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IN THE SUPREME COURT OF THE UNITED STATES

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PETER B. CHIAFALO, LEVI JENNET)
GUERRA, AND ESTHER VIRGINIA JOHN,)

Petitioners,)

v.) No. 19-465

WASHINGTON,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, May 13, 2020

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:00 a.m.

APPEARANCES:

L. LAWRENCE LESSIG, ESQ., Cambridge, Massachusetts;
on behalf of the Petitioners.

NOAH PURCELL, Solicitor General, Olympia, Washington;
on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 19-465, Chiafalo and others versus the State of Washington.

Mr. Lessig.

ORAL ARGUMENT OF L. LAWRENCE LESSIG

ON BEHALF OF THE PETITIONERS

MR. LESSIG: Mr. Chief Justice, and may it please this Court:

The cases -- the question in these cases is straightforward: Do the states have the power to control through law how an elector may vote? They do not. The ordinary expected meaning of the words of the Constitution, against the background of the framers' deliberation, make it clear that the states have no such power.

But what is also clear is that Washington does not like the Constitution's design. It asks this Court to read the word "elector" as agent or, maybe better, minion, and it declares that the votes electors cast are not, as the Constitution expressly describes

1 them, their votes, meaning the electors' votes,
2 but instead are the votes of the state. Article
3 II in Washington's hands effectively gives the
4 states the power to cast votes for President in
5 such manner as the legislature thereof may
6 direct.

7 But the actual Article II does not
8 give the states the power to cast votes. It
9 gives the states the power to appoint electors.
10 And the actual electors that the Constitution
11 creates have a legal discretion, as every
12 elector does, not an unfettered discretion, as
13 Washington puts it. To the contrary, a
14 completely fettered discretion, just fettered by
15 moral and political obligations, not by legal
16 constraint.

17 Washington's alternative to "vest
18 discretion in citizens rather than electors" may
19 be a better plan, at least as part of a coherent
20 change, but the question for this Court is not
21 which plan would be better. The question is
22 which plan is the Constitution's now.

23 And the answer to that question is
24 clear in the Constitution's text. The states
25 get to appoint, no doubt, but they appoint

1 electors who are then privileged to cast their
2 votes without regulation by the state.

3 CHIEF JUSTICE ROBERTS: Mr. Lessig, do
4 you object to the pledge itself? Assume there's
5 no fine or any other sanction. Is simply
6 requiring a prospective elector to take a pledge
7 okay in your view?

8 MR. LESSIG: Absolutely, Your Honor.
9 A pledge, understood the way Ray understood a
10 pledge, having no legal obligation but a moral
11 obligation, is perfectly fine pursuant -- as
12 part of the appointment power of the state.

13 CHIEF JUSTICE ROBERTS: Well, then --
14 so -- so the addition of a sanction makes no
15 difference?

16 MR. LESSIG: No, the sanction makes
17 all the difference. So long as there is not a
18 legal sanction, then a pledge is appropriate.
19 It's the same -- the same in the context, Your
20 Honor -- Your Honor, of -- of the -- of the
21 Speech and Debate Clause.

22 Of course, you can't punish somebody
23 for a vote in Congress, but there's nothing
24 inconsistent with the Speech and Debate Clause
25 in asking a member to make a pledge. Indeed,

1 states right now ask members to make a pledge as
2 a condition of being a party member.

3 CHIEF JUSTICE ROBERTS: So, if there
4 were a fine of one dollar, you would say that
5 violates the Constitution, but if it's simply a
6 pledge, no violation at all?

7 MR. LESSIG: That's right, because a
8 fine is a legal obligation. It crosses the line
9 because the State has no such power to impose
10 such an obligation through law.

11 CHIEF JUSTICE ROBERTS: So your
12 argument is not that the sanction must have
13 coercive effect, it's simply a -- if it's only a
14 symbolic requirement, it still violates the law?

15 MR. LESSIG: No, Your Honor. It's
16 symbolic requirement. It's, of course, an
17 important moral requirement. It's a moral
18 obligation when you take a pledge. But it can't
19 cross the line and become a legally coercive
20 obligation, consistent with the freedom that the
21 Constitution grants electors to vote by ballot.

22 CHIEF JUSTICE ROBERTS: So, by legally
23 coercive, you mean something different than
24 simply coercive? In other words, if you add one
25 dollar, that becomes legally coercive?

1 MR. LESSIG: That's right, just as,
2 with the Speech and Debate Clause, if you fine a
3 Congressperson one dollar for his speech or his
4 vote on the floor of Congress, that violates the
5 Speech and Debate Clause.

6 But there's no problem with saying to
7 that Congressperson, to be a member of the
8 Republican party, you must pledge to support the
9 platform of the Republican party.

10 CHIEF JUSTICE ROBERTS: Under your
11 view, there would be no way to enforce the
12 popular vote referendum?

13 MR. LESSIG: The national popular vote
14 compact, is that what you mean, Your Honor?

15 CHIEF JUSTICE ROBERTS: Right. I
16 mean, assuming that gathers enough support and
17 becomes law, there'd be no way to enforce it?

18 MR. LESSIG: Well, Your Honor, that
19 obligation requires the states to pick a select
20 slate of electors that fits with the winner of
21 the national popular vote, and that slate of
22 electors then would have the same discretion,
23 legal discretion, that we believe any elector
24 has.

25 But, of course, if there's a national

1 popular vote compact, the number of electors for
2 the winner would be so significant, it would be
3 very hard to imagine any discretion affecting
4 the ultimate result.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Thank you, Chief
9 Justice.

10 Mr. Lessig, just a preliminary
11 question. Should we ask ourselves whether or
12 not the State is granted the authority to
13 regulate the vote of the elector, or are -- is
14 -- should we ask ourselves whether the
15 Constitution prohibits the State?

16 MR. LESSIG: Your Honor, I think you
17 can ask the question both ways, and it's the
18 same answer both ways. The only argument the
19 State has made in Washington, in the Washington
20 case, is an argument grounded in the Appointment
21 Clause. They don't invoke the Tenth Amendment.
22 So that would -- the question is whether the
23 Appointment Clause gives them power to control,
24 and we believe they do not.

25 But then you can look at it from the

1 other side and ask, as an elector who is given
2 an obligation to vote by ballot, does that
3 obligation entail a protection from legal
4 regulation? And we believe, just as the Speech
5 and Debate Clause does, it creates an immunity
6 from being punished for how one votes.

7 JUSTICE THOMAS: So when -- when you
8 make your -- I'm curious. When you make your
9 federal function argument, is that -- does that
10 depend in part on the fact -- on the -- on the
11 -- your view that the elector has discretion?

12 MR. LESSIG: The federal function
13 establishes the discretion, Your Honor. It's
14 exactly the same as in the cases of Hawke and
15 Leser, where the question was a state
16 legislature's -- a legislator's discretion to
17 vote on an Article V amendment.

18 And, of course, a state legislator
19 works for the state. He works for the people of
20 the state, he works subject to the constitution
21 of the state. But what Hawke and Leser
22 establish is that that state legislator is free
23 of the impositions of the state, either through
24 referendum or a constitutional -- the
25 constitution itself, when that legislator votes

1 on an Article V amendment.

2 And that's the same immunity that we
3 think a presidential elector has.

4 JUSTICE THOMAS: How do we determine
5 what the contours of this federal function -- of
6 the federal function would be?

7 MR. LESSIG: I would -- I would look
8 just to the text. The federal function in
9 balloting, as Ray described it, is the function
10 in casting a ballot, as the Twelfth Amendment
11 describes, and then the additional steps the
12 Twelfth Amendment requires, which is to name the
13 President and Vice President, make lists and so
14 forth, sign and certify and send it forward.
15 That's the function which the Constitution gives
16 to electors, distinct from the power to appoint,
17 which Ray also describes.

18 JUSTICE THOMAS: But does the -- does
19 the Twelfth Amendment mention discretion?

20 MR. LESSIG: No. The Twelfth
21 Amendment mentions the votes, and, of course, by
22 requiring that someone make a list of the people
23 that were voted for, it implies that there's
24 more than one person that could be voted for.

25 But, of course, the Twelfth Amendment

1 also doesn't mention the State at all. Yet the
2 way the State conceives of it, the State -- the
3 State is a proctor that stands in the room as
4 the electors cast their votes, looking over
5 their shoulder. But that's nowhere in the
6 Twelfth Amendment, Your Honor. The State
7 doesn't appear in the Twelfth Amendment, except
8 to name where the electors will meet.

9 JUSTICE THOMAS: You know, can the
10 State remove someone, for example, that's -- I
11 just wonder what limits -- what authority the
12 State actually has here.

13 Can the State remove someone who
14 openly solicits payments for his or her vote?

15 MR. LESSIG: You can certainly -- of
16 course, this Court has said in *Burroughs* and in
17 *Fitzgerald v. Green*, the state can certainly
18 regulate corruption, and bribery would be
19 corruption. And we believe that it's absolutely
20 clear that the State has that -- the government
21 has that power right now.

