

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5142

ASA GORDON,

Appellant,

v.

JOSEPH R. BIDEN, JR.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

(A) Appellant in this case is Asa Gordon, Plaintiff below. Appellee is Joseph R. Biden, in his official capacity as Vice President and President of the Senate, Defendant below. There are no amici curiae nor intervenors.

(B) Ruling Under Review. The ruling under review is the March 26, 2009, Memorandum Opinion and Order of the Honorable Henry H. Kennedy, granting the government's motion to dismiss and entering judgment in favor of Appellee.

(C) Appellee is aware of no pending related cases.

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2 U.S.C. § 2a. 13

2 U.S.C. § 6. 1, 3, 4, 12

3 U.S.C. § 15. 3, 9, 10

28 U.S.C. § 1291.1

42 U.S.C. § 1983. 1, 3

STATUTORY PROVISION**3 U.S.C. § 15**

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting 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, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration 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. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be

counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

QUESTIONS PRESENTED

1. Whether Appellant lacked standing to challenge the Vice President's actions in the Electoral College, where Appellant alleges dilution of his vote for President based on the winner-take-all voting of five States, none of which is his State of residency.

2. Whether, if Appellant nonetheless had standing, his claim for vote dilution became moot as a result of the inauguration of the President in January 2009.

3. Whether, if the Appellant nonetheless presented a justiciable claim for vote dilution, the claim would still fail to state a claim upon which relief may be granted where he alleges dilution of his vote from the winner-take-all system in five other States.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5418

ROBERT ASA GORDON, Appellant,

v.

JOSEPH R. BIDEN, JR., Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF JURISDICTION

Appellant 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. See R.1¹ Complaint ¶ 1. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF THE CASE

I. Factual Background.

According to his complaint in District Court, Asa Gordon is a “registered voter of the District of Columbia[;] Presidential Elector[;] and Chair, DC Statehood Green Party Electoral College Task Force.” R.1 Complaint ¶ 2.

¹ “R.” refers to the 1 document number in the District Court record.

His complaint alleged unconstitutional dilution of his vote for president, based on the voting practices in the Electoral College by the Electors in five southern States -- Arkansas, Georgia, Louisiana, Tennessee, and Texas. *Id.* ¶¶ 8-10. He did not sue any officials in those States, however, but instead sued only the Vice President of the United States, in his capacity as president of the Senate, overseeing the counting of the votes of the Electoral College on January 6, 2009. *Id.* ¶¶ 3, 12.

Gordon's theory of vote dilution is indirect and, at points, difficult to follow. What is clear is that he alleged that the five named States had what he termed "unbound" systems for their presidential Electors, in that the state law does not oblige those Electors to vote for any particular candidate in the Electoral College voting for President and Vice President. *Id.* ¶¶ 6-7.²

² Gordon did not cite -- in either his complaint or his brief in this Court -- the pertinent laws of the five States, but a review of those laws does appear to indicate that in four of the five, no state law governs the Electors' voting. See Ark. Code Ann. §§ 7-8-306 (provision entitled "Voting by Electors" places no limits on Electors' votes), and 7-8-302(1)(A) & (B) (state political parties choose Electors at their state conventions and the State's Electors are those of the party "successful at the polls"); Ga. Code Ann. §§ 21-2-10 (election of Presidential Electors), 21-2-11 (time of voting), and 21-2-172 (selection of Electors by convention); La. Rev. Stat. Ann. §§ 18:1263 (meeting of Electors), and 18:1260 (vote for presidential candidate treated as vote for corresponding Elector); Tex. Elec. Code Ann. §§ 192.006 (time & place of meeting for vote), and 192.03 ("Method of Becoming Elector"). In Tennessee, however, the state law directs the Electors to vote for a particular candidate. See Tenn. Code Ann. § 2-15-104(c)(1) ("The electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as electors if both candidates are alive.").

Gordon further alleged that these five States' Electors vote in the Electoral College for the winner of the popular vote in each State, respectively, on a winnertake- all basis. *Id.* ¶¶ 8, 10. Though it is not explicit in his court papers, Gordon seems to claim that the Electors may not vote in this way in the absence of a state law authorizing them to do so. *See id.* ¶ 8; Appellant's Brief ("Brief.") at 9. This practice, he alleged, is "predicated on the majority choice of [the States'] white citizens," apparently with the intent or result of diluting the vote of those States' "black citizens." R.1 ¶ 10; *see also id.* ¶ 11. Gordon does not allege that he is black, however, nor that he has voted or intends to vote in any of the five specified States.

