DAVID BOIES (*Pro Hac Vice to be filed*)
DBoies@bsfllp.com
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

LUIS ROBERTO VERA JR. (*Admitted Pro Hac Vice*)
lrvlaw@sbcglobal.net
LULAC National General Counsel
THE LAW OFFICES OF LUIS VERA JR., AND ASSOCIATES
1325 Riverview Towers, 111 Soledad
San Antonio, Texas 78205-2260
Telephone: (210) 225-3300
Facsimile: (210) 225-2060

DAVID H. FRY, SBN 189276
david.fry@mto.com
BENJAMIN W. SCHRIER, SBN 288490
benjamin.schrier@mto.com
J. MAX ROSEN, SBN 310789
max.rosen@mto.com
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Counsel for Plaintiffs (Additional Counsel Listed on Signature Page)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PAUL RODRIGUEZ; ROCKY CHAVEZ; LULAC; and CALIFORNIA LULAC,

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Courtroom: 8B
Judge: The Honorable Consuelo B. Marshall

TABLE OF CONTENTS

Page

I. California's WTA Method of Allocating Electors Is Unconstitutional. 4

A. California's WTA Method of Allocating Electors Violates the One Person, One Vote Principle Under the Fourteenth Amendment. 5

B. California's WTA Method of Allocating Electors Also Violates Plaintiffs' Rights Under the First and Fourteenth Amendments. 23

C. California's Purported State Interest in Maximizing its Power in National Elections Is Neither a Legitimate State Interest, nor, in any Event, Sufficient to Justify these Burdens. 27

D. The Constitutionality of California's WTA Method of Allocating Electors is not a Political Question. 29

TABLE OF AUTHORITIES

Cases **Page(s)**

Allen v. State Bd. of Elections
393 U.S. 544 (1969).....13

Anderson v. Celebrezze,
460 U.S. 780 (1983).....18, 27

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....4

Bears v. Cenarrusa,
342 F.3d 1073 (9th Cir. 2003).....6

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....4

Borough of Durvea, Pa. v. Guarnieri,
564 U.S. 379 (2011).....23

Burdick v. Takushi,
504 U.S. 428 (1992).....5, 27

Burns v. Richardson,
384 U.S. 73 (1966).....passim

Bush v. Gore,
531 U.S. 98 (2000).....passim

California Dem. Party v. Jones,
530 U.S. 567 (2000).....21, 26, 28, 29

City of Mobile Ala. v. Bolden,
446 U.S. 55 (1980).....14

Club's Freedom Club PAC v. Bennett,
564 U.S. 721 (2011).....26

Conant v. Brown,
248 F. Supp. 3d 1014 (D. Or. 2017).....19

Cousins v. Wigoda,
419 U.S. 477 (1975).....22

Delaware v. New York,
385 U.S. 895 (1966).....19

Dudum v. Arntz,
640 F.3d 1098 (9th Cir. 2011).....passim

E. Carroll Par. Sch. Bd. v. Marshall,
424 U.S. 636 (1976).....15

Fortson v. Dorsey,
379 U.S. 433 (1965).....12, 14

Grace Geothermal Corp. v. N. Cal. Power Agency,
619 F. Supp. 964 (N.D. Cal. 1985).....4

Graham v. Fong Eu,
403 F. Supp. 37 (N.D. Cal. 1975).....passim

Gray v. Sanders,
372 U.S. 368 (1963).....passim

Green Party of Tennessee v. Hargett,
767 F.3d 533 (6th Cir. 2014).....28

Hancock v. Symington,
1995 WL 89377 (9th Cir. Mar. 3, 1995).....4

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966).....6, 12

Hicks v. Miranda,
422 U.S. 332 (1975).....20

Hitson v. Baggett,
446 F. Supp. 674 (M.D. Ala 1978.).....19

In re Tracht Gut, LLC,
836 F.3d 1146 (9th Cir. 2016).....4

Kendrick v. Walder,
527 F.2d 44 (7th Cir. 1975).....15

Kusper v. Pontikes,
414 U.S. 51 (1973).....24

League of Women Voters of Ohio v. Brunner,
548 F.3d 463 (6th Cir. 2008).....6

Lowe v. Treen,
393 So. 2d 459 (La. Ct. App. 1980).....19

Mandel v. Bradley,
432 U.S. 173 (1977).....17, 18

Maya v. Centex Corp.,
658 F.3d 1060 (9th Cir. 2011).....4

McPherson v. Blacker,
146 U.S. 1 (1892).....passim

Penton v. Humphrey,
264 F. Supp. 250 (S.D. Miss. 1967).....19

Pub. Integrity All., Inc. v. City of Tucson,

836 F.3d 1019 (9th Cir. 2016) ..... passim

Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections,
827 F.3d 333 (4th Cir. 2016) 6

Reynolds v. Sims,
377 U.S. 533 (1964) 23

Romero v. City of Pomona,
883 F.2d 1418 (9th Cir. 1989) 4

Schweikert v. Herring,
2016 WL 7046845 (W.D. Va. Dec. 2, 2016) 19

SDJ, Inc. v. City of Houston,
841 F.2d 107 (5th Cir. 1988) 19

Smith v. Ark. State Highway Empls. Local,
441 U.S. 463 (1979) 25

Stewart v. Blackwell,
444 F.3d 843 (6th Cir. 2006) 6

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 24

Town of S. Tucson v. Tucson Gas, Elec. Light & Power Co.,
149 F.2d 847 (9th Cir. 1945) 4

Vieth v. Jubelirer,
541 U.S. 267 (2004) 14, 15

Washington v. Davis,
426 U.S. 229 (1974) 20

Wesberry v. Sanders,
376 U.S. 1 (1964) 18, 19

Whitcomb v. Chavis,
403 U.S. 124 (1971) 6, 7, 13, 15

White v. Register,
412 U.S. 755 (1973) 12, 13, 20

Williams v. Va. St. Bd. of Elections,
288 F. Supp. 622 (E.D. Va. 1968) 16, 18, 19, 20

Williams v. North Carolina,
2017 WL 4936429 (W.D.N.C. Oct. 2, 2017) 19

Williams v. Rhodes,
393 U.S. 23 (1968) ..... passim

Zimmer v. McKeithen,
485 F.2d 1297 (5th Cir. 1973) 15

Statutes

2 U.S.C. § 2c 19
Cal. Elec. Code § 6901 8
Cal. Elec. Code § 6902 8
Cal. Elec. Code §15505 8

Rules

Fed. R. Civ. P. 8 14
Fed. R. Evid. 201(b) 4

Secondary Sources

Christopher Berry, Barry C. Burden, and William G. Howell, *The President and the Distribution of Federal Spending*, 4 Am. Pol. Sci. Rev. 104 (2010)……25

Hudak, John J., *The Politics of Federal Grants: Presidential Influence Over the Distribution of Federal Funds*, Dissertation, Vanderbilt University (2012) ……25

Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in* 31 The Papers of Thomas Jefferson (Barbara Oberg ed., 2005) …….. 29

Richard Pildes and Kristen Donaghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal Forum 241 (1995)…….. 19

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 (1880)……29

INTRODUCTION

California's winner-take-all ("WTA") method for counting its citizens' votes in Presidential elections discards the votes of millions of California voters in order to magnify the votes of others. In particular, the WTA method systematically magnifies the votes of members of California's Democratic Party by affording all of California's 55 electors in a Presidential election to that party's chosen candidate—regardless of whether 10%, 30%, or 49% of California citizens cast their votes for another candidate. This system violates the constitutional principle of "one person, one vote" under the Equal Protection Clause of the Fourteenth Amendment, as well as the voting, speech, associational, and petition rights of California voters embodied in the Fourteenth and First Amendments.

