SUPERIOR COURT OF WASHINGTON FOR FRANKLIN COUNTY

GABRIEL PORTUGAL, BRANDON PAUL MORALES, JOSE TRINIDAD CORRAL, and LEAGUE OF UNITED LATIN AMERICAN CITIZENS, Plaintiffs, v. FRANKLIN COUNTY, a Washington municipal entity, CLINT DIDIER, RODNEY J. MULLIN, and LOWELL J. PECK, in their official capacities as members of the Franklin County Board of Commissioners, Defendants.	No. 21-2-50210-11 AMICUS RESPONSE TO INTERVENOR-DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

The Washington Voting Rights Act ("WVRA" or the "Act") was enacted in 2018 to vindicate the right of Washington voters to an equal opportunity to elect their candidate of choice, free from discriminatory local election systems. Building on the protections of the federal Voting Rights Act of 1965, the WVRA provides a remedy in state law for discriminatory race-based vote dilution by allowing voters to challenge election systems that deny them an equal opportunity to elect candidates of their choice as the result of vote dilution. The Act also allows any political subdivision to proactively change its electoral system to remedy a potential violation. The WVRA is not only constitutional; it is essential to protect the constitutional rights of the citizens of this

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State. This Court therefore should deny Intervenor-Defendant's Motion for Judgment on the Pleadings ("MJOP").

II. FACTUAL AND PROCEDURAL BACKGROUND

Amicus concurs with and adopts the factual and procedural background set forth in Plaintiffs' Opposition Brief.

III. ISSUES ADDRESSED BY AMICUS

(1) Whether Plaintiffs have standing to sue.

(2) Whether the WVRA is constitutional under U.S. Const. Amend. XIV.

(3) Whether the WVRA is constitutional under Wash. Const. Art. I § 12.

IV. LEGAL ARGUMENT

A. The Legislature enacted the WVRA to ensure that local electoral systems do not impair voting rights based on race, color, or language minority status.

The Washington Voting Rights Act was enacted in 2018 because the state's increasingly diverse electorate was being denied fair representation in local government. Census Bureau Data issued in 2016 showed that racial and ethnic diversity was growing across the state.[1] But legislative bodies of local governments throughout the state—the vast majority of which are elected through at-large voting systems—remained stubbornly homogenous.[2] For example, Latino residents made up nearly 60 percent of the population in Adams County and more than 50 percent of the

[1] Gene Balk, *Washington state becoming less white – but not Seattle*, The Seattle Times (June 28, 2016), https://www.seattletimes.com/seattle-news/data/from-ocean-to-idaho-border-state-becoming-less-white (noting double digit increases among Latino, Asian, Pacific Islander, multiracial and Black populations throughout the state).

[2] See Zachary Duffy, *Unequal Opportunity: Latinos and Local Political Representation in Washington State*, The State of the State for Washington Latinos 20 (Dec. 11, 2009), http://walatinos.net/wp/wp-content/uploads/2011/11/UnequalOpportunityZachDuffy.pdf (finding that ninety-two percent of elections for local offices in Washington were conducted at-large). *See also* Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 Ind. L. J. 1033, 1048–49 (2018) (noting that almost two-thirds of municipalities nationwide use at-large elections).

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population in Franklin County, yet fewer than 3.6 and 2.7 percent of office holders in those counties, respectively, were Latino.[3]

As the Legislature found in 2018, the prevalence of at-large systems among Washington's local governments had "in some cases . . . resulted in an improper dilution of voting power for . . . minority groups," offending both the state constitution's right to free and equal elections and the right to vote protected by the Fourteenth and Fifteenth Amendments to the U.S. Constitution. RCW 29A.92.050. Narrow prescriptions in state law regulating local governments made it difficult for jurisdictions to remedy vote dilution on their own. *Id.* And beyond costly litigation under the federal Voting Rights Act, voters in Washington had no recourse under state law to remedy the harms from discriminatory race-based vote dilution.

Against this backdrop, the Legislature enacted the WVRA to "promote equal voting opportunity in political subdivisions" and to ensure that electoral systems do not deny the constitutional rights of members of race, color, or language minority groups by diluting their votes. Laws of 2018, ch. 113 (codified at RCW 29A.92); *see also* RCW 29A.92.005.[4] The Act bars jurisdictions from maintaining any electoral system "that impairs the ability of members of a protected class . . . to have equal opportunity to elect candidates of their choice as a result of the dilution or abridgement of the rights" of such voters. RCW 29A.92020, 010(4). The law permits any political subdivision to proactively "change its electoral system" to remedy a potential

[3] Lilly Fowler, *WA to protect against voting discrimination with new law*, Crosscut (March 6, 2018), https://crosscut.com/2018/03/washington-voting-rights-act-legislaturediscrimination-law-jay-inslee.

