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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

The Washington Voting Rights Act ("WVRA") does not confer standing to sue upon the race majority of Franklin County, namely Hispanics.[1] And if Plaintiffs' race group was a minority with standing, the WVRA is unconstitutional under the federal and state constitutions.

Mr. Gimenez' Opening Brief demonstrated that the only plausible construction of the WVRA is that it protects racial groups, granting them the right to sue if and only if that group is a ***minority*** of the population of the jurisdiction it sues. Plaintiffs must admit that they represent a race ***majority*** in Franklin County, and therefore lack standing.

Mr. Gimenez' Opening Brief also demonstrated that the WVRA lacks any of the Fourteenth Amendment guardrails the Supreme Court required as a condition of finding that the FVRA was constitutional. Because it lacks any of these guardrails, the WVRA fails Fourteenth Amendment strict scrutiny. From the outset, Plaintiffs' Brief inadvertently conceded the WVRA's

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[1] Assuming, of course, that "Hispanics" are a race, an assumption often made in federal civil rights litigation but never once actually decided by a court, nor found specifically in any statute, including the federal Voting Rights Act ("FVRA") or the WVRA.

failure to satisfy the Fourteenth Amendment. Deriding Mr. Gimenez' Statement of the Case as "argumentative," Resp. Br. at 2 n. 2, Plaintiffs' contrary Statement expends over four pages discussing press reports of historical discrimination against Hispanics without a single reference to the Clerk's Papers. In the trial court Plaintiffs declined to bother adducing or offering such evidence because the WVRA explicitly omits any requirement to present evidence of historical discrimination in order to establish a WVRA violation in need of remedy—a key 14th Amendment guardrail the Legislature deleted.

The Opening Brief also demonstrated that the statute divides every political sub-jurisdiction of the state into racial determined winners and losers, granting certain groups the right to sue and to control districting, while denying others the same right—a clear violation of the Washington constitution. Plaintiffs attempt to salvage the WVRA by disregarding the effect of the statute on individuals in each locality, and denying constitutional protection to the right to sue and control redistricting.

Finally, Plaintiffs present a frivolous argument, slightly similar to an equally frivolous argument presented below, that the Court does not have jurisdiction over an appeal from a denied CR 12(c) motion because the AG was not notified of the

arguments presented. The argument was not presented below, and is foreclosed by fifty years of precedent from this Court.

II. Argument.

A. Plaintiffs Lack Standing.

The United States Census Bureau reports that "White alone, not Hispanic or Latino" constitute under 40% of Franklin County's population.[2] "Hispanic or Latino" constitute 54% of the population. In a lawsuit against Franklin County, which of these two race groups is a minority for purposes of the WVRA?

Plaintiffs can't decide. They acknowledge the census data, describing Franklin County as having a Latino majority. Resp. Br. at 7. Pages later, they claim it is "nonsense" to say that Latinos are not a minority. Resp. Br. at 24. And further on, they say that the WVRA is entirely race-neutral and whites can sue under the statute. Resp. Br. at 43. Which is it?

As Mr. Gimenez' Opening Brief showed, the WVRA adopts a non-existent definition when it refers to "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

[2] All census data cited in this brief can be found at https://www.census.gov/quickfacts/franklincountywashington (last accessed December 16, 2022).

rights act, 52 U.S.C. 10301 et seq." RCW 29A.92.010. Mr. Gimenez' brief showed that the only plausible sense that can be imposed on the garbled syntax is that a "protected class" is a racial group constituting a minority of the population of the political subdivision at issue in a WVRA suit. He showed that any other construction of the statute renders it unconstitutional beyond any possible doubt or question, under both the state and federal constitutions. He also showed that, properly construed, Plaintiff lack standing under the WVRA, because they are not a "protected class" within Franklin County, by virtue of their majority status.

