STATE OF WASHINGTON
FRANKLIN COUNTY SUPERIOR COURT

GABRIEL PORTUGAL, BRANDON PAUL MORALES, JOSE TRINIDAD CORRAL, and LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Plaintiffs,

v.

FRANKLIN COUNTY, a Washington Municipal entity, and 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

MOTION FOR JUDGMENT ON THE PLEADINGS

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Table Of Contents

I. Introduction And Relief Requested 1

II. Materials Relied on 3

III. Questions Presented 3

IV. Argument 4

A. Plaintiffs Lack Statutory Standing To Sue. 4

B. The Race-Based Remedy In The Statute Was Repealed By One Or Both of 2018 c 301 § 8 And 2021 c 173 § 1, Codified At RCW 29A.76.010. 6

C. The Statute Violates Wash. Const. Art. I § 12. 7

D. The Statute Violates The Equal Protection Guarantees Of U.S. Const. Amend. XIV. 9

1. Equal Protection And Section 2 Of The Federal Voting Rights Act. 11

2. The WVRA Explicitly Excludes The Compactness Requirement, Triggering Strict Scrutiny. 13

3. The WVRA Fails Strict Scrutiny Under the Fourteenth Amendment. 15

V. Conclusion. 18

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Table Of Authorities

Cases

Abrams v. Johnson, 521 U.S. 74 (1997) 17
ATU Legislative Council of Washington State v. State, 145 Wash. 2d 544 (2002) 6
Bartlett v. Strickland, 556 U.S. 1 (2009) ..... passim
Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017) 14, 15
Carlson v. San Juan Cty, 183 Wash. App. 354 (2014) 8
Cooper v. Harris, 137 S. Ct. 1455 (2017) 13, 14, 15, 18
Fam. of Butts v. Constantine, 198 Wash. 2d 27 (2021) 5
Georgia v. Ashcroft, 539 U.S. 461 (2003) 11
Grant Cty Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wash. 2d 791 (2004) 8
Growe v. Emison, 507 U.S. 25 (1993) ..... passim
Johnson v. California, 543 U.S. 499 (2005) 14
Johnson v. De Grandy, 512 U.S. 997 (1994) 12, 18
Kendall v. Douglas, Grant, Lincoln & Okanogan Ctys. Pub. Hosp. Dist. No. 6, 118 Wash. 2d 1 (1991) 8
League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 16, 18
Madison v. State, 161 Wash. 2d 85 (2007) 8
Magney v. Truc Pham, 195 Wash. 2d 795 (2020) 5
Miller v. Johnson, 515 U.S. 900 (1995) 11, 17
Powers v. Ohio, 499 U.S. 400 (1991) 14
Shaw v. Hunt, 517 U.S. 899 (1996) 11, 12
Shaw v. Reno, 509 U.S. 630 (1993) 11, 13, 14, 18
State v. Jackson, 137 Wash. 2d 712 (1999) 5
State v. Johnson, 179 Wash. 2d 534 (2014), as amended (Mar. 13, 2014) 5
State v. Smith, 117 Wash. 2d 263 (1991) 8
Thornburg v. Gingles, 478 U.S. 30 (1986) 12
United States v. Hays, 515 U.S. 737 (1995) 18

Statutes

2011 c 349 § 26 ..... 6, 7
2018 c 301 § 8 7
2021 c 173 § 1 7
52 U.S.C. § 10301 ..... 4, 11
RCW 29A.76.010 ..... 2, 6, 7
RCW 29A.92.005 16
RCW 29A.92.010 ..... 4, 5, 14, 17

Ard Law Group PLLC

P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243

RCW 29A.92.020 9
RCW 29A.92.030 ..... passim
RCW 29A.92.050 6
RCW 29A.92.110 14

Constitutional Provisions

U.S. Const. Amend. XIV 9
Wash. Const. Art. I § 12 ..... 2, 7, 8, 9

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I. Introduction And Relief Requested

The Washington Voting Rights Act ("WVRA" or the "Act"), adopted in 2018, is an unconstitutional law—not inadvertently unconstitutional, but intentionally so. The statute's text largely codifies several decades of federal jurisprudential gloss on Section 2 of the federal Voting Rights Act of 1965 ("Section 2"), specifically the interpretation that Section 2 allows race-based gerrymanders of election districts to remedy "vote dilution" claims. If that were all the WVRA did, it would be a pointless and superfluous statute, given that Section 2 made the same remedy available to address the same harm. But the Legislature did more—or rather, did less. Apparently dissatisfied with constitutionally mandated limits on racial gerrymandering—limits the United States Supreme Court consistently applied for decades—it chose to explicitly ignore the limitations set by the Court by ***eliminating*** one Court-imposed requirement. The Supreme Court has repeatedly interpreted Section 2 to require compactness in proposed racially gerrymandered districts as a condition precedent to applying any kind of districting remedy. Without the "compactness" requirement, the Court has always said it would find the statute facially unconstitutional. Instead, the Court repeatedly held, if the statute lacks compactness there can be no harm, and thus the statute may offer no remedy.

