No. 19-

IN THE
Supreme Court of the United States

PETER BRET CHIAFALO, LEVI JENNET GUERRA, AND ESTHER VIRGINIA JOHN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A Washington State law threatens a fine for presidential electors who vote contrary to how the law directs. RCW 29A.56.340 (2016). Petitioners are three 2016 presidential electors who were fined under this provision solely because they failed to vote as the law directs, namely for the presidential and vice-presidential candidates who won a majority of the popular vote in the State.

The question presented is whether enforcement of this law is unconstitutional because:

(1) a State has no power to legally enforce how a presidential elector casts his or her ballot; and

(2) a State penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is available at 193 Wash. 2d 380 (2019) and is reproduced in the Appendix at App. A.

The oral decision of the Washington Superior Court is unpublished and is reproduced in the Appendix at App. B. An accompanying Order is reproduced in the Appendix at App. C.

The administrative order imposing the fines on Petitioners is unpublished and is reproduced in the Appendix at App. D.

JURISDICTION

The decision and judgment of the Washington Supreme Court was entered on May 23, 2019. On August 5, 2019, Justice Kagan granted an extension of time to file this Petition to October 20, 2019 (No. 19A138). This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the U.S. Constitution provides in relevant part that "[e]ach 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."

The Twelfth Amendment provides in relevant part that "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; 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."

RCW 29A.56.340 (2016) provides in relevant part that "[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars."

Additional relevant constitutional and statutory provisions are reproduced in the Appendix.

INTRODUCTION

This petition presents a clear split in authority between state and federal courts on a critically important question of federal constitutional law: whether, after appointment, a state may by law direct how presidential electors cast their votes for President and Vice President, and enforce that direction through legal penalties. This petition presents this unresolved question cleanly and in a context where resolution of the question would not directly affect the outcome of a presidential election.

The Washington Supreme Court held that states have the power to direct how electors perform their duties after appointment, and that the State may enforce that power through a fine. Petitioners believe that the fines in this case are the very first imposed on any presidential elector in the history of the Republic. Yet Petitioners are not the first electors to cast their ballots independently. Indeed, from the birth of the Republic, electors have cast their ballots contrary to legislative direction or expectation without penalty or legal consequence.

Just two months after the Washington Supreme Court's decision, the Tenth Circuit reached the exact opposite conclusion in another case involving 2016 presidential electors. Contrary to the Washington Supreme Court's decision below, the Tenth Circuit held that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion." *Baca v. Colorado Dep't of State*, 935 F.3d 887, 955 (10th Cir. 2019). Unlike the Washington Supreme Court, which authorized a state's unprecedented restriction of elector freedom, the Tenth Circuit found

unconstitutional Colorado's attempt to control the vote of its electors.

This Court should resolve this conflict now, before it arises within the context of a contested election. In the most recent presidential election, ten of the 538 presidential electors either cast presidential votes for candidates other than the nominees of their party,[1] or attempted to do so and were replaced with other electors on the day of voting.[2] A swing by that same number of electors would have changed the results in five of fifty-eight prior presidential elections. And as the demographics of the United States indicate that contests will become even closer, there is a significant probability that such swings could force this Court to resolve the question of electoral freedom within the context of an ongoing contest.

The Supreme Court should avoid that dangerous possibility. This case gives the Court the rare opportunity to decide a constitutional question related to presidential selection in a non-emergency setting. In contrast to this Court's most recent encounters with the law of presidential electors, such as *Ray v. Blair*, 343 U.S. 230 (1952), and *Bush v. Gore*, 531 U.S. 98 (2000)—both of which were decided in mere days, by necessity—this appeal would give the Court ample time to consider important evidence from the Founding and across the Nation's history. And this case permits the Court to issue a decision outside of

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[1] They were the three electors in this case, another Washington elector, a Democratic elector in Hawaii, and two Republican electors in Texas. *See* FairVote, "Faithless Electors," at https://perma.cc/CL6W-HGQ5.

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

the white-hot scrutiny of a contested presidential election.

There is no reason to allow this direct split to linger. No other court could resolve this question before the next election. This Court would therefore gain nothing from waiting to grant a case on this issue and letting the split stand—but the consequences of delay could be severe.

On the merits, the Washington Supreme Court is mistaken. As the Tenth Circuit correctly held, the original text of the Constitution, as amended by the Twelfth Amendment, secures to "electors" the freedom to vote as they choose. Likewise, the structure of the Constitution, as interpreted by this Court over our 230-year history, prohibits the states from interfering with the exercise of this plainly federal function. The decision below should be reversed.

Finally, although it may be appropriate to grant certiorari in both this case and the Tenth Circuit's *Baca* case (if requested), this petition unquestionably presents the Court with an appropriate vehicle to resolving this question. Whether or not both cases should be granted, certainly the instant case should.

STATEMENT OF THE CASE

I. Legal Background

A. The selection of electors

The Constitution does not provide for direct election of the President and Vice President by the people. Instead, each State "appoint[s]" a number of presidential electors equal to the total number of the State's Members of the House and Senate. U.S. CONST. art. II, § 1; U.S. CONST. amd. XII. While a state's power over elector appointment is "plenary," *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that power is also constrained by other constitutional provisions, *see Williams v. Rhodes*, 393 US 23, 29 (1968). And once appointed, presidential electors "exercise *federal functions* under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (emphasis added).

Washington, like 47 other states and the District of Columbia, appoints a slate of presidential electors from the political party of the candidates for President and Vice President that receive the most popular votes in the State.[3] *See* RCW 29A.56.310 *et seq.* (2016).[4] Once

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[3] Maine and Nebraska use a hybrid system under which they award one elector to the popular vote winner of each congressional district in the state and two electors to the statewide winner.

[4] Several of the state-law provisions at issue here were amended in 2019; thus, all Washington state statutory references are to the versions in effect in 2016. *See* 2019 Wa. S.B. 5074 (enacted Apr. 26, 2019). Those amendments do not affect the fines levied here and thus do not affect this Court's jurisdiction in any way. In fact, the amendments are an attempt by the State to exert

appointed, electors meet in the respective states "on the first Monday after the second Wednesday in December next following their appointment," which, in the most recent election, was December 19, 2016. 3 U.S.C. § 7.

B. Casting and counting electoral votes

When the electors meet around the country at the appointed time, the Twelfth Amendment directs how presidential electors are to cast, tabulate, and transmit their votes.

In particular, the Amendment requires electors to "name in their ballots the person voted for as President, and in distinct ballots the person for as Vice-President." U.S. CONST. amd. XII. The electors themselves are then required to "make distinct lists" of the "persons voted for as President" and "Vice-President," to which the electors then add the "number of votes for each." *Id.* The electors then "sign and certify" the lists and "transmit" them "sealed to the seat of the government of the United States, directed to the President of the Senate." *Id.* The President of the Senate is then required to open and count all of the certificates in the presence of the House and the Senate. *Id.*

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more control over the votes of presidential electors than it had in 2016, not less, because the amendments purport to allow the State to remove an elector who does not cast a ballot for the ticket that the electors are expected to support. *See* Wa. SB 5074 § 7 (to be codified at RCW 29A.56.___). Thus, a decision in this case would determine the constitutionality of both the 2016 law and the revised law, as well as similar laws in over half the states that purport to dictate the votes of electors in one way or another. *See* FairVote, "State Laws Binding Electors," at http://bit.ly/StateBindingLaws.

Federal statutory law mirrors the Twelfth Amendment. First, "as soon as practicable after the conclusion of the appointment of the electors," state executives must tell the Archivist of the United States who the electors are. 3 U.S.C. § 6. Next, at the appropriate place and time, the law requires presidential electors to vote "in the manner directed by the Constitution," *id.* § 8, and then adds additional detail to what must occur after the electors vote. In particular, federal law provides that the "electors shall make and sign six certificates of all the votes given by them." *Id.* § 9. As in the Twelfth Amendment, the electors themselves are then required to certify their own vote, seal up the certificates, and send one copy to the President of the Senate; two copies to the Secretary of State of their state; two copies to the Archivist of the United States; and one copy to a judge in the district in which the electors voted, *id.* § 11. The "executive of the State" is to furnish to the electors a list of electors that must be attached to their certificates of vote. *Id.* § 9. The only active role mentioned for a state's Secretary of State is to transmit to the federal government one of the Secretary's copies of the certificate of vote. Even that role, however, is only conditional: only if the electors themselves fail to send a copy and a federal official requests a copy does the Secretary of State then have a role to play. *Id.* § 12.

Thus, in the ordinary case, the appointment of electors is "conclu[ded]" well before the electoral vote, 3 U.S.C. § 6, and neither the Constitution nor federal law envision *any* role for *any* state official during the balloting by electors. There is no mechanism for state officials to monitor, control, or dictate electoral votes. Instead, the right to vote in the Constitution and

federal law is personal to the electors, and it is supervised by the electors themselves.

The final step in the formal process of presidential election occurs on January 6 following each presidential election. On that day, Congress assembles in a joint session to open the certificates and count the electoral votes. *Id.* § 15. If an electoral vote is questioned, members of each House can initiate a formal debate and then vote on the validity of any electoral vote. *Id.*

A formal challenge to an independent electoral vote has been debated only once in the Nation's history, in 1969. In that instance, Congress decided that the anomalous vote for George Wallace, rather than Richard Nixon, should be counted, even though the elector was a Republican elector. *See* 115 Cong. Rec. 246 (Senate vote of 58-33 to count the electoral vote); *id.* at 170–71 (House vote of 228-170). In fact, Congress has accepted the vote of every vote contrary to a pledge or expectation in the Nation's history that has been transmitted to it—a total of more than 150 votes across twenty different elections from 1796 to 2016. *See* FairVote, "Faithless Electors," at https://perma.cc/CL6W-HGQ5.

II. This Case

A. Petitioners are nominated as electors and perform their duties under the Constitution.

In the summer of 2016, Petitioners Peter Bret Chiafalo, Levi Jennet Guerra, and Esther Virginia John were nominated as presidential electors for the Washington Democratic Party for the 2016 Presidential Election. App. 3a. On November 8, 2016,

Hillary Clinton and Tim Kaine, the Democratic nominees for President and Vice President, received the most popular votes in the State, which meant that Petitioners and their fellow Democratic electors were appointed to serve as Presidential Electors for the State of Washington. App. 3a.

On December 19, 2016, presidential electors across the country met in their respective states to cast their electoral votes for President and Vice President. *See* 3 U.S.C. § 7 (setting day for meeting of presidential electors). Washington's presidential electors met in the state capital, Olympia.

State law instructs Washington's presidential electors to "perform the duties required of them by the Constitution and laws of the United States." RCW 29A.56.340; *see also* 3 U.S.C. § 8 (elector voting must occur "in the manner directed by the Constitution"). Nonetheless, despite this recognition that electors perform a federal duty, Washington law also attempts to control the electors' votes. Specifically, State law provided that "[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars."[5] RCW 29A.56.340.

Although each Washington presidential elector was a member of the Democratic Party, Petitioners did not vote for the nominee of their party. Instead, each Petitioner voted for Colin Powell for President, and for Maria Cantwell (Guerra), Susan Collins (John), or

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[5] In connection with their nomination as electors, each Petitioner had also previously been required to sign and file with the Secretary of State a pledge to cast an electoral vote for the nominees of the Democratic Party. App. 2a & n.1.

