CASE NO. 18-2235

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RICHARD J. LYMAN, WILLIAM F. WELD, and ROBERT D. CAPODILUPO,

Plaintiffs and Appellants,

v.

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; and WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts

Defendants and Appellees.

Appeal from the United States District Court,
District of Massachusetts, Case No. 1:18-cv-10327-PBS, Hon. Patti B. Saris

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INTRODUCTION

Every four years, millions of Massachusetts citizens, including Plaintiffs, cast their votes in a national presidential election. And every four years the result is the same: no matter how close the election, Massachusetts allocates all eleven of its electoral votes to the winner of a bare plurality, ensuring millions of votes, including Plaintiffs', have no impact on the presidential election. This method of allocating Massachusetts' electoral votes, known as "Winner Take All" ("WTA"), is not required or mentioned in the United States Constitution. Indeed, WTA was never contemplated by the drafters of the Constitution, and was criticized upon its subsequent adoption for ensuring 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). Nevertheless, through the continued use of WTA, Massachusetts, 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.

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

To stop this practice, Plaintiffs filed this suit seeking an injunction prohibiting the continued use of WTA in Massachusetts' Presidential elections. The district court granted the State's motion to dismiss, erroneously relying on the Supreme Court's summary affirmance from a half-century ago of *Williams v. Virginia Board of Elections*, 393 U.S. 320 (1969), *aff'g* 288 F. Supp. 622, 629 (E.D. Va. 1968). Extensive Supreme Court precedent, unaddressed in *Williams*, makes clear that WTA's use in modern elections violates the Fourteenth and First Amendments.

First, the Supreme Court has made clear that WTA unconstitutionally discards Plaintiffs' votes for President at an intermediate step in the presidential election. By using WTA to award all of its electoral votes to the plurality winner, Massachusetts ensures that Plaintiffs' "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). WTA in Massachusetts thus has the same unconstitutional effect as it did in *Gray*, in which the Supreme Court enjoined Georgia's use of plurality WTA at the county level to allocate each county's unit votes in statewide primaries. *See id.* Plaintiffs in *Williams* did not raise this argument or cite *Gray* for this proposition, and the *Williams* lower court decision neither addressed this argument or the reasoning of *Gray*.

Second, even if one were to understand Massachusetts' presidential election as a state-level election for a multi-member body of Electors—rather than as the first step in a two-step election for President—the constitutional problems are just as apparent. Under this analytical frame, the election constitutes an at-large state-wide vote for competing slates of eleven Electors, with the loser receiving zero representation. As the Supreme Court made clear in *White v. Regester*, states may not use at-large, slate elections for multi-member bodies to ensure minority voters receive no representatives in those bodies. 412 U.S. 755, 769 (1973). *White*, decided five years after *Williams*, illuminates the problem with WTA, and makes clear it is unconstitutional.

Finally, in violation of the First Amendment, 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 associate with and petition candidates and electoral representatives. Because of WTA, presidential candidates are well aware that winning a greater share of minority voters in Massachusetts, or convincing them to go the polls, is irrelevant to the election, as are Plaintiffs as voters. 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. As even the district court acknowledged, *Williams* did not address this First Amendment challenge and does not foreclose it.

The harm from WTA extends well beyond Plaintiffs. WTA causes presidential campaigns to all but ignore non-battleground states, including Massachusetts. 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 will happen with increasing frequency. WTA distorts the incentives of the Executive Branch to favor the interests of voters in swing states. And WTA increases political polarization, aggrandizing the power of dominant state parties and erasing the existence of political diversity across the country. Not one of these consequences is the result of the Electoral College alone, or the intention of the framers. Without judicial intervention, the burdens of WTA will persist. 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.

STATEMENT OF JURISDICTION

Plaintiffs assert claims under the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C.

§ 1291. The district court dismissed Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6) on December 7, 2018, and Plaintiffs timely appealed on December 12, 2018. APP019.

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, thereby ensuring those votes "[are] worth nothing" in the 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 11 Electors and ensuring minority voters systematically receive zero representation in Massachusetts' 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," *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968), to associate for the advancement of political beliefs, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and to associate with candidates and petition for relief.

4. Whether, in light of the "severe" burdens WTA places on Plaintiffs' First and Fourteenth Amendment rights, the State can show that WTA "advance[s]

a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

5. Whether, given the district court's unquestionable power to enjoin Massachusetts' use of WTA, the injuries WTA causes are redressable.

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 Plaintiffs' challenge to WTA should succeed where others have failed, this Court should understand three key points about the history of WTA's adoption and previous challenges to it.

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, and decades before the ratification of the Equal Protection Clause, the dominant political parties in states, including in Massachusetts, adopted WTA to consolidate their power in presidential elections by discarding votes of the political minority and magnifying the votes of the political majority.

Second, the Supreme Court has not addressed in a plenary merits opinion the constitutionality of WTA, even as it has invalidated analogous electoral systems in merits decisions.

And *third*, in part because it was adopted to consolidate the power of partisan state legislatures, without judicial intervention, WTA and its attendant burdens on American democracy are likely to persist.

A. The Origins of WTA

Plaintiffs do not and could not challenge the existence of the Electoral College itself. 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."

In contrast, WTA is nowhere mentioned in the Constitution. The Elector Clause does not prescribe how a state must allocate its Electors and leaves it to individual states to determine the method of allocation. *Cf. Rhodes*, 393 U.S. at 29 ("Nor can it 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."). And other provisions of the Constitution contemplate methods other than WTA. *See* Art. II § 1 (emphasis added); Amd. XII (similar text) (directing 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" (emphasis added) (suggesting an allocation of votes among different candidates)).

Nor is there evidence WTA was ever part of the constitutional design. WTA is not 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). That is not surprising in light of the framers' intention that Electors comprise a state-level, "deliberative body in which presidential electors would exercise independent and detached judgment," *id.* at 74, a function they performed in the first election, *see id.* at 73–74 (noting the first Electors "acted in a reasonably deliberative manner"); *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 in modern times makes the role of Electors purely ministerial, is inconsistent with this design.

It was not the constitutional design, but the rise of partisan politics, that led to WTA's broad adoption. *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"); *cf. id.* at 177 (noting that the Electoral College was "created by the Founders in large part to promote geographic equality," but through elements like WTA, "bec[a]me a major source of geographic

inequality"). Writing to then-Virginia Governor James Monroe in 1800, Thomas Jefferson criticized WTA, stating it would ensure that the "minority [was] entirely unrepresented." *See* Letter from Thomas Jefferson, *supra*. He nevertheless urged Virginia to adopt WTA for political and partisan 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.* 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 interests led to its widespread adoption elsewhere. Massachusetts was a leading player in this process. John Adams, a Federalist, was concerned that Jefferson might capture one of Massachusetts' electoral votes, so he convinced the state legislature to award all of its Electors (without an election) to a single candidate—i.e. through legislative WTA. Koza, *supra*, at 80–81. Partisans around the country reacted, using similar reasoning to persuade their legislatures to use WTA in presidential 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).

Against this backdrop, Massachusetts formally adopted WTA through popular elections in 1824, and has used a variant of WTA in every presidential election since. *Koza*, *supra*, at 356.

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 become clear only 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 based on congressional district, arguing that the Elector Clause *required* statewide WTA, and that the Equal Protection Clause afforded each citizen the right to vote for *each* Elector in the state, precluding district elections. *Id.* at 24, 39. Although it rejected

the claim presented, 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.

Sixty years later, the Supreme Court 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 allocated to 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) based on WTA. *Id.* The Court held Georgia's primary violated the Equal Protection Clause on two independent bases. First, such units were not allocated in proportion to population, and favored rural voters. *See id.* at 379. Second, even if "unit votes were allocated strictly in proportion to population," the impermissible "weighting of votes would continue" because the use of WTA inside of each county would permit "the candidate winning the popular vote in the county to have the entire unit vote of that county" and ensure "votes for a different candidate [would be] worth nothing and . . . counted only for the purpose of being discarded." *Id.* at 381 n.12. This holding had undeniable implications for the use of WTA in presidential elections,

which, like Georgia's parallel use, was not "sanctioned by the Constitution." *Id.* at 380.

