No. 20-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are two California Republicans and two non-profit organizations who have alleged their votes for President and Vice President are diluted by California's use of the so-called winner-take-all system. That system, by law, results in the appointment of members of only one political party to the Nation's largest electoral college delegation. The Ninth Circuit held that a claim brought under the Equal Protection Clause was properly dismissed because it was governed by a summary affirmance from over fifty years ago. It dismissed a claim brought under the First Amendment on independent grounds.

The questions presented are:

(1) Do the Equal Protection Clause, the First Amendment, or both prohibit California—and, by the same reasoning, all the States—from appointing a one-party slate of presidential electors, thereby rendering irrelevant and ineffective the votes and views of millions of voters?

(2) Does a fifty-year-old summary affirmance control, even where significant developments in election law since then have undermined its foundation and where the lower courts are split as to the proper scope of summary affirmances?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners Paul Rodriguez and Rocky Chavez are natural persons.

Petitioner League of United Latin American Citizens has no parent company and no publicly held corporation holds more than 10% of its stock.

Petitioner California League of United Latin American Citizens is a California affiliate of League of United Latin American Citizens and no publicly held corporation holds more than 10% of its stock.

RELATED CASES

- *Rodriguez, et al., v. Brown, et al.,* No. 2:18-cv-001422, U.S. District Court for the Central District of California. Judgment entered September 21, 2018.
- *Rodriguez, et al., v. Newsom, et al.,* No. 18-56281, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 9, 2020.
- *Lyman, et al., v. Baker, et al.,* No. 1:18-cv-10327, U.S. District Court for the District of Massachusetts. Judgment entered December 7, 2018.

- *Lyman, et al., v. Baker, et al.,* No. 18-2235, U.S. Court of Appeals for the First Circuit. Judgment entered March 31, 2020.
- *Baten, et al., v. McMaster, et al.,* No. 2:18-cv-00510, U.S. District Court for the District of South Carolina. Judgment entered March 8, 2019.
- *Baten, et al., v. McMaster, et al.,* No. 19-1297, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 21, 2020.
- *Baten, et al., v. McMaster, et al.,* No. 19-1297, U.S. Court of Appeals for the Fourth Circuit. Judgment entered September 1, 2020.
- *League of United Latin American Citizens, et al., v. Abbott, et al.,* No. 5:18-cv-00175, U.S. District Court for the Western District of Texas. Judgment entered February 25, 2019.
- *League of United Latin American Citizens, et al., v. Abbott, et al.,* No. 19-50214, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 26, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Paul Rodriguez, Rocky Chavez, League of United Latin American Citizens, and California League of United Latin American Citizens respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is available at *Rodriguez v. Newsom,* 974 F.3d 998 (2020) and is reproduced in the Appendix at App. A.

The opinion of the District Court is available at *Rodriguez v. Brown,* 2018 WL 6136140 (2018) and is reproduced in the Appendix at App. B.

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 8, 2020. This Court extended the time to file any petition for certiorari due on or after March 19, 2020, to 150 days and thus this Petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution of the United States is reprinted in the appendix of this petition. App. 37a–40a.

The Twelfth Amendment is reprinted in the appendix of this petition. App. 41a–42a.

The Fourteenth Amendment provides in relevant part that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

California Elections Code §§ 6900–6909, 15400, 15452, 15505 provide for the statewide selection of single-party presidential elector slates by deeming votes for a presidential ticket as votes for an entire slate of presidential electors. App. 42a–47a.

Section 6901 says in relevant part that "[t]he Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election." App. 42a–43a.

INTRODUCTION

This petition gives this Court the chance to address the merits of an electoral practice that is longstanding but constitutionally infirm: a state's use of the winner-take-all method of selecting presidential electors ("WTA"). Each presidential election year, this unique method of selection means that tens of millions of Republican and Democratic votes are "worth nothing and . . . counted only for the purpose of being discarded." *Gray v. Sanders*, 372 U.S. 368, 381, n.12 (1963). That makes this method unconstitutional.

Presidential elections in California, and in the rest of the country, take place in multiple steps. At the first step, California conducts an election that, from the perspective of voters is for President, but is in reality a vote for a slate of presidential electors. In the second step, over the last eight presidential elections, because of WTA, the Democratic presidential candidate received all fifty-five of California's electoral votes, and the votes cast by the Republican party's voters were ignored. In the final step of the election, the electors vote for President, making official the predetermined result.

Of course, in every election, at the final stage, the votes of the losing candidate are ignored. But the discarding in this system happens at an intermediate stage. California does not elect the President. The Electoral College does. Under WTA, the votes of California Republicans are discarded before they could count in the final stage of selecting the President.

Even if viewed as a single-step election for California's electors, rather than as a multi-step election for President, California's process is

constitutionally dubious. From this perspective, the use of WTA in presidential elections is akin to a single slate, at-large election for State Assembly in which the slate of the party that receives the most votes wins all of the seats. Under *White v. Regester*, 412 U.S. 755 (1973), such a system would clearly be unconstitutional and, for that reason at least, is used nowhere else in America other than in presidential elections. Nor could it be. It is axiomatic that no state could throw out every vote cast for all but one political party and elect a WTA State Assembly. No county could elect a WTA slate Board of Supervisors, and thereby reduce the minority party's representation to zero. And no city could elect a WTA City Council, so that only a single party has a voice in legislating. Yet, every four years, that is exactly what WTA does in presidential elections.

This cancellation of the votes of the minority party is unconstitutional for two reasons. First, as *Gray* makes clear, the government may not discard millions of votes at an intermediate step of a multi-stage election, like that for President. 372 U.S. at 381 n.12. Second, as this Court made clear in *White,* 412 U.S. at 769—decided after the summary affirmance in *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd,* 393 U.S. 320 (1969), on which the court below erroneously relied—states may not use at-large, slate elections for multi-member bodies to disregard the preferences of a minority of voters.

The importance of the issue alone makes this case cert.-worthy, as this case presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The WTA

rule is used by 48 states, and has been for many years, but it is found nowhere in the Constitution. Nor has this unique but all-important method of election ever been sanctioned on the merits by this Court. Instead, in *Delaware v. New York*, 385 U.S. 895 (1966), this Court denied Delaware's motion to file a complaint against New York addressing the issue in an original matter. And three years later, in *Williams,* this Court affirmed without opinion the decision of a three-judge panel upholding a challenge against a very different doctrinal background and very different arguments than those made here. The time has come for this Court to address the issue.

Moreover, the question of *Williams*' status is independently cert.-worthy. Courts below often divide on the proper interpretation of summary dispositions on the merits, and they did so here. Yet this Court has so far done little to settle a conflict of interpretation in the lower courts. At minimum, this Court should grant certiorari to provide guidance for how courts should address *Williams*.

STATEMENT OF THE CASE

I. Legal Background

A. The non-constitutional origins of winner-take-all.

Article II of the Constitution creates the unique office of "presidential elector" and provides that each state appoint, "in such manner as the legislature thereof may direct," electors equal in number to its congressional representatives. U.S. Const. art. II, § 1. Once selected, these electors meet and vote for President and Vice President. *See* U.S. Const. amend. XII. The collection of these electors has come to be called the "Electoral College."

No particular method of appointment is mentioned specifically in Article II, and some degree of political diversity of each state's delegation is implicit in the Constitution. Article II and the Twelfth Amendment, for instance, direct electors in each state to meet, vote for President and Vice President, and "make a List of all the Persons voted for, and of the Number of Votes for each." U.S. Const. art. II § 1; amend. XII (similar text). Implicit in this requirement is that the electors in a given state may individually vote for different candidates, not that they will vote as a bloc for a single ticket.

At the framing, the WTA method of selecting electors was rarely mentioned: WTA is nowhere addressed in The Federalist Papers and was not discussed at the Constitutional Convention. *See* John R. Koza et. al, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* 82, 366 (4th ed. 2013). This is not surprising. The framers intended electors to comprise a state-level,

"deliberative body in which presidential electors would exercise independent and detached judgment." In the first election (prior to the rise of partisanship), most of them acted in that manner. *See id.* at 73–74 (noting in this election electors "acted in a reasonably deliberative manner"); *see also McPherson v. Blacker*, 146 U.S. 1, 36 (1892) ("[I]t was supposed [by the Framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive."); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (acknowledging that many Framers "shared that outlook" of Hamilton and Jay that electors would exercise discretion). But WTA, which elects a slate of electors on party lines and treats them as tools for tallying a state's plurality popular vote, is inconsistent with this understanding.

It was not the constitutional design, but the rise of partisan politics that subsequently led to the broad adoption of WTA. *See generally* Koza, *supra*, at 75–82 (partisan gamesmanship led to adoption of WTA, a system the founders "never envisioned" and for which they "did not advocate"). Writing to then-Virginia Governor James Madison in 1800, Thomas Jefferson criticized WTA, stating that it would ensure that the "minority [was] entirely unrepresented." *See* Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in* 31 Papers of Thomas Jefferson, Vol 31. 300-01 (Barbara B. Oberg., 2004). He nevertheless urged Virginia to adopt it for political reasons. Namely, Jefferson had recently lost the 1796 presidential election after two states he counted on for support—Virginia and North Carolina—permitted their electoral votes to be split among multiple candidates, while other states, carried by the Federalists, did not. *Id.*; *see also* Noble E. Cunningham, *History of*

American Presidential Elections 1878–2001, 104-05 (2002) (describing the election of 1796). Jefferson wanted to ensure he received all of Virginia's electoral votes in 1800 and that no minority voters received representation. WTA was the answer. It proliferated not because it was good for the Nation but because it was good for political parties.

After Virginia's Republican legislature adopted WTA, similar partisan gamesmanship led to its widespread adoption elsewhere. John Adams, a Federalist, was concerned that Jefferson might capture one of Massachusetts' electoral votes, so he convinced the state legislature to legislatively award all of its electors through WTA. Koza, *supra*, at 80–81. Partisans around the country used the same reasoning to persuade their legislatures to adopt WTA and the method was widespread by 1836. *See* David W. Abbott & James P. Levine, *Wrong Winner: The Coming Debacle in the Electoral College* 21 (1991) ("The political logic and competitive pressure from other states became irresistible. One state followed another in switching to a winner-take-all system."). WTA was not the result 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." 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).