[4] The WVRA was first introduced in 2013 and revised, reintroduced, and debated in 2015 and 2017 before its final passage in 2018. Intervenor-Defendant's assertion that the legislation was passed in "haste" to serve as a "test-case law" is wrong. MJOP at 2. The law was carefully considered over three legislative sessions, revised and re-revised in committee hearings, and debated multiple times on the House and Senate floor to ensure the law was properly tailored to local electoral conditions in Washington State. *See* Bill Information, SB 6002 (2017-18), https://app.leg.wa.gov/billsummary?BillNumber=6002&Year=2017; Bill Information, HB 1745 (2015-16), https://app.leg.wa.gov/billsummary?BillNumber=1745&Year=2015; Bill Information, HB 1413 (2013-14), https://apps.leg.wa.gov/billsummary/?BillNumber=1413&Year=2013&Initiative=false.

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violation, RCW 29A.92.040, and permits voters harmed by a violation to sue for a court-ordered remedy after providing notice and working with the jurisdiction for at least 90 days to agree upon a locally tailored remedy. RCW 29A.92.060-70, 110.

The WVRA sets out a streamlined, two-part test to determine whether a challenged electoral system discriminates in violation of the Act: "(a) Elections in the political subdivision exhibit polarized voting; and (b) Members of a protected class . . . do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgement of [their rights]." RCW 29A.92.030(1).

To ensure that its vote-dilution standard is appropriately sensitive to local conditions of voting discrimination in Washington, the Legislature both drew from and departed from the test set out by the U.S. Supreme Court to prove a vote dilution claim under Section 2 of the federal Voting Rights Act (VRA), 52 U.S.C. § 10301 *et seq.* In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court required plaintiffs seeking a federal vote-dilution remedy to prove three threshold elements known as the *Gingles* preconditions: (1) 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; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority group 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.* at 48–49. If the preconditions are met, a court must determine whether, "based on the totality of circumstances," the challenged electoral system impairs the minority group's ability to elect representatives of its choice. *Id.* at 44–45. The totality of circumstances is assessed using the so-called "Senate factors" as a "non-exhaustive list." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2333 (2021).

The first element of the WVRA's standard for establishing liability, polarized voting, incorporates the second and third *Gingles* preconditions by direct reference to federal case law. *See* RCW 29A.92.010(3). The second element of the WVRA requires plaintiffs to prove that vote

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dilution leaves a protected class without equal opportunity to elect candidates of its choice. Plaintiffs can present a pragmatic assessment of relevant "local election conditions" rather than a full review of the "totality of circumstances" as required under Section 2. RCW 29A.92.030(2); *see also* RCW 29A.92.030(6) (listing certain "Senate Factors" as probative to establishing a violation).

The Legislature opted not to require plaintiffs to prove the first *Gingles* precondition (that the protected class is sufficiently large and geographically compact to form a majority-minority district), instead deferring that issue for consideration in fashioning a remedy. RCW 29A.92.030(2). Omission of this factor, which Intervenor-Defendant dubs the "compactness requirement," reflects the Legislature's judgment that geographic segregation of a protected class is not necessary to detect race-based vote dilution in Washington State. This judgment is also consistent with the WVRA's provisions contemplating a variety of remedies to cure vote dilution, including alternative voting systems such as ranked-choice voting and cumulative voting that may remedy vote dilution experienced by minority groups that are not geographically segregated. *See* 29A.92.040, 110 (permitting courts and jurisdictions to choose remedies "including, but not limited to[]" district-based election systems).[5]

B. Plaintiffs are members of a protected class under the WVRA and therefore have standing to sue.

By its terms, the WVRA confers standing on Plaintiffs. "If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone." *State v. Watson*, 146 Wn.2d 947, 954–55, 51 P.3d 66 (2002). The WVRA expressly references the federal Voting Rights Act,

[5] *See* H. Floor Debate at 56:40-56:52 (Feb. 27, 2018), available at https://www.tvw.org/watch/?eventID=2018021342 (Rep. Zach Hudgens opposing the imposition of federal VRA elements, including the first Gingles precondition, because doing so would "limit the ability of local jurisdictions" to tailor a remedy "that fits their community"); S. State Gov't, Tribal Relations & Elections Comm. Pub. Hearing at 54:16-56:34 (Jan. 10, 2018), available at https://www.tvw.org/watch/?eventID=2018011082 (voting rights expert Justin Levitt, in colloquy with Sen. Miloscia, explaining that the WVRA is "more flexible" than the federal VRA in permitting dispersed populations to seek remedies other than districts to correct unlawful vote dilution).

