No. 20-1100

IN THE

Supreme Court of the United States

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

Petitioners,

v.

GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, & JAMES SCHWAB, ACTING SECRETARY OF STATE OF CALIFORNIA, IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

REPLY BRIEF

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May 19, 2021

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ARGUMENT

California's response fails fundamentally to address the arguments favoring review in this case.

Yes, lower courts have followed *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968) to reject challenges to the method States use to allocate presidential electors. That is precisely the problem: *Williams* has been read broadly to stifle challenges based on decisions of this Court that post-date *Williams*. *Williams* has also been used improperly to avoid the merits of arguments that were not raised or addressed in *Williams* itself. Yet as this Court has instructed, "an unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (citations omitted); *see also, Hicks v. Miranda*, 422 U.S. 332, 345 n.14 (1975) (noting that "[a]scertaining the reach and content of summary actions may itself present issues of real substance.").

This case itself demonstrates the uncertainty that *Williams* has generated. The district court below treated *Williams* as negating any challenge to the method of allocating electors, however framed. Pet. App. 35a. The Court of Appeals narrowed that conclusion, finding *Williams* controlling only as to Fourteenth Amendment claims. Pet. App. 20a. The Fourth Circuit, by contrast, has not held *Williams* as "controlling" but merely "persuasive." *Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) (Wynn, J., dissenting).

California does not contest the importance of the question whether the dominant method for allocating presidential electors in the states remains consistent with the Constitution. Resp. at 5 (There is no doubt that the manner in which the States select presidential electors is an important issue). That question—the answer to which was last supplied over a half-century ago by a district court decision which this Court summarily affirmed—should be addressed directly by this Court. This Court should grant the petition, and either take up that question itself, or vacate the judgment, and remand to the Ninth Circuit, with instructions to consider the constitutional questions, independently of *Williams*.

1. Petitioners' fundamental claim is that the *Williams* summary affirmance relied upon by the lower courts to deflect any constitutional challenge to the method of allocating electors has itself been undermined by later decisions of this Court. For example, this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), changed the contours of Fourteenth Amendment constraints on state-crafted election rules. *Williams* neither anticipated *White* nor is it consistent with *White*.

Its inconsistency is demonstrated directly in the example Petitioners offered in their brief, Pet. 27, and to which California has made no reply. Following the "winner take all" (WTA) method it uses to allocate its 55 presidential electors, could California also allocate its 40 state senate seats by holding a single slate, state-wide election and giving to the party that wins that election all 40 seats? Under *White*, the answer to that question is likely "no." Under *Williams*, the answer is presumptively "yes". Such a system would

not "in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote," even though the senate would then "speak[] only for the element with the largest number of votes," and even though "[t]his in a sense is discrimination against minority voters." *Williams*, 288 F. Supp. at 627.[1]

California resists this conclusion by suggesting that *White* touches only (1) "invidious discrimination" (2) on the basis of race. Resp. 12-13. But *White*, 412 U.S. at 765, explicitly builds upon *Burns v. Richardson*, 384 U.S. 73 (1966). And *Burns* addressed both racial and political discrimination. 384 U.S. at 88 (policing schemes "to minimize or cancel out the voting strength of racial *or political elements* of the voting population.") (emphasis added). This Court's later jurisprudence strongly suggests that there is no requirement of "invidiousness" in the context of an Equal Protection challenge to the presidential election system. In *Bush v. Gore*, 531 U.S. 98 (2000), for example, the only question the Court asked was whether the recount measures adopted by the Florida Supreme Court resulted in "arbitrary and disparate treatment of the members of its electorate." *Id.* at 104-05.

2. California rejects Petitioners' reliance on *Gray v. Sanders*, 372 U.S. 368 (1963), by arguing that the "core concern" of *Gray* was the unequal population in the county units that determined the state-wide result. Resp. 11.

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[1] In the context of *Williams*, the court's reference to "minority voters" refers to voters who are in the minority, not to the racial or ethnic characteristics of the voters.

But regardless of whether "geographic discrimination" was *Gray's* "core concern," California does not dispute that it was not the only reason this Court offered for striking Georgia's county-unit voting scheme. *Gray* identified a second structural flaw in Georgia's election system, based on the method that Georgia had adopted for determining its county-wide results.

