CASE NO. 19-50214

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; DAVID WHITLEY, in his official capacity as Secretary of State of the State of Texas,

Defendants- Appellees.

Appeal from the United States District Court,
Western District of Texas, Case No. 5:18-cv-00175-DAE,
Hon. David Allen Ezra

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INTRODUCTION

The history of Winner-Take-All ("WTA") is neither complicated nor disputed. WTA was adopted in the early 1800s to "consolidate the vote of [each] State" for that state's dominant political party (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)), providing the "greatest partisan advantage" to each state's dominant political party. Noble E. Cunningham, *History of American Presidential Elections 1878-2001* 104–05 (2002). WTA was understood since its inception to ensure that the "minority is entirely unrepresented" (Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in 31 The Papers of Thomas Jefferson*, Vol. 31, 300–01 (Barbara B. Oberg ed., 2004). WTA was widespread decades before the ratification of the Equal Protection Clause. In the past half century, however, the Supreme Court has repeatedly condemned precisely what WTA represents: the deliberate use of a complex voting structure to dilute and discard minority votes, in order to aggrandize the power of a dominant majority. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 759, 765–69 (1973); *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963). Applying the facts to the law, WTA cannot be sustained.

Texas knows this. As a result, its brief largely consists of a single request: that this Court should not apply modern, established voting jurisprudence to WTA.

Instead, Texas suggests that, because WTA was created decades before the Equal Protection Clause, it *must* be constitutional. That argument ignores the *actual* history of WTA, which condemns rather than saves it. And it ignores the fact that the Supreme Court has repeatedly enjoined the use of electoral systems that are "deeply rooted and long standing" when, applying modern Equal Protection Clause jurisprudence, they are unconstitutional. *Gray*, 372 U.S. at 376.

Texas further asks this Court to defer to its purportedly plenary power under the Constitution to create any kind of presidential election it wishes, notwithstanding that "the power to select electors [may not] be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (*"Rhodes"*).

Finally, Texas asks this Court to defer to two summary affirmances that resolved challenges to electoral systems that resembled Texas's today. Yet Texas does not dispute that neither affirmance actually addressed the precise holdings Plaintiffs cite, including numerous decisive vote dilution cases, and that the petitioners in those earlier cases never made the arguments Plaintiffs make to this Court. Contrary to Texas's assertion, it is not enough that these earlier challenges *resembled* Plaintiffs'; summary affirmance resolves only the "precise issues presented" and "necessarily decided" within them. *See Mandel v. Bradley*, 432

U.S. 173, 176 (1977). Were it otherwise, the legal questions in this case would *never* be reviewed or decided by any court.

To the extent Texas addresses the merits of Plaintiffs' challenge, it wrongly suggests Plaintiffs are merely members of a minority political party complaining that they "lost the election," (Answering Br. at 30), and wrongly treats Plaintiffs' claims as though they addressed a simple, "statewide election … for a statewide office such as governor or attorney general." *Id.* at 30. But Plaintiffs claim no right to win elections and have not challenged WTA in an election for Governor or Senator, where it would be permissible. They challenge two aspects of WTA that binding Supreme Court precedent makes clear may, and here do, operate to impermissibly dilute or discard minority votes: the use of WTA in a slate election for *38 Electors* and the use of WTA at the first step of a two-step election to discard votes for the President.

Against these more tailored arguments, the State responds, *inter alia*, that vote dilution claims cannot be brought on behalf of political, as opposed to racial minorities. But such claims may indeed be premised on allegations that a voting structure "operate[s] to minimize or cancel out the voting strength of racial *or political elements* of the voting population." *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (emphasis added) (internal quotations omitted); *see also Burns v. Richardson*, 384 U.S. 73, 88 n.14 (1966) (acknowledging "block voting multi-

member districts" may "diminish the opportunity of a minority party to win seats"). Under the correct legal framework, Texas has no response to Plaintiffs' claims.

This Court should reject Texas's invitation to ignore the implications of this caselaw, or to insulate WTA from meaningful review. Instead, it should review WTA as it would any other piece of voting legislation: assessing WTA's historical purpose and dilutive effects. The Court should conclude that Plaintiffs' claims should not have been dismissed on the pleadings.

I. THE STATE'S DECISION TO USE WTA IS NOT INSULATED FROM JUDICIAL REVIEW BY ITS HISTORICAL PEDIGREE OR THE STATE'S PLENARY POWER UNDER THE ELECTOR CLAUSE.

