COLORADO SUPREME COURT Court Address: 2 E. 14th Ave. Denver, CO 80203	
District Court, City & County of Denver, Colorado Hon. Elizabeth Anne Starrs Case No. 2016CV34522	
In re: Wayne W. WILLIAMS, in his official capacity as Colorado Secretary of State, Petitioner **v.** Polly BACA and Robert NEMANICH, in their official capacities as presidential electors, and others so similarly situated, Respondents.	**▲ COURT USE ONLY ▲**
Attorney: The Witt Law Firm Name: Jesse Howard Witt Address: 3100 Arapahoe Avenue Suite 340 Boulder, Colorado 80301 Telephone: (303) 216-9488 Facsimile: (303) 216-9489 E-mail: jesse@witt.law Atty. Reg. #: 33241	Case No.: _____
PETITION FOR IMMEDIATE REVIEW UNDER § 1-1-113, C.R.S.	

Polly Baca and Robert Nemanich, petitioners in this Court and respondents in the court below, by and through their attorney, hereby submit this petition for immediate review of an injunction issued under § 1-1-113, C.R.S. and concerning the meeting of Colorado's presidential electors at 12:00 p.m. on 19 December 2016.

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B. If a presidential elector votes for a candidate who did not win the popular vote, is his or her act of voting a "refusal to act" that triggers a vacancy in the electoral college?

II. GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

This Court has jurisdiction under § 1-1-113(3), C.R.S., which provides for review within three days of a district court ruling, unless this Court declines jurisdiction. The district court announced its order from the bench and entered written orders on 13 and 15 December 2016. This petition is thus timely.

III. STATEMENT OF THE CASE

This case concerns the 2016 election for President of the United States and presents the fundamental question of whether the Colorado Secretary of State may remove presidential electors based on who they may vote for. Several of Colorado's nine presidential electors have indicated that they might join with electors in other states to support a bipartisan candidate as an alternative to Donald Trump, whom many fear is unqualified to lead the nation. These electors emphasize their duty under the United States Constitution to meet, deliberate, and investigate before choosing a candidate for president.

The Colorado Secretary of State (the "Secretary") filed this action in Denver District Court on 9 December 2016, ten days before the meeting of the Electoral College.[1] The Secretary alleged that Petitioners Polly Baca and Robert Nemanich (the "Electors") were presidential electors from the Colorado Democratic Party who had expressed an intent to vote for candidates other than Hillary Clinton and Timothy Kaine, winners of the popular vote in Colorado. The Secretary sought relief under §§ 1-1-101 to 1-13-803, C.R.S. (the "Election Code"),[2] and requested an injunction under § 1-1-113 to require the Electors to act in substantial compliance with the code. (Pet. ¶ 58.) The Secretary emphasized § 1-4-304(5), which provides that each presidential elector in Colorado "shall vote for the presidential candidate and … vice-presidential candidate who received the highest number of votes at the preceding general election in this state." (Pet. ¶ 55.) The Secretary alternatively sought a declaration under C.R.C.P. 57 that a vote for any candidate other than Hillary Clinton or Timothy Kaine would be a refusal to act that created a vacancy in the electoral college under § 1-4-304(1). (Pet. ¶ 68.) The Secretary also asked the court to adopt various other procedures. (Pet. at 7–8.)

[1] A copy of the Secretary's petition is included in the attached addendum.

[2] Except where otherwise indicated, all statutory references are to the Colorado Revised Statutes.

Given the limited time available, the court set a merits hearing for 13 December 2016 to receive evidence and hear argument on the Secretary's petition. At that hearing, the Secretary noted that the Electors had filed their own action challenging the constitutionality of § 1-4-304(5) in the United States District Court for the District of Colorado, and that the judge had denied their motion for a preliminary injunction under federal law the day before.[3] The Secretary then said that he was seeking guidance from the state court on how to interpret the Election Code in the event that the Electors or others did not vote for Clinton and Kaine, and the Secretary asked the court to grant the relief sought in his petition.

The Secretary called both of the Electors as witnesses. Baca, a former Colorado state senator, discussed statements she had made suggesting that she might vote for someone other than Clinton and Kaine. Nemanich testified that he had signed a pledge with the Democratic Party promising that he would vote for Bernie Sanders as a presidential elector. Both said that they supported Clinton and intended to follow the law, but they were unsure how they would vote when the Electoral College convened. Baca and Nemanich each indicated a willingness to consider voting for someone other than Clinton or Sanders.

