CASE NO. 18-56281

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL RODRIGUEZ; ROCKY CHAVEZ; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; and CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Plaintiffs and Appellants,

v.

JERRY BROWN, in his official capacity as Governor of the State of California; and ALEX PADILLA, in his official capacity as Secretary of State of the State of California,

Defendants and Appellees.

Appeal from the United States District Court,
Central District of California, Case No. 2:18-cv-01422-CBM-ASx,
Hon. Consuelo B. Marshall

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants League of United Latin American Citizens and California League of United Latin American Citizens, hereby file their corporate disclosure statement as follows. League of United Latin American Citizens and California League of United Latin American Citizens are not-for-profit entities. No parent corporation or publicly held corporation owns 10% or more of stock in either entity.

Dated: January 7, 2019

Respectfully submitted,

/s/ David Boies

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INTRODUCTION

Every four years, Plaintiffs—Republican and third-party voters in California—cast their votes in a national presidential election. And every four years, the result is the same: whether Plaintiffs' chosen candidate receives 10, 30, or 49% of the vote, California allocates all 55 of its presidential Electors to the winner of the plurality vote, ensuring millions of votes, including Plaintiffs', have no impact on the presidential election. This method of allocating California's electoral votes, known as Winner Take All ("WTA"), is nowhere required, or mentioned, in the United States Constitution. Nevertheless, through the use of WTA, California, like 47 other states,[1] systematically discards, dilutes, and silences the voices and voting strength of millions of its citizens, in order to greatly magnify the votes of its plurality. WTA violates Plaintiffs' rights to an equal vote under the Fourteenth Amendment and their free speech and associational rights under the First and Fourteenth Amendments, and its use should be enjoined.

Seeking to stop this practice, Plaintiffs sued California's Governor and Secretary of State, asserting claims under the Fourteenth and First Amendments, and requesting that the district court declare WTA unconstitutional and enter an

[1] The unconstitutional effects of WTA are not confined to California. Cases challenging WTA have been filed in two red states (Texas and South Carolina), as well as two blue states (California and Massachusetts)—seeking a national solution.

injunction prohibiting its use. The district court granted the State's motion to dismiss, holding a summary affirmance from a half-century ago, *Williams v. Virginia State Bd. of Elections*, foreclosed Plaintiffs' challenge. 288 F.Supp. 622, 629 (E.D.Va. 1968), *aff'd,* 393 U.S. 320 (1969). This was error. Supreme Court precedent confirms that WTA's use in modern elections *violates* the Fourteenth and First Amendments, and nothing in *Williams* compels a contrary conclusion.

First, far from foreclosing Plaintiffs' claims, the Supreme Court has endorsed Plaintiffs' primary argument: that WTA effectively discards Plaintiffs' votes for President at an intermediate step in the presidential election. By using WTA to consolidate its electoral votes for a single candidate, California ensures "votes for a different candidate [are] worth nothing and … counted only for the purpose of being discarded." *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963). In this way, WTA in California has the same unconstitutional effect as it did in *Gray*, in which the Supreme Court held Georgia's use of WTA at the county level to allocate each county's unit votes in statewide primaries violated the Equal Protection Clause. *Williams* never addressed this argument, instead analyzing Virginia's elections as state-level elections for Electors (rather than for President), a conception of presidential elections inconsistent with modern reality.

Second, even if the Court views California's presidential elections as elections for *Electors*, and not as two-step elections for President, the constitutional

problems are equally severe. WTA unconstitutionally cancels out Plaintiffs' votes for Electors by using an at-large, slate election to translate millions of Republican and third-party votes into zero representatives. As the Supreme Court made clear in *White v. Regester*, 412 U.S. 755, 769 (1973)—decided after *Williams*—states may not use at-large, slate elections for multi-member bodies to disregard the preferences of a minority of voters. Subsequent cases have further established that the "invidious" standard of proof—relied on in *Williams*—is no longer the exclusive route to a valid Equal Protection claim. The district court's reliance on *Williams* was thus erroneous. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (summary orders do not control in the face of doctrinal shifts).

Finally, WTA silences Plaintiffs' voices in national politics by robbing them of a chance to cast a meaningful vote, to associate with their party, and to petition their electoral representatives, in violation of the First Amendment. Because of WTA, incremental changes in California's vote totals can have no effect on the national election. Plaintiffs thus have little incentive to participate in presidential elections and associate with like-minded voters, and presidential candidates have no incentive to pay attention to Plaintiffs' voices or interests. *Williams* never purported to address this First Amendment challenge, and it does not foreclose it.

The harm from WTA's continued unconstitutional operation redounds beyond just these Plaintiffs. Because of WTA, presidential campaigns all but

ignore non-battleground states, including California. Because of WTA, presidential elections are likely to regularly result in candidates winning a majority of Electors despite losing the national popular vote, and demographic patterns suggest this may happen with increasing frequency. And because of WTA, the priorities of the Executive Branch are distorted, favoring swing states over the interests of voters in states like California in a way inconsistent with the basic tenets of American democracy.

Not one of these consequences is the result of the Electoral College alone, nor the intention of the framers. Each is instead the result of the use of a device not mentioned in the Constitution or contemplated by the framers: Winner-Take-All. Without judicial intervention, the burdens of WTA will only become more pronounced. As Justice Kagan stated in the context of partisan gerrymandering: "[T]he need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill v. Whitford*, 138 S.Ct. 1916, 1941 (2018) (Kagan, J. concurring).

WTA violates Plaintiffs' constitutional rights, and its use should be enjoined. The district court's dismissal should be reversed.

STATEMENT OF JURISDICTION

Plaintiffs assert claims under the First and Fourteenth Amendments to the United States Constitution. The district court has jurisdiction over this action under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. The district court dismissed Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6) on September 21, 2018, and Plaintiffs timely noticed their appeal on September 28, 2018. ER1-7, 8-15.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs plausibly allege that WTA violates the Equal Protection Clause by discarding their votes for President at the first step of a two-step presidential election, and thereby ensuring those votes "[are] worth nothing" in the ultimate presidential election. *Gray*, 372 U.S. at 381 n.12.

2. Whether Plaintiffs plausibly allege that WTA violates the Equal Protection Clause by diluting, and "cancel[ing] out," Plaintiffs' votes for a multi-member body of 55 Electors and ensuring Republican and third-party voters systematically receive zero representation in California's Electoral College. *White*, 412 U.S. at 769-70.

3. Whether Plaintiffs plausibly allege that WTA violates their First and Fourteenth Amendment rights "to cast their votes effectively [] regardless of their political persuasion," "to associate for the advancement of political beliefs," and to

petition the Executive for relief, by ensuring Plaintiffs' votes can have no effect on the presidential election. *Dudum v. Arntz*, 640 F.3d 1098, 1105-06 (9th Cir. 2011).

4. Whether the State's interest in magnifying the power of a plurality of its voters—an interest that is "simply circumlocution" for the constitutional problem of discarding Plaintiffs' votes, *California Dem. Party v. Jones*, 530 U.S. 567, 582 (2000)—is a compelling state interest sufficient to justify WTA's severe burdens on Plaintiffs' rights. *Dudum,* 640 F.3d at 1106.

STATEMENT OF THE CASE

Although Plaintiffs' Complaint focuses on the modern use of WTA, it is not the first challenge to WTA. To understand why previous judicial challenges have failed, and why Plaintiffs' should succeed, requires addressing the history of WTA's adoption and of previous challenges to it.

That history establishes three key points.

First, although the Constitution established the Electoral College, neither the Constitution, nor the framers who drafted it, contemplated or intended that states would use WTA to allocate and consolidate their electoral votes. Instead, years after the ratification of the Constitution, the dominant political parties in states adopted WTA for the purpose of consolidating their power and discarding minority votes—a purpose and effect that continues to this day.

Second, the Supreme Court has never addressed the constitutionality of this practice—which was widespread a century before the principle of one person, one vote—in a plenary merits opinion.

And *third*, given that WTA was adopted to consolidate the power of partisan state legislatures, without judicial intervention, WTA, and its attendant burdens on American democracy, is likely to persist.

A. The Origins of WTA

Although the district court conflated the Electoral College with WTA, the two are fundamentally distinct. Article II of the Constitution creates the unique office of "presidential elector" and provides that each state appoint, "in such manner as the legislature thereof may direct," Electors equal in number to its congressional representatives. U.S. Const. art. II, § 1, Cl. 2 (the "Elector Clause"). Once selected, Electors meet and vote for President and Vice President. *See* U.S. Const. amend. XII. The collection of these Electors has come to be called the "Electoral College."

WTA, by contrast, is nowhere mentioned in the Constitution. The Elector Clause does not prescribe how a state must allocate its Electors. Other provisions of the Constitution, however, appear to contemplate methods other than WTA. Article II and the Twelfth Amendment, for instance, direct Electors in each state to meet, vote for President and Vice President, and "make a List of all the Persons

voted for, *and of the Number of Votes for each* ….” Art. II § 1 (emphasis added); Amd. XII (similar text). Implicit in this requirement is that the Electors in a given state may individually vote for *different* candidates, not that they will vote as a bloc for a single ticket.

