No. 20-1100

In the Supreme Court of the United States

PAUL RODRIGUEZ, *et al.*,

Petitioners,

v.

GAVIN NEWSOM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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May 7, 2021

QUESTION PRESENTED

Whether a State's system of awarding all of its Electoral College votes to the winner of the statewide popular vote violates the Constitution.

PARTIES TO THE PROCEEDING

James Schwab was the Acting Secretary of State of California at the time the petition was filed. *See* Pet. ii. Subsequently, Dr. Shirley Weber was sworn in as Secretary of State. Rule 35.3 directs that Secretary Weber is automatically substituted for her predecessor. The other parties are correctly identified in the petition.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT

1. Article II of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. The Twelfth Amendment directs that the person who receives the "greatest number of [electoral] votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed[.]" *Id.* amend. XII. Thus, the Constitution does not vest individual citizens with the right to "vote for electors for the President of the United States." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). It "leaves it to the legislature exclusively to define the method" for awarding electoral votes. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

Early on, state legislatures experimented with different approaches to choosing electors. *See generally McPherson*, 146 U.S. at 29-33. Some awarded their State's electoral votes to the winner of a "general ticket"; others "by the legislature itself on [a] joint ballot"; and still others "by vote of the people in districts." *Id.* at 29. By 1836, however, nearly every State had decided to award all of its electoral votes to a single candidate chosen by the winner of the statewide popular vote. *Id.* at 32 (noting that South Carolina was the only exception); *see generally* Dixon, *Electoral College Procedure*, 3 W. Political Quarterly 214, 215-216 (1950). Today, 48 States and the District of Columbia follow that approach. Pet. App. 2a.

California adopted the winner-take-all approach in 1852, the first year in which it participated in a presidential election. *See* 1852 Cal. Stats. ch. 72. It has

awarded its electoral votes in that manner ever since. Today, California law requires political parties to submit their "certified list[s] 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 state is then entitled to," *id.* § 6902; only the names of the candidates for President and Vice President appear on the ballot, *id.* § 6901. After the election, the Secretary of State certifies to the Governor the names of the persons who received the most votes and issues a certificate to each elector for the winning presidential and vice-presidential candidates. *Id.* § 15505. Those electors then meet at a time and day specified by state law, *id.* § 6904, and must vote 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.

2. Petitioners are "self-identified Republican and third-party voters in California." Pet. App. 4a. In 2018, they filed this lawsuit against the Governor and Secretary of State. *Id.*; *see also* D. Ct. Dkt. 1. Their core theory is that California's decision to award all of its electoral votes to the winner of the statewide popular vote violates the "'one person, one vote'" guarantee of the Equal Protection Clause because it "magnifies the votes of a bare plurality of voters by translating those votes into an entire slate of electors" and gives "no effect" to the "votes cast for all other candidates." Pet. App. 4a. They also allege that the winner-take-all system burdens various First Amendment rights. *Id.*

The district court dismissed petitioners' complaint. Pet. App. 36a. It concluded that petitioners' equal protection claim was "foreclosed by" this Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), and by this Court's summary affirmance of the decision of a three-judge district court in *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (1969) (per curiam). *Id.* at 30a. The district court rejected petitioners' assertion that *Gray v. Sanders*, 372 U.S. 368 (1963), compelled a different result. *Id.* at 32a-34a. It also held that *Williams* required dismissal of petitioners' First Amendment claim. *Id.* at 34a-35a.

The court of appeals affirmed. Pet. App. 1a-25a. It agreed that this Court's summary affirmance in *Williams* controlled petitioners' equal protection claim. *Id.* at 6a-10a. In *Williams*, the court of appeals explained, the plaintiffs alleged that Virginia's decision to award all of its electoral votes to the winner of the statewide popular vote violated the "one-person, one-vote principle of the Equal Protection Clause" because it "accorded no representation among the electors to the minority of voters." *Id.* at 7a (quotation marks, citations, and brackets omitted). The three-judge district court in *Williams* rejected that claim because the winner-take-all system did not "in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote." *Id.* at 8a (quoting *Williams*, 288 F. Supp. at 627). The court of appeals here recognized that, in light of this Court's summary affirmance of that decision, *Williams* controlled "unless 'subsequent developments suggest otherwise'" or this case did "not involve the 'precise issues presented and necessarily decided' in *Williams*." *Id.* at 10a (quoting *United States v. Blaine County*, 363 F.3d 897, 904 (9th

Cir. 2004) and *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)).