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[3] The federal action is currently under appeal in the Tenth Circuit. *See Baca v. Hickenlooper*, No. 16-1482.

The Secretary also called an elections manager from his office as a witness. The manager testified that he intended to preprint forms for the Electoral College members with the names of Clinton and Kaine, and that he had drafted a oath for the Electoral College members to sign that would recite their willingness to adhere to state law when they cast their ballots for president.

The Electors moved to dismiss the action under C.R.C.P. 12(b)(1), arguing that the district court lacked jurisdiction to (a) enter an advisory opinion on hypothetical events that might never occur, (b) enter injunctive relief against presidential electors performing duties arising under federal law, or (c) rewrite the statute to alter the meaning of the phrase "refusal to act."

After considering the arguments, the district court granted the Secretary's petition in part and denied it in part. The court concluded:

> 1. [The district court] has jurisdiction pursuant to § 1-1-113, C.R.S.
> 2. Colorado presidential electors are required to vote for Hillary Clinton and Tim Kaine, pursuant to § 1-4-304(5).
> 3. A presidential elector's failure to comply with § 1-4-304(5), is a "refusal to act" as that term is used in § 1-4-304(1), and causes a vacancy in the electoral college.
> 4. A vacancy in the electoral college shall be immediately filled by a majority vote of the presidential electors present. A quorum of presidential electors is not required to fill this vacancy.

5. The Colorado Democratic Party shall provide the presidential electors with nominations to fill any vacancy which occurs.

(Order, Dec. 13, 2016.)[4] The court issued a subsequent order on 15 December 2016 to resolve a question relating to a possible tie in the event of a vacancy. The Electors now appeal.

IV. SUMMARY OF ARGUMENT

Presidential electors occupy a unique role as state actors fulfilling federal duties. Although the state has plenary authority to decide how to appoint its presidential electors, the electors, once appointed, are subject to the federal duties set forth in the Constitution and the Twelfth Amendment. Section 1-1-113 only permits injunctive relief in limited circumstances that are not present here. The district court erred first by concluding that it had jurisdiction under this statute (Order ¶ 1) and by then relying on this statute to require the Electors to vote for Clinton and Kaine (Order ¶ 2).

The district court further erred by concluding that the act of voting for different candidates would be a refusal to act that creates a vacancy in the Electoral College (Order ¶ 3). This was an advisory opinion that conflicts with the plain language of the Election Code.

[4] A copy of this order is included in the attached addendum.

V. ARGUMENT

A. Colorado district courts do not have jurisdiction under the state election code to enjoin presidential electors from performing their federal duties

1. Section 1-1-113 does not confer jurisdiction on the courts to enter an injunction against a presidential elector

The Secretary's petition sought injunctive relief under § 1-1-113, which permits an injunction upon a mere showing of "good cause," rather than the more stringent standard that would otherwise apply under C.R.C.P. 65. *Cf. State ex rel. Salazar v. Cash Now Stores, Inc.*, 12 P.3d 321, 325 (Colo. App. 2000), *rev'd on other grounds*, 31 P.3d 161 (Colo. 2001). This is meaningless, however, if the statute does not apply to presidential electors.

Section 1-1-113(1) provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code.

The Electors do not dispute that the Secretary is an "official" under this statute.[5]

[5] "Election official" is defined as "any county clerk and recorder, election judge, member of a canvassing board, member of a board of county commissioners, member or secretary of a board of directors authorized to conduct public elections,

The statute's plain language, however, only permits an official to obtain an injunction against certain categories of person, generally those involved in running elections. Specifically, the statute allows an official to seek an injunction against "any candidate, or any officers or representatives of a political party, or any persons who have made nominations." A presidential elector is none of these.

"When the legislature specifically includes one thing in a statute, it implies the exclusion of another." *Henisse v. First Transit, Inc.*, 247 P.3d 577, 580 (Colo. 2011). Had the legislators intended to include presidential electors among those subject to injunctive relief under this provision, they certainly could have done so. They did not.

The Secretary, meanwhile, has never even attempted to explain how this statute could apply to presidential electors—who are neither candidates, nor party officials, nor party representatives, nor nominators. In his petition, the Secretary skipped over this part of the statute in its entirety. (*See* Pet. ¶ 58.) The Secretary quoted only the portion of the statute providing the relief he hoped to obtain, "an order requiring substantial compliance with the provisions of this code," omitting the text that limits the circumstances when such relief is available. (*Id.*)

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representative of a governing body, or other person contracting for or engaged in the performance of election duties as required by this code." § 1-1-104(10).

