

Does the Electoral College Dilute Votes?

Park v. Parnell (Timothy M. Burgess, D. Alaska 3:16-cv-281), *James v. Cascos* (Robert Pitman and Jeffrey C. Manske, W.D. Tex. 6:16-cv-457), *Conant v. Oregon* (Marco A. Hernandez, D. Or. 3:16-cv-2290), and *Barnes v. Wisconsin* (William C. Griesbach, E.D. Wis. 1:16-cv-1692)

A pro se complaint sought to enjoin on a vote-dilution theory a state's Electoral College votes' going to the prevailing presidential candidate in the state, because although that candidate earned a majority of electoral votes, an opposing candidate earned more votes nationwide. Four days later, the district judge ruled against the plaintiff. Although the judge granted the plaintiff in forma pauperis status during the emergency phase of the litigation, the judge denied in forma pauperis status on appeal because the plaintiff did not present supplementary financial information as ordered. Pro se actions in Virginia, Oregon, Texas, and Wisconsin challenging winner-take-all allocations of Electoral College votes also were unsuccessful.

Subject: Voting irregularities. *Topics:* Electoral College; pro se party.

A 2016 lawsuit in Alaska unsuccessfully challenged the state's contribution to an Electoral College victory for the presidential candidate who placed second in national popular votes. Suits challenging the winner-take-all rule in Virginia, Oregon, Texas, and Wisconsin also were unsuccessful.

Virginia, Alaska, and Texas

A voter filed a pro se federal complaint in the District of Alaska on December 12, 2016, against Alaska's three delegates to the Electoral College, seeking to enjoin the delegates from voting for Donald Trump as President because Hillary Clinton's receiving nearly three million more votes than Trump nationwide meant that an Electoral College victory for Trump would "effectively cause a single vote for Clinton to be valued less than a single vote for Trump."¹ The voter filed a motion for expedited consideration with her complaint.²

Two days later, Judge Timothy M. Burgess set the case for hearing on December 15.³ Although the voter did not "explain efforts to communicate with or the positions taken by opposing parties," Judge Burgess observed that the matter needed to be resolved by the December 19 meeting of the Electoral College.⁴

1. Complaint at 3, *Park v. Parnell*, No. 3:16-cv-281 (D. Alaska Dec. 12, 2016), D.E. 1; see *Alaska's Presidential Electors Set to Vote Trump Despite Intense Lobbying*, Alaska Dispatch News, Dec. 16, 2016.

2. Motion, *Park*, No. 3:16-cv-281 (D. Alaska Dec. 12, 2016), D.E. 4.

3. Order, *id.* (Dec. 14, 2016), D.E. 5.

4. *Id.*

At the hearing, the voter said that she had not received a copy of the delegates' motion to dismiss the complaint, which was filed that day, so Judge Burgess agreed to accept a written response from the voter on the following day.⁵ Following oral arguments on December 15 and the voter's December 16 written response to the motion to dismiss⁶ the complaint, Judge Burgess dismissed the complaint as barred by the United States Constitution's establishment of the Electoral College as the body responsible for selecting the President of the United States.⁷

On the day that he announced his decision, Judge Burgess granted the voter in forma pauperis status.⁸

Based on the Court's review of [the in forma pauperis application], it appears that Park's ability to pay filing fees and costs is a close call. Under more normal circumstances, the Court would make further inquiry into Park's eligibility to proceed in forma pauperis. However, in light of the expedited schedule by which this case is proceeding, the Court believes that its time and resources are better spent considering the merits of this case rather than Park's finances.⁹

In response to the voter's motion to proceed on appeal in forma pauperis,¹⁰ Judge Burgess concluded, "As the Court is no longer faced with the same time constraints, the Court determines that additional inquiry into whether Park qualifies for in forma pauperis status for purposes of her appeal is warranted."¹¹ Because the voter did not file supplementary information by February 6, 2017, as ordered,¹² Judge Burgess denied the voter in forma pauperis status on appeal on February 14.¹³

On Wednesday, December 14, 2016, a Texas voter filed a pro se complaint in the Western District of Texas complaining, "my vote, and the vote cast by every other Texas voter for a Clinton elector, will be changed, against our democratically expressed wishes, to a vote for a Trump elector under Texas' winner-take-all presidential elector election scheme."¹⁴ With his complaint, the voter filed a motion for a temporary restraining order and a preliminary injunction.¹⁵

On Monday, Judge Robert Pitman concluded, "The court finds that it need not address any philosophical or political arguments regarding the justification of the 'winner-take-all' approach because it is bound by Supreme Court

5. Minutes, *id.* (Dec. 15, 2016), D.E. 13; *see* Motion to Dismiss, *id.* (Dec. 15, 2016), D.E. 9.

6. Response, *id.* (Dec. 16, 2016), D.E. 16.

7. Opinion, *id.* (Dec. 16, 2016), D.E. 18.

8. Order, *id.* (Dec. 16, 2016), D.E. 15.

9. *Id.*

10. *See* Docket Sheet, *Park v. Parnell*, No. 17-35061 (9th Cir. Jan. 23, 2017).

