UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

EUGENE BATEN; CHESTER WILLIS; CHARLETTE PLUMMER-WOOLEY; BAKARI SELLERS; CORY C. ALPERT; and BENJAMINE HORNE,

Plaintiffs,

v.

HENRY MCMASTER, in his official capacity as Governor for the State of South Carolina; MARK HAMMOND, in his official capacity as Secretary of State of the State of South Carolina; the SOUTH CAROLINA ELECTION COMMISSION; BILLY WAY Jr., in his official capacity as a Commission Member of the Election Commission; MARILYN BOWER, in her official capacity as Commission Member of the Election Commission; E. ALLEN DAWSON, in his official capacity as a Commission Member of the Election Commission; NICOLE SPAIN WHITE, in her official capacity as a Commission Member of the Election Commission,

Defendants.

Case No. 2:18-cv-00510-PMD

PLAINTIFFS' OPPOSITION TO DEFENDANTS GOVERNOR MCMASTER AND SECRETARY HAMMOND'S MOTIONS TO DISMISS THE COMPLAINT[1]

[1] Defendant McMaster moved to dismiss and submitted a memorandum in support. Dkt. No. 14. Defendant Hammond moved to dismiss, but joined McMaster's memorandum in support. Dkt. No. 17. Plaintiffs respond to both motions together.

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I. INTRODUCTION

South Carolina's winner-take-all ("WTA") method of counting its citizens votes in Presidential elections systematically discards the votes of nearly half of the state's voters while unfairly weighting the votes of others. This violates the constitutional mandate of "one person, one vote" under the Fourteenth Amendment, the free speech and associational rights of South Carolina voters under the First Amendment, and the protections of Section 2 of the Voting Rights Act. Defendants' "we have always done it that way" response, which suggests that this case is in conflict with settled case law as well as some beloved tradition, fails to respect the fundamental rights that have be trod upon by South Carolina. A significant subset of South Carolina's minority population as well as political minorities have been foreclosed from *any* meaningful participation in the election of our President for at least forty years. Defendants do nothing to deny that fact.

Plaintiffs do not dispute that, under the Elector Clause, Art. II, Sec. 2, Cl. 2, the South Carolina legislature is free to allocate its Electors without an election. But that power is not at issue here. As the Supreme Court has repeatedly affirmed, once the State chooses to exercise its right under the Elector Clause to give its citizens the right to vote, that right is fundamental, and the voting system it puts in place is subject to the constraints of the Fourteenth Amendment. *See Bush v Gore*, 531 U.S. 98, 104 (2000) (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). The current system fails to meet that standard because millions of South Carolinians have cast a ballot for the President only to have their votes discarded before they actually count towards electing the President. In that way, the system is indistinguishable from the voting system the Supreme Court struck down in *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963).

The U.S. Constitution does not require or even contemplate the WTA method, and the WTA method is entitled to no deference, historical or otherwise. Moreover, its use weakens the democratic integrity of our Presidential election system and mutes the votes of the electorate. The WTA method causes Presidential campaigns to all but ignore non-battleground states like South Carolina. In 2016, for instance, 99% of campaign spending was in 14 states—and South Carolina was not among them. Indeed, during the last general election for President, one major party candidate visited South Carolina a single time and that was to raise money for a state level candidate. Defendants do not dispute the negative consequences of the WTA method alleged in the Complaint. Instead, they argue WTA does not violate the one person, one vote principle because voters cast a vote for Presidential Electors, not for President. In turn, they argue that South Carolina's state-level election for Electors treats every vote equally.

But South Carolina actually deploys a two-step election. In the first step, voters go to the poll and cast their votes for President and Vice President. But, despite what is printed on the ballot, those votes are not actually counted as votes for the President and Vice President. Instead, pursuant to South Carolina's statute S.C. Code § 7-13-320(C)(b), the votes of those citizens are then actually counted as votes for a slate of electors. Only those electors then participate in the second step of the election, convening in the months following the vote of the citizens to cast South Carolina's *actual* votes for President. In nearly every Presidential election that has occurred in South Carolina in modern history, a very large percentage of South Carolina citizens, including an overwhelming percentage of its minority citizens as well as political minorities, have been denied participation in the second stage of the Presidential election, which is the only time effective votes can actually be cast. This is true despite the relatively straight-forward remedy that is available to the State to

allocate its electors based upon the votes of its citizenry—proportional distribution of electors that reflects the actual voices of South Carolina's citizens.

Even if the Court views South Carolina's election as one for Electors alone rather than the first stage in a two-stage election for President, South Carolina's WTA method of selecting Electors still violates the Equal Protection Clause of the Fourteenth Amendment. Under Defendants' theory, South Carolina's Presidential elections constitute a multi-member at-large election for Electors. The Supreme Court, however, has made clear the government may not dilute the votes of political or racial minorities by wasting their votes in at-large, multi-member elections in which the majority is likely to run the table. *White v. Regester*, 412 U.S. 755, 769 (1973); *Burns v. Richardson*, 384 US 73, 88 (1966). Taking Defendants' theory to its logical conclusion, South Carolina could elect its entire state legislative body through one statewide vote for a slate of Democratic or Republican Senators. Yet we know that such a WTA Senate scheme violates the one person, one vote principle because it deliberately cancels out the voting strength of racial and political minorities. *See id*. That is precisely what South Carolina has done with its Electoral College delegation.

Defendants' argument that South Carolina's WTA system should be upheld just because it has been around for a long time should be rejected. History cannot save an unconstitutional practice. *See Gray*, 372 U.S. at 376 (enjoining a practice the Court referred to as "deeply rooted and long standing"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) ("Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."). But more importantly, the vast majority of the history that South Carolina relies upon is irrelevant to the constitutional question presented here because it

predates both the passage of the Fourteenth Amendment and the Supreme Court's recognition of the doctrine of "one person, one vote" in *Gray*, 372 U.S. at 381, based on the Fourteenth Amendment's Equal Protection Clause. The cases Defendants primarily rely on were decided in an earlier era and do not reflect the significant doctrinal developments that have happened since the 1960s when it comes to voting rights.

Plaintiffs have also sufficiently alleged that South Carolina's WTA system violates their First Amendment rights. The First Amendment affords voters the right to an equal and ***effective*** vote. The WTA method violates the First Amendment because it weights votes differently depending on political party, thus depriving voters affiliating with minority parties a meaningful opportunity to cast effective votes for President. Defendants argue that because Plaintiffs can vote for the candidate of their choice, the WTA method does not violate Plaintiffs' First Amendment rights. But, as Defendants did in advancing their equal protection arguments, they ignore the reality that almost half of the votes cast for President in South Carolina are discarded after the first stage of the Presidential election, even where the voices of minority party voters would have sufficient weight to appoint one or more electors to cast votes in the second stage—the only time that effective votes for President can be cast.

In addition to these constitutional violations, South Carolina's WTA law violates Section 2 of the Voting Rights Act because it results in South Carolina minorities "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10103(a); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C. 2012), *aff'd,* 568 U.S. 801 (2012) (the VRA "provides that states may not impose or apply electoral voting practices or procedures that result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."). The question, as posed

by Plaintiffs' Complaint is not whether vote dilution occurs as a result of WTA. The vote dilution caused by South Carolina's WTA rules is a mathematical certainty. As further discussed below, given the size of the African-American voting population and the strong tendency of African American voters to vote for candidates from one political party, the complete absence of a single Presidential elector from the party of choice for African Americans is proof of the active and effective dilution of their votes. South Carolina's WTA rules have had the effect of impeding the selection of their candidates, and WTA is not permitted in the post-VRA world. Plaintiffs have alleged detailed facts showing that they meet each of the three required preconditions to bring a Section 2 claim to trial laid out in *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986). The VRA claims should survive Defendants' Motion to Dismiss.

Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety.

II. STANDARD OF REVIEW

To survive a motion to dismiss, a 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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "When ruling on a motion to dismiss, courts must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017). A "court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably

be questioned." Fed. R. Evid. 201(b). Courts routinely take judicial notice of facts related to elections.[2]

III. ARGUMENT

Plaintiffs have pled facts sufficient to show that South Carolina's WTA method for counting its citizens' votes in Presidential elections violates the Fourteenth and First Amendments and Section 2 of the Voting Rights Act. Defendants' motion to dismiss must therefore be denied.

A. South Carolina's WTA Method of Allocating Electors Violates the One Person, One Vote Rule under the Fourteenth Amendment.

Defendants do not dispute that the Fourteenth Amendment—including the one person, one vote principle—applies to presidential elections. Dkt. No. 14, Defendant McMaster's Motion to Dismiss ("Defs' Mot.") at 12. Nor could they. Although a State may permissibly choose to select Presidential Electors by direct legislative appointment, once it has given its citizens the right to vote for President, that right becomes a "fundamental" right to an "equal vote" endowed with "equal dignity," and it is subject to the Equal Protection Clause. *Bush*, 531 U.S. at 104–05;[3] *see*

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[2] *See, e.g.*, *Mills v. Green*, 159 U.S. 651, 657–58 (1895) ("this court must take judicial notice of the days of public general elections of members of the legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect"); *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) ("where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as South Carolina has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support").

[3] Defendants wrongly assert that *Bush v. Gore* does not apply here because it was limited to its facts. *Bush v. Gore* is binding Supreme Court precedent. *See Stewart v. Blackwell*, 444 F.3d 843, 860 n.8 (6th Cir. 2006) ("Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it."), *vacated on other grounds*, 444 F.3d 843 (July 21, 2006). The Fourth Circuit and other appellate courts have therefore relied on the principles stated in *Bush*. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 337 (4th Cir. 2016) ("The right to vote is 'fundamental,' and once that right 'is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'") (quoting *Bush*, 531 U.S. at 104–05); *accord League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (same); *Idaho*

also Harper, 383 U.S. at 665; *Rhodes*, 393 U.S. at 29 (holding that the powers granted to the states under the Elector Clause "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."). Those constitutional protections include the one person, one vote principle under the Fourteenth Amendment, which prohibits a state from discarding or diluting the votes of certain of its citizens while magnifying others, unless that outcome is required by a specific constitutional provision. *Gray*, 372 U.S. at 380–81; *Bush*, 531 U.S. at 104.

Instead, Defendants attempt to argue that South Carolina does not discard votes for President because, in Defendants' view, South Carolinians do not vote for President, they vote only for Electors. Defs' Mot. to Dismiss at 3–4, 9. But that argument disregards the reality of South Carolina's elections today, in which voters cast a ballot *for the President*—not for Electors. South Carolina law bars the Electors' names from appearing on the ballot and requires the names of the Presidential candidates. But even if the Court were to accept Defendants' framing of modern elections as a single state-wide vote for nine electors rather than the first stage of a two-stage Presidential election, South Carolina's WTA method of selecting Electors still violates the Fourteenth Amendment because it dilutes the vote of any South Carolinian who casts a vote for anyone other than the most popular candidate. *See White*, 412 U.S. at 769; *Burns*, 384 U.S. at 88. Defendants' appeals to history and precedent do not change this analysis.

1. Defendants Rely on an Outdated View of Modern Presidential Elections.

Defendants would have this Court view South Carolina's Presidential elections as a one-step election where the people do not vote for the President, but, instead, vote only for Electors.

Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1077 n.7 (9th Cir. 2003) ("when a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause") (citing *Bush*, 531 U.S. at 104).

Defendants try to equate South Carolina's modern Presidential elections to the Elector selection mechanisms used by states 230 years ago and envisioned by the Framers. Defs' at 12–13. That system, however, is the same system the Framers put forward as a means of ensuring the election of the President is *not* left "to the people," *Gray*, 372 at 376 n.8, and is instead given to an "intermediate body of electors" that would be "detached" from "cabal, intrigue, and corruption," *The Federalist Papers* No. 68 (Hamilton). Because this body would exercise "reasonable independence and fair judgment" to select a President and Vice-President, it follows that a vote, as initially envisioned by the founders, would only be voting for independent Electors—and *not* for the President. *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

Today's reality is quite different. As alleged in the Complaint and reflected in South Carolina law, in South Carolina's modern Presidential elections, citizens do not vote for Electors; they vote for the President in two steps. *See* Compl. ¶¶ 2–4, 14, 44. In the first step, the people cast their votes for President—the Electors' names are not even on the ballot. *Id.*; S.C. Code Ann. § 7-19-70. After this first step, South Carolina allocates all nine of its electors to the political party that received the most votes—even if only a plurality—and discards the rest of the votes. In the second step, South Carolina's nine electors cast the only effective vote for President allowed by the Constitution in lockstep for the most popular political party. Compl. ¶ 43.

South Carolina law undermines the central predicate of Defendants' argument—that South Carolinians vote only for Electors and not for a Presidential candidate. South Carolina mandates that "[t]he names of candidates for electors . . . shall not be printed on the ballot," and "[i]n place of their names . . . there shall be printed on the ballot the names of the candidates for President and Vice-President." S.C. Code § 7-19-70. Moreover, Electors in South Carolina today do not perform any functions requiring "reasonable independence and fair judgment," *McPherson*, 146 U.S. at 36.

Instead, South Carolina law mandates that electors cast their vote for the candidate that received a plurality of the people's votes.[4] In fact, South Carolina law makes it a ***crime*** for any elector to exercise independent judgment. S.C. Code § 7-19-80. By law, South Carolina has created a two-stage election for President—not an election for independent electors who will then vote for an appropriate candidate for President after a free and open debate.

Those points are underscored by how everyone—voters, candidates, and Electors alike—view and participate in South Carolina's elections. Presidential elections are publicly called and celebrated after the vote of the people in November, not after the vote of the Electors in December, and one would be hard pressed to find many voters who could state the name of an Elector at the time the voter cast his or her vote or determine when the Electors cast their votes. The congress of the Electoral College is an event of no moment to the citizens who have already cast their vote for President. All of those facts, grounded in common understanding of modern Presidential elections, point to an inescapable conclusion: the people vote for the President and the states allocate Electors *solely* to consolidate and count those votes. To argue otherwise today is like arguing that voting machines cast votes, not the people who pull the lever.[5]

[4] South Carolina law requires Presidential electors to declare in advance the candidate for president and vice-president he will vote for, and requires the state attorney general to institute criminal action for violating that declaration. S.C. Code Ann. § 7-19-80.

[5] At times, Defendants seem to agree with this basic premise. Defendants argue that Plaintiffs' First Amendment rights are not violated because "South Carolina voters were able to express their political views by casting their votes for *their candidate*." Defs.' Mot. to Dismiss at 14 (emphasis added). On the other hand, Defendants also argue that citizens vote only for Electors for purposes of the Fourteenth Amendment. *Id.* at 3–4, 9. Defendants cannot have it both ways. A vote does not change depending on the constitutional protection being analyzed.

2. South Carolina's WTA Method of Allocating Electors Based on the People's Vote for the President Violates the One Person, One Vote Rule.

Because the election for President in South Carolina is a two-step election, the Supreme Court's decision on unit-voting schemes in *Gray v Sanders*, 372 U.S. 368, 381 (1963), controls here. In that case, the Supreme Court reviewed Georgia's "deeply rooted and long standing" practice of allocating a set number of "units" to each county to consolidate and count the vote in that county in primary elections for statewide offices. *Gray*, 372 U.S. at 370–71, 76. All of each county's units were awarded through a WTA allocation based on a county-wide vote, and the candidate who had the most units after a tally of all the county-level elections in the state won. *Id.* The Supreme Court struck down Georgia's system on the basis that it weighted rural votes more than urban votes. *Id.* at 379. The Court noted, however, that even if the state allocated a perfectly proportional number of units to each county, the system would still unconstitutionally weight certain votes because votes for a candidate who failed to win in a given county would be counted "only for the purpose of being discarded" before the final tally. *Id*. at 381 n.12.