22 JUSTICE THOMAS: So -- but where --

23 MR. LESSIG: The question that --

24 JUSTICE THOMAS: -- so where's the
25 authority? Where does that come from?

1 MR. LESSIG: Well, it's interesting,
2 Burroughs itself, Burroughs versus the United
3 States, of course, found it inherent in the
4 federal power to be able to protect federal
5 elections from corruption.

6 In Fitzgerald versus Green, they saw
7 it as incidental to the power to appoint
8 electors to be able to assure that the election,
9 in that case the vote by the people, was
10 consistent with law.

11 Either of those could create the
12 authority to avoid corruption, but, of course,
13 corruption, like bribery, is independent of the
14 vote. You don't need to police a vote to be
15 able to police corruption, just as with the
16 Speech and Debate Clause, you can convict a
17 Congressperson of bribery even though the
18 bribery includes the vote that might have
19 occurred.

20 CHIEF JUSTICE ROBERTS: Justice
21 Ginsburg?

22 JUSTICE GINSBURG: Mr. Lessig, I was
23 surprised with the answer you gave to the Chief
24 about Ray. I would have thought that under your
25 absolute elector discretion view, Ray should

1 have come out differently under your theory.

2 MR. LESSIG: No, Your Honor. We think
3 Justice Jackson in Ray was completely right
4 about the original understanding, and we think
5 Justice Jackson was completely wrong about what
6 followed from that original understanding.

7 The framers did believe that electors
8 would exercise independent judgment. That's
9 absolutely clear. But they did not inscribe
10 that belief into the text of the Constitution.
11 They could have. Maryland's Electoral College
12 had that text in the constitution to constrain
13 the discretion in a particular way, but our
14 constitution didn't, which means that the
15 question in Ray was whether the State had the
16 power to discriminate on the basis of political
17 affiliation and loyalty when picking electors.

18 And after the Twelfth Amendment, we
19 believe that's perfectly obvious. They have
20 that power to discriminate because that's the
21 function that the -- the Electoral College has
22 come to occupy.

23 JUSTICE GINSBURG: It's somewhat hard
24 to understand the concept of something I am
25 pledged, bound to do, I have made a promise to

1 do something, but that promise is unenforceable.

2 MR. LESSIG: I understand, Your Honor.

3 And -- and it is -- it is -- it's difficult

4 until we recognize how familiar it is. Every

5 single political pledge is of this character.

6 We couldn't find a single case in the history of

7 political pledges, a pledge that's been

8 considered of anything beyond a moral

9 obligation.

10 We cited the Kucinich versus Texas

11 Democratic Party case, where Texas requires

12 candidates to pledge to support the candidate in

13 the Democratic Party, and that was upheld

14 exclusively on the ground that that was simply a

15 moral obligation.

16 And we can see that in the context of

17 Congress again. Again, there's no problem with

18 requiring a member of the Republican party to

19 pledge to support the Republican party as a

20 condition of being a candidate for Congress.

21 But we understand the Speech and

22 Debate Clause to say you can't punish them for

23 their vote. And the pledge is not inconsistent

24 with the Speech and Debate Clause. It's

25 perfectly consistent because a pledge is always

1 and only a moral obligation.

2 JUSTICE GINSBURG: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: Thank you. Good
6 morning.

7 Counsel, a state can appoint people,
8 requirement, that they be permanent residents of
9 the state. That's all right, isn't it?

10 MR. LESSIG: Of course.

11 JUSTICE BREYER: Of course. And then
12 could they say, and you must be a permanent
13 resident at the time that you cast your vote?

14 MR. LESSIG: Yes.

15 JUSTICE BREYER: Yes. And then what
16 happens if, in fact, Mr. Smith, who is a
17 permanent resident when elected, changes his
18 residency and goes to a different state before
19 the vote is cast? Now he is not a permanent
20 resident. He hasn't met the State's
21 requirement. And so could the State also say,
22 in case that happens, we have an alternate who
23 will cast the vote?

24 MR. LESSIG: Yes, we believe they can
25 because --

1 JUSTICE BREYER: They can, all right.

2 MR. LESSIG: -- it's a requirement --

3 JUSTICE BREYER: What's the difference
4 between that and this situation, where they say,
5 you must promise to vote for the person who wins
6 the most votes, and then he gets to the room,
7 and in that room, he doesn't live up to that
8 requirement, just as he didn't live up to the
9 requirement that he be a resident of the state?

10 MR. LESSIG: Your Honor, the
11 difference is the line between the appointment
12 and the voting. The Constitution draws that
13 line. It says that Congress can set the time of
14 the appointment and they can set the day on
15 which the vote is cast.

16 And we believe incidental to the
17 appointment power is to -- the power of the
18 State to assure that there is an elector there
19 who will perform the function, the federal
20 function of balloting. But, once the voting
21 starts, the State disappears. The State does
22 not appear at all, except to name the location
23 of the vote, in the Twelfth Amendment. It
24 certainly doesn't stand there to observe whether
25 someone's voted properly.

1 JUSTICE BREYER: If, in fact, he
2 changes his residence 10 minutes before he casts
3 his vote, then you could remove him?

4 MR. LESSIG: Prior to the --

5 JUSTICE BREYER: But, if you say he
6 can't -- they can't, the State, when, in fact,
7 he actually casts the vote, but surely a person
8 who casts a vote for Jones instead of Black has,
9 in fact, changed his mind 10 minutes before, and
10 so can you not, in fact, remove him because of
11 that preceding change of mind 10 minutes before?

12 MR. LESSIG: No, because the pledge is
13 a pledge made prior to the appointment.

14 JUSTICE BREYER: There's not a pledge
15 in my hypothetical. It is a requirement that
16 he, in fact, cast his -- not cast his vote but
17 that he, in fact, be a person willing to cast
18 his vote for Mr. Jones, the majority winner, at
19 least 10 minutes before.

20 I'm just trying to make it as close as
21 possible to the person who changes his residence
22 10 minutes before.

23 MR. LESSIG: But, again, Your Honor,
24 the Constitution gives the states no power to
25 regulate the vote. They have the power to

1 appoint. And incident to the power to appoint,
2 Ray said they can say you must make a pledge to
3 support the party nominee.

4 And at the time my clients made their
5 pledge, they absolutely intended to vote for the
6 party nominee. So the regulation that's
7 authorized by Ray has nothing to do with what
8 you've described, which is the regulation of the
9 vote.

10 CHIEF JUSTICE ROBERTS: Justice Alito?
11 Justice Alito?

12 JUSTICE ALITO: Yes. Mr. Lessig, my
13 question is similar to Justice Breyer's, or at
14 least it follows along the same lines.

15 Suppose an elector is bribed between
16 the time of the popular vote and the time when
17 the electors vote. Can the State remove that
18 elector?

19 MR. LESSIG: Your Honor, we believe
20 that prior to the vote, the State's power is --
21 the incidental power exists to assure that the
22 person who shows up has not engaged in criminal
23 -- is not engaged in a criminal activity.

24 It's difficult to imagine how that
25 plays out, though, because, of course, the claim

1 someone has bribed -- been bribed is a charge.
2 It needs to be proven. And so we believe
3 there's going to be a difficulty there with the
4 bribery.

5 But let's remember that the framers
6 expressly considered this problem. George --
7 George Mason expressly said a reason not to have
8 electors is that they could be bribed. But what
9 the framers saw is that there were two risks.
10 There was the risk of elector bribery, but there
11 was also the risk of cabal and corruption, as
12 Madison put it --

13 JUSTICE ALITO: Well, I thought your
14 --

15 MR. LESSIG: -- if you give --

16 JUSTICE ALITO: -- argument was that
17 -- your argument must be either that the
18 electors cannot be removed by the State -- the
19 State says that at least some removal power goes
20 along with the appointment power. So I -- I
21 think your argument has to be they can't be
22 removed, or there are at least some
23 circumstances in which they can be removed.

24 And if there are some circumstances in
25 which they can be removed, such as when the

1 elector has been bribed, why would the violation
2 of a pledge not be one of those circumstances?

3 MR. LESSIG: Your Honor, we -- we have
4 said the bribe is different from a pledge
5 because, of course, the bribe is proven
6 differently from -- separately from how one
7 votes. So we've recognized that there's a
8 capacity to regulate bribery.

9 But what I -- I -- your question is
10 perfectly framed, because I do want to assert
11 that there's no power to remove prior to the
12 vote. The power that comes from, for example, 3
13 U.S.C. 4, which Congress gives the states the
14 power to fill vacancies, is the power to fill a
15 vacancy once the vacancy occurs. It's not the
16 power to create a vacancy.

17 And -- and that's the structure that
18 the Constitution establishes as well.

19 JUSTICE ALITO: So the State cannot
20 create a vacancy by removing an elector who has
21 been bribed?

22 MR. LESSIG: Yes, unless the bribery
23 statute makes as a -- a penalty a removal from
24 office and there's a conviction prior to the
25 actual time at which the vote has been taken,

1 but that's, of course --

2 JUSTICE ALITO: Let me ask you one
3 other question if I can. Those who disagree
4 with your argument say that it would lead to
5 chaos, that in -- where the election -- where
6 the popular vote is close and changing just a
7 few votes would alter the outcome or throw it
8 into the House of Representatives, there would
9 be -- the rational response of the losing
10 political party or elements within the losing
11 political party would be to launch a massive
12 campaign to try to influence electors, and there
13 would be a long period of uncertainty about who
14 the next President was going to be.

