
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)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Asa Gordon, PRO SE
1667 Webster Street, N.E.
Washington, D.C. 20017
(202) 635-7926
digasa@aol.com

Dated: March 12th, 2010

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Appellant petitions this court pursuant to the Federal Rules of Appellate Procedure rules 35 and 40 for a panel rehearing and rehearing en banc of the panel's decision to affirm the ruling of the district court dismissing the plaintiff's complaint for lack of standing.

STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

This case requires an en banc rehearing for the following reasons:

A. The Appellate Panel: 1) has reached a factual false assertion as to the nature of the Appellant 's alleged injury by misconstruing the very basis of the case of controversy as pleaded by the Appellant; 2) judgment is in conflict with the entire body of Supreme Court rulings on standing in minority vote dilution civil actions; 3) discriminates against appellant as a resident of the District of Columbia; 4) fails to address the issues of standing that formed the basis for the district court ruling under review while erroneously sustaining the district ruling.

References to the Civil Docket For Case#: 1:08-cv-01294 Excerpts are [CD#_*]
(# = docket entry number_* = page number)

References to the Appellate Docket For Case#: 09-5142 Excerpts are [AD#_*]
(# = docket entry number_* = page number)

B. Appellant has presented a question of exceptional importance requiring a court to resolve the constitutional question whether the Vice President acting *ex officio* when counting electoral votes under the 12th Amendment can count the Electoral Votes of states on a winner-take-all basis where there exists no state statute authorizing the Secretary of State or state Governor to award those electoral votes. Appellant maintains that the Vice President, by effecting a mal-apportionment in the electoral count, dilutes the representation by appellant (and those similarly situated) in the process of voting for the Chief Executive . In this way the President of the Senate violates §2 of the 14th Amendment, as implemented by §6 of Title 2 of the United States Code. It is a question of exceptional importance that the court issue a declaratory judgment to adjust the count of presidential electors to reflect proportional allocation of the offending states' electors before Congress enacts reapportionment in the House of Representatives based on the 2010 census.

ARGUMENT

I. The Panel Decision is in Conflict with a Plethora of Supreme Court Decisions on Standing in Minority Vote Dilution Civil Actions.

The judgment of the Court of Appeal asserts that "The plaintiff is not injured by the operation of the five states' winner-take-all systems because he does not vote in those states." [AD1228476_2]. This statement of the law could not possibly be more wrong. The Supreme Court has stated principles to the contrary

that "..., **the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States ...**". Just as Congress can regulate intrastate commerce which affects interstate commerce, plaintiff can oppose the voting in one state that dilutes or debases his vote by interstate impacts.

Furthermore, in the context of a Presidential election, state-imposed restrictions [Footnote 18] implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. [Footnote 19]. [See *Anderson v. Celebrezze*, 460 U.S. 780, 794-795 (1983)]

The *Celebrezze* case specifically supports plaintiff in that it held that the 14th Amendment applied to the mode of electing the President of the United States.

The Appellate Panel violates the reasoning of the landmark Supreme Court reapportionment or mal-apportionment case which said that plaintiff has a right "to protect or vindicate an interest of their own" under the 14th Amendment even if it also protected or vindicated rights "of those similarly situated."

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored

counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally. *Baker v. Carr*, 369 U.S. 186, 207-208 (1962).

