ELECTION LAW — PRESIDENTIAL ELECTIONS — FOURTH CIRCUIT RULES THAT WINNER-TAKE-ALL SYSTEM IS CONSTITUTIONAL. — *Baten v. McMaster*, 967 F.3d 345 (4th Cir. 2020).

The American presidential election process is curiously composed of two elections: a widely publicized election in which the general public is allowed to participate and another one in which obscure electors[1] gather to determine the new President. All but two states use the winner-take-all (WTA) system in which the candidate with the majority of the statewide popular vote receives the votes of all of the state's electors.[2] The WTA approach exacerbates the difference between the popular will and the final result, increasing the likelihood of electing the "wrong winner": a President who won the nationwide electoral vote but not the popular one.[3] Recently, in *Baten v. McMaster*,[4] the Fourth Circuit affirmed the dismissal of a challenge to South Carolina's use of the WTA approach in the presidential election context.[5] The Fourth Circuit's decision exposed a settled doctrinal landscape lined up in defense of the WTA system, suggesting that forces seeking WTA reform should focus their efforts on state-level political action rather than federal litigation.

In every presidential election since 1980, all of South Carolina's votes in the Electoral College have been allocated to candidates from the Republican Party.[6] In 2018, six voters who had voted for Democratic candidates in past presidential elections and planned to do so again brought suit against the state to challenge the WTA system.[7] First, the plaintiffs argued that the WTA system violates the Fourteenth Amendment's Equal Protection Clause by diluting the votes of the political minority in the selection of electors and discarding their ballots at the second, elector-based round of voting, thus undermining the "one person, one vote" principle.[8] Second, they contended that the system runs counter to the First and Fourteenth Amendments by burdening

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[1] *See* DAVID W. ABBOTT & JAMES P. LEVINE, WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE 18–19 (1991).

[2] The two exceptions are Maine and Nebraska. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2321 n.1 (2020).

[3] *See* ABBOTT & LEVINE, *supra* note 1, at 22. In fact, in five presidential elections, the winning candidate did not receive the largest share of the popular vote. Dave Roos, *5 Presidents Who Lost the Popular Vote but Won the Election*, HIST. (Nov. 2, 2020), https://www.history.com/news/presidents-electoral-college-popular-vote [https://perma.cc/SS3Y-8PJC].

[4] 967 F.3d 345 (4th Cir. 2020).

[5] *Id.* at 361.

[6] *See id.* (Wynn, J., dissenting); Complaint for Declaratory and Injunctive Relief ¶¶ 46–47, Baten v. McMaster, 374 F. Supp. 3d 563 (D.S.C. 2019) (No. 18-cv-00510) [hereinafter Complaint].

[7] *Baten*, 967 F.3d at 350; Complaint, *supra* note 6, ¶¶ 22–28.

[8] Complaint, *supra* note 6, ¶¶ 14, 41.

their freedom of association.[9] Third, the plaintiffs — three of whom were African American — claimed that the system violates section 2 of the Voting Rights Act[10] (VRA) by preventing African American voters from having their preferred candidate receive representation in electoral votes.[11]

The District Court for the District of South Carolina dismissed all three claims.[12] On the equal protection claim, the court relied in part on the Supreme Court's summary affirmance of *Williams v. Virginia State Board of Elections*[13] to conclude there was no violation because the system did not "unfairly elevate[] one person's vote over another."[14] Regarding the freedom of association claim, the court found that the plaintiffs' argument "conflates a diminishing *motivation* to participate with a severe burden on the actual *ability* of people to participate in the voting process."[15] Finally, because "the WTA system does not mean that the political process is 'not equally open to *participation* by' Democratic voters, whether they be African-American or of another race," the court dismissed the VRA claim as well.[16]

