No. _____

IN THE

Supreme Court of the United States

JAMES GIMENEZ,
Petitioner,

v.

FRANKLIN COUNTY, A WASHINGTON MUNICIPAL ENTITY, CLINT DIDIER, RODNEY J. MULLEN, LOWELL B. PECK, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE FRANKLIN COUNTY BOARD OF COMMISSIONERS, GABRIEL PORTUGAL, BRANDON PAUL MORALES, JOSE TRINIDAD CORRAL, AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court held that something more than the mere existence of racially polarized voting was required for an at-large voting system to implicate Section 2 of the Voting Rights Act. Plaintiffs must also show that a racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. This additional requirement is a constitutional guardrail, ensuring that Section 2 does not become a rule requiring "maximum possible voting strength" for one minority group over another, entangling courts in race-based inquiries and "race-based predictions." *Bartlett v. Strickland*, 556 U.S. 1, 16, 18 (2009) (plurality opinion). Without it, Section 2 could be read to "'unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'" *Id.* at 21.

Washington recently adopted its own voting rights act that expressly eschews the *Gingles* "compactness" requirement. App. 73-74. Without that requirement, a municipality must change from at-large elections to districts when there is racially polarized voting. Petitioner challenged the Act as unconstitutional because it makes race the reason why municipalities must change election systems. App. 3. Applying only rational basis review, the Washington Supreme Court held the Washington Voting Rights Act is constitutional. App. 35-39.

The question presented is:

Whether the Washington Voting Rights Act is subject to strict scrutiny.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is James Gimenez. Petitioner was an intervenor in the trial court and appellant in the Supreme Court of Washington.

Respondents are Gabriel Portugal, Brandon Paul Morales, Jose Trinidad Corral, and League of United Latin American Citizens. Respondents were plaintiffs in the trial court and respondents in the Supreme Court of Washington.

Additional Respondents are Franklin County, a Washington municipal entity, Clint Didier, Rodney J. Mullen, and Lowell B. Peck in their official capacities as members of the Franklin County Board of Commissioners. Respondents were defendants in the trial court and did not participate on appeal in the Supreme Court of Washington.

Petitioner is unaware of any "directly related" proceedings as defined in Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Section 2 of the Voting Rights Act prohibits states and localities from using at-large elections if they "result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). If a plaintiff proves her Section 2 claim, then Section 2 may compel states or localities to replace at-large elections with single-member districts. But she must, in fact, prove it, and that is no easy feat. *See Allen v. Milligan*, 599 U.S. 1, 29 (2023) ("§ 2 litigation in recent years has rarely been successful"). At-large elections are not "*per se* violative of § 2." *Gingles*, 478 U.S. at 46; *see also White v. Regester*, 412 U.S. 755, 765-66 (1973) (at-large systems "are not *per se* unconstitutional") (italics added). Nor is it enough to show voting is racially polarized. *See Gingles*, 478 U.S. at 48-51 & nn.15-17. Rather, before plaintiffs can insist that election schemes change for race-based reasons, they must overcome the *Gingles* juggernaut. *See id.* at 46, 50-51. They must show that a minority group in the at-large district "is sufficiently large and geographically compact to constitute a majority in a single-member district," otherwise "they cannot claim to have been injured" by the at-large scheme. *Id.* at 50 & n.17.

This *Gingles* 1 requirement is a constitutional guardrail, narrowing the statute's scope to areas where minority groups remain residentially segregated. *See Bartlett v. Strickland*, 556 U.S. 1, 21-22 (2009) (plurality opinion); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 279 (2020). Any lesser standard, and Section 2 would "'raise[] serious constitutional questions,'"

mandating "districts drawn with race as 'the predominant factor'" without any logical endpoint. *Bartlett*, 556 U.S. at 21-22 (plurality) (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006); *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Race-based election policy would continue indefinitely into the future, even "as residential segregation decreases—as it has 'sharply' done since the 1970s." *Allen*, 599 U.S. at 28-29.

The guardrails are off in Washington. Enacted in 2018, the Washington Voting Rights Act (WVRA) likewise bars minority vote dilution. But it has different rules. Washington requires local governments to dismantle existing at-large election systems, such as county commissions elected at-large, just because racially polarized voting exists. The law excludes the *Gingles* 1 "compactness" requirement from the inquiry. App. 76-78. Nor is any further proof of past discrimination by the locality required—let alone the sort of "specific, identified instances of past discrimination that violated the Constitution or a statute" that could justify a race-based change to elections. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 207 (2023). Put another way, the WVRA requires no causal connection between the locality's use of an at-large scheme and the lack of electoral success—only the correlation between whom voters vote for and their race. *But see Gingles*, 478 U.S. at 50 (explaining that if a district is "substantially integrated" such that a minority group would not "constitute a majority in a single-member district," then "the *multimember form*

of the district cannot be responsible for minority voters' inability to elect its candidates").

