for candidates for President and Vice President of each political party "shall be counted for the candidates for presidential electors of that political party." RCW 29A.56.320. Once the general election votes are canvassed and certified, the majority of Washington's popular vote for President and Vice President determines the party whose electors will serve in the Electoral College from Washington. RCW 29A.56.320, .330. The Secretary of State signs and submits a list of the winning party's electors to the Governor for signature. RCW 29A.56.330; *see also* AR 27-30.

Hillary Clinton and Tim Kaine, candidates for the Democratic Party, won the Washington popular vote for President and Vice President by more than 500,000 votes. *See* AR 16, 27-30. The Democratic Party's slate of electors thus served in the Electoral College for Washington. *See* AR 31-32. Petitioners were each included in the Democratic Party's slate of electors for the State of Washington. AR 31-32.

**B. Petitioners Violated Their Pledge at Washington's Meeting of the Electoral College**

Prior to the meeting of the presidential electors, Petitioners Chiafalo and Guerra asked the federal district court to issue an injunction, arguing that RCW 29A.56.340 violated the United States Constitution. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1144 (W.D. Wash. 2016). After clarifying that Washington does not preclude presidential electors from voting as they

choose, the district court concluded that Chiafalo and Guerra were unlikely to prevail on their constitutional claims. *Chiafalo*, 224 F. Supp. 3d at 1144. The district court found that the U.S. Supreme Court has implied that article II and the Twelfth Amendment do not give electors absolute freedom to vote for the candidates of their choice. *Id.* Because an Electoral College vote is akin to an official duty and the electors chose to seek nomination subject to Washington’s rules and limitations, the district court found that their First Amendment rights were likely not implicated. *Id.* at 1145. Finally, the district court concluded that, even if there were such a First Amendment right, a financial penalty imposes only a minimal burden and there were several compelling state interests to support the penalty. *Id.* The Ninth Circuit denied Chiafalo and Guerra’s emergency motion for a temporary restraining order and injunction pending appeal, finding that they had not “shown a likelihood of success or serious questions going to the merits.” Order, *Chiafalo v. Inslee*, No. 16-36034 (9th Cir. Dec. 16, 2016) (Docket No. 16).

Washington’s Electoral College convened on December 19, 2016, at twelve o’clock noon as required by 3 U.S.C. § 7 and RCW 29A.56.340. AR 31. Federal law provides that “[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.” 3 U.S.C. § 4. State law provides that “[i]f there is any vacancy in the office of an elector occasioned by death, refusal to act, neglect to attend, or otherwise, the electors present shall immediately proceed to fill [the vacancy] by voice vote, and plurality

of votes.” RCW 29A.56.340. Thus, the presidential electors had the option of refusing to participate, in which case, an alternate would have filled the vacancy. *Id.*; *see also* AR 27 (listing Democratic alternative nominees). Once any vacancies are filled, the electors shall then “proceed to perform the duties required of them by the Constitution and laws of the United States.” RCW 29A.56.340. Under the Twelfth Amendment, the electors “shall . . . vote by ballot for President and Vice-President . . . in distinct ballots.” “[T]hey shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States[.]” U.S. Const. amend. XII; *see also* 3 U.S.C. §§ 10, 11.

Petitioners were each present as one of the duly elected electors for the State of Washington. AR 31. Petitioner Guerra signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin L. Powell for President and a ballot casting an electoral vote for Maria Cantwell for Vice President. AR 353-54. Petitioner John signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin Powell for President and a ballot casting an electoral vote for Susan Collins for Vice President. AR 33-34. Petitioner Chiafalo signed and submitted on behalf of Washington State a ballot casting an electoral vote for Colin Powell for President and a ballot casting an electoral vote for Elizabeth Warren for Vice President. AR 672-73. None of the individuals for whom Petitioners cast an electoral vote were nominated by the

Democratic Party for President or Vice President: Hillary Clinton and Tim Kaine, respectively. *See* AR 16. Further, none of these individuals was on the general election ballot and none was a winner of Washington's popular vote. AR16.

