FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

2004 OCT 13 PM 1:46

GREGORY C. LANGHAM
CLERK

BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-RB-2114(BNB)
(To be supplied by the court)

Jason Napolitano, a Colorado registered voter, Plaintiff,

v.

Donetta Davidson, in her official capacity as Secretary

of the Colorado Department of State, Defendant

MOTION FOR PRELIMINARY INJUNCTION

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1. As outlined in the Complaint regarding this case, this case involves an election being administered by the Colorado Department of State on November 2, 2004. Early voting in said election is to begin on October 18. At said election, Colorado voters are to vote on presidential electors as well as an initiative to amend the Colorado Constitution regarding the selection of Presidential Electors (the "Proposal"). In contrast to the current winner-take-all system by which Colorado chooses its presidential electors, the Proposal calls for Colorado's presidential electors to be chosen based on the proportion of ballots cast for a given ticket.

2. The Proposal specifically calls for its provisions to apply retroactively to the 2004 election (see Section 1f of the Proposal, attached as Appendix A to the Complaint regarding this case).

3. As outlined in the Memorandum of Law regarding this case, plaintiff's case has a reasonable probability of success because applying the Proposal retroactively for the 2004 election violates

the 14th Amendment and Article II of the United States Constitution.

4. Certain groups of voters will suffer irreparable harm if the November 2 election is conducted according to the currently announced plans of the Colorado Department of State. These groups of voters will have the effect of their votes diluted because applying the Proposal retroactively will undermine the ability of these voters to combine their votes with like minded voters (see paragraphs 2 through 8, 12 and 23 of the Memorandum of Law regarding this case for more information).

5. Applying the Proposal retroactively fails to comply with 3 U.S.C. § 5, a "safe harbor" in federal law regarding the counting of electoral votes. Failing to comply with 3 U.S.C. § 5 introduces the risk that Colorado's electoral votes counted in the Presidential election will be decided by the U.S. Congress rather than the voters of Colorado (or potentially even that Colorado will not be able to have any electoral votes counted in the Presidential election). If this happens, all Colorado voters will suffer irreparable harm (see paragraphs 71 through 78 of the Memorandum of Law regarding this case for more information).

6. There is no adequate remedy at law for the harm described in paragraphs 3, 4 or 5 of this motion.

7. The Proposal violates the Fourteenth Amendment because it denies equal protection to certain classes of voters. The Proposal denies equal protection to voters whose first choice is a minor

party ticket, but would vote for a major party ticket in a winner-take-all election because the do not believe the minor ticket could win a plurality. In a proportional system such voters may well stick with their first choice because all that is required is enough votes to command 1 of 9 presidential electors, a much lower threshold than a plurality. How are such voters to decide if the manner of choosing presidential electors is not clear at the time of voting? The likely result will be to split these voters between the two choices, denying them the ability to combine their votes with like minded voters, possibly resulting in their mutual detriment no matter which system prevails.

8. Certain classes of voters will choose to vote differently based on a winner-take-all system and a proportional system. Effectively, the two different systems ask voters to vote on two fundamentally different questions. Uncertainty regarding which system will prevail will undermine the ability of these voters to combine their votes with like minded voters. This can affect the outcome of the election, and can lead to vastly different outcomes in close elections (see paragraphs 2 through 8 of the Memorandum of Law regarding this case).

9. Article II, § 1 of the United States Constitution reads "Each state shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors..." (emphasis added). The Proposal is an initiative and has not been passed by the Colorado Legislature. It is unconstitutional to choose electors in this manner.

10. The notion of direct popular vote elections for president was considered and rejected at the

Constitutional Convention of 1787 as many of the delegates feared the potential implications of giving such power directly to the people (it has been said that most of the delegates considered democracy synonymous with "mob rule"). The delegates instead affirmatively gave the ability to appoint electors to deliberative bodies - the state Legislatures.

11. In modern times, all state Legislatures have opted to appoint presidential electors by popular vote. The Colorado Legislature has not acted to delegate its authority to direct the manner of choosing electors, which is currently a winner-take-all, popular vote system. In fact, a plan to change the manner of choosing electors from the current winner-take-all system failed to pass the Legislature in 2001.

12. The Proposal has not been approved or endorsed by the Colorado Legislature. Instead, it is being put to a direct vote of the citizens of Colorado with minimal time for public debate and discussion. The electoral college, different manners of choosing electors and the implications of one state changing its system without others doing the same are complex issues which are poorly understood by the general population. This creates an environment opposite from what the U.S. Constitution contemplates when choosing the manner of appointing electors. The U.S. Constitution calls for a deliberative body, the Legislature, which is designed to consider, debate and decide upon issues and whose members are charged with understanding the underlying issues in all their complexity. Instead, the Proposal calls for the general population, whose members are poorly informed on the underlying issues in all their complexity, to make a decision with minimal time for debate and discussion.

REQUEST FOR RELIEF

Plaintiff requests the following temporary relief:

This court directs the Secretary of the Colorado Department of State to follow existing laws and procedures and not the Proposal in conducting the choice of Presidential electors in 2004.

Date: October 13, 2004

(Plaintiff's Original Signature)

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