

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO**

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

Plaintiffs,

v.

GREGORY WAYNE ABBOTT, in his official
capacity as Governor of the State of Texas; and
ROLANDO PABLOS, in his official capacity
as Secretary of State of the State of Texas,

Defendants.

Civil Action No. 5:18-cv-00175

Oral Argument Requested

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

TABLE OF CONTENTS

Introduction..... 1

Standard of Review..... 5

Argument 6

 I. Texas’s WTA Method of Allocating Electors Violates the One Person, One Vote Principle Under the Fourteenth Amendment. 6

 A. Defendants Rely on an Outdated View of Modern Presidential Elections..... 7

 B. Texas’s WTA Method of Allocating Electors Based on the People’s Vote for the President Violates the One Person, One Vote Principle. 9

 C. Even if the Court Adopts Defendants’ Fiction that in Texas Voters Merely Elect Electors, Texas’s WTA Method is Still Unconstitutional. 11

 D. Neither the History Nor the Cases Cited by Defendants Supports the Constitutionality of the WTA Method for Allocating Electors. 13

 1. Defendants’ Recitation of History Is Irrelevant to the Constitutionality of WTA in Modern Presidential Elections. 13

 2. Defendants’ Cited Precedent Does Not Address the Legal Questions Presented by Plaintiffs’ Claims and Predates Important Doctrinal Shifts. 17

 II. Texas’s Method of Allocating Electors Violates the First Amendment. 23

 III. Texas’s WTA Method of Allocating Electors Violates Section 2 of the VRA. ... 26

 A. Statutory Language and Supreme Court Precedent Establish Section 2’s Applicability to Presidential Electors. 26

 B. Defendants’ Arguments Concerning Remedy Are Equally Flawed. 29

Conclusion 30

TABLE OF AUTHORITIES

Cases

<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969).....	12, 28
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	20, 23, 25
<i>Armstrong v. Allain</i> , 893 F. Supp. 1320 (S.D. Miss. 1994).....	27
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	15
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	5
<i>Boerne v. Flores</i> , 521 U.S. 507 (1997).....	30
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	23
<i>Burns v. Richardson</i> , 384 US 73 (1966).....	passim
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	passim
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	27, 28
<i>Conant v. Brown</i> , 248 F. Supp. 3d 1014 (D. Or. 2017)	21
<i>Delaware v. New York</i> , 385 U.S. 895 (1966).....	21
<i>Employment Div., Dept. of Hitman Resources v. Smith</i> , 494 U.S. 872 (1990).....	23

<i>Evenwel v. Abbott</i> , 136 S. Ct. 1120 (2016)	15
<i>Fla. State Conference of N.A.A.C.P. v. Browning</i> , 522 F.3d 1153 (11th Cir. 2008)	6
<i>Foreman v. Dallas Cty., Tex.</i> , 521 U.S. 979 (1997)	28
<i>Fortson v. Dorsey</i> , 379 U.S. 433 (1965)	11
<i>Gonzalez v. Harris Cty.</i> , 601 F. App'x 255 (5th Cir. 2015)	30
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963)	passim
<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663 (1966)	2, 6
<i>Harrison v. PPG Indus.</i> , 446 U.S. 578 (1980)	28
<i>Hicks v. Miranda</i> , 422 U.S. 332 (1975)	21
<i>Hitson v. Baggett</i> 446 F.Supp. 674 (M.D. Ala. 1978)	19, 29
<i>Holley v. Askew</i> , 583 F.2d 728 (5th Cir. 1978)	5
<i>Houston Lawyers' Assoc. v. Texas</i> , 501 U.S. 419 (1991)	27
<i>Idaho Coal. United for Bears v. Cenarrusa</i> , 342 F.3d 1073 (9th Cir. 2003)	6
<i>Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.</i> , 677 F.2d 1045 (5th Cir. 1982)	5
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973)	25
<i>League of United Latin Am. Citizens, Council No. 4434 v. Clements</i> , 986 F.2d 728 (5th Cir.)	5, 26

<i>League of Women Voters of Ohio v. Brunner</i> , 548 F.3d 463 (6th Cir. 2008)	6
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977).....	19, 20
<i>McCarthy v. Briscoe</i> , 429 U.S. 1317 (1976).....	5
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892).....	passim
<i>Mills v. Green</i> , 159 U.S. 651 (1895).....	5
<i>Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson</i> , 357 U.S. 449 (1958).....	25
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	17
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	3, 17
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970).....	28
<i>Patino v. City of Pasadena</i> , 230 F. Supp. 3d 667 (S.D. Tex. 2017)	30
<i>Pennsylvania Dep't of Corrections v. Yeskey</i> , 524 U.S. 206 (1998).....	28
<i>Perez v. Perry</i> , 2017 WL 962686 (W.D. Tex. Mar. 10, 2017)	5, 26
<i>Political Civil Voters Org. v. City of Terrell</i> , 565 F. Supp. 338 (N.D. Tex. 1983)	5
<i>Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections</i> , 827 F.3d 333 (4th Cir. 2016)	6
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	24
<i>Rodriguez v. Harris Cty.</i> , 964 F. Supp. 2d 686 (S.D. Tex. 2013)	30

<i>Schweikert v. Herring</i> , 2016 WL 7046845 (W.D. Va. Dec. 2, 2016)	21
<i>SDJ, Inc. v. City of Houston</i> , 841 F.2d 107 (5th Cir. 1988)	21
<i>Sedima, S.P.R.L. v. Imrex Co.</i> , 473 U.S. 479 (1985)	28
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	28
<i>Stewart v. Blackwell</i> , 444 F.3d 843 (6th Cir.)	6
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986)	24
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	26
<i>Tigrett v. Cooper</i> , 855 F. Supp. 2d 733 (W.D. Tenn. 2012)	27
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997)	24
<i>United States v. Euclid City Sch. Bd.</i> , 632 F. Supp. 2d 740 (N.D. Ohio 2009)	30
<i>Veasey v. Perry</i> , 135 S. Ct. 9 (2014)	26
<i>Walston v. City of Port Neches</i> , 980 F. Supp. 872 (E.D. Tex. 1997)	5
<i>Washington v. Davis</i> , 426 U.S. 229 (1974)	22
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1965)	11, 20, 21, 22
<i>White v. Regester</i> , 412 U.S. 755 (1973)	passim
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	passim

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017)..... 12

Statutes

2 U.S.C. § 2c 22

52 U.S.C. §10301(a) 26

52 U.S.C. §10301(b) 4, 29

TEX. ELEC. CODE § 192..... 8, 19

Rules

Fed. R. Evid. 201(b)..... 5

INTRODUCTION

Texas’s winner-take-all (“WTA”) method for counting its citizens’ votes in Presidential elections systematically discards the votes of nearly half of the state’s voters while greatly magnifying the votes of others. This violates the constitutional principle of “one person, one vote” under the Fourteenth Amendment, the free speech and associational rights of Texas voters under the First Amendment, and the protections of Section 2 of the Voting Rights Act.

Beyond the immediate unconstitutional effects of WTA, the democratic consequences—for both Texas and the Nation—of the WTA method are profound. Because of the WTA method, Presidential campaigns all but ignore non-battleground states like Texas. In 2016, for instance, 99% of campaign spending was in 14 states—and Texas was not among them. Because of the WTA method, Presidential elections will regularly result in the selection of Presidents who lose the popular vote but win a majority of Electors. And because of the WTA method, our Presidential election system remains vulnerable to interference by hostile third parties, who can focus their efforts on a handful of states to swing a relative handful of votes to their preferred candidate. The U.S. Constitution does not require or even contemplate the WTA method. Yet its continued use weakens the democratic integrity of our Presidential election system.

Defendants do not dispute these consequences. Instead, they defend the WTA method of allocating Electors by arguing that Texans are casting a vote only for Presidential Electors, not for President. In turn, they argue that Texas’s election for Electors treats every vote equally.

But Presidential elections in Texas are not simply elections for Electors; today, Texans vote for candidates for President and the state then allocates Electors based on that vote. Indeed, Texas law does not even permit the names of Electors to be placed on a ballot. Few people can name even a single Elector. Defendants cannot defend the actual election that Texas conducts by

pretending it is something radically different.

Plaintiffs do not dispute that, under the Elector Clause of the U.S. Constitution, the legislature in Texas is free to allocate its Electors without an election. But, as the Supreme Court has affirmed repeatedly, once Texas chooses to exercise its right under that Clause to give its citizens the vote for the President, which Texas has chosen to do, the voting system it puts in place is subject to the constraints of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). The current system fails to meet that standard because millions of Texans cast a ballot for the President only to have their votes discarded before they actually count. In that way, the system is indistinguishable from the voting system the Supreme Court struck down in *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963).

But even if Defendants are correct that the Court must view Texas's election as one for Electors alone, Texas's WTA method of selecting Electors still violates the Equal Protection Clause of the Fourteenth Amendment. Under Defendants' theory, Texas's Presidential elections constitute a multi-member at-large election for Electors. The Supreme Court, however, has made clear the government may not dilute the votes of political or racial minorities by wasting their votes in at-large, multi-member elections in which the majority is likely to run the table. *White v. Regester*, 412 U.S. 755, 769 (1973); *Burns v. Richardson*, 384 US 73, 88 (1966). Taking Defendants' theory to its logical conclusion, Texas could elect its entire state legislative body through one statewide vote for a slate of Democratic or Republican Senators. Yet we know that such a WTA Senate scheme violates the one person, one vote principle because it deliberately cancels out the voting strength of racial and political minorities. *See id.* That is

precisely what Texas has done with its Electoral College delegation.

Texas's appeal to historical entrenchment is unavailing. The vast majority of the history that Texas relies upon is irrelevant to the constitutional question presented here because it predates both the passage of the Fourteenth Amendment and the Supreme Court's recognition of the doctrine of "one person, one vote" in *Gray v. Sanders*, 372 U.S. at 381. In any event, an unconstitutional practice cannot be saved from judicial examination by virtue of its historical pedigree. *See id.* at 376 (enjoining a practice the Court referred to as "deeply rooted and long standing"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) ("Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

The cases Defendants primarily rely on are also unavailing because they were decided at a time in history when Electors—not simply the candidates for President—were listed on ballots, and because they addressed direct elections for those Electors. None of the cases address whether allocating all of a state's Presidential Electors to the winning candidate based on a two-step election—first, with the voters casting their vote for a Presidential candidate and, second, with the Electors casting their vote for the Presidential candidate receiving the plurality of the peoples' votes—violated the Equal Protection Clause of the Fourteenth Amendment or the principle of one person, one vote.

Moreover, those same cases predate important doctrinal shifts in the one person, one vote jurisprudence. This includes the Supreme Court's determination in *White*, 412 U.S. at 769, that the dilution of votes through at-large elections can violate the one person, one vote principle, and its determination in *Bush v. Gore*, 531 U.S. at 107, that "invidious" intent is no longer a

necessary finding for invalidating state systems used in the election for President.

Defendants' arguments concerning Plaintiffs' First Amendment claim are similarly flawed. The First Amendment affords voters the right to an equal and effective vote. The WTA method violates the First Amendment because it weights votes differently depending on political party, thus depriving voters affiliating with minority parties a meaningful opportunity or incentive to associate. Defendants argue that because Plaintiffs can vote for the candidate of their choice, the WTA method does not violate Plaintiffs' First Amendment rights. But as Defendants did in advancing their equal protection arguments, they ignore the reality that almost half of the votes cast for President in Texas are discarded or discounted in the direct election for the President, when it is most important that they be counted. The reality of today's Presidential elections is that voters exercise their choices for President by marking their ballots for their preferred candidate—not by voting for Electors who are expected to exercise their independent judgment.

In addition to these constitutional violations, Texas's WTA law violates Section 2 of the Voting Rights Act because it results in Hispanics and African-Americans "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b). Defendants do not dispute that Plaintiffs have adequately alleged all of the elements of a Voting Rights Act claim. Rather, they claim incorrectly that the Voting Rights Act does not apply to elections for President, citing no cases that stand for the remarkable proposition that, in elections for the highest office, the Voting Rights Act does not ensure that all voters have an equal opportunity to participate. The statute's broad remedial intent, as well as its language, defeats Defendants' arguments.

Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motion to

dismiss in its entirety.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “The court must accept as true all material allegations in the complaint as well as any reasonable inferences to be drawn from them.” *Walston v. City of Port Neches*, 980 F. Supp. 872, 874 (E.D. Tex. 1997) (citing *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)). A “court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Courts routinely take judicial notice of facts related to elections.¹

¹ See, e.g., *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) (“where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support”); *Mills v. Green*, 159 U.S. 651, 657–58 (1895) (“this court must take judicial notice of the days of public general elections of members of the legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect”); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 778 (5th Cir.), *on reh’g*, 999 F.2d 831 (5th Cir. 1993) (affirming the district court’s decision to take “judicial notice of the history of official discrimination against Hispanics and Blacks in Texas”); *Holley v. Askew*, 583 F.2d 728, 729 (5th Cir. 1978) (taking judicial notice of the fact that voters approved an amendment to the Florida constitution by casting ballots in a general election); *Perez v. Perry*, 2017 WL 962686, at *1 (W.D. Tex. Mar. 10, 2017) (taking judicial notice of election returns on the Texas Secretary of State’s website; of data from the census and the American Community Survey; and of election returns in two Texas counties); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 341 (N.D. Tex. 1983) (taking “judicial notice of the rampant official discrimination in recent history in Texas against blacks” that prevented them from effectively participating in elections).

ARGUMENT

Plaintiffs have pled facts sufficient to show that Texas’s WTA method for counting its citizens’ votes in Presidential elections violates the Fourteenth and First Amendments and Section 2 of the Voting Rights Act. Defendants’ motion to dismiss must, therefore, be denied.

I. TEXAS’S WTA METHOD OF ALLOCATING ELECTORS VIOLATES THE ONE PERSON, ONE VOTE PRINCIPLE UNDER THE FOURTEENTH AMENDMENT.

Under the Constitution, a state may decide in the first instance the manner in which it selects Presidential Electors, including by popular vote or by direct appointment by the legislature. *Bush*, 531 U.S. at 104–05 (citing *McPherson*, 146 U.S. at 35). When a state exercises that choice in favor of giving its citizens the right to vote for President, that right becomes a “fundamental” right to a vote of “equal weight” endowed with “equal dignity,” and is subject to the Equal Protection Clause. *Id.* (emphasis added);² *see also Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Rhodes*, 393 U.S. at 29 (“But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these

² *Bush v. Gore* is binding Supreme Court precedent. *See Stewart v. Blackwell*, 444 F.3d 843, 859 n.8 (6th Cir. 2006) (“Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it.”), *vacated on other grounds* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007). Appellate decisions have, therefore, frequently relied on the principles stated in *Bush*. *See, e.g., Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 337 (4th Cir. 2016) (“The right to vote is ‘fundamental,’ and once that right ‘is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.’” (quoting *Bush*, 531 U.S. at 104–05)); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (same); *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 (9th Cir. 2003) (“when a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause”) (citing *Bush*, 531 U.S. at 104); *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1185 (11th Cir. 2008) (Barkett, J., concurring in part and dissenting in part) (“‘Equal protection applies as well to the manner of its exercise. 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.’” (quoting *Bush*, 531 U.S. at 104–05)).

granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”). Those constitutional protections include the one person, one vote principle under the Fourteenth Amendment, which prohibits a state from discarding or diluting the votes of certain of its citizens, while magnifying others, unless that outcome is required by a specific constitutional provision. *Gray*, 372 U.S. at 380–81; *Bush*, 531 U.S. at 104.

