No. 100999-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GABRIEL PORTUGAL, *et al.*,

Plaintiffs-Respondents,

v.

FRANKLIN COUNTY,

Defendant,

AND

JAMES GIMENEZ,

Intervenor Defendant-Appellant.

BRIEF OF LAW SCHOOL CLINICS FOCUSED ON CIVIL RIGHTS AS *AMICI CURIAE*

David B. Owens, WSBA #53856
CIVIL RIGHTS AND JUSTICE CLINIC
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
William H. Gates Hall, Ste. 265
P.O. Box 85110
Seattle, WA 98145
(206) 616-8742
dbownes@uw.edu

Ruth Greenwood
Nicholas Stephanopoulos
ELECTION LAW CLINIC
HARVARD LAW SCHOOL
6 Everett Street, Ste. 4105
Cambridge, MA 02138
(617) 998-1010
rgreenwood@law.harvard.edu
nstephanopoulos@law.harvard.edu

Attorneys for AMICI CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Federal Constitutional Provisions

Other Authorities

I. INTRODUCTION

For decades, Washington's electorate has been rapidly diversifying—but its elected representation has not. Against this backdrop, Washington enacted antidiscrimination legislation, the Washington Voting Rights Act ("WVRA" or the "Act"), that established a simple principle: All the State's residents, regardless of their race, must be afforded equal voting opportunity. Within the bounds of that antidiscrimination guardrail, local jurisdictions retain broad discretion to define the method and manner of elections. The rights the WVRA creates flow to members of *all* racial groups, and the remedies it envisions can be entirely *race-neutral*. To the extent that the WVRA requires consideration of race at all—to show racially polarized voting—it expressly binds itself to federal case law. Yet Appellant James Gimenez argues that these equal protection efforts are at odds with the Equal Protection Clause, rendering the Act facially unconstitutional. That conclusion is as wrong as it sounds.

II. INTEREST OF *AMICI CURIAE*

Amicus curiae Civil Rights and Justice Clinic at the University of Washington School of Law and *amicus curiae* Election Law Clinic at Harvard Law School are clinical legal programs committed to advancing civil rights enforcement and racial equity through legal advocacy. The interests of *amici* are set forth in the Motion for Leave to File. *Amici* respectfully submit this brief to explain why the WVRA is consistent with—and indeed, effectuates—the Equal Protection Clause of the Fourteenth Amendment and its core purposes.

III. ISSUE TO BE ADDRESSED BY *AMICI*

(1) Whether the WVRA is constitutional under U.S. CONST. amend. XIV.

IV. STATEMENT OF THE CASE

Amici concur with and adopt the Statement of the Case set forth in the Brief of Respondents.

V. ARGUMENT

A. Gimenez fails to state a racial gerrymandering claim.

Gimenez's racial gerrymandering claim does not identify a single racially gerrymandered district and must fail. A racial gerrymandering claim must allege that "race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Ala. Legis. Black Caucus v. Alabama* ("*ALBC*"), 575 U.S. 254, 263 (2015) (citations omitted). Courts have consistently reiterated the necessity of challenging individual districts and not a jurisdiction's entire electoral system "considered as an undifferentiated 'whole.'" *Id.* at 262; *see Miller v. Johnson*, 515 U.S. 900, 916 (1995) (requiring racial predominance in "the legislature's decision to place a significant number of voters within or without *a particular district*" (emphasis added)); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (observing that "the basic unit of analysis for racial gerrymandering claims . . . is the *district*"

(emphasis added)); *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (focusing racial predominance analysis on "the *lines of legislative districts*" (emphasis added)).

Once specific districts have been challenged, courts proceed to a two-step analysis. The challenger must first show that "race was the predominant factor motivating" those district lines. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citations omitted). If that showing is made, the state then carries the burden of proving that its use of race satisfies strict scrutiny. *Id.* at 1464.

