

Faithless Electors

Baca v. Hickenlooper (Wiley Y. Daniel, D. Colo. 1:16-cv-2986), *Chiafalo v. Inslee* (James L. Robart, W.D. Wash. 2:16-cv-1886), *Koller v. Brown* (Edward J. Davila, N.D. Cal. 5:16-cv-7069), and *Abdurrahman v. Dayton* (Paul A. Magnuson, D. Minn. No. 0:16-cv-4279)

After one party's candidate earned more votes in the 2016 presidential election, but the other party's candidate earned more Electoral College votes, electors in four states won by the popular-vote victor filed federal complaints to relieve electors from voting as pledged. No federal court granted any plaintiff immediate relief. But in 2019, a court of appeals ruled that the Constitution requires states to allow electors to vote as they please. The Supreme Court disagreed.

Subject: Voting irregularities. *Topics:* Electoral College; intervention; laches.

The 2016 presidential election resulted in a majority of votes for Hillary Clinton, but Donald Trump earned a majority of Electoral College votes.¹ Electors in four states that Clinton won filed unsuccessful federal lawsuits seeking judicial rulings freeing electors from voting as pledged. A later lawsuit resulted in a ruling by a court of appeals that electors retain the right to vote as they please, but the Supreme Court reversed that holding.

Colorado

Two members of the Electoral College who were pledged to vote for the Democratic nominees for President and Vice President who prevailed in Colorado on November 8, 2016, filed a federal complaint in the District of Colorado on December 6 seeking relief from legal obligations preventing the Electoral College from being a deliberative body.² The electors sought, for example, an opportunity to vote for a consensus candidate other than Hillary Clinton, who prevailed in Colorado, or Donald Trump, who was expected to earn the most votes in the Electoral College and whom the plaintiffs regarded as unfit.³ With their complaint, the electors filed a motion for a temporary restraining order and a preliminary injunction.⁴

On Friday, December 9, Judge Wiley Y. Daniel granted a motion by Colorado's Republican Party to intervene to protect its candidates' ultimate vic-

1. See, e.g., Michael Finnegan, *Electors Stick to Script, Seal Trump as President*, L.A. Times, Dec. 20, 2016, at A1.

2. Complaint, *Baca v. Hickenlooper*, No. 1:16-cv-2986 (D. Colo. Dec. 6, 2016), D.E. 1 [hereinafter *Baca* Complaint]; *Baca v. Colo. Dep't of State*, 935 F.3d 887, 903 (10th Cir. 2019); see John Frank, *Anti-Trump Electors Sue State*, Denver Post, Dec. 7, 2016, at 2A; Sean Sullivan & Ed O'Keefe, *Electors for Trump Urged to Have Second Thoughts*, Wash. Post, Dec. 7, 2016, at A4.

3. *Baca* Complaint, *supra* note 2, at 3–4.

4. Motion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 6, 2016), D.E. 2.

tories.⁵ On Monday, Judge Daniel granted Trump’s motion to intervene to protect the Electoral College process.⁶

At a hearing on the afternoon of December 12, Judge Daniel denied the electors immediate relief.⁷ Four days later, the court of appeals denied the electors’ motion for an injunction pending appeal.⁸ On December 21, Judge Daniel issued an opinion explaining his December 12 ruling.⁹ He noted that the plaintiffs were seeking immediate relief that would change rather than preserve the status quo.¹⁰ As to the merits, “I agree with Defendants’ contention that the presidential electors waived their First Amendment rights when they accepted the nomination to be presidential electors.”¹¹

The electors voted for the Democratic nominees on December 19.¹² They filed an amended complaint on July 18, 2017,¹³ and six days later the parties stipulated dismissal of Trump as a party.¹⁴ Judge Daniel granted a voluntary dismissal of the whole case in August.¹⁵

Washington

Also pleading the presumptive Electoral College victors as unfit, two Washington electors filed a federal complaint in the Western District of Washington on December 8, 2016, seeking relief from a legal obligation to vote for the Democratic nominees.¹⁶ With their complaint, they filed a motion for a temporary restraining order and a preliminary injunction.¹⁷

5. Intervention Order, *id.* (Dec. 9, 2016), D.E. 15; Transcript at 3, *id.* (Dec. 12, 2016, filed Dec. 14, 2016), D.E. 23 [hereinafter *Baca* Transcript]; Intervention Motion, *id.* (Dec. 9, 2016), D.E. 11.

Judge Daniel died on May 10, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6. Intervention Order, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 18; *Baca* Transcript, *supra* note 5, at 3; Intervention Motion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 16.

