CASE NO. 19-50214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF TEXAS; JOSEPH C. PARKER, JR.; HECTOR FLORES; SANFORD LEVINSON; YVONNE M. DAVIS; MARY RAMOS; GLORIA RAY; GUADALUPE TORRES; RAY VELARDE; DORRIS WILLIAMS

Plaintiffs - Appellants,

v.

GREG ABBOT, GOVERNOR OF THE STATE OF TEXAS; DAVID WHITLEY, in his official capacity as Secretary of State of the State of Texas,

Defendants - Appellees.

Appeal from the United States District Court,
Western District of Texas, Case No. 5:18-cv-00175-DAE,
Hon. David Allen Ezra

BRIEF OF PROPOSED AMICUS CURIAE EDWARD FOLEY, AS AN INTERESTED NON-PARTY SUPPORTING NEITHER PARTY

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CERTIFICATE OF INTERESTED PARTIES

Professor Edward Foley is a neutral third party whose interest in this matter is academic only, and whose *amicus* filing intends only to provide a historical perspective to the discussion about the electoral college and its development in U.S. history. Professor Foley has no personal interest in the outcome of this matter other than as an expert in the field of Constitutional and Election law as stated in the Motion and Brief. Professor Foley's work in connection with this brief is not sponsored by or paid for by any person or group with an interest in the outcome of the case.

Professor Edward Foley, by and through his undersigned counsel, submits the following brief as *amicus curiae* in this matter.[1]

A. Introduction

By design, the Electoral College should elect as President the candidate supported by a compound majority. The President must receive a majority of the Electoral votes allocated to the states, and the votes of the Electors should reflect the will of the majority in each state. At present, forty-eight states use a winner-take-all system in which every one of a state's Electors cast votes for the candidate receiving the most votes in that state's election presidential – a mere plurality rather than a majority. These states do not require majorities and do not award the votes proportionally based on the outcome of the popular vote. As a result, a candidate can achieve an Electoral College majority through state-level pluralities that do not account accurately for voter preferences.

The Plaintiffs have challenged Texas's system for selecting Electors, arguing that the winner-take-all method violates certain protections of the federal Constitution. In assessing such claims, Professor Foley respectfully suggests that the Court should consider the principles underlying the Electoral College system

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amicus curiae* or his counsel made such a monetary contribution.

reflected in the Constitution. Professor Foley does not advocate for any specific outcome in this case, and so this *amicus* brief only seeks to help the Court understand the historical purpose and functioning of the Electoral College in a way the parties do not address.

B. The Interests and Perspective of the Proposed Amicus

Professor Foley is a Professor of Law at the Moritz College of Law at The Ohio State University, and a former Clerk to Justice Harry Blackmun of the Supreme Court of the United States. Professor Foley is interested in this matter as a scholar of election law and constitutional law, in particular the history of contested elections in the United States and the procedures for identifying the winning candidate. At Moritz, Professor Foley is the Director of Election Law and holds the Ebersold Chair in Constitutional Law. He has authored four books and nearly sixty scholarly articles and essays, and his written commentary has been published in major print and online publications, including *The Washington Post*, Slate, and *The New York Times*. In the last five years, he has authored, among other writings, *Due Process, Fair Play and Excessive Partisanship: A New Principle of Judicial Review of Election Law*, 84 U. CHICAGO L. REV. 655-758 (2017), and *Ballot Battles: The History of Disputed Elections in the United States* (Oxford Univ. Press, 2016). In addition, Professor Foley has testified before state and federal legislatures on election law issues, including both houses of Congress.