Gimenez argues that the WVRA compels the creation of racial gerrymanders, but he fails to identify any district plan, let alone specific districts, that the WVRA has compelled. Under *ALBC*, this Court's inquiry should end there. *See* 575 U.S. at 262–63 (requiring challenge to specific districts). And even if such a plan existed, Gimenez also does not allege that he, or anyone else, was sorted into a specific district on the basis of their race—or that the WVRA compels that outcome. In fact, he

concedes that it would be perfectly consistent with the WVRA for "race-neutral considerations" to "drive the way Franklin County might draw its district lines." Pet. Br. 44. Under *Cooper*, this Court's inquiry could end there too: A district motivated by race-neutral considerations was necessarily not predominantly motivated by race. *See* 137 S. Ct. at 1463 (requiring showing of racial predominance).

More fundamentally, not only does the WVRA not compel the creation of racial gerrymanders, but it also does not compel any particular outcome at all. Far from directing how (or even whether) localities draw district lines, the WVRA simply creates a basic antidiscrimination guardrail: When racial groups prefer different candidates, jurisdictions cannot deny any group an equal opportunity to elect its preferred candidates. Within that guardrail, localities retain discretion over what electoral systems they adopt, whether and how they draw district lines, and which factors they consider in doing so.

And indeed, the limits the WVRA imposes come with a corresponding expansion: The Act authorizes local governments to change their electoral systems to ensure WVRA compliance. RCW 29A.92.040(1). The Legislature found that jurisdictions "are often prohibited from addressing [equal protection issues] because of Washington laws that narrowly prescribe [their authority]," and it intended to "modify" those laws to allow greater remedial authority. RCW 29A.92.005. In other words, the WVRA serves to *expand* local governments' discretion, not constrain it—let alone to commandeer it for the purpose of racial gerrymandering.

To accept Gimenez's argument, then, this Court would have to depart from three decades of precedent requiring a challenge to particular districts and racial predominance in the drawing of those districts. It is that precedent on which Gimenez bases his constitutional claim, *see* Pet. Br. 42–44 (citing almost exclusively racial gerrymandering cases, including *Shaw v. Reno*

("*Shaw I*"), 509 U.S. 630 (1993), *Cooper*, and *Bethune-Hill*), and it is that precedent that forecloses it.

B. Even if Gimenez makes a general equal protection challenge, strict scrutiny does not apply to the WVRA.

"[M]ere awareness of race in attempting to solve [societal problems] does not doom that endeavor at the outset." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015). Vote-dilution statutes, like all disparate-impact regimes, are not racial classifications (and thus not subject to strict scrutiny) simply because they target racial discrimination. Indeed, any statute targeting race-based discrimination "reflect[s] a concern with race." *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998). "That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Id.*; *see Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 318 (2014) (Scalia, J. concurring) ("[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution.").

As a result, the U.S. Supreme Court has never characterized landmark antidiscrimination statutes like the federal Voting Rights Act ("FVRA"), Fair Housing Act, and Title VII of the Civil Rights Act as racial classifications subject to strict scrutiny. Gimenez asks this Court to break new ground by subjecting an entire antidiscrimination statute itself—as opposed to a particular application thereof—to strict scrutiny. His arguments are unavailing.

i. The WVRA's definition of protected class is not a racial classification.

A law is facially neutral if it classifies using non-race-based factors and "neither says nor implies that persons are to be treated differently on account of their race." *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527, 537 (1982). The WVRA's protections flow to members of a "protected class," RCW 29A.92.030(1)(b), which is defined as "members of a race, color, or language minority group," 29A.92.010(5). Gimenez claims this definition

is facially race-based, Pet. Br. 35–36, but Gimenez misunderstands the classification at issue.

The WVRA creates liability only when a "protected class" has been denied "equal opportunity" in voting as a result of vote dilution. 29A.92.030(1)(b). Thus, treatment under the Act is based not on race, which could trigger strict scrutiny, "but rather on [a group's] experience of discrimination"—regardless of race. *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 64 (D.C. Cir. 2016). And when faced with unequal opportunity, members of *any* racial group are entitled to the Act's protections under that definition, not just statewide or local numerical minorities. *See* Brief of the State of Washington as Amicus Curiae. When, by contrast, the Legislature intended to enumerate specific covered groups, it has done so. *See, e.g.*, RCW 35.22.650 (expressly defining "minority group members"); 49.04.100 (expressly defining "[r]acial minority").