The Fourth Circuit affirmed. Writing for the panel, Judge Niemeyer[17] found that challenges to WTA systems are justiciable and that the plaintiffs had standing.[18] Turning to the merits, the court rejected the plaintiffs' two-part equal protection claim that the WTA system first dilutes votes by not selecting presidential electors aligned with the political minority and then discards minority votes in the elector-based presidential vote.[19]

On vote dilution, the court reasoned that "each State has plenary authority to determine through its legislature how to appoint Electors[,] . . . [which] includes the authority to require Electors to vote for the presidential ticket that received the plurality of votes in the State."[20] Looking to *Williams* and *Chiafalo v. Washington*,[21] the court found that "no vote in the South Carolina system is diluted" since "each vote is counted equally"[22] and "all persons entitled to vote have had the opportunity to

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9 *Id.* ¶¶ 15, 57.

10 Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301).

11 Complaint, *supra* note 6, ¶¶ 16, 23, 25–26, 76–79.

12 Baten v. McMaster, 374 F. Supp. 3d 563, 565 (D.S.C. 2019).

13 288 F. Supp. 622 (E.D. Va. 1968), *summarily aff'd mem.*, 393 U.S. 320 (1969) (per curiam).

14 *Baten*, 374 F. Supp. 3d at 569.

15 *Id.* at 570.

16 *Id.* at 571 (quoting 52 U.S.C. § 10301(b) (emphasis added)).

17 Judge Niemeyer was joined by Judge Floyd. *Baten*, 967 F.3d at 348.

18 *Id.* at 352.

19 *See id.* at 355–58.

20 *Id.* at 355.

21 140 S. Ct. 2316 (2020).

22 *Baten*, 967 F.3d at 355.

vote."[23] The court found that *White v. Regester*[24] was inapposite since *White* "addresse[d] the dilutive effects of creating *multi-member legislative districts* and not of appointing Electors as a slate."[25] While the Court in *White* found that racial minority groups in two multimember districts were "effectively excluded from the political process to the extent that they were unable to elect representatives,"[26] that holding required a showing that minority groups had "less opportunity than did other residents in the district to participate in the political processes."[27]

The court then disposed of the vote discarding argument by distinguishing the case from the Supreme Court's decision in *Gray v. Sanders*.[28] The Court in *Gray* invalidated Georgia's statewide election system that allocated to each county a certain number of "units" to award to the popular-vote winner of that county.[29] The Fourth Circuit panel noted that unlike the state election context in *Gray*, "in the presidential context, there is no statewide elected seat up for grabs."[30] The court also highlighted the *Gray* Court's recognition that the "type of 'numerical inequality' that may render a state electoral process unconstitutional is a feature — not a flaw — of the Electoral College system."[31] Further, since "[a]ll votes cast in presidential elections in South Carolina are treated the same[,] . . . there is no risk, as there was in *Gray*, that votes are treated differently based on geography."[32] Therefore, the court dismissed the plaintiffs' Equal Protection Clause claim.[33]

Moving to the First Amendment issue, the court concluded that the plaintiffs' claim that the WTA interferes with their freedom of association was "far more tenuous than those [claims] recognized as First Amendment violations."[34] While the First Amendment protects the right to associate for purposes of advocacy, the court held, it "provides no guarantee that a speech will persuade or that advocacy will be effective."[35] Furthermore, the court determined that the First Amendment does not "guarantee to the residents of South Carolina attention from candidates for nationwide office."[36] The WTA system may "raise[] the

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[23] *Id.* at 356.
[24] 412 U.S. 755 (1973).
[25] *Baten*, 967 F.3d at 356.
[26] *Id.*
[27] *White*, 412 U.S. at 766.
[28] 372 U.S. 368 (1963).
[29] *See id.* at 371, 379–80.
[30] *Baten*, 967 F.3d at 357.
[31] *Id.* at 358 (quoting *Gray*, 372 U.S. at 378).
[32] *Id.*
[33] *See id.*
[34] *Id.* at 359.
[35] *Id.* (quoting Smith v. Ark. State Highway Emps., Loc. 1315, 441 U.S. 463, 465 (1979) (per curiam)).
[36] *Id.*

stakes of victory," but it does not deprive the plaintiffs of the opportunity to advocate for their desired outcome.[37]

