No. 23-500

In the Supreme Court of the United States

JAMES GIMENEZ,
Petitioner,
v.
FRANKLIN COUNTY, WASHINGTON, ET AL.,
Respondents.

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

BRIEF FOR PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

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INTEREST OF *AMICUS CURIAE*

The Project on Fair Representation is a public-interest organization committed to the principle that racial and ethnic classifications are unconstitutional, unfair, and harmful. It works to advance race-neutral rules in education, government action, and voting. The Project pursues these goals through education and advocacy and has been involved in several cases before the Court involving these important issues.

The Project opposes racial gerrymandering of all kinds. Eliminating racial sorting in districting is not only what our Constitution requires, but it is also a needed remedy for our Nation's increasingly polarized and racialized politics. Because the decisions below require local governments to make official decisions and structure elections based solely on citizens' races, the Project has a direct interest in this case.*

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* Under Rule 37.2, *amicus* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Washington has devised a districting law that "specifically rejects" the "threshold requirement" mandated by this Court in federal Voting Rights Act cases: that "members of a protected class" be sufficiently "compact" before new districts can be imposed. App. 14 (emphasis omitted). Eliminating this requirement means that anytime racially polarized voting exists in Washington—no matter how integrated the population—at-large voting districts can be forced to switch to single-member districts. As the Washington Supreme Court repeatedly emphasized below, the State's law is thus "much broader" than and "in direct contrast" to this Court's federal Voting Rights Act jurisprudence. App. 11–12.

By making "geographical compactness" "both irrelevant and unnecessary at any stage," App. 14, Washington's law makes racial voting patterns the deciding factor in districting cases. Yet the courts below refused to apply strict scrutiny, instead upholding the law under bare rational basis review. This Court should grant certiorari to correct that misunderstanding of the Fourteenth Amendment.

First, under settled precedents, applying Washington's law to require its citizens to alter their districts based solely on the existence of racially polarized voting is subject to strict scrutiny. That is because the law hinges on race. Strict scrutiny generally governs even race-based applications of the federal Voting Rights Act, and Washington's law eliminates a critical guardrail that this Court has placed in federal cases to alleviate tension with the Equal Protection Clause: the requirement of

geographic compactness. By hinging liability on private voting decisions, Washington's scheme presents an even more severe equal protection problem. No matter how integrated Washington becomes, the law indefinitely requires single-member districts in the presence of voting patterns based on race. Strict scrutiny applies.

Second, unlike Congress with the federal VRA, Washington cannot claim refuge in the Reconstruction Amendments' extraordinary authority. That authority, including the power to enforce the Fourteenth Amendment's guarantee of equal protection, was given to Congress to combat continued state efforts to discriminate based on race. Washington's scheme is an *example* of such state racial discrimination. By declining to apply at least the same heightened scrutiny that applies to federal VRA race-based remedies, the decision below would invert the authority granted by the Fourteenth Amendment to the federal government alone to remedy States' racial discrimination.

As Justice O'Connor explained, "[a]t the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease." *Bush* v. *Vera*, 517 U.S. 952, 993 (1996) (concurring opinion). Washington's scheme bases liability on nothing more than racially polarized voting, manifesting discrimination that the Constitution bars. The Court should grant the petition and hold that strict scrutiny applies.

REASONS FOR GRANTING THE WRIT

I. Washington's law discriminates based on race and lacks necessary guardrails.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 208 (2023) (cleaned up). "For that reason," official "classification or discrimination based on race" is "a denial of equal protection." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). "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* v. *Johnson*, 515 U.S. 900, 911 (1995) (cleaned up); see *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The law" "takes no account of" a citizen's "color when his civil rights as guaranteed by the supreme law of the land are involved.").

Voting laws that prescribe differential treatment for citizens based on their race are not "excepted from standard equal protection precepts." *Miller*, 515 U.S. at 914. "Under the Equal Protection Clause, districting [laws] that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993)). These laws "tend[] to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious

groups in enclaves." *Johnson* v. *De Grandy*, 512 U.S. 997, 1030 (1994) (Kennedy, J., concurring in part and in judgment) (cleaned up). Laws that require this approach "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Wisconsin Legislature*, 595 U.S. at 401 (quoting *Miller*, 515 U.S. at 904).

