

Jerry:

Good to hear from you.

I will study this document closely. I was not aware of Williams v. Rhodes.

There was another equal-protection type of case in 1968 that upheld winner-take-all laws, namely Williams v. Virginia State Board of Elections, 288 F. Supp. 622. Dist. Court, E.D. Virginia (1968). There is a written opinion at the lower court level. This decision was affirmed by U.S. Supreme Court at 393 U.S. 320 (1969) (per curiam).

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From: Jerry L. Sims [mailto:JLSims@investmentlawgroup.com]
Sent: Wednesday, November 30, 2016 9:56 AM
To: media-inquiries@nationalpopularvote.com
Subject: Constitutionality of Winner-Take-All Selection of Presidential Electors

I have a lawsuit idea I would love to see pursued by the Clinton campaign or an organized group that would be likely to have standing. Its objective is similar to the objective of the National Popular Vote Campaign. Since I didn't know who to send this email to, I am hopeful that it will be given to the appropriate people.

I believe that a reasonable argument can be made that the allocation of State presidential Electors on a winner-take all basis is an unconstitutional denial of the equal protection of the law and the principal of one man one vote. I would like to present this position to someone with close ties to the Clinton campaign. The argument may be summarized as follows:

1. Article 2, Section 1, of the Constitution mandates the selection of the president by the **Electoral College** with each state having the same number of electors as it has Senators and Representatives. This creates an inherent bias in favor of small

states. **But** it is a fairly minor bias. Trump won the Electoral Vote not because of the small state bias but because of the winner-take-all method of allocating electors used by 49 of the 51 jurisdictions participating in the Electoral College. Trump won 306 Electoral votes while Clinton won 232. In doing so, Trump won the popular vote in 31 States while Clinton won in 19 States and the District of Columbia. Each candidate took all of the Electors in each state won, except Trump took one elector in Maine. Without the two Bonus Electors in each state there would be a total of 436 Electors and Trump would have won 306 Electors minus $(2 \times 31) = 306 - 62 = 244$ and Clinton would have won 232 Electors minus $(2 \times 20) = 232 - 40 = 192$. She lost the election because of the winner-take-all method of allocating Electors. Trump's lead in Electors would only have dropped from 74 to 52 when the extra two electors are removed from each State. As a percentage of all Electors Trump's lead would have only dripped from 13.8% to 11.92%.

2. The constitution does not mandate the method the states use to select electors. That matter is left to the discretion of the States. Originally the State legislators selected the Electors. But during the 19th Century all of the states moved to statewide elections. Currently all of the States select Electors by statewide elections and all but two of the States, Nebraska and Maine, select electors on a winner-take-all basis. Nebraska and Maine allocate electors by congressional district with two electors elected on a statewide winner-take-all basis.

3. Since the electoral system was adopted vast changes have occurred in state populations, so that as of 2010 our least populace state, Wyoming had a population 563,626, and 3 presidential electors, and our most populous State, California had a population of 37,253,956 and 55 presidential electors. Thus California had a population more than 66 times greater than Wyoming while having only 18 times as many presidential electors. As of 2010 our most populace 9 States in aggregate have a larger population than the other 41 states combined. The large concentration of population in a few states has skewed the original constitutional design so that the likelihood that a candidate who loses the popular vote will win the **Electoral College** has become much greater. A minority candidate has only been elected President 5 times in US history. It occurred 3 times in the 19th Century when the election was thrown into the House of Representatives because the electoral votes were spread between multiple candidates with no candidate getting a majority. As we all know it has also occurred twice in the last 16

years. The 2000 election was the first time in US history that the minority candidate won a majority of the Electoral College outright. Now it has happened again in 2016. The major contributing factors to this outcome are the winner-take-all system of allocating electors coupled with the growing concentration of the US population in a handful of States. These factors exaggerate the small state advantage and have dramatically increased the likelihood of the outright election of a minority presidential candidate, and the critical legal factor is strictly a function of State law.

4. In *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), the Supreme Court made the critical point regarding presidential election law, that although the election of the president by the Electoral College is established by Article II of the Constitution, presidential electors may be selected by the States in any manner they choose, but when the States opt to select electors by an election, the election conducted by the states must be conducted in a manner consistent with other provisions of the constitution:

‘The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that ‘Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors * * *’ to choose a President and Vice President. There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. **** Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote ‘for electors for President or Vice President.’ Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment’s command that ‘No State shall * * * deny to any person * * * the equal protection of the laws.’ Id. pp, 28-29.

5. In *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), the Supreme Court further explained as follows:

“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the **Electoral College**. **** When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 (“[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated”) (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”). It must be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). *Id.*, pp. 104-105.

6. In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Supreme Court made the following salient observation:

Legislators represent people, not trees or acres. *Legislators* are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect *legislators* in a free and unimpaired fashion is bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of

votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. Id p. 561.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state *legislative bodies*, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Id. P. 565.

Although *Reynolds* was decided in connection with legislative elections, the same point as the Court made in *Reynolds* is clearly true in connection with the selection of presidential electors, modifying the language of *Reynolds* to apply to the election of Presidential Electors, the statement would be: “[Presidential Electors] represent people, not trees or acres. [Electors] are elected by voters, not farms or cities or economic interests. ****Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's Electors. To conclude differently, and to sanction minority control of [the Electoral College], would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.”

Conversely, a winner-take-all allocation of Electors within the states denies the minority of voters within each state any representation whatsoever within the Electoral College and ultimately in the case of the 2000 and 2016 elections, denied or would deny the plurality of voters nationwide their choice for President. This is not a reasonable result in a representative democracy. This result was not dictated in 2000 and 2016 by the constitutional skew in the Electoral College in favor of small states, this result was dictated by the winner-take-all method of allocating electors used by the states. It is this state law method of allocating Electors that is an unconstitutional violation of the equal protection clause of the 14th Amendment and its bedrock one man one vote rule.