The Washington Legislature removed that requirement from the WVRA, ignoring the United States Supreme Court's Fourteenth Amendment jurisprudence. "The fact that members of a protected class are ***not*** geographically compact . . . ***shall not*** preclude a finding of a violation . . ." RCW 29A.92.030 (emphasis added). The resulting statute ***compels*** Franklin County to make race a predominant factor in the decision to move to district general elections, and draw new district lines, in violation of the Fourteenth Amendment. The Legislature also drafted a statute that explicitly focuses on redistricting to improve the ability of protected classes to ***influence*** electoral outcomes, a step that the Supreme Court has said would raise grave equal protection concerns if read into federal Section 2.

Of course, the literal text of the Act also grants one class of citizens—the statute's "protected class"—special privileges as to litigation and districting which do not belong equally to

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all citizens—a blatant violation of Wash. Const. Art. I § 12. Nonetheless, because of errors and oversights by the Washington Legislature in drafting this "test-case" law, this Court need not reach Constitutional questions under either the state or federal constitution. In its haste to pass this blatantly unconstitutional law, the legislature swung and missed—not once, but three times.

Strike one: It created a new cause of action, and granted standing only to members of specific "protected classes"—a term in the Act's definitions section that is defined by incorporating by reference a definition the WVRA says is in the federal voting rights act. But as to two of the three identified classes—including the one claimed by plaintiffs here—***no such definition exists*** in federal law. As a result, the Legislature incorporated a nullity by reference, leaving the definition almost entirely blank. No plaintiff has statutory standing.

Strike two: The day the Act passed, to whatever extent it allowed racial groups to sue and create race-based districts, it impliedly repealed a decades-old statute that explicitly forbids the use of race-based analyses in drawing district lines. But the Legislature re-passed the prior law ***again*** just eight days later, in the very same session, effectively repealing any race-conscious clauses in the WVRA. Not content with repealing the statute only once, in 2021 the Legislature ***again*** re-enacted RCW 29A.76.010, confirming the repeal of race-based districting authority in the WVRA.

Strike three: Passing a law that was plainly intended to create a U.S. Supreme Court "test case," the Legislature must have assumed that WVRA defendants would actually defend themselves. In this, it greatly overestimated the diligence of elected officials. As it turns out, many potential defendants actually welcomed the possibility of gerrymandered district lines, knowing that by drawing the new lines themselves, they would create safe seats to ensure their own re-election through non-competitive elections in perpetuity. Indeed, the desire of elected officials to evade competitive elections knows no party boundary, and the brief history of WVRA litigation—including this very case—has seen members of both parties conspiring both across party lines and with nominal plaintiffs in order to secure court-blessed racial gerrymanders which may purport to disadvantage one party, but which in reality cement the positions of existing officials at the expense

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of actual voters. Thus, no test case has previously actually arisen, as WVRA lawsuits repeatedly "sue-and-settle" so as to entrench incumbents at the expense of actual voting citizens.

The Legislature's challenge to U.S. Supreme Court equal protection jurisprudence only creates a suitable test case where a plaintiff properly alleges standing, by virtue of membership in a protected class as defined in the statute. Due to the Legislature's oversight, no present plaintiff satisfies that statutory minimum, and the case must be dismissed for lack of statutory standing. Even if the Court finds that a plaintiff has adequately pled standing, the resulting race-based districting remedy was repealed not once, but twice, by subsequent legislation. Finally, if it somehow survived both of the repealing statutes, it is unconstitutional under the state and federal constitutions. The state constitution forbids granting a privilege to one class that is not available to all—but the literal text of the WVRA clearly does just that. And the statute explicitly, directly, and unmistakably purports to negate a fundamental requirement of Fourteenth Amendment equal protection law—reiterated by the United States Supreme Court for decades in jurisprudence that every lower court is duty-bound to follow—that no state may advantage one racial group at the expense of another. For any one of the forgoing reasons, the lawsuit must be dismissed.