Five years after *Gray*, plaintiffs brought an Equal Protection challenge to Virginia's use of WTA to allocate presidential Electors.[2] They did not cite or rely on *Gray* footnote 12, nor focus their attack on WTA unconstitutionally discarding their votes *for President* at the first step in a two-step election. *See* APP069–93. Such an argument would not have been colorable even had they made it. In contrast to modern elections, Virginia's elections formally resembled the elections for *Electors* envisioned by the farmers: Electors' names in fact appeared on the ballot and, if elected, Electors had no legal obligation to support their party's nominee.[3] *See* APP074 (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 plaintiffs argued that WTA invidiously canceled out votes for a slate of Electors, and asked the Court to impose a district method of allocation. *Id.*; *see* APP087, APP093.

A three-judge panel rejected their challenge. It agreed that the *Williams* plaintiffs' argument had "merits and advantages," and acknowledged that "once the

[2] They did not bring a First Amendment challenge.

[3] 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.

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 the 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. Beyond this single ground for rejecting the challenge, the 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 had not been made. And the panel did not cite any case addressing the dilution of votes for a multi-member body through an at-large election, as indeed the Supreme Court would not invalidate such an election for another five years. *See White*, 412 U.S. at 769–70.[4]

The Supreme Court summarily affirmed.

C. The Modern WTA System and Plaintiffs' Challenge

Since *Williams*, the unconstitutional problems with WTA have become more evident. Ballots in Massachusetts print only the names of the presidential candidates; Electors' names are not permitted to be on the ballot. *See* Mass. Gen. Laws ch. 54, § 43. Those Electors are then *required* to "pledge . . . to vote for the

[4] The Supreme Court had acknowledged at the time of *Williams* that electoral systems could not be used to "cancel out the voting strength of … political elements of the voting population," *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (finding no Equal Protection Clause violation under the facts before it); the *Williams* court did not cite that decision. *See Williams*, 288 F. Supp. at 627, 629.

candidate named in the filing." *Id*. ch. 53 § 8. In every respect, the Electors' role is purely ministerial. What was not obvious at the time of *Williams* is obvious today: Massachusetts voters vote for President in two steps, and Massachusetts discards the minority's votes at the first step in precisely the way the Supreme Court found unconstitutional in *Gray*. *Gray*, 372 U.S. at 381 n.12.

The democratic burdens WTA imposes on voters and citizens like Plaintiffs also have become more pronounced. In each of the last eight presidential elections, Massachusetts, 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 9.6 million votes for Republican, Libertarian, and other non-Democratic candidates. APP021, APP023 (Compl. ¶¶ 2, 5). Non-Democratic candidates combined have won as much as 52.4%, and as little as 38.1% of the popular vote, and Republican candidates in particular have garnered as much as 45.4% and as little as 28.1% of the vote. APP030–31 (Compl. ¶ 32); Massachusetts' Election Statistics, http://electionstats.state.ma.us/elections/search/year_from:1972/year_to:2016/office_id:1/stage:General (last visited Apr. 17, 2019). The relative success of minority voters in Massachusetts elections, however, has consistently been irrelevant, swept away by the use of WTA. Massachusetts is not alone in this respect: forty-seven other states and the District of Columbia continue to employ WTA. APP021 (Compl. ¶ 2).

The distorting effects of WTA on participatory democracy have also become more pronounced. In modern elections, WTA incentivizes presidential campaigns to focus on "battleground" states at the expense of single-party-dominated states like Massachusetts where WTA ensures incremental voting changes will have no effect on the election. APP023–24 (Compl. ¶ 8).[5] Thus, in 2016, fourteen battleground states received 99% of candidates' advertising and 95% of their personal appearances, and Massachusetts was not among them. *Id*. WTA ensures that minority voters have less incentive to participate in presidential elections and associate with like-minded voters, and candidates have less incentive to cater to them.[6] It thus skews the priorities of the Executive branch, affecting issues as diverse as disaster relief and the general allocation of federal funds. APP035 (Compl. ¶ 45).[7] WTA also ensures that presidential candidates are increasingly

[5] *See* Douglas Kriner & Andrew Reeves, *The Particularist President: Executive Branch Politics & Political Inequality*, 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, (Nov. 26, 2016, 5:00 AM) https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state.

[7] *See* John Hudak, *Presidential Pork: White House Influence Over the Distribution of Federal Grants* 4 (2014) ("Through its state-centered, winner-take-

likely to win elections without winning the popular vote. *See* Abbott & Levine, *supra*, at 21–42; *accord* Koza, *supra*, at 129. 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. APP036–37 (Compl. ¶¶ 50–52). They are the predictable effects of a system expressly adopted for partisan advantage, to ensure the minority was "entirely unrepresented." Letter from Thomas Jefferson, *supra*.

D. Procedural History

On February 21, 2018, Plaintiffs filed their Complaint seeking a declaration that WTA is unconstitutional and must be enjoined. APP021–41. On May 21, 2018, the State moved to dismiss. APP015.

On December 7, 2018, the district court granted the State's motion. *See* ADD001–23.[8] The court first held *Williams* foreclosed Plaintiffs' challenge. Turning to the merits, it further rejected Plaintiffs' analogy to *Gray*. *See* ADD016-17. In doing so, however, the court cited only *Gray*'s conclusion that "one unit vote

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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 et al., *The President & the Distribution of Federal Spending*, 4 Am. Pol. Sci. Rev. 104, 783–99 (2010).

[8] Massachusetts conceded at oral argument, for standing purposes, that "the injury-in-fact analysis overlaps with the merits of the plaintiffs' constitutional claims." *Id.* at 85.

in a rural country represented over 900 residents, whereas the same vote in a rural county represented over 92,000 residents." ADD017. The court did not address the *second* holding of *Gray*, relied on by Plaintiffs, that makes clear that the use of WTA at the first step of a two-step election created an independent constitutional problem. *See Gray*, 372 U.S. at 381 n.12.

Next, the district court rejected Plaintiffs' First Amendment claim. It agreed *Williams* did not resolve that claim, but held that Plaintiffs had failed to demonstrate WTA "purposely burden[s]" Plaintiffs' rights. ADD021.

Finally, the district court suggested that Plaintiffs' Complaint, which seeks, *inter alia*, an injunction against Massachusetts' use of WTA, is not redressable because the court could not order Massachusetts to adopt a proportional system of allocation. ADD021–23.

On December 18, 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. *Rhodes*, 393 U.S. at 29; *see also Bush v. Gore*, 531 U.S. 98, 104–05 (2000). 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." *Anderson*, 460 U.S. at 30.

In resolving challenges to state voting laws, this Court "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' 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.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). When the burdens on Plaintiffs' rights are "severe," an electoral rule must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Massachusetts' 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.

First, Massachusetts' use of WTA discards Plaintiffs' votes for President in order to consolidate the voting strength of a plurality of voters, burdening Plaintiffs' rights under the Equal Protection Clause. *See Gray*, 372 U.S. at 381 n.12. As in *Gray*, Massachusetts uses WTA at the first step of a two-step election (in *Gray*, for, *inter alia*, Governor; in Massachusetts, for President) to magnify the power of a plurality of voters. Just as in *Gray*, the use of WTA at this first step ensures that Plaintiffs' votes, and those of millions of Massachusetts voters who do not support the plurality's candidate, are "worth nothing [in the ultimate tally] and . . . [are] counted only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12. The district court failed to adopt this argument because it analyzed only *Gray*'s first holding, that Georgia could not allocate units to counties out of proportion to their population, but ignored its second. *See* ADD016–17. The court further relied on *Williams*, but the panel opinion in *Williams* never addressed Plaintiffs' argument here premised on *Gray*, and as the district court itself acknowledged, summary orders cannot be used to foreclose arguments they did not address. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Alternatively viewing Massachusetts' elections as one-step elections for a body of Electors, WTA still burdens Plaintiffs' rights under well-established precedent. Framed as an election for Electors, Massachusetts' presidential elections are directly akin to votes for members of a state-level, political body. The Supreme Court has held that states may not use at-large voting schemes for members of a multi-member body "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 (invalidating such a law for the first time); *Burns*, 384 U.S. at 88 (explaining that such voting principles apply to political as well as racial minorities). There is no question that Massachusetts 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, and ensures political minorities are systematically denied any representation in the Electoral College. *See* Letter from Jefferson, *supra*.

