

**CASE NO. 19-1297****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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

*Plaintiffs and 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 State of the State of South Carolina; the 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, in her official capacity as a 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 and Appellees.*

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On Appeal from the United States District Court  
For The District Of South Carolina At Charleston

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**PLAINTIFFS-APPELLANTS' RESPONSE TO MOTION TO DISMISS**

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## INTRODUCTION

South Carolina's Governor (the "State") devotes the majority of its motion to dismiss to an argument that requires "very little discussion." *Williams v. Rhodes*, 393 U.S. 23, 28 (1968). Specifically, the State argues that Plaintiffs' challenge to South Carolina's winner-take-all rules ("WTA") rules for distributing electoral college votes in the national presidential election presents a political question, and this Court therefore lacks subject matter jurisdiction. That political question argument "has been rejected in cases of this kind numerous times. It was rejected by the Court unanimously in 1892 in the case of *McPherson v. Blacker*, 146 U.S. 1, 23-24," and it has been rejected many times since. *Rhodes*, 393 U.S. at 28 (collecting cases). The State does not even mention the 127 years of unbroken authority that controls its present jurisdictional challenge. It never once cites *Rhodes*, and it cites *McPherson* only in passing.

Instead, the State focuses on the Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). *Rucho* did not silently overrule more than a century of settled precedent. Rather, *Rucho* addressed partisan gerrymandering claims in which plaintiffs ask courts to determine whether a series of single-member districts—neutral and constitutional on their face—are suspect because of the distribution of partisan power. *Id.* at 2503. Unlike challenges to a state's electoral college rules, the Supreme Court did not have a long history of finding political

gerrymandering claims justiciable. Rather, the Supreme Court’s “partisan gerrymandering cases . . . ‘[left] unresolved whether such claims may be brought.’” *Id.* at 2494 (citation omitted). In contrast, this case raises merits “questions ‘historically viewed as capable of resolution through the judicial process.’” *Id.* (citation omitted). Specifically, Plaintiffs challenge multi-member, at-large elections—which, unlike the single-member districting plans at issue in *Rucho* “generally pose greater threats to minority-voter participation in the political process” and are easier to analyze. *Grove v. Emison*, 507 U.S. 25, 40 (1993); *see also Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (A “distinct minority” subject to vote dilution by multi-member district may be “racial, ethnic, economic, or political . . . ”); *Rucho*, 139 S.Ct. at 2495-96 (acknowledging in the congressional context that “[i]n two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts”).

Plaintiffs also bring a claim under the Voting Rights Act—a statutory claim that *Rucho* does not address. Congress has given courts jurisdiction to resolve VRA claims, and Plaintiffs’ claims invoke well-established legal standards articulated by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986)). Applying these traditional standards, Plaintiffs have shown that 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 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). South Carolina denies them this opportunity, thus violating the VRA.

The State also previews its merits arguments and raises a hodgepodge of inapplicable standing arguments that it failed to address below. This is not a case in which a plaintiff in one district is arguing that a voter in a different district has been harmed by gerrymandering. Plaintiffs each cast their vote in a statewide election for nine Electors, and Plaintiffs were all harmed by having their votes discarded and voices silenced before the second stage of the election by South Carolina’s WTA rules. Indeed, Plaintiffs’ standing is just as well-established as in the cases they cite—including *Rogers*, *Thornbug*, and *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963). Plaintiffs allege that their votes have been diluted on based on political and racial characteristics. If that is correct on the merits, Plaintiffs have standing. Defendants, for their part, are responsible for implementing South Carolina’s unconstitutional WTA rules, and they can be enjoined from doing so.

The State’s motion to dismiss should be denied.

### **ARGUMENT**

The State’s arguments can be split into two categories. First, the State argues that this case presents a political question under *Rucho*. Second, the State argues that “Plaintiffs lack the requisite Article III standing to maintain the present challenge.”

MTD at 4. The State's Article III standing arguments raise a variety of issues that have little to do with *Rucho* and could have been raised in the trial court. As set out below, these arguments all fail. First, though, one thing should be made clear: This is not a political gerrymandering case.