South Carolina's WTA method of allocating Electors is materially indistinguishable from the system rejected in *Gray*. South Carolina, as in *Gray,* has implemented a two-step system for counting votes—in this case for President. As in *Gray,* only the votes for the winning candidate matter in the second step when the final vote count occurs. As in *Gray*, votes for a candidate that failed to win a plurality in the relevant jurisdiction are counted "only for the purpose of being discarded" before the final tally. *Id*. Therefore, like the system for counting votes in *Gray*, South Carolina's system for counting votes for President violates the one person, one vote rule. *See id.*

Defendants fail to address the similarities between South Carolina's Presidential election system today and the election system struck down in *Gray*. Rather, they refrain from discussing the facts of *Gray* and instead rely both on the longevity of South Carolina's WTA system and an

outdated, and incorrect, understanding of the election. As the Supreme Court explained *Bush v. Gore*, South Carolina has the right to decide, in the first instance, the contours of its elections. 531 U.S. 98. Having chosen to grant the right to the voters and treat its elections as one for *President*, South Carolina cannot now avoid the clear implication of *Gray v. Sanders*—and its application of the one person, one vote principle—by disclaiming its own legislative choice.[6]

3. Even if the Court Adopts Defendants' Argument that, in South Carolina, Voters Merely Vote for Electors, South Carolina's WTA Method Is Still Unconstitutional.

Even viewing South Carolina's Presidential election as one in which South Carolinians vote only for Electors, the WTA method still fails to satisfy the requirements of equal protection that apply to at-large, multi-member elections like South Carolina's statewide election for its nine Presidential Electors.

As the Supreme Court has explained, "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 v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *see also White v. Regester*, 412 U.S. 755, 769 (1973) (striking down a multi-

[6] Nor can Defendants argue that *Gray* does not apply here because the constitutional provisions setting up the Electoral College themselves create some inequality in the weighting of votes. Merely because *some* inequality is constitutionally created by assigning to states the number of electors equal to each state's number of representatives and senators does not mean South Carolina is free to *create additional* inequality by selecting those electors by WTA. *Gray* makes clear that the "*only* weighting of votes sanctioned by the Constitution" is that which is specifically mandated by the Constitution, such as the number of Electors accorded to each state or the allocation of two Senators to each state. *Gray*, 372 U.S. at 380 (emphasis added). This suit, however, does not challenge the distribution of Electors to the states or any other mandate of the Constitution; it challenges under the Fourteenth Amendment the state's exercise of discretion in choosing the WTA method of allocating Electors. Compl. ¶¶ 11, 12. The Defendants do not, and cannot, argue that the WTA method of allocating Electors is mandated by the Constitution.

member, at-large election scheme as unconstitutional). The reason is that by "encouraging block voting, multi-member districts" can "diminish the opportunity of a minority party to win seats." *Burns*, 384 US at 88 n.14. Here, Plaintiffs have alleged that that South Carolina's system unconstitutionally cancels out the voting strength of both racial and political minorities. *See* Compl. ¶¶ 5, 8–9, 18–19. Indeed, the vast majority of South Carolina minority voters and certain political constituencies have been barred from any participation in the Electoral College for at least forty years.

Applying this standard for constitutional vote dilution, the Supreme Court in 1973 in *White*, 412 U.S. at 769, for the first time invalidated a multi-member districting scheme in one Texas county because it found that Mexican-Americans were "effectively removed from the political processes" of the county because their votes were submerged into an at-large pool with a majority that was likely to multiply the majority's voting power. The situation the Supreme Court found unconstitutional in *White* is indistinguishable from South Carolina's WTA method—which is nothing more than a statewide, at-large election for its nine Presidential Electors in which racial and political minorities have little to no chance of being represented by even one of South Carolina's Electors. Indeed, South Carolina has selected 42 Electors in the last five elections, and *all* were members of the Republican Party, notwithstanding the 3,811,501 million votes (more than 40%) for the Democratic candidate. Compl. ¶¶ 4–5, 45–47. If translating millions of Democratic votes into zero representation does not "cancel out the voting strength" of both Democratic voters and racial minorities that tend to support Democratic candidates, then it is difficult to know what would meet the constitutional standard for dilution.

In fact, if South Carolina had authorized this type of election for any other multi-member body of elected officials, it would be obvious that it violated the Constitution. For instance, South

Carolina could not constitutionally abolish its 46 single-member state senate districts and instead hold a statewide election for all of its senators by letting voters choose whether they wanted that body to be composed entirely of Democratic or Republican Senators. That is because the results of that contest would *always* be one-party rule in the state senate: the party that got a plurality of votes would get all 46 senate seats. That hypothetical WTA state senate scheme would violate one person, one vote because it cancels out the voting strength of racial and political minorities in the state. For the same reasons, the WTA Presidential Elector scheme does too.[7] *See Burns*, 384 U.S. at 88.

South Carolina's motion to dismiss fails even to acknowledge these cases. Instead, it contends that no "one person, one vote" claim is possible because under WTA "all South Carolina voters are afforded a vote of equal weight in appointing presidential electors." Defs. Mot. to Dismiss at 12. But the entire point of the doctrine of vote dilution under the Constitution (and the VRA) is that elections in which each vote is nominally assigned an equal value can sometimes be not so equal after all. Rather, the "right to vote can be affected by a dilution of voting power" just as much as "by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).[8] Here, South Carolina's consistent dilution of the votes of racial and political

[7] This analysis necessarily applies to multi-member elections only, not single-member elections. Even though many votes are "discarded" in the election of Governor, that is constitutionally acceptable because the election is for a single statewide office. But here, South Carolina holds a statewide election for 9 Electors, so it must use a method of election that does not dilute the votes of millions of citizens. South Carolina's WTA method fails this basic test.

[8] *See also Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc) (use of at-large, multi-member elections for governing council and school board in Louisiana parish resulted in unconstitutional vote dilution), *aff'd sub nom E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (per curiam) (noting in affirmance that "single-member districts are to be preferred absent unusual circumstances"); *Kendrick v. Walder*, 527 F.2d 44, 50 (7th Cir. 1975) (plaintiffs in Illinois city stated claim that multi-member elections for City Council unconstitutionally minority diluted votes); *Lipscomb v. Wise*, 399 F. Supp. 782, 783 (N.D. Tex. 1975) (use of city-wide, at-

minorities is difficult to rationalize in light of the fact that a constitutionally permissible alternative is so readily available—allocate South Carolina's Electors based on the share of the votes received by each presidential candidate. Allow the votes to speak for the voters.

B. Neither the History Nor the Cases Cited by Defendants Support the Constitutionality of the WTA Method for Allocating Electors.

Defendants primarily defend the WTA method of allocating Electors on the basis that past practice and precedent somehow insulate it from constitutional scrutiny. But Defendants' historical recitation and appeals to purportedly binding precedent have little to do with modern Presidential elections or with current Fourteenth Amendment jurisprudence, including the principle of one person, one vote. That history and those cases, therefore, cannot control here.

1. Defendants' Recitation of History Is Irrelevant to the Constitutionality of WTA in Modern Presidential Elections.

Defendants argue that the WTA method survives constitutional scrutiny because it has been widely employed by states for more than two centuries. Defs.' Mot. at 4, 9. But far from supporting the constitutionality of a WTA method, that history demonstrates that a WTA method became widespread decades before the ratification of the Fourteenth Amendment and more than a century before the Supreme Court's articulation of modern notions of voter equality. Both the constitutional protections for voters and our system of elections have undergone fundamental changes not envisioned by the Framers who created the early Electoral College.

To the extent the history of Presidential election administration plays any role here, it only underscores how dramatically Presidential elections today differ from elections when the Electoral College was first conceived. As the Supreme Court has recognized: "The electoral college was

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large voting for every seat on multi-member Dallas City Council resulted in unconstitutional vote dilution).

designed by men who did not want the election of the President to be left to the people." *Gray*, 372 U.S. at 377 n.8. The Framers envisioned that states would select Electors who "would exercise a reasonable independence and fair judgment in the selection of the Chief Executive." *McPherson*, 146 U.S. at 36; *see also The Federalist Papers* No. 68 (Hamilton). The State cannot statutorily handcuff the electors with threat of criminal prosecution while simultaneously pleading fealty to the Electoral College envisaged by the Founders. The two are fundamentally at odds.

The Complaint acknowledges that WTA is the "predominant method in America for counting votes in presidential elections." Compl. ¶ 1. Indeed, by 1832—34 years *before* ratification of the Fourteenth Amendment—every state but one had adopted some form of a WTA method to allocate its electoral votes. But the WTA method was not implemented to ensure voter equality in line with current jurisprudence. Quite the opposite. The WTA method in its original form was adopted to maximize the influence of the state's majority party and cancel out the voting strength of everyone else. *See Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622, 628 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (1969) ("The legislature of the Commonwealth had the choice of appointing electors in a manner which will fairly reflect the popular vote but thereby weaken the potential impact of Virginia as a State in the nationwide counting of electoral ballots, or to allow the majority to rule and thereby maximize the impact of Virginia's 12 electoral votes in the electoral college tally."); *see also* Senator 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) ("The general ticket system . . . was the offspring of policy, and not 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.").

Since the widespread adoption of the WTA method of allocating Electors, there have been dramatic changes to the applicable legal landscape. Most importantly, the United States adopted the Fourteenth Amendment in 1868. The Supreme Court initially approached the Fourteenth Amendment with caution—generally refusing to read it in such a way that it could, or did, affect the contours of state elections. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (noting that, prior to *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court "long resisted any role in overseeing the process by which States dr[e]w legislative districts"). It was not until the 1960s and 1970s—130 years after WTA became widespread—that the Court began to apply the Fourteenth Amendment to scrutinize—and in some cases enjoin—state electoral processes, on the basis of the one person, one vote principle articulated by the Supreme Court in *Gray*. 372 U.S. at 377 n.8 ("Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that [the] conception of political equality [prevalent in the Founding era] belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections."); *White*, 412 U.S. at 769 (holding that a South Carolina county's use of an at-large election for multiple elected officials violated the Fourteenth Amendment). Thus, what is now a bedrock principle of constitutional voting rights law was not even in place during the majority of the historical period upon which the Defendants rely.

In addition, the actual contours of Presidential elections have changed since the late 1960s. In the past few decades, South Carolina and many other states have abandoned any pretense that citizens are voting merely for Electors, and not for President. Today, people cast a vote for the President, not for individual Electors. This was not always true, and it was not true at the time of the cases on which Defendants rely. For example, the briefing in *Williams*, the principle case on which Defendants rely, makes clear that Virginia at the time placed the names of Electors on the

ballot. 288 F. Supp. at 629; Ex. A at 4 (Plaintiffs' brief on the merits in *Williams*, describing the Virginia ballot). The same is true of *McPherson*, where the Michigan ballot in question allowed voters to select the name of a single Elector for their district and one Elector for their half of the state. *McPherson*, 146 U.S. at 1, 4 (quoting Act No. 50 of the Public Acts of 1891 of Michigan). Such elections bear little resemblance to the ones Plaintiffs challenge.

At the same time that fundamental shifts have taken place in the nature of the people's participation in Presidential elections, the distortions created by the WTA method have become increasingly evident—making clearer, and more pronounced, the Constitutional problems with WTA. In modern elections, the WTA method reduces the influence of non-battleground states like South Carolina, removing any incentive for Presidential candidates to campaign in South Carolina and discouraging South Carolinians from participating in the electoral process. *Id.* ¶ 9.[9]

Historical practice cannot be used to foreclose meaningful review of Plaintiffs' claims. Defendants are correct that settled practice can "liquidate" the meaning of specific constitutional provisions—in particular when the provisions are ambiguous, and when the adopters of the practice understood it to be consistent with the provisions under review. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). However, as discussed above, the WTA method was widespread *before* the ratification of the Equal Protection Clause—and long before the advent of the one person, one vote principle in the 1960s. The longstanding nature of the WTA method

[9] It is also troubling that the WTA method facilitates outside influence in our elections by hinging outcomes on a few battleground states, allowing hostile parties to focus their efforts on a handful of states to swing a relative handful of votes to their preferred candidate. *Id.* ¶¶ 65–67. Such concerns were recognized by the drafters of the Constitution when they adopted the Electoral College approach. The conduct of separate gatherings of Electors in each of the state was seen as one way to inhibit any efforts by "foreign powers to gain an improper ascendant in our councils." *The Federalist Papers*, No. 68 (Hamilton). Under the current system, most of the elections in each state, such as South Carolina, are for all intents and purposed pre-ordained by the WTA approach. Leaving only the so called "battleground states" as weak links it the process.

therefore cannot be used to "liquidate" the meaning of the Fourteenth Amendment—nor assist the Court in understanding the one person, one vote principle it embodies.

Moreover, nothing in the Supreme Court's jurisprudence suggests that an *unconstitutional* practice should be saved just because it has been repeatedly inflicted on the citizens. *See Gray*, 372 U.S. at 376 (enjoining a practice under the 14th Amendment that the Court referred to as "deeply rooted and long standing"). Quite the contrary: "The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

2. Defendants' Cited Precedent Does Address the Legal Questions Presented by Plaintiffs' Claims and Predates Important Doctrinal Shifts.

The Court should also reject Defendant's argument that previous decisions foreclose Plaintiffs' challenge. Defendant points to a variety of cases in which parties have challenged the Elector-allocation models of various states throughout history. Yet, in not *one* of these cases did the court address Plaintiffs' central factual and legal argument here: when a state functionally conducts an election as one for President, and *not* as one for Electors, its election must comport with constitutional protections that necessarily govern two-step elections. In addition, Defendants' reliance on the summary affirmance in *Williams* is misplaced because it no longer holds in the face of factual and doctrinal shifts in the one person, one vote jurisprudence.

Defendant's reliance on *McPherson*, 146 U.S. at 36, is likewise misplaced. The Court in *McPherson* did not address whether allocating all of a state's Presidential Electors to the Presidential candidate that received the most votes violated the Equal Protection Clause of the Fourteenth Amendment. And it also did not address a violation of the one person, one vote principle that would not be articulated for 70 more years. *McPherson* simply upheld Michigan's

district method for selecting Electors. Far from holding that WTA passed constitutional muster, *McPherson* rejected the argument that WTA was constitutionally required. *McPherson*, 146 U.S. at 24-25, 38. *McPherson*'s more general discussion of the historical practice of WTA does not help Defendant as this Court assesses the Equal Protection Clause issues Plaintiffs raise. The *McPherson* Court relied on historical practice to "liquidate" the meaning of the *Elector Clause* in Article II—not the Fourteenth Amendment—and, as noted, in doing so held only that the early historical usage of the district method of allocating Electors supported its permissibility under that Clause. 146 U.S. at 36.

Moreover, as noted above, the Court analyzed an election in the context of the electoral system that prevailed in Michigan at the time, under which the names of *Electors* were printed on the ballot and the voters selected the name of a single Elector for their district, and a single Elector for their half of the state. *McPherson*, 146 U.S. at 1, 4 (quoting Act No. 50 of the Public Acts of 1891 of Michigan)). Given those differences, *McPherson* is not binding precedent for an election system that was not challenged and a legal question that was not presented.