Since then, plaintiffs have sued throughout the state to replace at-large elections with districts based on racially polarized voting. In 2021, plaintiffs challenged Franklin County's at-large county commission. All they had to show was voting was racially polarized in the county. Not surprisingly, the county admitted liability and abandoned its at-large system to elect county commissioners to be replaced with single-member districts. App. 96-97.

During the litigation, Petitioner James Gimenez, a Hispanic Franklin County voter, intervened to challenge the WVRA's constitutionality. App. 2. He argued that the WVRA violates the U.S. Constitution's Equal Protection Clause by requiring local governments to change their election systems based on race alone—*i.e.*, the mere existence of racially polarized voting. App. 3. When the appeal reached the Washington Supreme Court, the Court held the WVRA need only survive rational-basis review and affirmed its constitutionality. App. 35-39.

This Court's intervention is warranted, either by summarily reversing the Washington Supreme Court or by granting plenary review on the merits. The Washington Supreme Court gave state law, affecting Washington voters from Seattle to Spokane, a free pass under the Equal Protection Clause. Contrary to the court's application of rational-basis review, state laws that are either expressly race-based or are "'unexplainable on grounds other than race'" are subject to "strict scrutiny" that is indeed "strict."

Shaw v. Reno (*Shaw I*), 509 U.S. 630, 643-44 (1993) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion). That is the WVRA. In its application, it makes race the only factor in determining whether a locality may use an at-large electoral system, and it is subject to strict scrutiny as a result. Worse, it has no *Gingles* 1 guardrail to ensure that the alleged harm—the inability to win elections—is traceable to *the government*'s adoption of the at-large scheme. *See Gingles*, 478 U.S. at 50 & n.17. Washington's is "a perilous enterprise," "relying on a combination of race and party" without more. *Bartlett*, 556 U.S. at 22 (plurality).

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 1 Wash. 3d 629, 530 P.3d 994. It is reproduced in the Appendix at 1-45. The joint order approving settlement and order of dismissal in the Superior Court of Washington is reproduced at App. 61-67. The order denying motion for judgment on the pleadings in the Superior Court of Washington is reproduced at App. 68-71.

JURISDICTION

The Supreme Court of Washington issued its opinion on June 15, 2023. App. 1. This Court granted an extension to file a petition for certiorari to and including November 7, 2023. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are reproduced in the appendix.

STATEMENT OF THE CASE

A. Section 2 of the Voting Rights Act

For decades, this Court has struck a delicate balance between the Equal Protection Clause and compliance with the Voting Rights Act. The Equal Protection Clause prohibits race-based action unless it survives "a daunting two-step examination" of "'strict scrutiny.'" *SFFA*, 600 U.S. at 206 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). Even when used for "remedial purposes," such race-based laws "may balkanize us into competing racial factions; [they] threaten[] to carry us further from the goal of a political system in which race no longer matters." *Shaw I*, 509 U.S. at 657. But "compliance with the Voting Rights Act" seemingly "pulls in the opposite direction: It often insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).

"The concern that § 2" of the Voting Rights Act "may impermissibly elevate race in the allocation of political power within the States is, of course, not new." *Allen*, 599 U.S. at 41-42. Taking those concerns head-on, this Court has eschewed limitless application of the Voting Rights Act, lest lawmakers be subject to "'competing hazards of liability.'" *Abbott*, 138 S. Ct. at 2315. Time and again, this Court has rejected that the Voting Rights Act could require

something that the Constitution would prohibit. *See, e.g.*, *id.* at 2334-35; *Vera*, 517 U.S. at 984-86; *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 907-08, 916-18 (1996); *Miller*, 515 U.S. at 927-28; *see also Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

The Court has struck that balance with the *Gingles* preconditions. Not long after Congress amended §2 to prohibit voting practices that "result[] in a denial or abridgement" of voting rights, App. 72 (52 U.S.C. §10301(a)), *Gingles* limited that amended text to only those locales where its three "preconditions" were met. *See Gingles*, 478 U.S. at 50-51. "First, the 'minority group must be sufficiently large and geographically compact to constitute a majority in a [single-member] district.'" *Allen*, 599 U.S. at 18 (cleaned up) (quoting *Wis. Leg. v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022) (per curiam)). "'Second, the minority group must be able to show that it is politically cohesive.'" *Id.* (quoting *Gingles*, 478 U.S. at 51). "And third, 'the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it … to defeat the minority's preferred candidate.'" *Id.* (quoting *Gingles*, 478 U.S. at 51). The "second and third *Gingles* factors" are referred to collectively as "racially polarized voting." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

Importantly, *Gingles* rejected that all at-large systems are "*per se* violative of § 2," just as at-large systems are not "*per se* unconstitutional." *Gingles*, 478 U.S. at 46; *White*, 412 U.S. at 765 (italics added). For the at-large system to come within Section 2's crosshairs, a plaintiff must prove the at-large system has the effect of "dilut[ing] minority voting strength

by submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality); *see Gingles*, 478 U.S. at 51. And a plaintiff cannot do so with proof of racially polarized voting alone. *Gingles*, 478 U.S. at 50-51. The plaintiff must clear *Gingles* 1, showing that the particular "minority group" is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 595 U.S. at 402 (per curiam). "Only when a geographically compact group of minority voters could form a majority in a single-member district has th[at] first *Gingles* requirement been met." *Bartlett*, 556 U.S. at 26 (plurality). Because only then can the minority group show that they would have the potential to elect representatives if the at-large scheme were replaced with districts. *Gingles*, 478 U.S. at 50 n.17. Absent that potential to form a majority in a single-member district, the locality's adoption of at-large elections "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50.