Elizabeth Warren (Chiafalo) for Vice President. App. 4a, 39a. The State transmitted these votes to Congress, which accepted Petitioners' votes in the official tally of electoral votes. 163 Cong. Rec. H185–90 (daily ed. Jan. 6, 2017) (counting and certifying election results).

B. Petitioners are fined because of their votes and appeal the fines.

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

Petitioners appealed their fines to an Administrative Law Judge and argued the fines were unconstitutional. The ALJ was without power to consider the constitutional objection, and accordingly upheld the imposition of the fine. App. 41a–43a.

Petitioners then appealed the administrative determination to the State Superior Court. The Superior Court held an oral argument during which it recognized the importance of the constitutional issues presented by this case, but the court ultimately issued a brief oral decision rejecting Petitioners' appeal. App. 30a–32a.

C. The Washington Supreme Court hears the case on direct appeal.

Following the Superior Court's decision, Petitioners requested that the Washington Supreme Court hear the case directly. Due to the importance of

the issue, the State agreed that the State Supreme Court should accept the case on direct review. On direct review, the Washington Supreme Court affirmed the Superior Court and upheld the issuance of the fines in an 8-1 opinion issued on May 23, 2019.

The majority "acknowledge[d] that some framers had intended the Electoral College electors to exercise independent judgment." App. 22a. But the court argued that nothing in the Constitution "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." App. 19a. It instead found the state's power to appoint electors under Article II, as interpreted by *Ray v. Blair*, was sufficiently broad that the appointment power could also be invoked to "impose a fine on electors for failing to uphold their pledge." App. 20a.

The court recognized that, constitutionally, presidential electors perform a "federal function" that may be insulated from state interference, but argued that "the Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors." App. 19a. And the Court reasoned that "nothing in article II, section 1 [of the Constitution] suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." App. 19a.

Finally, the majority rejected Petitioners' argument that the State's interference violated the First Amendment. The court contended that "electors act by authority of the State," and so Petitioners had no expressive rights to assert. App. 26a.

Justice Steven C. González dissented. Quoting an unchallenged historical statement from Justice

Jackson's dissenting opinion in *Ray*, Justice González said "'[n]o one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the [individuals] best qualified for the Nation's highest offices.'" App. 28a–29a (quoting 343 U.S. at 232 (Jackson, J., dissenting)). He then observed that there is a "meaningful difference between the power to appoint and the power to control," and a state has only the former power under the Constitution. App. 29a. This "leav[es] the electors with the discretion to vote their conscience." App. 29a.

D. The Tenth Circuit disagrees in *Baca*.

While the Washington courts were considering this case, litigation presenting the identical issue was proceeding in federal district court in Colorado and then the Tenth Circuit. The other case arose from Colorado's separate attempt to control the electoral votes of its 2016 electors—in particular, the Colorado Secretary of State's discarding of an electoral vote cast for John Kasich by an elector nominated by the Democratic Party and expected to vote for Hillary Clinton.

Less than two months after the Washington Supreme Court in this case held that "nothing in the [Constitution] suggests that electors have discretion" in casting their votes for President and Vice President, App. 19a, the Tenth Circuit reached the opposite conclusion and found that the electors' rights were violated when a state official infringed upon their right to vote freely for the candidate of their choosing. Specifically, the Tenth Circuit held that "Article II and the Twelfth Amendment provide presidential electors

the right to cast a vote for President and Vice President with discretion." *Baca*, 935 F.3d at 955.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case meets all the conventional requirements for certiorari. *See* Supreme Court Rule 10(a). The Washington Supreme Court's decision that states may regulate the vote of an elector either directly or indirectly conflicts with the Tenth Circuit's contrary decision, issued only two months later, that the Constitution gives electors discretion to vote for whomever they wish. The issue is undeniably important: presidential elections in the Electoral College will be increasingly close, and could literally turn upon whether electors have a constitutionally protected discretion. This case is the ideal vehicle to decide the issue, because this appeal cleanly presents the question outside of a heated political contest. There is no guarantee that the next opportunity to decide this question will arise in advance of a contested presidential election. Finally, on the merits, the Washington Supreme Court's position that a state may interfere with electors' votes is at odds with the plain text, structure, and original meaning of the Constitution, as well as the history of presidential Electoral College voting. This Court should grant the petition and, upon hearing the case on the merits, reverse.

I. The Decision Below Directly Conflicts With A Recent Decision Of The Tenth Circuit And Other Decisions.

The petition presents a direct split in legal authority between the federal courts of appeal and

Washington's court of last resort. Both Washington and Colorado have laws—as do a majority of states—that require their respective electors to vote for the candidates who had won the popular vote in the state. App. 2a; *Baca*, 935 F.3d at 901. In both states, at least one elector voted for a candidate who did not win the popular vote in that state. App. 3a–4a; *Baca*, 935 F.3d at 901. And in both states, the electors were penalized for their independent votes: the Washington electors were fined $1,000, while the Colorado elector had his vote discarded and was referred for perjury prosecution. App. 4a; *Baca*, 935 F.3d at 914. Yet, despite hearing constitutionally indistinguishable cases, the courts reached opposite conclusions. The Supreme Court of Washington upheld the fines as constitutional on the ground that "nothing in article II, section 1 suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." App. 19a. Conversely, the Tenth Circuit held that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion." *Baca*, 935 F.3d at 955. Only this Court can reconcile these conflicting decisions.

A. The reasoning and conclusions of the Washington Supreme Court and Tenth Circuit are irreconcilable.

The decisions of the Washington Supreme Court and the Tenth Circuit are opposed on every material point.

State v. federal authority. Both courts acknowledge, as they must, that electors exercise a "federal function" when they "vote by ballot" for candidates for President and Vice President. App. 10a, 23a; *Baca* 953 F.3d at

907. This Court has repeatedly described Electors as exercising a "federal function." *Burroughs*, 290 U.S. at 545; *see also Ray*, 343 U.S. at 224 (noting that "presidential electors exercise a federal function in balloting for President and Vice-President" and comparing the "federal function" of a presidential elector to "the state elector who votes for congress[persons]"); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (same, quoting *Burroughs*, 290 U.S. at 545). That characterization is obvious.

Yet that is where the agreement ends: The courts are directly split on whether this Court has already resolved the question of elector freedom in its prior decisions; the import of the electors' undisputed exercise of an independent federal function; and on the appropriate method of interpreting the constitutional text to answer this important question.

Whether Ray v. Blair *resolves the question*. The two courts initially disagreed in their interpretation of this Court's only encounter with any aspect of elector discretion: *Ray v. Blair*, 343 U.S. 230 (1952). In *Ray*, as a condition of their appointment, this Court permitted a state to require electors to pledge to support the nominee of their party. 343 U.S. at 231. That conclusion makes perfect sense of the states' "appoint[ment]" power. But the Court expressly noted that such "promises" may be "legally unenforceable" because they could be "violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college." *Id.* at 230 (citation omitted).

The Washington Supreme Court ignored this Court's expressly reserved question and read *Ray*

broadly to "dispose[] of this question [of elector discretion]." App. 24a. The court said *Ray* stands for the broad idea that "the Twelfth Amendment does not demand absolute freedom of choice for electors." App. 24a. It therefore found that *Ray* "rejects unfettered elector discretion." App. 24a n.9.

The Tenth Circuit disagreed. It thought that *Ray*'s holding was "narrow." *Baca*, 935 F.3d at 935. While *Ray* recognized a state's right to determine how electors are appointed, the Tenth Circuit wrote that "*Ray* does not address restrictions placed on electors *after appointment* or actions taken against faithless electors who have performed their federal function by voting for a different presidential or vice presidential candidate than those they pledged to support." *Id.* at 936 (emphasis added). In contrast to the Washington Supreme Court, the Tenth Circuit claimed that *Ray* in fact "leaves open the relevant enforcement question." *Id.*

While the majority in Washington and the majority in the Tenth Circuit were on opposite sides of the same issue, the succinct dissent in the Washington Supreme Court employed a similar line of reasoning as the Tenth Circuit. Like the Tenth Circuit, the dissent in Washington recognized that "*Ray v. Blair* concerns only the broad authority to appoint electors . . . but did not address the elector's discretion" once appointed. App. 28a. Because "[t]he Constitution provides the State only with the power to appoint," that "leav[es] the electors with the discretion to vote their conscience." App. 29a. The Tenth Circuit's agreement

with the Washington dissent—and not the majority—creates a direct and irreconcilable split.[6]

The ability of states to interfere with an independent federal function. The two courts also took diametrically opposed views of the control that state officials can exercise over officials exercising an independent federal function. The Washington Supreme Court determined that states are barred from burdening the exercise of federal functions only when states "engage in activity that was specifically conferred to the federal government." App. 18a. And because "[t]he Constitution does not limit a state's authority in adding requirements to presidential electors, indeed, it gives to the states absolute authority in the manner of appointing electors," App. 19a–20a, the Washington Supreme Court found that requiring electors to vote for a particular candidate did not violate the Supremacy Clause and did not run afoul of the proper division between state authority and an individual's exercise of a federal function under the Constitution.

The Tenth Circuit disagreed. It reasoned that "the Supremacy Clause . . . immunizes all federal functions from limitations or control by the states." *Baca*, 935 F.3d at 938. Thus—in direct contrast to the Washington Supreme Court's view that any state interference with voting not expressly prohibited by the Constitution was permitted—the Tenth Circuit held that a state could interfere with elector voting "only if [that power is] expressly delegated by the

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[6] One Tenth Circuit judge dissented on jurisdictional grounds but did not disagree with the court's analysis of the merits of elector discretion. *See Baca*, 935. F.3d at 956 (Briscoe, J., dissenting).

Constitution." *Id.* at 939. And since that was not the case, the interference was invalid.

The importance and meaning of constitutional text. The Washington Supreme Court undertook no detailed analysis of the relevant constitutional text. Instead of analyzing the meaning of key constitutional terms like "elector," "vote," and "ballot," either originally or today, the court instead based its decision upon the "historic reality" that most electors were expected to vote for the nominees of their party. App. 22a. In a footnote, the court addressed whether the phrase "by Ballot" implied a secret ballot, but it did not analyze other aspects of that word, nor did it discuss the meaning of the words "elector" or "vote." App. 23a n.8. Ultimately, the court concluded that the language was flexible enough to permit states to require electors to vote for particular candidates.

The Tenth Circuit reasoned completely differently. In a comprehensive opinion, the court analyzed dictionary definitions of the key text from at least five early dictionaries and said the words used "have a common theme: they all imply the right to make a choice or voice an individual opinion." *Baca*, 935 F.3d at 945. The court agreed with Petitioners "that the use of these terms supports a determination that the electors, once appointed, are free to vote as they choose." *Id.*

The upshot of this disagreement: as the law stands today, in Washington, the State may infringe on elector discretion in the next presidential election. But in Colorado, and throughout the Tenth Circuit, states may not. Only this Court can resolve this dispute and render the law of a crucial component of presidential selection consistent across the Nation.

B. The two recent cases reflect both sides of a pre-existing split.

These two recent cases address the issue of elector discretion head-on. That split alone warrants this Court's attention before the election of 2020.

