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U.S. DISTRICT COURT
DISTRICT OF COLORADO

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GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BY _____ DEP. CLK

Civil Action No. 04-PB-2114(BJR)
(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

PLAINTIFF'S MEMORANDUM OF LAW

**FIRST CLAIM FOR RELIEF
AND SUPPORTING FACTUAL ALLEGATIONS**

1. In the upcoming election on November 2, 2004, Colorado citizens are to vote on Amendment 36 (the "Proposal"), an amendment to the Colorado Constitution regarding the selection of Presidential Electors (the Proposal is Appendix A of the Complaint regarding this case).

The Proposal violates the 14th Amendment to the U.S. Constitution

2. 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 they 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.

3. The point made in paragraph 2 is probably best highlighted by an example, as follows and as described in paragraphs 4 through 8.

	Ticket A	Ticket B	Ticket C
(1) Proportional	49%	44%	7%
Electoral Votes ("EV")	4	4	1
(2) Winner-take-all	49%	50%	1%
EV	0	9	0
(3) Uncertain	49%	47%	4%
Winner-take-all EV	9	0	0
Proportional EV	5	4	0

4. In the example in paragraph 3, there are three Presidential Tickets, or Tickets, for Colorado voters to choose from: A, B and C, who will receive different vote totals under different systems. Tickets A and B are Major political party tickets and Ticket C is a Minor political party ticket.

5. Under a proportional system (1), 49% of voters choose A, 44% choose B and 7% choose C. This would result in 4 electoral votes for A, 4 for B and 1 for C under the Proposal.

6. If the same voters were placed in a winner-take-all system (2), some voters whose first choice is C will switch to a major party candidate because these voters do not believe C can command a plurality. In this example, these C voters all prefer B to A. Candidate B picks up an additional 6% (at C's loss) as compared to the proportional system. At 50%, Candidate B will win a plurality and all 9 electoral votes.

7. If the same voters are placed in a circumstance where the manner of allocating electoral votes is subject to a vote simultaneous with the choosing of candidates (3), there will be uncertainty as to which system will prevail. In this circumstance, some voters whose first choice is C, but who would vote for B in a winner-take-all system, will conclude the proportional system will prevail and will vote for C. Other like minded voters will conclude the winner-take-all system will prevail and will vote for B. In this example, an equal number (3% of total voters) make each choice. In this case, if the winner-take-all system prevails, A will have a plurality of 49% and all 9 electoral votes. If the proportional system prevails, A will receive 5 electoral votes and B will receive 4 electoral votes (Under the provisions of the Proposal, each Ticket's percentage of the vote is multiplied by the number of electoral votes to which Colorado is entitled (currently 9) and rounded to the nearest whole number to determine the number of electoral votes that Ticket is entitled to. If the resulting sum of all electoral votes is less than the number of electoral votes that Colorado is entitled to (as in this example, where the resulting sum is 8), the Ticket with the greatest number of votes shall received any unallocated electoral votes.).

8. Note that under scenario (3), voters who prefer C, and whose second choice is B, are worse off no matter which system prevails than they would have been had the manner of choosing electors been clear prior to the election. If a winner-take-all system prevails, all 9 electoral votes go to A as opposed to B (the second choice of these C voters) when the system is clear. If a proportional system prevails, C receives no electoral votes as opposed to 1 electoral vote when the system is clear. This is a result of the uncertainty surrounding the system that will be used to choose electors undermining the ability of certain voters to combine their votes with like minded voters.

9. "Major political party" and "Minor political party" are terms defined by Colorado law (Colorado Statutes 1-1-104 (22) and (23)).

10. In the 2000 presidential election, there was evidence of groups of voters behaving similarly to what is described here. There were press reports of internet sites matching Nader voters in states where the election was perceived to be close with Gore voters in states where the election was not perceived to be close with the two voters agreeing to swap candidates. This was perceived to 1) help Mr. Gore win the election, 2) help Mr. Nader achieve 5% of the national popular vote and thus qualify Mr. Nader's party for federal funds in 2004, and 3) to prevent Mr. Bush from benefitting from the vote of Nader voters whose second choice was Mr. Gore. One such site, Voteswap2000.com, was shut down under pressure from the California Secretary of State ("How to Go to the Polls Twice", *New York Times*, November 3, 2000).

