presidential elector performs a federal function, he votes as agent of the State pursuant to its appointing authority under Article II, Section 1, Paragraph 2 of the Constitution. *In re Green*, 134 U.S. 377. Delaware sues to protect its electors' votes from a relegation to second class status never contemplated by our federal system. In so doing, it seeks to vindicate a state constitutional right of the highest order. Its claim is comparable (in origin only) to those based upon the state's roles in our federal system which gave South Carolina standing to challenge the federal Voting Rights Act of 1965 in *South Carolina v. Katzenbach*, ___ U.S. ___, 86 S. Ct. 803.

Its action as *parens patriae*, however, asserts claims on a broader basis transcending sovereign and proprietary interests of the state as an entity. In such an action a state vindicates the rights of its citizens as an aggregate of persons and protects them in their health, prosperity and welfare. *Parens patriae* actions have been readily sustained when brought to enforce economic and property rights of the state's citizenry, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (suit to enjoin enforcement of another state's statutory preference of its own citizens in the distribution of natural gas): *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (suit to enjoin discharge of noxious industrial gases from another state); *Missouri v. Illinois*, 180 U.S. 208 (suit to prevent discharge of sewage into interstate waters); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (suit against twenty railroads to enjoin an alleged conspiracy to fix unreasonable rates for Georgia business). The present suit is similarly brought by Delaware as *parens patriae*, representing the interests of its citizens in being accorded their constitutional rights in the national process of electing the President.

Neither by logic nor precedent can it be said that suits based upon citizens' rights of political equality and voting effectiveness are on any lower plane with respect to standing to sue than are suits concerning their health or economic interests. The familiar line of cases beginning with

Baker v. Carr, *supra*, and continuing through *Carrington v. Rash*, 380 U.S. 89, and *Harper v. Virginia State Board of Elections*, ___ U.S. ___, 86 S. Ct. 1092, establish, not only the "one voter-one vote" principle, but also that rights of suffrage are as basic as those protected from interstate infringement in previous *parens patriae* actions. Standing to protect such rights has never been diminished by the fact that they are vindicated in a representative suit rather than directly by individual voters. Although this suit is one of first impression, so were previous *parens patriae* suits involving health or economic interests when they were adjudicated in the interests of the human rights which were at stake. This action raises interstate legal issues as substantial as those of previous *parens patriae* suits and is equally entitled to be adjudged on its merits.

There is also precedent for multi-state *parens patriae* suits to vindicate individual interests which are based in federal law. In both the natural gas original action, *Pennsylvania v. West Virginia*, *supra*, and the railroad rate litigation, *Georgia v. Pennsylvania R.R.*, *supra*, *parens patriae* was invoked by a state to vindicate its citizens' interests based on the federal constitutional policy of free flow of commerce in a unified national economy. In the railroad rate case there was also explicit reliance on federal antitrust statutes. The present action similarly seeks to protect from abridgment by other states' laws a basic federal constitutional interest of Plaintiff's citizens, that of participation on a valid, reasonable basis in the election of the Nation's Chief Magistrate. The people's interest in a fair, representative and undistorted interstate elective process is as important as their interests in the interstate flow of natural gas, stream pollution or noxious industrial fumes.

The limitation of *Massachusetts v. Mellon*, 262 U.S. 447, upon states' *parens patriae* actions is not applicable to the present suit. There the state's purpose was to challenge a *national* legislative policy on *national* consti-

tutional grounds. Here, *state* policies are challenged as depriving Plaintiff and its citizens of federally-based rights, as in the *Georgia* and *Pennsylvania* cases.

Like the present action, South Carolina's recent challenge of the Voting Rights Act of 1965 was predicated both upon interests of the state in protecting its electoral processes and interests of its citizenry in their rights of suffrage. Unlike this action, it sought to nullify national legislative policies. Nonetheless, the state's standing was held to be sufficient except for a few minor claims barred by the *Massachusetts v. Mellon* rule and other considerations not present here. One basis of state standing was held to be interests of the state *vis-a-vis* the National Government in our federal system. *South Carolina v. Katzenbach*, *supra*. *A fortiori*, Delaware has standing to assert its interests *vis-a-vis* other states of the Union, as well as standing *parens patriae* to protect its citizens' federal suffrage rights from debasement by actions of other states.

It may be contended that Plaintiff and its citizens lack standing to challenge laws of other states which apply directly only to persons within such states. Such a mechanistic and blindly negative view was squarely rejected in *Pennsylvania v. West Virginia*, *supra*. Citizens of Pennsylvania and Ohio successfully challenged a West Virginia statute regulating natural gas transmission. Like defendants' election laws, West Virginia's gas code necessarily operated only within its own jurisdiction, but it had extra-territorial consequences which abridged federal rights of other states' citizens and which enabled them to obtain redress in this Court. If the present case differs significantly, it is in that defendants' state unit-vote laws have a more destructive extra-territorial effect upon federal rights because of the inherently interrelated functioning of the national electoral machinery.

Nor is the fact that Plaintiff relies partly upon denials of rights of citizens in other states any impediment to its

standing. Any rule that a litigant may complain only of denials of his own rights is merely a rule of practice which need not be applied in constitutional litigation. Where a plaintiff has personal standing to assert a claim against a defendant, he may show that defendant's wrongful acts also deprive others of their rights. *Barrows v. Jackson*, 346 U.S. 249; *United States v. Raines*, 362 U.S. 17. More importantly, the intrastate effects of defendant's state unit-vote laws are inseparable from their interstate effects which injure Plaintiff and its citizens in their national political rights. The state unit system's wrongful cancellation of state minorities' votes and its arbitrary misappropriation of the state's voting power attributable to such minorities is the aspect of the system which unconstitutionally isolates political partisans in one state from allied partisans in other states.

JUSTICIABILITY

Since *Baker v. Carr*, *supra*, it is no objection to a federal court action that it seeks to vindicate political rights or to correct states' internal distributions of voting weight, representation or political power. Since its decision on state legislative apportionment, this Court has also applied constitutional mandates to states' apportionments of their delegations in the House of Representatives, *Wesberry v. Sanders*, 376 U.S. 1, and to the county unit system of electing a governor, *Gray v. Sanders*, 372 U.S. 368. This action seeks to apply the same principles to invalidate the unit-vote feature of presidential elections, likewise a creature of state law. As in the previous cases "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government co-equal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home . . . Nor need [Plaintiff] . . . ask the Court to enter upon policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, *supra*, at 226.

In *Baker*, Mr. Justice Brennan suggested several grounds for distinguishing, rather than overruling, some previous dismissals of legislative representation or voting unit suits. Most of these turned upon aspects of appellate review and none is relevant here. The suggested grounds included: imminence of an election, *Colegrove v. Green*, 328 U.S. 549; possibility of legislative action and suit prematurely brought, *Remmey v. Smith*, 342 U.S. 916; no substantial federal question raised below, *Tedesco v. Board*, 339 U.S. 940; and, adequate state grounds supporting a lower court decision, *Anderson v. Jordan*, 343 U.S. 912.

That election of a co-equal and independent branch of the Federal Government is involved is no obstacle. *Wesberry v. Sanders*, *supra*. More specifically, the challenge of state methods of appointing presidential electors does not affect justiciability. *McPherson v. Blacker*, *supra*; *Ray v. Blair*, *supra*.

Prospective difficulty of devising and enforcing a remedy has sometimes been a consideration underlying a determination to treat a cause as nonjusticiable. Where a remedial writ must run against a sister branch of government at the same level and compel affirmative action, this consideration may well give pause. *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475. But this factor is not present in this suit, as it was not in the analogous federally based suits concerning state legislative apportionments, congressional districting and county unit voting. In such suits, courts now freely entertain the actions and the enforcement problems have been far less than some had expected. (See the litigation summaries and status reports in Council of State Governments, *Legislative Reapportionment in the States* (June, 1964 and Supp., June 1965); Representation Column, 54 *Nat. Civ. Rev.* 430 (September, 1965).)

It must be concluded that there is no basis for treating

this presidential elector suit differently from the recent "one man-one vote" suits regarding state legislative apportionment, congressional districting, and county unit voting for one state officer. Certainly, the characterization of questions as "political" is no longer a valid basis for holding them inappropriate for adjudication. The case law appears to be in agreement with Professor Wechsler that federal courts should abstain from adjudication of so-called "political questions" only upon a determination that "the Constitution has committed to another agency of government the autonomous determination of the issue raised." Wechsler, "Toward Neutral Principles of Constitutional Law." 73 Harv. L. Rev. 1, 9 (1959).

