

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5142
(C.A. No. 08-1294-HHK)

ASA GORDON, DC Presidential
Elector, DC Statehood Green Party
Electoral College Task Force, Executive
Director Douglass Institute of Government, Appellant,

v.

JOSEPH R. BIDEN, Jr., Vice President of the
United States, President of the Senate of
the United States of America, Appellee.

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, Joseph R. Biden, Jr., Vice President of the United States and President of the United States Senate ("the Vice President"), respectfully moves this Court to affirm summarily the Honorable Henry H. Kennedy, Jr.'s Memorandum Opinion and Order dated March 26, 2009 granting the Vice President's motion to dismiss.¹ Summary affirmance is appropriate because the merits of the Vice President's case are so clear that expedited action is justified. Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*).

¹ Copies of the Memorandum Opinion and Order are attached.

Background

On July 28, 2008, Appellant, Asa Gordon,² commenced suit in District Court seeking to enjoin the Vice President³ from performing certain ministerial duties related to the oversight of the U.S. Electoral College in the then- upcoming 2008 presidential election. Specifically, Gordon sought declaratory and injunctive relief enjoining the Vice President from "effecting the counting of the full slate of presidential electors," and performing "any presumptive tabulation of 'winner take all' electors from states that have no 'winner take all' statute in the electoral count," as well as requiring the Vice President to reduce "the number of State electors and representatives in congress in proportion to the disenfranchised class of U.S. Citizens whose voting rights were *denied and/or abridged* or in the alternative effect proportional apportionment of the counting of the electoral votes in congress." R. 1 (emphasis in original) and R. 21 at 3.

² In his Complaint, Gordon identifies himself as a District of Columbia resident and registered voter, Green Party Presidential Elector Chair, member of the District of Columbia Statehood Green Party Electoral College Task Force, and Executive Director of the Douglass Institute of Government. R. 1. "R." followed by a number refers to the document identified at that number in the District Court's docket report.

³ The case was filed against former Vice President Richard Cheney who has been substituted by Vice President Joseph Biden, pursuant to Federal Rule of Civil Procedure 25(d).

Gordon's Complaint implied a theory of standing under Section 2 of the Fourteenth Amendment which the District Court interpreted and summarized, as follows: "[Gordon's] vote as an elector and registered voter, as well as that of all other electors and registered voters, would be diluted by electoral votes from states in which electors vote for whichever candidate wins the popular vote (under so-called "winner take all" laws) rather than voting for candidates in the proportion of votes they win." R. 21 at 4.

On August 18, 2008, the Vice President moved to dismiss Gordon's Complaint on the grounds that Gordon's standing theory fails and that he does not bear his burden with respect to any of the elements required for a showing of standing. R. 9 at 7-11.

On March 26, 2009, the District Court granted the Vice President's motion and dismissed the case because, "assuming that Gordon has sufficiently plead an injury in fact, the alleged injury is not fairly traceable to the Vice President's allegedly unlawful conduct." R. 21 at 4. The District Court also dismissed as moot Gordon's Motion for Temporary Restraining Order and Preliminary Injunction, his Motion to Present Oral Argument for Summary Judgment, and his Augmented Motion for Summary Judgment. R. 21 at 6. On April 22, 2009, Gordon appealed. R. 24.

For the following reasons, the Vice President respectfully requests that this Court affirm the District Court decision.

Argument

The District Court correctly concluded that Gordon fails to establish standing.

Standing must be determined as a threshold matter. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83,101-102 (1998); Whitmore v Arkansas 495 U.S. 149, 154-155 (1990). As a party invoking federal jurisdiction, Gordon has the burden of establishing the elements of constitutional standing. Luian v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In particular, Gordon must show an injury-in-fact, a causal relationship between that injury and the action challenged, and the likelihood that the injury could be redressed by the relief requested of the court. *Id.* at 560-561.

At the pleadings stage - which is as far as Gordon's case had advanced in District Court - standing does not depend on the merits of the plaintiff's contention that particular conduct is illegal, and the factual allegations will be accepted as true. Tooley v. Napolitano, 556 F.3d 836, 839 (D.C. Cir. 2009), quoting Warth v. Seldin, 422 U.S. 490, 500 (1975) (internal quotations omitted); *see also* Aktieselskabet AF 21. November 2001 v Fame Jeans Inc., 525 F.3d 8, 15 & n. 3 (D.C. Cir. 2008) (reaffirming this Circuit's adherence to longstanding

fundamentals of notice pleadings and, thus, the applicable standing requirements at the pleading stage).

The District Court correctly concluded that Gordon had failed to satisfy the causation element of standing. Applying the proper standard to determine causation, "[the court] examine[d] whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." R. 21 at 5, quoting Microwave Acquisition Corp. v. FCC, 145 F.3d 1410, 1412 (D.C. Cir. 1998); Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (*en banc*). The District Court explained that because Gordon's claims are predicated on allegations of wrongdoing by third parties, and not the actions of the Vice President in his ministerial role in presiding over the tabulation of the electorate, the "causation" or "traceability" element of the showing required to demonstrate standing are absent. R. 21 at 5. Because Gordon's alleged injury is not "fairly traceable" to the Vice President's actions, which are purely ministerial, but rather is attributable to the actions of third party states and state officials, the District Court ruled that Gordon fails to satisfy the causation element of standing and, therefore, is unable to prosecute this action.

Conclusion

Accordingly, Defendant respectfully requests that this Court summarily affirm the District Court's judgment dismissing the case.

CHANNING PHILLIPS
Acting United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

YASAMAN S. SUTTON
Special Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June 2009, the foregoing Appellee's Motion for Summary Affirmance was served by depositing a copy thereof in the first class United States mail, postage prepaid, marked for delivery to:

Asa Gordon
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