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.

BRIEF OF APPELLANT

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I. Introduction and Summary of Argument.

The Washington Voting Rights Act ("WVRA"), Chapter 29A.92 RCW, creates three "protected classes" which it entitles to sue to force changes to electoral systems. Specifically, those protected classes may compel a political subjurisdiction of the state—such as Franklin County—to draw district lines which ensure that the protected class' members may elect a candidate of their choice where that choice differs from the electoral preference of members of groups which are not statutorily defined "protected classes." Plaintiffs here sued Franklin County, asserting that as Latinos, they were entitled to force Franklin County to draw county commissioner district lines that allowed their minority group the ability to elect a candidate of choice, and force Franklin County to abandon its preferred at-large elections for commissioners.

Plaintiffs' lawsuit fails for multiple reasons, all of which require careful construction of the relevant section of WVRA. Therefore, the detailed statutory construction question relevant to each issue is summarized here, but presented in detail with the relevant argument below.

WVRA defines three groups as follows: '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). It goes on to grant this defined class of voters the unique privilege of suing municipalities to force changes in election systems. RCW 29A.92.080. WVRA thus sets out three groups whose members are members of a "protected class" under the Act. Only members of a protected class, as defined by the Legislature, may bring claims under WVRA. These classes have specific characteristics, but those characteristics are surprisingly unclear, not only in WVRA, but across the whole of Title 29A. Properly construed, first, the three groups are characterized as being "race, color, or language minority group[s] . . ." This means the groups comprise "race minority groups," "color minority groups," or "language minority group[s] as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*"

Second, the groups comprise "voters." This word is not defined in either Chapter 29A.92 RCW or in Chapter 29A.04 RCW, but its meaning can be extrapolated from the context in which it is used in other Definitions in that introductory chapter.

Third, the group members are a "minority." As detailed below, the incorporation of the FVRA definition of "language minority," could be read as classifying all persons who are American Indian, Asian American, Alaskan Natives or of

Spanish heritage as members of a "protected class" regardless of their fraction of the population. However, both the introductory section preceding the definitions, and the statute as a whole, make clear that the Legislature intended for WVRA to grant standing to sue to groups that, taken as a population in whole, constituted a minority of the total population within the jurisdiction being sued.

This proper construction results in the Plaintiffs' suit failing as a matter of law for at least four reasons:

First, WVRA defines three race-based categories, and litigation under the statute allows Plaintiffs to compel Franklin County to draw district lines taking race into account. However, subsequent to the statute's passage, the Legislature impliedly repealed its application, at least as to counties in Washington, by passing a law that forbids the consideration of race in drawing county district lines. This argument requires the Court to construe the definitions of "protected class" to show that all three groups are race-based groups.

Second, properly construed, WVRA grants standing to "voters" who are members of a total population group which is a minority as compared to the total population of the jurisdiction being sued. Because Latinos comprise a majority of Franklin County, Plaintiffs lack standing. This requires the Court to

construe the precise meaning of certain statutory words and phrases that are not surprisingly not self-evident in WVRA or entire Revised Code, including the word "voter."

Alternatively, the proper construction of the definition of "language minority group" adopted from federal law protects those whose primary language is Spanish; Plaintiffs plead no facts to show that they meet this definition.

Third, WVRA intentionally purports to repeal (or explicitly exclude from consideration) a number of factors in race-based redistricting that the United States Supreme Court has identified as mandatory preconditions to save a statute from violating the Fourteenth Amendment. WVRA forbids consideration of geographical compactness or past discrimination. But, properly construed, WVRA grants the right to sue only to race groups. Doing so, WVRA makes race the primary consideration in districting, in violation of the Fourteenth Amendment.

Fourth, WVRA grants the privilege of suing to force redistricting in favor of themselves to specific race groups in each jurisdiction while denying that privilege to others, in violation of Wash. Const. Art. I § 12.

II. Assignments of Error

1. The Superior Court erred in finding that WVRA was not repealed as to counties by subsequent statutes.

2. The Superior Court erred in finding that the Plaintiffs have standing.

2. The Superior Court erred in concluding that the statute does not violate the state and federal constitutions.

III. Issues Pertaining to Assignments of Error

1. Are WVRA "protected classes" race-based minority groups?

2. Did one or both of 2018 c 301 § 8 and 2021 c 173 § 1 repeal WVRA's race-conscious redistricting mandate as to counties?

3. Are Plaintiffs members of a protected class minority group as defined in WVRA?

4. Does the definition of "language minority group" in the Federal Voting Rights Act ("FVRA"), incorporated in WVRA, identify the racial/ ethnic group of "Latinos" or "Hispanics;" or does it identify those who speak primarily or only Spanish?

5. WVRA defines "protected class" by race; grants members of a "protected class" the right to sue for redistricting; and does not require a factual showing of, *i.a.*, compactness or

past discrimination. Does it thereby make race the "primary factor" in redistricting in violation of U.S. Const. Amend. XIV?

6. WVRA divides the population of every jurisdiction into members of "protected classes" and others. Does this violate Wash. Const. Art. I § 12?

IV. Statement of the Case.

"On October 12, 2020, Plaintiffs properly notified Franklin County by letter that the County was in violation of WVRA and that Plaintiffs intended to challenge the County's electoral system unless the County adopted an appropriate remedy." CP 16 (Am. Comp. ¶ 5.5). Plaintiffs filed suit on April 22, 2021, and filed an Amended Complaint on May 5, 2021. CP 1. That remained the operative pleading in the case.

