No. 23-500

In the

Supreme Court of the United States

JAMES GIMENEZ,

Petitioner,

v.

FRANKLIN COUNTY, WASHINGTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF IN OPPOSITION

MARTIN J. SIEGEL, Director
CIANNE E. JIMENEZ
FAATIMA OVAIS
DAVID J. SEGAL
UNIVERSITY OF HOUSTON LAW CENTER
APPELLATE CIVIL RIGHTS CLINIC
4170 Martin Luther King Blvd.
Houston, Texas 77204
(713) 743-2094

EDWARDO MORFIN
MORFIN LAW FIRM PLLC
7325 West Deschutes Avenue
Suite A
Kennewick, WA 99336-6705
(509) 380-9999

CHAD W. DUNN
Counsel of Record
SONNI WAKNIN
BERNADETTE REYES
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90065
(310) 206-8431
chad@uclavrp.org

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Court should entertain a facial challenge to the Washington Voting Rights Act even though that statute has several constitutional applications not contested by Petitioner.
2. Whether Petitioner has standing to complain of racial gerrymandering though he doesn't allege he was placed in a specific, racially determined district and hasn't suffered any other injury.
3. Whether the Washington Voting Rights Act violates the Equal Protection Clause where, contrary to Petitioner's main contention, the law doesn't force jurisdictions to abandon at-large systems simply because of racially polarized voting, but also requires a showing of vote dilution and allows for other remedies that would permit continued at-large voting.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITION AND STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

In 2018, Washington exercised its sovereign authority over its political subdivisions to enact the Washington Voting Rights Act (WVRA). Modeled on the federal Voting Rights Act and other state laws, the WVRA allows local governments to modify their election systems. Voters suffering from vote dilution based on race and other factors can also seek relief in court. Wash. Rev. Code § 29A.92.030; 29A.92.080. This relief can take various forms, including single-member districts, ranked choice voting, and cumulative voting systems. *See* Wash. Rev. Code § 29A.92.110.

This case arose when Latino voters challenged the election scheme for Franklin County, Washington, under the WVRA because the at-large system used to elect county commissioners diluted the votes of Latinos and prevented them from electing candidates of their choice. App. 116-139. The Latino voters and Franklin County reached a settlement providing for voting in districts rather than at-large, with the districts drawn by the county's own expert. Before the trial court approved the settlement, however, Petitioner James Gimenez, an isolated voter in Franklin County, intervened to challenge the constitutionality of the WVRA on its face. App. 2.

Gimenez made no complaints at all about the actual district lines drawn by the county's expert and ultimately ordered by the court, nor does the record disclose which district he will vote in. According to Gimenez, the WVRA facially violates the Fourteenth Amendment's Equal Protection Clause because it purportedly requires all Washington counties to

abandon their at-large systems on a showing of racially polarized voting and nothing else. Pet. 3, 20. Both the trial court and the Washington Supreme Court rejected this argument. They held that Gimenez was misrepresenting the statute; that vote dilution, not just polarized voting, must also be shown before a remedy is required; and that the law easily survives a facial challenge because it has several plainly constitutional applications not disputed by Gimenez. App. 3-4, 22, 69-71.

Gimenez now reprises his complaint about the WVRA in this Court. His petition suffers from fatal threshold defects, however. First, he has repeatedly asserted that his only challenge to the WVRA is a facial one. *See e.g.*, App. 2. Yet he doesn't dispute that the WVRA has several constitutional applications. For example, he makes no challenge to the constitutionality of non-districting remedies a court could impose under the WVRA to address vote dilution or abridgement. Because the WVRA is not unconstitutional on its face, the Court will never reach his specific complaint about newly fashioned districts and should therefore deny the petition.

Second, Gimenez lacks standing to challenge the WVRA. This Court has long held that only voters actually assigned to racially gerrymandered districts can challenge them, but there is no indication in the record that this is true of Gimenez. In fact, he doesn't challenge the specific line-drawing performed by the county or the trial court at all. Gimenez therefore does not and cannot make any claim of particularized injury caused by the WVRA that is not equally

applicable to any and all citizens of Franklin County or the State of Washington.