WTA is not only absent from the text of the Constitution; it is nowhere mentioned in *The Federalist Papers*, and was not discussed at the Constitutional Convention. *See John R. Koza et. al, Every Vote Equal*, 82, 366 (4th ed. 2013). This is not surprising. The framers intended Electors to comprise a state-level, “deliberative body in which presidential electors would exercise independent and detached judgment,” and in the first election, most of them acted in that manner. *See id.* at 73-74 (noting the first Electors “acted in a reasonably deliberative manner”);[2] *see also McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (“[I]t was supposed [by the framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive.”). WTA, which elects a slate of Electors on party lines and treats them as tools for consolidating the plurality’s vote, is inconsistent with this understanding.

[2] In this first presidential election, three states used systems that resemble WTA but differed in material ways from modern practice. For instance, Maryland had geographic quotas, and New Hampshire’s legislature would appoint Electors should there be no popular majority in favor of five candidates. *See McPherson*, 146 U.S. at 36.

It was not the constitutional design, but the rise of partisan politics, that led to the broad adoption of WTA. *See generally* Koza, *supra*, at 75-82 (partisan gamesmanship led to adoption of WTA, a system the founders "never envisioned" and for which they "did not advocate"). Writing to then-Virginia Governor James Madison in 1800, Thomas Jefferson criticized WTA, stating it would ensure that the "minority [was] entirely unrepresented." *See* Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in* 31 The Papers of Thomas Jefferson, Vol. 31, 300-01 (Barbara B. Oberg ed., 2004). He nevertheless urged Virginia to adopt WTA for political reasons. Jefferson had recently lost the 1796 presidential election after two states he counted on for support, Virginia and North Carolina, permitted their electoral votes to be split by multiple candidates, while other states, carried by the Federalists, did not. *Id*.; *see also* Noble E. Cunningham, History of American Presidential Elections 1878-2001, 104-05 (2002). Jefferson wanted to ensure he received all of Virginia's electoral votes in 1800 and that no minority voters received representation.

After Virginia's Republican legislature adopted WTA, partisan gamesmanship led to its widespread adoption elsewhere. John Adams, a Federalist, was concerned that Jefferson might capture one of Massachusetts' electoral votes, so he convinced the state legislature to legislatively award all of its Electors through WTA. Koza, *supra*, at 80-81. Partisans around the country used

the same reasoning to persuade their legislatures to adopt WTA through popular elections, and the method was widespread by 1836. *See* David Abbott & James Levine, Wrong Winner, The Coming Debacle in the Electoral College, 15 (1991) ("The political logic and competitive pressure from other states became irresistible. One state followed another in switching to a winner-take-all system."). WTA "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." Thomas Hart Benton, *Thirty Years' View, or A History of the Working of the American Government for Thirty Years, From 1820 to 1850*, Vol. I, at 38 (1880).

In short, WTA was never intended by the framers, and indeed was anathema to their design. Koza, *supra*, at 177 (noting that the Electoral College was in fact "created by the Founders in large part to promote geographic equality," but it has, through elements like WTA, "become a major source of geographic *inequality*"). It was, instead, invented by partisans to consolidate the power of their state's majority party by discarding minority votes. *See* Cunningham, *supra*, at 104-05 ("[T]he party that controlled the state legislature was in a position to enact the system of selection that promised the greatest partisan advantage" and did so).

It was in this context that California adopted a form of WTA in 1852, shortly after its admission to the Union. Although the system's contours have changed, California has used a variant of WTA in every presidential election since.

B. The Development of a Constitutional Right to an Equal Vote

Although Jefferson and others recognized the disenfranchising effect of WTA on political-minority voters as early as 1800, the legal implications of this effect would only become clear with the later ratification of the Equal Protection Clause and the evolution of the principle of one person, one vote.

Shortly after the ratification of the Fourteenth Amendment, the Supreme Court first acknowledged in *McPherson* that the Equal Protection Clause operates to restrict a state's power under the Elector Clause. 146 U.S. at 24-25. Plaintiffs in *McPherson* challenged Michigan's law providing for the selection of Electors pursuant to congressional district, arguing the Elector Clause *required* statewide WTA, and that the Equal Protection Clause afforded each citizen the right to vote for *each* Elector, precluding district elections. *Id.* at 24, 39. Although rejecting the challenge, the Court held that a challenge to a state's method of allocating its Electors does not present a political question, *id.* at 24, and that the Fourteenth Amendment applies to elections for Electors, *see id.* at 40 (if Electors "are elected

in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made").[3]

Sixty years later, the Supreme Court further made clear that WTA is unconstitutional when it articulated the principle of "one person, one vote," and relied on it to hold unconstitutional the Georgia Democratic Party's "deeply rooted and long standing" practice for conducting its primary elections. *Gray*, 372 U.S. at 376, 381. Under that system—which resembled the Electoral College—the Georgia Democratic Party provided each county a set number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election for statewide office-holders (such as governor), and awarded *all* of its units (up to six) through WTA. *Id.* The Court held that this system violated the Constitution because units were not allocated in proportion to population, and favored rural voters. *See id.* at 379. It then further held that even if "unit votes were allocated strictly in proportion to population," the impermissible "weighting of votes would continue" because of WTA, which would permit "the candidate winning the popular vote in the county to have the entire unit vote of that county" and ensure

[3] Michigan's use of the district system was brief. Because the system afforded the Democratic candidate five votes to the Republican candidate's nine in 1892, the Republican state legislature switched back to WTA after the election. Koza, *supra*, at 84.

"votes for a different candidate [would be] worth nothing and … counted only for the purpose of being discarded." *Id.* at 381 n.12. The Court thus held that Georgia's use of WTA in a context materially identical to WTA's use in presidential elections constituted an *independent* constitutional violation.

Five years after *Gray*, plaintiffs brought an Equal Protection challenge to Virginia's use of WTA to allocate presidential Electors. They did not cite or rely on *Gray* footnote 12 to argue WTA discarded their votes *for President* at the first step in a two-step election. *See* ER38-63 (*Williams* Plaintiffs' Merits Brief). Instead, they argued that WTA invidiously discriminated against members of Virginia's minority party by canceling out their votes in an at-large election for Electors—*i.e.* a state-level body of representatives. *Id.*; *see* ER57, 63.

A three-judge panel rejected their challenge. It agreed that the *Williams* plaintiffs' argument had "merits and advantages," and acknowledged that "once the electoral slate is chosen, it speaks only for the element with the largest number of votes," and that "[t]his in a sense is discrimination against minority voters …." *Williams*, 288 F.Supp. at 627, 629. It nevertheless held that such discrimination was not enough to violate the Constitution unless "invidious" and found that requirement unmet. *Id.* at 627. This holding was unsurprising given the law at the time. Only after *Williams* would the Court strike down an at-large election for a multi-member body on the grounds that it canceled out minority votes, *see White*,

412 U.S. at 769-70, and make clear that if an electoral process fails to "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right to vote," it violates the Equal Protection Clause with no requirement of a finding of invidiousness, *see Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The *Williams* panel did not address any argument that Virginia's use of WTA was identical to the primary structure at issue in *Gray*'s footnote 12. Such argument was not made, and it would not have been clear at the time that voters were voting for President in two-steps, rather than simply for Electors. In contrast to modern elections, Electors' names in Virginia were on the ballot, and voters cast their ballots for Electors who had no legal obligation to support their party's nominee.[4] *See* ER44 (describing the Virginia ballot); *see also* 2001 Va. HB 1853 (changing the Virginia statute in 2001 so that Electors are "required to vote" for the party's nominee). The *Williams* court also had no occasion to address any First Amendment challenge, as none had been brought.

The Supreme Court summarily affirmed.

[4] The short ballot (that replaced Electors' names with those of Presidential candidates) was not fully adopted by the states until 1980 and was not yet in use in Virginia. Koza, *supra*, at 87.

C. The Modern WTA System and Plaintiffs' Challenge

In the years since *Williams*, the contours of WTA have shifted. Ballots in California now print only the names of the presidential candidates—the Electors' names are not permitted to be on the ballot. *See* Cal. Elec. Code §§ 6901-02. Those Electors are then bound, by law, to support the "candidates of the political party which they represent." *Id*. § 6906. In every respect, the Electors' role is purely ministerial. What was not obvious at the time of *Williams* is obvious today: Californians vote for President in two steps, and Electors function like the units in *Gray*.

The democratic burdens WTA imposes on voters and citizens like Plaintiffs have also become more pronounced. In each of the last seven presidential elections, California, relying on WTA, has awarded *all* of its electoral votes to the candidate receiving the plurality of votes—in each case, a Democrat—discarding over 31 million votes for Republican candidates. ER17-18 (Compl. ¶¶ 3, 5). Any incremental change in California's popular vote (including Plaintiffs' votes) has therefore had no effect on the outcome of the national presidential election margin: the Republican candidate has won as little as 30%, and as much as 44.3% of the popular vote, but has always received zero electoral votes. ER25-26 (*Id.* ¶ 33). California is not alone in using WTA to discard the votes of political minorities;

forty-seven other states and the District of Columbia continue to employ it. ER17 (*Id.* ¶ 2).