Gordon claimed violation of the Fourteenth Amendment, two statutes governing the electoral process (2 U.S.C. § 6 and 3 U.S.C. § 15), as well as 42 U.S.C. § 1983. R.1 at 8. He seeks three things for relief. First, he seeks to bar the Vice President "from effecting the counting of the full slate of presidential electors[.]" *Id.* at 8 ¶ 1.³ Second, he seeks enforcement of the "mal-

³ It is unclear whether this language seeks to bar the counting of any and all electoral votes from each State, or instead to reduce the number of votes permitted from each State, which reduction would be proportional to the allegedly improper denial of the vote in the State. *See also* Brief at 11 (similarly ambiguous). It is also unclear whether he intends to limit his requested relief to the five States he named or, alternatively, to any States with a similar denial of the right to vote.

apportionment” clause of the Fourteenth Amendment, whereby the congressional delegation of a State is to be reduced by the same proportion as the State denies the right to vote its citizens. *Id.* at 8 ¶ 2.4 Finally, he seeks to bar the Vice President from “tabulation of ‘winner take all’ electors from states that have no ‘winner take all’ statute.” *Id.* at 8 ¶ 3.

Nowhere in court papers in this case does Gordon allege any particular level of dilution of his vote, nor does he suggest any particular proportion by which any of the named States’ congressional delegations or Electoral slates should be reduced.

II. Procedural Background.

Gordon filed this action on July 28, 2008, and moved for temporary relief two days later, in advance of the 2008 presidential election. The government filed a combined opposition to the motion for temporary relief and motion to dismiss, arguing that Gordon lacked constitutional standing to sue. R.9 & 10. Gordon cross-moved for summary judgment and after briefing of these motions, the District Court granted the government’s motion and denied Gordon’s. R.21 & 22.

The District Court found that Gordon lacked standing to sue. Specifically,

⁴ *Compare* Fourteenth Amendment (referring to “male” citizens) *and* 2 U.S.C. § 6 (same) *with* Nineteenth Amendment (enfranchising women).

the District Court found that the Vice President's duties in counting the votes of the Electoral College "are purely ministerial" and the injury Gordon alleges is not "'fairly traceable' to the Vice President's actions[.]" R.21 at 5. Instead, any alleged injury "rather is attributable to the actions of third-party states and state officials." Id.

This appeal followed.

SUMMARY OF ARGUMENT

Gordon cannot establish standing for a claim of vote dilution based on the winner-take-all practices of five States different from his place of residency. First, the winner-take-all system creates no legally cognizable injury, as that quintessentially republican system is surely constitutionally permissible. Second, he cannot trace any injury to the actions of the Vice President in the counting of the votes of the Electoral College. Third, the District Court cannot provide meaningful redress because neither it nor the Vice President have authority to reduce any State's congressional delegation nor reject votes of their Electors. Even if Gordon could establish standing, however, his claims were mooted by the inauguration of the new President in January 2009. (To the extent he might argue that his claims apply to the next presidential election in 2012, those claims would be unripe.) Finally, even if he somehow could establish jurisdiction, his

underlying claim lacks merit and would require dismissal for failure to state a claim.

ARGUMENT

I. Standard of Review.

The Court reviews dismissal for lack of standing de novo, where the District Court resolved no factual disputes in reaching its decision. *Judicial Watch, Inc. v. Dep't of Commerce*, --- F.3d ---, No. 08-5490, 2009 WL 3232110 (D.C. Cir. Oct. 9, 2009).

II. Gordon Lacks Constitutional Standing.

“The ‘irreducible constitutional minimum of standing contains three elements’: (1) injury in fact, (2) causation, and (3) redressability.” *Young America’s Foundation v. Gates*, 573 F.3d 797, 799 (D.C. Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A plaintiff must establish all three elements to have a justiciable case, but as explained below, Gordon cannot establish any one of them.

A. Gordon Has No Injury from Other States’ Electoral College Voting Practices.

Whatever Gordon’s precise theory of injury may be, it is clear that it hinges on the use of winner-take-all voting by the Electors in the five named States. As a

general matter, however, 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. Cf. *Rodgers v. Lodge*, 458 U.S. 613 (1982) (upholding challenge to at-large election system for county board where each position was elected on a winner-take-all basis, and affirming the relief, ordered by the district court, that county adopt a traditional system of geographic districts, wherein each position would be elected on a winner-take-all basis). By design, those voters whose candidate loses in any given district will not have "their" representative in office, but if this were a cognizable injury, then the republican system of government constructed in our Constitution would suffer the same shortcoming. There must be more at stake than mere dilution of his vote from winner-take-all systems to constitute a cognizable injury to his right to vote.