11. It's worth noting that if no ticket wins an electoral college majority, under the 12th Amendment to the U.S. Constitution the U.S. House of Representatives chooses from the 3 candidates with the highest electoral vote counts. This introduces the potential that one electoral vote from Colorado could potentially introduce a compromise candidate into House deliberations, which minor party voters may be hoping for. Although this may be unlikely, it is not impossible and it could matter enormously. A recent article in USA Today contemplated a tie in the electoral college between Mr. Bush and Mr. Kerry - just the type of scenario discussed here ("Remember the mess in 2000? How about a tie?", *USA Today*, September 3, 2004). In any case, likelihood of an outcome should not drive decisions regarding constitutional questions.

12. The underlying point is that it is unconstitutional to ask voters to vote without making it clear under what electoral system that vote is to be counted. Certain groups of voters will choose to vote differently based on a winner-take-all system and a proportional system. Uncertainty regarding which system will prevail undermines the ability of these groups of voters to combine their votes with like minded voters, to campaign and convince others to vote along with them and thus to participate fully in the political process. The denial of equal protection to these voters is conspicuous in its nakedness under the Proposal.

13. The U.S. Supreme Court has considered similar, but not identical, cases in the past. In *Bush v. Gore* 531 U.S. 98 (2000), a case regarding recount standards in a case decided by the Florida Supreme Court in the disputed Presidential election in Florida in 2000, which the U.S. Supreme Court decided on limited equal protection grounds, stating in its opinion that "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities", the U.S. Supreme Court made general statements regarding equal protection in a Presidential election conducted under Article II, § 1 that the U.S. Supreme Court opinion did not limit to "the present circumstances." In this regard, the U.S.

Supreme Court said:

The individual citizen has no federal constitutional right to vote for the electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College... When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and *the equal dignity owed to each voter.* (emphasis added)

14. Another such case is *Williams v. Rhodes* 393 U.S. 23 (1968), which involved the attempt of an independent candidate for President to have his name placed on the ballot in Ohio. In

Williams, the Court found:

State laws enacted pursuant to Art. II, 1, of the Constitution to regulate the selection of electors must meet the requirements of the Equal Protection Clause of the Fourteenth Amendment.

15. In *Williams v. Rhodes*, the U.S. Supreme Court considered the Equal Protection Clause in regard to the rights of individuals to associate for the advancement of political beliefs and the rights of voters to cast their votes effectively, regardless of their political persuasion. The Court highlighted the importance of these rights. The Court found that these rights must be weighed against legitimate state interests that may require they be restricted. The Court said:

In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. In the present situation the state laws place burdens on *two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively*. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is *entitled under the Fourteenth Amendment to the same protection from infringement by the States*. Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." (emphasis added)

16. The U.S. Supreme Court considered a similar situation in *Anderson v. Celebrezze* 460 U.S. 780 (1983), another case regarding an independent candidate for President attempting to have his name placed on the ballot in Ohio. In *Anderson*, the Court wrote about the difficulty for a state in limiting the political participation of an identifiable political group and the value of such groups to society. In *Anderson*, the Court said:

As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and - *of particular importance - against those voters whose political preferences lie outside the existing political parties*. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. (emphasis added)

17. In *Anderson v. Celebrezze*, the U.S. Supreme Court also wrote about the national interest in a Presidential election and its impact on a state's regulation of elections. The Court said:

Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United

States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States ... the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

18. The U.S. Supreme Court decided *Anderson v. Celebrezze* consistent with its decision in *Williams v. Rhodes* - that the admittedly important rights of certain groups be weighed against the legitimate interest of the state in burdening those rights. In *Anderson*, the Court found:

In resolving constitutional challenges to a State's election laws, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the interests asserted by the State to justify the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the court in a position to decide whether the challenged provision is unconstitutional.

19. The state interest in applying the Proposal retroactively is a weak one. Section 1e of the Proposal states, "The will of the Colorado electorate is best reflected by the popular proportional allocation of electoral college representatives." This sentiment is echoed in the first of the "Arguments For" the Proposal beginning on page 11 of the "Analysis of the 2004 Ballot

Proposals” (the latter defined here as the “Blue Book”) required under Section 1-40-124.5 of the Colorado Statutes. The second of the “Arguments For” in the Blue Book states “This proposal may motivate more people to vote because the votes of more Coloradoans will be represented in the electoral college ... may also encourage minor-party candidates to pay more attention to Colorado issues, in hopes of winning electoral votes.”