Even aside from these threshold hurdles, Gimenez's actual complaint about the WVRA presents no serious constitutional question. Gimenez claims that districting can be ordered under the statute based on racially polarized voting alone, but as the courts below recognized, that simply isn't true. App. 32. A voter must also show vote dilution, which will not automatically appear in every case of polarized voting. *Id*. Gimenez also claims Washington has removed the required constitutional "guardrail" of requiring plaintiffs in vote dilution cases to show that remedial voting districts would be compact. Actually, though, Washington courts may consider compactness before ordering an at-large jurisdiction to adopt districts. Wash. Rev. Code § 29A.92.030. Gimenez identifies no case of a court imposing a noncompact district, including this one. In short, the WVRA easily meets constitutional standards. If accepted, Gimenez's argument would undermine not only Washington's but all states' sovereign right to govern their own elections. This Court should reject it.

STATEMENT OF THE CASE

A. Statutory History

In 2018, the Washington Legislature enacted the WVRA to "protect the rights of Washington voters in local elections." App. 5. Washington's legislature found that "local government subdivisions are often prohibited from addressing" the recurring problem of vote dilution "because of Washington laws that narrowly prescribe the methods by which they may

elect members of their legislative bodies." Wash. Rev. Code § 29A.92.005. The legislature enacted the WVRA "so that minority groups have an equal opportunity to elect candidates of their choice or influence the outcome of an election." *Id.*

Before the legislature passed the WVRA, local jurisdictions in Washington couldn't voluntarily change their electoral systems. As a result, two jurisdictions were found liable for breaching Section 2 of the federal Voting Rights Act. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014)*; Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS (E.D. Wash. Jan 27, 2017). Before being found liable, the City of Pasco – the county seat of Franklin County – actively lobbied the Washington Legislature to permit district-based voting in order to rectify its existing vote dilution. *Glatt*, No. 4:16-CV-05108-LRS at ** 9-10.

The WVRA has three main provisions. First, the law creates an avenue for local jurisdictions to *voluntarily* change their electoral systems. This change can, but is not required to, include district-based election systems. If a jurisdiction decides to implement district-based elections, it must follow Washington law requiring reasonably equal population and compact districts. Wash. Rev. Code § 29A.92.040(2) *and* 29A.92.050.

Second, the WVRA permits a voter to challenge an electoral system for diluting the votes of a particular minority. Wash. Rev. Code § 29A.92.030. As under the federal Voting Rights Act, the plaintiff must show that the applicable minority group "is politically cohesive and that the majority group votes sufficiently as a block to enable it usually to defeat the minority

preferred candidate." App. 13-14. (cleaned up, citations omitted). A voter seeking relief under the WVRA must also show that "members of a protected class or classes do not have an equal opportunity to elect a candidate of their choice as a result of the dilution or abridgement of the rights of members of that protected class or classes." App. 14; Wash. Rev. Code § 29A.92.030(1)(b).

Third, the WVRA provides for a variety of remedies, including implementation of a different electoral system when necessary. Wash. Rev. Code § 29A.92.110. Because a court-ordered remedy can include several different types of electoral systems, some of which preserve at-large voting, courts need not consider the compactness of newly drawn districts unless and until the trial court orders them in the first place. App. 11-14.

B. The History of Vote Dilution and Racial Tension in Franklin County

Before enactment of the WVRA, Franklin County elected its three county commissioners through an at-large general election.[1] In May 2022, the commissioners voted unanimously to implement district-based elections. They decided to use the district map drawn by the county's own expert demographer after input from the commission and the community. Voters in Franklin County will begin to

[1] Unlike the general elections, primary elections for the county commission occur by district, and candidates are selected by voters in each district. App. 120.

elect commissioners through district-based elections starting in 2024.