Yet there has also been a longstanding divide among the courts about how to think about electors that independently warrants this Court's definitive resolution. That divide became evident as the lower courts attempted to answer this unresolved question on an emergency basis during the election of 2016. Three days before the electors voted in 2016, the Northern District of California found there were "equally plausible opposing views" on the merits of elector freedom, but it denied a request for emergency relief on prudential grounds. *Koller v. Brown*, 224 F. Supp. 3d 871, 880 (N.D. Cal. 2016). And in emergency litigation involving the 2016 Colorado electors, a Tenth Circuit panel noted that "there is language in the Twelfth Amendment that could arguably support the plaintiffs' position." *Baca v. Hickenlooper*, No. 16-1482, 2016 U.S. App. LEXIS 23391, at *13 & n.3 (10th Cir. Dec. 16, 2016). Nonetheless, the Tenth Circuit on the eve of the electoral vote denied a request for emergency relief because it thought it "unlikely" that electors' votes would actually be interfered with. *Id.* at *15 n.4.

These recent courts had trouble coming to a definitive resolution in part due to a longstanding split. Prior to 2016, the high courts of Alabama, Ohio, and Kansas had all held or implied that the Constitution requires elector independence. *Op. of the Justices*, 250 Ala. 399, 401 (1948) (rejecting Alabama state law that bound electors because the "legislature

cannot . . . restrict the right [to vote] of a duly elected elector."); *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 146 (1948) ("According to the federal Constitution a presidential elector may vote for any person he [or she] pleases for president or vice-president."); *Breidenthal v. Edwards*, 57 Kan. 332, 339 (1896) ("In a legal sense the people of this State vote for no candidate for President or Vice President, that duty being delegated to 10 citizens who are authorized to use their own judgment as to the proper eligible persons to fill those high offices.").

There has long been authority to the contrary, however, from lower state and federal courts of several jurisdictions. These court decisions tend to prize an evolved constitutional meaning based on historical practice over the text. For example, in *Thomas v. Cohen*, 262 N.Y.S. 320, 324, 326 (Sup. Ct. 1933), a New York trial judge found that an "elector who attempted to disregard" the duty of his pledge "could . . . be required by mandamus to carry out the mandate of the voters of his State." The Court in *Thomas* acknowledged that its holding contradicts "the language of the Constitution," but it held that its meaning had "ripened" over the course of dozens of elections, and the Constitution had therefore come to mean something very different from what the framers had actually ratified. *Id. See also Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748–49 (W.D. Mich. 2012) (reasoning that the states "have great latitude in choosing electors and guiding their behavior"); *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 163 (Neb. 1912) (finding that declarations by presidential electors that they would vote for the

candidates of another party constituted vacaturs of the office).

This split has persisted long enough. As mentioned, days before the electoral vote in Colorado, the Tenth Circuit predicted that it was "unlikely" an elector's vote would be interfered with. *Baca v. Hickenlooper*, No. 16-1482, 2016 U.S. App. LEXIS 23391, at *13 & n.4 (10th Cir. Dec. 16, 2016). Yet what appeared "unlikely" at the time of decision actually occurred only three days later. Because it is increasingly likely something similar will happen again, this Court should intervene now to conclusively resolve the issue so that courts are not left guessing next time around.

C. This appeal and *Baca* are not legally distinguishable.

Although this Court should grant certiorari and follow the Tenth Circuit's well-reasoned opinion to resolve this split, there is one aspect of the Tenth Circuit's opinion that was not correct. In a footnote, and in dicta, the *Baca* court asserted that there might be some legal difference between its decision and the decision of the Washington Supreme Court, because of the difference in the nature of the penalty. *Baca*, 935 F.3d at 950 n.30. Yet the suggestion that the cases are distinguishable is incorrect.

In its footnote, the Tenth Circuit first expressly said that it did "not embrace the analysis of the majority opinion in *In re Guerra*." *Id.* That understates their disagreement. In fact, as illustrated by the diametrically opposed reasoning described above, the Tenth Circuit rejected essentially all of *Guerra*'s reasoning.

The Tenth Circuit continued by noting that "the issue before the Washington Supreme Court is materially different than the question presented here: Whether after voting in the electoral college has begun, the state may remove an elector and nullify his vote." *Id.* Yet the footnote ends there. The Tenth Circuit did not give any reason why the particular sanction imposed—a civil fine in Washington, versus removal from office and referral for perjury prosecution in Colorado—impacted the constitutional analysis. Nor did it explain why the particular sanction would affect the validity of nearly identical laws that each require electors to vote for particular candidates.

In fact, there is no relevant difference. The question of whether electors have constitutional discretion is dispositive in both cases, and the two courts are split on whether that right exists under the Constitution. The particular enforcement mechanism—a fine in Washington and elector removal in Colorado—is constitutionally irrelevant. The question in both cases is state power, and each case renders state power differently. Electors are not "free" to perform their federal function if subject to a fine, just as James William McCulloch—a cashier of the federally-chartered Second Bank of the United States—was not free to perform his federal function because he was fined by the state of Maryland. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The difference may affect what vote gets transmitted to Congress; it does not affect whether a state has infringed an elector's right to vote with discretion. The Tenth Circuit has held that electors plainly have such a right, and the Washington Supreme Court has held

they plainly do not. That conflict demands this Court's review.

To Petitioners' knowledge, this Court has never upheld a law that categorically prohibits the exercise of an unfettered constitutional right merely because the sanction was not as severe as it is elsewhere. Nor can otherwise impermissible governmental restrictions stand so long as the government permits citizens to engage in the conduct and then imposes punishment after-the-fact (as in Washington) rather than intervene before or during the act (as in Colorado). To the contrary: in *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court noted that the government's imposition of a mere fine for the observation of Saturday Sabbath would be an unconstitutional penalty on the exercise of the constitutional right to free exercise of religion; to infringe the right does not require that the government physically prevent religious observance on Saturday mornings. *Id.* at 404. It follows necessarily that neither jail time nor official coercion nor rejection of the vote is required to prove a constitutional violation in this case. A fine is more than enough of a sanction to give rise to an unconstitutional interference with a constitutional freedom.

Thus, if electors have a constitutional discretion in their vote—as the Tenth Circuit has held—that discretion is infringed by a fine as much as by direct coercion. The core issue is whether presidential electors have been sanctioned at all solely for exercising an unambiguous constitutional discretion. In both cases, they have—and the two courts came out

differently as to whether that was permissible. There is thus no way to distinguish the cases.

II. The Question Presented Is Exceptionally Important And Warrants Review In This Particular Case.

There is no reason for this Court to wait any longer to resolve this entrenched split. To the contrary: this particular case presents the issue of elector freedom directly and outside the context of a partisan political battle. Because there is no guarantee this Court will have another opportunity to resolve this question prior to an election—where the outcome could be election-dispositive, and where the decision could be of monumental significance—the Court's intervention is warranted in this particular appeal.

A. This issue is exceptionally important because its ultimate resolution would make clear the rules for the Electoral College before a contested presidential election.

The courts and parties involved in this litigation all agree that this case is of exceptional importance. It is possible that a presidential election could turn on just a few disputed electoral votes cast in purported violation of state law; currently, over half the states have laws that purport to dictate the votes of electors in one way or another. *See* FairVote, "State Laws Binding Electors," http://bit.ly/StateBindingLaws. If that happened, it is not clear whether the states, citizenry, or Congress will accept those votes as valid. The country would need to figure out how to resolve such a contest over electoral votes in the midst of a heated partisan political dispute. It is not entirely

clear how that would play out—but there is a very real risk of substantial unrest, or worse, if that does happen.

This Court need not guess what that would look like, however. Instead, it need only turn to history. The election of 1876 was decided by a one-vote margin in the Electoral College following disputes about electoral results and elector slates in three states, plus the validity of a single electoral vote from Oregon. The controversy was such that the identity of the new president was not determined until March 2, 1877, two days before inauguration day. *See* William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876* 5 (2004). Rutherford B. Hayes was ultimately declared the winner with a majority of 185 electoral votes to Samuel Tilden's 184.

The late Chief Justice Rehnquist's book about the disputed 1876 election is not called *Centennial Crisis* for nothing. It describes a nearly forgotten historical scenario where disputed vote tallies led to competing slates of electors from multiple states that nearly tore the country apart. Chief Justice Rehnquist found that, in the uncertainty following the initial results, there were "realistic threats of violence—of armed partisans marching on Washington." *Id.* at 248. And because "Congress could not resolve the dispute by itself," it turned to an extraordinary ad hoc Electoral Commission composed of five Supreme Court justices and ten partisan politicians to determine the validity of certain elector slates. *Id.* Chief Justice Rehnquist concluded that without the country's uneasy acceptance of the work of the Commission—which resolved each disputed electoral vote by a slim 8-7 margin in favor of Hayes—"the country would [have

been] thrown back to some form of either violence or political Russian roulette." *Id.*

No one can predict when a presidential election will occur that turns on the vote of a handful of electoral votes that are disputed because cast contrary to state law. But what is certain is that recent presidential elections have been quite close; in 2000, for instance, the election was decided by five electoral votes. The most recent election had an unprecedented number of electors vote independently: seven independent votes were cast and recorded, and additional electors in Maine, California, Colorado, and Minnesota either sued over their right to vote independently or attempted to do so and were denied the right by state officials, *see* FairVote, "Faithless Electors," at https://perma.cc/CL6W-HGQ5 (counting seven actual anomalous votes and three attempted votes that were interfered with); *Koller*, 224 F. Supp. 3d at 879 (additional California litigation). It is not improbable that the near future could bring an election that is as close in the Electoral College as the 2000 election, and that such an election could have several electors who may vote inconsistently with their electoral pledges or expectations.

In this milieu, the only sure way to avoid a crisis scenario like that following the election of 1876 is for this Court to resolve the issue of elector discretion now, outside of an actual disputed partisan contest. The Court's decision in this case will assuredly not affect the outcome of the presidential election in 2016. Instead, it will conclusively determine the validity of laws that attempt to restrict elector discretion that are in effect in more than half the states. Then, if the Court's decision affects any future election, it will do

so only as a matter of constitutional principle, not partisan affiliation. That makes this Court's intervention now critical.

That factor is the main reason why this Court should grant this petition now. But, as an additional benefit, this Court's decision could also settle whether proposed laws that cabin elector discretion in novel ways are also permissible. In a move expressly designed to force the current President to release his tax filings, several state legislatures have recently considered bills that would prevent presidential electors in those states from voting for candidates who do not release copies of their recent tax returns. *See* S. 26, § 3, Assemb. Reg. Sess. 2017-2018 (N.Y. 2017); A. 1230, Statement, 218th Leg., Reg. Sess. (N.J. 2018) ("The bill also provides that an elector shall not vote for a candidate for President or Vice-President unless the candidate submits federal income tax returns to the [State]").[7] A decision in this case would likely settle whether elector discretion may be cabined on those grounds or any other.

[7] In 2017, the California legislature passed a similar bill that would deny ballot access to candidates that did not release their tax returns, but Governor Jerry Brown vetoed it when he found it "may not be constitutional." Veto Message on S.B. 149 from Gov. Jerry Brown to Members of the California State Senate (Oct. 15, 2017). In 2019, California actually enacted a bill that denies ballot access in primaries to candidates that do not release their tax returns. *See* 2018 Cal. SB 27 (enacted July 30, 2019). Because the California law applies to primary elections only and does not expressly cabin elector discretion, it is not clear whether that it would be impacted by the Court's decision in this case.

