RECORD NO. 19-1297

In The

United States Court Of Appeals

For The Fourth Circuit

EUGENE BATEN; CHESTER WILLS; CHARLETTE PLUMMER-WOOLEY; BAKARI SELLERS; CORY C. ALPERT; BENJAMIN HORNE,

Plaintiffs - Appellants,

v.

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

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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Signature: s/Christopher P. Kenney Date: 03/26/2019

Counsel for: Appellants

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I certify that on 03/26/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

Every four years, over a million South Carolina citizens, including Plaintiffs, cast their votes in a national presidential election. And every four years the result is the same: No matter how close the election, all of South Carolina's nine Electors, and all of its electoral votes, are awarded to the winner of a plurality of the statewide vote. This ensures that as many as a million voters, including Plaintiffs, have no representation in South Carolina's Electoral College delegation and no impact on the presidential election. This method of electing South Carolina's Electors and allocating its electoral votes, known as "Winner Take All" ("WTA"), is not mentioned in the United States Constitution. Indeed, WTA was criticized upon its subsequent adoption for ensuring the "minority [was] entirely unrepresented" in a State's delegation of Electors. *See* Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800) *in 31 The Papers of Thomas Jefferson*, Vol. 31, 300–01 (Barbara B. Oberg ed., 2004). Key developments in voting rights law starting in the 1960s have finally caught up with Thomas Jefferson's concerns. The use of WTA to elect a State's Electoral College delegation infringes on Plaintiffs' fundamental constitutional rights and violates the Voting Rights Act ("VRA").

It is important to understand the structural nature of the problem. Under the Constitution, the contest for the presidency is not a one-stage election for a single candidate, like the election of South Carolina's Governor, where someone wins and

someone loses, but everyone's vote carries equal weight. Rather, the Constitution establishes a two-stage election for President. In the first stage, the Constitution requires the states to select electors. In modern elections, every state allows its citizens to cast votes for President in this first stage (as opposed to relying on the state legislature)—meaning that the Fourteenth Amendment and other protections fully apply—and allocates its electors based on that vote. In the second stage, the electors selected by the state cast the only effective votes for President allowed by the Constitution: The President is elected based solely on the votes cast by electors.

By awarding *all* of a state's Electors to whoever wins a plurality of the vote at the first stage, South Carolina's WTA rules dilute and discard minority votes in *two ways*. It dilutes votes for the Electors themselves, using an at-large election for nine Electors to ensure minority voters never have any representation in that delegation. And it discards their votes for President at the second stage, ensuring that only Electors selected by the plurality can ever affect the presidential vote. Further, while Plaintiffs' constitutional claims are not based solely on race—WTA rules are intentionally and unconstitutionally designed to disadvantage voters who support minority candidates whomever they may be—the harm caused by South Carolina's WTA rules is starkly illustrated by the near-total silencing of the state's large black population in national elections. The facts set out below are sufficient, standing alone, for all of the black Plaintiffs in this action to bring their VRA claims

to trial; the same analysis applies equally to all Plaintiffs on their constitutional claims.

Black voters make up approximately 27% of South Carolina's voting-age population. In turn, approximately 95% of South Carolina's black voters consistently vote for Democratic candidates in Presidential elections. This means that, under a more proportional system, South Carolina's black voters alone would have the voting strength to elect two of the state's nine electors *without the support of a single white voter*. But because South Carolina has adopted WTA rules that consistently throw out their votes at *both* stages of the election, the vast majority of South Carolina's black population is consistently striped of their voice in the State's Electoral delegation *and* in the critical second stage of the election when effective votes are cast. In other words, the use of WTA over-rewards South Carolina's majority voters in both stages of the Presidential election by completely eliminating the voting power of South Carolina's minority voters, including virtually its entire black population.

Properly understood, the first question this Court asks should not be "how can widespread electoral rules that have been around since the 1700s be unconstitutional?" Rather, this Court should ask "why has this been allowed to go on for so long?" The answer is simple: State laws governing Presidential elections have not caught up to the sea change in voting rights law brought about by the

Supreme Court and Congress starting in the 1960s and extending to the present day. The "one person, one vote" principle was first articulated by the Supreme Court in 1962, the VRA was enacted in 1965, and election law has developed rapidly since then. Yet district courts in the modern era have consistently rejected challenges to the use of WTA in presidential elections based predominantly on a single summary affirmance in 1969: *Williams v. Virginia Board of Elections*, 393 U.S. 320 (1969), *aff'g*, 288 F. Supp. 622, 629 (E.D. Va. 1968). But *Williams* did not address any of the arguments that Plaintiffs make here, and it does not control. Notwithstanding WTA's long history, no court has *ever* addressed the implications of modern statutory and constitutional jurisprudence on that system. Plaintiffs raise new arguments in this case, and this Court is writing on a clean slate with respect to the specific challenges Plaintiffs raise.

First, the Supreme Court has established that it is unconstitutional to use WTA rules to discard votes at the second stage of a two-stage election—as South Carolina does to Plaintiffs' votes for President. By using WTA to award all of its electoral votes to the plurality winner, South Carolina ensures that Plaintiffs' "votes for a different candidate [are] worth nothing and . . . counted only for the purpose of being discarded." *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963). WTA in South Carolina thus has the same unconstitutional effect as it did in *Gray*, in which the Supreme Court enjoined Georgia's use of plurality WTA at the county level to

allocate each county's unit votes—the first stage of the election—before the unit votes were tallied in statewide primaries at the second stage. *See id.* Plaintiffs in *Williams* did not raise this argument or cite *Gray* for the proposition that the use of WTA rules at the first stage of a two-stage election is unconstitutional vote weighting, and the *Williams* lower court decision neither addressed this argument nor the reasoning of *Gray*.

Second, WTA unconstitutionally dilutes Plaintiff's votes at the *first* stage of the Presidential election: their votes for a multi-member delegation of Electors. The first stage of South Carolina's election constitutes an at-large, state-wide vote for competing slates of nine Electors, with the losing candidates receiving zero representation. Five years after *Williams*, the Supreme Court made clear in *White v. Regester* that states may not use at-large, slate elections for multi-member bodies to ensure minority voters receive no representatives in those bodies. 412 U.S. 755, 769 (1973).

Third, WTA silences Plaintiffs' voices in national politics by robbing them of a chance to cast a meaningful vote in violation of the First Amendment (a claim not raised in *Williams*).

Finally, South Carolina's WTA system 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). At the motion to dismiss

stage, vote dilution under the VRA is a straightforward mathematical question. The focus of the Court's VRA analysis must be on the "*effect*" of the challenged law, and Congress has "expressly repudiated an intent requirement that had previously applied." *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C.), *aff'd*, 568 U.S. 801 (2012) (citations omitted; emphasis added).

As illustrated above, it is a mathematical certainty that South Carolina's WTA rules have diluted the votes of South Carolina's black citizens. Given the size of the black voting population and the strong tendency of black voters to vote for Democratic presidential candidates, South Carolina's black voters would have the voting strength to appoint two electors in each recent Presidential election without a single white vote if they had "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). By completely barring minority voters from having any voice in the Presidential election—either the first stage (electing the Electors) or the critical second stage (the only stage in which *effective* votes can be cast for President under our Constitution)—South Carolina's WTA rules have not just diluted, but have virtually eliminated, the voice of the state's black population.

