NO. 100999-2

SUPREME COURT OF THE STATE OF WASHINGTON

Gabriel Portugal, et al.,
Plaintiffs-Respondents,

v.

Franklin County,
Defendant-Appellant,
And

James Gimenez,
Intervenor Defendant-Appellant.

AMICUS BRIEF OF THE STATE OF WASHINGTON

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I. INTRODUCTION AND INTEREST OF AMICUS

The Legislature enacted the Washington Voting Rights Act (WVRA) to combat the discriminatory impact of at-large elections and other electoral processes in some local jurisdictions. RCW 29A.92. The WVRA provides a mechanism for local governments to change their electoral systems to remedy the harm to voters denied an equal opportunity to elect candidates of their choice on account of their race, color, or language. RCW 29A.92.030. Voters experiencing such vote dilution can sue political subdivisions under the WVRA and begin the work of transitioning political subdivisions from at-large elections to other election systems. RCW 29A.92.030.

Amicus Curiae State of Washington has several interests in this case. The State has an obvious interest in defending the validity of its statues. *See* RCW 7.24.110 ("In any proceeding [in which a] . . . statute . . . is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."). The State also has an

interest in ensuring that elections held within its political subdivisions remedy historical and current discrimination. Moreover, the State has implemented many statutes designed to redress such discrimination. This case raises arguments that, if accepted, threaten to undo well-established antidiscrimination law. The State accordingly has an interest in the proper application of statutory interpretation and state constitutional principles to this case.

II. ISSUES ADDRESSED BY AMICUS

Does the Washington Voting Rights Act comport with the Privileges and Immunities Clause of the Washington Constitution by remedying discriminatory vote dilution in local electoral processes?[1]

[1] The State agrees with Portugal regarding Portugal's standing, the federal constitutional analysis, and whether the WVRA was impliedly repealed by subsequent legislation. The State takes no position on the attorney fees issue.

III. STATEMENT OF THE CASE

A group of Latinx voters, including lead plaintiff Gabriel Portugal (collectively, Portugal), invoked the WVRA to challenge at-large elections of county commissioners in Franklin County. Portugal alleged that at-large elections violated RCW 29A.92.030 by diluting Latinx votes. After Franklin County modified its electoral system in connection with this litigation, James Gimenez intervened in the case to raise a facial challenge to the WVRA.[2] Gimenez challenged the application of the WVRA to Portugal under the statute's terms and argued the WVRA violates the privileges and immunities provision of the Washington Constitution, as well as the federal constitutional guarantee of equal protection. The superior court rejected Gimenez's challenge and entered judgment in favor of Portugal.

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[2] The parties disagree about the proper presentation of relevant facts in this appeal. *See* Resp'ts' Br. at 2 n.2. The State offers this brief only as to the merits of appellant's constitutional claims, to which the parties' differing factual presentations are not relevant.

IV. ARGUMENT

The trial court correctly concluded that the WVRA is constitutional. Gimenez cannot meet the high burden in this facial challenge of showing that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

The Legislature has expansive authority to pass laws to prevent discrimination in the electoral process. The WVRA ensures that the votes of Washingtonians are not discriminatorily diluted on account of their race, color, or language. In so doing, the WVRA does not create special privileges for certain groups, and thus does not violate the state Privileges and Immunities Clause. The Court should affirm the trial court and declare that the WVRA is constitutional.

A. The WVRA Does Not Limit a "Protected Class" to a Minority Race or Color

Gimenez's privileges and immunities claim is based on a characterization of the WVRA as granting standing to sue only to certain race groups. That interpretation is incorrect.

A political subdivision violates the WVRA when its elections "exhibit polarized voting" *and* "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class." RCW 29A.29.030(1). The WVRA defines a "protected class" as "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." RCW 29A.92.010. Gimenez argues that the phrase "minority group" modifies "race" and "color," rather than simply "language minority group." But this argument ignores the statute's plain language, principles of statutory construction, and constitutional principles.

Starting with the plain language, the WVRA's definition of "protected class" explicitly includes the term "language minority group," without doing the same for "race" or "color." *See Wash. Ass'n of Counties v. State*, 199 Wn.2d 1, 10, 502 P.3d 825 (2022) (statutory construction begins with the plain language of the statute). The Legislature adopted this term, and the WVRA's definition of "protected class," directly from California's Voting Rights Act, after California courts had already construed that statute to encompass all races and colors without regard to minority status. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666, 683, 51 Cal. Rptr. 3d 821 (2006) (construing Cal. Elec. Code 14026(d) to be "race neutral" and to "not favor any race over others or allocate burdens or benefits to any groups on the basis of race"); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (a statute taken verbatim from another jurisdiction usually carries the same construction as the originating jurisdiction). A California court specifically rejected an argument that the law

excludes White voters from protection in concluding that the California VRA was constitutional. *Sanchez*, 145 Cal. App. 4th at 682.