**C. The Secretary of State Enforced Washington's Pledge Requirement by Issuing a Notice of Violation and Civil Penalty**

On December 29, 2016, Secretary of State Wyman, in her capacity as Chief Elections Officer for the State of Washington, issued Notices of Violation to each of the Petitioners apprising them of their violation of RCW 29A.56.340, issuing a civil penalty of \$1,000 under the statute, and informing them of their administrative appeal rights. AR 5-34 (John); AR 325-54 (Guerra); AR 644-73 (Chiafalo).<sup>2</sup> Each of the Petitioners appealed and requested an adjudicative proceeding. AR 4 (John); AR 324 (Guerra); AR 642-43 (Chiafalo). The Office of Administrative Hearings later consolidated the matters. *See* AR 47. At the administrative hearing, Petitioners stipulated to the facts and exhibits set forth in the Notices of Violation and stipulated that the Secretary of State followed all applicable procedures in issuing the Notices of Violation. AR 376-77. The administrative law judge issued an initial order affirming the Notices of Violations for each of the Petitioners based solely on the statute's plain

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<sup>2</sup> A fourth elector, Robert Satiacum, also cast electoral ballots for persons not nominated by the Democratic Party for President and Vice President. *See* AR 31. The Secretary of State issued a Notice of Violation to Mr. Satiacum for which he sought an adjudicative proceeding before the Office of Administrative Hearings. He did not seek further judicial review of the administrative order affirming his Notice of Violation.

language. AR 288-95. The parties stipulated to making the Initial Order the Final Order. AR 296-97.

Petitioners sought judicial review before the superior court, which also affirmed the Notices of Violations and found that Petitioners had not met their burden of showing that RCW 29A.56.340 is unconstitutional. Petitioners timely appealed. CP 118-23.

#### IV. ARGUMENT

##### A. **The Constitution Provides Washington with Plenary Power to Appoint the State’s Presidential Electors and Facilitate the State’s Objective of Carrying Out the People’s Will**

Article II, section 1, clause 2 of the United States Constitution provides states with plenary power over the appointment of electors and the mode by which electors carry out their appointment. U.S. Const. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]”); *Ray v. Blair*, 343 U.S. 214, 227, 72 S. Ct. 654, 96 L. Ed. 894 (1952) (subject to possible other constitutional limitations, states have a right to appoint electors in such manner as they choose); *McPherson v. Blacker*, 146 U.S. 1, 10, 13 S. Ct. 3, 36 L. Ed. 869 (1892) (“from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors”); *cf. William v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (states’ “broad powers” to regulate voting may include “laws relating to the qualification and functions of electors”). The Twelfth Amendment in turn

sets forth the specific process for how presidential electors are to cast ballots in their respective states:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate[.]

U.S. Const. amend. XII. It also sets forth how the ballots are to be counted by Congress and what happens if no person has a majority. U.S. Const. amend. XII.

In *McPherson*, the Court affirmed Michigan's power to elect presidential electors by congressional district rather than popular vote under article II, section 1 and the Twelfth Amendment. *McPherson*, 146 U.S. at 42. Looking to these provisions and the history of the Electoral College, the Court held that "the appointment and mode of appointment of electors belong exclusively to the state under the constitution of the United States." *Id.* at 35. The Court also noted that, while the Constitution limits Congress's powers to determining the time for choosing electors and the date for giving their votes, the states' "power and jurisdiction" over electors was otherwise "exclusive." *Id.*

Likewise, in *Ray*, the Court held that nothing in article II or the Twelfth Amendment restrains the states' plenary authority over the appointment of electors, including the power to impose requirements

intended to secure the outcome of their votes. *Ray*, 343 U.S. at 224-27. In that case, the Court considered whether Alabama could authorize political parties to choose 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. Saying yes, the Court deemed it "an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." *Id.* at 227. As in *McPherson*, the Court looked to the language of article II and the Twelfth Amendment, as well as history, and saw "no federal constitutional objection" to the states exercising their appointment powers in such a manner. *Id.* at 231.

Here, RCW 29A.56.340 falls squarely within Washington's constitutional power under article II and does not conflict with the Twelfth Amendment. It sets the time and location at which the state's electors for President and Vice President convene on the day fixed by Congress. RCW 29A.56.340. It sets the method by which vacancies in the office of elector are fulfilled. *Id.* It orders electors to "proceed to perform the duties required of them by the Constitution and laws of the United States." *Id.* It also, while not mandating that the electors vote in a particular manner, imposes a penalty against an elector who casts his or her ballot in a manner inconsistent with the condition of their appointment—their party pledge. *Id.*; see also RCW 29A.56.320 ("Each presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by that party.").