WTA violates Plaintiffs' constitutional rights and the VRA, and its use should be enjoined.

STATEMENT OF JURISDICTION

Plaintiffs assert claims under the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court dismissed Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6) on March 8, 2019, and Plaintiffs timely appealed on March 18, 2019. J.A. 612.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs plausibly allege that the use of WTA violates the Equal Protection Clause by ensuring their votes "[are] worth nothing" in the second stage of the Presidential election—the stage when the President is in fact elected. *Gray*, 372 U.S. at 381 n.12.

2. Whether Plaintiffs plausibly allege that WTA violates the Equal Protection Clause by diluting, and "cancel[ling] out," Plaintiffs' votes at the first stage of the election—the at-large election for a multi-member body of 9 Electors—and thereby ensuring minority voters systematically receive zero representation in South Carolina's Electoral College notwithstanding their voting strength. *White*, 412 U.S. at 769–70.

3. Whether Plaintiffs plausibly allege that WTA violates their First and Fourteenth Amendment rights to cast effective votes and to associate. *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).

4. Whether, in light of the "severe" burdens WTA places on Plaintiffs' First and Fourteenth Amendment rights, the State can show that WTA "advance[s] a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

5. Whether South Carolina's WTA rules violate the rights of the black Plaintiffs under the VRA by denying them "the opportunity to exercise an electoral power that is commensurate with [their] population in the relevant jurisdiction." *Hall*, 385 F.3d at 429.

6. Whether, given the district court's unquestionable power to enjoin South Carolina's use of WTA, the injuries WTA causes are redressable.

STATEMENT OF THE CASE

Although Plaintiffs' Complaint focuses on the modern use of WTA, it is not the first challenge to WTA. To understand why Plaintiffs' challenge to WTA should succeed where others have failed, this Court should understand three key points about the history of WTA's adoption and previous challenges to it.

First, although the Constitution established the Electoral College, neither the Constitution nor the framers who drafted it contemplated or intended that states

would use WTA to allocate and consolidate their electoral votes. Instead, years after the Constitution's ratification, the dominant political parties in states adopted WTA to consolidate their power in presidential elections by discarding votes of the political minority and magnifying the votes of the political majority.

Second, the Supreme Court has not addressed in a plenary merits opinion the constitutionality of WTA, even as it has invalidated analogous electoral systems in merits decisions. Nor has the Supreme Court ever addressed the implications of the VRA on WTA, where WTA specifically discards the votes of protected minorities.

Third, in part because it was adopted to consolidate the power of partisan state legislatures, WTA and its attendant burdens on American democracy are likely to persist without judicial intervention.

A. The Origins of WTA

Plaintiffs do not challenge the existence of the Electoral College itself. Article II of the Constitution creates the unique office of "presidential elector" and provides that each state appoint, "in such manner as the Legislature thereof may direct," Electors equal in number to its congressional representatives. U.S. Const. art. II, § 1, Cl. 2 (the "Elector Clause"). Once selected, Electors meet and vote for President and Vice President. *See* U.S. Const. amend. XII. The collection of these Electors has come to be called the "Electoral College."

In contrast, WTA is not mentioned in the Constitution. The Elector Clause does not prescribe how a state must allocate its Electors and leaves it to individual states to determine the method of allocation. *Cf. Rhodes*, 393 U.S. at 29 ("Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws."). And other provisions of the Constitution contemplate methods other than WTA. *See* Art. II § 1; Amd. XII.

Nor is there evidence WTA was ever part of the constitutional design. WTA is not mentioned in *The Federalist Papers* and was not discussed at the Constitutional Convention. *See* John R. Koza et al., *Every Vote Equal*, 82, 366 (4th ed. 2013). Rather, it was the framers' intention that Electors comprise a state-level, "deliberative body in which presidential electors would exercise independent and detached judgment," *id.* at 74—a function they performed in the first election, *see id.* at 73–74; *see also McPherson v. Blacker*, 146 U.S. 1, 36 (1892) ("[I]t was supposed [by the framers] that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive."). WTA, which in modern times makes the role of Electors ministerial, is inconsistent with this design.

It was not the constitutional design, but the rise of partisan politics, that led to WTA's broad adoption. *See generally* Koza, *supra*, at 75–82, 177. Writing to then-Virginia Governor James Monroe in 1800, Thomas Jefferson criticized WTA, stating

it would ensure that the "minority [was] entirely unrepresented." *See* Letter from Thomas Jefferson, *supra*. He nevertheless urged Virginia to adopt WTA for political and partisan reasons. Jefferson had recently lost the 1796 presidential election after two states he counted on for support, Virginia and North Carolina, permitted their electoral votes to be split by multiple candidates, while other states, carried by the Federalists, did not. *Id.* Jefferson wanted to ensure he received all of Virginia's electoral votes in 1800 and that no minority voters received representation.

After Virginia's Republican legislature adopted WTA, partisan interests led to WTA's widespread adoption elsewhere. John Adams, a Federalist, was concerned that Jefferson might capture one of Massachusetts' electoral votes, so he convinced the state legislature to award all of its Electors (without an election) to a single candidate—i.e. through legislative WTA. Koza, *supra*, at 80–81. Partisans around the country reacted, using similar reasoning to persuade their legislatures to use WTA in presidential elections, and the method was widespread by 1836. *See* David Abbott & James Levine, *Wrong Winner: The Coming Debacle in the Electoral College*, 15 (1991). WTA "was the offspring of policy, and not of any disposition to give fair play to the will of the people." 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).

Against this backdrop, South Carolina adopted WTA rules the first year it opened the Presidential election to the popular vote, 1868.

B. The Development of a Constitutional Right to an Equal Vote

Although Jefferson and others recognized the disenfranchising effect of WTA on political-minority voters as early as 1800, the legal implications of this effect would become clear only with the later ratification of the Equal Protection Clause and the evolution of the principle of one person, one vote.

Shortly after the ratification of the Fourteenth Amendment, the Supreme Court first acknowledged in *McPherson* that the Equal Protection Clause operates to restrict a state's power under the Elector Clause. 146 U.S. at 24–25. Plaintiffs in *McPherson* challenged Michigan's law providing for the selection of Electors based on congressional district, arguing that the Elector Clause *required* statewide WTA and that the Equal Protection Clause afforded each citizen the right to vote for *each* Elector in the state, precluding district elections. *Id.* at 24, 39. Although it rejected the claim presented, the Court held that a challenge to a state's method of allocating its Electors does not present a political question, *id.* at 24, and that the Fourteenth Amendment applies to elections for Electors, *see id.* at 40.

Sixty years later, in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court articulated the principle of "one person, one vote," and the Court relied on it to hold unconstitutional the Georgia Democratic Party's "deeply rooted and long standing" practice for conducting its primary elections. *Gray*, 372 U.S. at 376, 381. Under that system—which resembled the Electoral College—the Georgia Democratic

Party allocated to each county a set number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election for statewide office-holders (such as governor) and awarded *all* of its units (up to six) based on WTA. *Id.*

The Court held Georgia's primary violated the Equal Protection Clause on two independent bases. First, such units were not allocated in proportion to population and favored rural voters. *See id.* at 379.[1] Second, even if "unit votes were allocated strictly in proportion to population," the impermissible "weighting of votes would continue" because the use of WTA inside of each county would permit "the candidate winning the popular vote in the county to have the entire unit vote of that county" and ensure "votes for a different candidate [would be] worth nothing and . . . counted only for the purpose of being discarded." *Id.* at 381 n.12. This holding had undeniable implications for the use of WTA in presidential elections, which, like Georgia's parallel use, was not "sanctioned by the Constitution." *Id.* at 380.