11. Order, *Park*, No. 3:16-cv-281 (D. Alaska Jan. 27, 2017), D.E. 25.

12. *See id.*

13. Order, *id.* (Feb. 14, 2017), D.E. 26; *see* Order, *id.* (Mar. 24, 2017), D.E. 30 (denying reconsideration).

14. Complaint at 3, *James v. Cascos*, No. 6:16-cv-457 (W.D. Tex. Dec. 14, 2016), D.E. 1.

15. Motion, *id.* (Dec. 14, 2016), D.E. 3.

precedent on this issue.”¹⁶ Judge Pitman also noted¹⁷ that relief was denied in a similar pro se action filed in the Western District of Virginia on October 4,¹⁸ and Judge Norman K. Moon in the Virginia case relied on a 1968 three-judge decision in the Eastern District of Virginia, summarily affirmed by the Supreme Court, upholding the constitutionality of winner-take-all allocations of a state’s Electoral College votes.¹⁹ The 1968 court observed that awarding all of a state’s Electoral College votes to a single candidate maximized the state’s influence on the Electoral College result.²⁰

Also on Monday, December 19, 2016, Western District of Texas Magistrate Judge Jeffrey C. Manske recommended dismissal of the complaint for lack of standing: “A general interest in seeing that the government abides by the Constitution is not [sufficient].”²¹ Finding no clear error, and observing no objection from the plaintiff, Judge Pitman adopted Judge Manske’s recommendation on January 9, 2017.²²

Oregon and Wisconsin

Pro se plaintiffs challenged the winner-take-all rule in federal complaints filed in the District of Oregon on December 7, 2016,²³ and in the Eastern District of Wisconsin on December 21.²⁴

On December 23, Eastern District of Wisconsin Judge William C. Griesbach determined that the plaintiff was unable to establish a strong likelihood of success on the merits.²⁵ Judge Griesbach ruled quickly:

The Defendant State of Wisconsin has not yet been served with the complaint, and it seems unlikely that once it is served, it will have much time to respond to Barnes’ request for preliminary relief before the event Barnes seeks to enjoin occurs. The Court will therefore proceed to address Barnes’

16. Opinion at 4, *id.* (Dec. 19, 2016), D.E. 6.

17. *Id.* at 5.

18. Opinion, Schweikert v. Herring, No. 3:16-cv-72 (W.D. Va. Oct. 18, 2016), D.E. 17; *see* Complaint, *id.* (Oct. 4, 2016), D.E. 1; *see also* Opinion, *id.* (Dec. 2, 2016), D.E. 29, 2016 WL 7046845 (dismissing the action); Order, *id.* (Nov. 1, 2016), D.E. 23 (denying reconsideration of the preliminary relief decision); Order, *id.* (Nov. 14, 2016), D.E. 25 (denying a motion to recuse the judge because he was nominated to the bench by the husband of one of the presidential candidates).

19. Williams v. Va. State Bd. of Elections, 288 F. Supp. 622 (E.D. Va. 1968), *summarily affirmed*, 393 U.S. 320 (1969).

20. *Id.* at 626–28.

21. Report and Recommendation, James, No. 6:16-cv-457 (W.D. Tex. Dec. 19, 2016), D.E. 7.

22. Order, *id.* (Jan. 9, 2017), D.E. 10.

23. Complaint, Conant v. Oregon, No. 3:16-cv-2290 (D. Or. Dec. 7, 2016), D.E. 1 [hereinafter *Conant* Complaint].

24. Complaint, Barnes v. Wisconsin, No. 1:16-cv-1692 (E.D. Wis. Dec. 21, 2016), D.E. 1; *see* Amended Complaint, *id.* (Dec. 28, 2016), D.E. 3.

25. Opinion at 2, *id.* (Dec. 23, 2016), D.E. 2 [hereinafter *Barnes* Opinion]; *see* Order, *id.* (Dec. 30, 2016), D.E. 7 (denying reconsideration).

request for a preliminary injunction without waiting for the State's response.²⁶

The plaintiff voluntarily dismissed the action on January 13, 2017.²⁷

With his complaint, which was filed “late in the day,”²⁸ the Oregon plaintiff filed a motion for expedited emergency hearing “no later than Monday, December 12, 2016,”²⁹ on his challenge to Oregon’s winner-take-all allocation of Electoral College votes.³⁰ District Judge Marco A. Hernandez observed on December 9 that the plaintiff’s “urgency, which was created by his own late filing, is due to a December 13, 2016 deadline for state certification of Oregon electors.”³¹ Observing also that “challenges to the Electoral College have been routinely rejected,”³² Judge Hernandez construed the motion as a motion for a temporary restraining order, which Judge Hernandez denied.³³ On December 28, Judge Hernandez again denied the plaintiff immediate relief³⁴ following a December 22 motion for a temporary restraining order³⁵ and a December 27 amended complaint.³⁶

On March 29, 2017, Judge Hernandez dismissed the case.³⁷ Judge Hernandez also denied relief from the omission of Electoral College electors’ names from the presidential ballot and the exclusion of independent voters from party primary elections.³⁸ The court of appeals affirmed the dismissal for lack of standing.³⁹

26. *Barnes* Opinion, *supra* note 25, at 1.

27. Notice, *Barnes*, No. 1:16-cv-1692 (E.D. Wis. Jan. 13, 2017), D.E. 14.

28. Opinion at 1, *Conant v. Oregon*, No. 3:16-cv-2290 (D. Or. Dec. 9, 2016), D.E. 4 [hereinafter *Conant* Opinion].

29. Motion, *id.* (Dec. 7, 2016), D.E. 2.

30. *Conant* Complaint, *supra* note 23.

31. *Conant* Opinion, *supra* note 28, at 2.

32. *Id.* at 4.

33. *Id.* at 4–5.

34. Docket Sheet, *Conant*, No. 3:16-cv-2290 (D. Or. Dec. 7, 2016) (D.E. 12).

35. Temporary Restraining Order Motion, *id.* (Dec. 22, 2016), D.E. 11.

36. Amended Complaint, *id.* (Dec. 27, 2016), D.E. 14.

37. *Conant v. Brown*, 248 F. Supp. 3d 1014 (D. Or. 2017).

38. *Id.*

39. *Conant v. Brown*, 726 F. App’x 611 (9th Cir. 2018).