15 Do you deny that that is a -- a good
16 possibility if your argument prevails?

17 MR. LESSIG: We deny it's a good
18 possibility. We don't deny it's a possibility.
19 And we believe there are risks on either side,
20 which is a good reason to avoid the
21 risk-adjusted constitutional interpretation.

22 We agree that, of course, the
23 possibility exists that you could flip electors.
24 But look historically at the number of times
25 that could have mattered. In fact, in the

1 history of electors, there has been one elector
2 out of the 23,507 votes cast who have switched
3 parties against the majority party in a way that
4 it could have mattered. That was the very first
5 time this happened, Samuel Miles in 1796.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 MR. LESSIG: In the ordinary close
9 election --

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Counsel, you
13 compare in your brief the Electoral College to a
14 jury, arguing that they are structurally similar
15 under the Constitution. You can't remove a
16 juror because of his or her vote.

17 But, if that's true, I don't see how
18 that helps you. A juror makes all sorts of
19 pledges: to be impartial, not to discuss the
20 case with anyone during the trial, not to
21 research the case with the parties, to tell the
22 truth during voir dire. Yet, if a juror is
23 selected and violates one of those pledges, say
24 the juror talks about the case with the other
25 jury members, the judge is empowered -- with

1 others than the jury members, the judge is
2 empowered to remove that juror.

3 So why isn't a presidential elector
4 subject to being removed in the same way? He
5 has made a particular pledge, different than
6 remaining impartial, but he has told the people
7 who have appointed him: I will vote in this
8 particular way. I -- you call it morally --
9 commit myself. So why isn't that any different
10 than a juror who says, I'm not going to do this,
11 and then does it and a judge can remove him?

12 MR. LESSIG: Well, Your Honor, you've
13 identified the core immunity that a juror has,
14 and that is the immunity in the vote to convict
15 or not. And we agree that is an immunity that
16 cannot be regulated, can't be punished. It
17 can't be fined for a vote improper according to
18 the court or to the State, though there are
19 other obligations, you're right, that you can be
20 held to account for.

21 We think that's perfectly parallel
22 with the presidential elector. The presidential
23 elector has an immunity in his or her vote.
24 But, of course, sitting in the elector room, he
25 can't cause a disturbance, he can't threaten

1 somebody with a weapon, he can't engage in any
2 number of criminal activities that might, of
3 course, interfere with the opportunity to
4 perform the duty.

5 There's no general immunity. There's
6 a particular immunity because the immunity to
7 vote is an immunity from penalty for vote, just
8 as the Speech and Debate Clause cases have made
9 clear.

10 JUSTICE SOTOMAYOR: Now you rely a lot
11 on history in your argument, but doesn't
12 McPherson undermine your position very directly,
13 just like Ray does in some extent?

14 In those cases, the -- in -- in those
15 cases, the Court made clear that whatever the
16 framers expected -- and, here, you make a good
17 argument that some of the framers originally
18 expected electors to have discretion -- that
19 historical practice since the founding offered a
20 practical interpretation of the Constitution.
21 That's what Ray said.

22 And McPherson said experience soon
23 demonstrated that the electors were chosen
24 simply to register the will of the appointing
25 State. Don't -- doesn't --

1 MR. LESSIG: Your Honor --

2 JUSTICE SOTOMAYOR: -- that same
3 principle undermine whatever you think some of
4 the framers expected that historical --

5 MR. LESSIG: Your Honor --

6 JUSTICE SOTOMAYOR: -- practice, at
7 least since the Twelfth Amendment, has shown
8 that states have imposed not just pledges but
9 have imposed fines and some removal of electors
10 who are faithless?

11 MR. LESSIG: Your Honor, first, no
12 state has ever, prior to 2016, imposed a fine to
13 remove an elector.

14 But number two, our argument has
15 nothing to do with expectations. It is the
16 State's argument that hangs on expectations.
17 What we say is that the Constitution, as
18 McPherson says, should be read not according to
19 modern-day expectations but according to the
20 words, the ordinary expected meaning of the
21 words the framers used in the Constitution.

22 So, in McPherson --

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 MR. LESSIG: -- the question --

25 JUSTICE KAGAN: Mr. Lessig, so let me

1 ask you about those words. As I understand it,
2 most of your argument depends on a particular
3 reading of the terms "vote" and "ballot" and
4 "elector," and, of course, you know, usually we
5 think of those terms as involving some choice
6 but not necessarily.

7 People are electors, at least
8 formally. People vote, at least formally.
9 People cast ballots, at least formally at times
10 when there is no choice. Think of a
11 Soviet-style system or, you know, think of
12 somebody who has -- has pledged himself to -- to
13 vote because another person is voting another
14 way.

15 So why do these terms necessarily
16 involve choice in the way you suggest?

17 MR. LESSIG: Well, Your Honor, we
18 believe, as Chief Justice Roberts has described,
19 that the best way to understand these words, the
20 best dictionary is the Constitution itself.

21 The Constitution speaks of elector in
22 two contexts. Article I speaks of what Justice
23 Thomas has referred to as congressional
24 electors, unique voters. And we believe the
25 freedom of congressional electors is exactly the

1 freedom of presidential electors.

2 And we understand the authority of
3 this Court to establish that the office, as
4 Justice Kennedy put it in his opinion in
5 Thornton, the office of the elector, the elector
6 there meaning the congressional elector, is
7 created by the Constitution and it's free of
8 constraints, either private constraints or state
9 constraints. So it's the same sense of elector
10 that the Constitution used.

11 Now, of course, they could have said,
12 we mean by elector in Article I someone who has
13 freedom and discretion, but, by Article II, we
14 mean what will become the Soviet Union
15 conception of elector. That would have been
16 possible. We're not saying it's impossible to
17 imagine this.

18 We're saying the ordinary expected
19 meaning of these words would have supported the
20 discretion that absolutely the framers expected
21 electors would have, and that --

22 JUSTICE KAGAN: If that's right, Mr.

23 --

24 MR. LESSIG: -- these were in --

25 JUSTICE KAGAN: -- if that's right,

1 Mr. Lessig, if -- if -- if your reading is -- is
2 very deeply contextual, then shouldn't we look
3 to what happened in the very first elections
4 under the Constitution, where, you know,
5 immediately, right away, electors associated
6 themselves with a political party, pledged their
7 votes ahead of time, and -- and it's that
8 practice that has continued for over 200 years?

9 So, if your reading isn't demanded by
10 dictionary but is instead demanded by context
11 and history, doesn't the context and history
12 suggest the opposite?

13 MR. LESSIG: Your Honor, we believe
14 the context and history supports the idea,
15 absolutely, that electors were to pledge
16 themselves. We're not saying that the
17 Constitution required them to be Hamilton's
18 philosophers. That's not our claim.

19 Our claim is that the discretion that
20 they created in the office of elector survives.
21 So, yes, look at 1796, where the first so-called
22 faithless elector, Sam Miles, switches sides,
23 which, of course, is noticed and objected to.

24 And, indeed, in 1800, that election
25 also was complicated by the failure of electors

1 to do what they were expected to do. Gallatin
2 noted that to Jefferson and said to Jefferson,
3 we should eliminate electors. And Jefferson
4 said, yes, let's have a --

5 CHIEF JUSTICE ROBERTS: Thank you --

6 MR. LESSIG: -- amendment --

7 CHIEF JUSTICE ROBERTS: -- counsel.

8 Justice Gore -- Justice Gorsuch?

9 JUSTICE GORSUCH: Counsel, could a
10 state, for example, ask an elector to make a
11 sworn statement as to his present intention to
12 vote for a particular candidate, make the pledge
13 an oath?

14 MR. LESSIG: Yes.

15 JUSTICE GORSUCH: And could a state
16 later prosecute that elector for perjury if that
17 statement under oath -- if there's evidence that
18 that was a false statement?

19 MR. LESSIG: In principle, absolutely,
20 Your Honor. We think, in practice, that would
21 be just like with a Judge making a promise to a
22 Senate committee upon confirmation -- prior to a
23 confirmation, it would be incredibly difficult
24 to imagine enforcing in a way that wouldn't be
25 just retaliatory against a particular elector.

1 JUSTICE GORSUCH: And could a state
2 say that we'll pay your expenses and give you a
3 per diem for your service, but only if you carry
4 out your promise to vote in a particular way
5 that you pledged initially?

6 MR. LESSIG: No. That's what
7 Washington's new law, in fact, does. That is,
8 in effect, a penalty as well.

9 JUSTICE GORSUCH: Why -- why couldn't
10 it do that if it could do the other things?

11 MR. LESSIG: Well, again, Your Honor,
12 the difference is between a legal consequence or
13 a legal penalty based on your judgment, your
14 vote, a federal function of balloting, which is
15 free of state control, and the other incidental
16 powers relative to appointment.

