

Nos. 19-465, 19-518

IN THE
Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

COLORADO DEPARTMENT OF STATE,

Petitioner,

v.

MICHEAL BACA, POLLY BACA, AND ROBERT NEMANICH,

Respondents.

On Writs of Certiorari to the
Supreme Court of Washington and the
U.S. Court of Appeals for the Tenth Circuit

**BRIEF OF JERRY H. GOLDFEDER AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS IN
CHIAFALO AND RESPONDENTS IN *BACA***

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INTEREST OF AMICUS CURIAE¹

Jerry H. Goldfeder has practiced election law for many years, representing candidates for federal, state and local office. He has taught the subject as an Adjunct Professor at the Fordham Law School from 2003 through the present, and at the University of Pennsylvania Law School from 2009 through 2019. He is the author of *Goldfeder's Modern Election Law* (NY Legal Publishing Corp., 5th Ed., 2018), and is the co-author of the New York Law Journal's regular column, *Government and Election Law*. After the terrorist attack on the United States on September 11, 2001, he wrote a seminal law review article on whether terrorism could disrupt a presidential election, and subsequently has written articles in a variety of popular publications on the potential disruption of elections by natural disasters or terrorism.

SUMMARY OF THE ARGUMENT

The issue of whether a presidential elector has discretion to cast a vote for whomever he or she chooses has absorbed a narrow swath of academics for years. *See, e.g.*, *AFTER THE PEOPLE VOTE* (John Fortier, Ed., 3d ed., 2004). Indeed, even when Congress

¹ Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or his law firm made a monetary contribution to its preparation or submission. *Amicus* is a salaried special counsel of the undersigned law firm, which encourages its attorneys to teach, write and lecture on subjects of interest to the bench and bar. The within brief constitutes the *amicus's* argument, not his law firm's; and Fordham Law School and the University of Pennsylvania Law School are referred to only for identification purposes, and are not signatories to this brief. The parties consented to this filing; their letters of consent are on file with the Clerk of this Court pursuant to Rule 37.3(a).

vigorously debated the issue during the tally of the 1968 electoral college votes, it failed to capture the public’s attention in any meaningful way, and Congress counted the allegedly “faithless” electoral votes. *See* 115 CONG. REC. 148, 170-71, 203-04, 246 (1969). Only after the 2016 election, when a handful of electors chose to vote independently did the question receive public attention in a somewhat sustained way. Tom Marshall, *The Final Vote for President: Learning About the Electoral College*, N.Y. TIMES, Dec. 8, 2016. It was the actions of these electors that ultimately led this Court to address the issue in the consolidated cases.

The merits of whether there is a constitutional right of electors to exercise discretion when casting their ballots, or if a state may limit such choice, is addressed in the main briefs. Here, the focus is upon the *necessity* of an elector to be able to cast a free choice.

While this argument is not explicitly addressed by the Founders, it is consistent with their emphasis on electors employing appropriate “discernment” in casting a judicious ballot. *See* THE FEDERALIST NO. 68 (A. Hamilton). In short, to fulfill the Founders’ contemplated plan for electing a president, exigent circumstances that disrupt an election or dramatically change the political circumstances after election day² *require* electors to be able to exercise their discretion.

² The use of the term “election day” herein is to be understood colloquially, *i.e.*, the “Tuesday after the first Monday in November.” 3 U.S.C.A. § 1. The day on which the electors meet in their respective states to actually cast ballots for president

ARGUMENT**I. UNPLANNED EXIGENCIES IN ELECTIONS: NATURAL DISASTERS AND TERRORISM REQUIRE ELECTOR DISCRETION.**

On February 18, 1952, a severe blizzard hit Lewiston, Maine on the morning of a municipal election. Although the record is ambiguous as to what protocols were followed to postpone the election, Mother Nature effectively made the call. *State v. Marcotte*, 89 A.2d 308 (Me. 1952). On election day thirteen years later, in Washington County, Pennsylvania, the Monongahela River flooded, causing electric outages. The local election judge suspended voting in eleven precincts of the county for two weeks, as other voters continued to cast ballots throughout the state. *In re General Election – 1985*, 531 A.2d 836 (Pa. 1987). On the morning of September 11, 2001, New York City and other local jurisdictions in that state were conducting political party primary elections. Interrupted by the attack on the United States, the election was suspended throughout New York by the Governor exercising his plenary power. The legislature convened several days later to address when and how to proceed. Guided by no precedent or specific statute, it permitted those who had voted in person to vote again, while denying mail-in voters the opportunity to do so. Adam Nagourney, *AFTER THE ATTACKS: THE ELECTION; Primary Rescheduled for Sept. 25, With Runoff, if Necessary, Set for Oct. 11*, N.Y. TIMES, Sept. 14, 2001.

occurs on the “first Monday after the second Wednesday in December.” 3 U.S.C.A. § 7.

