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

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.	§	Civil Action No. 5:18-cv-00175
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.	§	

DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiffs ask this Court to find that the predominant method of appointing presidential electors—used in every presidential election since 1789—violates the Constitution. This is not a new theory. Time and again, plaintiffs unhappy with election outcomes have sought to redefine how States appoint electors, and every court asked to do so has rejected those attempts. Plaintiffs' claims here are no different.

Texas—like forty-seven other States and the District of Columbia—appoints its presidential electors through a statewide winner-take-all election. States have appointed electors in this fashion for more than two centuries, dating back to the first election of George Washington. Thomas Jefferson petitioned the Virginia Legislature to adopt this appointment method before the 1800 presidential election. And by 1832, all States except for one appointed their electors in this fashion. The custom was so well-established even 126 years ago that the Supreme Court held that an interpretation of the Constitution endorsing this method of appointment had by then "prevailed too long and been too uniform to justify us in interpreting the language" otherwise. *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

Despite repeated challenges in the hundred-plus years after *McPherson*, no court has ever found that appointing electors through a winner-take-all election violates the First, Fourteenth, or Fifteenth Amendments—as none could. If a State gives its citizens the right to vote for electors, then the Constitution protects a voter's right to cast a ballot on terms equal to any other voter. That rule is followed, by

definition, when all of the State's voters cast a ballot for all of the State's electors on a statewide basis. Once those votes are counted, nothing guarantees the losing side proportional representation in the Electoral College. And merely losing an election does not constitute a vote denial or abridgment implicating Section 2 of the Voting Rights Act, let alone a vote denial or abridgment on account of race or ethnicity.

Almost fifty years ago, the Supreme Court summarily affirmed a decision rejecting the same basic challenge to the Electoral College appointment method that Plaintiffs bring today. *See Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd per curiam*, 393 U.S. 320 (1969). That affirmance is binding on this Court, as it was on all the other courts that have dismissed similar challenges to the winner-take-all appointment method. Plaintiffs' claims are easily dispatched by applying settled law to uphold a legitimate practice that dates back to the founding of the United States.

ARGUMENT AND AUTHORITIES

A complaint "may be dismissed for failure to state a claim if no relief could be granted as a matter of law even if the plaintiff's alleged facts are accepted as true." *United States ex rel. Morgan v. Fuerzas Armadas Colombianas*, 486 F. App'x 391, 392 (5th Cir. 2012) (per curiam) (citation omitted). Dismissing a complaint "on the basis of a dispositive issue of law . . . streamlines litigation by dispensing with needless discovery and factfinding." *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) (citations omitted). As explained below, Plaintiffs' claims fail as a matter of law.

I. PLAINTIFFS' CLAIMS CONTRADICT OVER TWO CENTURIES OF PRACTICE AND OVER A CENTURY OF BINDING PRECEDENT.

Article II, Section 1 of the U.S. Constitution provides that "[e]ach 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 Congress." U.S. Const. art. II, § 1, cl. 2. In drafting the Constitution, the Framers considered adopting a uniform manner by which the States would appoint presidential electors, including by statewide popular vote. *McPherson*, 146 U.S. at 28. But they could not agree. The decision to vest exclusive power over the appointment of electors in the state legislatures was the product of deliberation, debate, and, ultimately, compromise. *Id.* at 28–29. The final result "reconciled [a] contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through *popular election by districts or by general ticket*, or as otherwise might be directed." *Id.* (emphasis added).

Since the founding of the Nation, it has been understood that appointing electors through a "general ticket" is a permissible manner of exercising the authority the Constitution vested exclusively in the state legislatures. Indeed, the Pennsylvania Legislature appointed its electors through a statewide winner-take-all election for the first presidential election in 1789. *Id.* at 29 (citing 1788 Pa. Laws 140). New Hampshire followed suit for the second presidential election in 1792. *Id.* at 30 (citing 1792 N.H. Laws 398, 401). By the fourth presidential election in 1800, six States were appointing presidential electors via statewide popular vote, including Virginia on the advice of Thomas Jefferson. *Id.* at 31–32 (citing 1800 Va. Acts 3).

"After 1832 electors were chosen by general ticket in all the states except South Carolina, where the legislature chose them up to and including 1860." *Id.* at 32.