In arguing Texas has plenary power to allocate its Electors, and that history underscores that authority (Answering Br. at 9, 19, 21, 31 (citing *McPherson v. Blacker*, 146 U.S. 1, 36 (1892)), Texas conflates two constitutional provisions: U.S. Const. Art. II, § 1, cl. 2 (the "Elector Clause") and the Equal Protection Clause. Contrary to Texas's arguments, although it has plenary authority under the *Elector Clause* to allocate its Electors, that power is restricted by the Equal Protection Clause. Further, the history of WTA does not insulate it from review under the Equal Protection Clause; it condemns it.

In *McPherson*, petitioners challenged Michigan's district-based apportionment system.[1] They did so on two grounds: that the system was "void because" the *Elector Clause* required the use of WTA; and that it conflicted with "the fourteenth and fifteenth amendments to the constitution . . . ." 146 U.S. at 24. Addressing the Elector Clause (not the Fourteenth Amendment), the Supreme Court relied on history to interpret the meaning of that Clause, noting that it had been understood since the founding that states had broad authority to allocate their Electors. 146 U.S. at 35. *N.L.R.B. v. Noel Canning*, cited by Texas, addressed this portion of the *McPherson* decision, because the Supreme Court indeed used history to help define the meaning of the *Elector Clause*. 573 U.S. 513, 525 (2014) (citing *McPherson*, 146 U.S. at 27).

McPherson's resolution of the Fourteenth Amendment challenge endorsed no such plenary authority (and, in any event, did not address WTA). Plaintiffs there argued the Equal Protection Clause afforded each citizen the right to vote for *each* Elector, precluding district elections. *McPherson*, 146 U.S. at 24, 39. While the Court disagreed, it affirmed that the state's power under the Elector Clause is

[1] Texas perplexingly suggests that the Supreme Court "endors[ed]" WTA in *McPherson*. Answering Br. at 1. The Court held Michigan's district-based apportionment method constitutional, and had no occasion to address the constitutionality of WTA. Indeed, the *McPherson* plaintiffs were members of the state's dominant party who *wanted* the Supreme Court to restore WTA to deny representation to political minorities. *See* John R. Koza et al., *Every Vote Equal* 84 (2013) (describing the case).

subject to the Fourteenth Amendment. *See id.* at 40 (if Electors "are elected in districts *where each citizen has an equal right to vote, the same as any other citizen has*, no discrimination is made") (emphasis added); *see Rhodes*, 393 U.S at 45 n.7 (Harlan, J., concurring) ("The Court held [in *McPherson*] that, given the early history … the States have the plenary power to alter the method by which Electors are selected *so long as the method cannot be attacked on Fourteenth Amendment grounds.*" (emphasis added)).

The Supreme Court has since repeatedly affirmed that a state may have plenary power under the Elector Clause, but it must exercise that power consistent with the Equal Protection Clause. As the Court stated in *Rhodes*:

> Obviously we must reject the notion that Art. II, s 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall * * * deny to any person * * * the equal protection of the laws.'

Id. at 28–29 (rejecting state's argument that "it ha[d] absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution"); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and

the equal dignity owed to each voter.").[2] Texas may not select a manner of appointing Electors that violates the Equal Protection Clause.

Texas's reliance on long-standing historical practice is equally unpersuasive. In *McPherson*, the Supreme Court reviewed such practices to determine the meaning of the *Elector Clause*. But long-standing historical practice (which in any event *predated* the Fourteenth Amendment) does not insulate a voting restriction from scrutiny under the *Equal Protection Clause*, which meaning evolves over time. *Gray* is illustrative. When it decided *Gray*, the Supreme Court had not yet addressed the Georgia County unit system through "full plenary consideration," but it had *rejected* challenges to that system four times in *per curiam* and summary decisions. *See Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Cox v. Peters*, 342 U.S. 936 (1952); *South v. Peters*, 339 U.S. 276 (1950) (per curiam); *Cook v. Fortson*, 329 U.S. 675 (1946). Reflecting the "swift pace of … constitutional adjudication" in the 1950s and 1960s, *Gray*, 372 U.S. at 383 (Harlan, J., dissenting), the Supreme Court held Georgia's primary system violated the Constitution—notwithstanding

[2] Texas purports to acknowledge these restrictions, but suggests "the citizen's right to vote exists only to the extent it has been granted by the State." Answering Br. at 31. Texas implies that, because it has decided citizens have a right to vote for a slate of Electors in a WTA election, the right must be defined with respect to this legislation—as the right to vote for such a slate. This understanding would eliminate the protection of the Equal Protection Clause. Texas could allow *only* Democrats, or only Republicans, or only people over the age of 40 to vote: Texas would have defined the "right to vote [for President]" in a particular way, and—if Texas is right—would be immune from suit.

that it was a "deeply rooted and long standing" practice that had survived prior challenges, *id.* at 376 (majority opinion).[3] If the Equal Protection Clause contained a grandfather clause, many of the most egregious laws would be immune from challenge. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 615 (1982) (enjoining dilutive multi-member district that had existed since 1911).