The court of appeals concluded that this Court's decisions in *White v. Regester*, 412 U.S. 755 (1973), and *Bush v. Gore* were not "'subsequent development[s]'" undermining *Williams*'s precedential force. Pet. App. 10a-15a. And it rejected petitioners' contention that this case is more analogous to *Gray* than it is to *Williams*. *Id.* at 17a; *see also id.* 15a-20a. It explained that *Gray*'s "central concern was the presence of geographic discrimination" in the Georgia Democratic Party's process for determining its candidates for U.S. Senator and statewide officers; "[n]o comparable concern about geographic discrimination exists" in this case. *Id.* at 18a-19a.

The court of appeals also affirmed the dismissal of petitioners' First Amendment claim. Pet. App. 20a-25a. It reasoned that California's winner-take-all system does not burden petitioners' "right to cast an effective vote" because California does not prevent petitioners from "participat[ing] fully in California's presidential election." *Id.* at 21a. It also rejected petitioners' assertion that California's system burdens their associational rights, explaining that petitioners had alleged only that "they are not incentivized to associate, not that they cannot." *Id.* at 22a (emphasis omitted). In the alternative, any "minimal burden" on petitioners' First Amendment rights was justified by California's "important interest" in "maximizing the impact of the State's electors within the Electoral College." *Id.* at 23a-24a (quotation marks and brackets omitted).

3. On the same day petitioners filed this action, plaintiffs in Massachusetts, South Carolina, and

Texas (all represented by the same counsel as petitioners) filed similar complaints. *See Lyman v. Baker*, 954 F.3d 351, 357 n.3 (1st Cir. 2020). Each district court dismissed the respective complaints; on appeal, the First, Fourth, and Fifth Circuits affirmed. *See Lyman v. Baker*, 352 F. Supp. 3d 81, 84 (D. Mass. 2018), *aff'd*, 954 F.3d 351 (1st Cir. 2020); *Baten v. McMaster*, 374 F. Supp. 3d 563, 565 (D.S.C. 2019), *aff'd*, 967 F.3d 345 (4th Cir. 2020); *League of United Latin Am. Citizens v. Abbott*, 369 F. Supp. 3d 768, 774 (W.D. Tex. 2019), *aff'd*, 951 F.3d 311 (5th Cir. 2020). The plaintiffs in those cases did not seek further review in this Court.

ARGUMENT

Petitioners ask this Court to grant review and invalidate the system for awarding electoral votes that is currently used by all but two of the States. The courts have uniformly rejected petitioners' legal theories—including in four federal appellate decisions in the past 15 months. Those decisions are correct and there is no need for further review.

1. Petitioners urge this Court to grant review because this case "presents an issue of national importance." Pet. 18. There is no doubt that the manner in which the States select presidential electors is an important issue. That is why the States have studied and debated the issue since the earliest days of our Republic. The current consensus among the States, which emerged nearly two centuries ago, is to award electors based on the winner of the statewide popular vote. *See infra* p. 7. Federal courts—including this Court—have examined that approach in nearly a dozen cases over the past half century; they have rejected every constitutional challenge to it. *See infra* p. 8 & n.2 (collecting cases).

Petitioners do not identify any persuasive reason for this Court to disrupt that consensus. They argue that "[t]his Court has not hesitated to grant certiorari" to revisit the constitutionality of "long-standing, important practices." Pet. 20. But the cases they invoke to support that argument only underscore why further review is unnecessary here. This case does not involve any conflict on a constitutional question, unlike *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), and *NLRB v. Noel Canning*, 573 U.S. 513 (2014). *See* Pet. 20. Indeed, petitioners' strategy of filing nearly identical lawsuits in four different federal circuits (Pet. 15 n.1) has generated powerful and recent evidence that lower courts agree on how to approach the issues here: during the last calendar year, four courts of appeals carefully considered petitioners' constitutional claims and flatly rejected them. *See supra* p. 5.

