

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 REPLY BRIEF

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*Authorities upon which Appellant chiefly relies are marked with asterisks.

Other

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STATUTORY PROVISION

2 U.S.C. § 6

Reduction of representation.

Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article 14, section 2, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

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.

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)

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights and elective franchise). The Plaintiff asserted jurisdiction in the District Court under 2 U.S.C. § 6, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution.

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. § 6 1, 2, 3, 19,31

3 U.S.C. Chapter 1, §15 II, 2, 20, 21, 22, 23

28 U.S.C. § 1291..... 1,2

28 U.S.C. § 1331..... 1,2

28 U.S.C. § 1343..... 1,2

42 U.S.C. § 1983 1,2

STATEMENT OF THE FACTS

The plaintiff's factual background is presented in the Appellant's Brief at 3-5.

Once again the Defendant has misrepresented to the court the factual background in this civil action. Herein is a limited review.

The Attorney General in its recitation of what Gordon seeks in this Civil Action omits the *primary* redress the plaintiff pleads in this action, i.e. A Declaratory Judgment by the court for proportional allocation of presidential electors predicated on the popular vote split in unbounded states devoid of a "Winner-take-all" rule in the electoral code of a state to comply with the Constitutional Amend. 14§2 as implemented by 2 U.S.C.§6.

The Attorney General also falsely asserts that "Nowhere in court papers ... does he suggest any particular proportion by which any of the named States' congressional delegations or Electoral slates should be reduced." See Brief For Appellee at 3, 4.

However the plaintiff presented in the District Court "**Presidential Election Data Exhibits in Support of Motion to Present Oral Arguments For Summary Judgment**" CD18_1:

"See Exhibit B Table of Winner Take All vs Proportional Allocation of Presidential Electors for the *Unbounded Southern States*. ... Under the *Winner Take All* rule nearly 8 million votes that are cast in these states for presidential electors pledged to the democratic candidate Obama are not counted for participation in the electoral college. Absent a proportional apportionment of presidential electors for the *Unbounded Southern States*, the fourteenth amendment 's mal-apportionment penalty presents a *de jure* mandate for "reduction of representation" (2U.S.C.§6) of: Arkansas-2; Georgia-7; Louisiana-4; Tennessee-5; and Texas-15. The Defendant's exclusive selection of only majority polled presidential electors from the aforementioned *Unbounded Southern States* constitutes an abridgment of voting rights for minority-polled presidential electors in violation of the mal-apportionment penalty clause pursuant to the United States Constitution (Amend. XIV§2) and statutory Code (2U.S.C.§6)." CD18_2-3

SUMMARY OF ARGUMENT

The plaintiff's **Summary of Argument** is presented in the **Appellant's Brief** at 5-6.

Furthermore The arguments of the **Appellant's Brief** are argued in this **Reply Brief** and by the **Brief For Appellee** . The **Brief For Appellee** admits the plaintiff has presented a meritorious action under the Constitution that is not moot and confirms his standing for redress by a declaratory judgment for a valid claim.

**THE PLAINTIFF HAS ESTABLISHED STANDING AND
DEFENDANT HAS NOT DISPROVED THAT STANDING.**

See Appellant's Brief at 7-8.

The Attorney General presents as the Standard For Review that " The Court reviews dismissal for lack of standing de novo, where the District Court resolved no factual disputes in reaching its decision." See Brief For Appellee at 6.

This appears to be an independent argument by the Attorney General for a reversal of the District Court Order under review. This Standard of Review actually undermines the basis that the District Court used to grant the defendant's motion to dismiss. In fact the District Court *resolved* that "For the purpose of this motion to dismiss, the court 'must accept as true all of the factual allegations contained in the complaint.' " See CD21_2fn4.

Indeed the Attorney General did present in the District Court arguments that disputed the standing of the plaintiff based on the elements of "injury in fact" and "redressability". However we must assume that the district court found the Attorney General's arguments unpersuasive in regards to these elements and issued a finding the court viewed as more persuasive that went to the question of "causation" as a basis to dismiss the action.