Beyond the immediate unconstitutional effects of the WTA method, the democratic consequences—for both California and the Nation—are profound. Because of the WTA method, Presidential campaigns all but ignore non-battleground states like California. In 2016, for instance, 99% of campaign spending was in 14 states—and California 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 argue that Plaintiffs' allegations do not give rise to a valid constitutional claim for three reasons, each of which fails to withstand scrutiny.

First, California cites its purportedly plenary power to select a method for allocating its electors under the Elector Clause (Art. II, § 1, cl. 2), and argues that

deference to California's sovereignty under this Clause necessitates rejecting Plaintiffs' claims. This is incorrect. Plaintiffs do not dispute that, under the Elector Clause, the California legislature is free to allocate its Electors without an election. But, as the Supreme Court has repeatedly affirmed, once California chooses to exercise its right under that Clause to give its citizens the vote for the President, the voting system it puts in place must comply with the Fourteenth Amendment, including the principle of one person, one vote.

The WTA method fails to comply with that Amendment because it results in millions of Californians casting a ballot for the President only to have their votes discarded before they can actually affect the outcome. In that way, the system is directly analogous to the voting system the Supreme Court struck down in *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963), where Georgia tallied votes for a statewide primary in WTA elections at the district level, and thereby, in the Supreme Court's words, "discarded" those votes before they could actually count in the statewide primary. California fails to address the similarity between the WTA method and the voting system struck down in *Gray*, instead characterizing its elections as being effectively for a multi-member state-level body of Electors, rather than two-step elections for President. But putting aside that this characterization has little basis in California's actual elections (where Electors' names are not even permitted on the ballot), it also does nothing to save the WTA method: it is well-established that California cannot use an at-large, WTA election for a multi-member body in a way that ensures single-party control of that entire body, as the WTA method ensures.

The current system also violates Plaintiffs' Fourteenth and First Amendment rights to an equal and effective vote, to associate for the advancement of political beliefs, and to petition the Executive branch for relief, by rendering votes of individuals who do not support the Democratic candidate all but irrelevant in the final vote-count for President.

Second, California argues that two summary orders by the Supreme Court

control this case. The cases Defendants primarily rely on, however, do not address Plaintiffs' arguments in this litigation that the WTA method discards votes at the first-step of a two-step election for President. Indeed, two do not address challenges to the constitutionality of the WTA method of allocating electors at all. *See McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (addressing a challenge to district allocation); *Graham v. Fong Eu*, 403 F. Supp. 37, 44 n.28 (N.D. Cal. 1975), *summarily aff'd*, 423 U.S. 1067 (1976) (addressing an intra-party primary dispute). And, in in any event, these cases could not have dealt with Plaintiffs' argument that the WTA method discards votes before they are counted in the final tally, as they were decided at a time in history when Electors—and not simply the candidates for President—were listed on ballots and citizens indeed voted for Electors. Moreover, even to the degree any of these cases addressed an issue of relevance to this litigation, the reasoning of each has been supplemented by changes in the Supreme Court's voting rights jurisprudence—rendering these cases' holdings of limited value.

Finally, California attempts to justify the WTA method by arguing it increases the power of California as a state in national elections. That argument rests on a false premise, however. California's WTA method of allocating Electors does not increase the power of *all* of California's voters; it only increases the power of a plurality of voters (in particular, California's Democratic Party[1]) by discarding the votes of California citizens who do not support the plurality's chosen nominee. California's purported "interest" is not a legitimate interest; rather it is a restatement of the very harm that renders the WTA method unconstitutional. Further, the WTA method does not even strengthen California's influence on Presidential elections; just the opposite. Because of the WTA method, Democratic candidates are able to

[1] In California, the WTA method increases the power of the Democratic Party; but in other states, including in Texas where a challenge to the WTA method is also pending, the WTA method increases the power of the state's Republican Party.

take for granted that they will receive all of California's electoral votes, and Republican candidates that they will *not* receive them, incentivizing candidates of both parties to ignore California in the general election. *See* Compl. ¶¶ 8, 46.

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 facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff[s]." *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016) (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1067–68 (9th Cir. 2011)). A court, moreover, "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 election-related facts.[2]

ARGUMENT

I. California's WTA Method of Allocating Electors Is Unconstitutional.

As the Ninth Circuit has observed, "[r]estrictions on voting" may burden rights protected by the Equal Protection Clause, as well as "interwoven strands of liberty protected by the First and Fourteenth Amendments," such as "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes

[2] *See, e.g.*, *Romero v. City of Pomona*, 883 F.2d 1418, 1420 n.1 (9th Cir. 1989) (taking judicial notice of facts related to elections); *Town of S. Tucson v. Tucson Gas, Elec. Light & Power Co.*, 149 F.2d 847, 849 (9th Cir. 1945) (same); *Hancock v. Symington*, No. 93-16691, 1995 WL 89377, at *2 (9th Cir. Mar. 3, 1995) (unpublished) (same); *Grace Geothermal Corp. v. N. Cal. Power Agency*, 619 F. Supp. 964, 969 (N.D. Cal. 1985), *aff'd*, 770 F.2d 170 (9th Cir. 1985) (same).

effectively." *Dudum v. Arntz*, 640 F.3d 1098, 1105–06 (9th Cir. 2011) (internal citations and quotation marks omitted). Such burdens may be felt by the electorate generally, or may be felt by "subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017). Courts assessing such burdens must "weigh the character and magnitude of the asserted injury to [these rights] . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 1024 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted)). When these burdens are "severe," an electoral rule must be "narrowly drawn to advance a state interest of compelling importance." *Dudum*, 640 F.3d at 1106 (internal citation and quotation marks omitted).

Plaintiffs have pled facts sufficient to show that California's WTA method for counting its citizens' votes in Presidential elections violates their rights under the Equal Protection Clause and under the Fourteenth and First Amendments. These burdens are severe, and Defendants have proffered no legitimate state interest sufficient to justify them. Defendants' motion to dismiss must, therefore, be denied.

A. California'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 v. Gore*, 531 U.S. 98, 104–05 (2000) (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 entitled to "equal weight" and endowed with "equal dignity," and the state is subject

to the requirements of the Equal Protection Clause. *Id.* at 104;[3] *see also Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). The constitutional protections under that Clause include the one person, one vote principle, which prohibits a state from discarding or diluting the votes of certain citizens, while magnifying those of others, unless that outcome is required by a specific constitutional provision. *Gray*, 372 U.S. at 380–81; *see also Bush*, 531 U.S. at 104–05.

California's WTA system violates the principle of one person, one vote by discarding the votes of millions of Californians in each election cycle before those votes can affect the actual Presidential race. Using the WTA method, California ensures that voters who do not support the plurality candidate—in modern elections, always the Democratic Party candidate—receive no Electoral College votes. Thus, whether such candidates receive 9%, or 49% of California's popular vote, the votes of the Californians who support those candidates are discarded before they can matter: in the actual election of the President.

Defendants attempt to counter this conclusion by arguing California elections are not for the President, but for Electors, who comprise a multi-member, state-level body. Defs.' Mot. to Dismiss at 15 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (addressing such a body)). For the reasons discussed below, Defendants are wrong in viewing modern elections as votes for Electors rather than for President.