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located at 52 U.S.C. 10101 *et seq.*, when defining protected classes. RCW 29A.92.010(5). Where, as here, "a state statute is taken substantially verbatim from a federal statute, it carries the same construction as the federal law and the same interpretation as federal case law." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012). In this context, the WVRA tracks the federal Voting Rights Act, including the case law interpreting that statute.

Accordingly, the term "protected class" in the WVRA is coextensive with the term "on account of race or color" in the federal Voting Rights Act and the case law interpreting it. *Compare* RCW 29A.92.010 *with* 52 U.S.C. 10101 et seq. Both statutes are intended to eliminate discrimination in voting suffered by racial and ethnic minorities. The Washington Legislature passed the WVRA because "electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal election." RCW § 29A.92.005. Likewise, Congress passed the Voting Rights Act of 1965 so that "[a]ll citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote at all [] elections, without distinction of race, color, or previous condition of servitude." 52 U.S.C.A. § 10101. And the Supreme Court has definitively stated that the prohibition against discrimination "on account of race or color" is intended to protect racial and language minorities. *See Gingles*, 478 U.S. at 43 (Section 2 of the Voting Rights Act "prohibits all States and political subdivisions from imposing any voting qualifications or prerequisites to voting . . . which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities.").

Courts have long held that groups representing protected classes in voting have standing to sue under the Voting Rights Act. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016); *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1316 (11th Cir. 2021). *See also, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (allowing

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LULAC to assert a claim of vote dilution under Section 2 of the Voting Rights Act). By referring to the federal statute, including the case law interpreting it, the WVRA defines protected classes to include racial minorities (of any race) suffering from vote dilution because of racially discriminatory electoral processes. Plaintiffs here, who are, or represent the interests of, racial minorities in Franklin County fall squarely within that definition and have standing to sue.

C. The WVRA does not violate the Equal Protection Clause of the U.S. Constitution.

1. Intervenor-Defendant cannot satisfy the elements of a racial gerrymandering challenge to the WVRA because such claims are only applicable district-by-district.

Intervenor-Defendant's Motion fails to state a racial gerrymandering claim. The Supreme Court has "consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262–63 (2015) (emphasis in original) (citations omitted). A racial gerrymandering claim "applies district-by-district," and not, as Intervenor-Defendant would have it, "to a [jurisdiction] considered as an undifferentiated 'whole.'" *Id*.

Once a district has been challenged as a possible racial gerrymander, courts apply a two-part test: First, a plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citations omitted). Then, "[t]he burden . . . shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* at 1464.

Although Judge Peterson granted summary judgment in favor of Plaintiffs on September 13, 2021 and ordered that the parties "work cooperatively together on the development of the district map" that the Court would consider at a trial on November 15, 2021, Judge Swanberg vacated that order on October 11, 2021. Pls. Mot. to Change Venue at 5, 6 (Nov. 16, 2021). That means there are neither current districts nor any planned districts for the election of Franklin

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County Commissioners. And the WVRA is not, in itself, a district plan. Because there is no specific district to be challenged, Intervenor-Defendant's Motion for Judgment on the Pleadings based on a claim that the WVRA is a racial gerrymander necessarily fails.

2. Intervenor-Defendant cannot satisfy the elements of a facial challenge to the WVRA.

a. It is highly difficult to succeed in a facial challenge.

Intervenor-Defendant's *facial* challenge to the WVRA, as opposed to a challenge to the WVRA *as-applied* to the instant case, is "the most difficult challenge to mount successfully, since [he] must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also id.* ("The fact that a [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."). He cannot make that showing here.

Both federal and Washington courts disfavor facial claims like this one because they upend judicial deference to the legislative branch, "threaten[ing] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 451 (2008); *see also Yakima Cty. Deputy Sheriff's Ass'n v. Bd. of Comm'rs for Yakima Cty.*, 92 Wn.2d 831, 839-40, (1979) ("[I]n determining the constitutionality of a legislative enactment, every possible presumption is in favor of the validity of the statute" (quotation marks omitted)). There is no basis to overturn all the valid applications of a statute just because some hypothetical errant application might violate a constitutional provision.