Of course, the federal Voting Rights Act "often insists that districts be created precisely because of race," so "[i]n an effort to harmonize these conflicting demands," the Court has "assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2314–15 (2018). "In technical terms," race-based voting remedies must "satisf[y] strict scrutiny." *Id.* at 2315. Because the Washington law here requires race-based discrimination to an even greater extent than the federal VRA, its applications in vote-dilution cases are also subject to strict scrutiny.

The Washington law raises heightened equal protection concerns because it eliminates one of the essential preconditions of the federal VRA. Recognizing potential constitutional liabilities of the federal VRA, "[t]he Court's longstanding precedent imposes strict requirements for proving a vote-dilution claim." *Merrill* v. *Milligan*, 142 S. Ct. 879, 884 (2022) (Kagan, J., dissenting). The first requirement is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986). "If it is not, as would be the case in

a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates." *Ibid.* Thus, "*Gingles* and this Court's later decisions have flatly rejected" "group[ing] together geographically dispersed minority voters" in the name of "a proportional number of majority-minority districts." *Allen* v. *Milligan*, 599 U.S. 1, 43 (2023) (Kavanaugh, J., concurring in part).

Like the other *Gingles* preconditions (a politically-cohesive minority group and majority bloc voting), the compactness requirement is necessary to balance "the twin demands of the Fourteenth Amendment and the VRA." *Bush*, 517 U.S. at 990 (O'Connor, J., concurring). These "exacting requirements" "limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Allen*, 599 U.S. at 30 (cleaned up). All three conditions must be "rigorously appl[ied]" "[t]o ensure that *Gingles* does not improperly morph into a proportionality mandate" in contravention of the Equal Protection Clause. *Id.* at 44 n.2 (Kavanaugh, J., concurring in part).

An "underlying principle of fundamental importance" requires courts to "be most cautious before" requiring "inquiries based on racial classifications and race-based predictions"—for that would "raise[] serious constitutional questions." *Bartlett* v. *Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion). When racial lines are drawn, "the multiracial . . . communities that our Constitution seeks to weld together as one become separatist;

antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan." *Reno*, 509 U.S. at 648 (quoting *Wright* v. *Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

Thus, for compliance with the VRA "to be a compelling interest" as required under strict scrutiny, "the State must have a strong basis in the evidence for believing that all three of the threshold conditions . . . are met." *Bush*, 517 U.S. at 996 (Kennedy, J., concurring); see *Miller*, 515 U.S. at 922. "[T]o have a strong basis in evidence," "the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions." *Wisconsin Legislature*, 595 U.S. at 404 (cleaned up); see *De Grandy*, 512 U.S. at 1012 ("[T]he three *Gingles* factors may not be isolated as sufficient, standing alone, to prove dilution in every multimember district challenge.").

Washington's law, however, rejects the first *Gingles* precondition as, in the words of the Washington Supreme Court, "both irrelevant and unnecessary at any stage" in every case. App. 14. That startling change underscores that strict scrutiny governs race-based applications of the Washington law. Without the first *Gingles* precondition, those applications will "essentially collapse into one question: Is voting racially polarized such that minority-preferred candidates consistently lose to majority-preferred ones?" *Allen*, 599 U.S. at 69 (Thomas, J., dissenting) (citing *Gingles*, 478 U.S. at 51).

In other words, liability turns on citizens' races. And when laws discriminate based on citizens' races, strict scrutiny is required. See *id.* at 28 (majority opinion) ("Forcing proportional representation is unlawful . . . ."); *id.* at 98 (Alito, J., dissenting) ("When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open to the members of the group in question.").

