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Written Testimony of
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Before the
Senate State Government, Tribal Relations & Elections Committee

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Chair Hunt, Vice Chair Kuderer, Ranking Member Miloscia, Senator Saldaña, and Senator Zeiger:

Thank you for the invitation to join you here, and for the invitation to testify this morning.

My name is Justin Levitt. I am a tenured Professor of Law and the Associate Dean for Research at Loyola Law School, in Los Angeles.[1] I teach constitutional law and criminal procedure, and I focus particularly on the law of democracy, including election law and voting rights — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have recently returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to supervise and support much of the federal government's work on voting rights, among other issues. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

I have had the privilege to seek voting rights for clients and constituents, and the privilege to teach others how to do the same. I have had the privilege to pursue research cited by the courts, and to testify as an expert to them. And I have had the privilege to advise, and

[1] My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

occasionally represent, elected officials and election officials, of both major parties and neither major party, and those whose partisan affiliation I simply do not know.

I am delighted that this work has brought me back to Olympia: it is an honor to be before this committee on this exceedingly important topic. We have in America a fundamental and deeply shared commitment to two critical facets of the election process: a system of majority rule, and within that system, fierce preservation of minority rights, including the rights of minorities to equitable representation. No American jurisdiction offers any group a certainty of electoral success. But generations of Americans have fought to ensure equitable opportunity in the franchise — which is the guarantee that helps ensure equitable opportunity in so many other respects.

Unfortunately, too often, that vision and that opportunity is lost in the hubbub of the particular skirmish of the moment. The risk is particularly profound in redistricting, where individual stakes seem high, and shared norms of equal opportunity can fall lower than they should on the priority list. The consequences breed resentment, conflict, and expensive litigation as parties dig in on both sides. It is part of why, in only 50 states, we have had more than 230 lawsuits related to state and federal districts alone, just this cycle. And that leaves aside the conflicts, in court and beyond, over problems caused by an antiquated registration system.

From a national perspective, it looks like Washington State is setting out on a different and far more heartening path, and could demonstrate the potential for equitable consensus on voting rights nationwide. I shall begin first with redistricting, and then offer just a word about same-day registration — which I understand is also under consideration.

Here in Washington, you are considering in the Washington Voting Rights Act a bill working toward equal opportunity. It takes an approach I have not seen elsewhere: not federally, not in Illinois, not in California, where I am from, and where I have seen the operation of the California Voting Rights Act from a front-row seat, including serving as an expert in the only CVRA case thus far to go to trial.

The approach you are considering here in Washington is different, and meaningfully so. It departs from these other statutes in a way profoundly heartening to a professor: by <u>learning</u> — learning from the strengths and weaknesses of the other models.

The federal Voting Rights Act is and has been a powerful force for justice. It is among the most successful civil rights statutes ever. But it was written in 1965, and its substantive provisions have been updated by Congress only twice since; federal courts have had to do most of the work applying the Act to modern modes of conduct.

This work includes the Supreme Court's 1986 opinion in *Thornburg v. Gingles*, applying one of those two statutory amendments to a particular set of circumstances in North Carolina. Plaintiffs there were African-Americans living in relatively concentrated communities and facing severe and persistent racially polarized voting; they complained that several multimember at-large districts allowed white pluralities to win every one of the several seats available, diluting the black vote. And they asked instead for smaller single-member districts as their preferred means to allow an equitable opportunity to elect representatives of their choice. The Court

agreed. In the process, it interpreted the federal statute's application to claims of vote dilution, setting several threshold conditions for liability: because the plaintiffs were asking for single-member districts they had an equitable opportunity to control, the Court interpreted the Act to preclude liability for communities of insufficient size or compactness to constitute a district majority. Those threshold conditions have been extended for other applications of the federal Voting Rights Act, well beyond the conditions of their genesis. But it is important to remember that the *Gingles* conditions are not universal necessities: such size and compactness thresholds are not constitutionally required. Instead, they reflect interpretations of the 1982 language of a particular federal statute, drawn from the particular conditions in 1980s North Carolina facing the Court when called upon to interpret the new language for the first time. Some of today's electoral environment reflects echoes of that 1980s experience, but some is quite distinct.

The example also shows that the federal Voting Rights Act is designed for elections and electoral circumstances around the country, which means that fact patterns from far and wide have a hand in deciding how it is interpreted. Just in the past few years, cases out of Alabama and Texas and Virginia and North Carolina have shaped the way that the federal Voting Rights Act is applied here in Washington — and just as contemporary circumstances may be different from those in the 1980s, the political demography and electoral cleavages that gave rise to those cases far across the country may be very different from those you find here in Washington. Moreover, further interpretation of the federal Voting Rights Act, driven by decisions of federal courts in other districts, may be similarly out of your hands.

The federal Voting Rights Act also spurs some of the most complicated, cumbersome, and expensive litigation in the country. A relatively recent study by the Federal Judicial Center traced the time required on federal court calendars by various types of federal cases. Out of 61 different types of cases, voting rights cases were sixth most time-consuming, behind only death penalty habeas cases, environmental cases, civil RICO cases, continuing criminal enterprise drug cases, and patent cases. Voting rights cases can take years to resolve, and millions of dollars. Federal courts are still today laboring over cases about lines drawn in 2011. And the financial meter on these cases is still running, at taxpayers' expense.

Almost two decades ago, California enacted its own Voting Rights Act to try to get at some of these limits. It recognized that the size and compactness thresholds that apply to the federal statute are not constitutionally required. But it also addressed only those local jurisdictions electing representatives at-large, exempting all districted jurisdictions. And through a structure focused heavily on litigation, the California Voting Rights Act created a substantial incentive for jurisdictions to switch quickly to districts, both when there was reason to switch and when there was not. Well over 100 districts have changed their election structures after the act was passed. Only one has gone to trial.