The Plaintiff asserts that a proper Standard of Review is that the denial of standing reduces the Constitution to a dead letter, because if the people lack

standing, then who does have it. Is not Section Two enforceable? The rule of construction for both constitutions and statutes is that 1) the language should be read as a whole, 2) nothing should be regarded as surplusage. The rule of construction of the lower court violates both of these rules of construction.

Plaintiff has a constitutional right to proceed directly under the Constitution,¹ and under various Constitutional Amendments, including the Amendment that gives him a right to vote as a member of the District of Columbia for vote denial and vote dilution and the Civil War Amendments.

1. *Bivens v. Six unknown named federal agents*, 403 US 388, 91 S.Ct. 1999, 29 L.E.2d 619(1971)(a violation of a specific constitutional amendment by a Federal employee was recognized as a cause of action for monetary damages).

INTRODUCTION

Plaintiff proceeds in the complaint at issue herein under Section Two of the 14th Amendment . This section refers to a "*right to vote*" and it specifically governs "*...any election for the choice of electors for President and Vice President of the United States....*". The 14th Amendment introduces the word "equal" into the Constitution of the United States. Section Two of the 14th Amendment creates a **Malapportionment Penalty** where *the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State is denied to any of the male inhabitants of such State.* The reduction applies to membership in the House of Representatives. The linkage of Article II to Article I means that the reduction in the membership in the House of Representatives also reduces the number of electors allocated to the state under the Electoral College system for President and Vice-President of the United States.

ARGUMENT

I. PLAINTIFF HAS STATED A MERITORIOUS CASE OR CONTROVERSY UNDER THE CONSTITUTION OF THE UNITED STATES ADMITS THE BRIEF FOR APPELLEE.

The Brief For Appellee of the Attorney General of the United States admits that: 1) five states Arkansas, Louisiana, Georgia, Tennessee, Texas lack statutes authorizing awarding electoral votes, award their electoral votes; 2) these five states award their electoral votes on a winner- take-all basis nevertheless.²

The Attorney General of the United States claims that awarding electoral votes by a “winner-take-all” rule is “*constitutionally permissible*”³ but the Attorney General has not shown that awarding electoral votes on a “winner-take-all” basis is *constitutionally permissible when not legally authorized*.

The Attorney General does not cure this problem by referring to a *purported* “plenary power of the state Legislatures” to award electors.⁴ The core of this controversy remains unresolved precisely because the state Legislatures have not employed that “plenary power to award electors.”

2. Brief For Appellee, See fn 2.

3. “...the winner-take-all system created no legally cognizable injury, as that quintessentially republican system is surely *constitutionally permissible*.” Brief For Appellee at 5.

4. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

Plaintiff makes two arguments based upon the text of **Amend. 14§2** : 1) The government of the nation cannot "count" an award of the electoral votes on a winner-take-all basis where no state statute authorizing any award of electors whatsoever exists; 2) the award of the electoral votes on a winner-take-all basis has a disproportionately adverse impact on minorities by race and/or party affiliation and so *abridges* the *weight* of their votes.

History vindicates the assertion by plaintiff. In the first election for George Washington only ten states awarded electoral votes. Rhode Island and North Carolina awarded no electoral votes because they had not ratified the Constitution of the United States and were not then in the union. New York had ratified the Constitution of the United States at its state convention and was in the union. ***But New York did not award any electoral votes in the first election because it had no statute authorizing the state of New York to award electoral votes.***

Consequently, historical precedent supports plaintiff's claim that the five states without a state statute authorizing electoral votes also lack the power to award electoral votes for lack of a state statute authorizing such action. Since the five states lack the power to award electoral votes for lack of a state statute authorizing such action, no federal officer can count the electoral votes of these five states which award the electoral votes on a winner-take-all basis without any authorization to do so.

II. PLAINTIFF HAS STATED A CONTROVERSY UNDER THE FEDERAL CONSTITUTION THAT IS RIPE AND NOT MOOT ADMITS THE BRIEF FOR APPELLEE.

The admission by the Attorney General that five states lack statutes authorizing awarding electoral votes yet award their electoral votes on a winner take all basis guarantees an actual controversy in this case that cannot be moot. The Attorney General falsely argues that plaintiff's :

"... claims regarding the 2008 presidential election are moot and, to the extent his claims could be interpreted as based on any future presidential elections, they would be unripe." See Brief For Appellee at 14.