---

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

But even accepting their characterization of California Presidential elections, elections for multi-member state-level bodies violate the Fourteenth amendment when they "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb*, 403 U.S. at 143 (citing, *inter alia*, *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). As Plaintiffs allege, that is *precisely* what California's WTA system does. *See* Compl. ¶ 5.

In short, whether analyzing California's election for President as an intermediate step in a national election, or as the election for a multi-member body of Electors, the WTA method violates the principle of one person, one vote.

1. California's Use of the WTA Method Unconstitutionally Discards the Votes of Minority Party Voters at an Intermediate Step in the Presidential Election.

Defendants defend California's use of the WTA method by arguing that California voters simply vote for *Electors*. Based on this characterization, Defendants analogize California's Presidential election to a state-level election for a multi-member body. Defs.' Mot. to Dismiss at 15. Defendants' analogy ignores the reality of modern Presidential elections, and is incorrect.

As originally envisioned by the Framers, votes in Presidential elections were indeed for *Electors*, and not for the President. The Electoral College was designed to ensure the Presidential election was *not* left "to the people," *Gray*, 372 U.S. at 376 n.8, but 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, it follows that a vote in a Presidential election would be only 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 California law, in California's modern Presidential elections, citizens do not vote for Electors; they vote for the President in two steps. *See* Compl. ¶¶ 3, 13, 31, 37.

In the first step, the people cast their votes for President—the Electors' names are not on, and are not *permitted to be on*, the ballot. *See* Cal. Elec. Code §§ 6901-02. In the second step, California counts those votes and consolidates them by allocating to the winning candidate all of its 55 Electors, who are then tallied nationwide. Compl. ¶ 3; Cal. Elec. Code § § 6902, 15505. Those Electors are bound, by law, to support the "candidates of the political party which they represent." Cal. Elec. Code § 6906. They are, therefore, relegated to the ministerial function of voting for their party's candidate. The "reasonable independence and fair judgment" envisioned by the Framers does not fit the model of today's Electors, who stand only as an intermediate step in the election of the President and are nothing more than a mechanism for counting the people's vote.

That California's Presidential elections are not merely elections for Electors, but rather elections for President, is underscored by how everyone (voters, candidates, and Electors alike) participates in these 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. All of these facts, grounded in common understanding of modern elections, point to an inescapable conclusion: people vote for the President and the states count those votes solely to allocate Electors who are bound to vote for their party's candidate. To argue otherwise today is like arguing that voting machines cast votes, not the people who pull the lever.

The Supreme Court's decision in *Gray v. Sanders* addressed an election directly analogous to California's Presidential election, and thus controls this case. 372 U.S. at 381. In *Gray*, the Supreme Court reviewed Georgia's "deeply rooted and long standing" practice of allocating a set number of "units" to each county and counting units instead of votes 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 all the county-level elections in the state won. *Id.* at 371. 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 also held, however, that even if the state allocated a perfectly proportional number of units to each county (equalizing the number of people in each unit), the system would still violate the principle of one person, one vote, as 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 381 n.12.

California's WTA method of allocating Electors is analytically indistinguishable from the system rejected in *Gray*. *See Pub. Integrity All.*, 838 F.3d at 1025 (observing that "Georgia's primary election system [in *Gray*] was . . . similar to the electoral college used to elect our President"). As Georgia did in *Gray*, California relies on a two-step process for counting votes, using the WTA method to consolidate and count the vote of the people at the first step. As in *Gray*, because of the WTA method, only the votes for the winning candidate matter in the second step when the final vote count occurs. And as in *Gray*, votes for a candidate who failed to win a plurality in the first step are thus counted "only for the purpose of being discarded" before the final tally. *Gray*, 372 U.S. at 381 n.12. The WTA system in California therefore functions just like the mechanism the Supreme Court held unconstitutional in *Gray* because it discards millions of votes at an intermediate step in a two-step election. The effect of this system is to award the Democratic Party all of California's electoral votes in every election, while ensuring that voters from other parties, regardless of whether they receive 1% or 49% of the vote, have zero say in the ultimate election for President. Compl. ¶ 5.

Defendants' attempts to distinguish *Gray*, and escape this conclusion, are unavailing. First, California argues that Plaintiffs' challenge to the WTA method is

nothing more than a challenge to plurality voting procedures. *See* Defs.' Mot. to Dismiss at 14 (citing *Dudum*, 640 F.3d at 1109–10). This argument is a straw man: Plaintiffs are not suggesting that plurality voting in a single-step, single-office election is unconstitutional. *See Dudum*, 640 F.3d at 1103 ("Plurality voting is widely used in the United States *for single-office elections* . . . ." (emphasis added)). Plaintiffs are arguing that plurality voting at the *intermediate* step of a single-office election—when used to *discard* votes before they are ultimately tabulated at the final step—violates the principle of one person, one vote.[4]

Second, California attempts to distinguish *Gray* on the basis that *Gray* was a case about "geographical location" discrimination, and Plaintiffs' case is not. Defs.' Mot. to Dismiss at 13. But Plaintiffs have plausibly alleged geographical discrimination. Republican voters who live in California have their votes completely discarded *because* they live in California (and not, say, Texas) and it is the *California* Democratic Party whose voting strength is magnified by this decision. Further, Defendants' attempts to limit *Gray*'s holding to discrimination between rural and urban voters—or something similarly narrow—has no basis in that decision. The Court in *Gray* held that even if each county had units "allocated strictly in proportion to population"—that is, the weighting based on which county a voter lived in was removed from the analysis—the system would still be unconstitutional because votes for anyone but the most popular candidate in that county would be "worth nothing" and would be "counted only for the purpose of being discarded." 372 U.S. at 381 n.12. California's WTA method discriminates against voters in the same way.

In any event, to argue Plaintiffs fail to allege *geographical* discrimination in

[4] Indeed, single-step, statewide elections for single-member offices such as Governor or Attorney General do not present the same Equal Protection Clause concerns. By necessity, all votes for candidates other than the plurality winner must be discarded at this final step. But there is a difference between simply recognizing the plurality winner in a final vote tabulation in a one-step election and discarding votes after the first step of a two-step process—before the final vote is cast. The latter is an arbitrary mechanism that distorts the final vote.

this case misses the point: Plaintiffs do not need to allege any such discrimination, as they have plausibly alleged discrimination on the basis of political and party affiliation—discrimination that was not at issue in *Gray*, an intraparty dispute. *See* Compl. ¶ 5. Defendants themselves cite case law that explicitly recognizes "the weight assigned to individual votes cannot depend on where individual voters live or whether they belong to identifiable racial *or political groups*." Defs.' Mot. to Dismiss at 16 (emphasis added) (citing *Graham*, 403 F. Supp. at 45). Plaintiffs in this case are members of minority political parties challenging the use of the WTA method to discard their votes by magnifying the voting power of California's dominant political party. *Cf. Burns*, 384 U.S. at 88 (affirming that electoral systems cannot be used to "cancel out the voting strength of racial or political elements of the voting population" (internal citation and quotation marks omitted)). That a state might use the tool of discrimination held unconstitutional in *Gray* to discriminate against political minorities, and not simply rural voters, does not render *Gray* inapplicable. Indeed, in *Gray*, the Supreme Court struck down a state primary system even *absent* such political discrimination. And it did so notwithstanding the extensive deference the Court applies to primaries and intraparty disputes. *See infra* 21-22 (discussing this deference). California's use of the WTA method in a *general election* regime that discriminates against minority political parties even more clearly violates the Equal Protection Clause than the system at issue in *Gray*.