On July 21, 2021, Plaintiffs moved for partial summary judgment. CP 32. On September 7, 2021, Franklin County responded to the Motion for Summary Judgment. CP 168. In that Response, Franklin County stated that it "does not oppose Plaintiffs' Motion for Summary Judgment . . ." CP 171. It expressly stated that "Franklin County acknowledges that the current election system for its county commissioners constitutes a violation of WVRA and asks the Court to set a hearing on November 15, 2021, or later to allow Franklin County to seek

input from its citizens, including the Plaintiffs, in development of a plan that will best serve all of its citizens." CP 19.

On September 10, 2021, Mr. Gimenez, through counsel, informed Plaintiffs that he intended to intervene in the case to defend against WVRA challenge to Franklin County's elections system. CP 293. Three days later, on September 13, 2021, Plaintiffs and Franklin County hurried into court to have a judge sign an uncontested grant of summary judgment to Plaintiffs. CP 258. Three days after, on September 16, 2021, Mr. Gimenez moved to intervene to defend the lawsuit, because Franklin County declined to do so. CP 260. Plaintiffs opposed intervention on the grounds that, *i.a.*, it came too late, summary judgment having been granted. CP 310.

In the interim, the parties' collusive settlement fell apart. On September 23, 2021, the Franklin County Commissioners adopted Resolution 2021-210, expressly holding that the Commission had never consented to the County conceding summary judgment and instructing the County's lawyers to ask the Court to vacate the Order. CP 275. Franklin County's outside counsel withdrew, CP 276; Franklin County's PA filed a Motion to Vacate, CP 279; and the Benton County PA entered an appearance to fully brief and argue that motion for Franklin

County. CP 315. The Order was vacated, CP 349; and Mr. Gimenez was granted intervention. CP 351.

Mr. Gimenez then filed a Motion for Judgment on the pleadings, challenging Plaintiffs' standing and seeking a declaration that WVRA is unconstitutional. CP 353. Plaintiffs opposed, CP 525; and Mr. Gimenez Replied. CP 571. Prior to the hearing, Plaintiffs sought to change venue to Thurston County. CP 377. That Motion was eventually denied. CP 676. Plaintiffs also filed a motion asking the Court to dismiss Mr. Gimenez as a party "for lack of subject matter jurisdiction." CP 643. Mr. Gimenez opposed that Motion as frivolous, and sought fees. CP 655. Plaintiffs declined to file any Reply, and never sought a hearing on the Motion.

Mr. Gimenez' Motion was denied in a written order on January 7, 2022. CP 678. After other activity, Franklin County and Plaintiffs settled the case on May 9, 2022, over Mr. Gimenez' objections. CP 1300. Mr. Gimenez timely appeal on June 8, 2022. CP 1305.

V. WVRA Race-Based Districting Remedy Was Subsequently Repealed As To Counties.

Statutes passed after WVRA forbid counties from taking race into account in drawing district lines. If WVRA, properly construed, ***requires*** the use of race in drawing those lines, it has

been repealed by the later enactments. Resolving this question requires the Court to construe the statute. This Court engages in that task *de novo*. "Statutory interpretation is a question of law, which we review *de novo*." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash. 2d 516, 526 (2010). In that review, "[t]he court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent. Statutory interpretation begins with the statute's plain meaning. Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. While we look to the broader statutory context for guidance, we must not add words where the legislature has chosen not to include them, and we must construe statutes such that all of the language is given effect." *Id.* (cleaned up).

A. WVRA Creates Three Racial "Protected Classes"

RCW 29A.92.010(5), defining the three protected classes entitled to sue, can be parsed three ways, resulting in different group definitions.

> '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).

Here, the words "race" and "class" can be unmodified, or "race" and "class" can be modified by "minority group," or those two words can be modified by both "minority group" and the reference to federal statutory definitions. The possibilities are made more clear by extracting each from the balance of the sentence, as though the Legislature had drafted the section with three subsections, each containing a single class definition.

For the first possibility, the statute would read:

> "Protected class" means
>
> (a) a class of voters who are members of a race; or
>
> (b) a class of voters who are members of a color; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*

The second possible construction reads:

> "Protected class" means
>
> (a) a class of voters who are members of a race minority group; or
>
> (b) a class of voters who are members of a color minority group; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*

Finally, the third possibility reads:

> "Protected class" means:
>
> (a) a class of voters who are members of a race minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*; or

> (b) a class of voters who are members of a color minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*

In each of these three possibilities, the final phrase remains the same. As detailed below, for both grammatical and legal reasons, the word "language" must be modified by every word that follows, where the words "race" and "class" logically could be, but also, logically, need not be.

1. The Third Class: "Language Minority Group."

The last category is the simplest to construe: "'Protected class' means a class of voters who are members of a . . . language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*" For at least three reasons, the word "language" must be modified by "minority group, as . . . defined in the" FVRA.

First, it makes no linguistic sense to say "a class of voters who are members of a language." No one is a member of a language. One might speak a language, and thus we would say of a person: "She speaks Farsi." One might be a language speaker:

"He is a Farsi speaker." But no one would be described as: "She is Farsi" or "she is a Farsi."[1]

Second, as a matter of grammar and sentence structure, these final words must modify the last antecedent, the words immediately preceding this modifying phrase in the sentence. "One such grammar rule is the last antecedent rule, which states that qualifying or modifying words and phrases refer to the last antecedent. Related to this rule is the corollary principle that the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. We do not apply the rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation." *State v. Bunker*, 169 Wash. 2d 571, 578 (2010). Despite the comma, the last phrase will not modify earlier words, as discussed below, because it

[1] "Farsi" is used as an example because in many cases the word for a language is also the name of a country, confusing the grammatical differences: He speaks English/ He is English; She speaks Spanish/ She is Spanish. The distinction is particularly important here, where a voter who is of Spanish heritage may not be a Spanish speaker, and, in the context of American voting rights law, not be descended from residents or citizens of Spain.

results in an absurd and nonsensical interpretation. But they must modify the final preceding word.

