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

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

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Reply to the State of Washington and to Intervenors

The Constitution allows states to decide how to appoint electors, but it does not allow states to dictate how those electors will vote. The State of Washington's attempt to control how its electors vote in the Electoral College is constitutionally infirm, as are all similar state laws.

The Electoral College was established as one of the safeguards in the Constitution. The Electors safeguard the nation by assuring through their vote that: (1) the President and Vice President meet the qualifications listed in the Constitution; (2) they are free from undue influence by foreign powers; and (3) they are fit to hold their offices. *See* U.S. Const. Art. II, § 1 and Amend. XII; Federalist Nos. 64, 68.

PRELIMINARY MATTERS

I. The Electors did not delay bringing this case.

Intervenors assert Electors have had "months" to bring this challenge. This is not true. First, Electors had no way of knowing which candidates would receive the popular vote until November 29, 2016, when the election results in Washington were certified. *See* http://results.vote.wa.gov/results/current/.

Second, it is precisely because Electors take their constitutional duties seriously that they brought this suit now. Widespread information has surfaced this very month that Russia may have unlawfully hacked into certain computer

systems to assure Donald Trump was elected President. Furthermore, new information has come to light that Mr. Trump has extensive ties to Russia and may be unduly influenced by Russia. In light of this, Representative Don Beyer has called for the U.S. House of Representatives to delay the vote by the Electoral College so these allegations can be investigated and the results of that investigation reported to the Electoral College. Patricia Sullivan, *Virginia Congressman Calls for a Delay in Electoral College Vote*, THE WASHINGTON POST (December 14, 2016) (available at https://www.washingtonpost.com/local/virginia-politics/virginia-congressman-calls-for-delay-in-electoral-college-vote/2016/12/14/98022426-c21b-11e6-8422-eac61c0ef74d_story.html?utm_term=.9b8a505a95eb). Senate Minority Leader Harry Reid has also called for an intelligence briefing on this issue for the Electoral College. *Id*.

There are also allegations Hillary Clinton may have improperly used a personal server to send and receive emails while she was the Secretary of State, thus exposing classified information to possible hacking by foreign governments. These issues regarding both the Republican and Democrat candidates may inform the Electoral College as they debate among themselves and when each state meets on December 19, 2016.

Intervenors cite 3 U.S.C. § 5 for the proposition that all contests involving the Electoral College must be resolved at least six days prior to their meeting. That statute pertains only to disputes over how the members of the Electoral College are appointed, not to this dispute.

This court is quite capable of evaluating the issues herein on an expedited basis. It has certainly resolved other cases raising serious questions of law on an expedited basis, such as the California recall election and numerous death penalty habeas petitions.

II. This suit is not a political question.

Intervenors maintain this is a political question that should be left to Congress. The issue of whether Washington state law violates the federal Constitution is one for the courts, not Congress. *Williams v. Rhodes*, 393 US 23, 28 (1968).

III. Electors seek both a temporary restraining order and a preliminary injunction.

The district court denied Electors' motion for a temporary restraining order and a preliminary injunction because Revised Code of Washington ("RCW") 29A.56.340 is unconstitutional. Electors now ask this court to reverse the ruling by the district court and enter both a temporary restraining order and a preliminary injunction declaring RCW 29A.56.340 unconstitutional. Electors also seek a

permanent order striking down RCW 29A.56.340 as unconstitutional and a permanent injunction preventing its enforcement.

To obtain a temporary restraining order and a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Each of these factors is discussed below.

ANALYSIS

I. Electors are likely to succeed on the merits.

A. The text of the Constitution does not delegate to states the power to impose restrictions on how Electors vote after they are appointed.

The United States Constitution reads in relevant part:

> Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress … .
>
> The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. . . . .

U.S. Const. art. I, § 1, cl. 2.

These provisions were amended in 1804 as follows:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate . . .

