Case No. 16-36034

IN THE

United States Court of Appeals for the Ninth Circuit

P. BRET CHIAFALO AND LEVI GUERRA,

PLAINTIFFS-APPELLANTS,

—v.—

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WASHINGTON, BOB FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, AND KIM WYMAN, IN HER OFFICIAL CAPACITY AS WASHINGTON SECRETARY OF STATE,

DEFENDANTS-APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN CASE NO. 2:16-CV-01886, U.S. DISTRICT JUDGE JAMES L. ROBART

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR AN ORDER DECLARING REVISED CODE OF WASHINGTON 29A.56.340 UNCONSTITUTIONAL

ANDREW J. DHUEY
456 Boynton Avenue
Berkeley, California 94707
(510) 528-8200

Attorney for Plaintiffs-Appellants,
P. Bret Chiafalo and Levi Guerra

15 December 2016

CIRCUIT RULE 27-3 CERTIFICATE

(1) Telephone numbers and addresses of the attorneys for the parties

a. Counsel for Plaintiffs-Appellants

Andrew J. Dhuey (ajdhuey@comcast.net)
(510) 528-8200

456 Boynton Avenue
Berkeley, CA 94707

b. Counsel for Defendants-Appellees

Callie A. Castillo (calliec@atg.wa.gov)
Rebecca R. Glasgow (rebeccag@atg.wa.gov)
(360) 664-0869

Deputy Solicitors General
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

c. Counsel for putative Intervenor, Washington State Republican Party

Robert J. Maguire (robmaguire@dwt.com)
Harry J.F. Korrell (harrykorrell@dwt.com)
(206) 622-3150

Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

d. Counsel for putative Intervenors, President-Elect Donald J. Trump and Donald J. Trump for President, Inc.

Chad A. Readler (careadler@jonesday.com)
(614) 281-3891

325 John H. McConnell Boulevard, Suite 600
Columbus, OH 43215-2673

Robert A. McGuire, III (ram@lawram.com)
(253) 313-5485

Robert McGuire Law Firm
2703 Jahn Avenue NW, Suite C-7
Gig Harbor, WA 98335

(2) Facts Showing the Existence and Nature of the Emergency

Plaintiffs-Appellants (henceforth, "Electors") are presidential electors for the State of Washington in the Electoral College. *See* U.S. Const. Art. II, § 1 and Amend. XII. As set more fully below, on 14 December 2016, the district court denied Electors' motion for a temporary restraining order and preliminary injunction declaring Revised Code of Washington 29A.56.340 unconstitutional. Attachment A. As discussed in the minute entry, the district court will issue a written opinion regarding its order denying Electors' motion. That opinion had yet to be filed at the time Electors filed this emergency motion. Under this statute, Electors face punishment of up to a $1,000 penalty if they vote "for a person or persons not nominated by the party of which he or she is an elector" in the Electoral College on 19 December 2016. *Id.*

Both Electors are considering voting for candidates other than the Democratic Presidential candidate, Hillary Rodham Clinton and the Democratic Vice-Presidential Candidate, Timothy Kaine, despite the fact that doing so would violate section 29A.56.340. *See* Attachments D at 3 and E at 3. They are both in active discussions with electors of other states concerning their shared goal of electing candidates other than the Republican Presidential Candidate, Donald J. Trump, and the Republican

Vice-Presidential Candidate, Michael Pence. *See* Attachments D at 3 and E at 3. It is unknowable to Electors and everyone else whether a consensus candidate will emerge among sufficient electors to prevent Messrs. Trump and Pence from winning a majority of votes. What is certain, though, is that section 29A.56.340 prevents Electors from casting a free and uncoerced vote in the Electoral College.

Barring this Court's intervention, Electors would subject themselves to personal financial liability if they cast their votes contrary to the requirements of state law. For Elector Levi Guerra, a nineteen-year-old college student, a penalty of $1,000 would be ruinous. As she declared under oath before the district court, Guerra would be unable to pay this penalty. Attachment C.

In light of the foregoing, Electors respectfully request that the Court issue an order on or before **Sunday, 18 December 2016** (the day prior to the Electoral College vote) declaring that Revised Code of Washington 29A.56.340 is unconstitutional.

(3) When and How Counsel Notified

At 4:43 pm on 14 December 2016, counsel for Electors sent an email to all counsel listed in section (1), above, informing them that this motion would be filed, and that they would receive a pdf copy of it immediately

prior to filing. At approximately 8:00 am on 15 December 2016, counsel for Electors sent an email to those same counsel, with a pdf copy of the motion attached.

(4) Submission to District Court

Before the district court, on 8 December 2016, Electors sought a temporary restraining order and preliminary injunction declaring section 29A.56.340 unconstitutional and barring its enforcement (Attachment B). That motion was based on the same grounds set forth in this emergency motion. The district court orally denied the motion at a hearing on 14 December 2016, and filed a minute entry to that effect shortly thereafter (Attachment A).