II. Materials Relied on

This Motion for Judgment on the Pleadings relies the pleadings filed to date in the case.

III. Questions Presented

1. Do Plaintiffs Have Standing To Sue?

Answer: **NO**.

2. Were RCW 29A.92.040 and 050(3)(e) Repealed By 2018 c 301 § 8 And 2021 c 173 § 1?

(Answer: **YES**.

3. Is the WVRA Unconstitutional Under Wash. Const. Art. I § 12?

Answer: **YES**.

4. Is the WVRA Unconstitutional Under U.S. Const. Amend. XIV?

Answer: **YES**.

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IV. ARGUMENT

A. Plaintiffs Lack Statutory Standing To Sue.

The Act carefully defines which group members have standing to sue: "'Protected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq.*" RCW 29A.92.010(5). The Act goes on to grant this defined class of voters the unique privilege of suing municipalities to force changes in election systems. Only members of a protected class, as defined by the Legislature, may bring claims under the Act. Plaintiffs here assert that they are members of a race minority group, and as such are entitled by the WVRA to sue Franklin County. *See, e.g.*, FAC ¶¶ 4.28; 4.51. However, as an asserted race minority, they are absolutely ***excluded*** from the definition of protected class in the Act.

The federal voting rights act, 52 U.S.C. § 10301 *et seq.*, does not ever reference or define a "race minority group" or a "color minority group." Never, ever. Not once, not anywhere in the Act. The federal voting rights act forbids "denial or abridgment of the right . . . to vote on account of race or color . . ." 52 U.S.C. § 10301. The act forbids ***any*** racially discriminatory act, whether perpetrated by a racial majority against a racial minority or by a racial minority against a majority. Jim Crow was as criminal under the act as South African apartheid would be. As such, the federal act never once references or defines a race ***minority*** group or a color ***minority*** group.

As a result, the WVRA incorporates no definition of "race minority group." The legislature has simply failed to grant statutory standing to any person who claims a right to sue on the grounds that he is a member of such a group. Ironically, while the Legislature attempted to draft a statute that would challenge constitutional limitations on race-based districting, for purposes of the WVRA, race minorities simply do not exist. Language minorities have standing to sue under the WVRA; no other group does.[1]

[1] *See* 52 U.S.C. § 10503(e) ("For purposes of this section, the term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.")

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The test for statutory standing is well-established in Washington; plaintiffs obviously fail it. "The basic test for standing is whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the law in question." *Fam. of Butts v. Constantine*, 198 Wash. 2d 27, 40 (2021) (cleaned up). In order to have standing, a party "must show that his claim falls within the zone of interests protected by the statute or constitutional provision at issue." *State v. Johnson*, 179 Wash. 2d 534, 552 (2014), as amended (Mar. 13, 2014). Here, the statute explicitly protects only those groups falling within the zone of interests defined in the federal law incorporated by reference into the WVRA: language minority groups. Self-asserted "race minority groups" are not protected by the statute, and are excluded from the "zone of interests" because the statute, as drafted, excludes them by failing to give any definition of who or what such a group might be.

The statute is clear and unambiguous. "This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that the drafting of a statute is a legislative, not a judicial, function." *State v. Jackson*, 137 Wash. 2d 712, 725 (1999) (cleaned up). The Legislature instructed that it granted standing to a class defined in a specific federal statute.

That specific statutory definition also encompasses ***only*** the statutory text of the federal Voting Rights Act, unlike the definition of "polarized voting" in the WVRA: "voting in which there is a difference, ***as defined in case law regarding enforcement of the federal voting rights act***, 52 U.S.C. 10301 *et seq.*, in the choice of candidates . . ." RCW 29A.92.010(3). "In interpreting a statute we must also keep in mind the interpretive canon expressio unius est exclusio alterius, *i.e.*, where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *Magney v. Truc Pham*, 195 Wash. 2d 795, 803 (2020) (cleaned up). Here, because the statute specifically designated federal case law as a source for understanding the meaning of "polarized voting," therefore in its parallel silence it ***excluded*** any federal case law from providing a definition of persons granted standing to sue. By this intentional omission, the

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Legislature ensured that it incorporated exclusively the federal statutory text to define groups with standing to sue. That text, in turn, provides no definition of a "race minority" or "color minority."

Plaintiffs claim the right to sue based on self-asserted membership in a "race minority" and ask the Court to insist that future district lines in Franklin County reflect racial classifications. However, the Legislature barred that outcome by only granting standing to plaintiffs who can plead and prove that they are members of a "language minority," as defined in federal law. These plaintiffs have made no such attempt, and their case is therefore subject to dismissal for their lack of standing.

