

<p>DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, CO 80202</p>	
<p>WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State,</p> <p>Petitioner,</p> <p>v.</p> <p>POLLY BACA and ROBERT NEMANICH, in their official capacities as presidential electors, and others so similarly situated,</p> <p>Respondents.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorney: The Witt Law Firm Name: Jesse Howard Witt Address: 3100 Arapahoe Avenue Suite 410 Boulder, CO 80303 Phone No.: (303) 216-9488 Fax No.: (303) 216-9489 E-mail: jesse@witt.law Atty. Reg. No.: 33241</p>	<p>Case No. 2016CV34522 Div. 376</p>
<p style="text-align: center;"><u>EMERGENCY MOTION TO REQUIRE SECRETARY OF STATE TO ADMINISTER OATH OF OFFICE SET FORTH IN STATE CONSTITUTION</u></p>	

Respondents Polly Baca and Robert Nemanich, by and through their attorney, hereby submit this *emergency* motion to require the Colorado Secretary of State to administer the oath of office set forth in the state Constitution.

C.R.C.P. 121 § 1-15: The undersigned certifies that he conferred about this relief with the Attorney General’s office over the weekend by email and again this morning by telephone, and that the Secretary has not yet taken a position on the relief sought herein. Given the few hours that remain before the Electoral College convenes, Respondents are filing this motion now and asking for an emergency hearing or other relief. If the parties reach agreement, they will promptly advise the Court.

1. One question remains unresolved in this proceeding: May the Colorado Secretary of State can change the oath of office that Chief Justice Rice will administer to the presidential electors today at noon?

2. As the Court is aware, this matter concerns the meeting of the Electoral College. At a merits hearing last week, the Court granted the Secretary's request for an order requiring Respondents to vote for Hillary Clinton and Timothy Kaine, and stating that a vote for any other candidate would be a refusal to act that triggered a vacancy in the Electoral College.

3. The Colorado Supreme Court issued an order Friday afternoon declining to hear their appeal. Later that evening, the Tenth Circuit denied a request by Respondents for an injunction during the appeal of their related federal action. As such, this Court's order shall remain in effect when the Electoral College meets today.

4. Although the Court has given the Secretary the relief he asked for, Respondents are concerned that the Secretary may nevertheless seek to have them swear to an oath that conflicts with the requirements of the state constitution.

5. The Constitution of the State of Colorado provides:

Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter.

Colo. Const. art. XII, § 8. This is substantially the same as the "Oath of Office" appearing on the Secretary's website. See <https://www.sos.state.co.us/pubs/business/PDFFillable/OATH.pdf> (last accessed Dec. 18, 2016). The fillable form on the website reads:

I, _____ do solemnly swear by the everliving God, that I will

support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office of

upon which I am about to enter.

Id. A copy is attached hereto as Exhibit A.

6. Respondents had believed and expected that the Secretary would administer this oath to them when the Electoral College convened. Indeed, Senator Baca has been a presidential elector before, and she has no recollection of any change from the standard oath. Moreover, when the Secretary filed his petition in this Court, he made no mention of changing the oath when he asked the Court to grant him relief.

7. Nevertheless, a witness at last week's hearing testified that he had prepared a new oath for Respondents to sign this year. The new oath would begin with the constitutional text quoted above but then continue with the electors swearing to "...vote for the presidential candidate and vice presidential candidate who received the highest number of votes at the preceding general election in this state." (Tr. Dec. 13, 2016, at 80:1-17, copy attached hereto as Exhibit B.)

8. The basis for this change was not originally clear, but the Secretary's subsequent comments to the media may provide an explanation. Shortly after the merits hearing, Secretary Wayne Williams himself told the press that this change was intended to entrap presidential electors into committing perjury:

Williams told POLITICO in a phone interview that he intends to administer an oath to electors prior to Monday's official meeting of the Electoral College. Any electors who decide to oppose Clinton won't just be violating the election law that requires them to support Colorado's popular vote winner – they'll be violating their oath as well.

"If Elector A writes down Bernie Sanders or Ted Cruz or anyone other than Hillary Clinton, they immediately cease to be an elector and

they're replaced," he said. "The difference here is you have perjured yourself."

Kyle Cheney, "Colorado elections chief: Rogue electors could face perjury charge," *Politico* <http://www.politico.com/story/2016/12/colorado-elections-chief-rogue-electors-could-face-perjury-charge-232661> (Dec. 14, 2016), copy attached hereto as Exhibit C.

9. This tactic is both improper and unnecessary. The Court has already ruled that electors who do not vote for Hillary Clinton can be removed from office for refusal to act under § 1-4-304, C.R.S. There is no reason to change the oath of office to encourage a possible perjury charge.

10. Moreover, if the Secretary wanted to change the oath of office for this election, he had ample opportunity to request it in his petition, which contained a long list of desired remedies. (*See* Pet. at 7-8 ¶¶ A-H.) The Secretary instead chose to seek an order requiring the electors to follow the existing statute—a remedy that this Court granted. Having prevailed on this issue, he should not now be heard to request additional relief.

11. Finally, the recent order from the Tenth Circuit suggests that the Secretary's attempt to alter the oath of office would violate the United States Constitution. The appellate panel acknowledged that "[Secretary] Williams has allegedly instituted a new oath to be given to Colorado's Electors on December 19, 2016, and has stated that if an elector violates Colo. Rev. Stat. § 1-4-304(5), they will likely face either a misdemeanor or felony perjury charge." Order, *Baca v. Hickenlooper*, No. 16-1482 (10th Cir. Dec. 16, 2016), copy attached as Exhibit D. The panel then explained, that while a statutory requirement to vote for a particular candidate may create a duty, it should not be considered a qualification to hold the office. *Id.* at 11. The panel later stated:

...Williams' threat to remove and place any elector who fails to comply with Colo. Rev. Stat. § 1-4-304(5) is not based on the text of that provision, but rather upon his interpretation of the authority afforded to

him under Colo. Rev. Stat. § 1-4-304(1). As noted above, § 1-4-304(1) expressly affords the State of Colorado with authority to “fill [any] vacanc[ies] in the electoral college” prior to the start of voting. Whether that statute also affords the State with authority to remove an elector after voting has begun is not a question that has been posed by plaintiffs to either the district court or this court.

Id. at 12 (brackets original). In a footnote, the panel added: “And we deem such an attempt by the State unlikely in light of the text of the Twelfth Amendment.” *Id.* at 12 n.4.

12. In sum, Secretary Williams has obtained the relief he wanted in the form of an order stating that presidential electors who vote for an alternate candidate may be removed for “refusal to act.” The Secretary’s petition did not ask to change the oath of office, and there is no reason for this Court to grant such a request in light of its prior ruling. The Court should order the Secretary to administer the standard oath of office as appears on his website and in the attached Exhibit A, and to proceed in accordance with this Court’s prior rulings. Changing the rules on the eve of the election is improper.

13. The relief sought herein is proper under § 1-1-113(1), C.R.S., which allows an injunction to enter against an election official upon good cause shown to ensure substantial compliance with the election code.

14. Wherefore, Respondents Polly Baca and Robert Nemanich request this honorable Court set a hearing as necessary and grant the relief sought herein on an emergency basis.

Respectfully submitted this 19th 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 19th 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.

Leeann Morrill, First Assistant Attorney General
W. Eric Kuhn, Senior Assistant Attorney General
Christopher Jackson, Assistant Attorney General

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s/ Jesse Howard Witt