Regardless of the outcome, the Court's decision in this case should be based on an understanding of the Electoral College which is informed by the historical record. For these reasons, Professor Foley asks the Court to exercise its discretion to consider his *amicus* brief in deciding this appeal. Fed. R. App. Pro. 29. The brief is intended to provide the Court with "ideas, arguments, theories, insights, facts, [and] data" regarding the Electoral College which "are not to be found in the parties' briefs." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). Professor Foley relied on research conducted over the course of his career, including a recent focus on the Electoral College and the role of majority rule in presidential elections. Specifically, Professor Foley has written a book, to be published later this year by Oxford University Press, entitled *Presidential Elections and Majority Rule*. This brief, although not an excerpt of that book, reflects its analysis and findings.[2]

C. <u>The Majoritarian Electoral College</u>

The President of the United States is elected under the principles of Article II of the Constitution and by the Twelfth Amendment. Each state appoints a number of Electors equal to the number of congressional representatives; the Constitution does not define how the Electors are chosen, leaving that decision to state legislatures. U.S. CONST. Art. II, § 1, cl. 2. The Electors then cast their votes for

[2] Professor Foley can provide additional supporting source information if requested by the Court.

President and Vice President, and the candidates with a majority of the votes in the Electoral College are declared the winners. U.S. CONST., Am. XII. In practice, voters choose from the possible presidential candidates, and the Electors vote based on the preference of the voters in the popular election. In forty-eight states and the District of Columbia, the Electors' vote is based on a winner-take-all concept; the candidate with the most votes receives all of the Electoral votes.

The nations' fifty-eight presidential elections can be grouped into three eras. From 1789 to 1804, the provisions of Article II governed, and Electors chose the candidate with majority and consensus support at the national level based on local majority interests. From 1804 to 1824, the nation elected its President under the Twelfth Amendment, still based on the majority interests of the people of the states. From 1824 to the present day, the President is and has been chosen under the Twelfth Amendment but without regard to whether the President received a majority or a mere plurality of the votes in each state. The following discussion examines these three eras and, in particular, the instances in which the Electoral College chose a candidate who lacked, or may have lacked, a compound majority.

D. <u>The Article II System: The Consensus Choice of the Majority</u>

The Framers created an electoral system for President and Vice President which balanced their interest in securing a consensus leader also supported by the majority. Under Article II, each state was given a "Number of Electors, equal to

the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[3] U.S. CONST. Art. II, § 1, cl. 2. Once selected, the Electors cast two equally-weighted votes for president; the winner would be the President, and the runner-up the Vice President. *Id.* In theory, the two equally-weighted votes by each Elector would allow a consensus choice to appear.

But to be elected, a President was also required to receive a majority of the votes based on the number of Electors: "The Person having the greatest Number of Votes shall be the President, ***if*** such Number be a Majority of the whole Number of Electors appointed." *Id.* Art. II, § 1 cl. 3 (emphasis added). Thus, if a candidate received 40% of the vote, and two other candidates received 30% each, the candidate at 40% could not be elected because he had not obtained a majority. The same result could be described differently, where 60% of the Electors voted *against* the candidate with the greatest number of votes. Absent a single majority choice, the Constitution sent the election to the House of Representatives for a runoff election of the five candidates with most votes. *Id.* Art. II, § 1 cl. 3. In the runoff, each state cast one vote for the President through its Representatives. *Id.* The candidate with a majority of the votes became President; the second-place finisher, the Vice President. *Id.*

[3] Each state has two Senators and is apportioned a number of the total representatives based on that state's population. U.S. CONST. Art. I, § 2 cl. 3; § 3.

Although desiring consensus, the Framers had a strong preference for majority rule as a way to control the danger of factions, and they specifically rejected plurality-rule voting systems. In the initial draft of the language governing the Electoral College process, the runoff election went to the Senate (composed at that time of members appointed by the state legislatures) rather than the House of Representatives (composed of elected congressmen). In response, James Madison and others proposed allowing the candidate with the greatest vote tally to rise to the Presidency to reflect the popular choice and avoid an "aristocratic" selection by the Senate. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale Univ. Press, 1966) 514. Those in favor of plurality relented when the runoff was moved to the House and the winning candidate was required to receive a majority of *all* states, not just participating states. *Id.* at 525-27. If any states abstained from voting, a president elected by the majority of participating states would lack the true majority support the Framers required. *Id.* at 535-36.