Texas's appeal to history is not only unpersuasive, it is particularly inapt in this context. As the Supreme Court has held, the reason a state adopts a voting law can be relevant to its constitutionality. *See id.* at 617 (assessing "discriminatory intent" in a vote dilution claim). Texas cannot dispute (and certainly not on the pleadings), that WTA was enacted years *before* the ratification of the Fourteenth Amendment for the *express* and invidious purpose of diluting the voting power of political minorities. *See* Opening Br. at 10–14, 29–30. That history does not save WTA from challenge; it condemns it.

II. TEXAS'S USE OF WTA VIOLATES THE EQUAL PROTECTION CLAUSE UNDER ESTABLISHED SUPREME COURT PRECEDENT.

Texas's election for President proceeds in two stages. At the first stage, Texas citizens cast their votes for 38 Electors. The use of WTA at this stage—to

[3] In *Gray*, the Court observed that population disparities that were *required* by the Constitution itself—such as the allocation of Electors to states disproportionate to the states' populations—were not subject to challenge under the Equal Protection Clause despite the passage of time. *See* Opening Br. at 31–33. But WTA is not required by the Constitution; that it is a "deeply rooted and long standing" practice is no more relevant than that fact was in *Gray*.

provide 100% of the representation in Texas's Electoral College delegation to Texas's dominant political party—"operate[s] to minimize or cancel out the voting strength of … [a] political element[] of the voting population" through the use of an at-large election for a multi-member body of Electors, and is unconstitutional. *Whitcomb*, 403 U.S. at 143 (internal quotation omitted). At the second, national stage, these Electors assign Texas's 38 electoral votes to a Presidential candidate. WTA prescribes that all 38 votes are awarded to the candidate preferred by a plurality of Texas voters, ensuring that votes of political minorities are counted only for the "purpose of being discarded" after the first stage. *Gray*, 372 U.S at 381 n.12. For this independent reason, WTA is unconstitutional.

A. WTA Burdens Plaintiffs' Fourteenth Amendment Rights at the First Stage of the Election by Unconstitutionally Diluting Plaintiffs' Votes for Texas's Electors.

As Texas admits, the first stage of the Presidential election constitutes an at-large, WTA election for a 38-person, multi-member delegation—no different from a statewide, at-large election for all thirty-one seats in the Texas Senate. Answering Br. at 26. Through the use of WTA, Texas ensures absolute one-party control over its Electoral College delegation: in the last ten presidential elections, more than 26 million votes cast for Democratic presidential candidates have resulted in *zero* Electors. Opening Br. at 18. This is not just the *effect* of WTA, but its purpose. *See* Opening Br. at 11–14, 18, 29–30. Plaintiffs have plainly

stated a claim that WTA violates the rights of political minorities in Texas by purposefully diluting their voting power through an at-large, multi-member election. *See* Opening Br. at 27–30.[4]

1. Texas Misconstrues Supreme Court Caselaw to Attempt to Foreclose Plaintiffs' Vote Dilution Claim.

Texas suggests Plaintiffs cannot bring a constitutional vote dilution claim on behalf of a political, as opposed to racial, minority, and may simply be "confus[ed]." Answering Br. at 15. To the contrary, the Supreme Court has *repeatedly* affirmed that "encouraging block voting multimember districts" may "diminish the opportunity of a minority party to win seats"—and not simply a racial minority. *Burns*, 384 U.S. at 88 n.14; *see also Rogers*, 458 U.S. at 616 (a "distinct minority" for purposes of a vote dilution claim may be "racial, ethnic, economic, *or political* . . . " (emphasis added)); *Whitcomb*, 403 U.S. at 143 ("But we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'"); *accord Fortson v. Dorsey*,

[4] Texas suggests courts have not "frequently determined … that multi-member, at-large election schemes are unconstitutional because they dilute minority voting strength." Answering Br. at 17. But, since the 1970s, the Supreme Court has sustained constitutional challenges to schemes involving *far* smaller multi-member districts on multiple occasions. *See, e.g.*, *Rogers*, 458 U.S. at 627–28; *White*, 412 U.S. at 765–69.

