

ASA GORDON,

Plaintiff

v.

NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION, *et al.*

Defendants

FACTUAL BACKGROUND

At the Jan., 9th TRO hearing, Defendants filed a dispositive motion to move the court to dismiss this Civil Action asserting that the Plaintiff “ lacks standing, his claims are moot, and there is no legal basis for the mandamus relief that he seeks” [Dfs' Mot. to Dismiss&Opp.to TRO at 2¶1].

Defendants, despite acting to fulfill the aforementioned funtions, avers to the court an incredulously bold argument i.e. that the Plaintiff:

“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”. [Dfs' Mot. to Dismiss&Opp.to TRO at 8 ¶ 2]

Defendants' bold assertion is belied by the activities of the Defendants through the Office of the Federal Register (OFR) pursuant to the Federal Registration Act **44U.S.C.15, 1CFR2** to inform:

" citizens of their rights and obligations by providing ready access to the official text of Federal laws, Presidential documents, administrative regulations and notices, and descriptions of Federal organizations, programs and activities."

The OFR has produced and posted on the Internet "*Provisions of the Constitution and United States Code relating to Presidential Elections*" as General Information within the zone of interest of all citizens. This document is also produced in pamphlet form for State Governors and the Mayor of the District of Columbia.

To what purpose?

It is obvious that in this *Case-or-Controversy*, a writ of mandamus to correct the *wrongful judgment* of OFR to misinform the Plaintiff, the citizenry and their public officials by the OFR's willful omission of an indisputable provision pertaining to their suffrage rights is far from *speculative* and will be definitively redressed by a favorable court decision. *Richardson v. Ramirez*, 418 U.S. 24, 61 (1974).

[**Defendants' unwitting affirmation of Plaintiff's principle claim in their Motion to Dismiss**]

Defendants' Motion to Dismiss, submitted at the TRO hearing, *confirms* plaintiff's assertion that the Defendants have the authority to provide redress for injury arising from an unconstitutionally constituted Electoral College. Specifically, Defendants *affirm* their role in insuring the integrity of the Electoral College by declaring at ¶ 1 Pg.3 in their Motion to Dismiss:

“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.)”. (My emphasis).

Thus Defendants *affirm their authority and responsibility to ensure* the constitutional integrity of presidential electors submitted by the states. However, when the Archivist receives the Certificates of Vote from the states, Defendants choose not to review them to *ensure* that no members serve as electors in violation of the apportionment mandate of **U.S. Const. AMEND. XIV. § II.**

This singular unwitting admission by Defendants constitutes a nugatory refutation of the entire set of arguments Defendants posit in their now fatally flawed Motion to Dismiss.

However, for the sake of argument.

ARGUMENT

I. 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.

II. On the Question of STANDING

A. Unique Standing as a DC Citizen Voter

Defendant's aver that Plaintiff:

“Suffered No Injury because He Did Not Vote in an Unbound State. 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)". [Dfs' Mot. to Dismiss&Opp.to TRO at 5 ¶ 2].

Defendants assert 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.

Defendant argues that the Government is immune when it "*nuke*s" citizens' rights.

However, in this cause of action, Plaintiff's standing is singularly unique as a citizen voter. 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, is 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 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 to whom he 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, nor can Plaintiff appeal for representative

leverage to apply pressure to remedy Plaintiff suffering from the malfeasance of governmental officials. Thus as a *pseudo* citizen voter, 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.

B. Anderson v. Celebrezze

Defendants argue that Plaintiff lacks standing because Plaintiff does not vote in any of the states subject to this civil action. Defendants' principle reliance on Supreme Court precedents: *Allen v. Wright*, 468 U.S. 737, 750 (1984) ; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) ; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ; *Raines v. Byrd*, 521 U.S. 811, 818 (1997) [Dfs' Mot. to Dismiss&Opp.to TRO at 3 ¶ 4-5], wherein the Plaintiffs' lack of standing is predicated upon the thesis that *Plaintiffs' alleged injuries are not redressable by the Defendants but are subject to other third parties*, is totally misplaced for in this instance the Defendants represent the only party that has assumed the responsibility for the action in question (to ensure the integrity of electors). Furthermore none of these precedents address standing in regards to the electoral process.

As a DC voter, Plaintiff asserts the same claim of standing as granted by the Supreme Court to out of state voters in *Anderson v. Celebrezze*. The Supreme Court held in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) that:

“A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment, and discriminates against those candidates and voters whose political preferences lie outside the existing political parties. And in 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.”

C. Havens Realty Corp. v. Coleman

Plaintiff as Executive Director of DIG associates has standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), because there has been a “concrete and demonstrable injury to the organization's activities[,] with the consequent drain on the organization's resources.” See also *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904-05 (2dCir. 1993).

D. Non-enumerated and reserved 9th&10th Amend. Rights

The Federal citizen's "right to vote" for presidential electors under Section 2 of the 14th Amendment supersedes the appointment of electors "in such manner as the Legislature thereof may direct" under Article II, section 1, clause 2, because where two constitutional amendments apply to the same subject, (election of presidential electors) QUOD LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT. Furthermore, Amendment XIV is clear by its adoption and by the constitutional construction of its framers that the non-enumerated rights of the Ninth Amendment retained by the people takes precedence over the non-delegated powers of the Tenth Amendment reserved to the states, (or to the people). The plain text of the second section of the Fourteenth Amendment sets a clear hierarchy, placing the citizen's right to vote over a state representative's right to hold his seat in Congress for an abridgment of that right.