B. The Race-Based Remedy In The Statute Was Repealed By One Or Both of 2018 c 301 § 8 And 2021 c 173 § 1, Codified At RCW 29A.76.010.

On March 20, 2018, the day the Legislature passed the WVRA, existing Washington law banned the use of race in drawing county commissioner district lines. That statute, codified at RCW 29A.76.010, had been passed most recently as 2011's SSSB 5171, 2011 c 349 § 26, and stated that "Population data may not be used for purposes of favoring or disfavoring any racial group or political party." RCW 29A.76.010(4)(d). But the WVRA purported to create racial classifications, grant race-based groups the right to sue to compel redistricting, and required the county to favor the racial group which sued in drawing new district lines. *See* RCW 29A.92.050(3)(e). This constituted an implied repeal of the ban on using race in drawing district lines. Although "[r]epeal by implication is strongly disfavored . . . [it] is properly found in either of two situations . . . (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect." *ATU Legislative Council of Washington State v. State*, 145 Wash. 2d 544, 552 (2002). No county or court could comply with the flat, blanket ban on "favoring or disfavoring any racial group" while also drawing lines intended to improve the ability of one racial group to elect its "candidate of choice" at the expense of another racial group's candidate of choice.

The 2018 Legislature wasn't done, and neither was it particularly careful. Eight days later, it enacted S.H.B. 2887, "AN ACT Relating to county commissioner elections." Within that act,

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2018 c 301 § 8, the Legislature amended and re-enacted 2011 c 349 § 26, codified at RCW 29A.76.010. The amendments added requirements for public comment on redistricting plans, but it also re-enacted the hard and fast ban on race considerations: "Population data may not be used for purposes of favoring or disfavoring any racial group or political party." 2018 c 301 § 8 (re-enacting RCW 29A.76.010(4)(d)).

Both this and the WVRA were given effective dates of June 7, 2018. Perhaps, with the same effective date, the later-enacted statute did not repeal the earlier? This court need not consider the question, because just this past May, the Legislature passed SSB 5013, 2021 c 173, "AN ACT Relating to local redistricting deadlines." Once again, the Legislature re-enacted and amended RCW 29A.76.010. *See* 2021 c 173 § 1. It added specific deadlines for post-2020 census redistricting in RCW 29A.76.010(3)(a) and (b), but once again re-enacted, unchanged, the long-standing and firm ban on race-based districting. Current RCW 29A.76.010(4)(d) continues to read "Population data may not be used for purposes of favoring or disfavoring any racial group or political party."

Plaintiffs ask the Court to order Franklin County to draw new district lines which are explicitly crafted to favor a racial group, the plaintiffs' racial group. The WVRA, when enacted, purported to allow that outcome.[2] But on two separate occasions since passing the WVRA, the Legislature has explicitly ***banned*** the use of population data to favor a racial group in county redistricting. The more recent enactment cannot be reconciled with the earlier; they cannot both be given effect. The two re-enactments of RCW 29A.76.010(4) constitute the repeal of the relevant portion of the WVRA, and that statute precludes the relief sought by plaintiffs.

C. The Statute Violates Wash. Const. Art. I § 12.

If it remains, effective law, the WVRA violates the Washington Constitution's ban on laws creating special privileges and immunities: "No 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. "[T]he

[2] But only to the extent that it actually defined "race minority group," which it did not.

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privileges and immunities clause of the Washington State Constitution, article I, section 12, requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant Cty Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 805 (2004). In engaging in that independent analysis, the court recognizes that "the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Grant Cty*, 150 Wash. 2d at 806–07. As Justice Utter characterized it, "[e]nacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups." *State v. Smith*, 117 Wash. 2d 263, 283 (1991) (Utter, concurring).

The WVRA explicitly violates Art. I § 12. "For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *Grant Cty*, 150 Wash. 2d at 812. That privilege must "pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Id.* at 813. "Voting is of the most fundamental significance under our constitutional structure." *Carlson v. San Juan Cty*, 183 Wash. App. 354, 369 (2014) (cleaned up), and thus, "the right to vote is a privilege of state citizenship, implicating the privileges and immunities clause of the Washington Constitution." *Madison v. State*, 161 Wash. 2d 85, 95 (2007). Furthermore, "the Washington Constitution goes further to safeguard the right to vote than does the federal constitution." *Id.* at 96.