After reviewing the various positions that Plaintiffs insist are "clear" or "plain," the Court will conclude that Plaintiffs never resolve this fundamental contradiction, and instead switch from one position to the other when it suits their argument. For purposes of standing, they argue that Latinos are a minority as defined in the FVRA, while for purposes of the constitutionality of the statute, they argue that "the WVRA provides [white voters] the same remedy as any other group." Resp. Br. at 43. As Mr. Gimenez' brief showed, if the WVRA allows whites to sue when they are a population minority, the WVRA must refer to the white fraction of a sub-jurisdiction, because whites are not a minority of the entire state's population. But sauce for the goose

is sauce for the gander, and in Franklin County, the Hispanic fraction of the jurisdiction's population is more than half. If Plaintiffs have WVRA standing to sue Franklin County, then their minority status must be measured against the entire state population, and the statute does not allow suits by whites. If so, it cannot survive any challenge under either the state or federal constitution. If, as Plaintiffs have it, "the WVRA does not single out any individual racial groups and only refers to 'race' and 'protected class' in a general sense," Resp. Br. at 43, it thereby also grants standing to whites when that group is a racial minority in a jurisdiction. That's the case in Franklin County: whites, not Hispanics, have standing to sue Franklin County.

B. The Race-Based Districting Remedy Was Repealed.

Mr. Gimenez' opening brief showed that the Legislature re-enacted a ban on the use of population data to favor a race group in county redistricting ***after*** passage of the WVRA. Plaintiffs acknowledge this, as they must. And the settlement of this case, as Plaintiffs show in their Brief, relied on race to re-draw the Franklin County commissioner districts. That re-drawing, and the forthcoming elimination of county wide general elections, was done to ensure that one race group—Hispanics, the majority race of Franklin County—have an opportunity "to

elect candidates of their choice." RCW 29A.92.030(1). That opportunity favors Hispanics. It does not thereby favor the race of any other citizen of Franklin County—whether white, Black, Asian, or Native American. As such, the WVRA lawsuit required Franklin County to use population data to favor Hispanics, which, according to Plaintiffs, is a racial group. This violates a statute re-enacted in 2022, requiring that in county redistricting, "population data may not be used for purposes of favoring or disfavoring any racial group or political party." RCW 29A.76.010(4)(d). There can be no more explicit repeal.

In response, Plaintiffs insist that "the local government redistricting statute can readily be harmonized." Resp. Br. at 26. But their Response does not show ***how*** the race ban can be harmonized with the explicit use of race in the WVRA. They attempt to exclude race from the WVRA by pointing to WVRA language that refers to "protected class[es]", but elsewhere acknowledge that this definition incorporates "race" through its reference to the FVRA. They state without demonstrating that "the statutory language of RCW 29A.76.010(4)(d) clearly works in concert with the WVRA." Resp. Br. at 27. But they present no explanation of how the two contrary mandates were both fulfilled in this suit against Franklin County. The suit was based on race, used race data to identify voting patterns, and used race data to

re-draw district lines, all for the express purpose of changing future election outcomes to favor Plaintiffs. Plaintiffs then conclude: "These statutes were meant to complement each other, rather than supersede, contradict or repeal the other." Resp. Br. at 28. But how? The earlier-enacted WVRA, according to Plaintiffs—and its plain terms—compels a county, when sued, to use population data to draw new district lines that alter district lines and even election systems to favor ***only*** the racial minority group that sues. It does not favor a racial majority group, nor any non-litigious minority. A later-enacted statute forbids this. How do they work in concert? How are these opposite commands "harmonized?" Plaintiffs don't say. As Mr. Gimenez showed, they don't; they can't be. The race-based districting remedy of the WVRA was repealed as to counties.

C. Mr. Gimenez' Facial Challenge Is Appropriate.

Plaintiffs argue that because the WVRA allows for a theoretically infinite set of possible remedies beyond the sole remedy listed—single member, district-based elections—Mr. Gimenez cannot bring a facial challenge, because he cannot show that every single one of an unstated, undefined, uncountable number of alternative remedies would be constitutional. This argument fails for two reasons. First, as Mr. Gimenez showed,

the WVRA is unconstitutional because it makes race the primary factor in districting, and intentionally eliminates the required guardrails that the U.S. Supreme Court has written onto the FVRA to preserve its constitutionality. It is also unconstitutional under the state constitution because it gives privileges to one class or group in a sub-jurisdiction that it denies to others. Both constitutional defects apply ***regardless of the remedy***. Even if Plaintiffs' argument could plausibly remove this case from the scope of a facial challenge, it would only be relevant if Mr. Gimenez urged that the WVRA is unconstitutional ***because*** of the remedy Plaintiffs sought and settled on. He did not. The WVRA is unconstitutional because, for all purposes in the statute—from the start of writing a demand letter, to the negotiations with the jurisdiction, to the filing of a lawsuit, to the selection of a remedy—the statute demands that race be the central concern for the government. Even if Plaintiffs had invented and sought some other remedy, WVRA litigation has race as its central concern and makes it the central feature of any remedy.