The translation of these principles to the case of controversy of this civil action is patently obvious. Plaintiff's complaint charges that the states award of presidential electors on a "winner-take-all basis" ungrounded in state law *constitutes arbitrary and capricious state action*. Plaintiff's constitutional claim is, *in substance*, that he has a *right to a vote free of arbitrary impairment by the defendant Vice President presiding ex officio over the electoral count pursuant to title 3 U.S.C. § 15, when such impairment resulted from dilution by a false tally of presidential electors that is offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by section two of the Fourteenth Amendment to the Constitution as implemented by title 2 U.S.C. § 6*. Plaintiff's complaint charges that the defendant Vice President's declaration of the final count for the unbounded states resulted in *effecting a gross disproportion of representation* in the electoral college. Plaintiff's complaint charges that the defendant Vice President, acting *ex officio*, has a ministerial duty to disregard the "Certificates of Votes" as represented by the Secretaries of State of the five unbounded states (Arkansas; Georgia; Louisiana; Tennessee; and Texas) who act on a "winner-take-all" basis without statutory authority. Plaintiff charges that the

defendant Vice President has no legal (or constitutional) power to count said electoral votes on a "winner-take-all" basis and that his action placed the Plaintiff *in a position of constitutionally unjustifiable inequality vis-a-vis* presidential electors *in irrationally favored* unbounded states.

The ministerial nature of the act of the Vice-President in this matter does not abolish standing; rather it guarantees it. The court can order the Vice-President not to count the "electoral votes" on a winner-take-all basis for unbounded states lacking proper authorization as a matter of law.

Similarly the Panel's rationale for its judgment is in conflict with the standard for standing upheld in *Reynolds v. Sims* and *Dunn v. Blumstein*:

And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The Union over which the President presides is a single jurisdictional unit. The Electoral College over which the Vice President presides *ex officio* is a single jurisdictional unit.

The jurisdictional unit that gives cause to this case of controversy is in the Electoral College *count* in the Hall of the House of Representatives, *not in the casting of votes for presidential electors in unbounded states!* The Supreme Court has stated, “Within a given constituency, there can be room for but a single constitutional rule - one voter, one vote.”¹ But the District Court of Appeal violates overriding opinions on the fundamental nature of that “more perfect union” in adopting the notions of the Confederacy defeated in the Civil War.²

This court of Appeal for the nation's capital violates this direct and explicit ruling by the Supreme Court of the United States that appellant has standing since **"... any person whose right to vote is impaired, had standing to sue."**³ The challenged practice by the Defendant (Vice-President) *counting* the electoral votes of states on a winner-take-all basis who have no statutes authorizing the awarding of electoral votes does impair Appellant's vote as it adbridges, dilutes and debases the Appellant's vote.

1. Mr. Justice Stewart, whom Mr. Justice Clark joins, concurring. in *Gray v. Sanders*, 372 U.S. 368 (1963), citing *United States v. Classic*, 313 U.S. 299 (1941).
2. *Colegrove v. Green*, 328 U.S. 549 (1946); *Baker v. Carr*, 369 U.S. 186 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).
3. *Gray v. Sanders*, 372 U.S. 368, 375 (1963).

The Panel's decision , if allowed to stand, places an discriminate bias burden on the Appellant for establishing standing for a claim of injury by vote dilution in the mal-apportionment of electors in the Electoral College. This is irrationally disproportionate to the Supreme Court's grant of standing in claims of vote dilution in the reapportionment of Congressional districts. This is particularly egregious and illogical when we factor in the fact that the Electoral College maps one to one with congressional districts.

II. Additional Questions of Exceptional Importance.

A. The Panel Judgment Places the Unbounded State Congressional Representatives in Constitutional Limbo and Legal Jeopardy.

The Panel Judgment in essence presents that any state citizen who votes in the unbounded southern states possesses a "concrete and particularized" injury standing for a cause of action to now enjoin the Clerk of the House from seating representatives subject to the mal-apportionment of Presidential Electors in the 2008 election, in a direct challenge to congressional reapportionment in the House of Representatives based on the 2010 census. Thus the 2010 House of Representatives is now in serious jeopardy of legal chaos unless this issue is resolved expeditiously by this Appellate Court to issue a declaratory judgment for a constitutional mandate for proportional allocation of electors pursuant to 2U.S.C.§6 in this Civil Action .

B. The Chair of the House Committee On The Judiciary has Confirmed That this Action Presents A Question of Exceptional Importance .