It was in this context that California adopted WTA following its admission to the Union in 1850. The State used a form of WTA in the 1852 presidential election and in every election since then. *See generally* Koza, *supra*, at 82–91.

B. The early but incomplete application of the Fourteenth Amendment to presidential selection.

Although Jefferson and others recognized the disenfranchising effect of WTA on political-minority voters as early as 1800, the legal implications of this effect would only become clear with the ratification of the Fourteenth Amendment's Equal Protection Clause and the evolution of the principle of "one person, one vote." Yet, without this Court's intervention in this case, that application will remain incomplete.

Shortly after the ratification of the Fourteenth Amendment, this Court first acknowledged that the Equal Protection Clause operates to restrict a State's power under the Elector Clause in *McPherson v. Blacker*. 146 U.S. at 24–25. The plaintiffs in *McPherson* challenged Michigan's law providing for the selection of electors pursuant to congressional district, arguing the Elector Clause required WTA, and that the Equal Protection Clause afforded each citizen the right to vote for each elector, precluding district elections. *Id.* at 24, 39. This Court rejected their claims. In doing so, it held that a challenge to a state's method of allocating its electors does not present a political question, *id.* at 24, and that the Fourteenth Amendment applies to elections for electors, *see id.* at 40.

Sixty years later, the Supreme Court relied on the developing principle of "one person, one vote" to hold unconstitutional the Georgia Democratic Party's "deeply rooted and long standing" process for conducting its primary elections. *Gray*, 372 U.S. at 381. Under that system, which resembles fundamentally the WTA method of allocating electors,

the Georgia Democratic Party provided each county a set number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election for statewide officeholders, such as governor, and awarded all of its units to the winner in each county. *Id.* This Court held that this system violated the Constitution first, because units were not allocated in proportion to population, and so unconstitutionally favored rural voters. *See id.* at 379. But second, and significant here, the Court also held that even if "unit votes were allocated strictly in proportion to population," the unconstitutional "weighting of votes would continue" because of WTA. *Id.* at 381 n.12. That is, WTA requires "the candidate winning the popular vote in the county to have the entire unit vote of that county," ensuring "votes for a different candidate [would be] worth nothing and . . . counted only for the purpose of being discarded." *Id.* The Court thus held that Georgia's use of WTA in a context materially identical to WTA's use in presidential elections constituted an independent constitutional violation.

C. The *Delaware* missed opportunity and the *Williams* summary affirmance.

Immediately following *Gray*, several stakeholders began to realize that WTA might be unconstitutional under the *Gray* reasoning and the emerging "one person, one vote" line of cases. In *Delaware v. New York*, Delaware moved in this Court to litigate an original lawsuit challenging WTA because "[i]n every election, the state unit system abridges the political rights of substantial numbers of persons by arbitrarily awarding all of the electoral votes of their state to the

candidate receiving a bare plurality of its popular votes." *Delaware v. New York*, Orig. No. 28 (1966), Motion for Leave To File Bill of Complaint ¶ 7. This Court, though, denied leave to file without opinion. 385 U.S. 895.

Two years later, a different group of plaintiffs challenged Virginia's use of WTA to allocate presidential electors under the Equal Protection Clause. These plaintiffs, though, did not cite *Gray*'s second holding or argue WTA discarded their votes for President at the second step in a multi-step election, as in *Gray*. *See Williams*, 288 F. Supp. at 629. Instead, they argued that WTA discriminated against members of Virginia's minority party by canceling out their votes in an at-large election for electors. *Id. at* 622 ("Unfairness is imputed to the plan because it gives the choice of all of the electors to the statewide plurality of those voting in the election" 'winner take all' and accords no representation among the electors to the minority of the voters.").

A three-judge panel rejected their challenge, and this Court again avoided directly addressing the question and instead summarily affirmed the lower court's decision. The three-judge panel agreed that the *Williams* plaintiffs' argument had "merits and advantages," and acknowledged that "once the electoral slate is chosen, it speaks only for the element with the largest number of votes," and that "[t]his in a sense is discrimination against minority voters." *Williams*, 288 F. Supp. at 627, 629. It nevertheless held that such discrimination was not enough to violate the Constitution unless "invidious." *Id.* at 627. This Court summarily affirmed but did not opine on the merits of the issue. 393 U.S. at 320.

Williams' holding was unsurprising given the law at the time and given the limited arguments made by the plaintiffs. But four years after *Williams*, in *White v. Regester,* the Court squarely addressed on the merits the argument made by the plaintiffs in *Williams,* in the context of ethnic minorities. The Court struck down an at-large election for a multi-member body, directly analogous to the first step in the multi-step process of electing Presidents, on the ground that it canceled out minority votes, *White*, 412 U.S. at 769–70; *see also Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) ("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.").

And even later, the Court made clear that if an electoral process fails to "satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right to vote," it violates the Equal Protection Clause with no requirement of a finding of invidiousness. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

WTA has thus persisted for another 50 years since *Delaware* and *Williams* even as Equal Protection jurisprudence has evolved. But this Court has never directly addressed the merits of the practice.

II. This Case

A. California's implementation of WTA and its distorting effect.

California, like 47 other states, uses the WTA system to select a one-party slate of electors that supports the Presidential and Vice-Presidential candidates at the top of the ticket. Cal. Elec. Code §§ 6900-09, 15505. Ballots for California's fifty-five presidential electors print only the names of the presidential candidates; the electors' names are not permitted to be on the ballot. Cal. Elec. Code §§ 6901-02. Those electors are then bound, by law, to support the "candidates of the political party which they represent." Cal. Elec. Code § 6906. In every respect, the electors' modern role is purely ministerial.

The democratic burdens this system imposes on voters and citizens like Petitioners have become especially clear in recent decades. In each of the last eight presidential elections, California, relying on WTA, has awarded all of its electoral votes to the Democratic ticket and has effectively discarded over 31 popular million votes for Republican candidates. Compl. ¶ 3, 5. Any incremental change in California's popular vote has therefore had no effect on the outcome of the national presidential election margin by design: the Republican candidate has won as little as 30%, and as much as 44.3% of the popular vote. But, despite the fact that the election is for President, the Republican party has always received zero electoral votes. *Id.* ¶ 33.

Because it is used so widely, WTA distorts American democracy. In modern elections, WTA incentivizes presidential campaigns to focus on

battleground states at the expense of one-party-dominated, "safe" states like California. WTA ensures that California's fifty-five electoral votes are treated as safely Democratic. *Id.* ¶ 8. Thus, in 2016, 14 battleground states received 99% of candidates' advertising and 95% of their personal appearances. *Id.* ¶ 8. California—despite being the most populous state in the union—was not among these states. *Id.* ¶ 8. WTA ensures that minority party voters have less incentive to participate in presidential elections and associate with like-minded voters—as their votes are predictably irrelevant to the election. And WTA may skew the priorities of the Executive branch itself, affecting issues as diverse as disaster relief and the general allocation of federal funds. Compl. ¶ 46.

WTA also ensures that presidential candidates are increasingly likely to win elections without winning the popular vote. Abbott & Levine, *supra*, at 21-42 (explaining how WTA makes this outcome more likely); *accord* Koza, *supra*, at 129. And indeed, WTA even jeopardizes national security: modern technological trends have made American elections increasingly vulnerable to attacks by hostile foreign entities. WTA—by artificially ensuring elections come down to a small but predictable pocket of votes—makes presidential elections especially vulnerable to such attacks. *Id.* ¶¶ 51-53. These effects are not caused by the Electoral College itself. They are caused,

instead, by the use of a device nowhere sanctioned by the Constitution: WTA.[1]

B. Prior proceedings

Recognizing the burden WTA places on their rights to vote and associate in violation of the Equal Protection Clause and First Amendment, Petitioners—two California Republican voters and two non-profits—brought the underlying suit seeking a declaration that WTA is unconstitutional and must be enjoined.

The state moved to dismiss, and the district court granted the State's motion, primarily holding that the Supreme Court's summary affirmance in *Williams* foreclosed Petitioners' challenge. App. 26a–36a. On appeal, the Ninth Circuit affirmed the dismissal in an opinion filed on September 8, 2020. App. 1a–26a.

The court of appeals, like the district court before it, primarily relied on the argument that the *Williams* summary affirmance controlled the outcome. The court noted the factual similarities between this case and *Williams* and held that *Williams* had "binding

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[1] As this makes clear, the unconstitutional effects of WTA are not confined to California. Cases challenging WTA were also filed in Massachusetts, another state dominated by Democrats, and in Texas and South Carolina, which are dominated by Republicans. *Baten v. McMaster*, 967 F.3d 345 (4th Cir. 2020), *as amended* (July 27, 2020) (South Carolina); *Lyman v. Baker*, 954 F.3d 351 (1st Cir. 2020) (Massachusetts); *League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311 (5th Cir. 2020) (Texas). The cases were brought in the recognition that this issue requires a national solution. Because this Court uniquely can resolve the issue nationally though granting cert. in only one case, this is the only cert. petition from that quartet of cases.

effect" even though it was a summary affirmance. App. 9a. The court acknowledged that subsequent cases, such as *White*, had modified and refined the relevant standard, but it held those later cases applicable only where there is "invidious discrimination," which the court said was not the case here. App. 11a. The court also rejected the argument that *Gray* should control. App. 14a–19a. And the court of appeals rejected the First Amendment associational arguments because it held that WTA "does not limit [Petitioners'] ability to associate with like-minded voters." App. 22a.