Finally, California suggests, in footnote, that Plaintiffs' challenge is merely a challenge to the Electoral College. Defs.' Mot. to Dismiss at 17 n.9 (noting "the Electoral College [i]s a constitutionally approved exception to 'one person, one vote.'"). As already explained, Plaintiffs do not challenge the provisions of the Constitution establishing the Electoral College, or any inequalities in voting that are constitutionally imposed, such as the number of Electors accorded to each state. *See Gray*, 372 U.S. at 378, 80 (noting that *these* provisions are not unconstitutional notwithstanding inequities). Plaintiffs instead challenge the manner through which

California selects its Presidential Electors, which is in no way constitutionally mandated, and therefore not insulated from review. It is well established that once the state decides to select Electors through a vote of the people, that right is "fundamental," and the constitutional protections of the Fourteenth Amendment safeguard that right.[5] *Bush*, 531 U.S. at 104 (citing *McPherson*, 146 U.S. at 35); *see also Rhodes*, 393 U.S. at 29; *Harper*, 383 U.S. at 665. Because California's WTA system is not constitutionally mandated, and because it discards millions of votes at an intermediate step in the Presidential election, it violates the principle of one person, one vote mandated by the Equal Protection Clause.

2. The WTA Method is Unconstitutional Even Under Defendants' Framework.

As noted, California argues that its elections are statewide, at-large elections for its 55-member Electoral College delegation—rather than intermediate steps in the election for President. Defs.' Mot. to Dismiss at 4, 6–7. But even viewing California's Presidential election as one in which Californians simply vote for Electors, the WTA method still fails to satisfy the requirements of the Equal Protection Clause that apply to at-large elections for multi-member bodies. 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 v. Register*, 412 U.S. 755, 769–70 (1973) (striking down a Texas multi-member, at-large election scheme as unconstitutional). Plaintiffs have alleged that California's

[5] It is true that the Elector Clause—in contrast to the facts in *Gray*—*does* require that the election for President operate in two steps. But the Elector Clause *does not* require California to tabulate its votes using WTA at the first step, and it is not a shield against the holding of *Gray*.

use of the WTA method "cancel[s] out the voting strength of racial or political elements of the voting population.'" *See* Compl. ¶¶ 28–40. This is enough to sustain Plaintiffs' claims under either view of Presidential elections—as an election for Electors only or as a two-step election for President.

In *Allen v. State Bd. of Elections*, the Supreme Court clarified that the "right to vote can be affected by a dilution of voting power" through either the adoption of at-large voting schemes or "by an absolute prohibition on casting a ballot." 393 U.S. 544, 569 (1969). Applying this standard, the Court in *White v. Regester* for the first time invalidated a multi-member districting scheme because it found that Mexican-Americans in one Texas county were "effectively removed from the political processes" when their votes were submerged into an at-large pool with a majority that was likely to multiply its voting power. 412 U.S. at 769. While that case involved a racial minority, the Court has long held that "encouraging block voting, multi-member districts" may "diminish the opportunity of a minority party to win seats" which is no more permissible than doing so on the basis of race. *Burns*, 384 US at 88 n.14.[6]

The situation the Supreme Court found unconstitutional in *White* is indistinguishable from California's WTA system, if viewed as a statewide, at-large election for its 55 Presidential Electors. *See* Comp. ¶ 5. California has selected 382 Electors in the last seven elections, and *all* were members of the Democratic Party, notwithstanding over thirty million votes for the Republican candidates over that time. *Id*. ¶¶ 4–5, 33. If translating tens of millions of Republican votes into zero representation does not "cancel out the voting strength" of Republican voters, then it is difficult to know what would meet the constitutional standard for dilution.

Indeed, if California had authorized this type of election for any other state-

[6] It is true that in most vote dilution cases, it is the "racial element" of multi-member elections that is in fact at issue. *See Burns*, 384 U.S. at 88. But the Court has included the "political element" language in its multi-member districting cases, *see id.*; *Whitcomb*, 403 U.S. at 143, and there has been no indication that it is no longer a valid theory.

level, multi-member body of elected officials, it would be obvious that it violated the Constitution. For instance, California could not constitutionally abolish its forty 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 Democrats or Republicans. The results of that one-vote, WTA contest would *always* be one-party rule. This hypothetical WTA state senate method would thus violate one person, one vote. The WTA Presidential Elector method violates one person, one vote for the same reason. *See Burns*, 384 U.S. at 88.

In the face of these clear precedents, Defendants try to defend the WTA method (if viewed as an at-large election for electors) by citing two different lines of cases. Neither saves the WTA system from its unconstitutional dilutive effect. *First*, Defendants argue Plaintiffs' claims fail because the Fourteenth Amendment "does not require proportional representation as an imperative of political organization." Defs.' Mot. to Dismiss at 14 (quoting *City of Mobile Ala. v. Bolden*, 446 U.S. 55, 75–76 (1980) and *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion)). This argument is a straw man. As an initial matter, although it is true that Plaintiffs identify a proportional method of allocating electors as a sufficient remedy in their Complaint, Compl. Prayer for Relief ¶ 1.e, their primary request for relief is that the Court rule the current WTA method of allocating Electors unconstitutional and order the State to adopt a constitutional method. Plaintiffs only request that the Court impose a remedy on California if the state fails to conform to a constitutional method. *See* Fed. R. Civ. P. 8 (permitting a party to request alternative forms of relief).

More significantly, whether the Constitution requires fully "proportional representation" in any given electoral context is not the issue. Even applying Defendants' framing of its elections, California has adopted a system that affords its minority party voters *no* representation out of 55 electors and is *designed* to consistently produce that outcome. Defendants cannot justify a patently

unconstitutional, and unrepresentative, system by noting that the Supreme Court has—in the districting context, for instance—stated that a state may not be required to create a *maximally* proportionate representative body.[7]

Second, in addressing cases involving selection mechanisms for multi-member bodies, Defendants mischaracterize the nature of the inquiry. Quoting extensively from *Whitcomb*, 403 U.S. at 124, Defendants point out that courts have rejected the idea that plurality voting for multi-member slates "inherently violates equal protection principles." Defs.' Mot. to Dismiss at 15. That is true but irrelevant: Plaintiffs have not pled that the WTA method's multi-member feature means that it "inherently" violates equal protection principles. Rather as *Whitcomb* itself acknowledges, Plaintiffs may succeed on a constitutional claim for vote dilution if they can show that multi-member elections have certain dilutive characteristics. *Id.* at 143. "Such a tendency," the Court said "is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-member for both houses of the legislature or if it lacks provision for at-large candidates running from particular geographical subdistricts." *Id.* at 143–44. Plaintiffs here have plausibly pled a valid case under that standard.[8]

---

[7] Further, the cases Defendants cite to argue that proportional representation is not required in representative bodies have little relevance in the instant case. For example, in *Vieth v. Jubelirer*, the plurality addressed whether districting must be done in a way that creates proportional representation, and expressed concern, in that context, that true proportional representation was impossible, as districts created based solely on traditional factors like compactness and contiguity inevitably skew politically; measuring representation at the state level is subjective; and ascertaining whether any new system would, over time, result in proportional representation cannot be reasonably administered. 541 U.S. at 289–90. In this case, adopting a representational system of allocating electoral votes is not difficult, would inarguably be more democratic, and would require no judicial speculation.

