

SUPREME COURT OF THE UNITED STATES

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PETER B. CHIAFALO, LEVI JENNET)
GUERRA, AND ESTHER VIRGINIA JOHN,)
 Petitioners,)
 v.) No. 19-465
WASHINGTON,)
 Respondent.)
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v.) No. 19-465

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Washington, D.C.

Wednesday, May 13, 2020

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:00 a.m.)

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

Mr. Lessig.

ORAL ARGUMENT OF L. LAWRENCE LESSIG
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Thank you, Chief
9 Justice.

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

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

25 But then you can look at it from the

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

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

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

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

1 on an Article V amendment.

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

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

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

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

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

25 But, of course, the Twelfth Amendment

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

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

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

15 MR. LESSIG: You can certainly -- of
16 course, this Court has said in *Burroughs* and in
17 *Fitzgerald v. Green*, the state can certainly
18 regulate corruption, and bribery would be
19 corruption.

20 And we believe that it's absolutely
21 clear that the State has that -- the government
22 has that power right now.

23 JUSTICE THOMAS: So -- but where --

24 MR. LESSIG: The question that --

25 JUSTICE THOMAS: -- so where's the

1 authority? Where does that come from?

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

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

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

21 CHIEF JUSTICE ROBERTS: Justice
22 Ginsburg?

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

1 absolute elector discretion view, Ray should
2 have come out differently under your theory.

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

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

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

24 JUSTICE GINSBURG: It's somewhat hard
25 to understand the concept of something I am

1 pledged, bound to do, I have made a promise to
2 do something, but that promise is unenforceable.

3 MR. LESSIG: I understand, Your Honor.
4 And -- and it is -- it is -- it's difficult
5 until we recognize how familiar it is. Every
6 single political pledge is of this character.
7 We couldn't find a single case in the history of
8 political pledges, a pledge that's been
9 considered of anything beyond a moral
10 obligation.

11 We cited the Kucinich versus Texas
12 Democratic Party case where Texas requires
13 candidates to pledge to support the candidate in
14 the Democratic Party, and that was upheld
15 exclusively on the ground that that was simply a
16 moral obligation.

17 And we can see that in the context of
18 Congress again. Again, there's no problem with
19 requiring a member of the Republican party to
20 pledge to support the Republican party as a
21 condition of being a candidate for Congress.

22 But we understand the Speech and
23 Debate Clause to say you can't punish them for
24 their vote. And the pledge is not inconsistent
25 with the Speech and Debate Clause. It's

1 perfectly consistent because a pledge is always
2 and only a moral obligation.

3 JUSTICE GINSBURG: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer?

6 JUSTICE BREYER: Thank you. Good
7 morning.

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

11 MR. LESSIG: Of course.

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

15 MR. LESSIG: Yes.

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

23 And so could the State also say, in
24 case that happens, we have an alternate who will
25 cast the vote?

1 MR. LESSIG: Yes, we believe they can
2 because --

3 JUSTICE BREYER: They can, all right.

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

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

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

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

1 certainly doesn't stand there to observe whether
2 someone's voted properly.

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

6 MR. LESSIG: Prior to --

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

14 MR. LESSIG: No, because the pledge is
15 a pledge made prior to the appointment.

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

22 I'm just trying to make it as close as
23 possible to the person who changes his residence
24 10 minutes before.

25 MR. LESSIG: But, again, Your Honor,

1 the Constitution gives the states no power to
2 regulate the vote. They have the power to
3 appoint. And incident to the power to appoint,
4 Ray said they can say you must make a pledge to
5 support the party nominee.

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

12 CHIEF JUSTICE ROBERTS: Justice Alito?
13 Justice Alito?

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

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

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

1 It's difficult to imagine how that
2 plays out, though, because, of course, the claim
3 someone has bribed -- been bribed is a charge.
4 It needs to be proven. And so we believe
5 there's going to be a difficulty there with the
6 bribery.

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

15 JUSTICE ALITO: Well, I thought your
16 --

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

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

1 And if there are some circumstances in
2 which they can be removed, such as when the
3 elector has been bribed, why would the violation
4 of a pledge not be one of those circumstances?