Plaintiffs' argument also fails because, if adopted, it grants the statute's drafters the ability to prevent this Court from reviewing the facial constitutionality of the statute. According to Plaintiffs, the Legislature can prevent facial constitutional review by appending a generic "or try anything else" clause to a statute.

A facial challenge can never be raised to such a statute, according to Plaintiffs, because it is impossible to explore and describe every possible circumstance that fits under the "anything else" clause. Because a challenger can never prove the negative of infinity, no challenge ever satisfies the "facial challenge" predicate of showing no possible Constitutionally permissible application. This interpretation would violate the "[t]he doctrine of separation of powers [which] divides power into three co-equal branches of government: executive, legislative, and judicial. The doctrine . . . ensures that the fundamental functions of each branch remain inviolate. If the activity of one branch threatens the independence or integrity or invades the prerogatives of another, it violates the separation of powers." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wash. 2d 974, 980 (2009). Plaintiffs' idea of "one easy trick to avoid facial constitutional review" certainly falls within that scope.

D. WVRA Is Subject To Strict Scrutiny And Violates U.S. Const. Amend. XIV.

As noted above, once the U.S. Constitution is considered, Plaintiffs' characterization of the WVRA changes drastically. Their brief initially expends pages describing the racial discrimination their race cohort has faced in Franklin County, and the need for the WVRA lawsuit to change the process of

elections to take into account the differing voting preferences of their "protected class," a racial group. But when addressing the 14th Amendment, suddenly the statute has nothing at all to do with race! Neither characterization is accurate.

Plaintiffs first claim that the WVRA is not subject to strict scrutiny. It is. The Supreme Court has long held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (cleaned up). Plaintiffs acknowledge, as they must, that the WVRA has a purpose and object that is race-based. Indeed, Plaintiffs cite extensive legislative purpose language showing that the statute has a race-based purpose. Strict scrutiny applies.

The WVRA fails that scrutiny, because it makes race the predominant factor in redistricting. Plaintiffs' claims to the contrary are unavailing. For example, they argue: "Nowhere in the text of the law does the WVRA establish a 'racial quota system,' nor does it call for racial classification in the analysis or evaluation of at-large electoral systems." Resp. Br. at 43. "Racial quota system" is a red herring, of course. No one claimed that WVRA calls for race quotas, or that such quotas are the prerequisite for violating the 14th Amendment. The WVRA ***does***

call for "racial classification in the analysis or evaluation of at-large electoral systems." *Id.* How else can one determine if a protected class exhibits polarized voting, as called for in RCW 29A.92.030? First, one must classify the races before determining how each race votes. And in fact, that's exactly what Plaintiffs did here, as demonstrated throughout the first half of their brief.

Plaintiffs also state, without support, that "[t]he WVRA does not require political subdivisions to use race as a predominate [sic] factor, nor does it allow political subdivisions to use race as the predominate [sic] factor. The WVRA does not permit political subdivisions to use race however they may see fit in remedying vote dilution." Resp. Br. at 49. What, then, is the predominant factor for redistricting under the WVRA? A race group sues; that race group shows that it cannot elect its candidates of choice; then that race group oversees redistricting and other changes to electoral systems to ensure that the suing race group can, in future elections, elect its candidates of choice. And, of course, it need not merely redistrict or eliminate at-large elections—Plaintiffs point out that there are infinite other possible remedies. How is race not predominant, and where and how does WVRA forbid jurisdictions from using race "however they may see fit in remedying vote dilution?" Plaintiffs assert, but

don't demonstrate. They identify no statutory language in support of the argument, because none exists they can point to.

