IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 28 ORIGINAL

STATE OF DELAWARE,

Plaintiff,

against

THE STATE OF NEW YORK, *et al.*,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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Defendant, the State of New York, submits this brief in opposition to plaintiff's motion for leave to file its complaint in the instant case.

Jurisdiction

Plaintiff seeks to invoke the jurisdiction of this Court under U. S. Const. art. III, § 2 and 28 U.S.C. § 1251.

Questions Presented

1. Does Delaware have standing to bring an original action in this Court since it claims violation of individuals' federal constitutional rights, rather than injury in its quasi-sovereign or proprietary capacity?

2. Can there be a controversy among the States regarding the validity of similar statutes which were inde-

pendently enacted by the legislatures of each of the States in exercise of the plenary power granted by the Constitution?

3. Is the complaint sufficient to state a cause of action where the alleged injury is to individual rights, but where no facts are offered to support that allegation and where the relief requested relates only to plaintiff's relative power as a political entity?

4. Is this case susceptible of judicial resolution, in the absence of any constitutional standard for evaluating the complicated legislative policy considerations raised?

We submit that each question should be answered in the negative and that plaintiff's motion to file the complaint should be denied.

Statement

Plaintiff, the State of Delaware, seeks leave pursuant to U. S. Const. art. III, § 2 and 28 U.S.C. § 1251 to commence an original action in this Court against all the States of the United States and the District of Columbia to declare unconstitutional the statute of each jurisdiction which provides for the election of electors for President and Vice President and to enjoin the enforcement of such statutes. Specifically, Delaware challenges the procedure whereby presidential electors are chosen by slates, the winning slate being the one which has a plurality of the statewide popular vote. This procedure, known as the "general ticket" or "unit vote" system is employed by every State, including Delaware, and by the District of Columbia.

As of this date motions to realign as parties plaintiff have been received from the following States: Arkansas, Florida, Iowa, Kansas, Kentucky, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah and Wyoming.

Summary of Argument

Delaware seeks leave to attack the general ticket system for appointing presidential electors which has been independently enacted by the legislature of each State. Delaware does not attack the electoral college or its role in our political system. Rather, its cause of action is dependent on the existence of the electoral college and the inequities inherent therein. Despite plaintiff's generalized allegations of voter inequality, an analysis of its imprecise and disjointed complaint reveals that no cause of action is presented for consideration on the merits by this Court. Delaware does not seek to establish the "one person-one vote" principle, nor even to approximate it within the limits allowed by the electoral system. The inequality among voters of the several States is embodied in the Constitution and operates to the advantage of small States such as Delaware. Delaware's real complaint is that the general ticket system exaggerates the voting power of the larger States and therefore relegates the smaller States to the political shadows. The issue in this case is therefore not the right to vote; the issue is political power and the political arena is the place to decide this question.

The allegations of the complaint are inadequate to provide a basis for the exercise of original jurisdiction by this Court over controversies among the States. In order to bring such an action, plaintiff must be a State acting in its quasi-sovereign or proprietary interest. But Delaware claims only to be acting in the interests of individuals. Moreover, the complaint does not even establish a controversy because Delaware uses precisely the same method of appointing electors as every other State. The implication that the use of the general ticket system by other States necessitates its use by Delaware is untenable. Each State has plenary power to fix a method for appointing electors and each State acts independently in this regard.

POINT I

The State of Delaware is not a real party in interest and may not invoke the original jurisdiction of this Court.

A. Plaintiff is not suing as a State in its quasi-sovereign or proprietary interest.

Delaware claims to be suing, not in its own sovereign or proprietary interest, but in the interest of the individual rights of its citizens under the Fifth, Ninth, Tenth and Fourteenth Amendments. It variously claims to be suing in the interest of all its citizens (Complaint, pp. 6, 10), of a minority of its citizens (pp. 7-8) of "minority voters" in all of the other States (pp. 6, 7-8) of all of the voters of small States (pp. 11-13), and of both the Democratic and Republican parties (pp. 8-9), without differentiating which which alleged rights belong to which. Delaware certainly has no standing to represent any of these but its own citizens and in representing those citizens, it must still act in its quasi-soverign capacity.

In order to bring an action in this Court under 28 U.S.C. § 1251, a complaining State must sue in its own sovereign or proprietary interest rather than in the individual interest of its citizens. *New Jersey* v. *New York*, 345 U. S. 369; *Oklahoma* v. *Cook*, 304 U. S. 387; *Massachusetts* v. *Mellon*, 262 U. S. 447; *North Dakota* v. *Minnesota*, 263 U. S. 365; *Oklahoma* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 220 U. S. 277; *Louisiana* v. *Texas*, 176 U. S. 1. The purpose of granting this Court original jurisdiction over controversies among the States (U. S. Const. art. III, § 2), was to provide a substitute for diplomatic negotiations which otherwise would have been available between or among them as individual sovereigns. The subject matter of the action must relate to an interest which would have been subject to such negotiations had it not been for the

creation of the Union. See *Nebraska* v. *Wyoming*, 325 U. S. 589; *North Dakota* v. *Minnesota*, *supra*; *Louisiana* v. *Texas*, *supra* at 15-17.

