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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

2:18-cv-001422-CBM-ASx

NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

Date: July 10, 2018
Time: 10:00 a.m.
Courtroom: 8B
Judge: The Honorable Consuelo B. Marshall

Action Filed: February 23, 2018

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, on July 10, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Consuelo B. Marshall, United States District Judge, in Courtroom 8B of the United States District Court for the Central District of California, located at 350 W. 1st Street, Los Angeles, California 90012, Defendants Edmund G. Brown Jr., in his official capacity as Governor of the State of California, and Alex Padilla, in his official capacity as Secretary of State of State of California, will move this Court to dismiss without leave to amend Plaintiffs' Complaint for Declaratory and Injunctive Relief, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This motion is brought on the grounds that (1) the Complaint fails to state a claim upon which relief can be granted under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and (2) the Complaint presents a nonjusticiable political question over which the Court lacks subject matter jurisdiction. This motion is based on this Notice, the Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on April 12, 2018.

Dated: April 19, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

California awards all of its presidential electors to the winner of the popular vote in California's general presidential election. Plaintiffs' challenge to this use of plurality voting (colloquially known as "winner-take-all") fails as a matter of law because it is foreclosed by binding Supreme Court precedent, and also because Plaintiffs do not and cannot allege that California treats votes for presidential electors differently based on geographic location or a protected classification. In selecting its presidential electors, California counts every vote equally, before awarding all of its electors to the candidate that received the most votes. As many courts have already ruled in this and other contexts, plurality voting comports with "one person, one vote" requirements. The associational rights claim fails because any burden on associational rights imposed by plurality voting is minimal or non-existent, and is easily justified by California's interest in maximizing the influence of its electors in the Electoral College. Finally, to the extent that Plaintiffs' challenge is part of a broader attempt to reform the Electoral College without a constitutional amendment, the challenge fails on political question grounds.

LEGAL AND PROCEDURAL BACKGROUND

I. THE SELECTION OF PRESIDENTIAL ELECTORS

A. Constitutional Requirements for the Selection of the President.

The Constitution provides that the president is to be selected by electors appointed by each State, and 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 the Congress . . . ." U.S. Const. amend. XII; *id*. art. II, § 1, cl. 2. Winning the presidency requires a majority of the electors, and if no candidate receives a majority, the House of Representatives selects the president from among the top three candidates, with each State's delegation having one vote. *Id*. amend. XII.

In granting discretion to the States to decide how to appoint their electors, 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." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). Each State has "plenary" authority to determine the manner of appointing its electors. *Id*. at 35. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (citing U.S. Const. art. II, § 1). "The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors." *Id*.

The autonomy afforded to each State in selecting its electors is reflected throughout the larger Electoral College process, in which each State functions as an independent unit. For example, if the selection of the president is to be determined by the House of Representatives, "[t]he state acts as a unit, and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in congress elected by districts." *McPherson*, 146 U.S. at 27. The same principle applies if the president is selected directly by the electors: "The state also acts individually through its electoral college . . . ." *Id*. The Constitution "requires that electoral votes be cast state-by-state, not that the President be elected by plurality or majority of the nationwide popular vote. . . . Article II, section 1 and the Twelfth Amendment are the Constitution we have. State-by-state voting is the system for which they provide." *Porter v. Bowen*, 518 F.3d 1181, 1183-84 (9th Cir. 2008) (Kleinfeld, J., dissenting from denial of reh'g en banc). Thus, within the Electoral College, States act as individual units with the collective power to elect the President, a power which States have discretion in wielding.[1]

[1] In addition, "the responsibility for administering presidential elections occurs across fifty-one separate jurisdictions, including individualized determinations of,

The States' constitutional power to act as individual sovereign entities is not limited to the Electoral College. The Constitution recognized States as autonomous political actors and preserved the powers of the States as individual units, in exchange for the States' agreement to give over portions of their sovereignty to the federal government. "[T]here is not a single representative institution created by our constitutional framework in which the will of the majority is not filtered through the states, at least to some degree. That is to say, the Senate, the House of Representatives, and the constitutional amendment process, like the electoral college, all rely on the states as political entities." Samuel Issacharoff, *Law, Rules, and Presidential Selection*, 120 Pol. Sci. Q. 113, 116 (2005). For example, the Senate provides equal representation to all States, regardless of population; each State receives a minimum of one seat in the House, even if a State's population is lower than the nationwide average number of persons represented by a House member; and the Article V amendment process requires "ratification by a supermajority of state legislatures," and not ratification by "state legislatures representing a supermajority of the American people." *Id*. at 117-118. The Electoral College is but one example indicating that the Framers of the Constitution "were unequivocal in maintaining an overriding commitment to the preservation of the states as political entities within the federal system." *Id*. at 116.