Defendants' argument that *Williams* controls is similarly flawed. 393 U.S. at 320. As an initial matter, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), makes clear that courts looking to apply summary affirmances must closely analyze the factual and legal issues presented to determine if they are identical. The Supreme Court explained that the "precedential significance of the summary action" must be "assessed in the light of all the facts in that case," and the Court declined to apply a summary affirmance because facts were sufficient to distinguish the case at bar from the former case. *Id.* Yet here—with respect to Plaintiffs' primary argument—they are not.[10]

[10] Nor does the summary affirmance in *Hitson v. Baggett* control. 446 F. Supp. 674, 675–76 (M.D. Ala. 1978), *aff'd without opinion*, 580 F.2d 1051 (5th Cir. 1978); *see* Defs.' Mot. to Dismiss at 8,

Nowhere in the district court's decision in *Williams* does it address Plaintiffs' primary constitutional claim: that a state may not discard votes *for the President* through the WTA method of allocating Electors in the same manner that, in *Gray*, votes were discarded at an intermediate step in a two-step election. The absence of such legal analysis is no surprise because *Williams* addressed the WTA method of allocating Electors at a significantly different time—a time, as in *McPherson*, when voters cast their vote for Electors as candidates listed on the *ballot*. *See* Ex. A at 4 (Plaintiffs brief on the merits in *Williams*, describing the Virginia ballot).[11]

The Court should similarly reject Defendant's attempt to rely on several non-binding trial court decisions. *See, e.g.*, *Conant v. Brown*, 248 F. Supp. 3d 1014, 1025 (D. Or. 2017); *Schweikert*,

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n.1. Each of the legal holdings in *Hitson* addressed an entirely different challenge than the one brought here. First, the plaintiffs in *Hitson* specifically challenged the apportionment of Electors to the states. *Hitson*, 446 F. Supp.at 675–76. Plaintiffs here do not. Second, the district court in *Hitson* expressly stated that there was no "contention that Alabama's electoral scheme for the selection of presidential electors operates" to "minimize or cancel out the voting strength of (minority voters)," and as a result, there was no discrimination. *Id.* at 676 (citation and internal quotation marks omitted). Here, Plaintiffs clearly contend, and allege, such facts. *See* e.g., Compl. ¶¶ 1–5, 44–46, 67–105. And third, plaintiffs in *Hitson* "contend that the Constitution prohibits Alabama from selecting presidential electors by popular election." *Id.* Plaintiffs here make no such argument. The Court did not address any other issues.

[11] *Mandel* also makes clear that courts reviewing summary affirmances should not read the lower court's *rationale* as controlling, just the narrow final judgment. 432 U.S. at 176 ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below."). This is especially true when the district court presents two rationales for upholding the judgment as the *Williams* court did—one of which, as noted, relied *dispositively* on the specific way Virginia elected *Electors*—which is materially different from South Carolina's method. *Williams*, 288 F. Supp. at 627–28 (upholding Virginia's electoral system because it was difficult for the court to see how votes for Electors were treated unequally, *and* because it found that the system resembled the election of Representatives, which the Supreme Court stated in *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) was constitutional and which Congress had "expressly countenanced"); *see also Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain the judgment."). The issue is not whether the *Williams district court* opinion addresses Plaintiffs' claims here, but whether the Supreme Court's summary affirmance necessarily settles the questions herein.

2016 WL 7046845; *Williams v. North Carolina*, No. 3:17-cv-265-MOC-DCK, 2017 WL 4936429, at *5 (W.D.N.C. Oct. 2, 2017), *report and recommendation adopted*, 2017 WL 4935858 (W.D.N.C. Oct. 31, 2017).[12] The predominantly *pro se* plaintiffs in those cases did not adequately air the relevant issues. For example, one *pro se* plaintiff "did not directly respond to Defendants' motion [to dismiss]," and thus the district court determined that it "need not delve too deeply into the content of Plaintiff's complaint." *Schweikert*, 2016 WL 7046845, at *1-2. Moreover, none of those decisions addressed the critical distinction that South Carolina has set up its elector process as a two-step election for President. Those cases are not persuasive where Plaintiffs here have set forth the many reasons why *Williams* does not bar the Fourteenth Amendment claim based on *Gray v. Sanders*.

Moreover, even if the Court were to agree with Defendants that South Carolina's system should be viewed as a one-step election of an at-large, multi-member body, the summary affirmance in *Williams* does not control. That is because, even on this question, *Williams* has since been undermined by doctrinal shifts in the one person, one vote case law that stripped it of any lasting binding effect. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (holding that "inferior federal courts" should not "adhere" to summary affirmances when subsequent doctrinal developments undermine the result).

Indeed, *Williams* was decided before *White v. Regester* struck down a county's use of a multi-member at-large election system. 412 U.S. at 768. *White* therefore fundamentally shifted the legal landscape. Moreover, part of the district court's rationale in *Williams* was that Congress "expressly countenanced" at-large elections for congressional representatives. *Williams*, 288 F. Supp. at 628. That rationale no longer exists. Congress changed federal law to require that all states

[12] Unpublished case law attached as Ex. B.

with two or more Representatives hold all Congressional elections through single-member districts. *See* 2 U.S.C. § 2c.[13] Congress did so for good reason: "a primary motivation" for Congress's move to single-member districts was a "fear[] [that] Southern states might resort to multimember congressional districts to dilute minority (that is, black) voting power." Pildes and Donaghue, *Cumulative Voting in the United States*, U. Chi. Law Forum at 251 n.43. All of these changes do more than render outdated the district court's conclusion in *Williams* that statewide, multi-member elections comply with the Equal Protection Clause because they purport to weight each vote equally; they also undermine the weight of the Supreme Court's summary affirmance.

Further, *Williams* has also been undermined because the district court in *Williams* applied an "invidiousness" standard that has since been modified. *Williams* specifically held that "in a democratic society the majority must rule, unless the discrimination is invidious," 288 F. Supp. 627, but *Bush* dispensed with invidiousness as a necessary intent requirement.[14] In its place, that Court stated that "the State may not, under the Equal Protection Clause, value one person's vote over that of another by later arbitrary and disparate treatment," and it did not look at anything that could be described as an intent to discriminate. 531 U.S. at 104–05; *see also id. at* 107 ("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"). If that straightforward principle is applied, then a statewide, multi-member, winner-take-all election in a large state like South Carolina is

[13] This change in statutory law mirrors the evolution in constitutional law. If the federal law were repealed and South Carolina attempted to elect its seven U.S. Representatives via a single statewide, multi-member election and then sent a delegation of seven Republican House Members to Congress, there is little doubt in light of Supreme Court pronouncements that courts would find that system unconstitutional because it afforded millions of Democrats no representation.

[14] "Invidious discrimination" at the time of *Williams* entailed some level of "intentional" or "purposeful" discrimination. Such a restrictive view of the element of invidiousness has also evolved. *See Washington v. Davis*, 426 U.S. 229, 242 (1974) ("[A]n invidious discriminatory *purpose* in application of a statute may often be inferred from the totality of the relevant facts....").

necessarily unconstitutional. Such a system—like that in *Bush v. Gore*—purports to initially count all the votes equally, but, after certifying the final tally, South Carolina then arbitrarily grants the votes for the plurality winner "greater voting strength" than any other group by maximizing the representation of those votes and canceling out the strength of all others.

In short, there is no question that, viewing South Carolina's election as one for *President*, it is unconstitutional under *Gray v. Sanders*; but even if one adopts Defendants' frame of the election as one for an at-large, multi-member body of Electors, neither history nor precedent save it from constitutional invalidation under the Equal Protection Clause.

C. South Carolina's WTA Violates Plaintiffs' First and Fourteenth Amendment Associational Rights.

South Carolina's WTA method not only implicates Fourteenth Amendment rights, it also burdens Plaintiffs' First Amendment rights, requiring this Court to carefully assess South Carolina's interests in limiting Plaintiffs' rights by employing the WTA method. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788–89). In evaluating a constitutional challenge to a state election law which impinges Plaintiffs' associational rights, the court must weigh the "'character and magnitude'" of the injury with the rights protected by the First and Fourteenth Amendments. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The Court "must then identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. This standard is intended to be flexible, because "no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997).

Plaintiffs outline their alleged constitutional harms in the Complaint, yet Defendants fail to advance any state interest. The Complaint alleges that the WTA "violates the First Amendment

because of the burdens that it places on the right of association and on the right to have a voice in presidential elections through casting a vote." Compl. ¶ 15. In addition, the Complaint outlines that the WTA system limits Plaintiffs' ability to express their political preference through a meaningful vote for the Democratic or third-party candidate. Compl. ¶ 58. Similarly, the WTA system marginalizes the Democratic and third-party voters in South Carolina because candidates from major political parties rarely hold campaign events in South Carolina once they are selected by their parties in the primary. Compl. ¶ 60. As the Supreme Court has recognized, membership in a political party means little if the members of that party are denied an equal, full, and effective opportunity to participate in the political process. *Rhodes*, 393 U.S. at 31 ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (noting that "each and every citizen has an inalienable right to *full and effective* participation in the political process") (emphasis added). "[T]he right to vote is heavily burdened if that vote may be cast only for one of the two parties at a time when other parties are clamoring for a place on the ballot." *Rhodes*, 393 U.S. at 29. In short, the WTA method ensures that the dominant party has a monopoly on the state's votes in the second stage of the Presidential election—the only time when effective votes for President can actually be cast—and eliminates all practical opportunity for non-dominant party voters in South Carolina to effectively voice their preference for President.

South Carolina's WTA method also discourages participation in non-dominant political parties through voting or otherwise. This is so because the preordained outcome of the electoral votes in traditionally one-party dominant states provides little incentive for non-dominant party voters to exercise their right to vote. *See* Compl. ¶¶ 55–63. But, as the Supreme Court has articulated, "the primary values protected by the First Amendment—'a profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' are served when election campaigns are not monopolized by the existing political parties." *Anderson*, 460 U.S. at 794. Supreme Court precedent makes clear that associational rights are implicated where state action influences the collective propensity to engage in the political process. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958). Here, the WTA method discourages uninhibited, robust, and wide-open political debate by discounting and discouraging the voices of minority and third-party voters.

Because Plaintiffs' have articulated a First Amendment violation, Defendants must provide South Carolina's justification for the "burden imposed by its rule." *Anderson*, 460 U.S. at 789. Instead, Defendants respond by arguing that Plaintiffs have failed to state a cognizable claim because Plaintiffs are able to exercise their right to vote, but simply dispute the effectiveness of the vote. Defs.' Mot. to Dismiss at 14–15. Defendants misunderstand the First Amendments' protections. As the Supreme Court has articulated, the First Amendment protects an individual's right to a full and effective vote, in addition to protecting an individual's right to associate with and speak on political issues of his or her choice. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). The fact that that WTA does not entirely deprive members of minority parties of the opportunity to vote does not make it constitutional. *See id.* (finding that a restriction on primary voting violated the First Amendment even though it did not "deprive [voters] of all opportunities to associate with the political party of their choice"). Rather, the inquiry concerns the manner and degree to which the regulation burdens the "prime objective" of associating with others in the exercise of political power. *Id.*

Defendants otherwise make no attempt to justify use of the WTA method, let alone identify interests that would compensate for the substantial burden on Plaintiffs' First Amendment rights.

And South Carolina's state interests in regulating Presidential elections are entitled to less deference than statewide election laws because "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795. Because Defendants have not even attempted to identify a state interest that outweighs the burden the WTA method places on South Carolinians' associational and expressive rights, the Court should deny their Motions to Dismiss.

D. South Carolina's WTA Violations Section 2 of the Voting Rights Act.

Section 2 of the Voting Rights Act "provides that states may not impose or apply electoral voting practices or procedures that 'result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.'" *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C.), *aff'd*, 568 U.S. 801 (2012) (quoting 42 U.S.C. § 1973(a)) (emphasis added; alteration omitted) (Duffy, J.). "[T]he focus of § 2 is on the ***effect*** that [an] apportionment scheme has on the opportunity for members of a political minority to elect representatives of their choice," and Congress has "expressly repudiated an intent requirement that had previously applied." *Id.* (citations omitted; emphasis added). "Ultimately, the right to 'undiluted' voting strength in Section 2 is a guarantee" that African-Americans and certain other minority groups must have "the opportunity to exercise an electoral power that is commensurate with [their] population in the relevant jurisdiction." *Hall v. Virginia*, 385 F.3d 421, 429 (4th Cir. 2004). In other words, if a covered minority group is sufficiently large and politically cohesive in the relevant jurisdiction, it must have "the opportunity to 'dictate electoral outcomes independently' of other voters in the jurisdiction." *Id.* at 430 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)).

Here, the vote dilution caused by South Carolina's WTA rules is a mathematical certainty, and Plaintiffs have alleged detailed facts showing that they meet each of the three required

preconditions to bring a Section 2 claim to trial laid out in *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986); s*ee* Compl. at ¶¶ 83–110. In short, Plaintiffs allege that African-Americans make up approximately 27% of South Carolina's voting-age population, *id.* at ¶¶ 85–86, and approximately 95% of South Carolina's African-American population consistently votes for Democratic candidates, *id.* at ¶ 91. This means that, since South Carolina appoints nine Presidential electors through a statewide election, South Carolina's African-American voters would be able to appoint two electors with no help from white voters if they had "the opportunity to exercise an electoral power that is commensurate with [their] population in the relevant jurisdiction." *Hall*, 385 F.3d at 429. Thanks to South Carolina's WTA rules, they do not have that opportunity. As a result, for the past four decades, South Carolina has appointed zero electors to vote for a minority-preferred candidate in the second stage of the election, Compl. at ¶¶ 46–47, and the white-preferred Republican candidate has had a monopoly on the state's 82 electors during that time.

Defendants do not contest that South Carolina's WTA rules have had the effect of silencing South Carolina's African-American voices during the second stage of the Presidential election, nor do Defendants really dispute that Plaintiffs have alleged facts sufficient to meet the three *Gingles* preconditions. *See generally*, Defs' Mot. to Dismiss at 16–17. Defendants also do not assert that South Carolina's WTA rules are somehow beyond the scope of the VRA. *Id.*; *see also Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (holding that Section 2 encompasses "[e]very election in which registered electors are permitted to vote") (citation and quotation marks omitted). Rather, Defendants ask the Court to ignore Plaintiffs' *Gingles* allegations and conclude without further factual analysis that "Plaintiffs' Complaint is premised not on racial discrimination but on . . . their stated preference for voting for Democratic candidates." Defs' Mot. to Dismiss at 17. In other words, Defendants argue the cause of Plaintiffs' harm relates to partisanship rather than race.

Defendants' argument, if accepted, would make it virtually impossible for any Section 2 case to advance where an African-American-preferred candidate happens to be from a major party. That is not the law in South Carolina; the Fourth Circuit Court of Appeals has already considered and rejected Defendants' argument. *See United States v. Charleston Cty., S.C.*, 365 F.3d 341, 347–49 (4th Cir. 2004). In *Charleston City*, "[t]he crux of the [defendant]'s argument, from the outset of [the] litigation, [had] been that voting in Charleston County is polarized as a result of partisanship rather than race," and the defendants argued that causation should be evaluated under the third *Gingles* factor rather than as one of many aspects of "the wide-ranging, [and] fact-intensive" totality-of-the-circumstances test that must be applied at trial. *Id.* at 347–48. The Fourth Circuit disagreed: "[T]he approach most faithful to the Supreme Court's case law is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry." *Id.* "By expanding the inquiry into the third *Gingles* precondition to ask not merely whether, but also why, voters are racially polarized, the County would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Id.* at 348.

A motion to dismiss is simply not the place for Defendants to make this argument. Once a plaintiff establishes the *Gingles* factors, "a court must undertake a searching practical evaluation of the past and present reality, which demands a comprehensive, not limited, canvassing of relevant facts." *Id.* (citations omitted); *see also Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 492 (2d Cir. 1999) ("The Supreme Court has made it clear that resolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court."). "It is this inclusive examination of the totality of the circumstances that is tailor-made for considering why voting patterns differ along racial lines." *Charleston Cty.*, 365 F.3d at 348.

The two cases that Defendants cite in support of their argument—dicta from a three-member plurality decision and a case from a different circuit—both predate *Charleston City* and do not reflect the law of South Carolina. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J.); *League of United Latin Am. Citizens (LULAC), Council No. 4434 v. Clements*, 999 F.2d 831, 850–51 (5th Cir. 1993). In fact, the Fourth Circuit specifically rejected the approach taken in *LULAC* and instead followed "the majority of our sister circuits" on the issue of causation. *Charleston Cty.*, 365 F.3d at 348. And, even if the cases Defendants' relied on actually applied, they do not help the Defendants—both cases went to trial and were being reviewed on a full evidentiary record. *See generally Vera*, 517 U.S. 952 (discussing "the evidence" throughout); *see also LULAC*, 999 F.2d at 868 (discussing "[t]he evidence presented at trial").