While there was no dissent in this case, there was a dissent in a similar case brought in the Fourth Circuit. First, the dissenting judge noted that this case did not present the "precise issues" addressed in *Williams*, because, among other reasons, that case did not address the argument based on the second holding in *Gray* and because that case "does not speak to the issue of vote dilution," presented and decided after the *Williams* case in *White.* Both of those issues are central here. *Baten v. McMaster*, 967 F.3d 345, 364 (4th Cir. 2020), *as amended* (July 27, 2020) (Wynn, J., dissenting). The dissent noted that Equal Protection doctrine has "developed significantly" since *Williams*. *Id.*

Freed from the yoke of *Williams*, the dissent applied straightforward principles of vote dilution, first articulated in *White,* to conclude that the plaintiffs here had plausibly alleged that the WTA system may not pass muster under the Fourteenth Amendment. After all, "by submerging [the plaintiffs'] votes in the state-wide total and then allocating electors only on the basis of the state-wide plurality winner, South Carolina has subjected them to

arbitrary and disparate treatment and created a system that is not equally open to participation by South Carolina's Democratic voters." *Id.* at 369. The dissent also recognized there was a "cognizable First Amendment burden" from WTA because voters in non-swing states have diminished opportunities to organize, build political power, and interface with and petition candidates. *Id.* 373–74. The same considerations apply directly in this case.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case undoubtedly meets the conventional requirements for certiorari. *See* Supreme Court Rule 10. The issue of the method of presidential selection is undeniably important: presidential elections are perhaps this nation's most consequential democratic exercises. Yet this Court has never directly opined on the merits of what is by far the dominant method of selecting electors. It should remedy that lacuna. When it does, it should make clear that the "one person, one vote" principle requires that each vote be treated fully and equally in presidential elections, no less than other elections. And that requires the retirement of the WTA method of selecting electors.

Aside from the merits, this case also gives this Court a chance to clarify the status of summary affirmances, which have long befuddled the lower courts. Courts below have disagreed about the status of *Williams* specifically, and, more broadly, courts have not received any recent guidance on how to treat summary affirmances. This Court could use this case to clarify important law.

This case is the ideal vehicle to decide both questions. This appeal cleanly presents the question of presidential selection outside of a heated political contest. It presents the merits question in the context of litigation against a state with the Nation's largest allocation of presidential electors, which reveals the magnitude of the problem. And the decision below squarely considered the scope of the *Williams* summary affirmance, and disagreed with other courts, including the district court here and the Fourth Circuit, about its impact. This Court should grant certiorari on both questions, or, at minimum, grant, vacate, and remand the decision to give the lower courts a chance to decide this question without feeling bound to an overly weighty assessment of the import of *Williams*.

I. The Decision Below Presents An Issue Of National Importance That This Court Has Never Directly Addressed.

"California, like all but two states, awards all of its electors to the party of the candidate who wins the popular vote in the State." App. 4a. (citing Cal. Elec. Code §§ 6901, 6902, 6906, 15400, 15452, 15505). Indeed, California has selected electors this way since it was admitted to the Union in 1850. Nearly all states have followed suit and have used WTA since the mid-19th century or earlier. *See* Koza, *supra*, at 82–91.

But, while the legal landscape changed drastically since this system ossified, this Court has never considered whether this centuries-old system survived the Constitution's amendments. In particular, the Fourteenth Amendment was adopted in 1868. The protections under that Clause include the principle of "one person, one vote," 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. *See Gray*, 372 U.S. at 380–81; *see also Bush*, 531 U.S. at 104–05. This Court has never reviewed on the merits the use of WTA, much less, under that standard.

The importance of addressing the issue at long last could not be clearer. Petitioners plausibly alleged, and the lower courts did not dispute, that because of WTA, presidential campaigns all but ignore non-battleground states, including California, the country's most populous state.[2] Under WTA, two recent presidential elections have resulted in the selection of Presidents who lost the popular vote but won a majority of electors. The demographic patterns suggest this may happen with increasing frequency. Because WTA creates "safe," non-battleground states, WTA dis-incentivizes potential voters from casting a ballot. And because of WTA, the priorities of the Executive Branch can be distorted, favoring swing states over the interests of voters in states like California in a way inconsistent with the basic tenets of American democracy.[3]

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[2] *See* Compl. ¶ 8 (noting that statistics show that effectively all of candidates' time and money is spent in swing states). This negatively impacts voter turnout. *See, e.g.*, Danielle Kurtzleben, CHARTS: Is the Electoral College Dragging Down Voter Turnout In Your State?, NPR, https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state (Nov. 26, 2016).

[3] Douglas L. Kriner & Andrew Reeves, *The Particularistic President* 175 (2015) (noting that the focus on swing states is a

This Court has not hesitated to grant certiorari when presented with long-standing, important practices that have somehow avoided this Court's review. It only recently affirmed that laws binding presidential electors to vote for specific candidates were constitutional, though those laws have been in place for over a century. *See Chiafalo*, 140 S. Ct. at 2319. It decided questions regarding aspects of the Recess Appointments Clause that had been in use for centuries but had escaped this Court's review until recently. *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014). And, more than two hundred years after the passage of the Second Amendment, the Court for the first time held that the Second Amendment protected an individual right to bear arms, and that the Amendment was incorporated against the states. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (incorporation). In 1967, the Court invalidated Virginia's laws against interracial marriage, which "arose as an incident to slavery and have been common in Virginia since the colonial period." *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

This case is in a similar vein. As the Court noted in *Heller*, "[i]t should be unsurprising that such a significant matter has been for so long judicially unresolved." *Heller*, 554 U.S. at 625. Aside from the two chances in the late 1960s to address this question,

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recent element of presidential elections; that technological advances are making it increasingly easy for "[m]odern presidential candidates [to] focus on courting swing state voters;" and that "contemporary presidents may have even greater incentives to pursue particularistic policies for electoral gain than did their predecessors").

neither of which resulted in a merits opinion by this Court, "[f]or most of our history the question did not present itself." *Id.* at 626. It took some time for the Court to make clear that the Equal Protection Clause required equal weighting of votes. And it took even longer to understand the true impact of WTA on individual rights.

But now the impact is clear: WTA violates the constitutional principle of equal votes, and that violation badly harms voters and our entire political system. This Court should grant certiorari to address the status of WTA.

II. The Decision Below Should Be Reversed.

This Court, of course, is not bound by the summary affirmance in *Williams*. *See, e.g.*, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (noting that "*lower courts* are bound by summary actions on the merits by this Court") (emphasis added). When this Court addresses the issue without needing to address the impact of the outdated holding of *Williams*, it is clear that the Ninth Circuit should be reversed. WTA is not consistent with the Fourteenth Amendment's promise of equality or the First Amendment's promise of freedom of political association.

A. WTA burdens the right to an equally weighted vote by discarding Petitioners' votes for President in the second step of a multi-step election.

Although under Article II of the Constitution, a state may decide in the first instance the manner in which it selects presidential electors, the exercise of that choice must be consistent with other constitutional commands. *Bush*, 531 U.S. at 104–05,

107. *See also Chiafalo*, 140 S. Ct. at 2324 n.4, *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969), *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Thus, when a state exercises its choice in favor of giving its citizens the right to vote for President, that vote becomes a "fundamental" right entitled to "equal weight" and endowed with "equal dignity" relative to other voters, and subject to the protections of the Equal Protection Clause. *Bush*, 531 U.S. at 104. The protections under that Clause include the principle of "one person, one vote," 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. *See Gray*, 372 U.S. at 380–81.

California's use of WTA magnifies the influence of a plurality of California voters by awarding their chosen candidate all fifty-five of its electoral votes, and by counting all other votes "only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12. California's use of WTA thus violates the principle of "one person, one vote," and burdens Petitioners' rights under the Fourteenth Amendment. *See id.*

This conclusion follows directly from *Gray*. In *Gray*, plaintiffs challenged the Georgia Democratic Party's practice of using the county unit system to conduct statewide primaries for senator and governor. *Id.* at 370–71, 76. Under that system, each county received a set number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election, awarding all of its units to the plurality vote-getter through WTA. *Id.* The units were then tallied at the state level, with the majority winner receiving the nomination. *Id.* Like the

presidential election system, Georgia thus had a multi-step process for selecting statewide candidates; the votes of the minority were discarded at an intermediate stage of that reckoning.

The Court found problematic the unequal distribution of units relative to the population of a given county. But it also addressed a distinct constitutional problem apart from the quantity of units allocated to counties: the use of WTA to award those units at that intermediate stage. The Court recognized that Georgia had proposed an amendment that would allocate units more proportionally to population, but the Court also held that, even if "unit votes were allocated strictly in proportion to population," the resulting scheme would still be unconstitutional. *Id.* at 381 n.12. That was because of the method by which the counties awarded their units: WTA. *Id.* (explaining that Georgia would allow "the candidate winning the popular vote in the county to have the entire unit vote of that county"). Because of WTA, "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." *Id.* Because WTA ensured that incremental vote changes in each county could have no effect on the state election, it violated the principle of "one person, one vote." Stated differently, the problem with Georgia's primary was not only the number of units allocated to each county, but independently of that inequality, that minority votes were discarded at an intermediate stage. WTA, in other words, was the problem.

The modern use of WTA in the presidential election is precisely analogous to the system invalidated in *Gray*. Just as in *Gray*, the presidential election is conducted in multiple steps. At the first step, California conducts an election, that in the view of voters is for President, but is in fact a vote for a slate of presidential electors. In the second step, instead of allocating the electors in proportion to the votes received, the plurality winning candidate receives all of the State's electoral votes, and the losing party's voters have all of their votes thrown out. In the final step, all of California's electors, chosen as a single slate, validate the predetermined result by voting for the presidential candidate selected by a plurality of voters. Thus, in the final step of a presidential election—the vote in the Electoral College—the votes of California Republicans have been erased.

Just as in *Gray*, California uses WTA *at an intermediate stage* to consolidate its electoral votes and provide them to the candidate receiving the plurality of votes. Then, whether a losing candidate receives 10% or 40% of California's popular vote, those votes are "discarded" before they can affect the actual election: in *Gray*, for senator or governor, and in California, for President. *Gray*, 372 U.S. at 381 n.12. The use of WTA in this circumstance is not "sanctioned by the Constitution." *Id.* at 380. Thus, as in *Gray*, WTA's unequal weighting of votes violates the Equal Protection Clause.

California could have, in theory, put the names of electors on the ballot and afforded those electors a true independent say in who becomes President. But it has done the opposite: it has passed laws mandating that electors function as nothing more than the units in

Gray. California cannot treat its electors as units, and simultaneously insulate WTA from review by suggesting its citizens are voting for independent electors, and this Court should not ignore that reality. *Healy v. James*, 408 U.S. 169, 183 (1972) (noting that courts "are not free to disregard the practical realities."). Thus, when the election is seen as it truly is—an election for President and Vice President that happens to be conducted in multiple steps—it becomes clear that neither California nor any other state can throw away millions of votes.