[1] In connection with its first holding, *Gray* explained that the geographical weighting of votes inherent in the Electoral College system is constitutional only because it is a feature of the Constitution, saying "[t]he only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President." *Id.* at 380

Five years after *Gray*, plaintiffs brought an Equal Protection challenge to Virginia's use of WTA to allocate presidential Electors.[2] They did not cite or rely on *Gray* footnote 12, nor even address the discarding of votes for President at the second stage of a two-stage election. *See* J.A. 132-58. Such an argument, focused on this second way WTA discards votes, would not have been colorable in any event. In contrast to modern elections, Virginia's elections formally resembled the elections for *Electors* envisioned by the framers: Electors' names in fact appeared on the ballot and, if elected, Electors had no legal obligation to support their party's nominee.[3] *See* J.A. 137-38 (describing the Virginia ballot); *see also* 2001 Va. HB 1853 (changing the Virginia statute in 2001 so that Electors are "required to vote" for the party's nominee). The plaintiffs argued that WTA invidiously canceled out votes for a slate of Electors and asked the Court to impose a district method of allocation. *See* J.A. 149-50, 57.

A three-judge panel rejected their challenge. It agreed that the *Williams* plaintiffs' argument had "merits and advantages," and it acknowledged that "once the electoral slate is chosen, it speaks only for the element with the largest number

[2] The *Williams* plaintiffs did not bring a First Amendment challenge, and of course did not (and could not) bring a VRA challenge.

[3] The short ballot (that replaced Electors' names with those of presidential candidates) was not fully adopted by the states until 1980 and was not yet in use in Virginia. Koza, *supra*, at 87.

of votes" and that "[t]his in a sense is discrimination against the minority voters." *Williams*, 288 F. Supp. at 627, 629. It nevertheless held that such discrimination was not enough to violate the Constitution unless "invidious" and found that requirement unmet. *Id.* at 627. Beyond this single ground for rejecting the challenge, the panel did not address any argument that Virginia's use of WTA deploys a constitutionally infirm structure that discards votes for President (at the second stage) in the same way described in *Gray*'s footnote 12. And, to the degree the panel addressed the dilution of votes for Electors at the first stage of the election, it could not have recognized the constitutional burden created by such dilution, as the Supreme Court would not invalidate such an election *for another five years*. *See White*, 412 U.S. at 769–70.[4]

The Supreme Court summarily affirmed.

C. The Modern WTA System and Plaintiffs' Challenge

Since *Williams*, the unconstitutional problems with WTA have become more evident. The discarding effect at the second stage of the election has, in particular, become more pronounced: Ballots in South Carolina print only the names of the presidential candidates; Electors' names "shall not be printed on the ballot." S.C.

[4] The Supreme Court had acknowledged at the time of *Williams* that electoral systems could not be used to "cancel out the voting strength of . . . political elements of the voting population," *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (finding no Equal Protection Clause violation under the facts before it); the *Williams* court did not cite that decision. *See Williams*, 288 F. Supp. at 627, 629.

Code Ann. § 7-19-70. The appointed Electors are then required to declare who they will vote for, and South Carolina makes it a crime for the elector to vote for someone else. S.C. Code § 7-19-80. What was not obvious at the time of *Williams* is obvious today: South Carolina voters do not simply vote for Electors, but for President in two stages. South Carolina's use of WTA not only dilutes Plaintiffs' votes for Electors, but is designed to ensure their votes are discarded before they can influence the Presidential election in precisely the way the Supreme Court found unconstitutional in *Gray*. *Gray*, 372 U.S. at 381 n.12.

Vote dilution at the first stage of the election—the vote for the Electors themselves—has also been a problem for essentially as long as a vote dilution claim has been recognized by the Supreme Court. Looking just at the last five elections, South Carolina has selected 42 Electors, and *all* were members of the Republican Party, notwithstanding the 3,811,501 million votes (more than 40%) for the Democratic candidate. J.A. 14. And although Plaintiffs' constitutional arguments are not limited to race, the plight of South Carolina's black voters—of particular relevance to the VRA—is especially stark under the state's WTA rules. Black voters make up approximately 27% of South Carolina's voting-age population, J.A. 36, and approximately 95% of South Carolina's black population consistently votes for Democratic candidates, J.A. 37. Even though these black voters alone would have

the voting strength to elect two Electors in every presidential election during that time, South Carolina's WTA rules ensured that they instead elected zero.

As these problems have become more pronounced, voting rights jurisprudence has evolved to respond to them. In the wake of *White v. Regester*, Congress and the Supreme Court went back and forth, clarifying and furthering the concept of vote dilution. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1671-76 (2001) (detailing how Supreme Court decisions, and Congress's 1982 Amendments to the VRA, condemned states' uses of "at-large districting schemes" for multi-member delegations—including post-Reconstruction—to "guarantee[] that even a sizeable minority group will always be outvoted by whites in any state where voting is racially polarized.").

D. Procedural History

On February 21, 2018, Plaintiffs filed their Complaint seeking a declaration that WTA is unconstitutional and must be enjoined. J.A. 12-45. On May 3, 2018, the State moved to dismiss. J.A. 72-74.

On March 8, 2019, the district court granted the State's motion. *See* J.A. 598-610. Addressing the discarding of votes at the second stage of a two-stage election, the court held that *Gray* does not control because "[*Gray*] explicitly noted that 'inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical

inequality.'" J.A. 602. MTD Order at 5. The district court did not address the fact that this language applied only to *Gray*'s first holding that the Georgia system was unconstitutional because the number of unit votes received by each county was not proportional to the county's population—similar to the electoral college's constitutionally sanctioned geographic inequality. The court did not address *Gray*'s *second* holding, relied on by Plaintiffs, that makes clear that the use of WTA at the first step of a two-step election created an independent constitutional problem nowhere sanctioned by the constitution. *See Gray*, 372 U.S. at 381 n.12.

Despite its ultimate ruling, the district court agreed with much of Plaintiffs' position: it affirmed that the presidential election is a two-stage election (for Electors *and* for President) and stated that "Plaintiffs make compelling arguments based on logic and public policy, and even create an enticing legal argument for extending the principles of *Bush v. Gore* and other election law cases to the context of WTA systems for the electoral college." J.A. 607. But the court ultimately determined that it was not "empowered" to rule in Plaintiffs' favor and that it is up "to the Supreme Court to determine whether it wishes to extend *Bush v. Gore*'s reasoning to find that South Carolina's WTA system of apportioning its electoral college votes violates the constitutional rights of South Carolinians to have their vote for president be accorded 'equal weight' and 'equal dignity.'" J.A. 605 - 607.

Next, the district court rejected Plaintiffs' First Amendment claim, holding that Plaintiffs' argument "conflates a diminishing *motivation* to participate with a severe burden on the actual *ability* of people to participate in the voting process. J.A. 608.

Finally, the district court rejected Plaintiffs' claim under Section 2 of the VRA on essentially the same basis as Plaintiffs' Fourteenth Amendment claim. J.A. 609.