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

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

19 And -- and that's the structure that
20 the Constitution establishes as well.

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

24 MR. LESSIG: Yes, unless the bribery
25 statute makes as a -- a penalty a removal from

1 office and there's a conviction prior to the
2 actual time at which the vote has been taken,
3 but that's, of course --

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

17 Do you deny that that is a -- a good
18 possibility if your argument prevails?

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

24 We agree that, of course, the
25 possibility exists that you could flip electors.

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 MR. LESSIG: In the ordinary-course
11 election --

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

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

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

1 the juror talks about the case with the other
2 jury members, the judge is empowered -- with
3 others than the jury members, the judge is
4 empowered to remove that juror.

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

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

23 We think that's perfectly parallel
24 with the presidential elector. The presidential
25 elector has an immunity in his or her vote.

1 But, of course, sitting in the elector room, he
2 can't cause a disturbance, he can't threaten
3 somebody with a weapon, he can't engage in any
4 number of criminal activities that might, of
5 course, interfere with the opportunity to
6 perform the duty.

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

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

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

24 And McPherson said experience soon
25 demonstrated that the electors were chosen

1 simply to register the will of the appointing
2 State. Don't -- doesn't --

3 MR. LESSIG: Your Honor --

4 JUSTICE SOTOMAYOR: -- that same
5 principle undermine whatever you think some of
6 the Framers expected that historical --

7 MR. LESSIG: Your Honor --

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

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

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

24 So, in McPherson --

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 MR. LESSIG: -- the question --

2 JUSTICE KAGAN: Mr. Lessig, so let me
3 ask you about those words. As I understand it,
4 most of your argument depends on a particular
5 reading of the terms "vote" and "ballot" and
6 "elector," and that, of course, you know,
7 usually we think of those terms as involving
8 some choice but not necessarily.

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

17 So why do these terms necessarily
18 involve choice in the way you suggest?

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

23 The Constitution speaks of elector in
24 two contexts. Article I speaks of what Justice
25 Thomas has referred to as congressional

1 electors, unique voters. And we believe the
2 freedom of congressional electors is exactly the
3 freedom of presidential electors.

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

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

20 We're saying the ordinary expected
21 meaning of these words would have supported the
22 discretion that absolutely the Framers expected
23 electors would have, and that --

24 JUSTICE KAGAN: If that's right, Mr.
25 --

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

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

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

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

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

1 And, indeed, in 1800, that election
2 also was complicated by the failure of electors
3 to do what they were expected to do. Gallatin
4 noted that to Jefferson and said to Jefferson,
5 we should eliminate electors. And Jefferson
6 said, yes, let's have a --

7 CHIEF JUSTICE ROBERTS: Thank you --

8 MR. LESSIG: -- amendment --

9 CHIEF JUSTICE ROBERTS: -- counsel.
10 Justice Gore -- Justice Gorsuch?

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

16 MR. LESSIG: Yes.

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

21 MR. LESSIG: In principle, absolutely,
22 Your Honor. We think, in practice, that would
23 be just like with a Judge making a promise to a
24 Senate committee upon confirmation -- prior to a
25 confirmation, it would be incredibly difficult

1 to imagine enforcing in a way that wouldn't just
2 be retaliatory against a particular elector.

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

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

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

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

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

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

25 So a State -- and my -- my last

1 hypothetical is just simply saying we'll pay
2 your -- your -- your lunch, your -- your -- your
3 travel and your per diem if -- if you conform to
4 your pledge under oath. And -- and -- and
5 that's not permissible, but it is permissible to
6 -- to convict a -- an elector for perjury?

7 I'm just not --

8 MR. LESSIG: Well, that --

9 JUSTICE GORSUCH: -- certain about
10 that.

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

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

20 MR. LESSIG: Okay. But the
21 hypothetical imagines that someone has committed
22 a criminal act. Okay, on the basis of the
23 criminal act, in theory, they could be punished,
24 that's right. But the difference between an
25 elector who gets compensated based on their vote

1 or not based on their vote is a difference
2 driven by the substance of the constitutional
3 discretion that electors are given, the -- the
4 federal function in balloting, the right to
5 vote.