At trial, Plaintiffs will "demonstrate an actual [Section 2] violation" by showing "that, under the totality of the circumstances, the State's challenged electoral scheme has the ***effect*** of diminishing or abridging the voting strength of the protected class." *Id.* (emphasis added; citations and alterations omitted). But, for the time being, Plaintiffs' detailed allegations regarding each of the *Gingles* factors—and Plaintiffs' additional "totality of the circumstances" allegations—are sufficient to satisfy the "preliminary" *Gingles* inquiry and establish that South Carolina's WTA "at-large system potentially violates § 2." *Id.*; *see also Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir.1993) ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances.").

IV. CONCLUSION

For these reasons, Defendants' Motions to Dismiss should be denied.

Dated: May 31, 2018

Respectfully submitted,

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EXHIBIT A

(Plaintiff's Br. Before Hr'g Upon the Merits, Williams v. Virginia State Board of Elections, C.A. No. 4768-A (E.D. Va. May 24, 1968).

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

AT ALEXANDRIA

Civil Action No. 4768-A

J. HARVIE WILLIAMS, ET AL., *Plaintiffs*,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ETC., ET AL.,
Defendants

Plaintiffs' Brief Before Hearing Upon the Merits, Upon Defendants' Motion to Dismiss, and Upon Plaintiffs' Motion for Summary Judgment

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STATEMENT OF THE CASE

The 10 plaintiffs herein seek a declaratory judgment and injunctive relief to enjoin, on constitutional grounds, the operation and enforcement of those provisions of the election laws of the Commonwealth of Virginia which impose upon its citizens the state-wide general ticket system of electing those 10 of its 12 presidential electors whose offices exist solely by virtue of the 10 Representatives in Congress ("representative" electors) apportioned to the people of

Virginia, and which deny its citizens the right to vote to elect one such elector in and solely by each of their respective Congressional districts.

This class action, in behalf of citizens of the United States resident in Virginia, invokes the provisions of the Privileges and Immunities Clause, of the Due Process Clause, and of the Equal Protection Clause, of the Fourteenth Amendment of the Constitution of the United States, and sections of the United States Code enacted in pursuance thereof, to protect and restore the full benefit of the plaintiffs' right to vote under these and other provisions of the Constitution.

QUESTIONS INVOLVED

1. Does the Constitution of the United States require that the "representative" electors of the electoral college be elected in single-member districts, as Representatives in Congress are elected?

2. Does the state-wide general ticket system of electing the "representative" electors of the electoral college result in debasing, abridging or misrepresenting the weight of the votes of citizens of the United States in presidential elections unconstitutionally?

STATEMENT OF THE FACTS

The 10 plaintiffs herein are citizens of the United States each resident in, and a duly qualified and registered voter in, a different one of the 10 Congressional districts of Virginia. They bring this action as a class action in behalf of themselves and in behalf of all other citizens of the United States similarly situated who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors.

The defendants herein are Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, Martha Bell Conway, Secretary of the Commonwealth of Virginia, and the Virginia State Board of Elections, a separate and permanent board created within the office of the Secretary of the Commonwealth. Each of the defendants has a relationship to the operation and enforcement of those provisions of the election laws of Virginia involved in this proceeding.

All material facts in this case are based upon state statutes, the procedures followed by public officials acting thereunder, public documents and records, uncontested and disinterested tabulations of public records and data, and published historical information, documents, records, reports, data and tabulations thereof. Plaintiffs will present and prove at the hearing on the merits of this case, by stipulation, by uncontested exhibits, by testimony, and/or by affidavit or by the Court's taking proper judicial notice of public documents and recognized public facts, the following, among other, facts:

1. There are 10 Congressional districts in Virginia as shown in Exhibit B of the Complaint, as redistricted by the state legislature in November 1965 to conform to the Congressional districting principle of *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964). Based on the 1960 U. S. Census figures, the population of each of these Congressional districts is as nearly equal as is practicable, as follows:

First District	401,052
Second District	419,642
Third District	408,494
Fourth District	386,184
Fifth District	386,179
Sixth District	381,611
Seventh District	377,511
Eighth District	400,812
Ninth District	386,948
Tenth District	418,516

The total population of Virginia under the 1960 Census is 3,966,949, and the mathematical average for each of the 10 Congressional districts would therefore be 396,695.

2. The form of ballot uniformly used throughout Virginia for voting in presidential elections is as shown in Exhibit A attached to the Complaint. It lists under the name of each political party and the nominees thereof for President and Vice President the names of that party's elector candidates, two designated as at-large and one listed and designated as from and resident in each of the respective 10 Congressional districts of Virginia. It permits a voter to vote only for one or another political party, and thus for the party's nominees for President and Vice President. A vote cast on such ballot constitutes, under Virginia election laws, one vote for each of the 12 electors listed thereon under the name of the party and its nominees. Using the uniform ballot, no vote can be cast and counted for any elector or electors individually, or separately from the other electors.

3. Using the uniform ballot, it is impossible to cast one vote for each of the two at-large electors and only one additional vote for the one additional elector candidate from the voter's own Congressional district. Also, it is impossible to prevent the votes cast by voters in other Congressional districts from being counted as a vote for the election of an elector candidate from one's own Congressional district.

4. The Official Statements of the Vote in Virginia for Electors of President and Vice President, as compiled from Official Records by the Secretary of the State Board of Elections, list and show only the whole number of votes cast in each county for the respective party nominee for President. It does not list or show any vote or votes as such for any individual elector or electors of any political party or from any Congressional district.

5. In the 1964 presidential election, the official state-wide popular vote in Virginia was:

For Lyndon B. Johnson	558,038	53.5%
For Barry M. Goldwater	481,334	46.2%
For Eric Hass	2,895	.3%

Johnson's plurality was 76,704. All 12 of Virginia's Democratic Party electors for Johnson were thereby deemed elected under Virginia's election laws, and all 12 of Virginia's presidential electors cast their ballots for Johnson.

6. In the 1964 presidential election, the official popular vote cast in each of the 10 respective Congressional districts of Virginia was:

1st District		
For Johnson	60,386	56.8%
For Goldwater	45,852	43.2%
2nd District		
For Johnson	57,993	61.8%
For Goldwater	35,887	38.2%
3rd District		
For Johnson	58,015	43.2%
For Goldwater	76,388	56.8%
4th District		
For Johnson	43,336	49.0%
For Goldwater	45,102	51.0%
5th District		
For Johnson	37,134	47.6%
For Goldwater	40,901	52.4%
6th District		
For Johnson	53,254	48.3%
For Goldwater	57,064	51.7%
7th District		
For Johnson	40,075	50.9%
For Goldwater	38,645	49.1%
8th District		
For Johnson	47,781	54.0%
For Goldwater	40,730	46.0%

9th District

For Johnson	55,783	59.8%
For Goldwater	37,447	40.2%

10th District

For Johnson	104,281	62.2%
For Goldwater	63,318	37.8%

7. In the 1964 presidential election, if one electors were elected in, from, and solely by the votes cast in, each of the 10 respective Congressional districts of Virginia, and only two electors were elected at-large on a state-wide basis, the presidential electors elected would have voted as follows:

	For Johnson	*For Goldwater*
1st District	1	
2nd District	1	
3rd District		1
4th District		1
5th District		1
6th District		1
7th District	1	
8th District	1	
9th District	1	
10th District	1	
	6	4
Two at-large	2	
Total	8	4

Thus, 60.0% of Virginia's district or representative presidential electors would have voted for Johnson and 40% would have voted for Goldwater. The other two at-large presidential electors would have voted for Johnson, with the result that 66.66% of all of Virginia's presidential electors would have voted for Johnson and 33.33% would have voted for Goldwater.

8. In the 1960 presidential election, the official state-wide popular vote in Virginia was:

For Richard M. Nixon	404,521	52.4%
For John F. Kennedy	362,327	47.0%
For C. Benton Coiner	4,204	.5%
For Eric Hass	397	.1%

Nixon's plurality was 42,194. All 12 of Virginia's Republican Party electors for Nixon were thereby deemed elected under Virginia's election laws, and all 12 of Virginia's presidential electors cast their ballots for Nixon.

9. In the 1960 presidential election, the official popular vote cast in each of the 10 respective Congressional districts of Virginia (omitting the independent party candidates) was:

1st District

For Nixon	36,004	50.4%
For Kennedy	35,061	49.1%

2nd District

For Nixon	29,184	42.4%
For Kennedy	39,195	56.9%

3rd District

For Nixon	57,912	62.4%
For Kennedy	34,448	37.1%

4th District

For Nixon	24,684	41.0%
For Kennedy	34,820	57.8%

5th District

For Nixon	31,042	51.8%
For Kennedy	28,366	47.3%

6th District

For Nixon	51,416	59.6%
For Kennedy	34,663	40.2%

7th District

For Nixon	37,637	60.6%
For Kennedy	24,252	39.0%

8th District

For Nixon	34,779	53.0%
For Kennedy	30,296	46.1%

9th District

For Nixon	39,874	48.6%
For Kennedy	41,776	51.0%

10th District

For Nixon	61,989	50.8%
For Kennedy	59,450	48.8%

10. In the 1960 presidential election, if one elector were elected in, from, and solely by the votes cast in, each of the 10 respective Congressional districts of Virginia, and only two electors were elected at-large on a state-wide basis, the presidential electors elected would have voted as follows:

	For Nixon	*For Kennedy*
1st District	1	
2nd District		1
3rd District	1	
4th District		1
5th District	1	
6th District	1	
7th District	1	
8th District	1	
9th District		1
10th District	1	
	7	3
Two at-large	2	
Total	9	3

Thus 70% of Virginia's district or representative presidential electors would have voted for Nixon and 30% would have voted for Kennedy. The other two at-large presidential electors would have voted for Nixon, with the result that 75% of all of Virginia's presidential electors would have voted for Nixon and 25% would have voted for Kennedy.

11. California's number of Representatives in Congress and number of "representative" electors was 23 in 1948 and 38 in 1964. New York's number of Representatives in Congress and number of "representative" electors was 45 in 1948 and 41 in 1964. Each of these were based on the 1940 Census and the 1960 Census respectively. The number of Representatives in Congress and the number of "representative" electors of 25 of the 50 states was changed based on the changes in the 1960 Census from the 1950 Census.

JURISDICTIONAL MATTERS RAISED BY DEFENDANTS

1. Proper Parties Defendant

A. The Governor

The Governor of Virginia is a proper party defendant in this action. It is his duty to certify to the Administrator of General Services, and to the presidential electors elected in Virginia, the names of the presidential electors so elected in Virginia and the canvass or other ascertainment under the law of the number of votes given or cast for each person. See 3 U.S.C.A. 6, as amended October 31, 1951.

He therefore has a special and definite relation to this suit. He should be enjoined by this Court against certifying the election of presidential electors in Virginia except as they shall have been elected in accordance with the ruling of this Court.

B. The Secretary of the Commonwealth

The Secretary of the Commonwealth is a proper party defendant in this action. Under Section 24-24, Chapter 3 of Title 24 of the Code of Virginia, as amended, the Virginia State Board of Elections is a separate and permanent Board created "within" the office of the Secretary of the Commonwealth. All of the acts and records of the State Board of Elections are therefore "within" the office of the Secretary of the Commonwealth. The validity and authenticity of any act of certification of the State Board of Elections is therefore subject to certification by the Secretary of the Commonwealth. The Secretary of the Commonwealth also signs the certificate of election of electors that is forwarded by the Governor to the Administrator of General Services.

The Secretary of the Commonwealth has a special relation to this suit and is therefore a proper party defendant herein.

2. Not an Action Against the Commonwealth of Virginia

This action is clearly not an action against the Commonwealth of Virginia, as contended by defendants. This action is similar in principle and theory of jurisdiction to the citizen suit involved in the important case of *Mann* v. *Davis*, 213 F. Supp. 577, that arose in this Court. This Court's statement on page 3 of its opinion in that case clearly applies in answer to the same contention of the defendants here:

> "Nor is this a suit against a State barred by the Eleventh amendment, as defendants contend. It is a suit against State officials acting pursuant to State laws, a type of action universally held appropriate to vindicate a Federally protected right. Ex parte Young, 209 U.S. 123, 155-56 (1908); Duckworth v. James, 267 F. 2nd 224, 230-31 (4th Cir.) cert. denied 361 U.S. 835 (1959); Kansas City So. Ry. v. Daniel, 180 F. 2nd 910, 914 (5th Cir., 1950)."

This Court's ruling in that case was sustained by the United States Supreme Court's decision on appeal in *Davis* v. *Mann*, 377 U.S. 678, 84 S. Ct. 1441 (1964).

3. Class Action

The action in *Davis* v. *Mann, supra,* was a class action of plaintiffs "residents, taxpayers and qualified voters of Arlington and Fairfax Counties filed . . . . in their own behalf and on behalf of all voters in Virginia similarly situated, challenging the apportionment of the Virginia General Assembly". At 377 U.S. 680, 84 S. Ct. 1442. That action was sustained as a class action as other similar class actions have been sustained, in the United States Supreme Court. *Baker* v. *Carr,* 369 U.S. 186, 82 S. Ct. 691 (1962); *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526 (1964); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362 (1964).

In the instant case the action is brought by 10 plaintiffs who are citizens of the United States and duly registered and qualified voters under the laws of Virginia. They are each resident in, and qualified voters in, a different one of the 10 Congressional districts of Virginia and bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, in behalf of themselves and in behalf of all other citizens of the United States similarly situated, as recited in paragraph 4 of the Complaint,

> "* * * who are also residents and duly qualified voters of one of said Congressional districts of Virginia and who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors and have a common interest in protecting their individual and several voting rights in such elections, their right to effective representation therein, and the rights of representation therein of minors and others resident in their respective Congressional districts who are ineligible, or otherwise unable, to vote in such elections."

This action is brought to protect and restore the full benefit of plaintiffs' right to vote. Plaintiffs seek to elect one presidential elector in, and solely by a plurality of the votes cast in, their own respective Congressional districts. They seek thereby to prevent the dilution of their own votes, and the denial of any possibility of their having any electoral representation when not part of the state-wide plurality, that now result from counting the votes of all voters throughout the state in determining the plurality of votes for the election of the one presidential elector that has been apportioned to the people resident in their respective Congressional district by virtue of their numbers. Thus, they seek to prevent the votes of residents in other Congressional districts of Virginia from being counted in determining the plurality of votes for the election of one presidential elector in, by, and from their own respective Congressional district.

As a natural and necessary corollary thereof, they seek to have their own votes not counted in determining the plurality of votes for electing one presidential elector in, by, and from Congressional districts of Virginia other than their own respective Congressional district.

Consequently, it is believed that a more truly representative and comprehensive group of plaintiffs having similar and common interests in the relief sought could not likely be conceived for bringing this action and seeking such relief.

4. Plaintiffs' Standing To Sue

Plaintiffs herein have full capacity and standing to sue and to prosecute this action against the defendants. Defendants' contention to the contrary is without legal support.

Qualified voters of certain counties of Tennessee who sought a declaration that a state apportionment statute was an unconstitutional deprivation of equal protection of the

laws, were held to have standing to maintain such suit. *Baker* v. *Carr,* 369 U.S. 186, 82 S. Ct. 691 (1962). See ruling and discussion of this point at 369 U.S. 206-208, 82 S. Ct. 704-705, in which it is stated:

> "And Coleman v. Green, supra, squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue . . . . .
>
> "It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it."

Also, a qualified voter in Georgia seeking to restrain the use of Georgia's county unit system as a basis of counting votes, was held to have standing to sue. *Gray* v. *Sanders,* 372 U.S. 368, 83 S. Ct. 801 (1963) in which the rule was succinctly stated, at 372 U.S. 375, 83 S. Ct. 805,

> "We also agree that appellee, like any person whose right to vote is impaired (Smith v. Allwright, supra; Baker v. Carr, supra, 369 U.S. pp. 204-208, 82 S. Ct. pp. 703-705), has standing to sue."