17 And so, in appointment, I want to make
18 sure you're an honest person --

19 JUSTICE GORSUCH: I'm sorry for
20 interrupting, but I'm not sure -- I'm not sure I
21 understand where -- where you're going, so I
22 just want to cut -- cut to it if we can.

23 So a state -- and my -- my last
24 hypothetical is just simply saying, we'll pay
25 your -- your -- your lunch, your -- your -- your

1 travel and your per diem if -- if you conform to
2 your pledge under oath. And -- and -- and
3 that's not permissible, but it is permissible to
4 -- to convict a -- an elector for perjury?

5 I'm just not --

6 MR. LESSIG: Well, that --

7 JUSTICE GORSUCH: -- certain about
8 that.

9 MR. LESSIG: Well, that's right, Your
10 Honor, because perjury involves a false
11 statement at the time the pledge is made. In
12 our case, our electors absolutely intended to
13 pledge -- to vote for Hillary Clinton if Hillary
14 Clinton won the election.

15 JUSTICE GORSUCH: I'm -- I'm not
16 asking about your client. I'm -- I'm -- just
17 stick to the hypothetical, counsel, please.

18 MR. LESSIG: Okay. But the
19 hypothetical imagines that someone has committed
20 a criminal act. Okay, on the basis of the
21 criminal act, in theory, they could be punished,
22 that's right. But the difference between an
23 elector who gets compensated based on their vote
24 or not based on their vote is a difference
25 driven by the substance of the constitutional

1 discretion that electors are given, the -- the
2 federal function in balloting, the right to
3 vote.

4 JUSTICE GORSUCH: And -- and with
5 respect to the perjury example, could a state
6 remove that individual and -- and not count his
7 vote?

8 MR. LESSIG: Your Honor, the perjury
9 example does not allow them to remove the
10 individual, no. And what we know in the context
11 of other areas where votes have been tainted,
12 for example, a bribery conviction which involved
13 a vote in Congress, is the vote is not -- not
14 counted. That's just a consequence of the
15 separation between the prosecution and the --

16 JUSTICE GORSUCH: Well, I'm sorry, I
17 thought you indicated to earlier questions that
18 you thought it was fine for a bribed elector to
19 be removed from office prior to voting.

20 MR. LESSIG: Yeah, I said that if you
21 convict and convict the person prior to the
22 actual voting, then you could remove them if it
23 was --

24 JUSTICE GORSUCH: Okay. The same --
25 same would be true of perjury, I suppose, then

1 too? No?

2 MR. LESSIG: If you could structure
3 the statute and -- and succeed in the
4 conviction, but, of course, the perjury requires
5 at the time a false statement.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: Thank you, Mr.
10 Chief Justice.

11 Good morning, Mr. Lessig. I want to
12 follow up on Justice Alito's line of questioning
13 and what I might call the avoid chaos principle
14 of judging, which suggests that if it's a close
15 call or a tiebreaker, that we shouldn't
16 facilitate or create chaos.

17 And you, I think, answered and said it
18 hasn't happened, but we have to look forward,
19 and just being realistic, judges are going to
20 worry about chaos. So what do you want to say
21 about that?

22 MR. LESSIG: It's a good thing to
23 consider, Your Honor, and what we've said is
24 yes, on the one side, you might worry that
25 there's a increased risk of "chaos" if electors

1 have the discretion we believe they've always
2 had.

3 We suggest that the likelihood of
4 that -- that is tiny given it requires electors
5 who are the loyal of the loyal to band together
6 in dozens or, you know, three dozen in the last
7 election and flip sides. And, of course, the
8 likelihood of that is extremely small.

9 But what we've also said is there's
10 risk on both sides. The Twentieth Amendment
11 self-consciously presupposed electoral
12 discretion in the context of the death of a
13 candidate prior to the vote in the Electoral
14 College.

15 And if that happens, but laws like
16 Washington and Colorado ban the exercise of
17 discretion, then the votes from those electors
18 could, in principle, be wasted. And that could
19 throw the decision into the House and that could
20 flip the result, also unexpected, also
21 potentially creating chaos. So there's chaos
22 both ways.

23 And the number of times we've had
24 candidates die is actually twice as frequently
25 as we've had candidates -- as we've had electors

1 switch their votes and vote for somebody from
2 the other side. So in the face of --

3 JUSTICE KAVANAUGH: Okay. Let me --
4 can I -- I'm sorry to interrupt. I want to --

5 MR. LESSIG: Sure.

6 JUSTICE KAVANAUGH: -- get to another
7 question.

8 You set this up appropriately as, in
9 essence, the states versus the electors in some
10 sense, but isn't it also appropriate to think of
11 this as the voters versus the electors and that
12 your position would, in essence, potentially
13 disenfranchise voters in the state?

14 MR. LESSIG: Your Honor, of course, in
15 our case, the action of the electors was to
16 further enfranchise the voters in the case -- in
17 this case.

18 JUSTICE KAVANAUGH: As a general
19 theory --

20 MR. LESSIG: They are trying --

21 JUSTICE KAVANAUGH: -- as a general
22 theory -- I'm sorry to interrupt -- wouldn't
23 your position potentially lead to that?

24 MR. LESSIG: It's potentially true.
25 That's -- that's right, Your Honor.

1 JUSTICE KAVANAUGH: Okay. And then
2 the last question is -- the question here is not
3 whether the Constitution requires the states to
4 bind electors; of course, it's whether the
5 Constitution permits states to bind electors.
6 And on that question, why doesn't the Tenth
7 Amendment, as Justice -- or the -- the states'
8 authority, preexisting authority, as Justice
9 Thomas was suggesting, come in?

10 MR. LESSIG: Well, Your Honor, first,
11 of course, the State doesn't invoke the Tenth
12 Amendment, but, if it did, it would fail
13 because, whereas, in the Thornton case, for
14 example, Justice Thomas could point to
15 traditions that allowed the states to exercise
16 the power that they wanted to exercise there,
17 there is no tradition in America, maybe in the
18 Soviet Union, as Justice Kagan -- Kagan
19 suggests, but not in America, of a government
20 exercising control over a voter, over an
21 elector. That power doesn't exist. Therefore,
22 it's not a question of whether it was taken away
23 by the federal government. It wasn't given --
24 it wasn't there before. And, therefore --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. LESSIG: -- there's no Tenth
3 Amendment power either.

4 CHIEF JUSTICE ROBERTS: Counsel, thank
5 you. You can take a minute to wrap up if you'd
6 like.

7 MR. LESSIG: Thank you, Your Honor.

8 The question here has got to both be
9 the constitutional and the pragmatic. And the
10 constitutional question is simply the question
11 whether there is a power in the states which
12 comes from the power to appoint. And there
13 isn't.

14 And it is also the question whether
15 the electors as electors, the same sort of
16 electors that Article I creates, have a
17 discretion. And the discretion is the same
18 discretion which Congresspeople have when they
19 exercise their judgment not to be punished at
20 all under the principles of the Speech and
21 Debate Clause.

22 But there's also a question we
23 acknowledge of the risks, but facing risks on
24 both sides, this Court should do what it can do,
25 which is to interpret the Constitution as the

1 Constitution was written and it has not been
2 amended.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 General Purcell.

7 ORAL ARGUMENT OF NOAH PURCELL

8 ON BEHALF OF THE RESPONDENT

9 MR. PURCELL: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Constitution gives states the
12 power to appoint electors. That power has
13 always included the power to set conditions of
14 appointment, such as requiring that an elector
15 live in the state or show up for the Electoral
16 College meeting.

17 One condition that states are clearly
18 allowed to impose is that electors promise to
19 support the presidential candidate preferred by
20 the state's voters. States have been choosing
21 electors on that basis since the founding. This
22 Court approved that condition in *Ray*. And the
23 other side admits that states can impose this
24 condition.

25 The only dispute here is whether

1 states can enforce this condition or any other
2 valid condition of appointment. Petitioners say
3 no, or at least that's what they said in their
4 brief. They say that states cannot remove or
5 sanction electors after appointment for any
6 reason, even if the elector is being bribed or
7 blackmailed, even if they lied about their
8 eligibility to serve in the first place, or even
9 if they refuse to show up for the meeting of the
10 Electoral College.

11 That is not the law, as Petitioners
12 now seem to acknowledge. Constitutional text,
13 original understanding, historical practice, and
14 this Court's precedent all demonstrate that
15 states can enforce valid conditions of
16 appointment like those here.

17 Now I'd like to start by discussing
18 original understanding because Petitioners want
19 you to believe that this case presents a
20 conflict between our country's long-standing
21 practices and the framers' intent. But two
22 stubborn facts refute their claim.

23 First, the framers and their
24 contemporaries clearly understood that states
25 could remove or fine electors after appointment.

1 From even before the Twelfth Amendment, many
2 states had laws removing or fining electors for
3 violating the conditions of their appointment,
4 repudiating a central premise of Petitioners'
5 claim.