Third, the FVRA contains a definition of "language minority group": "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3). But the FVRA contains no definition of "race" or "race minority group," nor of "color" or "color minority group." If the portion of the sentence incorporating a definition from federal law does not modify "language minority group," it has no meaning whatsoever. This Court "construes statutes such that all of the language is given effect, and no portion is rendered meaningless or superfluous." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash. 2d 674, 682 (2003). Thus, the third protected class in WVRA must be "a class of voters who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."

2. The First And Second Classes: What Modifiers?

Who are members of the first two protected classes? What among those final words and phrases modify "race" and "color?" Here, the answer is not as immediately clear. Again, the question is, to whom did the Legislature grant the right to sue? Under construction one, any person can sue, asserting the rights

of all members of his race or color. Under the second construction, only a voter who identifies as a member of a minority race or color group can sue, again asserting the rights of all members of his claimed race or color minority group. Under the third construction, only a voter who is a member of a race or color minority group as such group is defined in the FVRA may sue, again asserting the rights of all members of that federally defined group. Review of both the introductory section of WVRA and the FVRA reveal that only one of the three plausible, grammatically permissible constructions can be adopted.

(a) Member Of A Race Or Color.

This first possibility can be rejected by reference to the Legislature's Findings – Intent of WVRA, found in RCW 29A.92.005:

> The legislature finds that electoral systems that deny ***race, color, or language minority groups*** an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal elections . . . The legislature also finds that local government subdivisions are often prohibited from addressing these challenges because of Washington laws that narrowly prescribe the methods by which they may elect members of their legislative bodies. The legislature finds that in some cases, this has resulted in an improper dilution of voting power for ***these minority groups***. The legislature intends to modify existing prohibitions in state laws so that these jurisdictions may voluntarily adopt changes on their own, in collaboration with affected community members, to remedy potential

> electoral issues so that ***minority groups*** have an equal opportunity to elect candidates of their choice or influence the outcome of an election.

Plainly, the statute refers to multiple "minority groups": race minority groups, color minority groups, and language minority groups. It uses the same phrase in .005 as it uses in .010: "race, color, or language minority group." These must mean the same thing in both sections. "An act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous." *Bunker*, 169 Wash. 2d at 578 (cleaned up).

In RCW 29A.92.005, the Legislature clarified that the phrase does not refer to (1) members of any race, (2) members of any color, and (3) members of language minority groups. It clarifies this by specifically referring to all three groups as "these minority groups" and "minority groups." Additionally, the first sentence only makes grammatical sense if the Legislature refers to race and color at least as "groups." Otherwise, the sentence would read: "The legislature finds that electoral systems that deny race . . . an equal opportunity to elect candidates . . ." "Systems" cannot deny "race" an opportunity, so the sentence must refer to either "race groups" or "race minority groups." The balance of the section makes clear that all three groups were,

in the Legislature's drafting, "minority groups," not "race groups," "color groups," and "language minority groups." Thus, in the next section, RCW 29A.92.010, if "minority group" only modifies "language," then the phrase would mean something different in .005 than it means in .010, violating the principle of construction described in, *i.a.*, *Bunker*.

(b) Member Of A Race Or Color Minority Group As Defined In The FVRA.

This third possibility must also be rejected. The incorporated statutory text of the FVRA, 52 U.S.C. § 10301 *et seq.*, does not ever reference or define a "race" or a "color," nor does it define a "race minority group" or a "color minority group." The FVRA 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. Jim Crow was as criminal under the act as South African apartheid would be. As such, the statutory text of the FVRA never once references or defines a "race minority group" or a "color minority group." Thus, construing the statute to grant standing to members of three groups, all of which are defined in federal law, results in a construction that eliminates two of the three defined groups. This construction

would violate the "fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of the statute." *In re Dependency of K.D.S.*, 176 Wash. 2d 644, 656 (2013) (cleaned up).

Thus, properly construed, WVRA creates three protected classes, each of which is a race group. Each race group is granted the right to sue and compel changes in county districting to give that race group the ability to elect candidates preferred by that race group. It does so by mandating district lines be drawn on racial lines when demanded by a voter in that group.

B. Subsequent Statutes Barred Use Of Race In County Districting, Repealing WVRA As To Counties.

On March 20, 2018, the day the Legislature passed WVRA, existing Washington law banned the use of race in drawing county commissioner district lines. That statute, codified at RCW 29A.76.010, had been passed most recently as 2011's SSSB 5171, 2011 c 349 § 26, and stated that "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 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). This constituted an implied repeal of the ban on using race in drawing district lines. 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.

The 2018 Legislature wasn't done, and neither was it particularly careful. Eight days later, 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)).

Both this and WVRA were given effective dates of June 7, 2018. Perhaps, with the same effective date, the later-enacted statute did not repeal the earlier? This Court need not consider the question, because 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. As of the date of the operative pleading in the court below, RCW 29A.76.010(4)(d) continued to read "Population data may not be used for purposes of favoring or disfavoring any racial group or political party."

Plaintiffs asked the superior court to order Franklin County to draw new district lines which are explicitly crafted to favor a racial group, the Plaintiffs' racial group. WVRA, when enacted, purported to allow that outcome. But on two separate occasions since passing WVRA, the Legislature 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 WVRA, and that statute precludes the relief Plaintiffs sought below.

VI. Plaintiffs Lack Standing.

Plaintiffs lack standing to sue Franklin County because either they are members of a group that does not comprise a minority of Franklin County (when the statute is properly construed) or, alternatively, they are not a language minority group as that term is properly construed in federal law. Analyzing this requires the Court to construe the statute to determine the meaning of the words defining the two parts of the relevant fraction, so as to know whether the "class of voters" who sue when asserting that they "are members of a race, color, or language minority group" are, in fact, members of a ***minority*** group. The relevant "classes" are construed above; here, the Court must determine other characteristics of the class, the numerator, as well as the relevant comparator, or denominator.