"Because that process has occurred, and there is no apparent constitutional provision or waiver of sovereign immunity permitting the courts to affect it these claims have been rendered moot by the actual tabulation of votes and inauguration of President Obama. See *Larsen v. U.S. Navy*, 525 F.3d 1 (D.C. Cir. 2008)(dismissing challenge to Navy policy as moot when policy was changed). See Brief For Appellee at 15.

The law recognizes an exception to the mootness doctrine for issues that are "capable of repetition yet evading review."⁵ Election cases are consistently recognized as coming within this exception. The Supreme Court has declared that if it were to hold an election issue to be moot, "...[t]here would be every reason to

5. See *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2662 (2007).

expect the same parties to generate a similar, future controversy subject to identical time restraints."⁶. Moreover, the courts allow an exception to the mootness doctrine "as applied" to constitutional challenges because adjudication of the issue "...will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held."⁷

Indeed the courts have the authority to hear cases which are otherwise moot so long as they present: 1) unsettled legal issues of public interest and importance and 2) an issue of a recurring nature that will escape review unless the Court exercises its discretionary jurisdiction.⁸ Therefore good cause exists to hold a hearing now rather than in the teeth of a close election . This case concerns the most important election in the entire country.

6. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

7. *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)

8. *Citizens for Safe Waste Management v. St. Louis County Air Pollution Control Appeal Board*, 896 S.W.2d 643, 645 (Mo. App. W.D. 1995).

The inauguration of a new president does not moot the question. Election cases are a classic exception to the rule of mootness and ripeness as they traditionally recur without the opportunity to correct them.

As it stands now, this case is neither unripe nor moot. This suit now lies against the current Vice-President Joseph Biden. As it stands now, Vice-President Joseph Biden will be the one who counts or will preside over the counting of electoral votes in 2012. As it stands now, five states lack statutes authorizing awarding electoral votes, yet award their electoral votes on a winner take all basis . A case or controversy thus exists as things stand now, so it is irrelevant that "... a great deal could change in the intervening time..." or that "States change their electoral laws from time to time and that certainly could occur here." See Brief For Appellee at 16

The voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be "free to return to...[their] old ways." ⁹

9. Mr. Justice Douglas delivered the opinion of the Court in *Gray v. Sanders*, 372 U.S. 368, 376 (1963); citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

Absent an appropriate declaratory judgment by the court, the Vice-President can be expected to repeat in the next Presidential Election the constitutional injury to **Amend. 14§2** exacted by his predecessor by continuing to adhere to the "winner take all" rule for unbounded electoral states. Such action will de facto:

1) violate the 1st Amendment rights of the citizens of the various unbounded states by misrepresenting their political expression.

2) disenfranchise those electors of the states based only upon the majority choice of its white citizens and thus transfer the weight of the votes of the black citizens of the states to augment the white citizens' vote and transfer the weight of the votes of minority-polled parties to augment the disproportionate representation of the party that opposes their political expression.

The states in question have been violating the Constitution for many Presidential elections; the issue is ripe now; there is no reason to dismiss this complaint; there is good reason to hear the controversy now and not in the teeth of a contested election with the fate of the nation in the balance.

III. THE COMPLAINT STATES A CAUSE OF ACTION FOR DILUTION OR DENIAL OF A VOTE FOR AN OFFICER OF THE GOVERNMENT OF THE UNITED STATES.

"Vote denial" occurs when a person is prevented from casting his or her vote. "Vote dilution" happens when a person is able to vote, but his or her vote does not count equally to the votes of others. The Section Two of the 14th Amendment constitutionally outlaws the denial of the right to vote or the diluting of the right to vote in Presidential elections. The Brief For Appellee does not dispute the fact of "vote denial" or "vote dilution." The Brief For Appellee admits the facts of "vote denial" and "vote dilution." The Brief For Appellee asserts the following defenses: 1) Plaintiff cannot challenge the distortion resulting from the Electoral College on constitutional grounds because the Constitution provides for the Electoral College¹⁰ and 2) Plaintiff cannot not fairly trace the denial of the right to vote and the dilution of the vote of the plaintiff to the actions of the Vice President sitting as the President of the Senate counting of the electoral vote for President and Vice-President¹¹.