Nor is this case similar to those in which the Court granted plenary review of a decision that invalidated a longstanding government practice and represented a sharp departure from prior lower-court precedent. *See District of Columbia v. Heller*, 554 U.S. 570, 576 (2008); *Noel Canning*, 573 U.S. at 519, 521-522, 528-533; Pet. 20. To the contrary, the decision below upheld a longstanding practice in keeping with a long line of precedent. Petitioners thus rely principally on the strength of their own novel merits theories. *See* Pet. 21-30. As explained below, however, those theories are incorrect.

2. The lower courts properly rejected petitioners' argument that the predominant method for selecting presidential electors throughout our Nation's history violates the Constitution. Pet. 21-30.

a. As petitioners acknowledge, the Constitution does not prescribe any "particular method of appoint[ing]" electors. Pet. 6. Instead, Article II "conceded plenary power to the state legislatures in the matter," using language that "convey[ed] the broadest power of determination" over who becomes an elector. *McPherson v. Blacker*, 146 U.S. 1, 27, 35 (1892); *see* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors[.]"); *see also id.* amend. XII.

Consistent with that broad grant of authority, several States awarded all of their electors to the winner of the statewide popular vote in each of the first four presidential elections. *See McPherson*, 146 U.S. at 29-32. By 1836, all but one had decided to do the same. *Id.* at 32; *see supra* p. 1. And with only three exceptions, limited to single elections, every State used the same process from the end of the Civil War until 1969. Koza, et al., *Every Vote Equal* 83-84 (4th ed. 2013). Today, 48 States award all their electoral votes to the winner of the State's popular vote, as does the District of Columbia. Pet. App. 2a; *cf. Chiafalo*, 140 S. Ct. at 2326 ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'").

The States' power to appoint electors is of course subject to "other constitutional constraint[s]." *Chiafalo*, 140 S. Ct. 2324. In particular, a State "cannot select its electors in a way that violates the Equal Protection Clause." *Id.* at 2324 n.4. But every court to consider the claim that a winner-take-all system for selecting presidential electors violates that Clause has rejected it—including this Court.

In *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622, 623-624 (E.D. Va. 1968), a group of

Virginia voters challenged the State's "'winner take all'" method of awarding electoral votes, alleging that it "violate[d] the 'one-person, one-vote' principle of the Equal Protection Clause." A three-judge district court rejected that argument. *Id.* at 626-629. It reasoned that the winner-take-all system did not "in any way denigrate the power of one citizen's ballot" or "heighten the influence of another's vote." *Id.* at 627. On the contrary, it was undisputed that every citizen had been "offered equal suffrage" and that no one had been "deprive[d] of the franchise." *Id.* While the resulting "electoral slate" spoke "only for the element with the largest number of votes," that did not mean that the winner-take-all system violated the Constitution. *Id.* Rather, any "discrimination against the minority voters" simply reflected the principle that "in a democratic society, the majority must rule." *Id.* This Court summarily affirmed that decision. *See* 393 U.S. 320 (1969) (per curiam), *reh'g denied*, 393 U.S. 1112 (1969).[1]

Every other court to consider an equal protection challenge like the one raised here has rejected it for similar reasons.[2] Those decisions recognize that a

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[1] Two years before *Williams*, this Court had denied Delaware's motion for leave to file a bill of complaint against every other State raising a similar claim. *See Delaware v. New York*, 385 U.S. 895 (1966), *reh'g denied*, 385 U.S. 964 (1966); *see also* Motion for Leave to File Complaint at 2, *Delaware*, 385 U.S. 895 (No. 28 Original), 1966 WL 100407, at *2.

[2] *See* Pet. App. 1a-36a (decisions below); *Baten v. McMaster*, 374 F. Supp. 3d 563, 565 (D.S.C. 2019), *aff'd*, 967 F.3d 345 (4th Cir. 2020); *Lyman v. Baker*, 352 F. Supp. 3d 81, 84 (D. Mass. 2018), *aff'd*, 954 F.3d 351 (1st Cir. 2020); *League of United Latin Am. Citizens v. Abbott*, 369 F. Supp. 3d 768, 774 (W.D. Tex. 2019), *aff'd*, 951 F.3d 311 (5th Cir. 2020); *Conant v. Brown*, 248 F. Supp.