6 And, second, as this Court recognized
7 in Ray and in McPherson, from the very first
8 presidential election, states have been choosing
9 electors specifically because they had promised
10 to support a particular presidential candidate.
11 And this contradicts Petitioners' claim that the
12 framers viewed the exercise of discretion as
13 central to the elector role, and it shows that
14 Petitioners' quarrel is not just with our
15 long-standing practice; it is with the framers
16 themselves. Accepting their position would mean
17 concluding that the framers misunderstood the
18 role they had created.

19 CHIEF JUSTICE ROBERTS: General --

20 MR. PURCELL: Now, if you're --

21 CHIEF JUSTICE ROBERTS: -- could the
22 legislature appoint whomever they want to be an
23 elector?

24 MR. PURCELL: Your Honor, there are
25 certainly some limits on -- on the discretion.

1 Other constitutional provisions, such as the
2 Equal Protection Clause, impose limits, of
3 course. But, in general, states have exclusive
4 authority, as this Court has said, to -- to
5 appoint electors and to set conditions of
6 appointment.

7 And -- and, certainly --

8 CHIEF JUSTICE ROBERTS: Well, let's
9 say after -- they don't appoint electors in any
10 way before the -- the national vote, and then
11 they select the electors that they would like
12 after that vote. Is that all right?

13 MR. PURCELL: I don't think that's all
14 right, Your Honor. I would need a few more
15 facts to know for certain. But the -- the risk
16 there is that, once the State has given to the
17 people the right to vote for President, that
18 right is fundamental, as this Court has
19 recognized. So the state legislature cannot
20 override the will of the people by appointing
21 electors to do something different after the
22 fact. So -- so that would not be acceptable.

23 But -- but the State does have the
24 authority to enforce valid conditions of
25 appointment, such as just requiring that an

1 elector show up for the meeting of the Electoral
2 College.

3 And on the other side's view, even
4 that is unacceptable. And as you heard today --
5 I'm somewhat confused by exactly what their
6 position is on this -- but it seems they're
7 saying you cannot remove someone even if you
8 know they accepted a bribe unless you can
9 somehow move through the criminal process before
10 the electors meet.

11 And that's just absurd. It's -- it's
12 completely contrary to the historical record,
13 and it leads to a dangerous consequence, Your
14 Honor, that there's a huge incentive, under the
15 other side's view, for -- for those who want to
16 meddle in our presidential elections, whether it
17 be a foreign power or just a wealthy individual,
18 to attempt to bribe or blackmail electors.

19 And it's quite easy to imagine a
20 foreign government hacking into the computer of
21 a few dozen electors to find embarrassing
22 information about them and try to get them to
23 change their votes. And if there's nothing --

24 CHIEF JUSTICE ROBERTS: Say the State
25 --

1 MR. PURCELL: -- the State can do
2 about that --

3 CHIEF JUSTICE ROBERTS: -- let's say
4 the State law for electors say that they have to
5 vote for the slate of the party that sponsors
6 them and that they will be certified as
7 electors, unless the circumstances after the
8 election have changed to the extent that the
9 legislature thinks the electors ought to be
10 changed.

11 In other words, not unbridled
12 discretion with the legislature, but a condition
13 known to the electors before they were selected.
14 Would that be all right?

15 MR. PURCELL: Mr. Chief Justice, I
16 think that raises the same challenge as your
17 earlier hypothetical, that while the legislature
18 in the first instance has the power to set, you
19 know, any condition that complies with the
20 Constitution, once the legislature has given to
21 the public the power to vote in a presidential
22 election, they cannot override that vote,
23 consistent with the Equal Protection Clause and
24 this Court's cases.

25 So -- so, you know, your hypothetical,

1 I think, pushed up against that principle. And
2 it's not just what commitment are you asking the
3 electors to make but what have you told the
4 public about their role. And, of course, under
5 the other side's theory, the public role we
6 currently think of as the presidential election
7 process, the campaigns, the debates, the
8 rallies, the voting, is all irrelevant and
9 always has been. It's purely advisory.

10 And so --

11 CHIEF JUSTICE ROBERTS: So that all
12 they have to do is tell the public that when it
13 comes to electors, we're going to follow Mr.
14 Lessig's view?

15 MR. PURCELL: I'm sorry, Mr. Chief
16 Justice, I don't understand that. I don't
17 understand the question. The --

18 CHIEF JUSTICE ROBERTS: Well, the
19 question is you're -- you're suggesting that the
20 critical factor is whether the State's conduct
21 is based on a condition prior to the selection
22 of electors, and if the electors know that they
23 have the discretion or that the State -- excuse
24 me, that the State has the discretion to replace
25 them and the people know that, shouldn't that be

1 enough?

2 MR. PURCELL: No, Mr. Chief Justice.
3 My -- my -- my -- the critical point is that if
4 the condition is constitutional, then the
5 condition can be enforced by removal or by
6 sanction, just as it has been since before 1800.

7 So, if the condition is you have to
8 show up for the meeting of the Electoral
9 College, the State can enforce that. If the
10 condition is you have to pledge to vote for the
11 candidate chosen by the state's voters, we know
12 that's a valid condition, the State can enforce
13 it. So that's the crucial --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 JUSTICE THOMAS: Yes, thank you, Chief
18 Justice.

19 General Purcell, just to -- to
20 clarify, could you give us precisely some of the
21 limitations on the restrictions that the State
22 can impose on elect -- on the electors?

23 I understand you can require them to
24 show up for the vote. I understand that the --
25 you have the limit of what's constitutional.

1 But, beyond that, what -- what -- what else
2 limits you?

3 MR. PURCELL: Well, I think those are
4 meaningful limits, Justice Thomas, and those are
5 the limits -- this Court has said that the power
6 of states over appointment is exclusive, is
7 plenary.

8 Obviously, as I said, the Equal
9 Protection Clause imposes limits. Other
10 constitutional provisions, like the Presidential
11 Qualifications Clause, impose limits, such that
12 states can't, for example, restrict electors'
13 choice of who they can vote for in a way that
14 would violate the Presidential Qualifications
15 Clause.

16 But, other than that, the states have
17 plenary authority to appoint electors and to set
18 valid conditions. And if -- if the condition is
19 valid, if the condition is constitutional, then
20 the condition can be enforced. That's -- that's
21 our position.

22 JUSTICE THOMAS: Yeah. Well, I guess
23 that's why we're here, but one other question.
24 The -- I'm interested in, you know, the -- what
25 you think and how we -- how you would define the

1 scope of the federal function concept.

2 MR. PURCELL: Your Honor, I think
3 there's three crucial problems with the other
4 side's federal function argument.

5 The first is that it's just not even
6 supported by the cases they cite. Burroughs and
7 Ray mention federal function in the sense that
8 there is a federal interest, obviously, in the
9 conduct of presidential elections, but they
10 don't say or imply in any way that the Supremacy
11 Clause restricts state authority over electors.

12 And -- and then second, the -- the
13 whole point of the federal function doctrine is
14 to prevent state interference with actions of
15 the federal government and with actions of
16 federal officers. And in this context, the
17 federal government does not elect the President.
18 And federal -- and electors are not federal
19 officers.

20 And the third point, Your Honor, is a
21 historical one, that if they were right about
22 this federal function idea, then states never
23 ever would have been able to remove or sanction
24 electors for any reason. And -- and yet we see
25 statutes from even before 1800 in many states

1 that provided for exactly that, for removal or
2 sanction of electors.

3 And under the other side's theory,
4 those statutes have always been
5 unconstitutional. And under the other side's
6 theory, the State can't remove or sanction an
7 elector for any reason as far as I can tell from
8 their -- their theory. Even if we -- even if
9 the State knows the person has taken a bribe,
10 the State cannot remove or replace them.

11 Even if the State knows that the
12 person is not going to show up for the meeting
13 of the Electoral College, the State cannot
14 remove or replace them, even though states have
15 been doing that, again, since before 1800.

16 So -- so I just don't understand how
17 the other side's theory is at all consistent
18 with the original understanding if it's not --
19 it's just not the original understanding. It's
20 an academic theory that has never been put into
21 practice.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Ginsburg.

25 JUSTICE GINSBURG: What do you make of

1 the fact that Congress has never failed to count
2 an anomalous electoral vote, not once? It has
3 always accepted the anomalous vote.

4 MR. PURCELL: Justice Ginsburg, I
5 think that highlights Congress's view that it
6 should defer to states about the votes that they
7 certify to Congress to count.

8 Of course, in every example that the
9 other side's given, the State had certified
10 those votes as the State's votes. But, if you
11 look at 2016, Congress also counted the votes
12 from Colorado and from Minnesota, where the
13 state replaced faithless electors with electors
14 who promised to vote as pledged and did vote as
15 pledged, and Congress counted those votes as
16 well.

17 So what you see in the history is
18 Congress deferring to the State's designation of
19 which electors are validly appointed by the
20 State.