Here, the Legislature instead chose to define "protected class" in a manner that encompasses *all* racial groups. And it

chose to define liability on the basis of experienced discrimination, not membership in a protected class alone. A racial classification requires more.

ii. The WVRA's polarized voting requirement is not a racial classification.

Gimenez's constitutional claim is based on the misconception that "[l]iability under the Act turns entirely on the existence of racially polarized voting to the exclusion of all other factors." Pet. Br. 49. On that view, a plaintiff need only show that electoral preferences diverge along racial lines to compel a jurisdiction to change its electoral system or redraw district lines. And that resulting remedy, Gimenez thinks, is necessarily predominantly race-based because the remedial process was triggered "solely for racial reasons." *Id.* at 44. Indeed, his whole constitutional argument seems to rest on that story. *See id.* at 42 ("based on the presence of racially polarized voting"), 44 ("racially polarized voting is the *sole* reason"), 45 ("due to a single factor: racially polarized voting"), 48 ("focuses *solely* on

racially polarized voting"). The problem, however, is that liability under the WVRA does *not* turn exclusively on a showing of polarized voting.

To prove a violation of the Act, a plaintiff must show (1) polarized voting *and* (2) that she is a member of a protected class that "do[es] 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.92.030(1). A range of other factors, including the jurisdiction's history of discrimination in voting and other contexts, are also considered "probative," though not necessary. RCW 29A.92.030(6). The WVRA's second requirement, unequal opportunity, is the bedrock of the Act's disparate-impact regime—but goes entirely unmentioned in Gimenez's argument.

Far from *establishing* liability, the polarized voting requirement actually *limits* a jurisdiction's liability to only cases where unequal opportunity is accompanied by a meaningful difference in electoral preferences. Where those differences are

minimal, even members of a protected class that has unequal voting opportunity have no claim under the WVRA. That structure mirrors two of the three threshold preconditions required to bring a § 2 claim under the FVRA. *See Gingles v. Thornburg*, 478 U.S. 30, 50–51 (1986). Gimenez makes much of the first *Gingles* precondition, the compactness requirement, but makes no mention of preconditions two and three, which together require a showing of racially polarized voting, *see Gingles*, 478 U.S. at 50–51. The U.S. Supreme Court has never considered *Gingles*' polarized voting requirement to be a racial classification. Nor would that make sense: The threshold consideration of aggregated, anonymized voting patterns data does not classify individual voters by race. So just like the FVRA, the WVRA's polarized voting requirement is neither the exclusive basis for liability nor constitutionally problematic.

iii. The WVRA lacks paradigmatic features of racial classifications.

The WVRA also lacks two paradigmatic features of racial classifications: unequal benefits and burdens and individualized harm.

First, the WVRA treats all similarly situated persons alike. The "well established" touchstone of whether strict scrutiny applies is whether "the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The WVRA allows members of any racial group to bring a claim if they lack an equal opportunity to elect their candidates of choice. If white voters are being subjected to vote dilution, the WVRA's benefits flow to them too. *See supra* Section V.B.i. This symmetrical treatment is exactly what equal protection requires and what the WVRA provides.

It is on precisely these grounds that courts have upheld the California Voting Rights Act ("CVRA") against *nearly*

identical[1] constitutional challenges. Like Gimenez, the appellant in *Higginson v. Becerra* argued that the CVRA's reliance on polarized voting to establish liability amounted to an "express racial classification[]," which was "sufficient to trigger strict scrutiny." Brief for Appellant at 23, Higginson v. Becerra, 786 F. App'x. 705 (9th Cir. 2019) (No. 19-55275). But the Ninth Circuit disagreed: Appellant could not show that the CVRA "distribute[d] burdens or benefits on the basis of individual racial classifications," so strict scrutiny did not apply. *Higginson v. Becerra*, 786 F. App'x 705, 706 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020) (quoting *Parents Involved*, 551 U.S. at 720). The U.S. Supreme Court declined to revisit that holding. *Id.* Similarly, in *Sanchez v. City of Modesto*, the appellate court