B. Plurality Voting in the Selection of Presidential Electors.

Although the States initially experimented with various methods of selecting electors,[2] by 1836, every State but one had decided to put the selection of electors

among other things, voter eligibility." Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1257 (2012).

[2] At first, "various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways." *McPherson*, 146 U.S. at 29.

to a popular vote and award all of its electors to the popular vote winner. *See McPherson*, 146 U.S. at 32-33. Currently, only Maine and Nebraska depart from this practice, by awarding two electors to the winner of the popular vote and the rest of the electors proportionally, by congressional district. *See* Me. Rev. Stat. tit. 21-A, § 805; Neb. Rev. Stat. § 32-714.

Driving this shift toward near unanimity was an understanding that it is in each State's political self-interest to award all of its presidential electors to one candidate, once other States have adopted this practice. "In the fourth presidential election, Virginia, under the advice of Mr. [Thomas] Jefferson, adopted the general ticket, at least 'until some uniform mode of choosing a president and vice president of the United States shall be prescribed by an amendment to the constitution.'" *McPherson*, 146 U.S. at 31-32 (quoting Laws Va. 1799-1800, p. 3). Jefferson's advice "sprang from a desire to protect his State against the use of the general ticket by other States. He found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more in the college by adoption of the general ticket scheme of selection." *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622, 626 (E.D. Va. 1968), *aff'd per curiam*, 393 U.S. 320 (1969), *and reh'g denied*, 393 U.S. 1112 (1969). As Jefferson observed, "while ten states choose either by their legislatures or by a general ticket, it is folly and worse than folly for the other states not to do it."[3]

II. CALIFORNIA'S METHOD OF SELECTING PRESIDENTIAL ELECTORS

Prior to California's general presidential election, political parties "submit[] to the Secretary of State [their] certified lists of nominees for electors of President and Vice President of the United States . . . ." Cal. Elec. Code § 6901. Voters then select "as many electors of President and Vice President of the United States as the

[3] Michael J. O'Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. Cal. L. Rev. 2421, 2427 (1992) (citing Thomas Jefferson, *The Writings of Thomas Jefferson*, 134 (Library ed. 1903), quoted in American Bar Association, *Electing the President: A Report on the Commission on Electoral College Reform* (1967), at 23).

state is then entitled to," but it is the "names of the candidates for President and Vice President of the several political parties" that appear on the ballot. *Id*. §§ 6902, 6901.

The Secretary of State then "analyze[s] the votes given for presidential electors"; certifies to the Governor "the names of the proper number of persons having the highest number of votes"; and issues a certificate of election to each elector, which "shall be accompanied by a notice of the time and place of the meeting of the presidential electors . . . ." Cal. Elec. Code § 15505. At the meeting, the electors "shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent . . . ." *Id*. § 6906.

III. PLAINTIFFS' ALLEGATIONS

Plaintiffs filed this action on February 21, 2018, and on the same day Plaintiffs' counsel filed substantially identical complaints in federal courts in Massachusetts, South Carolina, and Texas.[4] The complaint alleges that California's method of selecting presidential electors violates Plaintiffs' equal protection and First Amendment associational rights, citing a general "constitutional right to an equal vote in the presidential election." Compl. ¶ 7. Plaintiffs allege that because nearly all States use plurality voting in selecting presidential electors, voters in different States are treated or valued differently by presidential campaigns, which focus solely on "battleground" States to the exclusion of California; and that this makes presidential elections more susceptible to "outside interference." *Id*. ¶¶ 8, 9,

[4] *See Lyman, et al. v. Baker, et al.*, No. 1:18-cv-10327 (D. Mass. Feb. 21, 2018), ECF No. 1; *Baten, et al. v. McMaster, et al.*, No. 2:18-cv-00510 (D.S.C. Feb. 21, 2018), ECF No. 1; and *League of United Latin American Citizens, et al. v. Abbott, et al.*, No. 5:18-cv-00175 (W.D. Tex. Feb. 21, 2018), ECF No. 1. The companion complaints also challenge state laws requiring selection of presidential electors on a "winner-take-all" basis, and raise the same equal protection and First Amendment associational rights claims alleged here. *See* Request for Judicial Notice ("RJN"), Exs. 1-3. The South Carolina and Texas complaints also assert claims under Section 2 of the Voting Rights Act. *Id.*, Exs. 2-3. A motion to dismiss the Texas action was filed on April 9, 2018 and is pending. *Id.*, Ex. 4.