10. *Gray v. Sanders*, 372 U.S. 368, 378 (1963) _The Electoral College certainly suffers from an "inherent numerical inequality" See. Brief For Appellee at 17-18

11. See. Brief For Appellee at 11.

A cause of action for interference with the right to vote requires only a denial or dilution. The Electoral College alters the outcome of the election once a generation or every 50 years. But the Electoral College denies and dilutes the votes of citizens in every Presidential Election. A citizen need not wait for a case where the dilution itself alters the outcome of the election before challenging the denial or dilution.

1. THE ATTORNEY GENERAL LOST THE CASE ONCE HE ADMITTED THAT THE ELECTORAL COLLEGE DILUTES VOTES

The Attorney General challenges the standing of appellant to proceed herein. But the Constitution says that voting is a "right;" it says so more than once.¹² Despite a clear statement in the Constitution of the right of black people to vote, the Supreme Court reduced the Civil War Amendments to "dead letters" for nearly a century.¹³ According to estimates by the Attorney General during hearings on the Voting Rights Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely

12. Constitution of the United States, Amendments 14, 15, 19, 23, 24, and 26.

13. *U.S. v. Reese*, 92 U.S. 214 (1875); *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *Plessy v. Ferguson*, 163 U.S. 537 (1896), etc,etc,etc.

inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.¹⁴

Case-by-case litigation against voting discrimination did little good in the face of institutions designed to deprive them of the right to vote. So the Voting Rights Act tried to address the distortion in the voting by blacks in the South by providing that

No voting qualification or prerequisite to voting, or ... procedure shall be imposed ... *to deny or abridge* the right of any citizen of the United States to vote on account of race or color .¹⁵

This historical legacy of injury by the Vice-President to a citizen's most fundamental right in a democracy and to an explicit provision of the Constitution as set forth in this reply brief will further deprive presidential electors of their constitutionally protected rights under the First and Fourteenth Amendments to the U.S. Constitution. Section Two of the 14th Amendment, in effect, took the Electoral College out of the Constitution and made it "statutory."

14. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

15. *Voting Rights Act*, Section 2.

2. DISPARATE IMPACT ON RACIAL AND PARTY MINORITIES IN THE ELECTORAL COLLEGE UNDER "WINNER TAKE ALL" RULE.

The defendant declares "*Gordon's theory of vote dilution is indirect and, at points, difficult to follow.*" (My emphasis) (Brief For Appellee at 2).

In fact the Plaintiff's "theory" of voter dilution is rather pedestrian in academic circles, and follows the mainstream thesis of scholars on the subject of the disparate negative impact of so called "Unit Voting" on the *political expression* of *racial* and *political* minorities as represented personally by the plaintiff in this action.

As one scholarly paper on the subject observes:

"A common criticism often offered in favor of the eradication of the Electoral College is that the College diminishes the voting power of various political minorities, including both voters of color and voters who support third-party candidates. The criticism is essentially that the winner-take-all system or unit rule unnecessarily "wastes" votes" ¹⁶

Following a presentation of extensive data in regards to third-party candidates the paper concludes that:

In sum, the unit rule does have a disproportionately negative impact on supporters of third-party candidates. Compared to a proportional distribution system, the unit rule minimizes the voting power of third parties.¹⁷

16. Fuentes-Rohwer, Luis E. and Charles, Guy-Uriel E., *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution.*

Florida State University Law Review, [Vol. 29:879], 903

17. *Id.* 905

In regards to the issue of race some scholars argue that the predominance of the unit-vote or winner-take-all method of selecting electors as employed by the majority of states disadvantages voters of color.¹⁸ Indeed there is an oft-stated assumption by numerous scholars that the Electoral College is inherently biased against voters of color.¹⁹

One commentator declares that the vote of African Americans in the South is “virtually meaningless in the final selection of the President.”²⁰

This commentator is even led to conclude that winner-take-all states violate the Voting Rights Act (“VRA”) by employing the unit-vote system to select presidential electors.²¹

18. Lawrence D. Longley & Neil R. Peirce, *The Electoral College Primer 2000*, at 137 (1999).

19. David W. Abbolt & James P. Levine, *Wrong Winner: The Coming Debacle in the Electoral College*, 90-99(1991) ; Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996); Lawrence D. Longley, *The Electoral College and the Representation of Minorities*, in *THE PRESIDENT & THE PUBLIC* (Doris A. Graber ed., 1982); Lloyd B. Omdahl, *The Negro Stake in the Electoral College*, 2 Black Politician 29, 62-63 (1971).

