

Case No. 09-5142

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiff/Appellant,

v.

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

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
C.A. No. 08-1294 (HHK)

APPELLANT'S BRIEF

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Dated: September 22, 2009

Certificate of Parties, Rulings Under Review, and Related Cases

Pursuant to D.C. Cir. R. 28(a)(1), The Plaintiff-Appellant hereby certifies that the following parties have an interest in the outcome of this case:

Gordon, Asa, DC Presidential Elector, Plaintiff - Appellant

Biden, Joseph R., Vice President of the United States, Defendant - Appellant

Sutton, Yasaman S., Assistant U.S. Attorney, Counsel for Defendant-Appellee

Phillips, Channing D., Acting U.S. Attorney, Counsel for Defendant-Appellee

Lawrence, Craig R., Assistant U.S. Attorney, Counsel for Defendant-Appellee

Burch, Alan, Assistant U.S. Attorney, Counsel for Defendant-Appellee

Kennedy, Henry H., U.S. District Judge, Court Ruling Under Review

The Plaintiff-Appellant hereby certifies that the March 26, 2009 ruling of Trial Judge Henry H. Kennedy, Junior, U.S. District Judge for case#: 1:08-cv-01294 granting the Defendant's Motion to Dismiss and denying as moot Plaintiff's Motion to Present Oral Argument for Summary Judgment , and Plaintiff's Augmented Motion for Summary Judgment are the issues under review for this notice of appeal filed 04/22/2009 by the Plaintiff - Appellant and there are no pending related cases.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument to aid this Court in its consideration of this appeal. Appellants request Court to grant oral argument so that a full hearing of the issues can be examined in an exchange wherein the issues can be properly weighted . The Defendant has demonstrated a propensity to misconstrue the underlying nature of this civil action with flawed background representations to the District Court and this Court of Appeals.

TABLE OF CONTENTS

	<u>Page</u>
Certificate of Parties, Rulings Under Review, and Related Cases	I
Statement Regarding Oral Argument	II
Table of Contents.....	III
Table of Authorities	V
Glossary of Abbreviations	VI
Jurisdictional Statement	1
Statement of Issues	1
Statutes and Regulations	2
Statement of the Facts	3
Summary of Argument	5
Standing	7
Argument	9
I. The District Court Incorrectly Concluded that the Plaintiff' s Alleged Injury Is Not <i>Fairly Traceable</i> to the Vice President's Actions.	9
A. The District Court Applied the Wrong Standard to Determine Causation	9

B.	The District Court Misconstrued the Substance of the Constitutional Injury Pleaded Before the Court.....	10
C.	The Plain Text of Amend.12 Should Inform the Court's Resolution of This Case.....	12
D.	The Judicial Philosophy of Textualism and Original Intent Should Offer a Degree of Guidance to the Court's Resolution of This Case.....	14
E.	The NARA Role in Misinforming State Officials Should Inform the Court in its Resolution of This Case.	15
II.	The District Court Incorrectly Concluded that the Plaintiff's Summary Judgment Issues are Moot.....	16
III.	This Court Should Direct the Issuance of a Court Order For Declaratory Relief	16
	Conclusion Stating the Relief Sought	18
	Signature Block	18
	Certificate of Compliance	19
	Certificate of Service	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Elrod v. Burns</i> , 427 U.S. 347, 96 S. Ct. 2673 (1976)	7
* <i>Reynolds v. Sims</i> , 377 U. S. 533,555 (1964)	9
<i>Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.</i> , 299 F.3d 1242, 1246 (11th Cir. 2002)	17
* <i>Phila. Marine Trade Ass’n</i> , 909 F.2d 754, 756 (2d Cir. 1990)	17
<i>Tally-Ho, Inc.</i> , 889 F.2d at 1029	17
 <u>Other</u>	
11A Charles Allen Wright, Arthur A. Miller & Mary Kay Kane, <i>Federal Practice and Procedure</i> § 2948.1 (2d. 1995)	7
NARA’s Office of the Federal Register (OFR) <i>The 2008 Presidential Election/Provisions of the Constitution and United States Code</i> http://www.archives.gov/federal-register/electoral-college/2008/ 2008-pamphlet.pdf , p.2	15

*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

VP ---- JOSEPH R. BIDEN, Jr., Vice President of the United States, President of the Senate of the United States of America, Defendant/Appellee.