Similarly, citizens and voters of Fulton County, Georgia, seeking to compel a redistricting of Congressional districts established under Georgia statutes, were held to have standing to sue. *Wesberry* v. *Sanders,* 376 U.S. 1, 5-7, 84 S. Ct. 526, 528-529 (1964).

5. Subject Matter

The subject matter of this action is the validity under the Constitution of the United States of those provisions of Virginia's election laws providing the method and procedure of electing electors of the President and Vice President of the United States in Virginia. The subject matter is therefore comparable to the subject matter involved in *McPherson* v. *Blacker,* 146 U.S. 1, 13 S. Ct. 3 (1892), in which the United States Supreme Court ruled constitutionally

valid a Michigan election law providing for the election of electors of the President and Vice President of the United States in each of the twelve Congressional districts of Michigan as single-elector districts.

In the *McPherson* case, which arose on writ of error from a decision of the Supreme Court of Michigan the United States Supreme Court ruled, *supra,* pages 23 and 24:

> "It is argued that the subject matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court had no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress.
>
> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. *Boyd* v. *Thayer,* 143 U.S. 135. . . .
>
> "The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

The contention that "exclusive authority" to protect the right of citizens to vote for Congressmen had been given to Congress, was rejected by the United States Supreme Court in *Baker* v. *Carr, supra,* and again in *Wesberry* v. *Sanders, supra,* in the following words in the latter case pages 6 and 7 (376 U.S.) and on page 529 (84 S. Ct.):

> " * * * but we made it clear in Baker that nothing in the language of that article (Article I, Section 4)

> gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, in 1803. Cf. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of 'non-justiciability.'" (Parenthetical material supplied).

The jurisdiction of this Court clearly exists under the provisions of Article III, Section 2 of the Constitution of the United States, and under the provisions of 28 U.S.C.A. 1331, relating to cases involving a federal question "arising under this Constitution, the Laws of the United States, and Treaties. . . ."

Jurisdiction in this Court has been clearly provided in all cases in which plaintiffs allege a deprivation of their rights as citizens under the provisions of 28 U.S.C.A. 1343, 42 U.S.C.A. 1983 and 42 U.S.C.A. 1988. Many cases of citizen suits charging deprivation of voting rights have been recognized as within the jurisdiction of the United States Courts under those statutes, solely upon the ground of those statutory provisions. *Baker* v. *Carr, supra,* page 187 and pages 198-204 (369 U.S.) or page 694 and pages 700-703 (82 S.Ct.); *Wesberry* v. *Sanders, supra,* page 3 and pages 6 and 7 (376 U.S.) or page 527 and page 529 (84 S.Ct.); *Reynolds* v. *Sims,* 377 U.S. 533, 537, 84 S.Ct. 1362, 1369 (1964), and other similar cases following those cases.

ARGUMENT

I. PEOPLE, NOT STATES, ARE ENTITLED TO REPRESENTATIVE ELECTORS UNDER THE CONSTITUTION, JUST AS THEY ARE ENTITLED TO REPRESENTATIVES IN CONGRESS

A. The Operative Effect of Article II, Section 1, of the Constitution

Article II, Section 1 of the Constitution of the United States creates a body of electors of the President and Vice President of the United States which in numbers and identification is at all times exactly parallel to the dual representation and membership in Congress. It provides:

> "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; . . . ."

Each state as a political entity is entitled to the two electors who are the counterparts of the two United States senators to which it is entitled as a political entity.

The number of additional electors from a state is the number of Representatives in Congress to which the people of the state are entitled. The national apportionment of Representatives among the states is based upon the total population of the nation and the proportion thereof in each State, calculated from the latest national census, with 435 now being the total number of Representatives. Each Representative is elected by the people of his Congressional district. The only exception is where one or more Representatives may be elected on a state-wide or at-large basis when a proper redistricting shall not have been made prior to the election.

When the proportion of the national population residing in one state increases or decreases substantially enough, that state correspondingly gains or loses one or more Representatives. Thus, as a result largely of migration of people into California, California's number of Representatives in Congress has grown from 23 in 1948 to 38 in 1964. On the other hand, New York's number of Representatives in Congress has diminished from 45 in 1948 to 41 in 1964. The number of Representatives in Congress from 25 of the 50 states was changed based on the changes in the 1960 Census from the 1950 Census.

A presidential elector also follows the number of people requisite to entitle them to a Representative in Congress. The number of the "representative" electors of those states have changed in identically the same way.

The apportionment provisions of Section 2 of Article I of the Constitution and of Section 2 of the Fourteenth Amendment of the Constitution and the apportionment statutes enacted in pursuance thereof by Congress, automatically operate functionally as well also as provisions for apportionment of "representative" electors among the states according to the number of persons in each State. It would seem that the framers of the Constitution probably could not have made representative presidential electors any more closely bound to, and inseparable from, the apportionment provisions, acts and procedures applying with respect to Representatives in Congress.

Even the smallest state's one minimum representative elector is attributable to its people. The State cannot keep, acquire, or in any way control, the number of representative electors to be elected within its geographic limits. Chief Justice Fuller recognized this operational effect under Article II, Section 1 of the Constitution in the *McPherson* case, *supra*, when he noted, near the end of page 35 thereof, as one of the exceptions from the power and jurisdiction of the State thereunder, "the exception of the provisions as to the number of electors. . ."

It is therefore submitted that the actual operative effect of all the words in context in Article II, Section 1 of the Constitution is that the substantive right to elect one elector, who is the counterpart of a Representative in Congress, lies in the people who constitute each Congressional district.

B. Dual Citizenship and Dual Representation

The dual character of persons as "citizens of the United States" and as "citizens of the State" is clearly established in the Constitution of the United States by use of the respective terms in the first Articles thereof and by the following positive declaration in the first sentence of Section 1 of the Fourteenth Amendment:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Dual representation was established in the Constitution in the bi-cameral Congress, providing: (1) for equal representation of states as political entities, regardless of population or any other measure of size, in the Senate by two Senators now elected under the Seventeenth Amendment in state-wide elections by the people in their capacity as citizens of the State; and (2) for representation of the people in their capacity as citizens of the United States by representatives in the House of Representatives elected directly by the people in single-member districts and apportioned among the several states according to the respective numbers of persons. In the discussion of this subject in *Wesberry* v. *Sanders*, 376 U.S. 1, 12-14, 83 S.Ct. 526, 532-533 (1964), the Court quotes William Samuel Johnson of Connecticut as follows:

> "in one branch the *people*, ought to be represented; in the *other*, the *States*."

The difference in the character of the representation in the two houses of Congress is sharply drawn in the provisions of Article I of the Constitution relating to qualifications, specifying: that the Representative shall be:

> "an Inhabitant of the State *in* which he shall be chosen." (italics supplied).

and that the Senator shall be:

> "an Inhabitant of the State *for* which he shall be chosen." (italics supplied).

This balanced and symmetrical structure of dual citizenship and dual representation in Congress applies consistently in the parallel structure of dual representation inherently established in the electoral college. Thus, the election of two electors on a state-wide basis is an election *for* the State by persons acting in their capacity as "citizens of the State"; and the election of additional electors by each Congressional district would provide separate elections *in* each state by persons acting in their capacity as "citizens of the United States".

II. ELECTIONS OF REPRESENTATIVES AND OF REPRESENTATIVE ELECTORS SHOULD BE BY SINGLE-MEMBER DISTRICTS

A. Because Single-Member Districts Are Required Under National Apportionment Laws

In enacting apportionment acts, Congress has considered that prescribing the guiding principles for the formation of the elective units (districts) of the people to be established in the states is necessarily a part of the function of apportionment being effectuated by Congress. The Apportionment Act of June 25, 1842, 5 Stat. 491, c. 47, R.S. #23, provided that the election should be by districts. This provision was repeated in the superseding Apportionment Act of February 25, 1882, and repeated in substance in each of the subsequent apportionment acts. See Notes to 2 U.S.

C.A. 3, of the Apportionment Act of August 8, 1911, which provided:

> "3. Election by districts. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

That Act of 1911, as amended February 14, 1912, 2 U.S. C.A. 2, established that the House of Representatives shall be composed of 435 Members, and apportioned them among the several states, including Arizona, and New Mexico, which became states in 1912. Notwithstanding the subsequent addition of Hawaii and Alaska as states, the total number of Representatives in the House of Representatives is now 435, and reapportionments have been effectuated under the Apportionment Act of June 18, 1929, as amended, 2 U.S.C.A. 2a. The provisions of the Act of 1911, 2 U.S. C.A. 3, above quoted, were not re-enacted in the Act of 1929 as amended, 2 U.S.C.A. 2a, and they expired by express limitations in the Act of 1911 itself upon the enactment of the Reapportionment Act of 1929. See Notes to 2 U.S. C.A. 3.

It should be noted that Article IV, Section 55 of Virginia's Constitution also requires its Congressional districts to be contiguous and compact and to have as nearly as practicable an equal number of inhabitants; and Section 24-4 of Title 24 of the Code of Virginia provides that each of such districts shall choose one representative.

The United States Supreme Court, of course, has since declared in *Wesberry* v. *Sanders, supra,* that Article I, Section 2 of the Constitution, together with the apportionment provisions therein and in Section 2 of the Fourteenth Amendment, "commands" that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Based on this command, the rule of the case is that the Congressional districts in each of the States shall be essentially equal, or as nearly equal as is practicable. Footnote 10 of the opinion shows that the Court did not need to reach the further arguments based on the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.

Mr. Justice Black, writing for the Court, concluded at 376 U.S. 18 and 84 S.Ct. 535 with a quotation from James Madison in No. 57 of the Federalist and then stated:

> "Readers surely could have fairly taken this to mean, 'one person, one vote.' Gray v. Sanders, 372 U.S. 368, 381, 83 S.Ct. 801, 809, 9 L.Ed. 2d 821.
>
> "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."

The decision in the *Wesberry* case, *supra,* may not have had the clear effect of re-establishing the requirement contained in earlier Apportionment Acts (from 1842 until 1929) providing "no district electing more than one Representative," the single-member district provision.

In any event, Congress recently has clearly reinstated this requirement of election of Representatives in single-member districts, by further amending the Apportionment Act of 1929 as follows in the Act of December 14, 1967, P.L. 90-196, 81 Stat. 581:

> "In each state entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled 'An Act to provide for apportionment of Representatives' (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to

which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)."

B. Because Single-Member Districts Are Most Representative of All the People

The significant effects of the single-member district mode of electing Representatives versus the multi-member or general ticket system of electing Representatives upon the nature of the resulting representation and upon the character of the government, were reviewed in connection with the enactment of the Apportionment Act of 1842. When President John Tyler approved and signed that Apportionment Act, he lodged with it in writing a question whether the mandatory requirement of the law that the states form single-member districts for election of Representatives was constitutional. A Select Committee of the House of Representatives was promptly designated to review this action by the President, under the chairmanship of John Quincy Adams, who had been a Senator and President.

The Report of the Select Committee designated as Report No. 909, House of Representatives, 27th Congress, 2d Session, was entitled "Apportionment Bill" and dated July 16, 1842. Drawing upon his pre-eminent background in and understanding of the history and constitutional foundations of our government, Adams' Report states the case for single-member districts versus multi-member districts or the general ticket system as follows:

"The President announces that one of his reasons for entertaining deep and strong doubts of the constitutionality of the law which he has approved and signed is, that it purports to be mandatory on the States to form districts for the choice of Representatives in single districts.

"The committee believe this to be by far the most important and most useful provision of the act. They believe, indeed, the establishment of the principle absolutely indispensable to the preservation of this Union. The representation of the people by single districts is undoubtedly the *only* mode by which the principle of representation, in proportion to *numbers,* can be carried into execution. The provision of the Constitution is, that the representatives shall not exceed *one* for every thirty thousand of federal numbers, and every act of apportionment has necessarily prescribed *one* member for every addition of the common multiple within each of the several States. A more unequal mode of assembling a representation of the people in a deliberative body could not easily be contrived than that of one portion chosen by a general ticket throughout the State, another portion by single districts, and a third portion partly by single and partly by double, treble, and quadruple districts. This forms, in the mass, a representation not of *one* representative for the common standard number throughout the whole Union, but of States, and cities, and sectional divisions, in knots and clusters of population, of different dimensions and proportions, more likely to be governed by the spirit of party than of patriotism. At present, six of the smaller States acquire an undue share of locally concentrated power in the House, by general ticket elections, stifling the voice and smothering the opinions of minorities nearly equal to half the people of the State, thus disfranchised by the overbearing insolence of a majority, always meager, and as it grows leaner growing more inexorable and oppressive. The larger States have hitherto passed over with little notice this practical iniquity, by which the State of New Hampshire, with five members, preponderates over the State of New York, with forty. But it is in the nature of things impossible that this should be suffered to continue long. The manner of election for the members of this House must be uniform. The general ticket or the single district must be the common rule for all; and if the smaller States will insist upon sending members to this House all of one mind, New York, or Pennsylvania, or Ohio, or all three together,

will, ere long, teach them by other results the arithmetical combination of concentrated numbers.

"Should the general ticket system universally prevail, it is obvious that the representation in this House will entirely change its character, from a representation of the people to a representation of States, and transform the constitutional Government of the United States into a mere confederation like that which, fifty-four years ago, fell to pieces for the want of ligatures to hold it together."

Mr. Justice Douglas, in his dissenting opinion in *Fortson* v. *Dorsey*, 379 U.S. 433, 440, 85 S. Ct. 498, 502 (1965), considered the case of single-member versus multi-member districts in elections of state senators in Georgia. Fulton County contained seven senatorial districts and DeKalb County contained three districts and each elected all of their senators on a county-wide voting basis, while other districts containing one or more counties each elected one senator. He agreed with the three-Judge District Court below that

" 'The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not.' . . . .

"As appellees point out, even if a candidate for one of those districts (in Fulton or DeKalb) obtained all of the votes in that district, he could still be defeated by the foreign vote (of other districts), while he would of course be elected if he were running in a district in the first group (where voting is by single-member districts). I have no idea how this weighted voting might produce prejudice race-wise, religion-wise, politics-wise. But to allow some candidates to be chosen by the electors in their districts and others to be defeated by the voters of foreign districts is in my view an 'invidious discrimination"—the test of unequal protection under the Fourteenth Amendment. Baker v. Carr, 369 U.S. 186, 244, 82 S. Ct. 691, 724, 7 L.Ed.2d 663. I had assumed we had settled this question in Gray v. Sanders, 372 U.S. 368, 379, 83 S. Ct. 801, 808, 9 L.Ed.2d 821,

where we said: 'Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.' " (Parenthetical material supplied)

The majority of the Supreme Court in that case ruled the multi-member district situation in the *Fortson* case, *supra,* to be constitutional because the record in the case lacked any evidence that this "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." The Court in conclusion stated, with respect to this point, the following at 379 U.S. 439 and 85 S. Ct. 501:

"Since, under these circumstances, this issue has 'not been formulated to bring it into focus, and evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question.' Wright v. Rockefeller, 376 U.S. 52, 58, 84 S. Ct. 603, 606, 11 L.Ed. 2d 512."

Again, in *Burns* v. *Richardson,* 384 U.S. 73, 88-89, 86 S. Ct. 1286, 1294-1295 (1966), the United States Supreme Court ruled

" 'It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson, districts are large in relation to the total number of legislators,* if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an indivious result must appear from evidence in the record. Cf. McGowan v. State of Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393. That demonstration was not made here. 14" (Italics supplied.)

In footnote 14 thereof, the Court states:

> "Appellant Burns concedes in his brief that '[i]n the case of the Hawaii House multi-member districts, extensive proofs were not put in as to the details of the submergence of minorities.' There may, for example, be merit in the argument that by encouraging block voting, *multi-member districts diminish the opportunity of a minority party to win seats.* But such effects must be demonstrated by evidence." (Italics supplied).