20. Hoffman, *supra* note 19, at 936.

21. *Id.* 947,1020.

The "disparate impact"²² on the weight of votes cast by minority-polled voters when counted under "winner take all" rules in the unbounded southern states is not hypothetical or theoretical, it is a mathematical certainty tantamount to a physical law. This disparate-treatment results in the mal-apportionment of presidential electors under the "right to vote" provision of Amend. 14§2, *triggering* the Constitutional mandate for a "Reduction of Representation" pursuant to the implementing federal statute 2USC§6.

This electoral *debasement* is reminiscent of the historical disparate-treatment of Americans of African descent under the reign of American Apartheid during which "Jim Crow" laws in the Southern States did not discriminate in the *collection* of taxes from the state's citizens, only in their *distribution*. Similarly here, the "winner-take-all" rule does not discriminate in *counting* all of the states' citizens as a basis for a state's presidential electors, but instead the "winner-take-all" rule has a "disparate impact" on the *distribution* of electoral representation in the electoral college for the state's minority-polled presidential electors based on race and/or party affiliation.

22. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Supreme Court reconized the *disparate impact* framework for analyzing discrimination claims.

3. THE PLAIN TEXT of 3U.S.C.§15 CONFIRMS THE "CAUSATION" ELEMENT OF STANDING FOR PLAINTIFF.

In the Trial Court the Plaintiff filed an **Augmented Motion For Summary Judgment** that presented a factual account (undisputed by the VP in the trial court) of actions taken by the VP pursuant to the 12th Amendment and 3U.S.C.§15 wherein he willfully and knowingly abrogated his responsibility 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 by (1) choosing not to inform the assembled body that he is aware that there are several "Certificate of Votes" being presented that list only the presidential electors pledged to the candidate that received a majority of votes cast in the state by a "winner-take-all" rule with no basis in state law and (2) choosing to ignore his statutory obligation to "call for objections" pursuant to 3U.S.C.§15.

"On January 08, 2009, Defendant Richard B. Cheney as a party to this civil action, knowingly and willfully facilitated and consummated electoral injury to minority polled presidential electors by de facto disfranchisement of millions of citizens of the *unbounded southern states* that are the subjects of this action ... On January 08, 2009, The House reconvened in a Joint Session with the Senate to count and certify the Electoral College Ballots. The Defendant presented the state certificates to the tellers and the tellers then read the certificates from each state to the House chamber." **CD19-2,3**

The pertinent text is "[a]s they are opened by the President of the Senate, all the certificates and papers *purporting* ²³ (my emphasis) to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States" 3U.S.C.§15.

"In each instance when the tellers declared "The Certificate of the Electoral Vote of the state of (*Unbounded Southern State*) seems to be regular in form and authentic and it appears therefrom that John McCain received (x) votes for president and that Sarah Palin received (x) votes for vice president", the Defendant demurred from informing the assembled body that the award of all of the electoral votes on a "winner-take-all basis" for the *Unbounded Southern State* was untethered from either state or federal election law.

At the conclusion of the reading of certificates, the Defendant directed the tellers to deliver the results of the count. The Defendant then announced the certified election results for the positions of President and Vice President of the United States - officially announcing Barack Obama the President-Elect and Joe Biden the Vice-President-Elect.

The Defendant concluded the 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 "The Certificates of Vote" by declaring:

23. purport *-tr.v.*ported, -porting, 1. To contain the claim or profession (to be or do some-thing). *Reader's Digest Illustrated Encyclopedic Dictionary*, Vol. 2 L-Z, First edition, Pleasantville, New York, 1987

'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.'