In the last case, Louisiana sued Texas under the interstate commerce clause, alleging that a Texas quarantine statute repeatedly had been used to prohibit shipment of goods from New Orleans to various points in Texas. This Court held that even if Texas or its officials were interfering in interstate commerce and even if that interference had a deleterious effect on the economy of Louisiana, Louisiana as a state had no right to bring the action. *Id.* at 9. Louisiana, itself, was not engaged in interstate commerce nor did it have the authority to enforce the commerce clause. Justice HARLAN, in a concurring opinion, stated the rule as follows:

> "When the Constitution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States,' and to controversies 'between a State and citizens of another State,' and the word 'party' in the clause declaring that this Court shall have original jurisdiction of all cases 'in which a State shall be party' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of

the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court." *Id.* at 24-25.

In *Massachusetts* v. *Mellon, supra,* Massachusetts attempted to enjoin the Secretary of the Treasury from enforcing the Maternity Act on the grounds that it was an unconstitutional encroachment on the prerogatives of state government. This Court held that the claim of invasion of state sovereignty presented an abstract political question which was inherently non-justiciable. It also held that the State was not the real party in interest, and was not permitted to sue on behalf of the individual rights of its citizens.

In *Oklahoma* v. *Cook, supra,* the Oklahoma Bank Commissioner, who was given authority under state statute to enforce liability during the course of liquidation against the shareholder of an Oklahoma bank, sued an out-of-state citizen. The Court held that the statute embodied a legitimate economic policy of the State, but that the suit was actually for the benefit of creditors of the bank. Thus, Oklahoma was not suing in its quasi-sovereign capacity, and could not bring an original action in this Court. *Id.* at 393-94. Also see *Massachusetts* v. *Missouri,* 308 U. S. 1, 17; *Arkansas* v. *Texas,* 346 U. S. 368, 370.

Delaware's bare claim that it is suing as *parens patriae* for the rights of its citizens (Complaint, pp. 6, 10) does not avoid the strict jurisdictional requirements of 28 U.S.C. § 1251. There are three prerequisites to an original *parens patriae* action in this Court. First, the state still must sue in its quasi-sovereign capacity. See *North Dakota* v. *Minnesota, supra* at 375-76; *New Jersey* v. *New York, supra* at 372; *New York* v. *New Jersey,* 256 U. S. 296 at 301-302.

Next, the right in which the *parens patriae* action is based must be one whose enforcement is committed to state government. *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Massachusetts* v. *Mellon, supra; Louisiana* v. *Texas, supra.* Finally, the *parens patriae* suit must be brought in the interest of all of the citizens of the plaintiff state. *New Jersey* v. *New York, supra* at 372; *Kentucky* v. *Indiana*, 281 U. S. 163, 173. Delaware does not qualify as a plaintiff on any of these grounds.

B. The Federal Government, not the State, is the *parens patriae* of United States citizens with respect to individual rights protected by the Constitution.

Delaware claims that the electoral statutes of all the States violate United States citizens' voting rights which are protected by the Fifth and Fourteenth Amendments (Complaint, p. 10). This Court has held that Fifth Amendment rights belong to individuals, not to States, and that with regard to rights under this Amendment only the federal government may stand as *parens patriae* to United States citizens. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 324; *Massachusetts* v. *Mellon, supra* at 485-86; cf. *Louisiana* v. *Texas, supra.*

Like the Fifth, the Fourteenth Amendment confers no power of enforcement on any state, nor is a state a "person" whose rights are protected. On the contrary, it protects people within the jurisdiction of each state *against the actions of that state* and specifically confers the power to enforce its provisions on the federal government. See *e.g. Katzenbach* v. *Morgan*, 384 U. S. 641. Indeed, state officials are the only possible defendants in an action based on Fourteenth Amendment rights.

In *Wisconsin* v. *Zimmerman*, 205 F. Supp. 673 (W. D. Wis. 1962), the Attorney General of Wisconsin brought suit in *parens patriae* to enjoin the Wisconsin Secretary of State from holding an election for members of the state

legislature. The complaint alleged that the legislative districts were malapportioned in violation of the Fourteenth Amendment under the principles enunciated by this Court in *Baker* v. *Carr*, 369 U. S. 186. The three-judge court held that since the Fourteenth Amendment protects "persons," not states, Wisconsin was not the real party in interest. It ruled that standing to assert the individual rights protected under that Amendment was dependent on the joinder of two or more Wisconsin voters as parties plaintiff.

Delaware further alleges that the electoral statutes of all the States violate the rights allegedly reserved to its citizens under the Ninth, Tenth and Fourteenth Amendments to seek national office and to be courted during a presidential campaign. The Fourteenth Amendment, as has just been discussed, grants rights only to persons, not to states. It is unlikely that the Ninth Amendment requires equal campaigning per elector on the part of presidential candidates or that it requires every State to have produced a nominee for President. In fact, there have been nominees for President from the small States from the time of Andrew Jackson to the election of 1964. In any case, these alleged rights belong to the individual rather than to the State. The Ninth Amendment, like the Fifth and Fourteenth, creates no rights in the States, but protects the rights of the people from disparagement by federal action and perhaps even by state action. See *Griswold* v. *Connecticut*, 381 U. S. 499. Nothing is added by invoking the provisions of the Tenth Amendment, since, although it reserves powers to the States, Delaware relies only on the individual's right to political participation.