21 JUSTICE GINSBURG: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer?

24 JUSTICE BREYER: Thank you.

25 Counsel, I'd like you to assume,

1 whether this is Mr. Lessig's argument or not,
2 assume this is my argument for present purposes.

3 The only thing a state cannot do is to
4 punish the elector for the way he actually casts
5 his vote. As far as bribery laws are concerned,
6 there are plenty. As far as gratuities, all
7 kinds of things, what he's doing before, he'd
8 accepted a bribe or promised to before. The
9 only thing is the actual casting of the vote.

10 Now there, as to that, what would
11 happen -- and there have been quite a few
12 faithless electors. For the most part, it
13 hasn't mattered.

14 Where it really might matter is if
15 somebody died or some catastrophe happened or
16 worse. There, it might matter. And in the one
17 case, Congress refused to count votes which were
18 cast for the person who was promised, Horace
19 Greeley, and so there is a mechanism in Congress
20 to protect catastrophe; namely, they count which
21 ballots they choose to count.

22 The alternative is your alternative,
23 which is the State tries to control it. Which
24 is the greater danger, which is the greater
25 safeguard: to have a Congress that will decide

1 what to do with the faithless electoral vote or
2 to have the State possibly, who knows what they
3 could pass as a requirement?

4 Now what is your opinion about that?

5 MR. PURCELL: Well, Justice Breyer,
6 there's a lot there and I want to start by
7 addressing your last question about what can
8 Congress do.

9 Congress cannot solve this problem
10 because Congress cannot appoint an elector for a
11 state. So if -- if -- even if Congress could
12 reject a ballot, for example, if it found out --
13 if it knew that the elector had been bribed, the
14 State has lost that electoral vote and cannot
15 get it back.

16 The State cannot -- the Congress
17 cannot appoint a new elector for the State. And
18 just rejecting that ballot might alter the
19 outcome of the presidential election, rejecting
20 several ballots might. So the idea that
21 Congress can solve this after the fact is
22 just -- it's not true and it -- and it -- it --
23 it -- it ignores the constitutional delegation
24 of power to the states.

25 Turning to your other points, I mean,

1 there's just no -- I want to -- an example I
2 think helps illustrate why there's really no
3 constitutional difference between failing to
4 show up and failing to keep your promise.

5 Imagine two electors who both do not
6 like the nominee eventually -- who eventually
7 wins their party's nomination and is -- is --
8 and wins the general election. One says, I'm
9 not going to show up for the Electoral College
10 meeting because I don't like this person. The
11 other says, I'm going to show up and I'm going
12 to vote for someone else.

13 Both have violated valid conditions of
14 their appointment. Both can be removed and
15 replaced by the State. And there's no
16 constitutional problem with that. There's no --

17 JUSTICE BREYER: But there is a
18 difference between the two. And in the one
19 case, your State is punishing the person for
20 what he does before voting. In the other case,
21 he is punishing him for the way he casts his
22 vote.

23 MR. PURCELL: Well, two points.

24 JUSTICE BREYER: And that is what I
25 think the -- the other side says is the one

1 thing the State cannot do.

2 MR. PURCELL: First of all, Justice
3 Breyer, we -- Washington's revised law now
4 removes the person before they can vote, just as
5 Colorado's law does. Washington's prior law did
6 impose a fine for breaking your pledge, for
7 violating the condition of appointment.

8 And -- and there's nothing wrong with
9 that. If you look historically from even before
10 1800, states had fines for violating conditions
11 of appointment. And so -- and -- and it's also
12 quite common for appointed officials at the
13 state and federal level to potentially face
14 consequences for -- for voting in violation of a
15 promise.

16 So, for example, the United States
17 ambassador to the U.N. certainly has a vote in
18 the U.N. General Assembly, but if -- if they
19 vote differently from how the President directs
20 them, the President, of course, can sanction
21 them or remove them.

22 So -- so it's quite common with
23 appointed officials that they can face
24 consequences for voting differently than they've
25 promised. And -- and -- and that's what this is

1 just a straightforward example of.

2 JUSTICE BREYER: Thank you very much.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Thank you.

5 Counsel, does the Constitution impose
6 any limits on a state's power to attach
7 conditions to the appointment of an elector?

8 MR. PURCELL: Some, Justice Alito.
9 The -- the ones I was referencing earlier.
10 Obviously, the State cannot impose conditions
11 that themselves would be unconstitutional, such
12 as race-based conditions, for example.

13 JUSTICE ALITO: Okay.

14 MR. PURCELL: But our big -- sorry, go
15 ahead.

16 JUSTICE ALITO: What else?

17 MR. PURCELL: Well, as -- as I said
18 before, the State can't impose conditions that
19 would violate the Presidential Qualifications
20 Clause. You know, other constitutional
21 limitations might come into play if -- if the --
22 you know, I mean, it's hard to imagine what --
23 but -- but -- but our basic point is that if a
24 condition is constitutional, and we know this
25 condition is, then that condition can be

1 enforced. That's the key question, is -- is the
2 condition itself constitutional.

3 JUSTICE ALITO: Could a state require
4 electors to cast their votes for the candidate
5 chosen in a resolution passed by the state
6 legislature after the popular vote is cast?

7 MR. PURCELL: No, Your Honor. That's
8 -- that's what I was trying to say in answer to
9 the Chief Justice's question as well. That
10 would violate the public's fundamental right to
11 vote, once they have been granted that right by
12 the State, and -- and violate the fundamental --
13 their fundamental right to vote.

14 JUSTICE ALITO: Well, I didn't quite
15 understand that answer. Is a state obligated to
16 choose electors through popular vote?

17 MR. PURCELL: No, Your Honor. As --
18 as -- at the beginning, in the early days, the
19 legislature can choose electors directly if it
20 wants. And in -- in that circumstance, the
21 legislature can impose and enforce a pledge.

22 But once the elector -- sorry, once
23 the legislature has given the power to -- to
24 vote to the public, the public now has a
25 fundamental right to vote and to have their

1 votes counted equally and -- as this Court has
2 said in a number of cases. And so -- and so the
3 -- the legislature can't then override that vote
4 after the fact.

5 JUSTICE ALITO: Why -- why is that so?
6 Could Washington say we're going to choose five
7 wise people -- I -- I'm sorry, 12 wise people to
8 be our electors and we are going to allow the --
9 the public to advise them through a -- a -- a
10 popular vote, to give them the sense of what the
11 people of Washington want? Would that be
12 unconstitutional?

13 MR. PURCELL: If the legislature made
14 clear that the public vote was entirely
15 advisory, then -- then -- then, you know, I
16 think that presents a tough question, but I
17 think they probably could do that.

18 You know, the -- the key compromise of
19 the Constitution as to electors was to leave it
20 to states to decide exactly what authority they
21 would have. States were free to decide to leave
22 electors with discretion, as some states did
23 then and as some states still do today.

24 But states were also free to choose
25 electors on the basis of who they had pledged to

1 support, as -- as many states did from the
2 beginning, and as -- as the majority --

3 JUSTICE ALITO: What -- what is the
4 difference --

5 MR. PURCELL: -- of states do now.

6 JUSTICE ALITO: -- between -- what is
7 the difference between that setup and the setup
8 that Mr. Lessig says is required?

9 MR. PURCELL: Well, Your Honor, the --
10 the -- the crucial difference is that Lessig is
11 saying there's nothing the states can do to
12 remove or -- or sanction electors after
13 appointment for any reason, and we are saying
14 that we know from history and we know from Ray,
15 and the other side even admits, that this
16 condition of -- of pledging to support the
17 candidate preferred by the State's voters is a
18 conditional condition. And that condition can
19 be enforced just like any other constitutional
20 condition. That's the key -- that's our key
21 point.

22 And states have been removing and
23 replacing electors for violating conditions of
24 appointment since before 1800. States have been
25 choosing electors specifically because of who

1 they pledge to support since the very beginning.

2 If the other side were right about how
3 electors were supposed to operate, what you
4 would have seen historically is electors trying
5 to convince legislatures and the public to
6 choose them because of their great wisdom and
7 knowledge. They would have been saying: Choose
8 me. I will -- I will decide well on your
9 behalf.

10 And that is never ever how American
11 presidential elections have operated. Electors
12 were chosen because of the candidate they had
13 promised to support. So to adopt their view
14 would be to radically change, to radically
15 change, how American presidential elections have
16 always operated.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, I'm
20 curious about your views on the Tenth Amendment.
21 The other side points out that you never raised
22 it. Two of my colleagues have referred to it.

23 But am I assuming correctly that
24 Thornton sort of puts a quash on relying on the
25 Tenth Amendment in a situation like this? This

1 is a new procedure that Congress intended, so
2 the states can't say that they expected or
3 reserved a right in something they never knew
4 they had?

5 MR. PURCELL: Well, Your Honor, we
6 didn't explicitly argue the Tenth Amendment, but
7 we don't -- we don't think we need to rely on
8 it, and we -- we support our colleagues in
9 Colorado in making that argument.

10 We think that the -- the -- the
11 fundamental premise of the Constitution is that,
12 you know, states have -- the federal government
13 is one of the enumerated powers; states have
14 powers unless they're taken away. Nothing in
15 the Constitution restricts state authority to
16 impose conditions on appointment of electors and
17 to enforce them.