RELATED CASE STATEMENT PURSUANT TO NINTH CIRCUIT RULE 28-2.6

A similar challenge has been filed in California in *Koller v. Brown*, Case No. 5:16-cv-07069-EJD (N.D. Cal. 2016) before the Honorable Edward J. Davila. The undersigned counsel for Electors in this case also represents the presidential elector in *Koller*. The parties expect the district court in *Koller* to rule on December 15, 2016. The parties also expect that, no matter which way the district court rules, the case will be appealed to this court and another emergency motion will be filed in a day or two thereafter.

Koller is a presidential elector of the Democratic Party. In his complaint, Koller seeks declaratory relief that California Election Code §§ 6906 and 18002 are unconstitutional restraints on presidential electors, and furthermore, that those sections have the same effect as threats against electors made criminal by Election Code § 18540(a) and 18 U.S.C. § 594.

Like Washington, California requires its electors to vote for the candidate who received the most votes in the state:

> The electors, when convened, if both candidates are alive, *shall* vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.

Cal. Elec. Code § 6906 (emphasis added); *see also* Cal. Elec. Code § 7100 (setting forth how Democrat electors are elected) and § 7300 (setting forth how Republican electors are elected).

California imposes similar penalties to Washington, except that in addition to a $1,000 fine, California law also makes an elector's failure to follow state law a felony:

> Every person charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it, or who, in his or her official capacity, knowingly and fraudulently acts in contravention or violation of any of those laws, is, unless a different punishment is prescribed by this code, punishable by fine not exceeding one thousand dollars

> (1,000) or by imprisonment in the state prison for 16 months or two or three years, or by both.

Cal. Elec. Code § 18002.

Koller filed a declaration stating that because of the civil and criminal penalties in California under California Elections Code §§ 6906, 18002, he intended to vote for Hillary Clinton, but that if a court struck down those penalties then he would not vote for Hillary Clinton and instead he would "fulfill his constitutional duty" and vote for "Mitt Romney, John Kasich, or another qualified compromise candidate." *See* Attachment F.

Koller's complaint raises the issues of whether California Election Code §§ 6906 and 18002 are unconstitutional under Article II of the U.S. Constitution, as amended by the Twelfth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment rights of freedom of speech because: (1) they violate the constitutional obligation of electors to act as a deliberative body, analyzing the fitness of prospective candidates for those offices, and judiciously acting on relevant information before placing their votes; and (2) they violate the Equal Protection Clause of the Fourteenth Amendment by coercing the votes by electors from some states, but not others. *See* Attachment G (complaint). Koller also argues that these statutes are in violation of federal and state laws prohibiting and criminalizing the coercion of votes.

Counsel in the *Koller* case are as follows:

MELODY A. KRAMER, SBN 169984
KRAMER LAW OFFICE, INC.
4010 Sorrento Valley Blvd., Ste. 400
San Diego, California 92121
Telephone (855) 835-5520
kramerlawinc@gmail.com

ANDREW J. DHUEY, SBN 161286
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200
Attorneys for Plaintiff

Brian Selden SBN 261828
JONES DAY
1755 Embarcadero Road
Palo Alto, California 94303
Telephone: +1.650.687.4142
Facsimile: +1.650.739.3900
bgselden@jonesay.com

Chad Readler (pro hac vice)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
Telephone: +1.614.469.3939
Facsimile: +1.614.461.4198
careadler@jonesday.com

Attorneys for Intervenors PRESIDENT-ELECT DONALD J. TRUMP AND DONALD J. TRUMP FOR PRESIDENT, INC.

Charles H. Bell, Jr. SBN 060553
Brian T. Hildreth SBN 214131
Terry J. Martin SBN 307802
BELL, McANDREWS & HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, California 95814

Telephone: +1.916.442.7757
Facsimile: +1.916.442.7759
cbell@bmhlaw.com

Attorneys for Intervenor CALIFORNIA REPUBLICAN PARTY

KAMALA D. HARRIS
Attorney General of California
MARC A. LEFORESTIER
Supervising Deputy Attorney General
KEVIN A. CALIA
Deputy Attorney General
State Bar No. 227406
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-6114
Fax: (916) 324-8835
E-mail: Kevin.Calia@doj.ca.gov

Attorneys for Defendants Attorney General Kamala D. Harris and Secretary of State Alex Padilla, and Governor Edmund G. Brown Jr.

INTRODUCTION AND SUMMARY

This case concerns whether Electoral College electors are voters or voting machines. While the provisions governing the Electoral College are among the most detailed in all of the constitutional text, there are no substantive requirements concerning how presidential electors cast their votes other than that they not vote for running-mates from the same state. States have no power to add such substantive requirements. The State of

Washington's attempt to control how its electors vote in the Electoral College, and all similar state laws, are constitutionally infirm.

The day has come to resolve the question the Supreme Court left open in *Ray v. Blair*: whether party-loyalty "promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college." 343 U.S. 214, 230 (1952). Permitting states to impose Congressional term limits was intolerable because that "would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995). The patchwork of state laws imposing varying severities of punishment on faithless electors, weaved in with state legislative schemes that leave electors free to vote their conscience, is precisely the sort of national disuniformity the Framers would not have envisioned and the *Thornton* court would not have countenanced.