The enactment of the general ticket system is based on a specific grant of power to the state legislatures. U. S. Const. art. II, § 1. Consequently, it is not a non-enumerated power subject to the provisions of the Ninth and Tenth Amendments. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 95-96.

C. Plaintiff may not sue in *parens patriae* because it seeks to represent the interest of only some of its citizens.

Delaware's cause of action is based principally on the rights of its "minority voters" (Complaint, pp. 7-8), as opposed to those who have voted for the majority candidate. Certainly the state Legislature could, on balance, choose a system where the electoral votes would be divided. Certainly, "minority voters" may have rights which they can sue to protect. But the State, acting as *parens patriae,* must represent the interest of all its citizens. *New Jersey* v. *New York, supra; Kentucky* v. *Indiana, supra.*

Complaints alleging violation of voting rights actually should be made in class actions brought by individual voters. *Wisconsin* v. *Zimmerman, supra.* See *e.g., Baker* v. *Carr, supra; Nixon* v. *Herndon,* 273 U. S. 536; *Hawke* v. *Smith* (no. 1), 253 U. S. 221. The Eleventh Amendment prohibition of suits by individual citizens of one State against another State cannot be avoided by the unilateral choice of one State to make itself party plaintiff of record in such a case. As this Court pointed out in *North Dakota* v. *Minnesota, supra* at 375-76:

> "It was argued [in *New Hampshire* v. *Louisiana,* 108 U. S. 76] that as a sovereign the State might press the claims of its citizens against another State, but it was answered by this Court that such right of sovereignty was parted with by virtue of the original Constitution in which, as a substitute therefor, citizens of one State were permitted to sue another State in their own names, and that when the Eleventh Amendment took away this individual right, it did not restore the privilege of state sovereignty to press such claims. The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present

and enforce individual claims of its citizens as their trustee against a sister State." Also see *Massachusetts* v. *Missouri, supra; Oklahoma* v. *Cook, supra* at 393-94; *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277, 289.

Notwithstanding the Eleventh Amendment's limitation, Delaware citizens could not sue another State on a complaint alleging violation of voting rights because they do not have a right to vote in any State but their own. *Reynolds* v. *Sims*, 377 U. S. 533, 577-58; *Gray* v. *Sanders*, 372 U. S. 368, 379-80; *United States* v. *Classic*, 313 U. S. 299, 314-15; *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 192 (D. Nebr. 1962). Nevertheless, the same issues which Delaware attempts to raise herein can be the subject of an action brought by individual voters to enjoin the appropriate officials of their own State from enforcing the allegedly unconstitutional statute.

Consequently, plaintiff's allegation (Complaint, p. 13) that this Court is the only available forum to vindicate the rights asserted is incorrect. Indeed the allegation is particularly strange in light of plaintiff's obvious familiarity with the reapportionment cases, since each of those cases was commenced in a district court by individual voters. Under Delaware's theory in this case virtually any voter could sue his State's officials. The problem for plaintiff is not that this Court is the only forum available, but that no rights have been violated. Had an individual citizen of Delaware commenced this suit in a district court, it would be immediately apparent that it is not only impossible for his vote to be weighed equally with that of a New Yorker, but that the inequities in the electoral system favor Delaware voters.

POINT II

The complaint does not establish a controversy between two or more states and thus fails to provide a basis for the exercise of the original jurisdiction of this Court. U. S. Const. art. III, § 2.

A. There is no interstate controversy regarding the validity of the general ticket statutes which have been enacted independently by all the States.

Since Delaware has precisely the same system for appointing electors as all of the other States, there is no controversy about its use. U. S. Const. art. III, § 2. Delaware implies that it has an interest in the use of the general ticket system by other states because that system "maximizes their relative strengths in the national election" and that Delaware is therefore required to do likewise as a "defensive measure" (Complaint, pp. 6-7). In fact, there is no controversy because the political structure of the country is such that each State must pass its own legislation respecting the appointment of electors and each State must cast its own electoral votes for President.

Under U. S. Const. art II, § 1 "Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors. . . ." This provision has long been held to vest plenary power in the States to fix and alter their methods of appointing electors. Speech of Charles Pinckney, 10 ANNALS OF CONGRESS 128-29 (1800) quoted in WILMERDING, THE ELECTORAL COLLEGE 44. Indeed, James Madison, who anticipated a popular election for President, acknowledged that even state legislatures might, if they chose, appoint electors. *Id.* at 21; THE FEDERALIST No. 45. This Court, too, has held that the method for appointing electors resides solely in the States. *McPherson* v. *Blacker*, 146 U. S. 1, 35; *Ray* v. *Blair*, 343 U. S. 214, 224-26; also see *In re Green*, 134 U. S. 377.

The state legislative power to control the appointment of electors is in marked contrast to its power to regulate Congressional elections. The latter power, while given to the States in the first instance, is subject to control by Congress. U. S. Const. art. I, § 4; *United States* v. *Classic*, *supra*. No such supervisory power is retained over the appointment of electors.