20. Unless a presidential ticket has such overwhelming support as to command all 9 of Colorado’s electors, Colorado will split its votes among presidential tickets, reducing Colorado’s impact under the electoral college and making the votes of all Coloradoans less influential.

In answer to the second of the “Arguments For” in the Blue Book, if Colorado voters understand this, it would be rational for fewer to choose to vote in the presidential election because such votes matter less than under the previous system. In answer to the first of the “Arguments For” in the Blue Book, when considering its choice of presidential electors, there is a state interest (i.e. greater influence in national affairs) that may outweigh, and at least mitigates, other considerations when considering the overall state interest. One can reasonably conclude there is an overall state interest in using a winner-take all system instead of a proportional system.

21. While third party participation may be higher under the Proposal, if applied retroactively it will come at the cost of 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 they do not believe the minor ticket could win a plurality, as outlined in paragraphs 2-8 above, a claim for relief here and not consistent with the Proposal’s claim to best reflect “the will of the Colorado electorate”.

Note that this does not occur if the Proposal is not applied retroactively.

22. Colorado has chosen presidential electors in a winner-take-all system since 1880 and all other states have employed a winner-take-all system for at least the past 40 years (Nebraska and Maine appoint some electors by congressional district, but in a winner-take-all system). Colorado has never, and other states have not for a long time, seen a compelling state interest in a proportional system of choosing presidential electors due to such a system better reflecting the will of the people or for any other reason. The constitutional arguments made in this complaint outweigh any state interest in applying the proposal retroactively.

23. A more pressing point is the need to end the uncertainty regarding the manner of choosing electors prior to the votes being cast. As plaintiff has outlined, the system of choosing electors will change the vote of certain groups of individuals. Effectively, the two systems ask voters to vote on two fundamentally different questions. In practice, some voters will vote assuming a winner-take-all system and others will vote assuming a proportional system under the Proposal. As seen in the example above, in close elections this can lead to vastly different outcomes. These problems cannot be remedied after the fact - once the vote is taken, it is impossible to determine how things would have changed had the system for appointing electors been clear prior to the vote.

The Proposal violates Article II of the U.S. Constitution

24. 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).

25. Article V, § 1 of the Colorado Constitution reads, "The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly." The first power the people reserve above is referred to as the Initiative and the second is referred to as the Referendum in the Colorado Constitution.

26. The Proposal is an Initiative.

27. The Proposal seeks to amend the Colorado Constitution by the addition of a new section to Article VII (Suffrage and Elections).

28. The Proposal explicitly states that "the popular proportional selection of presidential electors is intended to apply retroactively and thus determine the manner in which our state's presidential electors are chosen and our state's electoral votes are cast for the general election of 2004."

(Section 1f of the Proposal)

29. The Proposal asserts that “The Colorado Constitution reserves to the people of this state the right to act in the place of the State Legislature *in any Legislative matter*, and through enactment of this section, *the people do hereby act as the Legislature of Colorado for the purpose of changing the manner of electing presidential electors* in accordance with the provisions of Article II, Section 1 of the United States Constitution.” (Emphasis added - see Section 1b of the Proposal)

30. Based on informal discussions with other citizens, plaintiff believes that the average citizen is aware that the President of the United States is not chosen by popular vote, that the average citizen believes there is something unfair about this system and there should be a more equitable way of choosing a President, and that the average citizen is poorly informed about the actual workings of the electoral college and the implications of only one state using a proportional system rather than the winner-take-all system employed by all other states. (Note: Maine and Nebraska appoint some electors by congressional district in a winner-take-all system)

31. Plaintiff asserts that Article II, Section 1 of the United States Constitution places no direct constraints on a state’s ability to amend its own constitution, including doing so retroactively and/or through an initiative. Plaintiff asserts that Article II does place indirect constraints on a state’s ability to amend its own constitution to the extent it conflicts with Article II, as outlined in paragraph 33 below.

32. As the Proposal is amending the Colorado Constitution, for this case it is important to consider the responsibilities, powers and limits Article II and a state constitution place on that state's legislature.