"Pursuant to no federal or state statute, the Defendant Richard B. Cheney's bias presentation for tabulation in the Hall of the House of Representatives, on January 8, 2009 of majority polled presidential electors from *unbounded southern states* ungrounded in either state or federal law , constituted a discriminatory 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* pursuant to the United States Constitution (Amend. XIV§2) and statutory Code (2U.S.C.§6)." *Id.*

The pertinent text is:

"[t]he President of the Senate, who shall thereupon announce the state of the vote, *which announcement shall be deemed a sufficient declaration* (my emphasis) of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any." 3U.S.C.§15.

The aforementioned proceedings establish that the Vice President failed to inform the congressional body that several "Certificates of Votes" were not based on State law and thus provided no legal basis why citizens that voted for a minority party are *denied* any representation in the electoral college. The Vice President compounded that injury by a failure to call for objections thus abrogating his responsibility under the governing federal statute. ²⁴

Therefore the aforementioned actions of the Vice President within the context of the plain text of 3U.S.C.§15 establishes that it requires the "***announcement of the state of the vote***" by the president of the Senate to effect the transformation of ***purported*** "certificates of votes" submitted by the states into a "***sufficient declaration***" of the persons elected President and Vice-President of the United States. Thus pursuant to 3U.S.C.§15 the aforementioned actions of the VP is *necessary* and *sufficient* to certify the "certificates of votes". Q.E.D.

24. 3 U.S.C.§15

4. VICE PRESIDENTS "MINISTERIAL" ROLE CONFIRMS" STANDING FOR PLAINTIFF.

The ministerial nature of the act of the Vice-President in this matter does not abolish standing; rather it guarantees it.²⁵ The court can order the Vice-President not to count the "electoral votes" lacking proper authorization as a matter of law.

Once the electors prepare a list of electors and votes they seal it "*...directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.*"²⁶

Amendment XII that altered the Constitution also identifies the Vice-President as the person who counts the votes as these words remain the same in the 12th Amendment.

The role of the Vice-President in this process of counting the votes or in declaring the count of the votes authentic is a question under the Constitution of the United States and the laws under that Constitution.

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

26. Constitution of the United States, Article II, Section I, Clause 3.

If the counting is ministerial, then²⁷ the Vice-President can be compelled by a court of law to count the votes in a particular way if controlled by statute or constitutional provisions. The plaintiff pleads that both statute or constitutional provisions bear upon which electoral votes must be counted.

Plaintiff has suffered injury in fact by the dilution of his vote; the conduct of the Vice-President caused that dilution; barring the Vice-President from counting electoral votes unless they are apportioned to conform with the mal-apportionment penalty clause would remedy that dilution.²⁸

For example, actions by the state are not conclusive on the question at the national level due to the Supremacy Clause. In 1876 one of the electors from Oregon was a federal postmaster contrary to the provision that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."²⁹ The Vice-President sitting as the President of the Senate could not have counted the Oregon federal postmaster. For that reason, the State of Oregon withdrew this vote and gave the office of elector to another person to cast it.

27. under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

28. *Penton v. Humphrey*, 264 F. Supp. 250, 251. (S.D. Miss. 1967).

29. Constitution of the United States, Article II, Section I, Clause 2

Had the State of Oregon failed to do so, the provision of the Constitution of the United States would have warranted, yea required, the President of the Senate to not count that vote. And that single vote provided the winning margin in the election of 1876.

If the conduct of the Vice-President here were discretionary, then plaintiff would have no basis to proceed with trial. It is because the conduct of the Vice-President here is ministerial, that a court of law can order him to do the right thing.

IV. AS AN ARISTOCRATIC DEVICE, THE ELECTORAL COLLEGE IS NOT AND NEVER WAS A FEATURE OF A REPUBLICAN GOVERNMENT.

...our country's republican form of government has always embraced winner-take-all voting at all levels of government, and indeed, it is *used by the vast majority of states and their political subdivisions with explicit approval of the Supreme Court.*³⁰ See Brief For Appellee at 7.