In practice, the *Gingles* 1 requirement narrows Section 2's focus to areas of residential segregation versus "a substantially integrated district." *Id.* Two decades after *Gingles*, in *Bartlett*, this Court rejected calls to relax *Gingles* 1 and apply Section 2 to areas where minority voters are too integrated or too few to form a reasonably configured single-member district. *See Bartlett*, 556 U.S. at 25-26 (plurality). Constitutional concerns drove that decision: "To the extent there is any doubt about whether § 2 calls for the majority-minority rule, we resolve that doubt by

avoiding serious constitutional concerns under the Equal Protection Clause." *Id.* at 21. The Court refused to "expand the reaches of § 2" with a relaxed requirement that "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Id.* at 21-22, 25 (quoting *Miller*, 515 U.S. at 916).

B. The Washington Voting Rights Act

Washington passed its own version of the Voting Rights Act in 2018. App. 5, 73-92. The WVRA addresses "two types of voting discrimination: 'abridgement' and 'dilution.'" App. 6. An "abridgement of the right to vote refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group," such as "the requirement of the payment of a poll tax as a precondition to voting or … the discriminatory use of literacy tests." App. 7 (cleaned up). That part of the WVRA is not at issue in this case.

This case is about the WVRA's "dilution" prong. On that issue, the Washington Legislature adopted rules that sharply differ from this Court's rules for the federal Voting Rights Act. The WVRA provides "a broader range of redressable claims for vote dilution than those recognized by Section 2." App. 9. To enlarge the WVRA's scope, the Washington legislature went even farther than this Court was asked to go (and didn't go) in *Bartlett*. It did so by expressly removing the *Gingles* 1 showing required under the WVRA: "[U]nlike Section 2, the WVRA specifically rejects the first *Gingles* factor as a *threshold* requirement: 'The

fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation'" of the WVRA. App. 14 (quoting Wash. Rev. Code §29A.92.030(2)); App. 77.[1]

In practice, a political subdivision violates the WVRA anywhere that voting is racially polarized, without regard to whether minority voters are sufficiently numerous and compact to make up a majority of a proposed single-member district. Plaintiffs need only show that "(a) [e]lections in the political subdivision exhibit polarized voting; and (b) [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 abridgement of the rights of members of that protected class or classes." App. 76-77. "Polarized voting," in turn, "means voting in which there is a difference, as defined in case law regarding enforcement of the federal voting rights act, … in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." App.

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[1] The California Voting Rights Act served as a model for the WRVA. *See* Wash. State Gov't, Elections & Info. Tech. Comm., H. Bill Rep. H.B. 1800, at 6 (Jan. 16, 2018). That law, too, sought to "provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act," *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333, 350 (Cal. Ct. App. 2014), and to avoid the problem of this Court's "[r]estrictive interpretations" of Section 2, *see* Assem. Comm. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.), as amended Apr. 9, 2002, p.2.

75. And 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." App. 76.

Upon a finding of a violation of the WVRA, "[t]he court may order appropriate remedies including, but not limited to, the imposition of a district-based election system." App. 88. In other words, if there is racially polarized voting in a county, the county cannot elect commissioners at large. The WVRA also gives courts the discretion to hold the political subdivision (and intervenor-defendants like Petitioner) liable for attorneys' fees and costs. App. 91.

Finally, the WVRA provides a "safe harbor" to political subdivisions to induce early settlements between challengers and political subdivisions. App. 83. Under the WVRA, a prospective plaintiff may not commence an action until 90 days after providing written notice to the political subdivision that its method of conducting elections may violate the WVRA. App. 82, 84-85. The political subdivision must obtain "a court order stating that it has adopted a remedy in compliance with [Washington Revised Code Section] 29A.92.020" within the applicable safe harbor window. *Id.* A political subdivision can limit its exposure under the WVRA, as a result, only by quickly adopting a new electoral system and obtaining court approval. If the political subdivision does not obtain

such a court order, a prospective plaintiff may then file an action. *Id.*

C. Proceedings below

Like many Washington localities, Franklin County used an at-large voting system in general elections to elect its county commissioners. App. 17. Such at-large systems remain common across the country. Carolyn Abott & Asya Magazinnik, *At-Large Elections and Minority Representation in Local Government*, 64 Am. J. Pol. Sci. 717, 717 (2020) ("As of 2012, approximately 64% of U.S. cities relied exclusively on at-large voting for their city council elections."). In April 2021, the League of United Latin American Citizens and three voters challenged Franklin County's at-large system in Washington Superior Court, arguing that such a system violated the WVRA, because it "dilut[ed] the votes of Latino/a voters." App. 2, 117.