51-53. Plaintiffs also allege that California "counts votes for a losing presidential candidate in California only to discard them in determining Electors who cast votes directly for the presidency," which "results in the votes of citizens who voted for a losing candidate in the state not being counted in the final direct election for President." *Id*. ¶¶ 13, 55. Plaintiffs further allege that California's use of plurality voting burdens "the right of association" and "the right to have a voice in presidential elections through casting a vote" because it "ensures that Plaintiffs' voices are not heard and Plaintiffs' votes do not count toward the selection of Electors," thereby placing "a severe burden on Plaintiffs' rights to associate and to effectively express their political preference through voting . . . ." *Id*. ¶¶ 14, 44, 58. Plaintiffs seek declaratory and injunctive relief barring the use of plurality voting for presidential electors in California, as well as "any other system that fails to treat each California citizen's vote for the President in an equal manner, including selection by Congressional District vote." *Id*. (Prayer for Relief 1.c.). Plaintiffs also ask the Court to set a deadline for California officials to adopt a new method for selecting presidential electors and, if they fail to timely propose or implement a "valid method," to devise one and impose it on the State. *Id*. (Prayer for Relief 1.d.-e.).

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (citation omitted). "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) (internal quotation marks and citation omitted). The court accepts as true all material allegations in the complaint

and construes those allegations in the light most favorable to the plaintiff. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678.

Federal Rule of Civil Procedure 12(b)(1) allows a court to dismiss a claim for lack of subject matter jurisdiction. Such a motion is based on the allegations of the complaint, and requires the district court to accept the allegations of the complaint as true. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). However, the plaintiff bears the burden of showing that each claim comes within the jurisdiction of a federal court. *See Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

Dismissal without leave to amend is appropriate when the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Watison v. Carter*, 668 F.3d 1108, 1117 (9th Cir. 2012) (internal quotation marks and citation omitted).

ARGUMENT

I. PLURALITY VOTING IN THE SELECTION OF CALIFORNIA'S PRESIDENTIAL ELECTORS DOES NOT VIOLATE "ONE PERSON, ONE VOTE"

Plaintiffs' "one person, one vote" claim relies inappropriately on principles from the Supreme Court's reapportionment cases, which establish that "jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016), citing *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The Court has also held that "one person, one vote" prohibits differential weighting of votes based on where a voter resides (e.g., rural versus urban areas). *See Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Plaintiffs allege that California's use of plurality voting violates "one person, one vote" because California "counts votes for a losing presidential candidate in California only to discard them in determining Electors who cast votes directly for the presidency." Compl. ¶ 13. This allegedly "unconstitutionally magnifies the votes of a bare plurality of voters by translating those votes into an entire slate of presidential Electors . . . while, at the same time, the votes cast for all other candidates are given no effect." *Id.* This allegedly "results in the votes of citizens who voted for a losing candidate in the state not being counted in the final direct election for President." *Id.* ¶ 55.

Plaintiffs' "one person, one vote" claim is foreclosed by binding Supreme Court precedent. It also fails on the merits, because all votes are indeed counted equally under California's method of selecting presidential electors.

A. The One Person, One Vote Claim is Foreclosed by Binding Supreme Court Precedent.

Plaintiffs' "one person, one vote" challenge fails under directly controlling Supreme Court precedent. Over a century ago, the Court rejected a similar challenge to a State's decision to appoint electors by congressional district, *McPherson v. Blacker*, 146 U.S. 1—a method that, under Plaintiffs' theory, would be unconstitutional. Compl. ¶ 12. In *McPherson*, the Court held that "the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States." 146 U.S. at 35. The Court found no violation under the Fourteenth or Fifteenth Amendments so long as "each citizen has an equal right to vote, the same as any other citizen has." *Id.* at 40.

The Supreme Court has also affirmed a decision directly rejecting a claim identical to Plaintiffs' claim here. In *Williams v. State Board of Elections*, a three-judge district court considered a "one person, one vote" challenge to Virginia's plurality voting method of awarding presidential electors. 288 F. Supp. 622 (E.D. Va. 1968). The district court called this practice "another form of the unit rule" and

concluded that "the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote." *Id*. at 626, 627. Although the losing parties receive no electors, and this could "in a sense" be considered discrimination, "in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone." *Id*. at 627. The Supreme Court summarily affirmed. 393 U.S. 320 (1969), *reh'g denied*, 393 U.S. 1112 (1969).