6 JUSTICE GORSUCH: And -- and with
7 respect to the perjury example, could the State
8 remove that individual and -- and not count his
9 vote?

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

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

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

1 JUSTICE GORSUCH: Okay. The same --
2 same would be true of perjury, I suppose, then
3 too? No?

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: Thank you, Mr.
12 Chief Justice.

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

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

24 MR. LESSIG: It's a good thing to
25 consider, Your Honor, and what we've said is

1 yes, on the one side, you might worry that
2 there's a increased risk of "chaos" if electors
3 have the discretion we believe they've always
4 had.

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

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

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

25 And the number of times we've had

1 candidates die is actually twice as frequently
2 as we've had candidates -- as we've had electors
3 switch their votes and vote for somebody from
4 the other side. So in the face of --

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

7 MR. LESSIG: Sure.

8 JUSTICE KAVANAUGH: -- get to another
9 question.

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

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

20 JUSTICE KAVANAUGH: As a general
21 theory --

22 MR. LESSIG: They are trying --

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

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

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

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

1 it wasn't there before. And, therefore --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. LESSIG: -- there's no Tenth
5 Amendment power either.

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

9 MR. LESSIG: Thank you, Your Honor.
10 The question here has got to both be
11 the constitutional and the pragmatic. And the
12 constitutional question is simply the question
13 whether there is a power in the states which
14 comes from the power to appoint. And there
15 isn't.

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

24 But there's also a question we
25 acknowledge of the risks, but facing risks on

1 both sides, this Court should do what it can do,
2 which is to interpret the Constitution as the
3 Constitution was written and it has not been
4 amended.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 General Purcell.

9 ORAL ARGUMENT OF NOAH PURCELL

10 ON BEHALF OF THE RESPONDENT

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

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

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

1 condition.

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

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

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

25 First, the Framers and their

1 contemporaries clearly understood that states
2 could remove or fine electors after appointment.
3 From even before the Twelfth Amendment, many
4 states had laws removing or fining electors for
5 violating the conditions of their appointment,
6 repudiating a central premise of Petitioners'
7 claim.

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

21 CHIEF JUSTICE ROBERTS: General --

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

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

1 MR. PURCELL: Your Honor, there are
2 certainly some limits on -- on the discretion.
3 Other constitutional provisions, such as the
4 Equal Protection Clause, impose limits, of
5 course. But, in general, states have exclusive
6 authority, as this Court has said, to -- to
7 appoint electors and to set conditions of
8 appointment.

9 And -- and, certainly --

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

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

25 But -- but the State does have the

1 authority to enforce valid conditions of
2 appointment, such as just requiring that an
3 elector show up for the meeting of the Electoral
4 College.

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

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

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

1 CHIEF JUSTICE ROBERTS: Say the State

2 --

3 MR. PURCELL: -- the State can do
4 about that --

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

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

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

1 this Court's cases.

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

12 And so --

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

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

20 CHIEF JUSTICE ROBERTS: Well, the
21 question is you're -- you're suggesting that the
22 critical factor is whether the State's conduct
23 is based on a condition prior to the selection
24 of electors, and if the electors know that they
25 have the discretion or that the State -- excuse

1 me, that the State has the discretion to replace
2 them and the people know that, shouldn't that be
3 enough?

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: Yes, thank you, Chief
20 Justice.

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

25 I understand you can require them to

1 show up for the vote. I understand that the --
2 you have the limit of what's constitutional.
3 But, beyond that, what -- what -- what else
4 limits you?

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

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

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

24 JUSTICE THOMAS: Yeah. Well, I guess
25 that's why we're here, but one other question.

1 The -- I'm interested in, you know, the -- what
2 you think and how we -- how you would define the
3 scope of the federal function concept.

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

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

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

22 And the third point, Your Honor, is a
23 historical one, that if they were right about
24 this federal function idea, then states never
25 ever would have been able to remove or sanction

1 electors for any reason. And -- and yet we see
2 statutes from even before 1800 in many states
3 that provided for exactly that, for removal or
4 sanction of electors.