Each of these provisions sets the mode and method by which electors act to fulfill the State's obligation in the Electoral College. *See Ray*, 343 U.S. at 224-25, 228. Moreover, the latter provision fulfills the State's legitimate legislative objective of facilitating the effective operation of democratic government. *See McPherson*, 146 U.S. at 25-26. It provides a means to hold electors to their pledge, a requirement of their electoral appointment, that is certainly less drastic than ballot invalidation or removal as other states require,<sup>3</sup> but which nevertheless makes it more likely an elector will vote consistent with the will of the State's electorate. *See Ray*, 343 U.S. at 226 n.14, 228 n.15.

Nothing in the plain language of article II or the Twelfth Amendment prevents the State from placing conditions on presidential electors as part of the State's plenary appointment power and then enforcing those conditions. *See Ray*, 343 U.S. at 227. Instead, the requirement of a pledge and the corresponding enforcement provision are a valid means of the "state-controlled elective process." *Id.* Because RCW 29A.56.340 is soundly within the State's authority under the Constitution, it should be upheld.

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<sup>3</sup> Twenty-five states mandate a particular electoral vote or require automatic resignation or forfeiture of the elector's office when an elector votes contrary to his or her pledge. *See, e.g.*, Mich. Comp. Laws § 168.47; Minn. Stat. § 208.46; N.C. Gen. Stat. § 163-212; Okla. Stat. § 26-10-108; *see also* <https://nass.org/node/131> (summary of state laws regarding presidential electors) (last visited July 6, 2018).

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

To skirt the State's plenary powers under article II, Petitioners cast their arguments around a fundamentally incorrect premise: that Washington law requires or prevents presidential electors from casting electoral votes in a particular way. *E.g.*, Pet'rs' Br. at 9, 14, 21-28. They are simply wrong. While it is true that state law requires electors to submit a pledge that they will vote for the candidates nominated by their party, RCW 29A.56.320, and that the law provides a mechanism to penalize electors who fail to adhere to pledge, RCW 29A.56.340, nothing in state law prevents electors from actually casting a ballot for the candidate of their choosing. In fact, unlike the laws of many others states, nothing in RCW 29A.56.340 or any other statute directs the State to reject an elector's vote if it is contrary to the elector's pledge. Indeed, the State submitted Petitioners' electoral ballots for individuals other than Hillary Clinton and Tim Kaine to Congress. But even if, for the sake of argument, RCW 29A.56.340 did require Petitioners to cast their electoral ballots in a specific manner, the requirement would not violate the Constitution. Nor would it violate the Constitution for the State to enforce such a requirement through a penalty or otherwise.

**1. Electors act on behalf of the State when they cast electoral ballots**

First, Petitioners are incorrect when they contend that states cannot regulate or control presidential electors' votes because electors serve a "federal function." *See* Pet'rs' Br. at 9-14. The State does not dispute that

the Supreme Court has recognized that electors serve a federal function. *See, e.g., Ray*, 343 U.S. at 224-25; *Burroughs v. United States*, 290 U.S. 534, 545, 54 S. Ct. 287, 78 L. Ed. 484 (1934); *Fitzgerald v. Green*, 134 U.S. 377, 379, 10 S. Ct. 586, 33 L. Ed. 951 (1890). To make their argument, however, Petitioners ignore a fundamental, countervailing principle of these cases: When electors cast their electoral ballots, they do so on behalf of the State and its people. *Fitzgerald*, 134 U.S. at 379 (Electors’ “sole function” is “to cast, certify, and transmit *the vote of the state* for president and vice-president of the nation.” (Emphasis added.)); *see also Ray*, 343 U.S. at 224-25 (“[Electors] act by authority of the state that in turn receives its authority from the federal constitution.”).

In *Fitzgerald*, a defendant convicted of unlawfully voting in a state election to appoint presidential electors challenged the state’s authority to regulate such elections. *Fitzgerald*, 134 U.S. at 378-79. The Supreme Court held that states “clearly” had such authority under article II, *id.* at 380, notwithstanding that presidential electors serve a federal function:

*The only rights and duties, expressly vested by the constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize congress to determine the time of choosing the electors, and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the senate in the presence of the two houses of congress, and the votes shall then be counted. Const. art. 2, § 1; Amend. art. 12. The sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice-president of the nation. Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when*

*acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress.*  
Const. art. 1, §§ 2, 3.

*Id.* at 379 (emphases added). The Court then affirmed the states' authority to control the manner of the electors' appointment and to regulate their election "unaffected by anything in the constitution and laws of the United States." *Id.* at 380.

