

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

ASA GORDON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action 08-1294 (HHK)
)	
RICHARD B. CHENEY, Vice President of the United States)	
)	
)	
Defendant)	

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff opposes Defendant's Motion to Dismiss (MTD) because the Defendant has cited cases for propositions of law for which they do not stand and have raised arguments that are otherwise legally flawed.

I. INTRODUCTION

DEFENDANT FUNDAMENTALLY MISCONSTRUES THE COMPLAINT

Moving Defendant Richard B. Cheney, Vice President of the United States, by and through his counsel's OPPOSITION TO PLAINTIFF'S TEMPORARY RESTRAINING(?) ORDER AND MOTION TO DISMISS (MTD) _ Civil Action No. 08-124(TPJ)(?) in its opening statement of the FACTUAL BACKGROUND fundamentally misconstrues the nature of the complaint.

First of all Lawrence Douglass Jamison is not a party to this action.

Defendant asserts in its FACTUAL BACKGROUND that "Plaintiffs seeks an order prohibiting Defendant from counting the 'full slate of unbounded presidential electors on January 6, 2009. See Plaintiffs Motion for Temporary Restraining Order at 8."

This is taken out of context. The plaintiff enters a request in the Conclusion of the Temporary Restraining Order (TRO) that the court issue the TRO to prohibit "Defendant from counting the full slate of unbounded presidential electors on Jan. 6th, 2009 in violation of Section 2 of the Fourteenth Amendment to the US Constitution which requires that said States Electors **'be reduced in the proportion'** of the states protected class of voters under the Fourteenth Amendment denied the right **'to vote at any election for the choice of electors for President and Vice-President of the United States.'**" See TRO at 8.

Defendant misrepresents in its FACTUAL BACKGROUND that "Plaintiff alleges that Presidential electors for several states, namely Arkansas, Georgia, Louisiana, Tennessee, and Texas, violated the 1st and 2nd Amendments to the Constitution as well as Section 2 of the 14th Amendment. Id. at 2-3." See MTD at 3.

No such allegation is made or appears anywhere in the Plaintiffs TRO! No where in the TRO is there any claim that Presidential electors have violated any provision of the constitution. Indeed, Presidential electors constitute the very class the Plaintiff's TRO is designed to protect from constitutional abuse pursuant to Section 2 of the 14th Amendment.

Defendant appears to be oblivious to the fact that this is a civil action *to protect the voting rights of presidential electors and the voters they represent with the consequential debasement of the Plaintiff's voting rights as a presidential elector.*

Thus the Defendant's MTD arguments proceed on the foundation of their misconstrued and finally flawed misrepresentation of the action's FACTUAL BACKGROUND and as a consequence should be disregarded .

However, for the sake of argument:

II. FACTUAL BACKGROUND

This *Case or Controversy* arises out of the Defendant Richard B. Cheney, in his capacity as the President of the Senate acting as presiding officer over the Senate and House of Representatives meeting in the Hall of the House of Representatives for the presenting and counting of the certificates of electoral votes on January 6, 2009, from presiding over the

discriminatory tabulation of majority polled presidential electors from *unbounded electoral states* (Arkansas, Georgia, Louisiana, Tennessee, Texas) on a "winner-take-all basis", absent any legal basis in either state or federal statute, with a de facto disfranchisement of minority polled Presidential Electors. Plaintiff seeks redress by enforcement of the mal-apportionment penalty (MAP) enshrined in the Constitution of the United States of America (**Amend. XIV§2**) and the U.S. Code (**2USC§6**) with a *de jure* mandate for the reduction of State electors and representatives "when the right to vote at any election for the choice of electors for President and Vice-President of the United States... is denied to any ... citizens of the United States, or in any way abridged" or in the alternative *proportional apportionment of presidential electors*.

III. ARGUMENT

A. Stipulation of Voluntary Dismissal without prejudice Bars Doctrine of Res Judicata

Defendant's evocation of the doctrine of *res judicata* is disingenuous and would seriously undermine the credibility of reaching legal agreements with the government if sustained. See Defendant's MTD at 2-5. The Defendant is well aware that the Plaintiff's Stipulation of Voluntary Dismissal constituted a joint stipulation between the Plaintiff and Defendant that specifically specified that "This Stipulation shall constitute a dismissal of this action *without prejudice*". See Civ. Action No. 05-00006 (HHK) Dkt. No. 9. Within legal civil procedure dismissal without prejudice is a dismissal that allows for re-filing of the case in the future. There was no adjudication on the merits of the action. Therefore all of the Defendant's memorandum of points and authorities in support of the MTD in this regard is not applicable to these proceedings.