In the districting context, the Washington Supreme Court has held that "[a]n equal protection violation exists if (1) the boundary lines are intentionally drawn to discriminate against an identifiable political group and (2) there is an actual discriminatory effect." *Kendall v. Douglas, Grant, Lincoln & Okanogan Ctys. Pub. Hosp. Dist. No. 6*, 118 Wash. 2d 1, 13 (1991). That, of course, is the precise goal of the WVRA: it grants to a specific identified class the right and privilege to

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have county commissioner boundaries drawn so that members of that identified class—but not the public at large, or members of other definable classes—can elect a "candidate of choice."

The statute provides that "no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs 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 or abridgment of the rights of voters who are members of a protected class or classes." RCW 29A.92.020. By its omission, of course, that also means that a method of electing the governing body ***may be*** imposed in a manner that ***does impair*** the ability of anyone else, anyone who is not a member of a protected class, "to have an equal opportunity to elect candidates of their choice." The statute can only grant the benefit to the newly created protected class by denying that right to anyone not in the protected class. After all, Franklin County has only three commissioners, and to the extent any one of them is not the "candidate of choice" of a protected class but nonetheless has been elected, that commissioner must be the "candidate of choice" for a majority of voters, many of who presumably are not in the protected class. Elections are quintessentially zero-sum: one candidate wins, another loses. By requiring the county to draw district lines that tilt the playing field in favor of a defined class, the WVRA confers a voting privilege to that class, and thereby excludes any other class from that same voting privilege. As such, it violates Art. I § 12.

D. The Statute Violates The Equal Protection Guarantees Of U.S. Const. Amend. XIV.

The Fourteenth Amendment forbids state action that denies any person of the equal protection of law. On its face, the equal protection guarantee forbids state action that favors one racial group at the expense of the other. Nonetheless, the United States Supreme Court has recognized that, in order to remedy past discrimination, narrowly tailored remedies may have the temporary effect of favoring the group that has been discriminated against. However, the Supreme Court has consistently held that in the case of a remedy for "vote dilution," a court may order a remedy in the form of racially gerrymandered districts **only** where the statute requires that each proposed district is sufficiently compact. In other words, under the Fourteenth Amendment,

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compactness is a necessary precondition of race-based districting. Otherwise, race would be the predominant factor in the districting decision, thus violating the Fourteenth Amendment.

The Supreme Court has reiterated the compactness requirement countless times in the past decades, to the chagrin of those who seek greater flexibility to engage in gerrymandering based on race. A majority of the 2018 Washington Legislature appears not to have heeded the Supreme Court's consistently expressed direction on applying the Fourteenth Amendment. It adopted the WVRA to enact into state law remedies that purported to apply the jurisprudential "vote dilution" gloss on Section 2. But the Legislature did more—or rather, did somewhat less. The WVRA embodies in its statutory text only part of the Supreme Court's Section 2 vote dilution jurisprudence, while it explicitly and specifically ***deletes*** the constitutionally mandated compactness requirement. By doing so, it ensures—indeed, requires—that Franklin County make race the primary consideration in drawing district lines, in clear violation of the Fourteenth Amendment.

The Fourteenth Amendment permits the federal VRA to impose a proposed minority district so that minority members have "the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). However, it **requires** that any such district be sufficiently compact. "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality) (quoting *Growe*, 507 U.S. at 41). Dissatisfied with the United States Supreme Court's holding that the Fourteenth Amendment imposed that standard on Section 2 of the federal voting rights act, the Washington Legislature wrote it out of the WVRA. "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district ***shall not preclude a finding of a violation*** under this chapter, but may be a factor in determining a remedy." RCW 29A.92.030(2) (emphasis added).

By excluding any compactness requirement before finding a violation of "vote dilution," the WVRA explicitly makes racial considerations the *only* factor, not just the dominant factor, in determining whether Franklin County must use an at-large electoral systems rather than its

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district-based system. Under the WVRA, finding racially polarized voting is sufficient *by itself* to find the county liable for vote dilution and, in turn, to bar Franklin County from using at-large elections. According to the WVRA and Plaintiffs, Franklin County must switch to district-based elections as a result.

1. Equal Protection And Section 2 Of The Federal Voting Rights Act.

The "central purpose" of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*"). "Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." *Id.* Such "[e]xpress racial classifications are immediately suspect because, absent searching judicial inquiry, there is simply no way of determining which classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 642–43 (cleaned up).