While *Williams* admittedly understood Virginia's elections as for slates of Electors (as opposed to two-step elections for President), it did not, and could not, address the argument as Plaintiffs make it here, and is not controlling. *See Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (summary orders do not control in the face of doctrinal shifts). Before the Supreme Court's decision in *White* (issued five years after *Williams*) that Court had never found an at-large election for a multi-member

body to violate the Constitution. *White*, 412 U.S. at 769–70. *Williams* thus nowhere addressed the principles applied and elaborated on in cases like *White*—principles on which Plaintiffs rely in this challenge, and which have only gained additional force in the years since *White*. Instead, the *Williams* court simply held that plaintiffs failed to prove "invidiousness." *Williams*, 288 F. Supp. at 627. Although at the time of *Williams* the Supreme Court routinely required that plaintiffs prove "invidiousness" to make out a claim, the Court has since 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. In other words, in multiple doctrinal respects, *Williams* lacked the legal tools to articulate the constitutional violation before it, and its holding should not prevent this Court from applying new precedent to reach the correct conclusion.

Finally, WTA burdens Plaintiffs' rights to a meaningful vote, to associate with other voters, and to associate with candidates and petition electoral representatives. By ensuring Plaintiffs' votes and associational efforts are predictably irrelevant to the presidential election, WTA disincentivizes Plaintiffs and other Massachusetts citizens from voting, impedes their ability to associate for the election of presidential candidates, and effectively penalizes candidates for associating with them during, and after, elections. *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). The district court's contrary holding rested on the assumption that Plaintiffs must prove these burdens were purposeful. ADD021. But a First Amendment claim does not require invidious purpose, *see, e.g.*, *Burdick*, 504 U.S. at 434 (nowhere requiring invidious intent), and in any event, history makes clear Massachusetts adopted WTA to do precisely what it does today: to minimize the voting strength of minority party voters. *See supra* pp. 7–10.

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." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Massachusetts has proffered no state interest in maintaining WTA, and it cannot do so. History again makes clear that WTA's purpose is to magnify the weight afforded to a plurality of voters by minimizing the weight afforded to a political minority, a purpose that is "simply circumlocution" for the precise constitutional problem with WTA. *Cal. Dem. Party v. Jones*, 530 U.S. 567, 582 (2000) (observing that a state cannot rephrase the constitutional violation in a First Amendment case into an interest).

Finally, because Plaintiffs have requested an injunction of Massachusetts' use of WTA and a declaration of its unconstitutionality, and there is no question the Court has the power to issue such relief, Plaintiffs' claims are redressable. *See, e.g.*, *Gray*, 372 U.S. at 381 (affirming district court's injunction of the county unit

system); *McPherson*, 146 U.S. at 24 (holding challenge to electoral allocation law does not present a political question).

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, Massachusetts magnifies 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. 372 U.S. at 381 n.12.

A. Massachusetts' Use of WTA Magnifies the Voting Strength of the Dominant Party in Massachusetts 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); *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. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). The protections under that Clause include the principle of one person, one vote, which prohibits states from discarding or diluting the votes of certain citizens unless that outcome is required by a specific constitutional provision. *Gray*, 372 U.S. at 380–81; *Bush*, 531 U.S. at 104–05.

Massachusetts' use of WTA to allocate its electoral votes magnifies the influence of a plurality of voters in the presidential election by counting all other votes "only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12. It thus violates the principle of one person, one vote, and is unconstitutional.

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, 376. 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, after which the units were tallied at the state level. *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. In disapproving of this disparity, the Supreme Court 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, 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; see also Gordon v. Lance*, 403 U.S. 1, 4 (1971) ("[I]n [*Gray*] we h[e]ld that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population.").

The modern use of WTA in Massachusetts' presidential elections is materially identical. Just as in *Gray*, presidential elections in Massachusetts are conducted in two steps: at the first step, Massachusetts citizens vote for President and Massachusetts translates that vote into a number of Electoral votes;[9] and at the second step, Massachusetts' Electoral votes, and those of other states, are tallied at the national level to determine the President. *See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017) (recognizing that "Georgia's primary election system [in *Gray*] was . . . similar to

[9] To be sure, there is a *formal* difference: citizens in Massachusetts vote for *Electors* whereas citizens in Georgia voted for *units*. But this a distinction without a difference: as a functional matter, today's Electors serve the same—and no more—purpose than the units in *Gray*. *See* M.G.L.A. 54, § 43 (Electors' names are not permitted to be on the ballot); *id.* ch. 53 § 8 (requiring Electors to "pledge . . . to vote for the candidate named in the filing").

the electoral college used to elect our President").[10] Just as in *Gray*, whether a losing candidate receives 10% or 40% of Massachusetts' popular vote, those votes are "discarded" at the first step using WTA—ensuring that any incremental vote gains by minority voters have no effect at all on the national election. *Gray*, 372 U.S. at 381 n.12. And just as in *Gray*, the use of WTA, in contrast to the Electoral College itself, is *not* "sanctioned by the Constitution." *Id.* at 380. Indeed, Massachusetts could, consistent with the Electoral clause, adopt a system of allocation that affords minority voters significant say in the presidential election, such as a proportional method of allocation. Its choice to instead discard their votes is not required by the Constitution and is, to the contrary, forbidden by it.

Gray thus makes clear that WTA in Massachusetts' presidential elections is unconstitutional. And indeed, a comparison of the facts of *Gray* itself and this case suggest that the use of WTA in Massachusetts' presidential elections is more problematic than even that at issue in *Gray*. In *Gray*, WTA was used in the context

[10] The district court noted that "[i]t is worth mentioning that Massachusetts's ballots list the candidates' names immediately below the disclaimer, 'Electors of president and vice president," ADD009 n.1 (citing M.G.L.A. 54, § 43), and suggested that "[i]n this way, voters are made aware that they are voting for a slate of electors, not the candidates directly," *id.* But there is little question that voters understand themselves to be voting for *President* in two steps, rather than for specific *Electors*, as Massachusetts law ensures that Electors are functionally no different from the units in *Gray*. *See* M.G.L.A. 54, § 43 (Electors' names are not permitted to be on the ballot); *id.* ch. 53 § 8 (requiring Electors to "pledge . . . to vote for the candidate named in the filing").[10]

of a primary election, where states have significant leeway, and where its effect was not to discriminate against members of minority parties. *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.

The purpose and effect of WTA in Massachusetts' elections also reveals its constitutional infirmity. Plaintiffs need not show invidious purpose to succeed in this challenge: it is enough that WTA "[does] not 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; *see also infra* Part II.B (explaining the elimination of the invidiousness requirement). Nevertheless, the history of WTA—both its origins, and recent history—make clear that it was indeed designed to increase the power of the dominant political party in Massachusetts at the expense of minority voters, and it has consistently served that purpose. *See supra* pp. 7–16. The Supreme Court has long recognized that electoral systems cannot be used to "cancel out the voting strength of racial *or political elements* of the voting

population." *Burns*, 384 U.S. at 88 (emphasis added) (internal citation omitted). WTA, in purpose and effect, "promis[es] the greatest partisan advantage" to the majority political party in Massachusetts and effects a form of discrimination that was not even at issue in *Gray*. Noble E. Cunningham, *History of American Presidential Elections 1878–2001*, 104–05 (2002).

B. The District Court Misunderstood the Holding in *Gray* on Which Plaintiffs Rely

In rejecting Plaintiffs' reliance on *Gray*, the district court committed two principal errors.

First, it improperly limited its analysis to the *first* holding of *Gray*, that Georgia had allocated units without respect to population. In rejecting Plaintiffs' claim, the district court ignored *Gray*'s second holding. The court explained that "what the Supreme Court deemed unconstitutional in *Gray* was not the use of any unit system, but [the fact that] one unit vote in a rural country represented over 900 residents, whereas the same vote in a rural county represented over 92,000 residents." *Id.* at 90 ("This disparity rendered the system unconstitutional."). Having identified the purported "core constitutional problem in *Gray*," the court unsurprisingly concluded that Plaintiffs had "not explained how Massachusetts's WTA system inflicts a similar harm." *Id.* The problem with this analysis is evident: the district court completely ignored *Gray*'s second, and *independent* holding, on which Plaintiffs actually rely: that "even if unit votes were allocated strictly in

proportion to population" in Georgia, the "weighting of votes would continue" because of the use of WTA. *Gray*, 372 U.S. at 381 n.12; *see also Gordon*, 403 U.S. at 4 (making clear this was indeed a holding of independent force).

Second, the district court further erred by incorrectly suggesting Plaintiffs contend "that the electoral college is numerically unfair," and that such unfairness is "embedded in the Constitution." *Id.* at 89. Plaintiffs do not challenge the "numerical inequality" inherent in the Electoral Clause: that it affords highly populated states fewer electoral votes per citizen than it affords less-populated states. *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). *Gray* made clear this inequality is not subject to constitutional challenge: after Georgia argued that its own disproportionate allocation of unit votes to counties was constitutional by analogy to the Electoral College, the Supreme Court responded 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." *Gray*, 372 U.S. at 380 (emphasis added).) Unlike the allocation of electoral votes to states, however, WTA is *not* sanctioned by the Constitution. Because WTA in Massachusetts' presidential elections results in the unequal

"weighting of votes," *id.* at 381 n.12, and because it is not "sanctioned by the Constitution," *Gray* makes clear that it violates the Equal Protection Clause.