When the Washington Legislature enacted California's definition—after it was construed by California courts—the Legislature could easily have modified that language had it intended a different result. *See Davis v. Cox*, 183 Wn.2d 269, 284, 351 P.3d 862 (2015), *overruled on other grounds*, *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 440 n.15, 423 P.3d 223 (2018); *cf. Spokane County v. State*, 196 Wn.2d 79, 85, 469 P.3d 1173 (2020) (concluding that, where a Washington statute was identical to one from California, Washington's legal understanding of that statute is the same as California's). But it did not. The Legislature adopted the California statute verbatim, even though the *Sanchez* court specifically held that California's VRA applied neutrally to any race. *Sanchez*, 145 Cal. App. 4th at 666.

Gimenez's position also ignores rules of statutory interpretation because it conflicts with the last antecedent rule. The last antecedent rule provides that qualifying or modifying words and phrases generally refer only to the last antecedent. *See City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006) (courts apply last antecedent rule absent contrary legislative intent). While "[t]he 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," here, there is no comma before the phrase "minority group." *Id.* This demonstrates that the Legislature intended the term "minority group" to modify only the last antecedent term—"language"—and not the terms "race" or "color." *Id*. Applying the last antecedent rule here is also consistent with statutory language defining the class as "referenced and defined in the federal voting rights act." RCW 29A.92.010(5). The federal VRA only defines the term "language minority group": it does not use or define the terms

"race minority group" or "color minority group." 52 U.S.C. §10310(c)(3).

Gimenez's interpretation also plainly attempts to manufacture a constitutional issue, in conflict with the doctrine of constitutional avoidance. Although Gimenez's constitutional arguments are not well-founded, to the extent that Gimenez's proposed interpretation would create a constitutional issue, this Court should construe the statute to "avoid constitutional doubt," because doing so here is "consistent with the purposes of the statute." *State v. Moreno*, 198 Wn.2d 737, 742, 499 P.3d 198 (2021). Here, Gimenez's attempt to append the phrase "minority group" onto "race" and "color" is contrary to the legislative intent to pass a broad anti-discrimination statute and the Legislature's verbatim adoption of the definition of "protected class" from the California VRA. *See* RCW 29A.92.005 (intent of the WVRA is to eliminate discriminatory vote dilution and protect the right to vote).

Had the Legislature intended to define a protected class to include only "racial minority groups" or "color minority groups," as argued by Gimenez, it would have done so. Without compelling evidence to the contrary, the Court should not conclude that the Legislature intended the broad terms "race" and "color" to mean the more narrow "race minority group" or "color minority group."

Gimenez points out that the WVRA's intent section describes the act as protecting "minority groups," RCW 29A.92.005, and so argues that the act must be read to apply only to race minority groups and color minority groups. But proof of historical and structural discrimination are relevant factors in determining a WVRA violation, including "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." RCW 29A.92.030(6). The Legislature's recognition that the WVRA will help remedy the vestiges of such

discrimination against minority groups does not mean that non-minority groups lack standing under the statute's operative provisions. Rather, this language merely expresses the character of the act as a civil rights statute. In any event, declarations of intent are not controlling, and while they may assist in statutory construction, they do not change the clear meaning of the operative portions of a statute or override statutory language. *See State v. Reis*, 183 Wn.2d 197, 212, 35 P.3d 127 (2015); *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000).

If the reference to "minority groups" in the intent section is relevant to anything, it would be to the proposition that the act addresses the dilution of votes of minority groups statewide, and does not exclude minority groups constituting a local majority in a specific city or county. *See* RCW 29A.92.005 (addressing the need for local jurisdictions to modify election procedures on their own). Indeed, the most egregious examples of Jim Crow era voter suppression—such as poll taxes and literacy tests—were specifically designed to prevent Black majorities from

participating in elections. *See* Brad Epperly et. al, *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 Persp. On Pol. 756, 761-64 (2020). Discriminatory practices, combined with White supremacist violence, were implemented by White minorities specifically to neutralize the political power wielded by Black majorities during Reconstruction, thus ensuring that they would remain out of power despite their numbers. Epperly, 18 Persp. On Pol. 756, 761-64; Const. Rts. Found., *Race and Voting in the Segregated South*, https://tinyurl.com/4ejb44rr (last visited Mar. 24, 2023) (discussing laws and practices put in place in post-Reconstruction Mississippi to prevent Blacks, a majority of the state population, from voting); *see also* Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 Harv. Latino L. Rev. 99, 102 (2015) (arguing, in the context of the federal VRA, that "laws that make it harder to vote are more likely to be enacted in states with large minority