The Constitution contemplates the States as equal and independent units whose legislation affects only those persons "within its jurisdiction". U. S. Const. amend. XIV. As this Court said in *Kansas* v. *Colorado*, 206 U. S. 46, 97:

> "One cardinal rule underlying all the relations of the states to each other is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield in its own views to none."

In *Massachusetts* v. *Missouri*, *supra*, the plaintiff State asked for injunctive and declaratory relief against the defendant State's taxation of an estate over which Massachusetts claimed exclusive jurisdiction. This Court held that the assets of the estate in question were sufficient to satisfy the claims of both litigants, so that there was no controversy between them. Compare *Texas* v. *Florida*, 306 U. S. 398. Holding that Massachusetts had no legitimate interest in Missouri's legislation because each State's statute was independent of the other, this Court denied leave to file the complaint.

Since the Constitution provides that electoral votes are to be cast State by State a State's provision for the selection of its electors has effect only within that State. Delaware, like every one of the defendant States and the District of Columbia, employs the general ticket system to allocate its electoral votes. It contends, nevertheless, that a controversy exists because the prevalence of the general ticket denies to plaintiff the power to choose any other. It is not correct to attribute what might be

called a "domino" effect to the general ticket system. Delaware is by no means barred from instituting for itself the "reforms" it seeks to have this Court institute for others. Indeed, if the general ticket were unconstitutional, the cause of the adoption of the system could not be relevant. Determination of the constitutionality of the statute is not aided by a discussion of the excuse for its adoption.

Furthermore, plaintiff's domino theory is historically dubious at best. In the election of 1788, ten States cast electoral votes. Of these States only Virginia had what can be described as a pure district system (Plaintiff's Exhibit "B"). In 1792, only two of fifteen States used a pure district system. Plaintiff employed legislative appointment, a system it used until the election of 1832 when it adopted the general ticket. In 1800, Thomas Jefferson raised wnat plaintiff describes as a "principled objection" (Br. p. 60) to the use of the district system by one State where other States cast their votes as a unit. "In these ten states [which cast their votes as a unit] 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 [Virginia's] minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government" (Br. p. 60).

Mr. Jefferson thus agreed that Virginia should, as it did, abandon its district system, not simply because the other States would vote as units, but because some of Virginia's electoral votes might be lost to him in the election of 1800. In the same year, Alexander Hamilton, filled with a sense of foreboding that New York would cast all of its votes for Jefferson, urged Governor Jay to district the State. The former Chief Justice rejected the proposal, calling it "a measure for party purposes which I think it would not become me to adopt." STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897, 60 (1898). Throughout this period there was no suggestion by either its advocates

or opponents that the general ticket system raised constitutional issues.

Whatever the system in other States, it is a natural tendency for any state government to unify its vote at least if it can be assured of the direction of that vote. The desirability of such unity is a question of state policy. Any state may change its system. If the state legislature decides that it is desirable to reflect in the electoral vote the division in the popular vote, it is free to change as Hamilton tried to change New York in 1800, as Michigan did change in 1892 for a brief interval and as many states changed until 1836, when the general ticket system became prevalent. See WILMERDING, *supra* at 44f; Plaintiff's Exhibit "B". Since state power as an electoral unit is thus necessarily rejected, the fact that other States vote as units is irrelevant.

B. The Attorney General of Delaware does not establish authority to represent his State in attacking its statute.

Because the State legislature has the plenary power to appoint electors, the Delaware Attorney General has no standing to attack his own State's statutory system. Delaware Code Ann., Tit. 15, §§ 4301-02 (1953), § 4502 (Supp. 1964). That statute, enacted in its basic form before the election of 1832 (Plaintiff's Exhibit "B") is the only expression of sovereign will issued by the legislature of Delaware. Yet, in an action requiring that plaintiff be a State acting in a sovereign caapcity, the Attorney General of Delaware challenges the exercise by his legislature of a function expressly committed to it by the Constitution. No allegation is made that the legislature has authorized the suit. See *Coleman* v. *Miller*, 307 U. S. 433; *Texas* v. *White*, 74 U. S. [7 Wall.] 700; *Pennsylvania* v. *Wheeling Bridge Co.*, 54 U. S. [13 How.] 518, 558. It is not even clear that legislative acquiescence could be alleged through appropriation for purposes of this action. Cong. Quarterly Fact Sheet, August 12, 1966, p. 5. Plainly, whatever the

right of the Attorney General within Delaware to attack state legislation, he cannot, in effect, sue his own State in this Court. *Stewart* v. *Kansas City*, 239 U. S. 14; *Smith* v. *Indiana*, 191 U. S. 138.

Although Delaware implies that it was coerced into choosing the general ticket system by a "domino" effect, it makes no factual allegations to show that its Legislature originally chose the general ticket as a defensive measure against its use by other states nor does it allege that the legislature would change that system, but for its continuance in other states. Thus, the position of the Delaware Attorney General is directly contrary to the long standing policy of the State he claims to represent in this case. He establishes no controversy between his legislature and the legislature of any other State. It should be noted that all of the State Attorneys General who have moved to realign as parties plaintiff similarly attack the statutes of their own legislatures. None has alleged legislative authorization for taking a position inconsistent with established State policy. Considering this Court's traditionally cautious policy in intervening in alleged disputes purported to be among States, this question of authority is no mere technical defect in pleading, but a basic flaw precluding the exercise of the Court's original jurisdiction.

