

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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ASA GORDON, ET AL.,)
)
Plaintiffs,)
)
vs.)
	Case: 1:11-cv-00003 (HHK))
)
THE HONORABLE KAREN L. HAAS,)
CLERK OF THE U.S. HOUSE OF)
REPRESENTATIVES,)
)
Defendant.)
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**DEFENDANT’S REPLY TO PLAINTIFFS’ OPPOSITION
TO DEFENDANT’S MOTION TO DISMISS**

On March 17, 2011, defendant Karen L. Haas, Clerk of the U.S. House of Representatives, moved to dismiss this challenge to the Electoral College system on the grounds that (1) plaintiffs have not satisfied any of the constitutional requirements for standing (injury, causation, redressability); (2) the Clerk is immune from this suit under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1; (3) plaintiffs’ claims are moot insofar as they seek to have the Court enjoin the Clerk to “unrecognize” seated Members of the House (or have the Court somehow effect this “unrecognition” itself), and seek relief related to the 2008 Presidential election; and (4) the Complaint fails to state a claim upon which relief may be granted. See Mem. P. & A. Supp. Def.’s Mot. Dismiss at 5-15 (March 17, 2011) (“Clerk’s Memo”).

Plaintiff Thelma Tharpe has not responded to the motion to dismiss and, accordingly, the Court may and should treat the motion as conceded as to her. See D.D.C. L. Civ. R. 7(b) (if an opposing memorandum is not timely filed, “the Court may treat the motion as conceded.”). The other plaintiff, Robert Asa Gordon, who has responded, indicates that he is proceeding in this

matter *pro se*. See Plaintiffs' Mem. P. & A. Opp'n Def.'s Mot. Dismiss at 32, 33 (April 29, 2011) ("Opp."). We understand that Mr. Gordon is not an attorney and, therefore, he may not represent Ms. Tharpe or file pleadings on her behalf. See, e.g., *Georgiades v. Martin-Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984) ("federal courts have consistently rejected attempts at third-party lay representation") (quoting *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982)); *Collins v. O'Brien*, 208 F.2d 44, 45 (D.C. Cir. 1954) ("The privilege of appearing in proper person is one reserved to the individual. He cannot appear in that capacity and seek to represent others.").¹

Mr. Gordon, in turn, has responded to only *some* of the arguments we advanced. In particular, he has ignored entirely the causation prong of the standing analysis. That is, Mr. Gordon makes exactly no effort to establish "a fairly traceable connection between [his alleged] injury and the complained-of conduct of the defendant." Clerk's Memo at 6 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)). Accordingly, the Court may and should treat that argument as conceded, and dismiss the Complaint on that ground alone without going further. See, e.g., *Hopkins v. Women's Div., General Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997)); *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149

¹ Mr. Gordon is likewise precluded from representing a class of "registered voters and Presidential Electors of states subject to the impact of the diminishment of their vote by the denial and/or abridgement of Presidential Electors who represent their candidate in unbounded Southern states . . ." Compl. for Declaratory and Injunctive Relief at ¶ 18 (Jan. 3, 2011). See *Gordon v. Biden*, 606 F. Supp. 2d 11, 12 n.1 (D.D.C. 2009), *aff'd per curiam*, No. 09-5142, 2010 WL 606684 (D.C. Cir. Feb. 1, 2010) (holding, in earlier Gordon suit making same allegations made here, that "*pro se* litigants cannot serve as adequate representatives of a class.").

(D.D.C. 2002) (“[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded, even when the result is dismissal of the entire case.”).²

In any event, the arguments Mr. Gordon does articulate in response to the Motion to Dismiss are wrong, as we now explain.