populations or high minority turnout"). Such textbook vote suppression and dilution can be seen in more subtle ways today. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (finding that redrawing of district lines in majority-Latinx county "took away the Latinos' opportunity [to impact elections] because Latinos were about to exercise it" and that "[t]his bears the mark of intentional discrimination"); Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How much Discrimination can the Constitution Tolerate?*, 43 Harv. C.R.-C.L. L. Rev. 385, 406-09 (2008) (collecting cases of voter suppression and dilution in the face of growing minority populations).

It would be incongruous to construe a civil rights statute as excluding protection of Latinx voters on the basis that they may outnumber Whites in some local areas, just as it would be incongruous to deny protection to White voters where they can establish a substantive violation of the act. *See* RCW 29A.92.030

(describing elements of a WVRA violation).[3] It cannot be correct that only members of a class constituting a numerical minority in a particular local jurisdiction can bring a WVRA claim. Indeed, the Eastern District of Washington determined shortly before passage of the WVRA that the City of Pasco (the largest city in Franklin County) had violated the federal VRA by diluting the votes of Latinx voters even though Latinx people constituted a numerical majority in that jurisdiction. *Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS, Mem. Op. and Order, Dkt. No. 40, at 5-6 (E.D. Wash. Jan. 27, 2017). The court reasoned that although Latinx people constituted a raw majority of the overall city population, they nonetheless constituted, at most, 38.5% of the

[3] To be clear, the phrase "voters who are members of a race, color, or language minority group" occurs in the statutory definition of "protected class." RCW 29A.92.010. Inclusion in that definition does not, without more and despite Gimenez's arguments to the contrary, entitle anybody to automatic relief under the WVRA. The cause of action is set forth in RCW 29A.92.030(1). A challenge to a local election system based on the WVRA is not as simple as qualifying as a protected class and demanding relief based on that status alone.

voting age population and so could bring a claim challenging policies that diluted their votes.

Even accepting Gimenez's arguments on the meaning of "race" and "color," Gimenez cannot escape the application of the WVRA to Latinx voters here as a "language minority group." RCW 29A.92.010(5). As Gimenez acknowledges, the federal VRA specifically defines "language minority group" to include persons "of Spanish heritage." 52 U.S.C. §10310(c)(3). None of the arguments Gimenez musters in this case escape the WVRA's application to Portugal in that regard.

B. The WVRA Complies With Article I, Section 12 of the Washington Constitution

1. The WVRA does not confer a "privilege" on any subclass of voters

Article I, section 12 of the Washington Constitution, also known as the Privileges and Immunities Clause, prohibits laws that unjustifiably grant a class of citizens privileges and immunities that are not equally available to all citizens. Const. art. I, § 12. To establish a violation, a litigant must demonstrate

(1) that the challenged law grants a "privilege or immunity" to a class of citizens for purposes of the state constitution, and (2) if so, that there is not a reasonable ground for granting the privilege or immunity. *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 805, 83 P.3d 419 (2004).

The privileges and immunities clause requires a separate analysis from the federal Equal Protection Clause. *Grant Cnty. Fire Prot. Dist. 5*, 150 Wn.2d at 805. While the Equal Protection Clause is concerned with "majoritarian threats of invidious discrimination against nonmajorities," the Privileges and Immunities Clause protects against "laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Id.* at 806-07.

The term "privileges" and "immunities" refers only "to those fundamental rights which belong to the citizens of [Washington] by reason of such citizenship." *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). Not every legislative classification constitutes a "privilege." *Am. Legion Post 149 v.*

Dep't of Health, 164 Wn.2d 570, 607, 192 P.3d 306 (2008) (holding that a law that outlawed smoking in some public establishments but not others did not create a privilege or immunity). Thus, courts do not recognize a privilege every time a statute treats one group differently than another. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 778-79, 317 P.3d 1009 (2014).

The WVRA does not implicate a fundamental right held by virtue of state citizenship. Although voting is undoubtedly a fundamental right, the WVRA does not limit the right to vote. It regulates districting and election administration to *protect* the right to vote free of discrimination.