Other consequences of Washington's choice to ditch the first *Gingles* precondition confirm that strict scrutiny should apply. Start with the reality that an integrated population will have no effect—none—on liability under the State's law. This Court recently explained that "as residential segregation decreases—as it has sharply done since the 1970s—satisfying traditional districting criteria such as the compactness requirement becomes more difficult." *Allen*, 599 U.S. at 28–29 (cleaned up); see Chen & Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 921 (2021) ("In most states, it seems, minority voters are geographically distributed in such a way that a proportional share of reasonable-looking opportunity districts cannot be drawn."). The Court's point was that extraordinary race-based remedies are—and should be—both rare and ever rarer. See *Allen*, 599 U.S. at 29–30. Not so under Washington's law, which would generally force municipalities to abandon at-large elections. Cf. *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 n.15 (1980) (plurality opinion) ("It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was

universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government.").

Consider too the reality that, once integration is irrelevant, Washington's law loses a central limitation of the federal VRA: time. This Court has emphasized that extraordinary legislation like the VRA, even if initially "justified by exceptional conditions," "must be justified by current needs." *Shelby County* v. *Holder*, 570 U.S. 529, 542, 545 (2013) (cleaned up). "[T]he authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring in part). But under Washington's scheme, no matter how integrated society becomes, the law still forces local governments to divide citizens based on race. This is a recipe for "indefinite use of racial classifications." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion).

Finally note that besides abandoning the compactness requirement, Washington's scheme also—again "in direct contrast to the [federal VRA]"—"explicitly" contemplates "the creation of a crossover or coalition district 'that provides the protected class the opportunity to join in a coalition of two or more protected classes to elect candidates of their choice.'" App. 12 (cleaned up) (quoting Wash. Rev. Code Ann. § 29A.92.110(2)). As this Court has said in rejecting a similar requirement under the federal VRA, "[i]t would be an irony" "to entrench racial differences by" "requir[ing], by force of law, the voluntary cooperation our society has achieved" between citizens. *Bartlett*, 556 U.S. at 25–26 (plurality opinion) (cleaned up).

"[R]equir[ing] crossover districts" "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 21 (cleaned up). Once again, Washington's scheme only heightens its use of race, highlighting its departure from this Court's rule that "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." *Id.* at 26.

Of course, these consequences suggest that race-based applications of Washington's law would *fail* strict scrutiny. At a minimum, though, they underscore that the required constitutional standard for race-based laws like Washington's is strict scrutiny.

Applying the proper standard is not some unimportant technicality. "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911–12 (cleaned up). "In doing so, the [State] furthers 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." *Students for Fair Admissions*, 600 U.S. at 221 (cleaned up). These classifications necessarily "promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

"[T]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause, and racial classifications are permitted only as a last resort." *Bartlett*, 556 U.S. at 21 (plurality opinion) (cleaned up). Washington's scheme starts and ends with race. The Court should grant certiorari and reject the Washington Supreme Court's deference to that race-centric approach.

II. Congress, not States, has authority under the Reconstruction Amendments.

Congress's authority to enact legislation like the VRA comes from the Fourteenth and Fifteenth Amendments, which permit Congress to "enforce" those amendments' substantive provisions "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. Congress may enforce them "by creating private remedies against the States for actual violations." *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (emphasis omitted). In other words, the Reconstruction Amendments sought to give Congress the power to *stop* States from discriminating based on race.

Letting States like Washington *continue* discriminating based on race by excusing race-based voting laws would turn the Reconstruction Amendments on their head. As explained, strict scrutiny often applies even to the milder federal VRA. And regardless of whether the federal VRA passes that scrutiny in every application, it makes no sense to decline to at least *apply* that scrutiny to state efforts to do exactly what the Reconstruction Amendments sought to outlaw: discrimination based on race. Those amendments conferred "extraordinary" power on

Congress to *remedy* racial discrimination—not power on States to propound it. *Shelby County*, 570 U.S. at 546.

The history of the Reconstruction Amendments confirms this lesson. In the aftermath of the Civil War, Congress recognized that the role of rebuilding had to be placed "in the hands of men who would be loyal to the Union." Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. Cal. L. Rev. 378, 385 (1966). The Reconstruction Congress understood that this responsibility could not be left to the States: Northern states denied black people the right to vote, ex-Confederate soldiers threatened to disarm and murder freedmen, and the South was in the process of implementing the Black Codes. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 772 (2010); Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 Harv. L. Rev. F. 109, 113 (2013); Lash, *Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 Geo. L.J. 1389, 1396 (2018). Congressional Republicans, heeding the lessons of the Civil War, understood that the restoration of the Union required a strong federal government and protection of civil rights. See *Students for Fair Admissions*, 600 U.S. at 239 (Thomas, J., concurring); Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1807, 1810 (2010). The job of reconstructing the Union fell to the federal government.

