

Initiative to Reallocate Electoral Votes

Napolitano v. Davidson

(Lewis T. Babcock, D. Colo. 1:04-cv-2114)

On the 2004 general election ballot in Colorado was proposed Amendment 36 to Colorado's constitution; this amendment would allocate Colorado's nine electoral votes in the 2004 selection of President and Vice President proportionally to the popular vote in Colorado rather than more traditionally awarding all to the winner in Colorado.¹ On October 13, a voter filed a pro se federal constitutional challenge to the amendment.² The plaintiff's chief complaint was the uncertainty that the proposed amendment created with respect to the effect of a presidential vote in the same election that the amendment was up for consideration.³ With his complaint, he filed motions for a temporary restraining order⁴ and a preliminary injunction.⁵

The court assigned the case to Judge Robert E. Blackburn, but he recused himself because of his close acquaintance with the defendant secretary of state.⁶ Judge Lewis T. Babcock got the case instead.⁷ On the case's second day, Judge Babcock held a hearing on the motion for the temporary restraining order.⁸ Judge Babcock deferred ruling on injunctive relief until after briefing on motions to intervene by two parties—a Republican elector and a Democratic elector.⁹ Judge Babcock granted intervention.¹⁰

After a second hearing on October 26, Judge Babcock granted Colorado's motion to dismiss.¹¹ The judge determined that the plaintiff's concerns were too speculative.¹² The plaintiff decided not to pursue the case further.¹³ Judge Babcock recalls the pro se plaintiff as articulate and respectful.¹⁴

1. See Karen Abbott, *Amendment 36 Lawsuit*, Rocky Mountain News, Oct. 14, 2004, at 12A.

2. Complaint, *Napolitano v. Davidson*, No. 1:04-cv-2114 (D. Colo. Oct. 13, 2004), D.E. 1, available at Ohio State University Moritz College of Law election law website [hereinafter ELM], <http://moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf>; see Abbott, *supra* note 1.

3. Complaint, *supra* note 1; see Karen Abbott, *Amendment 36 Suit Brings Out Lawyers*, Rocky Mountain News, Oct. 15, 2004, at 28A.

4. Docket Sheet, *Napolitano*, No. 1:04-cv-2114 (D. Colo. Oct. 13, 2004) (D.E. 4).

5. Preliminary Injunction Motion, *id.* (Oct. 13, 2004), D.E. 5, available at ELM, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/amend36preliminjunction.pdf>.

6. Docket Sheet, *supra* note 4; Interview with Hon. Lewis T. Babcock, July 25, 2012. Tim Reagan interviewed Judge Babcock for this report by telephone.

7. Docket Sheet, *supra* note 4.

8. *Id.*

9. *Id.*; see Abbott, *supra* note 3; Alicia Caldwell, *Groups Target Electoral-Vote Case*, Denver Post, Oct. 15, 2004, at B2.

10. Docket Sheet, *supra* note 4.

11. *Id.*; see Karen Abbott, *Judge Tosses Ballot Lawsuit*, Rocky Mountain News, Oct. 27, 2004, at 26A.

12. See Abbott, *supra* note 11.

13. See *id.*

14. Interview with Hon. Lewis T. Babcock, July 25, 2012.

The amendment did not pass.¹⁵

15. See Jim Tankersley & Ann Carnahan, *Electoral Votes Remain in Single Bloc*, Rocky Mountain News, Nov. 3, 2004, at 14A.