The Supreme Court has recognized that Section 2 is in tension with these constitutional commands. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 927–28 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Section 2 bars practices "imposed or applied . . . in a manner which results in a denial or abridgement" of the right to vote. 52 U.S.C. § 10301(a). When Section 2 is invoked to remove racially discriminatory voting restrictions, it is undisputed that the statute enforces citizens' right under the Fourteenth Amendment to vote free from racial discrimination.

But Section 2 also has been interpreted to protect minority voters against "vote dilution." The Supreme Court has held that a municipality's use of at-large districts can "dilute[] minority voting strength by submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality). Section 2 thus *requires* governments to create majority-minority districts in certain circumstances. *See Shaw v. Hunt*, 517 U.S. 899, 906–08 (1996) ("*Shaw II*"). This focus on ensuring minority groups can "elect representatives of their choice"—which *increases* the role of race in voting—raises serious

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constitutional concerns because it expressly classifies voters by their race. *See Bartlett*, 556 U.S. at 20– 21 (plurality). As a result, the Supreme Court has interpreted Section 2 in a way to keep it from violating the Equal Protection Clause's ban on racial classifications.

Specifically, the Court has identified "three 'necessary preconditions' for a claim that the use of multimember [or at-large] districts constitute[s] actionable vote dilution under § 2: (1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Bartlett*, 556 U.S. at 11 (plurality) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)). Under Section 2, "only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 11–12.

The Supreme Court has repeatedly emphasized the importance of the first *Gingles* factor—that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district—in ensuring that Section 2 enforces the right to vote instead of requiring racial gerrymandering. The requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett*, 556 U.S. at 15 (plurality) (quoting *Growe*, 507 U.S. at 41). Absent this requirement, in other words, Section 2 would entitle "minority groups to the maximum possible voting strength," *id*. at 16, which "causes its own dangers, and they are not to be courted," *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994).

The compactness requirement saves Section 2 from constitutional doubt. Section 2 undeniably makes race the predominant factor—even with the compactness precondition in place—when it requires the creation of majority-minority districts. *See Shaw II*, 517 U.S. at 906–08. The Supreme Court has thus "assumed," but not held, "that one compelling interest" justifying the use of race under strict scrutiny "is complying with operative provisions of the

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Voting Rights Act of 1965." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). But compliance with Section 2 is assumed to be a compelling interest only because it is understood to remedy racial discrimination in voting. *Bartlett*, 556 U.S. at 10 (plurality). There is no racial discrimination to remedy, however, if the minority population is not sufficiently "compact" such that it would have "the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40–41.

Furthermore, the use of race in districting must be narrowly tailored even assuming the existence of a compelling interest. *Cooper*, 137 S. Ct. at 1464. Without the compactness precondition, the Supreme Court has made clear, Section 2 could never meet that requirement. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I*, 509 U.S. at 657. In short, eliminating the compactness requirement would "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 21 (plurality) (citation omitted).

2. The WVRA Explicitly Excludes The Compactness Requirement, Triggering Strict Scrutiny.

In 2018 the Washington Legislature did not simply test the Supreme Court's definition of the boundaries of the Fourteenth Amendment; it openly defied them: "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district ***shall not*** preclude a finding of a violation under this chapter . . ." RCW 29A.92.030(2). Further, "[p]roof of intent on the part of the voters or elected officials to discriminate against a protected class is not required for a cause of action to be sustained." RCW 29A.92.030(5). Instead, factors "such as . . . 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" may be probative. RCW 29A.92.030(6). Once there is a finding of racially polarized voting, the political

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subdivision can be compelled to abandon its at-large system. "The court may order appropriate remedies including, but not limited to, the imposition of a district-based election system." RCW 29A.92.110(1).

Plainly, the Washington Legislature drafted a statute that purported to overturn binding U.S. Supreme Court precedent as to the meaning and application of the Fourteenth Amendment. The WVRA classifies voters on the basis of their "race, color, or language minority group," RCW 29A.92.010, and it imposes liability on municipalities based on those classifications (*e.g.*, based on the presence of racially polarized voting). That is a paradigmatic racial classification, and all racial classifications get strict scrutiny regardless of their purported universal applicability. The Supreme Court has been quite clear on this point: "[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw I*, 509 U.S. at 651; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *Johnson v. California*, 543 U.S. 499, 506 (2005) (rejecting argument that prison's racial classification policy should be "exempt" from strict scrutiny "because it is 'neutral'—that is, it 'neither benefits nor burdens one group or individual more than any other group or individual'").