The winner-take-all allocation of multiple electors (ranging from 3 electors in our smallest states to 55 in our largest) denies any voice whatsoever to each states minority voters, no matter how substantial their vote may be. Moreover, I believe that it can be demonstrated statistically that this method of allocating Electors substantially increases the likelihood of a presidential candidate who did not win the popular vote winning the Electoral College far beyond any intentional advantage

given to small states by awarding each state two extra Electors. The distortion of the small state advantage by a winner-take-all apportionment of a state's Electors is an unconstitutional denial of the equal protection of the law. Paraphrasing *Reynolds v. Sims*: "to conclude differently, and to sanction the winner-take-all control of state Electors would appear to deny the minority of voters within the state any say whatsoever in the selection of the president in a way that far surpasses any possible denial of majority rights that might otherwise be thought to result." If the selection of Electors is viewed by a state as a statewide election and 51% of the voters in that State vote for Candidate A and 49% for Candidate B and all 29 Electors from that State are Electors for Candidate A, then the voice of all of the voters for Candidate B will be ignored unless that State's Electors are allocated proportionately between candidate A and Candidate B. Any other allocation of Electors will not be representative of the State's voters when they vote in the Electoral College and will deny any voice for the minority voters in the next round of the election at the Electoral College. If the selection of Electors is viewed by a state as part of a nationwide election, then no matter what percentage of the voters in that State vote for Candidate A and what percentage vote for Candidate B a winner take all approach makes sense when the "winner" is based on the winner of the national popular vote.

I have attached an excel spreadsheet showing what would happen in the current election if Electors were appointed proportionately by each state disregarding candidates with *de minimis* votes of under 5%. The columns are labeled at the bottom of the spread sheet. The far left side uses voting figures (percentages) as of the end of week of the election, the voting figures to the right are based on voting totals as of Thursday of last week.

I am probably going too far into the weeds here, but to illustrate how extreme the winner-take-all allocation of Electors could be, it would be possible to win the presidency by winning the vote in 37 of the 40 states (losing any 3 of the jurisdictions with only 3 Electoral votes) with the smallest population (including DC). These states would have a combined 45% of the total US population. Winning the vote would not necessarily even require a majority of all votes cast in each state – only a plurality would be required. Assuming voters in each of the 50 States voted in the same approximate percentages and further assuming that the Electors from every State are allocated on a winner-take-all basis, then 22.6% of all US voters could elect the president without a single vote from any of the other States being required.

To illustrate the minor effect of the small state advantage and the huge impact of the winner-take-all method, if you added the further assumption that all 50 States

and the District of Columbia had the same number of voters and the same number of Electors, a candidate could win the required number of Electors with 25.5% of the vote by carrying 26 states by only a few votes each. Again, not a single vote would be necessary from any other State. The point here is not that such an extreme result is likely; the point is that the winner-take-all system is a disaster waiting to happen. The small state advantage is not a big deal, the winner-take-all method of allocating electors based on the vote within each particular state is a huge, very dysfunctional deal. However this discussion of the *possibility* of a minority candidate being elected that arises from a winner-take-all method of selecting Electors was not meant to imply that the *probability of a minority candidate being elected* was strictly a function of winner-take-all selection of Electors. The *probability* of a minority being elected has been greatly increased by the growing concentration of our population in a handful of states.

Proportional allocation of electors would greatly reduce (but not entirely eliminate) the risk of a President being elected who did not win the popular vote and would respect the one man one vote rule. Allocating all of a state's electors based on the winner of the nationwide popular vote is another way to increase the likelihood that the election of the president will reflect the will of the people and honor the one man one vote rule.

I think it is important that the argument be made that either proportional selection of Electors be allowed on the state level or winner-take-all selection of Electors be allowed based on the National vote. Under both methods every vote counts. But more importantly the winner-take-all method on the national vote level could serve as a backstop used in Democratic States against Republicans moving to gerrymandered district voting for Electors in Red States. It would also serve to prevent the increased risk of elections being thrown into the House of Representatives due to some Electors going to third-party candidates. This is a greater risk using proportional selection of Electors even if a *de minimis* cutoff of 10% is used in selecting Electors. If no cutoff is used (I used a 5% *de minimis* cutoff), then my chart would show that the election would go to the House of Representatives. For example California has 55 Electors and even 2% of the vote would round down to one Elector.

Finally both options would encourage voters to turn out and vote because either method would count all votes. Under current methodology democratic votes in heavily Red States play no role in the outcome of the election and the same is true of Republican votes in heavily Blue States. Under either method of allocating Electors, every vote in every state counts in determining the outcome.

There are arguments that can be made against proportional allocation or the unconstitutionality of winner-take-all and I am aware of several of them, but probably not all. There are also several end arounds – the most obvious being drawing (or shall I say gerrymandering) districts from which each elector is selected by popular vote. Another would be to have electors appointed by the legislature. Anyway, if I am missing something please let me know. The time between now and the voting of the Electoral College may be the last time in a generation that there is a chance of fixing this huge dysfunction within our system. A favorable ruling on the Circuit Court level would be likely to be affirmed by a split 4 to 4 decision. After Trump’s term, The Supreme Court is likely to be hostile to the one man one vote concept.

I understand that there are many strategic issues to be considered, but I am convinced that the best strategy is to move forward. Passivity will never win the day. If you have any interest in discussing any of this further, please let me know by email or calling me on my cell.

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