Finally, the court found that the plaintiffs did not satisfy the three-pronged standard for proving a section 2 VRA violation and that the current case was distinguishable from the multimember district situation in *Thornburg v. Gingles*.[38] In presidential elections, the court noted, there are no districts — instead, "[t]he relevant geographic area . . . is the entire State, and Black voters do not constitute a majority statewide."[39] Therefore, the court found, Black voters cannot be held to have had their votes diluted under *Gingles*: the plaintiffs were not represented by their preferred electors because they had voted for an unpopular candidate, not because they had been excluded based on their status as Black voters.[40]

Judge Wynn dissented, noting that the plaintiffs had "stated plausible violations of the First and Fourteenth Amendments and the Voting Rights Act."[41] He found that both the vote dilution[42] and vote discarding arguments were plausible based on the states' obligation to comply with the Fourteenth Amendment.[43] On the First Amendment violation, Judge Wynn chided the district court for misunderstanding the plaintiffs' allegation. In his view, the plaintiffs' allegation was not "that Democrats do not come to South Carolina [to campaign]," but rather "that *all* major party candidates do not come to South Carolina because of the state's winner-take-all system."[44] He also remarked that if the plaintiffs' First Amendment claims were allowed to proceed, South Carolina might not be able to demonstrate a legitimate state interest in the WTA system.[45] Finally, Judge Wynn found that the plaintiffs had

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[37] *Id.* (alteration in original) (quoting Lyman v. Baker, 954 F.3d 351, 377 (1st Cir. 2020)).

[38] 478 U.S. 30 (1986). The court noted three requirements for plaintiffs bringing a claim under § 2 of the VRA: "(1) 'the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;' (2) 'the minority group . . . is politically cohesive;' and (3) 'the [W]hite majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Baten*, 967 F.3d at 360 (alterations in original) (quoting *Gingles*, 478 U.S. at 50–51); *see also id.* at 360–61.

[39] *Baten*, 967 F.3d at 361.

[40] *See id.* at 360–61.

[41] *Id.* at 361 (Wynn, J., dissenting).

[42] *Id.* at 370 (noting that while the Constitution allocates electors to the states, states are not free to "replicate that allocation on a smaller scale if that system would violate the Equal Protection Clause"); *see also id.* at 368–71. Citing historical patterns and the existence of a single "district" from which electors are selected, Judge Wynn concluded that "South Carolina's system of selecting presidential electors has many of the features that risk creating . . . vote dilution." *Id.* at 369.

[43] *See id.* at 371–72 (finding the plaintiffs plausibly alleged that the WTA system discards votes).

[44] *Id.* at 374.

[45] *Id.* at 375 ("[P]reservation of political power for the people who currently hold power is not a legitimate state interest.").

sufficiently alleged the three *Gingles* prerequisites for proving a section 2 VRA claim.[46]

The seemingly fixed doctrinal landscape exposed by *Baten* shows that forces for WTA reform should focus their efforts on mobilizing constituencies for state-level political reforms rather than federal litigation. The WTA approach is replete with defects, and a nationwide revision of the system could plausibly take place through Congress, the federal judiciary, or state legislatures. While congressional reform efforts have largely focused on proposals of constitutional amendments, the vast majority of attempts have thus far been fruitless.[47] *Baten*'s reasoning — together with three other recent circuit court decisions reaching the same result[48] — demonstrates the hostility of the federal judiciary toward reforming the WTA system. The track record of the Roberts Court on election law also makes it unlikely that the Supreme Court will invalidate the system on its own.[49] Consequently, the best avenue to eliminate the WTA system might be collective state legislation, such as the National Popular Vote Interstate Compact.[50]

The WTA system is ripe for reform. Unlike other aspects of the Electoral College, the WTA approach is not mandated by the Constitution.[51] As a state-initiated mechanism, the WTA system contributes to "the risk of popular-electoral splits," creates "incentives for fraud[and] voter suppression," and "arbitrarily privileg[es] some voters' preferences at others' expense."[52] Given how the WTA system hinges the presidential election on only a few states, the election may fall prey to outside influence more easily.[53] The WTA system also aggravates polarization among the political parties and the general public.[54] Moreover, when the result of the popular vote does not align with that

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[46] *Id.* at 378–79.