[1] As if to highlight the rinse-and-repeat nature of this claim, entire pages of Gimenez's argument on this point are word-for-word identical to the Opening Brief of the Appellant in *Higginson*. *Compare* Pet. Br. 37–41 *with* Brief for Appellant at 3–7, Higginson v. Becerra, 786 Fed. App'x. 705 (9th Cir. 2019) (No. 19-55275); *compare* Pet. Br. 42–43, *with* Brief for Appellant at 32, Higginson.

found that while "the CVRA involves race and voting, . . . it does not allocate benefits or burdens on the basis of race." 145 Cal.App.4th 660, 680 (Cal. Ct. App. 2006). Here, faced with a very similar statute, substantially similar facts, and identical constitutional claims, the result should be the same.

To be sure, even neutral allocation of benefits and burdens does not always save government action that sorts individuals on the basis of race. *See, e.g., Johnson v. California*, 543 U.S. 499, 506 (2005) (segregation of prisoners by race); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (exclusion of jurors on the basis of race). But when, as here, a statute "mandat[es] equal treatment," it is "particularly true" that the law is not a racial classification. *Schuette*, 572 U.S. at 331 (Scalia, J., concurring).

Second, the WVRA does not sort individual voters based on their race. A "fundamental principle," *Parents Involved*, 551 U.S. at 743, under the Fourteenth Amendment is that equal protection rights attach to "*persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 201, 227 (1995). Of course,

when one racial *group* is treated differently than another, courts still apply strict scrutiny to safeguard the "*personal* right to equal protection" in recognition of the fact that the differential treatment can flow to specific individuals. *See id.* at 227. Even in *Shaw I*, the primary case Gimenez cites, the Court noted that cognizable racial classifications are those that "threaten to stigmatize *individuals* by reason of their membership in a racial group." 509 U.S. at 643. Thus, the racial classification in districting cases is the placement of individual voters "within or without a particular district," *Miller*, 515 U.S. at 916, not a generalized contention of race-consciousness.

Under that principle, the WVRA is not a racial classification because it does not sort, assign, or otherwise arrange individual voters—or, for that matter, groups of voters—within an electoral system based on their race. Jurisdictions themselves are responsible for any drawing of district lines within the broad remedial guardrails set by the WVRA. And if a jurisdiction uses its discretion to draw lines based predominantly

on race, a court can (and should) apply strict scrutiny to that particular remedy under *Cooper*. Nothing in the WVRA requires otherwise. As *Shaw I* makes clear, any classification results only once district lines have been drawn. 509 U.S. at 643. The WVRA, which does not itself sort voters at all, falls outside *Shaw I*'s bounds. As a result, Gimenez's argument is supported least by the case he relies on most.

It was for precisely these reasons that the *Higginson* Court held that equal protection is implicated only when an "individual" has been classified "based on that individual's membership in a racial group," which the CVRA did not do. 363 F. Supp. 3d 1118, 1126 (S.D. Cal. 2019), *aff'd*, 786 F. App'x 705 (9th Cir. 2019). Gimenez's identical claim merits an identical result.

C. The WVRA's lack of a compactness requirement does not run afoul of the Constitution.

i. Compactness is not a condition of the constitutionality of Section 2 of the federal Voting Rights Act.

Unlike the FVRA, as interpreted by *Gingles* and its progeny, 478 U.S. at 50, the WVRA does not require a protected class to be "[sufficiently] geographically compact or concentrated to constitute a majority" in a given district to state a claim. RCW 29A.92.030(2). This, Gimenez argues, poses two constitutional problems. First, it creates liability when there has been no harm: When the compactness requirement cannot be satisfied, "[t]here is no racial discrimination to remedy." Pet. Br. 40. Second, it compels unconstitutional remedies: Without a compactness requirement, jurisdictions are "compel[ed]" to adopt "district based elections, with racially-drawn lines" whenever non-compact groups establish liability. *Id.* at 40–41. But in making that argument, he can point to no case, principle, doctrine, or logic that supports his claims.