On March 18, 2019, Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

Although the Elector Clause provides "extensive power" to the states to "pass laws regulating the selection of electors," that power may not be exercised in a way that violates the rights of the State's citizens under the First and Fourteenth Amendments. *Rhodes*, 393 U.S. at 29; *see also Bush v. Gore*, 531 U.S. 98, 104–05 (2000). Such rights include the right to an equal vote under the Equal Protection Clause, as well as "interwoven strands of liberty protected by the First and Fourteenth Amendments," such as "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Anderson*, 460 U.S. at 30.

In resolving Constitutional challenges to state voting laws, this Court "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed

by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). When the burdens on Plaintiffs' rights are "severe," an electoral rule must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

South Carolina's use of WTA severely burdens Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment, and the State has proffered no counterbalancing state interest of compelling importance.

South Carolina's election for President proceeds in two stages: an election for an electoral delegation (i.e. for Electors), and the casting of that delegation's votes for President. The use of WTA discards and dilutes Plaintiffs' votes at each of these stages.

First, South Carolina's use of WTA discards Plaintiffs' ultimate votes for President by ensuring that those votes are discarded prior to the second stage of the Presidential election. *See Gray*, 372 U.S. at 381 n.12. As in *Gray*, South Carolina uses WTA at the first step of a two-step election to magnify the power of a plurality of voters at the second-step. Just as in *Gray*, the use of WTA at this first step ensures that Plaintiffs' votes, and those of millions of South Carolina's voters who do not

support the plurality's candidate, are "worth nothing [in the ultimate tally] and . . . [are] counted only for the purpose of being discarded." *Gray*, 372 U.S. at 381 n.12.

Second, the use of WTA dilutes Plaintiffs' votes at the first stage—the election of a nine member, state-level delegation of Electors. The Supreme Court has held that states may not use at-large voting schemes for members of a multi-member body to minimize or cancel out the voting strength of minority voters. *White*, 412 U.S. at 769–70 (invalidating such a law for the first time); *Burns*, 384 U.S. at 88 (explaining that such voting principles apply to political as well as racial minorities); *see generally* Gerken, *supra*, at 1673 & n.18. There is no question that South Carolina would be constitutionally prohibited from conducting its elections for its state senate through a WTA, slate election, ensuring one party systematically controlled all 46 of its senate seats—and indeed, it does not do so. WTA in the use of presidential elections is no different.

Third, WTA also burdens Plaintiffs' rights under the First Amendment to a meaningful vote. By ensuring Plaintiffs' votes and associational efforts are predictably irrelevant to the presidential election, WTA discourages Plaintiffs and other South Carolina citizens from voting, impedes their ability to associate for the election of presidential candidates, and effectively penalizes candidates for associating with them during, and after, elections. *See Gill v. Whitford*, 138 S. Ct.

1916, 1938 (2018) (Kagan, J., concurring) (explaining that voting systems can operate to make it difficult for voters to associate for the election of candidates).

Because WTA severely burdens Plaintiffs' rights under the First and Fourteenth Amendments, it must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). South Carolina has proffered no state interest in maintaining WTA, and it cannot do so.

Fourth, regardless of this Court's view of the constitutional violations in this case, Plaintiffs have alleged that South Carolina's WTA system 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); *see also United States v. Charleston Cty., S.C.*, 365 F.3d 341, 347-49 (4th Cir. 2004). South Carolina's WTA rules guarantee that the state's black population is denied "the opportunity to exercise an electoral power that is commensurate with [their] population in the relevant jurisdiction," and WTA therefore violates the VRA. *Hall*, 385 F.3d at 429.

Finally, because Plaintiffs have requested the court to enjoin South Carolina's use of WTA and declare its unconstitutionality, Plaintiffs' claims are redressable. *See, e.g.*, *Gray*, 372 U.S. at 381 (affirming district court's injunction of the county unit system); *McPherson*, 146 U.S. at 24 (holding challenge to electoral allocation law does not present a political question).

ARGUMENT

Standard of Review

This Court reviews *de novo* a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018). The Court accepts all factual allegations as true and draws all reasonable inferences in favor of the Plaintiffs. *Id.*

I. WTA BURDENS PLAINTIFFS' RIGHT TO AN EQUALLY WEIGHTED VOTE BY DISCARDING PLAINTIFFS' VOTES FOR PRESIDENT AT THE FIRST STEP OF A TWO-STEP ELECTION

A. South Carolina's Use of WTA Magnifies the Voting Strength of the Dominant Party in South Carolina by Discarding Plaintiffs' Votes for President

Under Article II of the Constitution, a state may decide in the first instance the manner in which it selects presidential Electors, but the exercise of that choice must be consistent with other constitutional commands. *Bush*, 531 U.S. at 104–05 (citing *McPherson*, 146 U.S. at 35); *Rhodes*, 393 U.S. at 29 (it cannot be "thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws."). Thus, when a state exercises its choice in favor of giving its citizens the right to vote for President, that vote becomes a "fundamental" right entitled to "equal weight" and endowed with "equal dignity" relative to other voters, and it is subject to the protections of the Equal Protection Clause. *Id.* at 104; *see also Rhodes*, 393 U.S. at 29;

Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966). The protections under that Clause include the principle of one person, one vote, which prohibits states from discarding or diluting the votes of certain citizens unless that outcome is required by a specific constitutional provision. *Gray*, 372 U.S. at 380–81; *Bush*, 531 U.S. at 104–05.

South Carolina's election for President proceeds in two stages: an election for Electors, and the casting of votes for President. South Carolina's use of WTA magnifies the influence of a plurality of voters at both steps. As an initial matter, it ensures Plaintiffs have no influence on the ultimate election at issue—the election for President at the second stage—by ensuring minority votes are cast "only for the purpose of being discarded after the first stage." *Gray*, 372 U.S. at 381 n.12. It thus violates the principle of one person, one vote, and it is unconstitutional.

In *Gray*, Plaintiffs challenged the Georgia Democratic Party's practice of using the county unit system to conduct statewide primaries for senator and governor. *Id.* at 370–71, 376. Under that system, each county received a number of units corresponding to the number of representatives it had in Georgia's lower House of Representatives. *Id.* at 370. Each county then conducted its own election, awarding all of its units to the plurality vote-getter through WTA (the first stage), after which the units were tallied at the state level (the second stage). *Id.*

In holding this system unconstitutional, the Court rested its decision on two distinct grounds. First, the Court noted that Georgia allocated units

disproportionately to the population of counties. Thus, the largest county in Georgia received six units, and the smallest two, even though the largest had 300 times as many people. *See id.* at 371.

In disapproving of this first disparity, the Supreme Court addressed the lower court's position that the Electoral College permitted population disparities in how electoral votes are allocated to states, and Georgia should thus be able to do the same. *Id.* at 377. The Court held that, although the Electoral College permitted such disparity, Georgia had no license to do the same, as "[t]he only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President." *Id.* at 380. The Court contrasted the permissible, constitutionally sanctioned weighting of votes in Senatorial and Presidential elections with impermissible weighting of votes in other cases. "If a State, in a statewide election, weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable." *Id.* (citing *Terry v. Adams*, 345 U. S. 461 (1953). Because Georgia's electoral system was not expressly sanctioned by the Constitution, its weighting was impermissible.