Unlike in most statewide elections across the nation, in which the votes for a candidate are counted at the state level, Georgia had divided its process into multiple stages: first, citizens cast their votes for their chosen candidate for statewide office; second, the plurality winner in each county was awarded all of the "units" allocated to the county; and third, the units were tallied across counties to determine the statewide winner.

It was the particular way in which those county units were awarded that created an Equal Protection problem. For by aggregating votes at the county level and then assigning a single winner based on the candidate receiving a plurality of votes, Georgia effectively discarded the votes of the political minority in each county at an intermediate stage of that statewide election. That "discarding" was the constitutional problem. As this Court observed,

> "if a candidate won 6,000 of 10,000 votes in a particular county, [that candidate] would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and *being counted only for the purpose of being discarded*."

Gray, 372 U.S. at 381 n.12. (emphasis added). California cannot deny either (1) that this structure describes precisely the dynamic of California's WTA system for allocating presidential electoral votes, or (2) that this argument from *Gray* was never presented in *Williams* or otherwise to this Court. Indeed, California does not so much as mention the second part of *Gray* in its response to our Petition.

As with the system in Georgia, California's system is a multi-stage process for determining the electoral outcome. In both systems, in the first stage, citizens vote. In Georgia citizens voted, in their perception, for candidates for statewide office. In California, they vote, in their perception, for President. In the second stage, both Georgia and California consolidate power in the hands of the plurality—in Georgia at the county level and in California at the state level.

In the final stage, the differences between Georgia and California are purely superficial. In Georgia, the total county units awarded to each candidate were counted to determine the state-wide winner. California's electors perform the equally mechanical task of voting for the Democratic candidate for President, as they are bound to do. As in Georgia, the WTA method that California has adopted for awarding electoral votes "count[s]" the votes of Republicans "in the first stage only for the purpose of being discarded." 372 U.S. at 381 n.12. This second part of *Gray* thus addresses exactly the effect of WTA in the allocation of presidential electors. Yet the Ninth Circuit refused to consider how that analysis applies to California's use of WTA.

As did the Ninth Circuit, California seeks to avoid this argument by suggesting that *Gray* itself

effectively exempted California's choice of WTA from Equal Protection review because the Constitution, in its creation of the Electoral College, contains its own inequalities: "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." Resp. at 10.

But this argument is a non-sequitur. Petitioners are not challenging the Electoral College. We are *not* saying that it is unconstitutional to conduct an election for President in the manner the *framers* chose—in a multi-stage manner, or in the allocation of Electors among the states according to the number of each state's Congressional representatives.

Petitioners are rather challenging the method that *California* has chosen for allocating its electors which, uniquely in modern elections, throws out the votes of the losing party at an intermediate step of a multi-stage election. WTA is not within the Constitution. It is instead a partisan invention by the states that has become the default for the nation. As such, it must meet the standards of the Equal Protection Clause. Under this Court's precedent in *Gray*, WTA does not.

3. California cannot deny that *Williams* has been read—and applied—far beyond the appropriate scope for a summary affirmance. As this Court has explained, "the precedential effect of a summary affirmance can extend no further than 'the precise issues presented and necessarily decided by those actions." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182–83 (1979) (citations omitted). As in *Illinois State Bd. of Elections,* "the issue presented here was not referred to by" either the

plaintiff or the three-judge panel in *Williams*. *Id.* "A summary disposition affirms only the judgment of the court below," as this Court has explained, "and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.5 (1983) (collecting cases). Yet clearly in this case, much more was "read into [this Court's] action than was essential."

This mistake has not been limited to the Ninth Circuit. It has blocked the ability of courts to review, on the merits, the application of a much-changed Equal Protection doctrine to the states' rules for allocating electors. Because courts have read *Williams* as dispositive of issues *Williams* did not address, there has been no effort by the courts for over a half-century to test whether the states' rules meet the standards of the Constitution. Petitioners therefore ask this Court to grant certiorari in this case to address that question directly. Alternatively, the Court should grant, vacate, and remand this case, with instructions to evaluate Petitioners' claims independently of *Williams*. Judge Wynn's dissent in the Fourth Circuit, *Baten*, 967 F.3d at 361, demonstrates the strength of Petitioners' claims, once viewed independently of *Williams*. Those claims should be evaluated without the overhang of a fifty-year-old summary affirmance.