Gordon, however, failed to allege specific facts that might enable him, at a minimum, to present a more plausible theory of harm. For example, he did not allege that he ever voted in any of the five named States, nor that he intends to. Nor did he allege that he voted for any particular candidate who did not win, much less as a result of the dilution of his vote. Nor even did he allege that he belongs to any racial minority or other group whose vote was somehow diluted or denied.

Finally, he failed to describe the magnitude of the dilution of his vote so that the District Court could measure whether it went beyond *de minimus non curat lex*. For these reasons, Gordon has failed to establish an injury in fact, and for that reason alone, he cannot establish constitutional standing.

B. Gordon's Alleged Injury Is Not Fairly Traceable to the Vice President's Actions.

Even were Gordon able to establish a cognizable injury, he would still fail to establish standing because none of his alleged harms are fairly traceable to the actions of the Vice President. Instead, it is purely third parties -- the five named States and/or their respective Electors -- whose actions would appear responsible for Gordon's alleged injury. Because Gordon hopes to affect the actions of these third parties by forcing the hand of a government official, he faces an elevated standard for causation:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well. The

existence of one or more of the essential elements of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 . . . (1989) (opinion of Kennedy, J.); *see also Simon, supra*, 426 U.S. at 41-42 . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g., Warth, supra*, 422 U.S., at 505 Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily “substantially more difficult” to establish.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992). *Accord Freedom Republicans v. Fed. Election Com.*, 13 F.3d 412, 417 (D.C. Cir.) (quoting this language from *Defenders of Wildlife*), *cert. denied*, 513 U.S. 821 (1994).

Here is it plain that the Vice President’s actions “are purely ministerial” as the District Court found. This follows from the plain language of the pertinent constitutional provisions and the statute Gordon cites governing the tabulation of votes of the Electoral College, 3 U.S.C. § 15. The Twelfth Amendment explicitly provides that the Electors “shall meet in their respective States, and vote by ballot for President and Vice President[.]” U.S. Const. Amd. XII. In those State meetings, the Electors themselves “shall sign and certify” their votes prior to sending them on to the Capitol for tabulation. *Id.* Once the certified votes arrive at the Capitol, the Vice President “shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”

Id. Thus, the Constitution directs only that the Vice President “shall . . . open” the “certificates,” but it does not direct him to perform the actual counting or any other tasks.

The statute, section 15, provides more detail on the counting process, directing that the Vice President is to open “all the certificates and papers purporting to be certificates of the electoral votes” and then hand them to four “tellers,” appointed by the House and Senate (two each, respectively) for reading and counting. See 3 U.S.C. § 15. The statute requires the Vice President to perform precisely two additional actions: “announce the state of the vote” after tabulation and counting, and “call for objections” from individual Members of Congress. *Id.* Notably, the Vice President performs no role in adjudicating any objections that might be lodged because the objections are referred to the House or Senate respectively for consideration by each House, depending on whether the particular objection was raised by a Representative or a Senator. *See id.*

Thus, the Vice President has no authority to make any decisions regarding either the prior certification of the Electors’ votes (which takes place in the respective States), nor counting of the votes (performed by the “tellers”), nor resolution of any objections raised by any Members of Congress after the Vice President’s announcement of the “state of the vote.”

Gordon argues that the “authentication” of the votes of the Electors is traceable “only” to the Vice President, Brief at 5, but identifies no support for his assertion. Instead, the text of the Twelfth Amendment plainly makes the Electors responsible for “certifying” their votes and Section 15 makes the respective Houses of Congress responsible for resolving any objections to the tally of votes.

There is simply no basis for an argument that the Constitution or Section 15 empowers the Vice President to reduce a State’s congressional delegation or reject a State’s Elector’s votes. For this reason, Gordon cannot establish causation. Consistent with this, court decisions finding that particular voters had standing to sue for claims of vote dilution all involved civil actions in which the defendants had legal authority to act differently and effectuate different substantive outcomes. *See, e.g., Davis v. Mann*, 377 U.S. 678 (1964) (suit against Commonwealth of Virginia for its apportionment of the Virginia General Assembly); *Gray v. Sanders*, 372 U.S. 368 (1963) (suit against political party and Georgia Secretary of State); *Georgia v. Nat’l Democratic Party*, 447 F.2d 1271 (D.C. Cir.) (State sued national party over its apportionment of party delegates to its national convention), *cert. denied*, 404 U.S. 858 (1971). These cases provide no support for Gordon because the Vice President has no authority to provide the relief Gordon seeks. Gordon cites no legal authority, and Appellee is aware of none, supporting his

bald assertion of causation. This is a second and independent reason why Gordon cannot establish constitutional standing.