By eliminating the compactness requirement, the Act "unnecessarily infuses race into virtually every redistricting" decision, and thereby "rais[es] serious constitutional questions." *Bartlett*, 556 U.S. at 21 (plurality). The WVRA makes race not merely one factor or the predominant factor, but the ***only*** factor in triggering WVRA litigation remedies and redistricting on racial lines. It must therefore "must withstand strict scrutiny" because it compels Franklin County, and any other targeted jurisdiction, to allow "racial considerations [to] predominate[] over others" in changing from at-large to district-based elections. *Cooper*, 137 S. Ct. at 1464.

Strict scrutiny of a voting statute applies "if race was the criterion that, in the State's view, could not be compromised, and race-neutral considerations came into play only after the race-based decision has been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (cleaned up). That constitutional flaw is exactly what the WVRA demands. The WVRA

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focuses exclusively on race by putting voters into racial groups and imposing liability on cities when those groups tend to vote for different candidates. Under the statutory scheme, such racially polarized voting is the ***sole*** reason why Franklin County may be forced to switch from an at-large electoral map to a by-district map. Whether race-neutral considerations drive the way Franklin County might draw its district lines ***after*** having been found to violate the WVRA is irrelevant. Any such line-drawing comes "into play only after the race-based decision ha[s] been made." *Bethune-Hill*, 137 S. Ct. at 798–99 (rejecting the argument that "race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria."). Strict scrutiny applies "if race for its own sake is the overriding reason for choosing one map over others," *id.* at 799. Here, it applies to the decision to set district based maps and election systems over at-large solely for racial reasons.

3. The WVRA Fails Strict Scrutiny Under the Fourteenth Amendment.

Of course, even if state action violates a provision of the constitution, it may be defended if the state can meet strict scrutiny by showing that its action results from a ***compelling*** state interest and that it has been ***narrowly tailored***. Where "racial considerations predominated over others, the . . . burden thus shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper*, 137 S. Ct. at 1464. Strict scrutiny applies when racial considerations predominate over others in choosing an electoral system. That means once a plaintiff establishes that racial considerations predominate in the decision to adopt a particular election process, government has the burden to show that the statute mandating that process is narrowly tailored to a compelling interest.

Race predominates over any other considerations in any political subdivision in Washington re-drawing district lines and abandoning at-large elections to comply with the WVRA. The Act requires Franklin County to switch from at-large electoral elections to district based elections, with lines drawn on a race-conscious basis, due to a single factor: racially polarized voting, *i.e.*, the fact that voters of different races tend to vote for different candidates. Plaintiffs ask

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this Court to force Franklin County to abandon at-large elections under the WVRA solely due to racial reasons.

The WVRA therefore does not serve a compelling interest. There *might* be a compelling interest in ensuring protected classes can "elect a representative of [their] own choice in some single-member district" under Section 2. *Growe*, 507 U.S. at 40. But there is no compelling interest in providing a "minority group[] … the maximum possible voting strength," *Bartlett*, 556 U.S. at 16 (plurality). Nor is there a compelling interest in the ability of protected classes "influencing" the outcome of elections. It is one thing to ensure (as Section 2 of the VRA does) that at-large elections are not used to deny minority voters the ability "to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality). But outlawing at-large elections merely to ensure that minority voters can influence elections exacerbates the Constitutional equal protection problem. Indeed, it was the suggestion that Section 2 might require the creation of "influence districts" that led Justice Kennedy (joined by the Chief Justice and Justice Alito) to raise concerns about the law's constitutionality. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006). The Court thus concluded that "§ 2 does not require the creation of influence districts." *Bartlett*, 556 U.S. at 13 (plurality). The Washington Legislature thought better of this. The WVRA was explicitly intended by the Legislature to go beyond the Constitutional constraints on Section 2 by focusing on the ability of members a protected class to "***influence*** the outcome of an election." RCW 29A.92.005 (emphasis added). Because the WVRA's goal is to not just to remedy actual vote dilution, but to provide the protected classes with the ability to "influence the outcome of an election," it imposes unconstitutional race-based mandates. Violating the Fourteenth Amendment does not serve a compelling state interest.

Second, the WVRA is not narrowly tailored to remedy racial discrimination. Unlike Section 2 of the federal VRA, the WVRA does not require that a protected class be sufficiently "compact" to "elect a representative of its own choice in some single- member district." *Growe*, 507 U.S. at 40. That "compactness" requirement ensures that an at-large system actually has the potential to dilute the minority group's voting power before a municipality can be forced to switch to a by-

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district election. If it is impossible to draw a majority-minority district, then the at-large electoral system could not dilute that group's votes in the first place. In other words, "there neither has been a wrong nor can be a remedy." *Bartlett*, 556 U.S. at 15 (plurality). Eliminating the compactness requirement thus "unnecessarily infuse[s] race into virtually every redistricting." *Id.* at 21 (citation omitted).