Moreover, the history of WTA reveals that this unconstitutional erasure of the votes of millions of citizens was not just a bug in the system, but a feature of it. It was designed not to promote fairer elections that equally weighted every vote—the modern constitutional requirement—but to enable politicians to "consolidate the votes of the State." Benton, *supra*, at 38. Jefferson himself lamented that the system would leave the "minority . . . entirely unrepresented," but he recognized that the states his party controlled would be constrained to adopt WTA defensively if the other party did so in states they controlled. Jefferson Letter, *supra*, at 300-01.

Today, we recognize this as a classic problem of game theory. In some scenarios, all parties get stuck in a suboptimal position because changing unilaterally would result in a short-term loss for the state that changes its rules, even if all parties would be better off in the long run following a change en masse. That is the situation America finds itself in now with respect to WTA. It is unconstitutional and creates great harm. Only this Court can remedy the unconstitutional status quo.

B. WTA unconstitutionally dilutes the votes of the losing party under *White*.

As this Court recently recognized, "[e]very four years, millions of Americans cast a ballot for a presidential candidate." *Chiafalo*, 140 S. Ct. at 2319. As a practical matter, however, citizens' votes "actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns," and "[t]hose few 'electors' then choose the President." *Id.* WTA then unconstitutionally operates to dilute the votes of the losing party – in this case, the Republican Party – by immersing them in an at-large, state-wide sea of Democratic votes. In no other election could a state *require* that a multi-member, state-level body be composed solely of members of one political party. To do so unconstitutionally dilutes the votes of those who did not vote for the majority party.

This Court has held 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." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). In particular, "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)).

In *White*, this Court applied this principle to invalidate a multi-member districting scheme. The

Court held 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. Accordingly, the voting system in place violated their Fourteenth Amendment rights to an equally weighted vote. *Id.* That holding applies equally to discrimination on the basis of race and political party, because "multi-member districts" can unconstitutionally "diminish the opportunity of a minority party to win seats." *Burns*, 384 U.S. at 88 n.14.

WTA appears nowhere else in our electoral universe. If it did, its unconstitutionality would be plain. Suppose California decided to abolish its forty single-member state senate districts and instead hold a statewide election for all of its senators using one at-large WTA election, in which voters can choose either the Democratic slate or the Republican slate. The result would be legally-required single-party rule, and would affect an unprecedented denial of minority representation in a state-level body. The story would be the same at any level of government. There can be no such thing as a constitutional city-level, county-level, or district-level multi-member body that is *required* to be composed entirely of members of one political party. Perhaps such a scheme would have a place in one-party China, but here, it would be unconstitutional under *White* and *Burns*.

The court of appeals had no meaningful response to this point. Instead, it relied primarily on the proposition that "*Williams* controls and forecloses [the] equal protection claim." App. *14a*. But that is not a sufficient defense on the merits. If one recognizes, as

held in *Bush* 531 U.S. at 104-05, that the "one-person, one-vote" principle applies to presidential elections, then it becomes clear that WTA "unconstitutionally submerge[es] [Plaintiffs'] votes in the state-wide total" and leaves a wide swath of voters without any representation. *Baten*, 967 F.3d at 369 (Wynn, J., dissenting). The court below could not argue that such a scheme would be constitutional in any other election for any other multi-member body, nor could it. Carving out an exception for presidential elections has no place in law.

The court below also suggested that the *sui generis* scheme could pass constitutional muster because the WTA scheme was not adopted for any kind of invidious reason—that is, even if it dilutes votes, there was no impermissible intent. But although invidiousness may be relevant to certain challenges, such as in gerrymandering cases, there are electoral systems that are sufficiently arbitrary in their treatment of voters that no showing of invidiousness is required. This Court in *Bush* found a violation of "one person, one vote," yet it never discussed whether the discrimination in voting it found was "invidious." 531 U.S. at 104–05. Rather, the Court held 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." *Id.* As lower courts have recognized, invidiousness is not required where voting requirements result in arbitrary and disparate treatment. *See, e.g.*, *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (rejecting that an election-related violation of the Equal Protection Clause always requires intentional discrimination); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) ("Any voting system that

arbitrarily and unnecessarily values some votes over others cannot be constitutional."). Instead, it is the effects that matter: "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 squarely to this case. *Bush*, 531 U.S. at 105 (internal quotation marks omitted).

C. WTA burdens Petitioners' First Amendment rights.

As the court of appeals recognized, Petitioners' claims under the First Amendment are not controlled by *Williams*. App. 20a. Nonetheless, the court held that Petitioners had not plausibly alleged constitutional violations. That was error, for two reasons.

First, by diluting and discarding votes, WTA violates Petitioners' right to cast an effective vote. Compl. ¶¶ 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.") WTA strips Petitioners' votes of any meaning "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).

To be sure, Petitioners do not have a right to have their chosen candidate win. But, in creating a political system whereby California minority-party votes can never be expected to affect the presidential election, 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. *See Rhodes*, 393 U.S. at 41 (Harlan, J., concurring) (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.").

Second, in distorting the political process, WTA predictably severs the connection between voters and presidential candidates, ensuring such candidates ignore California's voters in each election cycle—and in setting national priorities. Compl. ¶¶ 8, 46. The system thus undermines the core relationship at the heart of democracy, between constituents and their representatives. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) ("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."). As Judge Wynn of the Fourth Circuit recognized, this negatively impacts both parties, because "all major party candidates do not come to [safe states] because of the . . . winner-take-all system." The bottom-line is that, without WTA, Petitioners' votes would matter, and these candidates would presumably take note. *Cf. California Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) ("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."). With WTA, they are ignored.

III. This Court Should Grant Certiorari To Determine The Status Of Summary Affirmances For Divided Lower Courts, Or, At Minimum, Grant, Vacate and Remand With Instructions That *Williams* Does Not Control.

As an independent matter, the lower courts are divided on the proper interpretation of this Court's summary merits dispositions, and this Court should use this appeal to clarify that such decisions must be read very narrowly, else they prevent the proper development of the law in light of current jurisprudence.

In this very case, the court of appeals and district court disagreed about the scope of the summary affirmance in *Williams*. The court of appeals thought it controlled the Fourteenth Amendment claims only, while the district court thought that it controlled all the claims in the case. *Compare* App. 20a *with* App. *35a.* ("Because the Supreme Court summarily affirmed a state's use of the WTA method in selecting presidential electors as constitutional in *Williams*, the Court also grants Defendants' Motion to dismiss Plaintiffs' associational rights claim under the First and Fourteenth Amendment.").

That was not the only split on this precise issue. While the Ninth Circuit viewed *Williams* as controlling at least with respect to the Fourteenth Amendment claim, the Fourth Circuit found it "persuasive" but not necessarily controlling. *Baten*, 967 F.3d at 355; *see also id.* at 362 (Wynn, J., dissenting) (agreeing that *Williams* was not controlling).

This is not the only time the lower courts have been split on the meaning and impact of one of this Court's summary dispositions on the merits. In the years preceding this Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the courts were divided over the impact of the 1972 summary dismissal for lack of a substantial question in *Baker v. Nelson*, 409 U.S. 810 (1972). Some thought that the summary decision was binding on lower courts until the case is directly overruled by this Court, regardless of doctrinal developments. *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014) (following *Baker* in rejecting claim that Constitution prohibited ban on same-sex marriage); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (*Baker* "is precedent binding on us unless repudiated by subsequent Supreme Court precedent"). Other courts, by contrast, held that lower courts need not follow a summary decision on the merits if subsequent developments have rendered the decision obsolete, even if this Court has not "explicitly overrule[d]" the summary disposition. *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1205 (10th Cir. 2014) (noting that *Baker* had been "undermined" and refusing to follow it). In *Obergefell*, this Court overruled *Baker* but provided no guidance as to how lower courts should treat similar precedents going forward. 576 U.S. at 675.

This Court should grant certiorari and clarify the standard for lower courts. This is an excellent vehicle for doing so, as this Court's voting rights jurisprudence has hardly been stagnant since *Williams* was affirmed without opinion half a century ago. Moreover, courts below split three ways on the meaning and scope of *Williams*, so this Court's guidance is clearly necessary.

Finally, at minimum, this Court could grant certiorari, vacate the decision below, and remand with instructions that *Williams* does not control, so that the lower courts may consider this important issue under modern voting rights law.

* * *

This petition presents this Court with the rare opportunity to resolve an important electoral issue that has not yet been the subject of this Court's careful scrutiny. But, in fact, WTA is unique in our electoral universe. The time has come for this Court to at last address its constitutional status.

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: February 5, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 8, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

974 F.3d 998

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

Plaintiffs-Appellants,

v.

GAVIN NEWSOM,* IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA; ALEX PADILLA, SECRETARY OF STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Defendants-Appellees.

No. 18-56281

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* Gavin Newsom is substituted for his predecessor, Edmund G. Brown, Jr., as Governor of the State of California. Fed. R. App. P. 43(c)(2).

Appendix A

Appeal from the United States District Court
for the Central District of California,
D.C. No. 2:18-cv-01422-CBM-AS,
Consuelo B. Marshall, District Judge, Presiding

March 3, 2020, Argued and Submitted, Pasadena,
California; September 8, 2020, Filed

Before: Consuelo M. Callahan and Jacqueline H. Nguyen, Circuit Judges, and Dana L. Christensen,[**] District Judge.

OPINION

NGUYEN, Circuit Judge:

The State of California, like forty-seven other States and the District of Columbia, employs a winner-take-all ("WTA") approach to selecting its presidential electors. Under this system, the State awards all of its electors to the political party of the popular vote winner in the State, regardless of relative vote share. Appellants, a coalition of voters in California, appeal the district court's dismissal of their lawsuit. They allege that WTA violates the equal protection and First Amendment rights of California residents who, like them, usually do not vote for the State's popular vote winner and thus enjoy no representation among the State's electors.