It is a "well-established rule that the Supreme Court's summary affirmances bind lower courts, unless subsequent developments suggest otherwise." *United States v. Blaine Cty., Montana*, 363 F.3d 897, 904 (9th Cir. 2004) (citing *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)). Summary affirmances "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). Because the Supreme Court summarily affirmed a lower court decision rejecting the same claim raised here by Plaintiffs, this Court is bound by that ruling and Plaintiffs' "one person, one vote" claim must fail.

Plaintiffs mistakenly argue that *Bush v. Gore*, 531 U.S. 98 (2000), undercuts *Williams*, by somehow eliminating an "invidiousness" requirement for "one person, one vote" claims. Compl. ¶ 40. Plaintiffs are incorrect. *Bush* did not overrule prior cases on this point. To the contrary, the Court's per curium decision was expressly limited to its unique facts. *Id*. at 109. The decision also rested on concerns that Florida's recount procedures were based on arbitrary and disparate "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 105-106. To the extent *Bush* has any relevance beyond its specific facts, it re-enforces, rather than calls into question, the invidiousness requirement. And finally, the Supreme Court has continued to apply an invidiousness requirement in

"one person, one vote" cases subsequent to *Bush*. *See, e.g.*, *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016) ("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") (internal quotation marks and citation omitted). For all these reasons, *Bush* does not authorize this Court to reopen "the precise issues presented and necessarily decided" by *Williams*. *Mandel*, 432 U.S. at 176.

Indeed, every other court to have considered this type of challenge has rejected it, usually in reliance on *McPherson* or *Williams*, including those ruling after *Bush*.[5] *See Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978) (rejecting equal protection challenge to plurality voting for selection of State's presidential electors), *aff'd*, 580 F.2d 1051 (table) (5th Cir. 1979); *Penton v. Humphrey*, 264 F. Supp. 250, 251 (S.D. Miss. 1967) (same); *see also Lowe v. Treen*, 393 So. 2d 459, 461 (La. Ct. App. 1980) (same). As one court recently concluded, "[t]he precise issue contained in Plaintiff's complaint was previously litigated, dismissed, and affirmed summarily by the Supreme Court. This Court lacks the authority to reach a conclusion that directly contradicts the Supreme Court's own jurisprudence—which is precisely what Plaintiff's complaint would ask this Court to do. Accordingly the case must be dismissed." *Schweikert v. Herring*, No. 3:16-cv-00072, 2016 WL 7046845, at *1 (W.D. Va. Dec. 2, 2016) (citations to *Williams* omitted).[6] *McPherson* and *Williams* are thus directly controlling authorities that require the dismissal of the "one person, one vote" claim.

[5] In 1966, thirteen States sued the other 37 States, challenging the widespread practice of awarding presidential electors based on plurality voting. That case was filed directly in the U.S. Supreme Court, which declined to exercise original jurisdiction. *See Delaware v. New York*, 385 U.S. 895 (1966).

[6] *See also Williams v. North Carolina*, No. 3:17-cv-00265, 2017 WL 4935858, at *1 (W.D.N.C. Oct. 31, 2017) ("the remedy [plaintiff] seeks from this Court—which is mandating that North Carolina adopt a pro-rata system for presidential electors rather than a winner-take-all scheme—is decisively foreclosed by binding precedent"); *Conant v. Brown*, 248 F. Supp. 3d 1014, 1024 (D. Or. 2017) (holding

B. California's Method of Selecting Presidential Electors Satisfies "One Person, One Vote" Principles.

Even if Plaintiffs' "one person, one vote" claim were not foreclosed by Supreme Court precedent, it would still fail on the merits. Each vote cast in California's election for presidential electors carries the same weight as all other votes cast in that election. California's practice is therefore in stark contrast to *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in which the Supreme Court struck down a State's "county unit" system for political primaries because it valued votes differently based on geographic location.[7] California does not weigh votes for presidential electors differently depending on where the voter lives; there are no differences as between rural or urban votes, or any other differences based on location. Nor does California require that a presidential candidate receive support from a minimum number of voters in certain counties, which has also been found to violate "one person, one vote" principles. *See Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) (striking down state law applying "a rigid, arbitrary formula to sparsely settled counties and populous counties alike" in the context of a petition requirement for nomination of presidential electors). Under California law, every vote counts equally in determining which presidential candidate received the most votes; that is, every vote has the same value in determining the winner of the election.

