

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

1 State. This Court therefore should deny Intervenor-Defendant’s Motion for Judgment on the
2 Pleadings (“MJOP”).

3 II. FACTUAL AND PROCEDURAL BACKGROUND

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

6 III. ISSUES ADDRESSED BY AMICUS

- 7 (1) Whether Plaintiffs have standing to sue.
- 8 (2) Whether the WVRA is constitutional under U.S. Const. Amend. XIV.
- 9 (3) Whether the WVRA is constitutional under Wash. Const. Art. I § 12.

10 IV. LEGAL ARGUMENT

11 A. The Legislature enacted the WVRA to ensure that local electoral systems do not 12 impair voting rights based on race, color, or language minority status.

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

21 ¹ Gene Balk, *Washington state becoming less white – but not Seattle*, The Seattle Times (June 28,
22 2016), [https://www.seattletimes.com/seattle-news/data/from-ocean-to-idaho-border-state-
23 becoming-less-white](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,
24 multiracial and Black populations throughout the state).

25 ² See Zachary Duffy, *Unequal Opportunity: Latinos and Local Political Representation*
26 *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).

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

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

11 Against this backdrop, the Legislature enacted the WVRA to “promote equal voting
12 opportunity in political subdivisions” and to ensure that electoral systems do not deny the
13 constitutional rights of members of race, color, or language minority groups by diluting their votes.
14 Laws of 2018, ch. 113 (codified at RCW 29A.92); *see also* RCW 29A.92.005.⁴ The Act bars
15 jurisdictions from maintaining any electoral system “that impairs the ability of members of a
16 protected class . . . to have equal opportunity to elect candidates of their choice as a result of the
17 dilution or abridgement of the rights” of such voters. RCW 29A.92020, 010(4). The law permits
18 any political subdivision to proactively “change its electoral system” to remedy a potential

19 _____
20 ³ Lilly Fowler, *WA to protect against voting discrimination with new law*, Crosscut (March 6,
21 2018), <https://crosscut.com/2018/03/washington-voting-rights-act-legislaturediscrimination-law-jay-inslee>.

22 ⁴ The WVRA was first introduced in 2013 and revised, reintroduced, and debated in 2015 and
23 2017 before its final passage in 2018. Intervenor-Defendant’s assertion that the legislation was
24 passed in “haste” to serve as a “test-case law” is wrong. MJOP at 2. The law was carefully
25 considered over three legislative sessions, revised and re-revised in committee hearings, and
26 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>.

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

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

9 To ensure that its vote-dilution standard is appropriately sensitive to local conditions of
10 voting discrimination in Washington, the Legislature both drew from and departed from the test
11 set out by the U.S. Supreme Court to prove a vote dilution claim under Section 2 of the federal
12 Voting Rights Act (VRA), 52 U.S.C. § 10301 *et seq.* In *Thornburg v. Gingles*, 478 U.S. 30 (1986),
13 the Supreme Court required plaintiffs seeking a federal vote-dilution remedy to prove three
14 threshold elements known as the *Gingles* preconditions: (1) the minority group must be able to
15 demonstrate that it is sufficiently large and geographically compact to constitute a majority in a
16 single-member district; (2) the minority group must be able to show that it is politically cohesive;
17 and (3) the minority group must be able to demonstrate that the white majority votes sufficiently
18 as a bloc to enable it to defeat the minority’s preferred candidate. *Id.* at 48–49. If the preconditions
19 are met, a court must determine whether, “based on the totality of circumstances,” the challenged
20 electoral system impairs the minority group’s ability to elect representatives of its choice. *Id.* at
21 44–45. The totality of circumstances is assessed using the so-called “Senate factors” as a “non-
22 exhaustive list.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2333 (2021).

23 The first element of the WVRA’s standard for establishing liability, polarized voting,
24 incorporates the second and third *Gingles* preconditions by direct reference to federal case law.
25 See RCW 29A.92.010(3). The second element of the WVRA requires plaintiffs to prove that vote
26

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

6 The Legislature opted not to require plaintiffs to prove the first *Gingles* precondition (that
7 the protected class is sufficiently large and geographically compact to form a majority-minority
8 district), instead deferring that issue for consideration in fashioning a remedy.
9 RCW 29A.92.030(2). Omission of this factor, which Intervenor-Defendant dubs the “compactness
10 requirement,” reflects the Legislature’s judgment that geographic segregation of a protected class
11 is not necessary to detect race-based vote dilution in Washington State. This judgment is also
12 consistent with the WVRA’s provisions contemplating a variety of remedies to cure vote dilution,
13 including alternative voting systems such as ranked-choice voting and cumulative voting that may
14 remedy vote dilution experienced by minority groups that are not geographically segregated. *See*
15 29A.92.040, 110 (permitting courts and jurisdictions to choose remedies “including, but not
16 limited to[.]” district-based election systems).⁵