379 U.S. 433, 439 (1965); *see also Rhodes*, 393 U.S. at 24 (sustaining Equal Protection Clause claim brought by political minorities against Ohio's process for electing Electors). Plaintiffs therefore can state, and have plausibly stated, an Equal Protection claim based on Texas's use of WTA to dilute the power of a political minority in order to magnify the power of a political majority.[5]

Next, Texas suggests that the Supreme Court, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that "the one-person-one-vote rule 'is followed *automatically* … when Representatives [to Congress] are chosen as a group on a statewide basis …'" Answering Br. at 26 (quoting *Wesberry*, 376 U.S. at 8). The State faults Plaintiffs for failing to address this "foundational one-person-one vote case." *Id.*

[5] The Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) does not affect this precedent. In *Rucho*, the Court held that partisan gerrymandering claims are non-justiciable. It did not reach the merits of any Equal Protection Clause claim, holding that the Elections Clause delegated the power to review such issues to Congress, not courts—in contrast to challenges to a state's system of allocating Electors under the Fourteenth Amendment, which *are* justiciable. *See McPherson*, 146 U.S. at 23–24 (affirming justiciability of claim brought by Electors of one political party). Further, the problem the Court addressed in *Rucho* is fundamentally distinct from this case: partisan gerrymandering claims ask courts to determine whether a series of single-member districts—neutral on their face—are suspect because of the distribution of partisan power. *Rucho*, 139 S. Ct. at 2503. The Supreme Court has struggled to identify meaningful standards to make this determination. *See generally id.* In contrast, "multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts." *Growe v. Emison*, 507 U.S. 25, 40 (1993). For this reason, the Court has long affirmed that claims challenging such dilutive structures may be brought on behalf of political minorities.

But *Wesberry* is not a Fourteenth Amendment case, let alone a one-person-one vote case. *Wesberry* involved a claim that congressional districts were disproportionate on the basis of population, and plaintiffs raised claims under Art. I. § 2 of the U.S. Constitution (the "Elections Clause"), and, *inter alia*, the Equal Protection Clause. *Wesberry*, 376 U.S. at 3. The Court reached only the Elections Clause claim and *explicitly* stated that it did "not reach the arguments that the Georgia statute violates the … Equal Protection … Clause[] of the Fourteenth Amendment." *Id.* at 8 n.10. The statement from *Wesberry* that the State cites pertains to the Elections Clause only, and is dicta. *Id.* at 8.[6]

2. Properly Applying These Standards, Plaintiffs Clearly State a Claim.

(a) Plaintiffs Have Plausibly Alleged WTA Has the Purpose and Effect of Diluting Their Votes.

Citing precedent addressing racial dilution claims, Texas observes that such claims require a showing of dilutive purpose and effect. *See* Answering Br. at 26 (citing *Shaw v. Reno*, 509 U.S. 630, 649 (1993)). Plaintiffs recognize that the Supreme Court has historically required a showing that a voting structure has the "purpose and effect of diluting" a minority group's "voting strength." *Shaw*, 509 U.S. at 649. Plaintiffs have plausibly alleged purpose and effect here.

[6] Even if it could be construed as relevant, *Wesberry*'s dicta concerned Congressional elections and not the use of WTA in presidential elections; had no occasion to address the invidious history of WTA; and preceded the holdings and analysis in *Whitcomb*, *White*, and *Rogers*.

A plaintiff may make out a vote dilution claim by alleging an electoral system was adopted for a discriminatory purpose, or that—even if adopted for a neutral purpose—it is being maintained for a discriminatory one. *See Rogers*, 458 U.S. at 622, 627 (affirming district court's finding that electoral scheme "while neutral in origin" was "being maintained for invidious purposes"). So too may a Plaintiff show that a given multi-member district is highly dilutive in effect—a fact relevant *both* to the state's likely reason for maintaining that system, and to its impermissible operation. *See Rogers*, 458 U.S. at 627 (citing district court's findings that a multi-member district was "nearly two-thirds the size of [the state]" as "enhanc[ing] the tendency of [the district] to minimize the voting strength of racial minorities," and as a factor "underlying [the district court's] ultimate finding of intentional discrimination").

Plaintiffs allege that WTA was adopted to consolidate the power of the majority party in Texas. Opening Br. at 11–14, 18, 29–30. They also allege that WTA in Texas continues to have this effect and is purposefully maintained for this reason. Indeed, the Republican Party's candidate has won every recent election in Texas, and the Republican Party controls Texas's Senate and House. *See Rogers*, 458 U.S. at 626 (noting as relevant that the legislators who benefitted from the multi-member district were the ones with the power to eliminate it).