Plaintiffs allege that their votes are somehow "discarded" because votes for the losing candidate do not result in any electors. Compl. ¶¶ 1, 6, 13, 31, 32, 33, 44, 45. But this is essentially a challenge to the use of plurality voting to

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that challenge to Oregon's "winner-take-all rule" is "foreclosed by Supreme Court precedent").

[7] Under Georgia's "county unit" primary system, each county received one to three representatives, depending on population, and the winner of each county's popular vote received all of the county's representatives. This system was used for primary elections for Georgia's lower legislative chamber, United States senator, and governor. *See Gray*, 372. U.S. at 370-71.

determine the winner of the election in California—and not a cognizable equal protection claim. Plurality voting is the standard electoral method in the United States, used for Congressional and state legislative districts and many local elections as well, and no court has ever found it to violate one person, one vote principles. As the Ninth Circuit has determined, the ballots of the voters who "select[] a losing candidate in a plurality or runoff election" are not "discarded" but rather "are simply counted as votes for losing candidates." *Dudum v. Arntz*, 640 F.3d 1098, 1109-10 (9th Cir. 2011) (rejecting argument that in an instant runoff voting system[8] "ballots are discarded, and so not counted, in determining the election's ultimate outcome").

Nor, contrary to the theory of Plaintiffs' complaint, have courts recognized a right under "one person, one vote" or the Equal Protection Clause to cast an "effective" vote that translates directly into representation. The Supreme Court has flatly rejected this principle: "The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization." *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 75-76 (1980). "[T]o say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004). The Constitution "guarantees equal protection

[8] Instant runoff voting "allows voters to rank, in order of preference, candidates for a single office." *Dudum*, 640 F.3d at 1101. A candidate with the majority of first-choice votes wins the election. If no candidate received a majority, "the candidate who received the fewest first-choice votes is 'eliminated,' meaning that that candidate cannot win the election. The second-choice votes on the ballots that had selected the eliminated candidate are then distributed to those voters' second-choice candidates. Some candidates' vote totals, as a result, now reflect a combination of first- and second-choice votes. If all candidates ranked by a voter are eliminated, that voter's ballot is 'exhausted,' meaning that it is not recounted as the tabulation continues." *Id*. (citations omitted). This reallocation process continues until one candidate "receives a majority of the operative votes on the 'continuing' ballots." *Id*. (citation omitted).

of the law to persons, not equal representation in government to equivalently sized groups . . . ." *Id*. at 288.

The Supreme Court has also rejected the precise arguments made by Plaintiffs here, in the context of multimember districts. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court upheld the use of multimember districts for state legislatures, in which multiple candidates are elected based on plurality voting. In doing so, the Court rejected arguments that plurality voting inherently violates equal protection principles:

> [T]ypical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year.

403 U.S. at 153. The Court concluded, "we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." *Id*. at 160.

Similar arguments that proportional representation is a constitutional imperative were also rejected by a three-judge district court in a challenge to California's former statutes governing the election of political parties' delegates to their national conventions, and this decision was summarily affirmed by the Supreme Court. *Graham v. Fong Eu*, 403 F. Supp. 37 (N.D. Cal. 1975), *aff'd per curiam*, 423 U.S. 1067 (1976). In *Graham*, plaintiffs challenged these statutes based on their purported "failure to provide convention representation for those who support losing candidates," which allegedly resulted in "an unconstitutional denial of 'fair and effective representation' and the 'right to cast an effective ballot.'" *Id*. at 42. The three-judge court squarely rejected this line of reasoning, holding:

> Assuming the Equal Protection Clause to be applicable here, it requires only that when an election is held in the delegate selection process, the weight assigned to individual votes cannot depend on where individual voters live or whether they belong to identifiable racial or political groups. There are no claims of geographic discrimination in these cases, and neither set of plaintiffs has made a factual showing of discrimination against an identifiable racial or political group. All that appears is that losing voters are denied convention representation, not because of their support of particular candidates, but because the candidates they have chosen to support have lost an election. This is not a denial of equal protection.

Graham, 403 F. Supp. at 45 (citations omitted).