4. California rejects Petitioners' First Amendment argument that a system that "count[s]" Petitioners' votes "only for the purpose of being discarded," *Gray*, 372 U.S. at 381 n.12., is inconsistent with Petitioners' right to "cast an effective . . . vote." *Reynolds v. Sims*, 377 U.S. 533, 581 (1964). California suggests that right is satisfied so long as Petitioners are not treated "differently from any other" voters or prevented "from

casting a vote." Resp. at 14, 16. But Republican voters in California *are* treated "differently" than Democratic voters, whose votes, unlike Republican votes, not only count, but are magnified in their effect. And the idea that the state is obligated to allow a voter to *cast* a ballot, but is then free to do with that ballot whatever it wants, makes a mockery of the right to cast an *effective* vote. Given the importance of this issue to the selection of the President, this Court should grant review.

5. California is mistaken to suggest that WTA does not unconstitutionally intrude on Petitioners' First Amendment associational rights. Resp. at 14. Even though California "has not directly limited appellants' right to assemble or discuss public issues or solicit new members," the effect of WTA is to "eliminate[] the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights." *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (Kagan, J., concurring) (explaining that, in the context of partisan gerrymandering, "[m]embers of the 'disfavored party' in the State deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office . . . .").

WTA also encumbers First Amendment rights by severing the connection between voters and presidential candidates. As Petitioners have argued, Pet. 19-21, WTA renders voters in the vast majority of states irrelevant to the candidates running for

president. Voters in California matter not at all to either candidate, because California, like as many as 36 other states, is a "spectator state" rather than a "swing state" or "battleground state." *See America Goes to the Polls*, Nonprofit VOTE and US Elections Project, https://perma.cc/4SJY-EC2N. The vast majority of campaign spending and campaign attention—and as Petitioners argued without contradiction by California, policy responsiveness, *see* Douglas L. Kriner & Andrew Reeves, *The Particularistic President* 175 (2015)—is within the swing states. *America Goes to the Polls* at 7. Were California to allocate its electors proportionally, all voters in California would matter more to presidential candidates than they do today. But because of the strategic cost to the Democratic Party of changing the WTA rule by itself, that change simply will not happen.

Petitioners' claims are individual, to each of them and any voter like them. Republican voters in California are not identical to Republican voters elsewhere. Their interests and concerns are distinct. Yet because of WTA, their potentially distinctive contribution to the election of the President is rendered irrelevant. That consequence is solely the product of California's choice to give effect only to the votes of the plurality winner, which for the last eight presidential election cycles, has been the Democratic candidate.

* * *

There is no facet of the Electoral College that is more broadly condemned, in a cross-partisan way, than the effect of WTA on our presidential selection system. Allocating electors according to WTA denies

voters in every spectator state any real relevance to the campaigns of either major party candidate, and the vast majority of America lives in spectator states. Kentucky, no less than California, is irrelevant to presidential campaigns. Kentucky, like California, is a spectator state that allocates its electors according to WTA.

Nothing in the framers' design anticipated, much less, compels this result. And the principles of equality that were added to the framers' design in the Reconstruction Amendments weigh decisively against it. No doubt, the Constitution entrenches an Electoral College. But nothing in the Constitution cements the states' choice of WTA. And as this Court has repeatedly affirmed, *see Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 n.4 (2020), *Bush*, 531 U.S. at 104–05, 22 107, *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969), *Williams*, 393 U.S. at 29, constitutional norms constrain the states' implementation of their role in our presidential elections.

In principle, the states that suffer most because of this dynamic could change their method unilaterally. In our Petition (at 25) we likened this to a classic problem of game theory, in which "all parties get stuck in a suboptimal position because changing unilaterally would result in a short-term loss" of influence in the Electoral College. No state wants to "disarm" unilaterally. If this Court would recognize the right of Petitioners to a system that properly accounts for their vote, that change could be effected nationally quite quickly.

At the very least, there is a strong reason for this Court to address directly the issues presented by WTA that the summary affirmance in *Williams* has, for a

half-century, blocked courts from considering on the merits. Every citizen should have the right to have their vote matter in a presidential election, regardless of the votes of others in their state. WTA defeats that principle, and under current Supreme Court jurisprudence, that defeat cannot be justified.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to determine the constitutional status of the use of WTA for presidential elections.

Respectfully submitted,

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Dated: May 19, 2021