NARA ---- The National Archives and Records Administration

This Brief uses the following designations:

- References to the Civil Docket For Case#: 1:08-cv-01294 Excerpts are [CD[#]-*]
(# = docket entry number_ * = page number)
- References to the Court of Appeals Docket # 09-5142 Excerpts are [AD[#]-*]
(# = docket entry date - mm/dd/yyyy _ * = page number)

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 for Final decisions of District Courts. Plaintiff timely filed a notice of appeal on April 22, 2009.

The District Court had jurisdiction based on 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights and elective franchise).

STATEMENT OF THE ISSUES

1. Did the District Court erroneously conclude that the Plaintiff's Alleged Injury Is Not *Fairly Traceable* to the Vice President's Actions ?
2. Did the District Court erroneously conclude that the Plaintiff's Summary Judgment Issues are Moot ?
3. Should This Court Direct the Issuance of a Court Order For Declaratory Relief ?

STATUTES AND REGULATIONS

Pages

2 U.S.C. § 62,3,5,6,8,10,11,14,16

3 U.S.C. Chapter 1, §152,5,7,8,9,11,12

28 U.S.C. § 1291..... 1,8

28 U.S.C. § 1331..... 1

28 U.S.C. § 1343..... 1

STATEMENT OF THE FACTS

This civil action, cause of controversy, arises from the Vice President's presentation for tabulation in the Hall of the House of Representatives of majority polled presidential electors from *unbounded southern states*¹ on a *winner-take all basis* ungrounded in either state or federal law. This act by the VP constitutes an *abridgment* of the voting rights of minority polled presidential electors based on race and/or party affiliation in violation of the *mal-apportionment penalty clause*² pursuant to the United States Constitution (**Amend. XIV§2**) and statutory Code (**2USC§6**).

The District Court concluded that the Plaintiff "fails to satisfy the causation element of standing" therefore he is "unable to prosecute the action" for the "alleged injury is not 'fairly traceable' to the Vice President's actions". The court also concluded that the Plaintiff's summary motions for relief were moot. **CD21_5**. This appeal followed.

¹ The *unbounded states* are states wherein *Winner-take-all* or *First Past the Post* systems for awarding a states presidential electors is not specified in a state's electoral statute.

² The *mal-apportionment penalty clause* is used throughout this action in lieu of the *REDUCTION OF REPRESENTATION clause* of **Amend. 14§2 & 2USC§6** because it is posited that this construction best frames the constitutional injury in a matter that infers an appropriate democratic and non disruptive remedy, i.e. proportional apportionment of presidential electors.

The facts that follow were pleaded by the Appellant before the District Court in a Motion and Augmented Motion For Summary Judgment.

1. "The Defendant Richard B. Cheney, acting in his capacity as the President of the Senate, and presiding officer over the Senate and House of Representatives meeting in the Hall of the House of Representatives for the presenting and counting of the certificates of electoral votes on January 8, 2009, effected the exclusive tabulation of only majority polled presidential electors from the *Unbounded Southern States* of ARKANSAS, GEORGIA, LOUISIANA, TENNESSEE, and TEXAS wherein the submitted "certificates of electoral votes" cited no state or federal statute as a basis for the exclusion of the counting of minority polled presidential electors." **See: CD19_4**
2. "The Office of the Federal Register of the National Archives and Records Administration explicitly declares that there is "No Legal Requirement" that "Electors in these (Southern) States ARKANSAS, GEORGIA, LOUISIANA, TENNESSEE, and TEXAS are not bound by State Law to cast their vote for a specific candidate { <http://www.archives.gov/federal-register/electoral-college/laws.html> }". **See: CD13_4**