Defendants argue that they do not discard votes for President because, in their view, Texans do not vote for President, they simply vote for Electors, and each vote for Elector supposedly counts equally. Defs.’ Mot. to Dismiss at 1, 3–4, 9. This argument disregards the basic reality of Texas’s elections today, where voters cast a ballot *for the President*—not for Electors. The names of Electors are not even permitted to appear on the ballot under Texas law. But even if this Court accepts Defendants’ implausible framing of modern elections, Texas’s WTA method of selecting Electors still violates the Fourteenth Amendment because it dilutes the vote of any Texan who casts a vote for anyone other than the most popular candidate. *See White*, 412 U.S. at 769; *Burns*, 384 US at 88. Defendants’ appeals to history and precedent do not change this analysis.

A. DEFENDANTS RELY ON AN OUTDATED VIEW OF MODERN PRESIDENTIAL ELECTIONS.

Defendants would have this Court view Texas’s Presidential elections as a one-step election where the people do not vote for the President, but, instead, vote only for Electors. Defendants try to equate Texas’s modern Presidential elections to the Elector selection mechanisms used by states 230 years ago and envisioned by the Framers. Defs.’ Mot. to Dismiss at 3–4, 9. That system, however, is the same system the Framers put forward as a means of ensuring the election of the President is *not* left “to the people,” *Gray*, 372 U.S. at 377, and is

instead given to an “intermediate body of electors” that would be “detached” from “cabal, intrigue, and corruption,” *The Federalist* No. 68 (Alexander Hamilton). Because this body would exercise “reasonable independence and fair judgment” to select a president and vice-president, it follows that a vote, as initially envisioned by the founders, would only be for Electors—and *not* for the President. *McPherson*, 146 U.S. at 36. Today’s reality is quite different. As alleged in the Complaint and reflected in Texas law, in Texas’s modern Presidential elections, citizens do not vote for Electors, they vote for the President in two steps. *See* Compl. ¶¶ 1–4, 22–33, 37, 43–46, 50. In the first step, the people cast their votes for President—the Electors’ names are not even on the ballot. *Id.*; TEX. ELEC. CODE § 192.034. In the second step, Texas counts those votes and consolidates them by allocating to the winning candidate all of its Electors, who are then tallied nationwide. *Id.* ¶ 43.

Texas law therefore belies the central premise underlying Defendants’ argument—that Texans vote only for Electors rather than a Presidential candidate. Not only does Texas mandate that the names of the candidates for the President and Vice President be printed on the ballot, it specifically provides that “the names of presidential elector candidates *may not be placed* on the ballot” TEX. ELEC. CODE § 192.034 (emphasis added)). Moreover, Electors in Texas today do not perform any functions requiring “reasonable independence and fair judgment,” *McPherson*, 146 U.S. at 36; instead, they are bound by law and party rules to support the candidate that received a plurality of the people’s votes.³

³ Under Texas law, Presidential Electors must be nominated by their respective party, TEX. ELEC. CODE, § 192.003, and nominated Electors are required to be officially “affiliated” with the party, *id.* § 192.002. The parties require the Electors to support the party’s nominee in order to serve. *See e.g.*, Rules of the Republican Party of Texas, Rule 39. In 2016, for the first time in Texas’s history, two Texas Electors went against their pledge and refused to support their party’s nominee, creating a public outcry. In 2017, a bill was introduced into Texas’s legislature mandating that any Elector who “refuses or otherwise fails to vote for the candidates for

These points are underscored by how everyone—voters, candidates, and Electors alike—view and participate in Texas’s elections. Presidential candidates campaign for the votes *of the people*, not the votes of Electors; Electors refrain from campaigning for votes altogether; Presidential elections are publicly called and celebrated after the vote of the people in November, not after the vote of the Electors in December; and one would be hard pressed to find many voters who could recall the name of an Elector at the time the voter casts his or her vote. All of these facts, grounded in common understanding of modern Presidential elections, point to an inescapable conclusion: the people vote for the President and the states allocate Electors *solely* to consolidate and count those votes. To argue otherwise today is like arguing that voting machines cast votes, not the people who pull the lever.⁴

B. TEXAS’S WTA METHOD OF ALLOCATING ELECTORS BASED ON THE PEOPLE’S VOTE FOR THE PRESIDENT VIOLATES THE ONE PERSON, ONE VOTE PRINCIPLE.

Because the election for President in Texas is a two-step election, the Supreme Court’s decision in *Gray v. Sanders*, 372 U.S. at 381, controls here. In that case, the Supreme Court reviewed Georgia’s “deeply rooted and long standing” practice of allocating a set number of “units” to each county to consolidate and count the vote in that county in primary elections for statewide offices. *Id.* at 370–71, 76. All of each county’s units were awarded through a WTA allocation based on a county-wide vote, and the candidate who had the most units after a tally of president and vice-president receiving the most votes in this state in the general election” will be “ineligible to serve” and “may never serve as an elector or alternate elector in this state” and “vacates the office of elector[.]” 2017 Texas House Bill No. 543, Texas Eighty-Fifth Legislature, § 192.0061.

⁴ At times, Defendants seem to agree with the Complaint’s basic premise. Defendants argue that Plaintiffs’ First Amendment rights are not violated because “Texas voters were able to express their political views by casting their votes for *their candidate*.” Defs.’ Mot. to Dismiss at 14 (emphasis added). On the other hand, Defendants also argue that citizens vote only for Electors for purposes of the Fourteenth Amendment. *Id.* at 3–4, 9. Defendants cannot have it both ways. A vote does not change depending on the constitutional protection being analyzed.

all the county-level elections in the state won. *Id.* The Supreme Court struck down Georgia's system on the basis that it weighted rural votes more than urban votes. *Id.* at 379. The Court noted, however, that even if the state allocated a perfectly proportional number of units to each county, the system would still unconstitutionally weight certain votes because votes for a candidate who failed to win in a given county would be counted "only for the purpose of being discarded" before the final tally. *Id.* at n.12.

Texas's WTA method of allocating Electors is indistinguishable from the system rejected in *Gray* in any material respect. Texas has, as Georgia did in *Gray*, implemented a two-step system for counting votes—in this case for President. As in *Gray*, only the votes for the winning candidate matter in the second step when the final vote count occurs. As in *Gray*, votes for a candidate that failed to win a plurality in the state are counted "only for the purpose of being discarded" before the final tally. *Id.* at n.12. Therefore, like the system for counting votes in *Gray*, Texas's system for counting votes for President violates the one person, one vote principle. *See id.*

Defendants fail to address the clear similarities between Texas's Presidential election system today and the election system struck down in *Gray*. Rather, they refrain from discussing the facts of *Gray* and instead rely both on the longevity of Texas's WTA system, and an outdated, and incorrect, understanding of the election. Defs.' Mot. to Dismiss at 4, 9, 10. As the Supreme Court explained in *Bush v. Gore*, Texas has the right to decide, in the first instance, the contours of its elections. Having decided to treat its elections as one for *President*, Texas cannot

now avoid the clear implication of *Gray v. Sanders*—and its application of the one person, one vote principle—by disclaiming its own legislative choice.⁵

C. EVEN IF THE COURT ADOPTS DEFENDANTS’ FICTION THAT IN TEXAS VOTERS MERELY ELECT ELECTORS, TEXAS’S WTA METHOD IS STILL UNCONSTITUTIONAL.

But even viewing Texas’s Presidential election as one in which Texans only vote for Electors, the WTA method still fails to satisfy the requirements of equal protection that apply to at-large, multi-member elections like Texas’s statewide election for its 38 Presidential Electors.

Defendants claim that a multi-member, at-large election for Electors “automatically” satisfies the Fourteenth Amendment because in such a system, “each citizen has an equal right to vote, the same as any other citizen has.” Defs.’ Mot. to Dismiss at 10–11 (citing *McPherson* and *Wesberry v. Sanders*, 376 U.S. 1, 8 (1965)). But as the Supreme Court has explained, “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)); see also *White*, 412 U.S. at 769 (striking down a

⁵ Nor can Defendants argue that *Gray* does not apply here because the constitutional provisions setting up the Electoral College themselves create some inequality in the weighting of votes. Merely because *some* inequality is constitutionally created by assigning to states the number of electors equal to each state’s number of representatives and senators does not mean Texas is free to *create additional* inequality by selecting those electors by WTA. *Gray* makes clear that the “only weighting of votes sanctioned by the Constitution” is that which is specifically mandated by the Constitution, such as the number of Electors accorded to each state or the allocation of two Senators to each state. *Gray*, 372 U.S. at 380 (emphasis added). This suit, however, does not challenge the distribution of Electors to the states or any other mandate of the Constitution; it challenges under the Fourteenth Amendment the state’s exercise of discretion in choosing the WTA method of allocating Electors. Compl. ¶¶ 11, 12. Defendants do not, and cannot, argue that the WTA method of allocating Electors is mandated by the Constitution.

Texas multi-member, at-large election scheme as unconstitutional). Here, Plaintiffs have alleged that Texas’s system unconstitutionally cancels out the voting strength of both racial and political minorities. *See* Compl. ¶¶ 45–53. This dilution of votes in an at-large, multi-member election violates the Constitution.

In *Burns*, the Supreme Court noted that “encouraging block voting, multi-member districts” may “diminish the opportunity of a minority party to win seats.” *Burns*, 384 U.S. at 88 n.14. The Court later recognized the “right to vote can be affected by a dilution of voting power” through the adoption of at-large voting schemes just as much as “by an absolute prohibition on casting a ballot.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (abrogated on other grounds by *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)).

Applying this standard in 1973, the Supreme Court in *White v. Regester*, for the first time invalidated a multi-member districting scheme in one Texas county because Mexican-Americans were “effectively removed from the political processes” of the County because their votes were submerged into an at-large pool with a majority that was likely to multiply its voting power. 412 U.S. at 769. The scheme the Supreme Court held was unconstitutional in *White* is indistinguishable from Defendants’ own characterization of Texas’s WTA method—which is nothing more than a statewide, at-large election for its 38 Presidential Electors in which racial and political minorities have little to no chance of being represented by even one of Texas’s 38 Electors. Indeed, Texas has selected 176 Electors in the last five elections, and *all* were members of the Republican party, notwithstanding the nearly 16 million votes for the Democratic candidate over that time. Compl. ¶¶ 14–15, 45–53. If translating millions of Democratic votes into zero representation does not “cancel out the voting strength” of both Democratic voters and racial minorities that tend to support Democratic candidates, then it is

difficult to know what would meet the constitutional standard for dilution.

In fact, if Texas had authorized this type of election for any other multi-member body of elected officials, it would be obvious that it violated the Constitution. For instance, Texas could not constitutionally abolish its 31 single-member state senate districts and instead hold a statewide election for all of its senators by letting voters choose whether they wanted that body to be composed entirely of Democratic or Republican Senators. That is because the results of that one-vote, WTA contest would *always* be one-party rule in the state senate: the party that got a plurality of votes would get all 31 senate seats. This hypothetical WTA state senate scheme would violate one person, one vote because it deliberately cancels out the voting strength of racial and political minorities in the state. For the same reasons, the WTA Presidential Elector scheme does, too.⁶ *See Burns*, 384 U.S. at 88.

D. NEITHER THE HISTORY NOR THE CASES CITED BY DEFENDANTS SUPPORTS THE CONSTITUTIONALITY OF THE WTA METHOD FOR ALLOCATING ELECTORS.

Defendants primarily defend the WTA method of allocating Electors on the basis that history and precedent protect it from constitutional scrutiny. But Defendants' historical recitation and appeals to purportedly binding precedent have little to do with modern Presidential elections or with current Fourteenth Amendment jurisprudence, including the principle of one person, one vote. That history and those cases, therefore, cannot control here.

1. Defendants' Recitation of History Is Irrelevant to the Constitutionality of WTA in Modern Presidential Elections.

Defendants argue that the WTA method survives constitutional scrutiny because it has

⁶ This analysis necessarily applies to multi-member elections only, not to single-member elections. Even though many votes are "discarded" in the election of Governor, that is constitutionally acceptable because the election is for a single statewide office. But here, Texas holds a statewide election for 38 Electors, and so it must use a method of election that does not dilute the votes of millions of citizens. Texas's WTA method fails this basic test.

been widely employed by states for over two centuries. Defs.’ Mot. to Dismiss at 4, 9. But far from supporting the constitutionality of a WTA method, that history demonstrates that a WTA method became widespread decades before the ratification of the Fourteenth Amendment and over a century before the articulation of modern notions of voter equality. Both the constitutional protections for voters and our system of elections have undergone fundamental changes not envisioned by the Framers who created the early Electoral College.

To the extent the history of Presidential election administration plays any role here, it only underscores how dramatically Presidential elections today differ from elections when the Electoral College was first conceived. As the Supreme Court has recognized: “The electoral college was designed by men who did not want the election of the President to be left to the people.” *Gray*, 372 U.S. at 377 n.8. The Framers envisioned that states would select Electors who “would exercise a reasonable independence and fair judgment in the selection of the Chief Executive.” *McPherson*, 146 U.S. at 36; *see also The Federalist* No. 68 (Alexander Hamilton).

Defendants are correct that by 1832—34 years *before* ratification of the Fourteenth Amendment—every state but one had adopted some form of a WTA method to allocate its electoral votes. Defs.’ Mot. to Dismiss at 1. The WTA method, however, was not implemented to ensure voter equality in line with current jurisprudence. Indeed, it was quite the opposite. The WTA method in its original form was adopted to maximize the influence of the state’s majority party and cancel out the voting strength of everyone else. *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622, 629 (E.D. Va. 1968) (“The legislature of the Commonwealth had the choice of appointing electors in a manner which will fairly reflect the popular vote but thereby weaken the potential impact of Virginia as a State in the nationwide counting of electoral ballots, or to allow the majority to rule and thereby maximize the impact of Virginia’s 12

electoral votes in the electoral college tally.”) *aff’d*, 393 U.S. 320 (1969); *see also* Senator 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) (“The general ticket system ... 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.”).

Since the widespread adoption of the WTA method of allocating Electors, there have been dramatic changes to the applicable legal landscape. Most importantly, the United States adopted the Fourteenth Amendment in 1868. The Supreme Court initially approached the Fourteenth Amendment with caution—generally refusing to read it in such a way that it could, or did, affect the contours of state elections. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (noting that, prior to *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court “long resisted any role in overseeing the process by which States dr[e]w legislative districts”). It was not until the 1960s and 1970s—130 years after WTA became widespread—that the Court began to apply the Fourteenth Amendment to scrutinize—and in some cases enjoin—state electoral processes, on the basis of the one person, one vote principle articulated by the Supreme Court in *Gray*. 372 U.S. at 381; *id* at 377 n. 8 (“Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that [the] conception of political equality [prevalent in the Founding era] belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.”); *White*, 412 U.S. at 769 (holding that a Texas County’s use of an at-large election for multiple elected officials violated the Fourteenth Amendment). Thus, what is now a bedrock principle of constitutional law was not even in place during the majority of the historical period upon which the Defendants rely.

