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No. 100999-2

SUPREME COURT OF THE STATE OF WASHINGTON

GABRIEL PORTUGAL, *ET AL.*

PLAINTIFFS-RESPONDENTS,

VS.

FRANKLIN COUNTY,

DEFENDANT,

AND

JAMES GIMENEZ,

INTERVENOR DEFENDANT-APPELLANT.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. Introduction

Petitioner James Gimenez seeks direct review of a decision of the Franklin County Superior Court ruling that:

(1) The Washington Voting Rights Act, Chapter 29A.92 RCW ("WVRA"), was not repealed with respect to county commissioner districts;

(2) The WVRA granted standing to race and ethnic groups that constitute a majority of the population of a political subdivision; and

(3) The WVRA did not violate either the Washington State or U.S. Constitutions.

II. Nature of the Case and Decision.

Plaintiffs brought suit in Franklin County Superior Court, seeking to compel Franklin County to re-district its county commissioner districts using race-based criteria, and to eliminate the previous method of electing commissioners by county-wide, at-large general elections. CP 1-18. Franklin County declined to challenge Plaintiffs' claims, and agreed to a partial summary judgment conceding that race-based redistricting was mandated by statute, and failing to raise any substantive factual or legal defenses. CP 168-187. Consequently, local citizen-voter James Gimenez sought to intervene. CP 260-266. In the ensuing fracas, the Benton County Prosecuting Attorney's office stepped in to

represent Franklin County, in order to seek relief from the order granting partial summary judgment on the grounds that it had not been authorized by Franklin County. CP 276-290; 315-321. When the order was vacated, CP 349-350, Mr. Gimenez was granted intervention, CP 351-52, and promptly sought judgment on the pleadings. CP 353-376.

Apparently dissatisfied with proceedings in Franklin County Superior Court, Plaintiffs then moved to dismiss Mr. Gimenez for purported lack of subject-matter jurisdiction, CP 643-654, and to transfer the months-old case to Thurston County. CP 377-524. Plaintiffs eventually abandoned the Motion to Dismiss, the Court denied the Motion to Transfer, CP 676-77, and then proceeded to rule on Mr. Gimenez' 12(c) Motion. CP 678-81.

In a written order, Franklin County Superior Court denied the Motion. It held that the Plaintiffs had standing to sue, because "'protected class' means a class of voters who are members of a race, color or language minority group, as defined by the federal voting rights act. Therefore, the court finds that standing to proceed is not limited to those who are a minority within the specific county in question." Order at 2:10-14, CP 679. It alternatively held that the WVRA granted statutory standing to

any race or ethnic group that constitutes a minority of "eligible voters" within a political subdivision. *Id.* at 2:15.

The Court also found that the WVRA did not violate the 14th Amendment's Equal Protection guarantees, because "the court finds no authority for the assertion that the legislature's decision not to include a compactness requirement in the WVRA renders it violative of the Equal Protection Clause of the federal Constitution." *Id.* at 3:17-19, CP 680. Finally, the Court also concluded that the WVRA did not violate the Washington State Constitution's Privileges and Immunities clause, Art. I § 12, because "the WVRA, while race conscious, does not discriminate based on race. The court further finds that the WVRA represents a closely tailored, race neutral means to accomplish its legitimate goals as a remedial statute and, therefore passes the rational basis review standard applicable in this case." *Id.* at 4:3-6, CP 680.

Plaintiffs and Defendant Franklin County eventually settled the lawsuit over Mr. Gimenez' objections, adopting a commissioner district map, changing Franklin County's commissioner elections from at-large to district-based, and awarding $375,000 in attorneys' fees to Plaintiffs' counsel. CP 1300-1304.

Mr. Gimenez timely appealed to this Court.

III. Issues Presented For Review.

(1) Was the race-conscious district line-drawing mandate of the WVRA repealed in application to all Washington counties by subsequent legislation, 2018 c 301 § 8 and 2021 c 173 § 1?

(2) Does the WVRA grant statutory standing to race or ethnic groups that constitute a majority, not a minority within the district subject to suit?

(3) Does the WVRA violate Wash. Const. Art. I § 12?

(4) Does the WVRA violate U.S. Const. Amend. XIV?

IV. Grounds For Direct Review.

Petitioner seeks direct review based on RAP 4.2(a)(4), which authorizes direct review for the following type of case: "Public Issues. A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination."

