

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASA GORDON,

Plaintiff

v.

NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION, *et al.*

Defendants

Case 1:16-cv-02458-RJL

DEFENDANTS' MOTION TO DISMISS

Defendants, the National Archives and Records Administration, the Office of the Federal Register, the Archivist of the United States, and the Director of the Office of the Federal Register, hereby move to dismiss Plaintiff Asa Gordon's complaint in its entirety. As shown in the accompanying brief, Mr. Gordon, lacks standing, his claims are moot, and there is no legal basis for the mandamus relief that he seeks.

Dated: January 9, 2017

Respectfully submitted,

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**DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION TO DISMISS AND IN OPPOSITION
TO PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiff *pro se* Asa Gordon contends that eleven states do not legally require a winner-take-all allocation of electoral votes and therefore *must* allocate their electoral votes proportionally according to the popular vote. Otherwise, he says, they violate the “plain text” of the Fourteenth Amendment. (He does not fully explain this theory.) Mr. Gordon seeks emergency relief in the form of a temporary restraining order or preliminary injunction requiring the National Archives and Records Administration and the Office of the Federal Register¹ to reject any electoral votes that do not conform. [Pl.’s Mot. for TRO or Prelim. Inj. at 2 ¶ 5, ECF No. 4.] Mr. Gordon has previously filed at least six other lawsuits making essentially the same argument—each time without success. This one fares no better. As before, Mr. Gordon lacks standing to bring his claims because he did not vote in the eleven states that are subject to his challenge and because the

¹ The Archivist of the United States is the head of the National Archives and Records Administration, an independent agency in the executive branch of the federal government. The Office of the Federal Register is a component of NARA. Unless otherwise noted in this brief, reference to the National Archives includes both the National Archives and the Office of the Federal Register.

National Archives did not cause and cannot remedy his alleged injury. Further, Mr. Gordon's claims are moot because the Senate has already counted the electoral votes and declared Donald Trump the winner of the presidential election. The National Archives can do nothing to reverse that action. Finally, Mr. Gordon's claim, which is in the nature of mandamus, fails on the merits because no federal law imposes upon the National Archives an obligation to do what he demands. Mr. Gordon's claim therefore lacks the likelihood of success necessary for emergency relief and instead must be dismissed in its entirety. He also fails to satisfy the other factors necessary for emergency relief.

OVERVIEW OF PLAINTIFF'S CLAIMS

Article Two of the United States Constitution mandates that the President and Vice President of the United States be chosen by Electors appointed by each state. U.S. Const. art. II, § 1. Those Electors' votes are generally tied in one way or another to a popular vote for President and Vice President held by the states. Following the popular vote this past Election Day, November 8, 2016, the Electors met on December 19 in their respective states and cast their votes for President and Vice President. *See* 3 U.S.C. § 7 (electors meet "on the first Monday after the second Wednesday in December"). For each state, the results of that vote were recorded on six Certificates of Vote, one of which had to be sent to the President of the Senate and two of which had to be sent to the Archivist of the United States, one for safekeeping in case the Senate failed to receive its Certificate and one for public inspection. 3 U.S.C. § 11. On January 6, 2017, Congress met in joint session, counted the votes, and declared Donald Trump President-elect and Mike Pence Vice President-elect. *See* 163 Cong. Rec. H185–90 (daily ed. Jan. 6, 2017) (Counting of Electoral Votes—Joint Session of the House and Senate); 3 U.S.C. § 15 (mandating that such vote take place on January 6). During the fall of 2016, as it does every four years in connection with this process,

the Archivist of the United States, through the Office of the Federal Register, provided information to state governors and election officials. The primary communicative method is the Federal Register website, which includes, among other resources, a summary of the electoral-college process, quotation of the relevant federal laws, and procedural instructions on how to fill out the necessary documentation.² When the Archivist received the Certificates of Vote from the states, the Office of the Federal Register reviewed them to ensure, for example, that they were signed, that they listed separate vote totals for the president and vice president, and that no members of Congress or the Cabinet served as electors (see U.S. Const. art. II, § 1, cl. 2.).

