

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASA GORDON,

and

THELMA THARPE,

Plaintiffs,

v.

LORRAINE C, MILLER., Clerk of the
U.S. House of Representatives,

Defendant.

Civil Action 11-00003 (HHK)

**PLAINTIFFS' RESPONSE TO DEFENDANT'S REPLY (DR) TO PLAINTIFFS'
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

**A MOTION TO DISMISS MUST NOT BE AWARDED TO A DEFENDANT WHO
COMPLETELY MISTATES THE FACTS AND ALLEGATIONS**

The defendant is laboring hard, and is desperately trying to misconstrue this action as an equal protection claim under the "one-person, one-vote" principle directed at the electoral college. It is not. Let us be clear, any equal protection claims in this action are *derivative* claims that are not directed at the electoral college. They are directed at a *state practice* not even grounded in state law. Any *derivative* injuries to the Fourteenth Amendment's section one *equal protection clause* raised in this action are a natural by product of a violation of the *malapportionment penalty clause* of Amend.14§2. The Fourteenth Amendment's first section specifies that states may not discriminate by their actions or laws against the people in violation of the Declaration's intent. Section two specifies the severe penalties exacted on state

governments for discriminate actions in regards to the exercise of the franchise by citizens of the state; and section two also specifies the severe penalties exacted on the national *electoral college* and *Representatives to Congress* for discriminate actions that deny or abridge any citizen's "right to vote" for a state's presidential electors in violation of the Declaration's intent.

I. Mr. Gordon Meets the Injury and Redressability Prongs of the Standing Analysis as Established in "Minority Vote Dilution" Supreme Court Precedents.

(A) Traceable Conduct

Defendant makes the specious assertion that:

Mr.Gordon makes exactly no effort to establish “a fairly traceable connection between [his alleged]injury and the complained-of conduct of the defendant.”
See. DR_p.2¶2(May. 11, 2011)

Plaintiffs have asserted a right for a constitutional *remedy* as a *matter of law* for the "ministerial" actions of the clerk that have in fact consummated an existing and ongoing *injury* to their constitutional exercise of the franchise.

Enshrined in the Constitution of the United States of America (**Amend. XIV§2**) as implemented by the "Reduction of representation" U.S. Code (**2USC §6**) is a *de jure* mandate for the reduction of a State's representatives to Congress"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". *See. Compl. for Declaratory and Injunctive Relief at ¶ 8* (Jan. 3, 2011)

Furthermore the Plaintiff's complaint seeks a remedy for redress specifically directed at the actions of the clerk under several provisions of the Constitution that also address the question of mootness i.e.:

Plaintiffs aver and request that this court take judicial notice of the following: The Honorable Lorraine C. Miller, acting ex-officio as the Clerk of the U.S. House of Representatives, under House Rules will in the absence of a court injunction recognize elected members to the U.S. House of Representatives, on January 5th, 2011, and *following sessions of each Congress* in explicit violation of **Amend. XIV§2** as implemented by the

"Reduction of representation" U.S. Code **2USC§6** , depriving citizens' constitutionally protected rights under the First , Ninth, Tenth and Fourteenth Amendment to the United States Constitution from minority vote dilution based on race and/or party affiliation and certain **Amend. IX** rights retained by the people or **Amend. X** powers reserved to the people. *See*. Compl. for Declaratory and Injunctive Relief at ¶ 16 (Jan. 3, 2011). Emphasis added.

Plaintiffs enter this plea for injunctive relief against the Defendant, Clerk of the U.S. House of Representatives, acting ex officio under House Rules in order to enjoin the Clerk from recognizing the full slate of elected members from *unbound Southern electoral states* to the U.S. House of Representatives, who by practice, unsupported by state or federal statute, traditionally award Presidential Electors on a "winner-take-all basis". Plaintiffs seek redress by enforcement of the *malapportionment penalty* provided by Section 2 of the 14th Amendment to the U.S. Constitution, wherein "the right to vote at any election for the choice of electors for President and Vice President of the United States, ... is denied .. or in any way abridged" . *See*. TRO at ¶ 6 (Jan. 3, 2011)

(B) Injury

Completely ignoring the Plaintiffs' Opposition the Defendant makes the specious assertion that:

[H]e (Gordon) does not contend that he was personally deprived of his vote or disenfranchised in any way in the 2008 presidential election. 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.

In stark contradiction to this assertion, in the TRO the plaintiffs (Gordon) declared that:

There is no state election law in the unbounded Southern states that authorizes the allocation of the states' presidential electors on a "winner take all" basis. Therefore the exclusive selection of the States' slates of electors on a "winner take all" basis constituted an *abridgment* of the States' black citizens' "right to vote" and a debasement in the weight of the national black vote and *plaintiffs vote* in and *external* to the unbounded Southern electoral states in violation of **Amend. 14§2**. as implemented by **2U.S.C. § 6**. *See*. TRO at ¶ 9 (Jan. 3, 2011). Additional emphasis added to original.