B. Plaintiff Meets the Standards For issuance of Injunctive Relief

To issue preliminary injunctive relief, "a district court need not find that the evidence positively guarantees a final verdict" in favor of the movant. Levi Strauss & Co., 51 F.3d at 985. Plaintiff need only demonstrate a likelihood of success on the merits. See TRO at 6.

The Plaintiff's points and authorities in support of the TRO is *on point* in regards to the case of controversy in this action i.e. the issue of the abuse of "voting rights", (see TRO at 6-7), while the points and authorities cited in the Defendant's MTD are unrelated to injunctive relief under the color of voter rights abuse. See MTD at 5-11.

1. Defendants' Response Demonstrates the Likelihood of Plaintiff's Success on the Merits.

Indeed the Defendant's MTD make it more than probable that given an opportunity wherein the court is able to adjudicate with sufficient time to consider the pleadings before the court, as it did not have in Civ. Action No. 05-00006 (HHK) Dkt. No. 4, wherein the main point of controversy became moot within a very compressed timeframe, the plaintiff's action will succeed on the merits.

Consider the following undisputed issues of fact presented in the Plaintiff's TRO that remain uncontested in the Defendant's MTD:

a. Defendant fails to make or argue any point of authority that disputes the civil complaint that Electors in these *Unbounded Southern States* ARKANSAS, GEORGIA, LOUISIANA, TENNESSEE, and TEXAS are not bound by State Law to cast their vote for a specific candidate, and have no "winner take all" statute in their election code. See TRO at 5.

b. Defendant fails to make or argue any point of authority that disputes the civil complaint that the Defendants exclusive selection of only majority polled presidential electors from the *Unbounded Southern States* constitutes "a debasement or dilution of the weight" of minority polled presidential electors ungrounded in either state or federal statute. See TRO at 3,6,8.

The right to vote is a "fundamental political right." Yick Wo v. Hopkins 118 U.S. 356, 370 (1886). This right is "denied by a debasement or dilution of the weight of a citizens vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 554 (1964). As the Supreme Court in Reynolds noted, "The conception of political equality ... can mean only one thing - one-person, one-vote. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing

candidates, underlies many of our decisions." Id. at 557-58 (internal citations omitted).

c. Defendant fails to make or argue any point of authority that disputes the civil complaint that the Defendants presumptive unilateral action on Jan. 6th, 2009 constitutes *arbitrary treatment* in regards to the counting of presidential electors based on race/and or party affiliation. See TRO at 3,6,8.

Voting is a fundamental right that cannot be subject to arbitrary or inconsistent treatment. See, e.g., Harper v. Virginia, 383 U.S. 663 (1966); Reynolds v. Sims, 379 U.S. 870 (1964).

d. Defendant fails to make or argue any point of authority that disputes the civil complaint that the Defendants presumptive unilateral action on Jan. 6th, 2009 in regards to the *Unbounded Southern States* constitutes an arbitrary discriminatory distinction among presidential electors not grounded in federal or state law. See TRO at 3,6,8.

It is well-established that even with respect to matters that do not involve fundamental rights, the government cannot engage in arbitrary distinctions among similarly situated citizens. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Moreover, the government cannot deny an individual's liberty or property interests through procedures that operate in a wholly arbitrary fashion. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). These principles apply a fortiori to the exercise of a fundamental right such as voting.

2. Plaintiff's TRO Protects the Class of Minority Polled Electors from Certain Injury.

The aforementioned undisputed issues of fact (a-d) presented in this motion and in the Plaintiff's TRO, constitute real, non hypothetical injury, to minority polled presidential electors and the voting citizens they represent.

The weight of the presidential electors that represent the majority choice of the minority race in unbounded southern states will be disfranchised as a *mathematical fact* by the action of the Defendant with an uncontested certainty on Jan. 6th, 2009.

Plaintiff filed 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 including the full slate of Presidential Electors in the electoral count of January 6th, 2009 from *Unbounded Southern States*.