The WVRA has been invoked repeatedly in jurisdictions across the state to compel changes to district lines and modes of election, and every one of those cases has concluded with a settlement between the plaintiffs and targeted jurisdiction. Indeed, by compelling the targeted jurisdiction to pay plaintiffs' fees, it encourages settlement, and, because district-based general elections (instead of at-large) in gerrymandered districts protect incumbent politicians, WVRA cases routinely feature

litigation-based, court-blessed deals in the interests of incumbent politicians but opposed by the general public.

Portugal v. Franklin County represents the rare occurrence where a concerned citizen intervened to bring the serious constitutional challenge to the statutory scheme. Only under these circumstances would any appellate court every have the opportunity to rule on the important constitutional questions presented, which have state-wide import and, in the case of the settlement below, should be resolved prior to the filing deadline to run in the new, district-based elections occurring in 2024. It is vitally important not only for Franklin County's proposed change to the mode of elections in 2024, but for jurisdictions across the state who are considering re-writing elections law in response to demand letters, *see* RCW 29A.92.060, to know whether or not the WVRA passes Constitutional muster. Only this Court can give every political subdivision in the state the finality it needs when faced with demands under the WVRA. And only direct review by this Court can answer that question prior to the May 2024 filing deadline in Franklin County.

A. Did The Legislature Repeal Application Of The WVRA To County Commissioner District Lines?

Two Washington statutes give completely contradictory instructions on drawing county commissioner district lines. One,

the WVRA, compels the use of race in line-drawing, while the other, codified at RCW 29A.76.010, forbids it. The second statute bluntly states: "Population data may not be used for purposes of favoring or disfavoring any racial group or political party." RCW 29A.76.010(4)(d). But the WVRA purported to create racial classifications, grant race-based groups the right to sue to compel redistricting, and required the county to favor the racial group which sued in drawing new district lines. *See* RCW 29A.92.050(3)(e).

Although "[r]epeal by implication is strongly disfavored . . . [it] is properly found in either of two situations . . . (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect." *ATU Legislative Council of Washington State v. State*, 145 Wash. 2d 544, 552 (2002). No county or court could comply with the flat, blanket ban on "favoring or disfavoring any racial group" while also drawing lines intended to improve the ability of one racial group to elect its "candidate of choice" at the expense of another racial group's candidate of choice.

Which statute, then is operative and which is repealed? Although RCW 29A.76.010 predates the WVRA, eight days after the 2018 Legislature enacted the WVRA, it enacted S.H.B. 2887,

"AN ACT Relating to county commissioner elections." Within that act, 2018 c 301 § 8, the Legislature amended and re-enacted 2011 c 349 § 26, codified at RCW 29A.76.010. The amendments added requirements for public comment on redistricting plans, but it also re-enacted the hard and fast ban on race considerations: "Population data may not be used for purposes of favoring or disfavoring any racial group or political party." 2018 c 301 § 8 (re-enacting RCW 29A.76.010 (4)(d)).

To emphasize the repeal, in May 2021, the Legislature passed SSB 5013, 2021 c 173, "AN ACT Relating to local redistricting deadlines." Once again, the Legislature re-enacted and amended RCW 29A.76.010. *See* 2021 c 173 § 1. It added specific deadlines for post-2020 census redistricting in RCW 29A.76.010(3)(a) and (b), but once again re-enacted, unchanged, the long-standing and firm ban on race-based districting. Current RCW 29A.76.010(4)(d) continues to read "Population data may not be used for purposes of favoring or disfavoring any racial group or political party."

On two separate occasions since passing the WVRA, the Legislature has thus explicitly ***banned*** the use of population data to favor a racial group in county redistricting. The more recent enactment cannot be reconciled with the earlier; they cannot both be given effect. The two re-enactments of RCW

29A.76.010(4) constitute the repeal of the relevant portion of the WVRA, and that statute precludes the relief sought by Plaintiffs below.

B. Does The WVRA Grant Standing To Members Of A State-Wide Race Or Ethnic Minority That Constitutes A Majority In A Political Subdivision Subject To Suit?