ARGUMENT

I. Section 29A.56.340 Is Inconsistent with the Electoral College Provisions of Article II and the Twelfth Amendment.

In *Thornton*, the Supreme Court held that the Constitution prohibits States from imposing congressional qualifications additional to those specifically enumerated in its text. 514 U.S. at 838. The court reasoned that the power to add qualifications is not a reserved right of the states under the Tenth Amendment; instead, "electing representatives to the National Legislature was a new right, arising from the Constitution itself." *Id.* at 805. Allowing states to impose term limits would contravene the Framers' intention that qualifications for Congress "be fixed in the Constitution and be uniform throughout the Nation." *Id.* at 837. Furthermore, it would be anomalous to have "federal supremacy over the procedural aspects of determining the times, places, and manner of elections while allowing the States *carte blanche* with respect to the substantive qualifications for membership in Congress." *Id.* at 810.

The rationale of *Thornton* is especially compelling with regard to state laws that punish Electoral College votes made contrary to elector pledges or party loyalty requirements. Like Congress, the Electoral College was a new

entity created by the Constitution itself; thus there are no reserved powers under the Tenth Amendment with regard to how its electors vote.

The intolerable "patchwork of state qualifications" state-imposed term limits would have woven resembles what the Electoral College has now: electors in some states are completely free to vote their conscience, while electors in other states are subject to varying severities of punishment if they vote for someone other than their party's candidate. California electors face felony criminal liability and up to three years in prison if they vote contrary to state law requirements. Cal. Elec. Code §§ 6906, 18002.

And very much like in *Thornton*, state control over electors' votes results in the anomaly of federal supremacy over the procedural aspects of determining the times, places, and manner of the Electoral College vote while allowing states *carte blanche* with respect to the substance of their vote. Indeed, laws such as section 29A.56.340 render the Electoral College conventions a completely pointless exercise for electors who have no discretion whatsoever in how they vote. The Electoral College process in these states is effectively superfluous.

Article II, Section 1, Clause 2 states that electors shall vote "for two persons, of whom one at least shall not be an inhabitant of the same State

with themselves." This is the only constraint the Constitution explicitly imposes on how the electors are to cast their vote. In *Thornton*, the Supreme Court observed because the qualifications to be elected to the House of Representatives were stated in the Constitution itself and were exhaustive. Accordingly, the Court ruled that the enumerated list in the Constitution excluded states from enacting limitations on the number of terms for which an incumbent could be re-elected. It is equally plausible to read the constitutional specification of how an elector must vote as exhaustive, thus precluding the states from enacting any additional constraints on the elector's vote.

II. Electors Will Suffer Irreparable Harm If This Court Does Not Issue an Order Declaring that Revised Code of Washington 29A.56.340 Is Unconstitutional.

The right at issue in this case is what the Supreme Court considered hypothetically in *Ray v. Blair*: the "constitutional freedom of the elector under the constitution, Art. II, § 1, to vote as he may choose in the electoral college." 343 U.S. at 230. Under section 29A.56.340, Electors do ***not*** have the freedom to vote as they may choose in the Electoral College – not without facing liability for a substantial penalty, which in Elector Guerra's case would be financially ruinous. *See* Attachment C. This depravation of

their constitutional right to vote for the candidate of their choice, uncoerced, is itself the irreparable harm, regardless of how Electors ultimately choose to vote.

If the Court agrees with Electors that section 29A.56.340 wrongly denies them their constitutional freedom to vote for the candidate of their choice, then irreparable harm is established. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Alan Wright *et al.*, 11A Federal Practice & Procedure § 2948.1; *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 877 (9th Cir. 2008) *rev'd on other grounds and remanded*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."). There can be no court-ordered "do-over" of the Electoral College vote on 19 December 2016. Electors will either vote under coercion or with their conscience, depending on this Court's resolution of this motion.

Finally, the Court should be aware that in the related *Koller* case, discussed *supra*, the presidential elector has declared under oath, unequivocally, that he would vote for a presidential candidate other than Secretary Clinton, but for the California criminal statute that makes it a

felony for him to do so. Attachment F. It is likely that an emergency motion in *Koller* will be before this Court in a day or two.

CONCLUSION

The Court should issue an order on or before **Sunday, 18 December 2016** (the day prior to the Electoral College vote) declaring that Revised Code of Washington 29A.56.340 is unconstitutional.

Respectfully submitted,

/s/ Andrew J. Dhuey
Attorney for Plaintiffs-Appellants
P. Bret Chiafalo and Levi Guerra

15 December 2016

CERTIFICATE OF SERVICE

The undersigned certifies that on 15 December 2016, prior to the filing of this motion and attachments, he sent emails with pdf copies of them to the individuals listed below at the addresses stated:

Callie A. Castillo (calliec@atg.wa.gov)
Rebecca R. Glasgow (rebeccag@atg.wa.gov)

Robert J. Maguire (robmaguire@dwt.com)
Harry J.F. Korrell (harrykorrell@dwt.com)

Chad A. Readler (careadler@jonesday.com)
Robert A. McGuire, III (ram@lawram.com)

/s/ Andrew J. Dhuey