Mr. Gordon contends that the electoral-college process as administered by certain states is unconstitutional. Specifically, he asserts that Electors in eleven states that do not legally mandate a winner-take-all allocation of electoral votes—i.e., “unbound” states—*must* allocate their electoral votes proportionally based on the percentage of the popular vote cast for each candidate within each state.³ To do otherwise, he says, violates Section 2 of the Fourteenth Amendment of the Constitution, which penalizes states for abridging the right of citizens to vote by reducing their Representatives in Congress. *See also* 2 U.S.C. § 6. To remedy this perceived violation, Mr. Gordon seeks an order in the nature of mandamus requiring that the National Archives (1) inform state governors that the Electors must abide by the Fourteenth Amendment during their December 19 meetings and notify them that reference to section 2 of the Fourteenth Amendment should have been included in the informational packet sent to them; and (2) examine the Certificates of Vote

² See <https://www.archives.gov/federal-register/electoral-college/officials.html>.

³ Those states, according to Mr. Gordon, are Alabama, Arizona, Georgia, Indiana, Iowa, Michigan, North Carolina, Pennsylvania, South Carolina, Tennessee, and Wisconsin. [Compl. ¶ 11.] In each state, a majority of the popular vote went to Donald Trump. Mr. Gordon says that a proportional allocation of Electors from those states would result in additional Electors being awarded to Hillary Clinton and an overall victory for her candidacy. [*Id.* ¶ 13]

to ensure that they comply with Mr. Gordon’s reading of section 2 of the Fourteenth Amendment and reject those that do not. [Compl. ¶¶ 32, ECF. No. 1.]

Mr. Gordon has filed lawsuits substantially similar to this one on at least six prior occasions, and every one of them has been dismissed. *See Gordon v. Haas*, 828 F. Supp. 2d 13, 16 n.8 (D.D.C. 2011) (listing Mr. Gordon’s other lawsuits).

ARGUMENT

I. Mr. Gordon Lacks Standing.

Mr. Gordon cannot claim injury because he did not vote in any of the eleven states where he finds fault with the electoral process. “Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’” *Allen v. Wright*, 468 U.S. 737, 750 (1984). To meet this threshold jurisdictional requirement, a plaintiff must have “standing” to challenge the action sought to be adjudicated. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

A party seeking to invoke a federal court’s jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To satisfy this burden, a plaintiff must show three familiar elements. *First*, he must demonstrate an “injury in fact,” consisting of “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (internal quotation marks omitted). *Second*, he must prove the existence of “a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court.” *Id.* (internal quotation marks omitted). *Third*, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (citation omitted) (internal quotation marks omitted).

The Supreme Court has emphasized that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). These considerations are particularly important in a case such as this one where the Court recognized that “our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Id.* at 819–20.

A. Mr. Gordon Suffered No Injury because He Did Not Vote in an Unbound State.

Mr. Gordon complains that eleven unbound states unconstitutionally allowed their Electors to cast all of their votes to the winner of their popular vote. [Compl. ¶ 10.] Putting aside for now the merits of that challenge, Mr. Gordon lacks standing to bring it. He does not allege that his *own* vote was affected in any way. He resides in Washington, D.C. [see Compl. ¶ 7], which is not one of the unbound states with which he finds fault. Consequently, Mr. Gordon suffered no direct abridgement of his own vote and has therefore not met his burden of pleading a “concrete and particularized” injury for standing. *See Lujan*, 504 U.S. at 561. Instead, his claimed injury seems to be that the abridgement of *other* people’s votes resulted in the electoral victory of a candidate he disfavors. [See Compl. ¶¶ 18–24.] As such, his claim asks the “Court [to] decide a question and afford a remedy as to which [his] interest is remote and speculative and shared by millions of others.” *Lampkin v. Connor*, 239 F. Supp. 757, 761 (D.D.C. 1965). He has no standing to bring such a claim. In fact, two of his prior lawsuits challenging the winner-take-all allocation of electoral votes from unbound states were also dismissed for lack of standing. *See Gordon v. Biden*, 364 F. App’x 651, 652 (D.C. Cir. 2010) (“The plaintiff is not injured by the operation of the five states’ winner-take-all systems because he does not vote in those states.”); *Gordon v. Haas*, 828

F. Supp. 2d 13, 18 (D.D.C. 2011) (“In this rehashed complaint, Gordon has, yet again, failed to furnish facts demonstrating an injury-in-fact. . . . Gordon remains a voter only in the District of Columbia. The allegation that he suffers injury from alleged minority vote dilution in the five states does not save his claim.”).

