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Recommended Citation

Alan Raphael & Elliott Mondry, Are Presidential Electors Free to Vote as They Wish, despite a State's Popular Vote (19-465) (19-518), 47 Preview U.S. Sup. Ct. Cas. 37 (4).

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Are Presidential Electors Free to Vote As They Wish, Despite a State's Popular Vote?

CASE AT A GLANCE

Washington and Colorado state laws require presidential electors to vote for the state's popular vote winner. Peter Chiafalo, a Democratic presidential elector in Washington, in 2016 voted for Colin Powell and not Hillary Clinton, who had won the state's popular vote. He was fined \$1,000 for doing so. Colorado presidential elector Michael Baca did not cast his vote for Hillary Clinton, the Democratic candidate who won the state's popular vote, but for John Kasich, a Republican not on the ballot. Baca was removed as an elector and replaced by an elector who voted for Clinton. The Washington Supreme Court affirmed Chiafalo's fine; the United States Court of Appeals for the Tenth Circuit found the replacement of Baca as an elector was unconstitutional. The Supreme Court granted *certiorari* to determine the constitutionality of laws that require presidential electors to vote the way state law directs, subject to removal or fine for failing to do so.

Chiafalo v. Washington

Docket No. 19-465

Colorado Department of State v. Baca

Docket No. 19-518

Argument Date: May 13, 2020

From: The Washington Supreme Court (Chiafalo), The Tenth Circuit (Baca)

by Alan Raphael & Elliott Mondry
Loyola University Chicago School of Law, Chicago, IL

ISSUES

1. Do state laws that require presidential electors to vote in accordance with the state's popular vote, or penalize those who fail to do so, violate electors' constitutional rights under Article II or the Twelfth Amendment?
2. Does a presidential elector intending to vote for someone other than the person to whom he or she was pledged have standing under state law to object to being removed as an elector?

FACTS

Peter Chiafalo and 2 others were among the 12 Democratic presidential electors elected for the State of Washington in the 2016 presidential election. Pursuant to Washington state law, electors must "perform the duties required of them by the Constitution and laws of the United States." RCW 29A.56. Electors are expected to cast their ballots for the presidential candidate who won the state's popular vote. Because Hillary Clinton and Tim Kaine, running for president and vice president respectively, won the popular vote in Washington, the electors were required to vote for them. However, Chiafalo and two other electors cast their votes for Colin Powell for president and various persons for vice president.

Their votes were counted for the persons chosen by the electors, not for the Democratic candidates receiving the majority of the state's votes. Washington state law indicates that any electors who do not vote for their party's candidate are subject to a fine of up to \$1,000. 5 RCW 29A.56.340. On December 29, 2016, the Washington secretary of state fined Chiafalo and the other electors \$1,000 each for failing to vote in line with the state's popular vote. The electors challenged the law, claiming that a fine for voting contrary to the popular vote of the state violates their Article II and Twelfth Amendment rights. The electors contested their fines in administrative proceedings. The administrative law judge did not have the power to consider the constitutionality of the statute and upheld the fines. The electors appealed to the State Superior Court, which rejected their arguments. The Washington Supreme Court affirmed the Superior Court's ruling in an 8–1 opinion. *Chiafalo v. Washington*, No. 19-465 (Wash. Sup. Ct., 2019).

The United States Constitution states, "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[.]" United States Const., Art. II, § 1. The Washington Supreme Court concluded that the state law requiring electors to vote for the candidates receiving the majority of the state popular

vote and fining any elector who fails to do so are justified because “the Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors.” The court further reasoned that “nothing in Article II, Section 1 [of the United States Constitution] suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature.” The court rejected the electors’ argument that the state’s imposition of fines violated their First Amendment rights.

In a dissenting opinion, Justice Steven González stated, “[n]o 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 [individuals] best qualified for the Nation’s highest offices.” (quoting *Ray v. Blair*, 343 U.S. 232 (1952) (Jackson, J., dissenting)). The dissent reasoned that states have only the power to appoint their electors but not the power to control them, thus leaving electors with the discretion to vote in any manner they so choose.