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

19 By its terms, the WVRA confers standing on Plaintiffs. “If a statute is clear on its face, its
20 meaning is to be derived from the plain language of the statute alone.” *State v. Watson*, 146 Wn.2d
21 947, 954–55, 51 P.3d 66 (2002). The WVRA expressly references the federal Voting Rights Act,

22 ⁵ *See* H. Floor Debate at 56:40-56:52 (Feb. 27, 2018), available at
23 <https://www.tvw.org/watch/?eventID=2018021342> (Rep. Zach Hudgens opposing the imposition
24 of federal VRA elements, including the first *Gingles* precondition, because doing so would “limit
25 the ability of local jurisdictions” to tailor a remedy “that fits their community”); S. State Gov’t,
26 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).

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

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

21 Courts have long held that groups representing protected classes in voting have standing to
22 sue under the Voting Rights Act. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir.
23 2017); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016); *Greater*
24 *Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299, 1316 (11th Cir.
25 2021). *See also, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (allowing
26

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

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

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

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

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

22 Although Judge Peterson granted summary judgment in favor of Plaintiffs on September
23 13, 2021 and ordered that the parties “work cooperatively together on the development of the
24 district map” that the Court would consider at a trial on November 15, 2021, Judge Swanberg
25 vacated that order on October 11, 2021. Pls. Mot. to Change Venue at 5, 6 (Nov. 16, 2021). That
26 means there are neither current districts nor any planned districts for the election of Franklin

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

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

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

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

13 Both federal and Washington courts disfavor facial claims like this one because they upend
14 judicial deference to the legislative branch, “threaten[ing] to short circuit the democratic process
15 by preventing laws embodying the will of the people from being implemented in a manner
16 consistent with the Constitution.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.
17 442, 451 (2008); *see also Yakima Cty. Deputy Sheriff’s Ass’n v. Bd. of Comm’rs for Yakima Cty.*,
18 92 Wn.2d 831, 839-40, (1979) (“[I]n determining the constitutionality of a legislative enactment,
19 every possible presumption is in favor of the validity of the statute” (quotation marks omitted)).
20 There is no basis to overturn all the valid applications of a statute just because some hypothetical
21 errant application might violate a constitutional provision.

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

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

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

6 As explained above, *supra* Part IV.A, the WVRA’s standard for establishing liability
7 incorporates the second and third *Gingles* preconditions, as well as five of the probative Senate
8 factors, RCW 29A.92.030, but does not include the *Gingles* compactness requirement. Intervenor-
9 Defendant’s insistence that Section 2 is constitutional only because of the compactness
10 requirement (therefore rendering the WVRA unconstitutional due to its exclusion), MJOP at 12-
11 13, finds no support in federal law.

12 The Supreme Court has never suggested that the federal Voting Rights Act is constitutional
13 only because of the *Gingles* compactness requirement. *See Perry*, 548 U.S. at 430 (“To be sure,
14 § 2 does not forbid the creation of a noncompact majority-minority district”); *see also Voinovich*
15 *v. Quilter*, 507 U.S. 146, 158 (1993) (“[T]he *Gingles* factors cannot be applied mechanically and
16 without regard to the nature of the claim”).⁶ Indeed, the Supreme Court has held that states may
17 elect to draw crossover districts—districts in which minority voters form less than a majority but
18 elect their preferred candidates with crossover support from some white voters—and that doing so
19 would not violate the Equal Protection Clause. “In those areas [where] majority-minority districts
20 would not be required [under the VRA] in the first place, . . . States could draw crossover districts
21 as they deemed appropriate.” *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). That is, the Supreme
22

23 ⁶ The Supreme Court has assumed the constitutionality of the federal VRA in the long line of cases
24 interpreting Section 2 as a statute that remedies vote dilution. *See, e.g., Bartlett v. Strickland*, 556
25 U.S. 1,6 (2009); *Gingles*, 478 U.S. at 43-46. Likewise, the Supreme Court has assumed without
26 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).

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

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

18 Moreover, the Supreme Court’s interpretation of the federal VRA in *Gingles* does not
19 preclude state governments from establishing rights of action beyond those in Section 2 to combat
20 vote dilution. See *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 687-88, 51 Cal. Rptr. 3d 821
21 (2006) (“There is no rule that a state legislature can never extend civil rights beyond what Congress
22 has provided.”). Nor does it foreclose Washington’s use of alternative election systems to remedy
23 vote dilution, such as ranked choice voting and cumulative voting, which do not require the
24 drawing of district lines and therefore make a compactness element at the liability stage irrelevant.
25 See *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring) (“[N]othing in our present
26

1 understanding of the Voting Rights Act places a principled limit on the authority of federal courts
2 that would prevent them from instituting a [alternative method of elections] as a remedy under
3 § 2.”).