The VP's

3. "[e]xclusive selection of only majority polled presidential electors from the aforementioned Unbounded Southern States constitutes an abridgment of minority polled presidential electors ungrounded in either state or federal statute". **See: CD13_4**

The VP's action

4. "[c]onstitutes arbitrary treatment in regards to the counting of Unbounded Southern States presidential electors that will mathematically represent the majority choice of the state's white voters with zero representation based on the majority choice of the state's black voters". **See: CD13_5**

The VP's action

5. "[c]onstitutes arbitrary treatment in regards to the counting of Unbounded Southern States presidential electors that will represent the exclusive selection of votes cast for the states' Republican presidential electors to the exclusion of all votes cast for the States' Democratic presidential electors." **See: CD13_5**

The VP's action

6. "[i]n regards to the Unbounded Southern States constitutes an arbitrary discriminatory distinction among presidential electors not grounded in federal or state law." **See: CD13_5**

SUMMARY OF ARGUMENT

The summary of argument for this brief is taken from the introduction to the argument of the "APPELLANT'S REPLY TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE AND MOTION FOR ORAL ARGUMENT FOR AFFIRMATIVE RELIEF." :

" 'The true measure of a Democracy is not in counting how many votes are cast, but in how many of those votes that are cast truly count.' See:CD19_1.

State Officials perform ministerial duties by merely reporting on how many votes were cast for presidential electors in their state, however the *counting* and *authentication* of the final tally of presidential electoral votes that are cast in any state is more than just "*fairly traceable*" indeed it is *only traceable* to the actions of the Vice President as established in the United States statutory code 3USC§15.

Thus the injury arising from the *mal-apportionment penalty* pursuant to 2USC§6 from a tabulation that abridges the counting of minority polled presidential electors in regards to *unbounded Southern States* is by the plain textual language of the governing statute *directly traceable* to the conduct of the Vice

President as pleaded in the civil action by the Appellant.

'Every pleading by the Plaintiff in this civil action has pointedly argued that this Case of Controversy arises out of the violation of the 'Mal-apportionment Penalty Clause' for the abridgment of a citizen's 'right to vote' under the Second Section of the Fourteenth Amendment not the 'Equal Protection Clause' of the first section of the Fourteenth Amendment.' **See: CD16_5**

A Court opinion derived from an analysis of the Appellant's *derivative* equal protection claims cannot be dispositive of the entire civil action in the absence of an analysis of the Appellant's *primary* mal-apportionment penalty claim .

Therefore, the District Court's flawed analysis fails to apply a proper standard to determine causation, wherein "[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." *See Appellee's Motion For Summary Affirmance* at 5. The District Court's *truncated* analysis *does not include* consideration of standing in regards to the Appellant's *mal-apportionment penalty* claims pursuant to 2USC§6." **See: AD06/17/2009_4-5**

This action is not moot, for the District Court ruling has enabled the very injury the plaintiff sought to stay, with a court finding that ignored the plain language of **Amend. 14§2**. The District Court's holding is irreconcilable with the federal statute **2USC§6** de jure mandate to exact a *mal-apportionment penalty* for a de facto denial or abridgment of a citizen of the United States' *right to vote* for presidential electors .

Finally undisputed facts have been established in the District Court in this civil action that warrant de novo review by the Circuit Court to grant the plaintiff's plea for declaratory relief as a matter of law in the public interest.

STANDING

Appellant's' Standing Is Singularly Unique as a Voter and Presidential Elector.

"No other United States citizen stands in the unique position of the Plaintiff and the citizens of the District of Columbia. ... The Plaintiff as do all the citizens of the District of Columbia are precluded the right to vote for representatives in the House or Senate who can vote or protect their interests in the Congress of the United States of America. Congress has uniquely limited the right of this class of citizen to enjoy the franchise to vote with the explicit exception that this class of citizen can participate only in the selection of electors to vote for the President and Vice President of the United States. *This limited franchise is diminished and diluted, indeed negated*, if those duly selected electors which includes the [Appellant] from the District of Columbia are held to compete with a class of *unbounded electoral states* presidential electors who have not met constitutional muster. This injury is real , particularized and unlike any injury that any other citizen from any other state can assert. The Plaintiff, unlike any other American citizen, has no congressional representative to whom he may appeal or who can raise an objection at the appointed time established for such objections under 3USC § 15. The reason being, the plaintiff has no representative who has a right in law to speak on the floor of Congress. Thus the Plaintiff stands alone to petition the only forum of government that can provide a remedy in this instance, the federal court of the United States of America." **See: DC12_7-8**