This case illustrates precisely a "set of circumstances," *Salerno*, 481 U.S. at 745, in which application of the WVRA is plainly constitutional. Even if Intervenor-Defendant were correct that the absence of a majority-minority district requirement (*Gingles* prong one) in the WVRA rendered it constitutionally suspect (he is not), Plaintiffs in *this* case have proposed a majority-minority district. That is, Defendants would face the same liability under Section 2—which Intervenor-

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Defendant acknowledges is a constitutional enactment—as they face under the WVRA. Because this very case illustrates a constitutional application of the WVRA under Intervenor-Defendant's *own view* of the law, his facial challenge fails.

b. The U.S. Supreme Court has never held compactness to be a condition of the constitutionality of Section 2 of the federal Voting Rights Act.

As explained above, *supra* Part IV.A, the WVRA's standard for establishing liability incorporates the second and third *Gingles* preconditions, as well as five of the probative Senate factors, RCW 29A.92.030, but does not include the *Gingles* compactness requirement. Intervenor-Defendant's insistence that Section 2 is constitutional only because of the compactness requirement (therefore rendering the WVRA unconstitutional due to its exclusion), MJOP at 12-13, finds no support in federal law.

The Supreme Court has never suggested that the federal Voting Rights Act is constitutional only because of the *Gingles* compactness requirement. *See Perry*, 548 U.S. at 430 ("To be sure, § 2 does not forbid the creation of a noncompact majority-minority district"); *see also Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim").[6] Indeed, the Supreme Court has held that states may elect to draw crossover districts—districts in which minority voters form less than a majority but elect their preferred candidates with crossover support from some white voters—and that doing so would not violate the Equal Protection Clause. "In those areas [where] majority-minority districts would not be required [under the VRA] in the first place, . . . States could draw crossover districts as they deemed appropriate." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). That is, the Supreme

[6] The Supreme Court has assumed the constitutionality of the federal VRA in the long line of cases interpreting Section 2 as a statute that remedies vote dilution. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1,6 (2009); *Gingles*, 478 U.S. at 43-46. Likewise, the Supreme Court has assumed without holding that compliance with the federal Voting Rights Act is a defense to a racial gerrymandering claim under the Equal Protection Clause. *See Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017); *Cooper*, 137 S. Ct. at 1463; *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

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Court has expressly blessed the very thing Intervenor-Defendant says renders the WVRA unconstitutional.

The *Gingles* preconditions, including the compactness requirement, are not conditions on Section 2's constitutionality but rather elements the Supreme Court has held are required by the federal VRA's *text*. *See Gingles*, 478 U.S. at 50 & n.17 (viewing its three preconditions as required by Section 2's text); *see also Bartlett*, 556 U.S. at 18 ("[T]he *Gingles* requirements are preconditions, *consistent with the text and purpose of § 2*, to help courts determine which claims could meet the totality-of-the-circumstances standard *for a § 2 violation*." (emphases added)); *Johnson v. De Grandy*, 512 U.S. 997, 1010 (1994) (noting that the *Gingles* preconditions provided "structure to the statute's 'totality of circumstances' test"). Nothing in the Constitution sets a 50% plus one threshold, or a geographic compactness requirement, for remedying the effects of past discrimination. Rather, as the Supreme Court has recognized, there is "a significant state interest in eradicating the effects of past racial discrimination," *Shaw v. Reno*, 509 U.S. 630, 656 (1993), and that interest does not have an on-off trigger based upon the presence or absence of a geographically compact 50%+1 minority group in a particular geographic region. This Court should resist Intervenor-Defendant's effort to transform *Gingles'* statutory interpretation into a constitutional dogma.

Moreover, the Supreme Court's interpretation of the federal VRA in *Gingles* does not preclude state governments from establishing rights of action beyond those in Section 2 to combat vote dilution. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 687-88, 51 Cal. Rptr. 3d 821 (2006) ("There is no rule that a state legislature can never extend civil rights beyond what Congress has provided."). Nor does it foreclose Washington's use of alternative election systems to remedy vote dilution, such as ranked choice voting and cumulative voting, which do not require the drawing of district lines and therefore make a compactness element at the liability stage irrelevant. *See Holder v. Hall,* 512 U.S. 874, 910 (1994) (Thomas, J., concurring) ("[N]othing in our present

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understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a [alternative method of elections] as a remedy under § 2.").