Precedents which suggest a reluctance in the Court to accept certain cases in its original jurisdiction are also distinguishable. Where other forums are available and where the suit involves untangling complicated issues of fact, the parties on occasion have been remitted to their remedies elsewhere. *Massachusetts v. Missouri,* 308 U.S. 1; *Louisiana v. Cummins,* 314 U.S. 580. Apparently contrary, however, is *Georgia v. Pennsylvania R.R., supra.* By contrast, the present suit turns upon legal questions concerning states' and citizens' rights to participate in presidential elections. The operation of the electoral college system is relatively simple and the necessary facts are largely historical and subject to judicial notice. No evidentiary hearing should be necessary. Also, no alternative forum is available because 28 U.S.C. Sec. 1251 vests original and exclusive jurisdiction in this Court of all controversies between two or more states, while non-exclusive jurisdiction is authorized for actions by a state against citizens of another state.

Furthermore, an original action to which all states are parties is the only practical means of remedying the inequities caused by the national inter-action of unit-vote laws in presidential elections. Although individual actions within various states by their citizens are available to minority voters whose votes are arbitrarily misappropri-

ated, such irregular and piece-meal elimination of the states as electoral units could cause chaos in a succession of presidential elections. All such cases ultimately would come to this Court, in any event. In this action all necessary facts are equally available and one decree can be effective as to all states and produce the necessary corrections in a timely, orderly and uniform manner.

The recent Prayer and Bible Reading Cases indicate a policy in favor of according standing and exercising jurisdiction where an important issue is such that otherwise it could not be effectively adjudicated. *Engel v. Vitale*, 370 U.S. 421; *School Dist. of Abington Township v. Shempp, Murray v. Curlett*, 374 U.S. 203 at 224 n.9 and 226 n.30. This consideration is even more compelling in the present case which raises issues which are unquestionably of national concern. The ineffectiveness of other remedies to correct the alleged interstate wrongs bring this action within the reasoning of *Missouri v. Illinois*, 180 U.S. 208, where in exercising jurisdiction this Court noted:

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent them and defend them." (*Id.* at 241).

QUESTIONS PRESENTED

Although it is impossible to determine all the issues until the defendants have responded to Plaintiff's motion and complaint, it is believed that the motion alone raises no substantial question because a claim within the original jurisdiction of this Court clearly is stated in the proposed complaint. On the merits, if issue is joined on all constitutional claims set forth in the complaint it is submitted that the following questions will then be presented:

1. Whether a state's unit system of awarding all of a state's presidential electoral votes to the winner of a plurality of its popular votes denies to minority voters within the state due process of law and equal protection of the laws in violation of the Fourteenth Amendment by arbitrarily misappropriating their voting power and asserting it for a candidate to whom they are opposed.

2. Whether the combined national effect of all the state unit systems operates to deny to Plaintiff's citizens due process of law in violation of the Fifth Amendment and burdens and abridges their rights reserved under the Ninth and Tenth Amendments to engage in national political activity.

3. Whether the state unit system denies to small states' citizens privileges of United States citizenship by unfairly favoring a few large states in presidential elections.

4. Whether the provisions of the Constitution governing presidential elections by the Electoral College are violated by the stronger weight which the state unit system gives to the large states' electors.

5. Whether the state unit system violates general rules of equity applied in original actions between states.

6. The appropriateness of available remedies to correct the system.

SUMMARY OF ARGUMENT

It is first contended that the state unit-vote laws deny the voting rights of minority voters within each state by totally cancelling their effects when the state's entire electoral vote is awarded to the winner of a bare plurality of the popular vote. This is an internal denial of equal protection which falls under the same "one person-one vote" principle which was fatal to Georgia's county unit system. This isolation of state minority voters leads to an external or interstate abridgment of fundamental rights

to engage in national political activity because the state units combine nationally in a way which distorts, and possibly defeats, the popular will. The essential right to associate for political activity must extend across state lines in presidential elections, but the state unit-votes prevent political partisans in one state from joining their efforts with fellow partisans in another unless they muster pluralities, in which event they are joined on an inflated basis. This compartmentalizing of voters also offends the national due process requirement of the Fifth Amendment.

The political disadvantage to small states denies to their citizens the Fourteenth Amendment privilege of U.S. citizenship of participating fairly in elections of national officers. Delaware as a State, and its three electors, are denied participation on the elector-equality principle implicit in the Electoral College provisions. Finally, apart from specific constitutional provisions, general principles of equity applicable in interstate litigation require invalidation of state unit-votes. Remedial problems are easily hurdled. Alternatives include state or federal legislation or Court decree, any of which could require the states to use election methods reasonably designed to reflect in their electoral votes substantial divisions in their popular votes. Methods which subdistrict the states or proportion according to the state-wide popular vote are available for any of these remedies.

ARGUMENT

I

The State Unit System Violates the Fourteenth Amendment and Denies Equal Protection of the Laws and Due Process of Law to Minority Voters Within States by Arbitrarily Cancelling Their Votes, Misappropriating Their Voting Power and Asserting It for Candidates to Whom They Are Opposed.

a. Plaintiff's interest in effects upon other states' citizens.

This proposition is addressed to the unconstitutional intrastate effects of state unit laws upon minority voters within states when their voting power is arbitrarily misappropriated in each presidential election. The Court may take judicial notice of the existence in national politics of a two-party system. Exhibit C to the complaint shows its operation in every state in the last five elections. This establishes the presence in each state in every election of thousands of persons who vote for a losing major candidate. The state unit system causes their votes to be spent and their own political effectiveness exhausted at a preliminary stage of the election.

Plaintiff admittedly relies here upon denial of rights of citizens of other states, persons to whom it holds no *parens patriae* relation. As indicated in the discussion of standing, however, *supra* p. 46, any rule against such assertions is but a rule of practice which should not be applied in constitutional litigation. More importantly, this arbitrary misappropriation of minority votes is the feature of the state unit system which is the principal cause of the distortion of voting effects in the national counting process, which is the basis of other claims made by Plaintiff and its citizens purely in their own right. This internal state nullification of minority votes causes the interstate isolation of voters which is the gravamen

of the next argument concerning the burden placed upon concerted national political activities of citizens in different states. These denials in other states are a direct cause of the injuries to Plaintiff's citizens resulting from the combined effects of the various states' unit systems. No state is an island unto itself in presidential elections.

b. *The nature of state legislative power.*

The granting provisions of the U. S. Constitution is that "Each state shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors . . .". Article II, section 1, paragraph 2. Plaintiff may be met at the outset with arguments that this commits to the state legislatures an unbridled or "plenary" power to select the methods by which its presidential electors are chosen. Concededly, there is dictum in *McPherson v. Blacker, supra,* to this effect and the Court's reasoning there even indicated that a legislature might itself appoint the electors. But voting rights have come far since 1892, and state election laws of all types are fully subject to the commands of the Fourteenth Amendment. *Baker v. Carr, supra; Carrington v. Rash, supra; Harper v. Virginia State Board of Elections, supra.* Those who would relegate any right of suffrage to a mere "privilege" find no support in any viable decision of this Court.

It is now firmly established that voting rights are legal rights of the highest order, protected from discriminatory state action by the equal protection clause of the Fourteenth Amendment. We need not consider whether any state could now totally abrogate popular election of presidential electors. "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage 'is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.'" *Harper v.*

Virginia State Board of Elections, supra, at 86 S.Ct. 1079. Although not specifically mentioned in the Constitution, the right of suffrage has gained recognition as "close to the core of our constitutional system." *Carrington v. Rash, supra* at 89. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders, supra* at 17.

The role of the President in the law-making and governing process is as important to the citizen as that of other officials elected under state laws which have been subordinated to the Fourteenth Amendment. In *Carrington v. Rash, supra,* the Texas statute disqualifying service men from voting was applicable to all elections including those of presidential electors, but it was not suggested that voting in such elections was less a matter of individual right, or more a subject of legislative discretion, than voting in other elections, and the Texas bar to voting was invalidated in its entirety. For this reason, Plaintiff anticipates that no defendant will seriously rely on the *McPherson* dictum on plenary legislative power and the issue will not now be labored.

c. Denials of Equal Protection of the laws.