For its part, Texas has appointed electors via statewide winner-take-all vote since 1848, the first presidential election after it joined the Union. *See* Act approved March 15, 1848, 2d Leg., ch. 94, § 2, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas*, *1822–1897*, at 104–06 (Austin, Gammel Book Co. 1898); Tex. Elec. Code §§ 192.001, 192.005. Forty-seven other States and the District of Columbia today do the same. Complaint ¶ 3 (ECF No. 1) ("Compl."). The only States that do not, Maine and Nebraska, appoint two electors on a statewide basis and the remaining electors based on the vote from each congressional district. But even that method does not satisfy Plaintiffs' demand for proportional representation. *Id.* ¶ 13 (requesting injunction against appointment by statewide election or "other non-representational methods, such as selection by Congressional District vote").

Given that Plaintiffs' theory would invalidate practices in place for 230 years and currently used by all 50 States and the District of Columbia, it should be no surprise that binding precedent forecloses their claims. *McPherson*, 146 U.S. at 26–42. *McPherson* rejected a challenge to a Michigan law that allocated electors by congressional district. The Court emphasized that the Framers' decision to grant state legislatures the power to choose the manner of appointment was the result of compromise, *id.* at 28, and that after ratification States pursued different methods of appointment, including "by vote of the people for a general ticket," *id.* at 28–29. "No question was raised as to the power of the State to appoint, in any mode its legislature

saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution." *Id.* at 29. The Constitution "recognizes that the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object*." *Id.* at 27 (emphasis added). The Court rejected the claim that the Fourteenth and Fifteenth Amendments dictate whether States may choose electors via a statewide winner-take-all election. *Id.* at 37. Under the Constitution, if "each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made." *Id.* at 40.

Since *McPherson*, federal courts have rejected every type of attack on winner-take-all systems imaginable. *See Williams*, 288 F. Supp. at 625–29 (dismissing claims against Virginia's winner-take-all system); *Delaware v. New York*, 385 U.S. 895 (1966) (declining original jurisdiction over equal-protection challenge to the winner-take-all system brought by smaller States); *Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978) (rejecting contention "that, because of its statewide and at-large features, Alabama's electoral scheme for the selection of presidential electors discriminates against minority voters"), *aff'd*, 580 F.2d 1051 (5th Cir. 1978) (unpublished); *Williams v. North Carolina*, No. 17-cv-00265, 2017 WL 4935858, at *1 (W.D.N.C. Oct. 31, 2017) ("[M]andating that North Carolina adopt a pro-rata system for presidential electors rather than a winner-take-all scheme . . . is decisively foreclosed by binding precedent." (citations omitted)); *Conant v. Brown*, 248 F. Supp. 3d 1014, 1025 (D. Or. 2017) ("Plaintiff's winner-take-all claim has no merit.");

Schweikert v. Herring, No. 16-cv-00072, 2016 WL 7046845 (W.D. Va. Dec. 2, 2016) (dismissing claims against Virginia's winner-take-all system under the U.S. Constitution and Section 2 of the Voting Rights Act).

But those decisions not only persuasively explain why Plaintiffs' claims are meritless, at least one of them—*Williams v. Virginia State Board of Elections*—is controlling. In *Williams*, the Supreme Court summarily affirmed a three-judge court's dismissal of a challenge under the Fourteenth and Fifteenth Amendments to Virginia's winner-take-all method of appointment. *Williams*, 393 U.S. at 320. The district court concluded that even if it could be said to "discriminate" in favor of the voting majority, the appointment of electors based on a statewide winner-take-all election did not result in "the denial of privileges outlawed by the one-person, one-vote doctrine or banned by Constitutional mandates of protection." *Williams*, 288 F. Supp. at 627. On the contrary, "[i]n the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. . . . Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone." *Id.*

The Supreme Court's summary affirmance in *Williams* requires dismissal. "Summary affirmances . . . reject the specific challenges presented" and, accordingly, "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *see Price v. Warden*, 785 F.3d 1039, 1041–42 (5th Cir. 2015). By summarily affirming, the Supreme Court necessarily decided that Texas's manner

of appointing presidential electors—which replicates the Virginia system at issue in *Williams*—does not dilute, debase, or otherwise impair the right to vote. The district court held that nothing about this type of system is "offensive to the Constitution" and that the plaintiffs' "demand or *any other* proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment." *Williams*, 288 F. Supp. at 627, 629 (emphasis added). That is the end of the matter. "Just as with the Court's other precedential opinions, lower courts should assume they are bound by summary decisions . . . until such time as the Court informs (them) that (they) are not." *Price*, 785 F.3d at 1041 (citation and quotations omitted).