Furthermore in the Plaintiffs' Opp.at 12 under the Heading:

"III. THE PLAINTIFFS' INJURY AND STANDING IS ESTABLISHED BY "MINORITY VOTE DILUTION" SUPREME COURT PRECEDENTS

The plaintiff Gordon is specific as to how his standing exceeds the standing granted to plaintiffs claims for *minority vote dilution* under the Fourteenth Amendment's *equal protection clause* wherein the right to an equally effective vote is *implicit*. Plaintiffs and specifically Mr. Gordon's claims of minority vote dilution in the present case before the bar are made under the Fourteenth Amendment's *malapportionment clause* wherein the right to vote is *explicit*.

Note the following selected examples:

The Court in *Davis v. Bandemer*, 478 U.S. 127-143 (1986) 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” and that “the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. *Davis v. Bandemer*, 478 U. S. 132-133

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

The reasoning in *Davis v. Bandemer* directly applies to plaintiff's *Gordon of D.C. and Moss of Louisiana who voted for a third party presidential candidate*. Additional emphasis added. *See Opp.* at 16 (Apr. 29, 2011)

In ***Anderson v. Celebrezze*, 460 U.S. 780 (1983)** The Supreme Court held that:

... [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest, because the President and Vice President are the only elected officials who represent all the voters in the Nation, and *the impact of the votes cast in each State affects the votes cast in other States*. 460 U. S. 790-795. Emphasis added.

... In *Williams v. Rhodes*, we squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena.

... The aforementioned findings of the Supreme Court in *Anderson v. Celebrezze* and *Williams v. Rhodes* sustains the standing of minority third party plaintiffs who challenge a state's electoral procedure that unduly favors a duopoly, and **who do not vote in the offending states**. This is precisely the position of the Green Party Plaintiff Gordon of DC and external to the state of Louisiana Green Party petitioner plaintiff Moss of Louisiana. *See Opp.* at 16-17 (Apr. 29, 2011).

The court should keep in mind that in this cause of action the plaintiffs are pleading for redress under the *malapportionment penalty clause* not the *equal protection clause*.

II. The malapportionment penalty clause (Amend. XIV§2) supersedes the Speech or Debate Clause (U.S. Const. art. I, § 6, cl. 1) for Members of Congress subject to the The Reduction of Representation of 2USC§6 in this Cause of Action.

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.” DR_p.6¶2(May. 11, 2011)

Plaintiff Gordon assumed that this argument embodies the authority of common sense.

However,

**QUOD LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT.
A later law by the same authority abrogates all its earlier laws to the contrary.**

Richard Henry Lee warned Samuel Adams in a letter on October 5, 1787, on how the doctrine of *quod leges* could subvert a Bill of Rights by allowing a subsequent Legislature to repeal the rights earlier granted.¹ In 1781, Thomas Jefferson referred to the doctrine of *quod leges* in his *Notes on the State of Virginia*, Query XIII.

[T]hough divers parliaments have attempted to restrain subsequent parliaments, yet could they never effect it; for the latter parliament hath ever power to abrogate, suspend, qualify, explain, or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition, or penalty, in the former: for it is a maxim in the laws of the parliament, ***quod leges posteriores priores contrarias abrogant.***²

The duty of the courts is to construe and give effect to the latest expression of the sovereign will.³

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1. *Richard Henry Lee Letter to Samuel Adams* (October 5, 1787) Letters 2:444-
 2. Lord Edward Coke, 4. *Inst.* 43.
 3. *Kappus v. Commissioner*, T.C. Memo. 2002-36, affd. 337 F.3d 1053, 1057 (D.C. Cir. 2003)(quoting *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); See *S. African Airways v. Dole*, 817 F.2d 119, 125- 126 (D.C. Cir. 1987); *Price v. Commissioner*, T.C. Memo. 2002-215 (where provisions conflicted, the last expression of the sovereign will prevailed under the last-in-time)

[W]e must examine the applicable statutes and Convention provisions to decide (1) whether the Code provisions and the Convention can be harmonized as both parties contend, and (2) *if they cannot be harmonized, which provision qualifies as the "last in time."*⁴

*[c]onflicts between a revenue law and a treaty must be resolved by applying the principle that the provision adopted later in time controls (the last-in-time rule).*⁵

Accordingly it follows that in this cause of action:

The **Reduction of representation clause (Amend. XIV§2)** of members to Congress for an abridgment of citizens' "right to vote" *supersedes*: the ***The three-fifths clause*** (U.S. Const. art. I, § 2, cl. 3 & U.S. Const. art. II, § 1, cl. 2); the ***Qualifications of members cause*** (U.S. Const. art. I, § 5, cl. 1; the ***Members punishment clause*** (U.S. Const. art. I, § 5, cl. 2), and the ***Speech or Debate Clause*** (U.S. Const. art. I, § 6, cl. 1) because where two constitutional amendments apply to the same subject (*representatives to Congress*) the last will of the sovereign prevails. *See Opp.* at 11 (Apr. 29, 2011)

The Defendant in reply simply ignores the aforementioned logical linkage and makes another *frivolous* ad hominem assertion devoid of reason:

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. DR_p.6¶2-7(May. 11, 2011)

The Defendant completely misconstrues this cause of action. The key to the Defendant's argument is the Speech or Debate Clause is “absolute” *when it applies*. This cause of action is joined at the juncture wherein the clerk recognizes an *illegitimate* allotment of members to congress assigned by states in explicit violation of the plain text of the constitution.