The state unit-vote results from the uniform state practice of allowing each voter to cast a ballot for a full slate of electors running upon a general ticket. The state laws to this effect are listed in Appendix A to the Complaint. Other extra-constitutional devices, such as the electors' pledges and the short ballot, generally insure loyalty of the successful electors to the candidates of the party which nominates them. Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections,* 27 Law and Contemp. Prob. 495, 506-509 (1962). The elector's pledge to vote for party nominees, has been upheld by this Court, *Ray v. Blair, supra,* and their validity is not at issue. Although elector loyalty is necessary to deliver all of a state's electoral votes to one party's

candidate, it is the general ticket method of their election which lumps them as an electoral unit and enables loyal electors to complete the conversion of a plurality popular vote into a unanimous electoral vote. The inherent vice of this artificial state unity was well stated by Missouri's Senator Thomas Hart Benton in 1824:

> "The general ticket system, now existing in 10 States, was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State. It would be easy to prove this by referring to facts of historical notoriety. It contributes to give power and consequence to the leaders who manage the elections, but it is a departure from the intention of the Constitution; violates the rights of minorities, and is attended with many other evils. The intention of the Constitution is violated, because it was the intention of that instrument, to give to each mass of persons, entitled to one Elector, the power of giving that Electoral vote to any candidate they preferred. The rights of minorities are violated, because a majority of one will carry the vote of the whole State. * * * In New York 36 electors are chosen; 19 is a majority, and the candidate receiving this majority is fairly entitled to count 19 votes; but he counts, in reality, 36; because the minority of 17 are added to the majority. These 17 votes belong to 17 masses of people, of 40,000 souls each, in all 680,000 people, whose votes are seized upon, taken away and presented to whom the majority pleases. * * * To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed." 41 Annals of Congress 170, 18th Cong., 1st Sess. (1824).

The unforeseen rise of the two party system prevents legislative history and intentions of the Framers of the Constitution from fully illuminating these issues. *Ray v. Blair*, *supra*, at 224, n. 11. Nonetheless, it is certain that it was never contemplated that each state would speak

with one artificially unified voice in presidential elections. As noted by Senator Benton, the Framers' actual intention was probably to the contrary. This is evidenced by the considerable early use of popular election of electors by districts, a historical fact shown by Exhibit B to the complaint and relied upon by this Court in upholding Michigan's use of a district system in 1892. *McPherson v. Blacker*, *supra* at 29-33. The Court's opinion there also noted that, "The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the Framers of the Constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable." *Id.* at 29.

The exact language of Madison, who has been justifiably called "The Father of the Constitution", shows the pragmatic purpose behind the abandonment of the district system. He wrote in 1823 that "The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted and was exchanged for the general ticket and the legislative election, as the only expedient for baffling the policy of the particular states which "had set the example." 3 *Letters and Other Writings of James Madison* 333-334 (Worthington ed. 1884).

When Virginia switched from the district method in 1800, Jefferson wrote to Monroe: "All agree that an election by districts would be best if it could be general but while ten states choose either by their legislatures or by a general ticket, it is folly and worse than folly for the other states not to do it." Jefferson went on to raise a more principled objection to one state's use of districts while others used the state as the electoral unit, by adding: "In these ten states the minority is certainly unrepresented; and their majorities not only have the weight of their whole state in their scale, but have the benefit of so much of our minorities as can succeed at a district elec-

tion. This is, in fact, ensuring to our minorities the appointment of the government." 10 *The Writings of Thomas Jefferson* 134 (Jefferson Memorial Ass'n, Library Ed. 1904). Despite this justification for Virginia's change, Chief Justice Marshall thought it so outrageous that he vowed never again to vote in presidential elections so long as Virginia continued the general ticket, a resolution which he kept until 1828 and possibly until his death. 4 Beveridge, *The Life of John Marshall* 463 (1919).

It requires little argument to establish that the current general ticket, or state unit-vote, system violates contemporary standards of political equality. It is a counterpart to Georgia's county unit system which was invalidated on Equal Protection grounds in *Gray v. Sanders, supra,* and the same reasoning is applicable. In an election of one official, a unit solidarity feature, as well as weighting of units, is constitutionally fatal. In the Court's opinion, Mr. Justice Douglas stated:

> "The county unit system, even in its amended form . . . would allow the candidate winning the popular vote in the county to have the entire vote of that county. Hence the weighing of votes would continue even if unit votes were allocated strictly in proportion to population. Thus if a candidate won six thousand of the ten thousand votes in a particular county, he would get the entire unit vote, the four thousand other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded." (*Id.* at 381)

It is no answer to the patent arbitrariness of this winner-take-all device to say that it is rationally justified by the fact that the winner received more popular votes than his nearest opponent. The unanimity of the electoral vote is the same whether he is the choice of 51% or 99% (or perhaps 35% if there is a third party candidate).

Some may attempt an analogy between the state unit of electoral votes and the multi-member legislative district approved by other decisions of the Court. This must fail because the Court has recognized that such multi-member

units are invalid if they operate to deny or dilute voting rights of significant minority interests. The Hawaii apportionment case made it clear that multi-member districts and other electoral arrangements are invidiously discriminatory if it is shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson*, __U.S.__,__, 86 S. Ct. 1286, 1294, quoting *Fortson v. Dorsey*, 379 U.S. 433, 439. The factual record was inadequate for application of this principle in *Burns*, but the present case is in sharp contrast. It is indisputable that the state unit laws "cancel out" the voting strengths of substantial political elements in every state in every presidential election.

It is also a crucial distinction that popular voting for presidential electors, like the voting within counties of Georgia's defunct county unit system, is *non-final*. It is merely one step in an integrated national election process whose sole purpose is to fill one national office. By contrast, in the election of a group of legislators from a multi-member district, the purpose is to place representatives in a deliberative body. The election is *final* and it is totally distinguishable from the intermediate winner-take-all operation of the unit-vote method of choosing presidential electors. Furthermore when a number of legislators are elected at-large in a multi-member district they are voted for individually, rather than as a party bloc, and each citizen's votes are counted for each of several candidates. A party division of the legislative delegation is thus possible and has occurred. By contrast, in general ticket voting for presidential electors, the electors are almost invariably voted for as party blocs. A voter would vote against himself if he split his ballot between Democratic and Republican Electors. For this reason, a majority of states use short ballots which do not even show the electors' names and limit the voter to a choice between

blocs of electors pledged expressly or impliedly to candidates of the major parties. States which list the electors generally do not permit ticket-splitting and require that a party's bloc be voted for as a unit. See Dixon, *Electoral College Procedure*, 3 Western Political Quarterly 214, 217 (1950); Wilkinson, *The Electoral Process and the Power of the States*, 47 A.B.A.J. 251, 253 (1961); Kirby, *supra* at 507-08.

The use of the state unit system, by conventional Equal Protection precepts, causes an arbitrary and unreasonable discrimination between two classes of persons within the state; those who vote for the presidential candidate who musters a plurality in the state, and the voters for the losing candidate. The latter group are prevented totally from having the effects of their votes joined with those of fellow partisans in any other state and from having any national effect. The votes of the former group by contrast are magnified in national impact by the state unit's manufactured unanimity and are effectively joined with the votes of fellow partisans in other states where the party also mustered pluralities.

The cases dealing with voting rights and legislative representation, establish that when a voter classification scheme can be shown mathematically to operate to treat differently voters similarly situated and to subject their votes to different weights, it will be meticulously scrutinized and its proponents bear a heavy burden of showing that it results from a rational plan directed to a reasonable purpose. *Reynolds v. Sims*, 377 U.S. 533. No such showing can be made here.

As Chief Justice Warren pointed out in *Reynolds v. Sims*, *supra*, "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." *Id.* at 562. The

State unit is more sophisticated, but its effect is more injurious. It does not merely dilute the votes cast for a losing presidential elector slate in a given state but treats them as a total nullity. However, as Chief Justice Warren also pointed out: "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" *Id.* at 563, quoting *Lane v. Wilson*, 307 U.S. 268, 275.