Plaintiffs have also alleged that WTA has dilutive effects of an

unprecedented scale. In *Whitcomb*, the Supreme Court explained that the tendency of a multi-member district to dilute minority voting strength would be "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." 403 U.S. at 143–44. In *Rogers*, the Supreme Court affirmed the district court's conclusion that, because a multi-member district was especially large (covering two-thirds of the state), it was particularly likely to be maintained for an invidious purpose. *Rogers*, 458 U.S. at 627. Here, WTA covers the *entirety* of Texas—and ensures that 100% of the representatives in Texas's Electoral College delegation go to a single party, election after election. WTA is an egregious form of impermissible vote dilution.

A determination of intent, moreover, is a finding of fact particularly ill-suited to a motion to dismiss, *see id.* at 623 ("issues of intent are commonly treated as factual matters"), and it may be proved through historical expert testimony, *see, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 228–29 (1985) ("testimony and opinions of historians were offered and received without objection" to prove discriminatory purpose). Where, as here, Plaintiffs have alleged that WTA has the purpose and effect of diluting the votes of political minorities, dismissal at the pleading stage is improper and should be reversed.

(b) In Any Event, Plaintiffs Need Not Plausibly Allege Intent to Succeed on Their Claim.

Recent Supreme Court decisions, including *Bush v. Gore*, make clear that a voting system may be so problematic on its face, *regardless* of intent, that it does "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to an equal vote. *Bush*, 531 U.S. at 105; Opening Br. 44–46 (collecting cases). Under this authority, there is *no question* Plaintiffs have alleged WTA is unconstitutional.

Texas attempts to narrow *Bush*'s significance. First, it suggests *Bush* required invidiousness, because Florida treated voters in a "disparate [manner] based on their place of residence," a form of invidious discrimination. Answering Br. at 19. Texas ignores the fact that the Supreme Court *nowhere* used the term "invidious." And in any event, invidiousness in voting jurisprudence has traditionally meant "discriminatory intent." *See Rogers*, 458 U.S. at 617 (intent required in "*all* types of equal protection cases"). Texas does not suggest that Florida *intended* to treat voters differently depending on where they lived, and nothing in *Bush* supports that reading. *See Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 234 & n.13 (6th Cir. 2011) (rejecting argument that "the Equal Protection Clause has not been violated because there has been no showing of intentional discrimination" (citing *Bush*, 531 U.S. at 104–05)).

Texas further suggests *Bush* is distinct from cases like *White* and *Rogers*, as

vote dilution claims are different from one person, one vote claims. But the intentionality requirement stems not from the nature of the voting violation but from the Equal Protection Clause. *See Rogers*, 458 U.S. at 617 (intent in vote dilution claim required because "a showing of discriminatory intent has long been required in *all* types of equal protection cases."). *Bush*'s holding that an Equal Protection Clause claim may be brought in the voting context—and in the context of a presidential election—without a showing of intent applies to Plaintiffs' claims.

Here, the extreme nature of WTA—as illuminated by the *Whitcomb* factors—makes that system plainly arbitrary on its face. Indeed, Texas does not reject Plaintiffs' characterization that WTA is analogous to a statewide, at-large election for all of Texas's state senators. Answering Br. at 26. It argues instead that such a system would be constitutional *unless* enacted for the purpose of diluting the votes of a racial minority. Texas's current state senate is laudably bipartisan, with 12 Democrats and 19 Republicans. Under the State's conception of Equal Protection, it could elect its entire senate through a single at-large, multi-member election—with the purpose and immediate effect of eliminating all Democrat seats in perpetuity. This Court should not sanction an application of the Equal Protection Clause that would allow such a result.

B. The Use of WTA Burdens Plaintiffs' Rights at the Second Stage of the Election.

WTA is unconstitutional under the Equal Protection Clause for a second,

independent reason: in purpose and effect, it discards the votes of political minorities to ensure they cannot influence the ultimate election *for President*.