The distorting effects of WTA on American democracy have also become more problematic. In modern elections, WTA incentivizes presidential campaigns to focus on "battleground" states at the expense of one-party-dominated states like California where WTA ensures incremental voting changes can have no effect on the election. ER18-19 (*Id.* ¶ 8).[5] Thus, in 2016, fourteen battleground states received 99% of candidates' advertising and 95% of their personal appearances. *Id*. California—the most populous state in the union—was not among these states. *Id*. WTA ensures that minority voters have less incentive to participate in presidential elections and associate with like-minded voters—as their votes are predictably irrelevant to the election.[6] WTA skews the priorities of the Executive branch, affecting issues as diverse as disaster relief and the general allocation of

[5] *See* Douglas Kriner & Andrew Reeves, *The Particularist President*, 175 (2015) (the focus on swing states is a recent element of presidential elections; technological advances are making it increasingly easy for "[m]odern presidential candidates [to] focus on courting swing state voters;" and "contemporary presidents may have even greater incentives to pursue particularistic policies for electoral gain than did their predecessors").

[6] *See, e.g.*, Danielle Kurtzleben, CHARTS: Is the Electoral College Dragging Down Voter Turnout in your State?, NPR, https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state (Nov. 26, 2016).

federal funds. ER30 (Compl. ¶ 46).[7] WTA ensures that presidential candidates are increasingly likely to win elections without winning the popular vote. *See* Abbott & Levine, *supra*, at 21-42; *accord* Koza, *supra*, at 129. And indeed, WTA even jeopardizes national security by artificially ensuring presidential elections come down to a small but predictable pocket of votes, making those elections especially vulnerable to attacks. ER31-32 (Compl. ¶¶ 51-53). These effects are not caused by the Electoral College alone. They are caused, instead, by the use of a device nowhere sanctioned by the Constitution: WTA.

D. Procedural History

On February 21, 2018, Plaintiffs filed their Complaint seeking a declaration that WTA is unconstitutional and must be enjoined. ER16-37. On April 19, 2018, the State moved to dismiss. ECF 57. On September 21, 2018 the district court granted the State's motion, primarily holding that the Supreme Court's summary

[7] *See* John Hudak, *Presidential Pork: White House Influence Over the Distribution of Federal Grants* 4 (2014) ("Through its state-centered, winner-take-all design, the Electoral College creates incentives that make federal spending an appealing campaign tool for the executive branch."); Kriner & Reeves, *supra*, at 41; Christopher Berry, Barry Burden, and William Howell, *The President and the Distribution of Federal Spending*, 4 Am. Pol. Sci. Rev. 104, 783-799 (2010); Thomas Garrett & Russell Sobel, The Political Economy of FEMA Disaster Payments, 41 Economic Inquiry 496 (issue 3) (2003); Marilyn Young, Michael Reksulak, & William Shuggart, The Political Economy of the IRS, 13 Economics and Politics (No. 2) 201 (2001).

affirmance in *Williams* foreclosed Plaintiffs' challenge. ER14.[8] The district court did not suggest *Williams* controlled the argument that WTA discards Plaintiffs' votes for President at an intermediate step in a two-step election. *See* ER11. Instead, it held *Gray* was inapposite as, even in modern elections, "California voters vote for Electors, and Electors for President"; as *Gray* is limited to "geographical discrimination"; and because the Electoral College itself is sanctioned by the Constitution. ER12-14.

On September 28, 2018, Plaintiffs timely appealed.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017). All well-pleaded allegations of material fact are accepted as true and construed in the light most favorable to Plaintiffs. *Id.*

SUMMARY OF ARGUMENT

Although the Elector Clause provides "extensive power" to the states to "pass laws regulating the selection of electors," that power may not be exercised in a way that violates the rights of the State's citizens under the First and Fourteenth Amendments. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see also Bush*, 531

[8] The district court rejected the State's argument that the constitutionality of a State's method of allocating Electors was a political question, citing the Supreme Court's rejection of that argument in *McPherson*. ER15.

U.S. at 104-05. Such rights include the right to an equal vote under the Equal Protection Clause, as well as "interwoven strands of liberty protected by the First and Fourteenth Amendments," such as "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Dudum*, 640 F.3d at 1105-06 (internal citations omitted).

In resolving challenges to voting laws, this Court "weigh[s] the character and magnitude of the asserted injury to [Plaintiffs' rights] . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1331 (2017) (internal quotation marks omitted). When the burdens on Plaintiffs' rights are "severe," an electoral rule must be "narrowly drawn to advance a state interest of compelling importance." *Dudum*, 640 F.3d at 1106 (internal quotation marks omitted).

California's use of WTA severely burdens Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment, and the State has proffered no counterbalancing state interest of compelling importance. The district court should therefore be reversed.

First, California's use of WTA discards Plaintiffs' votes for President in order to consolidate the voting strength of a plurality of voters, thereby burdening Plaintiffs' rights under the Fourteenth Amendment's Equal Protection Clause. *See Gray*, 372 U.S. at 381 n.12. Just as in *Gray*, California uses WTA at the first step in a two-step election to magnify the power of a plurality of voters—in modern elections, the Democratic Party. And just as in *Gray*, the use of WTA at the first step ensures that Plaintiffs' votes, and those of millions of Californians who do not support the plurality's candidate, are counted "only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12.

The district court's attempts to distinguish *Gray* are unavailing. The court suggested that *Gray* does not apply because Californians vote for Electors, not for President. But, in modern elections, Electors serve no greater role than the "units" discussed in *Gray*—and to suggest otherwise ignores reality. *See Healy v. James*, 408 U.S. 169, 183 (1972) (courts "are not free to disregard the practical realities."). Nor is *Gray* distinguishable on the basis that it merely addressed "geographical discrimination," as the district court suggested. The principle in *Gray*, that WTA operates to discard votes at the first step in a two-step election, applies four-square to this case. And any factual distinctions between this case and *Gray* serve only to magnify the constitutional problem: unlike in *Gray*, where the Supreme Court addressed a primary election, California (and other states) employs WTA in a

general election, where it has the *purpose and effect* of consolidating the power of a majority political party at the expense of minority voters. *See Burns v. Richardson*, 384 U.S. 73, 88 (1966) (affirming that electoral systems cannot be used to "cancel out the voting strength of racial or political elements of the voting population" (internal citation omitted)). Finally, contrary to the district court's suggestion, it is WTA, and not the Electoral College, that discards Plaintiffs' votes, and WTA, unlike the Electoral College, is nowhere sanctioned by the United States Constitution. The panel opinion in *Williams* never addressed this argument, and summary orders cannot be used to foreclose arguments they did not address. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Second, viewing California's election as an election for *Electors*, as the district court did, WTA still burdens Plaintiffs' rights under the Equal Protection Clause. Under the district court's legal fiction, Plaintiffs and other minority voters vote for 55 members of a state-level, deliberative body in which they systematically receive *zero* representation. The Supreme Court has "long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *White*, 412 U.S. at 769-70; *Burns*, 384 U.S. at 88 (such principles apply to political as well as racial minorities). California could not conduct its elections for its state senate through a WTA, slate election, ensuring

one party systematically controlled all 40 of its senate seats. WTA in the use of presidential elections is just as unconstitutional.

Admittedly, *Williams* addressed an argument similar to Plaintiffs' vote dilution argument here, but its holding in this regard has been undermined by subsequent doctrinal shifts. *See Hicks*, 422 U.S. at 344-45 (summary orders do not control in the face of doctrinal shifts). At the time of *Williams,* the Supreme Court had not yet found an at-large election for a multi-member body to violate the Constitution, and routinely required that plaintiffs prove "invidiousness" to make out a claim. *Williams* explicitly relied on this invidiousness requirement. *Williams*, 288 F.Supp. at 629. In the years since *Williams*, the principle that at-large, slate elections for multi-member bodies can violate the Constitution has become well established, *see, e.g.*, *White*, 412 U.S. at 769-70 (finding such a constitutional violation for the first time); and the Supreme Court has made clear that electoral systems that treat votes in an arbitrary and disparate manner violate the Fourteenth Amendment, regardless of a showing of invidiousness. *See Bush*, 531 U.S. at 104-05. *Williams* does not preclude this Court from addressing Plaintiffs' challenge to the modern use of WTA based on precedent subsequent to *Williams*.