C. Gordon's Alleged Injury Is Not Judicially Redressable.

It is equally true that Gordon's alleged injury is beyond the reach of any judicial remedy directing the actions of the Vice President. Neither Section 15 nor 2 U.S.C. § 6 (cited by Gordon) appear either self-executing or susceptible to different decisions by the Vice President.

In what appears to be the only reported case involving Section 6, *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966), this Court considered an appeal of the district court's dismissal for lack of standing of a challenge brought by two groups of voters. The voters in *Lampkin* alleged that the Department of Commerce and its Bureau of the Census failed to implement Section 6 properly by ignoring plaintiffs' claims of diminution of their vote. Specifically, Group I claimed their votes in certain *northern* States were diluted by the ongoing discrimination against black voters in many *southern* states, on the theory that this racial discrimination relatively amplified the weight of the eligible white voters in those States. *See id.* at 506 & 510. Group II voters, from three southern States, claimed unconstitutional restriction of their vote through improper literacy tests and poll tax restrictions. *See id.* In affirming, this Court avoided addressing the issue of

standing and found instead, as a jurisprudential matter, that the nature of the harm alleged was not suitable to declaratory relief in light of other concurrent congressional initiatives aimed at correcting the same harms plaintiffs alleged. *Id.* at 509-12.

Although the reasoning of *Lampkin* makes its holding less than directly controlling here, it does provide further evidence for the lack of any role of the Vice President in curing claims of vote dilution allegedly caused by the voting practices of other States, because there is no discussion of the Vice President in the case. See also *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), *aff'd*, 360 F.2d 505. Indeed, *Gordon* cites no case, and Appellee is aware of none, that find that the Vice President has any substantive role to play, that the courts are capable of applying a standard to review his actions,⁵ and that different decisions by the Vice President could cure an injury based on any theory of vote dilution.⁶

The uncertainties in *Gordon's* prayer for relief are of no moment because

⁵ *Cf. Ripon Society v. Nat'l Democratic Party*, 525 F.2d 567, 578 (D.C. Cir. 1975) (finding it likely that society lacked standing and noting both that "one person one vote" standard does not apply and that no other standard appears to either), cert. denied, 424 U.S. 933 (1976).

⁶ Similarly, the Vice President has no role in the decennial reapportionment of Congress following the census. See 2 U.S.C. § 2a; *Dep't of Commerce v. Montana*, 503 U.S. 442, 452 n.25 (1992) (mentioning no role for the Vice President).

there is nothing the District Court could order the Vice President to do differently that would undo or prevent the alleged vote dilution Gordon claims. Therefore, he cannot demonstrate redressability and this is a third reason why he cannot establish standing. Accordingly, the District Court's dismissal for lack of standing was correct and should be affirmed.

III. Gordon's Claims Present No Live Controversy.

Even were Gordon able to establish standing, his claims would still be nonjusticiable because his 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. All his claims are therefore subject to dismissal for lack of jurisdiction under Article III, Section 2 (extending the "Judicial Power" only to certain categories of "cases" and "controversies").

Gordon's complaint appears to focus on the 2008 presidential election, even though it provided few specifics about the extent of the alleged dilution of his vote. The complaint speaks in the present tense and focuses on the Vice President's counting of votes on January 6, 2009. See R.1 ¶ 12. Similarly, paragraphs 1 and 3 of his prayer for relief focus explicitly on tabulating the results of the 2008 election, see *id.* at 8, and paragraph 2 (requesting reduction in unnamed congressional delegations) presumably depends on Gordon being able to

prove a level of disenfranchisement in past elections, so as to permit the reduction to match the appropriate proportion in each affected State, see *id.* His claims for relief, therefore, appear intended to affect the counting of the Electoral votes of the January 2009 Electoral College. 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).