These are just a few examples of interrupted elections, instructive as to how state or local officials have responded. *See generally* Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 *FORDHAM URB. L. J.* 523 (2005).

On the other hand, a presidential election has never been suspended. The closest threat in modern time was in 2012, when Superstorm Sandy pummeled parts of New York City and New Jersey one week before election day, causing severe flooding and power outages and destroying thousands of homes. No national plan was in place, and the governors of New York and New Jersey were thus compelled to improvise, allowing provisional ballots to be cast at any polling site and New Jersey residents to vote by internet and fax. *See* Jerry H. Goldfeder, *In Case of Election Crisis, Congress Needs to Be Prepared*, *U.S. NEWS & WORLD REPORT*, Oct. 15, 2008; Andrew Cohen, *Could a Hurricane Like Sandy Postpone the Presidential Election?*, *THE ATLANTIC*, OCT. 29, 2012. For the most part, the presidential election proceeded normally, and the disruption did not alter the expected outcome in either New York or New Jersey.

But it could have. If a storm – or earthquake, terrorist attack or significant health epidemic – occurred on or immediately prior to election day, and its locus was in a population area that ordinarily provides an electoral tipping point in a state, statewide results could be skewed. Of course, any of these disruptions could occur at any time, with no warning, and practically anywhere in the country. For example, one normally thinks of California as the epicenter of earthquakes, but there are fault lines under states on the east coast, which have also experienced various

levels of quakes. See Jeremy Bogaisky, *Yes, Virginia: There Are Earthquakes on the East Coast*, FORBES.COM (Aug. 23, 2011).³ One also generally thinks of hurricanes as striking the southeastern seaboard during the summer and early fall, but hurricanes and violent storms like Sandy are likely as not to occur throughout the eastern United States on election day or during early voting. Snowstorms, too, have been known to cripple parts of the U.S. during elections See, e.g., Brad Maushart, *1936: Worst weather for election in Cincinnati history*, WCPO.COM (Nov. 8, 2016).⁴

Health issues such as the current coronavirus could also lead to large scale disruptions, preventing significant numbers of voters from casting ballots – and these, too, can occur anywhere in the United States.

After 9/11, the House of Representatives chose to weigh in on a potential disruption caused by terrorists, resolving that a presidential election should “never” be postponed. By a whopping vote of 419-2, the House resolved that

postponing an election in the aftermath of a terrorist attack would demonstrate weakness, not strength, and would be interpreted as a victory for the terrorists....

H.R. 728, 108th Cong. (2004). The House’s sentiment, while understandable, was ostrich-like. Especially in

³ Available at <http://www.forbes.com/sites/jeremybogaisky/2016/08/23/yes-virginia-there-are-earthquakes-on-the-east-coast/#271973114e20>.

⁴ Available at <http://www.wcpo.com/weather/1936-worst-election-day-weather-for-cincinnati>.

light of the fact that a presidential election is actually fifty-one separate jurisdictions casting ballots for electors based upon their own respective laws and regulations with precious few constitutional or statutory guidelines, it would have been prudent for the House – or, for that matter, the executive branch – to acknowledge that terrorism, or a weather or health disaster on or right before a presidential election, requires a planned response.

Indeed, neither 9/11, nor Sandy or the current coronavirus pandemic has thus far led to detailed and comprehensive contingency plans by Congress or the states.

To underscore the point that disruption of voting on or immediately before election day could have a consequential impact on a presidential election, the following hypothetical scenarios should be considered:

- A late-in-the-season hurricane ravages southern Florida, destroying dozens of condo communities of elderly voters in Broward and Miami-Dade counties, and effectively shutting down most of their polling sites.
- A fierce blizzard sweeps across the Midwest, including parts of Missouri, Illinois, Indiana and Ohio, making it impossible for tens of thousands of voters in these states to travel to the polls.
- A health crisis leads to a quarantine of thousands of residents of Birmingham, Montgomery, Chattanooga, Tallahassee, and Charleston, preventing them from voting, either early or on election day.