Appellants' equal protection challenge is foreclosed by *Williams v. Virginia State Board of Elections*, a decades-

[**] The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

old opinion that was summarily affirmed by the U.S. Supreme Court. 288 F. Supp. 622 (E.D. Va. 1968), *aff'd*, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 516 (1969), *reh'g denied*, 393 U.S. 1112, 89 S. Ct. 857, 21 L. Ed. 2d 813 (1969) ("*Williams*"). We join our three sister circuits to have considered the issue [1] in holding that, under *Williams*, a State's use of WTA to select its presidential electors is consistent with the Constitution's guarantee of equal protection. We also conclude that Appellants have failed to plausibly allege that California's use of WTA to select presidential electors violates the First Amendment. We therefore affirm.

I.

A.

Article II of the U.S. 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. "Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324, 207 L. Ed. 2d 761 (2020). The Twelfth Amendment adds that the electors "shall meet in their respective states and vote by ballot for President and Vice-President . . . ." U.S. Const. amend. XII.

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1. *Baten v. McMaster*, 967 F.3d 345 (4th Cir. 2020); *Lyman v. Baker*, 954 F.3d 351 (1st Cir. 2020); *League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311 (5th Cir. 2020).

California, like all but two states, [2] awards all of its electors to the party of the candidate who wins the popular vote in the State. *See* California Elections Code §§ 6901, 6902, 6906, 15400, 15452, 15505. We are asked to decide whether this method for selecting electors—WTA—is constitutional.

B.

Appellants are self-identified Republican and third-party voters in California. They sued then-Governor of California Jerry Brown and California Secretary of State Alex Padilla (collectively "California" or "the State"), contending that the State's use of WTA infringes their "constitutional right to an equal vote in the presidential election." Their core theory is that WTA "counts votes for a losing presidential candidate . . . only to discard them in determining [e]lectors who cast votes directly for the presidency." They allege that in so doing, WTA "unconstitutionally magnifies the votes of a bare plurality of voters by translating those votes into an entire slate of" electors "while, at the same time, the votes cast for all other candidates are given no effect." This, according to Appellants, violates the principle of "one person, one vote." Appellants further contend that WTA burdens various First Amendment rights.

The district court dismissed Appellants' complaint with prejudice, holding that their equal protection challenge

2. In Maine and Nebraska, "two electors go to the winner of the statewide vote and one goes to the winner of each congressional district." *Chiafalo*, 140 S. Ct. at 2321 n.1.

was "foreclosed by" *McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892), and *Williams. Williams*, it noted, held that "a state's selection of presidential electors on a 'winner take all basis' does not violate the 'one person, one vote' principle of the Fourteenth Amendment because '[i]n the selection of electors, the [winner take all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote.'" The district court further determined that *Williams* also foreclosed Appellants' First Amendment claims.

II.

We review de novo the district court's dismissal of a complaint alleging a violation of constitutional rights. *See United States v. Adams*, 388 F.3d 708, 710 (9th Cir. 2004). To survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012) (citation omitted).

III.

A.

The Constitution does not prescribe how States select electors. To the contrary, it "conceded plenary power to the state legislatures in the matter . . . ." *McPherson*, 146 U.S. at 35; *see also id.* at 27 (explaining the Constitution "recognizes that the people act through

their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object"). But a State's method for selecting electors must comport with equal protection principles. *Chiafalo*, 140 S. Ct. at 2324 n.4; *cf. McPherson*, 146 U.S. at 40 (concluding that "no discrimination is made" in a system for selecting electors where "each citizen has an equal right to vote"); *see also Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) ("*Rhodes*").

Equal protection requires, "as nearly as is practicable," that one person's vote "be worth as much as another's." *Wesberry v. Sanders*, 376 U.S 1, 7-8, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *see also Gray v. Sanders*, 372 U.S. 368, 381, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963) (describing the principle of "one person, one vote"). However, "[i]t hardly follows . . . that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501, 204 L. Ed. 2d 931 (2019).[3] "[E]ach vote must carry equal weight"—but "[t]hat requirement does not extend to political parties." *Id.* That is, it is not required "that each party . . . be influential in proportion to its number of supporters." *Id.*

B.

Over a century ago, the Supreme Court considered an equal protection challenge to a Michigan law providing for

3. *Rucho* involved the application of the "one-person, one-vote" principle to partisan gerrymandering claims. Although factually inapposite, the case offers an instructive explication of the "one-person, one-vote" principle.

the selection of electors by district. *McPherson*, 146 U.S. at 24. The Court rejected the challenge, *id.* at 27-36, but it did not opine on any *other* system for selecting electors, *see Williams*, 288 F. Supp. at 626 (explaining *McPherson* "did no[] more than hold permissible and valid Michigan's determination to select electors by districts"). *McPherson* thus does not weigh heavily in our analysis.

But *Williams* does. The plaintiffs in *Williams* challenged a Virginia law providing that "all of the State's electors [were to be] collectively chosen . . . by the greatest number of votes cast throughout the entire State . . . ." *Id.* at 623. The ballot included "the name of each political party and the nominees thereof for President and Vice President," as well as "the names of [each] party's elector candidates . . . ." It "permit[ted] a voter to vote only for one or another political party, and thus for the party's nominees for President and Vice President." And a "vote cast [for a given party] . . . constitute[d] . . . one vote for each of the 12 electors listed thereon under the name of th[at] party and its nominees." Thus, all of the State's electors were selected—as a group—according to the popular vote in the State, and all of the electors represented one political party.

The plaintiffs argued that the law was unconstitutional "because it g[ave] the choice of all of the electors to the statewide plurality of those voting in the election—'winner take all'—and accord[ed] no representation among the electors to the minority of the voters." *Id.* This "general ticket" method, according to the plaintiffs, "violate[d] the 'one-person, one-vote' principle of the Equal Protection Clause . . . ." *Id.* at 624.

The three-judge panel disagreed. Virginia's use of WTA did not "come within the brand of" the Supreme Court's "one-person, one-vote" decisions because the "system [wa]s but another form of the unit rule," which is not "offensive to the Constitution." *Id.* at 626-27 (noting the election of the president by the House when no majority is obtained in the electoral college is by unit); *see also id.* at 628 (quoting *Wesberry*, 376 U.S at 7) (explaining it had previously held constitutional the practice of electing members of the House as a unit, whereby "two or more or all are running at large, that is statewide").

The court acknowledged "possible objectionable results" from the use of WTA, including that "as much as 49 percent of a State's voters may see the portion of its electoral votes attributable to them cast for a candidate whom they oppose," thus "wast[ing]" their votes. *Id.* at 627. But any "deprivations imposed by the unit rule" did not "equate . . . with the denial of privileges outlawed by the one-person, one-vote doctrine or banned by Constitutional mandates of protection":

> In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen

> is offered equal suffrage and no deprivation of the franchise is suffered by anyone.

Id.

The court also explained that Virginia's use of WTA was "grounded on what ha[d] historically been deemed to her best interests in the workings of the electoral college." *Id.* at 628. Faced with a choice of "appointing electors in a manner [that would] fairly reflect the popular vote" or "allow[ing] the majority to rule and thereby maximize the impact of Virginia's 12 electoral votes," Virginia chose the latter. *Id.* And in the court's view, the decision was "[] not . . . unwise[]." *Id.* In sum, the Virginia law "d[id] not disserve the Constitution . . . ." *Id.* at 629.

Williams's applicability is obvious: like Virginia did, California awards all of its electors to the party of the candidate who wins the popular vote in the State. Appellants raise an equal protection challenge, contending WTA "discard[s]" the "votes for a losing presidential candidate" in the selection of electors. *Cf. id.* at 627 (considering the argument that WTA in Virginia "wasted" the votes "cast for a loser"). Appellants concede that *Williams* "addressed an argument similar to [Appellants'] vote dilution argument here."

That *Williams* was affirmed by the Supreme Court in summary fashion does not obviate its binding effect here, as summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." *Mandel v. Bradley*,

432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977); *United States v. Blaine County, Montana*, 363 F.3d 897, 904 (9th Cir. 2004) (explaining the "Supreme Court's summary affirmances bind lower courts"). Indeed, after the Court summarily affirms a lower court decision declaring a law unconstitutional, "other courts [are] not free to conclude that the [law] invalidated [is] nevertheless constitutional." *Mandel*, 432 U.S. at 176. The same is surely true, too, for laws declared to be constitutional.

The Supreme Court's summary affirmance of *Williams* thus controls—unless "subsequent developments suggest otherwise" or this case does not involve the "precise issues presented and necessarily decided" in *Williams*. *Id.; Blaine County*, 363 F.3d at 904. Appellants argue that both exceptions apply. We disagree.

C.

1.

Appellants argue that post-*Williams* cases involving multimember districts raise doubts regarding *Williams*'s continued viability. [4] They suggest that California's presidential election can be viewed as an election for fifty-five electors who constitute a multimember (state-level) body. And under this view, according to Appellants, WTA violates Appellants' equal protection rights by diluting their votes.

4. A multimember district is a district in which multiple candidates are elected to represent the district, usually based on plurality voting.

Appellants rely on *White v. Regester*, a case in which the Supreme Court affirmed a judgment invalidating certain multimember districts, for the proposition that a state cannot "cancel out or minimize the voting strength" of minority voters. 412 U.S. 755, 765, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973); *see also Burns v. Richardson*, 384 U.S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966).

But Appellants oversimplify the standard. In *White*, the Court explained that "multimember districts are not per se unconstitutional . . . ." 412 U.S. at 765. Rather, they are unconstitutional only when "used *invidiously* to cancel out or minimize the voting strength" of a minority group. *Id.* (emphasis added). Further, "it is not enough that the [minority] group . . . has not had legislative seats in proportion to its voting potential." *Id.* at 765-66. The group must "produce evidence . . . that the political processes leading to nomination and election *were not equally open to participation* by the group"—"that its members *had less opportunity* than did other residents in the district *to participate in the political processes* and to elect legislators of their choice." [5] *Id.* at 766 (emphases added).

This case does not directly fall within the ambit of *White* because Appellants have not alleged invidious discrimination. What they have alleged is that their

5. The Court relied on a plethora of findings regarding "the history of official racial discrimination in Texas." *Id.* at 766-69 (noting that "Mexican-Americans in Texas . . . had long 'suffered from, and continue[d] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others'" (citation omitted)).

votes are impermissibly diluted because they do not enjoy proportional representation among the State's electors—but that is "not enough." *Id.* at 765-66; *see also Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971) ("[W]e are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in . . . multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.").