Mr. Gimenez also demonstrated that the WVRA fails strict scrutiny because it was explicitly drafted to ***exclude*** the mandatory guardrails the U.S. Supreme Court has imposed on the FVRA. As stated in the Opening Brief, the U.S. Supreme 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 v. Strickland*, 556 U.S. 1, 11 (2009) (plurality) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)). Under FVRA 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.

Plaintiffs claim that these three requirements "are not required to uphold the constitutionality of the VRA, but are mandated by the text of the statute." Notably, Plaintiffs offer no

word of the text of the federal VRA in support, because none exists. That statute states in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301. "Large and geographically compact?" "Politically cohesive?" Any reference to bloc voting by the majority? Defeat of minority candidates? The words "majority"

and "minority" don't even appear in the statute! The so-called "*Gingles* factors" are ***not*** mandated by the text of the statute, but were grafted onto it by the U.S. Supreme Court to prevent finding the statute to violate the Fourteenth Amendment's ban on racial classifications.

The Court has emphasized their importance. As the Opening Brief showed, the compactness requirement is essential to constitutionality. Plaintiffs expurgate a single sentence from *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430 (2006), but grossly misrepresent the issue and holding in that case in suggesting it held otherwise. *Perry* involved a challenge to Texas' statewide map for United States House of Representative districts. The Court was therefore addressing a 33-seat redistricting plan that had added two seats to the Texas seat tally from the previous decade. It repeatedly emphasized the vital importance of the first *Gingles* factor—compactness—and did so even in the sentences preceding and following the cherry-picked line recited by Plaintiffs:

> [T]he District Court failed to perform a comparable compactness inquiry for Plan 1374C as drawn. *De Grandy* requires a comparison between a challenger's proposal and the "existing number of reasonably compact districts." To be sure, § 2 does not forbid the creation of a noncompact majority-minority district. The noncompact district cannot, however, ***remedy a***

> ***violation elsewhere in the State***. *See Shaw II*, supra, at 916, 116 S.Ct. 1894 (unless "the district contains a 'geographically compact' population" of the racial group, "where that district sits, 'there neither has been a wrong nor can be a remedy'" Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. And since there is no § 2 right to a district that is not reasonably compact, *see Abrams*, 521 U.S., at 91–92, 117 S.Ct. 1925, the creation of a noncompact district does not compensate for the dismantling of a compact opportunity district.
>
> THE CHIEF JUSTICE claims compactness should be only a factor in the analysis, ***but his approach comports neither with our precedents nor with the nature of the right established by § 2***.

Perry, 548 U.S. 430–31 (cleaned up, emphasis added). Under the Supreme Court's FVRA precedents, compactness was required to find a wrong, and compactness was required to justify a remedy for that wrong. The state could ***also*** create non-compact districts, including non-compact majority-minority districts. Doing so had no effect on the FVRA analysis, which requires compactness to preserve the constitutionality of § 2.

The alternative approach proposed by Justice Roberts (which Plaintiffs hope to slide by this Court), does not comport

with the U.S. Supreme Court's precedents. Without compactness, *Perry* reiterated, "there neither has been a wrong nor can be a remedy." Without these requirements, as the Opening Brief showed, race is infused into every districting decision, just as it was in Franklin County pursuant to Plaintiffs' WVRA litigation. Doing so violates the Fourteenth Amendment, as interpreted and applied by the Supreme Court. The Washington Legislature does not like the United States Supreme Court's application of Fourteenth Amendment jurisprudence to vote dilution litigation. This dislike is reflected in the WVRA. But because the Washington Legislature does not have the last word on the meaning and application of the U.S. Constitution, if the WVRA means what Plaintiffs claim it means, it must be struck down.

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

Mr. Gimenez' Opening Brief showed that the WVRA violates Wash. Const. Art. I § 12: "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." He showed that "the law, or its application, confer[s] a privilege to a class of citizens." *Grant Cty*, *Grant Cty Fire Prot. Dist. No. 5 v.*

City of Moses Lake, 150 Wash. 2d 791, 812 (2004). This means the clause is implicated by the WVRA. He showed that the privileges at issue under the WVRA "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).

Plaintiffs urge that the WVRA does not even implicate Wash. Const. Art. I § 12 because the rights the statute divvies up and parcels out to some groups but not others are just not very significant. This is a drastic about-face from everything that preceded the argument, but is the only way for Plaintiffs to preserve the constitutionality of the statute. According to Plaintiffs, the fundamental right to vote protected against discriminatory treatment under Art. I § 12 only means the right to receive a ballot and return it completed. Early in Plaintiffs' brief, this right is meaningless if the voter, together with fellow members of the voter's race, cannot elect candidates preferred by that racial group. Thus, WVRA is a salutary and perhaps even necessary law allowing Plaintiffs' racial group to sue and compel

race-based changes to Franklin County district maps, resulting in an electoral outcome preferred by that racial group. But while for all other purposes, merely casting a ballot is insignificant without the prospect that the vote cast is cast for a winner, suddenly for Art. I § 12 purposes, casting a ballot is all the State Constitution protects. Not so.

Furthermore, the WVRA does far more than merely affecting the right to vote: it divides the citizens of every political jurisdiction in the state into race minority "haves" and race majority "have-nots" for other fundamental rights, including the fundamental rights of petitioning the government, *see Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and of access to courts that this Court has found in, *i.a.*, Wash. Const. Art. I § 10. *See, e.g.*, *Doe v. Puget Sound Blood Ctr.*, 117 Wash. 2d 772, 782 (1991).

Plaintiffs also argue that WVRA does not grant rights to some citizens that it denies to others because "any voter can start a cause of action under its provisions." Opp. Br. at 38. They footnote that "Although Gimenez claims that '[t]he statute can only grant the benefit to the newly created protected class by denying that right to anyone not in the protected class,' BA 53, he provides no support for this claim. This is because the WVRA does not assign any specific rights to minority voters." *Id.* n. 14.

This argument disregards the text and effect of the WVRA—the support for Mr. Gimenez' claim. The WVRA divides every political subjurisdiction of the state into groups: people who are members of "protected classes" and people who are not members of protected classes. Those who are members of protected classes benefit under the WVRA because WVRA-based redistricting must result in electoral maps which favor them. Those who are ***not*** members of protected classes are denied that benefit. Plaintiffs' argument seems to urge that either (1) the statute confers no benefit to members of protected classes because a majority race could theoretically file suit or (2) the statute confers no special race-based benefit because a sub-jurisdiction could exist in which any identifiable race constitutes the protected class. Whatever Plaintiffs mean by the undeveloped statement, it fails.

First, while the statute can conceivably be read to allow any person to file suit, the remedy under the statute only flows to the race minority group identified as a protected class. It is hard to conceive that a race majority group could have standing to sue to procure a districting and electoral benefit inuring to the benefit of a race minority group. Thus, the supposed race neutral language becomes race-preferential once other constitutional limitations on the courts are considered.

Plaintiffs' second theory appears to urge that race neutrality is achieved as long as somewhere in the state, a member of a specific race has been granted a right, even if members of that same race are denied the right in other parts of the state. They offer no support for the novel theory that ***more*** race discrimination, more finely subdivided, somehow results in no race discrimination. They cite no case for the proposition that a state may engage in race discrimination so long as it discriminates a lot, with someone of every race suffering the indignity of race-based discrimination somewhere within the state. Mr. Gimenez' Opening Brief showed that the WVRA divides each and every subjurisdiction of the state into race-based groups of haves and have-nots. One county might contain Hispanic "haves" and white "have nots," while a town contains Asian "haves" and Hispanic "have-nots," and a school district contains white "haves" and Black "have-nots." Aggregating them does not produce a state-wide race-neutral effect. Instead, the WVRA invites every jurisdiction in the state to engage in race-based discrimination in handing out the privileges of petitioning, access to courts, and redistricting for favorable voting outcomes.

F. No AGO Notice Is Required For Defensive Challenges; The AGO Has Notice In Any Event.

Portugal renews a frivolous argument that is only passingly similar to one he raised—but abandoned and waived—in the court below. To the Court below, Portugal argued that Mr. Gimenez's 12(c) Motion should be dismissed for the supposed lack of personal jurisdiction of the Franklin County Superior Court over him. That claim, purportedly arising from Chapter 7.24 RCW addressing subject matter jurisdiction over certain claims arising under the Uniform Declaratory Judgment Act, was so patently frivolous and lacking merit that Plaintiffs never even sought a hearing on it before the court below.

Here, Plaintiffs once again claim that this Court lacks jurisdiction over the appeal because the Attorney General does not have notice of the case, despite again acknowledging that no UDJA claim can be found in any operative pleading. In their footnote 15, they baldly assert that "Gimenez's is a UDJA action." Resp. Br. at 51 n. 15. But Mr. Gimenez has no "action" at all. He filed no Complaint, no Answer, and no counterclaim—as Plaintiffs must admit. He filed a motion for judgment on the pleadings, but that is not an "action," not an affirmative claim, and does not invoke the trial court's jurisdiction under any statute independent of the Complaint. In short, it is exactly like

every case for the last 50 years that rejected the argument Plaintiffs present here.

Indeed, Plaintiffs' argument not only lacks any support in law—more on that below—it also ignored the appropriate remedy if it had any factual or legal support. This Court has made clear that the remedy of any failure to make required UDJA service on the AGO is remand for reconsideration of the matter in the court below, with the participation of the Attorney General, if that office so wishes. *See Leonard v. City of Seattle*, 81 Wash. 2d 479, 482 (1972). The AGO's amicus brief gives this Court the opportunity to inquire directly of that Office whether it wants the matter to be remanded to the trial court for reconsideration.

But Portugal's jurisdictional argument fails, as decades of this Court's jurisprudence make amply clear. As Portugal must acknowledge, Mr. Gimenez' intervention did not include any order entering an operative pleading from him. Mr. Gimenez never answered the complaint, and never filed a counterclaim. No pleading in the case asserted jurisdiction under the UDJA. Instead, Mr. Gimenez sought dismissal of the Complaint under CR 12(c). In response, Portugal moved for the dismissal of Mr. Gimenez—a person—for lack of subject matter jurisdiction.

This position, just like the new claim presented here that this Court lacks jurisdiction, is entirely foreclosed by over fifty years of precedent. In 1972, hearing the appeal of a lawsuit in which a plaintiff challenged a corporate merger in part by challenging the constitutionality of the "missing shareholder" statute, the respondents claimed the Court lacked jurisdiction because of plaintiff's failure to serve the AG under RCW 7.24.110. This Court rejected the jurisdictional challenge, because the lawsuit had not been brought under the UDJA. "To follow respondent's argument to its logical conclusion would require courts to consider as a declaratory judgment action any action in which a party challenges the constitutionality of a statute." *Watson v. Washington Preferred Life Ins. Co.*, 81 Wash. 2d 403, 407-8 (1972). In 1972, the Supreme Court refused to do exactly what Plaintiffs ask: treat this as a declaratory judgment action simply because of the constitutional challenge raised in a Motion to Dismiss.

This Court has repeatedly made clear that Washington courts have subject matter jurisdiction over any constitutional challenge that does not invoke UDJA jurisdiction, brought by any party, without serving the AG, if the complaint does not invoke UDJA jurisdiction. In *Standow v. City of Spokane*, 88 Wash. 2d 624 (1977), overruled on other grounds by *State v. Smith*, 93

Wash. 2d 329 (1980), the plaintiff sought relief from a city council decision by writ of certiorari in Superior Court, including a constitutional void-for-vagueness challenge. The lawsuit contained a direct challenge to the constitutionality of an ordinance, ***not*** invoking jurisdiction under the UDJA, but instead using the All Writs Act, RCW 7.16.040. The city sought to dismiss the appeal for lack of subject matter jurisdiction due to plaintiff's failure to serve the Attorney General. The Court upheld jurisdiction, because the case did not arise under the UDJA. RCW 7.24.110 "applies only to proceedings brought under the declaratory judgment statute." *Standow*, 88 Wash. 2d at 633. The rule also applies to defendants who challenge the constitutionality of statutes. Because RCW 7.24.110 "applies only to proceedings brought under the Uniform Declaratory Judgments Act," *City of Sumner v. Walsh*, 148 Wash. 2d 490, 497 (2003), defendant Walsh in that case could challenge the constitutionality of the ordinance under which he was fined. The Superior Court had jurisdiction, although he did not serve the AG with his briefs. This Court's jurisprudence allows the trial court to hear constitutional challenges brought by ***all*** parties, such as respondents in adoption matters, who are neither plaintiffs nor defendants. Thus, a birth mother challenging on appeal the constitutionality of a statute under which she was

losing parental rights did not have to serve the AG to perfect jurisdiction: "Rachel Smith responded to this lawsuit. She did not initiate a declaratory action challenging the constitutionality of a state statute. RCW 7.24.110 applies only to proceedings brought under the declaratory judgment statute. . . Therefore, Rachel did not need to serve the State attorney general with a copy of any pleading." *Matter of Adoption of C.W.S.*, 196 Wash. App. 1064 at *4 (2016).

Portugal hand-waves all this. His footnotes acknowledge that Mr. Gimenez filed no operative pleading, and admits that the only document in the record mentioning the UDJA is an exhibit to a motion. If Mr. Gimenez raised a UDJA claim in a counterclaim, then Portugal failed to answer, therefore defaulted, and the case should be remanded with instructions to dismiss.

G. Awarding Appeal Fees Against A Hispanic Citizen Intervenor Is Impermissible And Unconstitutional.

Plaintiffs' are not entitled to fees under CR 11 or RCW 4.84.18; the suggestion is ludicrous. Indeed, the only completely frivolous argument presented to the Court below or to this Court is Plaintiffs' UDJA argument, which this Court foreclosed in every opinion on that theory since the advent of the UDJA.

Nor is it permissible to award fees under the WVRA. First, Mr. Gimenez will prevail. Second, it is unconstitutional to permit a group of lawyers who are funded by another state's government to collect fees from an individual Washington Hispanic citizen because of his exercise of his fundamental right to access the state courts and petition the government. Indeed, as employees of a California state government institution, *pro hac vice* counsel should already be aware that the California attorney general refused to even defend such a statute passed by California's legislature, in *Miller v. Bonta*, No. 22-cv-1446-BEN (JLB) (S.D. Cal.). As that Court held in striking down a California punitive fee-shifting provision such as this one that Plaintiffs seek to exercise:

> "The right of petition is one of the freedoms protected by the Bill of Rights." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citation omitted). "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). "[P]ersons . . . have the right to petition the Government for redress of grievances which, of course, includes 'access . . . to the courts for the purpose of presenting their complaints.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (citations omitted).

Miller v. Bonta, No. 22CV1446-BEN (JLB), 2022 WL 17811114, at *2 (S.D. Cal. Dec. 19, 2022). As Plaintiffs' Brief shows, although they never asserted that they billed a dime to any client, and although lead counsel are salaried employees of UCLA Voting Rights Project, they nonetheless collected over a third of a million dollars from Franklin County in claimed attorneys' fees. If the WVRA is construed to allow imposition of such fees on an individual concerned citizen seeking to vindicate Constitutional rights, it ensures that no individual citizen can challenge what he believes—as Mr. Gimenez does in this case—to be collusive coordination between elected officials and private plaintiffs to insulate those officials from electoral scrutiny. It gives a road map to the Legislature to ensure that access to courts is denied to all but those who can afford to gamble hundreds of thousands or millions of dollars in prospective fees simply to have the opportunity to be heard by this Court. "Where money determines not merely the kind of trial a man gets, but whether he gets into court at all, the great principle of equal protection becomes a mockery." *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971) (Brennan, J. concurring) (cleaned up).

III. Conclusion

The WVRA is unconstitutional, dividing the entire state into pockets of race grievance, county by county and school

district by school district. It lacks the guardrails installed by the U.S. Supreme Court to prevent race-based redistricting from violating the constitution. As members of a race majority on Franklin County, Plaintiffs lack standing to sue in any event. The case should be remanded with instructions to dismiss.

CERTIFICATIONS

I hereby certify that the foregoing brief contains fewer than 6,000 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 December 22, 2022.

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