Third, and finally, WTA further burdens Plaintiffs' rights to a meaningful vote, to associate, and to petition their electoral representatives, by artificially

distorting the national election in a way that minimizes Plaintiffs' voting strength. By ensuring Plaintiffs' votes are predictably irrelevant to the presidential election, WTA disincentivizes Plaintiffs and other Californians from voting, impedes their ability to associate for the election of presidential candidates, and effectively penalizes candidates for speaking to them during elections. Such an artificial incentive structure violates Plaintiffs' rights. *See Gill*, 138 S.Ct. at 1938 (Kagan, J. concurring) (explaining that voting systems can operate to make it difficult for voters to associate for the election of candidates); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 733, 755 (2011) (explaining that laws that disincentivize candidates' speech can be just as unconstitutional as laws that outright ban it). *Williams* did not purport to address any First Amendment challenge and cannot control here.

Because WTA severely burdens Plaintiffs' rights under the First and Fourteenth Amendments, it must be "narrowly drawn to advance a state interest of compelling importance." *Dudum*, 640 F.3d at 1106; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983) (applying balancing test for weighing burdens on associational rights against purported governmental interest). But California has proffered no legitimate interest in maintaining WTA. WTA's intended purpose is to magnify the weight afforded to a plurality of voters by minimizing the weight afforded to a political minority. To suggest California has an *interest* in increasing

the voting power of its plurality is "simply circumlocution" for the precise constitutional problem with WTA, and is not a legitimate interest. *California Dem. Party*, 530 U.S. at 582 (observing that a state cannot rephrase the constitutional violation in a First Amendment case into an interest).

WTA burdens Plaintiffs' constitutional rights, and serves no legitimate state interest. The district court's dismissal of Plaintiffs' complaint should be reversed.

ARGUMENT

I. WTA BURDENS PLAINTIFFS' RIGHT TO AN EQUALLY WEIGHTED VOTE BY DISCARDING PLAINTIFFS' VOTES FOR PRESIDENT AT THE FIRST STEP OF A TWO-STEP ELECTION

Using WTA, California consolidates all of its electoral votes for a single candidate, magnifying the influence of a plurality of voters on the ultimate presidential election by minimizing the influence of Plaintiffs and other political minorities. WTA thus severely burdens Plaintiffs' right to an equally weighted vote under the Equal Protection Clause of the Fourteenth Amendment. *See Gray*, 372 U.S. at 381 n.12.

A. California's Use of WTA Magnifies the Voting Strength of the Majority Party in California by Discarding Plaintiffs' Votes for President

Although under Article II of the Constitution, a state may decide in the first instance the manner in which it selects presidential Electors, the exercise of that choice must be consistent with other constitutional commands. *Bush*, 531 U.S. at

104-05 (citing *McPherson*, 146 U.S. at 35);[9] *Rhodes*, 393 U.S. at 29 (it cannot be "thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws."). Thus, when a state exercises its choice in favor of giving its citizens the right to vote for President, that vote becomes a "fundamental" right entitled to "equal weight" and endowed with "equal dignity" relative to other voters, and subject to the protections of the Equal Protection Clause. *Id.* at 104; *see also Rhodes*, 393 U.S. at 29; *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). The protections under that Clause include the principle of one person, one vote, which prohibits a state from discarding or diluting the votes of certain citizens, while magnifying those of others, unless that outcome is required by a specific constitutional provision. *See Gray*, 372 U.S. at 380-81; *see also Bush*, 531 U.S. at 104-05.

California's use of WTA magnifies the influence of a plurality of voters by awarding their chosen candidate all 55 of California's electoral votes, and by

[9] *Bush v. Gore* is binding Supreme Court precedent. *See Stewart v. Blackwell*, 444 F.3d 843, 859 n.8 (6th Cir. 2006) ("Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it."), *vacated on other grounds* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007). Appellate decisions, including in the Ninth Circuit, have thus frequently relied on the principles stated in *Bush*. *See, e.g.*, *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 n.7 (9th Cir. 2003) ("[W]hen a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause.") (citing *Bush*, 531 U.S. at 104).

counting all other votes "only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12. California's use of WTA thus violates the principle of one person, one vote, and burdens Plaintiffs' rights under the Fourteenth Amendment. *See id.*

The manner in which WTA violates the principle of one person, one vote is illustrated by *Gray v. Sanders*. In *Gray*, plaintiffs challenged the Georgia Democratic Party's practice of using the county unit system to conduct statewide primaries for senator and governor. *Id.* at 370-71, 76. Under that system, each county received a number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election, awarding all of its units to the plurality vote-getter through WTA. *Id.* The units were then tallied at the state level, with the majority winner receiving the nomination. *Id.*

In holding this system unconstitutional, the Court rested its decision on *two* distinct grounds. First, the Court noted that Georgia allocated units disproportionately to the population of counties. Thus, the largest county in Georgia received six units, and the smallest two, even though the largest had 300 times as many people. *See id.* at 371. The Supreme Court held that this disparity violated the Constitution. In so holding, it addressed the lower court's position that the Electoral College permitted population disparities in how electoral votes are allocated to states, and Georgia should thus be able to do the same. *Id.* at 377. The

Court held that, although the Electoral College permitted such disparity, Georgia had no license to do the same, as "[t]he only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President." *Id.* at 380. Because Georgia's electoral system was not expressly sanctioned by the Constitution, its weighting was impermissible.

The Court then addressed a distinct constitutional problem from the quantity of units allocated to counties: the use of WTA to *award* those units. The Court acknowledged that Georgia had proposed an amendment that would allocate units more proportionally to population. *See id.* at 381 n.12. Nevertheless, the Court held that, even if "unit votes were allocated strictly in proportion to population," such that one county received, for instance, 55 votes, and another three, "the weighting of votes would continue." *Id.* That was because of the *WTA method* through which the counties awarded their units. *Id.* (explaining that Georgia would allow "the candidate winning the popular vote in the county to have the entire unit vote of that county"). Because of WTA, "if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded." *Id.* Stated differently, the problem with Georgia's primary was

not only the number of units allocated to each county, but independent of that, the way those units were allocated—through WTA.

The modern use of WTA in California presidential elections is materially identical to the way that device was used in Georgia, and is similarly unconstitutional. Just as in *Gray*, the presidential election is conducted in two steps: at the first step, each state receives a set number of electoral votes and conducts an election to allocate those votes; and at the second step, those votes are tallied to determine the President. *Cf. Pub. Integrity All.*, 838 F.3d at 1025 (recognizing that "Georgia's primary election system [in *Gray*] was . . . similar to the electoral college used to elect our President"). Just as in *Gray*, California uses WTA at the first step to consolidate all of its electoral votes and provide them to the candidate receiving the plurality of votes. Just as in *Gray*, whether a losing candidate receives 10% or 40% of California's popular vote, those votes are "discarded" before they can affect the actual election: in *Gray*, for senator or Governor, and in California, for President. *Gray*, 372 U.S. at 381 n.12. And just as in *Gray*, the use of WTA is not "sanctioned by the Constitution." *Id.* at 380. As in *Gray*, California's use of WTA to unequally weight votes violates the Equal Protection Clause.

B. The District Court's Attempts to Distinguish *Gray* Are Unavailing

The district court concluded that *Gray* was not controlling for three reasons: (1) Californians do not vote for President; they vote for Electors; (2) *Gray*'s facts are distinguishable, as *Gray* addressed intra-state geographical discrimination; and (3) the Electoral College is sanctioned by the Constitution. These reasons are all unavailing.

First, the district court rejected the application of *Gray* by suggesting California's elections are *different* from those in *Gray*, because Californians vote for *Electors*. In the district court's estimation, Electors are not analogous to "units" in a two-step election for President, but must be understood as the actual candidates Californians elect. Even were this understanding of presidential elections correct, California's election would be unconstitutional. *See infra* Part II. But it is also mistaken.

In modern elections, Electors serve no more purpose than the units in *Gray*. As California courts have held, Electors are relegated to a ministerial function. *Keyes v. Bowen*, 189 Cal.App.4th 647, 658 (2010) (noting that in California "the Electors have a ministerial duty to convene on a specific date, in a specific place, to cast their ballots for their parties' nominees, and then transmit their sealed list of votes to the President of the Senate."). Their names are not even on, and are *not permitted to be on*, the ballot. Cal. Elec. Code §§ 6901-02. They are bound by law

to support the winning candidate. *Id.* § 6906. It may have been the design of the Framers to have Electors show "reasonable independence and fair judgment." *McPherson*, 146 U.S. at 36; *Gray*, 372 U.S. at 376 n.8. Today, Electors operate with no more independent judgment than a voting machine.

The district court neither disputed nor addressed this reality. Instead, it noted that the California and United States Constitutions formally give Electors the power to vote for President. But any meaningful Equal Protection Clause analysis must go beyond this legal fiction to acknowledge the reality of how California elections work. *See Healy*, 408 U.S. at 183 (noting that courts "are not free to disregard the practical realities."). That reality is unambiguous: everyone—citizens, Electors, and presidential candidates—is well-aware Electors operate as mere units. Presidential candidates campaign for the votes *of the people*, not the votes of Electors. Electors refrain from campaigning for votes for themselves, and voters would be hard pressed to name even one presidential Elector. Presidential elections are publicly called and celebrated after the vote of the people for President in November, long before the vote of the Electors in December.