In addition, the actual contours of Presidential elections have changed since the late 1960s. In the past few decades, Texas and many other states have abandoned any pretense that citizens are voting merely for Electors, and not for President. As discussed, voters today cast a vote for the President, not for individual Electors. *See supra* at 7–9. This was not always true and was not true at the time of the cases on which Defendants rely. For example, the briefing in *Williams* makes clear that Virginia at the time placed the names of Electors on the ballot. 288 F. Supp. at 629; Ex. A at 4 (Plaintiffs’ brief on the merits in *Williams*, 288 F. Supp. 622, describing the Virginia ballot). The same is true of *McPherson*, where the Michigan ballot in question allowed voters to select the name of a single Elector for their district and one Elector for their half of the state. *McPherson*, 146 U.S. at 1, 4–5 (quoting Act No. 50 of the Public Acts of 1891 of Michigan)). Such elections bear little resemblance to the ones Plaintiffs challenge.

At the same time that fundamental shifts have taken place in the nature of the people’s participation in Presidential elections, the distortions created by the WTA method have become increasingly evident—making clearer, and more pronounced, the Constitutional problems with WTA. In modern elections, the WTA method reduces the influence of non-battleground states like Texas, removing any incentive for Presidential candidates to campaign in Texas or other non-battleground states and discouraging Texans from participating in the electoral process. Compl. ¶¶ 9–12, 17, 19, 64–66. It is especially troubling that the WTA method facilitates outside influence in our elections by hinging outcomes on a few battleground states, allowing hostile parties to focus their efforts on a handful of states to swing a relative handful of votes to their preferred candidate. *Id.* ¶¶ 1, 10.

Historical practice cannot be used to foreclose meaningful review of Plaintiffs’ claims. Defendants are correct that settled practice can “liquidate” the meaning of specific constitutional

provisions—in particular when the provisions are ambiguous, and when the adopters of the practice understood it to be consistent with the provisions under review. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). However, as discussed above, the WTA method was widespread *before* the ratification of the Equal Protection Clause—and long before the advent of the one person, one vote principle in the 1960s. The longstanding nature of the WTA method, therefore, cannot be used to “liquidate” the meaning of the Fourteenth Amendment—nor assist the Court in understanding the one person, one vote principle it embodies.

Moreover, nothing in the Supreme Court’s jurisprudence suggests that a clearly *unconstitutional* practice can be saved from judicial admonishment by virtue of historical pedigree. *See Gray*, 372 U.S. at 376 (enjoining a practice under the Fourteenth Amendment that the Court referred to as “deeply rooted and long standing”). Quite the contrary: “The nature of injustice is that we may not always see it in our own times. ... When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.” *Obergefell*, 135 S. Ct. at 2598.

2. Defendants’ Cited Precedent Does Not Address the Legal Questions Presented by Plaintiffs’ Claims and Predates Important Doctrinal Shifts.

Beyond citing to history, Defendants ask this Court to hold that previous decisions foreclose Defendants’ challenge. To support this position, Defendants point to a variety of cases in which parties have challenged the Elector-allocation models of various states throughout history. Defs.’ Mot. to Dismiss at 4–5. Yet, in not *one* of these cases did the court address Plaintiffs’ central factual and legal argument here: when a state chooses to treat an election as one for President, and *not* as one for Electors, its election must comport with constitutional protections that necessarily govern two-step elections. In addition, Defendants’ reliance on the

summary affirmance in *Williams* is misplaced, as it no longer holds in the face of factual and doctrinal shifts in the one person, one vote jurisprudence.

Defendants first rely on *McPherson*, 146 U.S. at 36, to establish that the Supreme Court has purportedly already accepted the WTA method of allocating Electors. Defs. Mot. to Dismiss at 3–5. But Defendants’ reliance on *McPherson* is misplaced. The Court in *McPherson* did not address whether allocating all of a state’s Presidential Electors to the Presidential candidate that received the most votes violated the Equal Protection Clause of the Fourteenth Amendment (much less the one person, one vote principle articulated 70 years later). The Plaintiffs in *McPherson* challenged Michigan’s decision to have district-by-district elections for Electors; they thus asked the Court to determine whether the Constitution *required* a state-wide election for all Electors, and the Court concluded the Constitution did not do so. *McPherson*, 146 U.S. at 24-25, 38.⁷ Specifically, the Court rejected the conclusion that Art. II, § 2, cl. 2 of the Constitution foreclosed such a district level vote for Presidential Electors, *id.* at 27-36, or that the Fourteenth Amendment created a right for each citizen of a state to vote for *each* Elector, *id.* at 39.

Moreover, as noted above, the Court analyzed an election in the context of the electoral system that prevailed in Michigan at the time, under which the names of *Electors* were printed

⁷ Nor is *McPherson*’s more general discussion of the historical practice of WTA relevant to this Court’s inquiry into the Equal Protection Clause issues Plaintiffs raise. Contrary to Defendants’ description of the case, *see* Defs.’ Mot. To Dismiss at 1, the *McPherson* Court relied on historical practice to “liquidate” the meaning of the *Elector Clause*—not the Fourteenth Amendment—and, as noted, in doing so held only that the early historical usage of the district method of allocating Electors supported its permissibility under that Clause. 146 U.S. at 36. It was this explication of the Elector Clause—through the use of Founding practice—that the Supreme Court cited in *Noel Canning* as an example of how such practice can “liquidate” the meaning of an ambiguous term in the Constitution. 134 S. Ct. at 2560 (citing *McPherson*, 146 U.S. at 27). Tellingly, the pin-cite to *McPherson* in *Noel Canning*, on which Defendants build their argument, is *solely* to the section of *McPherson* addressing the Elector Clause. *See id.*

on the ballot, and the voters selected the name of a single Elector for their district and a single Elector for their half of the state. *McPherson*, 146 U.S. at 1, 4 (quoting Act No. 50 of the Public Acts of 1891 of Michigan)).⁸ Given these differences, *McPherson* should not be read to provide binding precedent for an election system that was not challenged and a legal question that was not presented.

Defendants’ argument that *Williams* controls is similarly flawed. As an initial matter, Defendants cite *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), for the proposition that the Supreme Court’s summary affirmance in *Williams* is binding here. Defs.’ Mot. to Dismiss at 6–7. Defendants are wrong. *Mandel* makes clear that courts looking to apply summary affirmances must closely analyze the factual and legal issues presented to determine if they are identical. *Mandel*, 432 U.S. at 176 (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). Yet here—with respect to Plaintiffs’ primary argument—they are not.⁹ Nowhere

⁸ In addition, the “general ticket” system to which the Court referred to in *McPherson* is not the same as Texas’s use of the WTA method today. The prevailing general ticket system in the late-nineteenth and early-twentieth century accorded voters the ability to cast votes for individual Electors, and “general ticket” meant that voters had the option of selecting all Electors from a given party with one notation on the ballot. Texas State Historical Association, *Presidential Elections and Primaries in Texas, 1848-2012*, Texas Almanac (last visited May 5, 2018), <https://texasalmanac.com/topics/elections/presidential-elections-and-primaries-texas-1848-2012>. The WTA method in place in Texas today, while on its face is a vote for a two-person national Presidential ticket, is counted as a vote for *each* of that political party’s 38 Presidential Elector nominees. Unlike early elections, Texas voters today do not have the option of splitting their votes. See TEX. ELEC. CODE § 192.005.

⁹ Nor does the summary affirmance in *Hitson v. Baggett*, 446 F. Supp. 674, 675–76 (M.D. Ala.), *aff’d without opinion*, 580 F.2d 1051 (5th Cir. 1978), control. See Defs.’ Mot. to Dismiss at 8, n.1. Each of the legal holdings in *Hitson* addressed an entirely different challenge than the one brought here. First, the plaintiffs in *Hitson* specifically challenged the apportionment of Electors to the states. *Hitson*, 446 F. Supp. at 675–76. Plaintiffs here do not. Second, the district court in

in the district court’s decision in *Williams* does it address Plaintiffs’ primary constitutional claim: that a state may not discard votes *for the President* through the WTA method of allocating Electors in the same manner that, in *Gray*, votes were discarded at an intermediate step in a two-step election. The absence of such legal analysis is no surprise because *Williams* addressed the WTA method of allocating Electors at a significantly different time—a time, like in *McPherson*, when voters cast their vote for Electors as candidates listed on the *ballot*. See Ex. A at 4 (Plaintiffs’ brief on the merits in *Williams*, describing the Virginia ballot).¹⁰

Further, neither *Williams*, nor Supreme Court precedent preceding it, holds that such a two-step election *is* constitutional. Defendants argue that the *Wesberry* dicta discussed in the *Williams* district court opinion held that *all* WTA methods are “automatically” constitutional, and thereby suggest the summary affirmance in *Williams* may be similarly construed. See Defs.’

Hitson expressly stated that there was no “contention that Alabama’s electoral scheme for the selection of presidential electors operates” to “minimize or cancel out the voting strength of (minority voters),” and as a result, there was no discrimination. *Id.* at 676 (citation and internal quotation marks omitted). Here, Plaintiffs clearly contend, and allege, such facts. See e.g., Compl. ¶¶ 1–5, 44–46, 67–105. And third, plaintiffs in *Hitson* “contend that the Constitution prohibits Alabama from selecting presidential electors by popular election.” 446 F. Supp. at 676. Plaintiffs here make no such argument.

¹⁰ *Mandel*, 432 U.S. at 176, also makes clear that courts reviewing summary affirmances should not read the lower court’s *rationale* as controlling, just the narrow final judgment. *Id.* (“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.”). This is especially true when the district court presents two rationales for upholding the judgment as the *Williams* court did—one of which, as noted, relied *dispositively* on the specific way Virginia elected *Electors*—which is materially different from Texas’s method. *Williams*, 288 F. Supp. at 627–28 (upholding Virginia’s electoral system because it was difficult for the court to see how votes for Electors were treated unequally, *and* because it found that the system resembled the election of Representatives, which the Supreme Court stated in *Wesberry*, 376 U.S. at 8 was constitutional and which Congress had “expressly countenanced”); see also *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 the judgment.”). The issue is not whether the *Williams* district court opinion addresses or resolves Plaintiffs’ claims here, but whether the Supreme Court’s summary affirmance necessarily settles the legal questions that those claims raise.

Mot. to Dismiss at 10–11. But the Supreme Court in *Wesberry* could not have concluded that the two-step election process it had condemned as violating the principle of one person, one vote only the year before in *Gray*, 372 U.S. at 370–71, was in fact “automatically” constitutional in *Wesberry*. Such a holding would mean the summary affirmance in *Williams* broke important new ground, something that stretches the opinion far beyond what it can bear. *SDJ, Inc. v. City of Houston*, 841 F.2d 107, 108 (5th Cir. 1988) (noting that “summary actions should not be understood as breaking new ground”) (internal quotation marks and citation omitted)).¹¹

Moreover, even if the Court were to agree with Defendants, that Texas’s system should be viewed as a one-step election of an at-large, multi-member body, the summary affirmance in *Williams* does not control. That is because, even on this question, *Williams* has since been undermined by doctrinal shifts in the one person, one vote case law that stripped it of any lasting binding effect. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (holding that “inferior federal courts” should not “adhere” to summary affirmances when subsequent doctrinal developments undermine the result).

Indeed, *Wesberry* and *Williams* were decided before *White v. Regester* struck down a Texas County’s use of a multi-member at-large election system. 412 U.S. at 768. *White* therefore fundamentally shifted the legal landscape. Moreover, part of the district court’s

¹¹ Defendants also cite several other non-binding cases that warrant little attention. See Defs.’ Mot. to Dismiss at 5–6. See, e.g., *Delaware v. New York*, 385 U.S. 895 (1966) (declining to hear the case and issuing no relevant opinion); *Williams v. North Carolina*, 2017 WL 4936429, at *5 (W.D.N.C. Oct. 2, 2017), *report and recommendation adopted*, 2017 WL 4935858 (W.D.N.C. Oct. 31, 2017) (recommending dismissal of a *pro se* plaintiff’s claims against the WTA system in part because “Plaintiff has not offered any cases or argument to rebut the application” of almost entirely the same list of cases raised in Defendants’ motion here); *Conant v. Brown*, 248 F. Supp. 3d 1014, 1025 (D. Or. 2017) (dismissing a *pro se* plaintiff’s challenge to Oregon’s method of allocating Electors under a WTA system entirely on its conclusion that “*Williams* is still good law and Plaintiff offers no basis for distinguishing it”); *Schweikert v. Herring*, 2016 WL 7046845, at *2 (W.D. Va. Dec. 2, 2016) (same).

rationale in *Williams* was that Congress “expressly countenanced” at-large elections for congressional representatives. *Williams*, 288 F. Supp. at 628. That rationale no longer exists. Congress changed federal law after *Wesberry* to require that all states with two or more Representatives hold all Congressional elections through single-member districts. *See* 2 U.S.C. § 2c. Congress did so for good reason: “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.”¹² Richard Pildes and Kristen Donaghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal Forum 241, 251 n.43 (1995). All of these changes do more than render outdated the district court’s conclusion in *Williams* that statewide, multi-member elections “automatically” comply with the Equal Protection Clause because they purport to weight each vote equally; they also undermine the weight of the Supreme Court’s summary affirmance.

Further, the district court in *Williams* applied an “invidious” standard that has since been undermined. *Williams* specifically held that “in a democratic society the majority must rule, unless the discrimination is invidious,” 288 F. Supp. 627, but *Bush* dispensed with invidiousness as a necessary intent requirement.¹³ In its place, that Court stated that “the State may not by later arbitrary and disparate treatment, value one person’s vote over that of another,” and it did not look at anything that could be described as an intent to discriminate. 531 U.S. at 104–05; *see*

¹² This change in statutory law mirrors the evolution in constitutional law. If the federal law were repealed and Texas attempted to elect its 36 U.S. Representatives via a single statewide, multi-member election and then sent a delegation of 36 Republican House Members to Congress, there is little doubt in light of post-*Wesberry* Supreme Court pronouncements that courts would find that system unconstitutional because it afforded millions of Democrats no representation.

¹³ “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* in application of a statute may often be inferred from the totality of the relevant facts ...”).

also id. at 107 (“the 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” (internal quotations and citations omitted)). If that straightforward principle is applied, then a statewide, multi-member, WTA election in a large state like Texas is necessarily unconstitutional. Such a system—like that in *Bush v. Gore*—purports to initially count all the votes equally, but, after certifying the final tally, Texas then arbitrarily grants the votes for the plurality winner “greater voting strength” than any other group by maximizing the representation of those votes and canceling out the strength of all others.¹⁴

In short, there is no question that, viewing Texas’s election as one for *President*, it is unconstitutional under *Gray v. Sanders*; but even if one adopts Defendants’ frame of the election as one for an at-large, multi-member body of Electors, neither history nor precedent saves it from constitutional invalidation under the Equal Protection Clause.

II. TEXAS’S METHOD OF ALLOCATING ELECTORS VIOLATES THE FIRST AMENDMENT.

Texas’s WTA method not only implicates Fourteenth Amendment rights, it also burdens Plaintiffs’ First Amendment rights, requiring heightened scrutiny by the Court. *Employment Div., Dept. of Hitman Resources 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)). When determining whether a state election law violates First and Fourteenth Amendment associational rights, a court must weigh the “character and magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden and consider the extent to which the State’s concerns make the burden necessary. *Burdick v.*

¹⁴ While *Williams* does not control here, Plaintiffs also wish to formally preserve the argument that *Williams* should be overruled by the Supreme Court.

Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

This standard is intended to be flexible, because “no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.”

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997). Here, Plaintiffs adequately allege constitutional harms, yet Defendants fail to advance any state interest.

The Complaint alleges that Texas’s use of the WTA method to allocate Electors burdens the political association rights of minority party voters by discarding, or at the very least diluting, the votes of minority party members and magnifying the impact of majority party votes, *see e.g.*, Compl. ¶¶ 44–48, 57–59; as well as disincentivizing voters from joining or participating in minority parties and discouraging voting by non-majority party members, *id.* ¶¶ 9, 19, 57–59, 105. As the Supreme Court has recognized, membership in a political party means little if the members of that party are denied an equal, full, and effective opportunity to participate in the political process. *Rhodes*, 393 U.S. at 31 (“The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.”); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (noting that “each and every citizen has an inalienable right to *full and effective* participation in the political process” (emphasis added)). By awarding electoral votes on a WTA basis, votes are discarded “at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). In short, the WTA method eliminates all practical opportunity for non-dominant party voters in Texas to effectively voice their preference for President.

Texas’s WTA method also discourages participation in non-dominant political parties through voting or otherwise. This is so because the preordained outcome of the electoral votes in

traditionally one-party dominant states provides little incentive for non-dominant party voters to exercise their right to vote. *See* Compl. ¶¶ 9, 19, 44–46. Supreme Court precedent makes clear that associational rights are implicated where state action influences the collective propensity to engage in the political process. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958). Here, the WTA method discourages participation in the most fundamental means by which one may engage in the political process.

Defendants respond by arguing that there is no burden on First Amendment rights because each vote is literally counted. Defs.' Mot. to Dismiss at 15. However, the Constitution provides Texas voters a *full and effective* right to vote—not simply a formal one. The fact that that WTA does not entirely deprive members of minority parties of the opportunity to vote does not make it constitutional. *See Kasper v. Pontikes*, 414 U.S. 51, 58 (1973) (restriction on primary voting violated the First Amendment even though it did not “deprive [voters] of *all* opportunities to associate with the political party of their choice” (emphasis added)). Instead, the inquiry concerns the manner and degree to which the regulation burdens the “prime objective” of associating with others in the exercise of political power. *Id.*

Defendants otherwise make no attempt to justify use of the WTA method, let alone identify interests that would compensate for the substantial burden on Plaintiffs' First Amendment rights. Even if any such state interests were identified, they would be entitled to less deference than usually accorded to states in regulating elections because “the 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. Because Defendants have not even attempted to identify a state interest that outweighs the burden the Complaint alleges on Texans' associational and expressive

rights created by the WTA method, the Court should deny their Motion to Dismiss.

III. TEXAS’S WTA METHOD OF ALLOCATING ELECTORS VIOLATES SECTION 2 OF THE VRA.

Defendants do not contest the sufficiency of Plaintiffs’ allegations to state a claim under Section 2 of the Voting Rights Act. Nor could they. Plaintiffs have alleged detailed facts for each required element laid out in *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986). Compl. ¶¶ 67-105.¹⁵ Instead, Defendants argue that Section 2 simply does not apply to the WTA method of selecting Presidential Electors. As discussed below, that argument finds no support in the plain text of the statute, binding precedent, or the legislative record. To the contrary, each of these sources demonstrates that, like any other law governing the election of representative officers, Texas’s WTA law comes within Section 2’s ambit.

A. STATUTORY LANGUAGE AND SUPREME COURT PRECEDENT ESTABLISH SECTION 2’S APPLICABILITY TO PRESIDENTIAL ELECTORS.

Section 2 prohibits states from imposing on citizens any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]” 52 U.S.C. §10301(a). Certainly, the selection of Presidential Electors is a “standard, practice, or procedure” for purposes of Section 2. If Defendants’ argument that Section 2 “has nothing to do with presidential electors” were correct,

¹⁵ These allegations are consistent with the numerous cases that have found statewide and local Section 2 violations in Texas. *See, e.g., LULAC v. Perry*, 548 U.S. 399, 401 (2006) (“The second and third *Gingles* factors—Latino cohesion, majority bloc voting—are present, given the District Court’s finding of racially polarized voting in District 23 and throughout the State”); *Veasey v. Perry*, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting) (“Texas has been found in violation of the Voting Rights Act in every redistricting cycle from and after 1970.”); *Veasey v. Abbott*, 796 F.3d 487, 509–10 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir. 2016) (noting that “the Supreme Court has previously acknowledged the existence of racially polarized voting in Texas, and that in other litigation, Texas has conceded that racially polarized voting exists in 252 of its 254 counties”); *Perez v. Abbott*, 253 F. Supp. 3d 864, 887 (W.D. Tex. 2017) (noting that “all of the experts agreed that there is racially polarized voting in Texas”).

then Presidential Electors would have been expressly excluded from Section 2's purposefully broad language. Defs.' Mot. to Dismiss at 16. No such exclusion exists.

In the absence of such an exclusion, Section 2 should be read as broadly as possible and consistent with the Supreme Court's holding that Section 2 encompasses "[e]very election in which registered electors are permitted to vote[.]" *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (citation and quotation marks omitted). Thus, Section 2 covers elections for state trial judges, *Houston Lawyers' Assoc. v. Texas*, 501 U.S. 419, 428 (1991), school bond elections, *Armstrong v. Allain*, 893 F. Supp. 1320, 1323 (S.D. Miss. 1994), and even to a referendum on consolidating county and city governments, *Tigrett v. Cooper*, 855 F. Supp. 2d 733, 762 (W.D. Tenn. 2012). Because an election for Presidential Electors is an "election in which registered electors are permitted to vote," it applies here. *Chisom*, 501 U.S. at 392.

Defendants' argument to the contrary ignores not only the broad language of the statute, but also its purpose. "At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment." *Id.* at 392. The Court recognized that Congress did not intend to narrow the scope of the law with those amendments. *Id.* at 404 ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection."). Thus, Section 2 extends to the outer reaches of Congress's constitutional power under the Fifteenth Amendment, which, according to the Supreme Court, was "intended to [apply] in presidential elections." *Rhodes*, 393 U.S. at 28–29.

Defendants ignore these well-settled principles and, instead, make much of the fact that Congress did not explicitly mention Presidential Electors in Section 2's legislative history.

Defs.’ Mot. to Dismiss at 16. But inference from silence is a strongly disfavored mode of interpretation. *Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980). It is even more tenuous when applied to a broad, remedial statute such as the VRA. *Allen*, 393 U.S. at 567 (holding that the VRA should be interpreted in a manner that provides “the broadest possible scope”). At no point in the legislative history did Congress indicate that the results test does not apply to any category of elections—further buttressing that it was Congress’s intent to apply the Act broadly to all popular elections. And even if Congress did not expressly envision the applicability of the Act to the WTA method of allocating Electors, “the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’” *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).¹⁶

Given the thin reed on which Defendants attempt to stand, it is not surprising that Defendants do not cite any VRA cases that would come close to supporting the removal of an

¹⁶ The fact that numerous other portions of the VRA expressly refer to Presidential Electors further undercuts Defendants’ argument. Defs.’ Mot. to Dismiss at 16. For instance, Section 4’s original pre-clearance formula was based in part on the voter turnout rate in elections for presidential Electors. *South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966). In 1970, Congress amended the VRA to set the voting age for all federal elections, including those for Presidential Electors, and set residency requirements and absentee balloting provisions specifically for elections for Presidential Electors. *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970) (upholding Congressional authority to pass these amendments). Further, under the previous pre-clearance regime, Texas recognized that Section 5 of the VRA applied to its method for choosing Presidential Electors. In 1985, the State adopted a new election code, including a provision clarifying the operation of the WTA method for allocating Electors. Acts 1985, 69th Leg., ch. 211, General and Special Laws of Texas. It then submitted all proposed changes to the Justice Department for pre-clearance. *Foreman v. Dallas Cty., Tex.*, 521 U.S. 979, 980 (1997) (noting that in 1985 Texas submitted for Section 5 preclearance “the recodification of its entire election code”). Although the various provisions of the VRA are not entirely coextensive, they are closely related, and “it is unlikely that Congress intended ... [the] anomalous result” that certain elections would be covered by Section 5 but not Section 2. *Chisom*, 501 U.S. at 402. Texas’s explicit recognition that other statutory provisions apply to the selection of Presidential Electors further undermines Defendants’ contention that Section 2 cannot appropriately test the lawfulness of the WTA method. Defs.’ Mot. to Dismiss at 16.

entire federal election from the VRA's purview. Moreover, the single Fifth Circuit case cited by Defendants that looked at race discrimination in the context of allocation of Electors is not on point. In that case, *Hitson v. Baggett*, the Fifth Circuit addressed a challenge to the WTA method of allocating Electors in Alabama but did not address whether a Section 2 claim could be made against a WTA method because Plaintiffs did not allege "that Alabama's electoral scheme for the selection of presidential electors" operated to "minimize or cancel out the voting strength of minority voters." 446 F. Supp. 674, 676 (M.D. Ala.), *aff'd*, 580 F.2d 1051 (5th Cir. 1978). Those are precisely the allegations that are made by Plaintiffs here.¹⁷ Defendants' argument that the WTA laws could never be subject to Section 2 review finds no support in the text, binding precedent, or the legislative history.

B. DEFENDANTS' ARGUMENTS CONCERNING REMEDY ARE EQUALLY FLAWED.

Defendants ignore that Plaintiffs' primary remedy is to allow the state to devise its own constitutional scheme for the selection of Electors. Compl. ¶ 118(d). Defendants instead focus on Plaintiffs' alternative proposed remedy of allocating Electors in proportion to the popular vote. They claim this remedy is at odds with Section 2's disclaimer of "'a right to have members of a protected class elected in numbers equal to their proportion in the population.'" *See* Defs.' Mot. to Dismiss at 16–17 (quoting 52 U.S.C. § 10301(b)). Defendants, however, confuse the absence of a right to proportional representation with the availability of a proportional voting remedy that redresses both VRA and constitutional violations. In fact, numerous courts have

¹⁷ To the extent Defendants suggest the WTA statutes are exempted from Section 2 review simply because of their longevity, that argument too fails. A stated purpose of the 1982 amendment was to remedy situations where long-standing practice makes intentional discrimination difficult to prove. *See, e.g.*, S. REP. 97–417, 36 ("[I]f an electoral system operates today to exclude Blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance."). Courts apply Section 2 regardless of the historical duration of the challenged electoral practice.

imposed proportional voting remedies in Section 2 cases. *See, e.g., United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 770 (N.D. Ohio 2009).

Defendants’ contention that the remedy Plaintiffs seek is unconstitutional because it seeks to ensure “proportional representation in the Electoral College for all Democratic voters, regardless of their race” is equally wide of the mark. Defs.’ Mot. to Dismiss at 19. Plaintiffs do *not* contend that Section 2 requires proportional representation by political party. The proportional remedy Plaintiffs seek addresses the injuries that flow from both their constitutional and VRA claims.¹⁸

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court deny Defendants’ motion to dismiss in its entirety.

¹⁸ Defendants’ remaining challenges warrant little mention. Defendants claim that if Section 2 is read to require proportional allocation of Electors, it would not be “congruent and proportional” to the violation of that constitutional right,” under *Boerne v. Flores*, 521 U.S. 507, 520 (1997). Defs.’ Mot. to Dismiss at 19. As already noted, Plaintiffs do not claim that the VRA requires proportional allocation. Defendants also distort Plaintiffs’ injury by conflating partisanship and race simply because there is a correlation. *Id.* at 16–17. In any partisan election, racially polarized voting will necessarily occur along partisan lines because there is no other line along which it can occur. The purpose of the Supreme Court’s Section 2 test is to determine when this polarization is legally significant. Again, Plaintiffs have more than adequately alleged facts to satisfy this test. Compl. ¶¶ 67–105. There is also ample evidence that racially polarized voting in Texas occurs without regard to partisanship. *See, e.g., Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 692 (S.D. Tex. 2017) (finding racially polarized voting in non-partisan local elections across the City of Pasadena); *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 777 (S.D. Tex. 2013), *aff’d sub nom. Gonzalez v. Harris Cty.*, 601 F. App’x 255 (5th Cir. 2015) (finding that racial polarization existed even without regard to partisanship in Harris County). Defendants’ contention that Plaintiffs’ claim fails because a minority of “white voters [also] suffer ‘vote dilution’ under Plaintiffs’ theory” is simply untenable. Defs.’ Mot. to Dismiss at 17. If accepted, this contention would mean that no Plaintiff could ever use Section 2 to challenge any partisan election and would have the same effect as declaring the VRA entirely inapplicable to Presidential elections.

DATED: May 7, 2018

Respectfully submitted,

Luis Roberto Vera, Jr.
Texas Bar No. 20546740
LULAC NATIONAL GENERAL
COUNSEL
Attorney and Counselor at Law
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205-2260
Telephone: (210) 225-3300
Facsimile: (210) 225-2060
lrvlaw@sbcglobal.net

María Amelia Calaf
Texas State Bar No. 24081915
Jack A. Simms, Jr.
Texas State Bar No. 24100378
Ryan A. Botkin
Texas State Bar No. 00793366
Katherine P. Chiarello
Texas State Bar No. 24006994
Karen S. Vladeck
Texas State Bar No. 24102899
W. Reid Wittliff
Texas State Bar No. 00791951
WITTLIFF | CUTTER | AUSTIN, PLLC
1803 West Ave.
Austin, Texas 78701
Telephone: (512) 960-4730
Facsimile: (512) 960-4869
mac@wittliffcutter.com
jack@wittliffcutter.com
ryan@wittliffcutter.com
katherine@wittliffcutter.com
karen@wittliffcutter.com
reid@wittliffcutter.com

Matt Herrington (*Pro Hac Vice* Pending)
Roger E. Warin (*Pro Hac Vice* Pending)
Joe R. Caldwell, Jr. (*Pro Hac Vice* Pending)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000

David Boies (*Pro Hac Vice* Pending)
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (213) 629-9022
DBoies@bsfllp.com

James P. Denvir, III (Admitted *Pro Hac Vice*)
Amy J. Mauser (Admitted *Pro Hac Vice*)
Karen L. Dunn (Admitted *Pro Hac Vice*)
Lisa Barclay (Admitted *Pro Hac Vice*)
Amy L. Neuhardt (Admitted *Pro Hac Vice*)
Hamish P.M. Hume (Admitted *Pro Hac Vice*)
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: (202) 237-2727
Facsimile: (202) 237-6131
JDenvir@BSFLLP.com
AMauser@BSFLLP.com
KDunn@BSFLLP.com
LBarclay@BSFLLP.com
ANeuhardt@BSFLLP.com
HHume@BSFLLP.com

Michael D. Hausfeld (*Pro Hac Vice* Pending)
Swathi Bojedla (*Pro Hac Vice* Pending)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Telephone: (202)540-7200
Facsimile: (202)540-7201
mhausfeld@hausfeld.com
sbojedla@hausfeld.com

Scott A. Martin (*Pro Hac Vice* Pending)
Irving Scher (*Pro Hac Vice* Pending)
Jeanette Bayoumi (*Pro Hac Vice* Pending)
HAUSFELD LLP
33 Whitehall Street, 14th Floor
New York, NY 10004
Telephone: (646)357-1100

Facsimile: (202) 429-3902
mherrington@steptoe.com
rwarin@steptoe.com
jcaldwell@steptoe.com

Mark Guerrero
Texas State Bar No. 24032377
Mary Whittle
Texas State Bar No. 24033336
GUERRERO & WHITTLE PLLC
114 West 7th Street, Suite 1100
Austin, TX 78701
Telephone: (512) 605-2300
Facsimile: (512) 222-5280
mark@gwjustice.com
mary@gwjustice.com

Facsimile: (212)202-4322
smartin@hausfeld.com
ischer@hausfeld.com
jbayoumi@hausfeld.com

Jennifer D. Hackett (Admitted *Pro Hac Vice*)
James R. Martin (Admitted *Pro Hac Vice*)
Allison M. Vissichelli (Admitted *Pro Hac Vice*)
ZELLE LLP
1775 Pennsylvania Avenue, N.W., Suite 375
Washington, D.C. 20009
Telephone: (202) 899-4100
Facsimile: (202) 899-4102
jhackett@zelle.com
jmartin@zelle.com
avissichelli@zelle.com

Samuel Issacharoff
Texas State Bar No. 00785352
40 Washington Square South
New York, NY 10012
Telephone: (212) 998-6580
si13@nyu.edu

By: s/ María Amelia Calaf
María Amelia Calaf
Texas State Bar No. 24081915

Certificate of Service

I hereby certify that on this 7th day of May, 2018, the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss Complaint for Declaratory and Injunctive Relief was electronically filed with the Clerk of the Court using the CM/ECF system and served on all attorney(s) and/or parties of record, via the CM/ECF service and/or via electronic mail.

s/ María Amelia Calaf
María Amelia Calaf
Texas State Bar No. 24081915

ATTACHMENT A

IN THE
United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

AT ALEXANDRIA

Civil Action No. 4768-A

J. HARVIE WILLIAMS, ET AL., *Plaintiffs,*

V.