18 And even if that weren't the case, the
19 text itself gives states power to appoint
20 electors. That phrase -- this Court has
21 repeatedly said the appointment power --
22 inherent in that power is the removal of power,
23 unless there's contrary language. And the
24 original understanding has always been that the
25 appointment power of electors included removal

1 power, as you see in the early statutes.

2 So -- so, you know, I don't -- I don't
3 think the Court needs to rely on the Tenth
4 Amendment to resolve this case. I think -- but
5 -- but -- but I think it -- certainly, the
6 background principle that states have powers
7 unless they're limited by the federal
8 Constitution is relevant and -- and supports our
9 side.

10 JUSTICE SOTOMAYOR: Now you rely on a
11 default rule in your brief, which you haven't
12 mentioned yet, which is the power to appoint
13 includes the power to remove.

14 But all of the examples that you rely
15 on are vertical appointments, when an official
16 within one branch of government appoints a
17 subordinate in the same branch for an indefinite
18 period, and the idea is, I -- if I appoint you,
19 I should be able to get rid of you if, in your
20 service to me, you are doing something wrong.

21 But, here, the State is appointing a
22 voter to do something that most people think of
23 as requiring judgment and -- and -- judgment and
24 some measure of freedom, which is the power to
25 cast a ballot. The other side, in its brief,

1 points out that there were other words that
2 would have connoted -- that would have connoted
3 something different than elector, like a
4 delegate. You appoint a delegate to cast a vote
5 for you.

6 But that's not what Congress chose.
7 In appointing an elector, an elector has a sense
8 of someone who's going to vote. So how -- how
9 can you say that that tradition within the
10 executive branch of the power to remove is
11 controlling here?

12 MR. PURCELL: Justice Sotomayor --
13 Sotomayor, there's really three fundamental
14 problems with the electors' argument on that
15 front. There's a -- there's a textual problem,
16 a historical problem, and a --

17 JUSTICE SOTOMAYOR: Well, I don't
18 think it's their problem. I think it's your
19 problem.

20 MR. PURCELL: Well, like I said, they
21 -- none -- none of the cases say anything like
22 what they're -- they have drawn this vertical
23 appointment language. Well, first of all, it
24 first appears in their reply brief. In their
25 opening brief, they said that that rule -- well,

1 they didn't mention the default rule at all.
2 They suggested it was just the executive branch.

3 And then, in our response, we pointed
4 out, well, actually, there's a bunch of cases
5 from the judicial branch applying this rule.
6 And now they've invented this kind of vertical
7 rule.

8 But that rule appears nowhere in the
9 Court's cases. The Court has said, in context
10 after context, that the removal power is
11 "inherent in." It just comes along with the
12 appointment power. You said it in
13 constitutional cases, statutory cases,
14 high-level officials, low-level officials,
15 judicial branch, executive branch.

16 And even if you hadn't said that over
17 and over again, if you look at the history,
18 here, the history shows that states could remove
19 electors from the very beginning, again, from --
20 the statutes from before 1800. And -- and --
21 and so -- and the other side's theory on this
22 front also is that -- is that once the State
23 appoints the elector, they somehow become part
24 of another branch of government or -- or
25 something like that.

1 But -- but the Court has rejected that
2 idea. The Court has said that these -- these
3 electors are not federal agents or officials.
4 The Court said that very clearly in Fitzgerald
5 over a century ago.

6 So -- so their -- their -- their
7 new-found theory about so-called horizontal
8 appointments, it's just not supported by text,
9 by history, or by precedent. And -- and -- and
10 it's kind of a side show, frankly. It's just
11 not -- it's not -- it doesn't help answer the
12 question here. The Court has never drawn that
13 distinction.

14 JUSTICE SOTOMAYOR: But there is a --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Kagan?

18 JUSTICE KAGAN: General, what do you
19 view as your best textual argument?

20 MR. PURCELL: Well, Your Honor, we
21 think the best textual argument is just that
22 nothing in the Constitution limits state
23 authority over how to appoint electors or what
24 -- or whether states can impose conditions and
25 enforce them.

1 We think there's a direct grant of
2 authority in the appointment power, as -- as
3 this Court has repeatedly recognized. And we
4 think that, certainly, by the time of the
5 Twelfth Amendment, everyone understood that
6 electors were being chosen in the states because
7 they had promised to support particular
8 candidates.

9 So the idea that when the -- when the
10 framers of that amendment used the word
11 "elector," they inherently meant someone who can
12 exercise discretion is just -- it just doesn't
13 make any sense. That is not how the term was
14 being applied in any of the states. That was
15 not how they understood it.

16 And, in fact, the Framers of the
17 Twelfth Amendment quite clearly intended to --
18 to -- to embrace the system as it had developed,
19 where electors were pledging their votes and
20 states were choosing them on that basis. This
21 Court said that in *Ray* very clearly. That was a
22 key point of the Twelfth Amendment. So --

23 JUSTICE KAGAN: If I -- if I
24 understand you correctly, you're really saying
25 you don't have an affirmative textual argument.

1 What your -- what your argument is, is that the
2 Constitution doesn't say and in -- in -- in that
3 -- if the Constitution doesn't say, we should
4 presume that states were meant to decide?

5 MR. PURCELL: Well, let me be more
6 precise, Justice Kagan. I don't -- I think we
7 -- that -- that -- that starting principle is
8 right, that we -- that it should be the other
9 side's burden to show that we can't do this.
10 But -- but the power to appoint does include the
11 power to remove, and so there is a textual
12 grant.

13 And what I was getting at at the end
14 there was just that the central premise of the
15 other side's argument is that these words,
16 "elector" -- especially "elector" -- require the
17 exercise of discretion. And that's not true as
18 a textual matter, and it's absolutely not true
19 as a historical matter.

20 And so that's, I guess, the -- the
21 point that I was trying to get at there, was
22 that it's their argument, really, that asks you
23 to ignore the original understanding and early
24 practice, and they're asking you to do that
25 based on words that -- meanings of these words

1 that just are not how the framers and their
2 contemporaries understood them.

3 JUSTICE KAGAN: Isn't the idea that
4 the power to appoint includes the power to
5 remove highly contextual, that it depends on a
6 certain understanding of control, which is
7 exactly the question here? It does -- you're
8 sort of assuming the conclusion by saying that.

9 MR. PURCELL: I disagree, Your Honor.
10 The Court has said repeatedly that the power to
11 appoint includes the power to remove, unless
12 there is text limiting that power. And the
13 power -- and that limitations on the power, the
14 Court has said, will not be implied.

15 And, again, the Court has said that in
16 many, many, many contexts. And really the only
17 time the Court has found otherwise is where
18 there was explicit text limiting the removal
19 power. And so I don't -- you know, I don't want
20 to -- I don't want to overly emphasize this
21 point. I think it's at least as important that
22 when you look at the early understanding, the
23 framers and their contemporaries clearly
24 understood that states could remove and replace
25 electors, and they also clearly understood that

1 states could choose electors because of who they
2 had pledged to support.

3 So, you know, I think -- I think it's
4 the other side that really is asking you to rip
5 these words out of context and place vastly more
6 weight on them, on -- on these kind of
7 dictionary definitions untethered from how the
8 framers actually applied them.

9 You know, they're -- they're --
10 they're asking you to adopt kind of one possible
11 reading that the framers could have had of these
12 terms, but it's a possible reading that is just
13 refuted by what the framers and their
14 contemporaries actually did.

15 And it also, Your -- Your Honor,
16 Justice Kagan, it leads to the absurd
17 consequence that -- that everything that we
18 think of as the presidential election process
19 currently is really just advisory. It is all
20 largely irrelevant. It just -- it just -- you
21 know, all that matters is who the electors
22 choose. And on the other side's telling, they
23 can choose whoever they want for whatever reason
24 they want and they can't be removed even if
25 they're taking a bribe or even if they're being

1 blackmailed or even if they say in advance, I'm
2 not going to show up for the meeting.

3 It -- it just -- again, it would
4 radically change how American presidential
5 elections have always worked in our country.

6 JUSTICE KAGAN: Thank you, General.

7 CHIEF JUSTICE ROBERTS: Justice --
8 Justice Gorsuch?

9 JUSTICE GORSUCH: Counsel, I
10 understand your argument is that a thousand
11 dollar fine doesn't diminish or negate the fact
12 that the elector here is voting and has in some
13 real sense a right to vote and it -- it's being
14 honored.

15 But what about the new law that both
16 Washington's adopted and I know Colorado has
17 too, the Uniform Faithful Presidential Electors
18 Act, and I know you're going to tell me it's not
19 before us, but put that aside for the moment if
20 you will for purposes of this question, that as
21 I understand it, and you can correct me, that if
22 a -- a -- an elector renders a faithless vote,
23 that automatically removes him from office as a
24 matter of law, and, in fact, votes aren't even
25 counted until the Secretary of State has

1 collected the requisite number of ballots,
2 marked for the right people, based on
3 preexisting pledges.