It is immaterial for purposes of constitutional evaluation that it cannot be said with certainty in advance of an election whether it is Republicans or Democrats who will be the victims of a particular state unit's arbitrary misappropriation of their votes. (As a matter of political fact, this often is predictable and it is common knowledge in every election that certain states are "safe" for one candidate. Except briefly during Reconstruction Days, Republican voters in Arkansas have *never* seen their popular votes reflected in that State's electoral vote.) It should be sufficient that votes of one of two significant and ascertainable political elements are certain to be cancelled. This uncertainty is always resolved immediately after the voting in November and losing voters would unquestionably then be able to adjudicate the validity of their votes' cancellation by an impending state-unit electoral vote. Correction of the evil at this stage could cause delay and confusion of serious consequences to the national interest. Avoidance of such risks is a cardinal basis of equity powers to act in advance to prevent imminent wrongs. The Constitution neither requires nor permits states to compel citizens to exercise their most valued right of suffrage under a scheme which ensures that the votes of millions of them will be discarded at a preliminary counting stage. Both Equal Protection and Due Process should mean that no citizen must go to the polls under the threat of such potential debasement of his vote.

d. Denials of Due Process in Violation of the Fourteenth Amendment

In addition to its invidious discrimination, the state unit system denies an essential liberty without due process of law, a concept which means more than assurance of fair procedures. (Compare *Munn v. Illinois*, 94 U.S. 113 with *Lochner v. New York*, 198 U.S. 45.) Whether applied to matters of substantive economic policy or to regulation of substantive personal rights such as voting or birth control, due process requires that the regulation at issue bear a reasonable relation to a proper legislative purpose.

The concepts of "reasonable relation" and "proper legislative purpose" have changed in recent years to permit more governmental regulation of private or business conduct, *Nebbia v. New York*, 291 U.S. 502; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; but due process as applied to substantive policy on personal rights still requires basic reasonableness of any limitation.

This was reaffirmed recently by *Griswold v. Connecticut*, 381 U.S. 479, in which the Court invalidated Connecticut's laws forbidding use or dissemination of contraceptives. The opinion of the Court relied upon the "penumbra" of the First Amendment and other parts of the Bill of Rights, rather than substantive due process as such, but identifying particular rights as protected by the due process clause serves to give it a substantive meaning. The concurring opinions in *Griswold* are consistent with a reasonableness test of constitutionality of legislation which interferes with rights basic to the maintenance of a free and democratic society. Mr. Justice Goldberg's reasoning from the Ninth Amendment aids Plaintiff's previous argument and may be viewed also as a means of undergirding the basic due process concept of protection of deep-rooted fundamental rights. The concurring opinion of Mr. Justice White specifically invokes due process as a safeguard against arbitrary governmental policies which bear insufficient relation to a governmental purpose.

Recognition of voting as a fundamental right, which culminated in the *Carrington* and *Harper* cases, should also carry with it the due process protection afforded by the Fourteenth Amendment. It is no longer debatable that the right to vote is among those which cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67.

In two recent cases in which state poll taxes were held unconstitutional by three-judge courts, it was concluded in well-reasoned opinions that voting rights are protected by the due process clause of the Fourteenth Amendment. *United States v. Texas*, 252 F. Supp. 234, 250 (W. D. Tex. 1966); *United States v. Alabama*, 252 F. Supp. 95, 105 (M.D. Ala. 1966) (concurring opinion).

By its nature, voting must be subject to extensive governmental regulation, but due process nonetheless requires that such regulations be reasonable. It may be comparable to the practice of law in its amenability to regulation in the public interest. In *Schware v. Board of Bar Examiners*, 353 U.S. 232, the Court invalidated a state's refusal to allow an applicant to take the bar examination. The state's "bad character" conclusion was held not to be sufficiently founded under a ruling that a "state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Id.* at 238.

The isolation of state minority voters from the interstate mainstream of presidential electoral votes is much like the racial segration of school children in the District of Columbia which was held to violate the due process clause of the Fifth Amendment in *Bolling v. Sharpe*, 347 U.S. 497. Due process goes beyond discriminatory action, however, and reaches unreasonable laws even though they apply evenly. The infringement of a right for a purpose unrelated to any legitimate governmental objective is its touchstone.

The state unit system's cancellation of minority votes unquestionably infringes voting rights. Does it do so for any valid purpose? The relation of the people of a state to its electoral vote strength compels a negative answer. The great bulk of presidential electoral votes are allocated to states on the basis of their respective populations. Nonetheless, the state unit requires, in a typical two-party contest, that all of the state's electoral votes be cast for a candidate to whom as much as 49.9% of its voters may be opposed. The only conceivable device which would be more arbitrary would be for the *minority* candidate to receive all the electoral votes. Since majorities are naturally less prone to allow minorities to take 100% than they are to give them merely their due, this issue will not arise, but the difference is only one of degree. It is precisely such oppressions of minorities which the Fourteenth Amendment forbids.

May a state claim reasonableness for its state unit law on the grounds that other states also use it? As previously noted, the state unit-vote system became uniform when it was adopted it as a defensive maneuver after a few states had initiated it. Historically, its general utilization may therefore be the factual cause or "reason" for a particular state's use of it, but this does not make it "reasonable." Jefferson's theory of compensating disfranchisements of minorities in rival states, *supra*, p. 60, may have seemed fair as a party political tactic, but it can hardly answer the claims of those persons whose votes are misappropriated. Such a defense of the state unit-vote might be more tenable in a single-state suit by a minority voter, but it is no answer in a multi-state action in which all offenders may be required simultaneously to abandon the odious practice. In any event, its *total* cancellation of votes cast for the losing candidate in a state should preclude the defense that one state's use is motivated by another state's use. It would permit two wrongs to make a right where neither compensates for the others' injuries, but instead each duplicates and multiplies the harms of the other.

Because other methods are available which would make the presidential electors responsive to the popular vote, and because the state unit system causes demonstrable arbitrary misappropriation of minorities' votes, and because it serves no legitimate electoral purpose, it must be concluded that its use violates the due process clause of the Fourteenth Amendment.

II

The National Operation of the State Unit System Denies to Plaintiff's Citizens Due Process of Law in Violation of the Fifth Amendment and Abridges Their Rights Reserved Under the Ninth and Tenth Amendments To Engage in National Political Activity in Association With Citizens of Other States.

a. Reserved Rights To Engage in National Political Activity

The state unit system method of allocating the electoral vote, like the discredited county unit system of Georgia, operates to isolate voters of a given persuasion in one unit from voters of a similar persuasion in other units, even though all voters are casting their votes with ultimate reference to the same elective office. As alleged in the Complaint, this artificial separation operates to distort the effect of the popular vote and to produce inequitable and unjust electoral vote results which do not reflect actual popular sentiment.

This Court has recognized that the right to engage in political activity to further one's political views is a fundamental right reserved to the people by the Ninth and Tenth Amendments. *United Public Workers v. Mitchell*, 330 U.S. 75, 94. Such activity is essential to self-government and is presupposed by First Amendment guarantees of speech, press, assembly and petition. This Court long

ago referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370, and it has noted with equal emphasis the importance of political activity in general. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359. Yet, political discussion and elections are meaningless if votes are not cast and counted under procedures which give them a reasonable opportunity to be effective in their ultimate objective, the final tally which determines the outcome of an election. This elementary right is clearly within Mr. Justice Goldberg's reasoning in his concurring opinion in *Griswold v. Connecticut*, *supra*, that the Ninth Amendment protects rights which are "basic and fundamental and deep-rooted in our society", *id.* at 491, and Professor Redlich's conclusion that the Ninth and Tenth Amendments, as incorporated by the Fourteenth, protect rights fundamental to a free society which are adjacent or analogous to the pattern of individual rights specified in the Constitution. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. Rev. 787 (1962).

All legitimate political activity in a democracy is inherently associative, *i.e.*, exercised by groups of persons acting in concert. The state unit system debases and distorts such national efforts in presidential elections by arbitrarily separating efforts of some partisans (state losers) from their fellow partisans in other states, while joining others (state winners) on an inflated basis. Such oppression of political efforts is now intolerable at the state level. *Gray v. Sanders*, *supra*. It should also be intolerable in our only election which requires political efforts across state lines.

It has been shown how the state unit system produces a distortion of the actual popular will of each state because of the winner-take-all effect. It also has disfranchised over long time periods the opposition party voters in "safe states". The latter effect, as a corollary discourages opposition party organization and vigor, and depresses political party competition. Such a result should be of highest constitutional concern because vigorous political party competition, and the First Amendment Freedoms, are the twin pillars on which democratic government rests. It would be highly anomalous when major efforts have successfully protected freedom of political association at the local level, *NAACP v. Alabama*, 357 U.S. 449, to allow counting devices like the state unit-vote laws to continue to obstruct voters' freedom to associate on an interstate basis in national elections.

