

**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.

**MOTION FOR RECONSIDERATION OF DISPOSITION
WITHOUT ORAL ARGUMENT.**

Appellant pursuant to Fed. App. 34(a)(2); D.C. Cir. Rule 34(j)(2) moves the Court to reconsider the court's decision that oral argument will not assist the Court in this case and grant oral argument to the Appellant as a non-attorney *pro se*.

Appellant is mindful that such motions are disfavored by the court and accordingly pleads the indulgence of the Court to consider the following transcript of the Appellant's prepared supplemental points for oral argument within the spirit of FRCP 34(a)(2)(C). The Appellant avers that the decision process would have been significantly aided by oral argument.

TRANSCRIPT OF APPELLANT'S ORAL ARGUMENT

May it please the court.

[I request that 5 minutes of my time are reserved for rebuttal or closing argument.]

With apologies to Albert Einstein for modifying the meaning of his quotation: “Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.”

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.

In this Civil Action I pleaded for the District court to enter a Declaratory Judgment for proportional allocation of Presidential electors predicated on the popular vote split.

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.

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.

On the Question of MOOTNESS

This is not a "moot" case. This case falls within the classic exception to the "mootness" doctrine, a case that is constantly recurring and yet escaping judicial review. Election cases are common exceptions to the "mootness" doctrine for this very reason.

In this case, the challenged practice (awarding unbound electors on a winner take all basis in the absence of a state statute authorizing same) is a problem that has constantly been recurring (every four years) and constantly evading review (every four years) since the adoption of the Fourteenth Amendment. The challenge is difficult to mount because the shortness of the gap between the choice of slates of electors (the November election) and the time the electors cast their vote (the December election), to the time for the final counting of the electoral votes (in January), presents a compressed window of opportunity for judicial review. That narrow window and the recurring problem is the basis of the exception to the *mootness* doctrine which is tied to the "actual case or controversy" and the "standing" issues.

On the Question of the CAUSATION Element of Standing.

The plain text of 3U.S.C.§15 confirms that I satisfy the causation element of standing as a matter of law. Pursuant to 3U.S.C.§15 "all the certificates and papers *purporting* to be certificates of the electoral vote" ... "are opened by the President of the Senate" ... "the votes having been ascertained and counted ... the President of the Senate ... shall .. 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. "

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

The court should consider the following in relation to the issue of standing: 1) the Vice-President of the United States sits as the President of the Senate; 2) in that capacity, the Vice-President of the United States "counts" the votes; 3) the Vice-President of the United States is the only federal officer performing the acts (the counting) under the 14th Amendment; The explicit text of the 14th Amendment plainly warrants a lawsuit against the Vice-President of the United States when the vote is denied or diluted in the final counting of electoral votes.

Plaintiff has a right to proceed in a court of law because the very person who should be protecting him is denying his rights and because no part of the Constitution is a dead letter or surplusage. The Attorney General should be protecting the rights of plaintiff under the Constitution of the United States AS AMENDED, rather than denying plaintiff's rights under the superceded provisions of the Slaveholder's Constitution of 1787.

MINORITY VOTE DILUTION

The foundation of the electoral college is congressional representation. If you move the foundation, you move the house.

The integrity of the vote counting process does not end when the state has determined the set of ballots to be counted; the ballots themselves must also *count*. For a vote to count, all voters must cast an *equally effective vote*. The Supreme Court has stated that the Constitution requires “complete equality for each voter” [*Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).] and that “each citizen have an equally effective voice.” [*Reynolds v. Sims*, 377 U.S. 533, 565 (1964)]. The Court has applied this principle to require equal apportionment of state and congressional districts. [*Reynolds v. Sims*, 377 U.S. 533, 559, 568 (1964)] .

At-large voting denies voters **an equally effective vote**. At-large voting always operates to “minimize or cancel out the voting strength of racial or political elements of the voting population”[*Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)] . At-large voting clearly operates to suppress the representation of minority groups, whether racial, economic, political, or otherwise. The Court has set strict standards for protecting the principle **of one person, one vote**. For congressional districts, states must “make a good faith effort to achieve precise mathematical equality.” [*Reynolds v. Sims*]. Extending this strict standard to the case of at-large voting requires the complete abolition of at-large voting. History shows that some

governments adopted at-large voting to prevent the election of black candidates at the time of the adoption of the Fifteenth Amendment in 1870. [J. Morgan Kousser, "The Undermining of the First Reconstruction", in *MINORITY VOTE DILUTION*, 27, 32–33 (Chandler Davidson, ed., 1984)]

Courts have also recognized the discrimination inherent in at-large voting, noting that at-large voting will “tend to submerge electoral minorities and over represent electoral majorities.” For this reason, the Supreme Court “has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a singular combination of unique factors that justifies a different result.” [*Connor v. Finch* ; *Thornburg v. Gingles*, *Rogers v. Lodge*].

{ Winner-Take-All is At Large Voting on Steroids. }

In considering political gerrymandering claims, the Court further elaborated the right to an *equally effective vote*. The Court in *Davis v. Bandemer* stated that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s ... influence on the political process” and that voters must be able to “effectively influence the political process.”

{ Winner-take-all is arranged in this unconstitutional manner. }

May it please the Court, this is a Civil Action to democratize the Electoral College, to the extent that the Electoral College can be democratized. This is a Civil Action to protect the citizens' right to vote for minority polled presidential electors from any abridgment in the counting of their votes. This is a Civil Action, to resurrect from legal purgatory, to resurrect from historical purgatory, that provision of the constitution that gave full expression to the founding principle of our nation for which that "*band of brothers*" of European and African descent "*gave the last full measure of devotion*" to perfect our "*more perfect union*" , "*that this nation shall have a new birth of freedom*" as realized in the second section of the Fourteenth Amendment to the Constitution of the United States of America "*dedicated to the proposition that all men are created equal*" and so created, your honors, are "*endowed*" in a "*government of the people, by the people, for the people*" with a "*self- evident*" right to an *equal and effective* vote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's **MOTION FOR RECONSIDERATION OF DISPOSITION WITHOUT ORAL ARGUMENT** were served by First Class Mail this 21th day of January, 2010, upon:

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