7. *Baca* Transcript, *supra* note 5, at 3; Minutes, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 19; *Baca*, 935 F.3d at 903; *see* Amended Minute Order, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 8, 2016), D.E. 10 (scheduling the hearing); *see also* Brian Eason, *Will Electors Revolt?*, *Denver Post*, Dec. 19, 2016, at 1A; John Frank, *Electors’ Injunction Request Rejected*, *Denver Post*, Dec. 13, 2016, at 1A.

8. Opinion, *Baca v. Hickenlooper*, No. 16-1482 (10th Cir. Dec. 16, 2016); *Baca*, 935 F.3d at 903.

9. Opinion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 21, 2016), D.E. 27 [hereinafter D. Colo. *Baca* Opinion], 2016 WL 7384286.

10. *Id.* at 4; *Baca* Transcript, *supra* note 5, at 9.

11. D. Colo. *Baca* Opinion, *supra* note 9, at 8.

12. 2016 Electoral College Results, www.archives.gov/electoral-college/2016 [hereinafter Electoral College Vote Certificates] (compilation of the certificates of Electoral College votes).

13. Amended Complaint, *Baca*, No. 1:16-cv-2986 (D. Colo. July 18, 2017), D.E. 55.

14. Stipulation, *id.* (July 24, 2017), D.E. 56.

15. Order, *id.* (Aug. 2, 2017), D.E. 58; *see* *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 904 (10th Cir. 2019).

16. Complaint, *Chiafalo v. Inslee*, No. 2:16-cv-1886 (W.D. Wash. Dec. 8, 2016), D.E. 1; *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1142–43 (W.D. Wash. 2016); *see* Jim Brunner, *Two*

On December 9, Judge James L. Robart set the case for hearing on the afternoon of December 14.¹⁸

On December 12, Washington’s Republican Party moved to intervene “to protect its interest in ensuring its electors are faithful,”¹⁹ and Trump moved to intervene to protect the Electoral College process.²⁰ Deferring a ruling on intervention, Judge Robart ordered the putative intervenors to appear at the December 14 hearing.²¹

At the hearing, Judge Robart again deferred ruling on the intervention motions and denied the electors immediate relief.²² He concluded that it would be unlikely for First Amendment freedoms to extend to the casting of electoral votes by electors who voluntarily chose their rule-governed role.²³ Two days later, the court of appeals determined that the electors had not “shown a likelihood of success or serious questions going to the merits” and denied an emergency motion for an injunction pending appeal.²⁴

Trump withdrew his motion to intervene on December 21,²⁵ and Judge Robart granted intervention to Washington’s Republican Party on February 2, 2017.²⁶ The case was resolved by stipulated dismissal on March 15.²⁷

On December 19, 2016, the Western District of Washington plaintiffs were two of seven faithless electors: for President, three in Washington, including the plaintiffs, voted for Colin Powell, and one voted for Faith Spotted Eagle; in Texas, one voted for Ron Paul, and one voted for John Kasich; and one in Hawaii voted for Bernie Sanders.²⁸

Washington State Electors Sue Over Law on Election Results, Seattle Times, Dec. 13, 2016, at B3.

17. Motion, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 8, 2016), D.E. 2.

18. Order, *id.* (Dec. 9, 2016), D.E. 7; see Brunner, *supra* note 16.

19. Intervention Motion at 1–2, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 12, 2016), D.E. 9.

20. Intervention Motion, *id.* (Dec. 12, 2016), D.E. 13.

21. Order, *id.* (Dec. 13, 2016), D.E. 24.

22. *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1142, 1148–49 (W.D. Wash. 2016); Transcript at 3–4, 36–41, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 14, 2016, filed Dec. 23, 2016), D.E. 38 [hereinafter *Chiafalo* Transcript]; Docket Sheet, *id.* (Dec. 8, 2016) (D.E. 27); see Finnegan, *supra* note 1.

23. *Chiafalo* Transcript, *supra* note 22, at 38–39.

24. Order, *Chiafalo v. Inslee*, No. 16-36034 (9th Cir. Dec. 16, 2016).

25. Intervention Withdrawal, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 21, 2016), D.E. 36.

26. Intervention Order, *id.* (Feb. 2, 2017), D.E. 40.

27. Stipulation, *id.* (Mar. 15, 2017), D.E. 44.

28. Electoral College Vote Certificates, *supra* note 12; *Chiafalo v. Washington*, 591 U.S. ___, ___, 140 S. Ct. 2316, 2322 (2020); *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 950 (10th Cir. 2019); *In re Guerra*, 193 Wash. 2d 380, 384 & n.3, 441 P.3d 807, 808 & n.3 (2019); Notice, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Feb. 15, 2017), D.E. 41; see Rick Anderson, “Faithless Electors” Are Now Paying the Price, L.A. Times, Mar. 10, 2017, at A5; Jim Brunner, *4 Washington State Electors Break Ranks, Cast Protest Votes as Trump Seals Victory*, Seattle Times, Dec. 20, 2016, at A1.