Indeed, California's *own* understanding of Electors is consistent with this framework. California *could* put the names of Electors on the ballot and afford those Electors a true independent say in who becomes President. Instead, it has passed laws mandating that Electors function as nothing more than the units in

Gray. California *cannot* treat its Electors as units, and simultaneously insulate WTA from review by suggesting its citizens are voting for *independent* Electors.

Moreover, were the district court correct that California elections are really for *Electors*—or were California to endorse that position—it would potentially create a further constitutional problem. California may not willfully hide the identities of the officials for whom voters are casting dispositive votes. Forcing voters to "guess" at what is on the ballot violates their due process rights. *See, e.g.*, *Jones v. Bates*, 127 F.3d 839, 859 (9th Cir. 1997), *rev'd on other grounds*, 131 F.3d 843, 846 (9th Cir. 1997) (en banc); *Burton v. Ga.*, 953 F.2d 1266, 1269 (11th Cir. 1992) ("substantive due process requires . . . that the voter not be deceived about what [is on the ballot]"). While the Supreme Court decades ago acknowledged the practice of states hiding the identities of Electors through use of the short ballot, *see Ray v. Blair*, 343 U.S. 214, 229 (1952), no court has held that this bait-and-switch would be consistent with substantive due process and fair notice to voters *if*, as the district court held, Electors are deemed to be the meaningful elected officials for whom votes are "really" cast on election day. To hold that Plaintiffs vote for Electors, then, and not simply for President in two steps, is to suggest California elections suffer from yet another constitutional infirmity. The district court's holding that *Gray* does not apply is simply incorrect.

The district court's second attempt to distinguish *Gray* fares no better. The district court narrowed *Gray*'s holding to its precise facts, suggesting it applied only to intra-state "geographic discrimination." ER14 (citing *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (noting that, in *Gray*, "[t]he defect … [was] geographic discrimination")); ER14 (*Gray* only applies where a state "values votes within a particular geographic location within [the state] over votes from other geographic locations within the state.").

As an initial matter, although *Gray* may have addressed an intra-state primary system, its reasoning is broader: it holds that the use of WTA to magnify the power of the plurality of voters in a defined geographical space at the first step in a two-step election violates the Constitution by ensuring that votes "for [the losing] candidate [are] worth nothing [in the ultimate tally] and … [are] counted only for the purpose of being discarded." 372 U.S. at 381 n.12. It is this precedent—and not the *precise* facts of *Gray*—that is relevant, and that makes clear that California's use of WTA "fails to satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to an equal vote. *Bush*, 531 U.S. at 104-05

Further, to the extent the factual distinctions between this case and *Gray* inform this Court's analysis, they underscore, rather than undermine, the conclusion that WTA's use in presidential elections is unconstitutional. In *Gray*,

WTA was used in the context of a primary election, where states have significant leeway. *See Pub. Integrity All., Inc.* 836 F.3d at 1026-27 (citing "decades of jurisprudence permitting voting restrictions in primary elections that would be unconstitutional in the general election . . ." (collecting cases)). In contrast, Plaintiffs have challenged the use of WTA in the general election, where a state "has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795.

Plaintiffs also plausibly alleged that WTA in California operates to consolidate the power of the majority party at the expense of political minority voters, and the history of WTA's adoption makes clear that it was expressly adopted for this reason. ER18 (Compl. ¶ 5). As the State itself acknowledged below, "the weight assigned to individual votes cannot depend on where individual voters live or whether they belong to identifiable racial *or political groups*." ECF 57 (Mot. to Dismiss at 16) (emphasis added); *see also Burns*, 384 U.S. at 88 (affirming that electoral systems cannot be used to "cancel out the voting strength of racial or political elements of the voting population" (internal citation omitted)). Thus, Plaintiffs have alleged a form of impermissible discrimination in California that was not even at issue in *Gray*: WTA in the presidential system has the

purpose and effect of ensuring political minority voters in a given state "[are] entirely unrepresented." Letter from Thomas Jefferson, *supra*.[10]

Finally, even if Plaintiffs were required to allege "geographic discrimination" as in *Gray*, they have clearly done so. In support of its narrowing of *Gray*, the district court cited *Gordon v. Lance*, which stated that "[t]he defect [in *Gray*] [was] geographic discrimination." 403 U.S. at 5. WTA in California, however, *is* geographical discrimination in the same way as in *Gray*: in both cases, WTA's consolidation of the votes of *a defined geographical unit* at the first step of a larger election is what creates impermissible weighting. And *Gordon* did not suggest otherwise. In *Gordon*, plaintiffs challenged a state voting rule that required a threshold of 60% of the vote to create a new state debt. *Id.* at 2. In holding that this requirement was constitutional, the Supreme Court distinguished *Gray* by explaining that that case addressed "geographic discrimination," whereas *Gordon* involved a mere threshold requirement that did not afford some votes more

[10] Although Plaintiffs have alleged that WTA targets political minorities in purpose and effect, they need not do so. It is enough that WTA, in magnifying some votes while arbitrarily discarding others, "fails to satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." *Bush*, 531 U.S. at 104-05 (violation of one person, one vote could be found without any finding of invidiousness).

weight than others. *Id.*[11] WTA in California, in contrast to the facts of *Gordon*, indeed involves geographic discrimination in exactly the same way as WTA in Georgia. Plaintiffs (Republicans and third party voters *in California*) have their votes discarded *because* they live in California, and it is the *California* Democratic Party that benefits and takes advantage of a two-step election involving defined geographical units to consolidate votes.[12] Just as in *Gray*, Plaintiffs' votes "for the losing candidates [are] discarded solely because of … where the votes [are] cast." *Gordon*, 403 U.S. at 5 (citing *Gray*, 372 U.S. at 381 n. 12). Indeed, this is the precise discrimination at issue in *Gray*'s twelfth footnote. *Gray* acknowledged that Georgia had allocated units to counties disproportionately to their population, and thus had treated urban and rural counties *differently*. In footnote 12, however, the Court held that even if these counties were treated *the same*, WTA would still discriminate against voters in particular counties because it would "discard[]" the losers' votes in particular counties based on where they were cast. 372 U.S. at 381 n.12. So too in this case.

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[11] Further, in contrast to WTA in California, no political discrimination existed in *Gordon*. *See id.* ("[W]e can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing.").

[12] Further, the effect of WTA is to disfavor Plaintiffs, and other California voters, and favor swing state voters—a notable additional form of "geographic *inequality*." *See* Koza*, supra*, at 177.

Finally, the district court suggested that Plaintiffs' challenge was foreclosed by the *Gray* Court's statement that "[t]he only weighting of votes sanctioned by the Constitution concerns matters of representation, such as … the use of the *electoral college* in the choice of a President." ER14 (quoting *Gray*, 372 U.S. at 378) (emphasis in original). But Plaintiffs have *not* challenged the weighting of votes created by the Electoral College and sanctioned by the Constitution, such as the allocation of 55 votes to California and three to Montana. They have challenged the use of WTA to consolidate California's votes. *See* Kriner & Reeves, *supra*, at 39-40 (distinguishing the unequal apportionment of Electors to states from the use of WTA to allocate those Electors, and explaining that it is the *latter* that ensures voters like Plaintiffs' are "systematically ignored" in presidential elections). The *Gray* Court acknowledged that disparities created *by* the Elector Clause are constitutional. But WTA is not mentioned in the Elector Clause, nor sanctioned by the Constitution. Because *Gray* makes clear that WTA in this context results in the unequal "weighting of votes," *Gray*, 372 U.S. at 381 n.12, and because it is *not* "sanctioned by the Constitution," it violates the Equal Protection Clause, *id.* at 380 ("[t]he *only* weighting of votes sanctioned by the Constitution concerns matters of representation, such as … the use of the electoral college in the choice of a President." (emphasis added)).

C. Neither *McPherson* Nor *Williams* Controls

Although the district court relied on *McPherson* and *Williams* to dismiss Plaintiffs' claims, it did not suggest these cases control Plaintiffs' primary argument—that WTA discards votes at the first step of a two-step election for President. That is correct, as neither case addressed this argument.

McPherson did not address a challenge to WTA. The plaintiffs in *McPherson* challenged Michigan's decision to use district-by-district elections for the selection of Electors.[13] They argued the Constitution *required* a statewide election for all Electors, and thus did not permit district-by-district elections. 146 U.S. at 24-25, 38. The Court rejected this argument, and also the claim that the Equal Protection Clause afforded each citizen the right to vote for *each* Elector (requiring a statewide election). *Id.* at 27-36. Nothing in the Court's decision can be read to foreclose Plaintiffs' claims in this case.[14]

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[13] *McPherson* analyzed an election in the context of the electoral system that prevailed in Michigan at the time, under which the names of *Electors* were printed on the ballot, and the voters selected the name of a single Elector for their district and a single Elector for their half of the state. *Id.* at 1, 4 (citing Act No. 50 of the Public Acts of 1891 of Michigan)).