Article II thus explicitly required that the offices of President and Vice President be filled by consensus candidates who also had majority support in the Electoral College. Moreover, because the Electors were chosen by a majority vote of the people or selected by popularly-elected state legislatures, the Electors' votes would represent the interests of that state's citizens. Even a consensus candidate had to secure a compound majority that would give him legitimacy in that office.

E. The Compound Majority Principles of the Twelfth Amendment

Article II required each elector to cast two votes for president of equal weight in the hopes of producing a consensus winner with majority support. The idea was not far-fetched: George Washington was twice the consensus choice. The rise of political parties, however, revealed that the Article II system was not sustainable because consensus had become impossible. To ensure the election of the candidate with the support of a compound majority, the Eighth Congress proposed the Twelfth Amendment to the Constitution, which was ratified in 1804 and continues to govern our current presidential elections.

The nation's fourth election, in 1800, was nearly a disaster. Many states adopted new methods for choosing Electors in an attempt to protect local power interests after Federalist John Adams defeated Democratic-Republican Thomas Jefferson in a very close race in 1796. In 1800, the dominant Republicans sought to elect Jefferson as President and Aaron Burr as Vice President, but because each Republican cast two equally-weighted votes, Jefferson and Burr both received a majority of Electors' votes, requiring a runoff. Federalists controlled the outgoing House, however, creating the possibility that the displaced minority could thwart the will of the majority by elevating Burr to the presidency. The Federalists eventually conceded, fearing Burr more than Jefferson, but the standoff revealed the need for change.

With four elections behind them, the Eighth Congress held a substantial debate on the role of majorities, minorities, and consensus in the presidential election process. The Jeffersonian Republicans primarily sought to avoid anything like the debacle of 1800 through a commitment to majority rule and protecting the federal structure of United States. In a federal republic, the national majority of states necessary to elect the President must be determined by aggregating local majorities. The members of the Eighth Congress accepted and endorsed much of the existing system for electing the President as consistent with their majoritarian principles. They agreed that a candidate should ascend to the presidency without a runoff if he obtained a majority of the electoral votes, and that states should choose the method of appointing Electors to reflect local interests. A President selected by a majority of the states came into office with the necessary compound majority.

The Republicans, however, believed that allowing Electors to cast two equally-weighted votes in the name of consensus would continue to cause problems by handing over power from the majority to the minority. The Jeffersonian Republicans successfully changed the two-vote structure over the objections of the minority-party Federalists.[4]

[4]The importance of Jeffersonian principles in American politics should not be understated. The Jeffersonians dominated politics in the early 1800s, and the Federalists disappeared entirely by 1820.

The Twelfth Amendment replaced Article II, Section 1, Clause 3. The new text strengthened the majority-rule requirement and maintained the runoff procedure.[5] First, Electors would vote separately for the President and the Vice President, and each vote tally would be counted separately to allow only one candidate to achieve a majority that avoided a runoff. Second, the House runoff would be limited to the top three finishers rather than five, to prevent the House from selecting a President that a majority of Electors had opposed. Third, the Senate would conduct a separate runoff for the Vice President.

The states later ratified the Twelfth Amendment proposed by the Eighth Congress, ensuring that the President was elected by a compound majority and avoiding an abuse of power by any one faction. The minority would no longer thwart the will of the majority through the two-equal vote process, and the House could not elect a candidate opposed by a large margin in the Electoral College. In this way, the Eighth Congress recommitted to a federalist majoritarian philosophy, meeting the challenge of controlling factions in a federal republic. *See generally* THE FEDERALIST NO. 10 (James Madison).[6]

[5] The Twelfth Amendment also added a contingency: if the House did not elect a president by a set date after the runoff, the Vice President became President.