E. Plaintiff Asserts a Right to Proceed As Private Attorney General.

The Attorney General has a public trust to enforce the law. In more than 140 years, the Attorney Generals of the United States have failed to enforce Section 2 of the 14th Amendment even over periods where the violations were blatant and violent. Plaintiff is a person who was to benefit from Section 2 of the 14th Amendment. If the Attorney General has abdicated his duty to enforce the law, then let Plaintiff proceed as a private Attorney General. Section 2 of the 14th Amendment has never been litigated as it was intended by the Reconstruction-era Constitutional framers; it has never been

enforced. Judicial notice may be taken that for well over a century, Congress, the Judiciary and the Executive Branch of Government have failed to enforce this provision of the Constitution despite overt denials of the "right to vote" and other civil rights to African-Americans. Since Congress and the White House have not enforced this Constitutional provision for well over a century, then a theory of private Attorney General should fill the resulting gap, for there are no surplusages or dead letters in the law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

F. Universal Mathematical Standing

Every voting citizen has mathematical standing. Every citizen voter is included in the formula for calculating congressional and state representation . Congressional representation for each state is calculated by the formula:

$$Rs=Ps/(Pn/436)+2$$

where **Ps** is the population of the state (me) and **Pn** (me again) is the population of the nation. The number **436** represents the number of seats in the House of Representatives plus one for the District of Columbia. The equation is rounded to the nearest whole number for each state and then adjusted for any statistical anomaly when the resulting sum does not equal **538**.

III Augmented INJURIES TO PLAINTIFF

Defendants' malfeasance in the performance of their duties by the improper certification of **Art. II, § 1** electors and the non-certification of proper **Amend XIV§2** electors, commitment with the dissemination of deficient information to the Governors of states regarding the laws governing the presidential elections has caused the Plaintiff to divert and expend valuable resources specifically to counteract those violations.

There is a direct conflict between Defendants' malfeasance in the performance of their responsibilities in regards to the electoral process and DIG associate's mission of protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, and the electoral process at least at the federal level. Defendants electoral malfeasance creates questions about the legitimacy of the members who make up the Electoral College and thus the Constitutional legitimacy of the Presidency, leaving the public insufficient information to judge.

Plaintiff has expended a significant amount of time and resources since the 2000 presidential election educating the public about citizens' voting rights pursuant to section two of the fourteenth amendment. Because of disbelief that such rights exist, the public relies on the information posted at the web sites maintained by NARA as the definitive federally designated source for all valid information regarding Presidential elections.

IX CONCLUSION

The fundamental core of a democratic society is that the citizenry be informed. NARA is an agency charged with the responsibility to inform the citizenry. The choice to withhold pertinent information to a class of citizens who are misinformed of their rights is tantamount to malfeasance. The Plaintiff strongly asserts that the Defendant as a governmental entity has a responsibility when it undertakes to discharge a duty to the general public, to discharge that responsibility with accuracy and completeness.

The Federal Register Act (FRA) **44U.S.C.15. & 1CFR2** charges NARA to serve as a repository of governmental documents and inform the public as declared in their mission statement.

The dissemination of this information is mandated and only the medium and format of its dissemination is discretionary. Therefore the only adequate remedy available to the Plaintiffs for the Defendants' conduct is a writ of mandamus. The OFR is the author and has the sole editorial responsibility to amend or augment this document. The District of Columbia and the state officials who are the recipients of this pamphlet have no autonomy or statutory responsibility to amend or augment the document. Thus the remedy sought by plaintiffs is *traceable* only to the conduct of NARA.

NARA through the OFR has the sole authority to amend or edit the document "*Provisions of the Constitution and United States Code relating to Presidential Elections*".

Plaintiff brings this action as a DC voter and DIG associates' Exe. Dir., an organization along with Plaintiff, directly impacted by the misinformation occasioned by OFR's judgment to exclude a clear and unambiguous provision of the United States Constitution *relating to Presidential Elections*. This provision was intended for the benefit of the Plaintiff and other citizens similarly impacted to protect the fundamental right of suffrage pertaining directly to voting rights of individuals and the penalty for disregarding those rights.

The particular impact of this misfeasance by NARA on Plaintiff and others similarly situated was that they were not made cognizant of avenues of redress for the *denial* or *abridgment* of their suffrage rights under Section 2 of the Fourteenth Amendment of the United States Constitution. This injury is continuing and if not abated will have a similar impact in any future threat, denial or abridgment of the Plaintiff's suffrage rights and exact a particularized drain on Plaintiff's resources to exercise his responsibility as Exe. Dir. of DIG associates.

Finally, as established at the outset of this response, the Defendants' Motion to Dismiss, submitted at the Jan. 9th TRO hearing, *confirmed* Plaintiff's assertion that the Defendants have the authority to provide redress for injury arising from an unconstitutionally constituted Electoral College, QED.

In proceedings before the court to date, i.e. the January 9th, 2017 TRO hearing, the Defendant's Counsel have represented NARA officials presiding over the integrity of the Electoral College and the Presidential electoral process as impotent empires that can call constitutional strikes on electors but cannot call electors out, referees who can call constitutional fouls on offending electors but can exact no penalty.

For all of the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss.

Dated: February 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017 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:

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Furthermore, Courtesy copies (pdf) have been sent by email to johnny.walker@usdoj.gov.

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