B. This case is the best possible vehicle to resolve this issue.

Not only is now the right time for this Court to intervene, but this unique case is the best possible vehicle for the Court to consider the issue. The fines imposed on Petitioners mean that this case comes to this Court based on Petitioners' appeal of the imposition of the fines. There is no emergency; this is not a preliminary ruling; there are no questions of any party's standing or jurisdiction to hear the issue; and the outcome of the case will not determine the identity of the next President of the United States. It is thus ideal for this Court's review.

Moreover, as the Washington Supreme Court's decision reveals, this case cleanly presents all available constitutional theories for elector discretion. Petitioners in this case have made arguments based on Article II, the Twelfth Amendment, the Supremacy Clause, the Qualifications Clause, and the First Amendment. *See* App. 5a–27a. This means that essentially every strong argument will be thoroughly considered by this Court.

In particular, the presence of a viable First Amendment claim is a strong reason to grant certiorari in this case. Although the lower courts have not given as much attention to this theory of the case as they have to the Twelfth Amendment theory, the Washington Supreme Court's dismissal of Petitioners' First Amendment claims rests on an incorrect premise: that presidential electors "carry[] out a state government duty" and so do not possess a vote that is personal to them. App. 26a. That is wrong: as this Court has repeatedly made clear, electors actually perform a "federal function" in casting ballots. *See*

Burroughs, 290 U.S. at 545. Considering the First Amendment thus permits this Court to view the heart of the matter from a different angle than that provided by Article II and the Twelfth Amendment.

This Court could also conceivably grant certiorari and hold a merits hearing in the *Baca* case from Colorado if the State requests it. As the Tenth Circuit correctly concluded, that case too presents a justiciable controversy. *See Baca* 935 F.3d at 907–08. Moreover, if the Court is uncertain whether there is any meaningful constitutional difference between a state fining electors on the basis of their votes (as in Washington) and a state removing and replacing an elector on the basis of his vote (as in Colorado), then granting both cases would permit any decision on this issue to cover both possible sanctions.

What is critical is that this Court not wait to grant certiorari in either both this case and the *Baca* case or this case only, with the Colorado case then held for resolution of this case. Granting one or both cases now means that the issue would be resolved conclusively in advance of the 2020 election.

III. The Decision Below Is Incorrect.

On the merits, the Washington Supreme Court incorrectly upheld the penalty on electors who did nothing but cast votes for their preferred candidates. The court's decision is inconsistent with constitutional text; upsets the proper balance of power between the states, the federal government, and individual rights; and misinterprets an unbroken line of constitutional history.

It is bedrock law in our federal system that a state may not "dictate the manner in which the federal

function is carried out." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). Yet Washington law purports to "dictate" the performance of a "federal function" by requiring electors to vote in a particular way and penalizing them for their failure to do so. As the Tenth Circuit correctly concluded, *see Baca*, 935 U.S. at 937–41, the Supremacy Clause prohibits the State's interference.

In particular, Article II and the Twelfth Amendment provide detailed instructions about how the electoral vote must proceed: the electors themselves must "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," and electors themselves must then "sign and certify" those lists and transmit the list directly to the federal government. *See* U.S. CONST. amd. XII. The federal statutes implementing the Amendment likewise preclude any interference by state officials with the electors' vote. *See* 3 U.S.C. §§ 9, 12. Thus, to maintain the federal requirement of elector independence, state officials may not sanction electors for failing to vote in a particular manner.

The Washington Supreme Court's argument to the contrary is impossible to accept. The court seemed to reason that somehow the federal function of electors is not firmly established by the Constitution or federal law. *See* App. 19a. But any careful reading of constitutional text—as the Tenth Circuit engaged in—reveals just the opposite: not only are there detailed, federally-required procedures for independent elector voting, but the use of the words "elector," "vote," and "ballot" plainly require that presidential electors be permitted to do their work without interference or

coercion. *Baca*, 935 F.3d at 945. The freedom is the same freedom that any other elector in any other election must have. Otherwise, the right to vote is meaningless.

The Washington Supreme Court also reasoned that the state's power to appoint electors encompasses a complete power to also control them in the exercise of their core federal function. But, as the Tenth Circuit and the dissenting justice in Washington recognized, the two powers are different. In some circumstances, an appointing officer may also have the power to control or remove an appointee. But that supervisory authority runs with the appointment power only when that power is either expressly granted or derives from other powers, like "the President's broad executive power and his responsibility to faithfully execute the laws." *Id.* at 941. Thus, until the Nineteenth Amendment, States had the power to appoint Senators. States could even issue instructions to Senators about how to vote. But "attempts by state legislatures to instruct senators have never been held to be legally binding." Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 592 (1996). Thus, no Senator was ever punished by a state for failing to follow an instruction, despite state legislators believing Senators worked for them.

Likewise, and "[u]nlike the President appointing subordinates in the executive department, states appointing presidential electors are not selecting inferior state officials to assist in carrying out a function for which the state is ultimately responsible." *Baca*, 935 F.3d at 941. To the contrary, "[w]hen undertaking th[eir] federal function, presidential electors are not executing their appointing power's

function but their own." *Id.* Put simply, presidential electors are independent constitutional officials like U.S. Senators, not subordinate actors like executive branch employees. The Washington Supreme Court erred by missing this critical point.

The Washington Supreme Court made other key constitutional errors that this Court should also correct. For instance, it drew meaningless distinctions between this case and prior cases that have invalidated conceptually similar restrictions because they violate the key principle that no one may add requirements for constitutional offices over and above those in the Constitution. *See* App. 22a–23a (discussing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and *Powell v. McCormack*, 395 U.S. 486 (1969)). In fact, the Qualifications Clause cases provide another related reason to reverse.

Finally, as mentioned, the court below made another reversible error when it claimed electors had no First Amendment rights in their electoral votes. Actually, the State's penalizing Petitioners solely because they cast a vote in a way disapproved of by the State is what this Court has previously characterized as unconstitutional "retaliation amounting to viewpoint discrimination." *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011); *see also Clarke v. United States*, 886 F.2d 404, 417 (D.C. Cir. 1989) (concluding that congressional legislation that "coerces the [D.C.] Council members' votes" was invalid under the First Amendment), *vacated as moot after legislative repeal*, 915 F.2d 699 (D.C. Cir. 1990). The votes belong to the electors themselves, and they are expressions of their political views. The State may

not penalize or otherwise interfere with that expression.

* * *

This petition presents this Court with the rare opportunity to resolve an important electoral issue on which lower courts are irreconcilably split without any external time pressure or obvious political implications. For the sake of not only future presidential electors but also future citizens, this Court ought to grant this petition and decide whether states may interfere with or otherwise penalize presidential electors who vote contrary to pledges or state binding laws.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to determine whether presidential electors have constitutional discretion to vote for whatever person they choose.

Respectfully submitted,

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October 7, 2019

APPENDIX

APPENDIX A

193 Wash.2d 380 (2019)

SUPREME COURT OF WASHINGTON

In the MATTER OF LEVI GUERRA, ESTHER V. JOHN, and PETER B. CHIAFALO, APPELLANTS.
NO. 95347-3

ARGUED JANUARY 22, 2019
FILED MAY 23, 2019

MADSEN, Justice

¶1 Appellants Levi Guerra, Esther John, and Peter Chiafalo moved for direct appeal of a Thurston County Superior Court decision upholding the imposition of a $1,000 fine for failing to cast their votes in the United States Electoral College in accordance with the popular vote in the State of Washington. They argue the fine is a violation of article II, section 1 of the United States Constitution, the Twelfth Amendment, and the First Amendment.

¶2 For the reasons below, we reject appellants' argument and affirm the trial court.

FACTS

Background Facts

¶3 Under Washington State election law RCW 29A.56.320, each political party with presidential candidates is required to nominate electors from its party equal to the number of senators and

representatives allotted to the state. People nominated are required to pledge to vote for the candidate of their party.[1],[2] Should nominees choose not to vote for their party candidate, they may be subject to a civil penalty of up to $ 1,000. *See* RCW 29A.56.340. The people of the state do not vote for presidential electors. Rather, they vote for presidential candidates. The nominees of

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[1] RCW 29A.56.320 covers how electors are nominated. It reads:

> In the year in which a presidential election is held, each major political party and each minor political party or independent candidate convention that nominates candidates for president and vice president of the United States shall nominate presidential electors for this state. The party or convention shall file with the secretary of state a certificate signed by the presiding officer of the convention at which the presidential electors were chosen, listing the names and addresses of the presidential electors. 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. The names of presidential electors shall not appear on the ballots. The votes cast for candidates for president and vice president of each political party shall be counted for the candidates for presidential electors of that political party; however, if the interstate compact entitled the "agreement among the states to elect the president by national popular vote," as set forth in RCW 29A.56.300, governs the appointment of the presidential electors for a presidential election as provided in clause 9 of Article III of that compact, then the final appointment of presidential electors for that presidential election shall be in accordance with that compact.

[2] Appellants do not challenge the requirement that electors pledge to vote for the candidates who win the popular vote.

the party that wins the popular vote are appointed by the legislature to be Washington State's presidential electors. Along with all but two other states, Washington has a "winner-take-all" electoral system.

¶4 Appellants were nominated as presidential electors for the Washington State Democratic Party ahead of the 2016 presidential election. Hillary Clinton and Tim Kaine won the popular vote in Washington State, meaning appellants and their fellow Democratic Party nominees were appointed by the legislature to serve as electors for the State of Washington.

¶5 Based on the results from the nationwide election, it was expected that Donald Trump would become the next president. Nationwide, some electors, including appellants, announced they would not vote for either Clinton or Trump and would instead attempt to prevent Trump from receiving the minimum number of Electoral College votes required to become president.[3] Under the Constitution, if no candidate receives a majority of the Electoral College votes, the House of Representatives is to determine who will be the next president.

¶6 On December 19, 2016, appellants, along with the other presidential electors, met in Olympia to cast their ballots. Appellants did not vote for Hillary

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[3] During the 2016 election, seven presidential electors across the country voted for someone other than their pledged candidate. Four of these "faithless electors" were a part of Washington State's contingency to the Electoral College. *See* Kiersten Schmidt & Wilson Andrews, A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-collegeresults.html.

Clinton and Tim Kaine, as required by their pledge, but instead voted for Colin Powell for president and a different individual for vice-president. These votes were counted and transmitted to Congress for the official tally of the electoral votes. On December 29, 2016, the Washington secretary of state fined appellants $ 1,000 each, under RCW 29A.56.340, for failing to vote for the nominee of their party.[4]

Procedural Facts

¶7 Appellants appealed their fines to an administrative law judge (ALJ), arguing the fines were unconstitutional. Having no authority to rule on constitutional matters, the ALJ upheld the imposition of the fine, and appellants appealed to the Thurston County Superior Court.

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[4] RCW 29A.56.340 outlines the procedure for casting electoral votes and the penalty for failing to vote for the nominee of the elector's party. It reads:

> The electors of the president and vice president shall convene at the seat of government on the day fixed by federal statute, at the hour of twelve o'clock noon of that day. If 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 it by voice vote, and plurality of votes. When all of the electors have appeared and the vacancies have been filled they shall constitute the college of electors of the state of Washington, and shall proceed to perform the duties required of them by the Constitution and laws of the United States. *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.*
> (Emphasis added.)