The Court in *Burroughs* also recognized the states' broad authority concerning electors. *See Burroughs*, 290 U.S. at 544-45. The defendants there argued that Congress could not regulate so-called "corrupt practices" in presidential and vice presidential elections because that function was solely for the states. *Id.* at 544. The Supreme Court disagreed, reaching the unremarkable conclusion that Congress had concurrent authority to pass laws prohibiting such practices with respect to the executive branch. *Id.* at 544-45. But in reaching its conclusion, the Court recognized the limits of federal authority over presidential electors:

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. *Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made.* It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. *It in no sense invades any exclusive state power.*

*Burroughs*, 290 U.S. at 544-45 (emphases added).

Likewise, in *Ray*, the Court noted, "presidential electors exercise a federal function in balloting for President and Vice President but they are

not federal officers or agents any more than the state elector who votes for congressmen. *They act by authority of the state that in turn receives its authority from the federal constitution.*” *Ray*, 343 U.S. at 224-25 (emphasis added).

These cases confirm that states have plenary authority over the qualifications and regulation of electors. Petitioners’ attempt, therefore, to compare the electors’ role to that of others performing federal functions is simply inapt. *See* Pet’rs’ Br. at 11-14. When state legislators vote to ratify a proposed constitutional amendment, they are exercising an elective franchise personal to them under article V of the Constitution. *E.g.*, *Leser v. Garnett*, 258 U.S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505 (1922); *Hawke v. Smith*, 253 U.S. 221, 228-29, 40 S. Ct. 495, 64 L. Ed 871 (1920). Similarly, when private contractors perform a federal function, they do so on authority of the federal government, which the Supremacy Clause exempts from state regulation. *E.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988). In contrast, when presidential electors cast ballots in the Electoral College, they are not exercising their own individual right to vote or acting under their own independent authority. They are acting on authority of the State.

For this same reason, Petitioners’ assertion that states cannot add qualifications or conditions to affect the electors’ appointment is also wrong. Pet’rs’ Br. at 21-25. 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 22-23. 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 to those circumstances here, arguing that states similarly have no power to supplement electors’ duties or add qualifications to their appointment. Petr’s’ Br. at 23-24. But while the states have never possessed the ability to set qualifications for members of Congress, the Constitution explicitly grants states that power with respect to electors. U.S. Const. art. II; *McPherson*, 146 U.S. at 27 (state legislatures have “exclusive” power to appoint electors and “define the method of effecting the object” of doing so).

**2. Cases and history confirm that the states have plenary control**

Second, Petitioners are wrong to contend that they have a constitutional right to cast their electoral votes in secret and in accordance with their own political beliefs. Pet’rs’ Br. at 16-17. As an initial matter, nothing in the plain text of article II or the Twelfth Amendment actually addresses these issues. U.S. Const. art. II; U.S. Const. amend. XII; *cf.* *Ray*, 343 U.S. at 224 (“The applicable constitutional provisions on their face furnish no definite answer to the query[.]”). It may be true that some of the framers of the Constitution intended for presidential electors to be independent and free to vote for the candidate of their choice. *E.g.*, *The Federalist* No. 68 (Alexander Hamilton). Nevertheless, by the time of

Twelfth Amendment's adoption just a few years later, and ever since, electors have served to give effect to the will of the states and their people as to who should be President and Vice President. *E.g.*, 11 Annals of Cong. 1289-90 (1802) (statement of Rep. Mitchill) ("Wise and virtuous as were the members of the Convention, experience has shown that the mode [of the Electoral College] therein adopted cannot be carried into operation; for the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President. Therefore, practically, the very thing is adopted, intended by this [Twelfth] amendment.")<sup>4</sup>

More importantly, the Supreme Court has already implicitly dismissed Petitioners' arguments as inconsistent with the operation of the

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<sup>4</sup> See also Joseph Storey, *Commentaries on the Constitution of the United States* 321-22, § 1457 (1833):

It has been observed with much point, that in no respect have the enlarged and liberal views of the framers of the constitution, and the expectations of the public, when it was adopted, been so completely frustrated, as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges. It is notorious, that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them. Nay, upon some occasions the electors publicly pledge themselves to vote for a particular person; and thus, in effect, the whole foundation of the system, so elaborately constructed, is subverted. The candidates for the presidency are selected and announced in each state long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the state legislatures, to secure votes for the favourite candidate, and to defeat his opponents. Nay, the state legislatures often become the nominating body, acting in their official capacities, and recommending by solemn resolves their own candidate to the other states. So, that nothing is left to the electors after their choice, but to register votes, which are already pledged; and an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.

