

# Supreme Court Rules in Favor of States' Authority Over Presidential Electors Through the Party System in "Faithless Elector" Cases

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On July 6, the U.S. Supreme Court unanimously held in *Chiafalo v. Washington* and *Colorado Department of State v. Baca* that a State may compel a presidential elector to vote for the presidential candidate who won his State's popular vote. These decisions affirm two centuries of constitutional tradition and secure the continuing vitality of the Electoral College.

The disputes in *Chiafalo* and *Baca* arose from a similar set of facts. In both cases, a few of the States' presidential electors violated state law when they voted for individuals who had not won their State's popular election. In *Chiafalo*, Washington penalized these "faithless electors" by issuing them \$1,000 fines. In *Baca*, Colorado removed a faithless elector from his position. The electors challenged these penalties, claiming that the U.S. Constitution grants them an affirmative right to vote as they wish. The Washington Supreme Court rejected that argument, but the U.S. Court of Appeals for the Tenth Circuit accepted it. The Supreme Court granted review.

The Court, in an opinion by Justice Kagan that was joined by seven other Justices, wrote that the Constitution grants the States power to penalize an elector who fails to vote for the winner of his State's popular election. Article II specifies that each State may appoint electors "in such Manner as the Legislature thereof may direct." The Court said that this power to appoint an elector includes the lesser power to condition his appointment on the requirement that he align his vote with the State's popular vote. Moreover, "[n]othing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion."

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Notwithstanding this brief textual analysis, the driver of the Court's opinion was history and tradition. The Court emphasized the long-standing practice of the States, explaining that state laws "appointing electors chosen by the winner's party" who are "pledge[d]" to that party's nominee reflect a consistent "tradition more than two centuries old." "In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen." Relying in part on an *amicus* brief filed by Wiley Rein LLP on behalf of the Republican National Committee, the Court dismissed "[t]he history going the opposite way" as "one of anomalies only." Indeed, although the electors tried to make much of 180 alleged instances of faithless voting, the Court countered that these "faithless votes represent just one-half of one percent" of the 23,000 votes cast by electors since the Founding, and that one-third had come during a single election in 1872 when the Democratic Party's nominee died just after Election Day.

Justice Thomas concurred in the judgment. In a separate opinion joined in part by Justice Gorsuch, Justice Thomas agreed that "States have the power to require Presidential electors to vote for the candidate chosen by the people of the State." But Justice Thomas viewed the people of each individual State, not the text of Article II, as the ultimate source of a State's power over its electors. "This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment."

The majority and Justice Thomas agreed that whatever the source of their power, the States cannot violate the express provisions of the Constitution when they appoint electors. Justice Thomas pointed out that "Article I, § 10, contains a brief list of powers removed from the States." That qualification may prove important if the advocates of the National Popular Vote Interstate Compact or similar initiatives are successful in urging some States to appoint their electors based on the national popular vote. Among other things, Article I, § 10 provides that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State."

In the meantime, the Court's decisions will guard against the electoral "chaos" that *amici* warned about and which concerned some of the Justices at oral argument. And going forward, *Chiafalo* and *Baca* should reinforce the integrity of the Electoral College by affirming the authority of the States to express effectively the will of their people in presidential elections.

*Shane Roberts, a Law Clerk at Wiley Rein LLP, contributed to this article.*