VIRGINIA STATE BOARD OF ELECTIONS, ETC., ET AL.,
Defendants

**Plaintiffs' Brief Before Hearing Upon the Merits, Upon
Defendants' Motion to Dismiss, and Upon Plaintiffs'
Motion for Summary Judgment**

P
FILED

MAY 27 1968

CLERK, U. S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

HOWARD S. SPERING
1000 Connecticut Ave.
Washington, D. C. 20006
Telephone: 659-1777

PAUL REIBER
1158 Swinks Mill Road
McLean, Virginia 22101
Telephone: EL 6-3229

Attorneys for Plaintiffs

May 24, 1968



TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
QUESTIONS INVOLVED	2
STATEMENT OF THE FACTS	2
JURISDICTIONAL MATTERS RAISED BY DEFENDANTS	9
1. Proper Parties Defendant	9
A. The Governor	9
B. The Secretary of the Commonwealth	10
2. Not an Action Against the Commonwealth of Virginia	10
3. Class Action	11
4. Plaintiffs' Standing To Sue	12
5. Subject Matter	13
ARGUMENT	16
I. PEOPLE, NOT STATES, ARE ENTITLED TO REPRESENTATIVE ELECTORS UNDER THE CONSTITUTION, JUST AS THEY ARE ENTITLED TO REPRESENTATIVES IN CONGRESS	16
A. The Operative Effect of Article II, Section 1, of the Constitution	16
B. Dual Citizenship and Dual Representation ..	18
II. ELECTIONS OF REPRESENTATIVES AND OF REPRESENTATIVE ELECTORS SHOULD BE BY SINGLE-MEMBER DISTRICTS	19
A. Because Single-Member Districts Are Required Under National Apportionment Acts	19
B. Because Single-Member Districts Are Most Representative of All the People	22
III. THE STATE-WIDE GENERAL TICKET SYSTEM OF ELECTING ELECTORS PRODUCES INVIDIOUS MISREPRESENTATION	26

	Page
IV. ONE-MAN, ONE-VOTE PRINCIPLE APPLIES IN ALL ELECTIONS	29
V. REPRESENTATIVE ELECTORS ELECTED BY SINGLE-MEMBER DISTRICTS WOULD MEET ALL REQUIREMENTS OF THE CONSTITUTION	31
A. The Divisibility Principle of the Twelfth Amendment Would Be Met	32
B. District-Elected Electors Would More Closely Reflect the Expressed Will of the People ...	33
C. Equal Representation of All the People Is Provided Through District Elections of Representative Electors	34
D. Many of the Founders and Early Statesmen Intended District Elections of Representative Electors	37
E. An Early Statement Points Out the Evils of the General Ticket System	40
SUMMARY	41
CONCLUSION	42
TABLE OF CASES AND AUTHORITIES CITED	
CASES:	
Avery v. Midland County, Texas, 88 S.Ct. 1114 (April 1, 1968)	29
Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962)	11, 13, 14, 15
Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286 (1966)	25, 30
Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441 (1964)	11, 28, 29
Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498 (1965) ..	24, 25
Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963) ..	13, 28, 29
Lucas v. General Assembly of Colorado, 377 U.S. 713, 84 S.Ct. 1459 (1964)	29
Mann v. Davis, 213 F. Supp. 577	10
Maryland Committee v. Tawes, 377 U.S. 656, 84 S.Ct. 1429 (1964)	29

	Page
McPherson v. Blacker, 146 U.S. 1, 13 S.Ct. 3 (1892) ..	13, 17, 39
Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) ..	11, 15, 29, 30
Roman v. Sincoc, 377 U.S. 695, 84 S.Ct. 1449 (1964) ..	29
Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526 (1964) ..	3, 11, 13, 14, 15, 18, 20, 21, 29, 30
WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418 (1964)	29
CONSTITUTION OF THE UNITED STATES:	
Article I, Section 2	17, 19, 20, 41
Article I, Section 3	19
Article II, Section 1	16, 17, 18, 37, 41
Article III, Section 2	15
Amendment XII	32, 33, 36, 41, 42
Amendment XIV, Section 1	2, 18, 21, 28, 31, 42
Amendment XIV, Section 2	17, 20, 30, 41
CONSTITUTION OF VIRGINIA, Article IV, Section 55	20
STATUTES:	
2 U.S.C.A. 2, Apportionment Act of August 8, 1911, as amended February 14, 1912	20
2 U.S.C.A. 2a, Apportionment Act of June 18, 1929, as amended	20, 21
2 U.S.C.A. 3, Apportionment Act of August 8, 1911 ..	20
3 U.S.C.A. 6, as amended October 31, 1951	9
28 U.S.C.A. 1331	15
28 U.S.C.A. 1343	15
42 U.S.C.A. 1983	15
42 U.S.C.A. 1988	15
Act of December 14, 1967, P.L. 90-196, 81 Stat. 581, amending 2 U.S.C.A. 2a	21
Apportionment Act of June 25, 1842, 5 Stat. 49, c. 47, R.S. # 23, See Notes, 2 U.S.C.A. 3	19, 22
Apportionment Act of February 25, 1882, See Notes, 2 U.S.C.A. 3	19
Code of Virginia:	
Title 24, Election Laws of the Commonwealth of Virginia	1, 42
Title 24, Chapter 3, Section 24-24	10

MISCELLANEOUS:	Page
41 Annals of Congress 169-170 (1824)	40, 41
Federal Rules of Civil Procedure, Rule 23	11
Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 84th Con- gress, First Session, March 16, 18, 25, April 1 and 6, 1955, entitled "Nomination and Election of President and Vice President," page 387	40
House of Representatives Report No. 909, 27th Con- gress, 2nd Session, entitled "Apportionment Bill" and dated July 16, 1842	22
Letter dated January 12, 1800 from Thomas Jefferson to James Monroe, from Vol. VII The Writings of Thomas Jefferson, by P.L. Ford, page 401	39
Letter dated August 23, 1823 from James Madison to George Hay, from Vol. IX The Writings of James Madison, by Gaillard Hunt, page 147, at pages 151 and 152	38, 39
Letter dated March 29, 1828 from Chief Justice John Marshall to the Richmond Whig and Advertiser, published in the Enquirer dated April 4, 1828, quoted in part in Vol. IV The Life of John Mar- shall, by Albert J. Beveridge, page 463	40
Madison's Notes on the Constitutional Convention of 1787, Documents on the Formation of the Union, Government Printing Office 1927	34, 37
Paullin's, The Atlas of the Historical Geography of the United States	38
Reform of the Electoral System, by Lucius Wilmer- ding, Jr., in the March 1949 Issue of the Political Science Quarterly, and republished in the above cited Senate Judiciary Committee Hearing (1955) page 383, at page 385	41

IN THE
United States District Court
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

Civil Action No. 4768-A

J. HARVIE WILLIAMS, ET AL., *Plaintiffs*,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ETC., ET AL.,
Defendants

**Plaintiffs' Brief Before Hearing Upon the Merits, Upon
Defendants' Motion to Dismiss, and Upon Plaintiffs'
Motion for Summary Judgment**

STATEMENT OF THE CASE

The 10 plaintiffs herein seek a declaratory judgment and injunctive relief to enjoin, on constitutional grounds, the operation and enforcement of those provisions of the election laws of the Commonwealth of Virginia which impose upon its citizens the state-wide general ticket system of electing those 10 of its 12 presidential electors whose offices exist solely by virtue of the 10 Representatives in Congress ("representative" electors) apportioned to the people of

Virginia, and which deny its citizens the right to vote to elect one such elector in and solely by each of their respective Congressional districts.

This class action, in behalf of citizens of the United States resident in Virginia, invokes the provisions of the Privileges and Immunities Clause, of the Due Process Clause, and of the Equal Protection Clause, of the Fourteenth Amendment of the Constitution of the United States, and sections of the United States Code enacted in pursuance thereof, to protect and restore the full benefit of the plaintiffs' right to vote under these and other provisions of the Constitution.

QUESTIONS INVOLVED

1. Does the Constitution of the United States require that the "representative" electors of the electoral college be elected in single-member districts, as Representatives in Congress are elected?

2. Does the state-wide general ticket system of electing the "representative" electors of the electoral college result in debasing, abridging or misrepresenting the weight of the votes of citizens of the United States in presidential elections unconstitutionally?

STATEMENT OF THE FACTS

The 10 plaintiffs herein are citizens of the United States each resident in, and a duly qualified and registered voter in, a different one of the 10 Congressional districts of Virginia. They bring this action as a class action in behalf of themselves and in behalf of all other citizens of the United States similarly situated who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors.

The defendants herein are Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, Martha Bell Con-

way, Secretary of the Commonwealth of Virginia, and the Virginia State Board of Elections, a separate and permanent board created within the office of the Secretary of the Commonwealth. Each of the defendants has a relationship to the operation and enforcement of those provisions of the election laws of Virginia involved in this proceeding.

All material facts in this case are based upon state statutes, the procedures followed by public officials acting thereunder, public documents and records, uncontested and disinterested tabulations of public records and data, and published historical information, documents, records, reports, data and tabulations thereof. Plaintiffs will present and prove at the hearing on the merits of this case, by stipulation, by uncontested exhibits, by testimony, and/or by affidavit or by the Court's taking proper judicial notice of public documents and recognized public facts, the following, among other, facts:

1. There are 10 Congressional districts in Virginia as shown in Exhibit B of the Complaint, as redistricted by the state legislature in November 1965 to conform to the Congressional districting principle of *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964). Based on the 1960 U. S. Census figures, the population of each of these Congressional districts is as nearly equal as is practicable, as follows:

First District	401,052
Second District	419,642
Third District	408,494
Fourth District	386,184
Fifth District	386,179
Sixth District	381,611
Seventh District	377,511
Eighth District	400,812
Ninth District	386,948
Tenth District	418,516

The total population of Virginia under the 1960 Census is 3,966,949, and the mathematical average for each of the 10 Congressional districts would therefore be 396,695.

2. The form of ballot uniformly used throughout Virginia for voting in presidential elections is as shown in Exhibit A attached to the Complaint. It lists under the name of each political party and the nominees thereof for President and Vice President the names of that party's elector candidates, two designated as at-large and one listed and designated as from and resident in each of the respective 10 Congressional districts of Virginia. It permits a voter to vote only for one or another political party, and thus for the party's nominees for President and Vice President. A vote cast on such ballot constitutes, under Virginia election laws, one vote for each of the 12 electors listed thereon under the name of the party and its nominees. Using the uniform ballot, no vote can be cast and counted for any elector or electors individually, or separately from the other electors.

3. Using the uniform ballot, it is impossible to cast one vote for each of the two at-large electors and only one additional vote for the one additional elector candidate from the voter's own Congressional district. Also, it is impossible to prevent the votes cast by voters in other Congressional districts from being counted as a vote for the election of an elector candidate from one's own Congressional district.

4. The Official Statements of the Vote in Virginia for Electors of President and Vice President, as compiled from Official Records by the Secretary of the State Board of Elections, list and show only the whole number of votes cast in each county for the respective party nominee for President. It does not list or show any vote or votes as such for any individual elector or electors of any political party or from any Congressional district.

5. In the 1964 presidential election, the official state-wide popular vote in Virginia was:

For Lyndon B. Johnson	558,038	53.5%
For Barry M. Goldwater	481,334	46.2%
For Eric Hass	2,895	.3%

Johnson's plurality was 76,704. All 12 of Virginia's Democratic Party electors for Johnson were thereby deemed elected under Virginia's election laws, and all 12 of Virginia's presidential electors cast their ballots for Johnson.

6. In the 1964 presidential election, the official popular vote cast in each of the 10 respective Congressional districts of Virginia was:

1st District

For Johnson	60,386	56.8%
For Goldwater	45,852	43.2%

2nd District

For Johnson	57,993	61.8%
For Goldwater	35,887	38.2%

3rd District

For Johnson	58,015	43.2%
For Goldwater	76,388	56.8%

4th District

For Johnson	43,336	49.0%
For Goldwater	45,102	51.0%

5th District

For Johnson	37,134	47.6%
For Goldwater	40,901	52.4%

6th District

For Johnson	53,254	48.3%
For Goldwater	57,064	51.7%

7th District

For Johnson	40,075	50.9%
For Goldwater	38,645	49.1%

8th District

For Johnson	47,781	54.0%
For Goldwater	40,730	46.0%

6

9th District

For Johnson	55,783	59.8%
For Goldwater	37,447	40.2%

10th District

For Johnson	104,281	62.2%
For Goldwater	63,318	37.8%

7. In the 1964 presidential election, if one elector were elected in, from, and solely by the votes cast in, each of the 10 respective Congressional districts of Virginia, and only two electors were elected at-large on a state-wide basis, the presidential electors elected would have voted as follows:

	<i>For Johnson</i>	<i>For Goldwater</i>
1st District	1	
2nd District	1	
3rd District		1
4th District		1
5th District		1
6th District		1
7th District	1	
8th District	1	
9th District	1	
10th District	1	
	—	—
	6	4
Two at-large	2	
	—	—
Total	8	4
	—	—

Thus, 60.0% of Virginia's district or representative presidential electors would have voted for Johnson and 40% would have voted for Goldwater. The other two at-large presidential electors would have voted for Johnson, with the result that 66.66% of all of Virginia's presidential electors would have voted for Johnson and 33.33% would have voted for Goldwater.

7

8. In the 1960 presidential election, the official state-wide popular vote in Virginia was:

For Richard M. Nixon	404,521	52.4%
For John F. Kennedy	362,327	47.0%
For C. Benton Coiner	4,204	.5%
For Eric Hass	397	.1%

Nixon's plurality was 42,194. All 12 of Virginia's Republican Party electors for Nixon were thereby deemed elected under Virginia's election laws, and all 12 of Virginia's presidential electors cast their ballots for Nixon.