(Footnotes omitted).

Electoral College, which places the power to govern electors in the individual states. When affirming the states' plenary authority over electors, the Court in *McPherson* summarized the history of the constitutional provisions, noting that the founders ultimately reconciled all countervailing views by leaving the power to the states. *McPherson*, 146 U.S. at 27-29. And, in rejecting the idea that Michigan's method of election was contrary to the original object and purpose of the electoral system, the Court noted:

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

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

Similarly, the Court in *Ray* affirmed that neither article II, section 1 nor the Twelfth Amendment forbids a state from excluding electors because they would not pledge to support a party's candidates for president and vice president. *Ray*, 343 U.S. at 227-28. The Court considered and rejected "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:

It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand,

pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. *History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice.* Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead in one form or another they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party’s nominees for the electoral college. *This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weights [sic] heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.*

*Ray*, 343 U.S. at 228-30 (emphases added) (footnotes omitted).

While the Court in *Ray* ultimately left open the question of whether pledges are enforceable, *id.* at 230, nothing in the opinion suggests that they would not be. More importantly, nothing in the opinion suggests that electors have a constitutional right to operate independently from the will of the state’s voters. *See id.* at 224-25. In fact, had the Court understood electors to have the constitutional right that Petitioners assert here, it would not have made sense for the Court to uphold a requirement that electors sign a pledge in the first instance.

### **3. The weight of authority favors the states’ longstanding practice of control**

Finally, the State is not aware of any court decision—federal or state—that since *Ray* has concluded that electors have the constitutional rights asserted here. *Cf. Chiafalo*, 224 F. Supp. 3d at 1144 (finding Chiafalo and Guerra’s article II and Twelfth Amendment arguments to warrant

“minimal discussion” given the Court’s decision in *Ray*). Petitioners rely on two prior state court opinions, but neither carry persuasive weight. In *Breidenthal*, the Supreme Court of Kansas was commenting without analysis on a hypothetical situation not before it. *Breidenthal v. Edwards*, 57 Kan. 332, 46 P. 469 (1896). And the Alabama Supreme Court’s advisory opinion in *Opinion of the Justices*, 250 Ala. 399, 34 So. 2d 598 (1948), came out just a few years before the Supreme Court reversed that court’s rejection of the state’s pledge requirement under the Twelfth Amendment. *See Ray*, 343 U.S. at 222-23.<sup>5</sup>

Petitioners’ reliance on *Baca v. Hickenlooper*, No. 16-1482, slip op. (10th Cir. Dec. 16, 2016), is similarly in error. Petitioners describe *Baca* as finding that states have no authority to interfere with electors once voting begins. Pet’rs’ Br. at 19-20. But that description mischaracterizes the Court’s discussion, which was based on specific provisions found in Colorado state law that had not yet been acted upon and which are unlike any found in Washington. *See Baca*, slip op. at 12; *Chiafalo*, 224 F. Supp. 3d at 1144 (“Washington has no law precluding Plaintiffs from voting as they choose—and having those votes counted—in the Electoral College.”). Petitioners also ignore that the Circuit Court in *Baca* ultimately found that the electors failed to “point to a single word [in article II and the Twelfth

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<sup>5</sup> The Supreme Court of Ohio had also reached the same conclusion as the Alabama court. *State ex. rel Beck v. Hummel*, 150 Ohio St. 127, 146, 80 N.E.2d 899 (1948) (finding the pledge to be a mere “moral obligation”). Again, this case was decided before *Ray*. *See State ex. rel. Nebraska Republican State Central Committee v. Wait, Secretary of State*, 92 Neb. 313, 138 N.W. 159, 165 (1912), and *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (N.Y. App. Div. 1933), for contemporaneous opposite views by state courts predating *Ray*.

Amendment] that support their position that the Constitution requires that electors be allowed the opportunity to exercise their discretion in choosing who to cast their votes for.” *Baca*, slip op. at 10. The few cases that the Petitioners cite fail to support their arguments.