Plaintiffs incorrectly assert that *Williams* is not controlling because the one-person, one-vote framework has since evolved. Compl. ¶¶ 52–53 (discussing *Bush v. Gore*, 531 U.S. 98 (2000)). But summary affirmances only "lose their binding force when 'doctrinal developments' illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case." *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (citation omitted). Whatever else may be said of *Bush v. Gore*, it did not so alter the legal landscape that challenges to the winner-take-all appointment method dismissed by every court to hear them—both before and after the 2000 presidential election—are somehow now substantial. *Bush*, 531 U.S. at 109 (limiting the decision "to the present circumstances").

What matters here is whether siding with Plaintiffs would require this Court to second-guess "determinations . . . essential to sustain the judgment" in *Williams*

and whether "the facts presented in [*Williams*] are sufficiently analogous to those presented in [this] case." *Price*, 785 F.3d at 1042 (citations and quotations omitted). The answer to both questions is "yes." *See, e.g.*, *Schweikert,* 2016 WL 7046845, at *2 (dismissing claims brought under the "First Amendment, Fourteenth Amendment, Twelfth Amendment, Seventeenth Amendment, and Section 2 of the Voting Rights Act" because *Williams* "concerned the precise issues presented in the instant case—*i.e.*, the constitutionality of Virginia's winner-take-all system for selecting electors"); *Conant*, 248 F. Supp. 3d at 1024–25 ("*Williams* is still good law and Plaintiff offers no basis for distinguishing it.").[1]

But dismissal is required even if *Williams* is not controlling. In cases like this, the Supreme Court places "significant weight upon historical practice." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted). Just as the "long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President," *id.* (citation and quotations omitted), time-honored practice is significant in evaluating the division of authority between the States and the national government. Indeed, *Noel Canning* points directly to *McPherson* as illustrative of this

[1] In any event, the Fifth Circuit's summary affirmance in *Hitson* also decided the question that Plaintiffs' suit presents here. There, the district court rejected the "argument that plaintiffs' rights as minority citizens have been violated because Alabama has failed to structure its election for presidential electors on a district basis" and the argument "that the Constitution prohibits Alabama from selecting presidential electors by popular election." *Hitson*, 446 F. Supp. at 676–77. Although the Fifth Circuit's affirmance was unpublished, *supra* at 5, it is "nonetheless fully precedential and binding because it was issued before January 1, 1996," *United States v. Sanchez-Sanchez*, 779 F.3d 300, 307 n.32 (5th Cir. 2015) (citing 5th Cir. R. 47.5.3); *e.g.*, *United States v. Ellis*, 547 F.2d 863, 868 (5th Cir. 1977) (panel was "bound by the precedent" even though the decision "consisted of the one word 'Affirmed' pursuant to Fifth Circuit Local Rule 21").

settled principle. *See id.* at 2560 (citing *McPherson*, 146 U.S. at 27). Accordingly, "the longstanding practice of the government can inform [the Court's] determination of what the law is." *Id.* (citations and quotations omitted); *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."). "[T]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (citation and quotations omitted).

The longstanding practice of appointing presidential electors via a winner-take-all election is decisive. "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (citations omitted); *see, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (relying on "settled practice" that "all 50 States . . . have followed for decades, even centuries" to reject one-person, one-vote challenge to Texas statewide districting plan). There is no support for Plaintiffs' claim that a practice dating back to the first presidential election, which Texas has used since 1848, and which prevails in all but two States today, suddenly became unlawful after *Bush v. Gore*. The Court thus need not "delve too deeply into the content of [Plaintiffs'] complaint" to dismiss it for failing to "create a 'plausible claim for relief.'" *Schweikert*, 2016 WL 7046845, at *2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

II. PLAINTIFFS HAVE NOT STATED A CLAIM EVEN IF THE LEGALITY OF TEXAS'S MANNER OF APPOINTING ELECTORS WERE NOT A SETTLED ISSUE.