C. *Williams* Never Addressed Plaintiffs' Argument and Cannot Foreclose It

Finally, the district court erroneously relied on *Williams* to dismiss Plaintiffs' Equal Protection Clause argument based on *Gray*. But *Williams* did not address that argument and does not control.

As the district court acknowledged, summary orders control *only* those arguments that they specifically resolve. *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."); ADD008–09. Courts considering applying summary affirmances thus must 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.

The *Williams* plaintiffs did not raise the argument made here that WTA discards votes at the first step in a two-step election for President, and such argument was never addressed by the *Williams* court. *See* APP069–93. *See generally Williams*, 288 F. Supp. at 623. Indeed, in several places, the *Williams* panel explicitly analyzed that election as one for a slate of electors—i.e. a one-step election for a state-level body. *See, e.g.*, *id.* at 623 (noting plaintiffs argued that WTA "accords no representation among the electors to the minority of the voters"); *id.* at 627 ("Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes.") Moreover, even if *Williams* had addressed this *framework*, there is no question that the decision does not cite, much less distinguish *Gray*'s second holding in footnote 12—and again, the plaintiffs in that case never once cited that footnote. *See* APP069–93; s*ee generally Williams*, 288 F. Supp. 623. *Williams* cannot have resolved arguments it never addressed.

The district court did not reach this conclusion, in part because it again incorrectly framed Plaintiffs' argument. The district court understood Plaintiffs' argument as being rooted in two "factual distinctions" between *Williams* and this case: that Virginians did in fact cast their votes for Electors (while Massachusetts no longer puts the names of Electors on the ballot); and that Electors were not bound to vote for presidential candidates (while Massachusetts requires that they do so). ADD008-09; *see* APP074 (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). The court rejected these as significant factual distinctions. Although Plaintiffs indeed noted these distinctions, however, they are not the core of Plaintiffs' argument: that *Williams* does not control because it did not address the contention that WTA discards votes at the first step of a two-step election as condemned in *Gray* footnote 12. These factual distinctions help explain why the plaintiffs in *Williams* would not have put forth the argument Plaintiffs make here, and why the *Williams* court would not address it.[11] But the basic point is simpler: in light of the narrow deference afforded a summary order, *Williams* should not prevent this Court from addressing an argument *Williams* itself did not, and had no occasion to, resolve.[12]

II. EVEN IF VIEWED AS A ONE STEP VOTE FOR ELECTORS, MASSACHUSETTS' USE OF WTA VIOLATES THE FOURTEENTH AMENDMENT

Because modern elections for President relegate Electors to ministerial and hidden roles, they are best viewed as two-step elections for President, analogous to

[11] They are, further, not meaningless distinctions: for instance, 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.

[12] Independently, *Williams* has also been abrogated by subsequent developments in the case-law. *See infra* Part II.B. But the Court need not so hold to find *Williams* does not control Plaintiffs' primary argument: it is enough to note that *Williams* never addressed that argument, and cannot control it. Further, Plaintiffs reserve their right to argue *Williams* was wrongly decided, and should be overturned.

those in *Gray*. Nevertheless, even if this Court were to view Massachusetts' elections as single-step elections for a slate of *Electors*, as *Williams* did, the result under Equal Protection precedent is the same: WTA burdens Plaintiffs' Fourteenth Amendment rights by canceling out their votes for *Electors* through an at-large, slate election that systematically ensures zero representation in Massachusetts' Electoral College delegation. *See White*, 412 U.S. at 769.

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

Analyzed as one-step elections for a body of Electors, Massachusetts' voters elect an eleven-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 uses an at-large, slate election to systematically ensure all of these eleven 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.*

To illustrate the point, suppose Massachusetts decided to abolish its forty single-member state senate districts and instead to 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 unavoidably be single-party rule, and a flat denial of any political minority representation in a state-level body. Such a law would

clearly be unconstitutional. The use of WTA in allocating Massachusetts' presidential Electors is no different: viewing Massachusetts' elections as statewide, at-large elections for an eleven-member body of Electors, WTA ensures single-party control over all eleven seats.

Supreme Court precedent confirms this intuitive result. The Supreme Court has long 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 v. Bd. of Elections*, 393 U.S. 544, 569 (1969). 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. *White*, 412 U.S. at 769. 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).

Massachusetts' use of WTA, viewed as a statewide, at-large election for eleven presidential Electors, is in all relevant respects indistinguishable from the system condemned in *White*. Massachusetts has selected eighty-eight Electors in the last eight elections, and *all* were members of the Democratic Party, notwithstanding over nine and a half million votes for other candidates over that time, and over 8 million votes for Republicans specifically. APP021, APP023 (Compl. ¶¶ 2, 5). Cancelling 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.

The district court distinguished *White*, citing language in *White* referring to "invidious[]" discrimination, and holding that "[u]nlike *White* . . . Massachusetts' WTA system [was not] adopted to cancel out the voting strength of any particular group." ADD010–11. But WTA was indeed "adopted . . . to enable [the leading men of each state] to consolidate the vote of the State," *Benton*, *supra*, at 38, and it is no historical accident that it has that effect then and now. The mere fact that the

precise political party that benefitted in 1824 is not the same party that benefits today does not eliminate this taint: the modern Democratic Party in Massachusetts benefits from a system that was *designed* to benefit the dominant party of any era and persistently has had that effect. To require *more* for a finding of invidious purpose would insulate clearly discriminatory legislation from judicial review if it managed to survive long enough for the precise beneficiaries of the discrimination to change.

Further, and in any event, invidious intent is not a requirement of a modern Equal Protection Clause claim. ADD014–15; *see also infra* Part II.B.

In addition to distinguishing *White*, the district court cited two other lines of cases as undercutting Plaintiffs' challenge. *First*, the district court cited the Supreme Court's language in *City of Mobile v. Bolden* that the Constitution does not "guarantee[] proportional representation." ADD017–18 (citing 446 U.S. 55, 77–79 (1980)). Whether the Constitution *requires* fully "proportional representation" is not the issue. Instead, the issue is whether Massachusetts may use a system that is designed to deny *any* representation to minority party voters—that is maximally disproportional. Plaintiffs have asked the court to enjoin that system and order the state to adopt a constitutional method. APP038–39 (Compl. ¶ 60 (a)-(c)). They have only asked the court to impose a proportional method of allocating electoral votes if the state fails to impose a constitutional method. *See* APP039 (Compl. ¶ 60 (e)).

Second, the district court cited *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which rejected a challenge to a specific multi-member district (one of thirty-one senatorial districts in the state of Indiana) as undercutting Plaintiffs' challenge. ADD017–18 (citing *Whitcomb*, 403 U.S. at 127)). But *Whitcomb* explicitly acknowledges that plaintiffs may succeed on a constitutional claim for vote dilution if they can show that multi-member elections have certain dilutive characteristics – not present as a factual matter in *Whitcomb*. 403 U.S. at 143. The Court in *Whitcomb* explained such dilutive effects are "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. That exact situation pertains here. The "district" here is all of Massachusetts and 100% of "the seats" at issue—*all* eleven of its Electors, comprising a unicameral body, are allocated to one party by virtue of WTA. Plaintiffs and other similarly situated citizens have zero say in how this body votes for the Presidency. By contrast, Indiana's electoral system addressed in *Whitcomb* was bicameral in nature and had thirty-one senatorial districts and thirty-nine house districts. *Id.* at 127. The

single senatorial district at issue did not even remotely involve "a substantial proportion of the seats" in the legislature, much less 100% of the "seats."[13]

B. *Williams* Is Not Controlling as to Plaintiffs' Dilution Claim Because of Subsequent Developments in the Law

Even if this Court analyzes Massachusetts' elections as for an eleven-member, state-level body, *Williams* does not control. It is true that *Williams* understood and analyzed Virginia's presidential elections in this way: as elections for a slate of Electors (rather than two-step elections for *President*). Yet it did not, and could not, fully address the argument that WTA cancels out votes in such an election through an at-large, slate election, because it lacked the case-law to do so. Key doctrinal shifts in dilution law since *Williams* have undermined its holding, and this Court need not "adhere to" it. *See Hicks*, 422 U.S. at 344.[14]

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[13] *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).