33. Plaintiff believes a state Legislature must meet its obligations under Article II (i.e. directing the manner of appointment of Presidential Electors) while also complying with its own state constitution. In general, the degree to which this raises a federal constitutional issue depends on the degree of any constraint from the state constitution. For example, if a state Legislature decides to choose electors by popular vote and the state constitution decrees that for all popular vote elections the polls shall open at 8 a.m. and close at 8 p.m., the Legislature can simply ensure that the election is conducted in accordance with the constitutionally mandated open and closing poll times, which is in all likelihood not a serious constraint and would thus not raise a federal constitutional issue. At the other extreme, an amendment to a state constitution that read "The Governor of our state shall appoint all presidential electors" would certainly experience federal constitutional problems because it would remove all discretion from the state Legislature ability to meet its Article II obligations of directing the manner of choosing the state's electors while also complying with its own Constitution. It is not difficult to come up with examples that lie between the two. In general, the more onerous the constraint from the state constitution, the higher the likelihood of a federal constitutional issue.

34. The Colorado Constitution currently provides that "The general assembly shall provide that

after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.” (Section 20) The electoral system chosen - winner-take-all statewide, winner-take-all by district, proportional, etc. - is left to the discretion of the general assembly.

35. Under the Proposal, “The general assembly may enact legislation to change the manner of selecting presidential electors or any of the procedures related thereto.” (Section 11)

36. Plaintiff believes that amending the Colorado Constitution as the Proposal outlines does not present serious federal constitutional issues under Article II for elections after 2004, because it grants the general assembly full discretion in those elections to choose the manner in which Colorado’s electors are appointed, as seen in paragraph 35.

37. Plaintiff asserts that amending the Colorado Constitution as the Proposal outlines is unconstitutional under Article II regarding the 2004 election, because it removes all discretion from the Colorado Legislature in determining the manner in which presidential electors are chosen. As was argued in paragraph 33, a state constitution must be written to allow its Legislature at least some discretion in the manner of choosing presidential electors to comply with Article II of the U.S. Constitution.

38. Plaintiff asserts that Section 1b of the Proposal is unconstitutional under Article II to the degree it states that the people of Colorado have “the right to act in the place of the State

Legislature *in any Legislative matter...*" (emphasis added), as Article II clearly states that the Legislature must direct the manner of appointing electors. Plaintiff believes that the people of Colorado have the right to act in place of the Colorado Legislature in any Legislative matter not mandated to the Colorado Legislature by the U.S. Constitution. Article II provides just such a mandate.

39. The notion of direct popular vote elections for president and vice-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. For example,

Few of the Convention delegates would have acknowledged they were "democrats"; to most of them, "democracy" was virtually synonymous with "mob rule." They favored "republicanism,"... The framers were not truly seeking to establish a government under direct popular control. (Source: http://www.cr.nps.gov/history/online_books/constitution/intro.htm)

The delegates instead affirmatively gave the ability to appoint electors to deliberative bodies - the state Legislatures.

40. In modern times, all state legislatures have opted to appoint electors by popular vote but this has not been generally required of them.

41. The Colorado general assembly 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 Colorado's manner of choosing electors from the current winner-take-all system failed to

pass the Colorado general assembly in 2001.

42. Black's Law Dictionary defines Legislature as "The branch of government responsible for making statutory laws. The federal government and most states have bicameral legislatures, usually consisting of a house of representatives and a senate. - Also termed *legislative assembly*."

43. Despite the apparent clarity from constitutional history and modern usage that under federal law the word "Legislature" in Article II, § 1 of the U.S. Constitution is meant to apply to the Colorado general assembly, and only the Colorado general assembly, opponents of this complaint may argue for a far broader definition of "Legislature."

44. In addition to constitutional history and modern usage of the word "Legislature", one can look to some U.S. Supreme Court precedents to support plaintiff's assertion that the term "Legislature" refers to the Colorado general assembly, and only the Colorado general assembly, in Article II, § 1 of the U.S. Constitution under federal law.

45. In *Bush v. Palm Beach County Canvassing Board* 530 U.S. 70 (2000), the U.S. Supreme Court vacated a decision by the Florida Supreme Court regarding the 2000 Presidential Election and remanded the case to the Florida Supreme Court for clarification. While the U.S. Supreme Court declined to review the federal questions asserted due to uncertainty regarding the basis for the Florida Supreme Court's opinion, it made clear that there is a limit to the extent the Florida Constitution could limit the Florida legislature's ability to act under Article II, § 1 of the U.S.

Constitution. The U.S. Supreme Court stated:

There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl.2, “circumscribe the legislative power.” The opinion states, for example, that “[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no ‘unreasonable or unnecessary’ restraints on the right of suffrage” guaranteed by the state constitution. The opinion also states that “[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens’ right to vote...”