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Ginsburg.

2 JUSTICE GINSBURG: What do you make of
3 the fact that Congress has never failed to count
4 an anomalous electoral vote, not once? It has
5 always accepted the anomalous vote.

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

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

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

23 JUSTICE GINSBURG: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer?

1 JUSTICE BREYER: Thank you.

2 Counsel, I'd like you to assume,
3 whether this is Mr. Lessig's argument or not,
4 assume this is my argument for present purposes.
5 The only thing a State cannot do is to punish
6 the elector for the way he actually casts his
7 vote.

8 As far as bribery laws are concerned,
9 there are plenty. As far as gratuities, all
10 kinds of things, what he's doing before, he'd
11 accepted a bribe or promised to before. The
12 only thing is the actual casting of the vote.

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

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

25 The alternative is your alternative,

1 which is the State tries to control it. Which
2 is the greater danger, which is the greater
3 safeguard, to have a Congress that will decide
4 what to do with the faithless electoral vote or
5 to have the State possibly, who knows what they
6 could pass as a requirement?

7 Now what is your opinion about that?

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

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

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

1 it -- it ignores the constitutional delegation
2 of power to the states.

3 Turning to your other points, I mean,
4 there's just no -- I want to -- an example I
5 think helps illustrate why there's really no
6 constitutional difference between failing to
7 show up and failing to keep your promise.

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

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

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

1 MR. PURCELL: Well, two points.

2 JUSTICE BREYER: And that is what I
3 think the -- the other side says is the one
4 thing the State cannot do.

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

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

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

25 So -- so it's quite common with

1 appointed officials that they can face
2 consequences for voting differently than they've
3 promised. And -- and -- and that's what this is
4 just a straightforward example of.

5 JUSTICE BREYER: Thank you very much.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: Thank you.

8 Counsel, does the Constitution impose
9 any limits on a state's power to attach
10 conditions to the appointment of an elector?

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

16 JUSTICE ALITO: Okay.

17 MR. PURCELL: But our big -- sorry, go
18 ahead.

19 JUSTICE ALITO: What else?

20 MR. PURCELL: Well, as -- as I said
21 before, the State can't impose conditions that
22 would violate the Presidential Qualifications
23 Clause. You know, other constitutional
24 limitations might come into play if -- if the --
25 you know, I mean, it's hard to imagine what --

1 but -- but -- but our basic point is that if a
2 condition is constitutional, and we know this
3 condition is, then that condition can be
4 enforced. That's the key question, is -- is the
5 condition itself constitutional.

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

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

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

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

25 But once the elector -- sorry, once

1 the legislature has given the power to -- to
2 vote to the public, the public now has a
3 fundamental right to vote and to have their
4 votes counted equally and -- as this Court has
5 said in a number of cases. And so -- and so the
6 -- the legislature can't then override that vote
7 after the fact.

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

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

21 You know, the -- the key compromise of
22 the Constitution as to electors was to leave it
23 to states to decide exactly what authority they
24 would have. States were free to decide to leave
25 electors with discretion, as some states did

1 then and as some states still do today.

2 But states were also free to choose
3 electors on the basis of who they had pledged to
4 support, as -- as many states did from the
5 beginning, and as -- as the majority --

6 JUSTICE ALITO: What -- what is the
7 difference --

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

9 JUSTICE ALITO: -- between -- what is
10 the difference between that setup and the setup
11 that Mr. Lessig says is required?

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

25 And states have been removing and

1 replacing electors for violating conditions of
2 appointment since before 1800. States have been
3 choosing electors specifically because of who
4 they pledge to support since the very beginning.

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

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

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

1 But am I assuming correctly that
2 Thornton sort of puts a quash on relying on the
3 Tenth Amendment in a situation like this? This
4 is a new procedure that Congress intended, so
5 the states can't say that they expected or
6 reserved a right in something they never knew
7 they had?