Colorado law requires presidential electors to cast their votes for the winner of its state’s general election. Electors must “take the oath required by law for presidential electors.” Colo. Rev. Stat. § 1-4-304(1). State electors must cast their votes in the Electoral College for the presidential candidate who “received the highest number of votes at the preceding general election in this State.” *Id.* at § 1-4-304(5). If an elector refuses to do so and instead votes for someone else, the elector can be removed. The statute says if there is a vacancy, “in the office of presidential elector because of death, refusal to act, absence, or other cause, the presidential electors present shall immediately proceed to fill the vacancy in the Electoral College.” *Id.* at § 1-4-304(1).

Michael Baca (Mr. Baca), Polly Baca (Ms. Baca), and Robert Nemanich (Nemanich) were selected as three of nine Colorado presidential electors for the 2016 presidential election as a result of the Democratic ticket winning the state. *Baca v. Colorado Department of State*, No. 18-1173 (Co. Dist. Ct., 2019). The Colorado secretary of state informed the group that, if any of them were to vote against Hillary Clinton and Tim Kaine, he would likely remove the elector until everyone cast votes for Democratic candidates.

On December 16, 2016, the electors gathered to cast their votes for the president and vice president of the United States. Despite Colorado law requiring presidential electors to cast their votes for Hillary Clinton, the candidate who won the state’s popular vote, Mr. Baca cast his vote for John Kasich, the Republican governor of Ohio, an unsuccessful candidate for president in the 2016 Republican primaries, instead. As a result, Colorado’s secretary of state removed Mr. Baca as an elector, disregarded his vote, and replaced him with an elector who voted for Hillary Clinton. Ms. Baca and Nemanich voted for Hillary Clinton despite wanting to vote for John Kasich. The three sued the secretary of state alleging a violation of their constitutional rights under Article II and the Twelfth Amendment for removing Mr. Baca for not voting in accordance to the state’s popular vote and effectively prohibiting Ms. Baca and Nemanich from voting for John Kasich. *Williams v. Baca*, No. 2016-cv-34522, (Colo. Dist. Ct. Dec. 13, 2016). The

District Court for the District of Colorado granted Colorado’s motion to dismiss after finding all of the electors lacked standing and failed to state a claim upon which relief could be granted because the U.S. Constitution does not bar states from binding electors to vote for the candidate who wins the state’s popular vote. *Baca v. Colorado Department of State*, No. 18-1173 (Co. Dist. Ct., 2019).

On appeal, the United States Court of Appeals for the Tenth Circuit found that Mr. Baca had standing because he was removed from his position as an elector, but that the other two appellants did not have standing because they had not been prevented from serving as electors. *Baca v. Colorado Department of State*, 935 F.3d 887 (10th Cir. 2019). The court concluded that Mr. Baca was personally entitled to his position because he had been elected to his position. It rejected Colorado’s argument that states may exercise control over their electors. In the court’s view, the U.S. Constitution empowers electors to be “free to vote as they choose” in the Electoral College. The decision further held that a state’s right to appoint an elector does not allow for removal of an elector because the elector is exercising a federal function.

Justice Mary Beck Briscoe dissented. *Baca v. Colorado Department of State*, 935 F.3d 887 (10th Cir. 2019) (Briscoe, dissenting). The dissent concluded that the case was moot because no petitioner sought damages. Justice Briscoe cited *Lankford v. City of Hobart*, 73 F.3d 283 (10th Cir. 1996), for the proposition that a claim without damages is moot. A Section 1983 suit without a claim for damages against a state was not “sufficient to overcome mootness [because the claim] was nonexistent.”

The U.S. Supreme Court granted *certiorari* to hear the appeals, which will be heard the same day. Chiafalo’s counsel filed a brief for his client and Baca, but separate counsel will argue in each case. The Court will likely make its decision by the end of the current term well prior to the 2020 presidential election.