The Court then addressed a distinct constitutional problem from the quantity of units allocated to counties: the use of WTA to *award* those units. The Court

acknowledged that Georgia had proposed an amendment that would allocate units more proportionally to population. *See id.* at 381 n.12. Nevertheless, the Court held that, even if "unit votes were allocated strictly in proportion to population, the weighting of votes would continue." *Id.* Because of the *WTA method* through which the counties awarded their units, "if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded." *Id; see also Gordon v. Lance*, 403 U.S. 1, 4 (1971) ("[I]n [*Gray*] we h[e]ld that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population.").

The modern use of WTA in South Carolina's presidential elections is identical. Just as in *Gray*, presidential elections in South Carolina are conducted in two stages. At the first stage, South Carolina's citizens vote for President and South Carolina translates that vote into a number of Electors. At the second stage, South Carolina's Electors serve a ministerial function, casting their votes for the winner of the plurality in the national election for President. *See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017) (recognizing that "Georgia's primary election system [in *Gray*] was . . . similar to the electoral college used to elect our President"). Just as in *Gray*, whether a losing candidate receives 10% or 40% of South Carolina's popular vote, those

votes are "discarded" at the first step using WTA—ensuring that any incremental vote gains by minority voters have no effect at all at the second stage. *Gray*, 372 U.S. at 381 n.12. And just as in *Gray*, the use of WTA, in contrast to the Electoral College itself, is not "sanctioned by the Constitution." *Id.* at 380. Indeed, South Carolina could, consistent with the Electoral clause, adopt a system of allocation that affords minority voters significant say in the presidential election, such as a proportional method of allocation. Its choice to instead discard their votes is not required by the Constitution and is, to the contrary, forbidden by it.

Gray thus makes clear that WTA in South Carolina's elections is not only unconstitutional, its use is even more problematic than it use in the elections in *Gray*. In *Gray*, WTA was used in the context of a primary election, where states have significant leeway and where its effect was not to discriminate against members of minority parties. *See Pub. Integrity All., Inc.*, 836 F.3d at 1026–27 (citing "decades of jurisprudence permitting voting restrictions in primary elections that would be unconstitutional in the general election") (collecting cases). In contrast, Plaintiffs have challenged the use of WTA in the general election, where a 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.

The purpose and effect of WTA in South Carolina's elections also reveals its constitutional infirmity. Plaintiffs need not show invidious purpose to succeed in this challenge: it is enough that WTA "[does] not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to an equal vote. *Bush*, 531 U.S. at 104–05; *see also infra* Part II.B (explaining the elimination of the invidiousness requirement). Nevertheless, the history of WTA—both its origins and recent history—make clear that it was indeed designed to increase the power of the dominant political party in South Carolina and has since been used to subvert minority voters consistently. *See supra* pp. 8–17. Electoral systems cannot be used to "cancel out the voting strength of racial *or political elements* of the voting population." *Burns*, 384 U.S. at 88 (emphasis added) (internal citation omitted). WTA, in purpose and effect, "promis[es] the greatest partisan advantage" to the majority political party in South Carolina and effects a form of discrimination that was not even at issue in *Gray*. Noble E. Cunningham, *History of American Presidential Elections 1878–2001*, 104–05 (2002).

B. The District Court Misunderstood the Holding in *Gray* on Which Plaintiffs Rely

The district court expressly acknowledged that, just like the structure in *Gray*, "[t]here are, in reality, two stages of the presidential election process . . . ." J.A. 606. Notwithstanding this acknowledgment, the court concluded that the constitutional analysis in *Gray* does not apply to the Electoral College. The court arrived at this

conclusion by misapplying *Gray*, relying on language that applied only to the *Gray* Court's first holding, which is unrelated to Plaintiffs' claims, and ignoring the independent *second* holding in footnote 12 on which Plaintiffs base some of their claims.

The district court characterized *Gray* as declaring unconstitutional a system that "diluted the voting power of those in more populated districts," which would be "similar to a policy that would dilute someone's vote based on their gender or race, in clear violation of the Nineteenth and Fourteenth Amendments, respectfully." J.A. 602 (citing *Gray*, 372 U.S. at 379). This summary describes the issue addressed by *Gray*'s first holding. Georgia had argued that the state's voting system was constitutional by analogy to the Electoral College—the state gave rural counties more voting weight just like the Electoral College gives more weight to the votes of small states by constitutional design (*i.e.*, giving each state two votes regardless of population). *Gray*, 372 U.S. at 376–78. In this context, the Court rejected Georgia's argument on the basis that "inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality . . . ." *Id.*

Although the district court considered this language dispositive with respect to Plaintiffs' reliance on *Gray*, J.A. 602, it has nothing to do with Plaintiffs' arguments. Giving citizens in some parts of a state more voting power than citizens in a different part of the state is a constitutional problem that would exist in a state-wide election

regardless of whether the state held a one- or two-stage election. It is also a constitutionally mandated feature of the Electoral College system, and Plaintiffs do not challenge the "numerical inequality" between the voting power of small and large states.

Plaintiffs rely on *Gray*'s second, and *independent* holding, which the trial court ignored: that "even if unit votes were allocated strictly in proportion to population" in Georgia, the "weighting of votes would continue" because of the use of WTA. *Gray*, 372 U.S. at 381 n.12; *see also Gordon*, 403 U.S. at 4 (making clear this was indeed a holding of independent force); *see also* Douglas Kriner & Andrew Reeves, The Particularist President: Executive Branch Politics & Political Inequality, 39–40 (2015). Unlike the numerical allocation of electoral votes to states, WTA is *not* sanctioned by the Constitution. *Gray*, 372 U.S. at 380 ("The *only* weighting of votes sanctioned by the Constitution concerns matters of representation, such as . . . the use of the electoral college in the choice of a President.") (emphasis added).) Because WTA in South Carolina's presidential elections results in the unequal "weighting of votes," *id.* at 381 n.12, and because it is not "sanctioned by the Constitution," *Gray* makes clear that it violates the Equal Protection Clause.

C. *Williams* Never Addressed Plaintiffs' Argument and Cannot Foreclose It

Finally, the district court erroneously relied on *Williams* to dismiss Plaintiffs' first Equal Protection Clause argument based on *Gray*. *Williams* did not address that argument and does not control.

As the district court acknowledged, summary orders control *only* those arguments that they specifically resolve. J.A. 603-04. Courts considering applying summary affirmances must analyze the factual and legal issues presented to determine if they are identical. *Mandel v. Bradley*, 432 U.S. 173, 176–77 (1977) (explaining that the "precedential significance of the summary action" must be "assessed in the light of all the facts in that case"). "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." *Id*. And "inferior federal courts" should not "adhere" to summary affirmances if subsequent doctrinal developments undermine their result. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975).

The *Williams* plaintiffs did not raise and the district court did not address the argument made here that WTA discards votes at the first step in a two-step election *for President*—as opposed to merely at the first stage. *See* J.A. 132-57; *see generally Williams*, 288 F. Supp. at 623. Indeed, in several places, the *Williams* panel explicitly analyzed that election as one for a slate of electors—i.e. a one-step election for a state-level body. *See, e.g.*, *id.* at 623, 627. Moreover, even if *Williams* had addressed this *framework*, there is no question that the decision does not cite, much less distinguish *Gray*'s second holding in footnote 12. *See generally Williams*, 288 F. Supp. 623. *Williams* cannot have resolved arguments it never addressed.