On May 23, 2019, Washington’s supreme court affirmed \$1,000 fines against the electors who voted for Powell as within the state’s authority to direct the manner and mode of appointing electors.²⁹ The United States Supreme Court also affirmed the fines.³⁰

California

A California member of the Electoral College who was pledged to vote for the Democratic nominees filed a federal complaint in the Northern District of California on December 9 seeking relief from California statutes compelling him to vote for the California victors.³¹

On December 12, the elector filed a motion for a temporary restraining order and a preliminary injunction.³² That day, Judge Edward J. Davila observed that the notice requirements of Federal Rule of Civil Procedure 65(b)(1) had not been met for a temporary restraining order, and he ordered service and briefing on the motion completed by 4:00 p.m. on December 14.³³ On December 15, Judge Davila scheduled a hearing for the following morning.³⁴

California’s Republican Party and Trump moved on December 13 to intervene in the case.³⁵ Trump withdrew his motion on December 20,³⁶ and Judge Davila granted the Republican Party’s motion on January 3, 2017.³⁷ On June 2, noting that Trump was no longer involved in the action, Judge Davila denied a December 16, 2016, pro se intervention motion by an attorney and his wife seeking, among other things, that Trump answer for the kidnapping of their son.³⁸

29. *Guerra*, 193 Wash. 2d 380, 441 P.3d 807; *Chiafalo*, 591 U.S. at ____, 140 S. Ct. at 2323; see David Gutman, *High Court Backs Fines for Rogue Electors*, Seattle Times, May 24, 2019, at B6; see also Jim Brunner, *Four State “Faithless Electors” Are Fined*, Seattle Times, Dec. 30, 2016, at B1.

30. *Chiafalo*, 591 U.S. at ____, 140 S. Ct. at 2322–23; see Robert Barnes, *States May Bind Electors to Popular Vote, Justices Decide*, Wash. Post, July 7, 2020, at A1; Brent Kendall & Jess Bravin, *Ban on “Faithless” Electors Upheld*, Wall St. J., July 7, 2020, at A3; Adam Liptak, *States Can Curb Elector Choices, Justices Affirm*, N.Y. Times, July 7, 2020, at A1.

31. Complaint, *Koller v. Brown*, No. 5:16-cv-7069 (N.D. Cal. Dec. 9, 2016), D.E. 1; *Koller v. Harris*, 312 F. Supp. 3d 814, 820 (N.D. Cal. 2018); *Koller v. Brown*, 224 F. Supp. 3d 871, 875 (N.D. Cal. 2016).

32. Motion, *Koller*, No. 5:16-cv-7069 (N.D. Cal. Dec. 12, 2016), D.E. 4; *Koller*, 312 F. Supp. 3d at 820.

33. Order, *Koller*, No. 5:16-cv-7069 (N.D. Cal. Dec. 12, 2016), D.E. 10.

34. Order, *id.* (Dec. 15, 2016), D.E. 31.

35. Intervention Motion, *id.* (Dec. 13, 2016), D.E. 22 (candidate); Intervention Motion, *id.* (Dec. 13, 2016), D.E. 14 (party).

36. Notice, *id.* (Dec. 20, 2016), D.E. 47.

37. Order, *id.* (Jan. 3, 2017), D.E. 57; *Koller*, 312 F. Supp. 3d at 820.

38. Order, *Koller*, No. 5:16-cv-7069 (N.D. Cal. June 2, 2017), D.E. 100; see Intervention Motion, *id.* (Dec. 16, 2016), D.E. 38; Docket Sheet, *id.* (Dec. 9, 2016) (showing several additional filings).