POINT III

The complaint is insufficient to establish that the use of the general ticket system by defendant States impairs any constitutional right of the voters of Delaware.

Plaintiff casts its complaint and brief in terms of voter inequality which allegedly results from the general ticket system. In reality, however, plaintiff is not concerned with its own use of the general ticket, but with its use by other States. Plaintiff has neither the desire nor the intent to abandon a unit vote for itself (Br. p. 90).

Plaintiff's claim that the defendants violate the rights of Delaware's voters to be treated equally by using the general ticket system to appoint electors is not sustained by any factual allegation in the complaint. In an original action against a quasi-sovereign power, the plaintiff's burden to allege and establish harm by the action of such sovereign is particularly heavy. *Colorado* v. *Kansas*, 320 U. S. 383; *Alabama* v. *Arizona*, 291 U. S. 286; *Connecticut* v. *Massachusetts*, 282 U. S. 660; *North Dakota* v. *Minnesota*, 263 U. S. 365; *New York* v. *New Jersey*, 256 U. S. 296, 309; *Louisiana* v. *Texas*, 176 U. S. 1.

Plaintiff's allegations that inequality results from the use by other States of the general ticket system for appointing electors is made with total disregard to the inequality inherent in the system of apportioning those electors and with sublime indifference to the fact that that inequality consists of an overweighting of the votes cast in small States such as itself. It is apparent from the nature of the relief sought that, far from wishing to decrease voter inequality, plaintiff seeks to increase the power of the small States as political units, States whose voters already have an electoral advantage. In New York in 1964, over 7,150,000 votes were cast for the office of President. In Delaware, 201,320 votes were cast. Plaintiff's Exhibit "C", pp. 24-25. Thus, in New York, with 43 electors, over 166,279 votes were cast per elector. In Delaware, with three electoral votes, the ratio was 67,106 votes per elector.

The electoral college system of choosing a President represents a decision first, not to entrust the election of a President directly to the people (*Gray* v. *Sanders*, *supra* at 376 n. 8) and second, to choose a President on a federal rather than on a national basis, thus effecting a compromise between the large and small States. Farrand, The Framing of the Constitution 166-67 (1913). The electoral process was made indirect by placing it in the hands of electors and was made federal by apportioning those electors to the States on the basis of their total representation

in the House of Representatives and in the Senate regardles of population.

The Constitution provides for two methods of electing the President. Both make it impossible that the vote for electors of the President shall ever bear a direct relation to the vote by the people. Both also make it impossible for the votes in different States to have equal weight.

The first method, the voting by electors for President, precludes the electoral college from ever accurately reflecting the popular vote because each State has three electoral votes which are not allocated on the basis of population* and because the electoral vote of each State is constant no matter what the actual voter turnout may be. Voter inequality and the distortion of results are inevitable concomitants of this system. In an extreme situation, the results may differ and the candidate with fewer popular votes than his nearest opponent may win a majority of the electoral college votes. This has happened once in our history, in the election of 1888. Even there, while Benjamin Harrison had fewer popular votes than Grover Cleveland, Cleveland did not have a popular majority, his plurality being less than one percent. The other elections in which the candidates with fewer popular votes were elected were decided, not under the electoral college but by the second method of election in the House of Representatives.

In the event that any candidate fails to compile a majority of the electoral votes, the House of Representatives chooses the President "from the persons having the highest numbers not exceeding three on the list of those voted for as President . . . but in choosing the President, the votes shall be taken by states, the representation from each state having one vote. . . ." U. S. Const. amend.

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* Each state has two Senators and one Representative regardless of population.

XII. Initially many had the sanguine expectation that most elections would be held in the House. WILMERDING, *supra*, 17. Congress has decided three elections; the elections of 1800 and 1824 were decided by the House and the election of 1876 was in effect decided by an electoral commission appointed by Congress. The outcome of the latter two elections was the choice of the candidate with the fewer popular votes. Neither in 1800 nor in 1824 was the general ticket system predominant (Plaintiff's Exhibit "B"). The electoral system thus insures voter inequality among the voters in different States, the distortion of voting results and the double chance of thwarting the popular will. Plaintiff's attribution of these problems to the general ticket system is obviously erroneous.

The claim that the general ticket system "arbitrarily" misappropriates and isolates minority votes is untenable. Since all votes are cast within a State for electors who choose a President, no voter in Delaware can cast his vote for an elector in New York. The charge of "arbitrary misappropriation" was accurately analyzed in 1956 by Senator Paul Douglas of Illinois:

> "I cannot be disturbed over this argument of 'lost votes'. I think it is naive and without reason or logic. In every election where there can be only a single winner, all votes cast for the losing candidate can be labeled 'lost' or 'counted for the winner'. The Mundt-Coudert [district] plan would merely transfer the winner-take-all rule from the state level to the Congressional district. The votes cast for the candidate who failed to carry the congressional district could be called lost or counted for the candidate who did carry the district. The Lodge-Gossett [proportional] plan would merely transfer those so-called lost votes from the State to the National level. As former Senator Homer Ferguson has said, the truth is that no votes are lost when validly cast in an election. They are

actually counted toward the final decision, and if insufficient for victory, they have simply exhausted their power as votes.'' 102 Congressional Record 5566 (1956).