State's decision to award all its electoral votes to the winner of its popular vote does not "inherently favor or disfavor voters from any particular group (political or otherwise)." *Lyman v. Baker*, 954 F.3d 351, 371 (1st Cir. 2020). While the winner-take-all system "has the effect of rejecting the outcome sought by voters supporting minority parties," the same is true of "any democratic system." *Baten v. McMaster*, 967 F.3d 345, 358 (4th Cir. 2020). Indeed, plaintiffs' "challenge to the various roles exercised in the selection of a President" amounts to a "challenge [to] the Constitution itself." *Id.*

b. Petitioners' contrary arguments are unpersuasive. As to equal protection, petitioners first assert that *Gray v. Sanders*, 372 U.S. 368 (1963), compels the conclusion that a winner-take-all system for selecting electors violates the Fourteenth Amendment. Pet. 21-25. They misunderstand that decision.

Gray struck down the Georgia Democratic Party's method for selecting candidates for U.S. Senator and statewide officers. 372 U.S. at 381. Under that system, the Party assigned a certain number of units to each county and the candidate who received the most votes in a county was awarded all of the county's units. *Id.* at 372. Because of the way units were allocated,

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3d 1014, 1025 (D. Or. 2017), *aff'd on other grounds*, 726 F. App'x 611 (9th Cir. 2018); *Williams v. N.C. State Bd. of Elections*, 2017 WL 4935858, at *1 (W.D.N.C. Oct. 31, 2017), *aff'd*, 719 F. App'x 256 (4th Cir. 2018) (per curiam); *Schweikert v. Herring*, 2016 WL 7046845, at *2-*3 (W.D. Va. Dec. 2, 2016); *Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978), *aff'd*, 580 F.2d 1051 (5th Cir. 1978) (table); *Lowe v. Treen*, 393 So. 2d 459, 461 (La. Ct. App. 1980) (per curiam); *Penton v. Humphrey*, 264 F. Supp. 250, 251-252 (S.D. Miss. 1967); *see also Hagan v. Reagan*, 396 U.S. 1 (1969) (per curiam) (summarily affirming district court's dismissal of similar equal protection claim).

small rural counties had an outsized influence in determining the winners: "counties having population of one-third of the total in the state [had] a clear majority of county units." *Id.* at 373. This Court held that the party's method of weighting votes violated the "one person, one vote" guarantee of the Equal Protection Clause. *Id.* at 379-381. It reasoned that "[o]nce the geographical unit for which a representative is to be chosen is designated"—*i.e.*, the entire State—"all who participate in the election" must have an equal vote, no matter where "their home may be in that geographical unit." *Id.* at 379. In other words, equal protection requires that "every voter is equal to every other voter in his State." *Id.* at 379-380.

Petitioners contend that California's winner-take-all system is "precisely analogous to the system invalidated in *Gray*." Pet. 24. The court of appeals properly rejected that analogy. Pet. App. 15a-19a. Indeed, *Gray* itself carefully distinguished the case before it from the Electoral College. 372 U.S. at 378. As this Court explained, the decision to include the Electoral College in the Constitution contemplates that votes for President will not be given "precise[ly] equal[]" weight. *Id.* Like the allocation of two Senators to each State regardless of population, the awarding of electoral votes to each State expressly sanctions the "weighting of votes" in determining the President. *Id.* at 380. The analogy petitioners attempt to draw between the awarding of electoral votes and the awarding of the county unit votes at issue in *Gray* is simply "inapposite." *Id.* at 378; *see also Williams*, 288 F. Supp. at 626 (claim "does not come within the brand" of *Gray*); *Lyman*, 954 F.3d at 373 (while "[c]ounties qua counties in Georgia did not have the power to select Georgia's governor," Article II and the Twelfth

Amendment give the States "the power to select the electors who vote for president").[3]