At the December 16, 2016, hearing, Judge Davila denied the elector immediate relief.³⁹ Judge Davila acknowledged that the original plan for the Electoral College may have been for a collection of independent voters, but the Supreme Court had recognized in 1952 that modern electors were not unfettered.⁴⁰

On December 19, 2016, the elector voted for the Democratic nominees.⁴¹

On April 20, 2018, Judge Davila dismissed an amended complaint, finding that the elector's role in the 2016 election was moot, his role in future elections was speculative, and there could be no liability for the 2016 election, because "Plaintiff has not convincingly shown why it was clearly-established in 2016 that [California's election code was] unconstitutional and could not be enforced."⁴²

Minnesota

In Minnesota, an elector attempted to vote on December 19, 2016, for Bernie Sanders instead of Hillary Clinton, the Minnesota victor.⁴³ Instead of counting the elector's vote, Minnesota's secretary of state selected an alternate elector, who voted for Clinton.⁴⁴ The original elector filed a federal complaint in the District of Minnesota on December 19 challenging his replacement.⁴⁵ The elector also filed on that day a motion for a temporary restraining order and a temporary injunction,⁴⁶ a motion for summary judgment,⁴⁷ and a motion for expedited briefing and hearing.⁴⁸

Judge Paul A. Magnuson heard the case on Thursday, December 22.⁴⁹ His first question was, "Why is this entire matter not moot?"⁵⁰ On the following day, he denied the elector relief and dismissed the case.⁵¹ Because the Elec-

39. Transcript at 47, *id.* (Dec. 16, 2016, filed Dec. 16, 2016), D.E. 41; *Koller*, 312 F. Supp. 3d at 820.

40. *Koller v. Brown*, 224 F. Supp. 3d 871, 875–77 (N.D. Cal. 2016), *appeal dismissed*, Order, *Koller v. Brown*, No. 16-17283 (9th Cir. Dec. 21, 2016); *see Ray v. Blair*, 343 U.S. 214 (1952).

41. Electoral College Vote Certificates, *supra* note 12.

42. *Koller*, 312 F. Supp. 3d 814; *see Amended Complaint, Koller*, No. 5:16-cv-7069 (N.D. Cal. Feb. 17, 2017), D.E. 83.

43. Opinion at 2, *Abdurrahman v. Dayton*, No. 0:16-cv-4279 (D. Minn. Dec. 23, 2016), D.E. 22 [hereinafter D. Minn. *Abdurrahman* Opinion], 2016 WL 7428193; *see Complaint at 8, id.* (Dec. 19, 2016), D.E. 1 [hereinafter *Abdurrahman* Complaint]; Transcript at 2–3, *id.* (Dec. 22, 2016, filed Dec. 30, 2016), D.E. 281 [hereinafter *Abdurrahman* Transcript].

44. D. Minn. *Abdurrahman* Opinion, *supra* note 43, at 2; *see Abdurrahman* Complaint, *supra* note 43, at 8; *Abdurrahman* Transcript, *supra* note 43, at 3; *see also* Electoral College Vote Certificates, *supra* note 12.

45. *See Abdurrahman* Complaint, *supra* note 43.

46. Injunction Motion, *Abdurrahman*, No. 0:16-cv-4279 (D. Minn. Dec. 19, 2016), D.E. 5.

47. Summary-Judgment Motion, *id.* (Dec. 19, 2016), D.E. 11.

48. Ex Parte Motion, *id.* (Dec. 19, 2016), D.E. 8.

49. *Abdurrahman* Transcript, *supra* note 43.

50. *Id.* at 3.

51. D. Minn. *Abdurrahman* Opinion, *supra* note 43.

toral College ballots had already been submitted by the time of Judge Magnuson's decision, the elector's complaint was moot.⁵² The elector's claims were not among those capable of repetition but evading review, Judge Magnuson decided, because the would-be faithless elector was unlikely to be selected as an elector again.⁵³ In addition, the complaint was barred by laches, because the elector brought the action forty days after he knew he would become an elector.⁵⁴

On September 12, 2018, the court of appeals affirmed dismissal of the case.⁵⁵ Noting that "an action does not evade review if the short duration results from the party's failure to file suit sooner," the court concluded that the elector "did not proceed expeditiously with his claim."⁵⁶

Tenth Circuit

The two electors in the Colorado case dismissed their 2016 complaint, and on August 10, 2017, they filed a new complaint against Colorado's department of state seeking nominal damages for intimidating the plaintiffs into voting against their preferences and seeking a judgment that Colorado's infringement of their voting according to personal choice in the Electoral College was unconstitutional.⁵⁷ A September 20 amended complaint added a third plaintiff, who was removed as an elector for voting for Kasich instead of Clinton.⁵⁸ On April 10, 2018, Judge Daniel dismissed a second amended complaint for lack of standing.⁵⁹

The court of appeals determined on August 20, 2019, that the replaced elector did have standing.⁶⁰ The court further concluded that

while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote. In the absence of such a delegation, the states lack such power.⁶¹

52. *Id.* at 3.