The *Graham* court also distinguished the Supreme Court's opinion in *Williams v. Rhodes*, 393 U.S. 23 (1968), which struck down Ohio election laws imposing onerous requirements upon new political parties seeking to be placed on the ballot for a general presidential election. As the *Graham* court explained, "the right to cast an 'effective' vote announced in *Williams v. Rhodes* insured only that supporters of a particular candidate for President would have a reasonable opportunity to offer their candidate to the electorate and to vote for him themselves," and "it was not necessary that voter support be translated into voting strength in the electoral college, the final decision-making forum." 403 F. Supp. at 47 n. 34. The *Graham* court then noted that "[t]he [Supreme] Court's affirmance in *Williams v. Virginia State Board of Elections* just a few months later confirms the limited reach of the 'effective ballot' rationale of *Williams v. Rhodes* . . . ." *Id*. The Supreme Court's summary affirmance of the *Graham* opinion (423 U.S. 1067) reflects its agreement with "the precise issues presented and necessarily decided" in that case, *Mandel*, 432 U.S. at 176, and indicates that the Court saw no constitutional problem with the fact that supporters of losing presidential candidates received no representation.

In sum, Plaintiffs have failed to plausibly allege unequal counting of votes. Their arguments as to why plurality voting violates "one person, one vote" have already been repeatedly rejected, including in cases that are binding authority on

this Court.[9] The "one person, one vote" claim therefore fails as a matter of law and should be dismissed without leave to amend.

II. PLURALITY VOTING IN THE SELECTION OF PRESIDENTIAL ELECTORS DOES NOT VIOLATE ASSOCIATIONAL RIGHTS

Plaintiffs' First Amendment associational rights claim also fails as a matter of law and should be dismissed without leave to amend. It simply repackages the "one person, one vote" claim, and is thus foreclosed by binding Supreme Court precedent and a host of other decisions discussed above. Regardless, California's use of plurality voting satisfies the balancing test articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992).

A. The *Burdick* Balancing Test Applies to First and Fourteenth Amendment Challenges to State Election Laws.

The balancing test set forth by the Supreme Court in *Burdick* (504 U.S. 428) provides the "appropriate standard of review for laws regulating the right to vote." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). The *Burdick* test applies to Plaintiffs' associational claim, as well as to whatever might remain of Plaintiffs' equal protection claim. *See id*. at 1027 (applying "*Burdick* balancing approach" to equal protection claim after finding no basis for one person, one vote argument).

Burdick acknowledges that governments "must play an active role in structuring elections," and that "[e]lection laws will invariably impose some burden upon individual voters." 504 U.S. at 433. Therefore, "not every voting regulation is subject to strict scrutiny." *Id.* Rather, "a more flexible standard applies," and

[9] To the extent that Plaintiffs' objection is really that Plaintiffs' votes are "discarded when it really counts in mid-December" (Compl.¶ 1), the underlying objection is that the Electoral College itself does not comport with "one person, one vote" principles. Such a claim fails because the Supreme Court has already recognized the Electoral College as a constitutionally approved exception to "one person, one vote" principles: "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality." *Gray*, 372 U.S. at 378 (citations omitted).

this requires a court "considering a challenge to a state election law" to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (internal quotation marks and citation omitted).

Strict scrutiny applies under *Burdick*'s balancing test only when First or Fourteenth Amendment rights "are subjected to 'severe' restrictions." *Burdick*, 504 U.S. at 434 (citation omitted). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Ninth Circuit has "repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process." *Dudum*, 640 F.3d at 1106 (citation and alterations omitted).

B. Any Burden on Associational Rights Is Minimal or Non-Existent, So Strict Scrutiny Does Not Apply.

Plaintiffs contend that California's use of plurality voting burdens "the right of association" and "the right to have a voice in presidential elections through casting a vote" (Compl. ¶ 14) because it "ensures that Plaintiffs' voices are not heard and Plaintiffs' votes do not count toward the selection of Electors" (*id.* ¶ 44), thereby placing "a severe burden on Plaintiffs' rights to associate and to effectively express their political preference through voting" (*id.* ¶ 58). These objections just duplicate the "one person, one vote" claim that Plaintiffs' votes "do not count" if Plaintiffs are unable to elect their preferred candidates, and the associational rights claim thus styled must fail for the same reasons.