Even if history and practice do not foreclose this challenge, Plaintiffs still fail to state a claim. First, a statewide election by definition equally weighs all the votes cast in the state, so Texas's winner-take-all system for appointing electors does not violate the one-person, one-vote rule. Second, associational rights under the First and Fourteenth Amendments do not guarantee proportional representation to unsuccessful voters. Third, merely losing an election is not a vote denial or abridgment on account of race or color to trigger the protections of Section 2 of the Voting Rights Act.

A. THE APPOINTMENT OF ELECTORS BY A STATEWIDE VOTE DOES NOT VIOLATE THE "ONE PERSON, ONE VOTE" RULE.

Plaintiffs' one person, one vote claim is premised on the assumption that they have been "denied their constitutional right to an equal vote in the presidential election." Compl. ¶ 7; *see also id.* ¶¶ 44–53 (same). But Texas's winner-take-all system gives every voter an equal vote.

Plaintiffs rely on *Gray v. Sanders*, which held that, "[o]nce 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." 372 U.S. 368, 379 (1963), *cited in* Compl. ¶ 50. As the Supreme Court recognized in summarily affirming *Williams*, the winner-take-all system "automatically" satisfies that standard and gives equal weight to each vote.

Williams, 288 F. Supp. at 628 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)). After all, "each citizen has an equal right to vote, the same as any other citizen has." *McPherson*, 146 U.S. at 40. In Texas, every vote for presidential electors is given the same weight.

There is "nothing in [this approach that is] offensive to the Constitution." *Williams*, 288 F. Supp. at 627. If there were, the "election of members of the United States House of Representatives when two or more or all are running at large, that is statewide," would violate the one person, one vote rule. *Id.* at 628. But the Supreme Court explicitly endorsed such an approach. The one person, one vote rule "is followed *automatically* . . . when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history." *Wesberry*, 376 U.S. at 8 (emphasis added). "If [a statewide] plan is legally permissible in the selection of Congressmen, it may hardly be stigmatized as unlawful in choosing electors." *Williams*, 288 F. Supp. at 628.[2]

Plaintiffs object to *Williams* because, according to them, the decision relied on an "invidiousness" standard that the Supreme Court "removed" in *Bush v. Gore*. Compl. ¶ 53. Plaintiffs are incorrect. The Supreme Court uniformly applied an "invidiousness" standard to "one person, one vote" claims before *Bush v. Gore*, and it

[2] In all events, Texas's system affords representational equality to every voter, and under binding Supreme Court precedent, that is sufficient to satisfy the one person, one vote rule. *See Evenwel*, 136 S. Ct. at 1126 (holding that the one person, one vote mandate is satisfied by "representational equality," *i.e.*, the right to "a representative who represents the same number of constituents as all other representatives," and does not require "voter equality, *i.e.*, the right of eligible voters to an equal vote" (citations and quotations omitted)).

has done the same since. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016) (explaining that one person, one vote cases have "made clear that minor deviations from mathematical equality do not, by themselves, make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State" (citation and quotations omitted)). Had *Bush v. Gore* eliminated the invidiousness standard, it would have overruled decades of precedent. The Supreme Court "has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.'" *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam) (quoting *Agostini v. Felton,* 521 U.S. 203, 237 (1997)). Plaintiffs cannot overcome that hurdle.

In any event, Plaintiffs grossly distort *Bush v. Gore*, which involved a unique and narrow application of the one person, one vote rule. *Bush*, 531 U.S. at 109. The situation the Court confronted had nothing to do with Florida's decision to appoint its electors through a winner-take-all election. Indeed, the Court reaffirmed that "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself." *Bush*, 531 U.S. at 104. "Having once granted the right to vote on equal terms," however, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–05. The problem was that "the recount procedures the Florida Supreme Court . . . adopted" were violating "its obligation to avoid arbitrary and disparate

treatment of the members of its electorate" by employing "standards for accepting or rejecting contested ballots" that varied "not only from county to county but indeed within a single county from one recount team to another." *Id.* at 105–06. *Bush v. Gore* thus did not eliminate the invidiousness standard. The ruling enforced it. *See WMCA, Inc. v. Simon*, 370 U.S. 190, 191 (1962) (per curiam) (explaining a one person, one vote violation is "stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification").