Instead, this case involves a statewide, at-large election for nine Electors during the first stage of a two-stage election for President. Under South Carolina's WTA rules, the winner of a plurality of the vote in the first stage of the election receives all the Electors and 100% of the representation in the second stage. Plaintiffs and others who vote for minority candidates receive 0% of the representation in the second stage. Here, there are no districts to gerrymander, and there are no close lines to draw about how much gerrymandering across districts is too much.

Plaintiffs challenge the WTA system itself under well-established vote dilution precedents. WTA rules guarantee in every presidential election—and in every state in which they are employed<sup>1</sup>—that minority voters can have no impact whatsoever on the presidential election. Partisan gerrymandering cases, in contrast,

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<sup>1</sup> The State correctly observes that this case is part of a broader challenge to WTA in several states. The State is wrong, however, that the challenges are the result of some partisan political preference. Similar challenges have been brought in traditionally Republican states (South Carolina and Texas) and in traditionally Democratic states (California and Massachusetts).

do not challenge the structure of the system itself but rather what is fair within an otherwise fully permissible (and indeed, for congressional elections, ideal) system—a set of single-member districts.

South Carolina's WTA system is specifically designed to guarantee the total disenfranchisement of the state's minority voters (here, racial and political). This system is unconstitutional for two reasons. First, it dilutes Plaintiffs' votes for the Electors themselves, using an at-large election for nine Electors to ensure minority voters never have any representation in that delegation. Second, it discards Plaintiffs' votes for President after the first stage of a two-stage election, ensuring that only Electors selected by the plurality can ever impact the presidential vote. As Plaintiffs set out in their Opening Brief, these are "one-person, one-vote" issues under established Supreme Court vote dilution precedent. Plaintiffs also mathematically demonstrate that South Carolina's WTA rules almost totally silence the state's black population in presidential elections and violate the VRA.

These are merits issues. But they provide important context with respect to the jurisdictional issues that the State raises. The State plucks quotes from *Rucho* that interpret a different constitutional provision, arise from a different historical context, and address challenges to a fundamentally different electoral system. "But the history is not irrelevant." *Rucho*, 139 S. Ct. at 2496. As set out below, a long history of Supreme Court precedent holds that challenges to a state's electoral

college rules like Plaintiffs' challenge do not present political questions, and Plaintiffs have Article III standing to bring their claims.

**I. THIS CASE DOES NOT PRESENT A POLITICAL QUESTION**

**A. The Supreme Court Has Repeatedly Held That Challenges to a State's Process for Selecting Electors Are Justiciable.**

The State, primarily citing its purportedly plenary power under the Elector Clause, argues Plaintiffs' challenge to the State's method of selecting electors is non-justiciable. In so arguing, the State ignores over a century of Supreme Court precedent holding such challenges justiciable and rejecting the state's precise argument here.

First, in 1892, the plaintiffs in *McPherson v. Blacker* challenged Michigan's rules for apportioning presidential electors as "void because in conflict with (1) clause 2, § 1, art. 2, of the constitution of the United States; [and] (2) the fourteenth and fifteenth amendments to the constitution . . . ." 146 U.S. 1, 24 (1892). The plaintiffs were Republican Electors, challenging Michigan's newly-passed district-based apportionment system (which would ultimately provide several Electors to the minority party in Michigan). See *John R. Koza et. al, Every Vote Equal* 84 (2013) (describing the case). Michigan raised the same political question argument that the State makes here, and the Court rejected it:

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 has no power



finally to dispose of them; and that its decision [*sic*] 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.

*McPherson*, 146 U.S. at 23-24.

*McPherson* issued this holding even as it acknowledged the State's purportedly "plenary power . . . in the matter of the apportionment of electors." *Id.* at 35. While the *McPherson* court acknowledged that the State had broad authority under the Elector Clause, it not only rejected the argument that this power rendered the plaintiffs' challenge non-justiciable, but it also affirmed that the Fourteenth Amendment restricted the state's authority. *Id.* at 40 (if Electors "are elected in districts *where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made*") (emphasis added).