46. In *Bush v. Gore* 531 U.S. 98 (2000), a case that followed *Bush v. Palm Beach County Canvassing Board* in the disputed Presidential election in Florida in 2000, although the U.S. Supreme Court ultimately decided the case on limited equal protection grounds, stating in its opinion that “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities”, it did make general statements in its opinion regarding Article II, § 1. The U.S. Supreme Court said:

The individual citizen has no federal constitutional right to vote for the electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College... When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.

47. In another Article II case not directly on point, in *McPherson v. Blacker* 146 U.S. 1 (1892),

the U.S. Supreme Court upheld a ruling of the Michigan Supreme Court that a Michigan system of having Michigan citizens choose an at-large presidential elector and a district-based presidential elector was upheld. Again, the U.S. Supreme Court's opinion contained statements regarding Article II, § 1, including:

From this review, in which we have been assisted by the laborious research of counsel, and which we might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

48. Opponents of this measure may argue that cases involving the interpretation of Legislature Article I, § 4 can be used as guidance in this case. One such case is *State of Ohio ex rel Davis v. Hildebrandt* 241 U.S. 565 (1916). In this case, the general assembly of Ohio passed a redistricting act regarding congressional elections which was rejected under a referendum vote. A suit was brought to void the referendum and institute the Ohio general assembly's redistricting plan. The U.S. Supreme Court affirmed the decision of the Ohio Supreme Court in construing the term legislature broadly to hold

that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

49. However, in *Hawke v. Smith* 253 U.S. 221 (1920), another case involving the state of Ohio, the U.S. Supreme Court clarified how to interpret the term legislature in the U.S. Constitution,

making it clear that in most cases, Legislature refers to a representative body that makes state laws. In order to interpret Legislature in the U.S. Constitution, the Court said one should look to its purpose in a given section of the U.S. Constitution. The court's opinion specifically calls out Article I § 2 and Article I § 3 as examples where the Legislature refers to such a representative body. In *Hawke*, the U.S. Supreme Court said:

What did the framers of the Constitution mean in requiring ratification by 'legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the *representative body* which made the laws of the people. (emphasis added)

... There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action of the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

50. *Hawke v. Smith* was a case where the U.S. Congress had proposed to the states a Constitutional Amendment regarding the prohibition of intoxicating liquors (the 18th Amendment). The State of Ohio had passed an initiative amending the Ohio Constitution as follows:

'The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.'

51. In *Hawke v. Smith*, the U.S. Supreme Court reversed the Supreme Court of Ohio, which had held that Ohio had the authority to submit a U.S. Constitutional Amendment to a referendum. In explaining its reasoning, the U.S. Supreme Court stated:

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have like assented.

52. *Hawke v. Smith* is particularly relevant to plaintiff's claim, as the delegation of authority by the U.S. Constitution in Article II § 1 (i.e. "shall appoint"), is less restrictive than Article I § 3 (i.e. "chosen by") but more restrictive than Article V (where the legislature or a convention may approve constitutional amendments). *Hawke* declares that a state may not read "Legislature" in the broader sense (i.e. legislative action by a state which includes initiative and referendum) when interpreting Article V. As mentioned in paragraph 49, *Hawke* also explicitly stated that a constitutional amendment was required so that senators could be elected by popular vote (originally chosen under Article I § 3):

It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.

53. *Hawke v. Smith* also furthers our understanding of the type of body Article V contemplates deciding to ratify and amendment as it points out that "Both methods of ratification, by Legislatures or conventions, call for action by *deliberative assemblages representative of the people*, which it was assumed would voice the will of the people." (emphasis added)

54. As outlined in paragraphs 51 and 52, both Article I § 3 and Article V, refer to a representative

body of the people. As Article II § 1 lies between the two in terms of the delegation of authority under the U.S. Constitution, it is reasonable to assume the "Legislature" in Article II § 1 is of the same cloth as the others - i.e. a representative body of the people. This is also consistent with the case law described in paragraphs 45-47.

55. Does *Hawke v. Smith* contradict *Davis v. Hildebrandt*? In *Hawke*, the U.S. Supreme Court considered this and said no, the two cases do not contradict each other. This because Article I § 4 of the U.S. Constitution gives a state the authority to legislate within certain limits and such legislation is necessary for a state to choose its representatives. It is up to the state to determine by what process its laws are made and in *Davis*, the Ohio Supreme Court decided that process included a referendum in Ohio. In contrast, in *Hawke* the U.S. Supreme Court found that no actions to pass laws were required. In *Hawke*, the U.S. Supreme Court said:

But it is said this view runs counter to the decision of this court in *Davis v. Hildebrandt*. But that case is inapposite. It deals with Article I, Section 4 of the Constitution...