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

Petitioners’ references and arguments to being “punished” for exercising their constitutional “right to vote” are significantly misplaced. *See* Pet’rs’ Br. at 28-33. No court has found that presidential electors’ electoral ballot implicates any First Amendment right. Instead, courts have characterized the electors’ role as “ministerial,” emphasizing that the electors are carrying out a governmental duty. *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (N.Y. App. Div. 1933); *see also, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (performance of a governmental duty does not implicate First Amendment rights). In serving as presidential electors, Petitioners are not exercising their own individual right to vote. *See McPherson*, 146 U.S. at 38-39 (“The first section of the fourteenth amendment does not refer to the exercise of the elective franchise . . . . The right to vote intended to be protected [by the second section] refers to the right to vote as established by the laws and constitution of the state.”). Petitioners exercised that fundamental right when they cast a ballot in the general election on November 8, 2016. Instead, when Petitioners convened as part of Washington’s Electoral College, they were acting on behalf of the State of Washington and its people. Like the legislators referenced in *Nevada Commission on Ethics v.*

*Carrigan*, 564 U.S. 117, 126, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011), the electors are not casting ballots personal to them, but as representatives of the people of the State. *Fitzgerald*, 134 U.S. at 379; *Ray*, 343 U.S. at 224-25.

The United States Supreme Court has long recognized a state's expansive power to prescribe the election process within broad constitutional bounds. *E.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005); *Bullock v. Carter*, 405 U.S. 134, 141, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972). Accordingly, "States have significant flexibility in implementing their own voting systems." *John Doe No. 1 v. Reed*, 561 U.S. 186, 187, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). "To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation." *Id.* at 195-96. This is because the Court recognizes that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)).

Accordingly, the Court rejected resolving challenges to state election laws by "any 'litmus-paper test.'" *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730). Instead, the Court chose to apply a

flexible approach that weighs the “character and magnitude of the asserted injury” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789. “In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* Accordingly, the appropriate level of scrutiny depends upon the severity of the burden, which the party challenging the law bears the burden of specifically proving. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). Only if a state election law imposes “‘severe’ restrictions” must it also be “‘narrowly drawn to advance a state interest of compelling importance’” to pass constitutional muster. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)). If, on the other hand, the law imposes “only ‘reasonable, nondiscriminatory restrictions,’” then the requirements will survive review so long as they further a state’s “‘important regulatory interests.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

Petitioners assert that this analysis is inapt because the State is purportedly punishing Petitioners for exercising their “constitutional rights.” Pet’rs’ Br. at 31. In addition to misunderstanding the nature of the Petitioners’ electoral ballot as personal rather than ministerial, their argument significantly misconstrues RCW 29A.56.340, which does not tie a penalty to any protected speech but to the electors’ failure to adhere to the condition of their appointment. Petitioners were not forced to serve as

electors—they willingly sought appointment to the position and they were free to step down without penalty up until the moment of their vote. RCW 29A.56.340. Even if the First Amendment did extend to electoral balloting—which no court has found—the minimal burden of a \$1,000 civil penalty for electors choosing to vote against their pledge furthers the State’s significant interest in ensuring that the will of the people in casting their votes for President and Vice President is followed.

Petitioners point to no instance when a court has cast doubt on the strength of the State’s interest in carrying out the will of its electorate as expressed in the popular vote for President and Vice President. Washington has chosen a narrowly drawn means of achieving that goal by adopting a penalty provision and allowing electors to decide for themselves whether to risk incurring the penalty. The First Amendment requires nothing further from a state election law. *Burdick*, 504 U.S. at 434.

Finally, Petitioners’ attempts to invoke a different First Amendment test all fail. Petitioners’ argument that RCW 29A.56.340 constitutes a viewpoint-based restriction is belied by its plain text and application. Pet’rs’ Br. at 28-30. The law does not regulate or compel any speech. Petitioners were able to—and did—cast their electoral ballots as they deemed appropriate. The law also does not punish the electors’ speech per se, as was the situation in *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989), where elected members of an association were removed from office solely because of their stated position on a housing project. Instead, RCW 29A.56.340 is a reasonable regulation of the constitutional

requirement that each elector execute and file a pledge that he or she will vote for the candidates nominated by that party. RCW 29A.56.320. Petitioners willingly chose to stand for nomination as an elector and signed their pledges accordingly. They cannot now escape the rules and requirements of that position by claiming a constitutional violation where none exists.

## V. CONCLUSION

RCW 29A.56.340 falls squarely within Washington's plenary power under the Constitution to govern the conditions of the electors appointed to serve on behalf of the State and its people. Petitioners cannot avoid the consequences of their failure to abide by the conditions of their appointment by miscasting the requirements of state law or claiming constitutional rights not supported by the Constitution. This Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of July, 2018.

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