*Chiafalo v. Washington* (2020)

**Argued:** May 13, 2020 **Decided:** July 6, 2020

Background

**Article II of the U.S. Constitution** sets up the **Electoral College system**. When citizens go to the polls on election day in November, the president is not elected by the majority of the votes nationwide. Instead—on the first Monday after the second Wednesday in December—the Electoral College casts official votes for president and vice president. The Electoral College consists of **electors** from each state.

In the original Constitution, the person with the majority of electoral votes became president, and the second highest became vice president. However, in the election of 1800, no one received a majority of electoral votes. So, under the Constitution as it operated at that time, the election was decided in the House of Representatives, where each state received one vote.

The House of Representatives in 1800 had to vote 36 times before a president and vice president were elected. In response, the 12th Amendment was proposed and ratified to change the system. Today, because of that amendment, the electors vote separately for the president and vice president, with each needing a majority of the electors to win.

In the Electoral College system, each state gets a number of electors equal to its number of members in Congress, and each elector gets one vote. Each state has two senators, but the number of members a state has in the House of Representatives depends on its population. The sum of the number of senators and the number of members of the House of Representatives is a state’s total number of electors, also sometimes called its number of **electoral votes**. In all but two states, Maine and Nebraska, the **“winner-takes-all” system** awards all of the state’s electoral votes to the winner of the popular vote regardless of the margin of victory.

In the summer before the presidential election, electors are selected by their political party to act as representatives. They are usually chosen for their devotion, service, and loyalty to the party. In November if a party’s candidate wins the popular vote in a state, that party’s electors are appointed by their state legislature to cast electoral votes. Therefore, when citizens vote for president, they are actually voting for the electors who will represent their state in the Electoral College. In December, the electors for the winning candidate travel to their state capitol and officially cast their electoral votes. Those votes are sealed and sent by the state’s secretary of state to the president of the Senate to be counted.

If a candidate receives a majority of electoral votes—270, currently—they are officially elected president. If no candidate receives a majority of electoral votes, the House of Representatives will decide the election with each state casting only one vote.

Sometime an elector does not vote for the candidate who wins the popular vote in their state. From 1796 to 2016, there were more than 180 electoral votes cast for candidates other than the winner of the popular vote across 20 different elections. Electors who break with their parties have been nicknamed “faithless electors” by some.

There is not a clear answer in the Constitution about what to do about “faithless electors.” Some scholars and politicians look to the intent of the Framers by reading their notes from the debates at the Constitutional Convention, the Federalist Papers (essays supporting ratification of the Constitution), and personal letters. Several Framers wrote   
about their distrust in the uninformed public’s ability to choose a worthy president and the need for the Electoral College to override a bad choice, if necessary.

To make sure the electors vote in accordance with the popular vote, some states have passed laws “binding” their electors by imposing fines or other consequences for voting for a candidate other than the one who won the majority of their state’s popular vote on election day. In 1915, Oregon became the first state do this. Currently 32 states and the District of Columbia have laws that in some way restrict the voting discretion (ability to choose) of presidential electors.

Facts

In summer 2016, the petitioners (Peter Chiafalo, Levi Guerra, Esther John, and nine others) were nominated as electors for the Washington Democratic Party for the 2016 presidential election. According to Washington state law, all electors must sign a pledge that they will vote for the nominee of their party. All three petitioners signed the pledge. They were also aware of the Washington law that states electors who break that pledge will be fined up to $1,000. They sought preliminary relief, meaning that they asked in advance that the state of Washington be prevented from enforcing the law. That request was denied.

On November 8, 2016, the Democratic candidates for president and vice president, Hillary Clinton and Tim Kaine, won the election in the state of Washington with over 54% of the popular vote. Usually, because of Washington state’s “winner-takes-all” system, the Clinton-Kaine ticket would receive all 12 of Washington’s electoral votes. However, when the electors assembled to vote, Chiafalo, Guerra, and John voted for Colin Powell for president and other people (not Tim Kaine) for vice president. Washington’s secretary of state transmitted those votes to Congress, and they were part of the official tallying of electoral votes.