B. THE RIGHT OF ASSOCIATION DOES NOT GUARANTEE PROPORTIONAL REPRESENTATION FOR UNSUCCESSFUL VOTERS.

In their freedom-of-association claim, Plaintiffs ask this Court to extend the First and Fourteenth Amendments to guarantee proportional representation despite an electoral loss. The Supreme Court has recognized the right of individuals to associate by voting for the political party of their choice, and the right of political parties to define their membership, set policy objectives, and select candidates who will represent them. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–58 (1997); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 214–15 (1986). But "[t]he First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464–65 (1979) (citations and quotations omitted). Nothing in the First or Fourteenth Amendment guarantees representation to the losing party. Plaintiffs' request to recognize such a right should be rejected for several reasons.

First, Plaintiffs do not allege that appointing electors by statewide winner-take-all vote regulates ballot access—the key issue in several cases plaintiffs cite. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 430 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983); *Williams v. Rhodes*, 393 U.S. 23, 24–26 (1968); *Wilson v. Birnberg*, 667 F.3d 591, 598–99 (5th Cir. 2012). The Complaint alleges the opposite. In 2016, the Democratic Party's presidential candidate was on the ballot, and Texas voters were able to express their political views by casting their votes for their candidate. Compl. ¶¶ 44, 45.

Second, the Complaint does not allege that appointing electors by statewide vote implicates the rights of political parties to control their membership, direct their political efforts, or appeal to voters as a fundamental exercise of their right of association. *See, e.g.*, *Tashjian*, 479 U.S. at 215. Plaintiffs do not (and cannot) allege that appointing electors by statewide election requires political parties to divulge the names of members, disqualify a political party from public benefits or privileges, or compel association with unwanted members or voters. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 587 (2005). Nor does the Complaint allege that appointing electors in this way regulates, let alone interferes with, any party's ability to canvass the electorate, enroll or exclude potential members, nominate the candidate of its choice, hold political fundraisers and rallies, or otherwise engage in the same activities as any other political party.[3] *See id.* Because the appointment of electors by statewide

[3] The Complaint briefly suggests that the winner-take-all method interferes with citizens' association and petition rights because presidential candidates are less likely to hold campaign events in Texas. Compl. ¶ 59. This argument bears little attention, but it is worth noting that how and where a

winner-take-all election does not regulate the wide range of constitutionally-recognized political and associational activities, it cannot burden the exercise of those rights.

Finally, given the dearth of supporting precedent, Plaintiffs try to frame this statewide election as having "discarded" all of the votes for the Democratic candidate, thereby denying those voters the right to associate with the Democratic Party and express their political views through the ballot. *E.g.*, Compl. ¶ 57. Plaintiffs' problem is that no votes were discarded; they were all counted. *Id.* ¶ 2. Plaintiffs are just dissatisfied that the Republican Party's candidate secured more votes. Having failed to persuade a majority of Texans to vote for their preferred candidate, Plaintiffs now demand that, for the first time, a First Amendment right to make their political views effective via proportional representation in the Electoral College be recognized. The Court should reject that request.

C. PLAINTIFFS CANNOT PLAUSIBLY ALLEGE THAT THE WINNER-TAKE-ALL METHOD VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT.

To state a Section 2 vote-dilution claim, a plaintiff must sufficiently allege that a challenged voting practice "results in a denial or abridgment of the right . . . to vote on account of race or color," 52 U.S.C. § 10301(a), or "because [of membership in] a language minority group," *id.* § 10303(f)(2). That requires showing, in turn, that an electoral structure "operates to minimize or cancel out [minority voters'] ability to elect their preferred candidates." *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). Here,

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presidential campaign focuses its efforts is at the core of the candidate's and political party's exercise of *their own* associational rights.

Plaintiffs claim that Texas's system violates Section 2 by "dilut[ing] the power of the Hispanic and African-American voting bloc by expanding the electorate to include more white voters." Compl. ¶ 71. The Court should reject Plaintiffs' novel argument. They propose an unprecedented interpretation of Section 2 that lacks any foundation in the statute's text, history, or purpose.

As an initial matter, the purpose of Section 2's "results" test is undisputed. It has nothing to do with presidential electors. Congress adopted the current text of Section 2 to codify the effect-based vote-dilution standard announced in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See LULAC v. Clements*, 999 F.2d 831, 851 (5th Cir. 1993) (en banc). Congress was well aware of the potential for vote dilution in at-large elections, *see id.* at 851–52, but the congressional record contains no evidence that Congress thought Section 2 might disrupt the long-settled practice of appointing electors based on a statewide vote. There is no reason to believe Congress intended for Section 2 to diminish the States' plenary constitutional authority over the appointment of presidential electors.