The second holding of *Gray*, 372 U.S. at 381 n.12, is dispositive. In that case, the Supreme Court explained that a combination of two elements led to the impermissible weighting of votes in Georgia's primary. First, the Georgia Democratic party used a two-step election to nominate a single, statewide candidate, allocating a set number of county units to each county. Second, the party used WTA at the first step to allocate all of a county's votes to the majority winner. The combination of these elements—WTA at the first step, and a two-step structure—ensured that votes for a losing candidate were "worth nothing and . . . counted only for the purpose of being discarded." *Id.*[7]

Texas's use of WTA is functionally the same. As in *Gray*, the presidential election proceeds in two steps: first, Texas citizens elect presidential Electors; second, those Electors exercise their constitutionally-prescribed role—to cast those 38 votes for a presidential candidate. Opening Br. at 30–34. As in *Gray*, Texas employs WTA at the first step, awarding all of its 38 Electors (like the units in *Gray*) to the plurality winner. As in *Gray*, these two structural elements combine to impermissibly weigh votes, ensuring by design that the minority party's votes

[7] Texas does not argue a claim predicated on *Gray v. Sanders* requires any showing of intentional discrimination.

are discarded in the ultimate election for President.

There are admittedly some differences in the two cases. In *Gray*, Georgia *chose* to use a two-step election; Texas, in contrast, must do so under the Constitution. This technicality does not alter the analysis, however. The problem in *Gray* was created through the combination of two elements: WTA and a two-step election. Georgia could eliminate the impermissible weighting of votes by altering *either* of these elements. Texas cannot eliminate the two-step structure—but it *can* eliminate WTA. The constitutional problem in both cases, and the redressability of that problem, is the same.

Downplaying the clear applicability of *Gray* (which other courts have recognized, *cf. See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017) (recognizing that the election system in *Gray* is "similar to the electoral college used to elect our President")), Texas seizes on technical differences. According to Texas, its elections are different from those in *Gray* as—technically—they are only single-step elections for Electors, no different from any election for "statewide office such as governor or attorney general." Answering Br. at 30.[8] This ignores both reality and the law. As a constitutional matter, Electors are unlike other state officials: they are elected

[8] Even if Texas's elections were single-step, they are not for a single "statewide office," but for 38 office-holders. *See infra* Part II.A.

for a single purpose—to elect the President. As a practical matter, the statesmen who adopted WTA understood this reality: when Thomas Jefferson urged James Monroe to adopt WTA in Virginia, he did not do it simply because he wanted his political party to control *all* of Virginia's Electors, but also to ensure that Jefferson himself won the presidential election. *See* Opening Br. at 12. And Texas's laws enforce this two-step framework: Not only does Texas mandate that the names of the candidates for the President and Vice President be printed on the ballot, it provides that "the names of presidential elector candidates may not be placed on the ballot." TEX. ELEC. CODE § 192.034. This last point is crucial; Texas invokes its power to contour the presidential election as evidence that its elections are *one-step* only. *See* Answering Br. at 31 ("The right to vote as the Texas Legislature has prescribed entails only the right to vote in a statewide election for president to appoint a slate of presidential electors."). But its laws reveal the elections are two-step, and its citizens are encouraged to cast votes not only for Electors, but also for President.

As a technical matter, then, Texas citizens may vote for Electors in an at-large, slate election—and Plaintiffs do not deny as much. But "[f]or one-person-one vote purposes," Answering Br. at 30, Texas cannot treat its elections as presidential elections, and then disclaim the obvious parallel between what it has done, and what the Supreme Court condemned in *Gray*. To do so would be to fail

to recognize "the right to vote *as the legislature has prescribed*" it. *Bush*, 521 U.S. at 104 (emphasis added).

C. Plaintiffs' Remedy of Proportional Allocation Is Neither Impermissible Nor Relevant at this Stage.

Finally, Texas argues that Plaintiffs seek an "impermissible remedy": a proportional method of distributing Electors. Answering Br. at 32. Texas misconstrues Plaintiffs' complaint, and is any event incorrect.

As an initial matter, the question of the appropriate remedy—proportional or otherwise—is not before this Court, and is irrelevant to Texas's motion to dismiss. In their Complaint, Plaintiffs request in the first instance a declaration that WTA in Texas is unconstitutional and an injunction on its use. Only if the State fails to propose a valid alternative method in the face of this injunction do Plaintiffs propose a proportional method. *See* ROA.68 (Compl. ¶ 118(e)); FED. R. CIV. P. 8 (permitting a party to request alternative forms of relief). There is no question the court has the power to enjoin the use of WTA, and Texas does not suggest otherwise. *Cf. Gray*, 372 U.S. at 373, 381 (affirming injunction against use of county system); *White*, 412 U.S. at 759, 765–69 (affirming injunction on use of multi-member district); *Rogers*, 458 U.S. at 627–28 (same). It is premature, and unnecessary, to determine precisely what new electoral system Texas must ultimately adopt. *Cf. Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable

decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.").