[47] *See, e.g.*, *Past Attempts at Reform*, FAIRVOTE, https://www.fairvote.org/past_attempts_at_reform [https://perma.cc/HD64-AQ6W].

[48] *See* Rodriguez v. Newsom, 974 F.3d 998, 1002 (9th Cir. 2020); Lyman v. Baker, 954 F.3d 351, 355 (1st Cir. 2020); League of United Latin Am. Citizens v. Abbott, 951 F.3d 311, 313 (5th Cir. 2020).

[49] *Cf.* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 178–81 (exploring legal realist explanations of the Roberts Court's approach to election law decisions).

[50] *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/written-explanation [https://perma.cc/2JJF-YVJV].

[51] *See* Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment Is the Electoral College's Least Defensible Feature*, 68 CASE W. RSRV. L. REV. 317, 336–37, 370 (2017).

[52] *Id.* at 317.

[53] *See* Natasha Bertrand, *The "Unique" Nature of the US Voting System Could Help Russia Tip the Scales of Future Elections, Experts Say*, BUS. INSIDER (Oct. 5, 2017, 7:05 PM), https://www.businessinsider.com/did-russia-swing-the-election-electoral-college-meddling-2017-10 [https://perma.cc/H9YT-6T4E].

[54] *Cf.* Carlos Aramayo & Carlos Pereira, *Political Polarization: What the U.S. Can Learn from Latin America*, BROOKINGS INST. (Mar. 1, 2011), https://www.brookings.edu/opinions/political-polarization-what-the-u-s-can-learn-from-latin-america [https://perma.cc/KB23-JVJJ].

of the Electoral College, "the constitutional provision [enabling such an outcome] . . . would *itself* be called into question."[55]

Movements to reform the Electoral College have traditionally sought national mandates through constitutional amendments.[56] However, despite more than five hundred attempts in Congress since 1797 to change the presidential election system, all but one proposal, the Twelfth Amendment, have failed.[57] In 1956, a proposal to award the candidate winning the statewide popular vote in each state two electoral votes and allocate the remaining electoral votes in proportion to the nationwide popular vote[58] passed in the House of Representatives but failed in the Senate.[59] After the 1968 presidential election, a proposal to abolish the Electoral College in favor of a direct popular election passed in the House with a vote of 338–70, but it failed in the Senate because of a filibuster.[60] Absent the stimulus of a profound event or widespread public consensus on the need for change, congressional abolition of the WTA approach will likely remain woefully Sisyphean.[61]

While many scholars contend that federal courts are uniquely situated to change the WTA system,[62] *Baten* suggests that the judiciary is poorly suited to do so.[63] There is a dearth of cases examining the constitutionality of the WTA system in presidential elections;[64] existing constitutional vote dilution precedents thus focus on state and local legislative elections.[65] *Williams*, decided in 1969, is the only case involving the WTA approach in the presidential context to have reached the Supreme Court.[66] In the decades since *Williams*, the Court has "several times elaborated on the scope of the one-person, one-vote rule,"[67] yet the

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55 ABBOTT & LEVINE, *supra* note 1, at 46; *see also id.* ("[T]he central legitimacy myth in the United States is that our leaders govern by virtue of their selection by the voters . . . .").

56 ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 4–5, 58 (2020).