[6] Notably, Madison initially supported plurality rule during the Constitutional Convention but, by 1803, it was the party he founded with Jefferson which sought to strengthen the majoritarian principles of the Electoral College system.

F. The Majority-Plurality Mechanism Adopted in the States After 1824

States continued to experiment with various approaches to selecting their Electors, but always within majority-rule principles. The picture began to change in 1824, after the Federalist Party collapsed entirely and all four candidates ran on the Democratic-Republican ticket. No candidate earned a majority in the Electoral College. Candidates Andrew Jackson, John Quincy Adams, and William Crawford went to a runoff in the House; Henry Clay was excluded as the fourth-place finisher. Ignoring the Twelfth Amendment, Jackson believed he was entitled to the Presidency because he had a plurality of electoral votes, even if that meant that a majority of the Electors preferred another candidate. But Jackson could not secure a majority of the state delegations in the runoff, and Adams was elected.

Jackson's supporters were angry, arguing that Adams made a "Corrupt Bargain" with Clay to build a coalition against Jackson, and they sought to prevent a plurality winner from losing in the future. Jackson and others tried to amend the Constitution by eliminating or significantly modifying the Electoral College, but making changes at the federal level would prove difficult. As a result, his supporters targeted the state-selection processes. After 1824, the states began to adopt systems in which the Electors with the highest or greatest number of votes cast would be the winner for that state. By 1832, all but four states used plurality-rule voting systems, and Texas followed the trend for its first presidential election in 1848. Today, only

Maine and Nebraska do not use winner-take-all presidential voting schemes, having adopted alternatives in 1972 and 1996, respectively.

G. The Hidden Impact of Plurality-Rule in the 19th and 20th Centuries

At first, the shift to plurality-rule appeared to be irrelevant. Jackson won majorities in 1828 and 1832, and the occasional third-party candidate did not appear to impact the results. The elections of 1844, 1884, and 1912, however, revealed that state plurality winner-take-all voting can cause a candidate opposed by a majority to win, and a candidate with majority support to lose.

In 1844, the Democrat James Polk favored the aggressive expansion of land and slavery, while Whig candidate Henry Clay sought the peaceable acquisition of land and the limited growth of slavery. Polk won the election with a majority of the votes in the Electoral College, but only by a plurality victory in New York, where abolitionist James Birney drew just enough antislavery votes which would have gone to Clay to impact the election. Polk thus won the presidency despite failing to obtain the compound majority which underpins the Electoral College system. Similarly, in 1884, the major party candidates (Democrat Grover Cleveland and Republican James Blaine) were joined in the race by two third-party candidates. Like Polk, Cleveland achieved an Electoral College majority through a plurality victory in New York, but Blaine was likely to have been the candidate capable of achieving majority support. As a result, Polk and Cleveland ascended to the presidency based on

plurality victories in New York which obscured that the losing candidate was likely the majoritarian choice.

Then, in 1912, Republican President William Taft and Democrat Woodrow Wilson were the leading party candidates, and former Republican President Teddy Roosevelt mounted a third-party candidate of the Progressive (Bull Moose) party. The result was a competitive three-way race, and in which a candidate opposed by the majority (Wilson) was elected. On a national scale, state plurality victories based on 30-40% of the vote gave Wilson an Electoral College victory, diluting the votes against Wilson and defeating the majority preference for a candidate with Republican principles like Taft or Roosevelt.

These elections did not lead to significant changes in the Electoral College or in plurality voting procedures in the states. The results were attributed to special circumstances rather than the plurality winner-take-all approach. In 1844 and 1884, the public and the political class attributed the results in New York to rampant fraud in a notoriously corrupt state, and the three-way race of 1912 felt impossible to duplicate. Moreover, amending the Constitution or mounting a concerted campaign to change the voting process in the states would be difficult. While only seventeen states voted on the Twelfth Amendment, twenty-one new states had joined the union by 1884, and another ten joined by 1912. Thus, the Electoral College appeared to function as intended because plurality winner-take-all voting usually led to the

election of the candidate with majority support. Any deviation from the expected result could be explained away as a mere anomaly.