Further, any discrimination inherent in WTA is not invidious because "[e]very citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone." *Williams*, 288 F. Supp. at 627. Thus, even if the selection of California's electors could be framed as the election of a multimember district and post-*Williams* multimember district cases constituted a "subsequent development," [6] the cases would not undermine *Williams*.

Another purported "subsequent development" is that federal law has changed since *Williams* regarding "unit" voting for members of the House. As discussed above, *see supra* Part III.B., in *Wesberry* the Supreme Court

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6. We do not generally "conclude [the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). If Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [we] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).

affirmed the constitutionality of voting for representatives by unit. *Williams*, 288 F. Supp. at 628. The *Williams* court found it "notable that Congress . . . ha[d] [also] . . . countenanced" the practice. *Id.* Appellants point out that Congress has since changed the law to require that states use single-member districts for congressional elections. *See* 2 U.S.C. § 2c. This is correct but the change in law is immaterial to the constitutionality of unit voting.

The last "subsequent development" is a purported doctrinal shift toward eliminating the requirement of invidiousness. Appellants argue the Supreme Court has "clarified that, although invidiousness may be relevant to certain challenges, . . . there are electoral systems that are sufficiently arbitrary in their treatment of voters that no showing of invidiousness is required." *See Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000)). The *Bush* Court found an equal protection violation due to "arbitrary and disparate treatment"; it did not discuss whether the discrimination was "invidious." *Id.*

We are not persuaded. First, the precedential value of *Bush* is limited. *See id.* at 109 ("Our consideration is limited to the present circumstances . . . ."). Second, it is unlikely the Court would have silently changed a fundamental feature of its voting rights equal protection jurisprudence. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000). Indeed, even before *Williams* the Court noted that equal protection requires "faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness *or*

discrimination." *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964) (emphasis added). Third, *Williams*'s approval of WTA was based on a finding of non-invidiousness *and* a finding of non-arbitrariness. *See Williams*, 288 F. Supp. at 628 (characterizing Virginia's use of WTA as "historically . . . deemed to [be in the State's] best interests" and "[]not . . . unwise[]").

Appellants also identify factual differences between *Williams* and this case, but the differences are immaterial. In Virginia, Appellants emphasize, electors' names were on the ballot; by contrast, the California ballot today lists only the candidates and their parties. But in Virginia the electors' names were associated with candidates and political parties, and the inclusion of such names on the ballot does not appear to have affected the court's analysis. Further, Appellants note that, unlike in California today, the electors in Virginia had no legal obligation to support their parties' nominees. But the distinction is irrelevant: how electors *vote* is different from how they are *selected*, *cf. Chiafalo*, 140 S. Ct. at 2321-22, and, in any event, Virginia's electors voted—as would be expected—for their parties' nominees, *Williams*, 288 F. Supp. at 626 (noting that in the 1960 election, Virginia voters split 52.4% to 47% but the Republican nominee "was credited with 100% [o]f Virginia's electoral votes"). California's current system for selecting electors is thus substantively identical to Virginia's at the time of *Williams*.

We thus hold, as three of our sister circuits recently likewise have held, that *Williams* controls and forecloses Appellants' equal protection claim. *Baten*, 967 F.3d at 355-56 (following the reasoning of *Williams* in rejecting

an identical equal protection claim because a summary affirmance "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the case summarily affirmed (citation omitted)); *Lyman*, 954 F.3d at 366 (concluding that *Williams* "require[d] the dismissal" of an identical equal protection claim because it "decide[d] the core equal protection issue presented"); *League of United Latin Am. Citizens*, 951 F.3d at 315-17 (characterizing *Williams* as a "giant barrier stand[ing] in the[] way" of an identical equal protection claim).

2.

Appellants also argue that *Gray*, a Supreme Court case that predated *Williams*, controls rather than *Williams*. In *Gray*, the Supreme Court struck down the Georgia Democratic Party's ("GDP") primary election system. The system was based on "county unit[s]": the GDP assigned each county a certain number of units, and the candidate who received the most votes in a given county was awarded all of the county's units. [7] *Gray*, 372

7. In other contexts, "general ticket" or "unit" voting refers to a single bloc (such as the group of electors in *Williams*). In *Gray*, each county was assigned multiple "units," each of which functioned like an elector.

Originally, each county received two units for each of its representatives in Georgia's House of the General Assembly. *Gray*, 372 U.S. at 371. Later, the law was amended to resemble a "bracket system," whereby counties were allotted units in rough proportion with their populations. For example, counties with 0 to 15,000

U.S. at 370-71. The effect of the system was to weight counties disproportionately. *Id.* at 373 (explaining that counties constituting one-third of the State's population enjoyed a "clear majority of county units"); *see also id.* at 379 (explaining that the system "weight[ed] the rural vote more heavily than the urban vote and weight[ed] some small rural counties heavier than other larger rural counties"). The Court held the system unconstitutional, *id.* at 381, and then further specified in a footnote that the district court had properly enjoined the use of the system, even in its amended form:

> The county unit system, even in its amended form[,] . . . would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he 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.

Id. at 381 n.12.

Appellants read *Gray* as having two distinct holdings: first, the disproportionate allocation of units was unconstitutional; and second, the system

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residents were allotted two units, with an additional unit allotted for the next 5,000 people. *Id.* at 372. The Court rejected both forms. *Id.* at 381 & n.12.

would be unconstitutional even if units were allocated proportionately because the winner of a county would be awarded all of the county's units.

Appellants focus on the second holding, arguing the system *Gray* described is similar to California's. Appellants contend that in California, just as in *Gray*, the presidential election is "conducted in two steps: at the first step, each state receives a set number of electoral votes and conducts an election to allocate those votes; and at the second step, those votes are tallied to determine the President." And just as in *Gray*, a losing candidate's votes are "discarded" in California before they can affect the election. Appellants further argue that this "two-step" structure is distinguishable from the structure in *Williams*, which comprised a single step: a "vote for [e]lectors."

We reject Appellants' attempt to distinguish *Williams* by way of analogy to *Gray*. WTA in California is, for the reasons discussed above, materially identical to the system in *Williams*—and *Williams* was decided after *Gray*. [8] There is little to support Appellants' argument that California's system is similar to *Gray*'s (a purported "two-step" system) but different from *Williams*'s (a purported "one-step" system). Nothing in *Gray* supports such a reading and, more importantly, the system in

8. *Williams* also specifically rejected a "one-person, one-vote" argument based on *Gray*. *Williams*, 288 F. Supp. at 626. Although *Williams* did not discuss *Gray*'s footnote 12, the holding in that footnote would have been the one (of the purported two holdings in *Gray*) more relevant to *Williams*.

Williams was essentially the same as those in California *and Gray*—whether characterized as one-step or two-step.[9] Just as in *Gray* and in California today, the system in *Williams* involved Virginia's "receiv[ing] a set number of electoral votes and conduct[ing] an election to allocate those votes," and then "tall[ying]" the votes "to determine the President."

Further, the analogy to *Gray* falls short. [10] *Gray*'s central concern was the presence of geographic discrimination in the GDP's primary election system. *Gray*, 372 U.S. at 379. That concern extended to *Gray*'s footnote 12:

> [I]n [*Gray*], . . . we h[e]ld that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other candidates being

9. Appellants' purported distinction between *Williams*'s WTA system, on the one hand, and *Gray*'s and California's, on the other, is that *Williams* "rest[ed] on the premise that voters vote for *[e]lectors*" because the electors' names were on the ballot and the electors were not required to vote for a particular candidate. Those distinctions were not material to the court's reasoning in *Williams*, nor do they meaningfully distinguish *Williams*'s system from California's.

10. We recently rejected an attempt to "take a single sentence in [*Gray*] . . . and transform it into a new voting rights principle . . . ." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1026 (9th Cir. 2016) (en banc).

> discarded. *The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast.* Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the statewide total.

Gordon v. Lance, 403 U.S. 1, 4-5, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971) (citing *Gray*, 372 U.S. at 381 n.12) (emphasis added). We have similarly interpreted *Gray*. *See Angle v. Miller*, 673 F.3d 1122, 1129-30 (9th Cir. 2012) (citing *Gray*, 372 U.S. at 381 n.12) ("*Gray* and *Gordon* suggest that, with respect to a statewide election, a state must count votes on a statewide, rather than a district-by-district, basis. Doing otherwise devalues votes based on where voters happen to live.").

No comparable concern about geographic discrimination exists here. Appellants claim their votes are "discarded *because* they live in California, and it is the *California* Democratic Party that benefits and takes advantage of a two-step election involving defined geographical units to consolidate votes." But the Court's concern in *Gray* was that votes in Georgia were treated differently based on the voters' location within the state; in California, all votes are treated equally regardless of where they are cast.

IV.

Appellants allege that a WTA system burdens their First Amendment rights to cast their votes effectively, to associate with like-minded voters across the State, and to petition their government and associate with the candidates of their choice.

No First Amendment challenge was brought in *Williams*. Because Appellants' First Amendment claims do not implicate the "precise issues presented and necessarily decided" in *Williams, Mandel*, 432 U.S. at 176, *Williams* does not control them. But we may affirm on any ground supported by the record, *ASARCO, LLC v. Union Pacific Railroad Co.*, 765 F.3d 999, 1004 (9th Cir. 2014), and, because Appellants do not state a claim, we affirm.

A.

"[E]ach and every citizen has an inalienable right to full and effective participation in the political process[] . . . ." *Reynolds v. Sims*, 377 U.S. 533, 565, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). That includes the right to "cast [one's] votes effectively," which requires that no voter 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." *Dudum v. Arntz*, 640 F.3d 1098, 1106, 1109 (9th Cir. 2011) (citation omitted).

Appellants go further, asserting that their right to full and effective participation precludes the "diluting and discarding" associated with WTA. But Appellants offer no

support for stretching this right beyond its plain meaning and established precedents. [11] Because Appellants can participate fully in California's presidential election, including voting for their preferred candidates, their right to cast an effective vote is not burdened.