[14] 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 (1971)(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, framed as an election for a slate of Electors. *See Williams*, 288 F. Supp. at 627, 629. At the time, however, it lacked the case-law to provide those problems with a constitutional dimension. 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 the influence of political minorities. The district court downplayed the significance of *White*, noting that *White* itself downplayed its own significance and affirmed the uncontroversial proposition that "multimember districts are not per se unconstitutional." ADD010 (quoting *White*, 412 U.S. at 765). But this qualifying language in *White* does not undermine its significance: *White* was inarguably the first such challenge to succeed. Further, although *White* acknowledged previous decisions that articulated principles on which it relied, *see White*, 412 U.S. at 765 (citing *Burns*, 384 U.S. at 73 and *Fortson v. Dorsey*, 379 U.S. at 433), these cases were hardly the watershed *White* was. Indeed, the *Williams* panel did not even cite these cases, or appear to consider them significant to the analysis. *See generally Williams*, 288 F. Supp. 627.

Since the Supreme Court's 1973 ruling in *White*, courts have further developed the law around multi-member districts, frequently determining 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 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).

Williams was also the product of its time for a second reason. As *Williams* noted, Congress had "expressly countenanced" state-wide at-large elections for congressional representatives. *Williams*, 288 F. Supp. at 628. After *Williams*, Congress 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 & 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 as a prerequisite for an equal protection violation has also been overcome by doctrinal developments. *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 certain 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 v. Gore* 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.*[15]

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 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).

[15] "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.

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 matters when, without a finding of invidiousness, a court would not be able to successfully distinguish a fair voting system from a problematic one. For example, in *Harris v. Arizona Independent 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, 1305–07 (2016). However, implicit in this discussion was the fact that at some lever over 10% deviations alone are enough 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.

The district court rejected this basis for distinguishing *Williams*, suggesting that, even at the time of *Williams*, invidiousness was not necessarily a requirement of an Equal Protection Clause challenge. ADD009–11. According to the district court, the Supreme Court had entertained challenges under the Equal Protection

Clause to voting systems since before *Williams*, premised not just on invidiousness, but on the argument that a voting system contains "arbitrary and disparate treatment of voters." *Id.*

As an initial matter, the district court based this conclusion on an incomplete appreciation of *Roman v. Sincock*, a 1964 Supreme Court case. 377 U.S. 695 (1964). The district court cited *Roman* as an example of a case that did not require invidiousness, but in fact the Supreme Court cited the invidiousness requirement multiple times in its decision, noting that the Plaintiffs below argued that the apportionment scheme was "invidious," *id.* at 697, and that the lower court had held as much, *id.* at 700–01.

Even assuming the district court is correct, *Williams* was clearly based on the understanding that the lack of invidiousness was dispositive in defendants' favor – and that alone makes it distinguishable. The *Williams* decision acknowledged "discrimination against the minority voters," but rejected plaintiffs' challenge because "in a democratic society the majority must rule, *unless the discrimination is invidious*." 288 F. Supp. at 627 (emphasis added). The plaintiffs in *Williams* did not question the invidiousness requirement. *See* APP087, APP093. Because invidiousness is not a requirement of *the present challenge* it follows that *Williams* cannot have resolved Plaintiffs' challenge based on a legal standard that no longer controls.

Furthermore, the Supreme Court has itself made clear, specifically in the voting rights context, that summary decisions should not hold in the face of evolving case-law. Before *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). 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). *Williams* is even more a product of its time, and does not control Plaintiffs' arguments.

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

In addition to severely burdening Plaintiffs' rights under the Equal Protection Clause, WTA burdens Plaintiffs' First Amendment rights in participating in elections, the electoral process, and the political process. This violation alone subjects it to heightened scrutiny, and independently makes clear that WTA must be enjoined. *See Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990)

(recognizing that heightened scrutiny applies when more than one constitutional claim is at issue (termed a "hybrid" claim)). Further, as the district court agreed, *Williams* does not control this claim. *See Williams*, 288 F. Supp. 627 (nowhere addresses any First Amendment argument).

A. Plaintiffs Need Not Plead That WTA *Purposefully* Burdens Their First Amendment Rights, Although They Have Done So

The district court incorrectly dismissed Plaintiffs' First Amendment challenge in part by suggesting that it is not the "purpose[]" of WTA to "burden any particular individual, group, or party 'by reason of [its] views.'" ADD021.

First, as already noted, WTA was adopted by states, including Massachusetts, for the purpose of diluting the voting strength of minority political parties and aggrandizing the power of the dominant political party. *See supra* pp. 7–10; *id.* pp. 37–38.

Second, and in any event, purposeful discrimination is *not* a requirement of a First Amendment voting rights claim. The Supreme Court has on multiple occasions articulated the balancing test that applies to challenges to state election laws. *See Burdick*, 504 U.S. at 434; *see also, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). While intent may be relevant to illuminating the claimed discrimination, *see, e.g.*, *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring), it is not a *sine qua non* of a First Amendment voting rights claim, *see Burdick*, 504 U.S. at 434; Daniel Tokaji, Symposium: A Path through the thicket: the First Amendment

Right of Association ("[Under the] Anderson-Burdick standard . . . [a]n intent to harm the non-dominant party may be relevant, but it isn't required.").

B. WTA Burdens Plaintiffs' Rights to Cast an *Effective* Vote, to Associate With Likeminded Voters for the Advancement of Political Beliefs, to Associate with Candidates and Petition Elected Representatives

Because it rejected Plaintiffs' challenge by applying an incorrect legal standard, the district court did not analyze in detail the burdens the complaint alleges WTA imposes on minority voters in Massachusetts. Those burdens are significant. By ensuring that Plaintiffs' votes, and any associational efforts, can have no effect on the national election, WTA curtails their First Amendment rights to vote, associate, and petition. These burdens are, further, "especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies," *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 205 (2014), such as individuals who lack the wealth to participate in national politics not through exercise of democratic rights, but through their pocketbooks.

First, by diluting and discarding Plaintiffs' votes, WTA burdens Plaintiffs' right "to cast their votes effectively." *Rhodes*, 393 U.S. at 30–31; *See* APP025–26, 35, 38 (Compl. ¶¶ 14, 44, 58). 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*, 479 U.S. at 216.

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 (Kagan, J., concurring). Here, WTA guarantees that even if they are highly successful in associating for the election of their chosen presidential candidate (*i.e.*, they receive historic numbers of votes for a non-Democratic candidate in Massachusetts); Plaintiffs' candidate will predictably receive zero electoral votes in Massachusetts, dampening participation and association. *Cf. 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."); *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (explaining that, in the context of partisan gerrymandering, "[m]embers 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. . . .").

Finally, in distorting the political process, WTA incentivizes candidates to ignore Massachusetts as a whole and its minority voters in each election cycle and in setting national priorities and allocating federal resources. APP023–24, APP035 (Compl. ¶¶ 8, 46). Although WTA does not mandate that candidates ignore Plaintiffs and those like them, it creates an incentive system that has exactly that effect. *Cf. Ariz. Free Enter. Club PAC v. Bennett*, 564 U.S. 721, 733 (2011)(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"); 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"). But for WTA, such effects would be unlikely, and candidates would not systematically ignore Plaintiffs, and voters like them. *See McCutcheon*, 572 U.S. at 226–27 (noting that "political responsiveness [is] at the heart of the democratic process" and because voters "have the right to support candidates who share their views and concerns," representatives "can be expected to be cognizant of and responsive to those concerns").

WTA is thus unconstitutional for the independent reason that it violates Plaintiffs' First Amendment rights.

IV. MASSACHUSETTS HAS NO LEGITIMATE STATE INTEREST IN MAINTAINING THE WTA METHOD

Because WTA places severe burdens on Plaintiffs' rights, Massachusetts can justify it only by showing WTA is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). Yet Massachusetts has made no attempt to proffer any state interest to justify WTA. Nor could it. The *reason* Massachusetts—and countless other states—adopted WTA is was to maximize the power of the dominant political party in the state, and WTA has operated in that fashion in Massachusetts since WTA's inception. Maximizing the voting influence of a block of voters by discarding the votes of minority voters is not a *legitimate* state interest: it is the very infirmity that renders WTA unconstitutional. *See Cal. Dem. Party*, 530 U.S. at 582; *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("[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).