The challengers moved for partial summary judgment. App. 18. Franklin County did not resist. App. 18, 96-97. It stated that its review of the data showed "the citizens of Franklin County exhibit polarized voting" and the County could not "in good faith oppose Plaintiffs' current Motion for Summary Judgment." App. 95-96. Even though the County explained "that the current election system was not imposed to discriminate against any protected class" and "has been used in Franklin County for decades," the County saw its only option as conceding liability and switching to single-member districts. App. 96. "[T]he patterns of polarized voting as recently as the 2020 general election make it clear that the current

system of electing county commissioners stands contrary to the requirements of the WVRA." App. 97. That admission of liability, however, was "premised on the assumption that the WVRA is valid and constitutional." App. 112.

Because of Franklin County's capitulation, Petitioner James Gimenez intervened to defend the County's existing system and to challenge the WVRA's constitutionality. App. 18-19. He moved to dismiss the plaintiff's claims and argued (among other things) that the WVRA is unconstitutional because it requires municipalities to implement electoral systems based on race. App. 3, 19. The trial court denied Gimenez's motion, holding that "the WVRA does not violate the Equal Protection Clause." App. 70. The court explained that it "finds no authority for the assertion that the legislature's decision not to include a compactness requirement in the WVRA" could render it unconstitutional. App. 71.

On May 9, 2022, the trial court approved a new elections scheme for Franklin County. App. 63-66. Beginning in 2024, "all future elections for the office of Franklin County Commissioner shall be conducted under a single-member district election system for both primary and general elections." App. 63. The Court also approved an agreement for Franklin County to pay the challengers $375,000 in attorney's fees and costs. App. 63-65. Petitioner, as the remaining defendant, timely appealed to the Washington Supreme Court. App. 3, 20. The challengers "opposed Gimenez's arguments on the merits, but they agreed that direct review was appropriate." App. 20.

The Washington Supreme Court explained that "[b]ecause the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances than a Section 2 plaintiff. This is reflected in the elements required to prove a WVRA claim." App. 13. Namely, "unlike Section 2, the WVRA specifically rejects the first *Gingles* factor as a *threshold* requirement: 'The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation'" of the WVRA. App. 14.

Despite that guardrail, the Washington Supreme Court concluded that the WVRA was constitutional. App. 35-39. In the court's view, it was constitutionally permissible to require counties to replace at-large elections with districts because of the existence of racially polarized voting, no matter how residentially segregated or how integrated those voters were. The Court held "that Gimenez's equal protection claim triggers only rational basis review, which the WVRA easily satisfies on its face." App. 23; *see also* App. 35 (holding that the WVRA "triggers rational basis review, not strict scrutiny"). It never contemplated whether strict scrutiny ought to apply given the WVRA's *per se* prohibition on at-large elections for a reason "unexplainable on grounds other than race." *Arlington Heights*, 429 U.S. at 266.

The Court then awarded plaintiffs fees against Petitioner. App. 44, 46-57. "The WVRA allows, but does not require, an award of 'reasonable attorneys'

fees'" and costs to "'the prevailing plaintiff or plaintiffs.'" App. 40 (quoting Wash. Rev. Code §29A.92.130(1)). "Here," the court explained, "the plaintiffs are the prevailing parties … and Gimenez's appeal forced the plaintiffs to spend an entire year litigating this case *after* Franklin County settled their WVRA claim." App. 40-41. The court "therefore exercise[d] [its] discretion to award plaintiffs' request for fees and costs attributable to their litigation against Gimenez." App. 41. The Court ordered Petitioner to pay $67,055.86 to the challenges for pursuing his claim that the WVRA is unconstitutional. App. 57.

REASONS FOR GRANTING THE PETITION

Review is warranted because the Supreme Court of Washington "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This case presents an important question under the Equal Protection Clause: whether a State's use of racially polarized voting to force localities to abandon at-large electoral systems is subject to strict scrutiny. Applying only rational-basis review, the Supreme Court of Washington disregarded longstanding equal-protection principles and this Court's decisions concerning race-based laws. The statute plainly requires local governments to change election systems based on race, without any further showing that at-large systems are "responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. Perhaps the State has grounds for legislating with such a broad brush, but it must be put to the test of

strict scrutiny. *See SFFA*, 600 U.S. at 206; *Wis. Legislature*, 595 U.S. at 401 (per curiam).

I. The constitutional issues presented in this case are fundamental.

A. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. "The Framers of the Fourteenth Amendment … desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations." *Shaw II*, 517 U.S. at 908 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (cleaned up).