In sum, compactness is not a litmus test determining whether a race-neutral vote-dilution statute poses an Equal Protection violation. Compactness under *Gingles* is merely a factual finding that informs whether a particular remedy for vote dilution is available under federal law. The U.S. Constitution does not require that it be included in the WVRA.

c. The WVRA does not discriminate on the basis of race or color and is therefore not subject to strict scrutiny.

i. *The WVRA is an anti-discrimination statute equally applicable to all racial and ethnic groups that face voting discrimination.*

The WVRA is a race-neutral statute and therefore does not trigger strict scrutiny. States have wide authority to adopt measures designed "to eliminate racial disparities through race-neutral means." *Higginson v. Becerra*, 786 Fed. Appx. 705, 707 (9th Cir. 2019) (quoting *Tex. Dept. of Housing and Community Affs. v. Inclusive Cmties Project, Inc.*, 576 U.S. 519, 545 (2015)), *cert. denied*, 140 S. Ct. 2807 (2020); *see also Smith v. Robbins,* 528 U.S. 259, 273 (2000) ("[O]ur established practice, rooted in federalism, [is] allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy."). The WVRA is such a statute.

The WVRA, like the federal Voting Rights Act, is an antidiscrimination statute that seeks to vindicate citizens' voting rights against systems "that impair[] the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution . . . of the rights of voters," consistent with the mandates of the Fourteenth and Fifteenth Amendments. RCW 29A.92.020; *see also* RCW 29A.92.005. To the extent that the WVRA considers race, it does so in a way that is permissible under the Equal Protection Clause. "[R]ace may be considered in certain circumstances and in a proper fashion." *Inclusive Cmties.*

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Project, Inc., 576 U.S. at 545; *see also Shaw v. Reno*, 509 U.S. at 642 ("[R]ace-conscious redistricting is not always unconstitutional."). Courts have repeatedly held that an awareness of race or racial motive in curing discrimination does not trigger strict scrutiny if burdens or benefits are not distributed on the basis of race. *See*, *e.g.*, *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 547 (3d Cir. 2011) ("A racial classification occurs only when an action 'distributes burdens or benefits on the basis of' race.") (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 701, 720 (2007)); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48-49 (2d Cir. 1999); *Raso v. Lago*, 135 F.3d 11,16 (1st Cir. 1998) ("Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause."); *Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

Courts have applied this reasoning to uphold the California Voting Rights Act ("CVRA")[7] against challenge under the Equal Protection Clause. *See, e.g.*, *Higginson*, 786 Fed. Appx. at 706–07; *Sanchez*, 145 Cal. App. 4th at 680–83. In *Higginson*, the challenger raised the same argument advanced by Intervenor-Defendant here: that the state's vote-dilution statute "ma[de] race the predominant factor in drawing electoral districts" by forcing a jurisdiction "to abandon its at-large system based on the existence of racially polarized voting and nothing more," thereby triggering strict scrutiny. 786 Fed. Appx. at 706. The Ninth Circuit rejected this argument on grounds that the CVRA was race neutral and did not "distribute burdens or benefits on the basis of individual racial classifications." *Id.* at 706–07 (citation omitted). Similarly, in *Sanchez*, the California Court

[7] The CVRA shares many similarities with the WVRA. It provides racial minority groups a cause of action to remedy race-based vote dilution and permits remedies beyond district-based elections. *Sanchez*, 145 Cal. App. 4th at 670. Like the WVRA, the CVRA does not include the first *Gingles* precondition as an element to prove vote-dilution and instead reserves it as a consideration in tailoring a remedy. *Compare* Cal. Elec. Code § 14028(c) *with* RCW 29A.92.030(2). This choice was "consistent with the [California] Legislature's intent to provide a broader cause of action for vote dilution than the federal law provides." *Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 273 Cal. Rptr. 3d. 437, 445 (2020).

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of Appeal reasoned that the CVRA does not confer a benefit or burden on the basis of a racial classification because the law "confers on members of *any* racial group a cause of action to seek redress for a race-based harm." 145 Cal. App. 4th at 681 (emphasis added).