Latinos constituted a majority of the total population of Franklin County and one-third of the voting age population by 2021, yet no Latino has ever been elected to serve on the commission. That is due in part to the county's history of racial tension between white and Latino residents. Although Latinos, mostly Mexican Americans, were hired in the 1940s to work in Benton County, racial housing covenants prevented them from residing there.[2] Instead, Latinos were forced to live fifty miles away in Franklin County. In turn, Franklin County segregated Latinos into East Pasco, an area without basic sanitation and services.[3]

As the Latino population grew, discrimination against them persisted. Latinos face disparities in almost all aspects of modern life including housing, education, and income. App. 132-135. Franklin County officials occasionally contributed to the rise of racial tensions. For example, the Franklin County Coroner shared a social media post promoting white supremacy.[4] Most recently, many Latino residents

---

[2] *See* Kate Brown, *Only Part of the Story Is Being Told About the Police Shooting in Pasco*, TIME (Mar. 3, 2015), https://time.com/3729247/police-shooting-pasco-history/.

[3] *Id*.

[4] Jake Dorsey, *Franklin County Coroner Posted a 'White Power' Meme. Some Say His Apology Isn't Enough*, YAKIMA HERALD (Mar. 15, 2018), https://www.yakimaherald.com/news/local/franklin-county-coroner-posted-a-white-power-meme-some-say-his-apology-isn-t-enough/article_3b232aa8-2871-11e8-8f6b-03319b4b7e81.html.

were unable to participate in the county's redistricting process because public meetings and materials were not available in Spanish, despite the county's Latino majority.[5]

C. Procedural History

Respondents, three Latino voters in Franklin County, filed this lawsuit in Washington state court. They alleged that at-large election of county commissioners had the effect of diluting the votes of Latino citizens and thereby preventing them from electing their candidates of choice. App. 119-139.

After the Latino voters moved for summary judgment, the county responded by conceding that it could not "in good faith oppose" the motion because it was "factually supported." App. 96. It also noted that one commissioner, Clint Didier, intended to intervene in the suit in order to challenge the "validity and/or constitutionality of the VVRA." App. 112.

Although the trial court granted summary judgment for the Latino voters, Franklin County then claimed that its counsel had agreed to entry of judgment without proper consent. CP 341.[6] The order was therefore vacated. CP 349-50, 383. At that point, Commissioner Didier sought to intervene but reversed himself after the Latino voters objected. CP 297-302.

---

[5] Johanna Bejarano, *Franklin County Latino Population Wants More Redistricting Information in Spanish*, NWPB NEWS (Oct. 15, 2021), https://www.nwpb.org/2021/10/15/franklin-county-latino-population-wants-more-redistricting-information-in-spanish/.

[6] "CP" refers to the Clerk's Papers, the full trial court record filed in the Washington Supreme Court.

Instead, Gimenez moved to intervene and appended a proposed pleading he styled as "Answer, Affirmative Defenses and Counterclaim of Intervenor-Defendants." CP 260-266, CP 1317-1327. In this proposed answer, which was never filed as a separate document, Gimenez sought a "declaration that the…WVRA is unconstitutional under both the state and federal constitutions." CP 1324. He claimed harm "inasmuch as he will not be able to vote in a commissioner district whose boundaries were drawn based on race-neutral criteria," and "he will not be able to vote for commissioner to the county commission on a county-wide basis." CP 1325. The court granted Gimenez's motion to intervene, and he filed a motion for judgment on the pleadings facially challenging the constitutionality of the WVRA, which was denied. App 68-71.

After further litigation, the county and the Latino voters agreed to a settlement that provides for general elections for commissioners to occur in single-member districts drawn by the county's own expert, Dr. Peter Morrison. CP 1292-93.[7] The commissioners, including Didier, approved the settlement, which the trial court entered as an order. App. 61-67.

Gimenez, however, appealed the settlement to the Washington Supreme Court, modeling his argument at times verbatim on a prior unsuccessful challenge to the California Voting Rights Act. App. 21,

[7] Peter Morrison, PhD, retained by the county as an expert consultant, has evaluated redistricting plans for over 50 jurisdictions and testified as an expert in at least 16 cases. CP 218–244.

26, 37. For example, in his reply, Gimenez emphasized that he was bringing a facial challenge:

> Even if [the Latino voters'] argument could plausibly remove this case from the scope of a facial challenge, it would only be relevant if Mr. Gimenez urged that the WVRA is unconstitutional ***because*** of the remedy Plaintiffs sought and settled on. ***He did not***.

Reply Brief of Appellant, at 8, *Portugal v. Franklin County*, 1 Wash.3d 629 (2023), (No. 100999-2), 2022 WL 18941638. (emphasis added and in original).