The harms that occur from race-based laws are well documented. "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Id.* at 912. They "threaten[] to carry us further from the goal of a political system in which race no longer matters." *Shaw I*, 509 U.S. at 657. And even when used for remedial purposes, race-based government action is subject to "the strictest of judicial scrutiny." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted); *see also Vera*, 517 U.S.

at 978 (plurality opinion). That includes electoral systems based on race, lest a legislator "believe[] his primary obligation is to represent only the members of a particular racial group." *Alabama Leg. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (cleaned up); *see, e.g.*, *Miller*, 515 U.S. at 917-20; *Shaw I*, 509 U.S. at 653-58; *Shaw II*, 517 U.S. at 906-18. The Court's decisions in this area "reflect the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race.'" *SFFA*, 600 U.S. at 206.

The Equal Protection Clause, of course, applies to electoral systems at the local level too. *See, e.g.*, *Avery v. Midland Cnty.*, 390 U.S. 474, 480 (1968) ("[I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment."). And "local assemblies of citizens constitute the strength of free nations." 1 Alexis de Tocqueville, *Democracy in America* 60 (Henry Reeve trans., Colonial Press 1899). "[W]ithout the spirit of municipal institutions, [a nation] cannot have the spirit of liberty." *Id.* Local governments are responsible for law enforcement, public education, libraries, sanitation, fire protection, streets, local transportation, sewage, building codes, zoning, parks and recreation, and countless other basic functions of government. Municipalities, in sum, tend to "all those personal interests and familiar concerns to which the sensibility of individuals is [the most] immediately awake." The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Washington's law implicates these constitutional principles by requiring counties to replace at-large elections with districts drawn, based on racially

polarized voting alone. After the WVRA's passage in 2018, voters in one county may vote at-large while voters in another county must be districted, and race is the indispensable ingredient for deciding who votes how.

Unlike the federal Voting Rights Act, the WVRA turns on racially polarized voting. But racially polarized voting is an observation about voters' behavior, not discriminatory state action. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part). It is the aggregated effect of individual political choices. It reveals a *correlation* between a voter's race and his preferred candidates, but it does not prove that race *causes* those preferences. There are many reasons besides race that might lead to racially polarized voting, such as "education, economic status, or the community in which they live." *Shaw I*, 509 U.S. at 647. For that reason, racially polarized voting alone is not sufficient to mandate changes to election laws under the federal Voting Rights Act. *See Gingles*, 478 U.S. at 50-51. Something more is required—a federal plaintiff must show the election law is "*responsible for* the minority voters' inability to elect its candidates." *Gingles*, *Id.* at 50 & n.17 (emphasis added). The federal plaintiff does not do so by pointing to racially polarized voting; she does so by showing that "voters possess the *potential* to elect representatives in the absence of the challenged [law]" because they could form a majority in a reasonably configured district. *Id.* at n.17

The *Gingles* 1 "compactness" requirement—absent in Washington's state-law analog—is a

constitutional guardrail, ensuring that Section 2 does not become a rule requiring "maximum possible voting strength" for one minority group over another. *Bartlett*, 556 U.S. at 16 (plurality). It narrows the scope of Section 2 and avoids judicial "inquiries based on racial classifications and race-based predictions." *Id*. at 18. Without it, Section 2 would raise "serious constitutional questions" by "unnecessarily infus[ing] race into virtually every redistricting." *Id.* at 21 (quotation marks omitted). That *Gingles* 1 requirement has long been the salve for the familiar "concern that § 2 may impermissibly elevate race in the allocation of political power within the States." *Allen*, 599 U.S. at 41.

But in Washington, by relying only on racially polarized voting, the WVRA also assumes that race is the only factor motivating a person's vote and thus reinforces pernicious stereotypes to dictate voting systems that the government may adopt. *See SFFA*, 600 U.S. at 220. Forcing localities to abandon longstanding at-large elections for small municipalities or counties because votes are being cast along racial lines "reinforces the perception that members of the same racial group … think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. "If our society is to continue to progress as a multiracial democracy," however, "it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31 (1991). This is why strict scrutiny applies to all race-based laws. *See, e.g.*, *Gratz*, 539

U.S. at 270; *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

The WVRA also has no "'logical end point.'" *SFFA*, 600 U.S. at 221; *see also Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring) ("[E]ven if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future."). As recently as *Allen*, this Court explained that the federal Voting Rights Act should have an endpoint as American neighborhoods become more integrated. *See Allen*, 599 U.S. at 28-29. "[A]s residential segregation decreases—as it has 'sharply' done since the 1970s—satisfying … the compactness requirement" of *Gingles* 1 "'becomes more difficult.'" *Id.* (quoting Crum, *supra*, *at* 279 & n.105). But the WVRA has no similar guardrail. Washington expressly eschews the requirement that plaintiffs must prove a county's at-large elections are responsible for their inability to elect candidates, *see Gingles*, 478 U.S. at 50 & nn.16-17—meaning it will continue to require race-based changes to elections so long as there is some correlation between a person's race and their preferred candidates.