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

3. Defendants' Cited Cases Are Inapposite.

Defendants argue that three Supreme Court decisions control the outcome here and prevent the Court from holding the WTA method unconstitutional: *McPherson*, 146 U.S. at 35; *Williams v. Va. St. Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *summarily aff'd*, 393 U.S. 320 (1969); and *Graham*, 403 F. Supp. at 45. Not one of these cases, however, addresses Plaintiffs' primary argument: that the WTA method, by discarding votes at the first step of a two-step election for President, violates one person, one vote and the Fourteenth Amendment. In fact, these cases address fundamentally different legal and factual issues.

Defendants first rely on *McPherson*, 146 U.S. at 35, arguing that in that case the Supreme Court rejected a challenge "similar" to Plaintiffs'. Defs.' Mot. to Dismiss at 10. But the Court in *McPherson* did not address whether discarding votes for President through the WTA method of allocating Electors at an intermediate step in a two-step election violated the Equal Protection Clause of the Fourteenth Amendment (much less the one person, one vote principle articulated 70 years later). Far from it. The Plaintiffs in *McPherson* challenged Michigan's decision to use *district-by-district* elections for Electors, and in fact argued that the WTA method was *required* by the Constitution. *McPherson*, 146 U.S. at 24–25. 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. Indeed, *McPherson* addressed the Electoral College system that prevailed in Michigan at the time, which has almost no resemblance to the modern WTA method: in Michigan, the names of Electors were printed on the ballot, and the voter selected the name of a single Elector for the voter's district and a single Elector for the voter's half of the state. *Id.* at 1, 4–6 (quoting Act No. 50 of the Public Acts of 1891 of Michigan).

Defendants also argue that California's adoption of the WTA method is

entitled to deference because of the *McPherson* Court's statement that "the appointment and mode of appointment of electors belong exclusively to the states." Defs.' Mot. to Dismiss at 10 (quoting *McPherson*, 146 U.S. at 35). Contrary to Defendants' implication, this statement affirmed only that the *Elector Clause* does not prescribe one method of allocating Electors; it did not suggest a state's chosen allocation method is insulated from review under the *Equal Protection Clause*. *See McPherson*, 146 U.S. at 38–39. And, lest there was any confusion, in the decades since *McPherson*, the Supreme Court has repeatedly confirmed that the Equal Protection Clause restricts a state's otherwise plenary power under the Elector Clause; and that the Equal Protection Clause includes the principle of one person, one vote unknown at the time of *McPherson* itself. *See, e.g.*, *Bush*, 531 U.S. at 104–05; *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 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.").

Defendants' argument that the Supreme Court's summary affirmance of *Williams* controls is similarly flawed. Under *Mandel v. Bradley*, courts looking to apply summary affirmances must closely analyze the factual and legal issues presented to determine if they are identical. 432 U.S. 173, 176 (1977) (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). But *Williams* and this case are far from identical. Nowhere does the district court's decision in *Williams* address Plaintiffs' primary claim: that a state may not discard votes *for the President* through the WTA method of allocating Electors. The court's failure to address a two-step election for President in *Williams* is not surprising given that, unlike in today's elections, the Electors *were* the candidates listed on the ballot. *See* Ex. A at 4 (Plaintiff's Br. Before Hr'g Upon the Merits, *Williams v.*

Virginia State Board of Elections, C.A. No. 4768-A (E.D. Va. May 24, 1968), describing the Virginia ballot).

Given the district court's failure to address the two-step argument, the Supreme Court's summary affirmance simply cannot be read to address or foreclose Plaintiffs' position here. But even if the district court *had* addressed that argument, it would not render the Supreme Court's summary affirmance controlling as to Plaintiffs' claims. As *Mandel* makes clear, courts reviewing summary affirmances should not read the lower court's *rationale* as controlling, just the narrow final judgment. 432 U.S. at 176 ("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 relied *dispositively* on the specific way Virginia elected *Electors*, which is materially different from California'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 characterized as constitutional in *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), and which Congress had "expressly countenanced"). Given this alternative rationale, Defendants simply cannot argue that the Supreme Court's summary affirmance settles the legal questions that Plaintiffs' claims raise. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."). And indeed, there is substantial reason to assume the Supreme Court in *Williams* did *not* intend to resolve that argument: it is implausible that the Court *sub silentio* foreclosed constitutional challenges to voting systems which discarded votes at an intermediate step of a two-step election process only six years after its decision in *Gray* condemned just such a voting system. *See 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).[9]

Williams, and its summary affirmance, thus did not address—much less foreclose—Plaintiffs' primary argument here: that the WTA method discards votes at the first step in a two-step election. But even adopting Defendants' framing of California's elections, *Williams* has no lasting value. First, the district court's rationale that Congress "expressly countenanced" at-large elections for congressional representatives no longer applies—undermining any current import of that decision. *Williams*, 288 F. Supp. at 628. 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." Richard Pildes and Kristen Donaghue, *Cumulative Voting in the United*

[9] The remaining cases that Defendants cite do not raise legal issues that have not already been addressed. *See* Defs.' Mot. to Dismiss at 12; *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); *Lowe v. Treen*, 393 So. 2d 459, 460–61 (La. Ct. App. 1980), *writ denied*, 396 So. 2d 932 (La. 1981) (relying solely on the cases distinguished *supra*, at 16–20); *Hitson v. Baggett*, 446 F. Supp. 674, 675–76 (M.D. Ala 1978.), *aff'd without opinion*, 580 F.2d 1051 (5th Cir. 1978) (addressing the apportionment of Electors to the states and the constitutionality of popular elections for Electors, neither of which are challenged here); *Penton v. Humphrey*, 264 F. Supp. 250, 251–52 (S.D. Miss. 1967) (addressing the constitutionality of the Electoral College itself, and incorrectly finding that a Supreme Court's denial of leave to file a bill of complaint in *Delaware* without any relevant opinion was a binding decision on the merits).

States, 1995 U. Chi. Legal Forum 241, 251–52 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.

Reliance on the summary affirmance in *Williams* is further undermined by substantial doctrinal shifts in the one person, one vote case law in one-step elections for multi-member bodies. *See Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (noting that "inferior federal courts" should not "adhere" to summary affirmances if subsequent doctrinal developments undermine the result). In particular, *Williams* was decided before *White v. Regester* struck down a Texas County's use of a multi-member at-large election system. 412 U.S. at 768–69. *White* fundamentally shifted the legal landscape.

Further, in *Williams* the Court held that "in a democratic society the majority must rule, unless the discrimination is invidious." 288 F. Supp. at 627. *Bush*, however, dispensed with invidiousness as an element of a one person, one vote claim. 531 U.S. at 104–05. In its place, that Court stated that, under the Equal Protection Clause, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[10] *Id.* Completely absent from the Supreme Court's analysis was any suggestion that a finding of invidiousness was necessary to its holding. The Court's observation that "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" applies foursquare to this case. *Id.* (internal quotation marks omitted).