The plain text of **Amend. XIV§2** endows the citizen with a constitutional standing to retain the right to vote for the choice of presidential electors that cannot be denied or abridged. There is a presumption of irreparable injury when a constitutional right is at risk.³

³ *Elrod v. Burns*, 427, U.S. 347, 373-74, 96 S. Ct. 2673, 2690 (1976); see generally 11A Charles Allen Wright, Arthur A. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, at n.21 (2nd ed. 1995).

However, the only issue of standing in this civil action before this Appellate Court is the ruling of the District Court on the *singular* question of whether "causation" is "traceable" to the conduct of the Vice President or to the actions of third party state officials not appearing before the District Court.

The statutory requirements of **3USC Chapter 1 §15** clearly, unambiguously, as a matter of law, establish that the "causation" of any abuse of the *mal-apportionment penalty clause* under **Amend. 14§2** implemented by **2USC§6** in the counting of the *several* unbounded Southern states presidential electors is squarely "traceable" to the conduct of the Vice President acting in the role of the President of the Senate presiding over the tabulation of votes in the Electoral College.

Plaintiff has standing before this Appellate Court pursuant to 28USC§1291.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE PLAINTIFF'S ALLEGED INJURY IS NOT FAIRLY TRACEABLE TO THE VICE PRESIDENT'S ACTIONS

"[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

- *Reynolds v. Sims*, 377 U. S. 533,555 (1964)

A. The District Court applied the wrong standard to determine causation.

The District Court principally relies on precedents that determine that the plaintiff's *alleged injury is not redressable by the Vice President's conduct but is subject to other third parties not before the court*. This reliance is misplaced, and leads the court to apply a wrong standard of review to determine causation in this cause of action.

" 1. Third party State officials from 'unbounded southern states' cannot present for representation in the electoral college only presidential electors pledged to the majority polled party on a 'winner take all' basis for there is no state election statute that authorizes them to do so.

2. 'Unbounded Southern States' third party state officials can only forward the total number of votes cast for each of the presidential party candidates under their state election law.

3. The [Vice President], and only the [Vice President], as presiding officer can effect the *counting* of a state's presidential electors before congress and by that discretionary act de facto disfranchise minority polled presidential electors from 'unbounded southern states'. The [Vice President] is the only government official pursuant to 3USC Chapter 1 §15 who can *finalize* and

consummate this injury to 'voting rights' under the Fourteenth amendment, to minority polled presidential electors such as the Appellant."

See: CD12_9.

"Indeed, the fact is, many state officials submit their *Certificates of Vote* for the final count in the electoral college with no specific claim that the listed presidential electors with their vote tallies are the representative presidential electors of their state based upon a federal or state statute, a critical fact that is overlooked by the Court in this Civil Action." **See: CD25_3**

B. The District Court misconstrued the substance of the constitutional injury pleaded before the Court.

The District Court's analysis proceeds from a misconstrued understanding of the underlying nature of the plaintiff's civil action. This leads the court to a flawed *paraphrase* of the declaratory and injunctive relief pleaded by the plaintiff. The court mistakingly represented the plaintiff :

"[A]s 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" (emphasis in original). **See: CD21_3**

Thus the District Court is led to apply an inappropriate standard to determine *causation*, wherein the District Court commenced its analysis from a flawed understanding of the actual relief pleaded by the plaintiff i.e. :

"Plaintiff requests the court to apply the sanction in section two of the Fourteen Amendment and 2USC§6 which calls for the reduction of 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." CD1_8.