U.S. Const. amend. XII. As the court can see, none of these provisions states for whom the Electors must vote.

B. The Supreme Court left this question open in *Ray v. Blair*.

The U.S. Supreme Court ruled that states may choose the manner in which Presidential Electors were chosen. *Ray v. Blair*, 343 U.S. 214, 230 (1952). Significantly, the Court was very careful to leave open the question of whether a state law that mandated how such Electors voted once they were in the position would be constitutional. This court should resolve the question the Supreme Court left open in *Ray v. Blair*: whether "promises of candidates for the electoral college [to vote for their party] 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).

C. Section 29A.56.340 is unconstitutional under *Thornton*.

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), Arkansas enacted legislation imposing term limits on U.S. Senators and Congressmen. The Supreme Court held the Arkansas statute was unconstitutional.

In opposition to the Electors' motion, Washington contends Electors' "arguments regarding the Tenth Amendment and *Thornton* are in error because the Constitution itself explicitly grants the States' power to appoint electors as they choose." State Br. 2. This misses the point. The states' power to appoint electors is not in dispute. Electors dispute the states' attempt to control their voting after they have been appointed through coercive penalties, and possible criminal punishment if the fine cannot be paid. Appointments and voting are fundamentally different, and the Constitution treats them differently.

No constitutional provision delegates to states the power to ensure presidential electors vote in a manner dictated by the states. The Twelfth Amendment imposes the only requirement for how electors may vote: that one of the candidates for President and Vice-President "shall not be an inhabitant of the same state" as the electors. U.S. Const., Amend. XII. This restriction on Electors' voting discretion is critical to interpreting whether the states' attempts to coerce their electors into voting for a certain candidate are constitutional.

Neither Washington nor the Intervenors ever address how the Twelfth Amendment prohibition against voting for presidential running mates from the

same state is a retention of further federal or state control over how electors cast their votes.

The Twelfth Amendment's limit on how electors may vote is analogous to the clauses in the Constitution that set forth the qualifications for Congress at issue in *Thornton*. While states have broad authority to control the time, place and manner of congressional elections, that power does not permit states to add qualifications of their own to those set forth in the Constitution. *Thornton*, 514 U.S. at 834. For the same reason, states may not use their broad elector appointment power to add voting restrictions of their own to the lone constitutional limitation in the Twelfth Amendment.

Intervenors contend that Electors "never explain why the Constitution allows variety when it comes to the making of electoral pledges, but requires uniformity when it comes to the enforcement of those very same pledges." Intervenors Br. 17. In *Thorton*, the Court explained that the reason the Framers wanted congressional qualifications to be fixed throughout the nation reflected their "understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States." *Id*. at 837-38. Similarly, while the circumstances of their appointment might vary greatly among presidential electors, once they convene in the Electoral College, they serve their nation, not merely their political parties.

D. Intervenors' interpretation would render the Electoral College Superfluous.

Statutes requiring electors to vote for a party's slate of candidates lest the elector be punished with civil fines and penalties, render the Electoral College superfluous. This violates one of the most basic cannons of constitutional law and statutory interpretation. *See Hurtado v. California*, 110 U.S. 516, 534 (1884) (absent clear reason, a court cannot assume a part of the Constitution is superfluous).

The Founders did not draft the Constitution so that the President and Vice-President were directly elected by popular vote. Nor did they simply assign a certain number of votes to each state for the state to cast. Rather, they created the Electoral College so that informed people could use their experience and judgment to safeguard the nation in the Presidential election.