Finally, California incorrectly relies on the Supreme Court's summary

[10] "Invidious discrimination" at the time of *Williams* entailed some level of "intentional" or "purposeful" discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1974) ("[A]n invidious discriminatory *purpose* may often be inferred from the totality of the relevant facts....").

affirmance in *Graham.* Defs.' Mot. to Dismiss at 15–16. As an initial matter, in *Graham*, the district court reviewed an intra-party challenge to the Republican party's method of electing convention delegates. The case thus clearly addressed fundamentally different facts from Plaintiffs' challenge here, and the Summary Order is inapplicable for the same reasons discussed in the context of *Williams*. More fundamentally, the distinctions between this case and *Graham* are substantive and material: as noted, *Graham* reviewed an *intraparty* primary dispute. *See Buckley*, 424 U.S. at 250 (citing *Graham* as a case involving an "intraparty dispute"); *Graham*, 403 F. Supp. at 44–45 (holding that the Constitution does not protect a voter's right to "participate in the delegate selection process" or to have their vote translate "directly into delegate representation" because these "*are matters for the political parties themselves to determine* . . . ." (emphasis added)). As both the Supreme Court and Ninth Circuit have repeatedly affirmed, Courts view such challenges through fundamentally different—and far more lenient—constitutional standards. *See, e.g.*, *Pub. Integrity All., Inc.* 836 F.3d at 1026–27 (citing "decades of jurisprudence permitting voting restrictions in primary elections that would be unconstitutional in the general election . . . ." (collecting cases)). Courts give substantial deference to the political choices made by political parties in designing and effectuating their primaries, as political parties are independent entities with their own constitutional rights. *See, e.g.*, *California Dem. Party v. Jones*, 530 U.S. 567, 575 (2000) ("[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer who best represents the party's ideologies and preferences" (internal quotation marks omitted)); *see also id.* at 572–73 (affirming that "the processes by which political parties select their nominees are [not] wholly public affairs that States may regulate freely.").

Accordingly, the basic rights of citizens to vote that are fundamental in the context of general elections, have less purchase in primary elections. *See id.* at 573

n.5 (rejecting the idea that First and Fourteenth Amendment rights were sufficient to curtail the power of the California Democratic Party to exclude non-party members from its primaries). For these reasons, in *Cousins v. Wigoda*, a decision cited in *Graham*, 403 F. Supp. at 45 n.28, the Supreme Court rejected Illinois' justification of a restriction on a political party's primary as protecting Illinois' citizens' voting rights because, in the Court's words, "suffrage was exercised at the primary election to elect delegates to a National Party Convention," and the Court explained that, contrary to general elections, the "States themselves ha[d] no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential *candidates*." 419 U.S. 477, 489–90 (1975) (emphasis added).

As a result, the district court's reasoning in *Graham* in the context of an intraparty, primary dispute, has no bearing on whether California's WTA method is permissible in a *general election*. *See Buckley*, 424 U.S. at 250 (citing *Graham* and *Cousins* as evidence that up until *Buckley* the courts were unwilling to weigh in on "intraparty disputes concerning the seating of convention delegates" as "delegate selection and the management of political conventions have been considered a strictly private political matter, not the business of Government inspectors.").

Graham is also distinguishable in another dispositive way. In *Graham*, the Court acknowledged that, even under the lower constitutional standard applied for party conventions, the party could not dilute or discard the votes of individuals on the basis of "an identifiable . . . political group." 403 F. Supp. at 45. Plaintiffs in *Graham* failed to make "a factual showing of discrimination against" any such group, a finding unsurprising given that the case addressed an *intraparty* dispute. *Id*. But in making this statement, *Graham* explicitly recognizes that such a claim is cognizable if such facts are adequately shown.[11] Here, Plaintiffs plausibly allege

[11] To the extent *Graham* described the Electoral College WTA system, that reasoning was dicta and, further, relied entirely on *Williams*—which, as Plaintiffs have explained, is not controlling here. There is certainly no basis to conclude that the Supreme Court's summary affirmance in any way endorsed this *dicta*. In any event, Plaintiffs wish to make clear that they preserve the

exactly such discrimination: that California's WTA method for allocating electors in the *general* election magnifies the power of California's Democratic party by minimizing the votes of minority-party members, such as Republicans. *See* Compl. ¶ 5. Plaintiffs, therefore, have adequately pled a constitutional violation even under *Graham's* far more lenient constitutional standards.

B. California's WTA Method of Allocating Electors Also Violates Plaintiffs' Rights Under the First and Fourteenth Amendments.

In addition to burdening Plaintiffs' rights under the Equal Protection Clause, California's WTA system of Elector allocation burdens additional rights associated with voting, including "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Dudum*, 640 F.3d at 1105–06 (internal quotation marks omitted), "the right of individuals to associate for the advancement of political beliefs," *id.*, and Plaintiffs' right to petition their elected representatives—namely, the President and Vice President—for redress. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388, (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . .").

As alleged in the Complaint, the WTA method burdens Plaintiffs' rights in this regard in two ways. First, in diluting and discarding their votes, it violates Plaintiffs' right to cast an *effective* vote—*i.e.*, a vote that has the potential to affect the outcome of any Presidential election. *See* Complaint ¶¶ 14, 44, 58; *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[E]ach and every citizen has an inalienable right to *full and effective* participation in the political process . . . ." (emphasis added)).[12]

---

argument that *Williams* was incorrectly decided and should be overruled should this case reach the Supreme Court.

[12] The fact that Plaintiffs have the *formal* right to vote does not mean they have the right to vote *effectively*: the Supreme Court has repeatedly held that states may *burden* exercise of this right in numerous ways without *formally* and *completely* banning any citizen from casting a ballot. *See, e.g., Williams*, 393 U.S. at 23 ("Cumbersome election machinery can *effectively* suffocate … the right to vote." (emphasis added)); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (restriction on

Defendants wrongly suggest that this merely restates Plaintiffs' Equal Protection Claim. The right recognized under the First Amendment to an effective vote goes beyond the right to be treated like other voters, however: it is the affirmative right to voice one's preference "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). Further, it is a right that is foundational to all expression throughout the political process: as Justice Harlan explained in *Rhodes*, by denying a person "any opportunity to participate in the procedure by which the President is selected, the State … eliminate[s] the basic incentive that all political parties have for [assembling, discussing public issues, or soliciting new members], thereby depriving [them] of much of the substance, if not the form, of their protected rights." 393 U.S. at 41 (Harlan, J., concurring). In creating a political system whereby California minority votes, including those of Republicans, can never be expected to affect the Presidential election—regardless of how many such votes are cast and how persuasive Republican voters are in any given cycle—California not only denies these voters the right to effectively vote, but predictably removes their "basic incentive" for participating in the Presidential election at all. *Id.* This "burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies," *McCutcheon*,134 S. Ct. at 1449, *i.e.* individuals who lack the wealth to participate in national politics not by associating and voting, but by donating money to candidates.

Second, as Plaintiffs allege, WTA also burdens Plaintiffs' rights by systematically disincentivizing candidates from campaigning in California and from

---

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," and voters were only banned from voting in a primary if they had chosen to vote in another party's primary in the past 23 months (emphasis added)).

considering the interests of California voters. Compl. ¶¶ 8, 46. This burden cannot be understated: in creating an electoral system whereby Plaintiffs' votes have no effect on the ultimate election, the WTA method not only removes any incentive Presidential candidates have to consider the interests and campaign for the votes of Plaintiffs, but also effectively penalizes candidates for wasting time in California. The system thus severs the relationship between voters and candidates at the heart of representative government. *See McCutcheon*, 134 S. Ct. at 1461–62 ("Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials."); *Rhodes*, 393 U.S. at 41 (Harlan, J., concurring) ("The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association.").[13]

Dismissing this burden, Defendants cite *Smith v. Ark. State Highway Empls. Local* for the proposition that "there is no associational right to receive campaign attention." Opp. at 19 (citing 441 U.S. 463, 464–65 (1979)). This argument, however, misses the point. In *Smith*, the Supreme Court held that "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond" to the concerns of citizens. 441 U.S. at 465. Defendants' invocation of this language rests on a misconception: that because candidates for President are permitted under the First Amendment to ignore California voters, it follows that California may *incentivize* that lack of attention through adoption of the WTA method. But this is incorrect for at least two reasons.