A general ticket system, like an election for state office or for United States Senator, is an election at large in which all votes are counted equally within the largest possible unit. In no such election is there more than one winner. Elections at large have been upheld even for all of a State's delegation in the House of Representatives. *Wesberry* v. *Sanders*, 376 U. S. 1; *Norton* v. *Campbell*, 359 F. 2d 608 (10th Cir., 1966). *A fortiori*, a general ticket for the appointment of electors is constitutional. Voting in the largest possible unit for an official most accurately reflects the constituency of the office. The Presidency is our only national office and the general ticket provides for voting in the largest possible unit. The desirability of emphasizing the national character of the election is recognized by the more than thirty States, including Delaware, which employ the ''short'' ballot which lists not the candidates for electors, but only those for President and Vice-President. *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary on the Nomination and Election of President and Vice-President*, 88th Cong., 1st Sess. (supp. 1963) (Hereinafter ''*Hearings* (1963)'') p. 17.

Although the general ticket system does inaccurately reflect the division within a state, some distortion is inevitable. Indeed, ''there would be no point in placing the intermediate mechanism of electoral votes between the voters and the candidates if it served only to reflect with mathematical accuracy the distribution of popular votes.'' *Sindler, Presidential Election Methods and Urban-Ethnic Interests*, 27 LAW AND CONTEMPORARY PROBLEMS, 213, 215 (1961). Moreover, as an historical matter, the general ticket has tended to keep elections out of the House.

The general ticket may increase the power of the populous States in the electoral college. This, in fact, is Delaware's only complaint. It is concerned with power as a State and its "solutions" for alleged inequality merely shift the balance of power, having no effect on individual voter weight. Plaintiff suggests as alternatives either a district system or a proportional system. Under the district system, a State would either be divided into as many districts as it has electors, or into as many districts as it has Representatives, the other two electors being chosen at large. Under the proportional system, all of a State's votes would be counted together and the electors divided according to the percentage of the popular vote.

Analytically, the district system is precisely like the general ticket system on a smaller scale. The voters for the losing candidate within each district have their votes "exhausted" at an even earlier stage than under the general ticket system. Minority voters in District A could not have their votes combined with the majority voters in District B. The district system would increase the chance of electing a minority president since it would be possible for a candidate with a statewide plurality to capture less than half of the State's electoral votes. Thus, in 1960, Mr. Nixon won 14 of the 25 Congressional districts in Illinois and 7 of the 11 districts in Missouri, but Mr. Kennedy had the larger popular vote in both States.* Indeed, in 1960 a district plan would have changed the presidential election result. At least, within a State under the general ticket, it is impossible for a minority candidate to be chosen.

The only real effect of the district system in splitting state votes would be to split up the large States, as the

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* *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary on the Nomination and Election of President and Vice-President*, 87 Cong., 1st Sess. (1961) (Hereinafter "Hearings [1961]") pt. 3, p. 659.

late Senator Kefauver so clearly perceived. (*The Electoral College*, 27 LAW AND CONTEMPORARY PROBLEMS 188, 197 [1961]):

> "From 1789 to 1892, there were fifty-two instances of states using some form of district systems. In thirty-six instances, the state's votes were still cast as a unit. Analysis of how the district system would have operated in 1960 indicates that a surprisingly high number of states' votes would have still been cast in bloc. If congressional districts had been used for a district plan in 1960, electoral votes would still have been cast in a block by these twenty-one states: Alaska Arizona, Delaware, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. These states had a total of 119 electoral votes. In an additional seven states with a total of fifty-one electoral votes, only one vote in each would have been split from the state unit. They are Arkansas (1 of 8), Colorado (1 of 6), Connecticut (1 of 8), Idaho (1 of 4), Indiana (1 of 13), Montana (1 of 4), and Oklahoma (1 of 8). In six more states having a total of seventy-five electoral votes, the minority party would have captured no more than twenty-five per cent of the electoral votes. They are Kentucky (2 of 10), Ohio (5 of 25), South Carolina (2 of 8), Virginia (3 of 12), West Virginia (2 of 8), and Wisconsin (3 of 12).
>
> This suggests that in many states, the division of political sentiment is sufficiently uniform throughout the state that voting by districts will produce the same result as voting by states. For the minority party to capture electoral votes, its strength must be localized in pockets large enough to carry districts. In many states (and all districts), minority party voters would still be 'disfranchised' in the sense that their popular votes would not be reflected in the national vote totals.