The Attorney General is wrong to claim that the Electoral College is a "republican form of government." The Electoral College is not "quintessentially republican." The Electoral College is a device by which the aristocracy elected a Monarch or emperor. The Federalist Papers referred explicitly to the Electoral College of the Holy Roman Empire and the Polish Electoral College as examples. This feature of the Constitution was not republican; it was aristocratic. The Framers of the Constitution knew this for a fact.³¹ The inability of the people to vote directly for the president was a badge or incident of slavery. The monopoly on the right to vote for president was a mark of the aristocracy banned by the Constitution and the Articles of Confederation. Any agreement to establish an aristocracy by those professing to establish a republic is not binding and never was binding. The Brief For Appellee is absurdly incorrect.

30. Referring to *Rogers v. Lodge*, 485 U.S. 613 (1982).

31. See the opinion written by James Wilson in *Chisholm v. State of Georgia*, 2 U.S. 419 (1793). See also several references in the Federalist Papers.

At the Constitutional Convention, four of the leading five speakers (James Wilson, James Madison, Gouverneur Morris, and Rufus King) all championed the right of the people of the United States to elect the President of the United States. Madison recognized the Electoral College as "unrepublican."

The present rule of voting for President...is so great a departure from the Republican principle of numerical equality...and is so pregnant also with a mischievous tendency in practice, that an amendment of the Constitution on this point is justly called for by all its considerate and best friends. ³²

James Madison was an author of the Constitution and set out the rules for its construction: "...the ultimate authority, wherever the derivative may be found, resides in the people alone...." As was said by Rufus King, the last Federalist to run for President and a delegate to the Constitutional Convention who supported the direct election of the President of the United States: "The people are...the best keepers of their own rights; and any device to remove that power from them weakens the security of it."

32. James Madison to George Hay. 1823. Writings 9:147--55 Kurland and Lerner (1987). *The Founders' Constitution*. Volume 3, Article 2, Section 1, Clauses 2 and 3, Document 10. The University of Chicago Press.

As the author of the Declaration of Independence, Thomas Jefferson despised the Electoral College. As a champion of reason, Jefferson recognized its origins in religion when he called the mode of electing the President "...the most dangerous blot in our Constitution, and one which some unlucky chance will some day hit and give us a pope and anti-pope."

As the best trial lawyer in the country, Alexander Hamilton recognized the natural law of agency when he wrote that, "...it is not to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents." Hamilton said that "...no legislative act contrary to the Constitution can be valid. To deny this would be to affirm that the deputy (agent) is greater than his principal; that the servant is above the master; that the representatives of the people are superior to the people; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

Hamilton's own words contradict the power of the Electoral College in December to reverse the vote of the American people in November. The agent who acts against the expressed will of the principal clearly acts in excess of the power conferred and therefore without right, authority, legality, or legitimacy. Transitory members cannot transfer sovereignty to any Presidential candidate of the Electoral College because they do not, as individuals or taken as a body, have sovereignty.

A fortiori, the Electoral College and its members cannot transfer sovereignty to any person against the will of the American people previously expressed to the contrary. This surrenders the White House to control by naked power alone.

The Federalist Papers stated that any features of the Constitution that were aristocratic or monarchist could be challenged as contrary to the purposes of the Revolution principles (e.g., the principles set forth in the Declaration of Independence).

The "winner-take-all" system is quintessentially republican when it operates at the national election as the principle well known as "majority rule." But the Electoral College gerrymanders the national vote before it is conducted at the national level. The votes of the people of the United States are first "segregated" before they are aggregated. The complaint here attacks the fact that five states have no legal authority to declare "winner-take-all" on a state wide basis. The Brief For Appellee admits this distortion as a fact and leaves no doubt as to the dilution or distortion. In fact, the Brief For Appellee affirms the existence of the distortion and the dilution by defending them.

V. A DECLARATORY JUDGMENT WOULD BENEFIT THE PUBLIC INTEREST.

A Declaratory Judgment that protects the citizens' "right to vote" pursuant to Amend. 14§2 as implemented by 2USC§6 is without question in the public interest. The Reconstruction Era's Constitutional framers defined the franchise such that all votes cast by a state's citizens would receive equal weight when they are tallied in a national count. Clearly, the maintenance of this principle remains a matter of timeless public interest.