In any event, *Gray*'s "core concern" was that the county-unit system "magnified the voice of rural voters." *Lyman*, 954 F.3d at 373. That differential treatment was "particularly invidious because the favored rural counties had significantly lower populations of racial minorities than urban counties." *Id.* at 373 n.13. This Court has since confirmed that the "defect" in *Gray* was "geographic discrimination"—*i.e.*, that "[v]otes for the losing candidates were discarded solely because of the county where the votes were cast." *Gordon v. Lance*, 403 U.S. 1, 4-5 (1971); *see also Baten*, 967 F.3d at 358 (similar); Pet. App. 19a (similar). The winner-take-all system poses no similar concern: "in California, all votes are treated equally regardless of where they are cast." Pet. App. 19a.

Petitioners next argue that a winner-take-all system of selecting presidential electors "unconstitutionally dilutes the votes of the losing party" in contravention of *White v. Regester*, 412 U.S. 755

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[3] Of course, there are other ways in which the constitutional processes for electing the President do not give "each vote" an "equal[]" weight in determining our Chief Executive. Pet. 17. Article II provides that each State is entitled to a "Number of Electors, equal to the *whole Number* of Senators and Representatives" that represent it in Congress. U.S. Const. art. II, § 1, cl. 2 (emphasis added). But to achieve perfect equality, electoral votes would have to be divided into fractions. *See, e.g.*, *Lyman*, 954 F.3d at 374 (in Vermont there would be "'unequal' votes unless a candidate gets exactly zero or one third of the votes with the remainder all to the other"). Under the Twelfth Amendment, moreover, if no candidate receives a majority of electoral votes, then the House of Representatives chooses the President, with each State having "one, winner-take-all vote." *Id.* at 373-374.

(1973), and *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). Pet. 26; *see also id.* at 26-29. As the courts of appeals have uniformly recognized, that argument also lacks merit. *See* Pet. App. 10a-15a; *Baten*, 967 F.3d at 353-357; *Lyman*, 954 F.3d at 368-371, 374-376; *League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311, 316-317 (5th Cir. 2020).

White did not consider any winner-take-all system analogous to the one challenged here; it addressed the constitutionality of a reapportionment plan for the lower house of the Texas legislature, which included both single-member districts and multimember districts. 412 U.S. at 758, 764. This Court held that the redistricting plan as a whole did not invidiously discriminate against racial minorities. *Id.* at 763-764. But it affirmed the district court's conclusion that two multimember districts had to be redrawn into single-member districts. *Id.* at 765. The record revealed a history of pervasive discrimination against Blacks and Mexican-Americans in the political realm and other settings. *See id.* at 766-769. The Court reasoned that drawing single-member districts was necessary to "remedy the effects of past and present [racial] discrimination" and to bring those communities into the "full stream of political life of the county and State." *Id.* at 769 (quotation marks omitted). That analysis does not apply to the different circumstances presented here. *See Baten*, 967 F.3d at 356; *Lyman*, 954 F.3d at 369.

As *White* explained, moreover, "multimember districts are not per se unconstitutional." 412 U.S. at 765. They violate equal protection only when "used invidiously to cancel out or minimize the voting strength of racial groups." *Id.* To prevail on such a

claim, a plaintiff must show that the "political processes leading to [the] nomination and election were not equally open to participation by the group in question," and that the group's members did not have an equal opportunity to "elect legislators of their choice." *Id.* at 766; *see id.* (a showing that the group "has not had legislative seats in proportion to its voting potential" is insufficient to prevail on an equal protection claim); *see also Whitcomb v. Chavis*, 403 U.S. 142, 160 (1971) (the Equal Protection Clause is not violated "simply because the supporters of losing candidates" in a multimember district election "have no legislative seats assigned to them").

Even if *White* applied in this different context, petitioners could not make such a showing here. They "have not alleged invidious discrimination." Pet. App. 11a. Every Californian "is offered equal suffrage," and petitioners do not allege that they have suffered a "deprivation of the franchise." *Id.* at 12a (quoting *Williams*, 288 F. Supp. at 627). The basic problem they identify is that they "did not have enough votes to achieve the outcome they desired." *Baten*, 967 F.3d at 356. But denying electoral votes to losing candidates does not violate equal protection, "even in those so-called 'safe' [States] where the same party wins year after year." *Whitcomb*, 403 U.S. at 153 (discussing legislative districts).