9. In the 1960 presidential election, the official popular vote cast in each of the 10 respective Congressional districts of Virginia (omitting the independent party candidates) was:

1st District

For Nixon	36,004	50.4%
For Kennedy	35,061	49.1%

2nd District

For Nixon	29,184	42.4%
For Kennedy	39,195	56.9%

3rd District

For Nixon	57,912	62.4%
For Kennedy	34,448	37.1%

4th District

For Nixon	24,684	41.0%
For Kennedy	34,820	57.8%

5th District

For Nixon	31,042	51.8%
For Kennedy	28,366	47.3%

6th District

For Nixon	51,416	59.6%
For Kennedy	34,663	40.2%

7th District

For Nixon	37,637	60.6%
For Kennedy	24,252	39.0%

8th District

For Nixon	34,779	53.0%
For Kennedy	30,296	46.1%

9th District

For Nixon	39,874	48.6%
For Kennedy	41,776	51.0%

10th District

For Nixon	61,989	50.8%
For Kennedy	59,450	48.8%

10. In the 1960 presidential election, if one elector were elected in, from, and solely by the votes cast in, each of the 10 respective Congressional districts of Virginia, and only two electors were elected at-large on a state-wide basis, the presidential electors elected would have voted as follows:

	<i>For Nixon</i>	<i>For Kennedy</i>
1st District	1	
2nd District		1
3rd District	1	
4th District		1
5th District	1	
6th District	1	
7th District	1	
8th District	1	
9th District		1
10th District	1	
	<hr/>	<hr/>
	7	3
Two at-large	2	
	<hr/>	<hr/>
Total	9	3
	<hr/>	<hr/>

Thus 70% of Virginia's district or representative presidential electors would have voted for Nixon and 30% would have voted for Kennedy. The other two at-large presidential electors would have voted for Nixon, with the result that 75% of all of Virginia's presidential electors would have voted for Nixon and 25% would have voted for Kennedy.

11. California's number of Representatives in Congress and number of "representative" electors was 23 in 1948 and 38 in 1964. New York's number of Representatives in Congress and number of "representative" electors was 45 in 1948 and 41 in 1964. Each of these were based on the 1940 Census and the 1960 Census respectively. The number of Representatives in Congress and the number of "representative" electors of 25 of the 50 states was changed based on the changes in the 1960 Census from the 1950 Census.

JURISDICTIONAL MATTERS RAISED BY DEFENDANTS

1. Proper Parties Defendant

A. The Governor

The Governor of Virginia is a proper party defendant in this action. It is his duty to certify to the Administrator of General Services, and to the presidential electors elected in Virginia, the names of the presidential electors so elected in Virginia and the canvass or other ascertainment under the law of the number of votes given or cast for each person. See 3 U.S.C.A. 6, as amended October 31, 1951.

He therefore has a special and definite relation to this suit. He should be enjoined by this Court against certifying the election of presidential electors in Virginia except as they shall have been elected in accordance with the ruling of this Court.

B. The Secretary of the Commonwealth

The Secretary of the Commonwealth is a proper party defendant in this action. Under Section 24-24, Chapter 3 of Title 24 of the Code of Virginia, as amended, the Virginia State Board of Elections is a separate and permanent Board created "within" the office of the Secretary of the Commonwealth. All of the acts and records of the State Board of Elections are therefore "within" the office of the Secretary of the Commonwealth. The validity and authenticity of any act of certification of the State Board of Elections is therefore subject to certification by the Secretary of the Commonwealth. The Secretary of the Commonwealth also signs the certificate of election of electors that is forwarded by the Governor to the Administrator of General Services.

The Secretary of the Commonwealth has a special relation to this suit and is therefore a proper party defendant herein.

2. Not an Action Against the Commonwealth of Virginia

This action is clearly not an action against the Commonwealth of Virginia, as contended by defendants. This action is similar in principle and theory of jurisdiction to the citizen suit involved in the important case of *Mann v. Davis*, 213 F. Supp. 577, that arose in this Court. This Court's statement on page 3 of its opinion in that case clearly applies in answer to the same contention of the defendants here:

"Nor is this a suit against a State barred by the Eleventh amendment, as defendants contend. It is a suit against State officials acting pursuant to State laws, a type of action universally held appropriate to vindicate a Federally protected right. *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Duckworth v. James*, 267 F. 2nd 224, 230-31 (4th Cir.) cert. denied 361 U.S. 835 (1959); *Kansas City So. Ry. v. Daniel*, 180 F. 2nd 910, 914 (5th Cir., 1950)."

This Court's ruling in that case was sustained by the United States Supreme Court's decision on appeal in *Davis v. Mann*, 377 U.S. 678, 84 S. Ct. 1441 (1964).

3. Class Action

The action in *Davis v. Mann*, *supra*, was a class action of plaintiffs "residents, taxpayers and qualified voters of Arlington and Fairfax Counties filed . . . in their own behalf and on behalf of all voters in Virginia similarly situated, challenging the apportionment of the Virginia General Assembly". At 377 U.S. 680, 84 S. Ct. 1442. That action was sustained as a class action as other similar class actions have been sustained, in the United States Supreme Court. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962); *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

In the instant case the action is brought by 10 plaintiffs who are citizens of the United States and duly registered and qualified voters under the laws of Virginia. They are each resident in, and qualified voters in, a different one of the 10 Congressional districts of Virginia and bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, in behalf of themselves and in behalf of all other citizens of the United States similarly situated, as recited in paragraph 4 of the Complaint,

"* * * who are also residents and duly qualified voters of one of said Congressional districts of Virginia and who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors and have a common interest in protecting their individual and several voting rights in such elections, their right to effective representation therein, and the rights of representation therein of minors and others resident in their respective Congressional districts who are ineligible, or otherwise unable, to vote in such elections."

This action is brought to protect and restore the full benefit of plaintiffs' right to vote. Plaintiffs seek to elect one presidential elector in, and solely by a plurality of the votes cast in, their own respective Congressional districts. They seek thereby to prevent the dilution of their own votes, and the denial of any possibility of their having any electoral representation when not part of the state-wide plurality, that now result from counting the votes of all voters throughout the state in determining the plurality of votes for the election of the one presidential elector that has been apportioned to the people resident in their respective Congressional district by virtue of their numbers. Thus, they seek to prevent the votes of residents in other Congressional districts of Virginia from being counted in determining the plurality of votes for the election of one presidential elector in, by, and from their own respective Congressional district.

As a natural and necessary corollary thereof, they seek to have their own votes not counted in determining the plurality of votes for electing one presidential elector in, by, and from Congressional districts of Virginia other than their own respective Congressional district.

Consequently, it is believed that a more truly representative and comprehensive group of plaintiffs having similar and common interests in the relief sought could not likely be conceived for bringing this action and seeking such relief.

4. Plaintiffs' Standing To Sue

Plaintiffs herein have full capacity and standing to sue and to prosecute this action against the defendants. Defendants' contention to the contrary is without legal support.

Qualified voters of certain counties of Tennessee who sought a declaration that a state apportionment statute was an unconstitutional deprivation of equal protection of the

laws, were held to have standing to maintain such suit. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962). See ruling and discussion of this point at 369 U.S. 206-208, 82 S. Ct. 704-705, in which it is stated:

"And *Coleman v. Green*, supra, squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue

"It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it."

Also, a qualified voter in Georgia seeking to restrain the use of Georgia's county unit system as a basis of counting votes, was held to have standing to sue. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963) in which the rule was succinctly stated, at 372 U.S. 375, 83 S. Ct. 805,

"We also agree that appellee, like any person whose right to vote is impaired (*Smith v. Allwright*, supra; *Baker v. Carr*, supra, 369 U.S. pp. 204-208, 82 S. Ct. pp. 703-705), has standing to sue."

Similarly, citizens and voters of Fulton County, Georgia, seeking to compel a redistricting of Congressional districts established under Georgia statutes, were held to have standing to sue. *Wesberry v. Sanders*, 376 U.S. 1, 5-7, 84 S. Ct. 526, 528-529 (1964).

5. Subject Matter

The subject matter of this action is the validity under the Constitution of the United States of those provisions of Virginia's election laws providing the method and procedure of electing electors of the President and Vice President of the United States in Virginia. The subject matter is therefore comparable to the subject matter involved in *McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3 (1892), in which the United States Supreme Court ruled constitutionally

valid a Michigan election law providing for the election of electors of the President and Vice President of the United States in each of the twelve Congressional districts of Michigan as single-electors districts.

In the *McPherson* case, which arose on writ of error from a decision of the Supreme Court of Michigan the United States Supreme Court ruled, *supra*, pages 23 and 24:

"It is argued that the subject matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court had no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress.

"But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. *Boyd v. Thayer*, 143 U.S. 135. . . .

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

The contention that "exclusive authority" to protect the right of citizens to vote for Congressmen had been given to Congress, was rejected by the United States Supreme Court in *Baker v. Carr*, *supra*, and again in *Wesberry v. Sanders*, *supra*, in the following words in the latter case pages 6 and 7 (376 U.S.) and on page 529 (84 S. Ct.):

" * * * but we made it clear in *Baker* that nothing in the language of that article (Article I, Section 4)

gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, in 1803. Cf. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of 'non-judiciality.' " (Parenthetical material supplied).

The jurisdiction of this Court clearly exists under the provisions of Article III, Section 2 of the Constitution of the United States, and under the provisions of 28 U.S.C.A. 1331, relating to cases involving a federal question "arising under this Constitution, the Laws of the United States, and Treaties. . . ."

Jurisdiction in this Court has been clearly provided in all cases in which plaintiffs allege a deprivation of their rights as citizens under the provisions of 28 U.S.C.A. 1343, 42 U.S.C.A. 1983 and 42 U.S.C.A. 1988. Many cases of citizen suits charging deprivation of voting rights have been recognized as within the jurisdiction of the United States Courts under those statutes, solely upon the ground of those statutory provisions. *Baker v. Carr*, *supra*, page 187 and pages 198-204 (369 U.S.) or page 694 and pages 700-703 (82 S.Ct.); *Wesberry v. Sanders*, *supra*, page 3 and pages 6 and 7 (376 U.S.) or page 527 and page 529 (84 S.Ct.); *Reynolds v. Sims*, 377 U.S. 533, 537, 84 S.Ct. 1362, 1369 (1964), and other similar cases following those cases.

ARGUMENT

I. PEOPLE, NOT STATES, ARE ENTITLED TO REPRESENTATIVE ELECTORS UNDER THE CONSTITUTION, JUST AS THEY ARE ENTITLED TO REPRESENTATIVES IN CONGRESS

A. The Operative Effect of Article II, Section 1, of the Constitution

Article II, Section 1 of the Constitution of the United States creates a body of electors of the President and Vice President of the United States which in numbers and identification is at all times exactly parallel to the dual representation and membership in Congress. It provides:

“Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and together with the Vice President, chosen for the same Term, be elected as follows:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress;”

Each state as a political entity is entitled to the two electors who are the counterparts of the two United States senators to which it is entitled as a political entity.

The number of additional electors from a state is the number of Representatives in Congress to which the people of the state are entitled. The national apportionment of Representatives among the states is based upon the total population of the nation and the proportion thereof in each State, calculated from the latest national census, with 435 now being the total number of Representatives. Each Representative is elected by the people of his Congressional district. The only exception is where one or more Representatives may be elected on a state-wide or at-large basis when a proper redistricting shall not have been made prior to the election.

When the proportion of the national population residing in one state increases or decreases substantially enough, that state correspondingly gains or loses one or more Representatives. Thus, as a result largely of migration of people into California, California's number of Representatives in Congress has grown from 23 in 1948 to 38 in 1964. On the other hand, New York's number of Representatives in Congress has diminished from 45 in 1948 to 41 in 1964. The number of Representatives in Congress from 25 of the 50 states was changed based on the changes in the 1960 Census from the 1950 Census.

A presidential elector also follows the number of people requisite to entitle them to a Representative in Congress. The number of the “representative” electors of those states have changed in identically the same way.

The apportionment provisions of Section 2 of Article I of the Constitution and of Section 2 of the Fourteenth Amendment of the Constitution and the apportionment statutes enacted in pursuance thereof by Congress, automatically operate functionally as well also as provisions for apportionment of “representative” electors among the states according to the number of persons in each State. It would seem that the framers of the Constitution probably could not have made representative presidential electors any more closely bound to, and inseparable from, the apportionment provisions, acts and procedures applying with respect to Representatives in Congress.

Even the smallest state's one minimum representative elector is attributable to its people. The State cannot keep, acquire, or in any way control, the number of representative electors to be elected within its geographic limits. Chief Justice Fuller recognized this operational effect under Article II, Section 1 of the Constitution in the *McPherson* case, *supra*, when he noted, near the end of page 35 thereof, as one of the exceptions from the power and jurisdiction of the State thereunder, “the exception of the provisions as to the number of electors. . . .”

It is therefore submitted that the actual operative effect of all the words in context in Article II, Section 1 of the Constitution is that the substantive right to elect one elector, who is the counterpart of a Representative in Congress, lies in the people who constitute each Congressional district.

B. Dual Citizenship and Dual Representation

The dual character of persons as "citizens of the United States" and as "citizens of the State" is clearly established in the Constitution of the United States by use of the respective terms in the first Articles thereof and by the following positive declaration in the first sentence of Section 1 of the Fourteenth Amendment:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Dual representation was established in the Constitution in the bi-cameral Congress, providing: (1) for equal representation of states as political entities, regardless of population or any other measure of size, in the Senate by two Senators now elected under the Seventeenth Amendment in state-wide elections by the people in their capacity as citizens of the State; and (2) for representation of the people in their capacity as citizens of the United States by representatives in the House of Representatives elected directly by the people in single-member districts and apportioned among the several states according to the respective numbers of persons. In the discussion of this subject in *Wesberry v. Sanders*, 376 U.S. 1, 12-14, 83 S.Ct. 526, 532-533 (1964), the Court quotes William Samuel Johnson of Connecticut as follows:

"in one branch the *people*, ought to be represented; in the *other*, the *States*."

The difference in the character of the representation in the two houses of Congress is sharply drawn in the provisions of Article I of the Constitution relating to qualifications, specifying: that the Representative shall be:

"an Inhabitant of the State *in* which he shall be chosen." (italics supplied).

and that the Senator shall be:

"an Inhabitant of the State *for* which he shall be chosen." (italics supplied).

This balanced and symmetrical structure of dual citizenship and dual representation in Congress applies consistently in the parallel structure of dual representation inherently established in the electoral college. Thus, the election of two electors on a state-wide basis is an election *for* the State by persons acting in their capacity as "citizens of the State"; and the election of additional electors by each Congressional district would provide separate elections *in* each state by persons acting in their capacity as "citizens of the United States".

II. ELECTIONS OF REPRESENTATIVES AND OF REPRESENTATIVE ELECTORS SHOULD BE BY SINGLE-MEMBER DISTRICTS

A. Because Single-Member Districts Are Required Under National Apportionment Laws

In enacting apportionment acts, Congress has considered that prescribing the guiding principles for the formation of the elective units (districts) of the people to be established in the states is necessarily a part of the function of apportionment being effectuated by Congress. The Apportionment Act of June 25, 1842, 5 Stat. 491, c. 47, R.S. #23, provided that the election should be by districts. This provision was repeated in the superseding Apportionment Act of February 25, 1882, and repeated in substance in each of the subsequent apportionment acts. See Notes to 2 U.S.