To the extent the Secretary wishes to argue that a presidential elector could be "a person charged with a duty under this code," this provision is likewise limited. Section 1-1-113(1) only allows an injunction against "a person charged with a duty under this code," in suits where an "eligible elector files a verified petition in a district court." The Secretary is not an "elector" as defined by the code. *See* § 1-1-104(12). It is likewise undisputed that no person has ever filed a verified petition in the district court to support the Secretary's requests.

"If a court does not have power to resolve a dispute, then it does not have subject matter jurisdiction over the claim." *SR Condos., LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 870 (Colo. App. 2007). When the Electors moved for dismissal under C.R.C.P. 12(b)(1), the burden shifted to the Secretary to prove that the court had jurisdiction under § 1-1-113. *See Associated Governments of Nw. Colorado v. Colorado Pub. Utilities Comm'n*, 275 P.3d 646, 648 (Colo. 2012)("In response to a C.R.C.P. 12(b)(1) challenge, the plaintiff has the burden of proving subject matter jurisdiction"). The district court thereafter gave the Secretary the opportunity to call witnesses and present evidence. Again, however, the Secretary ignored the lack of jurisdiction and focused exclusively on the remedy he desired; the Secretary introduced testimony suggesting that the Electors might not act in "substantial compliance with the provisions of this code," but the Secretary never established

that either Baca or Nemanich was subject to the court's subject matter jurisdiction under § 1-1-113(1). Because of this, the district court erred both in finding jurisdiction over the Electors under § 1-1-113 (Order ¶ 1) and in requiring the Electors to vote for Clinton and Kaine (Order ¶ 2).

2. Once appointed to the Electoral College, presidential electors are subject to federal duties, not state duties

Alternatively, even if the court had jurisdiction under § 1-1-113, the court exceeded its jurisdiction by entering an injunction that interferes with the Electors' duties under federal law.

The Constitution establishes the Electoral College for election of the president and vice-president. U.S. Const. art. II, § 1, cl. 2. The founders chose the Electoral College out of concern that a popular vote could be manipulated or hijacked by the "deadly adversaries of republican government." *The Federalist* No. 68 (Alexander Hamilton). Among their concerns was the "desire in foreign powers to gain an improper ascendant in our councils." *Id.*

In the district court, the Secretary brushed passed this history and suggested that the Electoral College merely serves a purely ministerial function to relay the popular vote. This is not correct. Alexander Hamilton himself explained that the members of Electoral College must be comprised of "men most capable of analyzing

the qualities adapted to the station." *Id.* They should be convened "under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice." *Id.* "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." *Id.*

Hamilton's references to the Electoral College's need for "deliberation," "information," "complicated investigations," and "choice" lay bare the flaw in the Secretary's argument. Presidential electors are not mere ticket-takers hired to count ballots; they are a crucial part of our republican government, tasked under federal law with deciding who is fit to ascend to the highest office in the land.

Even without resorting to legislative history, the role of the Electoral College as a deliberative, investigatory body is implicit in the plain language of the Constitution itself. Under Article II § 1 cl. 2, the states must appoint individual electors who are free from potential conflicts; it provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The Twelfth Amendment later established specific voting procedures to avoid deadlocked elections. *See* U.S. Const. Amend. XII. All of this procedure would be mere surplusage if the electors were simply

performing the ministerial task of transmitting state election results to Washington. The United States Supreme Court has thus observed: "No 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 men best qualified for the Nation's highest offices." *Ray v. Blair*, 343 U.S. 214, 232 (1952)(Jackson, J., dissenting).

This is not to say that the states have no role in the selection and appointment of its electors. Quite the opposite, the Constitution gives each state plenary authority to appoint its electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II § 1 cl. 2. During the eighteenth and nineteenth centuries, the legislatures of Colorado and many other states appointed their electors directly, without any popular election thereon. *See McPherson v. Blacker*, 146 U.S. 1, 29–35 (1892)(discussing historical appointment of presidential electors). Likewise, it is well settled that presidential electors are not federal officers, but they are instead individuals acting on behalf of the state. *Id.* at 27. Nevertheless, while the electors act on behalf of the states and not the federal government, they are fulfilling a federal responsibility. As Chief Justice Rehnquist once noted:

> While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377, 379, 10 S.Ct. 586, 33 L.Ed. 951 [(1890)]), they exercise federal functions under, and

> discharge duties in virtue of authority conferred by, the Constitution of the United States.