A. What Is A Class Of Voters?

Each protected class consists of "voters," a word that is not defined in Chapter 29A.04 RCW, the general provisions of the Title which includes the definitions section. However, review of the many contexts in which it is used demonstrates that it is either completely or nearly synonymous with the defined term

"elector," and includes all voting age citizens qualified to vote, whether registered or not.

Begin with RCW 29A.04.145:

> "Registered voter" means any elector who has completed the statutory registration procedures established by this title. The terms "registered voter" and "qualified elector" are synonymous.

A "voter" need not be a "registered voter," just as an elector need not be a "qualified elector." An elector becomes a "qualified elector" by becoming a "registered voter," that is, by registering to vote. Because an "elector" can register to vote and thereby become a registered voter, this strongly suggests that "elector" and "voter" are synonymous, just as "registered voter" and "qualified elector" are synonymous.

Next, the definition of "elector" in RCW 29A.04.061:

> "Elector" means any person who possesses all of the qualifications to vote under Article VI of the state Constitution, including persons who are seventeen years of age at the primary election or presidential primary election but who will be eighteen years of age by the general election.

The group of Washington people who comprise "electors" is nearly coterminous with "citizen voting age population." It includes additional members who are a few weeks shy of 18 years old at the time of a primary election. It excludes "[a]ll persons

convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise." Wash. Const. Art. VI § 3. If "voter" is synonymous with "elector," then a class of voters in Chapter 29A.92 RCW comprises almost the same group as a group of citizens of voting age. Other definitions reinforce this reading. For example, RCW 29A.04.070 defines "future voter" as "a United States citizen and Washington state resident, age sixteen or seventeen, who wishes to provide information related to voter registration to the appropriate state agencies." Once the "future" comes to pass, this person will be a voting age citizen, and no longer a "future voter" but a "voter."

Two final definitions confirm that "voter" and the statutorily defined term "elector" are nearly or completely synonymous. First, RCW 29A.04.109:

> "Overseas voter" means any elector of the state of Washington outside the territorial limits of the United States.

In this definition, "overseas" plainly means "outside the territorial limits of the United States," and "voter" means "elector of the state of Washington."

Finally, RCW 29A.04.163:

> "Service voter" means any elector of the state of Washington who is a member of the armed forces under 42 U.S.C. Sec. 1973 ff-6 while in active service, is a member of a reserve component of the armed forces, is a student or member of the faculty at a United States military academy, is a member of the merchant marine of the United States, or is a member of a religious group or welfare agency officially attached to and serving with the armed forces of the United States.

Just as with "overseas voter," the word "service" is defined in this section by the extended phrase following "elector of the state of Washington," meaning that "voter" in this definition also means "elector of the state of Washington."

Thus, while the neither the definitions section at the outset of Title 29A, nor the definitions section of WVRA contain a definition of "voter," its meaning can be extrapolated readily from its use in various other definitions: it is almost or completely synonymous with the defined term "elector," and a group of "voters" comprises exactly or very nearly the citizen voting age population, possibly subject to small numbers added and subtracted as detailed above.

B. A Minority Of What?

Finally, the protected classes are "minorities." This raises two questions of statutory construction. First, as noted above, replacing the incorporated federal definition into the "language

minority" class yields a protected class that is "a class of voters who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." Contrast this with the first two groups: a class of voters who are members of a race minority group and a class of voters who are members of a color minority group. Merely inserting the federal definition into WVRA statutory definition could mean that the three protected classes are (1) race minorities, (2) color minorities, and (3) people who are American Indian, Asian American, Alaskan Natives or of Spanish heritage, regardless of whether they are minorities. So, a question arises: Does WVRA require that American Indians, Asian Americans, Alaskan Natives and those of Spanish heritage are "minorities?"

Next, a minority of what? Must members of each class be a minority of the entire United States population, the United States voting age population, the U.S. citizen voting age population, Washington's population, Washington's voting age population, or Washington's CVAP?[2] Or something else? What

[2] Naturally, no one would ever assume that any legislature in the United States, state or federal, would legislate with reference to world population. The relevant statutory interpretation question is not ***whether*** the Legislature was parochial, but how parochial it was.

is the population denominator that determines whether or not the plaintiff's class is a minority?

1. The Group Must Be A Minority Of The Population Of The Jurisdiction It Sues.

WVRA as a whole shows that the group granted standing to sue must be a minority within the jurisdiction it sues. RCW 29A.92.005 asserts that the purpose of WVRA as a whole is "to remedy potential electoral issues so that minority groups have an equal opportunity to elect candidates of their choice or influence the outcome of an election." RCW 29A.92.005. WVRA specifically refers to elections in "political subdivisions," and within those subdivisions, bars election methods "that impair[] the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice . . ." RCW 29A.92.020. Among the factors in finding a violation, "[t]he 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 . . ." RCW 29A.92.030 (emphasis added).

This compels the conclusion that the relevant denominator must be the political subdivision subject to a challenge. After all, if the "protected class" constitutes a majority of the political subdivision (albeit a minority of the state

or nation), it would not lack an equal opportunity to elect candidates of choice due to vote dilution ***within that subdivision***, and it would be impossible for it to fail to be a majority within at least some district-based election district ***within the subdivision***.