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

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

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

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

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

1 *Project, Inc.*, 576 U.S. at 545; see also *Shaw v. Reno*, 509 U.S. at 642 (“[R]ace-conscious
2 redistricting is not always unconstitutional.”). Courts have repeatedly held that an awareness of
3 race or racial motive in curing discrimination does not trigger strict scrutiny if burdens or benefits
4 are not distributed on the basis of race. See, e.g., *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665
5 F.3d 524, 547 (3d Cir. 2011) (“A racial classification occurs only when an action ‘distributes
6 burdens or benefits on the basis of’ race.”) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch.*
7 *Dist. No. 1*, 551 U.S. at 701, 720 (2007)); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48-49 (2d Cir.
8 1999); *Raso v. Lago*, 135 F.3d 11,16 (1st Cir. 1998) (“Every antidiscrimination statute aimed at
9 racial discrimination, and every enforcement measure taken under such a statute, reflect a concern
10 with race. That does not make such enactments or actions unlawful or automatically ‘suspect’
11 under the Equal Protection Clause.”); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (“Strict scrutiny
12 does not apply merely because redistricting is performed with consciousness of race.”).

13 Courts have applied this reasoning to uphold the California Voting Rights Act (“CVRA”)⁷
14 against challenge under the Equal Protection Clause. See, e.g., *Higginson*, 786 Fed. Appx. at 706–
15 07; *Sanchez*, 145 Cal. App. 4th at 680–83. In *Higginson*, the challenger raised the same argument
16 advanced by Intervenor-Defendant here: that the state’s vote-dilution statute “ma[de] race the
17 predominant factor in drawing electoral districts” by forcing a jurisdiction “to abandon its at-large
18 system based on the existence of racially polarized voting and nothing more,” thereby triggering
19 strict scrutiny. 786 Fed. Appx. at 706. The Ninth Circuit rejected this argument on grounds that
20 the CVRA was race neutral and did not “distribute burdens or benefits on the basis of individual
21 racial classifications.” *Id.* at 706–07 (citation omitted). Similarly, in *Sanchez*, the California Court

22 _____
23 ⁷ The CVRA shares many similarities with the WVRA. It provides racial minority groups a cause
24 of action to remedy race-based vote dilution and permits remedies beyond district-based elections.
25 *Sanchez*, 145 Cal. App. 4th at 670. Like the WVRA, the CVRA does not include the first *Gingles*
26 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).

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

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

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

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

22 His argument fails because racially polarized voting is *not* the only element of a WVRA
23 claim. The plain text of the Act requires plaintiffs to show *both* that “elections in the political
24 subdivision exhibit polarized voting” *and* that “members of the protected class or classes do not
25 have an equal opportunity to elect candidates of their choice as a result of the dilution or
26 abridgement of the rights of the members of that protected class or classes.” RCW 29A.92.30(1).

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

5 . . . the history of discrimination, the use of electoral devices or other voting
6 practices or procedures that may enhance the dilutive effects of at large elections,
7 denial of access to those processes determining which groups of candidates will
8 receive financial or other support in a given election, the extent to which members
9 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.

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

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

20 Second, the statute would still remain race-neutral on its face because racially polarized
21 voting is not a racial classification. Indeed, in *Sanchez* and *Higginson*, the state and federal appeals
22 courts both declined to apply strict scrutiny to the CVRA despite reading that law to impose
23 liability for vote dilution whenever it is shown that racially polarized exists in a jurisdiction that
24 maintains an at-large election system. *See Sanchez*, 145 Cal. App. 4th at 666 (noting that the CVRA
25 is race neutral because it “gives a cause of action to *any* racial or ethnic group that can establish
26

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

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

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

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

1 First, it is illogical that a statute that contemplates race-blind remedies like ranked-choice
2 voting and cumulative voting can be found unconstitutional on the grounds that it requires racial
3 predominance. As the Supreme Court has acknowledged, the adoption of a “system using
4 transferable votes” (such as county-wide ranked-choice voting) can “produce proportional results
5 without requiring the division of the electorate into racially segregated districts.” *Hall*, 512 U.S. at
6 909–10 (Thomas, J., concurring in the judgment).