The petitioners voted for candidates other than Clinton and Kaine in an attempt to disrupt the election of Donald Trump by encouraging electors across the nation (both Democratic and Republican) to vote for alternative candidates. They believed that this would deny either candidate a majority of electoral votes, and the election would be sent to the House of Representatives where states would have a chance to select a president other than Trump. Several other electors (from Colorado, Minnesota, Maine, Texas, and Hawaii) joined them, but they were not successful in changing the results of the election.

The Washington Secretary of State fined each of the petitioners $1,000 for failing to vote for the nominee of the Democratic party. This is the first time in U.S. history that a state has fined presidential electors for their failure to vote as state law required.

The petitioners appealed their fines. The Washington Supreme Court upheld the issuance of the fines. The court “acknowledge[d] that some framers had intended the Electoral College electors to exercise independent judgment.” But it added that nothing in the Constitution “suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature.” The petitioners asked the Supreme Court of the United States to review the case, and it agreed.

Issue: Is Washington’s law that fines presidential electors for voting for a candidate other than their party’s nominee an unconstitutional violation of the First Amendment?

Constitutional Provisions, State Statute, and Supreme Court Precedents

* **Article II of the U.S. Constitution:** “[e]ach State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.”

First Amendment to the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

* **12th Amendment to the U.S. Constitution:** “The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States.”
* **Washington Law RCW 29A.56.320 and RCW 29A.56.340(2016):** “[e]ach presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by that party.”

“[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars.”

* ***Ray v. Blair* (1952):** The Supreme Court upheld an Alabama state law that required presidential electors to pledge to support party candidates, but the Court left open whether the enforcement of such a pledge would be “violative of an assumed constitutional freedom of the elector under the Constitution to vote as he [or she] may choose in the electoral college.”

**Classifying Arguments Activity**

**DIRECTIONS**: After reading the **background, facts, issues, constitutional provisions, state statute,** and **Supreme Court precedent,** read each of the arguments below. These arguments come from the briefs submitted by the parties in this case. If the argument supports the petitioner, Chiafalo, write **C** on the line after the argument. If the argument supports the respondent, the state of Washington, write an **W** on the line after the argument. Work in your groups. When you have finished, determine which argument for each side is the most persuasive and be ready to give your reasons.

Arguments

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| 1. Voting for their choice of candidate is part of the petitioners’ core First Amendment freedoms, and the Washington state law is a violation of this right. |  |
| 1. The Framers would not have objected to states requiring electors to follow the voters’ will. During the Constitutional Convention, no delegate argued that electors should be free to ignore the will of their appointing states. |  |
| 1. “Each State shall appoint, in such Manner as the Legislature thereof may direct” (Article II) may include requiring a pledge to vote for the general election winner as a condition of appointment and a fine if that pledge is broken. |  |
| 1. This was the first time in U.S. history an elector has been fined for casting an electoral vote. This is a new practice not rooted in history or tradition. |  |
| 1. A small percentage (less than 1%) of electors have ever been “faithless.” Before 2016, no elector had ever broken a pledge in a state with a law penalizing it. |  |
| 1. Public confidence in the value of voting for president would be greatly undermined. It would mean that elections for the most powerful office in our government are hollow exercises because electors will have discretion to vote as they will. |  |
| 1. Neither the Constitution nor any federal law define a role for state officials during the balloting by electors except to certify and send the ballots to Congress. The right to vote in the Constitution and federal law allows the electors discretion when casting their ballot. |  |
| 1. There is a difference between the “power to appoint” electors given to the state legislatures in Article II and the power to control the electors’ votes. The electors are given the power to “vote by ballot” in the 12th Amendment. |  |
| 1. The Court should not ignore over 220 years of practice. More than 180 electoral votes contrary to a pledge or the popular vote across 20 different elections (1796 to 2016) have been cast, and Congress has accepted them all. |  |
| 1. States’ power to appoint electors includes the power to remove or fine those who violate the conditions of their appointment. Nothing in the Constitution stops states from conditioning appointment on pledging to follow the voters’ will. |  |

***If you were a Supreme Court Justice, how would you decide and why?*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
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***Do you agree with the Court’s Decision, why or why not? Explain*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
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