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

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

21 And even if that weren't the case, the
22 text itself gives states power to appoint
23 electors. That phrase -- this Court has
24 repeatedly said the appointment power --
25 inherent in that power is the removal of power,

1 unless there's contrary language. And the
2 original understanding has always been that the
3 appointment power of electors included removal
4 power, as you see in the early statutes.

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

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

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

23 But here the State is appointing a
24 voter to do something that most people think of
25 as requiring judgment and -- and -- judgment and

1 some measure of freedom, which is power to cast
2 a ballot. The other side, in its brief, points
3 out that there were other words that would have
4 connoted -- that would have connoted something
5 different than elector, like a delegate. You
6 appoint a delegate to cast a vote for you.

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

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

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

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

1 opening brief, they said that that rule -- well,
2 they didn't mention the default rule at all.
3 They suggested it was just the executive branch.

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

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

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

1 like that.

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

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

14 JUSTICE SOTOMAYOR: But there --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. Justice Kagan?

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

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

24 We think there's a direct grant of
25 authority in the appointment power, as -- as

1 this Court has repeatedly recognized. And we
2 think that, certainly by the time of the Twelfth
3 Amendment, everyone understood that electors
4 were being chosen in the states because they had
5 promised to support particular candidates.

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

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

20 JUSTICE KAGAN: If I -- if I
21 understand you correctly, you're really saying
22 you don't have an affirmative textual argument;
23 what your -- what your argument is, is that the
24 Constitution doesn't say and in -- in -- in that
25 -- if the Constitution doesn't say, we should

1 presume that states were meant to decide?

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

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

16 So that's, I guess, the -- the point
17 that I was trying to get at there, was that it's
18 their argument, really, that asks you to ignore
19 the original understanding and early practice.
20 And they're asking you to do that based on words
21 that -- meanings of these words that just are
22 not how the Framers and their contemporaries
23 understood them.

24 JUSTICE KAGAN: Isn't the idea that
25 the power to appoint includes the power to

1 remove highly contextual, that it depends on a
2 certain understanding of control, which is
3 exactly the question here? It does -- you're
4 sort of assuming the conclusion by saying that.

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

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

24 So, you know, I think -- I think it's
25 the other side that really is asking you to rip

1 these words out of context and place vastly more
2 weight on them, on -- on these kind of
3 dictionary definitions untethered from how the
4 Framers actually applied them.

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

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

24 It -- it just -- again, it would
25 radically change how American presidential

1 elections have always worked in our country.

2 JUSTICE KAGAN: Thank you, General.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch -- Justice Gorsuch?

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

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

25 Is that consistent with the

1 constitution's proscribed order of appointment
2 meaning in voting, it seems like the voting
3 comes first and then the appointment under the
4 uniform law, and is it also consistent with the
5 federal Electoral Count Act?

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

8 MR. PURCELL: Certainly, Justice
9 Gorsuch.

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

18 And -- and then they're replaced and
19 another elector is appointed who will follow the
20 law that they promised to -- to follow and --
21 and keep their promise and vote as directed. So
22 the order is -- is -- is proper. It's -- it's
23 appointment. It -- it -- and, you know,
24 depending when in the process the elector
25 announces their intentions, they're removed and

1 they're replaced by someone else who votes in
2 accordance with state law.

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

10 The State -- both -- both people have
11 violated valid conditions of appointment, both
12 people can be removed by the State and replaced
13 by someone else.

14 The other side's position is neither
15 of those people can be replaced. And -- and --
16 and even the person who says: I'm not showing
17 up because, you know, somebody gave me \$2
18 million to not show up because that might affect
19 the outcome of the election, the other side says
20 that person can't be replaced. That just makes
21 absolutely no sense historically, textually, or
22 practically.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice. Good morning, General Purcell.

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

10 What is the purpose you see of that
11 provision if your theory of the electors is
12 correct?

13 MR. PURCELL: Yes, Justice Kavanaugh.
14 Thank you for that question.

15 So the Framers did not spend a whole
16 lot of time talking about the exact role of
17 electors, and they certainly did not agree on
18 exactly what role they would play, but one thing
19 that they were clear on was they did not want
20 Congress choosing the President.