> In populous states with distinctive rural and urban areas, the district system very effectively splits state unit votes. Using the same analysis, in 1960 New York's vote would have split 25-20. California 19-13, Illinois 15-12, Pennsylvania 17-15, and Michigan 10-10. The large states would be drastically affected while most small states and essentially one-party states would see little change in the course of their electoral votes. One can see the truth to Thomas Hart Benton's 1834 prediction that 'the district system would break the force of the large states.' ''

The district system would greatly enhance the position of States which are already overrepresented in the electoral college. While the general ticket system tends to correct the inbalance, the district system would exaggerate it. Under a system of voting in Congressional districts and at large, the weight of the at-large vote would be greatly magnified in the small States. Under a system where the State is totally districted the vote for each elector would weigh differently in every State. Although Delaware ingeniously says that the electoral votes representing senators amount to less than 1/5 of the total electoral vote and are thus inconsequential, it fails to state the Delaware's senatorial vote is 2/3 of its total electoral vote and New York's is 2/43. The one advantage of the large state voter would thus be destroyed.

> "Instead of equalizing voter representation, the district system therefore introduces a new inequality of voting weight in favor of smaller states' citizens far greater than that now operating against them. This demonstrates the fallacy of attempting to apply concepts of voter equality while retaining the system of electoral votes which flows from federal principles of state representation in our bicameral national legislature." Kefauver, *supra* at 198. Also see *Hearings* (1961) (statement of Prof. Norman W. Johnson)

p. 657; 102 Cong. Record 5158 (1956) (remarks of Senator John F. Kennedy).

Plaintiff also suggests the possibility of a proportional system of counting votes, pointing out that although this system has never been used it often has been suggested. What plaintiff neglects to mention is that the system for proportional counting would be unworkable without a constitutional amendment, because the constitution does not allow an elector to split his vote. More important, a proportional count would so nearly achieve plaintiff's aim of an accurate reflection of the vote, that seldom would a candidate have the required majority of electoral votes, and more elections would have to be decided by the House of Representatives. It is significant that virtually every proposed constitutional amendment which retains the electoral votes but provides for a proportional count abolishes the office of elector and reduces the required electoral margin from 51% to 40% of the electoral vote. It is also true that while the office of elector remains, a voter votes for individuals. Under the proposed system it would not be possible to allocate the votes cast to determine which electors had been chosen. As in the district systems, the large states would be deprived of an effective voice, since far fewer votes in the smaller states could produce the same number of effective electoral votes as many more in a large State. Neither a district system nor a proportional system would eliminate voter inequality among the States.

Because of the severe lapses in plaintiff's legal theories and the complete absence of supporting factual allegations, the complaint constitutes an insufficient basis for bringing all of plaintiff's sister States to the bar of this Court. *Louisiana* v. *Texas, supra.*

POINT IV

The fact that, as a political unit, Delaware has less power than New York in the electoral college does not present a controversy which can be judicially resolved.

The crux of the complaint is whether Delaware, as a political entity, is entitled to a greater electoral voice in the choice of President. This is not a justiciable issue because the apportionment of and the power to designate electors are determined by the text of the Constitution, article I § 2; the choice of a method of designating electors requires an initial determination of alternative political values which are not properly the subjects of judicial discretion; and there are no standards provided by the Constitution or other judicial sources to determine which method of selecting electors is preferable.

The standards of justiciability enunciated by this Court in *Baker* v. *Carr,* 369 U. S. 186, 217, apply squarely to this complaint and preclude its being filed:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of

the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.''

As Point III, *supra,* demonstrates, Delaware's purpose in bringing this action is to increase its weight in the electoral college. Since the text of the Constitution precludes Delaware from acquiring such greater weight, it seeks to achieve the same end by reducing the strength of the more populous States. However, a constitutional amendment would be necessary to compel the States to split their electoral votes, for the text of the Constitution delegates to the state legislatures the power to choose electors in their own way. Delaware actually admits the necessity of constitutional amendment, but sues in this Court as a more convenient and non-political forum. In support of the instant motion it avers (p. 2):

> ''Although the Complaint seeks declaratory and injunctive relief, it is recognized that ultimate correction of the conditions complained of may best be achieved by Constitutional Amendment. But unless this Court sees fit to 'open the door,' and point the way through equitable interim relief, as it did in the field of legislative apportionment, no Constitutional Amendment aimed at fair and just reform of the Electoral College is likely to come from entrenched political interests which are satisfied with a voting device that suits their purposes. No other remedy is available to aid citizens whose votes in presidential elections are diluted, debased and misappropriated through the state unit system and its risks of miscarriage of the popular choice will continue indefinitely, unless this Court grant relief.''

Judicial decision is not a substitute for constitutional amendment. Indeed, the jurisdiction of this Court is defined and limited by the very same constitutional sections which Delaware allegedly seeks to amend.

Since the early nineteenth century there have been many and varied proposed amendments regarding the election of the President. They fall into four principal categories: (1) requirement of the general ticket system with or without retention of the office of elector; (2) districting of some sort; (3) proportional representation in some form; (4) national direct popular election of the President. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY (published as Volume II of the Annual Report of the American Historical Association and printed as H.R. DOC. NO. 353 (84th Cong., 2d Sess.); *Proposed Amendments to the Constitution of the United States of America*, 1926-1963 SEN. DOC. NO. 163, 87th Cong. 2d Sess. (1963).