Since *McPherson*, the Supreme Court and lower courts have routinely entertained—and sometimes sustained—challenges to state laws governing the selection of presidential electors, including challenges brought by political minorities. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court addressed a constitutional challenge to ballot access rules for the election of presidential Electors in Ohio brought by political minorities. As here, the state argued that "it ha[d] 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.” *Id.* at 28-29. The Court disagreed, enjoined the law, and affirmed that the state’s power over matters relating to Electors is not unlimited:

[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. . . . [I]t [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. . . . Obviously we must reject the notion that Art. II, s 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment’s command that ‘No State shall \* \* \* deny to any person \* \* \* the equal protection of the laws.’

*Id.* at 28-29.

Before reaching this merits determination, the Court also rejected the same political question argument that the State makes here as requiring “very little discussion” in a single paragraph. *Id.* at 28. “That claim has been rejected in cases of this kind numerous times. It was rejected by the Court unanimously in 1892 in the case of *McPherson* . . . and more recently it has been squarely rejected in *Baker v. Carr*, 369 U.S. 186, 208-237, 82 S.Ct. 691, 705-721, 7 L.Ed.2d 663 (1962), and in *Wesberry v. Sanders*, 376 U.S. 1, 5-7, 84 S.Ct. 526, 528-530, 11 L.Ed.2d 481 (1964).” *Id.* “These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena.” *Id.*

More recently, in *Bush v. Gore*, 531 U.S. 98 (2000), which the State cites as demonstrating its plenary power over the selection of Electors, the Supreme Court sustained a challenge to the process for counting ballots for electors and emphasized that the State’s exercise of its power under the Elector Clause is subject to challenge under the Equal Protection Clause: “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Id.* at 104 (discussing and applying *McPherson*).

The State does not so much as acknowledge *McPherson*’s holding that a case analogous to this one—a structural, constitutional challenge to a state’s chosen method of apportioning electors—does not present a political question. Nor does the State acknowledge the century-plus of unbroken authority interpreting and applying *McPherson* to reach the merits of challenges to state laws governing presidential elections. The Supreme Court has uniformly rejected the arguments both that a challenge like Plaintiffs’ presents a political question and that a state’s “plenary” power to appoint electors under the Elector Clause itself is not subject to restraints under *other* provisions of the Constitution, including the Equal Protection Clause and the First Amendment, as well as the Voting Rights Act.

The unbroken line of cases holds that Plaintiffs' challenge is justiciable, and, further, on the merits, that the State's process for the selection of electors must comport with the demands of the Equal Protection Clause, First Amendment, and Voting Rights Act. These holdings are not only controlling, but also vital. Were the State correct that challenges such as Plaintiffs' aren't justiciable, a state could adopt whatever restrictions it wanted regarding the appointment of electors, and there would be no mechanism to enforce the more specific constitutional and statutory restrictions that the Supreme Court has repeatedly held apply.

**B. *Rucho* Does Not Command A Different Result**

Instead of addressing over a century of precedent holding Plaintiffs' claims justiciable, the State cites *Rucho*, a recent Supreme Court decision holding that partisan gerrymandering claims are not justiciable. *Rucho* does not overturn *McPherson*, *Rhodes*, or *Bush*, and its central holding that no legal standards exist to resolve partisan gerrymandering claims does not apply to Plaintiffs' claims.

First, *Rucho* did not overturn the above decisions holding Plaintiffs' claims are justiciable. It does not once cite *McPherson*, *Rhodes*, or *Bush*, and it does not substantively address the long history of the Court resolving challenges to various aspects of state laws governing presidential elections—including challenges to laws dealing with the method for apportioning electors, like *McPherson* itself. See generally *Rucho*, 139 S.Ct. 2484.

Second, the logic of *Rucho* does not apply here. *Rucho* held that partisan gerrymandering claims are not justiciable. *Id.* at 2503. The Court had struggled prior to *Rucho*—and failed—to identify meaningful legal standards to make this determination. *See generally id.* Partisan gerrymandering claims are comparatively new, and they have never been successful in the Supreme Court. *See id.* at 2507 (“We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years.”).

