Presidential electors from Colorado and Washington State refused to vote for Hillary Clinton in 2016 even though she won the popular vote in their states. The question in *Colorado Department of State v. Baca* [2] and *Chiafalo v. Washington* [3] and is whether state law can make them.

Colorado, Washington, and 46 other states and the District of Columbia, appoint a slate of presidential electors from the political party of the candidate for President that receives the most popular votes in the state. Colorado, Washington, and 27 other states and the District of Columbia, bind their presidential electors to the winner of the state’s popular vote for President.

When Michael Baca of Colorado voted for John Kasich he was removed as an elector and his vote was discarded. When Peter Chiafalo of Washington State voted for Collin Powell he was fined $1,000. Baca and Chiafalo challenge the constitutionality of their state’s faithless elector statute. Before lower courts Baca won and Chiafalo lost.

The Tenth Circuit first held that Baca has standing to sue. According to the court, he “has asserted an injury in fact” because his vote for President was cancelled, he was not allowed to cast a vote for Vice President, and he was “removed him from his duly-appointed office as a presidential elector.”

Baca claims that the Colorado law violates Article II and the Twelfth Amendment to the United States Constitution. The Tenth Circuit agreed.

Article II states: “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” The Twelfth Amendment states that electors “vote by [distinct] ballot for President and Vice-President,” and that the candidates receiving votes for President or Vice President constituting a majority of the electors appointed are elected to those respective offices.

The Tenth Circuit concluded that Colorado lacks the authority to require electors to vote for the candidate receiving the most votes because “the definitions of elector, vote, and ballot [contained in Article II and the Twelfth Amendment] have a common theme: they all imply the right to make a choice or voice an individual opinion.”

Before the Supreme Court Chiafalo argues that Washington’s law is unconstitutional because “a state has no power to legally enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.”

The Washington Supreme Court upheld the state law writing: “The people of the state do not vote for presidential electors. Rather, they vote for presidential candidates.”

Regarding the First Amendment claim, the lower court concluded that “the First Amendment is not implicated when an elector casts a vote on behalf of the State in the Electoral College.” The court reasoned: “The power of electors to vote comes from the State, and the elector has no personal right
Washington State pointed out to Supreme Court that “[t]his case gives the Court the rare opportunity to decide a constitutional question related to presidential selection in a non-emergency setting.”

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