C.A. 3, of the Apportionment Act of August 8, 1911, which provided:

“3. Election by districts. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.”

That Act of 1911, as amended February 14, 1912, 2 U.S.C.A. 2, established that the House of Representatives shall be composed of 435 Members, and apportioned them among the several states, including Arizona, and New Mexico, which became states in 1912. Notwithstanding the subsequent addition of Hawaii and Alaska as states, the total number of Representatives in the House of Representatives is now 435, and reapportionments have been effectuated under the Apportionment Act of June 18, 1929, as amended, 2 U.S.C.A. 2a. The provisions of the Act of 1911, 2 U.S.C.A. 3, above quoted, were not re-enacted in the Act of 1929 as amended, 2 U.S.C.A. 2a, and they expired by express limitations in the Act of 1911 itself upon the enactment of the Reapportionment Act of 1929. See Notes to 2 U.S.C.A. 3.

It should be noted that Article IV, Section 55 of Virginia's Constitution also requires its Congressional districts to be contiguous and compact and to have as nearly as practicable an equal number of inhabitants; and Section 24-4 of Title 24 of the Code of Virginia provides that each of such districts shall choose one representative.

The United States Supreme Court, of course, has since declared in *Wesberry v. Sanders*, *supra*, that Article I, Section 2 of the Constitution, together with the apportionment provisions therein and in Section 2 of the Fourteenth Amendment, “commands” that “as nearly as is practicable one man's vote in a congressional election is to be worth as

much as another's.” Based on this command, the rule of the case is that the Congressional districts in each of the States shall be essentially equal, or as nearly equal as is practicable. Footnote 10 of the opinion shows that the Court did not need to reach the further arguments based on the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.

Mr. Justice Black, writing for the Court, concluded at 376 U.S. 18 and 84 S.Ct. 535 with a quotation from James Madison in No. 57 of the *Federalist* and then stated:

“Readers surely could have fairly taken this to mean, ‘one person, one vote.’ *Gray v. Sanders*, 372 U.S. 368, 381, 83 S.Ct. 801, 809, 9 L.Ed. 2d 821.

“While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.”

The decision in the *Wesberry* case, *supra*, may not have had the clear effect of re-establishing the requirement contained in earlier Apportionment Acts (from 1842 until 1929) providing “no district electing more than one Representative,” the single-member district provision.

In any event, Congress recently has clearly reinstated this requirement of election of Representatives in single-member districts, by further amending the Apportionment Act of 1929 as follows in the Act of December 14, 1967, P.L. 90-196, 81 Stat. 581:

“In each state entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled ‘An Act to provide for apportionment of Representatives’ (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to

which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)."

B. Because Single-Member Districts Are Most Representative of All the People

The significant effects of the single-member district mode of electing Representatives versus the multi-member or general ticket system of electing Representatives upon the nature of the resulting representation and upon the character of the government, were reviewed in connection with the enactment of the Apportionment Act of 1842. When President John Tyler approved and signed that Apportionment Act, he lodged with it in writing a question whether the mandatory requirement of the law that the states form single-member districts for election of Representatives was constitutional. A Select Committee of the House of Representatives was promptly designated to review this action by the President, under the chairmanship of John Quincy Adams, who had been a Senator and President.

The Report of the Select Committee designated as Report No. 909, House of Representatives, 27th Congress, 2d Session, was entitled "Apportionment Bill" and dated July 16, 1842. Drawing upon his pre-eminent background in and understanding of the history and constitutional foundations of our government, Adams' Report states the case for single-member districts versus multi-member districts or the general ticket system as follows:

"The President announces that one of his reasons for entertaining deep and strong doubts of the constitutionality of the law which he has approved and signed is, that it purports to be mandatory on the States to form districts for the choice of Representatives in single districts.

"The committee believe this to be by far the most important and most useful provision of the act. They believe, indeed, the establishment of the principle absolutely indispensable to the preservation of this Union. The representation of the people by single districts is undoubtedly the *only* mode by which the principle of representation, in proportion to *numbers*, can be carried into execution. The provision of the Constitution is, that the representatives shall not exceed *one* for every thirty thousand of federal numbers, and every act of apportionment has necessarily prescribed *one* member for every addition of the common multiple within each of the several States. A more unequal mode of assembling a representation of the people in a deliberative body could not easily be contrived than that of one portion chosen by a general ticket throughout the State, another portion by single districts, and a third portion partly by single and partly by double, treble, and quadruple districts. This forms, in the mass, a representation not of *one* representative for the common standard number throughout the whole Union, but of States, and cities, and sectional divisions, in knots and clusters of population, of different dimensions and proportions, more likely to be governed by the spirit of party than of patriotism. At present, six of the smaller States acquire an undue share of locally concentrated power in the House, by general ticket elections, stifling the voice and smothering the opinions of minorities nearly equal to half the people of the State, thus disfranchised by the overbearing insolence of a majority, always meager, and as it grows leaner growing more inexorable and oppressive. The larger States have hitherto passed over with little notice this practical iniquity, by which the State of New Hampshire, with five members, preponderates over the State of New York, with forty. But it is in the nature of things impossible that this should be suffered to continue long. The manner of election for the members of this House must be uniform. The general ticket or the single district must be the common rule for all; and if the smaller States will insist upon sending members to this House all of one mind, New York, or Pennsylvania, or Ohio, or all three together,

will, ere long, teach them by other results the arithmetical combination of concentrated numbers.

“Should the general ticket system universally prevail, it is obvious that the representation in this House will entirely change its character, from a representation of the people to a representation of States, and transform the constitutional Government of the United States into a mere confederation like that which, fifty-four years ago, fell to pieces for the want of ligatures to hold it together.”

Mr. Justice Douglas, in his dissenting opinion in *Fortson v. Dorsey*, 379 U.S. 433, 440, 85 S. Ct. 498, 502 (1965), considered the case of single-member versus multi-member districts in elections of state senators in Georgia. Fulton County contained seven senatorial districts and DeKalb County contained three districts and each elected all of their senators on a county-wide voting basis, while other districts containing one or more counties each elected one senator. He agreed with the three-Judge District Court below that

“The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not.”

“As appellees point out, even if a candidate for one of those districts (in Fulton or DeKalb) obtained all of the votes in that district, he could still be defeated by the foreign vote (of other districts), while he would of course be elected if he were running in a district in the first group (where voting is by single-member districts). I have no idea how this weighted voting might produce prejudice race-wise, religion-wise, politics-wise. But to allow some candidates to be chosen by the electors in their districts and others to be defeated by the voters of foreign districts is in my view an ‘invidious discrimination’—the test of unequal protection under the Fourteenth Amendment. *Baker v. Carr*, 369 U.S. 186, 244, 82 S. Ct. 691, 724, 7 L.Ed.2d 663. I had assumed we had settled this question in *Gray v. Sanders*, 372 U.S. 368, 379, 83 S. Ct. 801, 808, 9 L.Ed.2d 821,

where we said: ‘Once the geographical unit for which a representative is to be chosen is designated, all who participate in the 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. This is required by the Equal Protection Clause of the Fourteenth Amendment.’” (Parenthetical material supplied)

The majority of the Supreme Court in that case ruled the multi-member district situation in the *Fortson* case, *supra*, to be constitutional because the record in the case lacked any evidence that this “would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.” The Court in conclusion stated, with respect to this point, the following at 379 U.S. 439 and 85 S. Ct. 501:

“Since, under these circumstances, this issue has ‘not been formulated to bring it into focus, and evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question.’ *Wright v. Rockefeller*, 376 U.S. 52, 58, 84 S. Ct. 603, 606, 11 L.Ed. 2d 512.”

Again, in *Burns v. Richardson*, 384 U.S. 73, 88-89, 86 S. Ct. 1286, 1294-1295 (1966), the United States Supreme Court ruled

“‘It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf. *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393. That demonstration was not made here. 14’” (Italics supplied.)

In footnote 14 thereof, the Court states:

“Appellant Burns concedes in his brief that ‘[i]n the case of the Hawaii House multi-member districts, extensive proofs were not put in as to the details of the submergence of minorities.’ There may, for example, be merit in the argument that by encouraging block voting, *multi-member districts diminish the opportunity of a minority party to win seats*. But such effects must be demonstrated by evidence.” (Italics supplied).

Plaintiffs contend that they will have shown by a preponderance of the evidence in this case that the state-wide general ticket system of electing representative electors in Virginia, in essence a multi-member district system, clearly operates to “diminish the opportunity of a minority party to win seats” in Virginia’s electoral college.

III. THE STATE-WIDE GENERAL TICKET SYSTEM OF ELECTING ELECTORS PRODUCES INVIDIOUS MISREPRESENTATION

Under the state-wide general ticket system, all of the several and divisible number of electors who are the counterparts of Representatives in Congress are elected by the same state-wide count of votes by which the two electors who are counterparts of the state’s two senators are elected. Many objectionable results are shown to flow from this system, such as:

(1) All those who vote for the nominee, party, or block of electors, that receives less than the highest number of votes in the individual state, are always without any elector representing them in the electoral college,

(a) even if their votes aggregate as much as 49 per cent of all votes cast in the state, and

(b) even if their votes constitute a majority, or the highest number, or all, of the votes cast in one or more of the Congressional districts in the state.

(2) The weight of each voter’s vote will inevitably either

(a) be magnified or distorted, when on the winning side, from a plurality, however narrow the margin, to 100 per cent of the total electoral votes of the state, or

(b) be completely ignored and destroyed, when on the losing side, and be invidiously misrepresented as if supporting the winning plurality.

(3) Different weight is given to the votes of residents of one state from the weight given to the votes of residents of another state. For example, a citizen in New York votes for the election of 43 electors, while a citizen in Virginia votes for the election of only 12 electors. Exhibits presented by plaintiffs in this case will show that the official certified record of the “whole number of votes given for the office of Elector of President and Vice President was 331,590,904” in New York State in the 1960 Presidential Election when the total number of persons voting in New York was 7,290,824, and was 308,032,517 in the 1964 Presidential Election when the total number of persons voting therein was 7,166,013.

(4) The facts proved in this case and reviewed above show, with respect to the 1960 and 1964 Presidential Elections, the following electoral misrepresentation of the minority party in Virginia:

	Virginia's Popular Vote	Percent of Popular Vote	Percent of Virginia's Electoral Vote
1960			
Presidential Election			
For Democrat	362,327	47.0	0
For Republican	404,521	52.4	100
1964			
Presidential Election			
For Democrat	558,038	53.5	100
For Republican	481,334	46.2	0

(5) Many times as many citizens must vote for a particular nominee in large states as in single-representative states like Delaware, before their voting can have any effect or weight whatsoever in the election of the president.

(6) A substantial premium is placed on fraud in the larger states because a small margin that achieves a plurality carries 100 per cent of the large electoral vote of the state.

(7) Small splinter parties also can affect the whole electoral vote of a state by controlling the small margin that achieves a plurality in the state. For example, in 1948 Henry Wallace drew 509,000 votes largely from Truman, thereby throwing the 47 electoral votes from New York for Dewey with a plurality of only 61,000 votes out of the total of about 6,100,000 votes cast in the state.

(8) The United States Supreme Court has recognized that many inequities are present in the functioning of the electoral college:

In *Gray v. Sanders, supra*, at 372 U.S. 378, 83 S. Ct. 807:

"The inclusion of the electoral college in the Constitution . . . validated the collegiate principle despite its inherent numerical inequality, . . ." Repeated in *Reynolds v. Sims*, 377 U.S. 574-5, 84 S. Ct. 1388.

In *Davis v. Mann, supra*, at 377 U.S. 692, 84 S. Ct. 1448-49:

"The fact that the maximum variances in the populations of various state legislative districts are less than the *extreme deviations* from a population basis in the composition of the Federal Electoral College . . ." (*Italics supplied*).

(9) The "one-man one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution is breached in almost every conceivable way.

IV. ONE-MAN, ONE-VOTE PRINCIPLE APPLIES IN ALL ELECTIONS

The United States Supreme Court has enunciated the "one-man, one-vote" of equal weight principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution in recent years in *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801 (1963) (Georgia county unit system, a state electoral college system, in party primary elections for state-wide elected offices); *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526 (1964) (Georgia congressional districts); and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964) (Alabama state legislature apportionment); together with several other cases decided at the same time, namely, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 84 S.Ct. 1418 (1964) (New York state legislature apportionment); *Maryland Committee v. Tawes*, 377 U.S. 656, 84 S.Ct. 1429 (1964) (Maryland state legislature apportionment); *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441 (1964) (Virginia state legislature apportionment); *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449 (1964) (Delaware state legislature apportionment); and *Lucas v. General Assembly of Colorado*, 377 U.S. 713, 84 S.Ct. 1459 (1964) (Colorado state legislature apportionment). More recent cases have also applied the principle, with the latest case applying it to elections for local county governments in *Avery v. Midland County, Texas*, 88 S.Ct. 1114 (April 1, 1968) (single-member county districts of unequal population).

The principle is most fully expounded in the *Reynolds* case, *supra*, at 377 U.S. 554-568, 84 S.Ct. 1377-1382. It may be summarized as follows:

The "one-man one-vote" principle of the Equal Protection clause of the Fourteenth Amendment requires that, whenever and wherever in the United States voting by any of the people is provided for in state or federal elections, the citizens of the United States are entitled to be fairly, justly, and equitably represented and effectively weighted, by district units fairly related

to their numbers, in the outcome of such election; and they are entitled to have their right to vote protected against being abridged, debased, diluted, cancelled, destroyed, discriminated against on the basis of place of residence or on any other arbitrary basis, or otherwise made ineffective or unrepresentative, by or under any laws or practices of any state, or by or under any acts of any officials thereof or of any other persons.

This Constitutional principle applies to protect "the right of all qualified citizens to vote, in state as well as in federal elections". *Reynolds* case, *supra*, at 377 U.S. 554, 84 S.Ct. 13.77. Elections "for the choice of electors for President and Vice President of the United States, Representatives in Congress" are named first, and in that order, in the provisions of the second sentence of Section 2 of the Fourteenth Amendment of the Constitution. It seems clear, therefore, that the principle applies equally with respect to elections of presidential electors.

The Court in the *Reynolds* case also indicated, at 377 U.S. 577-78 and at 84 S.Ct. 1390, that the strict requirement that Congressional districts must be based on equality of population as nearly as is practicable, as held in *Wesberry v. Sanders*, *supra*, may not have to be applied so inflexibly as to state legislative districts because of the larger number of seats in state legislative bodies to be distributed within a state than Congressional seats within the state. Cf. the quotation above, on page 25 of this Argument, from *Burns v. Richardson*, *supra*, concerning the possible invidious effect of multi-member districts in relatively large districts.

The gross distortions, inequities, and misrepresentations, above enumerated under heading III of this Argument as existent in the functioning of the electoral college system are not due to the provisions of the Constitution, but are entirely due to the state election laws creating the state-wide general ticket system of election of those electors whose offices exist by reason of the Representatives in Congress apportioned on the basis of the number of people.