The WVRA defines which group members have standing to sue: "'Protected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 et seq." RCW 29A.92.010 (5). Unfortunately for the drafters, the federal voting rights act, 52 U.S.C. § 10301 *et seq.*, does not ever reference or define a "race minority group" or a "color minority group." Instead, the federal voting rights act forbids "denial or abridgment of the right . . . to vote on account of race or color . . ." 52 U.S.C. § 10301. The act forbids ***any*** racially discriminatory act, whether perpetrated by a racial majority against a racial minority or by a racial minority against a majority. As a result, the WVRA incorporates no definition of "race minority group." The legislature has simply failed to grant statutory standing to any person who claims a right to sue on the grounds that he is a member of such a group, as Plaintiffs did below.

In defense of their standing, Plaintiffs below urged that "[t]he WVRA is a broad statute intended to provide *all* persons in *any* race, ethnic, or language minority group standing." Opp. to 12(c) Motion at 11:24-26, CP 535 (emphasis in original), and that "[t]he WVRA . . . is a Race-Neutral Law that Applies to All Washington Voter[s]." *Id.* at 14:22-23. This includes, they argued, "any racial group including White or Anglo residents . . ." *Id.* at 9:1-2. They cited *Harding v. Dallas County*, 948 F.3d 302 (5th Cir. 2020), for the principle that White/ Anglo plaintiffs who constitute a minority of a specific political jurisdiction thereby have standing to bring these types of vote dilution claims under the FVRA, and urged that the WVRA be read the same way.

But as Mr. Gimenez pointed out, this saving construction also read them out of court. If White/ Anglo citizens can sue, despite being a majority of the population of the entire state, then the relevant denominator must be the population of the political subdivision at issue. And, as all parties agreed, Plaintiff Portugal was a member (along with Mr. Gimenez) of Franklin County's Hispanic ***majority***.

The Superior Court Order punts on this question. It notes that under the WVRA, "'protected class' "means a class of voters who are members of a race, color or language minority

group, as defined by the federal voting rights act," Order at 2:10-11, CP 679, without addressing the fact that the federal act does not define "race minority" or "color minority." Despite that the federal act has been interpreted, as Plaintiffs acknowledged, to allow white minorities within political subdivisions to sue, the Superior Court interpreted the WVRA to deny that right to Franklin County's white minority and grant it instead to the Hispanic ***majority***. By finding that Portugal *et al.* have standing to sue, the Franklin County Superior Court wrote the federal definitions ***out*** of the statute, contrary to the Legislative text, and wrote in an unclear definition that almost certainly violates the U.S. and state constitutions.

C. Does The WVRA Violate Wash. Const. Art. I § 12?

The Court below held that the WVRA does not violate the state constitution's Privileges and Immunities clause because a similar state in California was found not to violate the federal constitution. This ignored long-standing jurisprudence from this Court, holding that "the privileges and immunities clause of the Washington State Constitution, article I, section 12, requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant Cty Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 805 (2004).

In engaging in that independent analysis, the court recognizes that "the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Grant Cty*, 150 Wash. 2d at 806–07. As Justice Utter characterized it, "[e]nacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups." *State v. Smith*, 117 Wash. 2d 263, 283 (1991) (Utter, concurring).

Under a proper analysis, the Court should have found a violation of the Privileges and Immunities clause. "For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *Grant Cty*, 150 Wash. 2d at 812. That privilege must "pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Id.* at 813. "Voting is of the most fundamental significance under our constitutional structure." *Carlson v. San Juan Cty*, 183 Wash. App. 354, 369 (2014)

(cleaned up), and thus, "the right to vote is a privilege of state citizenship, implicating the privileges and immunities clause of the Washington Constitution." *Madison v. State*, 161 Wash. 2d 85, 95 (2007). Furthermore, "the Washington Constitution goes further to safeguard the right to vote than does the federal constitution." *Id.* at 96.

In the districting context, the Washington Supreme Court has held that "[a]n equal protection violation exists if (1) the boundary lines are intentionally drawn to discriminate against an identifiable political group and (2) there is an actual discriminatory effect." *Kendall v. Douglas, Grant, Lincoln & Okanogan Ctys. Pub. Hosp. Dist. No. 6*, 118 Wash. 2d 1, 13 (1991). That, of course, is the precise goal of the WVRA: it grants to a specific identified class the right and privilege to have county commissioner boundaries drawn so that members of that identified class—but not the public at large, or members of other definable classes—can elect a "candidate of choice."