Nor could any other interest possibly justify WTA. The result of Massachusetts' use of WTA is that presidential candidates generally ignore Massachusetts voters, unless they 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* APP035 (Compl. ¶ 46).

Nor is the continuation of WTA justified as a mere response to other states' continued use of it. Plaintiffs understand that Massachusetts might be hesitant to change its own system until other states must do so. For precisely this reason, challenges to WTA are pending in the Ninth, Fourth, and Fifth Circuits, seeking a national solution. There are, further, practical ways to fashion, condition, and time relief that can alleviate concerns over "unilateral disarmament" and, as reflected in the complaint, Plaintiffs are sensitive to these concerns. These practical considerations, however, do not qualify as a *state interest* that renders WTA constitutional—and thus saves it from any challenge in perpetuity. Massachusetts 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.

V. PLAINTIFFS' CLAIM IS REDRESSABLE

Finally, the district court, having rejected Plaintiffs' claim on the merits, held that Plaintiffs' "claim is unredressable in federal court" on the basis that the court could not require Massachusetts to adopt a proportional system of allocation. ADD023. But in their Complaint, Plaintiffs ask that the Court declare WTA in Massachusetts unconstitutional, and *enjoin its use*, APP038–39 (Compl. ¶ 60 (a)-

(c)), and there is no question that such an injunction is within the power of the Court to grant, *see, e.g.*, *Gray*, 372 U.S. at 381 (affirming district court's injunction of the county unit system); *McPherson*, 146 U.S. at 24 (challenge to electoral allocation law does not present a political question). Because the Court indeed can redress the unconstitutional use of WTA by granting Plaintiffs at least one form of relief they seek, the case poses no redressability problem. *See Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").[16]

CONCLUSION

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

[16] As noted, Plaintiffs do request the judiciary impose a proportional remedy if the State fails to conform to a constitutional method. APP039 (Compl. ¶ 60(e)); Fed. R. Civ. P. 8 (permitting a party to request alternative forms of relief). But whether or not the court may impose such a remedy—or may simply exercise its power to enjoin any unconstitutional method—is irrelevant to redressability, which is satisfied here.

Dated: April 17, 2019

Respectfully submitted,

/s/ Amy Mauser

BOIES SCHILLER FLEXNER LLP

Attorneys for Plaintiffs-Appellants Richard J. Lyman, William F. Weld, and Robert D. Capodilupo

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 First Circuit.

Dated: April 17, 2019

/s/ Amy Mauser
Amy Mauser

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 329(a)(7)(B)(i) because it contains 12,777 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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: April 17, 2019

/s/ Amy Mauser
Amy Mauser

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 First Circuit by using the appellate CM/ECF system on April 17, 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: April 17, 2019

/s/ Amy Mauser
Amy Mauser

ADDENDUM

ADDENDUM TO PLAINTIFFS-APPELLANTS' OPENING BRIEF

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD J. LYMAN, WILLIAM F. WELD, and ROBERT D. CAPODILUPO, Plaintiffs, v. CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts, and WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts, Defendants.	Civil Action No. 18-10327-PBS

MEMORANDUM AND ORDER

December 7, 2018

Saris, C.J.

INTRODUCTION

The plaintiffs, two Republicans and one Libertarian, challenge the constitutionality of Massachusetts's system for allocating electors in presidential elections. The plaintiffs have voted and plan to continue voting in Massachusetts for presidential candidates who are not members of the Democratic Party. They allege that their votes for these candidates are effectively discarded because Massachusetts has adopted a "winner-take-all" ("WTA") system for selecting electors. In this system, the candidate receiving the most votes in Massachusetts

is awarded all of the Commonwealth's electors, with the other candidates receiving no electors. The plaintiffs seek a declaration that this system violates the United States Constitution -- both the "one person, one vote" principle rooted in the Equal Protection Clause of the Fourteenth Amendment (Count I) and the voters' freedom of association protected by the First and Fourteenth Amendments (Count II). In their view, the Constitution requires a "more equitable" method for distributing electors, one that allocates electors proportionately to parties.

The Complaint seeks a declaration that the WTA system is unconstitutional and a corresponding injunction. It also asks the Court to impose a deadline by which state authorities must implement a valid method of selecting electors.

The defendants have moved to dismiss based on Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. After hearing, the Court concludes that the Massachusetts winner-take-all system of selecting electors in presidential elections is constitutional. The motion to dismiss (Dkt. No. 21) is **ALLOWED**.

FACTUAL BACKGROUND

The following facts are drawn from the Complaint.

I. The Parties

Plaintiff William F. Weld is a registered Libertarian and the former Republican Governor of Massachusetts. Plaintiffs

Richard J. Lyman and Robert D. Capodilupo are registered Republicans. All three plaintiffs are Massachusetts residents. They have consistently voted for non-Democratic candidates for president, and they intend to continue to do so in future presidential elections.

Defendant Charles D. Baker is the Governor of Massachusetts. Defendant William Francis Galvin is the Secretary of the Commonwealth, and his office administers elections. Both are sued in their official capacities.

II. Winner-Take-All Selection of Electors

Massachusetts, along with 47 other states and the District of Columbia, has adopted statutes under which its electors for president and vice president are appointed on a winner-take-all ("WTA") basis. See Mass. Gen. Laws ch. 54, § 118 (stating that electors "who have received the highest number of votes . . . shall . . . be deemed to be elected"). Under this system, the political party of the candidate who receives the most votes in Massachusetts appoints all of the Commonwealth's electors. See id. For example, in 2016, Secretary Hillary Clinton received 60 percent of the votes in Massachusetts and all of its electors. President Donald Trump received 32.8 percent of the Massachusetts vote, but none of its electors.

The end result of the WTA system is that the top vote-getter receives all of the Commonwealth's electors, and the

other candidates receive no electors. This is true regardless of whether the winning candidate earns a majority or a mere plurality of the popular vote. See Mass. Gen. Laws ch. 54, § 118 (requiring governor and secretary of state to collect names of presidential electors who receive more than one-fifth of entire number of votes cast for electors and deeming the highest vote-getter the winner). And it applies regardless of whether the candidate wins by a large margin or a slim one. See id.

The plaintiffs allege that the WTA system weakens the influence of Massachusetts voters in presidential elections. They claim that the WTA system leads candidates to focus disproportionate attention on "battleground" states that represent only 35 percent of eligible voters nationwide. In addition, they allege that the WTA system facilitates outside interference in presidential elections because a small number of voters in predictable battleground states exert undue influence over the presidential election results.

DISCUSSION

I. Standing

Moving to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the defendants' attack the plaintiffs' standing to bring this case. To satisfy standing, "[t]he party invoking federal jurisdiction bears the burden of establishing [three] elements." Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). First, the

plaintiff must have suffered an "injury in fact" -- that is, an invasion of a legally protected interest which is both "concrete and particularized," and "actual or imminent," as opposed to "conjectural or hypothetical." Id. at 560. "Second, there must be a causal connection between the injury and the conduct complained of." Id. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

In their brief, the defendants attacked two of these requirements: injury-in-fact and redressability. At oral argument, the parties agreed that the injury-in-fact analysis overlaps with the merits of the plaintiffs' constitutional claims. In other words, if WTA is unconstitutional, then the plaintiffs have suffered an injury-in-fact; otherwise, they have not. See Erwin Chemerinsky, Federal Jurisdiction § 2.3.2 (4th ed. 2003) (describing how, in some cases, "deciding whether there is an injury to a legally protected constitutional interest . . . requires inquiry into the merits of the case").

Accordingly, the Court will proceed directly to analyzing the plaintiffs' constitutional claims under the well-established standard for Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Rule 12(b)(6), the Court must analyze whether the complaint contains sufficient factual matter to state a claim to

relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009).

II. "One Person, One Vote" Claim

The plaintiffs assert that Massachusetts's WTA system for allocating electors violates the "one person, one vote" principle. The defendants argue that this claim is foreclosed by binding Supreme Court precedent. They also argue that even without this precedent, the WTA system does not violate "one person, one vote" because it does not weigh votes in a disparate or arbitrary fashion. The Court agrees with the defendants on both points.

A. Constitutional Backdrop

The United States Constitution provides for election of the president and vice president by electors. U.S. Const. art. II, § 1. It provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Id. The number of electors for each state is equal to the sum of its United States Senators and Representatives. See id.