Texas's true argument appears to be that—because Plaintiffs allege a proportional remedy would be appropriate (whether or not required)—it follows that their entire claim amounts to nothing more than a claim for proportional representation, which "[t]he Constitution [does not] guarantee." *City of Mobile v. Bolden*, 446 U.S. 55, 79 (1980)) (plurality op.); *see also Rucho*, 139 S. Ct. at 2501. That is incorrect. First, Plaintiffs' claims do not rest on a generalized right to proportional representation. They rely on established voting jurisprudence, in which the *degree* of disproportion created by a voting structure is highly relevant. *See Rogers*, 458 U.S. at 627 (holding, in a full merits decision two years after *Mobile*, that the district court's findings that a multi-member district was "nearly two-thirds the size of [the state]" was among those "underlying [the district court's] ultimate finding of intentional discrimination").

Second, Plaintiffs have never asserted that the *only* possible remedy in this case is a proportional system of allocating Electors; they have instead (correctly) asked that the State propose a system to replace WTA.

And finally, if indeed the only constitutional alternative to a fully *disproportionate* system of electing Electors (WTA) were a fully *proportionate* one, that would not defeat Plaintiffs' claims. That the Constitution does not

require proportional representation does not mean that such representation will never be necessary to *remedy* an established constitutional violation. *See, e.g.*, *Rogers*, 458 U.S. at 628 (where "a constitutional violation has been found, the remedy does not exceed the violation if the remedy is tailored to cure the condition that offends the Constitution" (internal quotations omitted)); *see also id.* (requiring the state go from multi-member, to single-member, districts).

III. NEITHER *WILLIAMS* NOR *HITSON* RESOLVES PLAINTIFFS' FOURTEENTH AMENDMENT CHALLENGES.

Plaintiffs have clearly alleged an Equal Protection Clause violation under established precedent. Nevertheless, Texas again asks this Court to avoid resolving Plaintiffs' claims because of two summary orders: *Hitson v. Baggett*, 446 F. Supp. 674 (M.D. Ala. 1978), *summarily aff'd*, 580 F.2d 1051 (5th Cir. 1978), and *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622, 629 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (1969). But Texas does not, and cannot, dispute that neither case addressed Plaintiffs' precise arguments: that, under *White v. Regester* and its progeny, WTA operates to cancel out plaintiffs' votes for Electors through an at-large election for a multi-member delegation; and that under *Gray*'s second holding, 372 U.S. at 381 n.12, WTA operates to discard the votes of Texas's political minorities for President.

As to *Hitson*, Texas fails to acknowledge that there was no "contention that Alabama's electoral scheme for the selection of presidential electors operates" to

"minimize or cancel out the voting strength of minority voters." 446 F. Supp. at 676. Nor did the district court in *Hitson* once cite to *Gray*. Assuming, *arguendo*, that a one-word summary affirmance could have precedential effect,[9] *Hitson* cannot have foreclosed arguments that were never presented or resolved.

Nor did *Williams* address either of Plaintiffs' arguments in this case. Opening Br. 36–41. Texas does not dispute that *Williams* did not address *White*, *Whitcomb*, or *Rogers*—decisions whose articulated standards are central to Plaintiffs' vote dilution claims—or the earlier vote dilution cases that preceded *Williams* (*Burns* and *Fortson*). Texas simply argues such decisions do not support Plaintiffs' claim, which, as noted *infra*, is incorrect. Nor does Texas dispute that

[9] Texas suggests *Hitson* is precedential. Answering Br. at 15. But in *N.L.R.B. v. Amalgamated Clothing Workers of Am., AFL-CIO, Local 990*, this Court addressed then-Rule 21 (allowing for one-word affirmances) and explained they have "no precedential value." 430 F.2d 966, 972 (5th Cir. 1970). Texas cites *United States v. Ellis*, 547 F.2d 863, 868 (5th Cir. 1977), in which the Fifth Circuit addressed whether a trial court abused its discretion in enforcing a deadline and noted that the same trial court had been affirmed under the same facts in a prior Rule 21 decision. *See id.* at 868. As the concurring judge made clear, that earlier affirmance "was a Local Rule 21 decision [that necessarily held] an opinion to be of no precedential value"; nevertheless, because it was so on-point, the affirmance "conclude[d] the matter as far as [the] panel [was] concerned." *Id.* at 869 (Roney, J. concurring). Other decisions have repeatedly acknowledged that Rule 21 affirmances are "without precedent." *See, e.g., Stroud v. Delta Air Lines, Inc.*, 548 F.2d 356, at *3 n.2 (5th Cir. 1977). Current Rule 47.6 continues the rule that summary affirmances have no precedential value; Rule 47.6 is unaffected by Rule 47.5.3 (cited by Texas) which states that unpublished *opinions*, such as *per curiam* decisions, published before January 1, 1996 are precedent. *United States v. Sanchez-Sanchez*, 779 F.3d 300 (5th Cir. 2015), cited by Texas, reflects this distinction. *Id.* at 307 n.32 (*Sam v. I.N.S.*, 16 F.3d 1216 (5th Cir. 1994), a *per curiam* unpublished opinion, was "fully precedential").