The district court concluded that *Williams* addressed and resolved Plaintiffs" argument based on an incorrect framing of Plaintiffs' argument. The district court understood Plaintiffs' argument as being rooted in factual distinctions between *Williams* and this case: that Virginians did in fact cast their votes for Electors (while South Carolina no longer puts the names of Electors on the ballot) and that Electors were not bound to vote for presidential candidates (while South Carolina requires that they do so). *See* J.A. 138, 604-05. The court rejected these factual distinctions as "irrelevant." J.A. 604. Although Plaintiffs indeed noted these distinctions, Plaintiffs' argument did not depend on them: *Williams* does not control because it did not understand presidential elections as two-stage elections, reckon with the discarding of votes at the second stage, or address *Gray*'s second holding and its implications for such a burden. These factual distinctions help explain why the plaintiffs in *Williams* would not have put forth the first argument Plaintiffs make here and why the *Williams* court would not address it.[5] But the point is simpler: In light of the narrow deference afforded a summary order,

[5] They are, further, not meaningless distinctions. For instance, the shift to the short ballot was significant: voters sometimes elected Electors from different parties in their states prior to its adoption. *See* Koza, *supra*, at 85–86.

Williams should not prevent this Court from addressing an argument *Williams* itself did not, and had no occasion to, resolve.[6]

II. SOUTH CAROLINA'S USE OF WTA VIOLATES THE FOURTEENTH AMENDMENT BY DILUTING PLAINTIFF'S VOTES FOR ELECTORS

WTA not only burden Plaintiffs voting rights at the second stage of the Presidential election—when Electors perform the ministerial function of translating the popular vote into presidential votes. It also independently burdens Plaintiffs' Fourteenth Amendment rights at the first stage of the election by canceling out their votes for Electors through an at-large, slate election that systematically ensures zero representation in South Carolina's Electoral College delegation. *See White*, 412 U.S. at 769.

A. The Use of WTA at the First Stage of the Presidential Election to Elect a Multi-Member, State-Level Delegation of Electors Unconstitutionally Dilutes Plaintiffs' Votes

As the district court recognized, South Carolina voters ultimately vote for the President in two stages—they do not simply vote for Electors. Nevertheless, at the first stage, South Carolina's voters elect a nine-person, multi-member state-level body. The Supreme Court, in the years since *Williams*, has made unambiguously

[6] Independently, *Williams* has also been abrogated by subsequent developments in the case-law. *See infra* Part II.B. But the Court need not so hold to find *Williams* does not control Plaintiffs' primary argument: it is enough to note that *Williams* never addressed that argument and cannot control it. Further, Plaintiffs reserve their right to argue *Williams* was wrongly decided and should be overturned.

clear that states may not use at-large, slate elections to systematically ensure all representatives are awarded to a single party. *See White*, 412 U.S. at 769–70; *see also Burns*, 384 U.S. at 88 (making clear that these principles apply to political minorities); Gerken, *supra*, at 1671-74. WTA thus "cancel[s] out the voting strength" of minority voters at this first stage in order to consolidate power in the hands of the plurality. *White*, 412 U.S. at 769–70.

To illustrate the point, suppose South Carolina decided to abolish its forty-six single-member state senate districts and instead to hold a statewide election for all of its senators using a single-slate, at-large WTA election to do so. The results of that one-step WTA contest would unavoidably be single-party rule and a flat denial of any political minority representation in a state-level body. Such a law would be unconstitutional. The use of WTA in allocating South Carolina's presidential Electors is no different: In the first step of the presidential election, South Carolinians participate in a statewide, at-large election for a nine-member body of Electors, and WTA ensures single-party control over all nine seats.

The Supreme Court has long held that the "right to vote can be affected by a dilution of voting power" through either the adoption of at-large voting schemes or "by an absolute prohibition on casting a ballot." *Allen v. Bd. of Elections*, 393 U.S. 544, 569 (1969). In particular, "apportionment schemes including multi-member districts" are constitutionally invalid "if it can be shown that 'designedly or

otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Burns*, 384 U.S. at 88 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

In *White v. Regester*, the Supreme Court applied this principle to invalidate, for the first time, a multi-member districting scheme. The Court held that because Mexican-Americans in one Texas county were "effectively removed from the political processes" when their votes were submerged into an at-large pool with a majority that was likely to multiply its voting power, the voting system in place violated their right to an equally weighted vote. *White*, 412 U.S. at 769. Although *White* involved a racial minority, the Court has long held that "encouraging block voting, multi-member districts" may "diminish the opportunity of a minority party to win seats"—an effect no more permissible than doing so on the basis of race. *Burns*, 384 US at 88 n.14; *see also Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (noting that "political elements" are a protected class in this context).

South Carolina's use of WTA is in all relevant respects indistinguishable from the system condemned in *White*. In the last five elections, South Carolina has selected 42 Electors, and *all* were members of the Republican Party, notwithstanding the 3,811,501 million votes (more than 40%) for the Democratic candidate. J.A. 14, 24-25.

Although Plaintiffs' arguments are not limited to race, the plight of South Carolina's black voters is especially stark under the state's WTA rules. Black voters make up approximately 27% of South Carolina's voting-age population, J.A. 36, and approximately 95% of South Carolina's black population consistently votes for Democratic presidential candidates, J.A. 37. This means that, since South Carolina elects nine Presidential electors through a statewide election, South Carolina's black 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, J.A.24-25, and the white-preferred Republican candidate has had a monopoly on the state's 82 electors during that time.

Cancelling millions of Democratic and third-party votes—and almost totally silencing South Carolina's entire black population in Presidential elections—with the goal of maximizing the influence of Republican Electors meets any reasonable definition of vote dilution sufficient to trigger constitutional scrutiny.

B. *Williams* Is Not Controlling as to Plaintiffs' Dilution Claim Because of Subsequent Developments in the Law

Williams also does not control Plaintiffs' second argument, predicated on *White* and subsequent authority. It is true that the *Williams* Plaintiffs identified a burden at this first stage—*i.e.* that WTA canceled out votes for Electors—and that the *Williams* court thus acknowledged and analyzed this burden. Yet it did not, and could not, fully address the argument that WTA cancels out votes in such an election through an at-large, slate election, because it lacked the case-law to do so. Key doctrinal shifts in dilution law since *Williams* have undermined its holding, and this Court need not "adhere to" it. *See Hicks*, 422 U.S. at 344.[7]

The *Williams* court acknowledged the problems with WTA, framed only as an election for a slate of Electors. *See Williams*, 288 F. Supp. at 627, 629. At the time, however, it lacked the case-law to provide those problems with a constitutional dimension. The Supreme Court had not yet invalidated a voting system for diluting votes in an election for a multi-member body. It was not until *White*, which post-dated *Williams*, that courts gave teeth to the principle that at-large elections can

[7] Lower courts have not followed summary affirmances in the face of important doctrinal shifts. In *Bostic*, for instance, this Court refused to follow the Supreme Court's summary dismissal of *Baker v. Nelson*, 409 U.S. 810 (1971) (dismissing an appeal from the Minnesota Supreme Court for want of a substantial federal question) after doctrinal developments showed that the Supreme Court no longer viewed challenges to same sex marriage statutes as unsubstantial. *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (citing *Hicks*, 422 U.S. at 344). And the Supreme Court itself illustrated this principle in *Gray*. *See supra* Part I.C.

violate the Fourteenth Amendment if they operate to dilute the influence of political minorities. *See* Gerken, *supra*, at 1673.