Thus the Plaintiff's clear request for a remedy from the District Court was misconstrued by the court as a requirement made on the Vice President?

Indeed the District Court was led astray by exclusively focusing on the plaintiff's *derivative* equal protection pleadings to the detriment of determining a proper standing in regards to the the plaintiff's *primary* pleading of constitutional injury pursuant to the mal-apportionment penalty provision of **Amend. XIV§2**.

The District Court erroneously failed to address the primary nature of the action, a civil action that is directed at a constitutional inappropriate counting of presidential electors subject to the mal-apportionment penalty.

What the plaintiff sought was to enjoin the Vice President:

"[F]rom effecting the counting of the full slate of presidential electors subject to the Mal-Apportionment Penalty(MAP) and 2USC§6, based on Fourteenth Amendment 1st Section "equal protection" and 2nd Section "Right to Vote" Violations predicated on Race and/or Party Affiliation pursuant to action taken under 3USC Chapter 1, § 15." **See: CD1_8.**

and

"[F]rom any presumptive tabulation of "winner take all" electors from states that have no "winner take all" statute in the electoral count of January 6th, 2009 pursuant to action taken under 3USC Chapter 1, § 15." **See: CD1_8.**

How is it logically possible to effect a "fairly traceable... third party states and

state officials...causation element standing" (CD21_5) analysis within the context of remedies pleaded only for action that can be taken by the Vice President pursuant to 3USC Chapter 1, § 15.

C. The Plain text of Amend.12 Should Inform the Court in its Resolution of This Case.

The plain text of the 12th Amendment to the constitution sets out *implicit* guidance to the role of state officials in regards to the *casting* of a state's electoral votes, whereas the role of the VP in the *counting* of a state's electoral votes in the electoral college is *explicit*.

1. The Text of Amend. 12 Does Not Specify a Definitive Role for State Officials in the Counting of a State's Presidential Electors.

A state's presidential electors are responsible for the casting of votes and making lists. A state's electors sign, certify and then transmit the list of the votes cast to the President of the Senate. There is no specific role provided for state officials such as the Governor or the State's Secretary of State specified in Amend. 12. These officials merely facilitate the actions of the state's electors and forward the votes cast by the state's presidential electors to the seat of the government of the United States.

2. The Text of Amend. 12 *Does* Specify a Definitive Role for the Vice President in the *Counting* of a State's Presidential Electors.

Unlike state officials, the VP's role in the counting of electoral votes *is specified*.

This critical role of the VP establishes the "causation" or "traceability" of the VP acting as President of the Senate in the presentation of the certificates of votes "in the presence of the Senate and House of Representatives" , **Amend. 12**

The VP concluded the last proceedings without any definitive offer to entertain any outstanding objections, and confirmed his singularly unique role as the sole federal official that could finalize without any option for review the *mal-apportionment* of presidential electors in the electoral count of *certificates of votes* by declaring:

"This announcement of the state of the vote by the president of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, each beginning for the term beginning January 20th 2009, and shall be entered together with the list of the votes on the journals of the Senate and the House of Representatives. The purpose of the joint session having been concluded, pursuant to Senate concurrent resolution number one , 111th Congress, the chair declares the joint session dissolved." **CD19_3**.

Therefore, the plain text of Amend. 12th sets out the preeminent role of the VP vis-a`-vis state officials in regards to a constitutional responsibility in insuring

that the citizen's right to vote pursuant to **Amend. 14 § 2** is given a proper weight in the *counting* of presidential electors.

D. The Judicial Philosophy of Textualism and Original Intent Should Offer a Degree of Guidance to the Court's Resolution of This Case

The Appellant pleads before this court of appeals that for this civil action a resolution by the court is best guided by the jurisprudence of "Textualism" weighted and tempered by the "Original Intent" of the Reconstruction era constitutional framers rather than undue reliance on legal precedents. Presently Case law precedents are insufficient in scope and limited in application to adequately inform us in this matter for this is an action in some degree of first impression in regards to civil litigation addressing the citizen's *right to vote* and the counting of presidential electors subject to the *mal-apportionment penalty clause* pursuant to **Amend. 14 & 2** implemented by **2USC§6**. Indeed case law precedents in this regard are fraught with the danger of slippage into reliance on redemptionist era court rulings which sustained the reestablishment of racial supremacy.