CASE ANALYSIS

The president and vice president of the United States are chosen by members of the Electoral College chosen in each state. Article II of the U.S. Constitution provides that “[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.” U.S. Const., Art. II, § 1, cl. 2. The Constitution does not define the term “manner.” The mechanism of choosing electors is left up to the states. All but two states award all of the votes to the winner of the statewide vote. Maine and Nebraska award the winner of the statewide vote two electors, and the winner of each congressional district vote receives one elector. The Constitution requires the votes of the electors to be sent to Washington and counted there. U.S. Const., Art. II, § 1, cl. 2. Under Article II, each elector casts two votes. The person with a majority of votes and the most votes becomes president; the other majority vote total winner becomes vice president. After the 1800 election resulted in a tie vote between Thomas Jefferson and Aaron Burr, both of whom had run on the Democratic-Republican slate, the Constitution was amended to provide for electors to vote separately for the two offices. U.S. Const. Amend. XII. The issue in this case is whether

the states may direct how electors vote or penalize those who do not vote for the candidate to whom they were pledged.

The Tenth Circuit in *Baca*'s case concluded that a state lacks the power to remove an elector who votes contrary to state law. *Baca v. Colorado Department of State*, 935 F.3d 887 (10th Cir. 2019). The court further states that, although the Constitution grants to the states the power to appoint electors, that power ceases once the elector is selected.

The Electoral College's purpose is discussed in the *Federalist Papers*. Alexander Hamilton stated, "It was desirable that the sense of the people should operate in the choice of the person" to be president. *The Federalist* No. 68 (Alexander Hamilton). Thus, the people exercise that role by choosing the electors who cast votes to determine the president of the United States. According to Hamilton, the presidential electors "should be...men most capable of analyzing the qualities adapted to the station.... A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations."

By 1796, political parties arose and regularly selected candidates for president. Each state chooses electors, and, generally, the electors' votes have reflected the popular will in the states. However, throughout our country's history, a small number of electors have voted for a candidate other than the person to whom the elector was pledged. The first instance occurred in 1796, when Samuel Miles voted for Thomas Jefferson instead of Samuel Adams. Some electors have voted for the opposing party candidate while many voted for persons not on the ballot. In 1872, after liberal Republican-Democrat candidate Horace Greeley died after the election, but before the electors cast their votes, all but three of his electors voted for other candidates. All of these votes were counted as cast except that the votes for the deceased Greeley were disallowed. In no instance did electors' votes contrary to the state vote result in a change in the result of the election, although the failure of 23 Virginian electors to vote for the Democratic candidate for vice president in the 1836 election resulted in no candidate receiving a majority of the votes; the Senate then chose the vice president pursuant to the Twelfth Amendment and selected the Democratic candidate.

In casting his vote as elector, *Baca* crossed off Clinton's name from the ballot and wrote in *Kasich*'s name. The Colorado secretary of state voided the vote, required a new elector to be chosen, and certified all of the Colorado votes for Clinton. Meagan Flynn, *He tried to stop Trump in the electoral college. A court says his 'faithless' ballot was legal*, *The WA Post* (Aug. 22, 2019, <https://www.washingtonpost.com/nation/2019/08/22/he-tried-stop-trump-electoral-college-court-says-his-faithless-ballot-was-legal/>).

Mr. *Baca* was elected as a presidential elector and had the duty of casting his votes for the offices of president and vice president. He asserts that the Colorado secretary of state removing him as an elector deprived him of fulfilling the duties of that position and prevented him from voting for *Kasich*, as he had determined appropriate. *Chiafalo*, not having been removed as an elector, cast his ballot as he thought appropriate and was subsequently fined for doing so rather than voting for Clinton, who had won the

majority of the state's presidential vote. He claims that the state government could not penalize him for performing his duties as an elector under the Constitution. There is no issue of standing in *Chiafalo*'s case, unlike the situation in *Baca*'s case. Even if the Supreme Court finds that *Baca* lacked standing to maintain his action, the Court will still have to rule in *Chiafalo*'s action and decide whether electors are free to vote as they choose, without being removed (as in *Baca*'s case) or fined (as in *Chiafalo*'s case) for disregarding state law requiring them to vote for the victor of the state's popular vote.