I. Mr. Gordon Still Has Not Satisfied the Injury and Redressability Prongs of the Standing Analysis.

Mr. Gordon does not deny that he is not a resident of, or registered to vote in, any of the five “unbound” states identified in the Complaint. Opp. at 25 (“Gordon does not vote in any state of the Union”). Furthermore, he does not contend that he was personally deprived of his vote or disenfranchised in any way in the 2008 presidential election. Indeed, he does not even contend that he voted in 2008, or will vote in the future, for a Presidential candidate who lost, or will in the future lose, the state-wide (or District-wide) popular vote. Factually, Mr. Gordon alleges nothing more than that he is a registered voter of the District of Columbia, a Presidential Elector, and the Chair of the D.C. Statehood Green Party Electoral College Task Force. See Compl. for Declaratory and Injunctive Relief at ¶ 2.

But those attributes do not translate into Article III injury in fact, as the D.C. Circuit held in affirming this Court’s dismissal of Mr. Gordon’s suit against the Vice President. See *Gordon v. Biden*, No. 09-5142, 2010 WL 606684 at *1 (“[Mr. Gordon] is not injured by the operation of the five states’ winner-take-all systems because he does not vote in those states.”). And if Mr.

² The last time around, when Mr. Gordon sued the Vice President in his quest to remake the Electoral College system, this Court dismissed the claim on causation/standing grounds: “[Even] assuming that Gordon has sufficiently plead an injury in fact, the alleged injury is not fairly traceable to the Vice President’s allegedly unlawful conduct. . . . rather [the alleged injury] is attributable to the actions of third-party states and state officials” not named in the suit. *Gordon v. Biden*, 606 F. Supp. 2d at 13, 14.

Gordon was not injured in a constitutional sense in that case, as the D.C. Circuit held, then he cannot be injured in a constitutional sense in this case.

As a result, Mr. Gordon is reduced to arguing that he is injured because the “President of the United States plays a critical role in the amount of taxes and the manner they are laid upon the various portions of the American population. . . . [and] [t]he inequality of the weight of the vote of citizen [sic] of the District of Columbia compared to that of a citizen of the United States who live in States is tantamount to ‘. . . taxation without representation.’” Opp. at 26-27.

Whatever that argument means – and it appears to mean little in light of the fact that District residents vote in *presidential* elections in the same manner that residents of the states vote in presidential elections, U.S. Const. amend. XXIII – it does not identify an injury that is concrete and particularized as to Mr. Gordon, as required by Article III. *See* Clerk’s Memo at 6.

With respect to the redressability prong of the standing analysis, we explained earlier that (i) any injunction that concerned the Clerk’s opening day responsibilities would have no practical force or effect since those responsibilities have already been discharged; (ii) any injunction directing the Clerk to now “unrecognize” seated Members also could have no practical force or effect inasmuch as the Constitution vests the House itself with the exclusive authority to remove Members from office; and (iii) insofar as Mr. Gordon’s alleged injury is the operation of a winner-take-all Electoral College voting system, as implemented by the various states, none of the injunctive relief he seeks will redress that injury. *See* Clerk’s Memo at 7-8.

Mr. Gordon’s response is to ignore all of this and to argue only that, “[a]s Congress prepared to convene on December 4, 1865, the clerk of the House, Edward McPherson, announced that he would not recognize representatives elected from the former Confederate states.” Opp. at 22. However, this history is not relevant here in light of the fact that McPherson

was also a Member of the House; McPherson was acting at the express direction of his elected colleagues; and McPherson was not acting at the direction of the judiciary or pursuant to the Fourteenth Amendment since that Amendment was not ratified until 1868. *See generally* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. Chi. L. Rev. 375, 398 and nn.120-29 (Spring 2001) (“Harrison”).³

In short, to satisfy the redressability prong of the standing requirement, there must be a substantial likelihood that “the exercise of the Court’s remedial powers would redress the claimed injuries.” *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74-75 (1978). Here, there is no likelihood that the exercise of the Court’s remedial powers will redress Mr. Gordon’s dissatisfaction with the operation of a winner-take-all Electoral College voting system, which is, at bottom, the heart of his Complaint.