Bush v. Gore, 531 U.S. 98, 112 (2000)(Rehnquist, C.J., concurring), *quoting Burroughs v. United States*, 290 U.S. 534, 545 (1934).

That presidential electors are operating under a federal duty is further confirmed in Colorado's own Election Code. Section 1-4-304(1) states:

> If any vacancy occurs in the office of a 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. When all vacancies have been filled, the presidential electors shall proceed to **perform the duties required of them by the constitution and laws of the United States.**

(emphasis added). Thus, while the act of appointing presidential electors in the general election discharges a state law duty, an individual elector's subsequent act of voting for president and vice-president satisfies a federal law duty. And to the extent the two duties may be in conflict, the Constitution must prevail. *See* U.S. Const. art. VI, cl. 2 (Constitution is "the supreme Law of the Land," notwithstanding any conflicting state laws).[6]

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[6] The Secretary may note that, in *Ray v. Blair*, 343 U.S. 214, 231 (1952), the Supreme Court held that a state political party may require a presidential elector to pledge support to a particular candidate. While that is correct, the opinion in *Ray* also acknowledged the possibility that "such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, s 1, to vote as he may choose in the electoral college." *Id.* at 230. Here, if the Court were to rule that the Electors

The source of these duties—whether state or federal—is crucial in this case, because the Election Code only permits entry of an injunction in controversies involving a "duty or function under **this code**" and as necessary to ensure "substantial compliance with the provisions of **this code**." § 1-1-113(1)(emphasis added).[7] Because a presidential elector casting a ballot in the Electoral College is subject to a duty that arises under the Constitution rather than the state code, there is no jurisdiction for the courts to enter an injunction under § 1-1-113(1). This is particularly true when the injunction would restrict the elector's duty to exercise the discretion and investigation implicit in the Electoral College, as recognized in the Constitution and the Twelfth Amendment.

There may, of course, be consequences for one who refuses to follow a state law, for reasons of civil disobedience or otherwise. In the instant case, the Attorney General has already threatened criminal prosecution of any electors who do not vote for Clinton and Kaine. That issue is beyond the scope of this case, however. The only question before this Court—and indeed, the only question properly before the district court—is whether the courts may enter injunctive and declaratory relief

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were bound to the pledges they made in the primary elections, that would create even more conflict with § 1-4-304(5), because such an order would force Nemenich to vote for Bernie Sanders.

[7] The phrase "this code" is defined to be the Election Code. § 1-1-101.

before the Electoral College meets. Because the Election Code does not permit such relief, the district court's order should be vacated.

B. The Election Code does not support deeming the act of voting for a different candidate as creating a vacancy in the Electoral College

Finally, the district court also erred by concluding that an elector's act of voting for someone other than Clinton and Kaine would be a "refusal to act" sufficient to trigger a vacancy in the Electoral College. The Election Code itself provides no mechanism for the removal of a presidential elector; it states only: "If any vacancy occurs in the office of a 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." § 1-4-304(1). The Court should neither adopt a strained definition of "refusal to act," nor assume that the legislature's decision not to provide such a remedy was merely an oversight.

1. The act of voting for a different candidate is not the same as refusing to vote for any candidate

At the merits hearing, Senator Baca said that she had seen a vacancy occur in Colorado's Electoral College delegation at least once before, when an elector was unavailable due to illness. On that occasion, the other electors followed the statutory procedure to fill the vacancy. The system should continue to operate in this manner.

At present, however, Baca has testified that she has no intention of refusing to act; she intends to vote for the candidate that she deems best for the country at the time that the Electoral College convenes. She has not yet indicated whom she will vote for, but she intends to vote. Nemanich, likewise, testified that he does not plan on refusing to act.

Nevertheless, the Secretary argued—and the district court agreed—that the actions of Baca and Nemanich could be deemed a "refusal to act" if they cast votes for someone other than Clinton and Kaine. (Order ¶ 3.) This was error. There is a significant difference between refusing to act (*e.g.*, not completing a ballot at all), and in acting in a manner that is contrary to what is expected (*e.g.*, voting for Bernie Sanders instead of Hillary Clinton); the former is a deliberate decision to refrain from action, while the latter is a choice to engage in action. *Accord Getty v. Witter*, 107 Colo. 302, 308, 111 P.2d 636, 638–39 (1941)("Here we are not concerned with a refusal to act, but with the manner in which the commission has acted").