The WVRA likewise does not distribute burdens or benefits on the basis of race. Voters of any race may bring a claim under the WVRA so long as they belong to a race or language minority in a community with racially polarized voting and a lack of opportunity for that minority to elect their candidate of choice. If white voters satisfy the elements in a particular jurisdiction, they too can assert a WVRA claim, just as they can under Section 2 of the federal VRA. *See, e.g.*, *Anne Harding v. County of Dallas, Tex.*, 948 F.3d 302 (5th Cir. 2020) (adjudicating Section 2 claim by white voters in Dallas County). In other words, the same benefit is extended to all similarly situated persons. That is all that the Equal Protection Clause requires. *See*, *e.g.*, *Parents Involved*, 551 U.S. at 752. The WVRA accordingly neither violates the Equal Protection Clause nor prompts strict scrutiny by creating racial classifications and conferring burdens or benefits based on those qualifications.

ii. *The WVRA's elimination of the federal VRA's compactness requirement does not make the WVRA subject to strict scrutiny.*

The Washington Legislature's decision not to include a compactness requirement to prove vote dilution under the WVRA does not trigger strict scrutiny. Intervenor-Defendant argues that the Act's omission of a compactness requirement triggers strict scrutiny because it leaves racially polarized voting as the sole factor determining liability and thereby "unnecessarily infuse[s] race into virtually every redistricting." *See* MJOP at 12–14 (internal citations omitted).

His argument fails because racially polarized voting is *not* the only element of a WVRA claim. The plain text of the Act requires plaintiffs to show *both* that "elections in the political subdivision exhibit polarized voting" *and* that "members of the 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 the members of that protected class or classes." RCW 29A.92.30(1).

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This second element requires a pragmatic assessment of local election conditions, including whether a jurisdiction maintains a discriminatory at-large system of election such that the preferences of the majority always overwhelm the minority. RCW 29A.92.030(2). The text of the WVRA also sets out a non-exhaustive list of probative factors including:

> . . . the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns.

RCW 29A.92.30(6). Accordingly, the omission of a compactness requirement does not make liability turn "entirely on the existence of racially polarized voting," MJOP at 18, and on Intervenor-Defendant's own theory, strict scrutiny does not apply.

Even if liability for maintaining an at-large election system turned on racially polarized voting alone (it does not), strict scrutiny would not apply for at least two reasons. First, the WVRA would not, as Intervenor-Defendant contends, necessarily infuse race into the drawing of district lines triggering strict scrutiny under racial gerrymandering doctrine. That theory is incompatible with a facial challenge because no districts have been drawn. *See supra* Part IV.C.1. And as discussed in depth below, *infra* Part IV.C.2.c.iii, the WVRA does not require that race predominate in drawing remedial districts and allows for remedies that do not involve districts at all.

Second, the statute would still remain race-neutral on its face because racially polarized voting is not a racial classification. Indeed, in *Sanchez* and *Higginson*, the state and federal appeals courts both declined to apply strict scrutiny to the CVRA despite reading that law to impose liability for vote dilution whenever it is shown that racially polarized exists in a jurisdiction that maintains an at-large election system. *See Sanchez*, 145 Cal. App. 4th at 666 (noting that the CVRA is race neutral because it "gives a cause of action to *any* racial or ethnic group that can establish

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that its members' votes are diluted through the combination of racially polarized voting and an at-large election system"); *Higginson*, 786 Fed. Appx. at 706 (adopting *Sanchez*'s reasoning). The *Sanchez* court further noted that the CVRA, in remedying the racially dilutive impact of maintaining at-large election systems amid racially polarized voting, was no different than other long-standing race-neutral antidiscrimination statutes that impose liability for actions and policies that have racially discriminatory effect, such as fair housing laws. *See Sanchez*, 145 Cal. App. 4th at 666, 681 (noting that strict scrutiny does not apply to race-neutral antidiscrimination laws simply because they reference race and create liability for race-based harm). In sum, strict scrutiny does not apply to the WVRA.

iii. *The WVRA's flexible remedial system does not require unconstitutional remedies.*

By its terms, the WVRA allows jurisdictions and courts to choose from a wide range of remedies beyond district-based elections, including race-blind electoral systems like ranked-choice voting and cumulative voting. Intervenor-Defendant's insistence that WVRA "requires Franklin County to switch from at-large electoral elections to district based elections" is contradicted by the plain text of the WVRA. The Act authorizes a court to order political subdivision "to change its electoral system, including, *but not limited to*, implementing a district-based election system, to remedy a potential violation." RCW 29A.92.040 (emphasis added). And courts, upon finding a violation, may order any "appropriate remedies, *including but not limited to*, the imposition of a district-based election system." RCW 29A.92.110 (emphasis added).

The explicit inclusion of other remedies not only suggests the WVRA is valid as-applied to Franklin County, but underscores the facial validity of the Act as a whole. The flexibility and discretion afforded by the WVRA's remedy provisions precludes any conclusion that race will unconstitutionally predominate in *every* application of the Act. *See Salerno*, 481 U.S. at 745. It does so in at least three ways.