[14] In rejecting the argument that the Elector Clause of the Constitution required WTA, the Supreme Court explained that the "practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." *Id.* at 35. It did not suggest that this "plenary power" under the Elector Clause insulated a state's choice from review under *other constitutional provisions*, and the Supreme Court has repeatedly affirmed that understanding. *See, e.g.*, *Rhodes*, 393 U.S. at 29.

Even if *McPherson* could be stretched to inform a modern assessment of WTA, the durability of its analysis would be questionable. *McPherson* adjudicated an Equal Protection Clause challenge more than seven decades before the Supreme Court introduced the Fourteenth Amendment principle of one person, one vote. At a minimum, significant changes to voting rights jurisprudence should cause this Court to read *McPherson* narrowly, and not to foreclose a challenge it did not address.

Nor does the summary affirmance in *Williams* foreclose Plaintiffs' challenge to WTA. The Supreme Court has repeatedly made clear that summary orders are just that—*summary* orders that cannot be given the weight of reasoned opinions. *See Anderson*, 460 at 784 n.5 ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."). In light of this treatment, courts considering applying summary affirmances must closely analyze the factual and legal issues presented to determine if they are identical. *Mandel*, 432 U.S. at 176-77 (explaining that the "precedential significance of the summary action" must be "assessed in the light of all the facts in that case" and declining to apply a summary affirmance because facts were sufficient to distinguish the case at bar from the former case). "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Id*. And "inferior

federal courts" should not "adhere" to summary affirmances if subsequent doctrinal developments undermine their result. *Hicks*, 422 U.S. at 344-45.

These principles apply in the voting rights context, as *Gray* itself illustrates. When it decided *Gray*, the Supreme Court had not yet addressed the Georgia County unit system through "full plenary consideration," but it had *rejected* challenges to that system four times in *per curiam* and summary decisions. *See Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Cox v. Peters*, 342 U.S. 936 (1952); *South v. Peters*, 339 U.S. 276 (1950) (per curiam); *Turman v. Duckworth*, 329 U.S. 675 (1946).[15] In *Gray*, reflecting the "swift pace of … constitutional adjudication" in the 1950s and 1960s, *Gray*, 372 U.S. at 383 (Harlan, J., dissenting), the Supreme Court ignored these decisions, holding Georgia's primary system violated the Constitution—notwithstanding that it was a "deeply rooted and long standing" practice that had survived numerous prior challenges, *id.* at 376, 381 (majority opinion).

The same is true here: WTA violates the Constitution, and *Williams* should not be read to foreclose that conclusion. That is particularly true because the very

[15] None of these decisions involved a full merits decision, but they were not all dismissals on jurisdictional defects. *See South*, 339 U.S. at 277 (dismissing the complaint on the grounds that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions").

argument Plaintiffs make to this Court—that WTA discards their votes at the first step in a two-step election as in *Gray*—was never addressed by the lower court decision in *Williams*, and could not be foreclosed by the Supreme Court's summary order. Instead, the lower court decision in *Williams* rests on the premise that voters vote for *Electors*. And indeed, that assumption was understandable given the facts of Virginia's elections at the time: Virginians voted *for Electors*, whose names were on the ballot, and who were not constrained by law from voting as they saw fit. *See* ER44 (describing the Virginia ballot); 2001 Va. HB 1853 (changing the Virginia statute in 2001 so that Electors are "required to vote" for the party's nominee). None of these facts are true of modern WTA elections.[16]

In short, neither the panel nor the parties in *Williams* discussed footnote 12 in *Gray*, and the facts did not support a challenge based on that footnote. It would stretch the power of summary orders beyond all reason to suggest that the *Williams* panel, and the Supreme Court, intended to *sub silentio* foreclose Plaintiffs' argument here.[17]

[16] The shift to the short ballot was significant: voters sometimes elected Electors from different parties in their states prior to its adoption. *See* Koza, *supra*, at 85-86.

[17] Additionally, as noted *infra*, voting rights jurisprudence has significantly changed since *Williams*. *See infra* Part II.B.

Because WTA violates Plaintiffs' rights under the Equal Protection Clause to a vote of equal weight, it is unconstitutional, and the district court's contrary holding should be reversed.

II. WTA BURDENS PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS BY DILUTING AND CANCELING OUT PLAINTIFFS' VOTES FOR CALIFORNIA'S 55 ELECTORS

The district court rejected Plaintiffs' argument that *Gray* controls by holding that Californians vote for Electors—rather than for President in two steps. Assuming that is so, the use of WTA still burdens Plaintiffs' Fourteenth Amendment rights by canceling out their votes for *Electors* through an at-large, slate election. *See White v. Regester*, 412 U.S. at 769.

A. Even If Viewed as an Election for a Multi-Member Body of 55 Electors, WTA Unconstitutionally Dilutes Plaintiffs' Votes

If, as the district court concluded, Californians vote for Electors only, it follows that Californians vote for members of a 55-person, multi-member state-level body. *See* Koza, *supra*, at 73 (the founders "anticipated that the Electoral College would act as a deliberative body"). So analyzed, WTA is unconstitutional because it systematically ensures that all of these 55 representatives are awarded to a single party. *See Burns*, 384 U.S. at 88; *see also White*, 412 U.S. at 769-70. It thereby "cancel[s] out the voting strength" of minority voters in order to consolidate power in the hands of the plurality. *Id.*

The Supreme Court has held that the "right to vote can be affected by a dilution of voting power" through either the adoption of at-large voting schemes or "by an absolute prohibition on casting a ballot." *Allen,* 393 U.S. at 569. In particular, "apportionment schemes including multi-member districts" are constitutionally invalid "if it can be 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*, 384 U.S. at 88 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

In *White v. Regester*, the Supreme Court applied this principle to invalidate for the first time a multi-member districting scheme. The Court held that because Mexican-Americans in one Texas county were "effectively removed from the political processes" when their votes were submerged into an at-large pool with a majority that was likely to multiply its voting power, the voting system in place violated their right to an equally weighted vote. *Id.* Although *White* involved a racial minority, the Court has long held that "encouraging block voting, multi-member districts" may "diminish the opportunity of a minority party to win seats," an effect no more permissible than doing so on the basis of race. *Burns*, 384 US at 88 n.14; *see also Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (noting that "political elements" are a protected class in this context).

California's use of WTA, viewed as a statewide, at-large election for 55 presidential Electors, is in all relevant respects indistinguishable from the system condemned in *White* and *Burns*. California has selected 382 Electors in the last seven elections, and *all* were members of the Democratic Party, notwithstanding over thirty million votes for the Republican candidates over that time. ER18, 25-26 (Compl. ¶¶ 4-5, 33). Cancelling tens of millions of Republican and third-party votes with the goal of maximizing the influence of Democratic Electors meets any reasonable definition of vote dilution sufficient to trigger constitutional scrutiny.

To illustrate this conclusion, suppose California decided to abolish its forty single-member state senate districts and instead hold a statewide election for all of its senators using a single-slate, at-large WTA election to do so. The results of that one-step WTA contest would be legally-required single-party rule, and would effectuate an unprecedented denial of minority representation in a state-level body. Such a law would be unconstitutional under *White* and *Burns*. Yet, using California's framework, the application of WTA for presidential elections is no different.

In the face of these clear precedents, the State below attempted to defend WTA by citing two different lines of cases. But neither line supports WTA's constitutionality.

First, the State argued that Plaintiffs' claims fail because the Fourteenth Amendment "does not require proportional representation as an imperative of political organization." ECF 57 (Defs.' Mot. to Dismiss at 14).[18] But whether the Constitution *requires* fully "proportional representation" is not the issue. Instead, the issue is whether California may use a system that is designed to deny *any* representation to minority party voters. To strike down this system because it is maximally disproportionate would not suggest all elections must be maximally *proportionate*.

Further, the cases the State relied on below for this proposition are distinguishable. In *Vieth v. Jubelirer*, a Supreme Court plurality addressed whether districting must be done in a way that creates "proportional representation," and expressed concern that in the context of districting, true "proportional representation" was difficult to create, define, and measure. 541 U.S. 267, 289-90 (2004) (plurality opinion). That was because of the unique aspects of districting, where factors like compactness and contiguity often skew politically, and where measuring representation at the state level can be subjective,

[18] Although Plaintiffs have identified a proportional method of allocating Electors as a sufficient remedy, ER33-34 (Compl. Prayer for Relief ¶ 1.e), their primary request for relief is that the Court rule the current system of allocating Electors unconstitutional and order the State to adopt a constitutional method, *see id.* Plaintiffs only request the judiciary impose a remedy if the State fails to conform to a constitutional method. *See* Fed. R. Civ. P. 8 (permitting a party to request alternative forms of relief).

making it difficult to ascertain whether any new system would result in more proportional representation. *Id*. Not so here. It is clearly because of WTA, and not a bevy of hard-to-measure factors, that Plaintiffs and voters like them receive *zero* representation in a 55-member body, and there is no question that alternative systems would result in more proportional representation, affording these voters more than *zero* representatives. The goal of better "proportional representation" is not quixotic in this context, but required by the Equal Protection Clause.