If the affected voters in any of these scenarios are unable to cast their ballots and the unaffected residents of a state are able to do so, the results of these states' totals might be skewed in an unpredictable way. Put another way, "blue states" could turn "red," or vice-versa. Several questions thus suggest themselves:

- Who has the authority to decide whether a state's vote for presidential electors should proceed or be suspended as a result of its having experienced a serious disruption?
- Can a state order the vote to proceed in the unaffected areas of the state, resulting in a final tally that excludes voters from the affected areas?
- Given the changed circumstances caused by the disruption, can a state permit those who voted by mail or during early voting cast a new ballot on a subsequent day?

These questions are governed by the laws of the affected states. U.S. Const., Art. I, § 4.

The only federal guidance is that if a state "has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law," it may appoint electors "in such a manner as the legislature of such State may direct." 3 U.S.C.A. § 2. Thus, an affected state may select electors either by permitting unaffected voters to cast ballots on election day with or without allowing affected voters to do so subsequently; or cancelling the vote altogether and permitting the governor or legislature to choose electors with no voter participation. In short, the procedure may be different than contemplated by

existing state law, and electors chosen by such *ad hoc* determinations may view their role differently than conventionally-chosen electors. And if the disruption crosses state lines, each state may respond to the emergency differently.

Irrespective of how they were selected, electors chosen after an electoral disruption may view the political landscape differently than prior to the exigent events, and thus must have the ability to exercise discretion when casting their vote.

II. UNPLANNED EXIGENCIES AFTER ELECTION DAY ALSO REQUIRE ELECTOR DISCRETION.

Electors may also feel duty-bound to cast discretionary ballots if any such natural disaster or terrorist attack occurs *after* election day and before the electors meet approximately six weeks later.

Of course, it need not be such a calamitous event that compels an elector to exercise his or her discretion. It could be as simple as a presidential candidate dying. In 1872, Horace Greeley died after election day (but before the electors met to vote). Three of the 66 electors pledged to Greeley voted for him anyway; 63 voted for other candidates. *Atlas of U.S. Presidential Elections* available at <https://uselectionatlas.org/RESULTS/index.html>. Greeley had lost the election to Ulysses Grant, so his electors' votes did not change the outcome, but the example is instructive.

Short of a candidate's death, information about a presidential candidate may come to light compelling electors to choose a candidate other than the one to

whom they had pledged support. Two hypothetical scenarios come to mind:

- President Dwight D. Eisenhower is incapacitated by a massive heart attack after the election of 1956 instead of a year earlier.
- After the election of 1960, leaked medical records demonstrate that John Kennedy has serious illnesses that are likely to impair his ability to govern.

These scenarios may not be as compelling as the death of a candidate, but they represent serious circumstances akin to a natural disaster or terrorist attack that could very well give a pledged elector serious food-for-thought about who should be president. The point is that electors may be required to use their discretion in casting their vote, just as they were compelled to do so after Horace Greeley died.

Unlike so-called faithless electors throughout American history who made political choices to vote for candidates other than those to whom they had been pledged (*see* FairVote, *Faithless Electors*, available at https://www.fairvote.org/faithless_electors), death, a natural disaster or pandemic would undoubtedly compel electors to feel the necessity of exercising discretion on grounds relating to the stability of the country.

In an increasingly dangerous and fragile world, electors may be presumed to care deeply about the republic, its leadership and their historic role in electing the president. Whether they must exercise discretion out of absolute necessity or because they have reached a judgment that objectively serious

circumstances compel them to vote their conscience, elector discretion is an essential component when faced with unforeseen or threatening events.

Such discretion is consistent with the wisdom and discernment required of electors as contemplated by our Founders. THE FEDERALIST NO. 68 (A. Hamilton).

CONCLUSION

In light of exigent circumstances electors may face when casting ballots for president of the United States, this Court is respectfully urged to affirm in *Colorado Department of State v. Baca* and reverse in *Chiafalo v. State of Washington*.

Respectfully submitted,

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