Finally, *Bush v. Gore* does not support petitioners' claim. Pet. 28. That decision was expressly "limited to the present circumstances" before the Court in that case. *Bush*, 531 U.S. at 109. Those circumstances involved a lack of uniform "statewide standards for determining what [was] a legal vote" in Florida in the 2000 presidential election. *Id.* at 110. That created a situation in which standards "might vary not only

from county to county but indeed within a single county from one recount team to another," *id.* at 106, which violated the "minimum requirement for nonarbitrary treatment of voters," *id.* at 105. No similar concerns are presented here.

c. As to the First Amendment, petitioners assert that California's winner-take-all system violates their right to "cast an effective vote" by "diluting and discarding votes." Pet. 29. As the court of appeals explained, however, the right to cast an effective vote has been held only to mean that a voter cannot be "'denied an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters.'" Pet. App. 20a; *see also Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (every citizen has the right to "effective participation in the political process[]"). Here, petitioners can "participate fully" in California's presidential election and they have identified "no support" for their dilution theory. Pet. App. 20a-21a.

Petitioners also contend that California's system infringes upon their associational rights by "remov[ing] their 'basic incentive' for participating in the presidential election" and encouraging presidential candidates to "ignore California's voters." Pet. 29-30. In analyzing associational rights, however, the Supreme Court has "focused on the [challenged] requirements themselves, and not on the manner in which political actors function under those requirements." *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 205 (2008). There is no infringement on associational rights by that measure. While a winner-take-all system of awarding presidential electors certainly "raises the stakes of victory," it does not interfere with petitioners' ability to associate freely with

the political party of their choice or otherwise deprive them of an "equal opportunity to win votes." *Lyman*, 954 F.3d at 377 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)). Consequently, petitioners are able to allege only that they "are not *incentivized* to associate"—"not that they *cannot*." Pet. App. 22a; *cf. Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-465 (1979) (per curiam) ("The First Amendment right to associate and advocate 'provides no guarantee that a speech will persuade or that advocacy will be effective.'").

3. Petitioners also ask this Court to grant certiorari to "determine the status of summary affirmances." Pet. 31. But there is no confusion on that point here: the court of appeals properly followed this Court's instruction that "summary affirmances 'prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided.'" Pet. App. 9a-10a (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)); *accord Baten*, 967 F.3d at 356; *Lyman*, 954 F.3d at 366; *League of United Latin Am. Citizens*, 951 F.3d at 315.[4] So there is no need in this case for plenary review regarding "the proper interpretation of this Court's summary

[4] Petitioners are correct that the district court erred by holding that *Williams* controlled their First Amendment claim, Pet. 31; but the court of appeals rectified that error, *see* Pet. App. 20a. And while the Fourth Circuit majority observed that the reasoning of the three-judge district court in *Williams* was "persuasive," Pet. 31, it also concluded (like the Ninth Circuit below) that this Court's summary affirmance of that decision precluded any different conclusion with respect to the equal protection claim, *see Baten*, 967 F.3d at 356.

merits dispositions," nor any basis for an order granting, vacating, and remanding "with instructions that *Williams* does not control." Pet. 31. In any event, the court of appeals independently—and correctly—rejected petitioners' assertions that *White* and *Gray* require a different result as to their equal protection claim. Pet. App. 10a-19a; *supra* pp. 9-14.

No doubt, States may continue to innovate in the exercise of their "broad[] power" to select presidential electors, *McPherson*, 146 U.S. at 27—and to debate the wisdom of winner-take-all systems as a policy matter.[5] As a constitutional matter, however, there is no cause for concern about a system like California's, which does not treat any voter or group of voters differently from any other or prevent anyone from casting a vote.

[5] *Cf.* 2011 Cal. Stats. ch. 188, § 1 (ratifying the Agreement Among the States to Elect the President by National Popular Vote, which, if ratified by States cumulatively possessing a majority of the Nation's electoral votes, would require signatory States to award their electors to the winner of the national popular vote).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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