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## LEGAL UPDATE

Legal Services Division



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### UNITED STATES SUPREME COURT DECISION — AUTHORITY TO DISCIPLINE FAITHLESS ELECTORS

**Purpose.** *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

#### Filed by the United States Supreme Court

July 6, 2020

Chiafalo v. Washington

No. 19-465

[www.supremecourt.gov/opinions/19pdf/19-465\\_i425.pdf](http://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf)

**Factual Background and Prior Proceedings.** In the 2016 presidential election, Hillary Clinton received more votes than Donald Trump in the State of Washington. Therefore, Washington appointed as its electors the nominees from the Democratic Party. At the time, Washington required electors to execute a pledge to mark their ballots for the presidential nominee from the party appointing them or face a civil fine of \$1,000. Three Washington electors instead voted for Colin Powell for president. Consequently, Washington fined those electors \$1,000.

The Washington Supreme Court ultimately upheld the constitutionality of the fine. Subsequently, in a separate case regarding electors who marked their ballots for a presidential nominee other than that of the party which appointed them (known as “faithless electors”) the United States Court of Appeals for the Tenth Circuit ruled that Colorado could not enforce its pledge law, which removes any elector who votes for any candidate other than the candidate of the party which appointed the elector. The United States Supreme Court (Court) granted certiorari in both cases to resolve the split.

**Issue.** Whether a state can enforce a law punishing a faithless elector for failing to cast a vote consistent with a pledge signed by the elector.

**Analysis.** In a unanimous decision, the Court held that a state can enforce a pledge law imposing a penalty against a faithless elector. The Court had previously ruled that a state could require an elector to sign a pledge and refuse to appoint an elector who refused to do so in *Ray v. Blair*, 343 U.S. 214 (1952). In *Ray*, the Court found that the imposition of a pledge requirement was a valid exercise of a state's authority, found in Article II of the United States Constitution (Article II), to appoint electors “in such manner as the Legislature thereof may direct.” However, that case did not involve the question of whether a state could enforce such a pledge through the imposition of a penalty.

The Court described Article II as granting the “broadest power of determination” to states, which may nevertheless be constrained by other provisions of the United States Constitution (for instance, the Court noted that a state could not select electors in a way that violates the Equal Protection Clause). The Court did not find any provision of the United States Constitution that prohibits a state from depriving an elector

of discretion in voting or from imposing a penalty against a faithless elector for failing to vote as mandated by state law.

The Washington electors argued that the plain meaning of the terms “vote” and “ballot” in the Twelfth Amendment to the United States Constitution (Twelfth Amendment) require that electors be granted freedom to vote as they choose. The Court disagreed, noting that a person voting at the direction of another is still voting. The Court also explained that, at the time of the drafting of the United States Constitution, two states granted autonomy to electors selected to choose state senators, but the framers did not make use of similar language when establishing the electoral college.

The Washington electors also argued they must be allowed to vote freely because the longstanding practice of allowing electors to vote freely indicated that the ambiguous language of both Article II and the Twelfth Amendment should be interpreted to allow such a practice. However, in a historical review of such a practice throughout the country, the Court found that, out of over 23,000 electors appointed since 1796, only 180 had voted for a candidate other than the candidate of the party that appointed them, many of which votes were cast in an election in which a nominee died just after election day. Further, the Court found that historical writings and cases showed that electors have been understood to be mere instruments for expressing the will of the voters who selected them since near the inception of the electoral college.

**Holding.** The Court held that the Washington law imposing a \$1,000 civil penalty on electors who violated a pledge to vote for a given candidate did not violate any provision of the United States Constitution.

**Concurrence.** Justice Thomas, joined in part by Justice Gorsuch, concurred in the judgment of the Court. However, he found that the Court was mistaken in finding that the states’ power to appoint electors in “such Manner as the Legislature thereof may direct” extended only to the power of appointment and that states lost the power to control the votes of electors post-appointment. He based this argument on the plain meaning of the word “manner,” the writings of the framers of the United States Constitution and ratifying conventions, and the definition given to the word by the Court in Article I of the United States Constitution. Justice Thomas also argued that, even if Washington did have the power to enforce a pledge that flowed from its appointment powers, the fact that Washington did not require electors to sign a pledge as a condition of appointment and instead imposed a duty by law took Washington’s actions outside that authority.

Rather than finding that the states have the power to enforce pledges by electors based on Article II and the Twelfth Amendment, Justice Thomas would find that the states reserved the power to do so under the Tenth Amendment to the United States Constitution, as such power was neither granted to the federal government nor denied to the states in the Constitution.

**Iowa Law.** Under Iowa Code sections 54.5, 54.7, and 54.8, as amended by the General Assembly in 2020, presidential electors are required to execute a pledge to mark their ballots for presidential and vice presidential nominees of the party or group that nominated them. If an elector then refuses to mark a ballot consistent with that pledge, the State Commissioner of Elections shall not accept the ballot and shall declare the elector’s position to be vacant. An alternate elector shall then be selected, who shall be required to execute a pledge to vote as required by the original elector’s pledge.

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