57 ABBOTT & LEVINE, *supra* note 1, at 117.

58 Ralph M. Goldman, *Hubert Humphrey's S. J. 152: A New Proposal for Electoral College Reform*, 2 MIDWEST J. POL. SCI. 89, 90 (1958).

59 *Past Attempts at Reform*, *supra* note 47.

60 KEYSSAR, *supra* note 56, at 225, 252.

61 *See id.* at 6–11; Vinod Bakthavachalam & Reed Hundt, Opinion, *How Trump Is Running to Snatch Victory from the Jaws of Defeat, Again*, N.Y. TIMES (Feb. 12, 2020), https://nyti.ms/2UKoZZa [https://perma.cc/CJJ2-KVAG].

62 *See, e.g.*, Michael Weisbuch, Note, *Winner-Take-All as a Collective Action Problem*, 35 J.L. & POL. 67, 69 (2019); *cf.* Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1993) (book review) (noting that some scholars view courts as "effective reformers").

63 While *Baten* foreclosed challenges to WTA elections only in the Fourth Circuit, efforts in three other circuits have recently failed. *See* cases cited *supra* note 48.

64 *See Baten*, 967 F.3d at 370, 374 (Wynn, J., dissenting).

65 *See, e.g.*, *id.* at 353 (majority opinion); *see also* Complaint, *supra* note 6, ¶¶ 50–52.

66 Williams v. Va. State Bd. of Elections, 393 U.S. 320 (1969) (per curiam) (mem.); *see also* Complaint, *supra* note 6, ¶ 53.

67 Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) (discussing rulings in the districting context).

Court has not had the opportunity to reconsider the WTA system. Since *Williams* was a summary affirmance without an opinion, the only Supreme Court precedent that analyzed voter equality in the presidential election context is *Bush v. Gore*,[68] and the Court severely limited the applicability of that case.[69] In addition, while the Court in *Bush v. Gore* held that ballots should be treated equally at the ballot-counting stage of the presidential electoral process,[70] the differential treatment of ballots under the WTA system takes place in the subsequent stage of allocating ballots to electors.

Beyond rejecting the plaintiffs' specific claims, the Fourth Circuit's decision suggests that the current doctrinal landscape is wholly inhospitable to WTA challenges. On the equal protection claim, the court found that under the WTA system, "all persons entitled to vote have had the opportunity to vote and . . . their votes have been counted with equal weight, regardless of political affiliation."[71] The decision suggested that the plaintiffs' "essential problem" — that "they did not have enough votes to achieve the outcome they desired" — is one that the judiciary is unable to remedy.[72] The court's treatment of the VRA claim is equally instructive. By noting that *Gingles*'s "requirements do not map onto the type of challenge that the plaintiffs have mounted,"[73] the majority implied that the *Gingles* test could *never* be satisfied by a WTA challenge in the presidential election context. Although the Supreme Court has not yet decided the question, the *Baten* court's WTA analysis seems to align with that of three other circuit courts that recently considered WTA challenges and issued unanimous decisions dismissing the plaintiffs' claims.[74] Moreover, as members of the Roberts Court appear ideologically committed to remaking election law into doctrines that allow

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[68] 531 U.S. 98 (2000) (per curiam).

[69] *See id.* at 109. Some scholars contend that the possibilities of election reform associated with *Bush v. Gore* are now nonexistent. *See, e.g.*, Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 3 (2007); *see also id.* at 4 ("[W]e should abandon any hope created by [*Bush v. Gore*] that the judiciary would serve as an engine of election administration reform.").

[70] *See Bush v. Gore*, 531 U.S. at 100, 104.

[71] *Baten*, 967 F.3d at 356.

[72] *Id.*

[73] *Id.* at 360.