Second, the State, quoting extensively from *Whitcomb*, 403 U.S. 124, argued that courts have rejected the idea that plurality voting for multi-member slates "inherently violates equal protection principles." ECF 57 (Defs.' Mot. to Dismiss at 15). This is true but irrelevant. Plaintiffs did not plead that WTA's multi-member feature "inherently" violates equal protection principles. Rather, as *Whitcomb* itself acknowledges, Plaintiffs may succeed on a constitutional claim for vote dilution if they can show that multi-member elections have certain dilutive characteristics. 403 U.S. at 143. Addressing multi-member elections in bicameral bodies, *Whitcomb* explained, "[s]uch a tendency is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-member for both houses of the legislature or if it lacks provision for at-large candidates running from particular geographical subdistricts." *Id.* at 143-44. This logic applies with force here: California treats its

entire state, and all 55 of its Electors, as part of a single district; and its Electoral College is a unicameral body entirely elected through WTA, such that Plaintiffs have zero say in how this body determines the Presidency. Framed as an election for a multi-member body, WTA in California is an unprecedented and flagrant example of impermissible dilution under *Whitcomb*.[19]

B. *Williams'* Holding Is Not Controlling as to Plaintiffs' Dilution Claim Based on Subsequent Developments in the Law

Although *Williams* did not address the argument that WTA discards Plaintiffs' votes *for President*, it did address the argument that WTA discards votes for Electors through an at-large, state election. Nevertheless, key doctrinal shifts in dilution law since *Williams* have undermined its holding in this regard, and this Court need not "adhere to" it. *See Hicks*, 422 U.S. at 344.[20]

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[19] *See also Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc) (use of at-large, multi-member elections for governing council and school board in Louisiana parish resulted in unconstitutional vote dilution), *aff'd sub nom E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (per curiam); *Kendrick v. Walder*, 527 F.2d 44, 50 (7th Cir. 1975) (plaintiffs stated claim that multi-member elections for City Council unconstitutionally diluted minority votes).

[20] Lower courts have not followed summary affirmances in the face of important doctrinal shifts. The Fourth Circuit in *Bostic*, for instance, refused to follow the Supreme Court's summary dismissal of *Baker v. Nelson*, 409 U.S. 810 (dismissing an appeal from the Minnesota Supreme Court for want of a substantial federal question) after doctrinal developments showed that the Supreme Court no longer viewed challenges to same sex marriage statutes as unsubstantial. *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (citing *Hicks*, 422 U.S. at 344). And the Supreme Court itself illustrated this principle in *Gray*. *See supra* Part I.C.

The *Williams* court acknowledged the problems with WTA. At the time, however, the Supreme Court had not yet invalidated a voting system for diluting votes in an election for a multi-member body. It was not until *White*, which post-dated *Williams*, that courts gave teeth to the principle that at-large elections can violate the Fourteenth Amendment if they operate to dilute racial or political minorities. Since the Court's 1973 ruling in *White*, courts, including this Court, have frequently determined that multi-member, at-large election schemes are unconstitutional or violate the Voting Rights Act because they dilute minority voting strength. *See e.g., Thornburg*, 478 U.S. at 47 ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'") (quoting *Burns*, 384 U.S. at 88)); *United States v. Blaine Cty.*, 363 F.3d 897, 916 (9th Cir. 2004) (at-large voting system for electing members to the County Commission prevented American Indians from participating equally in the County's political process in violation of Section 2 of the Voting Rights Act); *NAACP by Campbell v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 983 (11th Cir. 1982) (at-large school board electoral system diluted minority votes); *Montes v. City of Yakima*, 40 F.Supp.3d 1377, 1414 (E.D.Wash. 2014) (at-large voting system unlawfully diluted Latino votes under Section 2 of the Voting Rights Act); *Citizens*

for a Better Gretna v. City of Gretna, 636 F.Supp. 1113, 1135 (E.D.La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987) ("at-large" system of election to the Board of Aldermen in the City of Gretna deprived black voters of their lawful right to elect representatives of their choice and violated Section 2 of the Voting Rights Act). At the time of *Williams*, this principle was not developed in the case law.

Additionally, the lower court in *Williams* used another outdated reason to uphold WTA. At the time, Congress had "expressly countenanced" at-large elections for congressional representatives. *Williams*, 288 F.Supp. at 628. The *Williams* court found congressional approval persuasive and held that statewide, multi-member elections "automatically" complied with the Equal Protection Clause because they resembled the election of congressional Representatives, which the Supreme Court had characterized as constitutional in *Wesberry v. Saunders*, 376 U.S. 1 (1964). But Congress later changed that law to require that states with two or more Representatives use single-member districts for Congressional elections. *See* 2 U.S.C. § 2c. A "primary motivation" for Congress's move to single-member districts was a "fear[] [that] Southern states might resort to multimember congressional districts to dilute minority (that is, black) voting power." Richard Pildes and Kristen Donaghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal Forum 241, 251-52 n.43 (1995). This prong

of the *Williams* decision has thus been overcome by historical developments, which have flipped Congressional approval into express *disapproval*.

Finally, the *Williams* court's reliance on the invidiousness requirement further renders its holding a product of its time. *Williams* held that the discrimination that resulted from Virginia's WTA system was constitutional "unless [it was] invidious," a legal test that was not disputed by the plaintiffs. 288 F.Supp. at 627. In the years since, the Supreme Court has clarified that, although invidiousness may be relevant to certain challenges, such as in gerrymandering cases, there are electoral systems that are sufficiently arbitrary in their treatment of voters that no showing of invidiousness is required. The Court in *Bush* found a violation of one person, one vote, yet it never discussed whether the discrimination in voting it found was "invidious." 531 U.S. at 104-05. Rather, the Court held that under the Equal Protection Clause, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.*[21]

Since *Bush*, lower courts have recognized that invidiousness is not required where voting systems result in arbitrary and disparate treatment. *See e.g., Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (rejecting that

[21] "Invidious discrimination" at the time of *Williams* entailed some level of "intentional" or "purposeful" discrimination, *see Washington v. Davis*, 426 U.S. 229, 242 (1974) ("[A]n invidious discriminatory *purpose* may often be inferred from the totality of the relevant facts...."), and is inconsistent with *Bush*'s holding.

an election-related violation of the Equal Protection Clause always requires intentional discrimination); *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F.Supp.2d 795, 835 (S.D. Ohio 2012) ("Plaintiffs must show only that the Board's actions resulted in the arbitrary and disparate treatment of the members of the electorate."); *Black v. McGuffage*, 209 F.Supp.2d 889, 899 (N.D.Ill. 2002) ("Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional."). The Court's observation in *Bush* that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government" applies squarely to this case, but was not available to the *Williams* court. *See Bush*, 531 U.S. at 107 (internal quotation marks omitted).

That is not to say that invidiousness is always irrelevant in evaluating the constitutionality of a voting system. *Bush* stands for the principle that invidiousness only matters when, without a finding of invidiousness, a court would not be able successfully to distinguish a fair voting system from a problematic one. For example, in *Harris v. Arizona Indep. Redistricting Commission*, the primary case relied on by the Defendants below to argue that invidiousness is still necessary, the Court stated that if the "maximum population deviation between the largest and the smallest district is less than 10%," one cannot simply rely on the numbers to establish a *prima facie* invidious discrimination because this was a

"minor deviation." 136 S.Ct. 1301, 1305-7 (2016). However, implicit in this discussion was the fact that deviations *higher* than 10% are enough *on their own* to establish a prima facie case of discrimination under the Fourteenth Amendment, even without evidence of invidiousness. *Id.* Invidiousness, in short, functions as an evidentiary tool, necessary to establish a constitutional violation in some contexts, but not in others. Here, where 100% of political-minority votes are, by design, rendered ineffective, invidiousness is not required.[22] Given these doctrinal shifts, *Williams* does not control the argument that WTA dilutes votes for *Electors*.

III. WTA BURDENS PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS BY RENDERING THEIR VOTES, AND VOICES, IRRELEVANT TO PRESIDENTIAL ELECTIONS

In addition to burdening Plaintiffs' rights under the Equal Protection Clause, WTA burdens additional rights associated with voting, including (1) "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Dudum*, 640 F.3d at 1105-06 (internal quotation marks omitted), (2) "the right of individuals to associate for the advancement of political beliefs," *id.*, and to petition for redress their elected representatives—namely, the President and

[22] Plaintiffs maintain that they *have* shown invidious discrimination in California's use of WTA: the history of WTA makes clear it was adopted by states *precisely* to discard the votes of minority parties, and WTA has this effect today. Nevertheless, Plaintiffs *need not* allege or prove invidiousness, even if they had an obligation to do so at the time of *Williams*. Plaintiffs also preserve the argument that *Williams* was wrongly decided, and should be overturned.