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First, it is illogical that a statute that contemplates race-blind remedies like ranked-choice voting and cumulative voting can be found unconstitutional on the grounds that it requires racial predominance. As the Supreme Court has acknowledged, the adoption of a "system using transferable votes" (such as county-wide ranked-choice voting) can "produce proportional results without requiring the division of the electorate into racially segregated districts." *Hall*, 512 U.S. at 909–10 (Thomas, J., concurring in the judgment).

Second, nowhere in its guidance to courts does the WVRA mandate that race predominate in the fashioning of a remedy. *See Sanchez*, 145 Cal. App. 4th at 688 (upholding facial validity of the CVRA because it does not mandate unconstitutional remedies). Rather, the statute simply instructs courts to order "appropriate remedies" that are "tailor[ed]" to the specific circumstances of the violation. RCW 29A.92.110(1), (3). The WVRA provides courts and jurisdictions with the necessary discretion and flexibility to ensure that chosen remedies—whether district-based or not—take local election conditions into account, cure the violation, and respect constitutional guardrails. *Id.* This comports with the Supreme Court's recognition that "the choice of remedies to redress racial discrimination is a balancing process left, within the appropriate constitutional or statutory limits, to the sound discretion of the trial court." *United States v. Paradise*, 480 U.S. 149, 184 (1987).

Third, when the court orders a district-based remedy that could be susceptible to racial predominance, the WVRA affords flexibility in fashioning remedies within constitutional boundaries. The court can order the affected jurisdiction to set the boundaries or appoint an individual or panel to draw the lines. RCW 29A.92.110(1). Map drawers must respect traditional redistricting principles, including equal population, compactness, contiguity, natural boundaries, and communities of interest. RCW 29A.76.010(4)(b-c); RCW 29A.92.050(3). The WVRA sets no racial numerical targets for remedial districts and permits remedial districts in which members of a protected class are "not a numerical majority" so long as the remedy provides the protected class

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an equal opportunity to elect candidates of their choice. RCW 29A.92.110(2). As such, remedies under the WVRA include not just majority-minority districts, but also election systems with coalition, crossover, or influence districts.[8] RCW 29A.92.005, 110(2).

Contrary to Intervenor-Defendant's suggestion, the permissibility of coalition, crossover, and influence districts as WVRA remedies does *not* endanger the WVRA's constitutionality. MJOP at 16. Although the Supreme Court in *Bartlett* interpreted Section 2 as not requiring crossover districts, it explicitly allowed states to adopt their own laws that did so: "Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." 556 U.S. at 23. The *Bartlett* plurality underscored that crossover districts can advance important policy considerations "to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Id*. Crossover districts, as the Court acknowledged, "give[] [states] a choice that can lead to less racial isolation, not more." *Id*. The Court therefore concluded that "in the exercise of lawful discretion States c[an] draw crossover districts as they deem[] appropriate." *Id*. at 24. The Washington legislature permissibly took the Court up on that invitation, making these non-majority-minority remedial districts available as remedies to vote-dilution violations.

Given these features of its remedial system, the WVRA cannot be read to require the drawing of districts in a manner that "subordinate[s]" traditional redistricting principles to "racial considerations." *Cooper*, 137 S. Ct. at 1463–64. Even if some jurisdictions could conceivably engage in race-based districting to remedy a violation of the WVRA, and even if some future applications of the Act might conceivably constitute a racial gerrymander, Intervenor-Defendant's

[8] A coalition district is a district in which two politically cohesive minority groups form a coalition to elect a candidate of their choice. *Bartlett*, 556 U.S. at 13. A crossover district is one where the minority makes up less than a majority of the population but is large enough to elect a candidate of choice with help from majority voters who cross-over to support the minority group's preferred candidate. *Id.* An influence district is a district where the minority group makes up less than a majority of the population but can still influence the outcome of an election even if its preferred candidate cannot be elected. *Id.*

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claim that *every* future application of the WVRA to remedy an actual or potential violation will not survive constitutional scrutiny has no basis.[9] His facial challenge to the WVRA must fail.

d. The WVRA passes muster under rational basis review.