56. *Leser v. Garnett* 258 U.S. 130 (1922) was a case that questioned whether the Nineteenth Amendment had become part of the U.S. Constitution. The U.S. Supreme Court found it had, following logic consistent with *Hawke v. Smith*. In *Leser*, the Court said:

...the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

57. In *Smiley v. Holm* 285 U.S. 355 (1932), another case involving Article I, § 4 of the U.S. Constitution, the U.S. Supreme Court reversed the judgment of the Minnesota Supreme Court regarding the effect a veto by the Governor of Minnesota of a legislative plan for redistricting. Consistent with *Davis v. Hildebrandt*, the U.S. Supreme Court ruled that the Governor's veto was part of the process of making laws in Minnesota to which Article I, § 4 of the U.S. Constitution refers.

58. *Smiley v. Holm* is highly relevant to plaintiff's claim, as in *Smiley* the U.S. Supreme Court specifically described its reasoning, giving guidance as to how the term "Legislature" should be interpreted in regard to different sections of the U.S. Constitution. In its reasoning in the *Smiley* opinion, the U.S. Supreme Court was consistent with, and expanded upon, its reasoning in *Hawke v. Smith*, saying to interpret "Legislature" in a given section of the U.S. Constitution it is necessary to consider the action that section contemplates. If that function is one of making laws, then Legislature should be interpreted to be a state's process of making laws, including the people's right of referendum and the Governor's right to veto if those are part of a given state's laws. If it is not one of making laws, then the law making process of a given state is not relevant. In *Smiley*, the U.S. Supreme Court pointed out functions delegated to state legislatures under different sections of the U.S. Constitution of the latter type (i.e. not law making functions) and proper interpretations in those cases - "electoral body" (Article 1, §3, prior to the 17th Amendment), "ratifying body" (Article V) and "consenting body" (Article 1, §8, par. 17). In *Smiley*, the U.S. Supreme Court said:

The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the Legislature with a particular authority, and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver, and thus *renders inapplicable the conditions which attach to the making of state law*. (emphasis added)

59. Under *Smiley v. Holm*, “electoral body”, “ratifying body” and “consenting body” are all cut of the same cloth - i.e. a representative body meant to perform a specific function under the U.S. Constitution (referred to as a “Special Body” hereafter for convenience). A Special Body is a more narrow definition of Legislature than the broad definition required under Article I, § 4 (the latter referred to as a “Law Making Power” hereafter for convenience). As is seen under *Hawke v. Smith*, a Special Body is not subject to the law making process of a state (in *Hawke*, this was in regard to a referendum, but this can logically be extended to initiatives, governor’s vetoes, etc.).

60. While the definition of Legislature under Article II, § 1 is not specifically mentioned in the *Smiley v. Holm* opinion, “appointive body”, a type of Special Body, would be a reasonable inference. It is not reasonable to interpret the function performed by the Legislature under Article II, § 1 to be a law making function, as Article II contemplates the electors may be chosen by the Legislature directly (and this has occurred frequently in the past). A state Legislature choosing representatives directly under the U.S. Constitution is described under *Smiley* as an “electoral body” (a type of Special Body) and, accordingly, the state Legislature’s actions would not be subject to the law making processes of its state (referendum, governor’s vetoes, etc.) when a state Legislature is acting in this regard. If the state Legislature has the ability to act as an

“electoral body” at its choosing under the U.S. Constitution, it must be a Special Body, as one of its functions is deciding how it will function and it need not enter the law making arena (i.e. pass laws providing for a popular election) if it does not so desire. Additionally, if anything, the function of a state Legislature under Article I, § 8, par. 17 (the sale of land to the federal government) is closer to a law making function than it is under Article II, § 1, but under *Smiley* when acting under the former a Legislature is a “consenting body”, not a Law Making Process. Therefore, it is clear that the state Legislature under Article II, § 1 is not a Law Making Process, and accordingly, the actions of the state Legislature under Article II, § 1 are not subject to the law making processes of its state (initiative, etc.) as they are under Article I, § 4. Under Article II, § 1, the state Legislature is a Special Body of the same cloth as the “ratifying body” of Article V under *Smiley* (and not subject to state law making processes such as referendum, etc.). This is consistent with the case law described in paragraphs 45-47.