First, whether or not California voters have an affirmative right to their

[13] Social science research confirms the intuitive conclusion that the federal government tends, in allocating federal funds, to favor battleground states. *See* Hudak, John J., *The Politics of Federal Grants: Presidential Influence Over the Distribution of Federal Funds*, Dissertation, Vanderbilt University (2012); Christopher Berry, Barry C. Burden, and William G. Howell, *The President and the Distribution of Federal Spending*, 4 Am. Pol. Sci. Rev. 104, 783-799 (2010).

candidates' attention misses the point; they clearly have the fundamental right to an *effective vote*, and it is that right, which California has infringed, that protects their interest in receiving campaign attention. As the Supreme Court has recognized, candidates are presumably responsive to those voters who *actually* elect them. *Cf. California Dem. Party*, 530 U.S. at 581 ("That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable."). The Court likewise has observed that the "political responsiveness at the heart of the democratic process" involves two key prongs: voters "have the right to support candidates who share their views and concerns," and, in turn, representatives "can be expected to be cognizant of and responsive to those concerns." *McCutcheon*, 134 S. Ct. at 1461–62. By burdening Plaintiffs' right to an effective vote, California in turn creates a system where candidates have little reason to be "cognizant of and responsive to" Plaintiffs' concerns. *Id.* Contrary to Defendants' argument, the candidates' inattention is thus a relevant constitutional consideration: it is the inevitable consequence of burdening a right Plaintiffs' *clearly* possess.

Second, the Supreme Court has long held the First Amendment recognizes not only *direct* restrictions on speech—such as a formal ban on candidates associating with California's voters—but also incentive structures that operate to burden speech indirectly. *See, e.g., Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 733, 755 (2011) (holding that a system by which publically funded candidates received funding from the state when privately financed candidates spent additional funds burdened the rights of privately funded candidates, notwithstanding the lower court's observation that the law did "not actually prevent anyone from speaking in the first place or cap campaign expenditures" (quoting 611 F.3d 510, 513, 525 (9th Cir. 2010)); *see also id.* at 744 (noting that the record included evidence that candidates, motivated by Arizona's

law, chose to spend less money—just as Plaintiffs here allege candidates decline to visit California voters). The WTA method creates just such an incentive structure, where candidates cannot afford to spend time in a state that has the most Electors in the country. California cannot avoid this constitutional infirmity by hypothesizing a fictional world where it is the candidate alone, free from the constraints created by the WTA method, who chooses to ignore Plaintiffs' concerns.

C. California's Purported State Interest in Maximizing its Power in National Elections Is Neither a Legitimate State Interest, nor, in any Event, Sufficient to Justify these Burdens.

Finally, California argues that, notwithstanding these burdens, its purported interest in "increas[ing] the voting power" of the State justifies the WTA method. Defs.' Mot. to Dismiss at 20. Not so.

As an initial matter, the burdens identified above are unquestionably "severe": the WTA method violates the Equal Protection Clause and effectively silences millions of California voters in every Presidential election. To survive the *Burdick* balancing test, the rule thus must be "narrowly drawn to advance a state interest of compelling importance." *Dudum*, 640 F.3d at 1106 (internal quotation marks omitted). That is a difficult task for the state, made no easier by the fact that California "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.

Yet even if these burdens were not severe, as California argues, that would not end the inquiry. As the Ninth Circuit has repeatedly held, a court must still determine whether a state's "important regulatory interest[]" is sufficient to justify the regulation even when an election rule merely creates a minimal burden. *See, e.g.*, *Pub. Integrity All.*, 836 F.3d at 1025 (rejecting the contention that mere "rational basis review" applies where a burden is slight); *see also id.* at 1028; *Dudum*, 640 F.3d at 1114. The state bears the burden of justifying any burden on

Plaintiffs' rights even when the latter is not severe. *See Pub. Integrity Alliance, Inc.*, 836 F.3d at 1025 (rejecting the contention that if plaintiffs can show only a slight impairment of their rights, the burden shifts to them to show that the challenged regulations have no legitimate basis). Further, the severity of a burden, and the sufficiency of a government interest, include questions of fact that may not be resolvable as a matter of law. *See, e.g.*, *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 547–48 (6th Cir. 2014) (noting that "[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions," and finding a genuine issue of material fact existed regarding whether filing deadlines imposed severe burden on political parties and whether the state had compelling interest for the deadlines); *cf. Dudum*, 640 F.3d at 1115 (assessing evidence "adduc[ed]" by the defendant city to justify its voting rules).

In light of these principles, even if the Court were to hold that the burden Plaintiffs have identified is minimal, and not severe, there would be no basis to hold as a matter of law, on the pleadings, that California's proffered state interest justifies that burden for two independent reasons. First, California's purported interest in maximizing the power of the State is not a legitimate interest: it is "simply circumlocution" for the precise constitutional *problems* with the WTA method, namely that it *silences* the voice of California's minority voters in order to aggrandize the power of its plurality. *California Dem. Party*, 530 U.S. at 582 (observing that a state could not rephrase the constitutional violation in the case into an *interest*). To the degree WTA maximizes the power of California, it does not maximize the power of the State itself as a whole; instead, it maximizes the voting strength of a plurality of California voters (for the last seven election cycles, California Democrats, Compl. ¶ 5) by *minimizing* the voting strength, and voices, of minority voters. Properly framed, then, California's interest is in maximizing the

power of a plurality political party by discarding the votes of the minority.[14] This is not a legitimate state interest, but a restatement of the very ill that requires the system be changed. *See California Dem. Party*, 530 U.S. at 582; *McCutcheon*, 134 S. Ct. at 1450 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (internal quotation marks omitted)).

Second, California's suggestion that it has an interest in maximizing the power of the State as a whole is also belied by the true operation of the WTA method. Defs.' Mot. to Dismiss at 20. The result of California's WTA method is that Presidential candidates generally ignore California voters altogether. Although this burden is more acutely felt by minority voters, it affects the voting rights, and *power*, of the entire state. *See* Compl. ¶ 46. Beyond aggrandizing the power of the Democratic Party in California, then, the WTA method actually *subverts* the power of the State, and its voters, in Presidential elections.

In sum, California has not asserted any legitimate interest that outweighs even a minimal burden on Plaintiffs' constitutional rights, much less one that can sustain its burden on a motion to dismiss.