The Plaintiff meets the prerequisites to a class action, FRCP Rule 23, as set forth in the complaint, and the defendants have not disputed the plaintiffs' class action allegations.

Therefore, plaintiff meets the irreducible constitutional minimum for standing.

3. The Public Interest Will Be Served by Granting the Requested Relief

Defendant fails to argue any point of authority that disputes the Plaintiff's TRO serves the public interest but offers a perfunctory assertion that in fact argues in favor of granting the TRO. i.e.

" Public policy and the Federal Government benefit by presidential elections moving forward in accordance with the United States Constitution. The Government and the public would be harmed if its citizens' right to vote was interrupted." See MTD at 7.

Plaintiff agrees, indeed that is what this civil action is about.

Plaintiff seeks a temporary restraining order to prevent Defendant from taking the first step in a course of action that will lead to a violation of 42 U.S.C. § 1983. The fundamental purpose of Section 1983 is to protect the civil rights of the citizens of the United States. Mitchum v. Foster, 407 U.S. 225, 243 (1972); Owen v. City of Independence, 445 U.S. 622, 636 (1980). Accordingly, the federal courts have been authorized by Congress to effectuate this fundamental purpose by awarding injunctive relief against violations of Section 1983. This Court's grant of a temporary restraining order against Defendant would thus be consistent with and further the public interest in enforcing the federal civil rights laws. See TRO at 7.

C. Plaintiff Meets Article III and Prudential Test for Standing.

1. Plaintiffs' Standing Is Singularly Unique as a Voter and Presidential Elector.

No other United States citizen stands in the unique position of the Plaintiff and the citizens of the District of Columbia. The congress in its infinite wisdom abides the disfranchisement of the plaintiff and the citizens of the District of Columbia in a manner unlike

any other citizen of the United States of America. The Congress chose to circumscribe the opportunity of this class of citizens of which the Plaintiff is a member in the voting process. The Plaintiff 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 Plaintiff 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 Plaintiff, unlike any other American citizen, has no congressional representative to whom he may appeal or who can raise an objection at the appointed time established for such objections under 3USC § 15. The reason being, the plaintiff has no representative who has a right in law to speak on the floor of Congress. Thus the Plaintiff stands alone to petition the only forum of government that can provide a remedy in this instance, the federal court of the United States of America.

2. Defendants' "*Hypothetical Injury*" Precedents Are Misplaced and Unpersuasive.

Defendants' principle reliance on Supreme Court precedents:

Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d 43, 47 (D.C. Cir. 1999); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); American Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 764 (D.C. Cir. 1997); Mudd v. White, No. 01-5103 (D.C. Cir. November 8, 2002).; predicated upon the Defendants' thesis that this action is conducted in a "*rarified atmosphere*", is "*speculative*", is to "*abstract*", "*conjectural or hypothetical*", See MTD at 7-9,11, is specious and misplaced.

That only presidential electors that represent the majority choice of *white* voters from unbounded Southern States *will be counted* before congress pursuant to 3 USC Chapter 1, § 15, is neither *conjectural or hypothetical*. It is not *speculative* that only presidential electors that represent the majority choice of *black* voters *will not be counted* when Congress meets in joint

session, January 6, 2009, to count the electoral votes. It is not mere *atmospherics* that the exclusive selection of "winner take all" majority polled presidential electors that represent the consensus of the *white electorate* will negate minority polled presidential electors that represent the consensus of the *black electorate*. This de facto disfranchisement is not an *abstract* theory but a mathematical fact. That this injury to the voting rights of this class of *black* voters is not grounded in federal or state election law is not a *rarefied* debate but a *concrete* certainty. This debasement to citizen voting rights is not *conjectural, hypothetical or speculative* but will be an inevitable consequence in the event of judicial inaction.

3. Defendants' "*Third Parties*" and "*Defendant Conduct*" Precedents do not Apply.

Defendants' principle reliance on Supreme Court precedents:

Simon v. Eastern Ky. Welfare Rights Organization 426 U.S. 26, 41-42(1976); Lujan v. Defenders of Wildlife, 504 U.S. at 571; Valley Forge Christian College v. Americans United for Separation of Church & State. Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Ky. Welfare Rights Oreanization, 426 U.S. 26, 41-42 (1976); See MTD at 7-9, wherein the Plaintiffs' lack of standing is predicated upon the thesis that *Plaintiffs' alleged injuries are not redressable by the Defendants' conduct but are subject to other third parties not before the court* is misplaced.