First, Gimenez's theory of harm is specific to the liability regime set out by § 2 and has no constitutional dimensions. His argument rests on *Growe v. Emison*'s observation that, when the *Gingles* preconditions cannot be satisfied, "there neither has been

a wrong nor can be a remedy." 507 U.S. 25, 40–41 (1993) (citing *Gingles*, 478 U.S. at 30). But the narrow question that *Growe* addressed was "whether these *Gingles* threshold factors apply to a § 2 dilution challenge to a single-member districting scheme." 507 U.S. at 40. Gimenez does not explain why that holding would control under an entirely different vote-dilution regime or when plaintiffs are challenging (or seeking) a non-districted system.

At bottom, the WVRA simply defines harm more broadly than § 2 does. That a compactness requirement may be necessary to cognize harm under § 2 says nothing about whether it is necessary under an entirely different vote-dilution statute—especially one that expressly creates liability for non-compact protected classes. *See* RCW 29A.92.030.

Indeed, § 2 caselaw explicitly envisions broader conceptions of harm. In *Bartlett v. Strickland*, the U.S. Supreme Court held that the compactness requirement does not apply to, for example, intentional discrimination claims. 556 U.S. 1, 20

(2009) (plurality opinion). That holding is inconsistent with the idea that only compact, majority-minority groups have incurred a cognizable harm under the Equal Protection Clause. Justice Thomas has argued that there is "no reason" that vote-dilution protections should be limited only to "minority voters who are sufficiently geographically compact [to satisfy *Gingles*]." *Holder v. Hall*, 512 U.S. 874, 909 (1994) (Thomas, J., concurring).

Second, Gimenez's other claim—that the absence of a compactness requirement compels racial gerrymanders as remedies—fares no better. If a plaintiff proves that a voting system denies a protected class equal voting opportunity, it does not follow that any subsequent remedy is per se "unnecessarily infuse[d] [by] race." Pet. Br. 41 (quoting *Bartlett*, 556 U.S. at 21 (plurality opinion)). If a jurisdiction responds by adopting noncompact districts motivated predominantly by race, those districts can be challenged on equal protection grounds. In fact, the WVRA requires that remedies "must be approved by the court prior to their implementation." RCW 29A.92.110(1). But

nothing in the Act *compels* jurisdictions to draw noncompact districts, nor is noncompactness alone enough to demonstrate a racially predominant purpose, *see Shaw I*, 509 U.S. at 646.

The only reference to a constitutional (rather than statutory) basis for § 2's compactness requirement that Gimenez can find—discussion from the plurality opinion in *Bartlett*, Pet. Br. 41 (quoting *Bartlett*, 556 U.S. at 21)—does not support his position. There, the plurality suggested that interpreting § 2 as not requiring a majority-minority threshold for plaintiffs to state a claim "would result in a substantial increase in the number of *mandatory* districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Bartlett*, 556 U.S. at 21–22 (quoting *Miller*, 515 U.S. at 916) (emphasis added). As a result, "serious constitutional questions" could arise "[i]f § 2 were interpreted to *require* crossover districts [as remedies] throughout the Nation." *Bartlett*, 556 U.S. at 21 (quoting *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (Kennedy, J., concurring)) (emphasis added). The opinion's brief detour then ends with the

conclusion that "as a *statutory* matter, § 2 does not mandate creating or preserving crossover districts." *Bartlett*, 556 U.S. at 23 (emphasis added).

But unlike the counterfactual in *Bartlett*, the WVRA does not mandate the drawing of majority-minority or crossover districts. The Act permits (but does not require) districts to be used as remedies and specifies that remedies must be "appropriate." RCW 29A.92.110(1). Nothing in the WVRA compels plaintiffs to ask for—or courts to grant—unconstitutional remedies in the narrow band of cases where these constitutional questions could arise.

Still more, the Supreme Court has expressly envisioned states going further than § 2 in defining remedies. *See Bartlett*, 556 U.S. at 23 ("§ 2 allows States to choose their own method of complying with [the FVRA]," including adopting remedies that are not authorized under § 2); *see also id.* at 24 ("In those areas [where] majority-minority districts would not be required [under the FVRA] in the first place, . . . States could draw crossover

districts as they deemed appropriate."); *LULAC*, 548 U.S. at 430 ("§ 2 does not forbid the creation of a noncompact majority-minority district.").