Furthermore, as the plaintiffs below agreed, "WVRA's Definition of a "Protected Class" Extends to Any Racial Group." CP 529 (Opp. at 5). Plaintiffs specifically cited *Harding v. Dallas County*, 948 F.3d 302 (2020), for the principal that a white minority within a political jurisdiction must have standing to bring vote dilution claims under Section 2 of the FVRA. CP 533, *id.* at 9. WVRA cannot, as Plaintiffs urged, protect any racial group, including whites, if the denominator for determining whether a group is a minority is the state as a whole. As of the 2020 Census, Washington has a population of 7,705,281, of which 4,918,820 are non-Hispanic Whites. CP 576, Reply at 5 (citing U.S. Census data at https://data.census.gov/cedsci/profile?g=0400000US53). If the denominator total state population, WVRA cannot protect all racial groups from vote dilution, as Plaintiffs urged. Thus, the only possible construction of "minority" is "minority of the political subdivision being sued."

2. "Language Minority" Must Also Be A Numerical Minority In The Subdivision.

As noted above, inserting the federal definition into WVRA statutory definition could mean that the three protected classes are (1) voters who are members of a race minority, (2) voters who are members of a color minority, and (3) voters who are American Indian, Asian American, Alaskan Natives or of Spanish heritage, regardless of whether they are members of a minority group. However, for the reasons given above, such a construction would do violence to the meaning of the remainder of the statute. The introductory section repeatedly identifies the Legislature's concern for the plight of minority groups, and the statute purports to remedy vote dilution that results from at-large election systems, an issue that can only affect a numerical minority within a political subdivision. Thus, a protected class of "language minority group" must also mean that the total number of persons in the group is a minority of the political subdivision, just as with "race minority group" and "color minority group."

3. The Denominator Is Total Population, Not "Voters," "Electors," or "Citizen Voting Age Population"

WVRA identifies two different categories that comprise the fraction which determines if a "protected class" group is actually a minority. The numerator is "a class of voters," but in

that sentence, the denominator is not as clearly identified. However, WVRA repeatedly contrasts "groups" and in particular "minority groups" with "voters." The definition of "protected class" draws this distinction, where the "class" comprises "voters" who are members of a "group." The "group" must include more than only the "voters," or the "voters" would not be ***members*** of the "group," they ***would be*** the "group."

RCW 29A.92.020 draws a similar distinction:

> [N]o 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.

This contrasts the "members of a protected class" with the "rights of voters who are members of a protected class." "Voters" who are members of a protected class comprise a subset of the larger set, "members of a protected class." But "voters" means the same as "electors," and is synonymous or nearly so with "citizen voting age population." Thus, the entire group comprising the "members of a protected class" must be larger than "citizen voting age population" of that racial category. "It is also well established that when different words

are used in the same statute, it is presumed that a different meaning was intended to attach to each word." *Simpson Inv. Co. v. State, Dep't of Revenue*, 141 Wash. 2d 139, 160 (2000) (cleaned up).

Thus, the construction that gives meaning to all words in the statute is that the "group" which must constitute a minority comprises the total population of the "race minority group," "color minority group," or "language minority group," compared to the total population of the political subdivision. If the total population of a "race minority group," "color minority group," or "language minority group" constitutes less than half the total population of a political subdivision, then voters among its members may sue under WVRA. If it constitutes half or more of the total population of a political subdivision, it is not a "minority" for WVRA purposes, and its voter members lack standing.

(a) Member Of A Race Or Color Minority Group.

This, the second possible construction delineated above, is the only plausible construction that gives the same meaning to the phrase in RCW 29A.92.005 as in RCW 29A.92.010, and does not result in eliminating the phrase from the statute entirely by

incorporating a non-existent definition. Thus, the statute grants standing to sue to the following three groups:

> (a) a class of voters who are members of a race minority group;
> (b) a class of voters who are members of a color minority group;
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*

Finally, after pasting in the incorporated federal definition from 52 U.S.C. § 10310(c)(3), the complete WVRA definition of "protected class" reads as follows:

> "Protected Class" means:
> (a) a class of voters who are members of a race minority group;
> (b) a class of voters who are members of a color minority group;
> (c) a class of voters who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

Members of any of these three groups can sue as a protected class under WVRA. However, the statutory construction inquiry cannot end there. Two questions remain: what is a "class of voters," or, more specifically, what does it mean for a person to be a "voter" in the context of this definition? And, because "minority group" identifies a subset that constitutes less than half of a whole, what is the relevant full set of which the group is a "minority?"

C. Construed As A Race, Plaintiffs Are Not A Minority.

The test for statutory standing is well-established in Washington; Plaintiffs fail it. "The basic test for standing is whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the law in question." *Fam. of Butts v. Constantine*, 198 Wash. 2d 27, 40 (2021) (cleaned up). In order to have standing, a party "must show that his claim falls within the zone of interests protected by the statute or constitutional provision at issue." *State v. Johnson*, 179 Wash. 2d 534, 552 (2014), as amended (Mar. 13, 2014). Here, as detailed above, the statute grants standing to voter who are members of a "race minority group," a "color minority group," or a "language minority group." Plaintiffs pled that they are members of the group of "Latinos" or "Hispanics." But, as detailed above, to determine whether the asserted group comprises a minority, the Court must compare the total population of the protected class within the political subdivision to the total population of that subdivision. Here, Franklin County's 2020 population of 96,749 is 54% Hispanic or Latino— 52,445 people, the largest racial or ethnic group in the

County.[3] Plaintiffs are not, therefore, members of a minority group for purposes of WVRA, and lack standing.