That the compartmentalizing effects of the state unit-votes are constitutionally fatal follows from the decisions and underlying rationale of *Gomillion v. Lightfoot*, 364 U.S. 339; *Baker v. Carr*, *supra*, and the successor cases dealing with voting and political expression. [For a discussion of equal protection precedents see McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*. 61 Mich. L. Rev. 645 (1963); *cf.* Dixon, *Apportionment Standards and Judicial Powers*, 38 Notre Dame Lawyer, 367, 376 *et seq.* (1963).] In *Gomillion* this Court struck down an attempted disfranchisement of a large bloc of Negro voters by the redrawing of municipal boundary lines. The voters could still vote in county elections, but they would have been artificially separated, had the law not been nullified, from the city which was the center of their occupational, social, and community interests.

The Constitution recognized from the first that presidential election politics must transcend state lines by requiring electors to vote for persons "one of whom, at least, shall not be an Inhabitant of the same State with them-

selves". Article II, Section 1, Paragraph 3 (repeated in Amendment XII). National political parties were soon ". . . created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable". *Ray v. Blair*, *supra*, at 220. To treat each state's unit-casting of its electoral vote as a matter solely between it and its own citizens would ignore historical and political reality. States acting in concert, or at least in "conscious parallelism", to borrow an antitrust term, should not be able to inflict upon political rights throughout the United States injuries of a type which the Constitution forbids them from inflicting within their borders, and which federal government could not inflict nationally. The reservations of the Ninth and Tenth Amendments are meaningless if they may be so easily circumvented. The oppressive effects upon political activity, taken with the fact that such effects are caused by state laws, should be sufficient to require that this Court take corrective action. The state unit system's shackling of interstate political efforts in presidential elections and its burdens upon expression of the popular will strike at the heart of the Ninth and Tenth Amendments' withholding from all governments the power to abridge rights fundamental to a free society.

To this argument, some may respond that the Court should be indifferent to obstructions to the popular will in presidential elections because the electoral college is a unique part of our Constitution which is deliberately at odds with popular principles. If true, this would be immaterial in view of the intervention of the Fourteenth Amendment, but it is also based upon an uncharitable misconception of the Framers' views which should be put to rest. The truth actually buttresses Plaintiff's efforts in this action to bring presidential elections in line with the popular election principles now required for other political contests.

A reading of the debates in the Convention of 1787 shows that few delegates expressed themselves on the issue of popular choice of the president and that those who did so were divided. James Madison made an extended plea for national popular election, although he conceded some imperfections as follows:

> "He would only take notice of two difficulties which he admitted to have weight. The first arose from the disposition in the people to prefer a citizen of their own state and the disadvantage this would throw on the smaller states. Great as this objection might be, he did not think it equal to such as lay against every other mode which had been proposed. He thought, too, that some expedient might be hit upon that would obviate it. The second difficulty arose from the disproportion of qualified voters in the northern and southern states and the disadvantages which this mode would throw on the latter. The answer to this objection was, in the first place, that this disproportion would be continually decreasing under the influence of the republican laws introduced in the southern states and the more rapid increase of their population; in the second place, that local considerations must give way to the general interest. As an individual from the southern states, he was willing to make the sacrifice." 5 Elliot, *Debates on the Federal Constitution* 365 (Supp. 1845).

The fear that large states would prefer their own citizens, problems of distance and geography, and the great obstacle of differing suffrages were the apparent causes for the rejection of Madison's view, but he was openly supported in the debates by such distinguished men as Gouverneur Morris, 5 Elliot, *supra* at 322, James Wilson *ibid.*, and John Dickinson, *id.* at 364. Most of those who opposed popular election did not object in principle and in the ratifying conventions many indicated that the states' colleges of electors were to be responsive to the will of the people and used this as a selling point. General Charles Cotesworth Pinckney told the South Carolina convention that the President was "to be elected by the people through

the medium of electors chosen particularly for that purpose." 4 Elliot, *Debates on the Federal Constitution* 304 (2d ed. 1836). In Pennsylvania, James Wilson apologetically told the Convention that "the choice of this officer is brought as nearly home to the people as is practicable. With the approbation of the state legislatures, the people may elect with only one remove." *Id.* 511. Governor Randolph of Virginia, a reluctant supporter of the Constitution, stated without reserve: "How is the President elected? By the people--on the same day throughout the United States--by those whom the people please." *Id.* at 301. One of George Mason's criticisms in his opposition to the Constitution in the Virginia debates was that the electoral college proposal was "a mere deception -- a mere ignis fatuus on the American people--and thrown out to make them believe they were to choose him." *Id.* at 493.

The principal proponent of the Constitution who thought the electors were to be detached and independent of the popular will was Alexander Hamilton, but in asserting this view in the Federalist No. 68, he added that "the sense of the people should operate in the choice of the person to whom so important a trust was to be confided," *(id.* at 458, Cooke ed. 1961) and described the convention's plan as requring that "the people of each state shall choose a number of persons as electors." *Id.* at 460. As the Hamilton quote indicates, a strong case could have been made against the instances when legislatures themselves appointed electors, rather than merely directing a manner for popular choice. But, since the Framers had guaranteed the people of each state a republican, or representative, form of government, they doubtless assumed this would in turn cause legislatures to entrust presidential elections to methods responsive to the popular will. In the most complete recent work of scholarship on this subject, it was concluded that, "the Framers wanted and expected the popular principle to operate in the election

of the President." Wilmerding, *The Electoral College* 21 (1958). See also Roche, *The Founding Fathers: A Reform Caucus In Action*, 55 Am. Pol. Sci. Rev. 799, 810 (1961) and Kirby *supra* at 505.

There is then no reason, historical or otherwise, why, under the "popular principle" concept, rights to engage in political activity in presidential elections should not be protected on the same constitutional basis as in other elections. Admittedly, this cannot be perfectly accomplished because of the two bonus electoral votes of each state which correspond to its Senators, which can be altered only by constitutional amendment. But this is a relatively minor aspect of the state unit system's hostility to the national popular will. Less than one-fifth of the total electors are allocated on this basis and many of these are within a reasonable tolerance of the national ratio of electors to population. The electors who correspond to Representatives cause the electoral college to be dominantly population-based and justify the application of popular-election constitutional principles. In any event, the slight imperfection which is beyond judicial power because embodied in the Constitution is no excuse for leaving untouched the gross burden on national popular will which is solely the product of state laws and whose correction lies within familiar rules of judicial competence.

b. The Due Process Clause of the Fifth Amendment

At a glance the Fifth Amendment admittedly appears to be inapplicable to limit state discretion in choosing methods of electing presidential electors. The Fifth Amendment, like the remainder of the Bill of Rights, normally is treated as being applicable only to actions of the federal government.

The basis for application of the Fifth Amendment to the states in the present regard is the fact that the selection of presidential electors in each state is not simply a state process. Although electors are not federal officers,

In re Green, 134 U.S. 377, they perform a federal function and there is an essential federal interest in the mode of their election. *Burroughs v. United States*, 290 U.S. 534. The states provide for their election under mandatory direction of the Federal Constitution and their action is undertaken as part of an essential integrated federal process for filling a national office. In this field, therefore, the discretion of state legislatures should be subordinate to whatever constitutional restraints or guarantees condition exercises of federal power generally.

Analogous cases are found in the field of federal constitutional amendments, under the procedures authorized in Article V of the Constitution. That Article authorizes initiation of a proposed federal constitutional amendment either by a two-thirds vote of both houses of Congress, or by a national constitutional convention called by Congress on petition of two-thirds of the states. It authorizes two modes of ratification: approval by the legislatures of three-fourths of the states; approval by ratifying conventions in three-fourths of the states.

In a series of cases arising out of state action concerning the ratification of the proposed Eighteenth and Nineteenth Amendments, it was held: (a) that the word "legislature" in Article V is a term of fixed federal meaning and does not permit a state to substitute the process of popular referendum for action by the state legislature when Congress has specified that ratification be by state legislative action. *Hawke v. Smith*, 253 U.S. 221, *National Prohibition Cases*, 253 U.S. 350, 386; (b) that provisions in state constitutions inconsistent with a proposed amendment cannot qualify the power of the state legislature to ratify the federal amendment. *Leser v. Garnett*, 258 U.S. 130; (c) that official notice of state ratification to the Secretary of State (now, Director of General Services Administration) and proclamation by him of the fact of ratification precludes any challenge to the legality of the ratification based on violation of state rules of legislative

procedure in the ratification action by the state legislature. *Ibid.* The Court phrased the basic principle in *Leser v. Garnett, supra,* as follows: "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id.* at 137.