H. The Recent Rise in Electoral Victories Lacking a Compound Majority

For most of the twentieth century, the Electoral College chose the candidate likely to achieve a compound majority, even if the result was based on plurality victories at the state level. Certain candidates were extraordinarily successful; Ronald Reagan won 525 of 542 possible votes in the Electoral College, all from states in which he achieved a majority. In contrast, Richard Nixon relied heavily on plurality victories but likely had majority support based on the votes lost to segregationist George Wallace. Other than expediting the result, plurality voting seemed to be irrelevant to the outcome in the Electoral College. Between 1992 and 2016, however, strong third-party candidates and plurality voting have affected three presidential elections in ways which reflect the increasing role that plurality winner-take-all systems play in changing election outcomes.

In 1992, Bill Clinton won the Electoral College over President George H.W. Bush and third-party candidate H. Ross Perot through plurality victories in all jurisdictions other than Arkansas and the District of Columbia. Bush believed that Perot siphoned away Republican voters; others thought both candidates lost votes as a result of Perot's candidacy. As a result, it is impossible to tell whether Clinton or Bush was the true majoritarian candidate. In 2000, the legacy of hanging chads and

Bush v. Gore conceals that the election was decided by plurality voting. Even if the vote tally remained the same in Florida, neither Vice President Al Gore nor George W. Bush would have achieved a majority there. Gore was the probable majoritarian choice, however, given that Green Party candidate Ralph Nader drew votes from the environmentalist Gore. Bush was elected without a compound majority and despite the opposition of a majority of voters; Gore was denied the presidency despite being the likely majoritarian choice.

The third distortion in twenty-five years occurred in 2016, when both parties nominated candidates who divided their political allies. Democrat Hillary Clinton and Republican Donald Trump were challenged by candidates from the Green Party, the Libertarian Party, and other minor parties. Trump ultimately won through plurality victories in a number of states, but it is not clear who, if anyone, had the support of third-party voters if those states had required a majority or had allocated electoral votes. Thus, the results of 2016 do not tell us whether Clinton or Trump could have achieved a compound majority, only that a majority of voters opposed Trump in most states that awarded him their Electoral College votes.

The record of these contested elections shows that, as a result of plurality winner-take-all voting, it is impossible to tell whether the Electoral College chose the candidate with majoritarian support in 1992 and 2016. Conversely, it is clear

that plurality voting caused the Electoral College of 2000 to deny the presidency to the majoritarian candidate and award it to the candidate opposed by a majority.

I. Conclusion

Plurality, winner-take-all voting is having a greater impact on elections than at any time in the country's history. As a result, the Electoral College is not functioning as intended under the Twelfth Amendment, which reflects this federal republic's need for a President supported by a compound majority – a national majority of the aggregated local majority interests. The plurality approach adopted in the states since Andrew Jackson's loss in 1824 does not reliably identify the candidate with this compound majority, and recent election results show that this problem is on the rise. The use of plurality winner-take-all systems at the state level thus unavoidably skews the results in the Electoral College away from the principles underpinning the Twelfth Amendment. In turn, the modern presidential election does not reliably select a candidate through the compound majorities which provide legitimacy under the Constitution.

Respectfully submitted,

COZEN O'CONNOR

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Dated: July 3, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32 and Local Rule 29 because it contains 3,642 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

By: /s/ Gregory S. Hudson

Dated: July 3, 2019

United States Court of Appeals

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No. 19-50214 League of United Latin America, et al v.
Gregory Abbott, et al
USDC No. 5:18-CV-175

Dear Mr. Hudson,

You must submit the 7 paper copies of your amicus brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

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