¶8 The appeal was heard before Judge Carol Murphy of the Thurston County Superior Court. In affirming the secretary of state, the trial court noted the fine was constitutionally permissible because "[t]he State is not adding a qualification, nor is the State here requiring specific performance of the pledge." Verbatim Report of Proceedings at 49. Appellants timely filed a notice of appeal and filed a motion for direct review in this court.

ANALYSIS

State Authority under the Constitution

¶9 Appellants claim that as presidential electors, they perform a federal function. Further, they contend that electors are intended to exercise independent judgment in casting their ballots and that imposition of a fine by state law for failing to vote in a particular way interferes with a federal function in violation of the Constitution.

¶10 Electors rely heavily on the origins of the Electoral College, so we begin there. When the Electoral College was first created, there were a number of competing proposals for selecting the executive. Some delegates to the Constitutional Convention of 1787 proposed that the national legislature should select the president. *See* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2109-10 (2001). Initially, this proposal generally enjoyed agreement. *Id.* at 2109. However, some feared that entrusting selection of the executive to the legislative branch would compromise the

independence of the executive branch. *Id.* at 2110. As an alternative, one delegate suggested that the president be appointed by the people. *Id.* He also suggested a system that divided the states into districts with an elector being appointed in each district who would then elect the president.

¶11 As the debates continued, the two significant, competing proposals were direct popular election and appointment of the executive by Congress. *Id.* at 2112-13. The idea of a national vote gained support among the delegates due to strong concerns about the legislative branch appointing the executive. *Id.* at 2113. James Madison advocated for the national vote, but delegates from the small states objected, seeing it as disadvantageous for their states. *Id. at* 2114. When the delegates appeared deadlocked, a committee with one representative from each state was tasked with finding a reasonable solution. *Id. at* 2115. Ultimately, the committee returned with a proposal similar to today's Electoral College system—the president would be selected by a number of electors, based on the number of members of Congress each state was entitled to, who would be appointed by their respective states in such manner as they see fit. *Id. at* 2116. The system was later revised so that in the event of a runoff election, the president would be selected by the House of Representatives and the vice-president would be elected by the Senate. *Id.* at 2119.

¶12 When gathering support for ratification of the Constitution, Alexander Hamilton later wrote about the system agreed to in the convention and how it operated. *See* THE FEDERALIST No. 68 (Alexander Hamilton). Hamilton noted the importance of having the president elected by "men most capable of

analyzing the qualities adapted to the station." *Id.* "A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation." *Id.* He opined that selecting several electors to nominate the president would be more prudent than having just one elector nominating the president. Similarly, having the electors vote secretly by ballot and within their respective states would serve to obstruct "cabal, intrigue, and corruption" from entering the electoral process. *Id.*

¶13 The Electoral College system was adopted in article II, section 1 of the Constitution and limits the number of electors from each state to the number of senators and representatives allocated to the state. U.S. Const. art. II, § 1, cl. 2. Additionally, no senator, representative, or persons holding federal offices of trust or profit could be selected as electors. *Id.*

¶14 The manner of appointment of electors was left to the states. In the first presidential election, the majority of states decided their respective state legislatures would appoint electors to the Electoral College. *See* Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 968 (2016). Now, every state nominates electors through the popular vote. *See id.* Every state except for Maine and Nebraska employs a winner-take-all method of allocating elector votes. *Id.*

¶15 The initial Electoral College system was not without its flaws. The greatest problem was that the Constitution did not require electors to vote for a president and vice-president separately. This oversight manifested in the presidential election of

1800. John Adams picked Charles Pinckney as his running mate, while Jefferson chose Aaron Burr. *Id.* at 975. Jefferson and Burr both received 73 electoral votes even though Burr was running for vice-president. *Id.* As a result of the tie, the presidential election was sent to the House of Representatives. *Id.* To prevent a recurrence of the problem, the Twelfth Amendment was passed, requiring electors to cast one vote for the president and one vote for vice-president. U.S. Const. amend. XII.

¶16 Historically, the Electoral College has been largely a formality, as generally the electors would cast their votes consistent with the popular vote of their respective state. *See* Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 182 (2011). Indeed, even at the outset, "presidential electors were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment." Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 911 (2017). However, there have been instances where an elector voted for another candidate. Williams, *supra*, at 182. Today most states require some form of pledge by electors to vote for a particular party's candidate, and a number of states also have adopted ramifications should an elector vote contrary to that pledge. *Id.* at 182 & n.36. Neither article II, section 1, nor the Twelfth Amendment addresses electors' discretion in casting their votes.[5]

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[5] Article II, section 1 of the Constitution reads, in part:

> 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: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.
>
> The Twelfth Amendment reads:
>
> 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; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person

¶17 Against this backdrop, appellants first argue that because the Court in *Burroughs v. United States*, 290 U.S. 534, 54 S. Ct. 287, 78 L.Ed. 484 (1934), held the electors in the Electoral College perform a federal function when casting their ballots, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), precludes the State from imposing a fine because it unconstitutionally interferes with a federal function. Br. Of Appellants at 9.

¶18 *Burroughs* is one of the earliest cases where the Supreme Court has held presidential electors perform a federal function when casting their votes in the Electoral College. In *Burroughs*, the petitioners were charged with multiple counts of violating the Federal Corrupt Practices Act, 2 U.S.C. §§ 241-256. The act was the first comprehensive campaign reform statute and required that federal candidates disclose financial information. Burroughs, 290 U.S. at 540-42, 54 S.Ct. 287. The petitioners challenged the indictment, arguing in part that the act contravened article II, section 1 of the Constitution. *Id.* at 542, 54 S. Ct. 287.

> having the greatest number of votes as vice president, shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

¶19 While the court noted, "[P]residential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States," the Court determined that Congress enacted the Federal Corrupt Practices Act to "preserve the purity of presidential and vice presidential elections." *Id.* at 545, 54 S.Ct. 287 (citation omitted), 544, 54 S.Ct. 287. It did not "interfere with the power of a state to appoint electors or the manner in which their appointment" was made and was enacted only to address "political committees organized for the purpose of influencing elections in two or more states. *Id.* at 544, 54 S. Ct. 287. The statute in no sense invades any exclusive state power." *Id.* at 545, 54 S. Ct. 287.

¶20 In *McCulloch*, Congress passed an act to incorporate a national bank. Maryland subsequently passed a law that imposed a tax on all banks in the state. *See* 17 U.S. at 425. When the tax was challenged, the State argued that Congress did not have the authority to create a national bank, and the states have the authority to tax such an institution. *Id.* at 400. The Court engaged in a lengthy discussion of whether Congress had the authority to create a national bank. Congress, the Court held, has the power to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." *Id.* at 407. Although not expressly enumerated in the Constitution, the Court held the necessary and proper clause allowed Congress to pursue means that are necessary to the advancement of its enumerated

powers. *Id.* at 418-20. Thus, the Court held the incorporation of the national bank was constitutional. *Id.* at 423-24.

¶21 The national government, in being given the power to create the national bank, also impliedly wielded the "power to preserve" said creation. *Id.* at 426. Therefore, a "power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve." *Id.* The Maryland tax on banks at issue, the Court held, is a power that "may be exercised so as to destroy [the bank]." *Id.* at 427. Although states have a right to tax the people and their property, "[t]he sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." *Id.* at 429. The power to create a national bank however, was "not given by the people of a single state" but, rather, "given by the people of the United States." *Id.* "[A] single state cannot confer a sovereignty which will extend over them." *Id.* Maryland, therefore, could not tax the national bank, as it interfered with a federal function.

¶22 Appellants cite a number of examples of state actions that courts have held interfere with a federal function. In *Goodyear Atomic Corp. v. Miller*, the issue was whether a state could subject a federal nuclear production facility operated by a private entity to a workers' compensation provision for violating a state safety regulation. 486 U.S. 174, 178, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988). The complainant in that case was injured while performing routine maintenance work at the plant. *Id.* at 176, 108 S. Ct. 1704. He was awarded $9,000 in workers' compensation. *Id.* The complainant then filed for an

additional award under state law, which provides additional compensation when an employer fails to comply with the state's safety requirements. *Id.*

¶23 The Court stated that "federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Id.* at 180, 108 S. Ct. 1704 (quoting *Envtl. Prot. Agency v. State Water Res. Control Bd.*, 426 U.S. 200, 211, 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976)). However, the Court dismissed the issue of whether a supplemental workers' compensation award is a direct regulation by the states because "[the relevant federal statute] provides the requisite clear congressional authorization for the application of the provision to workers at the Portsmouth facility." *Id.* at 182, 108 S. Ct. 1704. Thus, the Court held that the private contractor could be subject to a supplemental workers' compensation award under state law. Appellants here rely on this case for the principle that a state may not "dictate the manner in which the federal function is carried out." *Id.* at 181 n.3, 108 S.Ct. 1704.

¶24 Similarly, courts have struck down actions taken under state constitutional provisions when they unconstitutionally interfere with federal functions. In *Hawke v. Smith*, the issue was whether the people of a state could use popular referendum to veto the state legislature's ratification of the Eighteenth Amendment. 253 U.S. 221, 224-25, 40 S. Ct. 495, 64 L.Ed. 871 (1920). In the state's constitution, any proposed amendment to the Constitution ratified by the General Assembly was also subject to a referendum by the people. *Id.* at 225, 40 S. Ct. 495. The Court held that "[t]he determination of the method of

ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States." *Id.* at 227, 40 S. Ct. 495. "[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution." *Id.* at 230, 40 S. Ct. 495. If the Constitution wished direct action by the people, it would have been explicit in doing so. *See id.* at 228, 40 S. Ct. 495 (citing U.S. Const. art. I, § 2).

¶25 In *Leser v. Garnett*, the State of Maryland challenged the validity of the Nineteenth Amendment. 258 U.S. 130, 136, 42 S. Ct. 217, 66 L.Ed. 505 (1922). The State had refused to ratify the proposed amendment. *Id.* The plaintiffs argued that several states have state constitutional provisions that render their legislatures ratifications invalid.[6] Id. at 136-37, 42 S. Ct. 217. As stated in *Hawke*, the Leser Court held that "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function . . . and it transcends any limitations sought to be imposed by the people of a State." *Id.* at 137, 42 S. Ct. 217.

¶26 Finally, appellants argue this court has also recognized the federal function principle. In *Department of Labor & Industries v. Dirt & Aggregate, Inc.*, this court held that state law cannot subject a

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[6] It is unclear what specific state constitutional provisions were alleged to invalidate legislatures' ratification of the Nineteenth Amendment.

federal subcontractor in a national park to its regulations. 120 Wash.2d 49, 52-53, 837 P.2d 1018 (1992). The department in that case sought to enforce provisions of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, in the boundaries of a national park. The appellees in that case had constructed a road within the park, and the department conducted noise and air testing at the site solely under the authority of WISHA. 120 Wash.2d at 50, 837 P.2d 1018. A Washington State statute had ceded " '[e]xclusive jurisdiction . . . to the United States over and within all the territory . . . set aside for the purposes of a national park.' " *Id.* at 52, 837 P.2d 1018 (quoting RCW 37.08.200 (formerly Rem. Rev. Stat. § 8110)). Because exclusive jurisdiction now lay in Congress, we reasoned that "state regulation of activities within the federal enclave may resume only with the express permission of Congress." *Id.* at 53, 837 P.2d 1018. Although the department argued the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and a WISHA operational status agreement with the secretary of labor granted it authority, we disagreed, holding that nothing in the language "constitute[s] a specific and unambiguous grant of authority." *Id.* at 54, 837 P.2d 1018. Based on the above line of cases, appellants argue the imposition of the fine in this case constitutes state interference of a federal function and should be struck down.