The Washington Supreme Court unanimously upheld the WVRA, stating that the law "on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote." App. 35. The Court highlighted Gimenez's "incorrect" reading of the statute, noting that the WVRA mandates "*equal* voting opportunities for members of every race, color, and language minority." App. 3, 35. Thus, there was no "favor" granted to some racial groups or penalty to others. App. 23. Rather, the Court held that the WVRA, akin to other statutes barring racial discrimination or "mandating equal voting rights," is subject to rational basis review, which it easily satisfies. *Id*.

The Washington Supreme Court also rejected Gimenez's claim that the WVRA violates the Equal Protection Clause by eliminating the compactness requirement, a threshold element in claims under Section 2 of the federal Voting Rights Act, as a component of liability in vote dilution cases under the

Washington law. The Court noted that Gimenez failed to "cite a single case – from any court – that actually says what he claims." App. 36. The Court also emphasized that Gimenez brought a facial challenge to the WVRA, which required him to prove the law "is unconstitutional in all of its potential applications." App. 38-39. Gimenez admitted he could not meet that burden. *Id.*

ARGUMENT

I. Gimenez's Petition Offers a Poor Vehicle to Review the WVRA

Two threshold defects in Gimenez's petition will preclude the Court from reaching the merits of his constitutional attack on the WVRA. First, the only type of challenge Gimenez preserved below is facial, yet he doesn't dispute that the WVRA has several constitutional applications. As a result, the Court will have no basis to consider his specific complaint about newly created districts. Second, Gimenez lacks standing. He does not, and cannot, claim to have been sorted into a specific, racially gerrymandered district or personally injured in any other way not applicable to all citizens of Franklin County or Washington State. Likewise, Gimenez has not been ordered to do or refrain from doing something. He therefore lacks standing. Nor is there a circuit split or any other compelling reason to grant Gimenez's petition. The Court should therefore deny it.

A. As a Facial Challenge to the WVRA, Gimenez's Case is a Weak Candidate for Review

There is no question that Gimenez's challenge is a facial one, despite the half-hearted stab he now takes at calling it as-applied. When a "claim and the relief that would follow… reach beyond the particular circumstances" of the claimant, he must "satisfy our standards for a facial challenge to the extent of that reach." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Determining the nature of a party's claim and requested relief requires examination of the operative pleading. *See id.*

Gimenez's pleadings are his motion to intervene and the counterclaim for declaratory and injunctive relief he appended to that motion.[8] In these pleadings, he repeatedly charges that the entirety of the WVRA violates the Fourteenth Amendment and, as part of his prayer for relief, seeks "A Declaration that the WVRA is unconstitutional." CP 260-261; CP 1324-1326. While Gimenez's counterclaim was not subsequently filed in the trial court as a separate document, App. 40 n. 18, his lower court briefing also made clear that his challenge is facial.[9] Furthermore,

---

[8] Gimenez failed to include any of these documents in the appendix to his petition. They can be found at CP 260-266 and 1318-1327.

[9] Intervenor-Appellant's Statement of Grounds for Direct Review at 4, P*ortugal v. Franklin County*, 1 Wash.3d 629 (2023) (No.100999-2) (issues presented include "Does the WVRA violate" the federal Constitution"); *id*. at 13–15 (debating constitutionality of statute); Brief of Appellant at 1-4, 6, *Portugal v. Franklin County*, 1 Wash.3d 629 (2023)(No. 100999-2), 2022

Gimenez's appeal arises from the denial of his motion for judgment on the pleadings – meaning that no facts were ever adjudicated and Gimenez sought judgment as a matter of law. Indeed, his reply brief to the Washington Supreme Court forthrightly argued: "Mr. Gimenez's *Facial Challenge* is Appropriate." Reply Brief of Appellant at 7, *Portugal v. Franklin County*, 1 Wash.3d 629 (2023) (No.100999-2) 2022 WL 18941638 (emphasis added).

