

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, Chair 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.

**APPELLANT'S REPLY TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE
AND MOTION FOR ORAL ARGUMENT FOR AFFIRMATIVE RELIEF.**

Appellant pursuant to FRCP 27(a)(3)(B) respectfully moves this Court to deny the Appellee's motion 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 Appellant further moves this 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* , because the merits of the Vice President's case is decidedly unclear to justify any expedited action by this court.

¹ Copies of the Memorandum Opinion and Order are attached.

FACTUAL BACKGROUND

On July 28, 2008, the Appellant¹, commenced suit in the District Court seeking to enjoin the Vice President in his capacity as the President of the Senate acting as 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, from presiding over the discriminatory tabulation of majority polled presidential electors from *unbounded electoral states* (Arkansas, Georgia, Louisiana, Tennessee, Texas) on a "winner-take-all basis", absent any legal basis in either state or federal statute, with a de facto disfranchisement of minority polled Presidential Electors.

The Appellant sought redress by petitioning the District Court for enforcement of the *mal-apportionment penalty* (MAP) enshrined in the Constitution of the United States of America (**Amend. XIV§2**) and the U.S. Code (**2USC§6**) with a *de jure* mandate for the reduction of State electors and representatives "when the right to vote at any election for the choice of electors for President and Vice-President of the United States... is denied to any ... citizens of the United States, or in any way abridged" or in the alternative *proportional apportionment of presidential electors*. R.1 at 3,8; R. 12 at 3-4.

¹ Asa Gordon, Presidential Elector, Chair of the District of Columbia Statehood Green Party Electoral College Task Force, 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.

On August 18, 2008, the Vice President moved the District Court to dismiss the Appellant's Complaint on the basis of standing. R. 9 at 7-11.

On September 19, 2008 the Appellant moved the District Court for Summary Judgment as a matter of law. R.12 .

On January 23rd, Appellant filed an Augmented Motion For Summary Judgment. R.19.

The District Court's ruling of March 26th, 2009 in this Civil Action in favor of the defendant's motion to dismiss (R.9), is predicated on the Court's Memorandum Opinion finding that:

"Gordon's alleged injury is not 'fairly traceable' to the Vice President's actions, which in fact are purely ministerial, but rather is attributable to the actions of third-party states and state officials, he fails to satisfy the causation element of standing. Therefore, he is unable to prosecute this action." R. 21 at 4.

The District Court also dismissed as moot Appellant'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, The Appellant appealed. R. 24.

For the following reasons, the Appellant respectfully requests that this Court does not affirm the District Court decision and deny the Appellee's Motion For Summary Affirmance.

ARGUMENT

Introduction.

"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." R. 19 at 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 is *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 augured that this Case of Controversy arises out of the violation of the 'Mal-apportionment Penalty Clause' for the abridgment of a citizens 'right to vote' under the Second Section of the Fourteen Amendment not the 'Equal Protection Clause' of the first section of the Fourteen Amendment." R. 16 at 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 Appellants *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." R. 21 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. Accordingly the Court of Appeals should return this matter to the District Court to adjudicate these omitted issues of fact in the District Court's ruling of March 26, 2009.

I. The Appellee's Background Presentation is Fatally Flawed.

The Appellee's Background presentation presents the fatally flawed analysis of the District Court's analysis as proceeding from a misconstrued understanding of the underlining nature of the Appellants civil action. The Appellee's flawed *paraphrase* of the declaratory and injunctive relief pleaded by the Appellant represents the Appellant to this court:

"[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.' R. 1 (emphasis in original) and R. 21 at 3". See Appellee's Motion For Summary Affirmance at 2.

This presents the Appellants demands of the Vice President as ridiculous

before the Court of Appeals, and if this absurd construction were true affirmance by this court would be understandable. But it is not. This flawed representation is reprehensible within the context of the prayer for relief actually pleaded by the Appellant i.e. :

"Plaintiff request 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." R.1 at 8.

How can the Appellant's clear request for a remedy from the court be misconstrued as a requirement made on the Vice President?

Thus the Appellee's arguments proceed on the foundation of a fundamental failure to even fairly represent the Background of this civil action to the Court of Appeals, and should be summarily rejected.

II. The District Court incorrectly concluded the Appellant failed to establish standing.

A. The Civil Action is Directed at the *Counting* of Electoral Votes.

What the Appellant 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 3 USC Chapter 1, § 15." R.1 at 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 3 USC Chapter 1, § 15." R.1 at 8.

How is it logically possible to effect a "fairly traceable... third party states and state officials...causation element standing" (R. 21 at 5) analysis within the context of remedies pleaded only for action that can be taken by the Vice President pursuant to 3 USC Chapter 1, § 15.

Indeed, the fact is, many state officials submit their *Certificates of Vote* for the final count in the electoral college, presided over by the Vice President, 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 District Court's analysis in this Civil Action.

B. Appellants' Standing Is Singularly Unique as a Presidential Elector.

"No other United States citizen stands in the unique position of the Plaintiff and the citizens of the District of Columbia. ... The [Appellant] 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 [Appellant], 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." R. 12 at 7-8

C. "Third Parties" and "Defendant Conduct" Precedents do not Apply.

The Appellee and District Court principle reliance on precedents that determine Appellant's *alleged injuries are not redressable by the Vice President's conduct but are subject to other third parties not before the court* are misplaced 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 states 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 3 USC Chapter 1 §15 that can *finalize* and *consummate this injury* to 'voting rights' under the Fourteenth amendment, to minority polled presidential electors such as the Appellant." R. 12 at 9.

D. This Action is Not Moot For Summary Judgment for Appellant.

"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". See Appellee's Motion For Summary Affirmance at 3.

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.

Conclusion

The Appellant with specificity has presented material facts wherein there exist no genuine issue of dispute of the *traceability* of the Vice Presidents actions in regards to injury pursuant to 2USC§6. See PLAINTIFF'S AUGMENTED MOTION FOR SUMMARY JUDGMENT, R. 19 at 2-5.

Accordingly, Appellant respectfully requests that this Court of Appeals deny the clearly flawed analysis in the Appellee's Motion For Summary Affirmance of the District Court's judgment dismissing the case, and grant the Appellant's Motion to Present Oral Argument for Affirmative Relief.

Respectfully submitted,

Asa Gordon, PRO SE
1667 Webster Street, N.E.
Washington, D.C. 20017

CERTIFICATE OF SERVICE

I hereby certify that on June 17th, 2009, a copy of "**APPELLANT'S REPLY TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE AND MOTION FOR ORAL ARGUMENT FOR AFFIRMATIVE RELIEF.**" was filed with the Court and served via first class mail on the following:

YASAMAN S. SUTTON, D.C.
Special Assistant U.S. Attorney
United States Attorney's Office
Civil Division
555 4th Street, NW
Washington, D.C. 20530
202-616-2257
yasaman.sutton@usdoj.gov

Asa Gordon
DC Presidential Elector
Chair, DC Statehood Green Party Electoral College Task Force
Exe.Dir. Douglass Institute of Government
1667 Webster St. NE
Washington, DC 20017