Plaintiffs contend that they will have shown by a preponderance of the evidence in this case that the state-wide general ticket system of electing representative electors in Virginia, in essence a multi-member district system, clearly operates to "diminish the opportunity of a minority party to win seats" in Virginia's electoral college.

III. THE STATE-WIDE GENERAL TICKET SYSTEM OF ELECTING ELECTORS PRODUCES INVIDIOUS MISREPRESENTATION

Under the state-wide general ticket system, all of the several and divisible number of electors who are the counterparts of Representatives in Congress are elected by the same state-wide count of votes by which the two electors who are counterparts of the state's two senators are elected. Many objectionable results are shown to flow from this system, such as:

(1) All those who vote for the nominee, party, or block of electors, that receives less than the highest number of votes in the individual state, are always without any elector representing them in the electoral college,

(a) even if their votes aggregate as much as 49 per cent of all votes cast in the state, and

(b) even if their votes constitute a majority, or the highest number, or all, of the votes cast in one or more of the Congressional districts in the state.

(2) The weight of each voter's vote will inevitably either

(a) be magnified or distorted, when on the winning side, from a plurality, however narrow the margin, to 100 per cent of the total electoral votes of the state, or

(b) be completely ignored and destroyed, when on the losing side, and be invidiously misrepresented as if supporting the winning plurality.

(3) Different weight is given to the votes of residents of one state from the weight given to the votes of residents of another state. For example, a citizen in New York votes for the election of 43 electors, while a citizen in Virginia votes for the election of only 12 electors. Exhibits presented by plaintiffs in this case will show that the official certified record of the "whole number of votes given for the office of Elector of President and Vice President was 331,590,904" in New York State in the 1960 Presidential Election when the total number of persons voting in New York was 7,290,824, and was 308,032,517 in the 1964 Presidential Election when the total number of persons voting therein was 7,166,013.

(4) The facts proved in this case and reviewed above show, with respect to the 1960 and 1964 Presidential Elections, the following electoral misrepresentation of the minority party in Virginia:

	Virginia's Popular Vote	Percent of Popular Vote	Percent of Virginia's Electoral Vote
1960			
Presidential Election			
For Democrat	362,327	47.0	0
For Republican	404,521	52.4	100
1964			
Presidential Election			
For Democrat	558,038	53.5	100
For Republican	481,334	46.2	0

(5) Many times as many citizens must vote for a particular nominee in large states as in single-representative states like Delaware, before their voting can have any effect or weight whatsoever in the election of the president.

(6) A substantial premium is placed on fraud in the larger states because a small margin that achieves a plurality carries 100 per cent of the large electoral vote of the state.

(7) Small splinter parties also can affect the whole electoral vote of a state by controlling the small margin that achieves a plurality in the state. For example, in 1948 Henry Wallace drew 509,000 votes largely from Truman, thereby throwing the 47 electoral votes from New York for Dewey with a plurality of only 61,000 votes out of the total of about 6,100,000 votes cast in the state.

(8) The United States Supreme Court has recognized that many inequities are present in the functioning of the electoral college:

> In *Gray* v. *Sanders, supra,* at 372 U.S. 378, 83 S. Ct. 807:
>
> "The inclusion of the electoral college in the Constitution . . . . validated the collegiate principle despite its inherent numerical inequality, . . ." Repeated in Reynolds v. Sims, 377 U.S. 574-5, 84 S. Ct. 1388.
>
> In *Davis* v. *Mann, supra,* at 377 U.S. 692, 84 S. Ct. 1448-49:
>
> "The fact that the maximum variances in the populations of various state legislative districts are less than the *extreme deviations* from a population basis in the composition of the Federal Electoral College . . ." (Italics supplied).

(9) The "one-man one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution is breached in almost every conceivable way.

IV. ONE-MAN, ONE-VOTE PRINCIPLE APPLIES IN ALL ELECTIONS

The United States Supreme Court has enunciated the "one-man, one-vote" of equal weight principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution in recent years in *Gray* v. *Sanders,* 372 U.S. 368, 83 S.Ct. 801 (1963) (Georgia county unit system, a state electoral college system, in party primary elections for state-wide elected offices); *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526 (1964) (Georgia congressional districts); and *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964) (Alabama state legislature apportionment); together with several other cases decided at the same time, namely, *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 84 S.Ct. 1418 (1964) (New York state legislature apportionment); *Maryland Committee* v. *Tawes,* 377 U.S. 656, 84 S.Ct. 1429 (1964) (Maryland state legislature apportionment); *Davis* v. *Mann,* 377 U.S. 678, 84 S.Ct. 1441 (1964) (Virginia state legislature apportionment); *Roman* v. *Sincock,* 377 U.S. 695, 84 S.Ct. 1449 (1964) (Delaware state legislature apportionment); and *Lucas* v. *General Assembly of Colorado,* 377 U.S. 713, 84 S.Ct. 1459 (1964) (Colorado state legislature apportionment). More recent cases have also applied the principle, with the latest case applying it to elections for local county governments in *Avery* v. *Midland County, Texas,* 88 S.Ct. 1114 (April 1, 1968) (single-member county districts of unequal population).

The principle is most fully expounded in the *Reynolds* case, *supra,* at 377 U.S. 554-568, 84 S.Ct. 1377-1382. It may be summarized as follows:

> The "one-man one-vote" principle of the Equal Protection clause of the Fourteenth Amendment requires that, whenever and wherever in the United States voting by any of the people is provided for in state or federal elections, the citizens of the United States are entitled to be fairly, justly, and equitably represented and effectively weighted, by district units fairly related

> to their numbers, in the outcome of such election; and they are entitled to have their right to vote protected against being abridged, debased, diluted, cancelled, destroyed, discriminated against on the basis of place of residence or on any other arbitrary basis, or otherwise made ineffective or unrepresentative, by or under any laws or practices of any state, or by or under any acts of any officials thereof or of any other persons.

This Constitutional principle applies to protect "the right of all qualified citizens to vote, in state as well as in federal elections". *Reynolds* case, *supra,* at 377 U.S. 554, 84 S.Ct. 1377. Elections "for the choice of electors for President and Vice President of the United States, Representatives in Congress" are named first, and in that order, in the provisions of the second sentence of Section 2 of the Fourteenth Amendment of the Constitution. It seems clear, therefore, that the principle applies equally with respect to elections of presidential electors.

The Court in the *Reynolds* case also indicated, at 377 U.S. 577-78 and at 84 S.Ct. 1390, that the strict requirement that Congressional districts must be based on equality of population as nearly as is practicable, as held in *Wesberry* v. *Sanders, supra,* may not have to be applied so inflexibly as to state legislative districts because of the larger number of seats in state legislative bodies to be distributed within a state than Congressional seats within the state. *Cf.* the quotation above, on page 25 of this Argument, from *Burns* v. *Richardson, supra,* concerning the possible invidious effect of multi-member districts in relatively large districts.

The gross distortions, inequities, and misrepresentations, above enumerated under heading III of this Argument as existent in the functioning of the electoral college system are not due to the provisions of the Constitution, but are entirely due to the state election laws creating the state-wide general ticket system of election of those electors whose offices exist by reason of the Representatives in Congress apportioned on the basis of the number of people.

All those distortions, inequities, and misrepresentations of the weight of the votes of citizens of the United States in Virginia clearly constitute invidious discriminations against political minorities, and must be prohibited under the "one-man, one-vote" of equal weight principle of the Equal Protection Clause and related clauses of the Fourteenth Amendment.

V. REPRESENTATIVE ELECTORS ELECTED BY SINGLE-MEMBER DISTRICTS WOULD MEET ALL REQUIREMENTS OF THE CONSTITUTION

When two electors counterpart to a state's two United States senators are elected on a state-wide basis, the people are acting in their capacity as "citizens of the state". To this extent, the electoral college system cannot be made to conform to the "one-man, one-vote" principle. The 102 electors so elected, however, constitute only approximately 19 per cent of the total 538 electoral votes. (The District of Columbia now has 3 electors, two of which we have regarded as counterpart to two United States Senators although the District does not have any Senators; and the other one of which we have regarded as counterpart to a Representative in Congress although the District does not have any Representative. This explains our reference to 436 electors elected by districts although there are only 435 Representatives and corresponding Congressional districts. It also explains our reference to 102 electors as counterpart to Senators although there are only 100 Senators from the 50 states).

The other 436 representative electors, 81 per cent of the total, if elected one in and by each congressional district, would be *constitutionally representative* of the people acting in their capacity as "citizens of the United States" in essentially equal districts. Each voter in the United States, without regard to the state of his residence, would normally vote for three electors: one "representative" elector elected in his Congressional district; and two electors elected on a state-wide basis. The inequalities of voting

in the national elections, which now exist between citizens resident in different states, and the invidious distortions and misrepresentations of the votes of citizens within the same state would be eliminated with respect to the election of 81 per cent of the nation's presidential electors.

The "one-man one-vote" principle would be fully met with respect to the election of this 81 per cent of the electors. The substantive right of the people as citizens of the United States to elect one elector in and by each Congressional district, based on their numbers, would also be fully met.

A. The Divisibility Principle of the Twelfth Amendment Would Be Met

The provisions of the Twelfth Amendment of the Constitution clearly provide that the electors of a state may be divided as to the persons voted for as president and vice president. The Twelfth Amendment, adopted in 1804, provides that the presidential electors meeting in their respective states:

> "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 the number of votes for *each,* which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate; . . . ". (Italics supplied)

The district election of "representative" electors would be fully compatible with the Twelfth Amendment, since it would provide an opportunity for a division of the electors elected in each state. In fact, a number of states had elected their presidential electors by districts prior to the adoption of the Twelfth Amendment, and this practice was followed in a number of subsequent elections by many states.

The general ticket system, on the other hand, is intended to preclude any possibility of division of the electoral votes

of the state, and therefore is contrary to the divisibility principle of the Twelfth Amendment.

B. District-Elected Electors Would More Closely Reflect the Expressed Will of the People

It is a mathematical fact that the greater the number of units in which elective pluralities are determined and are effective to elect one elector in each unit; the smaller will be the population of each unit; the greater will be the citizens' opportunity to have an effective voice in the national election; the smaller will be the number of voters in each unit who are adversely affected thereby when on the losing side; and the more limited in ultimate effect will be any local election fraud, or any splinter party or group, or any severe weather condition or other occurrence affecting voter turnout, or local misinformation that misleads citizens. Election of one elector in each of 436 Congressional districts and the election of two electors in each of 50 states and the District of Columbia is more desirable in all of these respects than the present system involving only 50 state-wide elections of all the electors of each of the 50 states.

Moreover, the election of representative electors in and solely by Congressional districts clearly tends to cause their electoral votes to be more closely representative of the people of the state. The facts established in the evidence herein show that, on such a district basis of election, the following electoral result would have occurred in Virginia:

	% of Popular Votes	Number of District Elector Votes	% of District Elector Votes	Total Number of Elector Votes	% of Total Elector Votes
1960 Presidential Election:					
For Democrat	47.0	3	30.0	3	25.0
For Republican	52.4	7	70.0	9	75.0
1964 Presidential Election:					
For Democrat	53.5	6	60.0	8	66.6
For Republican	46.2	4	40.0	4	33.3

Similarly, the election of one elector in and solely by Congressional districts would have resulted in the following electoral result in New York:

	% of Popular Votes	Number of District Elector Votes	% of District Elector Votes	Total Number of Elector Votes	% of Total Elector Votes
1960 Presidential Election:					
For Democrat	52.5	23	53.5	25	55.5
For Republican	47.3	20	46.5	20	44.5
1964 Presidential Election:					
For Democrat	68.6	41	100.0	43	100.0
For Republican	31.3	0	0	0	0

C. Equal Representation of All the People Is Provided Through District Elections of Representative Electors

There is another most important element inherent in the principle of representative government that the founding fathers uniformly adopted throughout the Constitution. James Wilson is reported in Madison's Notes on the Constitutional Convention for Saturday, June 9, 1787, as follows:

> "He (Mr. Wilson) entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal Numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives. . . . Representatives of different districts ought clearly to hold the same proportion to each other, as their respective Constituents hold to each other." From Documents on the Formation of the Union, Government Printing Office 1927, page 183, in discussions concerning the rule of suffrage in the first branch (House of Representatives) of Congress.

With Congressional districts of essentially equal population, a representative or a presidential elector elected in that district represents *all* of the people residing in that district. His effective weight within the particular framework of government should be, and is, measured by the essentially equal number of persons residing in each such district. He stands on a par with each other Representative or elector, as the case may be. His effective weight is not, and should not be, measured by the number of people who voted for him as against the number of people who voted for a Representative or elector from another district. Neither should his effective weight be, nor is it, measured by the total number of people who voted in his district (whether for or against him) as against the total number of people who voted in another district in the election of a Representative or elector.

The number of persons residing in any district includes the large number of children who are not of the age to be permitted to vote, resident aliens not permitted to vote, and many persons confined to institutions or homes because of illness or other physical, mental, or legal disability. Under our representative system of government, those people are all entitled to representation on a basis of equality with all other persons residing in districts of essentially equal population. Because of their large numbers across the nation, and the failure or disability for other causes (such as weather, business or whatever) of other qualified persons to vote, only about 37 per cent of the nation's total population voted in the 1964 presidential election, and only about 38 per cent voted in the 1960 presidential election.

Under the polling concept, it is generally accepted that, if only 25 per cent of the population in any district vote in an election, the plurality established by their votes will reach the same elective result that would have been reached by the plurality of the votes of 45 per cent or any other percentage of the population in the same election district if such other percentage of the population had voted. Computer predictions of election results from very early returns are based on this polling principle. This concept, of course, depends for its validity upon complete freedom of oppor-

tunity of all qualified and qualifiable persons in the district to vote and to have their votes properly counted. Under our laws great measures are taken to secure and protect that complete freedom of opportunity for all citizens to vote by secret ballot and to have their votes properly counted.

Thus, given a fair and representative district system of election, it is not so important or meaningful that a President shall have a majority or a plurality of all of the popular votes actually cast in the entire country. If the president is elected by a majority (as required under the Twelfth Amendment) of the whole number of the electors, 81 per cent of whom shall have been elected by a plurality of the votes of citizens of the United States in their respective Congressional districts, each of essentially equal population, his election will more accurately reflect, and more assuredly represent, the choice of the majority of *all* of the "people", even if, by chance, it does not also reflect the choice of the majority or plurality of those who actually voted in the election.

It is important that the President elected shall enter office with a broad base of support demonstrated in the election. The representation of states as political entities in the electoral college by the inclusion of 102 electors, elected two from each state on a state-wide basis, including the District of Columbia, adds significant support for the elected President, since the states are important and effective political entities in the national scene. Moreover, its inclusion along with district-elected "representative" electors maintains the President's constituency, to which he is responsible, the same as the basic constituency of the national government established by the Constitution.

The present state-wide general ticket system is in conflict with the basic constituency of the national government grounded in dual citizenship and dual representation.

D. Many of the Founders and Early Statesmen Intended District Elections of Representative Electors

The first proposal of an electoral college system of election of the President that was made at the Constitutional Convention of 1787, which convened on May 25, 1787, was made by James Wilson of Pennsylvania, the highly respected lawyer-framer of the Constitution who later became an Associate Justice of the United States Supreme Court. Madison's Notes reported on June 2, 1787 the following:

> "Mr. Wilson made the following motion, to be substituted for the mode proposed by Mr. Randolph's resolution, 'that the Executive Magistracy shall be elected in the following manner: That the States be divided into districts; & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect members for their respective districts to be electors of the Executive magistracy, that the said Electors of the Executive magistracy meet at and they or any of them so met shall proceed to elect by ballot, but not out of their own body person in whom the Executive authority of the national Government shall be vested'.
>
> "Mr. Wilson repeated his arguments in favor of an election without the intervention of the States. He supposed too that this mode would produce more confidence among the people in the first magistrate, than an election by the national Legislature." From Documents on the Formation of the Union, Government Printing Office 1927, page 136.