In the district court, the Secretary relied on several of this Court's decisions from the early Twentieth Century to suggest certain actions could be deemed refusals to act, but these addressed situations where a state officer had actually refused to perform a given function. *See Leary v. Jones*, 51 Colo. 185, 116 P. 130 (1911); *People v. Kenehan*, 55 Colo. 589, 136 P. 1033 (1913); *People v. McNichols*, 91

Colo. 141, 13 P.2d 266 (1932).[8] None suggested that an officer who performed a federal duty in a manner that conflicted with a state statute could thereafter be deemed to have taken no action at all.

2. The courts cannot rewrite the Election Code to create a remedy that the legislature never intended to enact

In its briefing, the Secretary also cited several statutes from other states that include a mechanism for the removal of presidential electors who vote for candidates other than those who won the states' popular votes. For example, Michigan law provides: "Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector…." Mich. Comp. Laws § 168.47. North Carolina and Utah have similar measures. *See* N.C. Gen. Stat. § 163-212; Utah Code § 20A-13-304(3).

These statutes confirm that the Colorado General Assembly could have acted at any time to amend the Election Code to provide for removal of electors who chose not to vote for the winner of the popular vote.[9] In Colorado, § 1-4-304(5), C.R.S. has

[8] Oddly, the cases all appear to have concerned civil servants who had refused to certify public records for various reasons.

[9] The Electors do not concede that such a provision would be constitutional. *See Ray v. Blair*, 343 U.S. 214, 230–232 (1952)(suggesting that state laws restricting the voting rights of presidential electors are unconstitutional). The Electors merely note

been in place for decades, enduring repeal, reenactment, and amendment on multiple occasions, yet the legislature has never seen fit to empower the Secretary or the courts with the right to remove electors who choose to vote for someone other than the winner of the popular vote. Colorado law does afford remedies for violation of the Election Code, including the possibility of criminal prosecution. *See, e.g.,* § 1-3-111. The judicial branch cannot assume that the legislature's failure to provide a different remedy was an oversight; the courts must enforce the statutes as they are written. *See Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1223 (2016)("We construe the legislature's failure to include particular language not as an oversight, but as a deliberate omission reflecting legislative intent"); *see also Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994)("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate").

It is also noteworthy that, of the fifty states and the District of Columbia, only twenty-nine are believed to have adopted statutes that purport to bind their electors to the results of a popular vote. *See* FairVote, *State Control of Electors*, https://perma.cc/CXQ7-752X (accessed Dec. 14, 2016). Thus, the Court should not

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that, if legislators wanted Colorado to have the right to remove presidential electors based on their votes, they surely would have enacted such a law by now.

rush to conclude that the Michigan model is universally favored, or that Colorado's laws are flawed. In truth, nearly half of the states impose no statutory restriction whatsoever on how their presidential electors vote.

Finally, this Court has repeatedly emphasized that C.R.C.P. 57 does not permit advisory opinions before actual controversy arises. *See, e.g., Taylor v. Tinsley,* 138 Colo. 182, 183, 330 P.2d 954, 955 (1958). This is true "even though it can be assumed that at some future time such question may arise." *Id.* at 183-84, 330 P.2d at 955. Here, Baca and Nemanich have testified that they may vote for an alternative candidate, or they may vote for Clinton and Kaine. If the Secretary wanted to regulate future events, he needed to either apply to the General Assembly or follow administrative rulemaking procedures; it was improper to ask the Judicial Branch to rewrite the code less than a week before the Electoral College convenes.

VI. CONCLUSION

This case presents an issue of mammoth importance yet turns on a simple question: Does § 1-1-113(1) permit an injunction against presidential electors performing a federal duty? Because a presidential elector is not "any candidate, or any officers or representatives of a political party, or any persons who have made nominations," and because an elector's duty to choose a president arises from federal law, the answer to this question is no.

When the Electoral College convenes on Monday, it should be allowed to operate freely in performance of its federal duties, subject to such guidance as the federal courts may provide in the interim. If additional proceedings in the state courts become necessary at some later time, the parties may then seek relief under existing law. Until then, the state courts lack jurisdiction to enter injunctive or advisory relief against the Electors.

For these reasons, Petitioners Polly Baca and Robert Nemanich request that this honorable Court vacate the order of the district court and remand the case with instructions to dismiss the Secretary's action under C.R.C.P. 12(b)(1).

Respectfully submitted this 15th day of December 2016.

THE WITT LAW FIRM

s/ Jesse Howard Witt
Original signature on file

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2016, I served a true and correct copy of the foregoing document on the following via the Colorado Courts E-Filing system.

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