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4. *Jamieson v. Commissioner of Internal Revenue*, United States Tax Court, T.C. Memo. 2008-118 (April 29, 2008).
 5. S. Rept. 100-445, at 321-322 (1988); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

The Defendant has *selectively* responded "to only *some* of the arguments" advanced in plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss (Apr. 29, 2011). That is the Defendant "makes exactly no effort" to counter the following argument in plaintiffs' Motion that goes to the illegitimacy of the allocation of members to Congress in violation of the explicit mandate of **Amend. XIV§2** as implemented by **2USC§6**. Specifically:

This civil action avers that the court take judicial notice that Section 2 of the 14th Amendment requires that unbounded southern states allocate their presidential electors in proportion to the popular vote split or suffer the federal statutory *mandate* to reduce the states' representatives in Congress. The 'winner take all' allocation of electors triggers the malapportionment penalty in Section 2, as implemented by the "Reduction of Representation" federal statute Section 6 of Title 2 of the US Code. This statute creates a remedy for the abridgment in the right "to vote at any election for the choice of electors for President and Vice-President of the United States." ... The Plaintiffs in this civil action move this District Court to enforce the Constitution's malapportionment penalty clause (14th Amendment, Section 2) mandate for a "Reduction of representation" of the offending states now in *standing* violation pursuant to 2USC§6 by an injunction of the clerk of the House. *See* Opp. at 4 (Apr. 29, 2011)

The Defendant's reply in this regard is directed at the Plaintiffs' complaint not the opposition motion. **The Defendant advances no argument to counter the plaintiffs argument that members to the House of Representatives from the unbounded Southern States of this action are subject to the malapportionment penalty clause of Amend. XIV§2.**

Accordingly, the Court may and should treat that argument as conceded, and deny the Defendant's Motion to Dismiss "on that ground alone without going further. See *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149(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”).

III. Mr. Gordon States a Claim For Relief that is not Moot.

The Defendant's Motion to Dismiss and Reply to Plaintiffs' Opposition Motion is consistent in misconstruing the representation of Plaintiffs' and specifically Mr. Gordon's claims in this cause of action as pleaded before the court. The representation by Defendant that Mr. Gordon claims there is no state law is disingenuous.

The Plaintiffs' including Gordon state their claims for relief of injury by *minority vote dilution* based on the State's unconstitutional *discrimination by race* and *minority party affiliation* in the allocation of the State's presidential electors by a *practice* of "Winner-Take-All" ungrounded in any election statute. The Plaintiffs'/Gordon proceed constitutionally to assert their rights for redress for the States' violation and the Clerk's subsequent *conformation* of the State's violation to the *malapportionment penalty clause* of **Amend. XIV§2** as implemented by **2USC§6**. This cause of action does not *proceed* or *rely* on any *derivative* "one-person, one-vote" claim of injury pursuant to the equal protection clause of **Amend. XIV§1**.

Therefore the Defendant's principle reliance on the precedent case law *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 defeated and exposed as a specious argument. The plaintiffs in *Williams* pressed their arguments on: (1) the intendment of Article II, Section 1... (2) the general ticket method violates the "one-person, one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment.

In this cause of action the arguments are pressed on: (1) the intendment of the Fourteenth Amendment, Section 2, *See Opp.* at 19-24 (Apr. 29, 2011) (2) A states mere *practice* of the general ticket method violates the *malapportionment penalty clause* of the Fourteenth Amendment by *race* and/or party affiliation.

The Plaintiffs in *Williams* made no claims (as in the present case before the court) that the general ticket system *discriminates* against *racial minorities* in the allocation of presidential electors, and made no claim under the *second* section of the Fourteenth Amendment .

Furthermore, in what is dispositive of this case law as a precedent, is that the challenge to the general ticket method (Winner-take-all) in *Williams* was grounded in state law, whereas in the present case before the court the Plaintiffs' including Gordon proceeds on a challenge to a Winner-take-all State *practice* ungrounded in the State's election statutes.

These issues are ongoing, the injuries are now standing, and will repeat in every future presidential election and therefore are an exception to the mootness doctrine. *See Oppt*, at 7-8.

CONCLUSION

For the foregoing reasons the **PLAINTIFFS' MOTION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** should be GRANTED with the court proceeding on a hearing of the issues raised in the plaintiffs' complaint.

Respectfully submitted,

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May 20th, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** to be served on counsel for defendant by e-mail attached pdf file of this motion in this matter, and in the manner set forth below:

By first class mail, postage prepaid.

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Respectfully submitted,

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May 20th, 2011