B. Even if Mr. Gordon Suffered a Particularized Injury, the Archivist Did Not Cause It and Cannot Redress It.

To effectuate the relief he seeks, Mr. Gordon has sued the National Archives and the Office of the Federal Register. But the National Archives does not decide how electoral votes from the eleven unbound states are allocated and therefore have no role in Mr. Gordon’s alleged injury. The Federal Register, on behalf of the Archivist, provides information to state governors and election officials citing and summarizing the provisions of law governing the Electoral College, accepts two of the original Certificates of Vote for safekeeping and public inspection, and conducts a review of those Certificates and alerts state officials of any technical deficiencies. Mr. Gordon wants the Federal Register to update its informational packet to convey his view that the Fourteenth Amendment requires proportional allocation from unbound states and to return nonconforming Certificates. [Compl. ¶¶ 26–30.] But neither of those actions would require the unbound states to change the way they allocate electoral votes. Consequently, Mr. Gordon has not shown that his alleged injury was caused by or is redressable by an action against the National Archives. *See Lujan*, 504 U.S. at 561.

This should come as no surprise to Mr. Gordon. After the 2008 presidential election, he sued the President of the Senate to try to enforce his perceived need for proportional allocation. His case was dismissed for lack of causation and redressability because states and state officials decide how to allocate electoral votes, not the Senate. *See Gordon v. Biden*, 606 F. Supp. 2d 11, 13 (D.D.C. 2009) (“Because Gordon’s alleged injury is not “fairly traceable” to the Vice

President’s actions, which in fact are purely ministerial, but rather is attributable to the actions of third-party states and state officials, he fails to satisfy the causation element of standing.”), *aff’d*, 364 F. App’x 651 (D.C. Cir. 2010). This case requires the same result.

II. Mr. Gordon’s Claims Are Moot because the Senate Has Already Declared the Winner of the Presidential Election.

Mr. Gordon’s request also comes too late because Congress has already declared the winner of the presidential election. The mootness doctrine limits Article III courts to deciding “actual, ongoing controversies.” *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). A case is moot if “events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.” *Clarke*, 915 F.2d at 701 (quoting *Transw. Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990)). Thus, “Article III denies federal courts the power ‘to decide questions that cannot affect the rights of litigants in the case before them,’ and confines them to resolving ‘real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Mr. Gordon claims that the eleven unbound states should have allocated their electoral votes—cast on December 19—proportionally according to the popular vote. [Compl. ¶ 10.] He seeks an injunction requiring that Defendants convey his instructions and return any offending Certificates of Vote. [*Id.* ¶¶ 26–30.] But even if Defendants did what Mr. Gordon requests, it would have no effect. The electoral votes have already been cast and the United States Senate has already counted them and declared Donald Trump the winner of the presidential election. *See* 163 Cong. Rec. H185–90 (daily ed. Jan. 6, 2017) (Counting of Electoral Votes—Joint Session of the House

and Senate); 3 U.S.C. § 15 (mandating that such vote take place on January 6). Mr. Gordon does not challenge the Senate’s action, and the National Archives can do nothing at this point to undo it. Accordingly, Mr. Gordon’s claims are moot and must be dismissed.

III. Mr. Gordon’s Mandamus Claims Must Fail because the National Archives Has No Ministerial Duty to Instruct State Governors or Election Officials on the Substantive Interpretation of Election Laws or to Invalidate Certificates of Vote.