Since the Supreme Court's 1973 ruling in *White*, courts have further developed the law around multi-member districts, frequently determining that multi-member, at-large election schemes are unconstitutional or violate the VRA because they dilute minority voting strength. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (quoting *Burns*, 384 U.S. at 88)); *United States v. Blaine Cty.*, 363 F.3d 897, 916 (9th Cir. 2004); *NAACP v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 983 (11th Cir. 1982); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1414 (E.D. Wash. 2014); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1135 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987).

Williams was also the product of its time for a second reason. As *Williams* noted, Congress had "expressly countenanced" state-wide, at-large elections for congressional representatives. *Williams*, 288 F. Supp. at 628. But in the years since *Williams*, Congress has repeatedly revised the VRA, including in 1982, specifically to ensure that states cannot use multi-member districts to dilute racial voting strength, *see* Gerken, *supra*, at 1671-76, a trend consistent with revisions that had just gone into effect at the time of *Williams* that outlawed such at-large delegations,

see 2 U.S.C. § 2c. 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." Richard Pildes & Kristen Donaghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal Forum 241, 251–52 n.43 (1995). This aspect of the *Williams* decision has thus been overcome by subsequent developments in the law, which have flipped Congressional approval into express prohibition.

Finally, as the district court implicitly recognized, the *Williams* court's reliance on the invidiousness as a prerequisite for an equal protection violation has also been overcome by doctrinal developments. *Williams* held that the discrimination that resulted from Virginia's WTA system was constitutional "unless [it was] invidious," a legal test that was not disputed by the plaintiffs. 288 F. Supp. at 627. In the years since, the Supreme Court has clarified that, although invidiousness may be relevant to certain challenges, such as in certain gerrymandering cases, there are electoral systems that are sufficiently arbitrary in their treatment of voters that no showing of invidiousness is required. The Court in *Bush v. Gore* found a violation of one person, one vote, yet it never discussed whether the discrimination in voting it found was "invidious." 531 U.S. at 104–05. Rather, the Court held that under the Equal Protection Clause, "the State may not,

by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.*[8]

Since *Bush*, lower courts have recognized that invidiousness is not required where voting systems result in arbitrary and disparate treatment. *See, e.g.*, *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (rejecting that an election-related violation of the Equal Protection Clause always requires intentional discrimination); *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 835 (S.D. Ohio 2012) ("Plaintiffs must show only that the Board's actions resulted in the arbitrary and disparate treatment of the members of the electorate."); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) ("Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional."). The Court's observation in *Bush* that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government" applies squarely to this case, but it was not available to the *Williams* court. *See Bush*, 531 U.S. at 107 (internal quotation marks omitted).

[8] "Invidious discrimination" at the time of *Williams* entailed some level of "intentional" or "purposeful" discrimination, *see Washington v. Davis*, 426 U.S. 229, 242 (1974) ("[A]n invidious discriminatory *purpose* may often be inferred from the totality of the relevant facts . . . ."), and is inconsistent with *Bush*'s holding.

Although the district court appears to have considered *Williams* dispositive—and emphasized language in the opinion applying an invidiousness standard—the court acknowledged that "the Supreme Court has further developed the [one person, one vote] principle" since 1968. J.A. 605. The court further acknowledged that *Bush v. Gore*, which did not apply an invidiousness standard, found Florida's recount procedures "unconstitutional because the recounting process was arbitrary and resulted in disparate treatment of voters" and did not accord "equal weight" or "equal dignity" to all voters. J.A. 606 (citing 531 S. Ct. at 529). The district court even acknowledged that "Plaintiffs make compelling arguments based on logic and public policy, and even create an enticing legal argument for extending the principles of *Bush v. Gore* and other election law cases to the context of WTA systems for the electoral college." J.A. 606. But the district court ultimately concluded that it is up "to the Supreme Court to determine whether it wishes to extend *Bush v. Gore*'s reasoning to find that South Carolina's WTA system of apportioning its electoral college votes violates the constitutional rights of South Carolinians to have their vote for president be accorded 'equal weight' and 'equal dignity.'" J.A. 607.

The district court incorrectly followed *Williams* instead of more recent authority. The *Williams* decision acknowledged "discrimination against the minority voters," but it rejected plaintiffs' challenge because "in a democratic society the majority must rule, *unless the discrimination is invidious*." 288 F. Supp.

at 627 (emphasis added). The plaintiffs in *Williams* did not question that invidiousness was a requirement. *See* J.A. 149-50, 57. Because invidiousness is not a requirement of *the present challenge*, *Williams* cannot have resolved Plaintiffs' challenge based on a legal standard that no longer controls.

III. WTA BURDENS PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS BY GUARANTEEING THAT MINORITY VOTERS HAVE NO ABILITY TO PARTICIPATE IN THE SECOND STAGE OF THE PRESIDENTIAL ELECTION

In addition to severely burdening Plaintiffs' rights under the Equal Protection Clause, WTA burdens Plaintiffs' First Amendment rights regarding their participation in elections, the electoral process, and the political process. These significant burdens on Plaintiffs' constitutional rights subject WTA to heightened scrutiny and independently makes clear that WTA must be enjoined. *See Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990) (recognizing that heightened scrutiny applies when more than one constitutional claim is at issue (termed a "hybrid" claim)).[9] By ensuring that Plaintiffs' votes and any associational efforts can have no effect on the presidential election, WTA curtails their First Amendment rights to vote, associate, and petition. These burdens are "especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies," *McCutcheon v. Fed. Election*

[9] *Williams* does not control this claim. *See Williams*, 288 F. Supp. 627 (nowhere addresses any First Amendment argument).

Comm'n, 572 U.S. 185, 205 (2014), such as individuals who lack the wealth to participate in national politics not through exercise of democratic rights, but through their pocketbooks.

By guaranteeing that voters who support minority candidates have no ability to impact either stage of the presidential election, WTA burdens Plaintiffs' right "to cast their votes effectively." *Rhodes*, 393 U.S. at 30–31 ("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); J.A. 16-17, 28-30. WTA also burdens Plaintiffs' ability to associate with like-minded voters—all of whom know that any such association, fundraising, or activities would be functionally useless. *See Gill*, 138 S. Ct. at 1938 (Kagan, J. concurring).

The district court recognized that, because of WTA, Plaintiffs' have alleged there is a decreased "likelihood [they] will engage in political activity, as it appears useless," but held that "[t]his argument conflates a diminishing motivation to participate with a severe burden on the actual ability of people to participate in the voting process." J.A. 607-608. Yet the district court misunderstood the nature of the First Amendment claim and the true contours of voting and associational rights.

The First Amendment recognizes that structural limitations may affect the *incentives* of voters to vote and associate, and that such incentives are constitutionally relevant. *See Rhodes*, 393 U.S. at 41 (Harlan, J., concurring) (by denying a person "any opportunity to participate in the procedure by which the President is selected, the State … eliminate[s] the basic incentive that all political parties have for [assembling, discussing public issues, or soliciting new members], thereby depriving [them] of much of the substance, if not the form, of their protected rights."); *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (explaining that, in the context of partisan gerrymandering, "[m]embers of the 'disfavored party' in the State deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office. . .."). So it is here.