53. *Id.* at 4.

54. *Id.* at 4–6.

55. *Abdurrahman v. Dayton*, 903 F.3d 813 (8th Cir. 2018).

56. *Id.* at 818 (identifying January 6, 2017, as the day that the claim became moot).

57. Complaint, *Baca v. Colo. Dep't of State*, No. 1:17-cv-1937 (D. Colo. Aug. 10, 2017), D.E. 1; *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901, 904 (10th Cir. 2019); see Brian Eason, "Faithless Electors" in Colorado Seek Damages in Lawsuit, *Denver Post*, Aug. 16, 2017, at 6A.

58. Amended Complaint, *Baca*, No. 1:17-cv-1937 (D. Colo. Sept. 20, 2017), D.E. 13; see *Baca*, 935 F.3d at 904; see also Jesse Paul, *Third Presidential Elector Joins Suit Against Colorado Secretary of State*, *Denver Post*, Sept. 22, 2017, at 8A.

59. Opinion, *Baca*, No. 1:17-cv-1937 (D. Colo. Apr. 10, 2018), D.E. 53; *Baca*, 935 F.3d at 901, 904; see Second Amended Complaint, *Baca*, No. 1:17-cv-1937 (D. Colo. Oct. 25, 2017), D.E. 39; see also Jesse Paul, *Federal Judge Tosses Out "Faithless" Lawsuit*, *Denver Post*, Apr. 11, 2018, at 2A.

60. *Baca*, 935 F.3d at 901, 905–22.

61. *Id.* at 943; see Trip Gabriel, *Electoral College Members Can Defy Voters' Wishes, Federal Court Rules*, *N.Y. Times*, Aug. 23, 2019, at A14; Justin Wingerter, *Court: State Electors Were Wrongly Forced to Vote for Hillary Clinton*, *Denver Post*, Aug. 22, 2019, at 2A.

Moreover, the “uninterrupted history of Congress counting every anomalous vote cast by an elector weighs against a conclusion that historical practices allow states to enforce elector pledges by removing faithless electors from office and nullifying their votes.”⁶²

By a two-to-one vote, the court remanded the removed elector’s claims to the district court for further proceedings.⁶³ A third judge determined that the case was moot.⁶⁴

Supreme Court

The Supreme Court originally consolidated its two cases on faithless electors: the Tenth Circuit case originating in Colorado and the state-court case in Washington, but Justice Sotomayor recused herself from the Colorado case when she realized that one of the plaintiffs was a friend, so the cases were de-consolidated.⁶⁵ On July 6, 2020, the Colorado case was resolved without opinion, reversing the court of appeals’ decision “for the reasons stated in” the Washington case.⁶⁶

2020

There were no faithless electors in 2020.⁶⁷

62. *Baca*, 935 F.3d at 950; see *Chiafalo v. Washington*, 591 U.S. ___, ___, 140 S. Ct. 2316, 2323 (2020).

63. *Baca*, 935 F.3d at 902, 956.

64. 935 F.3d at 956–59 (Judge Mary Beck Briscoe, dissenting).

65. Docket Sheet, *Colo. Dep’t of State v. Baca*, No. 19-518 (U.S. Oct. 21, 2019); Docket Sheet, *Chiafalo v. Washington*, No. 19-465 (U.S. Oct. 9, 2019); see Robert Barnes, *Sotomayor Recuses from 1 of 2 High Court Electoral College Cases*, Wash. Post, Mar. 11, 2020, at A2.

66. *Colo. Dep’t of State v. Baca*, 591 U.S. ___, 140 S. Ct. 2316 (2020); see Order, *Baca v. Colo. Dep’t of State*, No. 18-1173 (10th Cir. Oct. 1, 2020) (remanding the case to the district court); Docket Sheet, No. 1:17-cv-1937 (D. Colo. Aug. 10, 2017) (order dismissing the case, D.E. 73).

67. See Nick Corasaniti & Jim Rutenberg, *Electors Affirm Biden’s Victory; Vote Is Smooth*, N.Y. Times, Dec. 15, 2020, at A1; John McCormick & Alexa Corse, *Biden’s Win Affirmed by Electoral College*, Wall St. J., Dec. 15, 2020, at A1; Elise Viebeck, Dan Simmons, Amy Worden & Omar Sofradzija, *Vote Proceeds Without Surprises or Disruption, Despite Efforts of President and His Supporters*, Wash. Post, Dec. 15, 2020, at A1.