Application of the Fifth Amendment to the system of presidential elector selection would make applicable the arguments already advanced under the Fourteenth Amendment's Equal Protection and Due Process Clauses. In several cases the Court has given equal protection meaning to the Due Process Clause of the Fifth Amendment where federal matters are involved, *e.g., Bolling v. Sharpe, supra; Hurd v. Hodge,* 334 U.S. 24 (concerning restrictive racial covenants); and *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (concerning discrimination in jury selection). In several cases the Fifth Amendment's Due Process Clause has also been applied to invalidate arbitrary, capricious or unreasonable federal action analogous to the state action tested under the Fourteenth Amendment. Examples include *Adkins v. Children's Hospital,* 261 U.S. 525 (which expresses an earlier and since modified view of due process in wage and hour regulation), and *Aptheker v. Secretary of State,* 378 U.S. 500, (concerning denial of a passport to a member of a Communist organization).

The addition of the Fifth Amendment as a ground of unconstitutionality is not wholly duplicative. The Equal Protection Clause of the Fourteenth Amendment by its terms is applicable only to discriminations and unreasonable differences of treatment by a state on persons" within its jurisdiction". This limiting terminology in the Fourteenth Amendment might be held to permit a showing that the state unit system in a given state operates unlawfully upon its own citizens but not upon their fellow-partisans in other states. A showing of extra-territorial effects is

permissible if the Fifth Amendment is held to be applicable.

Viewing the presidential election, including the intrastate election of presidential electors, as an integrated federal process, voters in one state may appeal to the Due Process Clause of the Fifth Amendment to prevent another state in its discharge of an essentially federal function, from operating capriciously so as to cause gross national inequities in voter effectiveness. A voter in any state may object, under the Fifth Amendment, to the use by any state of a balloting and counting system which in its general national effect operates (a) to translate narrow popular pluralities in a state into unanimous state-unit electoral votes, and to translate popular votes for losing candidates into zero in electoral votes, no matter how narrow the losing margin; (b) to separate unnecessarily partisans of both parties from their fellow partisans in other states; (c) to cause gross and unnecessary inequalities in voter status and voter effectiveness vis-a-vis the presidency. All obviously exceed due process limitations.

III

The State Unit System Operates to the Unfair Advantage of Large States and Their Citizens and Denies Citizens of Delaware and Other Small States Privileges of United States Citizenship in Violation of the Fourteenth Amendment.

Plaintiff's first argument covered unconstitutional intrastate effects of individual state unit laws. The second covered the interstate, or extra-territorial, denials of voting rights throughout the United States caused by the combined national effects of such laws. This proposition is based upon specific injuries to citizens of Delaware and other small states caused by the political advantages which the state unit system gives to large states.

The facts alleged in this regard in paragraphs 14 and 15 of the Complaint cry out for relief. It cannot be disputed that the attractiveness of large states' blocs of electoral votes cause voters and potential candidates therein to receive special attention. The facts as to the home states of those elected and nominated prove that the tendencies of the system have indeed reduced citizens of Delaware, the *first* state, to a second class citizenship in national politics. Although this is now a glaring reality, it has been apparent to the experts for many years. Writing in 1898, a leading scholar on the presidency summarized the purpose and effects of the state unit-vote system as follows:

> "Originally, in most of the States where the popular system prevailed, each voter cast his ballot for three electors - two for the State at large, and one for the congressional district in which he resided. But politicians soon discovered that the weight of the State's influence was increased by a general election of the whole number by the plan known in France as the *scrutin de liste*. As soon as a few of the states had adopted this method it was necessary for the rest to do the same, for self-protection . . . . It is in this feature that the electoral plan of 1787 fails most conspicuously. The general ticket greatly increases the power of the large states. Since the first election of Jackson, when it became the usual rule of election, no President has been chosen in opposition to the vote of both New York and Pennsylvania, and but four in opposition to the vote of either of them." 2 Stanwood, *A History of the Presidency* 15 (1898).

Under the present system, the electoral votes of the eleven largest states, plus that of any one other state, is sufficient for election. These eleven states are New York, California, Pennsylvania, Illinois, Ohio, Texas, Michigan, New Jersey, Florida, Massachusetts and Indiana. In 1964 there were approximately 70.3 million popular votes cast in the nation for the two major candidates, of which 42.6 million were cast in these eleven states. A bare plurality in these states, approximately 21.4 million votes,

could have determined which candidate received their 268 electoral votes. Less than 30% of the national electorate therefore could have controlled the election because of their power over the largest blocs of electoral votes.

The strategic advantages of voters and candidates in these states is obvious and it is generally conceded even by defenders of the state unit system. Extensive hearings were held on this subject and proposed constitutional reforms by the Senate Judiciary Subcommittee on Constitutional Amendments in 1961. A staff study of the evidence developed in the hearings on evils of the present system and effects of proposed reforms included the following pertinent conclusions and observations:

"A further charge against the unit-rule system is that it strongly tends to overemphasize the political importance of the large populous states. This has meant that presidential candidates have come almost exclusively from such States. Except for Mr. Landon of Kansas in 1936 and the incumbent President Truman of Missouri in 1948, both major parties have limited their presidential nominations in the last half century to men from the eight largest States. Able men from small States are given little chance to secure nominations from either major party, and are generally not even regarded as 'presidential timber.' Both major parties are accused of greater concern with the capacity of their candidate to carry certain pivotal States than to command the support of voters throughout the Nation as a whole.

"The pivotal State also tends to monopolize the attention of the candidates and their campaign efforts with the result that presidential campaigns are not carried to the Nation as a whole. States which are not regarded as doubtful, or which are considered of less importance, are relatively ignored. Citizens in the smaller States are less apt to see or hear the candidates in person and may be inclined to think that their interests are of less importance to the candidates. For the same reason, it is charged that issues, party platforms, and campaign promises are formulated with a view to these pivotal States.

"At this point, the argument becomes a pragmatic one — addressed to the substantive programs of presidential candidates. These States for the most part have large metropolitan areas and heavy concentrations of urban voters who may be able to determine the winner of the State's electoral vote. President Truman, supporting a district system, stated:

> 'The electoral college was first devised to protect the small States from dominance by the larger States, as for example, Delaware and Rhode Island from being dominated by Virginia and New York.
>
> 'The problem we face today is that of the emergence of the big cities into political overbalance, with the threat of imposing their choices on the rest of the country.'

"Former President Hoover sounded a similar note in writing to Senator Kefauver concerning the subcommittee's hearings:

> 'Your subject is important. It confronts the same difficulties as were met by the Founding Fathers — that is, to prevent domination by a few large States.'

"In other words, despite the imbalance in the electoral college favoring small States, the large urban States have come into dominance because of the operation of the unit rule. Most defenders of the present system do not dispute this point. They concede that the present electoral system has an urban bias but justify it as compensating for other claimed inequities in our State and Federal Governments which are said to favor rural interests at the expense of urban areas. The following are representative of several statements to this effect submitted to the subcommittee by political scientists.

"Dean Stephen K. Bailey, Maxwell Graduate School of Citizenship and Public Affairs, Syracuse University:

> 'I am presently opposed to any change in the electoral college system. I believe the electoral college system presently overrepresents big urban States and minorities within those urban

States. I am prepared to admit the injustice of this. At such a time when the House of Representatives ceases to overrepresent egregiously, nonurban and rural areas, I would be willing to advocate some modification in the electoral college system.'

"Prof. H. D. Rosenbaum, Hofstra College:

'As I have come to understand the system of electing a President, its most important function in that regard has been to compensate for the rural domination of State and Federal legislatures by locating electoral decision in those States which, taken all together, comprise a majority of the electoral college vote. In this way the otherwise underrepresented majority of the urban-industrial States can at least provide a counterbalance in our political system.'