The district court also dismissed Plaintiffs' First Amendment argument by suggesting Plaintiffs' authority relates only to "internal state elections for state representatives for either state or national legislative bodies." J.A. 608. In fact, the Supreme Court in *Williams v Rhodes* explicitly rejected Ohio's argument that "it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution . . . ." 393 U.S. at 28–29. In rejecting this argument, the Court held that, even when it comes to the selection of electors, the state's "granted powers are always subject to the limitation that they

may not be exercised in a way that violates other specific provisions of the Constitution. . . . Obviously we must reject the notion that art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Id.* at 29. The Supreme Court has never held, as the district court suggests, that the protections of the Constitution apply only to purely internal elections. They apply here, to both stages of South Carolina's presidential election.

WTA is unconstitutional for the independent reason that it violates Plaintiffs' First Amendment rights.

IV. SOUTH CAROLINA HAS NO LEGITIMATE STATE INTEREST IN MAINTAINING THE WTA METHOD

Because WTA places severe burdens on Plaintiffs' rights, South Carolina can justify it only by showing WTA is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). Yet South Carolina has made no attempt to proffer any state interest to justify WTA. Nor could it. The *reason* South Carolina—and countless other states—adopted WTA was to maximize the power of the dominant political party in the state, and WTA has operated in that fashion in South Carolina since WTA's inception. Maximizing the voting influence of a block of voters by discarding the votes of minority voters is not a *legitimate* state interest: it is the very infirmity that renders WTA unconstitutional. *See Cal. Dem. Party v. Jones*, 530 U.S. 567, 582 (2000);

Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the First Amendment* . . . ." (emphasis added)), *superseded by statute on other grounds as stated in McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 (2003).

V. SOUTH CAROLINA'S WTA RULES VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT

The trial court expressly declined to apply binding authority from both the Supreme Court and this Court interpreting the VRA, holding that Plaintiffs' claims should be dismissed "[r]egardless of whether plaintiffs can meet [the] three" *Gingles* preconditions for bringing a VRA claim to trial. J.A. 609. The trial court's decision to take this approach was based on the same misunderstanding of *Gray* as its Fourteenth Amendment analysis—that courts cannot "consider the constitutionality of a state's WTA electoral college system using the same legal tools and concepts of constitutional fairness that the courts have relied on in assessing state-level voting procedures." *Id.* As explained above, the broad bar on any challenge to a state's Electoral College rules articulated by the district court misinterprets *Gray*, even read in isolation. *See* Section I, *supra*.

In addition to misinterpreting *Gray*, the district court ignored the holding in the later-decided *Rhodes* case that a state's rules governing the Electoral College "are always subject to the limitation that they may not be exercised in a way that

violates other specific provisions of the Constitution." 393 U.S. at 29. The *Rhodes* Court specifically held that "the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in *presidential elections*." *Rhodes*, 393 U.S. at 29 (emphasis added). In turn, the VRA—enacted three years before *Rhodes* was decided—was enacted precisely "[t]o enforce the fifteenth amendment to the Constitution of the United States." *Chisom v. Roemer*, 501 U.S. 380, 383 (1991). Below, defendants did not even dispute that the WTA rules adopted by South Carolina to govern the second stage of the Presidential election are constrained by the VRA. J.A. 90-91. They instead brought a merits argument that the district court did not address.

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*, 857 F. Supp. 2d at 565 (quoting 42 U.S.C. § 1973(a)) (emphasis added; alteration omitted). "[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

black voters 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*, 385 F.3d at 429. 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 *Gingles* preconditions. *See* 478 U.S. 30, 48-51 (1986); s*ee also* J.A. 36-41. In short, Plaintiffs allege that black voters make up approximately 27% of South Carolina's voting-age population, J.A. 36, and approximately 95% of South Carolina's black population consistently votes for Democratic candidates, J.A. 37. This means that, since South Carolina appoints nine Presidential electors through a statewide election, South Carolina's black 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, J.A. 24-25, and the white-preferred Republican candidate has had a monopoly on the state's 82 electors during that time.

Although the district court did not address the merits arguments made by Defendants,[10] the court asserted with no citations or analysis that "many white South Carolinians voted for Democratic candidates in the past, demonstrating that the white majority has not voted 'sufficiently as a bloc . . . to defeat the minority's preferred candidate." J.A. 38. That conclusion ignores both the well-pled allegations in Plaintiffs' complaint and at least the past four decades of history. The last black-supported candidate to receive *any* of South Carolina's electoral votes in the second stage of the election was Jimmy Carter in 1976. Since then, no minority-supported candidate has received as much as 45% of the overall vote in the state (Barak Obama in 2008), and results like the 14% gap between the candidates in the 2016 election—with more than 95% of the black population supporting the losing candidate—have become the norm. The fact that enough white voters supported a minority-preferred

[10] Below, Defendants did not dispute that Plaintiffs'' allegations satisfied all three *Gingles* preconditions. J.A. 90-91. Instead, Defendants argued that "Plaintiffs' Complaint is premised not on racial discrimination but on . . . their stated preference for voting for Democratic candidates." J.A. 91. This argument is foreclosed by this Court's opinion in *United Sates v. Charleston City, S.C. See* 365 F.3d at 347-48 ("[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."); *see also* J.A. 129.

candidate to elect him four decades ago has little relevance to the application of the *Gingles* factors today.[11] And it is small comfort to the millions of black South Carolina citizens who have had their voices silenced in the critical second stage of the election for generations—in many cases for their entire lives.

In short, Plaintiffs' claims are governed by the same body of law as any other challenge to the state's procedures for running the Presidential election, and Plaintiffs have met the *Gingles* preconditions to a mathematical certainty. 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." *Charleston City*, 365 F.3d at 348 (citations omitted). "It is this inclusive examination of the totality of the circumstances that is tailor-made for considering why voting patterns differ along racial lines." *Id.*

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—

[11] If all of history is fair game, the fact that Strom Thurmond received nearly 72% of South Carolina's vote and all eight of its Electors in 1948 illustrates that whites have served as a voting block that has been sufficiently strong to elect a candidate who ran as a third party on a segregationist platform.

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."). The dismissal of Plaintiffs' VRA claim should be reversed, and the claim should be remanded for a trial on the merits.

VI. PLAINTIFFS' CLAIM IS REDRESSABLE

Finally, the district court, having rejected Plaintiffs' claim on the merits, suggested that Plaintiffs' claim is unredressable because invalidating the WTA system to "'establish a proportionate one . . . is not something this court is empowered to do.'" J.A. 605 (citation omitted). But in their Complaint, Plaintiffs ask that the Court declare WTA in South Carolina unconstitutional, and *enjoin its use*, J.A. 43-44, and there is no question that such an injunction is within the power of the Court to grant, *see, e.g.*, *Gray*, 372 U.S. at 381 (affirming district court's injunction of the county unit system); *McPherson*, 146 U.S. at 24 (challenge to electoral allocation law does not present a political question). Because the Court indeed can redress the unconstitutional use of WTA by granting Plaintiffs at least one form of relief they seek, the case poses no redressability problem. *See Larson v.*

Valente, 456 U.S. 228, 243 n. 15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").[12]

CONCLUSION

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

Dated: June 5, 2019

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[12] Plaintiffs do request the judiciary impose a proportional remedy if the State fails to conform to a constitutional method. J.A. 44; Fed. R. Civ. P. 8 (permitting a party to request alternative forms of relief). But whether or not the court may impose such a remedy—or may simply exercise its power to enjoin any unconstitutional method—is irrelevant to redressability, which is satisfied here.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 5, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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