Faced with the responsibility of stabilizing a wounded nation, the federal government sought to

exercise greater power. Using the Republican Guarantee Clause, Congress forced southern States to adopt new constitutions that "establish[ed] a race-neutral voting system" and "promise[d] to maintain this race-neutral suffrage regime forever thereafter." Amar, *supra*, at 111. Congress also passed the Civil Rights Act of 1866 to outlaw slavery, guarantee equal protection, and expand citizenship to all those born on U.S. soil regardless of race. § 1, 14 Stat. 27.

But some questioned whether Congress had authority to enforce the Civil Rights Act. In his veto message to Congress, President Johnson wrote that the provisions of the Act "destroy our federative system of limited powers and break down the barriers which preserve the rights of the States." Cong. Globe, 39th Cong., 1st Sess. 1681 (1866). Even Representative John Bingham, a zealous supporter of civil rights and key framer of the Fourteenth Amendment, viewed the Civil Rights Acts as exceeding congressional authority. Goldstein, *The Birth and Rebirth of Civil Rights in America*, 50 Tulsa L. Rev. 317, 321 (2015).

To remedy this problem and "provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866," Congress passed the Reconstruction Amendments. *McDonald*, 561 U.S. at 775. These amendments included enforcement clauses "drafted to give Congress the power to act against state racial discrimination." Tsesis, *Enforcement of the Reconstruction Amendments*, 78 Wash. & Lee L. Rev. 849, 904 (2021). These amendments enabled the federal government to "intrude[] into legislative spheres of autonomy previously reserved to the

States." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997) (cleaned up). And they enabled the federal government to use extraordinary remedies like the VRA's, all thanks to "the authority of Congress under the Reconstruction Amendments." *Bush*, 517 U.S. at 992 (O'Connor, J., concurring). The federal VRA was "part of the apparatus chosen by Congress to effectuate this Nation's commitment to confront its conscience and fulfill the guarantee of the Constitution with respect to equality in voting." *Ibid.* (cleaned up). Congress considered the VRA "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Ibid.* (cleaned up).

States do not share those same congressional prerogatives under the Reconstruction Amendments. Of course, federalism did not end with the passage of the Fourteenth Amendment, and states "retain broad autonomy in structuring their governments and pursuing legislative objectives," including "the power to regulate elections." *Shelby County*, 570 U.S. at 543 (cleaned up). The State of Washington is free to adopt laws that expand the protections available to voters. But it must not violate citizens' rights under the Fourteenth Amendment, including by creating or expanding race-based voting remedies. Race-based remedies, by their very nature, entail discrimination: one group receives preferential treatment. When it comes to laws that require governments to divide citizens based on race, the Fourteenth Amendment made clear that "[n]o State shall" "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

So even if the federal government may, in rare cases, require race-focused remedies, States generally may not. Washington's law requires discrimination based on race, and it cannot be justified by either of the only two interests that this Court has said "permit[s] resort to race-based government action": "remediating specific, identified instances of past [unlawful] discrimination" and "avoiding imminent and serious risks to human safety in prisons." *Students for Fair Admissions*, 600 U.S. at 207. Whatever arguments the State may have on that score, they should be adjudicated in the context of strict scrutiny, because the State's law discriminates based on race.

The Fourteenth Amendment did not vest in States the authority to fashion race-based legal remedies for racially polarized voting. Instead, it outlawed state racial discrimination. Applying only rational basis to Washington's racial discrimination—when strict scrutiny applies even to the less severe federal VRA—gets the text, history, and context of the Reconstruction Amendments backwards. No matter how necessary the Washington legislature might have thought its law was "to eliminate racial disparities," App. 71, "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *J.A. Croson*, 488 U.S. at 501 (citing *Korematsu* v. *United States*, 323 U.S. 214, 235–240 (1944) (Murphy, J., dissenting)). Strict scrutiny should apply.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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