During a December 8, 2004 forum on voting irregularities in the national elections, the Plaintiff told the Hon. Rep. John Conyers Jr. (D-MI) that minority-polled Democratic presidential electors were not being counted in the weight of the percentage of their vote in states without a "winner-take-all" state statute. Rep.

Conyers responded: :

"This is the most amazing proposition that has ever been brought forward by a non-lawyer, and if it is accurate, it could change the whole outcome of the voting process in the United States."

Thus the plaintiff avers that the *En Banc* Court should take judicial notice that the Chair of the House Committee On The Judiciary has personally put on the congressional record that the issues of this civil action present questions of exceptional importance.

III. The Panel Decision Misconstrues the *Original* Case of Controversy.

"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.

This case of controversy arises from a dilution in the votes cast for presidential electors resulting from a mal-apportionment by race and/or party affiliation in the tabulation of electoral votes on an at large "Winner take all" basis ungrounded in either state or federal law as presided over by the Vice President of the United States acting ex-officio as president of the senate pursuant to title 3 U.S.C.§15. The VP's declaration of the final count for *unbounded* Southern State electors in the electoral college meeting in the Hall of the House of Representatives constitutes a violation of the

reduction of representation clause of section two of the Fourteenth Amendment to the Constitution as implemented by title 2 U.S.C.§6." (AD:1227345_2).

"The District Court erroneously concluded that plaintiff failed to satisfy the *causation* element of standing because the alleged injury is not fairly *traceable* to the actions of the Vice President. The court also concluded that plaintiff's summary motions for relief were moot."(id-3)

The Panel Judgment *by omission* concedes the Appellant's arguments that (A) The alleged injury (*counting*) is not *traceable* to Vice President was erroneous and (B) The District Courts mootness rationale was rendered moot when the Supreme Court recently made the same argument as the plaintiff in its recent decision in *Citizens United. Appellant v. Federal Election Commission*.

Thus the Appellate Court JUDGMENT ["we affirm the decision of the district court dismissing the plaintiff's complaint for lack of standing " (AD1228476_2)] is based on an issue of standing and cause of controversy not under appeal i.e. :

"The plaintiff is not injured by the operation of the five states' winner-take-all systems because he does not vote in those states. Nor has he alleged that the failure to redistribute electoral votes pursuant to Section 2 has caused him any 'concrete and particularized' injury." (AD1228476_2).

This assertion (besides being in direct conflict with the ruling in *Celebrezze*) can only be explained by the Panel mis-construeing the *original* cause of controversy as pleaded by the plaintiff, *recasting* the nature of the plaintiff's complaint to fit the rationale for the panel's findings. It is clear by the plaintiff's original complaint that **the cause of controversy in this civil action is not joined**

by the plaintiff at the point of the operation of the five states' winner-take-all systems without legal authority. The plaintiff asserts his cause of controversy *not* over the mal-apportionment in the allocation of the unbounded states' presidential electors in the *casting* of electoral votes, but at the point where the cause of controversy is a consequence of the mal-apportionment in the *count* of presidential electors in the final tally where there is a *cumulative* effect on the injury to minority vote dilution as presided over by the Vice President acting *ex officio* pursuant to 3 U.S.C.§15.

Accordingly, the actual cause of controversy as pleaded by the plaintiff is for redress resulting from a *failure to redistribute electoral votes pursuant to Section 2* by a correct *count* in proportion to all classes of voters regardless of race and/or party affiliation in the electoral college meeting in the Hall of the House of Representatives, (DC1_2,5,7,8). In this context the Plaintiff avers that:

"As a member of that population of minority polled presidential electors to suffer vote dilution in the electoral count by race and/or party affiliation with the singular exception of having no congressional representative but a surrogate federal court to petition, with a constitutional and unique standing plaintiff filed this Civil Action to enjoin the Vice President *as a matter of law* from a quarterly in effect ritual violation of the *mal-apportionment penalty clause* of the second section of the Fourteenth Amendment." (AD1227345_3).