In sum, because the WVRA is facially neutral and does not discriminate on the basis of race, it must be upheld so long as it is rationally related to a legitimate state interest. *See Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 363 (5th Cir. 2015) ("When a government action is facially race neutral and there is no proof of either discriminatory purpose or discriminatory effect, that action is subject to rational basis review."). The WVRA plainly satisfies this standard, and Intervenor-Defendant does not argue otherwise. The Act's purpose is to "promote equal voting opportunity" and mitigate the harms of race-based vote dilution in political subdivisions across the state. Laws of 2018, ch. 113; *see also* RCW 29A.92.005, 020. As discussed above, to achieve these important ends,[10] the WVRA employs closely tailored, race-neutral means: the Act bars jurisdictions from maintaining any electoral system "that impairs the ability of members of a protected class . . . to have equal opportunity to elect candidates of their choice" due to vote dilution, permits localities to change their election system to address potential violations, and

[9] The Supreme Court has assumed that districts drawn to comply with Section 2's vote-dilution prohibition serve a compelling interest and survive scrutiny so long as the entity had "'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines." *Cooper*, 137 S. Ct. at 1464 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278). This standard is meant to give entities "'breathing room' in drawing districts." *Id*. Drawing a remedial map in response to a violation of Washington's vote-dilution prohibition would also serve the same compelling interest.

[10] Intervenor-Defendant barely acknowledges the Act's stated purpose and instead shadowboxes "interests" that the law does not aim to advance. MJOP at 16-17. The WVRA does not guarantee minority groups "maximum possible voting strength," *id.*, but rather *equal* voting opportunity. To the extent Intervenor-Defendant considers this interest at all, he appears to concede it "might be . . . compelling." *Id.* In addition, the WVRA does not "force localities to redistrict based on the mere existence of racially polarized voting"; as discussed *supra* Parts IV.A. and IV.C.2.c.ii., RPV is *not* the only element of a WVRA claim. Finally, Intervenor-Defendant cites the use of the word "influence" in the statute's findings to contend that this somehow renders the law unconstitutional. But this argument is untethered to the actual liability standard. It is also peculiar to contend that a law limited to ensuring groups have an "equal opportunity" to participate in elections, RCW 29A.92.020, somehow violates the Equal Protection Clause.

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allows any voter whose vote has been diluted—regardless of race—to seek an appropriate, locally tailored remedy. RCW 29A.92.020, 060. The WVRA therefore survives equal protection scrutiny.

D. The WVRA does not violate the Privileges and Immunities Clause of the Washington Constitution.

The WVRA is consistent with the Washington Constitution's Privileges and Immunities Clause. The Washington Constitution dictates that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. Art. I § 12.

As discussed above, the WVRA does not confer upon any citizen or class of citizens any privilege which does not "*upon the same terms* equally belong to all citizens." *Id*. (emphasis added). Equal protection as derived from Washington's Privileges and Immunities Clause "requires that all persons similarly situated should be treated alike." *Am. Legion Post #149 v. Wash. State Dept. of Health*, 164 Wn.2d 570, 608, 192 P. 3d 306 (2008) (internal quotation omitted). The WVRA does not violate this principle. Contrary to Intervenor-Defendant's contention, the WVRA does not "tilt the playing field in favor of a defined class," MJOP at 9, but seeks to rectify situations where the playing field is already tilted against a race or language minority—conferring on *all* citizens the right to bring suit where they belong to a race or language minority in a community where there is racially polarized voting and a lack of opportunity for that minority to elect their candidate of choice. The privilege therefore applies to all citizens upon the same terms. Because the privilege afforded by the WVRA applies to any "similarly situated" citizen or class of citizens, there is no violation of the Washington Privileges and Immunities Clause.

The purpose and function of the WVRA are indeed aligned with Washington's Privileges and Immunities Clause. That clause "is aimed at securing equality of treatment by prohibiting hostile discrimination." *Am. Legion Post #149*, 164 Wn.2d at 608 (internal quotation omitted). The WVRA likewise seeks to secure equality of treatment by prohibiting hostile discrimination in the form of electoral systems that dilute citizens' voting rights. If any violation of the Privileges and

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Immunities Clause is to be found in this case, it is a violation by Franklin County against its Latino residents so long as it maintains a system of election that dilutes their vote. This is all the more serious because, as Intervenor-Defendant has recognized, "the Washington Constitution goes further to safeguard the right to vote than does the federal constitution." *Madison v. State*, 161 Wn.2d. 85, 96, 163 P.3d 757 (2007). Therefore, the WVRA is consistent with the protections found in Washington's Privileges and Immunities Clause.

V. CONCLUSION

For the foregoing reasons, Amicus requests that this Court deny Intervenor-Defendant's Motion for Judgment on the Pleadings.

Dated this 2nd day of December, 2021,

Respectfully,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled Amicus Response to Intervenor-Defendant's Motion for Judgment on the Pleadings on the following individual(s):

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DATED this second day of December, at Seattle, Washington.

/s/Chris Bascom
Chris Bascom, Legal Assistant

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