[74] The First and Fifth Circuits affirmed the dismissal of suits in Massachusetts and Texas, respectively, that alleged that the WTA system violates the Equal Protection Clause and the First Amendment. *See* Lyman v. Baker, 954 F.3d 351, 355 (1st Cir. 2020); League of United Latin Am. Citizens v. Abbott, 951 F.3d 311, 313 (5th Cir. 2020). The Ninth Circuit, the last to consider the WTA system in this round of parallel litigations, similarly dismissed the claims. *See* Rodriguez v. Newsom, 974 F.3d 998, 1002 (9th Cir. 2020).

powerful parties to do as they please at the state level,[75] the Supreme Court is unlikely to invalidate the WTA system.[76]

Baten suggests that collective action at the state level might be the most promising avenue for reform. Although courts could deliver relief when "politicians' incentives conflict with voters' interests,"[77] other Western countries employ various means of reform, including external review bodies and legislative initiatives.[78] *Baten*'s logic also makes clear that while nationwide redesign is unlikely, state legislatures have plenary power in governing their electors.[79] Two states currently reject the WTA approach in presidential elections,[80] and numerous alternatives to the WTA system exist.[81] The most ambitious attempt to enhance the representativeness of the presidential electoral process, the National Popular Vote Interstate Compact,[82] is "a state-based approach that preserves . . . the power of the states to control how the President is elected."[83] The Compact has so far garnered the support of sixteen jurisdictions of various sizes, amounting to a total of 196 electoral votes and leaving 74 more electoral votes until it goes into effect.[84] In addition, Americans may currently be unusually open to electoral reforms.[85]

Baten may ultimately be a blessing in disguise. Successfully reforming the WTA system will inevitably be an uphill battle fraught with resistance and compromise and requiring broad public participation. Perhaps it is time to look not to the judiciary, but directly to the people, for change.

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[75] *See* Stephanopoulos, *supra* note 49, at 178 ("Both the Court's intrusions into, and its abstentions from, the political process . . . empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices."); *see also id.* at 180.

[76] *See id.* at 113–16 (discussing the Court's recent approach of "refusing to fix democratic malfunctions judicially . . . [and] thwarting nonjudicial actors from dealing with them," *id.* at 115).

[77] Gill v. Whitford, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring).

[78] *See, e.g.*, Thomas Carl Lundberg, *Electoral System Reviews in New Zealand, Britain and Canada: A Critical Comparison*, 42 GOV'T & OPPOSITION 471, 473–75 (2007) (discussing electoral reform through external groups). When courts in other countries do take action, their impact may be indirect. *See* Lidia Nunez & Kristof T.E. Jacobs, *Catalysts and Barriers: Explaining Electoral Reform in Western Europe*, 55 EUR. J. POL. RSCH. 454, 467–68 (2016).

[79] *See Baten*, 967 F.3d at 355; Barry Fadem, *Supreme Court's "Faithless Electors" Decision Validates Case for the National Popular Vote Interstate Compact*, BROOKINGS INST. (July 14, 2020), https://www.brookings.edu/blog/fixgov/2020/07/14/supreme-courts-faithless-electors-decision-validates-case-for-the-national-popular-vote-interstate-compact [https://perma.cc/VM37-XPKY].

[80] *See supra* note 2.

[81] *See Gaming the Electoral College*, 270TOWIN, https://www.270towin.com/alternative-electoral-college-allocation-methods/?year=2016 [https://perma.cc/5CTU-2VMC].

[82] The National Popular Vote Interstate Compact proposes to change the presidential election system from a state-based federal system to a national popular vote system. *See Agreement Among the States to Elect the President by National Popular Vote*, *supra* note 50.

[83] *Id.*; *see also* Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 718–19, 725 (2007).

[84] *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status [https://perma.cc/XAD4-J73A].

[85] *See* Candice Bernd, *Winner-Take-All Electoral College Could Enable Dreaded Constitutional Crisis*, TRUTHOUT (Sept. 29, 2020), https://truthout.org/articles/winner-take-all-electoral-college-could-enable-dreaded-constitutional-crisis [https://perma.cc/7VAB-DB46].