The model that you are considering — the Washington Voting Rights Act — has learned from the strengths and weaknesses of both federal and state alternatives. The differences are improvements, shoring up the Act against potential challenge in the process. The structure you are considering is built for the 21st century, and based on Washington rules for Washington jurisdictions, interpreted by Washington courts but not always dependent on litigation.

What you are considering recognizes that this is not a monochromatic world, but one requiring equitable representation for a broad array of Americans with diverse backgrounds and

diverse needs. It does not restrict itself with artificial limits based on outdated or preconceived notions of what representation must necessarily entail. Instead, it recognizes that valid local governance may take many forms, that equal opportunity for distinct minority populations — whether concentrated or dispersed — can be deprived in many forms, and that remedies for that deprivation can take many forms.

What you are considering recognizes that citizens' preferences will not always break down along racial or ethnic lines — but that sometimes they will. It recognizes, but does not assume, the possibility.

Where different groups have distinct political preferences, citizens will often have an equitable opportunity to be meaningfully represented — but sometimes, they won't. Your bill recognizes, but does not assume, the possibility.

Where citizens with distinct preferences do not have equal opportunities, local jurisdictions will often have the incentive to respond on their own — but sometimes, they won't. Your bill recognizes, but does not assume, the possibility.

Where local jurisdictions want to respond to inequities they perceive, existing state law does not give them the tools to do so. A local jurisdiction that recognizes that it may not offer equitable opportunities to all of its citizens based on race or ethnicity now has to wait to get sued in order to fix the problem. That is cumbersome and rigid and expensive and disempowering all at the same time.

What you are considering recognizes that most jurisdictions can be encouraged to serve the changing needs of their changing constituents before the courts need to get involved, and creates incentives for that sort of dialogue, at lower cost. Your model also rewards jurisdictions that resolve real problems, with protection for local officials and taxpayers against litigation down the road. Compromise, avoiding cost, assurances of peace and quiet when jurisdictions actually fix a problem — I'd be grateful for that sort of approach to dispute resolution in most conflicts that I see.

What you are considering nudges local jurisdictions to consider whether their electoral systems provide equal opportunity or dilute the right to vote. It acknowledges demographics and electoral outcomes but is not solely reliant on either, and thereby shields itself against constitutional challenge. Where there are problems, what you are considering then gives jurisdictions, for the first time, the legal permission to make the changes that are necessary. And these jurisdictions can ease in to a wide menu of options — familiar choices like districts, or alternatives like systems borrowed from corporate law, which may be less effective than traditional remedies in some circumstances, but far more effective in others. It encourages jurisdictions to look for potential problems before they arise, and offers a robust safe harbor from expensive litigation for jurisdictions that are proactive or responsive.

The model you are considering is not merely lip service to equitable representation, but it is also not centralized command-and-control. Local areas that are providing equal opportunity to all of their citizens can continue to serve their citizens just as they have; local areas that have some work to do are finally given flexible tools to fix the problems; and there are meaningful

teeth for those most in need, as well as protections against frivolous misuse. Trust, but verify. And your bill fosters a dialogue between government and its customers that helps build that trust for the future.

Almost a decade ago, Chief Justice Roberts, Justice Kennedy, and Justice Alito said in a case called *Bartlett v. Strickland* that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." That call to action is, unfortunately, still abundantly necessary. With the nuanced compromise before the committee, sensitive to the needs of both citizens and their officials, and appropriately tailored to the governing law, you can help move both the state and the country forward.

I would like to add just a brief word on same-day registration, another promising policy the committee is considering. The ability of eligible citizens to register and vote on the same day, with appropriate safeguards to ensure the integrity of that process, is the way to bring Washington's registration system into the 21st century, where your constituents expect it to be. Voters become increasingly energized by the electoral process as election day approaches, and in virtually every jurisdiction, registration patterns show that citizens attempt to register in exponentially increasing numbers leading up to election day itself. And in virtually every jurisdiction with a deadline substantially before election day, this means that many otherwise eligible citizens find themselves unable to cast a valid vote in the election that has gotten them mobilized. When the wave of registration attempts crests after a registration deadline, democracy suffers by the exclusion of the eligible and energized.

Nor is same-day registration merely a means to accommodate newly energized Washingtonians. Modern life is mobile, and humans — both voters and officials — are imperfect. Eligible voters naturally face mistakes in the registration process, by them or by others, that are impossible to eliminate entirely. Particularly in a jurisdiction where mail ballots are the norm, same-day registration ensures that an eligible Washingtonian's vote should never be in irreparable jeopardy as long as they are able to come to a designated voting location, whatever their personal situation and whatever administrative glitches they may have faced. The problem can be fixed in real-time, with the real-time customer support voters expect.

Fifteen states, and the District of Columbia — blue and red and purple jurisdictions — already offer same-day registration to their constituents. You read in the news about the other 35 states, when a technical glitch means that citizens are unnecessarily turned away on election day. Sometimes this disenfranchisement results in litigation, or occasionally in the need to re-run an election — and more bad press. Properly calibrated same-day registration would instead put Washington in the news for all of the <u>right</u> reasons.

I am eager to offer whatever assistance I can as the Committee takes up its tasks. I look forward to answering any questions that you may have, and to assisting with placing each of these measures into the appropriate national context. I thank you again for the opportunity to testify before you, and wish you success on the work to come.