B. The Washington Supreme Court applied only rational-basis review to that scheme. The absence of any scrutiny is plainly wrong and should be summarily reversed. *See Wis. Legislature*, 595 U.S. at 406 (per curiam). Because it refused to apply strict scrutiny, the Court never asked whether there was "a race-neutral alternative" to meet its goals, *id.*—for instance, by asking why the State would not require

all jurisdictions, without regard to race, to move to districts. Nor did the Court ask whether there was any more "narrowly tailored" alternative, *Vera*, 517 U.S. at 979 (plurality opinion)—for example, by requiring only those jurisdictions with a sufficiently numerous and compact minority population to move to districts, analogous to the federal Voting Rights Act.

The Washington Supreme Court instead declared that the law need only pass rational-basis review. But the law is unquestionably race-based. The WVRA commands Washington localities to abandon at-large systems upon a showing of racially-polarized voting, without any further requirement that the County is responsible for any alleged dilution. *See* App. 76-78; App. 88 (upon a finding of a violation of the WVRA, "[t]he court may order appropriate remedies including … the imposition of a district-based election system"); App. 96-97 (admitting liability because there is racially polarized voting in Franklin County). In other words, the locality must change its electoral system because the race of voters tends to correlate with the selection of certain candidates—no matter what the government's role was in that. *Gingles*, 478 U.S. at 74. For the WVRA to compel that race-based change to Franklin County's election system, the WVRA must first withstand strict scrutiny, not mere rational-basis review.

The Washington Supreme Court's contrary view demands this Court's correction. The Court thought strict scrutiny did not apply because "the WVRA on its face does not classify voters on the basis of race." App. 35. But that is only the beginning of the inquiry. The Court never asked whether the WVRA's command

that Franklin County change its electoral system is a command "'unexplainable on grounds other than race.'" *Shaw I*, 509 U.S. at 643 (quoting *Arlington Heights*, 429 U.S. at 266). It is. Under the statutory scheme, such "racially polarized voting" is the reason why a county like Franklin may be forced to abandon its at-large system, while other counties without racial diversity or without racially polarized voting can keep at-large systems. Just as strict scrutiny applies "if race for its own sake is the overriding reason for choosing one [redistricting] map over others," *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017), strict scrutiny applies here where race is the overriding reason for requiring one electoral scheme over others.

There should be no debate that the WVRA requires Washington localities to change election systems for reasons explainable by race alone. The Washington State Legislature jettisoned any analogous *Gingles* 1 requirement—that minority voters first show that they would be "'sufficiently large and geographically compact to constitute a majority in a reasonably configured district,'" *Allen*, 599 U.S. at 18 (cleaned up)—precisely so that the reach of its state law would extend beyond the reach of the federal Voting Rights Act. App. 36; *supra*, at pp. 8-10. The WVRA was intentionally designed to make it easier to successfully challenge at-large districts by eliminating the first *Gingles* factor. *Id.*; App. 77 ("The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a

violation."). The WVRA thus overrides the "the balance that is found in the federal law," by allowing a plaintiff to take down a county's election system for race-based reasons without any of the guardrails in place for federal Voting Rights Act claims. H.R., 3d reading analysis of H.R. Bill No. 1800 (2017-2018) (remarks of Rep. Larry Haler at 1:01:43), bit.ly/3Stqxrn.

Race is the *raison d'etre* for requiring Franklin County, and any other racially diverse jurisdiction, to replace at-large elections with districts. Washington has not just relaxed the *Gingles* 1 requirement. It has rid its state-law version of the Voting Rights Act of the requirement altogether. But if *Gingles* 1 is critical for "avoiding serious constitutional concerns under the Equal Protection Clause" for the federal Voting Rights Act, *Bartlett*, 556 U.S. at 21 (plurality), it is surely all the more critical for a state-law version. That state law is entitled to none of the deference afforded to congressional legislation, including the federal Voting Rights Act, enacted to enforce the Fourteenth and Fifteenth Amendments. *Compare Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) ("Fourteenth Amendment was framed and adopted" to preclude "*State* laws [that] might be enacted or enforced to perpetuate [racial discrimination]," *with Allen*, 599 U.S. at 41, *and City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Vera*, 517 U.S. at 990-92 (O'Connor, J., concurring). Race is the trigger for the WVRA's mandatory remedies. The statute was expressly enacted to override federal jurisprudence that carefully limits the role of race in designing electoral systems. It must be subject to strict scrutiny.

II. The WVRA and similar statutes in other states are causing serious constitutional harm.

Franklin County's abandonment of its at-large system in the face of allegations of racially polarized voting is not an isolated event. The WVRA targets all at-large election systems. And when Washington enacted the WVRA, some praised the law as the panacea for getting rid of at-large district elections. *See* Shannon Cheng, *Democracy Just Got Stronger in Washington State*, ACLU (Mar. 20, 2018), perma.cc/85KC-F8KP.