1. Third party State officials from "unbounded southern states" cannot present for representation in the electoral college only presidential electors pledged to the majority polled party on a "winner take all" basis for there is no state election stature that authorizes them to do so.

2. "Unbounded Southern States" third party state officials can only forward the total number of votes cast for each of the presidential party candidates under their state election law.

3. The Defendant, and only the Defendant, as presiding officer can effect the *counting* of a states presidential electors before congress and by that discretionary act de facto disfranchise minority polled presidential electors from "unbounded southern states". The Defendant is the only government official pursuant to 3 USC Chapter 1 §15 that can *finalize* and *consumate this injury* to "voting rights" under the fourteen amendment, to the plaintiff, and the class of electors and citizen voters they represent.

4. Defendants' "Generalized Grievances" Precedents Are Misplaced and Unpersuasive.

Defendants' principle reliance on Supreme Court precedents:

Allen v. Wright, 468 U.S. 737, 750 (1984); American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000); Warth v. Seldin, 422 U.S. 490, 502-508 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); Lampkin v. Conner, 239 F. Supp. 757 (D.D.C. 1965); Jones v. Bush, 122 F. Supp. 2d 713, 2000 WL 1800567 (N.D. Tex., Dec. 1, 2000); See MTD at 7-8,10-11, wherein the Plaintiffs' lack of standing is predicated upon the thesis that *Plaintiffs' alleged injuries arise from generalized grievances* is misplaced..

Any *generalized grievances* in this action will arise from the *generalized injuries* exacted by the Defendant, whom with an uncontested certainty, will effect the exclusive counting of a whole class of *majority polled* presidential electors from *unbounded southern states*, ungrounded in either federal or state statute. This is not a "claim of injury presumably would be shared by all citizens", See MTD at 10. The Defendant's *generalized injuries* are specific to the class of minority polled citizens that will be disfranchised and voting rights that will be diminished by the Defendants' action, and this is an issue of fact that remains undisputed in this action. ***This is not about a general interest in the constitution but a specified interest in a specific injury to voting rights clearly defined in its scope.***

Defendant's argument in essence advance the thesis that : *Government accountability is inversely proportional to the degree of its irresponsibility* in determining a citizen's *standing* to petition a federal court for redress. The Defendant asserts that if the Government can establish that a citizen's grievance is common to a multitude of citizens similarly situated then that citizen is not entitled to any particular relief. i.e. The Government is immune when it "*nuke*" our rights.

IV. CONCLUSION

The Defendant has argued exclusively to the Plaintiffs' standing because it is abundantly

clear from the factual record herein that the government can proper no legitimate defense against the substance of the civil complaint.

The Defendant's MTD arguments to deny the Plaintiff individual standing is insufficient and unpersuasive while the arguments against the Plaintiffs class injury and standing is nonexistent.

The MTD controlling cases on this issue which calls for a *sufficiently individuated* or *palpable injury* are met because of the uniqueness of the class of which the plaintiff is a member. The plaintiff and *his derivative beneficiary class members* interest is not a *general interest* under *Lampkin* and *Jones* nor is it an *abstract interest* under *Allen*. It is a real and unique interest that is not in any context a distinction without a difference.

This is an action in the main to prevent the de facto disfranchisement of presidential electors and the voters they represent ungrounded in federal or state law and forestall the de jure constitutional mandate to assess the mal-apportionment penalty upon *unbounded southern states* pursuant to (2USC§6). This action seeks as an alternative to effect *proportional apportionment* of the counting of *unbounded southern states* electoral votes in congress.

The Plaintiff has established that: a TRO is warranted and issues pleaded in the complaint deserve adjudication; that this cause be maintained as a class action; and that they are entitled to a *clear right to relief*.

For all of the foregoing reasons, and the full record herein, the Court should reject the Defendant's opposition to the Plaintiff's TRO and deny the Defendants' Motion to Dismiss.

Respectfully submitted,

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

Dated: September 18th, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 18th, 2008, a copy of "PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS" was filed with the Court and served via first class mail on the following:

MEGAN M. WEIS
Special Assistant U.S. Attorney
United States Attorney's Office
Civil Division
555 4th Street, NW
Washington, D.C. 20530

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

September 18th, 2008