In contrast, Plaintiffs’ claims are based in well-established statutory and constitutional precedents, and they rely on vote dilution standards the Supreme Court has repeatedly applied to evaluate “multimember districting plans, as well as at-large plans”—structures that, in contrast to the single-member districts at issue in *Rucho*, “generally pose greater threats to minority-voter participation in the political process than do single-member districts.” *Grove*, 507 U.S. at 40. As an initial matter, the justiciability of Plaintiffs’ statutory challenge to such a structure under the Voting Rights Act is beyond dispute. *Rucho* did not address a Voting Rights Act claim or suggest its holding could affect the jurisdiction of a federal court to exercise power conferred on it by that statute. And it explicitly affirmed that its holding did not affect racial gerrymandering claims. *See* 139 S.Ct. at 2496 (citing *Shaw v. Reno*, 509 U.S. 630, 645 (1993)); *see Shaw*, 509 U.S. at 641 (citing *Thornburg v. Gingles*,

478 U.S. 30 (1986) as an example of such a claim under the Voting Rights Act). The State ignores this clear limitation on *Rucho*.

*Rucho*'s reasoning also does not apply to Plaintiffs' constitutional claims, which rest on well-established constitutional standards. The Court has long affirmed that plaintiffs may challenge multi-member, at-large electoral structures if they have specific, dilutive characteristics, and the Court has articulated standards for such challenges. *See Whitcomb v. Chavis*, 403 U.S. 124, 137, 143 (1971) (articulating a set of factors to identify impermissible vote dilution in multi-member elections); *White v. Regester*, 412 U.S. 755 (1973) (holding such an election unconstitutional and enjoining it); *Rogers v. Lodge*, 458 U.S. 613, 622, 627 (1982) (synthesizing and reiterating the standards for evaluating multi-member districts).

The Court has also analyzed—and enjoined—an election that, like WTA, discarded votes through a two-step election structure. *See Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963). Unlike in partisan gerrymandering claims, the Court has repeatedly affirmed that structural vote dilution claims may be brought on behalf of political minorities. *See, e.g., Rogers*, 458 U.S. at 616 (A “distinct minority” subject to vote dilution by multi-member district may be “racial, ethnic, economic, or political . . .”); *Whitcomb*, 403 U.S. at 143 (“But we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may ‘operate to minimize

or cancel out the voting strength of racial or political elements of the voting population.”); *Burns v. Richardson*, 384 U.S. at 88 n.14 (“encouraging block voting, multi-member districts” may “diminish the opportunity of a minority party to win seats”). These statements are consistent with Supreme Court Equal Protection Clause doctrine, which has repeatedly enjoined electoral systems that discriminated against political minorities, *see, e.g., Rhodes* 393 U.S. at 29 (ballot access claim brought by third parties), and even addressed intra-party vote dilution claims where there wasn’t an identified minority, political or otherwise, *see Gray*, 372 U.S. at 381 n.12 (democratic primary).

These standards are not difficult to manage, and *Rucho* did not suggest otherwise.

**C. The Text of the Elector Clause Affirms This Result**

Finally, the State suggests that the text of the Elector Clause supports its argument, as “[w]hen compared to partisan gerrymandering claims, noticeably absent from Article II, Section 1 is any corollary to Article I, Section 4’s Elections Clause, which vests Congress with a modicum of supervisory authority over the election of its Members.” State MTD at 11-12 n.2 (citing *Rucho*, 139 S. Ct. at 2496). The State misunderstands *Rucho*’s analysis of the Elections Clause, however. *Rucho* held that Congress’s supervisory power under the Elections Clause over states’ congressional districting choices was further evidence the federal courts were *not*

entrusted with enforcing the Equal Protection Clause in the partisan gerrymandering context. *See Rucho*, 139 S.Ct. at 2495 (“Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering”).

The fact that there is no supervisory power for Congress under the *Elector Clause* distinguishes *Rucho* further: Unlike in partisan gerrymandering claims, Congress does not have the clear power to remedy vote dilution problems. *Compare id.* (discussing Congress’s various laws eliminating large multi-member Congressional districts); *see also* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 251-52 n.43 (1995) (explaining that Congress eliminated such districts in “response to the frequent occurrence of a majority party’s sweeping an entire state delegation in at-large states”). *Rucho* cited to the text of the Elections Clause as comfort and evidence that a co-equal branch of the federal government had the power to preserve “full and effective participation” in the government. *Reynolds v. Sims*, 377 U.S. 533 (1964). Here, only the federal courts can guarantee that constitutional requirement.