The statute provides that "no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or

classes." RCW 29A.92.020. By its omission, of course, that also means that a method of electing the governing body ***may be*** imposed in a manner that ***does impair*** the ability of anyone else, anyone who is not a member of a protected class, "to have an equal opportunity to elect candidates of their choice." The statute can only grant the benefit to the newly created protected class by denying that right to anyone not in the protected class. After all, Franklin County has only three commissioners, and to the extent any one of them is not the "candidate of choice" of a protected class but nonetheless has been elected, that commissioner must be the "candidate of choice" for a majority of voters, many of who presumably are not in the protected class. Elections are quintessentially zero-sum: one candidate wins, another loses. By requiring the county to draw district lines that tilt the playing field in favor of a defined class, the WVRA confers a voting privilege to that class, and thereby excludes any other class from that same voting privilege. As such, it violates Art. I § 12.

D. Does the WVRA violate U.S. Const. Amend. XIV?

The United States Supreme Court has repeatedly held that the Fourteenth Amendment imposes strict limits on statutes that allow race-based district line drawing. The WVRA expressly

removes those constitutional guardrails, eliminating the constitutionally mandated "compactness" requirement for such districts.

The Fourteenth Amendment permits the federal VRA to impose a proposed minority district so that minority members have "the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). However, it **requires** that any such district be sufficiently compact. "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality) (quoting *Growe*, 507 U.S. at 41). Dissatisfied with the United States Supreme Court's holding that the Fourteenth Amendment imposed that standard on Section 2 of the federal voting rights act, the Washington Legislature wrote it out of the WVRA. "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district ***shall not preclude a finding of a violation*** under this chapter, but may be a factor in determining a remedy." RCW 29A.92.030(2) (emphasis added).

The Superior Court instead held that these vital constitutional guardrails, intended to preserve the federal law as constitutional under the Equal Protection clause, were merely

details of statutory construction. The Washington legislature's omission of them was therefore irrelevant, according to the Superior Court, to the constitutionality of the WVRA.

This was an error, as was the Court's decision to apply "rational basis review" Order at 4:7, CP 681, to whatever extent that factored into the Fourteenth Amendment analysis. The Washington Legislature drafted a statute that purported to overturn binding U.S. Supreme Court precedent as to the meaning and application of the Fourteenth Amendment to race-based district line drawing. The WVRA classifies voters on the basis of their "race, color, or language minority group," RCW 29A.92.010, and it imposes liability on municipalities based on those classifications (*e.g.*, based on the presence of racially polarized voting). That is a paradigmatic racial classification, and all racial classifications get strict scrutiny regardless of their purported universal applicability. The Supreme Court has been quite clear on this point: "[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw I*, 509 U.S. at 651; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *Johnson v. California*, 543 U.S. 499, 506 (2005) (rejecting argument that prison's racial

classification policy should be "exempt" from strict scrutiny "because it is 'neutral'—that is, it 'neither benefits nor burdens one group or individual more than any other group or individual'").

By eliminating the compactness requirement, the Act "unnecessarily infuses race into virtually every redistricting" decision, and thereby "rais[es] serious constitutional questions." *Bartlett*, 556 U.S. at 21 (plurality). The WVRA makes race not merely one factor or the predominant factor, but the ***only*** factor in triggering WVRA litigation remedies and redistricting on racial lines. It must therefore "must withstand strict scrutiny" because it compels Franklin County, and any other targeted jurisdiction, to allow "racial considerations [to] predominate[] over others" in changing from at-large to district-based elections. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

The Court erred in applying only rational basis scrutiny, if any, and in finding that the Fourteenth Amendment has nothing to say about a statute that calls for race-based districting.

E. Under RAP 4.2(a)(4), This Case Warrants Prompt And Ultimate Determination.

Franklin County has agreed to shift its county commissioner elections to district-based from its historically at-large elections system in 2024. Prompt resolution of this matter

by this Court will ensure that the applicability and constitutionality of the WVRA will be resolved well in advance of the filing date for the 2024 primary and general elections.

V. Conclusion

Petitioner James Gimenez respectfully requests that this Court grant direct review of his appeal from the decision of the Franklin County Superior Court.

Submitted this June 17, 2022.

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Certification

I hereby certify that the foregoing brief contains 3,402 words, *see* RAP 18.17(c)(1), exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief.

///

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Certificate of Service

I hereby certify under penalty of perjury under the laws of the United States of America that on June 17, 2022, I filed the foregoing Brief, Case No. 100999-2, through the Washington State Appellate Courts' Secure Portal which gives electronic notice of the filing to all active parties on the case.

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