"Prof. Clyde E. Jacobs, University of California:

'While I favor direct popular election of the President, I am strongly opposed to any change in the present system if direct popular election is not provided. I am particularly against the old Lodge-Gossett and the Mundt-Coudert plans. These are calculated to undermine the influence of the large industrial States in selecting the President. In view of the fact that nonurban populations possess disproportionate influence in Congress and the State legislatures, it is little enough for our urban population to enjoy greater influence in the selections of the Chief Executive. We will really be headed for national disaster if the Presidency is made captive to the same forces which usually dominate our legislative bodies.'" Staff of the Subcommittee on Constitutional Amendments, Committee on the Judiciary, 87th Cong., 1st Sess., "The Electoral College, Operation and Effect of Proposed Amendments to the Constitution of the United States", 31-32 (Comm. Print 1961).

Needless to say, the above-quoted arguments of those defending the present system now cut the other way. Decisions of this Court are causing state legislatures and delegations to the House of Representatives to be appor-

tioned to represent all people on an equal basis. The underrepresentation of urban interests in these bodies is ending and their compensating overrepresentation in presidential elections should correspondingly end. The same constitutional principles are equally applicable and the theory of mutually compensating rural-urban inequities, stated above, is no longer valid. Small states and rural areas are in danger of serious underrepresentation of their interests in government as a whole unless the state electoral units are made representative so that such interests may be restored to their rightful roles.

The previous arguments based upon reserved political rights under the Ninth and Tenth Amendments and denials of due process under the Fifth are applicable also to Plaintiff's claim based upon specific injuries to small states' citizens. Also, a stronger case could hardly be imagined for invocation of the Privileges and Immunities Clause of the Fourteenth Amendment.

The right to participate on an equitable basis in choosing the national officer representing the entire Union surely is a privilege of national citizenship which is protected from debasement by separate, parallel or collective state action. The national quality of the right to participate in the choice of national officers, was recognized by the otherwise overly-narrow concept stated in *Twining v. New Jersey*, 211 U.S. 78, which specifically noted that "among the rights and privileges of National citizenship . . . [is] . . . the right to vote for national officers". *Id.* at 97. The holdings that presidential electors perform a federal function and that their election is therefore regulable by Congress also assume the national quality of the entire election procedure. *Burroughs v. United States, supra; United States v. Classic*, 313 U.S. 299. In the broader language of *Twining*, the right infringed is among those which "arise out of the nature and essential character of the National Government." *Twining v. New Jersey, supra*, at 97. The state unit system obviously debases such rights, both by its intrastate treatment of minority

voters and by its interstate and national effects upon small states' citizens.

IV

Delaware's Presidential Electors' Votes Are Debased and Their Effectiveness Diluted by the State Unit System in Violation of the Equality of Electors Required by Article II, Section 1, and the Twelfth Amendment.

This proposition focuses upon the 538 presidential electors in their formal constitutional role rather than as the mere conduit or counting device to which they have been reduced by state law and the state unit system. This argument parallels the previous one which was based upon the electors' actual role and focused upon injuries to the citizens represented by them. By either view, the state unit system falls short of present constitutional standards for voting rights.

Once electors are appointed, they become a 538-member national constituency which elects the president by voting in a single election conducted at 51 polling places. The state unit method enables electors in larger states to be packaged in larger, more effective and politically attractive units. This violates the rule of *Gray v. Sanders, supra,* for elections of one official in a single constituency. "One person-one vote" should be the standard here also. When some electors vote in a bloc 13 or 14 times larger than Delaware's group, in effect they "gang up" on them. Equality of voting power means equality of weight and effectiveness, undiluted by distorting electoral arrangements. The elector whose vote is one of a unit of three cannot be said to have the voting strength of one whose vote is part of a 43-vote package. If "in union there is strength", then in greater unions there is greater strength. It may be common in elections generally for constituents to combine voting strengths or vote pursuant to mutual understandings, but such combinations are equally available to all voters. There is no means by

which Delaware's electors may vote as part of a larger unit.

This argument is supported by studies which have been made of voting power under "weighted voting" systems, which were proposed by some as a remedy for legislative malapportionment. If the 51 colleges of electors were deliberative bodies, they would be comparable to legislative delegations elected from 51 multi-member districts, but their "rubberstamp" unity precludes this analogy and makes their function, instead, a form of weighted voting. The result of their unit votes is exactly the same as if there were but one elector in each state and they cast weighted votes of from three to forty-three votes each. Analysis shows that weighting legislators' votes by the population of the districts represented does not yield an equitable result. One might expect that giving one legislative vote to the representative from a district of 10,000 population and five legislative votes to the representative from a district of 50,000 population would yield equal voting power for the voter-residents of the two districts. Instead, the effective voting power of residents of the large unit is excessively increased and that of residents of the smaller units is correspondingly decreased to the point of zero voting power in some instances. A simple example will illustrate this inequality of voting power.

Assume a pre-reapportionment five-district legislature, each legislator possessing one vote, but with one of the districts being 50,000 and the remaining four being 10,000 each. If we apply weighted voting as a corrective we still have a five-district, five-man legislature but one man now has five votes and the remaining four each have one vote. Obviously the five-vote man now has all the effective voting power and the other four have none. By contrast, if five seats are allocated to the largest district on a sub-district basis, the prospect of disagreement within the five-member delegation preserves the possibility that the legislators from the other districts may on occasion have effective voting power. This overrep-

resentation caused by weighted voting is fully developed in Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rutgers Law Review 317 (1965). Obviously, the overrepresentation increases as the size of the unit increases and varies according to factors other than the ratio of votes to population. The mathematical complexities are analyzed in Riker, *Some Ambiguities in the Notion of Power*, 58 Am. Pol. Sci. Rev. 341 (1964).

The constitutional variations in the states' electoral vote allocations require no such inequities. Either the choice of electors by sub-districts or proportioning the electoral vote according to the statewide popular vote would reduce the overrepresentation and would enable voters and electors in smaller states to share effective strength with fellow partisans in larger states.

Since the electors act "by authority of the state", *Ray v. Blair, supra,* at 224, the standing of the state to sue on their behalf to protect their integrity and political status is unquestionable. Individual suits by electors to assert the same claim are impossible for several reasons, principally because of the brevity of their period of office.

Furthermore, when Delaware sues on behalf of its electors it asserts its own interests as a political entity. After losing his battle for national popular election, Madison endorsed the method which prevailed and described it: "The immediate election of the President is to be made by the States in their political characters. The votes allotted to them, are in a compound ratio, which considered them partly as distinct and co-equal societies; partly as unequal members of the same society." *The Federalist No. 39,* at 255 (Cooke ed. 1961).

V

Voter Inequities Caused by the State Unit System Violate General Principles of Equity Enforced by the Supreme Court in Original Actions Between States.

In this case the Court's inquiry would not end if it wer to reject all of Plaintiff's previous arguments and hold that no constitutional limitations or reservations are violated by the state unit-vote system. As an original proceeding which the Constitution commits to Supreme Cour jurisdiction solely on the basis of the nature of the parties, there is no need to show a deprivation of a federal substantive right — as invoking "federal question" jurisdiction in lower federal courts or the Supreme Court's appellate jurisdiction over state courts. A federal substantive right may be at stake in an original proceeding, but it is not essential to this jurisdiction. If the nature of the parties qualifies the matter for the Court's origina. jurisdiction and if the petition for leave to file shows a "case" or "controversy" within the meaning of those terms in Article III of the Constitution, the dispute must be adjudicated.

It is sufficient for the requisite case or controversy that there is alleged a legally cognizable wrong under the law or equity principles, *i.e.*, a harm to a legally cognizable right, privilege or immunity, a deprivation of freedom, a forced inequality of status, or an interference with beneficial relationships. *Missouri v. Illinois, supra.* The asserted right need not be supported by constitutional language, but can rest in the federal common law applied by the Court in such cases. *Kansas v. Colorado*, 185 U.S. 125, 146-47; *Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110. This case law has developed by reason and by analogy to rules of the legal systems of the several states and the United States. This judicial law-making is essential to the exercise of the mandatory jurisdiction vested by Article III in the Court over controversies between states. In this respect the Supreme Court has all the power to

develop substantive principles of law that was possessed traditionally by common law courts in England. Here, as there, the only mandate is to *decide*, and in the decisional process it develops the rules of law from precedent and by reason and analogy.