The Legislature has explicit authority to regulate elections in political subdivisions. *See generally* Const. art. XI, §§ 4-5. The Legislature also has plenary power to enact laws that "develop the policy, statutory structure, and funding it determines will best effectuate the constitutional right." *Davison v. State*, 196 Wn.2d 285, 295, 466 P.3d 231 (2020) (citing *Wash.*

State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007)); *see also State v. Nichols*, 50 Wash. 508, 527-28, 97 P. 728 (1908) ("[W]e repeat, any reasonable method prescribed by the lawmaking power which accomplishes this result must be sustained by the judicial department of government."). The only limits on the Legislature's plenary power are the state and federal constitutions. *Wash. State Farm Bureau*, 162 Wn.2d at 290.

The statutory scheme created by the WVRA ensures that voters are treated equally and does not shut any voters out of elections. RCW 29A.92.030(1)(b) (WVRA claim requires showing that members of a protected class do not have "an equal opportunity to elect candidates" of choice because of vote dilution). It does not qualify the right to vote based on any particular characteristics. To the contrary, the Legislature enacted the WVRA to safeguard the right to vote against discriminatory vote dilution.

Further, not every law that relates to voting implicates a privilege or immunity. Otherwise, routine election administration laws, such as laws creating student voting hubs, or administering voting for military or overseas voters, would arguably create a constitutional "privilege." They do not. *See Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L .Ed. 2d 245 (1992) (noting that states retain the power to regulate their own elections); *Carlson v. San Juan County*, 183 Wn. App. 354, 373-74, 333 P.3d 511 (2014) (finding that statutes allowing residency districts of unequal populations did not infringe on right to vote or right to participate in an election and so did not implicate a fundamental right).

Moreover, the WVRA does not violate the Privileges and Immunities Clause because it does not favor any class of citizen over another. *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007), is helpful on this point. In *Madison*, formerly incarcerated people challenged Washington's felon disenfranchisement scheme, arguing it unlawfully denied the

right to vote to those who had not paid off their legal financial obligations.[4] This Court concluded that the scheme did not involve a grant of favoritism because it granted the "privilege" of restoration of voting rights on the same terms equally to all citizens. *Madison*, 161 Wn.2d at 97. Because the same standard applied evenly to all formerly incarcerated people seeking restoration of their voting rights, there was no constitutional violation. *Id.* at 97-98

So too here. All people are part of a "race" or "color," so any person may bring a claim if they satisfy the other elements of a WVRA claim. Thus, like the mechanism at issue in *Madison*, the WVRA provides the same rights and remedies to all voters on the same terms.

[4] The Legislature later revised the statutes that were at issue in *Madison*. Those revisions do not change the analysis here.

Because the WVRA provides the same protections and remedies to all voters equally, it does not confer a "privilege" on or favor any subclass of voters.

2. Even if the WVRA did confer a "privilege," the State had reasonable grounds for doing so

If the court determines that the WVRA confers a privilege that implicates a fundamental right, the basis for limiting the privilege need only be reasonable. *Ockletree*, 179 Wn.2d at 783. That entails considering (1) whether the law applies equally to all persons within a designated class, and (2) whether there is a reasonable ground for distinguishing between those who fall in the class and those who do not. *Id.*

The goal of the WVRA is to eliminate discrimination in elections, provide all voters an equal opportunity to elect candidates of their choice, and remedy vote dilution. RCW 29A.92.005. This is within the ambit of the State's power to regulate and ensure fair elections and to remedy discrimination. *Cf. Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that

government must play an active role in structuring elections . . . if they are to be fair and honest . . . ."). The State's interest in promoting fair elections provides more than reasonable grounds for protecting those impacted by discriminatory vote dilution.

Because the WVRA does not implicate a fundamental right for purposes of the state constitution, does not treat any group with undue favoritism, and does not distinguish between members and non-members of a class without reasonable basis, the WVRA does not violate the Privileges and Immunities Clause.

V. CONCLUSION

Gimenez maintains that allowing Portugal an equal chance to elect candidates of his choice necessarily impairs the right of others to elect their candidate of choice. But this is a fallacy. Protecting the rights of some does not require violating the rights of others.

Gimenez's argument rests on flawed interpretations of the WVRA and state constitutional law. The WVRA is a race-neutral

anti-discrimination provision designed to continue the hard work accomplished by the federal Voting Rights Act of remedying discrimination. The Court should therefore affirm the trial court's decision that the WVRA is constitutional.

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RESPECTFULLY SUBMITTED this 27th day of March 2023.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on all parties of record, according to the Court's protocols for electronic filing and service.

DATED this 27th day of March 2023, at Olympia, Washington.

s/ Stephanie N. Lindey
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