

Initiative to Reallocate Electoral Votes

Napolitano v. Davidson

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

A pro se plaintiff challenged a ballot initiative that would change the allocation of the state's Electoral College votes in the same election, alleging uncertainty in the strategic value of presidential votes. After expedited hearing, the court dismissed the complaint as too speculative.

Subject: Ballot measures. *Topics:* Ballot measure; pro se party; intervention; recusal.

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 He deferred ruling on injunctive relief until after briefing on motions

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, Ohio State University Moritz College of Law, Election Law @ Moritz [hereinafter ELM], moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf, archived at web.archive.org/web/20161217141819/moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf; see Abbott, *supra* note 1. See generally Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 *Hastings Const. L.Q.* 599, 600–05 (2008).

3. Complaint, *supra* note 2; 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, ELM, *supra* note 2, moritzlaw.osu.edu/electionlaw/litigation/documents/amend36preliminjunction.pdf, archived at web.archive.org/web/20161217141817/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.*

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 the case.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 recalled the pro se plaintiff as articulate and respectful.¹⁴

The amendment did not pass.¹⁵

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.

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