D. "Language Minority," Properly Construed, Refers To Spanish *Speakers*, Not A Race Group.

The relevant definitional text of the FVRA, added in 1975, first recites three groups emphasizing their ethnicity ("persons who are American Indian, Asian American, [or] Alaskan Natives"). Then, in a contrasting language structure, it identifies those "of Spanish heritage." Yet, most courts have treated the four groups as identically defined, and as all ethnic or racial groups, despite the very different words used to define the first three as compared to the last. But the text itself, especially when read in light of the enacted legislative findings that accompanied the 1975 amendment, demonstrate that the fourth protected group comprises those whose native language is Spanish. This group is not identical with all Hispanics, and has historically faced—and continues to face—unique disadvantages to full political participation, including voting. With that correct construction, Plaintiffs lack standing because they have not pled facts sufficient to show that they or the groups they claim to represent comprise people whose native language is Spanish.

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[3] https://data.census.gov/cedsci/profile?g=0500000US53021.

The statutory text alone strongly suggests that the fourth category differs from the first three ethnic groups, by emphasizing "heritage" rather than protecting "persons who are Spanish"[4] or even "persons who are "Hispanic." The legislative history firmly demonstrates this point. The proposed legislation originated with the administration, whose Civil Rights Division head testified that:

> The proponents of additional legislation have suggested two major legislative needs in this area. First, they point out that some states in which large numbers of non-English speaking Puerto Ricans, Mexican Americans or Native Americans reside conduct English-only elections, despite the existence of some court rulings that such minorities are entitled to bilingual elections. Second, they have alleged that other forms of discrimination against these minorities are sufficiently prevalent in some non-covered states to warrant expanding the special coverage provisions to cover such states.

The Extension of the Voting Rights Act: Hearing Before the Subcommittee on Civil Rights and Constitutional Rights of the H. Judiciary Comm., 94th Cong. at 1-2 (1975) (statement by J. Stanley Pottinger, Asst. A.G., Civil Rights Division). Fully recognizing the reason for the proposal, Congress also stated

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[4] As noted above with the example of "Farsi," this difference could be explained by Congress' need to make clear it was not attempting to extend the protections of the FVRA to citizens of the European nation, Spain.

clearly that it was extending FVRA protections to those whose primary language was other than English:

> The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation.

PL 94–73 (HR 6219), August 6, 1975, 89 Stat 400. The Senate's contribution to the legislative history concurs, stating that the 1975 amendment was intended "to insure that the Act's special temporary remedies are applicable to states and political subdivisions where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) significant concentrations of minorities with native languages other than English reside." S. Rep. No. 94-295, at 9 (1975), reprinted in U.S.C.C.A.N. 774, 775. That report clearly stated that "[t]he definition of those groups included in 'language minorities' was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices . . . . No evidence was received

concerning the voting difficulties of ***other language groups***." *Id.* at 24 (emphasis added). Finally, the president's signing statement concurred in the understanding of the bill as protecting those whose native language was Spanish: "'The bill I will sign today . . . broadens [FVRA] provisions to bar discrimination against Spanish-speaking Americans." Remarks of the President at the Signing of the Voting Rights Act, The Rose Garden (Aug. 6, 1975) (digitized from Box 14 of the White House Press Releases at the Gerald R. Ford Presidential Library).

The text and relevant history of the 1975 amendments demonstrate that the class of persons "of Spanish heritage" protected as "language minorities" are those whose primary language is Spanish, not a racial or ethnic class of all Hispanics or Latinos. Plaintiffs made no attempt to plead or prove that they fit this category, and therefore failed to show that they have standing to sue under WVRA which adopted that definition.

VII. WVRA Violates U.S. Const. Amend. XIV.

WVRA enacts certain race-based "protected c lasses" into law, and grants those race groups the right to sue in order to force jurisdictions such as Franklin County to re-draw district lines on a racial basis. But it explicitly disclaims any of the United States Supreme Court's carefully crafted safeguards that allow the similar federal provision to pass Constitutional muster under

the Fourteenth Amendment. Because it explicitly makes race the predominant factor in redistricting wherever it is invoked, it faces strict scrutiny, which it fails.

A. According To Plaintiffs, WVRA's "Protected Classes" Are All Race Groups.

To the Court below, Plaintiffs urged that all three categories of "protected class" under WVRA are race or ethnic categories. CP at 530. This is a plausible reading of the statute, which, under Plaintiffs' construction, protects (1) all race minority groups, (2) all color minority groups, and (3) four specific race/ color minority groups, namely, American Indians, Asian Americans, Alaskan Natives and those of Spanish heritage. This last, Plaintiffs argued identifies the race/ ethnic category of "Latinos" or "Hispanics." CP 530. Under this reading, the third category, "language minority groups," is entirely superfluous, because each of the four groups is already captured by the preceding categories, race minority groups and/ or color minority groups. Detailed above, a more plausible construction of "persons who are of Spanish heritage" in the set of "language minority group" in the FVRA comprises those who speak Spanish. Appellant recognizes, however, that no federal court has ever been specifically asked to determine the meaning of that section, and case law has generally assumed that the section,

despite identifying "language minority groups," invokes a race/ethnic category. As such, and as Plaintiffs argued, this Court can construe the statute such that every "protected class" in WVRA is a racial or ethnic class.

B. Equal Protection And Section 2 Of The Federal Voting Rights Act.

The "central purpose" of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*"). "Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." *Id.* Such "[e]xpress racial classifications are immediately suspect because, absent searching judicial inquiry, there is simply no way of determining which classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 642–43 (cleaned up).

The Supreme Court has recognized that Section 2 of the FVRA is in tension with these constitutional commands. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 927–28 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Section 2 bars practices "imposed or applied . . . in a manner

which results in a denial or abridgement" of the right to vote. 52 U.S.C. § 10301(a). When Section 2 is invoked to remove racially discriminatory voting restrictions, it is undisputed that the statute enforces citizens' right under the Fourteenth Amendment to vote free from racial discrimination.