Such a Declaratory Judgment would serve a civic public interest that would assure racial or party minorities who cast their votes in unbounded southern states that their exercise of the franchise will not be nullified. The explicit "right to vote" for presidential electors, grounded in the Constitution, cannot be outweighed by its perceived burden to the convenience of states adhering to a "tradition" of "winner-take-all" rules.

There is a public interest for a declaratory judgment by this court for *proportional apportionment of presidential electors* for the subject states of this action to close the open wound that has been imposed on our Constitution, an injury that has been allowed to fester because of the willful complicity of government officials and the mainstream media in maintaining an uninformed citizenry.

Finally, a declaratory judgment for *proportional apportionment of presidential electors* entered by this court will immeasurably serve the public interest by bringing to a substantial halt the Machiavellian mischief that would suppress minority voters and minority-polled parties in order to gain the entire number of a states presidential elector's under winner-take-all rules. Such anti-democratic behavior will measurably diminish if it stands to gain little more than a single elector. The Court's remand with a declaratory judgment for proportional allocation will remove most if not all of the incentive for organizations intent on voter suppression. A civil action that assures greater voter participation and the literal counting of tens of thousands of voters never counted before significantly undermines the need for voter suppression litigation with respect to presidential elections in the future. This alone warrants the declaratory judgment by this Appellate court as pleaded by the plaintiff .

VI. THE ATTORNEY GENERAL HAS CONCEDED THE ENTIRE CASE TO PLAINTIFF ON THE FACTS AND THE LAW.

The Brief For Appellee by the Attorney General uses the words "Electoral College" at pages 2, 3, 5, 9, 15, 17 and 18. However, the words "Electoral College" appear nowhere in the Constitution, as written or as amended. That itself produces an ambiguity. The so-called Electoral College of Article II is not the same as the Electoral College of the Twelfth Amendment. And the so-called Electoral College of Twelfth Amendment is not the same as the Electoral College of the Fourteenth Amendment. This produces further ambiguity.

The Attorney General of the United States admits that the "Electoral College" distorts the votes of the American people cast for the President of the United States. The Constitutional Convention of 1787 proposed a process of electing the President (and the Vice President) in Article II Section 3 of the Constitution of the United States. But the United States of America no longer employs this provision of Article II of the Constitution. Footnote 8 of the official Constitution of the United States states that "**This clause [Section 3 of Article II] has been superseded by amendment XII.**" The only constitutional reference made by the Brief For Appellee is at p. 9 and 12 to the Twelfth Amendment. So for purposes of argument in this case, we are no longer talking about the Article II. We are no longer talking about the Constitution; we are talking about "amendments" to the

Constitution.

This case presents a controversy over "what the Constitution says." The 12th Amendment appears to allow for inequality in votes. The 14th Amendment mandates penalties for the departure from the equality of votes. The two constitutional amendments collide and are diametrically opposed. The Attorney General claims that the 12th Amendment is controlling; the plaintiff claims that the 14th Amendment is controlling. Since both specifically refer to the process of electing the President the fact that the doctrine of specific legislation prevailing over general legislation does not save the case for the Attorney General.

The judicial branch has jurisdiction in the constitutional controversy because the very word "jurisdiction" is to say "what the law is."³³ The court must rule summarily for appellant because where two constitutional amendments apply to the same subject the last will of the sovereign prevails.

33. *Federalist Papers*, Alexander Hamilton; *Marbury v. Madison*.

CONCLUSION

Courts of justice have the power to "declare all acts contrary to the manifest tenor of the Constitution void." ³⁴ Appellant must prevail under the rule that the last expression of the sovereign prevails.

For the foregoing reasons, the Plaintiff requests that the Appellate Court Vacate the judgment of the District Court and remand with a declaratory judgment for a proportional allocation of presidential electors based on the popular vote for *unbounded* electoral states..

Respectfully submitted,

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34. Alexander Hamilton argued in *The Federalist* No. 78 (1788).

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS**

Appellant certifies that this Reply Brief is presented in Times New Roman style, 14-point size and contains 6,892 words, _exclusive of: Table of Contents; Table of Authorities, and Glossary of Abbreviations and complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's Brief were served by First Class Mail this 6th day of November, 2009, upon:

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