21 And so they specifically prohibited
22 members of Congress from serving in that role.
23 But other -- but they left it to states to
24 decide whether electors would serve as kind
25 of -- you know, as Hamilton envisioned them, as

1 the kind of sage chooser on behalf of the states
2 or, as many other Framers wanted, the electors
3 could be agents of the people, to -- to -- to
4 act on the people's behalf and for the people to
5 choose them and for them to be bound to that
6 outcome, to be bound to the people's preference.

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

15 JUSTICE KAVANAUGH: Mr. Lessig says
16 that the Framers considered various modes,
17 obviously, and you agree and history shows they
18 considered the states doing it directly, or at
19 least that was an idea out there through the
20 legislatures or governors. They considered
21 Congress, as you just pointed out, but there was
22 a separation of powers there, problem there.
23 They didn't necessarily want the new President
24 to be too dependent on Congress. A popular
25 election was -- was not adopted.

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

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

15 MR. PURCELL: Your Honor, the number
16 -- the Framers had a number of concerns about
17 direct elections that included logistical
18 concerns and concerns about the impact on the
19 influence of southern states, but, ultimately,
20 they settled on an approach that left it to the
21 states to decide, as this Court said in
22 McPherson, the broadest possible power of
23 determination as to how to appoint electors and
24 what role they would play.

25 And -- and the -- the options open to

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

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

22 And -- and the meetings of the
23 electors, even in 1804, were in many states mere
24 formalities. They -- they filled out
25 pre-prepared ballots. They did not discuss or

1 deliberate. And Congress did not question a
2 single one of those ballots or their validity.

3 So that just shows that by the time
4 the Twelfth Amendment, as this Court has said
5 repeatedly, the role of electors was simply to
6 transmit the vote of the state for President.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. Would you like to take a minute to
10 wrap up?

11 MR. PURCELL: Yes, thank you, Mr.
12 Chief --

13 MR. LESSIG: Yes, I would.

14 MR. PURCELL: Thank you, Mr. Chief
15 Justice.

16 Every four years, over 100 million
17 Americans participate in our country's
18 presidential election process. They attend
19 rallies, they watch debates, and, ultimately,
20 they go to the polls.

21 More Americans participate in this
22 election than in any other democratic process in
23 our system of government. But, under
24 Petitioners' theory, this entire process is
25 irrelevant and always has been because all that

1 matters is who the electors prefer.

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

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

15 We ask you to reaffirm that principle
16 today.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.

20 Mr. Lessig, you have two minutes for
21 rebuttal.

22 REBUTTAL ARGUMENT OF L. LAWRENCE LESSIG
23 ON BEHALF OF THE PETITIONERS

24 MR. LESSIG: Thank you, Mr. Chief
25 Justice.

1 Your -- Your Honors, the State has
2 relied upon early statutes which it says affirm
3 the power of the state to remove electors
4 because they violate a condition. Absolutely
5 none of those statutes had anything to do with
6 the conditions on voting.

7 Those statutes related to the
8 appointment power. They were incidental to the
9 appointment power. So you can see obviously
10 that, incidental to the appointment power, the
11 State has the authority to make sure someone --
12 someone shows up to vote. And we believe that
13 general laws apply to electors as well because
14 it's not a general immunity. But they have no
15 power to control the vote and they never have
16 exercised that.

17 The State has asserted that because
18 they appoint the electors, they get to control
19 the electors. But, in fact, the authority they
20 rely on is quite explicit. Myers, at page 119,
21 says the reason for this is that those in charge
22 of and responsible for administering functions
23 of government need the authority to control them
24 by removing them. That was the reason for the
25 principle.

1 But there is nothing in the founding
2 to suggest that the Framers imagined the states
3 administering the Electoral College. That's why
4 the states don't appear in the Twelfth Amendment
5 at all.

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

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

21 For the State of Washington, in 1977,
22 to discover it is to show they were chumps
23 believing they didn't have this power. And we
24 believe the power has always been with electors
25 to exercise discretion.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 counsel.

4 The case is submitted.

5 (Whereupon, 11:15 a.m., the case was

6 submitted.)

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