After being removed as an elector, Mr. *Baca* sued for nominal damages. The Tenth Circuit held that "Mr. *Baca*'s loss of his office—however brief its existence—is an injury in fact." *Baca v. Colorado Department of State*, No. 18-1173 (Co. Dist. Ct., 2019). Mr. *Baca* argues he suffered an injury through the loss of a government office as an elector and thus has standing to request damages. (citing *Myers v. United States*, 272 U.S. 52, 176 (1926)). Colorado's Constitution expressly states that "the electors of the electoral college shall be chosen by direct vote of the people." Colorado Const. sched. § 20. Mr. *Baca* was, in fact, voted for by the people of Colorado and had a "personal entitlement" to serve as an elector. When Mr. *Baca* was removed as an elector, he asserts that he suffered an injury sufficient to warrant his having standing in this action.

It is generally unpopular for electors to vote against the wishes of the voters who selected them. In the last half-century, a majority of states has attempted to curtail the practice. Of the 50 states, 32, plus the District of Columbia, require electors to vote for a pledged candidate. However, 17 of these states and the District of Columbia do not have any penalty or procedure to prevent votes for candidates other than the nominees of their party from counting as an official vote. Washington, New Mexico, North Carolina, South Carolina, and Oklahoma impose a penalty for electors who do not vote as pledged; 11 states cancel the vote and also provide for the elector who cast the vote to be replaced with an elector who will vote in accordance with the state's popular vote. In Colorado and Maine, no state law provides for the cancellation of these votes, but their secretaries of state have determined they have the authority to cancel these votes. *Faithless Elector State Laws*, FAIRVOTE, <https://www.fairvote.org/faithless-elector-state-laws> (last visited Feb. 2, 2019).

The Uniform Law Commission drafted and recommend a law called the Uniform Faithful Presidential Electors Act (Act). The Act requires electors to pledge to vote for a candidate. It further states that electors will be replaced with an alternate elector if they do not vote for the pledged candidate. Indiana, Minnesota, Montana, Nebraska, Nevada, and Washington have adopted the Act as of October 2019.

In the present case, the United States Court of Appeals for the Tenth Circuit rejected Colorado's argument that the power to appoint electors includes a right to remove them. The court found that Colorado relied on cases relating specifically to presidential appointment and removal powers, which it viewed as irrelevant to the removal of presidential electors. The appellate court held that presidential electors exercise a federal function as opposed to a state function when casting ballots. *Baca v. Colorado Department*

of State, 935 F.3d 887 (10th Cir. 2019) (citing *Burroughs v. United States*, 290 U.S. 534 (1934)). The court found that neither Article II nor the Twelfth Amendment allows a state to remove or punish electors who cast votes for candidates other than the nominees of their party.

Chiafalo argues that electors, although chosen in the state, derive their authority from the federal constitution and not the state. *Burroughs v. United States*, 290 U.S. 534 (1934). Because the electors are performing a federal function, Chiafalo argues, the precedent of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), prevents the state from removing an elector or imposing a fine as a result of the vote for a candidate other than the nominees of their party because it unconstitutionally interferes with a federal function. *McCulloch* held that Maryland could not tax a federal bank created by Congress because federal law is supreme over a contrary state law and the state taxation of a federal function violates the Supremacy Clause, United States Const., Art. VI, cl. 2.

Additionally, Chiafalo argues that the framers of the Constitution intended presidential electors to choose their own candidates as shown by the use of the word “vote” in referring to the electors’ duty. Voting is an act of discretion and free judgment. Chiafalo cites a source contemporary to the adoption of the Constitution as defining voting as “to speak for or in behalf of any person or thing; also to chuse or elect a person into any office, by voting or speaking[.]” Thomas Dyche and William Pardon, *A New General English Dictionary* (11th ed. 1760). Therefore, Chiafalo argues that voting is an act of discretion not subject to state control.

Washington argues that, although presidential electors exercise a federal function, “they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the Federal Constitution.” *Chiafalo v. Washington*, No. 19-465 (Wash. Sup. Ct., 2019) (citing *Ray v. Blair*, 343 U.S. 214 (1952)). *Ray* upheld an Alabama state requirement that electors chosen by a political party must pledge to vote as electors for the candidate of the party. However, there is no language in the Constitution nor any Supreme Court decision that requires a presidential elector to vote the way the elector pledged. It is within state power to require a person to pledge to support a candidate of the national party. Although *Ray* held that a state political party may require an elector to pledge to support the candidates of the national party, the decision did not determine whether the state had the authority to enforce the pledge. Washington asserts that no language in the Constitution prohibits a state from requiring electors to vote as pledged or to fine them for not voting for the nominee of their party.