Vice President, *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388, (2011), and (3) "[t]he right to associate with the political party of one's choice,'" *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). These additional burdens further establish that WTA is unconstitutional.

A. WTA Burdens Plaintiffs' Right to an Effective Vote

First, by diluting and discarding votes, WTA violates Plaintiffs' right to cast an *effective* vote. *See* ER20-21, 29, 32 (Compl. ¶¶ 14, 44, 58); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[E]ach and every citizen has an inalienable right to *full and effective* participation in the political process . . . ." (emphasis added)). WTA strips Plaintiffs' votes of any meaning "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). Although Plaintiffs do not have a right to have their chosen candidate win, WTA *artificially* dilutes and discards Plaintiffs' votes in the national election and thus burdens their First Amendment rights.

The First Amendment protection of the right to vote is complementary to that identified under the Equal Protection Clause. In creating a political system whereby California minority votes can never be expected to affect the presidential election, California not only denies these voters the right to effectively vote, but

predictably removes their "basic incentive" for participating in the presidential election at all. *See Rhodes*, 393 U.S. at 41 (Harlan, J., concurring) (by denying a person "any opportunity to participate in the procedure by which the President is selected, the State … eliminate[s] the basic incentive that all political parties have for [assembling, discussing public issues, or soliciting new members], thereby depriving [them] of much of the substance, if not the form, of their protected rights."). This "burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies," *McCutcheon v. Federal Election Com'n*, 134 S.Ct. 1434, 1449 (2014), *i.e.* individuals who lack the wealth to participate in national politics not by associating and voting, but by donating money to candidates. The First Amendment thus adds to the burden already extant under the Equal Protection Clause.

B. WTA Burdens Plaintiffs' Ability to Associate with Like-minded Voters Across the State to Elect a Presidential Candidate

Second, WTA burdens Plaintiffs' rights to associate with their party for the election of presidential candidates. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Tashjian*, 479 U.S. at 214 (internal citations

omitted). *See also Rhodes,* 393 U.S. at 41 (Harlan, J., concurring); *Gill*, 138 S.Ct. at 1938 (2018) (Kagan, J. concurring).

Here, WTA guarantees that even if they are highly successful in associating for the election of their chosen presidential candidate, California Republicans will predictably receive zero electoral votes. WTA therefore distorts the electoral process, and negates their ability to associate in a way analogous to that of extreme forms of partisan gerrymandering. The Supreme Court recently addressed the burdens on associational rights created by gerrymandering in *Gill*. As Justice Kagan explained: "Members of the 'disfavored party' in the State deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office . . . . By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Id.* at 1938 (internal citations omitted); *see also Common Cause v. Rucho*, 318 F.Supp.3d 777, 929-35 (M.D.N.C. 2018) (discussing associational harms of partisan gerrymandering).

These same considerations are at play here: those who do not support the Democratic candidate in California have little reason to drum up support for a candidate who will receive zero electoral votes *regardless* of their success. Again, that is not because the Electoral College itself renders their efforts meaningless or

because they have no hope of electing that candidate nationwide. It is because WTA artificially negates the relevance of their votes in *California*, rendering any incremental success meaningless.

C. WTA Renders Plaintiffs' Votes and Voices Meaningless to National Candidates and Elected Officials

Finally, in distorting the political process, WTA predictably severs the connection between Plaintiffs and presidential candidates, ensuring such candidates ignore California's minority voters in each election cycle—and in setting national priorities. ER18-19, 30 (Compl. ¶¶ 8, 46). The system thus undermines the core relationship at the heart of democracy, between constituents and their representatives. *See McCutcheon*, 134 S.Ct. at 1461-62 ("Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials."); *Rhodes*, 393 U.S. at 41 (Harlan, J., concurring) ("The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association.").

It is true, as the State argued below, that "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond" to the concerns of citizens. *Smith v. Ark. State Highway Empls. Local*, 441 U.S. 463,

464-65 (1979)). But candidates are not freely ignoring Plaintiffs; WTA incentivizes them to do so. Kriner & Reeves, *supra* at 39-41 ("[B]ecause of [the] institutional structure [of WTA], presidential candidates are all but compelled to value and vie for the votes of some Americans more than others"); *cf. Arizona Free Enter. Club's*, 564 U.S. at 733 (rights of privately funded candidates violated where publicly funded candidates received state funding whenever privately financed candidates spent additional funds, notwithstanding that the law did "not actually prevent anyone from speaking in the first place or cap campaign expenditures"). Without WTA, Plaintiffs' votes would matter, and these candidates would presumably take note. *Cf. California Dem. Party*, 530 U.S. at 581 ("That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable."); *see also McCutcheon*, 134 S.Ct. at 1461-62 (the "political responsiveness at the heart of the democratic process" involves two key prongs: voters "have the right to support candidates who share their views and concerns," and, in turn, representatives "can be expected to be cognizant of and responsive to those concerns").

D. *Williams* Does Not Address These Arguments

The district court concluded that *Williams* controls Plaintiffs' speech, association, and petition claims under the First and Fourteenth Amendments, and declined to address them on the merits. ER14-15. But the court in *Williams* did not address any First Amendment claim. The district court's reliance on *Williams* thus pushes the power of summary affirmances well past its breaking point. *See Anderson*, 460 U.S. at 784 n.5 ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.").

WTA burdens Plaintiffs' First and Fourteenth Amendment rights to a meaningful vote, to associate, and to petition, and on this basis alone, the district court must be reversed.

IV. CALIFORNIA HAS NO LEGITIMATE STATE INTEREST IN MAINTAINING THE WTA METHOD OF CONSOLIDATING ELECTORAL VOTES

Because WTA places severe burdens on Plaintiffs' rights, California can justify it only by showing WTA is "narrowly drawn to advance a state interest of compelling importance." *Dudum,* 640 F.3d at 1106. California is unable to do so, especially given the State "has a less important interest in regulating Presidential elections than statewide or local elections . . . ." *Anderson*, 460 U.S. at 795.

California offered a single purported interest below: that WTA "increas[es] the voting power" of the State. ECF 57 (Defs.' Mot. to Dismiss at 20). Properly framed, this interest is both illegitimate and incorrect.

WTA does not maximize the power of the State *as a whole*; instead, it maximizes the voting strength of a plurality of California voters—for the last seven election cycles, Democrats, ER18 (Compl. ¶ 5)—by deliberately *minimizing* the voting strength, and voices, of minority voters. Indeed, history makes clear that that is precisely the reason states adopted WTA. This is not a legitimate state interest; it is a restatement of the very burden Plaintiffs have identified renders WTA unconstitutional. *See California Dem. Party*, 530 U.S. at 582; *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the First Amendment*." (emphasis added)), *superseded by statute on other grounds as stated in McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 (2003); *see also Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 5-6 (D.C. Cir. 2009) (Kavanaugh, J.) (characterizing this sentence in *Buckley* as "perhaps the most important sentence in the Court's entire campaign finance jurisprudence").

Further, California's suggestion that it has an interest in maximizing the power of the State as a whole is inconsistent with the true operation of WTA, and with Plaintiffs' allegations. The result of California's use of WTA is that

presidential candidates generally ignore California voters, unless those voters are wealthy enough to become a fundraising draw. Although this burden is more acutely felt by minority voters and those with fewer means, it affects the voting rights, and power, of the entire State. *See* ER30 (Compl. ¶ 46). Beyond aggrandizing the power of the Democratic Party in California, WTA actually subverts the power of the State, and its voters, in presidential elections.

Finally California may try to justify WTA by noting that *other* states discriminate against their own political minorities, including Democrats, and that California must use WTA to counteract those states. But this too is no justification. Plaintiffs acknowledged below that a state might "be hesitant to change its WTA method of allocating Electors as long as other states have theirs in place." ECF 69 (Plts.' Opp. to Mot. at 30 n.15). Plaintiffs further noted that such a problem may be addressed by "develop[ing] … a plan for implementing the remedy or potential stays of any injunction pending an appeal" in recognition of this concern. *Id.* But these practical considerations surely do not render WTA constitutional. California cannot discard Plaintiffs' votes on the basis that other states discard their minority citizens' votes. The First and Fourteenth Amendments do not sanction a race to the bottom, or make individual rights subject to inter-state trade.

In sum, California has not asserted any legitimate interest that outweighs even a minimal burden on Plaintiffs' constitutional rights, much less a severe one.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Plaintiffs' claims should be reversed.

Dated: January 7, 2019

Respectfully submitted,

/s/ David Boies

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STATEMENT OF RELATED CASES

Appellants are not aware of any cases related to this appeal pending in the United States Court of Appeals for the Ninth Circuit.

Dated: January 7, 2019

/s/ David Boies

David Boies

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because it contains 13,992 words, excluding the parts of the brief exempted by Ninth Circuit Rule 32-1(c).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: January 7, 2019

/s/ David Boies

David Boies

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 7, 2019.

I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: January 7, 2019

/s/ David Boies
David Boies