As late as August 24, 1787, Gouverneur Morris of Pennsylvania also opposed election of the President by the national Legislature, and moved that he "shall be chosen by Electors to be chosen by the People of the several states". This motion was seconded and supported by 4 "ayes" (including Pennsylvania, Virginia, Delaware and New Jersey) and 6 "noes". See Madison's continuing notes on pages 611 and 612 of said Documents.

The language finally adopted at the Convention as Section 1 of Article II of the Constitution is not inconsistent

with the intent of those motions. The drafters were confronted with the practical problems of promptly setting up and carrying out the election of the first President without time for full implementation by the states. Also it was clear that the state legislature was the instrumentality closest to the people and their control that could perform necessary acts to bring about an apportionment of electors by districts and election by the people.

From the chart appearing in Paullin's "The Atlas of the Historical Geography of the United States", page 89, which will be in evidence here, it will be noted that the election of presidential electors by the people was conducted on a district basis within a number of the states in many presidential elections prior to 1836. Election of electors by districts was employed in the following numbers of states in the respective presidential election years:

	Number of states electing on a district basis	Total number of States participating
1788-89	3 (incl. Virginia)	10
1792	3 " "	15
1796	5 " "	16
1800	3	16
1804	5	17
1808	4	17
1812	4	18
1816	3	19
1820	6	24
1824	6	24
1828	4	24
1832	1	24
1836	0	26

With all this background at the Constitutional Convention, and following the Convention, it is not surprising that James Madison wrote to George Hay in a letter dated August 23, 1823 concerning the method of electing electors of the President and Vice President:

> "The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular states which had set the example."

When Virginia was about to change from the district system in 1800, Thomas Jefferson, then Vice President, wrote from Philadelphia on January 12, 1800, to James Monroe:

> "On the subject of an election by a general ticket, or by districts, most persons here seem to have made up their minds. All agree that an election by districts would be best, if it could be general; but while 10. states chuse either by their legislatures or by a general ticket, it is folly & and worse than folly for the other 6. not to do it. In these 10. states the minority is entirely unrepresented; & their majorities not only have the weight of their whole state in the scale, but have the benefit of so much of our minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government. To state it in another form; it is merely a question whether we will divide the U S into 16. or 137. districts. The latter being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments. But a representation of a part by great, & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the U S, were they assembled together . . ." VII Writings of Thomas Jefferson 401, P.L.Ford (1896).

Chief Justice Fuller in the *McPherson* case, *supra,* page 31, stated:

> "In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least 'until some uniform mode of choosing a President and a Vice President of the United States shall be prescribed by an amendment to the Constitution.' Laws Va. 1799, 1800, p. 3."

When this was done in Virginia, Chief Justice John Marshall resolved never to vote during the continuance of use of the general ticket system. A letter dated March 29, 1828 from Marshall to the Richmond Whig and Advertiser, published in the Enquirer dated April 4, 1828, is quoted in part in Albert J. Beveridge's IV The Life of John Marshall 463 as follows:

> "Though I had not voted since the establishment of the general ticket system, and had believed that I never should vote during its continuance, I might probably depart from my resolution in this instance, from the strong sense I felt of the injustice of the charge of corruption against the President and Secretary of State. . . ."

The district mode of electing electors was also favored by many other leaders, such as Hamilton, Jefferson, Madison, Gallatin, James A. Bayard, John Quincy Adams, Van Buren, Benton, Webster, and Story. See page 387 of Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 84th Congress, First Session, March 16, 18, 25, April 1, and 6, 1955, entitled "Nomination and Election of President and Vice President".

E. An Early Statement Points Out the Evils of the General Ticket System

Senator Benton of Missouri, probably the most tireless advocate of electoral college reform in the 19th Century, in 1824 pointed out the evils of the general ticket system in the following statement in 41 Annals of Congress 169-170:

> "The general ticket system, now existing in 10 States was the offspring of policy, and not 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. * * * It contributes to give power and consequence to the leaders who manage the elections, but it is a departure from the intention of the Constitution; violates the rights of minorities, and is attended with many other evils. The intention of the Constitution is violated, because it was the intention of that instrument, to give to each mass of persons, entitled to one elector, the power of giving that electoral vote to any candidate they preferred. The rights of minorities are violated because a majority of one will carry the vote of the whole State * * *. In New York 36 electors are chosen; 19 is a majority, and the candidate receiving this majority is fairly entitled to count 19 votes; but he counts, in reality, 36; because the minority of 17 are added to the majority. These 17 votes belong to 17 masses of people, of 40,000 souls each, in all 680,000 people, whose votes are seized upon, taken away and presented to whom the majority pleases. * * * To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."

Lucius Wilmerding, Jr., a distinguished Princeton scholar, set forth the foregoing quotation from Senator Benton in an article entitled "Reform of the Electoral System" published in the March 1949 issue of the Political Science Quarterly. He introduced it with the statement that the evils of the general ticket "were never better set out than by Senator Benton in 1824".

SUMMARY

Plaintiffs' contentions may be summarized as follows:

1. The structure of the electoral college, created under Article II, Section 1 of the Constitution, apportioned under the Acts of Congress to the people in pursuance of the apportionment provisions of Article I, Section 2 of the Constitution and of Section 2 of the Fourteenth Amendment, and functioning under the Twelfth Amendment and the basic representative framework of the Constitution, establishes that the "representative" electors belong to the people, not the States, and should be elected in single-member Con-

gressional districts by the people voting as citizens of the United States, as Representatives in Congress are elected.

2. The voting rights of citizens of the United States protected under the Fourteenth Amendment of the Constitution require that in presidential elections "representative" electors be elected in single-member Congressional districts in order to eliminate the many invidious discriminations inherent in state-wide general ticket elections.

3. The divisibility principle of the Twelfth Amendment of the Constitution requires that in presidential elections "representative" electors be elected by single-member Congressional districts rather than by state-wide general ticket elections.

4. It is unconstitutional for the election laws of Virginia to force the citizens of the United States resident therein to speak with a single voice, solely as citizens of the state, in presidential elections through state-wide general ticket elections of the ten "representative" electors apportioned to the people of Virginia according to their numbers.

CONCLUSION

Plaintiffs therefore contend that judgment should be granted in their favor, and urge that the Court enter its order in accordance with the prayers of their Complaint.

Respectfully submitted,

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May 24, 1968

EXHIBIT B

(Unpublished case law)

2016 WL 7046845
Only the Westlaw citation is currently available.
United States District Court,
W.D. Virginia,
CHARLOTTESVILLE DIVISION.

Robert Schweikert, Plaintiff,
v.
Mark R. Herring, et al., Defendants.

Case No. 3:16-CV-00072
|
Signed 12/02/2016

Attorneys and Law Firms

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Anna Tillie Birkenheier, Joshua David Heslinga, Office of the Attorney General, Richmond, VA, for Defendants.

MEMORANDUM OPINION

NORMAN K. MOON, UNITED STATES DISTRICT JUDGE

***1** This matter, in which Robert Schweikert ("Plaintiff") challenges the constitutionality of Virginia's selection of presidential electors, is now before the Court upon Defendants' Motion to Dismiss, (dkt. 18), filed on October 26, 2016. A Roseboro Notice was sent to Plaintiff on that same day, informing Plaintiff that if he did not respond to the motion within twenty-one days, "the Court may dismiss the case for failure to prosecute." (Dkt. 20). Plaintiff did not directly respond to Defendants' motion, but he did file an Emergency Motion for Rehearing, (dkt. 22), as well as a Motion for Recusal, (dkt. 24), the contents of which responded to some of Defendants' arguments.

Because Plaintiff is proceeding *pro se*, the Court will construe Plaintiff's subsequent motions as responsive to Defendants' Motion to Dismiss. Accordingly, Plaintiff's case will not be dismissed for failure to prosecute. Nevertheless, Defendants' motion will be granted, and Plaintiff's case will be dismissed because it fails to state a claim upon which relief can be granted by this Court. The precise issue contained in Plaintiff's complaint was previously litigated, dismissed, and affirmed summarily by the Supreme Court. *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968) (3 judge court), *aff'd per curiam*, 393 U.S. 320 (1969), *reh'g denied*, 393 U.S. 1112 (1969). This Court lacks the authority to reach a conclusion that directly contradicts the Supreme Court's own jurisprudence—which is precisely what Plaintiff's complaint would ask this Court to do. Accordingly the case must be dismissed.

I. LEGAL STANDARD

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

A court need not "accept the legal conclusions drawn from the facts" or "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). "Factual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955, with all allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor. *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2005). Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Consequently, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

II. BACKGROUND

***2** Article II of the United States Constitution establishes the basic parameters by which the President of the United States is elected by the Electoral College, but it grants considerable discretion to the states to determine

how to select electors. It states, "Each State shall appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors ...." U.S. Const. art. II, § 1, cl. 2. Throughout our nation's history, states have experimented with different procedures for selecting electors. Methods that have been used include, but are not limited to: (1) creating electoral districts, with one Elector chosen by the voters of each district; (2) selecting electors by congressional district, with the remaining two electors selected by the statewide popular vote; (3) selecting electors by congressional district, with the remaining two electors chosen by the other electors; (4) tasking the state legislature with selecting electors; and (5) selecting electors by statewide popular vote. Today, forty-eight states use a "winner-take-all" approach. Each state conducts a statewide election, and the candidate who wins the plurality of votes in that state sends their entire slate of electors to the Electoral College. [1]

Plaintiff asks the Court to upend over two centuries of electoral practice and declare that Virginia's winner-take-all method for selecting electors, *see* Va. Code §§ 24.2-202, 24.2-203, violates the First Amendment, Fourteenth Amendment, Twelfth Amendment, Seventeenth Amendment, and the Section 2 of the Voting Rights Act of 1965. (Dkt. 1 ¶¶ 66, 73, 94, 106). The general thrust of Plaintiff's voluminous complaint is that: (1) James Madison, the "father of the Constitution" preferred a district system for selecting electors, (*id.* ¶¶ 10–13); (2) the Seventeenth Amendment dictates that electors be chosen by the members of the district they represent, (*id.* ¶ 13); (3) Virginia's winner-take-all system violates protected First Amendment speech and association rights, as incorporated through the Fourteenth Amendment, (*id.* ¶¶ 60–73); (4) Virginia's winner-take-all system violates its authority under Article II, (*id.* ¶¶ 74–78); and (5) Virginia's winner-take-all system violates the constitutional right to vote, as discussed in *Reynolds v. Sims*, 377 U.S. 533, 554–55, (*id.* ¶¶ 79–81, 90–110).

III. ANALYSIS

Considering existing case law, the Court need not delve too deeply into the content of Plaintiff's complaint because it does not create a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In 1968, a three-judge panel from the United States District Court for the Eastern District of Virginia heard a nearly identical case challenging the constitutionality of Virginia's winner-take-all system for selecting electors. *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968) (3 judge court), *aff'd per curiam*, 393 U.S. 320 (1969), *reh'g denied*, 393 U.S. 1112 (1969). In *Williams*, the panel unequivocally declared Virginia's system of selecting electors constitutional. *Williams*, 288 F. Supp. at 629 ("Virginia's design for selecting presidential electors does not disserve the Constitution ...."). The *Williams* decision was affirmed *per curiam* by the United States Supreme Court. *Williams v. Virginia State Bd. of Elections*, 393 U.S. 320 (1969), *reh'g denied*, 393 U.S. 1112 (1969).

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 (1977). However, "[s]ummary [decisions] lose their binding force when 'doctrinal developments' illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case." *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (quoting *Hicks v. Miranda*, 422 U.S. 322, 344 (1975)).

This Court may not come to "opposite conclusions on the precise issues presented and necessarily decided" in *Williams*. *Mandel*, 432 U.S. at 176. Because the *Williams* decision concerned the precise issues presented in the instant case—*i.e.* the constitutionality of Virginia's winner-take-all system for selecting electors—any ruling in Plaintiff's favor would run afoul of Supreme Court precedent. The Court is not aware of any subsequent Supreme Court decisions that undermine the validity of *Williams*. To the contrary, the Supreme Court has reaffirmed the discretion of state legislatures to select their own method for selecting electors. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("[T]he state legislature's power to select the manner for appointing electors is plenary." (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892))). Accordingly, the Court is not permitted to reach a conclusion opposite the precise issues presented in *Williams*, and Plaintiff fails to state a claim upon which this Court can grant relief. Defendants' motion to dismiss the case pursuant to Rule 12(b)(6) must be granted.

IV. CONCLUSION

***3** Based on the foregoing, Defendants' Motion to Dismiss will be granted and the case will be dismissed with prejudice. In the absence of subsequent Supreme Court case law, the decision in *Williams* is binding, and thus, Plaintiff's complaint fails to state a claim upon which relief could be granted by this Court.

An appropriate Order will issue, and the Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion to Plaintiff, Defendants, and all counsel of record.

All Citations

Slip Copy, 2016 WL 7046845

Footnotes

1 Maine and Nebraska select electors by congressional district, and the remaining two electors are awarded to the candidate who earns a plurality of the statewide vote.

2017 WL 4935858
Only the Westlaw citation is currently available.
United States District Court,
W.D. North Carolina,
Charlotte Division.

Ronald Calvin WILLIAMS, Plaintiff,
v.
State of NORTH CAROLINA NC State Board of Elections; and The North Carolina Department of Secretary of State, Defendants.

DOCKET NO. 3:17-cv-00265-MOC-DCK
|
Signed 10/31/2017

Attorneys and Law Firms

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James Bernier, Jr., North Carolina Department of Justice, Raliegh, NC, Jeremy David Lindsley, NC Department of Justice, Raleigh, NC, for Defendants.

AMENDED ORDER

Max O. Cogburn Jr., United States District Judge

***1 THIS MATTER** is before the Court on review of a Memorandum and Recommendation (#38) issued in this matter. In the Memorandum and Recommendation, the magistrate judge advised the parties of the right to file objections within 14 days, all in accordance with 28, United States Code, Section 636(b)(1)(c). Objections have been filed within the time allowed.

I. Applicable Standard

The *Federal Magistrates Act of 1979*, as amended, provides that "a district court shall make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983). However, "when objections to strictly legal issues are raised and no factual issues are challenged, *de novo* review of the record may be dispensed with." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Similarly, *de novo* review is not required by the statute "when a party makes general or conclusory objections that do not direct the court to a specific error in the magistrate judge's proposed findings and recommendations." Id. Moreover, the statute does not on its face require any review at all of issues that are not the subject of an objection. Thomas v. Arn, 474 U.S. 140, 149 (1985); Camby v. Davis, 718 F.2d at 200. Nonetheless, a district judge is responsible for the final determination and outcome of the case, and accordingly the Court has conducted a careful review of the magistrate judge's recommendation.

II. Discussion

The Court has given careful consideration to each Objection contained both in "Plaintiff's Objection" (#40) and in the plaintiff's Addendum (#41). While the Court notes that plaintiff is proceeding *pro se*, he states that he is a retired attorney. In conducting a *de novo* review as warranted, the Court joins in Judge Keesler's observation that "Plaintiff, although a retired attorney, is ignoring ample binding legal precedent that prevents this Court from allowing him any of the relief he seeks." M&R (#38) at 10. While it is clear from both the Objections and the Addendum that plaintiff disagrees with Judge Keesler's recommendation that this action be dismissed, the objections are at best general or conclusory objections that mirror plaintiff's earlier pleadings and do not direct this Court to any precise error committed by Judge Keesler. The Court has, however, carefully considered the contentions of the Amended Complaint (#3) and the Motion to Dismiss (#19). The Court fully concurs in Judge Keesler's determination that plaintiff has failed to state a plausible claim for relief as the remedy he seeks from this Court—which is mandating that North Carolina adopt a pro-rata system for presidential electors rather than a winner-take-all scheme—is decisively foreclosed by binding precedent. M&R at 8-10; see McPherson v. Blacker, 146 U.S. 1 (1892); Bush v. Gore, 531 U.S. 98 (2000).