II. The Speech or Debate Clause Plainly Bars Mr. Gordon’s Suit Here.

We explained earlier that the protections of the Speech or Debate Clause apply to officers of the House (including the Clerk) when they are engaged in constitutionally-mandated

³ Prior to the convening of the 39th Congress, Republicans Members and Members-elect, who then held an absolute majority in both houses, decided that they would form a Joint Committee on Reconstruction, and that the credentials of Senators-elect and Representatives-elect from the states that had seceded would be referred to the Joint Committee without further debate. They also agreed that no Senators-elect or Representatives-elect from the states that had seceded would be seated by either body until the Joint Committee had reported and its report had been acted on. Harrison, 68 U. Chi. L. Rev. at 398-99 & nn.124-22.

Accordingly, when Congressman/Clerk McPherson called the roll, he omitted Representatives-elect from the states that had seceded. After the roll was called, Schuyler Colfax of Indiana was elected Speaker. After Speaker Colfax’s acceptance speech, Rep. Thaddeus Stevens offered a joint resolution creating the Joint Committee, which passed without debate under a suspension of the rules. *Id.* at 399-400 & n.129. *See also* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 502-503 (1989) (“[T]he Republicans in Congress refused to seat any of the Southern representatives, and continued to deny the Southern states representation throughout the entire period during which the Fourteenth Amendment was proposed and ratified.”).

activities; that the activities of the Clerk upon which the Complaint is predicated are in fact constitutionally-mandated; and that, therefore, the Clerk is absolutely immune from suit here. *See Clerk's Memo* at 11-12.

In response, Mr. Gordon first says that Speech or Debate Clause protections do not apply here because the Clerk's functions in assisting the House to assemble and organize itself at the beginning of a new Congress are "ministerial," not "discretionary." *Opp.* at 5, 9-10. However, even if the Clerk's activities were fairly characterized as "ministerial" – and we do not believe they are – the Speech or Debate case law draws no distinctions between "ministerial" and "discretionary" activities. There is but one standard: when Members and their aides (including officers of the House) are acting "within the 'sphere of legitimate legislative activity,'" *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (quoting *Gravel v. U.S.*, 408 U.S. 606, 624 (1972)), they are absolutely immune from suit. And the activities of the Clerk upon which this suit is predicated plainly fall within this "sphere of legitimate legislative activity," which has been broadly construed to encompass all activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (quoting *Gravel*, 408 U.S. at 625) (emphasis added).

Second, Mr. Gordon argues, without citing any legal authority, that Section 2 of the Fourteenth Amendment supersedes the Speech or Debate Clause because "where two constitutional amendments apply to the same subject . . . the last will of the sovereign prevails." *Opp.* at 11. The gaping flaw in this argument, of course, is that the Fourteenth Amendment and

the Speech or Debate Clause – which the Supreme Court repeatedly has held is “absolute” when it applies, *Eastland*, 421 U.S. at 501, 503, 509-10, 509 n.16 (dismissing, on Speech or Debate grounds, claims predicated on First Amendment) – do not even remotely “apply to the same subject.” There is no inconsistency between them and, thus, the argument that the Fourteenth Amendment trumps the Speech or Debate Clause is frivolous.

Finally, Mr. Gordon argues, again without citing any legal authority, that if the Speech or Debate Clause does not shield legislation passed by Members of Congress from judicial review, then the constitutional legitimacy of the Members themselves cannot be immune from judicial review under the Speech or Debate Clause. *Opp.* at 10. The flaw in this argument is that the conclusion does not flow from the predicate. Yes, legislation passed by Congress is subject to judicial review. But it simply does not follow from that that a Member of Congress – or in this case, the Clerk of the House – is subject to suit when, as here, she is engaged in activities that plainly fall within the “sphere of legitimate legislative activity.”