In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court recognized that “the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.” The *McPherson* Court upheld Michigan legislation allocating one electoral vote to the winner in each congressional district and two to the winner of the statewide vote, stating: “If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the

legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts.” It noted that the state “acts individually through its electoral college [and] by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.” Because the Constitution does not provide how electors are to be appointed, the state of Washington argues it is left exclusively to the state legislature to define the method of appointment by allowing states to choose their own appointment methods through their own state laws. The Twelfth Amendment requires the electors to meet at the specified date and time outlined by Congress and to cast two votes for qualified candidates. The Constitution, Washington claims, does not limit a state’s authority in adding requirements pertaining to presidential electors. Thus, it is within a state’s authority under Article II, Section 1, to impose penalties, including a fine, on electors who do not vote for the nominees of their party. Such penalties, the state contends, do not interfere with any federal function outlined in the Twelfth Amendment.

SIGNIFICANCE

These cases are important because the Supreme Court has the opportunity to determine whether a presidential elector may ignore a state law requiring electors to vote for the winner of the popular vote or whether state law can remove or fine an elector who fails to vote for the state’s popular vote winner. If the Court concludes that electors may not be removed or punished for voting as they consider appropriate, regardless of state law to the contrary, the decision would uphold the validity of an unpopular but frequent practice throughout our history. A ruling in favor of the states’ position would settle an ongoing controversy and bar an unpopular and seemingly anti-democratic practice. A ruling for the electors would mean that they, rather than the voters in the states, determine who is elected president, although it is likely that the overwhelming percentage of electors would still vote for the candidate with the popular vote majority in their states. Votes by electors for persons other than the candidates of their parties have never resulted in a change in who ultimately won the majority of votes in the Electoral College, but such a result is possible and would lead many to question the legitimacy of the president selected in that way. If the Court holds that the state’s power to determine the “manner” of selection of electors includes requiring them to vote for the candidate receiving the most votes in the state in the election, it will uphold the concept that the people get to decide who will serve as president.

Alexander Hamilton in *Federalist* No. 68 expressed the view that the electors from each state would be the most qualified and knowledgeable persons to select the president. That view may have reflected a time when most people in the country lived in isolated communities and lacked significant sources of information about potential candidates. It also reflected a time without organized political factions or parties, although they arose soon after the Constitution was adopted. Even if the rationale for the constitutional provision no longer exists, the Constitution has not been amended, and, according to Chiafalo and Baca, the provision should be observed.

Although United States citizens have the right to vote for electors pledged or listed to vote for the candidate of the voter’s choice,

the actual votes for president are cast by the electors rather than the statewide voters. The ruling in this case will likely determine whether 538 individual electors choose the highest federal executive officers, as determined by the states' popular votes, or whether the electors may use independent judgment in deciding which persons should be elected to hold the offices.

The Constitution clearly leaves it up to the states to choose the methods for selecting their electors, and the methods chosen by states differ. Early in our national history, some states had electors chosen by state legislatures with no popular vote for the offices of president and vice president. By the middle of the 19th century, all states moved to holding popular votes for electors. Over the past 200 years, the overwhelming majority of electors has voted for the candidates chosen by the political parties for the offices, but in many elections a small number of electors have not voted for the candidates who won the most votes in the state. The independent actions of these electors have generally been unpopular and have never changed the outcome of a national election. The Supreme Court is asked in these cases to determine if the states have the power to require electors to vote as directed by the popular vote, or be sanctioned or replaced for failing to do so, or whether the intent of the framers of the Constitution and continued practice indicate that electors are free to exercise independent judgment in casting their votes.

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PREVIEW of United States Supreme Court Cases 47, no. 7 (May 4, 2020): 37–41. © 2020 American Bar Association

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CONGRESSIONAL AUTHORITY

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EXECUTIVE IMMUNITY

Trump v. Vance

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FREE SPEECH

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HEALTHCARE AND RELIGIOUS FREEDOM

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INDIAN LAW

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RELIGIOUS FREEDOM

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TRADEMARK LAW

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Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education. ISSN 0363-0048