Gimenez's argument that, absent a compactness requirement, the WVRA would entitle minority groups to maximum representation is similarly unsupported. Pet. Br. 39–40 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994)). The passage Gimenez relies on was responding only to the "rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2." *De Grandy*, 512 U.S. at 1016. Nothing in the WVRA entitles minority groups to maximum representation, and he never explains why the lack of a compactness requirement results in that outcome. Gimenez's compactness arguments thus find no support in the WVRA's text, structure, or controlling precedent.

ii. Even if compactness is a condition of the constitutionality of the FVRA, the WVRA sets

> *out a distinct vote-dilution regime that is independently constitutional.*

The constitutional fates of § 2 and the WVRA are not inexorably tied. When the lawmakers drafted the WVRA, they consciously modified or departed from the approach taken by the FVRA in at least fifteen different ways, including to core elements like standing, liability, and evidence. STAFF OF S. COMM. SERVS., 65TH LEG., MAJOR PROVISIONS OF FEDERAL AND PROPOSED WASHINGTON VOTING RIGHTS ACTS, at 1–6 (Wash. 2018).

One difference, in particular, makes a difference: the express availability of non-districted remedies. RCW 29A.92.110(1). As several Justices have noted, the near-exclusive focus on single-member-district remedies has forced courts to grapple with thorny jurisprudential and prudential issues. *See Holder*, 512 U.S. at 905–09 (Thomas, J., concurring). The WVRA permits courts to adopt "appropriate" and "tailor[ed]" remedies, including non-districted, race-neutral

alternative remedies, RCW 29A.92.110(1)–(3), which do not implicate the compactness concerns Gimenez raises.

D. Gimenez cannot meet the requirements for a facial challenge.

i. There are circumstances where, even under Gimenez's theory, the WVRA is constitutional.

Invalidating a law on its face is a judicial intervention of last—not first—resort. For that reason, a facial challenge is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To succeed, Gimenez bears the "heavy burden" of "establish[ing] that *no set of circumstances exists* under which the Act would be valid." *Id.* (emphasis added). *See also Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in *all its applications*" (emphasis added)).

To find a "set of circumstances" where the application of the WVRA is constitutional, *Salerno*, 481 U.S. at 745, this Court

has to look no further than this very case. Even assuming (as Gimenez does) that the WVRA's lack of a majority-minority compactness requirement raises constitutional concerns, Pet. Br. 41–44, Plaintiffs *here* asked for a reasonably compact majority-minority district, Plaintiffs' Mot. for Summary Judgment at 15–17—the very thing Gimenez argues is required under *Gingles*. So, in this case, Defendant's liability under the WVRA is the same as under the FVRA, which Gimenez concedes is constitutional. Pet. Br. 40.

It is no answer to say that the WVRA might be unconstitutional as applied to future plaintiffs who *cannot* satisfy the first *Gingles* precondition because Plaintiffs in this case (and many conceivable others) plainly can. *See Salerno*, 481 U.S. at 745 ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.").

WVRA also allows for another class of conceivable cases—those involving race-neutral alternative remedies—that

directly undercuts Gimenez's constitutional argument. His argument rests exclusively and erroneously on the idea that the WVRA requires jurisdictions to enact race-based single-member districts. *See, e.g.,* Pet. Br. 1 ("[The WVRA] compel[s] [a jurisdiction] . . . to draw district lines"); 3 ("compel[s] Franklin County to draw district lines taking race into account"); 17 ("mandate[es] [that] district lines be drawn on racial lines"); 35 ("force[s] jurisdictions . . . to re-draw district lines on a racial basis"); 45 ("requires Franklin County to switch . . . to district based elections, with lines drawn on a race-conscious basis"); 53 ("requir[es] the county to draw district lines that tilt the playing field in favor of a defined class"). But this argument elides the WVRA's plain-text authorization of *non-district-based* remedies, RCW 29A.92.110(1), nullifying Gimenez's central concern. Non-districted remedies do not require "[the] division of the electorate into racially segregated districts," *Holder*, 512 U.S. at 910 (Thomas, J., concurring), sidestepping racial gerrymandering concerns altogether.