III. Certain of Mr. Gordon’s Claims for Relief Are Still Moot.

We explained earlier that Mr. Gordon’s claims are moot with respect to certain relief that he seeks. First, the Representatives-elect to the 112th Congress – including all Representatives-elect from the “unbound” states of Arkansas, Georgia, Louisiana, Tennessee and Texas – were sworn in as Members of the House on January 5, 2011; from that point forward, the Constitution vested the *House* with the exclusive authority to remove Members from office; and, accordingly, relief is no longer available, even as a theoretical matter, as against the Clerk who is the only named defendant. *See Clerk’s Memo* at 13-14. Mr. Gordon has no response to this contention, which, therefore, may be taken as conceded.

Second, the 2008 election, as to which Mr. Gordon seeks certain declaratory relief, is long since complete. *Id.* With respect to this contention, Mr. Gordon says only that “[e]lection cases are consistently recognized as coming within” the “capable of repetition, yet evading review” exception to the mootness doctrine. *Opp.* at 7. But even if this is true – and the cases Mr. Gordon cites do not support his sweeping contention that all election cases are automatically subject to the “capable of repetition, yet evading review” exception – it misses our point, which is only that Mr. Gordon’s claim for *specific relief as to the 2008 election* is now moot. *See* Clerk’s Memo at 13-14. We do not contend that this entire case is moot. For example, to the extent Mr. Gordon seeks “a declaratory judgment that **Amend. XIV§2** as implemented by **2USC§6** mandates *proportional apportionment of presidential electors* based on the popular vote split for unbounded electoral states,” *Compl. for Declaratory and Injunctive Relief* at 9, ¶ 4 (emphases in original), this case is not moot. With respect to this declaratory relief, the case must be dismissed on other grounds, including lack of standing, the Clerk’s immunity under the Speech or Debate Clause, and failure to state a claim.

IV. Mr. Gordon Fails to State a Claim.

As we explained earlier, the Supreme Court and the lower courts have rejected the notion that the winner-take-all Electoral College system is unconstitutional under the one-person, one-vote principle derived from the Equal Protection Clause of the Fourteenth Amendment. *See* Clerk’s Memo at 14-15. In response, Mr. Gordon argues only that *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff’d per curiam*, 393 U.S. 320 (1969), is distinguishable because, he says, “[t]he issue here is that the winner-take-all allocation did not conform to state law because the five states here have no state law.” *Opp.* at 6. This is incorrect for two reasons.

First, as a matter of fact, the five states named in the Complaint do have election laws, which election laws – reflecting choices made by the legislatures of those states – do not expressly bind their state electors by law or pledge to cast their votes for their party’s Presidential and Vice Presidential candidates.⁴

Second, the issue in *Williams* was whether the winner-take-all method of counting presidential electors violates the “one-person, one-vote” principle of the Equal Protection Clause of the Fourteenth Amendment. 288 F. Supp. at 626. The Supreme Court, by affirming the District Court’s holding that it did not, effectively resolved that issue. And, as we pointed out earlier, it is impossible to see how Mr. Gordon’s contention that a winner-take-all Electoral College system “denies” or “abridges” his right to vote in presidential elections can proceed constitutionally other than through that same “one-person, one-vote” principle. *See* Clerk’s Memo at 14-15. Certainly Mr. Gordon has identified no other constitutional theory that might conceivably support his contention that the Electoral College system “denies” or “abridges” his right to vote in presidential elections.

Accordingly, he has failed to state a claim.

⁴ *See* Ark. Code Ann. § 7-8-301, *et seq.* (West 2011); Ga. Code Ann. § 21-2-1, *et seq.* (West 2011); La. Rev. Stat. Ann. § 18:1251, *et seq.* (2011); Tenn. Code Ann. § 2-7-130 (2011); Tex. Elec. Code Ann. §§ 192.001-192.008 (Vernon 2003).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Clerk's Memo, the Motion to Dismiss should be granted.

Respectfully submitted,

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May 11, 2011

CERTIFICATE OF SERVICE

I certify that on May 11, 2011, I served one copy of the foregoing Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss by first class mail, postage prepaid, on:

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