¶27 The State does not dispute that presidential electors perform a federal function when casting a vote in the Electoral College. See Br. Of Resp't at 12-13. Instead, the State argues that article II, section 1 of the Constitution grants to state legislatures plenary

power to appoint electors and determine the manner in which their appointment shall be made, and the fine falls within that broad grant of authority. *Id.* at 8. The State argues that *Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654, 96 L.Ed. 894 (1952), *McPherson v. Blacker*, 146 U.S. 1, 35, 13 S. Ct. 3, 36 L.Ed. 869 (1892), and *Burroughs* support its position.

¶28 The issue in *Ray*, 343 U.S. at 217-18, 72 S.Ct. 654, was whether a state statute requiring electors to pledge their votes to a specific party candidate was unconstitutional. The Supreme Court of Alabama struck the provision down, holding that the pledge was in violation of article II, section 1 and the Twelfth Amendment to the Constitution. *Id.* at 223, 72 S. Ct. 654. The Court disagreed, holding that nothing in the Constitution prohibits an elector from "announcing his choice beforehand, pledging himself." *Id.* at 228, 72 S. Ct. 654. The Court went on to note, "History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the long-standing practice." *Id.* at 228-29, 72 S. Ct. 654 (footnote omitted); *see also id.* at 228-29 nn.15-16, 72 S.Ct. 654. Indeed, the Court held that while presidential electors exercise a federal function, "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." *Id.* at 224-25, 72 S.Ct. 654. *Ray* supports the State's position that nothing in the plain language of either constitutional provision prohibits a state from imposing certain conditions on electors as a part of the state's appointment powers, including requiring electors to pledge their votes.

¶29 In *McPherson*, the Court recognized that "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States." 146 U.S. at 35, 13 S.Ct. 3. In that case, at issue was whether Michigan's legislature could require that presidential electors be nominated by congressional district rather than by popular vote. *Id.* at 24-25, 13 S.Ct. 3. The Court upheld the legislation stating:

> If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts.

Id. at 25, 13 S.Ct. 3. The Court noted that the State "acts individually through its electoral college [and] by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided." *Id.* at 27, 13 S.Ct. 3. The Constitution does not provide how electors shall be appointed, leaving it exclusively to the legislature to define the method of appointment. *Id.*

¶30 Also relying on *Burroughs*, the State argues that although the electors perform a federal function, that Court also noted that the State has exclusive power in appointing electors and the manner in which their appointment shall be made. *See* 290 U.S. at 544-45, 54 S.Ct. 287. As discussed in *Burroughs*, the only power left to Congress is " 'the time of choosing the electors, and the day on which they shall give their

votes." ' *Id.* at 544, 54 S. Ct. 287 (quoting U.S. Const. art. II, § 1). Moreover, in *In re Green*, the Court stated the "electors for President and Vice President in each State are appointed by the State in such manner as its legislature may direct." 134 U.S. 377, 379, 10 S. Ct. 586, 33 L.Ed. 951 (1890). "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." *Id.* (emphasis added).

¶31 The State has the better argument. In each case cited by appellants, the authority that purportedly interfered with the federal function lay not in the states, but rather in Congress. Thus, the threshold issue was whether the State had been given authority to engage in activity that was specifically conferred to the federal government. For example, in *McCulloch*, the issue was whether a state had the authority to tax a national bank. The Court essentially held that states were not granted the authority to regulate national corporations. A national corporation is a creation unique to the federal government under the necessary and proper clause to carry out one of Congress's enumerated powers. The Constitution does not confer any authority on the states to interfere or control that manner.

¶32 Similarly, in *Hawke* and *Leser*, the Court reasoned that the Constitution does not grant to the people of the states the authority to interfere with the ratification of constitutional amendments. Instead, that power was specifically conferred to the legislatures of the states to ratify. That same reasoning was followed by this court in *Dirt & Aggregate* where we held there was no explicit grant of authority by Congress for the states to regulate in

federal parks. Contrast this with *Goodyear Atomic* where Congress explicitly granted the states authority to enforce their own workers' safety regulations in conjunction with the federal workers' compensation statutes.

¶33 Unlike the cases appellants rely on for support that states cannot interfere with a federal function, here, the Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors. Indeed, *Ray* undermines the position of appellants because, as noted, the Court there upheld the state's pledge requirement as constitutional. While appellants argue that *Ray* is limited to the primary election, the Court's holding clearly demonstrates the broad grant of authority to the states under article II, section 1. *Burroughs* and *McPherson* also reinforce the principle that the manner of appointment is exclusive to the states. As the Court in *In re Green* explained, the role of the elector is to "transmit the vote of the State for President," suggesting that the Electoral College vote belongs to the State, not the individual elector. 134 U.S. at 379, 10 S.Ct. 586.

¶34 Finally, nothing in article II, section 1 suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature. To the extent that the federal functions of the electors are mentioned in the Constitution, they are found in the Twelfth Amendment. The Twelfth Amendment simply requires the electors to meet at the specified date and time outlined by Congress and to cast two votes for qualified candidates—one for president and one for vice-president. The Constitution does not limit a state's authority in adding

requirements to presidential electors, indeed, it gives to the states absolute authority in the manner of appointing electors. Thus, it is within a state's authority under article II, section 1 to impose a fine on electors for failing to uphold their pledge, and that fine does not interfere with any federal function outlined in the Twelfth Amendment.

Elector Discretion

¶35 Auxiliary to the federal function argument above, appellants argue that electors were intended to exercise discretion when casting votes in the Electoral College.[7] "[I]t was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive." *McPherson*, 146 U.S. at 36, 13 S.Ct. 3. Appellants cite to a few cases as persuasive. *See Op. of Justices*, 250 Ala. 399, 400, 34 So. 2d 598 (1948) (proposed amendment to statute that required electors to "cast their ballots for the nominee of the national convention of the party by which they were elected" was likely unconstitutional); *Breidenthal v. Edwards*, 57 Kan. 332, 46 P. 469 (1896) (candidate has no right to dictate how his name is to be placed on the electoral ticket); Order of U.S. Court of Appeals, *Baca v. Hickenlooper*, No. 16-1482, 2016 U.S. App. LEXIS 23391 (10th Cir. Dec. 16, 2016) (denying motion for injunction because plaintiffs failed

[7] Appellants argue Hamilton's Federalist Papers supports the framers intended the electors to exercise discretion as they would have the " 'information and discernment' necessary to choose a wise President." Br. of Appellants at 16 (quoting The Federalist No. 68 (Alexander Hamilton)); *see supra* p. 6.

to show they had a likelihood of successfully appealing). These cases, appellants argue, support their position that state legislatures are without authority to " 'restrict the right [to vote] of a duly elected elector.' " Br. of Appellants at 19-20 (alteration in original) (quoting *Op. of Justices*, 250 Ala. at 401, 34 So.2d 598).

¶36 We find these cases inapt. The *Opinion of Justices* was an advisory opinion that speculated on the constitutionality of a proposed amendment before it was enacted. More importantly, it was published prior to *Ray*, which overturned that court's decision, in part, based on similar rationale to *Opinion of Justices*. As to *Breidenthal*, appellants rely on one sentence that was not dispositive. In *Baca*, the plaintiffs filed for a preliminary injunction to prevent the secretary of state from removing them as presidential electors. But the court denied their motion, holding they failed to show there was a likelihood the plaintiffs would succeed on the merits. Appellants urge that *Baca* is instructive where the court, in dictum, noted the State of Colorado would be unlikely to remove a presidential elector after voting had begun both because the Colorado statute provided only for filling vacancies prior to the start of voting and " 'in light of the text of the Twelfth Amendment.' " Br. Of Appellants at 20 (quoting *Baca*, 2016 U.S. App. LEXIS 23391, at * 16 n.4). We find other language in the court's opinion far more relevant. Significant here, the court pointed out that the electors had failed "to point to a single word in any [constitutional provision] that support their position that the Constitution requires that electors be allowed to exercise their discretion in choosing who to cast their votes for." Order at 10.

¶37 Appellants also argue a fine impermissibly adds new requirements that do not appear in the Constitution. They argue the only requirements to be nominated as an elector are that they cannot be a senator, representative, or other person holding an office of profit or trust; they must vote for at least one person who is not an inhabitant of the same state with themselves; and the person must be eligible for the office of president. *See* Br. of Appellants at 21-22. Appellants cite two cases that they argue support their contention. In *U.S. Term Limits, Inc. v. Thornton*, the issue was a state's proposed amendment that would prevent eligible candidates from appearing on the ballot if they have served more than three terms as a representative or two terms as a senator. 514 U.S. 779, 783, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) (term limits for federal officers). The Court there rejected the proposed amendment, holding that the states lack power to add qualifications. *Id.* at 805, 115 S. Ct. 1842. In *Powell v. McCormack*, the Court held that Congress did not have the authority to exclude members-elect after they were duly elected by the people. 395 U.S. 486, 547-48, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969). These cases offer little support for appellants' position. U.S. *Term Limits* rests on explicit language in article I, section 2 that is not present here, and Powell is a limit on congressional, not state, authority. We acknowledge that some framers had intended the Electoral College electors to exercise independent judgment, but the Court in *Ray* reflects the historic reality. As the Court noted, "The suggestion that in the early elections candidates for electors . . . 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." *Ray*, 343 U.S. at 228, 72 S.Ct. 654. While "[i]t is true that the Amendment says the electors shall vote by ballot," "it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself." *Id.* Even if read as narrowly as appellants urge, *Ray*'s holding rests on a rejection of appellants' position that the Twelfth Amendment demands absolute freedom for presidential electors.[8]

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[8] We also note that appellants and amici argue elector discretion is required by the language of the Constitution. They argue the phrase "by Ballot" means a "personal, secret ballot." Br. of Appellants at 16; *see also* Br. for Amicus Curiae Independence Inst. at 3-5. While it is plausible that the framers meant for the electors to cast their ballots "in secret," it is equally plausible the framers used the word "ballot" to describe a device used to record the electors' votes. *See* BLACK'S LAW DICTIONARY 171 (10th ed. 2014) ("An instrument ... used for casting a vote.") Indeed, the names of every presidential elector is on a state's certificate of ascertainment submitted to Congress. *See* 3 U.S.C. § 5. Moreover, we know how Washington State's presidential electors individually voted for president and vice-president in the 2016 election. *See* Natalie Brand, *Washington State Electors Vote for Clinton, Powell, Faith Spotted Eagle*, KING5 NEWS (Dec. 20, 2016, 6:22 AM), https://www.king5.com/article/news/politics/washington-state-electors-vote-for-clinton-powell-faith-spotted-eagle/281-373558515; Liza Javier, *PresidentialBallots*, KING5 NEWS, https://www.documentcloud.org/documents/3243191-PresidentBallots.html; Liza Javier, *VicePresidentBallots*, KING5 NEWS, https://www.documentcloud.org/documents/3243190-VicePresidentBallots.html.