The method by which the electors select the president and vice president is set forth in the Twelfth Amendment. See U.S. Const. amend. XII. The Twelfth Amendment also provides for the election of the president by the House of Representatives and the vice president by the Senate when no majority is obtained in

the electoral college. Id. It has long been observed that the "electoral college was designed by men who did not want the election of the President to be left to the people." Gray v. Sanders, 372 U.S. 368, 376 n.8 (1963); The Federalist No. 68 (Alexander Hamilton) (describing philosophy behind electoral college).

B. The Williams Decision

In Williams v. Va. State Bd. of Elections, 288 F. Supp. 622 (E.D. Va. 1968), aff'd, 393 U.S. 320 (1969), a three-judge panel of the district court rejected a constitutional challenge to Virginia's WTA system for selecting electors in a statewide general election. 622 F. Supp. at 629. The plaintiffs argued that the WTA system was unfair because it accorded no representation among the electors to the minority of voters. Id. at 623. The plaintiffs in that case specifically pressed the argument, among others, that the WTA system "violates the 'one-person, one-vote' principle of the Equal Protection Clause of the Fourteenth Amendment, i.e., the weight of each citizen's vote must be substantially equal to that of every other citizen." Id. at 624. The Supreme Court had recognized the "one person, one vote" principle as required by the Equal Protection Claim several years earlier. See Gray, 372 U.S. at 381 (equating "political equality" with "one person, one vote"); Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote

. . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens.").

After a discussion of the policy arguments against a WTA system, including the disenfranchisement of voters and the possibility of "minority candidates" the Court in Williams stated:

> Notwithstanding, it is difficult to equate the deprivations imposed by the [WTA] rule with the denial of privileges outlawed by the one-person, one-vote doctrine or banned by Constitutional mandates of protection. In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.

288 F. Supp. at 627. The Supreme Court summarily affirmed without opinion. Williams v. Va. State Bd. of Elections, 393 U.S. 320 (1969) (per curiam).

C. Effect of Williams in This Case

The parties disagree over whether Williams controls the outcome of this case. As a general matter, summary affirmances from the Supreme Court cannot be read too broadly, and they do not necessarily endorse the lower court's reasoning. See Mandel v. Bradley, 432 U.S. 173, 176 (1977). However, "[t]hey do

prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." Id. For the reasons explained below, the Court concludes that both prongs are satisfied here, and Williams is binding.

The plaintiffs begin by arguing that Williams is not controlling because of two factual distinctions. First, they point out that Williams involved ballots that listed the names of the electors, whereas now, in Massachusetts, only the candidates' names appear. See Mass. Gen. Laws ch. 54, § 43 (requiring that electors' names not be printed on ballot).[1] Second, the plaintiffs point out that Virginia's electors in the 1960s were not bound to vote for their party's chosen candidate, whereas Massachusetts's electors, by statute, are. See Mass. Gen. Laws ch. 53, § 8 (requiring presidential electors to "pledge . . . to vote for the candidate named in the filing"). But the Court in Williams did not rely on these factors, and the plaintiffs shed no light on why these distinctions make any meaningful difference in this case. The Court concludes that they have no bearing on the close similarity between the issues decided in Williams and presented in this case.

[1] It is worth mentioning that Massachusetts's ballots list the candidates' names immediately below the disclaimer, "Electors of president and vice president." Mass. Gen. Laws ch. 54, § 43. In this way, voters are made aware that they are voting for a slate of electors, not the candidates directly.

The plaintiffs next argue that "important doctrinal shifts" since Williams diminish its precedential value. First, they point out that White v. Regester, 412 U.S. 755 (1973), struck down the use of a multi-member at-large voting district. The plaintiffs overstate the importance of this holding vis-à-vis Williams. White concerned the 1970 reapportionment plan for the Texas House of Representatives. Id. at 756. The Court first rejected the lower court's holding that a 9.9 percent population differential between districts, standing alone, made out a prima facie equal protection violation. Id. at 763. After pointing out that it has "entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups," the Supreme Court then affirmed the lower court's determination that two specific multimember districts were unconstitutional in light of the state's history of discrimination against African-American and Mexican-American citizens. Id. at 765-70. The White Court carefully limited its holding, emphasizing that "multimember districts are not per se unconstitutional." Id. at 765.

The plaintiffs do not explain how this holding undercuts the strength of Williams -- and indeed, it does not. The plaintiffs argue that Massachusetts' WTA system is indistinguishable from the ones that White found to "invidiously . . . cancel out or minimize the voting strength" of particular

groups. Id. at 765. But White is readily distinguishable. Unlike White, the plaintiffs here have alleged no facts to suggest that Massachusetts's WTA system was adopted to cancel out the voting strength of any particular group. Rather, as discussed in more detail below, the voting process that underlies the WTA system in Massachusetts is "equally open to participation" by all voters. Id. at 766.

Second, the plaintiffs argue that Bush v. Gore, 531 U.S. 98 (2000), eliminated the invidiousness requirement from "one person, one vote" claims. In Bush, the Supreme Court held: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05. Framed this way, the plaintiffs seem to be suggesting that, prior to Bush, a "one person, one vote" claim required proof of conduct that was invidious, but after Bush, arbitrary and disparate treatment of voters is sufficient.

For starters, the precedential value of Bush is unclear, as the main opinion expressly states that it is "limited to the present circumstances." 531 U.S. at 109. In light of this cautious language, it is unlikely the Supreme Court intended to overturn Williams. Moreover, Bush does not discuss Williams or the precise issue decided in it. The Supreme Court "does not normally overturn, or . . . dramatically limit, earlier

authority sub silentio." Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000).

The plaintiffs are correct that some pre-Bush Supreme Court opinions indicate a violation of the Equal Protection Clause requires proof of invidiousness. See, e.g., Dusch v. Davis, 387 U.S. 112, 116 (1967) ("[T]he constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination."). But then again, so do some post-Bush opinions. See, e.g., Harris v. Ariz. Indep. Redistricting Comm'n, 136 S.Ct. 1301, 1307 (2017) ("[M]inor deviations from mathematical equality do not, by themselves, make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . .") (citation and quotation marks omitted).

In short, the plaintiffs' argument fails to appreciate that, over time, the Supreme Court has recognized at least two types of "one person, one vote" violations -- those based on invidious discrimination, and those based on arbitrary and disparate treatment of voters. In Roman v. Sincock, the Court explained that the Equal Protection Clause requires "faithful adherence to a plan of population-based representation," with minor deviations permissible only when "free from any taint of arbitrariness or discrimination." 377 U.S. 695, 710 (1964) (emphasis added). The disjunctive language is consistent with Bush in that it indicates that arbitrariness may suffice to

prove a "one person, one vote" violation, even in the absence of invidious discrimination. See also Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 234 & n.13 (6th Cir. 2011) (using "arbitrary and disparate" standard for Equal Protection challenge, and noting that "a showing of intentional discrimination has not been required" in prior Supreme Court cases). Cf. Clements v. Fashing, 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution." (emphasis added)). Accordingly, Bush did not alter the doctrinal requirements of "one person, one vote" claims.[2]

In short, in light of the absence of any material factual difference or doctrinal shifts, the Court concludes that the Supreme Court's summary affirmance in Williams is binding precedent that requires dismissal of the plaintiffs' claims.

D. WTA and the Equal Protection Clause

Even if the Court were not bound by Williams, the plaintiffs' claims would still fail for reasons that substantially mirror those given by the three-judge panel in

[2] Even if it had, this would have no bearing on the outcome of this motion. For the reasons explained below, Massachusetts's WTA system does not invidiously discriminate or treat voters in an arbitrary and disparate fashion.

that case. The WTA system for selecting electors simply does not violate the "one person, one vote" principle the way it has been described so far by the Supreme Court.

The plaintiffs' first obstacle is the text of the Constitution. Article II of the Constitution authorizes each state to appoint electors "in such Manner as the [state] Legislature . . . may direct." U.S. Const. art. II, § 1. The Supreme Court long ago observed that "from the formation of the government until now the practical construction of [this] clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." McPherson v. Blacker, 146 U.S. 1, 35 (1892) (emphasis added). For example, a state legislature could mandate appointment by the people (either at large or in districts), by the legislature itself, by the governor, or by the state supreme court. See id.

Of course, this does not permit states to choose a method that violates some other provision of the Constitution. And the plaintiffs here argue that the WTA system chosen by the Massachusetts legislature violates the "one person, one vote" rule. The essence of the rule is that, once a geographical unit for a representative is established, "all who participate in [an] election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their

income, and wherever their home may be in that geographical unit." Gray, 372 U.S. at 379.