Gordon's brief in this Court makes scant mention of the possibility that his claim became moot last January. See Brief at 16. He neither argues for an exception to the ban on hearing moot cases nor provides more specifics regarding continuation of any of the alleged problems with the 2008 election. Nor does he identify any imminent future harm by the new Vice President or by the Electors in the five named States. Given that the next presidential election is three years away, a great deal could change in the intervening time, and Appellee respectfully suggests that even if Gordon's complaint could be interpreted to reach a future presidential election, those claims would be unripe.

The Court tests for ripeness by looking to "both the fitness of the issues for

judicial decision and the hardship to the parties of withholding court consideration.” *Munsell v. Dep’t of Agric.*, 509 F.3d 572, 585-86 (D.C. Cir. 2007) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)); see also Larsen, 525 F.3d at 5 (dismissing other claims as unripe).

Here, Gordon’s claims fall short on the fitness element because (in addition to being vaguely pleaded with respect to the nature and severity of the dilution of his vote), Gordon provided neither any allegation nor basis to suggest that the harms he alleged will continue three years from now. States change their electoral laws from time to time and that certainly could occur here. This case would surely “benefit” from further “crystalliz[ation]” of the allegedly violative practices of the States. *See Worth v. Jackson*, 451 F.3d 854, 862 (D.C. Cir. 2006). Also, there is no apparent reason to predict hardship to Gordon from withholding judicial review until he is able to present a more definite theory of harm. Therefore, both elements of the ripeness test indicate that any challenge based on future presidential elections is unripe. Accordingly, all of Gordon’s claims are properly subject to dismissal for lack of a justiciable case or controversy.

IV. The States Enjoy Plenary Power Over Appointment of Electors.

Alternatively, if Gordon’s claims nonetheless constituted a justiciable case or controversy, dismissal would still have been appropriate for failure to state a

claim. This follows because the States have plenary power to determine how to “appoint” their electors and control (if they wish) the Electors’ votes for President and Vice President. See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (rejecting challenge to Michigan law under which Electors were chosen in winner-take-all geographic districts within the State and finding that “the appointment and mode of appointment of electors belong exclusively to the states”). Although Congress sets the date of the election and the Constitution sets eligibility requirements for presidential candidates, the rest is up to the “plenary power [of] the state legislatures[.]” *Id.*; see also *Ray v. Blair*, 343 U.S. 214 (1952) (upholding Alabama system of choosing Electors via primary election and candidates for Electors had to pledge to support the party’s nominee).

This plenary power trumps other, potentially conflicting constitutional safeguards, including the one-person-one-vote principal enunciated in *Baker v. Carr*, 369 U.S. 186 (1962). See *Gray v. Sanders*, 372 U.S. 368 (1963) (striking down state election scheme by applying one-man-one-vote rule, and rejecting lower court’s reasoning upholding the scheme on the rationale that it was no less skewed than the Electoral College with respect to equality of one’s vote); see also *Davis v. Mann*, 377 U.S. 678, 692 (1964) (again rejecting analogy to Electoral College). The Electoral College certainly suffers from an “inherent numerical

inequality,” *Gray*, 372 U.S. at 378, but that is by design of the Constitution and the more specific constitutional provisions governing the Electoral College have always controlled the more general protections elsewhere in the Constitution. *Accord Wisconsin v. City of New York*, 517 U.S. 1, 16-17 (1996) (rejecting challenge to Census Bureau’s refusal to adjust its enumeration results and finding that lower court erred in applying the one-person-one-vote standard to the apportionment of congressional delegations). Even if less than perfectly democratic, the Electoral College is by definition constitutional.

Therefore, any resulting inequality in the strength of the vote for President by a citizen or an Elector cannot, by itself, state a claim for injury. Nor has Gordon explained how his particular vote dilution theory transcends this general rule. He implies at various points that the States must enact a law governing how its Electors will vote for President and Vice President, *see, e.g.*, Brief at 9-10, but he cites no authority for this proposition, and Appellee is aware of none. Instead, the Constitution lets the States decide, *see* U.S. Const. Art. II, § 1, Cl. 2, and the plenary power recognized in *McPherson* and *Ray* permits both state laws directing how Electors must vote, *e.g.*, Tenn. Code Ann. § 2-15-104(c)(1), or no restriction at all. There is simply nothing unconstitutional or impermissible about winnertake-all voting in the Electoral College, “unbound” or not.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the judgment of the District Court be affirmed.

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

I HEREBY CERTIFY that the foregoing brief complies with the typevolume limitation of Fed. R. App. P. 32(a)(7)(B) and contains 4450 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2009, the foregoing Brief for Appellee was served on pro se Appellant via first class mail addressed to:

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