The Supreme Court has said that persons in plaintiff's position have a right to a correct tally for an incorrect tally or count "dilutes" or "debases" his vote.

See the APPELLANT'S FINAL BRIEF (AD1218264_13-14).

That is, the Panel's decision is in point of fact not a ruling on the actual case of controversy that formed the basis for the plaintiff's original complaint.

IV. The Panel Decision Ignores The Plaintiffs' "*Particularized*" Standing , and Discriminates Against Appellant as a Resident of the District of Columbia.

The judgment of the Court of Appeal asserts that "The Appellant is not injured by the operation of the five states' winner-take-all systems because he does not vote in those states." [AD1228476_2]. The fact of the matter is that Appellant does not vote in any state of the Union whatsoever.

Appellant has raised a cause or controversy regarding the *counting* of the Electoral Votes by the Vice-President under the 12th Amendment (*not* in the states). Appellant 's right to be free from dilution of his vote for the President in this process is all the more important for him, as a resident of the District of Columbia, because he has no power under the Constitution to vote for any other member of the national government since he cannot vote for members of Congress in the United States Senate or its House of Representatives.

Appellant votes for the President of the United States as a resident of the capital of the nation. Appellant has a fundamental interest in voting for the President. That interest was *not* created by *any state law*, but was created by the national government through an amendment to the national constitution (23rd Amendment). In the context of the complaint at bar, these facts constitute a "particularized injury" for the Appellant more than sufficient to establish standing to bring this action.

The opinion ignores the "particularized injury" that arises from being a citizen of the District of Columbia. Appellant has a special right to protection by the national government through votes for the President (and Vice-President) because Appellant as a *singularly non-state resident* of the District of Columbia has no "right" or power to chose any other member of the government of the nation as set forth in his argument to the court:

No other United States citizen stands in the unique position of the Appellant 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 Appellant has no representative who has a right in law to speak on the floor of Congress. Thus the Appellant stands alone to petition the only forum of government that can provide a remedy in this instance, the federal court of the United States of America. See: DC12_7-8.

For the Appellant court to rule that only a citizen of the state can complain overlooks the way that the Electoral College creates inequality of votes *on an interstate basis*.

Only by ignoring the foregoing *particularized* claim of standing by the plaintiff can the panel base its decision on the clearly counterfactual rationale that the plaintiff did not plea any injury " by the operation of the five states' winner-take-all systems because he does not vote in those states, " and that the plaintiff did not allege that a "failure to redistribute electoral votes pursuant to Section 2 has caused him any 'concrete and particularized' injury", (AD1228476_2).

The Plaintiff 's complaint declared that :

Plaintiff files this action in *behalf of himself* and *his derivative beneficiary class members* as registered voters and Presidential Electors of states subject to the impact of the diminishment of their vote by the denial and/or abridgment of Presidential Electors that represent their candidate in unbound states wherein there is no state election law that explicitly allocates that states electors on a "winner take all" basis, (CD1_6).

In *behalf of himself* the plaintiff alleged injury by vote dilution based on his *singularly* unique standing as a *DC voter and presidential Elector*, and the panel decision does *not* rule on this *particularized* standing of the plaintiff.

The panel decision discards the the lower courts' standing rationale for dismissal and provides its own standing rationale. Thus the panel renders an incongruent decision that sustains the District Court ruling on the basis of a rationale the District Court considered but did not select.