On its face, the WTA system in Massachusetts makes none of these forbidden distinctions. Nor does it necessarily cause "arbitrary and disparate treatment of the members of [the] electorate." Bush, 531 U.S. at 105. The WTA system, standing alone, does not treat voters differently at all. Massachusetts counts all presidential and vice-presidential votes equally, and then awards its electors to whichever party's candidate obtains the most votes. In short, this system complies with equal protection because it does not inherently favor or disfavor a particular group of voters. See McPherson, 146 U.S. at 40 ("If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made.").

The heart of the plaintiffs' assertion of unfairness revolves around their understanding that Massachusetts's WTA system functions as a two-step election. First, voters cast ballots for presidential candidates. Second, the votes are tallied, and the WTA system awards all of the Commonwealth's electors to the winner and zero electors to the candidates of the non-dominant parties. The plaintiffs argue that, in this way, the WTA system discards the votes for the non-dominant

candidates because of where those voters live and the political party with which they associate.

According to the plaintiffs, such a two-step system closely resembles one the Supreme Court declared unconstitutional in Gray. There, the Georgia legislature implemented a "county unit" system for electing statewide representatives. Gray, 372 U.S. at 371. The county unit system allowed the candidate who won the popular vote in a county to obtain the entire unit vote of that county. Id. at 381 n.12. "Thus 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. The end result of this system "weight[ed] the rural vote more heavily than the urban vote and weight[ed] some small rural counties heavier than other larger rural counties." Id. at 379. This, the Court held, violated the "one person, one vote" principle. Id. at 381.

The plaintiffs' analogy to Gray falls short. Indeed, Gray itself expressly distinguished any resemblance between the county unit system and the electoral college as "inapposite." Id. at 378. The Court also noted that, unlike the county unit system, "[t]he inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent

numerical inequality . . . ." Id. (footnote omitted) (emphasis added). In other words, even accepting the plaintiffs' contention that the electoral college is numerically unfair, Gray teaches that this is an inequality with which we must live because it is embedded in the Constitution.

Moreover, the core constitutional problem from Gray is absent from the WTA system in Massachusetts. Granted, there are some superficial similarities between Gray's county unit system and the electoral college. But what the Supreme Court deemed unconstitutional in Gray was not the use of any unit system, but rather the effect that this particular unit system had in disparately weighing votes. Under Gray's unit system, one unit vote in a rural county represented over 900 residents, whereas the same vote in a rural county represented over 92,000 residents. Id. at 371. This disparity rendered the system unconstitutional. See id. at 379. But the plaintiffs have not explained how Massachusetts's WTA system inflicts a similar harm.

To the extent that the plaintiffs desire nevertheless to invalidate this system and establish a proportionate one, that is not something this Court is empowered to do. See Williams, 288 F. Supp. at 629 (opining that any "proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment"); see also City of Mobile,

Ala. v. Bolden, 446 U.S. 55, 77–79 (1980) (upholding at-large city commissioner elections and noting that Supreme Court "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation"); Whitcomb v. Chavis, 403 U.S. 124, 158-60 (1971) (holding that multimember districts for state general assembly -- despite "their winner-take-all aspects" -- did not violate Equal Protection Clause "simply because the supporters of losing candidates have no legislative seats assigned to them").

The Court also observes that other lower courts have rejected similar equal protection challenges to WTA systems. See Williams v. North Carolina, Civ. No. 17-00265, 2017 WL 4935858, at *1 (W.D.N.C. Oct. 31, 2017), aff'd sub nom. Williams v. N.C. State Bd. of Elections, 719 F. App'x 256 (4th Cir. 2018) (rejecting plaintiff's challenge to North Carolina's WTA system as "decisively foreclosed by binding precedent"); Conant v. Brown, 248 F. Supp. 3d 1014, 1025 (D. Or. 2017) (noting that "Williams is still good law" which defeated plaintiff's challenge to Oregon's WTA system), aff'd, 726 F. App'x 611 (9th Cir. 2018).

There may be valid policy arguments for and against a WTA system for appointing electors -- and, indeed, for and against the electoral college itself. Under the Constitution and Supreme

Court precedent, though, Massachusetts's WTA system does not violate the "one person, one vote" rule.

III. Freedom of Association Claim

The plaintiffs' other constitutional claim is based on the First Amendment's protection of the freedom to associate. The theory behind this claim was most recently articulated in Justice Kagan's concurrence in Gill v. Whitford, 138 S. Ct. 1916 (2018). In Gill, the Supreme Court unanimously agreed that a group of plaintiffs challenging Wisconsin's legislative districts as unconstitutionally gerrymandered in violation of the Equal Protection Clause's "one person, one vote" principle had failed to prove that they suffered concrete, individualized harm for purposes of standing. See 138 S. Ct. at 1923, 1931-32.

Justice Kagan wrote separately to discuss the First Amendment theory of constitutional harm. Joined by three justices, she explained that partisan gerrymandering may "infringe the First Amendment rights of association held by parties, other political organizations, and their members." Id. at 1938 (Kagan, J., concurring). That is, there are "significant First Amendment concerns . . . when a State purposely subjects a group of voters or their party to disfavored treatment." Id. (citations and quotation marks omitted). This "associational harm" arises from the reality that a partisan gerrymander may "ravage[] the party [a citizen] works to support." Id. Members

of such a "disfavored party" are "deprived of their natural political strength" and "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." Id.

Justice Kagan's opinion drew extensively from the concurring opinion of Justice Kennedy in Vieth v. Jubelirer, 541 U.S. 267 (2004), another partisan gerrymandering case that focused on the Equal Protection Clause but included an alternative theory under the First Amendment. See 541 U.S. at 314 (Kennedy, J., concurring in the judgment). There, Justice Kennedy opined that "[t]he First Amendment may be the more relevant constitutional provision in future [partisan gerrymandering] cases" because the First Amendment prohibits "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." Id. By "subjecting a group of voters or their party to disfavored treatment by reason of their views," the state improperly infringes on "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." Id. (quoting California

Democratic Party v. Jones, 530 U.S. 567, 574 (2000)) (emphasis added).

The plaintiffs allege that Massachusetts's WTA system works a similar harm by "discarding" or "diluting" the votes of minority party members who, by virtue of WTA, get no voice in the electoral college. They argue that this amounts to an improper burden under the First Amendment. But unlike a partisan gerrymander, Massachusetts's WTA system does not purposely burden any particular individual, group, or party "by reason of [its] views." Id. Rather, whatever disadvantage the losing party and its members suffer is a function solely of their lack of electoral success. The WTA system in Massachusetts sets the stakes, but it does not help or hurt one group's chances of winning the Commonwealth's electors. As a result, the plaintiffs' complaint does not allege an associational burden for purposes of a First Amendment claim.

IV. Redressability

The plaintiffs have failed to allege legally cognizable injuries under the Equal Protection Clause or the First Amendment. Therefore, they have also failed to allege an injury to a legally protected interest for purposes of standing. Given this conclusion, the Court need not reach the issue of redressability, another prong of the standing inquiry. Accordingly, I address it only briefly.

The plaintiffs argue that the Court could redress their claimed injury simply by preventing the defendants from using the WTA system "or any other system that fails to treat each Massachusetts citizen's vote for the [p]resident in an equal manner including selection by Congressional District vote." At oral argument, the plaintiffs elaborated, asking the Court to require a system that awards electors in proportion to each party's share of the vote for all parties whose share exceeds a certain (as yet unspecified) threshold.

Ordering a state to implement a particular type of elector-allocation system would raise serious constitutional and federalism concerns. As already discussed, the text of the Constitution expressly provides that "[e]ach State shall appoint [its electors] in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1. The Supreme Court has interpreted this language to mean that "the state legislature's power to select the manner for appointing electors is plenary." Bush, 531 U.S. at 104 (2000) (discussing McPherson, 146 U.S. at 35).

Again, it does not follow that a state may exercise this power "in such a way as to violate express constitutional commands." Williams v. Rhodes, 393 U.S. 23, 29 (1968). But here, the plaintiffs ask the Court to affirmatively dictate what type of elector-allocation system Massachusetts must use (i.e., one

that allocates electors in proportion to the votes obtained by each party). The Court doubts that it has the constitutional power to order a state to do this. Instead, the plaintiffs' proposed limitations on a state's allocation of electors would require a constitutional amendment. See Williams, 288 F. Supp. at 629 ("[A]ny other proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment."). Therefore, the plaintiffs' claim is unredressable in federal court.

ORDER

The defendants' motion to dismiss (Dkt. No. 21) is **ALLOWED**.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge