No. 100999-2

SUPREME COURT OF THE STATE OF WASHINGTON

GABRIEL PORTUGAL, et al.,

Plaintiffs-Respondents,

v.

FRANKLIN COUNTY,

Defendant,

and

JAMES GIMENEZ,

Appellant.

BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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I. INTRODUCTION

Among a long list of arguments, Appellant contends that the Washington Voting Rights Act ("WVRA"), chapter 29A.92 RCW, requires impermissible racial classification and therefore facially violates the Fourteenth Amendment's Equal Protection Clause because it does not incorporate a geographic compactness inquiry at the phase of establishing liability. This contention is premised on a misapprehension of both the WVRA and federal law. To meet the standard for a facial challenge, no matter whether this court looks to federal or Washington precedent, Appellant must show that the WVRA cannot be constitutionally applied under any set of facts or that it lacks a legitimate sweep. He does not make this showing. Nor can he.

The Washington legislature enacted the WVRA to provide minority voters recourse from discriminatory local election systems and districting schemes in state court under state law. The statute incorporates key elements of the federal Voting Rights Act ("VRA") framework operationalized by the U.S.

Supreme Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to identify discriminatory systems and practices. Like its federal counterpart, the WVRA centers its assessment on the presence of racially polarized voting within the challenged jurisdiction and whether racial minorities have an equal opportunity to elect candidates of their choice. It codifies factors distinctly similar to those that federal courts have held since *Gingles* to be principal indicia of discriminatory vote dilution and impermissible inequality of electoral opportunity. And the WVRA is mindful to ensure that these inquiries are not applied mechanically, but instead in a fact-specific and localized way, consistent with the requirements of the U.S. Constitution.

Appellant is correct that the WVRA statutory framework departs from the federal standard in a notable way: it does not require a plaintiff to demonstrate that the minority community invoking protection is geographically compact and sufficiently numerous to form an electoral majority. Contrary to Appellant's assertions, however, this difference does not amount to a facial

conflict with the Fourteenth Amendment. *Gingles* requires plaintiffs to demonstrate geographic compactness and numerosity as a threshold matter, prior to a federal court's consideration of the central totality-of-circumstances inquiry that determines whether minority voters have an equal electoral opportunity, not to comply with the Fourteenth Amendment but rather to meet requirements particular to federal law. These requirements do not apply to Washington courts applying the WVRA.

For instance, *Gingles*'s numerosity and compactness requirements are rooted in the VRA's silence on appropriate remedies and the federal courts' preference for single-member districts to cure violations under federal law. Unlike the federal framework, the WVRA expressly empowers courts to consider as remedies non-district-based, alternative election systems in which compactness and numerosity are not relevant. In order to ensure the smooth administration of this scheme, the Washington

legislature instructs courts to assess liability separately from mitigating remedial options.

Contrary to Appellant's assertions, nothing in the text of the WVRA requires courts to essentialize race or to engage in racial classification. In fact, the statute does not on its face require the creation of any particular electoral district to remedy a violation. In fact, it explicitly contemplates alternative election systems that could operate at-large and be applied with no racial classification whatsoever. Nor does it encourage, much less require, drawing districts with an improper consideration of race where a district-based solution is imposed.

For these reasons, Appellant's Fourteenth Amendment challenge fails.

II. INTEREST OF AMICUS

Named for the late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at New York University

School of Law[1] is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve systems of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair representation at all levels of government. The Brennan Center has submitted amicus curiae briefs in a number of U.S. Supreme Court cases involving redistricting and/or the Voting Rights Act, including *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

[1] This brief does not purport to convey the position of New York University School of Law.

III. ISSUES ADDRESSED BY AMICUS

1. Whether the WVRA, chapter 29A.92 RCW, has a plainly legitimate sweep.

2. Whether the WVRA must include an express geographic compactness inquiry at the liability phase to be facially valid under the Fourteenth Amendment's Equal Protection Clause.

IV. STATEMENT OF THE CASE

Amicus concurs with and adopts the Statement of the Case set forth in the Brief of Respondents.

V. ARGUMENT

A. The localized and fact-intensive nature of a WVRA claim requires that it survive a facial challenge.

In designing the WVRA, the Washington legislature sought to address the well-known harms at-large systems produce under certain electoral and social circumstances, as well as the drawing of discriminatory districts. The codified test is not

a rote or simple calculus, but instead a fact-intensive and jurisdiction-specific inquiry that gives courts both appropriate guidance and flexibility to root out instances of actual discrimination. Indeed, the WVRA borrows many of the key inquiries used by federal courts under the VRA to identify denials of equal electoral opportunity. Taken together, the statutory framework is wholly consistent with the Fourteenth Amendment, especially under the exacting standard for facial challenges.

1. Facial challenges are disfavored under both federal and Washington law and face a high bar.

Like this Court, the U.S. Supreme Court has repeatedly emphasized that a facial constitutional challenge is "the most difficult challenge to mount successfully" because it requires the challenger to demonstrate either that "no set of circumstances exists" under which the statute would be valid or that the statute lacks any plainly legitimate sweep. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord United States v. Stevens*, 559 U.S. 460, 472 (2010); *City of Redmond v. Moore*, 151 Wn.2d 664,

669, 91 P.3d 875 (2004) ("[A] successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied."). A mere assertion that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" in a facial challenge. *Salerno*, 481 U.S. at 745.

For a statute to survive a facial challenge under the U.S. Constitution, a court need only find that at least some constitutional applications exist. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 (2008). Such challenges are generally disfavored because "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *State v. McCuistion*, 174 Wn.2d 369, 389, 275 P.3d 1092 (2012) (quoting *Washington State Grange*, 552 U.S. at 450 (internal quotation marks omitted)).

2. The WVRA is calibrated to target discriminatory election systems.

The WVRA can be invoked to challenge discriminatory at-large, districted, hybrid, or other electoral systems employed by localities in Washington. The statute provides that "no *method* of electing the governing body" of a locality "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." RCW 29A.92.020 (emphasis added). While the statute reaches all local systems, the Washington legislature was particularly mindful of the propensity of at-large systems, like the one used by Franklin County and subject to the present suit, to discriminate against minority voters.[2]

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[2] In its finding of intent, the Washington legislature pointed out that, prior to the passage of the WVRA, parts of the code limited certain localities to at-large election systems and were thus partly to blame for the "improper dilution of voting power for . . . minority groups." RCW 29A.92.005. This is why, among other things, the WVRA amended provisions that limited the ability of school boards, counties, cities and towns, fire protection districts, port commissions, and public utility districts to voluntarily change their electoral systems, which had

Such systems have demonstrably posed a real threat to minority voters in the state. The enactment of the WVRA came in the wake of a successful suit under Section 2 of the VRA challenging an at-large election system in the City of Yakima, *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014), and an admission of liability by the City of Pasco that its at-large system violated federal law. Mem. Op. and Order, *Glatt v. City of Pasco*, Case No. 4:16-CV-05108-LRS (E.D. Wash. Jan. 27, 2017), ECF No. 40.

To ensure that impacted minority voters could seek redress in state court under state law, the Washington legislature established a well-calibrated test for identifying dilutive schemes. For a political subdivision to be held liable under the WVRA, a plaintiff must show (1) that "[e]lections in the political

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previously been limited to at-large or hybrid election systems. *See* Engrossed Substitute Senate Bill 6002, Laws of 2018, ch. 113.

subdivision exhibit polarized voting; and" (2) that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice." RCW 29A.92.030(1)(a)-(b).[3] For each inquiry, the legislature empowered courts with significant discretion to consider the circumstances faced by minority voters and the electoral, social, and other relevant dynamics within a particular jurisdiction.

For instance, the WVRA instructs that courts consider a broad range of relevant elections to establish the existence of racially polarized voting and thereby satisfy the first element. RCW 29A.92.030(3). It also lays out considerable guidance to assist with the second element, requiring that the equal-opportunity-to-elect inquiry be "assessed pragmatically, based on local election conditions" and permitting the consideration of

[3] Contrary to how Appellant describes it, this provision requires a showing of both polarization *and* unequal opportunity. *Contra* Br. of Appellant at 44 ("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 white voters cross over to support minority-preferred candidates. *Id.* 29A.92.030(2). It further encourages courts to consider other indicia of discrimination that might interact with the challenged electoral system to deny equal electoral opportunity, such as a consideration of other electoral policies that disproportionately impact minority voters, disparities in access to campaign financing, the use of racial appeals in campaigning, and the existence of other social, political, and economic disparities that hinder equal political participation and may enhance the discriminatory effect of the system at hand. *Id.* 29A.92.030(6).

The elements of liability under RCW 29A.92.030 bear much in common with the VRA and the framework that federal courts have long used to identify impermissible vote dilution. A violation of the VRA exists when the totality of circumstances demonstrates that minority voters "have less opportunity than other members of the electorate to participate in the political

process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The U.S. Supreme Court gave this language effect in *Thornburg v. Gingles*, where it required that plaintiffs establish, as a threshold matter, that "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 31 (emphasis removed). If plaintiffs can establish these three factors—that (1) minority voters are sufficiently numerous and geographically compact; (2) minority voters are politically cohesive; and (3) elections exhibit racially polarized voting sufficient to usually defeat minority-preferred candidates—federal courts must then consider whether, under the totality of the circumstances, the election system operates to deprive minority voters of equal electoral opportunity. *Id.* at 44-46; *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam).

In turn, the totality-of-circumstances inquiry requires courts to weigh a non-exhaustive list of factors, which includes

(1) the history of discrimination that touches on the right to vote or participate in the democratic process; (2) the extent to which elections are racially polarized; (3) the extent to which the state has used various other election practices that enhance discrimination; (4) the denial of access to candidate slating; (5) the extent to which minority communities bear effects of discrimination in areas like education, employment, and health; (6) whether political campaigns have been characterized by overt or subtle racial appeals; and (7) the extent to which minority candidates have been elected to public office in the jurisdiction. *Gingles*, 478 U.S. at 36-37.

Not all of these factors need to be proven to sustain a violation of Section 2 of the VRA. Indeed, the *Gingles* Court characterized the enumerated factors as "neither comprehensive nor exclusive" and did not impose a "requirement that [a] particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 45 (citation omitted). The Ninth Circuit has noted, however, that "factors 2 (the extent to

which elections are racially polarized) and 7 (the extent to which minorities have been elected)" are the most important in determining whether at-large systems provide equal electoral opportunity. *United States v. Blaine County*, 363 F.3d 897, 903 (9th Cir. 2004).

Though not identical, the WVRA framework closely follows the inquiries of its federal counterpart and pays particular solicitude to the factors underscored by the Ninth Circuit. It appropriately elevates the importance of racially polarized voting given the WVRA's particular concern with the use of at-large systems and even defines the term in reference to federal case law. *See* RCW 29A.92.010(3). Further, it appropriately centers equality of opportunity as the lynchpin for impermissible vote dilution and lists probative facts that closely resemble the federal "totality of circumstances" inquiry. *See id.* 29A.92.030(1)(b), (2), and (6). Here too, the WVRA's definition section allows Washington courts to look to federal case law to define what constitutes "equal opportunity to elect." *Id.* 29A.92.020.

Taken together, not only is the WVRA framework robust and consistent with its federal counterpart, but Washington courts have been expressly permitted to apply the WVRA framework using federal case law as a guide. And given that the U.S. Supreme Court has, up to now, summarily affirmed the constitutionality of Section 2, *see Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984), a facial challenge of the WVRA must likewise fail.

Indeed, the only real source of daylight between the WVRA and VRA, as Appellant points out, is that the WVRA does not require plaintiffs to satisfy the first *Gingles* precondition. But, as discussed below in Part B, this is eminently proper considering that the WVRA does not mandate district-based remedies and that Washington courts are not bound by the same Article III justiciability concerns at the root of the federal compactness inquiry. *See League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013). For these reasons, requiring a consideration of the geographic distribution of

minority voters at the liability stage would be gratuitous. The WVRA thus properly situates compactness as an inquiry that "may be a factor in determining a remedy." RCW 29A.92.030(2).

3. The WVRA does not require courts to engage in impermissible racial classifications to determine liability.

None of the elements of a WVRA claim constitutes a racial classification that triggers strict scrutiny or is an otherwise improper consideration of race under current law. *See generally* Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1547-61 (2013) (discussing racial classifications in the U.S. Supreme Court's redistricting precedent). In redistricting, a racial classification occurs when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). More generally, the U.S. Supreme Court has established that, "when the government distributes burdens or benefits on the basis of *individual* racial

classifications, that action is reviewed under strict scrutiny." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (emphasis added) (citations omitted).

RCW 29A.92.030 does not constitute a racial classification under either formulation because it neither requires the drawing of any districts, *see* Part B below, nor distributes any burdens or benefits, and certainly not on the basis of individual racial classifications. Instead, the WVRA's liability inquiry merely seeks to uncover and understand whether a particular electoral system interacts with on-the-ground political conditions and other relevant indicia of discrimination and disparities to deny minority voters equal electoral opportunity.

As such, the WVRA's liability framework does not trigger strict scrutiny. Instead, it need only satisfy rational-basis review. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 680-86, 51 Cal. Rptr. 3d 821 (2006). The WVRA does so easily because "[c]uring vote dilution is a legitimate government interest and creation of a private right of action like that in the [California

Voting Rights Act] is rationally related to it." *Id.* at 680; *see also Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019) (unpublished) (agreeing with *Sanchez* and dismissing a Fourteenth Amendment challenge to the California Voting Rights Act). Accordingly, the WVRA, both its liability test and on the whole, has a plainly legitimate sweep.

B. The reasoning behind the VRA's geographic-compactness requirement does not apply to the WVRA.

Unlike federal courts interpreting the VRA, the WVRA has no remedial preference for single-member districts. As a result, that the geographic compactness of minority voters does not "preclude a finding of a violation" of the WVRA, *see* RCW 29A.92.030(2), does not facially clash with the U.S. Constitution. If anything, that limitation logically stems from the reality that how a minority community is geographically situated will not determine whether or not racial polarization or equal opportunity to elect exists within the relevant jurisdiction. The statute properly situates that inquiry. *See id*.

1. Federal courts consider geographic compactness at the liability phase to comply with Article III in light of the federal-law preference for single-member districts.

Article III of the U.S. Constitution limits the judicial power of federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2. As a result, plaintiffs in federal court must establish constitutional standing—that is, they must establish that the alleged conduct caused them a concrete injury that can be redressed by the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This applies equally in the VRA context, where federal courts can only hear cases if plaintiffs can show "that a workable remedy can be fashioned." *Montes*, 40 F. Supp. 3d at 1399.

When the U.S. Supreme Court required plaintiffs bringing vote-dilution claims under the VRA to demonstrate that minority voters are geographically compact and sufficiently numerous, it did so to ensure that claims would be redressable, and therefore justiciable, in early stages of litigation. The *Gingles* Court made this clear in its justification for the requirement:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

478 U.S. at 50 n.17. This mention of injury sounds squarely in federal justiciability doctrine. After all, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." S*teel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). And, to that end, the *Gingles* Court emphasized that "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected," 478 U.S. at 50 n.17.

That *Gingles* presumed a single-member–district remedy is deeply rooted in federal jurisprudence. Federal courts have, for more than 50 years, "strongly preferred single-member districts"

to remedy VRA violations and other representational harms. *See Growe v. Emison*, 507 U.S. 25, 40 (1993) (citation omitted); *see also Wise v. Lipscomb*, 437 U.S. 535, 540-41 (1978); *Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 18-21 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (per curiam). In an early case, the U.S. Supreme Court articulated its reasoning clearly:

> The requirement that federal courts, absent special circumstances, employ single-member districts when they impose remedial plans, reflects recognition of the fact that 'the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and over-represent electoral majorities . . .'

Wise, 437 U.S. at 540 (quoting *Connor v. Finch*, 431 U.S. at 415).

The Eleventh Circuit has been particularly direct on this point, finding that "[i]mplicit in the first *Gingles* requirement 'is a limitation on the ability of a federal court to abolish a particular

form of government and to use its imagination to fashion a new system.'" *Dillard v. Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1268 (11th Cir. 2004) (quoting *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994)) (rejecting cumulative voting because it did not come from within the confines of state government).

Given this concern for federal overreach, it is no surprise that federal vote-dilution claims presume a district-based remedy and thus require plaintiffs to show that an alternative district configuration where impacted communities can form a geographically compact electoral majority is possible. But it does not require Washington courts to be similarly oriented—neither the justiciability nor federalism concerns apply. This is particularly true given the plain text of WVRA's remedial provisions.

2. The Washington legislature gave courts a broad menu of remedial options to cure WVRA violations.

Unlike the text of the federal VRA, which is silent on remedial options, the WVRA explicitly contemplates remedies

beyond district-based systems. Indeed, "appropriate remedies" under the statute "includ[e], but [are] not limited to, the imposition of a district-based election system." RCW 29A.92.110(1). And the WVRA instructs courts to exercise flexibility to shape appropriate solutions based on the particular facts in a given suit. *See id.* 29A.92.050(3). This is a notable change in state law. *See Montes v. City of Yakima*, No. 12-CV-3108-TOR, 2015 WL 11120964, at *7 (E.D. Wash. Feb. 17, 2015) (rejecting limited-voting election system as a remedy under the Eleventh Circuit standard).

Practically speaking, the availability of remedies beyond single-member districts means that a court may choose to maintain an at-large election system while implementing alternative electoral systems that are both race-neutral and can be used to avoid vote dilution. *See generally* Steven Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1876-80 (1999); s*ee also*

Branch v. Smith, 538 U.S. 254, 309–10 (2003) (O'Connor, J., concurring) ("[A] court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the [VRA]."). When debating the WVRA, the legislature considered three common alternative voting systems: cumulative voting, limited voting, and ranked choice voting. *See* Senate Bill Report, H.B. 1800, at 2. Such systems do not typically split voters into electoral districts, and so the consideration of geographic compactness would be unnecessary.

For instance, under a cumulative voting system, voters are given a set number of votes in an at-large election that they can cast in favor of one candidate running for a particular position or allocate them across candidates vying for different positions. In certain circumstances, federal district courts have discussed and even ordered the use of cumulative voting to remedy VRA violations. *See United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 n.24 (11th Cir. 1984) (noting cumulative voting

and transferable preferential voting as potential remedies under the VRA); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (ordering use of cumulative voting).

Limited voting, on the other hand, permits voters in an at-large election to cast one vote per candidate, but the total number of votes available to be cast is less than the total number of positions to be filled. This means voters cast ballots for some but not all the positions for a governing body. These systems are designed to prevent a majority voting bloc from filling all the seats. *See generally*, Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97 (2010). There are also exceptional instances where federal courts have ordered the use of limited voting to cure VRA violations. *See, e.g.*, *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 752 & n.11 (N.D. Ohio 2009) (accepting the defendant's proposal for an at-large, limited voting system as a system that would "give minorities the opportunity to elect minority candidates"); *Moore v. Beaufort*

County, 936 F.2d 159 (4th Cir. 1991) (upholding a limited voting system provided by a VRA settlement agreement); *United States v. Town of Lake Park*, No. 09-80507, 2009 WL 10727593 (S.D. Fla. Oct. 26, 2009).

A ranked-choice voting system allows voters to rank the candidates running for each position in their order of preference. When votes are tallied, ballots whose top candidates fail to be electorally viable get retallied and reallocated to non-eliminated candidates according to the voters' subsequent rankings. *See* Steven Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1878-79. *See generally* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135 (1992) (discussing the benefits of non-district-based systems as remedies for vote dilution). Such systems can be used in at-large or districted systems, and federal courts have upheld the use of ranked-choice voting in jurisdictions that adopted them. *See Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011) (finding that a ranked-choice voting system did not burden the

constitutional right to vote and was valid under the First and Fourteenth Amendments); *Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Me. 2018) (upholding the state's ranked-choice voting system for federal elections).

3. The WVRA properly incorporates compactness when it contemplates a district-based remedy.

A geographic-compactness inquiry is unnecessary to the assessment of alternative election systems as potential remedies because district-drawing is not required. To be sure, such alternative election systems should be scrutinized for their ability to provide equal electoral opportunity within the jurisdiction and for their consistency with relevant state and federal law. But those considerations are geographically agnostic and courts face no obstacle in squaring the WVRA with the prohibitions of the U.S. Constitution.

Where the WVRA explicitly contemplates a locality adopting a district-based system, the statute requires the resulting districts to be "as reasonably equal in population as possible," "reasonably compact," and "geographically contiguous"; to

coincide with natural boundaries and reflect communities of interest; and not to be drawn "in a manner that creates or perpetuates [vote] dilution." RCW 29A.92.050(3)(a)-(e). The WVRA instructs courts to use district-based remedies in a manner "consistent with federal protections that may provide a similar remedy." *Id.* 29A.92.005.

These principles help avoid constitutional friction. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993) (finding that following "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," while not "constitutionally required," "may serve to defeat a claim that a district has been gerrymandered on racial lines"). In other words, Washington courts are fully empowered to consider geographic compactness where appropriate and are permitted to omit such inquiry where it would be superfluous. As such, the WVRA's remedial provisions also withstand Appellant's facial constitutional challenge.

C. Appellant's challenge should be dismissed.

To demonstrate that the WVRA is facially unconstitutional, Appellant must show that there is no set of circumstances where the WVRA could be constitutionally applied. As discussed above, the WVRA embraces a flexible inquiry for determining both liability and appropriate remedies that do not mandate racial classification or racial gerrymandering. Nor has Appellant identified any applications of the WVRA that have caused an Equal Protection injury. The WVRA—which itself is an effort to vindicate the rights guaranteed by the Equal Protection Clause—should not be struck down or otherwise limited on the basis of this claim.

VI. CONCLUSION

For the foregoing reasons, this Court should dismiss Appellant's facial challenge to the WVRA.

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RESPECTFULLY SUBMITTED this 27th day of March, 2023.

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