But Section 2 also has been interpreted to protect minority voters against "vote dilution." The Supreme Court has held that a municipality's use of at-large districts can "dilute[] minority voting strength by submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality). Section 2 thus *requires* governments to create majority-minority districts in certain circumstances. *See Shaw v. Hunt*, 517 U.S. 899, 906–08 (1996) ("*Shaw II*"). This focus on ensuring minority groups can "elect representatives of their choice"—which *increases* the role of race in voting—raises serious constitutional concerns because it expressly classifies voters by their race. *See Bartlett*, 556 U.S. at 20– 21 (plurality). As a result, the Supreme Court has interpreted Section 2 in a way to keep it from violating the Equal Protection Clause's ban on racial classifications.

Specifically, the Court has identified "three 'necessary preconditions' for a claim that the use of multimember [or at-

large] districts constitute[s] actionable vote dilution under § 2: (1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Bartlett*, 556 U.S. at 11 (plurality) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)). Under Section 2, "only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 11–12.

The Supreme Court has repeatedly emphasized the importance of the first *Gingles* factor—that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district—in ensuring that Section 2 enforces the right to vote instead of requiring racial gerrymandering. The requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett*, 556 U.S. at 15 (plurality) (quoting *Growe*, 507 U.S. at 41). Absent this

requirement, in other words, Section 2 would entitle "minority groups to the maximum possible voting strength," *id.* at 16, which "causes its own dangers, and they are not to be courted," *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994).

The compactness requirement saves Section 2 of the FVRA from constitutional doubt. Section 2 undeniably makes race the predominant factor—even with the compactness precondition in place—when it requires the creation of majority-minority districts. *See Shaw II*, 517 U.S. at 906–08. The Supreme Court has thus "assumed," but not held, "that one compelling interest" justifying the use of race under strict scrutiny "is complying with operative provisions of the Voting Rights Act of 1965." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). But compliance with Section 2 is assumed to be a compelling interest only because it is understood to remedy racial discrimination in voting. *Bartlett*, 556 U.S. at 10 (plurality). There is no racial discrimination to remedy, however, if the minority population is not sufficiently "compact" such that it would have "the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40–41.

Furthermore, the use of race in districting must be narrowly tailored even assuming the existence of a compelling interest. *Cooper*, 137 S. Ct. at 1464. Without the compactness

precondition, the Supreme Court has made clear, Section 2 could never meet that requirement. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I*, 509 U.S. at 657. In short, eliminating the compactness requirement would "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 21 (plurality) (citation omitted).

C. WVRA Explicitly Excludes The Compactness Requirement, Triggering Strict Scrutiny.

In 2018 the Washington Legislature did not simply test the Supreme Court's definition of the boundaries of the Fourteenth Amendment; it openly defied them: "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 . . ." RCW 29A.92.030(2). Further, "[p]roof of intent on the part of the voters or elected officials to discriminate against a protected class is not required for a cause of action to be sustained." RCW 29A.92.030(5). Instead, factors "such as . . .

the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process" may be probative. RCW 29A.92.030(6). Once there is a finding of racially polarized voting, the political subdivision can be compelled to abandon its at-large system. "The court may order appropriate remedies including, but not limited to, the imposition of a district-based election system." RCW 29A.92.110(1).

Plainly, 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. 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). 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*, 137 S. Ct. at 1464.

Strict scrutiny of a voting statute applies "if race was the criterion that, in the State's view, could not be compromised, and race-neutral considerations came into play only after the race-based decision has been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (cleaned up). That constitutional flaw is exactly what WVRA demands.

WVRA focuses exclusively on race by putting voters into racial groups and imposing liability on cities when those groups tend to vote for different candidates. Under the statutory scheme, such racially polarized voting is the ***sole*** reason why Franklin County may be forced to switch from an at-large electoral map to a by-district map. Whether race-neutral considerations drive the way Franklin County might draw its district lines ***after*** having been found to violate WVRA is irrelevant. Any such line-drawing comes "into play only after the race-based decision ha[s] been made." *Bethune-Hill*, 137 S. Ct. at 798–99 (rejecting the argument that "race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria."). Strict scrutiny applies "if race for its own sake is the overriding reason for choosing one map over others," *id.* at 799. Here, it applies to the decision to set district based maps and election systems over at-large solely for racial reasons.

D. WVRA Fails Strict Scrutiny Under the Fourteenth Amendment.

Of course, even if state action violates a provision of the constitution, it may be defended if the state can meet strict scrutiny by showing that its action results from a ***compelling*** state interest and that it has been ***narrowly tailored***. Where "racial

considerations predominated over others, the . . . burden thus shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper*, 137 S. Ct. at 1464. Strict scrutiny applies when racial considerations predominate over others in choosing an electoral system. That means once a plaintiff establishes that racial considerations predominate in the decision to adopt a particular election process, government has the burden to show that the statute mandating that process is narrowly tailored to a compelling interest.

Race predominates over any other considerations in any political subdivision in Washington re-drawing district lines and abandoning at-large elections to comply with WVRA. The Act requires Franklin County to switch from at-large electoral elections to district based elections, with lines drawn on a race-conscious basis, due to a single factor: racially polarized voting, *i.e.*, the fact that voters of different races tend to vote for different candidates. Plaintiffs ask this Court to force Franklin County to abandon at-large elections under WVRA solely due to racial reasons.