At a minimum, on the basis of fundamental fairness, not to mention due process, the Panel's Judgment should not rule with prejudice to the plaintiff's

complaint in a evidential vacuum of baseless assumption, but remand the case back to the trial court to rule on the bogus question of standing introduced in the Appellate Court. The Appellant has herein demonstrated in this petition however that **the Panel's judgment is irreconcilable with the classic Supreme Court rulings in regards to constitutional claims for minority vote dilution resulting from a mal-apportionment in representation.**

CONCLUSION

My standing in this cause of action is consistent with the Supreme Court precedent rulings to adjudicate claims for minority vote dilution resulting from mal-apportionment in government representation with disparate impact on the citizen's right to an equal and effective vote. The panel decision is in clear conflict with those Supreme Court precedents. Furthermore, the panel decision is erroneous in ruling on an alledged claim of injury resulting from the *ex officio* acts of the Secretary of State, or the Governor of states in the *reporting of certificates of votes* cast by presidential electors on a winner-take-all basis to the Vice President. The claim of injury, *as pleaded by the plaintiff*, is for the *ex officio* act of the Vice President for a mal-apportionment *in the tally* of the states' submitted electoral votes. A court can issue declaratory relief against an officer of the executive branch to prevent the *counting* of such illegitimate ballots as a violation of a ministerial duty by an officer of the national government [*Marbury v.*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's **PETITION FOR
PANEL REHEARING AND REHEARING EN BANC** were served by First
Class Mail this 12th day of March, 2010, upon:

ALAN BURCH
Assistant United States Attorney
555 4th Street, NW
Washington, DC 20530
(202) 514-7204

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5142

September Term, 2009

FILED ON FEBRUARY 1, 2010

ASA GORDON, DC PRESIDENTIAL ELECTOR, DC STATEHOOD GREEN PARTY ELECTORAL
COLLEGE TASK FORCE, EXECUTIVE DIRECTOR DOUGLASS INSTITUTE OF GOVERNMENT,
APPELLANT

V.

JOSEPH R. BIDEN, JR., VICE PRESIDENT OF THE UNITED STATES, PRESIDENT OF THE SENATE OF
THE UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01294)

Before: HENDERSON, ROGERS and GARLAND, Circuit Judges.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs filed by the parties, and on appellant's transcript of prepared supplemental points for oral argument contained in his motion for reconsideration filed January 21, 2010. See D.C. CIR. RULE 34(j). The court has accorded the issues filed consideration and has determined that they do not warrant a published opinion. See D.C. CIR. RULE 36(d). It is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

To satisfy "the irreducible constitutional minimum of standing," a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct of the defendant and that is likely to be redressed by a decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must be "(a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). The plaintiff fails to meet that burden here. He challenges the winner-take-all systems by which Arkansas, Georgia, Louisiana, Tennessee, and Texas award Electoral College votes, arguing that

-2-

those states have unconstitutionally disenfranchised voters who support the losing candidates. The plaintiff contends that the states should be penalized under Section 2 of the Fourteenth Amendment, which provides, in relevant part, that where “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 male citizen over the age of 21, or “in any way abridged, except for participation in rebellion, or other crime,” the basis of the offending state’s representation “shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizenstwenty-one years of age in such state.” U.S. CONST. amend. XIV, § 2. The plaintiff is not injured by the operation of the five states’ winner-take-all systems because he does not vote in those states. Nor has he alleged that the failure to redistribute electoral votes pursuant to Section 2 has caused him any “concrete and particularized” injury.

The plaintiff’s complaint indicated that he was filing his lawsuit as a class action. The district court correctly held that he could not proceed as a representative of a class because he did not file a class certification motion within 90 days of filing his complaint, as required by Local Civil Rule 23.1(b). D.D.C. LOCAL RULE 23.1(b). The plaintiff has not appealed this aspect of the court’s judgment.

Accordingly, we affirm the decision of the district court dismissing the plaintiff’s complaint for lack of standing.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. See FED. R. App. P.41(b); D.C. CIR. RULE 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Appellant, *Pro Se* provides the following information as to parties, rulings, and related cases:

(A) Appellant in this case is Asa Gordon. Appellee is Joseph R. Biden, Vice President of the United States acting *ex officio* as President of the Senate. 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) Appellant is aware of no pending related cases.