The law is having its intended effect. The City of Wenatchee was the first municipality to alter its election system under the WVRA, and Wenatchee Mayor Frank Kuntz "promoted the measure to protect the city from voting-rights litigation." Jefferson Robbins, *Primary Elections Roundup: What's on your Ballot?*, SourceOne (July 22, 2019), perma.cc/NVN2-4TJT; Steven Ellis, *Wenatchee Is First City to Use New Voting Rights Act to Ensure Better Representation*, Wash. State Wire (Aug. 10, 2018), perma.cc/R5CW-B22L. After a 6-1 council vote on the measure, Wenatchee moved from an at-large system to a primarily district-based one. Jefferson Robbins, *In 6-1 Vote, Wenatchee Chooses to Elect Council Members by District*, SourceOne (Aug. 10, 2018), perma.cc/SL97-ZQU5. Notably, the "sole vote against the measure came from the sole Hispanic councilmember, Ruth Esparza—although the district system was adopted in part to ensure more Hispanic representation in city government." *Id.*

Yakima County faced the first WVRA challenge that proceeded to litigation. *CLC Wins State Voting Rights Act Case in Historic Settlement*, Campaign Legal Ctr. (Aug. 31, 2021), perma.cc/R23D-VQNN. It ultimately settled the case by agreeing to move from an at-large system to a single-member district system. *Id.* Additionally, the court ordered Yakima County to pay nearly $272,000 in attorney's fees. Phil Ferolito, *Yakima County Ordered to Pay Nearly $272,000 in Voting Rights Case, Lower than $2M Requested*, The Spokesman-Review (Dec. 28, 2021), perma.cc/Z7WH-U3TM. Thirty-one other Washington counties use a system similar to Yakima County's, which means that they are also at risk of WVRA challenges. Rebecca White, *After Settlement in Yakima, Voting Rights Advocates Put County Governments on Notice*, Spokane Public Radio (Sept. 3, 2021), perma.cc/M5M4-TR9V.

Larger Washington counties "have voluntarily changed their charters to district elections, including King, Clark and Pierce Counties." *Id.* Yet, "[m]ost small counties, including several in central and northeast Washington which have high percentages of Latino and Indigenous residents," continue to use at-large districts. *Id.* One of those counties recently received a WVRA complaint letter. Emily McCarty, *Washington's Latinx and Native Voters Are Fighting for Their Votes to Matter*, Crosscut (Mar. 2, 2020), perma.cc/PS23-LAFH; Justus Caudell, *CBC Meets with Ferry County Commissioners on Election Complaint*, Tribal Trib. (Jan. 24, 2020), perma.cc/ZF5D-JW4N. More Washington local

governments will face race-focused challenges under the WVRA if this Court does not intervene.

This problem is not limited to Washington. Many political systems in states with similar laws are abandoning the at-large system in the face of allegations of racially polarized voting. At least 500 political subdivisions have changed to by-district elections because of the parallel California Voting Rights Act, on which the WVRA was modeled. *See supra*, at p. 9, n1. This includes 300 school districts, 170 cities, and 50 other special districts. *See* Charlie Mounts, *California's Voting Rights Act Continues to Force More Local Governments into By-District Elections*, Civic Bus. J. (Sept. 19, 2022), perma.cc/CK4H-26L8.

That so many municipalities are abandoning their at-large districts is not surprising. There is a "small cottage industry of lawyers and advocacy groups" dedicated to "suing jurisdictions under the [CVRA]." Thy Vo, *The Accidental Advocate*, Voice of OC (Dec. 8, 2020), perma.cc/Y39Q-ZEQ4. They are funded by the statutory fee-shifting provisions. And cities often settle because "fighting [the] lawsuit would be outrageously expensive with no possible successful conclusion." *Santa Clarita Settles California Voting Rights Act Lawsuit*, Pub. CEO (Apr. 13, 2022), perma.cc/Z5N7-FGZK. Those that try to defend against these lawsuits have been forced to pay staggering attorney's fees, including, among others, California's Palmdale ($4.7 million), Santa Clara ($4.55 million), Modesto ($3 million), Anaheim ($1.2 million), Whittier (more than $1 million), and Santa

Barbara ($600,000).[2] Countless municipalities in Washington will continue to be forced to abandon their at-large electoral systems because of these race-based mandates absent the Court's intervention.

Nor is California the only other state that has adopted similar statutes requiring redistricting because racially polarized voting exists. In 2022, for example, the New York Legislature passed John R. Lewis Voting Rights Act of New York (NYVRA), which Governor Kathy Hochul described as the "most expansive state level voting rights act in the country." Office of Gov. Hochul, *Governor Hochul Signs Legislative Package to Strengthen Democracy and Protect Voting Rights*, (Sept. 20, 2023), perma.cc/NK9F-CW2T. Like Washington and California, the NYVRA eliminates the compactness requirement to show a dilution violation. *See* N.Y. Elec. Law §17-206. Doing so was "an attempt for [the legislature] to step up in the absence of federal action." New York Senate Standing Comm. on Elections (statement of Sen. Zellnor Myrie at 4:30-6:51), perma.cc/V4HZ-F7DW. And because "[m]ost of the 933 towns throughout New York State" as well as "[m]ost villages and school districts" "utilize an at-large system rather than a ward system," those entities will also be subject to lawsuits. Jared A.