WVRA therefore does not serve a compelling interest. There *might* be a compelling interest in ensuring protected classes can "elect a representative of [their] own choice in some

single-member district" under Section 2. *Growe*, 507 U.S. at 40. But there is no compelling interest in providing a "minority group[] … the maximum possible voting strength," *Bartlett*, 556 U.S. at 16 (plurality). Nor is there a compelling interest in the ability of protected classes "influencing" the outcome of elections. It is one thing to ensure (as Section 2 of the VRA does) that at-large elections are not used to deny minority voters the ability "to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality). But outlawing at-large elections merely to ensure that minority voters can influence elections exacerbates the Constitutional equal protection problem. Indeed, it was the suggestion that Section 2 might require the creation of "influence districts" that led Justice Kennedy (joined by the Chief Justice and Justice Alito) to raise concerns about the law's constitutionality. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006). The Court thus concluded that "§ 2 does not require the creation of influence districts." *Bartlett*, 556 U.S. at 13 (plurality). The Washington Legislature thought better of this. WVRA was explicitly intended by the Legislature to go beyond the Constitutional constraints on FVRA Section 2 by focusing on the ability of members a protected class to "***influence*** the outcome of an election." RCW 29A.92.005 (emphasis added). Because WVRA's goal is to not just to remedy

actual vote dilution, but to provide the protected classes with the ability to "influence the outcome of an election," it imposes unconstitutional race-based mandates. Violating the Fourteenth Amendment does not serve a compelling state interest.

Second, WVRA is not narrowly tailored to remedy racial discrimination. Unlike Section 2 of the federal VRA, WVRA does not require that a protected class be sufficiently "compact" to "elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. That "compactness" requirement ensures that an at-large system actually has the potential to dilute the minority group's voting power before a municipality can be forced to switch to a by-district election. If it is impossible to draw a majority-minority district, then the at-large electoral system could not dilute that group's votes in the first place. In other words, "there neither has been a wrong nor can be a remedy." *Bartlett*, 556 U.S. at 15 (plurality). Eliminating the compactness requirement thus "unnecessarily infuse[s] race into virtually every redistricting." *Id.* at 21 (citation omitted).

WVRA requires the court to make race predominate over all other factors in compelling Franklin County to abandon at-large general elections and draw new commissioner district maps. In Plaintiff's suit, in fact, race is the *only* factor for the Court to consider in requiring Franklin County to abandon its

longstanding at-large general election in favor of district elections. The Court will command Franklin County to switch to district based elections, with racially-drawn lines, upon a showing of racially-polarized voting—period. *See* RCW 29A.92.010(3) (defining racially polarized voting); RCW 29A.92.030(1) (defining the presence of racially polarized voting and vote dilution as the facts necessary to find a violation). In other words, the locality must switch to by-district elections solely because individuals of one race tend to vote for one political party and individuals of another race tend to vote for another political party, if the protected race doesn't thereby elect its preferred candidates. The statute is simply pervasively dominated by racial considerations.

But under the Fourteenth Amendment, Washington does not have a compelling interest in forcing localities to redistrict based on the mere existence of racially polarized voting. There may be a compelling interest in ensuring that "the minority has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. But a statute that focuses *solely* on racially polarized voting does not pursue that anti-vote-dilution interest. WVRA unconstitutionally entitles "minority groups to the maximum possible voting strength." *Bartlett*, 556 U.S. at 16 (plurality). And maximizing the voting

power of minority groups is not a compelling interest. *See Miller*, 515 U.S. at 926; *Abrams v. Johnson*, 521 U.S. 74, 85–86 (1997) (explaining that *Miller* held that the Department of Justice's "max-black policy" violated the Equal Protection clause because of its "entirely race-focused approach to redistricting").

The Supreme Court's cases applying Section 2 of the VRA eliminate any doubt that the Legislature went too far in its use of race. The Court has not yet decided whether even Section 2 itself goes too far in its use of racial considerations. *See Cooper*, 137 S. Ct. at 1464. As Justice Kennedy warned, interpreting Section 2 to "infuse race into virtually every redistricting" would raise "serious constitutional questions." *Perry*, 548 U.S. at 405 (opinion of Kennedy, J.) (citation omitted); *see also Johnson*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in part and concurring in the judgment). That is why the Supreme Court has gone to great lengths to construe Section 2 more narrowly, imposing the *Gingles* factors. *See Bartlett*, 556 U.S. at 15, 21 (plurality); *Growe*, 507 U.S. at 40–41.

Yet WVRA explicitly purports to override that admonition. Liability under the Act turns entirely on the existence of racially polarized voting to the exclusion of all other factors. *See* RCW 29A.92.030. That is exactly the kind of rule the Supreme Court has cautioned would make race far too significant

a factor. *See Bartlett*, 556 U.S. at 15 (plurality); *Growe*, 507 U.S. at 40–41. Forcing Franklin County to switch to district-based elections solely because votes are being cast along racial lines "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. This is why strict scrutiny applies to all racially-driven laws. *See id.* at 647–48; *United States v. Hays*, 515 U.S. 737, 744–45 (1995). Under that level of scrutiny, WVRA fails.

VIII. WVRA Violates Wash. Const. Art. I § 12.

Whether every protected class is a race group or not, WVRA violates the Washington Constitution's ban on laws creating special privileges and immunities: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. Art. I § 12. "[T]he 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).

WVRA explicitly violates Art. I § 12. "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 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, 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.

IX. Conclusion

WVRA is unconstitutional. It makes race the predominant factor in districting, and grants elections and voting privileges to certain groups over others in every jurisdiction. The Court need not reach those questions, however, because the Legislature repealed its application to counties twice since passing WVRA. In any event, Plaintiffs identify as belonging to the race group Hispanics/ Latinos, which constitute a majority, not a minority in Franklin County, precluding their standing to sue. This Court

should reverse the judgment below and remand the case with instructions to dismiss it, voiding the settlement that drafted district lines based on race and compelled Franklin County to abandon county-wide commissioner elections.

CERTIFICATIONS

I hereby certify that the foregoing brief contains 11,287 words, 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.

I further certify that I filed the foregoing document via the Washington State Appellate Court's filing portal, which gives notice of this filing to all counsel for all parties who have appeared in the matter.

Submitted this July 28, 2022.

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