E. Intervenors' interpretation would violate the *Noel Canning* Doctrine.

Intervenors raise *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2558-60 (2014), in their opposition. There, the Supreme Court reviewed the constitutionality of Presidential appointments during a very short congressional recess. In interpreting the clause, the Court looked to history. "[T]he longstanding 'practice of the government,' can inform our determination of 'what the law is . . . .'" *Id*. at 2558 (citations omitted). *See also, e.g., Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 689–690 (1929);

McCullough v. Maryland, 17 U.S. 316 (1819); *Marbury v. Madison*, 1 Cranch 137, 176, 5 U.S. 137 (1803). Here too at the time of the founding, the Electoral College met and debated as the Framers anticipated:

> No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices. Certainly under that plan no state law could control the elector in performance of his federal duty, any more than it could a United States Senator who also is chosen by, and represents, the State.

Ray v. Blair, 343 U.S. at 231-32. "The ratification debate [of 1789] makes abundantly clear that the presidential electors were intended to exercise judgment and discretion." Delahunty, R.J., IS THE UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT CONSTITUTIONAL?, 2016 Cardozo L. Rev. De Novo 43-44.

Washington enacted RCW 29A.56.340 in 1891, 104 years after the Constitutional Convention of 1787. While it is true this country has not yet had a candidate for President whom the Electors thought did not meet the qualifications, the Electors still have an ongoing duty to review each candidate's qualifications every four years, just as the Electoral College historically did when this country was founded and these provisions were written into the Constitution.

F. History shows the Electoral College was not intended to be a potted plant.

The Framers created the Electoral College to be a "small number of persons selected by their fellow-citizens … most likely to possess the information and

discernment requisite to so complicated an investigation." The Federalist No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Electors were to act "under circumstances favorable to deliberation." *Id*. at 2. They were to be insulated from "mischief," "tumult," and "disorder." *Id*. The electors would be less exposed "to heats and ferments" of the people. *Id*. The Electoral College creates an "obstacle … to cabal, intrigue, and corruption." *Id*. Importantly, the Electoral College was to prevent "foreign powers" from "gain[ing] an improper ascendant in our councils." *Id*. at 412-13. The electors were to "vote for some fit person as President." *Id*. at 413. Thus, the country would be protected against a candidate who possessed "[t]alents for low intrigue, and the little arts of popularity … ." *Id*. at 414.

> On Hamilton's account, the presidential electors are chosen for the specific purpose of "analyzing the qualities" needed in a president; . . . It would be difficult to affirm more clearly that the electors must exercise judgment and discretion.

Delahunty, R.J., IS THE UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT CONSTITUTIONAL?, 2016 Cardozo L. Rev. De Novo at 40-41; *accord* The Federalist No. 64 (John Jay).

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

If this court agrees with Electors that section 29A.56.340 denies them their constitutional freedom to vote for the candidate of their choice, then irreparable

harm is established as a matter of law. *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 877 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.").

III. The balance of equities tips in the Electors' favor.

The Electors have a great interest in fulfilling their constitutional duties without the threat of prosecution or fines. It is, after all, their constitutional duty. The Electors take their role very seriously. Furthermore, the $1,000 penalty would exact a far greater toll on any individual elector, than it would benefit Washington to receive it. 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. It is unclear whether an elector who could not pay the fine might face criminal liability.

IV. An injunction is in the public interest.

It is in the public's interest that the Electors fulfill their duty. If the Electors are not permitted to assure the Presidential and Vice Presidential candidates meet the constitutional qualifications, then the country might have to suffer through impeachment proceedings and—worst of all—being governed by an unfit President or Vice President in the meantime. President Elect Trump has only spent

a little over one month thinking he will be the President. This effort hardly compares with the importance of the issues at stake in this Presidential election.

The Framers of the Constitution placed great faith in the Electoral College. It is not for any state to decide to make this important safeguard irrelevant.

CONCLUSION

Electors respectfully request that this court issue an order on or before **Sunday, December 18, 2016** (the day prior to the Electoral College vote) declaring RCW 29A.56.340 is unconstitutional, and granting them both a temporary restraining order and a preliminary injunction against RCW 29A.56.340.

Respectfully submitted,

/s/ Andrew J. Dhuey
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9th Circuit Case Number(s) 16-36034

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