In response, Gimenez tries to shed his "heavy burden," *Salerno*, 481 U.S. at 745, by arguing that it is unreasonable for Plaintiffs to require him to "show that every single one of an unstated, undefined, uncountable number of alternative remedies would be constitutional." Pet. Reply 7. But Plaintiffs do no such thing. They simply ask how a *race-neutral*, *non-district-based* remedy necessarily "makes *race* the primary factor in *districting*," Pet. Reply 8 (emphasis added), to use Gimenez's words. *See* Resp. Br. 30. He never answers that dispositive question. This Court, then, need not look further than the facts of this case and the arguments Gimenez himself advances to dispose of his facial challenge.

ii. Prudential considerations militate against facial invalidation.

Facial challenges are disfavored because they require courts to pass judgment without the wisdom of judicial experience and the context of extensive factual development. Although facial invalidation "may be efficient in the abstract,

any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." *Sabri v. United States*, 541 U.S. 600, 608–09 (2004). Facial invalidation also risks "premature interpretatio[n] of statutes on the basis of factually barebones records." *Id.* at 609 (citation omitted). Two features of this claim tug against Gimenez's call for facial invalidation.

First, no court has ever ruled on the merits of a claim arising under the WVRA. In finding the WVRA to be facially invalid, this Court would be interpreting the Act as having no possible constitutional construction before a single court has had occasion to interpret the statute at all. Facial invalidation would be premature before this Court—or any other court—has had the opportunity to profit from judicial experience in a highly nuanced doctrinal context. What Gimenez asks—but what the U.S. Supreme Court has repeatedly disclaimed—is for this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it." *Wash. State Grange v. Wash. State*

Republican Party, 552 U.S. 442, 450 (2008) (citation omitted). This Court should not do so.

Second, and relatedly, neither this case nor *Aguilar v. Yakima County*, No. 20-2-00180-19 (Wash. Super. Ct. Oct. 29, 2021), the only other case that has been brought under the WVRA, provides a robust factual record bearing on the nature and scope of claims arising under the Act. No trier of fact has had the opportunity to hear parties make their case at trial or grapple with how the WVRA bears on a particular set of facts. Instead, on the basis of the incomplete factual record developed in this case, a record that *does not support* Gimenez's claim as-applied, *see supra* Section V.D.i, he seeks to invalidate wholesale the WVRA's protections once and for all. And so here too Gimenez runs afoul of judicial restraint: Courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange*, 552 U.S. at 450 (citation omitted).

E. Under the appropriate standard, rational basis review, the WVRA passes muster.

Amici concur with the arguments set forth in the Brief of Respondents explaining why the WVRA satisfies rational basis review. *See* Resp. Br. 41–43. Of course, Gimenez does not even contend that the WVRA lacks a rational basis, so he necessarily fails to state a claim for relief under this standard. *See Higginson*, 786 F. App'x at 707.

VI. CONCLUSION

The Legislature passed the Washington Voting Rights Act to realize the promise of equal protection for all the State's residents. It found that "electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with . . . the Fourteenth and Fifteenth amendments." RCW 29A.92.005. Here, Appellant seeks to wield the Fourteenth Amendment not as a shield to provide minority groups equal protection but as a sword to deny

them it. For the foregoing reasons, this Court should reject those claims and affirm the constitutionality of the WVRA.

RESPECTFULLY SUBMITTED this 27th day of March, 2023.

/s/ David B. Owens
David B. Owens, WSBA #53856
CIVIL RIGHTS AND JUSTICE CLINIC
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall, Ste. 265
P.O. Box 85110
Seattle, WA 98145
(206) 616-8742
dbowens@uw.edu

Ruth Greenwood
Nicholas Stephanopoulos
ELECTION LAW CLINIC
HARVARD LAW SCHOOL
6 Everett Street, Ste. 4105
Cambridge, MA 02138
(617) 998-1010
rgreenwood@law.harvard.edu
nstephanopoulos@law.harvard.edu

CERTIFICATE OF COMPLIANCE

The undersigned certifies the number of words contained in this document, exclusive of the parts of the document exempted from the word count, complies with the provisions of RAP 18.17(c)(6). The total number of words contained in the brief of *amici curiae* is 4,952.