The WVRA requires the court to make race predominate over all other factors in compelling Franklin County to abandon at-large general elections and draw new commissioner district maps. In Plaintiff's suit, in fact, race is the *only* factor for the Court to consider in requiring Franklin County to abandon its longstanding at-large general election in favor of district elections. The Court will command Franklin County to switch to district based elections, with racially-drawn lines, upon a showing of racially-polarized voting—period. *See* RCW 29A.92.010(3) (defining racially polarized voting); RCW 29A.92.030(1) (defining the presence of racially polarized voting and vote dilution as the facts necessary to find a violation). In other words, the locality must switch to by-district elections solely because individuals of one race tend to vote for one political party and individuals of another race tend to vote for another political party, if the protected race doesn't thereby elect its preferred candidates. The statute is simply pervasively dominated by racial considerations.

But under the Fourteenth Amendment, Washington does not have a compelling interest in forcing localities to redistrict based on the mere existence of racially polarized voting. There may be a compelling interest in ensuring that "the minority has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. But a statute that focuses *solely* on racially polarized voting does not pursue that anti-vote-dilution interest. The WVRA unconstitutionally entitles "minority groups to the maximum possible voting strength." *Bartlett*, 556 U.S. at 16 (plurality). And maximizing the voting power of minority groups is not a compelling interest. *See Miller*, 515 U.S. at 926; *Abrams v. Johnson*, 521 U.S. 74, 85–86 (1997) (explaining that *Miller* held that the Department of Justice's "max-black policy" violated the Equal Protection clause because of its "entirely race-focused approach to redistricting").

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The Supreme Court's cases applying Section 2 of the VRA eliminate any doubt that the Legislature went too far in its use of race. The Court has not yet decided whether even Section 2 itself goes too far in its use of racial considerations. *See Cooper*, 137 S. Ct. at 1464. As Justice Kennedy warned, interpreting Section 2 to "infuse race into virtually every redistricting" would raise "serious constitutional questions." *Perry*, 548 U.S. at 405 (opinion of Kennedy, J.) (citation omitted); *see also Johnson*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in part and concurring in the judgment). That is why the Supreme Court has gone to great lengths to construe Section 2 more narrowly, inposing the *Gingles* factors. *See Bartlett*, 556 U.S. at 15, 21 (plurality); *Growe*, 507 U.S. at 40–41.

Yet the WVRA explicitly purports to override that admonition. Liability under the Act turns entirely on the existence of racially polarized voting to the exclusion of all other factors. *See* RCW 29A.92.030. That is exactly the kind of rule the Supreme Court has cautioned would make race far too significant a factor. *See Bartlett*, 556 U.S. at 15 (plurality); *Growe*, 507 U.S. at 40–41. Forcing Franklin County to switch to by-district elections solely because votes are being cast along racial lines "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. This is why strict scrutiny applies to all racially-driven laws. *See id.* at 647–48; *United States v. Hays*, 515 U.S. 737, 744–45 (1995). Under that level of scrutiny, the WVRA fails.

V. Conclusion.

The hastily-drafted, blatantly unconstitutional Washington Coting Rights Act does not confer standing on plaintiffs, self-described members of an undefined "race minority." Even if it did, the Legislature repealed the race-based districting mandate twice after enacting it. By purporting to overrule U.S. Supreme Court precedent under the Fourteenth Amendment, the statute, if enforceable by plaintiffs, violates both the state and federal constitutional equal protection guarantees. The Complaint must be dismissed with prejudice.

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November 10, 2021.

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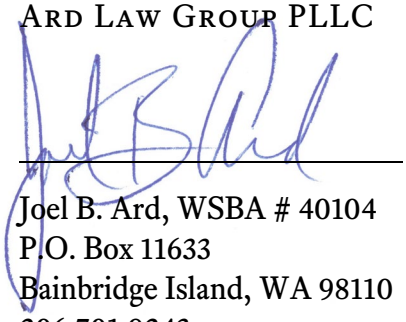
By: 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on November 10, 2021, I served the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS together with its related NOTE FOR MOTION DOCKET and PROPOSED ORDER in *Portugal et al. v. Franklin County et al.*, No. 21-250210-11, via email pursuant to prior consent of the parties, on counsel as follows:

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