A number of "faithless electors" have surfaced in prior elections. *See*, *e.g.*, Subcomm. on Constitutional Amendments of Comm. on the Judiciary, 87th Cong., *The Electoral College, Operation and Effect of Proposed Amendments to the Constitution of the United States* 9 (Comm. Print 1961) (Henry D. Irwin of

¶38 We believe that *Ray* disposes of this question.[9] The Twelfth Amendment does not demand absolute freedom of choice for electors. In the same way that the Twelfth Amendment does not prevent an elector from pledging himself, it does not prevent a state from requiring its electors pledge to vote for its party candidate.

First Amendment

¶39 Finally, appellants argue that imposing a fine violates their First Amendment right to vote. In support, appellants argue that voting is an expressive act and is protected from any viewpoint-based restrictive state action. Br. of Appellants at 28. Appellants argue their votes are a personal choice and the State must honor that choice. *See id.* at 29-30.

Oklahoma defected and voted for Senator Harry F. Byrd instead of Richard Nixon); Note, *State Power To Bind Presidential Electors*, 65 COLUM. L. REV. 696 (1965). We know of "faithless electors" also appearing in our nation's early elections. *See* Note, *supra*, at 701 nn.40-41 (In 1796, Federalist Elector Samuel Miles voted for the antifederalist candidates, Jefferson and Pinckney. In 1820, New Hampshire elector William Plumer voted for John Quincy Adams instead of James Monroe.). The fact that "faithless electors" have been identified throughout our nation's history suggests "ballot" simply means "to record a vote," rather than to vote in secret.

[9] Appellants say that *Ray* is not controlling here because the Court did not address enforceability of the pledge requirement. They argue there is a distinction between moral authority and legal enforceability. *See* Reply Br. of Appellants at 15-16. But *Ray* does make clear that the State may impose obligations such as a pledge and thus rejects unfettered elector discretion.

¶40 Appellants rely on *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989). In that case, a municipal governing board removed members of a public agency for failing to vote in a way the members of the board preferred. *Id.* at 527. The court held removal was unconstitutional because "the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials." Id. at 532. "The entire course of conduct by the defendants supports the conclusion that the plaintiffs were suspended because of the position they took as . . . members with respect to the housing project . . . . This was a violation of their first amendment rights." *Id.* at 533.

¶41 The State, on the other hand, relies on *Nevada Commission on Ethics v. Carrigan*, arguing that the case supports the imposition of the fine here. 564 U.S. 117, 119, 131 S. Ct. 2343, 180 L.Ed.2d 150 (2011). There, the appellee was under investigation for violating the State's recusal rules by voting to approve an application for a development project that his longtime friend and campaign manager worked on. *Id.* at 120, 131 S. Ct. 2343. The commission had concluded that he had a conflict of interest, and the appellee appealed, arguing the law was unconstitutional under the First Amendment. *Id.* at 120-21, 131 S. Ct. 2343. The Supreme Court reversed the Nevada Supreme Court's holding that the recusal rules violate the First Amendment. In doing so, the Court held that "a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but

belongs to the people; the legislator has no personal right to it." *Id.* at 125-26, 131 S. Ct. 2343.

¶42 Nevada Commission is analogous here because electors act by authority of the State. *See Ray*, 343 U.S. at 224-25, 72 S.Ct. 654. It is the "sole function of the presidential electors . . . to cast, certify and transmit the vote of the State for President and Vice President of the nation." *In re Green*, 134 U.S. at 379, 10 S.Ct. 586. In essence, the electors are carrying out a state government duty. *See Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L.Ed.2d 689 (2006) (speech made in the course of a government duty is not protected by the First Amendment). Indeed, we note the federal district court recently engaged in a similar analysis of an elector's First Amendment rights. *See Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1145 (W.D. Wash. 2016).[10] There, the court rejected the plaintiff's First Amendment argument on similar grounds, recognizing that the "[r]elevant legal authority characterizes electors' role as 'ministerial' [and] limits the context in which the First Amendment protects individuals performing their official, governmental duties." *Id.* (citation omitted) (discussing *Thomas v. Cohen*, 146 Misc. 836, 262 N.Y.S. 320, 326 (Sup. Ct. 1933), and *Garcetti*, 547 U.S. at 421-22, 126 S.Ct. 1951).

¶43 The power of electors to vote comes from the State, and the elector has no personal right to that role. The "[appellants] chose to stand for nomination

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[10] Some of the appellants filed for preliminary injunction in federal court prior to the State assessing the fine complained of here. Judge James Robart denied their preliminary injunction, rejecting nearly identical arguments the appellants make before us.

as an elector for their party, subject to the rules and limitations that attend the position. They also retain the ability to step down as electors without penalty." *Id.* (citations omitted). "[I]t is unlikely that casting electoral ballots implicates [appellants'] First Amendment rights." *Id.*

¶44 We hold the First Amendment is not implicated when an elector casts a vote on behalf of the State in the Electoral College.

CONCLUSION

¶45 Article II, section 1 of the United States Constitution grants to the states plenary power to direct the manner and mode of appointment of electors to the Electoral College. We hold that the fine imposed pursuant to RCW 29A.56.340 falls within that authority. We further hold nothing under article II, section 1 or the Twelfth Amendment to the Constitution grants to the electors absolute discretion in casting their votes and the fine does not interfere with a federal function. Finally, an elector acts under the authority of the State, and no First Amendment right is violated when a state imposes a fine based on an elector's violation of his pledge. We affirm the trial court.

WE CONCUR:
Fairhurst, C.J.
Johnson, J.
Owens, J.
Stephens, J.
Wiggins, J.
Gordon McCloud, J.
Yu, J.

GONZÁLEZ, J. (dissenting)

¶46 In 1976, Michael J. Padden, a Washington elector, voted for Ronald Reagan even though the Republican Party nominated Gerald Ford.[1] The following year, the legislature enacted a law requiring electors to vote for the candidates nominated by their political party or face a civil penalty of up to $ 1000. Laws of 1977, 1st Ex. Sess., ch. 238, §§ 1-2. In 2016, the electors before us did not vote for the candidates nominated by their party. We must decide if the State has the constitutional authority to impose a civil penalty on them. The majority upholds imposition of the civil penalty. I respectfully dissent.

¶47 The State's authority to penalize its electors is an issue of first impression. *Ray v. Blair* concerns only the broad authority to appoint electors. 343 U.S. 214, 227, 72 S. Ct. 654, 96 L.Ed. 894 (1952) ("It is an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." (citing U.S. Const. art. II, § 1)). The Court addressed the constitutionality of requiring electors to make a pledge but did not address the elector's discretion. *Id.* at 228, 72 S. Ct. 654. In dissent, Justice Robert H. Jackson raised concerns about an elector's freedom to exercise independent judgment as originally intended. I share his concerns. He opined, "No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the

[1] Official Ballot for the Position of President (Dec. 13, 1976) (on file with Wash. State Archives, Electoral College and Federal Election Certifications, 1948-2012).

[individuals] best qualified for the Nation's highest offices." *Id.* at 232, 72 S. Ct. 654 (Jackson, J., dissenting) (citing The Federalist No. 68 (Alexander Hamilton)).

¶48 There is a meaningful difference between the power to appoint and the power to control. "A power not expressly listed [in the Constitution] is granted only if incidental to an enumerated power." Br. for Amicus Curiae Independence Inst. at 8 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 4 L.Ed. 579 (1819)). The Constitution provides the State only with the power to appoint, leaving the electors with the discretion to vote their conscience. See U.S. Const. art. II, § 1. Therefore, the State cannot impose a civil penalty on electors who do not vote for the candidates nominated by their party. I respectfully dissent.

APPENDIX B

Trial Court Oral Decision
(Excerpted from full hearing transcript)

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

In the matter of:	) THURSTON
LEVI GUERRA, ESTER V. JOHN,	) COUNTY
and PETER B. CHIAFALO	) CAUSE NO.
	) 17-2-02446-34
Appellants.	)
	) SUPREME
	) COURT
	) CAUSE NO.
	) 953473

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on December 8, 2017, the above-entitled matter came on for hearing before the Honorable CAROL MURPHY, Judge of Thurston County Superior Court.

* * *

[Tr. 47] The Court is prepared at this time to issue a ruling in this case. This administrative appeal presents a constitutional challenge to the assessment of civil penalties against the petitioners under RCW 29A.56.340, because the petitioners, presidential Electors who signed pledges, did not vote consistent [Tr. 48] with their pledges.

An administrative hearing was held, and the Findings of Fact are not contested. The petitioners raised a constitutional argument at the hearing, but that could not be addressed by the Administrative Law Judge. The action of the Secretary of State in imposing $1,000 fines against each of the petitioners was affirmed at the administrative hearing.

The petitioners appealed to this court challenging the constitutionality of RCW 29A.56.340 as applied to each of them based upon the First and Twelfth Amendments to the United States Constitution. At this judicial review, the burden is on the petitioners to show that the statute is unconstitutional. Statutes are presumed to be constitutional.

The parties agree that, under Article II § 1 of the United States Constitution, states have plenary power over the appointment of presidential Electors. States may appoint Electors in the manner that they choose. The parties agree that the state may set requirements, including the pledge here, in its appointment of Electors.

Although the statute at issue does not require Electors to cast their ballots in a certain way, it [Tr. 49] does allow for the imposition of a fine, which was

applied in the case of each of the petitioners, if the Electors cast ballots contrary to their pledge.

Consistent with the holding of *Ray v. Blair*, states may authorize a political party to choose its nominees for Elector, and permissible Elector qualifications include a pledge to vote for the party's nominee. The enforcement of such a pledge in the form of a fine is the issue before the Court today.

This Court concludes that the petitioners have not met their burden to show that the statute is unconstitutional as applied in this context. After reviewing the authorities cited by the parties, the Court concludes that RCW 29A.56.340 does not infringe upon the constitutional rights of the petitioners. The State is not adding a qualification, nor is the State here requiring specific performance of the pledge. This Court, therefore, concludes that this statutory regulation is constitutionally permissible. The Court will sign an order prepared by the parties . . .

* * *

APPENDIX C

Trial Court Order

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

In the matter of:	)	
LEVI GUERRA, ESTER V. JOHN,	)	
and PETER B. CHIAFALO	)	NO.
	)	17-2-02446-34
Petitioners.	)	
	)	ORDER ON
	)	PETITION
	)	FOR REVIEW
	)	

THIS MATTER came for hearing on December 8, 2017. Counsel of record appeared on behalf of the petitioners, and on behalf of Respondent Washington Secretary of State Kim Wyman. The Court considered the Petitioners' Petition for Review, the arguments of counsel, and the following:

1. Administrative Record;
2. Petitioners' Opening Brief;
3. Respondent's Brief; and
4. Petitioners' Reply Brief.

NOW, THEREFORE, having considered the Petition, the arguments of counsel, and the papers,

records, and files in this matter, the Court hereby ORDERS:

The Petition for Review is DENIED. Petitioners have not met their burden of showing that RCW 29A.56.340 is unconstitutional. Enforcement of the statute is within the State's constitutional powers under article II, section 1 and neither the statute nor its enforcement violates the First and Twelfth Amendments of the United States Constitution. Each of the Petitioners' Notices of Violation are AFFIRMED.