Regardless, any denial or abridgment of the right to vote that Plaintiffs claim to have suffered is solely on account of their preference for Democratic or third-party candidates—not "on account of race or color." Plaintiffs assert that they have been "deprived of the right to have their votes counted equally and meaningfully" not because they are minorities (not all of them are), but because they "have voted for, and will vote for, the Democratic or third-party candidate for President in Texas." Compl. ¶ 22. They complain that "the entirety of Texas's Electors went to Republican

candidates, cancelling the votes of Democratic voters." *Id.* ¶ 45. And they allege that "the same phenomenon occurs in reverse in heavily Democratic states where votes for the Republican candidate for President are systematically discarded." *Id.* ¶ 6. In sum, the "phenomenon" underlying the Complaint is the failure of Democratic voters to secure the appointment of Democratic electors.

That is not a "denial or abridgment" of the right to vote, let alone denial or abridgment "on account of race or color." Section 2 draws a clear line between race-based vote-dilution and mere "political defeat at the polls." *Clements*, 999 F.2d at 850–55. As the en banc Fifth Circuit majority held in *LULAC v. Clements*, "failures of a minority group to elect representatives of its choice that are attributable to 'partisan politics' provide no ground for relief." *Id*. at 854. Yet that is precisely what Plaintiffs allege.

Their own allegations demonstrate that white Democratic voters experience the same alleged injury as minority Democratic voters. According to Plaintiffs, Democratic presidential candidates in Texas have won 84 to 98 percent of Black votes, 61 to 63 percent of Hispanic votes, and up to 27 and 31 percent of white votes. Compl. ¶¶ 86, 90–91. They add that "every single Democratic vote [has been] systematically discarded under [Texas's] method of selecting Electors." *Id.* ¶ 44. It follows, then, that a substantial percentage of white voters suffer "vote dilution" under Plaintiffs' theory, while a substantial percentage of Black and Hispanic voters do not. Whether a vote is "diluted," in other words, does not depend on the voter's race; it depends on which party he or she supports. The electoral defeats underlying the Complaint thus cannot

establish race-based vote dilution because they "were shared equally among all members of the Democratic Party." *Clements*, 999 F.2d at 852. Section 2 "is implicated only where Democrats lose because they are [minorities], not where [minorities] lose because they are Democrats." *Id.* at 854.

Plaintiffs' requested remedy also underscores the critical flaw in the theory of the Complaint: like the injury they claim, their proposed remedy applies equally to all Democratic voters, regardless of race. In particular, they ask the Court to "order a proportional method of distributing Electors, selecting a proportional number of Electors to each party, based on the number of votes each party's candidate receives statewide." Compl. ¶ 118(e). This relief is designed to redress partisan disadvantage, not a race-based injury.

Such relief would conflict with the VRA's text and purpose. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Yet Plaintiffs seek a guarantee that their votes for Democratic presidential candidates will translate into a proportional number of Democratic electors. Section 2 disclaims "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). Given that Section 2 rejects a right to proportional *racial* representation, there is no basis for construing the statute to ensure proportional *partisan* representation.

Finally, Plaintiffs seek to push Section 2 of the Voting Rights Act well beyond the breaking point. Section 2 was adopted pursuant to Congress's authority to enforce

the Fifteenth Amendment. *See Chisom v. Roemer*, 501 U.S. 380, 392 (1991). The "on account of race or color" requirement was intended to "help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude.'" *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993) (quoting U.S. Const. amend. XV). Remedial legislation enacted to enforce the Fifteenth Amendment must be "congruent and proportional" to the violation of that constitutional right. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). If Section 2 ensures proportional representation in the Electoral College for all Democratic voters, regardless of their race, it is not congruent and proportional to any constitutional right.

CONCLUSION

As the U.S. Supreme Court held 126 years ago, if a State chooses to appoint its presidential electors by election, so long as "each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made." *McPherson*, 146 U.S. at 40. Plaintiffs have failed to plead a claim upon which relief can be granted. Defendants request that Plaintiffs' claims be dismissed.

Respectfully submitted,

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* Application for Admission pending

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***Pro Hac Vice* motion pending

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2018, the foregoing *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.

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