Mr. Gordon seeks relief in the nature of mandamus to compel the National Archives to take five specific acts:

1. instruct governors and electors from the eleven unbound states that the December 19, 2016 meeting of electors must conform to the Fourteenth Amendment, Section 2 as interpreted by Mr. Gordon;
2. examine the Certificate of Votes from the 11 unbound states to ensure that they conform to the Fourteenth Amendment, Section 2 as interpreted by Mr. Gordon;
3. reject those Certificates of Votes that do not conform to the Fourteenth Amendment, Section 2 as interpreted by Mr. Gordon;
4. insert Section 2 of the Fourteenth Amendment into the informational packet sent by the National Archives to the states;
5. contact state governors to inform them that Section 2 of the Fourteenth Amendment and 2 U.S.C. § 6 was not included in the informational packet for the 2016 presidential election.

[Compl. ¶¶ 26–30.]

District courts are authorized by statute to award relief “in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff,” 28 U.S.C. § 1361. Mandamus, however, is an exceptional remedy. It “is drastic; it is available only in extraordinary situations; it is hardly ever granted.” *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (en banc) (quotations omitted). This limitation is achieved in part through a narrow interpretation of the statute’s use of the word “duty.” *13th Reg’l Corp. v. U.S. Dep’t of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). “According to traditional doctrine, a writ of

mandamus will issue ‘only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.’” *Id.* (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)). Finally, in addition to being extraordinary, mandamus relief is also discretionary. *Cartier v. Sec’y of State*, 506 F.2d 191, 199 (D.C. Cir. 1974) (noting that the “exercise of the power of mandamus is a matter committed to the sound discretion of the trial court”), *cert. denied*, 421 U.S. 947 (1975). “The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable.” *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002).

None of the five acts sought by Mr. Gordon are within the authority of the National Archives. The role of the National Archives stems primarily from the Federal statute providing that the National Archives is responsible for receiving two originals of the Certificates from each state for safekeeping and public inspection: 3 U.S.C. §§ 11, 12. That statute addresses the Archivist’s role if the Certificates are not timely delivered and the President of the Senate is not available to take action. Neither statute plausibly extends to instructing the states or Congress on how to interpret and implement state and federal election laws or to invalidating Certificates of Vote, and Mr. Gordon cannot cite to any other federal statute that does. Accordingly, the relief Mr. Gordon seeks is not available.

IV. Mr. Gordon Cannot Satisfy the Elements Necessary for a Temporary Restraining Order or Preliminary Injunction.

To obtain a preliminary injunction or temporary restraining order, a plaintiff must show the following: “1) a substantial likelihood of success on the merits, 2) that he would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.”

Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir.1995)). The Court then balances the showing in these four areas when deciding whether to grant an injunction. *CityFed Financial Corp.*, 58 F.3d at 747.

Mr. Gordon cannot make the requisite showing. (1) He does not have a likelihood of success on the merits for the reasons stated in the prior three parts of this memorandum. (2) He would not suffer irreparable injury because, as discussed in Part I, he has claimed no concrete and particularized injury. (3) An injunction would actually injure other parties by casting doubt upon the presidential electoral process after it has already concluded, the winner certified, and only weeks before Inauguration Day. And (4) for the same reasons just stated, an injunction would not be in the public interest. For those reasons, Mr. Gordon's motion for a temporary restraining order or preliminary injunction should be denied.

* * *

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff's motion for a temporary restraining order and preliminary injunction be denied and that this case be dismissed.

Dated: January 9, 2017

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Defendants' motion to dismiss and opposition to Plaintiff's motion for a temporary restraining order and preliminary injunction [ECF No. 4], it is hereby ORDERED that Defendant's motion is GRANTED and Plaintiff's motion is DENIED.

It is further ORDERED that this case is dismissed with prejudice.

It is further ORDERED that Plaintiff's motion for oral argument on summary judgment [ECF No. 2] is DENIED as moot.

Dated: _____

The Honorable Richard J. Leon
United States District Judge

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on this day, January 9, 2017, **Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss and in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction** was served upon Plaintiff by mailing it, postage prepaid, to the following address:

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Washington, District of Columbia 20017

A courtesy copy has been sent by email to dignews@aolcom.

/s/ Johnny Walker
JOHNNY H. WALKER
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