

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.

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.

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*]; 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 The electors filed an amended complaint on July 18, 2017,¹³ and six days later the parties stipulated to 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

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

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.

6. Intervention Order, *id.* (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; *see* Amended Minute Order, *id.* (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).

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. www.archives.gov/federal-register/electoral-college/2016/certificates-of-vote.html [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.

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 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.

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 Judge Robart 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; one in Texas voted for Ron Paul and one voted for John Kasich; and one in Hawaii voted for Bernie Sanders.²⁸

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.²⁹

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; 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.

29. 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).

On December 12, the elector filed a motion for a temporary restraining order and a preliminary injunction.³⁰ That day, Judge Edward J. Davila noted 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 14.³¹ On December 15, Judge Davila scheduled a hearing for the following morning.³²

California's Republican Party and Trump moved on December 13 to intervene in the case.³³ Trump withdrew his motion on December 20,³⁴ and Judge Davila granted the Republican Party's motion on January 3, 2017.³⁵ 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.³⁶

At the December 16, 2016, hearing, Judge Davila denied the elector immediate relief.³⁷ 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.³⁸

On December 19, 2016, the elector voted for the Democratic nominees.³⁹

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."⁴⁰

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

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

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

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

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

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

36. 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).

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

38. *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).

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

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

Minnesota

In Minnesota, an elector attempted to vote on December 19, 2016, for Bernie Sanders instead of Hillary Clinton, the Minnesota victor.⁴¹ Instead of counting the elector's vote, Minnesota's secretary of state selected an alternate elector, who voted for Clinton.⁴² The original elector filed a federal complaint in the District of Minnesota on December 19 challenging his replacement.⁴³ The elector also filed on that day a motion for a temporary restraining order and a temporary injunction,⁴⁴ a motion for summary judgment,⁴⁵ and a motion for expedited briefing and hearing.⁴⁶

Judge Paul A. Magnuson heard the case on Thursday, December 22.⁴⁷ Judge Magnuson's first question was, "Why is this entire matter not moot?"⁴⁸ On the following day, Judge Magnuson denied the elector relief and dismissed the case.⁴⁹ Because the Electoral College ballots had already been submitted by the time of Judge Magnuson's decision, the elector's complaint was moot.⁵⁰ 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.⁵¹ In addition, the complaint was barred by laches, because the elector brought the action 40 days after he knew he would become an elector.⁵²

On September 12, 2018, the court of appeals affirmed dismissal of the case.⁵³ 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."⁵⁴

41. 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*].

42. D. Minn. *Abdurrahman Opinion*, *supra* note 41, at 2; see *Abdurrahman Complaint*, *supra* note 41, at 8; *Abdurrahman Transcript*, *supra* note 41, at 3; see also Electoral College Vote Certificates, *supra* note 12.

43. See *Abdurrahman Complaint*, *supra* note 41.

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

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

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

47. *Abdurrahman Transcript*, *supra* note 41.

48. *Id.* at 3.

49. D. Minn. *Abdurrahman Opinion*, *supra* note 41.

50. *Id.* at 3.

51. *Id.* at 4.

52. *Id.* at 4–6.

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

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