B.

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (citations omitted).

According to Appellants, WTA burdens their right to "associate with like-minded voters" by "distort[ing] the electoral process": "those who do not support the Democratic candidate in California have little reason to

11. Citing *Rhodes*, Appellants argue that California's use of WTA "removes their 'basic incentive' for participating in the presidential election at all." But in *Rhodes*, Justice Harlan decried a statutory scheme that denied voters "any opportunity to participate in the procedure by which the President is selected." *Rhodes*, 393 U.S. at 41 (Harlan, J., concurring). Here, by contrast, Appellants have every opportunity to participate in the State's presidential election.

Another case cited by Appellants, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986), held that a statute restricting a political party's ability to open its primary to non-members "limit[ed] the [p]arty's associational opportunities."

drum up support for a candidate who will receive zero electoral votes . . . ." In these types of cases, 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. Lopez Torres*, 552 U.S. 196, 205, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008). And WTA does not limit Appellants' ability to associate with like-minded voters. At base, Appellants contend they are *not incentivized* to associate, not that they *cannot*. [12]

C.

The right to petition "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011). More generally, it "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Id.* at 388. But this right is uni-directional; it does not require

12. *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018), cited by Appellants, is inapposite. In *Gill*, Justice Kagan articulated a theory of associational harm in the context of partisan gerrymandering. She posited that a partisan gerrymander may infringe the associational rights of the members of a "disfavored party" by "depriv[ing] [them] of their natural political strength," thus creating challenges with respect to "fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates." *Id.* at 1938-39 (Kagan, J., concurring). But partisan gerrymandering is different than selecting electors with WTA; only the former is closely connected to the problems with party infrastructure that Justice Kagan identified.

government officials or politicians to respond, or even listen, to citizens. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979) (holding that "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond," nor does it "guarantee that a speech will persuade or that advocacy will be effective" (quotation marks and citation omitted)).

Appellants theorize that WTA causes presidential candidates to "ignore California's minority voters in each election cycle," which "undermines the core relationship . . . between constituents and their representatives." But Appellants again mistakenly focus on the incentives that flow from WTA. The issue is whether WTA burdens Appellants by limiting their ability to petition, not whether WTA changes politicians' behaviors. *See Lopez Torres*, 552 U.S. at 205. Appellants do not allege any restrictions on their ability to petition.

D.

Even assuming Appellants had plausibly alleged the State's use of WTA imposed some minimal burden, their claims would still fail. Under *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992), a "flexible standard" applies to laws regulating the right to vote: we "must weigh 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the

plaintiff's rights.'" *Id.* at 434 (citations omitted). "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions[,]' . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (citations omitted).

Any burden is—at most—minimal, and California has identified an important interest: "maximiz[ing] the impact of the State's electors within the Electoral College." WTA increases the voting power of the State within the electoral college, as all of its votes are cast in support of one candidate. And it also protects California against the use of WTA by the forty-seven other States that have adopted it. *Cf. Williams*, 288 F. Supp. at 626 (explaining that Thomas Jefferson recognized the merit of "protect[ing] his State against the use of [WTA] by other States" and relied on this justification in advising Virginia to adopt WTA, despite his preference for district-based selection of electors).

Appellants characterize California's interest as "illegitimate and incorrect." It is purportedly "illegitimate" because "WTA does not maximize the power of the State *as a whole*; instead, it maximizes the voting strength of a plurality of California voters." But Appellants conflate the intrastate and interstate effects of WTA; WTA maximizes the State's *interstate* power, and is thus not a "restatement of the very burden [Appellants] have identified." The interest is allegedly "incorrect" because WTA results in "presidential candidates generally ignor[ing] California voters," which "subverts the power of the State." Appellants again misconstrue the interest;

it is to maximize the State's power in the *electoral college*, not to attract campaigns.

* * *

Because Appellants fail to state a claim under either of their constitutional theories, we affirm the district court's dismissal of the complaint with prejudice.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, DATED SEPTEMBER 21, 2018

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. 2:18-cv-001422-CBM-ASx

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

Plaintiffs,

v.

JERRY BROWN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA; AND ALEX PADILLA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Defendants.

ORDER RE: DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The matter before the Court is Defendants Jerry Brown and Alex Padilla's (collectively, "Defendants'")

Appendix B

Motion To Dismiss the Complaint For Declaratory and Injunctive Relief pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). (Dkt. No. 57, the "Motion".)

I. BACKGROUND

This action challenges California's "winner-take-all" ("WTA") method of selecting Presidential Electors. The Complaint asserts two causes of action: (1) violation of the Fourteenth Amendment's "one person, one vote" principle; and (2) violation of associational rights under the First and Fourteenth Amendments. The Complaint seeks a declaratory judgment that California's WTA method of selecting Electors violates the First and Fourteenth Amendments to the United States Constitution; and an order permanently enjoining the use of the WTA method (or other non-representational methods, such as selection by Congressional District vote) of selecting Electors in presidential elections. (Compl., Prayer for relief ¶¶ 1.a-c.)

II. STATEMENT OF THE LAW

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). On a motion to dismiss for failure to state a claim, courts accept as true all well-pleaded allegations of material fact and construes them in a light most favorable to the non-moving party. *Manzarek v. St.*

Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031-32 (9th Cir. 2008). To survive a motion to dismiss, the 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, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868, (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). If a complaint cannot be cured by additional factual allegations, dismissal without leave to amend is proper. *Twombly*, 550 U.S. at 555.

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction bears the burden of proof that jurisdiction exists. *Sopak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). A motion under Rule 12(b)(1) may challenge the court's jurisdiction facially, based on the legal sufficiency of the claim, or factually, based on the legal sufficiency of the jurisdictional facts. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

III. DISCUSSION

A. Request for Judicial Notice

Defendants request that the Court take judicial notice of:

1. Exhibit 1: Complaint filed in *Lyman v. Baker*, No. 1:18-cv-10327 (D. Mass. Feb. 21, 2018);

2. Exhibit 2: Complaint filed in *Baten v. McMaster*, No. 2:18-cv-00510 (D.S.C. Feb. 21, 2018);

3. Exhibit 3: Complaint filed in *League of United Latin American Citizens v. Abbott*, No. 5:18-cv-00175 (W.D. Tex. Feb. 21, 2018); and

4. Exhibit 4: Motion to dismiss filed in *League of United Latin American Citizens v. Abbott*, No. 5:18-cv-00175 (W.D. Tex., Apr. 9, 2018).

(Dkt. No. 57-1.) The Court **GRANTS** Defendants' request to take judicial notice of the fact that the above-referenced pleadings were filed, but not for the truth of the contents therein. *See* Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

B. "One Person, One Vote" / Equal Protection — Fourteenth Amendment

The Complaint alleges California's WTA method of selecting Electors whereby the whereby the political party of the leading candidate among California's voters selects every Elector results in a "cancellation" of the vote of other California citizens and renders their vote "meaningless," in violation of citizens' constitutional right to an equal vote in the presidential election. (Compl. ¶¶ 2-4, 7.) Plaintiffs argue California's WTA system therefore violates the "one person, one vote" principle "by discarding the votes of millions of Californians in each election cycle before those votes can affect the actual Presidential race" because votes which do not support the plurality candidate receive no Electoral College votes.

Plaintiffs' Fourteenth Amendment challenge to California's WTA method based on the "one person, one

vote" principle of the equal protection clause is foreclosed by the Supreme Court's decisions in *McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892), and *Williams v. Virginia State Board of Elections, Williams*, 288 F. Supp. 622, 629 (E.D. Va. 1968) ("Virginia's [winner-take-all] design for selecting presidential electors does not disserve the Constitution"), *aff'd*, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 516 (1969). As stated by the Supreme Court in *McPherson*: "If presidential 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." 146 U.S. at 40. Here, Plaintiffs do not allege California citizens do not have an equal right to vote for presidential electors. Moreover, as recognized in *Williams*, which was summarily affirmed by the Supreme Court, a state's selection of presidential electors on a "winner take all basis" does not violate the "one person, one vote" principle of the Fourteenth Amendment because "[i]n the selection of electors, the [winner take all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote." 288 F. Supp. at 627.

Plaintiffs contend *McPherson* and *Williams* are distinguishable because: (1) those cases were decided during a time when Electors were the candidates listed on the ballot and voters were voting for Electors, whereas now the Presidential candidates are listed on the ballot and voters are voting for the President; and (2) those cases did not address whether "discarding of votes for the President through the WTA method of allocating Electors at an intermediate step in a two-step election violates the Equal Protection Clause of the Fourteenth Amendment."

Appendix B

The Complaint alleges California voters do not vote for Electors, but instead vote for the President in two steps: first, California voters cast their votes for the President, and second, California counts those votes and allocates to the winning candidate all of its 55 Electors. (*See* Compl. ¶¶ 3, 13, 31, 37.)

However, Plaintiffs' characterization of California's WTA method as a two-step process for voting for the President is inconsistent with the Constitution. Article II of Section 1 of the Constitution provides: "Each 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1. The Twelfth Amendment prescribes the method Electors shall vote for the President. U.S. Const. amend. XII; *see also* Cal. Elec. Code § 6906 ("The electors, when convened, if both candidates are alive, ***shall vote by ballot for that person for President*** and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.") (Emphasis added.). Therefore, California voters vote for Electors, and Electors vote for the President. *See Bush v. Gore*, 531 U.S. 98, 104, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for

many years after the framing of our Constitution. History has now favored the voter, and in each of the several States the citizens themselves ***vote for Presidential electors***.") (emphasis added); U.S. Const. amend. XII; Cal. Elec. Code § 6906.[1]

The Court is bound by the Supreme Court's decision in *McPherson* and the Supreme Court's summary affirmance of *Williams*,[2] and thereby holds Plaintiff fails to state a claim for violation of the equal protection clause under the Fourteenth Amendment.[3]

Plaintiffs contend the Supreme Court's decision in *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d

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1. *See also Porter v. Bowen*, 518 F.3d 1181, 1183-84 (9th Cir. 2008) (Kleinfeld, J., dissenting from denial of reh'g); *Graham v. Fong Eu*, 403 F. Supp. 37, 46-47 (N.D. Cal. 1975), *aff'd*, 423 U.S. 1067, 96 S. Ct. 851, 47 L. Ed. 2d 80 (1976).

2. Summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977).

3. *See Williams v. North Carolina*, 2017 U.S. Dist. LEXIS 181115, 2017 WL 4936429 (W.D.N.C. Oct. 2, 2017), *report and recommendation adopted* 2017 U.S. Dist. LEXIS 179833, 2017 WL 4935858 (W.D.N.C. Oct. 31, 2017); *Conant v. Brown*, 248 F. Supp. 3d 1014, 1024 (D. Or. 2017); *Schweikert v. Herring*, 2016 U.S. Dist. LEXIS 166854, 2016 WL 7046845, at *2 (W.D. Va. Dec. 2, 2016); *New v. Pelosi*, 2008 U.S. Dist. LEXIS 87447, 2008 WL 4755414, at *2 (S.D.N.Y. 2008); *Lowe v. Treen*, 393 So. 2d 459, 461 (La. Ct. App. 1980); *Trinsey v. United States*, 2000 U.S. Dist. LEXIS 18387, 2000 WL 1871697, at *2 (E.D. Pa. Dec. 21, 2000); *Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala.), *aff'd*, 580 F.2d 1051 (5th Cir. 1978).

821 (1963), "controls this case," and requires a finding that California's WTA method is unconstitutional irrespective of *McPherson* and *Williams* because California's WTA method "results in millions of Californians casting a ballot for the President only to have their votes discarded before they can actually affect the outcome."

Gray, however, does not supersede *Williams* because it was decided six years before *Williams*. Moreover, *Gray* dealt with Georgia's use of the county unit system for election of Senators and the Seventeenth Amendment—it did not involve a constitutional challenge to the use of the Electoral College for the Presidential Election pursuant to the Twelfth Amendment. In *Gray*, the Supreme Court emphasized that the Seventeenth Amendment provides the Senate of the United States must be composed of two Senators from each State, elected "by the people," and therefore use of a winner take all method for electing senators was unconstitutional. 372 U.S. at 380-81; *see also* U.S. Const. amend. XVII. The Twelfth Amendment, however, does not contain similar language regarding the election of the President "by the people," and instead provides that "Electors shall meet in their respective states and vote by ballot for President and Vice-President." U.S. Const. amend. XII. The Supreme Court recognized the distinction between elections of Senators vs. Presidential elections in *Gray*, noting "[t]he inclusion of the electoral college in the Constitution, as the result of specific historical concerns, ***validated the collegiate principle despite its inherent numerical inequality***, but implied nothing about the use of an analogous system by a State in a statewide election. . . ***The only weighting of***

votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and ***the use of the electoral college*** in the choice of a President." *Gray*, 372 U.S. at 378, 380 (emphasis added).[4]

Furthermore, *Gray* involved geographic discrimination, which Plaintiffs have not alleged in the instant case. *See id.* at 380-81; *Gordon v. Lance*, 403 U.S. 1, 4-5, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971). Here, the Complaint does not allege California's WTA method is discriminatory because it values votes within a particular geographic location within California over votes from other geographic locations within the state. Therefore, *Gray*'s holding regarding geographic discrimination is not applicable here since no geographical discrimination is alleged.

Accordingly, Plaintiffs' equal protection claim under the Fourth Amendment is foreclosed by *McPherson* and *Williams* and fails as a matter of law.

C. Associational Rights — First & Fourteenth Amendments

The Complaint also alleges California's use of the WTA method for selecting presidential electors "deprives Plaintiffs of their First and Fourteenth Amendment

4. *See also Pelosi*, 2008 U.S. Dist. LEXIS 87447, 2008 WL 4755414, at *2; *Trinsey*, 2000 U.S. Dist. LEXIS 18387, 2000 WL 1871697, at *2; *Penton v. Humphrey*, 264 F. Supp. 250, 251 (S.D. Miss. 1967).

associational rights based solely on Plaintiffs' political association and expression of political views at the ballot box" because it "discards Plaintiffs' votes for President, limiting Plaintiffs' ability to express their political preference" and "dilutes the power of the Republican and third-party voters in California." (Compl. ¶¶ 43, 44, 46.)

Because the Supreme Court summarily affirmed a state's use of the WTA method in selecting presidential electors as constitutional in *Williams*, the Court also grants Defendants' Motion to dismiss Plaintiffs' associational rights claim under the First and Fourteenth Amendment. *See Williams*, 288 F. Supp. at 629 ("Virginia's [winner-take-all] design for selecting presidential electors does not disserve the Constitution"), *aff'd* , 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 516 (1969); *see also Schweikert*, 2016 U.S. Dist. LEXIS 166854, 2016 WL 7046845, at *2.[5]

D. Non-Justiciable Political Question

Defendants also contend the Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of jurisdiction because Plaintiffs' claims present "a nonjusticiable political question" "[t]o the extent Plaintiffs simply disagree with the policy choice made by the California legislature pursuant to Article II, section 1 of the Constitution and ask this Court to impose a different choice" and "limit the States' roles as politically sovereign entities in the selection of presidential electors." The Supreme Court,

5. *See also Gray*, 372 U.S. at 380; *Pelosi*, 2008 U.S. Dist. LEXIS 87447, 2008 WL 4755414, at *2; *Trinsey*, 2000 U.S. Dist. LEXIS 18387, 2000 WL 1871697, at *2.

however, rejected a similar contention in *McPherson*. *See McPherson*, 146 U.S. at 23; *see also Rhodes*, 393 U.S. at 28.

Therefore, the Court the Court denies Defendants' Motion to Dismiss pursuant to Rule 12(b)(1).

IV. CONCLUSION

Accordingly, the Court **GRANTS** Defendants' Motion To Dismiss the Complaint for failure to state a claim pursuant to Rule (12)(b)(6), and dismisses the Complaint with prejudice.[6]

IT IS SO ORDERED.

DATED: September 21, 2018.

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

6. Because Plaintiffs' claims fail as a matter of law, amendment would be futile.

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Art. II-Full Text

ARTICLE II. THE PRESIDENT

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal

Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.][1]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation

1. The clause enclosed in brackets was superseded by the Twelfth Amendment.

or Inability, both of the President and Vice President, declaring what Officer shall then act as resident, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall

appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

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U.S.C.A. Const. Amend. XII

Amendment XII. Presidential Electors

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next

following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

West's Ann.Cal.Elec.Code § 6900

§ 6900. "Elector" or "presidential elector"

The term "elector" or "presidential elector" as used in this chapter means an elector of President and Vice President of the United States, and not an elector as defined in Section 321.

West's Ann.Cal.Elec.Code § 6901

§ 6901. Notice of nomination by party as candidate for elector; placement of names on ballot

Whenever a political party, in accordance with Section 6864, 7100, 7300, 7578, or 7843, submits to the Secretary of State its certified list of nominees for electors of President and Vice President of the United States, the Secretary

of State shall notify each candidate for elector of his or her nomination by the party. The Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election.

West's Ann.Cal.Elec.Code § 6902

§ 6902. Time of election

At the general election in each leap year, or at any other time as may be prescribed by the laws of the United States, there shall be chosen by the voters of the state as many electors of President and Vice President of the United States as the state is then entitled to.

West's Ann.Cal.Elec.Code § 6903

§ 6903. Duties of Governor

On or before the day of meeting of the electors, the Governor shall deliver to the electors a list of the names of electors, and he or she shall perform any other duties relating to presidential electors which are required of him or her by the laws of the United States.

West's Ann.Cal.Elec.Code § 6904

§ 6904. Meeting of electors

The electors chosen shall assemble at the State Capitol at 2 o'clock in the afternoon on the first Monday after

the second Wednesday in December next following their election.

West's Ann.Cal.Elec.Code § 6905

§ 6905. Vacancies

In case of the death or absence of any elector chosen, or if the number of electors is deficient for any other reason, the electors then present shall elect, from the citizens of the state, as many persons as will supply the deficiency.

West's Ann.Cal.Elec.Code § 6906

§ 6906. Vote for candidates

The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.

West's Ann.Cal.Elec.Code § 6907

§ 6907. Ballots

The electors shall name in their ballots the person voted for as President, and in separate ballots the person voted for as Vice President.

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West's Ann.Cal.Elec.Code § 6908

§ 6908. Certification of vote

The electors shall make separate lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign, certify, seal, and transmit by mail to the seat of the Government of the United States, directed to the President of the Senate.

West's Ann.Cal.Elec.Code § 6909

§ 6909. Compensation; mileage

Each presidential elector shall receive ten dollars ($10) for his or her services, and mileage at the rate of five cents ($0.05) per mile for each mile of travel from his or her domicile to the State Capitol and return.

Their accounts therefor shall be certified by the Secretary of State, and audited by the Controller, who shall draw his or her warrants for the same on the Treasurer, payable out of the General Fund.

West's Ann.Cal.Elec.Code § 15400

§ 15400. Declaration of results

The governing body shall declare elected or nominated to each office voted on at each election under its jurisdiction the person having the highest number of votes for

that office, or who was elected or nominated under the exceptions noted in Section 15452. The governing board shall also declare the results of each election under its jurisdiction as to each measure voted on at the election.

West's Ann.Cal.Elec.Code § 15452

§ 15452. Plurality of votes elects or nominates; exceptions

The person who receives a plurality of the votes cast for any office is elected or nominated to that office in any election, except:

(a) An election for which different provision is made by any city or county charter.

(b) A municipal election for which different provision is made by the laws under which the city is organized.

(c) The election of local officials in primary elections as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

(d) The nomination of candidates for voter-nominated office at the primary election to participate in the general election for that office as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

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West's Ann.Cal.Elec.Code § 15505

§ 15505. Presidential electors; certificate of election; notifications

No later than the 32nd day following the election, the Secretary of State shall analyze the votes given for presidential electors, and certify to the Governor the names of the proper number of persons having the highest number of votes. The Secretary of State shall thereupon issue and transmit to each presidential elector a certificate of election. The certificate shall be accompanied by a notice of the time and place of the meeting of the presidential electors and a statement that each presidential elector will be entitled to a per diem allowance and mileage in the amounts specified.