Williams did not address *Gray*'s second holding, distinguish (or otherwise acknowledge) that holding's reasoning, or in any way address the very arguments Texas itself relies on to distinguish *Gray*. 372 U.S. at 381 n.12. Essentially, Texas wants this Court to defer to *Williams* and *Hitson* not because either decision can be read to have addressed the issues in this case, but because, at a high level, both involved challenges to WTA-like systems under the Equal Protection Clause. That is not how summary orders work. They resolve only the "precise issues presented" and "necessarily decided" within them. *Mandel*, 432 U.S. at 176; *Price v. Warden*, 785 F.3d 1039, 1041–42 (5th Cir. 2015) (such decisions resolve only "determinations … essential to sustain the judgment" (internal quotation marks omitted)). Arguments that are neither made nor addressed are not such determinations. *See E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . . is to refrain from addressing issues not raised in the Court of Appeals."); *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 510 (5th Cir. 2005) (arguments not made to the district court are waived).[10]

IV. WTA BURDENS PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS BY ENSURING MILLIONS OF VOTES HAVE NO EFFECT ON PRESIDENTIAL ELECTIONS.

Texas sidesteps Plaintiffs' First Amendment arguments, choosing instead to point out what Plaintiffs are *not* arguing. Answering Br. at 34–35. Texas further

[10] *Williams* has also been abrogated for the reasons stated in Plaintiffs' opening brief. *See* Opening Br. at 41-47.

mischaracterizes Plaintiffs' injury as losing the Presidential election. *Id.* at 35–36. But Plaintiffs have not argued they have a right to win, but that WTA *artificially* renders their votes and voices futile, dampening their "basic incentive" for participating in the election. *Rhodes*, 393 U.S. at 41 (Harlan, J., concurring). So too does it burden their rights as political minorities to associate with their party for the election of presidential candidates by guaranteeing that even if they are relatively successful in such association, their candidate will receive zero electoral votes. *See Gill v. Whitford*, 138 S.Ct. 1916, 1941 (2018) (Kagan, J., concurring). And it incentivizes candidates to ignore Texas, rendering Plaintiffs' voices meaningless in national campaigns so long as they continue to vote in Texas. Opening Br. at 51–52.

These burdens do not exist because Plaintiffs lose or win the presidential election; they occur in every election cycle regardless of who wins, and they are the predictable effect of WTA.

V. TEXAS HAS NO LEGITIMATE STATE INTEREST IN MAINTAINING WTA.

Finally, Texas repeats the faulty state interest it cited to the district court: maximizing its influence in the Electoral College. *See* Answering Br. at 36–37. Texas ignores Plaintiffs' explanation why this is not a legitimate state interest, *see* Opening Br. at 53–55, as well as historical evidence that WTA was adopted to aggrandize the power of the state's dominant political parties at the expense of

minority voters, *id.* at 10–14, 53–55. To the extent this Court believes there is a factual dispute about the true purpose of WTA, the district court's dismissal on the pleadings must be reversed. *See Rogers*, 458 U.S. at 623 ("issues of intent are commonly treated as factual matters").

CONCLUSION

For the foregoing reasons, the dismissal of Plaintiffs' claims should be reversed.

Dated: September 27, 2019

Respectfully submitted,

/s/ David Boies

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation and world limitation of Fed. R. App. P. Rule 32(a)(7)(B), because it contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule32(f).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 365.

Dated: September 27, 2019

/s/ David Boies
David Boies

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 27, 2019.

I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: September 27, 2019

/s/ David Boies
David Boies

United States Court of Appeals

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September 30, 2019

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No. 19-50214 League of United Latin America, et al v.
Gregory Abbott, et al
USDC No. 5:18-CV-175

Dear Mr. Boies,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

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