61. It is noteworthy that under *Smiley v. Holm*, the function of a state Legislature under a given section of the U.S. Constitution is determined by the Federal Constitution (see quote in paragraph 58 which is consistent with quote in paragraph 56). That is, how a given state interprets the constitution and how it sets up its own law making process is irrelevant to the determination of the function of a state Legislature under the U.S. Constitution. The power granted to a state Legislature under the U.S. Constitution derives from the U.S. Constitution and cannot be fundamentally altered by a state or its people. Accordingly, a state may decide that it would like its Legislature to perform a law making function under Article II, § 1 by passing laws for the popular choice of electors, but that decision will not change the state Legislature’s (or any

other state Legislature's) function under Article II, § 1 as a Special Body. An example of this was seen in *Hawke v. Smith*, where the State of Ohio's laws allowed for an initiative to pass an amendment to the Ohio Constitution and a referendum on any law passed by the Ohio general assembly. The people of Ohio did both, passing an amendment to the Ohio Constitution stating that the people of Ohio reserved for themselves the legislative power of referendum on action of the general assembly in ratifying proposed amendments to the U.S. Constitution. A referendum vote ratifying the national prohibition amendment also failed to pass in 1919. Nevertheless, in *Hawke*, the U.S. Supreme Court ruled that the state of Ohio had no authority to submit the ratification to a referendum. This is because Article V power derived from the U.S. Constitution, a state Legislature is not acting in a law making function and is therefore a Special Body, the nature of which cannot be changed by a state Constitution, law or law making process.

62. Accordingly, it is concluded that in addition to constitutional history and modern usage of the word "Legislature", the U.S. Supreme Court precedents support plaintiff's assertion that the term "Legislature" refers to the Colorado general assembly, and only the Colorado general assembly, in Article II, § 1 of the U.S. Constitution under federal law.

63. Opponents of this measure may argue that the citizens or the voters of Colorado are the Legislature of the state for purposes of the Proposal under Article II, § 1 of the U.S. Constitution, but this is not a reasonable proposition. Those who accept a position in a Legislature accept the responsibility of informing themselves of the issues in all their complexity - and the people of Colorado are not obligated to such a higher standard in order to exercise their

right to vote. Nor can a minority effectively draft all other voters of Colorado to serve in the state Legislature. Even if elected, an individual can decline to serve in the state Legislature. A Legislature is a deliberative assembly representative of the people. By including all citizens or voters in the "Legislature", the concept of representation becomes a nullity, and without a formal forum for discussion and consideration it loses its ability to deliberate. Finally, in Article VI, the U.S. Constitution requires that members of the state Legislatures take an oath to support the U.S. Constitution. This is not required of Colorado voters in order to vote. It is therefore clear that defining the "Legislature" of Colorado to mean the citizens or the voters of Colorado is simply untenable. As outlined in paragraph 62, the Colorado general assembly is the Colorado Legislature under Article II, § 1 of the U.S. Constitution.

64. In contrast to the U.S. Supreme Court precedents considered above, where in all cases the state Legislature was at least involved, the Proposal excludes the Legislature from participating in the appointment of presidential electors in the 2004 election.

65. 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 generally poorly informed on the underlying issues in all their complexity, to make a decision with minimal time for debate and discussion.

66. In *Anderson v. Celebrezze*, the U.S. Supreme Court also recognized the unique national interest in a Presidential election and its impact on a state's regulation elections. The Court said:

Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States ... the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

67. If the Proposal is allowed to apply retroactively to the 2004 election despite the arguments above, the Blue Book (as defined in paragraph 19) required under Colorado law fails to inform the voters of Colorado of the potential consequences of such a situation.

68. On page 12 of the Blue Book, the third "Argument For" reads:

There can be no delay in the election of the president because of this change to the Colorado Consitution. The U.S. Constitution requires that the electoral college meet and cast votes in December following a presidential election, and that timing is unaffected by this proposal. Further, the Colorado courts have approved other proposals that are retroactive in nature.

69. On page 12 of the Blue Book, the third "Argument Against" reads:

Because the proposal attempts to be retroactive, it may be subject to legal challenge on the issue of timing, which could delay a final decision in Colorado on who wins the presidency in 2004. Further, voters in the 2004 election cycle may not realize that the outcome of the vote on this proposal will affect how Colorado's electoral votes are allocated in 2004.