E. The NARA Role in Misinforming State Officials Should Inform the Court in its Resolution of This Case.

The National Archives and Records Administration produces a pamphlet for State Officials entitled "THE 2008 PRESIDENTIAL ELECTION PROVISIONS OF THE CONSTITUTION AND UNITED STATES CODE"⁴ . NARA declares:

This pamphlet has been compiled and published by the Office of the Federal Register, National Archives and Records Administration, for use by the Executives and Electors of the several States in the performance of their duties in connection with Presidential Elections. [Revised July, 2008]

The National Archivist has deliberately chosen to exclude Section Two of the Fourteenth Amendment with its explicit provision in regards to the citizens' right to vote in this NARA pamphlet despite a civil action and the exhortations of the plaintiff and the secretary of the Green Party of The United States. The Archivist is arrogantly dismissive of this provision of the constitution.

4 <http://www.archives.gov/federal-register/electoral-college/2008/2008-pamphlet.pdf>, p.2

II. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE PLAINTIFF'S SUMMARY JUDGMENT ISSUES ARE MOOT.

As argued in the "APPELLANT'S REPLY TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE AND MOTION FOR ORAL ARGUMENT FOR AFFIRMATIVE RELIEF."

"This action is hardly moot. Indeed, this Civil Action was filed to render *moot* a Constitutional *mandate* that would be triggered to reduce state representatives from unbounded Southern States for de facto disfranchisement subject to the mal-apportionment penalty clause in the absence of a court order to effect proportional apportionment of presidential electors. The court's ruling as it now stands has mistakenly *un-mooted* that Constitutional injury to now be in effect and ongoing. " **See: AD06/17/2009_9.**

III. This Court Should Direct the Issuance of a Court Order For Declaratory Relief.

An appellate court ordinarily considers whether there is an abuse of discretion in the ruling of a District judge, however this is not the case wherein the court's decision relies on an erroneous interpretation of law. In this case the trial court has not even addressed the plaintiff's *primary* claim pursuant to a federal statute i.e. 2USC§6. The trial judge made fact determinations that solely relied on a record of the factual pleadings before the trial court. The appellate court is in as good a position to determine the factual issues in this matter as the trial court.

Under these circumstances the review is plenary and the appellate court may consider the matter de novo⁵.

Because this appellate court has a record from a set of undisputed facts from which it may resolve this action as a matter of law, this Court should determine de novo whether the Plaintiff has sufficiently demonstrated a right to declaratory relief and, if so, to direct the District Court to issue the appropriate order. The appellate court should vacate the decision of the trial court, and further remand with instructions to grant the Appellant's plea for declaratory relief .

5 *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246 (11th Cir. 2002); see *Phila. Marine Trade Ass'n*, 909 F.2d 754, 756 (2d Cir. 1990)(holding that review is broader where facts are conceded); see *Tally-Ho, Inc.*, 889 F.2d at 1029 (reversing District Court's denial of preliminary injunction and remanding with instructions to enter the same)

CONCLUSION STATING THE RELIEF SOUGHT

For the reasons set forth herein, The Appellant respectfully requests that the Court vacate the District Court's Memorandum and Order dated March 26, 2009 and further remand with instructions to grant the Appellant summary declaratory relief by a court directive for proportional apportionment of a state's presidential electors in the electoral count for the *unbounded* states in this action wherein there exist no genuine issues of material fact as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellant certifies that this Reply Brief is presented in Times New Roman style, 14-point size and contains 3,777 words, 19 pages, exclusive of Certificate of Parties, Rulings Under Review, and Related Cases; Statement Regarding Oral Argument; Table of Contents; Table of Authorities, and Glossary of Abbreviations.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's Brief were served by First Class Mail this 22rd day of September, 2009, upon:

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