7 Second, nowhere in its guidance to courts does the WVRA mandate that race predominate
8 in the fashioning of a remedy. *See Sanchez*, 145 Cal. App. 4th at 688 (upholding facial validity of
9 the CVRA because it does not mandate unconstitutional remedies). Rather, the statute simply
10 instructs courts to order “appropriate remedies” that are “tailor[ed]” to the specific circumstances
11 of the violation. RCW 29A.92.110(1), (3). The WVRA provides courts and jurisdictions with the
12 necessary discretion and flexibility to ensure that chosen remedies—whether district-based or
13 not—take local election conditions into account, cure the violation, and respect constitutional
14 guardrails. *Id.* This comports with the Supreme Court’s recognition that “the choice of remedies
15 to redress racial discrimination is a balancing process left, within the appropriate constitutional or
16 statutory limits, to the sound discretion of the trial court.” *United States v. Paradise*, 480 U.S. 149,
17 184 (1987).

18 Third, when the court orders a district-based remedy that could be susceptible to racial
19 predominance, the WVRA affords flexibility in fashioning remedies within constitutional
20 boundaries. The court can order the affected jurisdiction to set the boundaries or appoint an
21 individual or panel to draw the lines. RCW 29A.92.110(1). Map drawers must respect traditional
22 redistricting principles, including equal population, compactness, contiguity, natural boundaries,
23 and communities of interest. RCW 29A.76.010(4)(b-c); RCW 29A.92.050(3). The WVRA sets no
24 racial numerical targets for remedial districts and permits remedial districts in which members of
25 a protected class are “not a numerical majority” so long as the remedy provides the protected class
26

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

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

17 Given these features of its remedial system, the WVRA cannot be read to require the
18 drawing of districts in a manner that “subordinate[s]” traditional redistricting principles to “racial
19 considerations.” *Cooper*, 137 S. Ct. at 1463–64. Even if some jurisdictions could conceivably
20 engage in race-based districting to remedy a violation of the WVRA, and even if some future
21 applications of the Act might conceivably constitute a racial gerrymander, Intervenor-Defendant’s
22

23 ⁸ A coalition district is a district in which two politically cohesive minority groups form a coalition
24 to elect a candidate of their choice. *Bartlett*, 556 U.S. at 13. A crossover district is one where the
25 minority makes up less than a majority of the population but is large enough to elect a candidate
26 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.*

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

3 **d. The WVRA passes muster under rational basis review.**

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

16
17 ⁹ The Supreme Court has assumed that districts drawn to comply with Section 2’s vote-dilution
18 prohibition serve a compelling interest and survive scrutiny so long as the entity had “‘good
19 reasons’ to think that it would transgress the Act if it did *not* draw race-based district lines.”
20 *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.

21 ¹⁰ Intervenor-Defendant barely acknowledges the Act’s stated purpose and instead shadowboxes
22 “interests” that the law does not aim to advance. MJOP at 16-17. The WVRA does not guarantee
23 minority groups “maximum possible voting strength,” *id.*, but rather *equal* voting opportunity. To
24 the extent Intervenor-Defendant considers this interest at all, he appears to concede it “might be
25 . . . compelling.” *Id.* In addition, the WVRA does not “force localities to redistrict based on the
26 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.

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

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

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

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

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

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

7 **V. CONCLUSION**

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

10 Dated this 2nd day of December, 2021,

11 Respectfully,

12
13 /s/ Tiffany Cartwright
14 Tiffany M. Cartwright, WSBA #43564
15 MACDONALD HOAGUE & BAYLESS
16 1500 Hoge Building
17 705 Second Avenue
18 Seattle, WA 98104
19 Tel: (206) 622-1604
20 tiffanyc@mhb.com

17 Annabelle Harless
18 CAMPAIGN LEGAL CENTER
19 55 W. Monroe St., Ste. 1925
20 Chicago, IL 60603
21 Tel: (312) 312-2885
22 aharless@campaignlegal.org

21 Molly Danahy
22 Christopher Lamar
23 Simone Leeper
24 Valencia Richardson
25 Aseem Mulji
26 CAMPAIGN LEGAL CENTER
27 1101 14th Street NW, Suite 400
Washington, DC 20005
Tel: (202) 736-2200
mdanahy@campaignlegal.org
clamar@campaignlegal.org

27 AMICUS RESPONSE TO INTERVENOR-DEFENDANT’S
MOTION FOR JUDGMENT ON THE PLEADINGS- 20

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

1 sleeper@campaignlegal.org
2 vrichardson@campaignlegal.org
3 amulji@campaignlegal.org

4 Ruth Greenwood
5 ELECTION LAW CLINIC AT HARVARD LAW SCHOOL
6 6 Everett St, Suite 5112
7 Cambridge MA 02138
8 Tel: (617) 998-1010
9 rgreenwood@law.harvard.edu

10 *Attorneys for Amicus*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