All those distortions, inequities, and misrepresentations of the weight of the votes of citizens of the United States in Virginia clearly constitute invidious discriminations against political minorities, and must be prohibited under the "one-man, one-vote" of equal weight principle of the Equal Protection Clause and related clauses of the Fourteenth Amendment.

V. REPRESENTATIVE ELECTORS ELECTED BY SINGLE-MEMBER DISTRICTS WOULD MEET ALL REQUIREMENTS OF THE CONSTITUTION

When two electors counterpart to a state's two United States senators are elected on a state-wide basis, the people are acting in their capacity as "citizens of the state". To this extent, the electoral college system cannot be made to conform to the "one-man, one-vote" principle. The 102 electors so elected, however, constitute only approximately 19 per cent of the total 538 electoral votes. (The District of Columbia now has 3 electors, two of which we have regarded as counterpart to two United States Senators although the District does not have any Senators; and the other one of which we have regarded as counterpart to a Representative in Congress although the District does not have any Representative. This explains our reference to 436 electors elected by districts although there are only 435 Representatives and corresponding Congressional districts. It also explains our reference to 102 electors as counterpart to Senators although there are only 100 Senators from the 50 states).

The other 436 representative electors, 81 per cent of the total, if elected one in and by each congressional district, would be *constitutionally representative* of the people acting in their capacity as "citizens of the United States" in essentially equal districts. Each voter in the United States, without regard to the state of his residence, would normally vote for three electors: one "representative" elector elected in his Congressional district; and two electors elected on a state-wide basis. The inequalities of voting

in the national elections, which now exist between citizens resident in different states, and the invidious distortions and misrepresentations of the votes of citizens within the same state would be eliminated with respect to the election of 81 per cent of the nation's presidential electors.

The "one-man one-vote" principle would be fully met with respect to the election of this 81 per cent of the electors. The substantive right of the people as citizens of the United States to elect one elector in and by each Congressional district, based on their numbers, would also be fully met.

A. The Divisibility Principle of the Twelfth Amendment Would Be Met

The provisions of the Twelfth Amendment of the Constitution clearly provide that the electors of a state may be divided as to the persons voted for as president and vice president. The Twelfth Amendment, adopted in 1804, provides that the presidential electors meeting in their respective states:

"shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of *all* persons voted for as President, and of *all* persons voted for as Vice President, and the number of votes for *each*, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate; . . . ".
(Italics supplied)

The district election of "representative" electors would be fully compatible with the Twelfth Amendment, since it would provide an opportunity for a division of the electors elected in each state. In fact, a number of states had elected their presidential electors by districts prior to the adoption of the Twelfth Amendment, and this practice was followed in a number of subsequent elections by many states.

The general ticket system, on the other hand, is intended to preclude any possibility of division of the electoral votes

of the state, and therefore is contrary to the divisibility principle of the Twelfth Amendment.

B. District-Elected Electors Would More Closely Reflect the Expressed Will of the People

It is a mathematical fact that the greater the number of units in which elective pluralities are determined and are effective to elect one elector in each unit; the smaller will be the population of each unit; the greater will be the citizens' opportunity to have an effective voice in the national election; the smaller will be the number of voters in each unit who are adversely affected thereby when on the losing side; and the more limited in ultimate effect will be any local election fraud, or any splinter party or group, or any severe weather condition or other occurrence affecting voter turnout, or local misinformation that misleads citizens. Election of one elector in each of 436 Congressional districts and the election of two electors in each of 50 states and the District of Columbia is more desirable in all of these respects than the present system involving only 50 state-wide elections of all the electors of each of the 50 states.

Moreover, the election of representative electors in and solely by Congressional districts clearly tends to cause their electoral votes to be more closely representative of the people of the state. The facts established in the evidence herein show that, on such a district basis of election, the following electoral result would have occurred in Virginia:

	% of Popular Votes	Number of District Elector Votes	% of District Elector Votes	Total Number of Elector Votes	% of Total Elector Votes
1960					
Presidential Election:					
For Democrat	47.0	3	30.0	3	25.0
For Republican	52.4	7	70.0	9	75.0
1964					
Presidential Election:					
For Democrat	53.5	6	60.0	8	66.6
For Republican	46.2	4	40.0	4	33.3

Similarly, the election of one elector in and solely by Congressional districts would have resulted in the following electoral result in New York:

	% of Popular Votes	Number of District Elector Votes	% of District Elector Votes	Total Number of Elector Votes	% of Total Elector Votes
1960					
Presidential Election:					
For Democrat	52.5	23	53.5	25	55.5
For Republican	47.3	20	46.5	20	44.5
1964					
Presidential Election:					
For Democrat	68.6	41	100.0	43	100.0
For Republican	31.3	0	0	0	0

C. Equal Representation of All the People Is Provided Through District Elections of Representative Electors

There is another most important element inherent in the principle of representative government that the founding fathers uniformly adopted throughout the Constitution. James Wilson is reported in Madison's Notes on the Constitutional Convention for Saturday, June 9, 1787, as follows:

"He (Mr. Wilson) entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal Numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives. . . . Representatives of different districts ought clearly to hold the same proportion to each other, as their respective Constituents hold to each other." From Documents on the Formation of the Union, Government Printing Office 1927, page 183, in discussions concerning the rule of suffrage in the first branch (House of Representatives) of Congress.

With Congressional districts of essentially equal population, a representative or a presidential elector elected in that district represents *all* of the people residing in that district. His effective weight within the particular frame-

work of government should be, and is, measured by the essentially equal number of persons residing in each such district. He stands on a par with each other Representative or elector, as the case may be. His effective weight is not, and should not be, measured by the number of people who voted for him as against the number of people who voted for a Representative or elector from another district. Neither should his effective weight be, nor is it, measured by the total number of people who voted in his district (whether for or against him) as against the total number of people who voted in another district in the election of a Representative or elector.

The number of persons residing in any district includes the large number of children who are not of the age to be permitted to vote, resident aliens not permitted to vote, and many persons confined to institutions or homes because of illness or other physical, mental, or legal disability. Under our representative system of government, those people are all entitled to representation on a basis of equality with all other persons residing in districts of essentially equal population. Because of their large numbers across the nation, and the failure or disability for other causes (such as weather, business or whatever) of other qualified persons to vote, only about 37 per cent of the nation's total population voted in the 1964 presidential election, and only about 38 per cent voted in the 1960 presidential election.

Under the polling concept, it is generally accepted that, if only 25 per cent of the population in any district vote in an election, the plurality established by their votes will reach the same elective result that would have been reached by the plurality of the votes of 45 per cent or any other percentage of the population in the same election district if such other percentage of the population had voted. Computer predictions of election results from very early returns are based on this polling principle. This concept, of course, depends for its validity upon complete freedom of oppor-

tunity of all qualified and qualifiable persons in the district to vote and to have their votes properly counted. Under our laws great measures are taken to secure and protect that complete freedom of opportunity for all citizens to vote by secret ballot and to have their votes properly counted.

Thus, given a fair and representative district system of election, it is not so important or meaningful that a President shall have a majority or a plurality of all of the popular votes actually cast in the entire country. If the president is elected by a majority (as required under the Twelfth Amendment) of the whole number of the electors, 81 per cent of whom shall have been elected by a plurality of the votes of citizens of the United States in their respective Congressional districts, each of essentially equal population, his election will more accurately reflect, and more assuredly represent, the choice of the majority of *all* of the "people", even if, by chance, it does not also reflect the choice of the majority or plurality of those who actually voted in the election.

It is important that the President elected shall enter office with a broad base of support demonstrated in the election. The representation of states as political entities in the electoral college by the inclusion of 102 electors, elected two from each state on a state-wide basis, including the District of Columbia, adds significant support for the elected President, since the states are important and effective political entities in the national scene. Moreover, its inclusion along with district-elected "representative" electors maintains the President's constituency, to which he is responsible, the same as the basic constituency of the national government established by the Constitution.

The present state-wide general ticket system is in conflict with the basic constituency of the national government grounded in dual citizenship and dual representation.

D. Many of the Founders and Early Statesmen Intended District Elections of Representative Electors

The first proposal of an electoral college system of election of the President that was made at the Constitutional Convention of 1787, which convened on May 25, 1787, was made by James Wilson of Pennsylvania, the highly respected lawyer-framer of the Constitution who later became an Associate Justice of the United States Supreme Court. Madison's Notes reported on June 2, 1787 the following:

"Mr. Wilson made the following motion, to be substituted for the mode proposed by Mr. Randolph's resolution, 'that the Executive Magistracy shall be elected in the following manner: That the States be divided into districts; & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect members for their respective districts to be electors of the Executive magistracy, that the said Electors of the Executive magistracy meet at and they or any of them so met shall proceed to elect by ballot, but not out of their own body person in whom the Executive authority of the national Government shall be vested'.

"Mr. Wilson repeated his arguments in favor of an election without the intervention of the States. He supposed too that this mode would produce more confidence among the people in the first magistrate, than an election by the national Legislature." From Documents on the Formation of the Union, Government Printing Office 1927, page 136.

As late as August 24, 1787, Gouverneur Morris of Pennsylvania also opposed election of the President by the national Legislature, and moved that he "shall be chosen by Electors to be chosen by the People of the several states". This motion was seconded and supported by 4 "ayes" (including Pennsylvania, Virginia, Delaware and New Jersey) and 6 "noes". See Madison's continuing notes on pages 611 and 612 of said Documents.

The language finally adopted at the Convention as Section 1 of Article II of the Constitution is not inconsistent

with the intent of those motions. The drafters were confronted with the practical problems of promptly setting up and carrying out the election of the first President without time for full implementation by the states. Also it was clear that the state legislature was the instrumentality closest to the people and their control that could perform necessary acts to bring about an apportionment of electors by districts and election by the people.

From the chart appearing in Paullin's "The Atlas of the Historical Geography of the United States", page 89, which will be in evidence here, it will be noted that the election of presidential electors by the people was conducted on a district basis within a number of the states in many presidential elections prior to 1836. Election of electors by districts was employed in the following numbers of states in the respective presidential election years:

	Number of states electing on a district basis	Total number of States participating
1788-89	3 (incl. Virginia)	10
1792	3 " "	15
1796	5 " "	16
1800	3	16
1804	5	17
1808	4	17
1812	4	18
1816	3	19
1820	6	24
1824	6	24
1828	4	24
1832	1	24
1836	0	26

With all this background at the Constitutional Convention, and following the Convention, it is not surprising that James Madison wrote to George Hay in a letter dated August 23, 1823 concerning the method of electing electors of the President and Vice President:

"The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular states which had set the example."

When Virginia was about to change from the district system in 1800, Thomas Jefferson, then Vice President, wrote from Philadelphia on January 12, 1800, to James Monroe:

"On the subject of an election by a general ticket, or by districts, most persons here seem to have made up their minds. All agree that an election by districts would be best, if it could be general; but while 10. states chuse either by their legislatures or by a general ticket, it is folly & and worse than folly for the other 6. not to do it. In these 10. states the minority is entirely unrepresented; & their majorities not only have the benefit of their whole state in the scale, but have the benefit of so much of our minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government. To state it in another form; it is merely a question whether we will divide the U S into 16. or 137. districts. The latter being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments. But a representation of a part by great, & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the U S, were they assembled together . . ." VII Writings of Thomas Jefferson 401, P.L.Ford (1896).

Chief Justice Fuller in the *McPherson* case, *supra*, page 31, stated:

"In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least 'until some uniform mode of choosing a President and a Vice President of the United States shall be prescribed by an amendment to the Constitution.' Laws Va. 1799, 1800, p. 3."

When this was done in Virginia, Chief Justice John Marshall resolved never to vote during the continuance of use of the general ticket system. A letter dated March 29, 1828 from Marshall to the Richmond Whig and Advertiser, published in the Enquirer dated April 4, 1828, is quoted in part in Albert J. Beveridge's IV The Life of John Marshall 463 as follows:

"Though I had not voted since the establishment of the general ticket system, and had believed that I never should vote during its continuance, I might probably depart from my resolution in this instance, from the strong sense I felt of the injustice of the charge of corruption against the President and Secretary of State. . . ."

The district mode of electing electors was also favored by many other leaders, such as Hamilton, Jefferson, Madison, Gallatin, James A. Bayard, John Quincy Adams, Van Buren, Benton, Webster, and Story. See page 387 of Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 84th Congress, First Session, March 16, 18, 25, April 1, and 6, 1955, entitled "Nomination and Election of President and Vice President".

E. An Early Statement Points Out the Evils of the General Ticket System

Senator Benton of Missouri, probably the most tireless advocate of electoral college reform in the 19th Century, in 1824 pointed out the evils of the general ticket system in the following statement in 41 Annals of Congress 169-170:

"The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State. * * * It contributes to give power and consequence to the leaders who manage the elections, but it is a departure from the intention of the Constitution; violates the

rights of minorities, and is attended with many other evils. The intention of the Constitution is violated, because it was the intention of that instrument, to give to each mass of persons, entitled to one elector, the power of giving that electoral vote to any candidate they preferred. The rights of minorities are violated because a majority of one will carry the vote of the whole State * * *. In New York 36 electors are chosen; 19 is a majority, and the candidate receiving this majority is fairly entitled to count 19 votes; but he counts, in reality, 36; because the minority of 17 are added to the majority. These 17 votes belong to 17 masses of people, of 40,000 souls each, in all 680,000 people, whose votes are seized upon, taken away and presented to whom the majority pleases. * * * To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."

Lucius Wilmerding, Jr., a distinguished Princeton scholar, set forth the foregoing quotation from Senator Benton in an article entitled "Reform of the Electoral System" published in the March 1949 issue of the Political Science Quarterly. He introduced it with the statement that the evils of the general ticket "were never better set out than by Senator Benton in 1824".

SUMMARY

Plaintiffs' contentions may be summarized as follows:

1. The structure of the electoral college, created under Article II, Section 1 of the Constitution, apportioned under the Acts of Congress to the people in pursuance of the apportionment provisions of Article I, Section 2 of the Constitution and of Section 2 of the Fourteenth Amendment, and functioning under the Twelfth Amendment and the basic representative framework of the Constitution, establishes that the "representative" electors belong to the people, not the States, and should be elected in single-member Con-

gressional districts by the people voting as citizens of the United States, as Representatives in Congress are elected.

2. The voting rights of citizens of the United States protected under the Fourteenth Amendment of the Constitution require that in presidential elections "representative" electors be elected in single-member Congressional districts in order to eliminate the many invidious discriminations inherent in state-wide general ticket elections.

3. The divisibility principle of the Twelfth Amendment of the Constitution requires that in presidential elections "representative" electors be elected by single-member Congressional districts rather than by state-wide general ticket elections.

4. It is unconstitutional for the election laws of Virginia to force the citizens of the United States resident therein to speak with a single voice, solely as citizens of the state, in presidential elections through state-wide general ticket elections of the ten "representative" electors apportioned to the people of Virginia according to their numbers.

CONCLUSION

Plaintiffs therefore contend that judgment should be granted in their favor, and urge that the Court enter its order in accordance with the prayers of their Complaint.

Respectfully submitted,

Howard S. Sperring
HOWARD S. SPERRING

1000 Connecticut Ave.

Washington, D. C. 20006

Telephone: 659-1777

Paul Reiber
PAUL REIBER

1158 Swinks Mill Road

McLean, Virginia 22101

Telephone: EL 6-3229

Attorneys for Plaintiffs

May 24, 1968