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[2] *See* Douglas Johnson, *The California Voting Rights Act and Districting: The Demographer's Perspective*, Nat'l Demographics Corp. 5 (May 9, 2016), perma.cc/YX68-8WL3; *City Council Staff Report*, City of Citrus Heights 1-4 (Jan. 10, 2019), bit.ly/2UjaUDa; Katie Lauer, *Santa Clara Settles $4.5 Million Lawsuit over Districted Elections*, San Jose Inside (Apr. 21, 2021), perma.cc/EPA3-7RJW.

Kasschau, *New York Communities with At-Large Election Methods Facing Challenges Under Voting Rights Act*, Harris Beech PLLC (Aug. 28, 2023), perma.cc/Q5LW-3P48.

Oregon and Virginia likewise have passed the same basic law. Or. Rev. Stat. §255.411; Va. Code §24.2-130. And other states like Michigan, New Jersey, Maryland, and Illinois are considering similar laws. That states are moving toward *more* race-based decision-making today is particularly troubling. "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). And "all governmental use of race must have a logical end point." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Yet Washington is ensuring that the use of race in choosing between electoral systems will *increase* at a time when it should be doing the opposite. If under Section 2, "the authority to conduct race-based redistricting cannot extend indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), the same is true for these proliferating state-law analogs. They must be put to the test of strict scrutiny.

III. This case is an ideal vehicle for summarily reversing or resolving the question presented on the merits.

This case presents an ideal vehicle for the Court to address the question presented, either in a summary reversal or by granting plenary review on the merits. The constitutional issue is squarely presented and ready for review. The Washington

Supreme Court's opinion was the first, and now likely the last, decision opining on the constitutionality of the State's recently enacted WVRA. The Court definitively addressed tiers of scrutiny: only rational-basis review applies. Absent this Court's intervention, that will be the last word on the federal constitutionality of the state law affecting voters statewide and precipitating a trend in other large states. Granting the petition will allow the Court to address the critically important threshold question of whether WVRA should be subject instead to strict scrutiny.

On this point, Respondents may latch on to the Washington Supreme Court's discussion of as-applied versus facial challenges. "Without a doubt," that court explained, "the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges." App. 37. Respondents may argue that means the Court should wait for an "as-applied" case, as though there would be another case to reach the Washington Supreme Court in a posture different from that presented here. There will not be, nor is there any basis for waiting for the Washington Supreme Court to misapply this Court's Equal Protection Clause precedents again. This case *is* an as-applied challenge in any event; it is the WVRA as applied to Franklin County's prior, at-large voting scheme. It just so happens that the WVRA operates the same as to all other at-large districts with racially polarized voting. *See supra*, at pp. 22-24. Whatever the label, the WVRA's vote-dilution rules are subject to strict scrutiny. The Washington Supreme Court said it wasn't. And only this Court can fix that error.

Finally, there is no reason to wait for further developments in other lower courts. California courts have made clear that future challenges to its analogous California Voting Rights Act are also not subject to strict scrutiny. *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 842 (Cal. Ct. App. 2006). So has the Ninth Circuit, which also held that the California Voting Rights Act "do[es] not trigger strict scrutiny." *Higginson v. Becerra*, 786 F. App'x 705, 707 (9th Cir. 2019). That court "failed to grapple with the questions of exceptional importance raised" there by issuing an unpublished decision. *Ricci v. DeStefano*, 530 F.3d 88, 101 (2d Cir. 2008) (Cabranes, J., dissenting from denial of rehearing en banc). And this Court then denied review of that unpublished decision. Now *Higginson*'s reach has compounded: the Washington Supreme Court treated the denial as essentially binding in part because "the United States Supreme Court denied certiorari." App. 38. That denial, of course, is of no consequence. *See Evans v. Stephens,* 544 U.S. 942, 942 & n.1 (2005) (Stevens, J., respecting the denial of certiorari) ("a denial of certiorari is not a ruling on the merits of any issue raised by the petition") (collecting cases); *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."). Now with a published decision from Washington's highest court on the constitutionality of its state law, the appropriate time for this Court's review is now.

Deferring review also exacerbates the financial strain that challenging these laws imposes. Fee-shifting provisions create a powerful incentive for municipalities to surrender instead of appealing their constitutional defenses to this Court. *See supra* at p. 25. The Supreme Court of Washington awarded plaintiffs $67,055 in fees against Petitioner—a Hispanic resident and voter in Franklin County—for having the audacity to "force[] the plaintiffs to spend an entire year litigating this case" so he could try to vindicate the Equal Protection Clause's promise of colorblindness. App. 41. Few others will bear that risk.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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