Dated this 27th day of March, 2023.

/s/ David B. Owens

David B. Owens, WSBA #53856
CIVIL RIGHTS AND JUSTICE CLINIC
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall, Ste. 265
P.O. Box 85110
Seattle, WA 98145
(206) 616-8742
dbowens@uw.edu

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 27, 2023, I filed with the Court the foregoing document, and this certificate of service and served the same documents via e-mail upon:

Attorneys for Plaintiffs-Respondents:

Chad W. Dunn
Sonni Waknin
Bernadette Reyes
UCLA Voting Rights Project
3250 Public Affair Building
Los Angeles, CA 90065
chad@uclavrp.org
sonni@uclavrp.org
bernadette@uclavrp.org

Edwardo Morfin
Morfin Law Firm PLLC
7325 West Deschutes Avenue
Suite A
Kennewick, WA 99336-6705
eddie@morfinlawfirm.com

Attorneys for Appellant-Intervenor:

Joel Bernard Ard
Ard Law Group PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
joel@ard.law

Attorneys for Defendants:

Francis S. Floyd
Amanda D. Daylong
Amber L. Pearce
Floyd Pflueger & Ringer PS
3101 Western Avenue, Suite 400
Seattle, WA 98121-3017
ffloyd@floyd-ringer.com
adaylong@floyd-ringer.com
apearce@floyd-ringer.com

Dated this 27th day of March, 2023, at Seattle, Washington.

/s/ David B. Owens

David B. Owens, WSBA #53856
CIVIL RIGHTS AND JUSTICE CLINIC
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall, Ste. 265
P.O. Box 85110
Seattle, WA 98145
(206) 616-8742
dbowens@uw.edu

LOEVY AND LOEVY (2)

March 27, 2023 - 12:05 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,999-2
Appellate Court Case Title:	Gabriel Portugal et al. v. Franklin County et al.
Superior Court Case Number:	21-2-50210-4

The following documents have been uploaded:

- 1009992_Affidavit_Declaration_20230327114545SC926692_5065.pdf
  This File Contains:
  Affidavit/Declaration - Other
  The Original File Name was 2023.03.27 Affidavit for David Owens.pdf
- 1009992_Exhibit_20230327114545SC926692_2819.pdf
  This File Contains:
  Exhibit
  The Original File Name was 2023.03.27 Ex. 1 Amicus Brief PDF.pdf
- 1009992_Motion_20230327114545SC926692_4309.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2023.03.27 WVRA WA Supreme Court Motion for Leave to File Amicus Brief.pdf
- 1009992_Notice_20230327114545SC926692_2621.pdf
  This File Contains:
  Notice - Appearance
  The Original File Name was 2023.03.27 Notice of Appearance for David Owens.pdf
- 1009992_Other_20230327114545SC926692_0997.pdf
  This File Contains:
  Other - Proposed Order
  The Original File Name was 2023.03.27 Proposed Order.pdf

A copy of the uploaded files will be sent to:

- ADaylong@floyd-ringer.com
- APearce@floyd-ringer.com
- Bernadette@uclavrp.org
- Chad@uclavrp.org
- Eddie@MorfinLawFirm.com
- Sonni@uclavrp.org
- amuul@floyd-ringer.com
- david@loevy.com
- dbowens@uw.edu?
- ecampbell@floyd-ringer.com
- eddie4um509@yahoo.com
- ffloyd@floyd-ringer.com
- gee@loevy.com
- joel@ard.law
- sklotz@floyd-ringer.com

Comments:

Sender Name: Bethan Gee - Email: gee@loevy.com
Filing on Behalf of: David B Owens - Email: david@loevy.com (Alternate Email: blackmon@loevy.com)

Address:
311 N. Aberdeen
Chicago, AL, 60607
Phone: (312) 243-5900

Note: The Filing Id is 20230327114545SC926692