## **II. PLAINTIFFS HAVE ARTICLE III STANDING**

The State raises three Article III standing issues that it declined to raise below: (1) that Plaintiffs have suffered no injury, (2) that Plaintiffs’ injuries are not traceable to the named defendants’ conduct, and (3) that Plaintiffs claims are not redressable. Plaintiffs do not contest that these standing issues can be raised for the first time on



appeal.<sup>2</sup> But the State’s failure to raise classic Article III issues that are frequently raised in election disputes speaks volumes about the merits of the State’s arguments.

The State’s stated reason for bringing its Article III standing arguments for the first time now is that *Rucho* “unveils another critical jurisdictional defect—principally, that Plaintiffs lack Article III standing . . .” MTD at 15. But *Rucho* does not substantively address Article III standing at all. Rather, the *Rucho* Court merely notes an earlier holding in *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018), “that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly ‘cracked’ or ‘packed’ district.” *Rucho*, 139 S. Ct. at 2492; *see also id.* at 2498 (characterizing “standing” as a “‘threshold question[.]’ . . . which we addressed in *Gill*”). Plaintiffs address the State’s new standing arguments in turn.

**First**, Plaintiffs have suffered individualized injuries because their votes are diluted and then discarded in presidential elections by South Carolina’s WTA system. The State relies primarily on *Gill* to argue that Plaintiffs have not suffered an injury. But *Gill*’s holding is merely that “[a] plaintiff who complains of gerrymandering, *but who does not live in a gerrymandered district*, ‘assert[s] only a

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<sup>2</sup> The State’s argument that Plaintiffs named the wrong defendants is a possible exception since it could have been easily corrected—if the State’s current argument were right—by adding additional defendants below.

generalized grievance against governmental . . . .” 138 S. Ct. at 1921 (emphasis added). “Because that harm arises from the particular composition of the voter’s own district, remedying the harm does not necessarily require restructuring all of the State’s legislative districts. It requires revising only such districts as are necessary to reshape the voter’s district.” *Id.*

Here, Plaintiffs each vote in a statewide election during the first stage of the presidential contest, and South Carolina appoints a slate of nine Electors on a statewide basis under its WTA rules. Plaintiffs’ own votes have been diluted in the first stage because it is impossible for minority voters like Plaintiffs to receive any representation whatsoever in an at-large election for a multi-member body of Electors under South Carolina’s WTA rules. This injury has long been sufficient for standing, and it is the basis for the injury in all of the multi-member cases Plaintiffs cite. *See, e.g., Rogers*, 458 U.S. 616; *White*, 412 U.S. 755. Plaintiffs’ votes have also been discarded by applying WTA rules after the first stage of a two-stage election for President. This injury—created by the impermissible weighting of votes—is also a well-established one for standing. *See, e.g., Gray*, 372 U.S. at 381 n. 12.

The State also notes that Plaintiffs’ have cited other negative consequences of WTA, such as the threat of electoral interference, as evidence that these injuries are undifferentiated. MTD at 17. But the fact that South Carolina’s WTA rules *also*

cause negative effects to the American political system as a whole—effects that were never the intent of the Founders—does not diminish the fact that Plaintiffs’ own votes have been discarded and diluted. “A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution,” *Baker v. Carr*, 369 U.S. 186, 208 (1962), and Plaintiffs assert that South Carolina has impaired this right. If Plaintiffs cannot bring these claims, then no one can.