D. The Constitutionality of California's WTA Method of Allocating Electors is not a Political Question.

California's final argument—that Plaintiffs' claim that WTA violates the First

[14] Analysis of the history of the WTA method's adoption in the United States, including that specifically cited by Defendants, *see* Defs.' Mot. to Dismiss at 6, confirms this conclusion. In advocating for the general ticket in Virginia in 1800, Thomas Jefferson acknowledged that such a regime guaranteed that a "minority is entirely unrepresented"; he nevertheless advocated for it on the basis that failure to adopt such a system could result in the antifederalists losing another election. *See* Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in* 31 The Papers of Thomas Jefferson 300-01 (Barbara Oberg ed., 2005). Most states soon followed suit, adopting the WTA method to maximize the power of their own dominant voting blocs. Senator Thomas Hart Benson would later remark, reflecting on the adoption history of the WTA method, that it "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." 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).

and Fourteenth Amendments presents a political question—warrants little attention. *See* Defs.' Mot. to Dismiss at 22. As Defendants acknowledge, *see id.* at 22 & n.11, the Supreme Court has repeatedly held that constitutional challenges to state electoral regimes, including state methods of allocating electors in Presidential elections, are justiciable. *See, e.g.*, *McPherson*, 146 U.S. at 23–24; *Bush*, 531 U.S. at 104; *see also Williams*, 393 U.S. at 28. Indeed, Defendants suggest that the case presents a political question *only because* "Plaintiffs' claims under the First and Fourteenth Amendments fail on the merits"—a perplexing position. Defs.' Mot. to Dismiss at 22. Defendants' assertion that this case is non-justiciable thus appears to be nothing more than an attempt to distract the Court from Plaintiffs' constitutional arguments by suggesting Plaintiffs have alleged nothing more than disagreements with California's "policy choice." Defs.' Mot. to Dismiss at 23. But the fact that violating the Constitution is generally *also* bad policy does not transform a constitutional challenge into a political one.[15]

CONCLUSION

The WTA method in California burdens Plaintiffs' Equal Protection Clause rights, as well as their rights to effectively vote, associate, and petition candidates as protected by the First and Fourteenth Amendments. California offers no legitimate state interest to justify these burdens. Defendants' motion to dismiss must be denied.

[15] Plaintiffs recognize that a state would, on its own, be hesitant to change its WTA method of allocating Electors as long as other states have theirs in place—and indeed, the early adoption history of the WTA method underscores this fact. But a state cannot justify discriminating against its minority voters on the basis that other states are discriminating against theirs. Further, and without prejudice to any of Plaintiffs' rights to oppose any particular process, even assuming such a consideration could have any constitutional purchase or relevance, there are ways of addressing any such practical issues after the Court declares the WTA method unconstitutional, including the development of a plan for implementing the remedy or potential stays of any injunction pending an appeal. Further, and in any event, as Defendants acknowledge, there are suits challenging the WTA method nationwide—not merely in California.

DATED: June 5, 2018 Respectfully submitted,

By: /s/ J. Max Rosen
J. MAX ROSEN

DAVID H. FRY, SBN 189276
david.fry@mto.com
BENJAMIN W. SCHRIER, SBN 288490
benjamin.schrier@mto.com
J. MAX ROSEN, SBN 310789
max.rosen@mto.com
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MICHAEL B. DESANCTIS (*Pro Hac Vice to be filed*)
michael.desanctis@mto.com
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W.
Seventh Floor
Washington, D.C. 20004-1357
Telephone: (202) 220-1100
Facsimile: (202) 220-2300

LUIS ROBERTO VERA JR. (*Admitted Pro Hac Vice*)
lrvlaw@sbcglobal.net
LULAC National General Counsel
THE LAW OFFICES OF LUIS VERA JR., AND ASSOCIATES
1325 Riverview Towers, 111 Soledad
San Antonio, Texas 78205-2260
Telephone: (210) 225-3300
Facsimile: (210) 225-2060

MICHAEL D. HAUSFELD (*Pro Hac Vice* to be filed)
mhausfeld@hausfeld.com
SWATHI BOJEDLA (*Pro Hac Vice* to be filed)
sbojedla@hausfeld.com
HAUSFELD LLP
1700 K Street, NW
Suite 650
Washington, DC 20006
Telephone: (202) 540-7200

DAVID BOIES (*Pro Hac Vice to be filed*)
DBoies@bsfllp.com
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

ROBYN C. CROWTHER, SBN 193840
rcrowther@bsfllp.com
TREVOR P. STUTZ, SBN 296882
tstutz@bsfllp.com
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040
Facsimile: (213) 629-9022

JAMES P. DENVIR, III (*Admitted Pro Hac Vice*)
JDenvir@BSFLLP.com
AMY J. MAUSER (*Admitted Pro Hac Vice*)
AMauser@BSFLLP.com
KAREN L. DUNN (*Admitted Pro Hac Vice*)
KDunn@BSFLLP.com
LISA BARCLAY (*Admitted Pro Hac Vice*)
LBarclay@BSFLLP.com
AMY L. NEUHARDT (*Admitted Pro Hac Vice*)
ANeuhardt@bsfllp.com
HAMISH P.M. HUME (*Admitted Pro Hac Vice*)
HHume@BSFLLP.com
SAMUEL G. HALL (*Pro Hac Vice* to be filed)
Shall@bsfllp.com
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

Facsimile: (202) 540-7201

MATT HERRINGTON (*Pro Hac Vice* to be filed)
mherrington@steptoe.com
ROGER E. WARIN (*Pro Hac Vice* to be filed)
rwarin@steptoe.com
JOE R. CALDWELL, JR. (*Pro Hac Vice* to be filed)
jcaldwell@steptoe.com
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429 3000
Facsimile: (202) 429 3902

RANDALL L. ALLEN, SBN 264067
randall.allen@alston.com
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: (404) 881-7196
Facsimile: (404) 253-8473

SAMUEL ISSACHAROFF (*Admitted Pro Hac Vice*)
si13@nyu.edu
40 Washington Square South
New York, NY 10012
Telephone: (212) 998-6580

MARK GUERRERO (*Admitted Pro Hac Vice*)
mark@gwjustice.com
MARY WHITTLE (*Admitted Pro Hac Vice*)
mary@gwjustice.com
GUERRERO & WHITTLE PLLC
114 West 7th Street, Suite 1100
Austin, TX 78701
Telephone: (512) 605-2300
Facsimile: (512) 222-5280

SCOTT A. MARTIN, SBN 173329
smartin@hausfeld.com
IRVING SCHER (*Pro Hac Vice* to be filed)
ischer@hausfeld.com
JEANETTE BAYOUMI (*Pro Hac Vice* to be filed)
jbayoumi@hausfeld.com
HAUSFELD LLP
33 Whitehall Street, 14th Floor
New York, NY 10004
Telephone: (646) 357-1100
Facsimile: (212) 202-4322

JENNIFER D. HACKETT (*Admitted Pro Hac Vice*)
JHackett@zelle.com
JAMES R. MARTIN (*Pro Hac Vice* to be filed)
JMartin@zelle.com
ALLISON M. VISSICHELLI (*Admitted Pro Hac Vice*)
AVissichelli@zelle.com
ZELLE LLP
1775 Pennsylvania Ave. NW, Ste. 375
Washington, D.C. 20008
Telephone: (202) 899-4100
Facsimile: (202) 899-4102

MARIA AMELIA CALAF (*Admitted Pro Hac Vice*)
mac@wittliffcutter.com
JACK A. SIMMS JR. (*Admitted Pro Hac Vice*)
jack@wittliffcutter.com
RYAN A. BOTKIN(*Admitted Pro Hac Vice*)
ryan@wittliffcutter.com
KATHERINE P. CHIARELLO (*Admitted Pro Hac Vice*)
katherine@wittliffcutter.com
KAREN S. VLADECK (*Admitted Pro Hac Vice*)
karen@wittliffcutter.com
W. REID WITTLIFF (*Pro Hac Vice* to be filed)
reid@wittliffcutter.com
WITTLIFF | CUTTER | AUSTIN, PLLC
1803 West Ave.
Austin, Texas 78701
Telephone: (512) 960-4730
Facsimile: (512) 960-4869

Counsel for Plaintiffs