In any event, Plaintiffs have failed to plausibly allege that their associational rights are actually burdened, let alone "severely" burdened. Plaintiffs have not alleged that they are prevented from voting for the presidential candidate of their choice. *Cf. Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down state laws burdening ability of new political parties to place presidential candidates on the ballot); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986) (state law prohibiting political party from opening primary to non-party members affects partisan political organization efforts, which "limits the Party's associational opportunities"). Nor has any court recognized an associational right to successfully elect one's preferred candidate. "[T]he right to bring one's views to the attention of a final decision-making forum does not include a right to official representation with the forum itself. If the right of association included a right of proportional representation, *Whitcomb v. Chavis* [403 U.S. 124, rejecting challenge to multimember state legislative districts] could not have been decided as it was." *Graham*, 403 F. Supp. at 45 (citation omitted), *aff'd per curiam*, 423 U.S. 1067.

Plaintiffs allege that "candidates from major political parties rarely hold campaign events in California once they are selected by their parties in the primary. This results in a reduced opportunity for all Californians to interface with and petition with candidates for major political parties in person . . . ." Compl. ¶ 46. This allegedly prevents Plaintiffs from "express[ing] their ideas, hopes, and concerns to their government and their elected representatives." *Id*. These assertions do not constitute plausible allegations that associational rights have been burdened, because there is no associational right to receive campaign attention at all, much less in proportion to population. *See, e.g.*, *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-65 (1979) ("[t]he First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective" (internal quotation marks and citation omitted)).

Under California's method of selecting electors, "[t]here is no unequal weighting of votes, no discrimination among voters, and no obstruction or impediment to voting," which means that "the burden on [a plaintiff's] Fourteenth Amendment rights is far from severe. If a burden exists at all . . . it is at best very minimal." *Pub. Integrity All.*, 836 F.3d at 1027 (citations omitted). California's use of plurality voting in selecting its electors is thus a "reasonable, nondiscriminatory restriction[]," and strict scrutiny does not apply. *Burdick*, 504 U.S. at 434.

C. Plurality Voting Is Justified by California's Important Regulatory Interests.

California's important regulatory interests amply justify the use of plurality voting under *Burdick*'s balancing test. The Constitution gives the California legislature plenary authority to determine the manner of selecting the State's presidential electors (U.S. Const. art. II, § 1, cl. 2), and the California legislature has chosen a method that maximizes the impact of the State's electors within the Electoral College. The fact that plurality voting increases the voting power of a State within the Electoral College has been recognized in the social science literature,[10] as well as by the 48 jurisdictions that have adopted this method for the selection of electors. As observed with respect to Virginia's use of plurality voting, "[t]he legislature . . . 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. The latter course was taken, and we cannot say unwisely." *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. at 628.

[10] *See, e.g.*, John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 Vill. L. Rev. 304, 315-16 (1968).

The question of the California legislature's decision to use plurality voting for selecting presidential electors is "not one of policy but of power." *McPherson*, 146 U.S. at 35. The California legislature is entitled to this choice as a sovereign political actor playing a constituent role in the Electoral College. In doing so, the California legislature has acted consistently with its obligation to administer elections in a fair manner, without resort to discriminatory methods. Plurality voting for the selection of electors is a "generally applicable, evenhanded, politically neutral" electoral system that satisfies the *Burdick* test, because it does not discriminate based on political preference or any protected classification. *Dudum*, 640 F.3d at 1106 (citation and alterations omitted).

California's selection of plurality voting is therefore entitled to deference, and its determination that plurality voting best serves its interests should not be second-guessed by the courts. "Such respect for governmental choices in running elections has particular force where, as here, the challenge is to an electoral system, as opposed to a discrete election rule (e.g., voter ID laws, candidacy filing deadlines, or restrictions on what information can be included on ballots)." *Dudum*, 640 F.3d at 1114. "[E]lectoral systems serve diverse interests with various degrees of success. That is why, absent a truly serious burden on voting rights, 'it is the job of democratically-elected representatives to weigh the pros and cons of various [election] systems.'" *Id.* at 1115 (quoting *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)).

Thus, the electoral system chosen by the California legislature for the selection of presidential electors satisfies the *Burdick* balancing test. It places no burden on any associational rights that have been recognized by the courts, and in any event is justified by California's important regulatory interests as a sovereign political actor within the Electoral College. Plaintiffs have failed to state a claim for violation of associational rights, and the Court should dismiss this claim without leave to amend.

III. THE CHALLENGE TO CONSTITUTIONAL PROCEDURES FOR SELECTION OF THE PRESIDENT FAILS ON POLITICAL QUESTION GROUNDS

This case is part of Plaintiffs' broader attempt to displace the method of selecting presidential electors that has prevailed for nearly two centuries, and to replace it with a system in which the national popular vote translates into a proportional selection of electors. *See* RJN, Exs. 1-3. Insofar as Plaintiffs challenge the process for selection of the president as set forth in the Constitution, their claims fail on political question grounds.