At heart, the “injury” section of the State’s brief is a merits argument masquerading as a jurisdictional issue. The State believes that its adoption of WTA rules is proper. Plaintiffs disagree. Accepting the State’s argument would make it “necessary to decide whether appellants’ allegations of impairment of their votes by [South Carolina’s WTA system] will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it.” *See id.* at 208. “If such impairment does produce a legally cognizable injury, [Plaintiffs] are among those who have sustained it,” and Plaintiffs “are entitled to [a decision on the merits] on their claims.” *Id.* “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

**Second**, the State argues that Plaintiffs’ claims are not traceable to the named defendants’ conduct because Plaintiffs have not sued “the South Carolina General

Assembly.” MTD at 19-20. The State has not cited any case that says that Plaintiffs must—or even can—name a state legislative body as a defendant. Under the Eleventh Amendment, Plaintiffs cannot directly sue the state legislature; Plaintiffs must instead sue individuals responsible for implementing and enforcing unconstitutional state laws in their official capacity. *See generally Ex parte Young*, 209 U.S. 123, 155 (1908). “When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997).

The State does not contest that the named Defendants are responsible for implementing and enforcing South Carolina’s electoral laws. The approach Plaintiffs have taken here—suing executive branch officials responsible for implementation—is the same as the plaintiffs in *McPherson*, who sued the secretary of state. 146 U.S. at 2 (bringing suit “against Robert R. Blacker, secretary of state of Michigan, praying that the court declare the act of the legislature” regarding apportionment of electors unconstitutional). The same is true of the many other cases that Plaintiffs cite in their Opening Brief and here. *See, e.g., Gray*, 372 U.S. at 370 (naming Georgia Secretary of State and the Chairman and Secretary of the Georgia State Democratic Executive Committee as defendants); *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff’d*, 393 U.S. 320 (1969) (naming Virginia Board of

Elections as defendant). The State has been vigorously defending this action, and a successful result by Plaintiffs will enjoin the enforcement of an unconstitutional state law.

Further, the State's assertion that Plaintiffs cannot assert their claims in court and must wait for legislative action—that “the General Assembly is the appropriate forum for Plaintiffs to air such concerns, and actually, is the only entity capable of redressing them,” MTD at 20-21—is incorrect. “The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Plaintiffs seek to vindicate their fundamental rights here by enjoining the enforcement of unconstitutional laws.

**Third**, and finally, Plaintiffs claims are redressable. This issue is again controlled by *McPherson*. Although the Court upheld Michigan's law adopting a district system for the apportionment of electors, the Court stated that it had the power to require the state to adopt a different system had it found the state's system unconstitutional. *McPherson*, 146 U.S. at 24 (“As we concur with the state court, its

judgment has been affirmed; if we had not, its judgment would have been reversed.”).

The State’s argument is premised on a misunderstanding of the remedy Plaintiffs seek. Plaintiffs do not seek in the first instance to impose a fully proportional system for appointing electors. Rather, Plaintiffs ask that the Court declare WTA in South Carolina unconstitutional, and *enjoin its use*. J.A. 43-44. There is no question that such an injunction is within the power of the Court to grant. *See, e.g., Rogers*, 458 U.S. at 627-28 (enjoining county’s at-large system for electing members of its governing Board of Commissioners); *White*, 412 U.S. at 759, 765-69 (affirming district court’s injunction against use of multi-member districts in the Texas legislature); *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 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.”).<sup>3</sup>

While Plaintiffs’ constitutional claims do not seek to impose any particular proportionality standard in the first instance, Plaintiffs’ VRA claims require that South Carolina’s black voters 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). As set out in Plaintiffs’ Opening Brief, 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 have had the voting strength to appoint two Electors in each recent Presidential election without a single white vote. In South Carolina, the VRA therefore establishes an identifiable floor for the proportionality that any system must achieve. But it is hard to imagine that South Carolina could implement any system that gives minority

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<sup>3</sup> The State appears intent on litigating a merits issue—whether Plaintiffs’ claim fails on the merits because the Constitution does not require proportional representation. *See City of Mobile*, 446 U.S. at 79, *see also Rucho*, 139 S. Ct. at 2499. The State’s arguments in this regard are premature.

voters a voice in presidential elections that does not also achieve the result of bringing the state into compliance with the VRA.

### **CONCLUSION**

For the foregoing reasons, the State's motion to dismiss should be denied, and this Court should hear the merits of Plaintiffs' appeal.

Dated: September 9, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2)(A) because it contains 5,083 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: September 9, 2019

/s/ Randall L. Allen

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on September 9, 2019.

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