70. The statements in paragraphs 68 and 69 do not state the failure of the Proposal to comply with, and the potential consequences of not complying with, 3 U.S.C. § 5 - a "safe harbor" in federal law regarding the counting of electoral votes.

71. 3 U.S.C. § 5 reads:

If any state shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors*, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned. (emphasis added)

72. Under 3 U.S.C. § 1, “the day fixed for the appointment of electors” in 3 U.S.C. § 5 is November 2, 2004 (election day in Colorado and the rest of the United States).

73. Under 3 U.S.C. § 7, in 2004 presidential electors will meet and give their vote on December 13. Hence, the six day prior deadline in 3 U.S.C. § 5 is December 7 in 2004.

74. Since the Proposal will not have been “enacted prior to the day fixed for the appointment of electors”, Colorado will not enjoy the benefit of the federal “safe harbor” if the Proposal passes and all controversies and contests are not resolved by December 7, 2004. This gives 36 days after the election to resolve all controversies and contests, including the constitutional issues raised under plaintiff’s claim.

75. 3 U.S.C. § 15 provides procedures where the U.S. Congress may choose which electoral votes to count when the U.S. Congress has received more than one set of returns from a state. If the state in question has not complied with 3 U.S.C. § 5 and the two houses of the U.S. Congress agree, the U.S. Congress may count whatever set of returns it chooses.

76. 3 U.S.C. § 2 provides that a state Legislature may appoint electors after the day set out in U.S.C. § 1, if the “State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law.” In 2000, the Florida legislature began proceedings to act under 3 U.S.C. § 2 if the judicial disputes had not been resolved in time. However, the Colorado Constitutional language outlined in paragraph 34 as well as litigation

related to the Proposal, is likely to complicate (or potentially eliminate) the Colorado Legislature's ability to act under 3 U.S.C. § 2 and may be the subject of litigation of its own. For example, in order for the Proposal to be applied retroactively, one would have to argue that the Legislature referred to in Article II, § 1 is a Law Making Process (as herein defined). However, that same position could then be used to argue the Colorado general assembly may not select the electors directly under the Colorado constitution language outlined in paragraph 34 under 3 U.S.C. § 2. The act of trying to defend applying the Proposal retroactively complicates (or eliminates) the ability of the Colorado general assembly to act, if necessary. The citizens of Colorado could thus potentially face protracted litigation regarding both the Proposal and efforts by the Colorado general assembly to ensure Colorado casts electoral votes in the Presidential election. If these disputes are not resolved in time (as outlined in paragraph 77), Colorado may lose the ability to cast any votes in the Presidential election.

77. In *Bush v. Gore*, the U.S. Supreme Court ruled that Florida law required a "conclusive selection of electors be completed" by the deadline outlined in 3 U.S.C. § 5. A similar ruling on Colorado law, or the failure to produce the conclusive selection of electors by a later date (e.g. December 13, January 3 or January 20) may eliminate Colorado's ability to participate in the electoral process at all.

78. Paragraph 68 and 69 show that the Blue Book language significantly understates the risk to Colorado voters of voting for the Proposal. Even under the more conservative paragraph 69 language, the Proposal could "delay a final decision in Colorado", when in reality the risk is to

“eliminate a final decision in Colorado” and have Colorado’s votes decided by the U.S. Congress in Washington D.C. (or even potentially eliminated altogether as outlined in paragraph 77).

79. It should be considered that perhaps this is exactly the type of situation the framers of the U.S. Constitution feared when they drafted Article II, § 1 - a well intentioned populace, with minimal time for debate and discussion, voting on a measure they believe will accomplish what they want (in this case a more fair method of choosing a President), but with significant problems inherent in the detail of the measure that are poorly understood. The founders may have considered this and concluded that a Presidential election was so important to the nation as a whole that an additional check was required - a deliberative body which is designed to consider, debate and decide upon issues and whose members are charged with understanding the underlying issues in all their complexity would direct the manner of choosing electors in each state and those electors in turn would select the President.

80. The issues presented here are obviously important. It would be far better, however, to resolve them prior to the election, as any impact on the Presidential election will not be known with certainty during this time period. It will be far harder to come to a just decision that gains wide acceptance once the impact of the Court’s decision on the Presidential election is known with certainty. This, as well as the national interest in a Presidential election, counsels for a decision in this matter that precedes the November 2, 2004 election. At a minimum, this should be a lesson from the Presidential election of 2000.