This is not to say that all matters relating to the selection of presidential electors are immune from other constitutional principles, such as equal protection.[11] And, as set forth above, Plaintiffs' claims under the First and Fourteenth Amendments fail on the merits. However, Plaintiffs' challenge to California's decision to allocate its electors on the basis of plurality voting is not strictly a claim that California is interfering with the right to vote or weighting votes differently based on constitutionally impermissible criteria such as race or gender, because Plaintiffs do not allege that California actually treats votes differently or imposes any unlawful voting restrictions.

Although Plaintiffs state that they are not challenging the Electoral College itself,[12] Plaintiffs plainly wish to limit California's power as a political actor to

[11] The courts that have previously reached the merits of claims resembling those at issue here (*see supra* Argument, Part I.A) either did not consider whether the claims before them were justiciable, or rejected application of the political question doctrine to claims that a state's process for selecting presidential electors violated the Fourteenth or Fifteenth Amendments. *See McPherson*, 146 U.S. at 23-24; *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. at 626.

[12] Any claim based on the alleged inequities resulting from the widespread use of plurality voting in the selection of presidential electors, or from the allocation of electors in the Electoral College, fails for lack of redressability. *See Townley v. Miller*, 722 F.3d 1128, 1133-36 (9th Cir. 2013). As noted by the three-judge court in *Williams*, "[d]isparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme and to the permissible unit system [of plurality voting]. For these reasons the injustice cannot be corrected by suit, especially one in which but a single State is

select its presidential electors as it sees fit. This lawsuit is about Plaintiffs' disapproval of a policy choice made by the California legislature, pursuant to authority directly granted by the Constitution. *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("in the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution"). Plaintiffs prefer an alternative arrangement, one in which States do not have the discretion to ensure that their presidential electors have the greatest possible impact in the Electoral College. Plaintiffs are thereby challenging a key feature of the process for selecting presidential electors: each State's plenary power as a political actor to select its electors in the manner that it chooses, which includes the power to select a method that is most politically advantageous for the State. The Complaint repeatedly refers to the alleged nationwide effects of this presidential selection process (i.e., the alleged focus on battleground states and susceptibility to outside interference, Compl. ¶¶ 8-9, 51-53), making it apparent that Plaintiffs object to the widespread use of plurality voting that naturally results when States exercise the discretion given them by the Constitution.

This attempt to limit the power conferred on the States directly by the Constitution, or to undo policy choices made available to the States by the Constitution, is therefore an attempt to alter the presidential selection process established by the Constitution. To the extent Plaintiffs simply disagree with the policy choice made by the California legislature pursuant to Article II, section 1 of the Constitution and ask this Court to impose a different choice, the claims present a nonjusticiable political question.

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impleaded." *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. at 628.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court listed six independent tests for whether a political question is raised in a particular case:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

To the extent Plaintiffs seek to limit the States' roles as politically sovereign entities in the selection of presidential electors, such a fundamental change to the current constitutional regime requires a constitutional amendment—a process that satisfies the first *Baker* factor: "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker, 369 U.S. at 217. The Constitution expressly reserves the power to amend the Constitution for Congress and the States (acting through ratifying conventions or state legislatures). U.S. Const. art. V.

This challenge also implicates the second and third factors under *Baker*: "lack of judicially discoverable and manageable standards for resolving it," and "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. This Court is ill-equipped to review the California legislature's policy choices, as there are no "judicially discoverable and manageable standards" for determining what manner of selecting presidential electors best serves California's political self-interest. Such a decision would also call for a nonjudicial policy determination, as the California legislature is far better positioned than this Court to decide upon the best course of action for the people of California. *See Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 709

(9th Cir. 1992) (Kleinfeld, J., concurring) (second and third *Baker* factors render challenge to number of state court judges provided under state law nonjusticiable).

To the extent Plaintiffs seek to impose their policy preferences upon the States—which would fundamentally change a key feature of the Electoral College on a nationwide basis—Plaintiffs are raising a political question over which this Court lacks subject matter jurisdiction. *See Corrie v. Caterpillar*, 503 F.3d 974, 980-82 (9th Cir. 2007) (presence of a political question deprives the court of subject matter jurisdiction). Accordingly, the Court should dismiss these claims, without leave to amend.

IV. CONCLUSION

For the foregoing reasons, the complaint should be dismissed without leave to amend.

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