4 Is that consistent with the
5 Constitution's prescribed order of appointment,
6 meaning in voting, it seems like the voting
7 comes first and then the appointment under the
8 uniform law, and is it also consistent with the
9 federal Electoral Count Act?

10 If -- if -- if you could just speak to
11 me about those questions, I'd be grateful.

12 MR. PURCELL: Certainly, Justice
13 Gorsuch. It -- it is consistent because the way
14 that the laws work is that the elector who seeks
15 to violate the conditions of their appointment
16 by casting a faithless ballot is removed before
17 they can vote. They're not removed before
18 they're appointed. They are initially
19 appointed. But then they're removed when they
20 violate the condition.

21 And -- and then they're replaced and
22 another elector is appointed who will follow the
23 law that they promised to -- to follow and --
24 and keep their promise and vote as directed. So
25 the order is -- is -- is proper. It's -- it's

1 appointment. It -- it -- and, you know,
2 depending when in the process the elector
3 announces their intentions, they're removed and
4 they're replaced by someone else who votes in
5 accordance with state law.

6 And to come back to my example from
7 earlier if I can, there's really no meaningful
8 difference between the person who says, I don't
9 like our nominee, I'm not showing up for the
10 meeting, and one who says, I don't like our
11 nominee, I'm showing up for the meeting and I'm
12 voting for somebody else.

13 The State -- both -- both people have
14 violated valid conditions of appointment, both
15 people can be removed by the State and replaced
16 by someone else.

17 The other side's position is neither
18 of those people can be replaced. And -- and --
19 and even the person who says, I'm not showing up
20 because, you know, somebody gave me two million
21 dollars to not show up because that might affect
22 the outcome of the election, the other side says
23 that person can't be replaced. That just makes
24 absolutely no sense historically, textually, or
25 practically.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

6 Good morning, General Purcell. If
7 you're right about the electors not having this
8 kind of discretion from the Constitution, I
9 wanted to get your take on a provision of
10 Article II, Section 1 that says, no senator or
11 representative or person holding an office of
12 trust or profit under the United States shall be
13 appointed an elector.

14 What is the purpose you see of that
15 provision if your theory of the electors is
16 correct?

17 MR. PURCELL: Yes, Justice Kavanaugh.
18 Thank you for that question.

19 So the framers did not spend a whole
20 lot of time talking about the exact role of
21 electors, and they certainly did not agree on
22 exactly what role they would play, but one thing
23 that they were clear on was they did not want
24 Congress choosing the President.

25 And so they specifically prohibited

1 members of Congress from serving in that role.
2 But other -- but they left it to states to
3 decide whether electors would serve as kind
4 of -- you know, as Hamilton envisioned them, as
5 the kind of sage chooser on behalf of the states
6 or, as many other framers wanted, the electors
7 to be agents of the people, to -- to -- to act
8 on the people's behalf and for the people to
9 choose them and for them to be bound to that
10 outcome, to be bound to the people's preference.

11 So -- so, yes, they imposed that
12 limited limitation on who could serve, and --
13 and that is, you know, another example of a
14 constitutional condition limiting states'
15 authority. But, again, it just goes to the
16 point that if -- if the state can set a
17 condition to serve as an elector, that condition
18 can be enforced.

19 JUSTICE KAVANAUGH: Mr. Lessig says
20 that the framers considered various modes,
21 obviously, and you agree and history shows they
22 considered the states doing it directly, or at
23 least that was an idea out there through the
24 legislatures or governors. They considered
25 Congress, as you just pointed out, but there was

1 a separation of powers there, problem there.
2 They didn't necessarily want the new President
3 to be too dependent on Congress. A popular
4 election was -- was not adopted.

5 And so they came up instead with what
6 Mr. Lessig describes as a indirect mode of
7 selection with the model of electors who would
8 exercise, as he sees it, their own discretion
9 and independent judgment to pick the best person
10 to be President, the best person to head the
11 executive branch.

12 And he says that mode remains
13 indirect, consistent with the framers' choice,
14 only if the electors retain a legal discretion.
15 So, on that overall structure that Mr. Lessig
16 sets up and describes the history, why is he not
17 right, given that they rejected all these other
18 modes?

19 MR. PURCELL: Your Honor, the number
20 -- the framers had a number of concerns about
21 direct elections that included logistical
22 concerns and concerns about the impact on the
23 influence of southern states, but, ultimately,
24 they settled on an approach that left it to the
25 states to decide, as this Court said in

1 McPherson, the broadest possible power of
2 determination as to how to appoint electors and
3 what role they would play.

4 And -- and the -- the options open to
5 states certainly included both leaving electors
6 with discretion, as some states still do today,
7 and states choosing electors specifically
8 because they have pledged to support a
9 particular candidate. And, certainly, by the
10 time of the Twelfth Amendment, that had become
11 the virtually universal practice in states.

12 And the framers of the Twelfth
13 Amendment well understood that and -- and
14 adopted the -- the language of the Twelfth
15 Amendment to facilitate that. And if you need a
16 historical example, if that would be helpful,
17 in -- in the election of 1804, right after
18 adoption of the Twelfth Amendment, it -- it
19 operated just as they had expected. The parties
20 put forward presidential and vice presidential
21 tickets, electors were chosen throughout the
22 country because they supported those tickets,
23 and every single elector in the country voted
24 for the party ticket preferred by their state's
25 voters.

1 And -- and the meetings of the
2 electors, even in 1804, were in many states mere
3 formalities. They -- they filled out
4 pre-prepared ballots. They did not discuss or
5 deliberate. And Congress did not question a
6 single one of those ballots or their validity.

7 So that just shows that by the time of
8 the Twelfth Amendment, as this Court has said
9 repeatedly, the role of electors was simply to
10 transmit the vote of the state for President.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. Would you like to take a minute to
14 wrap up?

15 MR. PURCELL: Yes, thank you, Mr.
16 Chief --

17 MR. LESSIG: Yes, I would.

18 MR. PURCELL: Thank you, Mr. Chief
19 Justice.

20 Every four years, over 100 million
21 Americans participate in our country's
22 presidential election process. They attend
23 rallies, they watch debates, and, ultimately,
24 they go to the polls.

25 More Americans participate in this

1 election than in any other democratic process in
2 our system of government. But, under
3 Petitioners' theory, this entire process is
4 irrelevant and always has been because all that
5 matters is who the electors prefer.

6 On their view, the electors can choose
7 whoever they want to be President, regardless of
8 any voluntary commitments they made to secure
9 their position, regardless of how their state
10 voted, and regardless of whether they are being
11 bribed or blackmailed for their vote.

12 That is not the law. The
13 Constitution's text, the original understanding,
14 this Court's precedent, and our country's
15 historical practice all demonstrate that states
16 are allowed to require presidential electors to
17 vote for the candidate chosen by the state's
18 voters and to enforce that requirement.

19 We ask you to reaffirm that principle
20 today.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 General.

24 Mr. Lessig, you have two minutes for
25 rebuttal.

1 REBUTTAL ARGUMENT OF L. LAWRENCE LESSIG
2 ON BEHALF OF THE PETITIONERS

3 MR. LESSIG: Thank you, Mr. Chief
4 Justice.

5 Your -- Your Honors, the State has
6 relied upon early statutes which it says affirm
7 the power of the state to remove electors
8 because they violate a condition. Absolutely
9 none of those statutes have anything to do with
10 the conditions on voting.

11 Those statutes related to the
12 appointment power. They were incidental to the
13 appointment power. So you can see obviously
14 that, incidental to the appointment power, the
15 State has the authority to make sure someone --
16 someone shows up to vote. And we believe that
17 general laws apply to electors as well. This is
18 not a general immunity. But they have no power
19 to control the vote and they never have
20 exercised that.

21 The State has asserted that because
22 they appoint the electors, they get to control
23 the electors. But, in fact, the authority they
24 rely on is quite explicit. Myers, at page 119,
25 says the reason for this is that those in charge

1 of and responsible for administering functions
2 of government need the authority to control them
3 by removing them. That was the reason for the
4 principle.

5 But there is nothing in the founding
6 to suggest that the framers imagined the states
7 administering the Electoral College. That's why
8 the states don't appear in the Twelfth Amendment
9 at all.

10 And, finally, Your Honor, if you
11 recognize this power, how do you cabin it? If
12 you find the State has the power to regulate
13 electoral votes, may the State forbid the
14 elector from voting for a candidate who has not
15 visited the state, who has not released his tax
16 returns, as bills in New Jersey and New York
17 purport to do, or has not pledged to appoint
18 justices who will uphold Roe?

19 Open this door and there are an
20 endless list of partisan opportunisms that will
21 tempt the states. Throughout history, there
22 have been amendments to change the elector
23 discretion, every single time recognizing there
24 was that discretion.

25 For the State of Washington, in 1977,

1 to discover it is to show they were chumps
2 believing they didn't have this power. And we
3 believe the power has always been with electors
4 to exercise discretion.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:15 a.m., the case
9 was submitted.)

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