This is well expressed in *Kansas v. Colorado*, 185 U.S. 125, which was one part of a sequence of litigation which produced some of the most significant opinions of the Court on the nature of "law" in original jurisdiction cases. That suit, concerning allocation of waters, was founded on a *parens patriae* claim and on direct state interest. The Court spoke expressly of the need to find only a legally cognizable right, without reference to any legal system. The Court said:

> "Sitting, as it were, as an international as well as a domestic tribunal, we apply Federal law, state law, and international law as the exigencies of particular case demand . . ." (*Id.* at 146)

Later, after inviting the United States to present its views, the Court reached and decided the merits. Although the Court at that stage did not discuss jurisdiction or source of law at length, it based its ultimate opinion on principles of general equity, eclectically derived. (*Id.* 206 U.S. 46)

The *Kansas* case is helpful by analogy in the present action. At the instance of its citizens, Kansas sued to curb upstream diversion of water in Colorado. Although Kansas failed to get immediate relief, she did establish the principle that the Supreme Court, upon proper proof in a suit by Kansas in behalf of her citizens, could compel Colorado to change its dealing with Colorado citizens in order to prevent a residual harm to Kansas citizens. Like the state unit laws of defendants, Colorado's laws dealt only with her own citizens and she had no direct dealing with Kansas citizens and imposed no harm directly upon them. The same was true of Kansas, but because of the stream, Colorado's water policy and Kansas' water policy were inextricably interconnected. The Supreme

Court assumed jurisdiction and acted. Similar multi-state interests caused it later to require West Virginia to alter its natural gas policies at the instance of other states, although there the Constitution supplied the applicable rule of substantive law. *Pennsylvania v. West Virginia*, *supra*.

Similarly in the present suit, each defendant state deals only with its own citizens. But the Electoral College's multi-state streams of votes, like the flow of natural gas in the *Pennsylvania* case and the stream of water in *Kansas*, inextricably intertwines each state's policy with that of every other state.

In the present case, two significant factors accompany the testing of the state unit system against general equity principles applied in multi-state litigation. First, the arguments concerning illegality of the state unit system under the Fifth and Fourteenth Amendments continue to be applicable by analogy, but without regard to possibly limiting features, such as the applicability of the Fifth Amendment to quasi-federal state action and standards for testing injurious collective state action which crosses state lines to deny political rights. In the reasoning-by-analogy process, the Constitution's political equality principles can be incorporated despite the limited coverage of particular constitutional provisions. All of the arguments made previously are relevant here and need not be repeated.

Second, insofar as it is not limited by the state weighting which can be modified only by constitutional amendment, equal voter-status principles, incorporated as rules of equity, should nullify all inequitable and unnecessary state policies concerning the casting and counting of the popular vote. They should reach all state laws which have the effect of distorting the popular will, introducing uncertainty into presidential elections, and differentiating between voters on chance and arbitrary chance factors.

From this Article III perspective, *Gray v. Sanders, supra*, invalidating Georgia's county unit system, can be made directly applicable to the state unit system despite limited purview of the Fourteenth Amendment. From the perspective of the national, equitable, equal-voter-status principles which should emerge as the "common law" of this sort of *parens patriae* suit, there is no justification for continuing, along with the state-weighting in the allocation of electoral votes to the states, the winner-take-all state unit system which distorts both popular and electoral vote, state by state. Constitutional amendment is not necessary to correct the latter because it is within the reach of basic judicial principles. In short, the rule against unit votes which was applicable via the Fourteenth Amendment to safeguard equal voting status regarding the state-wide office of Governor, may be made applicable to presidential elections via basic equity concepts enforceable in this case. The unit-vote's essential vice is as wrongful in the election of the President of the United States as in the election of a Governor of Georgia. When this is corrected, the basic electoral vote apportionment to the states may still produce slight attenuation of popular will, but, as previously noted, it is the conjoined use of the states' unit-votes which guarantees a major national distortion of the popular vote.

VI

Appropriate Remedies Are Available for Invalidation of the State Unit System and Redress of Its Wrongs.

Plaintiff seeks only an injunction against continued use of the general ticket or state unit system as such. As in the state legislative apportionment cases, devising alternative and fair methods may be left, in the first instance at least, to legislative action. In any event, the Court should first dispose of the question of validity of the present system and perhaps as in *Brown v. Board of Education*, 347 U.S. 483, then conduct separate and further hear-

ings on the appropriate remedy, because various remedial courses are available. Either of the two principal modes of reform which have been proposed for constitutional amendment could also be embodied in: (1) state legislative reforms; or (2) a decree of this Court; or, (3) congressional legislation.

One of these proposals is a district system by which electoral votes would be awarded to plurality winners in state sub-districts, as was widely done in our early history. This could be done by using congressional districts as single-elector districts for the electoral votes corresponding to Representatives with the two electoral votes which correspond to a state's Senators going to the state-wide winner. (Delaware, by coincidence, is already in compliance with this method because it has but one Representative and the state boundaries coincide with the congressional district.) This would have the administrative advantage of utilizing existing congressional districts which are being redrawn on population bases pursuant to *Wesberry v. Sanders*, *supra*. A more representative, but less convenient, district system would divide every state into equally populated single-elector districts, the proposal advanced in 1824 by Senator Benton.

The second possibility is to divide each state's electoral vote among candidates proportionally according to their percentages of the state-wide popular vote. This has never been done by any state, but is the reform which has achieved the greatest congressional success, having passed the Senate as a proposed constitutional amendment in 1950. For full discussions of both proposals, see the Senate Judiciary Committee Print of 1961, quoted *supra*, p. 79, and Kefauver, *The Electoral College Old Reforms Take on a New Look*, 27 Law and Contemporary Problems 188 (1962).

A disadvantage of leaving to state legislatures the choice of alternatives is that a uniform national method might not result because the political party in power in

each state could choose the system which appeared to favor it. Timing of changes and legislative stalemate also could cause difficulty. For this reason the Court might choose to embody one of the proposals in a multi-state decree applicable uniformly to all states. Plaintiff is willing to do equity to obtain equity and submits eagerly to any alternative to the present system which the Court might select as a judicial remedy. As indicated, Plaintiff believes that it already is in compliance with one method which might be held to be reasonably designed to reflect substantial divisions of popular will within the states. Although this district system would have the effect of continuing the smallest states as electoral units, the Court has recognized that invidious cancelling of minority voting strengths by multi-representative districts may "more easily be shown if . . . districts are large in relation to the total number of legislators". *Burns v. Richardson*, ___ U.S. ___, ___, 86 S. Ct. 1286, 1294.

In any event, Congress can protect legislatively from any vacuum in election procedures. Once it is determined that the Fourteenth Amendment is violated by the state unit system, Congress could unquestionably act under its legislative power to implement this Amendment. *Cf.* The Voting Rights of 1965, upheld in *South Carolina v. Katzenbach, supra,* and *Katzenbach v. Morgan,* ___ U.S. ___. It could require the use of the proportional or a district method, or perhaps some system not previously considered. The ultimate result might be the submission of a proposed constitutional amendment for direct national election. Congress might well agree with Mr. Justice Jackson, who speaking for himself and Mr. Justice Douglas in their dissent in *Ray v. Blair, supra,* said:

> "The demise of the whole electoral system would not impress me as a disaster. At best it is a mystifying and distorting factor which may resolve a popular defeat into an electoral victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of

the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes". *Id.* at 224.

CONCLUSION

The motion for leave to file should be granted and injunctive relief should issue as prayed in the complaint.

DAVID P. BUCKSON
Attorney General
State of Delaware
Dover, Delaware

ROBERT G. DIXON, JR.
Special Counsel
720 - 20th Street, N. W.
Washington, D. C. 20006

JAMES C. KIRBY, JR.
Special Counsel
357 E. Chicago Avenue
Chicago, Illinois 60611

Of Counsel:

GOSNELL, DURKIN & McGRATH
John A. Gosnell
William J. Durkin
Henry J. Cappello
1225 Nineteenth Street, N. W.
Washington, D. C. 20036

APPENDIX TO BRIEF FOR PLAINTIFF

CONSTITUTIONAL PROVISIONS INVOLVED

Article II, Section 1, Paragraph 2:

"Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an office of Trust or Profit under the United States, shall be appointed an Elector."

Article III, Section 2, Paragraph 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XII:

"The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President, but in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disabil-

ity of the President.— The Person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

Amendment XIV:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XXIII:

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CODE PROVISIONS

Chapter 28, Section 1251 — Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their comestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens. June 25, 1948, c. 646, 62 Stat. 927"