After such careful review, the Court determines that the recommendation of the magistrate judge is fully consistent with and supported by current and binding case law. Further, the factual background and recitation of issues is supported by the applicable pleadings. Based on such determinations, the Court will fully affirm the Memorandum and Recommendation and grant relief in accordance therewith.

ORDER

***2 IT IS, THEREFORE, ORDERED** that the Memorandum and Recommendation (#38) is **AFFIRMED,** the defendant's Motion to Dismiss (#19) is **GRANTED,** and this action is **DISMISSED**. Plaintiff's Motion for Summary Judgment (#26) is **DENIED** as moot.

All Citations

Slip Copy, 2017 WL 4935858

2017 WL 4936429
Only the Westlaw citation is currently available.
United States District Court,
W.D. North Carolina,
Charlotte Division.

Ronald C. WILLIAMS, Plaintiff,
v.
State of NORTH CAROLINA, North Carolina Department of Secretary of State, and the NC State Board of Elections, Defendants.

CIVIL ACTION NO. 3:17-CV-265-MOC-DCK
|
Signed 10/02/2017

Attorneys and Law Firms

Ronald Calvin Williams, Charlotte, NC, pro se.

James Bernier, Jr., Jeremy David Lindsley, North Carolina Department of Justice, Raleigh, NC, for Defendants.

MEMORANDUM AND RECOMMENDATION

David C. Keesler, United States Magistrate Judge

***1 THIS MATTER IS BEFORE THE COURT** on Defendants' "Motion To Dismiss" (Document No. 19) and "Plaintiff's Motion For Summary Judgment" (Document No. 26). These motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b), and are now ripe for disposition. Having carefully considered the arguments, the record, and the applicable authority, the undersigned will respectfully recommend that the motion to dismiss be granted and the motion for summary judgment be denied as moot.

I. BACKGROUND

Ronald C. Williams ("Plaintiff"), appearing *pro se*, initiated this action with the filing of a "Complaint" (Document No. 1) on May 18, 2017. Plaintiff then filed an "Amended Complaint" (Document No. 3) pursuant to Fed.R.Civ.P. 15 (a)(1) on May 23, 2017. The Amended Complaint names the State of North Carolina, the North Carolina Department of State, and the NC State Board of Election as "Defendants" in this action and seeks declaratory relief from this Court. (Document No. 3). Specifically, Plaintiff asks this Court to declare that: the "winner-take-all" and "vote inequality" methods he attributes to the process by which the Electoral College elects a President and Vice President of the United States violate the Fifth and Fourteenth Amendments to the United States Constitution; a "pro \rata" method would be constitutional; "the results of the 2016 presidential and vice-presidential election are null and void *ab initio*;" and that Defendants must re-calculate the 2016 votes for President and Vice-President using the "pro rata" method. (Document No. 3, p.4).

Defendants' "Motion To Dismiss" (Document No. 19) was filed on July 18, 2017. The pending motion asserts that dismissal is appropriate pursuant to Fed.R.Civ.P. 12(b)(1), (4), (5), (6), and (7) on the grounds that:

1. The Eleventh Amendment bars the Complaint;

2. Plaintiff lacks standing;

3. Plaintiff has failed to state a claim for which relief can be granted in that Plaintiff has failed to state a claim cognizable under applicable law; and

4. This matter is now moot.

(Document No. 19, pp.1-2). Defendants' "Memorandum Of Law ..." focuses on arguments for dismissal pursuant to Rule 12(b)(1) and (6). (Document No. 20). "Plaintiff's Response ..." (Document No. 23) was filed on July 28, 2017; and "Defendants' Reply ..." (Document No. 24) was filed on August 3, 2017.

"Plaintiff's Motion for Summary Judgment" (Document No. 26) was filed on August 28, 2017. Defendants' Joint Response In Opposition ..." (Document No. 27) was filed on September 8, 2017; and Plaintiff's "... Reply Brief" (Document No. 33) was filed on September 27, 2017.

"Plaintiff's Motion To Amend" (Document No. 35) was filed on September 29, 2017, and has been denied by the Court.

The pending motions are now ripe for review and a recommendation to the Honorable Max O. Cogburn, Jr.

II. STANDARD OF REVIEW

The plaintiff has the burden of proving that subject matter jurisdiction exists. See Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The existence of subject matter jurisdiction is a threshold issue the court must address before considering the merits of the case. Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999). When a defendant challenges subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, 945 F.2d at 768. The district court should grant the Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id. See also, Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999).

***2** A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the "legal sufficiency of the complaint" but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992); Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. Partnership, 213 F.3d 175, 180 (4th Cir. 2000). A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 697, 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)); see also, Robinson v. American Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

The Supreme Court has also opined that

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quoting Twombly, 550 U.S. at 555-56, 127 S.Ct. 1955).

"Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). The court "should view the complaint in the light most favorable to the plaintiff." Mylan Labs, Inc. v. Matkar, 7 F.3d 1130, 1134 (4th Cir. 1993).

III. DISCUSSION

As stated in one of the cases cited by Defendants: "[c]onsidering existing case law, the Court need not delve too deeply into the content of Plaintiff's complaint because it does not create a 'plausible claim for relief.' " Schweikert v. Herring, 2016 WL 7046845, at *2 (W.D. Va. Dec. 2, 2016) (quoting Iqbal, 556 U.S. at 679, 129 S.Ct. 1937). Even viewing the Amended Complaint in the light most favorable to Plaintiff, the undersigned finds Defendants' arguments for dismissal to be compelling. Defendants' briefs are thorough and well-supported by relevant legal authority. (Document Nos. 20 and 24). In contrast, "Plaintiff's Response ..." fails to cite any legal authority to support his claims, and fails to mention, much less distinguish, *any* of the authority cited by Defendants. (Document No. 23). Although Plaintiff is appearing *pro se*, he has repeatedly stated that he is a retired attorney. See (Document No. 3, p.4; Document No. 23, p.5; Document No. 26, p.2).

As suggested above, Defendants briefing in this matter is particularly well done and will be adopted in large part in this discussion. See (Document Nos. 20 and 24). First, Defendants' "Memorandum Of Law ..." provides an instructive statement of the case that helps set the context of this lawsuit. (Document No. 20).

Pursuant to Article II of the Constitution of the United States, the President of the United States is to be elected by Electors appointed by the States.

> 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.

***3** U.S. Const. art. II, § 1, cl 1 & 2. The Twelfth Amendment to the Constitution of the United States sets out the manner in which the Electors appointed by the States are to cast their votes for President and Vice President.

> 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 ....

U.S. Const. amend XII.

North Carolina, like forty-seven other States and the District of Columbia, uses a "winner-take-all" system for appointing the State's Electors. See (Document No. 3, pp.1-2); See also Conant v. Brown, 2017 WL 1170858, at *7, 248 F.Supp.3d 1014 (D. Or. Mar. 29, 2017) (citing the National Archives at https://www.archives.gov/federal-register/electoralcollege/faq.html#wtapv) and Schweikert v. Herring, 2016 WL 7046845, at *2. "In these States, whichever candidate receives a majority of the popular vote, or a plurality of the popular vote (less than 50 percent but more than any other candidate), takes all of the state's Electoral votes." Conant 2017 WL 1170858, at *7, 248 F.Supp.3d 1014. Nebraska and Maine are the two exceptions. There, electors are selected by congressional district, and the remaining two electors are awarded to the candidate who earns a plurality of the statewide vote. See Schweikert, 2016 WL 7046845, at *2, n.1.

Chapter 163, Article 18, of the North Carolina General Statutes governs the appointment of North Carolina's electors. A candidate qualified to run in the state's presidential election submits to the Secretary of State a list of electors pledged to support his candidacy. Thus, the state's presidential contest is really a contest among slates of electors. A vote for a particular presidential candidate is counted as a vote for the slate of electors pledged to support him. The slate of electors which receives the greatest popular support in the state's presidential election becomes the slate which casts the state's electoral votes. See N.C. Gen. Stat. § 163-209(a); see also, Hitson v. Baggett, 446 F.Supp. 674, 675 (M.D. Ala. 1978) aff'd, 580 F.2d 1051 (5th Cir. 1978) (describing the appointment of electors in Alabama).

Defendants note that the Amended Complaint does not allege any facts specific to North Carolina, or to Plaintiff, or to any injury to Plaintiff's rights. (Document No. 20, p.4).

> Rather, plaintiff refers in general to the states and voters.
>
> • "NC and 47 other states have elected their electors by the "winner-take-all" method ..."
>
> • "NC is used as an example."
>
> • "In each state and in every general election for President and Vice-President, the voters for the state's loser are injured as set out below."

- "The 'pro-rata' method avoids this distortion by taking every vote all the way to the final count in the Electoral College as opposed to taking votes and giving them to the opponent at the state level in every state, thus distorting the final count."

***4** Id. (citing Document No. 3, pp.1-3).

Next, the undersigned will briefly set out Defendants' main arguments.

A. Eleventh Amendment

The Eleventh Amendment bars this complaint because Plaintiff sued the State and its agencies. The relief sought does not matter. "[U]nder the Eleventh Amendment, a State cannot be sued directly in its own name regardless of the relief sought, absent consent or permissible congressional abrogation." Smith v. United States Dep't of Veteran Affairs, 2013 WL 2947019, at *4 (M.D.N.C. June 14, 2013) (internal quotations omitted). "The North Carolina Secretary of State and the North Carolina Attorney General are both state officials. Thus, the claims against them, as well as the claim against the State of North Carolina, should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1)." Id. The Eleventh Amendment bars "not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997).

Moreover, to the extent Plaintiff has sought to add individual state officers as defendants, such claims would also be barred. See Boger v. Cooper, 5:17-CV-141-FDW, 2017 WL 3496459, at *2 (W.D.N.C. 2017) ("Immunity extends not only to the State, but also to "arm[s] of the State [,]" including state officers.... While acting in their official capacity, state officers are entitled to Eleventh Amendment immunity because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and "[a]s such, it is no different from a suit against the State itself.") (citations omitted).

Defendants conclude that they are entitled to Eleventh Amendment immunity, and thus, this Court lacks jurisdiction over them. (Document No. 20, p.6; Document No. 24, p.2).

B. Failure To State A Claim

Defendants also effectively argue that Plaintiff's action must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6). Defendants' briefs go to great length identifying binding case law, arising from similar lawsuits, which preclude the relief Plaintiff seeks here. (Document Nos. 20 and 24). Defendants' citations include the following:

• *McPherson v. Blacker*, 146 U.S. 1, 27, 35, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ("In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.")

• *Gray v. Sanders*, 372 U.S. 368, 378-79, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (recognizing that the Constitution allows numerical inequality and weighing of votes in the Electoral College.)

• *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) ("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.")

• *New v. Pelosi*, No. 07-40152-01, 2008 WL 4755414, 2008 U.S. Dist. LEXIS 87447 (S.D.N.Y. Oct. 29, 2008) ("The Supreme Court has consistently declined to extend the principle of 'one person, one vote' to the electoral college."), *aff'd*, 374 Fed. Appx. 158 (2d Cir. 2010)

***5** • *Delaware v. New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966) (declining to hear an original jurisdiction case brought by Delaware and twelve other small states alleging that the other thirty-seven states violated the Equal Protection Clause of the Fourteenth Amendment by using winner-take-all elections to choose state electors for the electoral college.)

• *New v. Ashcroft*, 293 F.Supp.2d 256 (E.D.N.Y. 2003) (finding that it lacked the power to strike the text of the Constitution)

• *Trinsey v. United States*, No. 00-5700, 2000 WL 1871697 at *3, 2000 U.S. Dist. LEXIS 18387 at *8-9 (E.D. Pa. Dec. 21, 2000) (reiterating that the Electoral

College and its inherent equality is contained within the Constitution itself, and that the court could not "strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent.")

• *Penton v. Humphrey*, 264 F.Supp. 250, 251-52 (S.D. Miss. 1967) ("It is the conclusion of the Court that we are bound by the dismissal of the Delaware case and that hence defendants' motion to dismiss the complaint herein must be sustained, with costs assessed to the plaintiff.")

• *Williams v. Va. State Bd. of Elections*, 288 F.Supp. 622, 628-29 (E.D. Va. 1968), *aff'd per curiam*, 393 U.S. 320, 89 S.Ct. 555, 21 L.Ed.2d 517 (1969) ("... the Constitution gives [the State legislatures] the choice, and use of the unit method of tallying is not unlawful.")

• *Schweikert v. Herring*, No. 3:16-CV-00072, 2016 WL 7049036, 2016 U.S. Dist. LEXIS 166854 (W.D. Va. Dec. 2, 2016) (holding that *Williams* is binding precedent.)

• *Hitson v. Baggett*, 446 F.Supp. 674, 677 (M.D. Ala. 1978) ("Thus, consistent with the Constitution, a state may provide for the selection of presidential electors 'through *popular election* ... or as otherwise might be directed.' "), *aff'd*, 580 F.2d 1051 (5th Cir. 1978) and *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979)

• *Conant v. Brown*, No. 3:16-cv-02290-HZ [248 F.Supp.3d 1014, 1025–26], 2017 U.S. Dist. LEXIS 47964 at *22 (D. Or. Mar. 29, 2017) (citing *Williams* as good law and holding that the "Plaintiff's winner-take-all claim has no merit.");

• *Birke v. The 538 Individual Members of the Electoral College*, No. 2:16-cv-08432, at 3 (C.D. Cal. November 18, 2016) (citing to *Williams* as good law and *sua sponte* dismissing the plaintiff's *pro se* complaint) (See Doc. #20-1).

(Document No. 24, pp.4-5).

Defendants conclude that Plaintiff's claims in this matter regarding the winner-take-all method of appointing electors do not differ significantly, if at all, from those asserted in McPherson, Delaware, Penton, Williams, Schweikert, Hitson, Conant, or Birke. The opinions in these cases, particularly the Supreme Court's opinion in Blacker and summary affirmation of Williams, apply herein.

Plaintiff has not offered any cases or argument to rebut the application of these cases to this matter. As such, he has failed to state a claim, and his Amended Complaint is subject to dismissal with prejudice.

IV. CONCLUSION

In short, the undersigned finds Defendants' arguments persuasive. (Document Nos. 20 and 24). Moreover, Plaintiff's response fails to adequately address Defendants' arguments or authority. (Document No. 23). It seems that Plaintiff, although a retired attorney, is ignoring ample binding legal precedent that prevents this Court from allowing him any of the relief he seeks.

Because the undersigned finds good cause to recommend dismissal of the Amended Complaint, this "Memorandum And Recommendation" will decline to analyze the motion for summary judgment in detail. However, even if this case were not dismissed at this stage, it appears that Plaintiff's motion for summary judgment is premature and lacks adequate support for a finding that Plaintiff is entitled to judgment as a matter of law. See (Document Nos. 26, 27, and 33).

V. RECOMMENDATION

***6 FOR THE FOREGOING REASONS**, the undersigned respectfully recommends Defendants' "Motion To Dismiss" (Document No. 19) be **GRANTED**.

IT IS FURTHER RECOMMENDED that "Plaintiff's Motion For Summary Judgment" (Document No. 26) be **DENIED AS MOOT**.

VI. TIME FOR OBJECTIONS

The parties are hereby advised that pursuant to 28 U.S.C. § 636(b)(1)(C), and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact, conclusions of law, and recommendation contained herein may be filed within **fourteen (14) days** of service of same. Responses to objections may be filed

within fourteen (14) days after service of the objections. Fed.R.Civ.P. 72(b)(2). Failure to file objections to this Memorandum and Recommendation with the District Court constitutes a waiver of the right to *de novo* review by the District Court. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005). Moreover, failure to file timely objections will preclude the parties from raising such objections on appeal. Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Snyder v. Ridenhour, 889 F.2d 1363, 1365 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 147-48, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986).

IT IS SO RECOMMENDED.

All Citations

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