DONE IN OPEN COURT this 8th day of December 2017.

Carol Murphy

The Honorable Carol Murphy
Superior Court Judge

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APPENDIX D

Administrative Order Imposing fines

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matters of:	**)Docket Nos.**
	) 010421;
Levi Guerra, Esther V. John, and	**) 010422;**
Peter B. Chiafolo	**) 010424**
	) INITIAL
Appellants.	**) ORDER**

1. ISSUES

1.1. Did the Secretary of State properly assess civil penalties against the appellant electors under RCW 29A.56.340 because they voted for a person other than their party's nominee?

1.2. If so, what is the appropriate penalty?

2. ORDER SUMMARY

2.1. The Secretary of State's action is AFFIRMED.

2.2. Levi Guerra shall pay a $1,000 civil penalty.

2.3. Esther V. John shall pay a $1,000 civil penalty.

2.4. Peter B. Chiafolo shall pay a $1,000 civil penalty.

3. HEARING

3.1. Hearing Date: March 3, 2017

3.2.Administrative Law Judge: Robert C Krabill

3.3. Appellants: Levi J. Guerra, Esther V. John, and Peter B. Chiafolo

3.3.1. Representative: Sumeer Singla appeared and represented all three appellants.

3.3.2. Appearances: Of the appellants, only Mr. Chiafolo appeared in person.

3.4. Agency: Secretary of State

3.4.1. Representatives: Callie Castillo, AAG and Rebecca Glasgow, AAG

3.5. Stipulated Facts: The parties stipulated to the facts alleged in each appellant's Notice of Violation.[1]

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

[1] Stipulated Facts, February 17, 2017.

4.1. On December 29, 2016, the Secretary of State's Office issued a Notice of Violation to Levi Guerra.[2] The Notice alleged that Ms. Guerra violated RCW 29A.04.230 when she voted Colin Powell for President and Maria Cantwell for Vice President. On that basis, it assessed a civil penalty of $1,000 against her. Ms. Guerra filed a timely request for hearing on January 19, 2017.[3]

4.2. On December 29, 2016, the Secretary of State's Office issued a Notice of Violation to Esther V. John.[4] The Notice alleged that Ms. John violated RCW 29A.04.230 when she voted Colin Powell for President and Susan Collins for Vice President. On that basis, it assessed a civil penalty of $1,000 against her. Ms. John filed a timely request for hearing on January 19, 2017.[5]

4.3. On December 29, 2016, the Secretary of State's Office issued a Notice of Violation to Peter B. Chiafolo.[6] The Notice alleged that Mr. Chiafolo violated RCW 29A.04.230 when he voted Colin Powell for President and Elizabeth Warren for Vice President. On that basis, it assessed a civil penalty of $1,000 against him. Mr. Chiafolo filed a timely request for hearing on January 19, 2017.[7]

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[2] Guerra Notice of Violation, December 29, 2016.
[3] Guerra Request for Hearing, January 16, 2017.
[4] Guerra Request for Hearing, January 16, 2017.
[5] John Request for Hearing, January 19, 2017.
[6] Chiafolo Notice of Violation, December 29, 2016.
[7] Chiafolo Request for Hearing, January 19, 2017.

Selection as Electors

4.4. The Washington State Democratic Party selected twelve Presidential electors that included Ms. Guerra, Ms. John, and Mr. Chiafolo. On August 4, 2016, the Democratic Party certified a slate of electors including all three appellants to the Secretary of State's Office.

4.5 On August 8, 2016, Ms. Guerra signed the pledge, "I will vote for the candidates nominated by the Democratic Party for President of the United States and Vice President of the United States." On August 2, 2016, Ms. John signed the same pledge. And, on August 3, 2016, Mr. Chiafolo signed the same pledge. The Washington State Democratic Party submitted copies of those pledges to the Secretary of State's Office on August 9, 2016.

4.6. On November 8, 2016, the Democratic Party nominees for President, Hillary R. Clinton, and Vice President, Tim Kaine, won the popular vote
Actions as Electors

4.7 On December 19, 2016, the Secretary of State convened Washington State's electoral college in Olympia. Rather than vote for the Democratic party's nominees, the three appellants voted as follows:

Elector	Presidential Vote	Vice Presidential Vote
Levi Guerra	Colin Powell	Maria Cantwell
Esther V. John	Colin Powell	Susan Collins
Peter B. Chiafolo	Colin Powell	Elizabeth Warren

4.8 The Secretary of State submitted their votes to the President of the United States Senate as cast.[8]

5. CONCLUSIONS OF LAW

Jurisdiction

5.1 I have jurisdiction to decide this matter under RCW 34.05.413 and chapter 34.12 RCW.

Liability for Civil Penalties

5.2 Under RCW 29A.45.340, the Secretary of State may assess a civil penalty up to $1,000 against any elector "who votes for a person or persons not nominated by the party of which he or she is an elector". Here, all three appellants were electors of the Washington State Democratic Party. The Democratic Party nominated Hillary R. Clinton for President and Tim Kaine for Vice-President. Because the appellants each cast their electoral votes for persons other than those their party nominated, the Secretary of State could assess a civil penalty of $1,000 against each of them under RCW 29A.56.340.

[8] Certificate of the Washington Electoral College Vote, December 19, 2016.

5.3 The Secretary of State did assess $1,000 civil penalties against each appellant under RCW 29A.56.340. Those civil penalties lay within her discretion, so they are proper in these cases.

Constitutionality of Civil Penalties

5.4 The Secretary of State and the appellants agree the U.S. Constitution delegates to Washington the power to determine the method of selecting its electors. They also agree that power includes the authority to require electors to sign a pledge committing to vote for their party's nominees.[9]

5.5 Washington does not prevent electors from voting contrary to their pledges. It does not unseat electors who attempt to vote contrary to their pledges, and it has not criminalized electors voting contrary to their pledges. The Secretary of State argues that the Constitution does delegate that power to Washington the same as the power to demand a pledge.

5.6 The appellants argue that the Constitution does not delegate to Washington the power to punish electors for voting contrary to their pledges. Without that power, Washington could not punish them. The Secretary of State argues that the Constitution does delegate that power to

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[9] *Ray v. Blair*, 343 U.S. 214 (1952). A political party may require candidates for elector to pledge their electoral votes to the party's national nominees for President and Vice President without violating the Twelfth Amendment to the U.S. Constitution.

Washington the same as the power to demand a pledge.

5.7 An executive branch agency cannot negate a law that the Legislature has entrusted it to administer by finding it unconstitutional.[10] "Only courts have that power."[11] Here, the Legislature has entrusted the Secretary of State to administer RCW 29A.56.340. Therefore, the Secretary of State cannot negate it as unconstitutional. The Secretary of State has delegated authority to determine this case to the Office of Administrative Hearings and through the Office of Administrative Hearings to me. My authority extends no farther than the Secretary of State's. Because the Secretary of State cannot negate RCW 29A.56.340 as unconstitutional, neither can I. So, I decline to find RCW 29A.56.340 unconstitutional.

5.8 The appellants have raised a Constitutional defense. They are free to make that record in the administrative hearing process, and they did. They can raise that defense on appeal in court.

6. INITIAL ORDER

6.1 The Secretary of State action is AFFIRMED.

6.2 Levi Guerra shall pay a $1000 civil penalty.

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[10] Cf. *Bare v. Gorton*, 84 Wn.2d 380, 383 (1974).
[11] *Id*.

6.3 Esther V. John shall pay a $1000 civil penalty.

6.4 Peter B. Chiafolo shall pay a $1,000 civil penalty.

Issued from Tacoma, Washington on the date of mailing.

Robert C. Krabill
Administrative Law Judge
Office of Administrative Hearings

APPENDIX E

Electors in Article II of Constitution

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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 3

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List 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. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a

Majority, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

U.S. CONST. art. II, § 1, cl. 4

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Supremacy Clause

U.S. CONST. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of peaceably to assemble, and to petition the Government for a redress of grievances.

Tenth Amendment

U.S. CONST. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Twelfth Amendment

U.S. CONST. amend. XII

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;–The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds

of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

APPENDIX F

RCW 29A.56.300 (2016)

PRESIDENTIAL ELECTORS

29A.56.310 Date of election—Number. On the Tuesday after the first Monday of November in the year in which a president of the United States is to be elected, there shall be elected as many electors of president and vice president of the United States as there are senators and representatives in Congress allotted to this state.

29A.56.320 Nomination—Pledge by electors—What names on ballots—How counted. In the year in which a presidential election is held, each major political party and each minor political party or independent candidate convention that nominates candidates for president and vice president of the United States shall nominate presidential electors for this state. The party or convention shall file with the secretary of state a certificate signed by the presiding officer of the convention at which the presidential electors were chosen, listing the names and addresses of the presidential electors. 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. The names of presidential electors shall not appear on the ballots. The votes cast for candidates for president and vice president of each political party shall be counted for the candidates for presidential electors of that political party; however, if the interstate compact entitled the

"agreement among the states to elect the president by national popular vote," as set forth in RCW 29A.56.300, governs the appointment of the presidential electors for a presidential election as provided in clause 9 of Article III of that compact, then the final appointment of presidential electors for that presidential election shall be in accordance with that compact.

29A.56.330 Counting and canvassing the returns. The votes for candidates for president and vice president must be canvassed under chapter 29A.60 RCW. The secretary of state shall prepare three lists of names of electors elected and affix the seal of the state. The lists must be signed by the governor and secretary of state and by the latter delivered to the college of electors at the hour of their meeting.

29A.56.340 Meeting—Time—Procedure—Voting for nominee of other party, penalty. The electors of the president and vice president shall convene at the seat of government on the day fixed by federal statute, at the hour of twelve o'clock noon of that day. If 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 it by voice vote, and plurality of votes. When all of the electors have appeared and the vacancies have been filled they shall constitute the college of electors of the state of Washington, and shall proceed to perform the duties required of them by the Constitution and laws of the United States. 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.

29A.56.350 Compensation. Every presidential elector who attends at the time and place appointed, and gives his or her vote for president and vice president, is entitled to receive from this state a subsistence allowance and travel expenses pursuant to RCW 43.03.050 and 43.03.060 for each day's attendance at the meeting of the college of electors.

29A.56.360 Slate of presidential electors. In a year in which the president and vice president of the United States are to be elected, the secretary of state shall include in the certification prepared under RCW 29A.52.321 the names of all candidates for president and vice president who, no later than the third Tuesday of August, have certified a slate of electors to the secretary of state under RCW 29A.56.320 and have been nominated either (1) by a major political party, as certified by the appropriate authority under party rules, or (2) by a minor party or as independent candidates. Major or minor political parties or independent presidential candidates may substitute a different candidate for vice president for the one whose name appears on the party's certification or nominating petition at any time before seventy-five days before the general election, by certifying the change to the secretary of state. Substitutions must not be permitted to delay the printing of either ballots or a voters' pamphlet. Substitutions are valid only if submitted under oath and signed by the same individual who originally certified the nomination, or

his or her documented successor, and only if the substitute candidate consents in writing.