The policy considerations which were the subject of the debate on these proposals are the kind which would confront this Court if it were to consider the merits of the general ticket system and its alternatives. See, *e.g.*, 102 Cong. Rec. Part 4 (84th Cong. 2d Sess.) 5136-5139, 5146-5166, 5231-5254, 5323-5325, 5332-5337, 5351-5357, 5365-5374, 5426-5440, 5535-5574, 5626-5674 (March 20-27, 1956); *Hearings* (1961); *Hearings* (1963).

For example, in arguing against both proportional representation and districting, the then Senator John F. Kennedy reviewed some of these policy considerations:

> "Today, we have a system which—in all but one instance throughout our history—has given us Presidents elected by a plurality of the popular vote. . . .
>
> Now it is proposed that we change all this. What the effects of these various changes will be on the Federal

system, the two-party system, the popular plurality system, and the large-State-small-State checks and balances system, no one knows. . . . —for an unknown, untried, but obviously precarious system which was abandoned in this country long ago, which previous Congresses have rejected, and which has been thoroughly discredited in Europe. No State legislature, political party, or major group of citizens has requested this change. Any State legislature which felt such a change to be more democratic or more logical has been free to adopt it for the past century. No statute or constitutional provision prevented the States from doing so. But, with the single exception of Michigan, which quickly abandoned the system proposed by Senate Joint Resolution 31 after a single trial more than half a century ago, not a single State has done so.

* * * *

Northern Democrats have been told that the Daniel amendment will assure their party of permanent control of the White House. Southern Democrats were told that the amendment would give them overwhelming control of their party. Liberals were told that the amendment would give them recognition by treating third-party movements more equitably. Conservatives were told that the influence of minority pressure groups in the Northern cities would be eliminated. And Republicans have been told that from the votes that will somehow appear in the South, under the Daniel amendment, or from gerrymandering of electoral districts by Republican-dominated State legislatures, under the Mundt amendment, their party will permanently possess the White House. It is difficult to believe that two-thirds of the Members of the Senate will accept such contradictory predictions.'' 102 Cong. Rec. 5158 (1956).

Even if the Constitution had not delegated the determination of these issues to the state legislatures, they would not be appropriate for judicial resolution. Evaluation of the relative importance of the federal, two-party, and checks and balances systems is a classic example of a political decision. It should be made by the body politic through the amending process or through its elected representatives, and not by judicial process. As this Court said with regard to sugar import regulations:

> "Whatever inequalities may thereby be created, this is not the forum for their correction for the all-sufficient reason that the extent and nature of inequalities are themselves controversial matters hardly meet for judicial solution." *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 618.

Neither the Constitution nor any judicial source provides a standard for the choice among conflicting policies which this Court would have to make to determine the merits of Delaware's claim. As a result, this case, in contrast to the apportionment cases, is not justiciable. See *Reynolds* v. *Sims*, 377 U. S. 533; *Gray* v. *Sanders*, 372 U. S. 368; *Baker* v. *Carr*, *supra*. In such cases, an overriding constitutional standard guides the Court.

> "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

This great principle made it possible to overcome the many problems of justiciability which, as this Court recognized, are inherent in redistricting. *Reynolds* v. *Sims*, *supra* at 556, 577-585. The general ticket system conforms to this intrastate requirement; but, nationally, the federal Constitution precludes the application of this fun-

damental standard to presidential elections. As this court has stated:

> "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." *Gray* v. *Sanders, supra* at 378.

The only constitutional standard for determining the proper position of Delaware with regard to the election of the President is found in U. S. Const. art. III, § 1 which provides that each State shall have a number of electors equal to its congressional delegation. That standard is now, and always has been, honored.

Delaware tries to justify this suit by suggesting (Br. pp. 91-92) that a ruling against the general ticket system might result in a constitutional amendment providing for direct popular election of the President citing the dissent in *Ray* v. *Blair*, 343 U. S. 214. Delaware's erroneous conception of the role of this Court, manifested throughout the complaint and brief, is epitomized in this inappropriate suggestion. In the first place, it is not a judicial function to aid in amending the constitution. In the second place, this cause of action has nothing whatever to do with direct popular election. No method of appointment of electors within the state can ameliorate the inequities inherent in the apportionment of electors. Lastly, Delaware has never supported direct popular election of the President. Proposed amendments to this effect have been defeated by the "entrenched political interest" (Br. p. 2) of the small states in the Senate where the representatives of Delaware's 446,292 inhabitants have power equal

to those representing New York's 16½ million. In 1934, an amendment proposed by Senator Norris for direct popular election, was defeated by a vote of 52 to 29 (not a ⅔ majority). It was supported by New York Senators Copeland and Wagner. It was opposed by both of Delaware's Senators, Hastings and Townsend. 78 CONG. REC. 9244-45 (daily ed. May 22, 1934). Had they supported the proposal, it would have passed. In 1956, New York's Senator Lehman made a similar proposal. It was opposed by Delaware's Senators Frear and Williams. CCH Congressional Index 8149-50 (April 18, 1956). Far from encouraging such an amendment, if Delaware were given even greater advantage in the electoral college it would be likely to oppose direct popular election with even more vigor.

CONCLUSION

For the foregoing reasons, the motion to file the complaint should be denied.

Dated: New York, New York, September 26, 1966.

Respectfully submitted,

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