As important, Gimenez has continually elected not to challenge the specific order and district map entered by the trial court but rather to attack the WVRA in the abstract, entirely disassociated from the facts and outcome of this case. App. 2 ("We are not asked to review the merits of… the parties' settlement agreement"). Rather than show that any voting district ordered by the trial court in Franklin County is actually a noncompact racial gerrymander, he critiques the WVRA for permitting that result in theory. Pet. 15-22. Consequently, the Washington Supreme Court was correct in noting, "Gimenez did not bring an as-applied challenge. He brought a facial challenge." App. 37.

Having described his own challenge in the Washington Supreme Court as a facial one, Gimenez

---

WL 18144310. (WVRA's facial meaning operates "in violation of" the Fourteenth Amendment); *id.* at 5 (trial court erred in concluding "the statute does not violate the state and federal constitutions"); *id.* at 8 (acknowledging his motion sought "a declaration that WVRA is unconstitutional"); *id.* at 35 ("WVRA Violates U.S. Const. Amend. XIV"); *id.* at 53 ("WVRA is unconstitutional").

now changes tack, insisting for the first time that his claim actually "*is* an as-applied challenge" because it concerns "the WVRA as applied to Franklin County's prior, at-large voting scheme. It just so happens that the WVRA operates the same as to all other at-large districts with racially polarized voting." Pet. 28 (emphasis in original). But Gimenez did not ask the lower courts to enter relief as to "Franklin County's prior, at-large voting scheme" – he asked it to declare the WVRA unconstitutional across the board, in all its applications and throughout the State of Washington. Nor is it accurate to say that the WVRA functions identically "as to all other at-large districts with racially polarized voting." *Id.* As discussed below, the WVRA permits a host of different remedies in voting dilution cases, not just the creation of individual districts. *See infra.* at 14-15. It also permits consideration of compactness when drawing remedial districts. *See infra.* at 15-16. How the law "operates," then, will depend entirely on the particulars of each individual case. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (how a majority-minority district will function "depends entirely on the facts and circumstances of each case"). In this case, the county's own expert drew the map implemented as part of the settlement.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." That a law might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States v. Salerno*, 481 U.S. 739, 745

(1987); *accord Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). Facial challengers therefore bear a "heavy burden." *Id.*

Facial constitutional challenges also "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it,' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (further quotation omitted)). They "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451 (citing *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 329 (2006)); *accord United States v. Raines*, 362 U.S. 17, 21 (1960).

There are undoubtedly circumstances "under which the [WVRA] would be valid," *Salerno*, 481 U.S. at 745, and Gimenez doesn't claim otherwise. For example, the Washington Supreme Court correctly recognized that WVRA provides for a wide variety of remedies for vote dilution besides the drawing of single-member districts. App. 12. These include limited voting, where a voter casts fewer votes than available candidates; cumulative voting, where a voter can cast multiple votes for a single candidate; and ranked choice voting, where candidates are ranked in order of preference and votes are transferred to lower-ranked candidates not elected on first-place votes if a

majority is not reached. *Id.*; Wash. Rev. Code § 29A.92.110(1) (court "may order appropriate remedies including, *but not limited to*, the imposition of a district-based election system" (emphasis added)); *id.* ("*If* the court orders a district-based remedy…" (emphasis added)). These alternate remedies have been considered and employed in federal vote dilution cases.[10]

Obviously, as the Washington Supreme Court commented, if these remedies are sought and implemented, "a showing of geographical compactness would be both irrelevant and unnecessary at any stage." App. 14. In other words, Gimenez is wrong to claim that "if there is racially polarized voting in a county, the county cannot elect commissioners at-large." Pet. 10. Actually, if there is racially polarized voting *and* a showing of vote dilution, as required by the statute, *see infra. at* 28-29; Wash. Rev. Code

---

[10] *See, e.g., Branch v. Smith,* 538 U.S. 254, 309-10 (2003) (O'Connor, J., concurring) ("a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies" the federal Voting Rights Act); *Moore v. Beaufort Cnty.*, 936 F.2d 159 (4th Cir. 1991) (upholding limited voting system following settlement); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 n. 24 (11th Cir. 1984) (noting cumulative voting and preferential voting as potential remedies); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (ordering use of cumulative voting); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 752 and n. 11 (N.D. Ohio 2009) (approving at-large, limited voting system); *United States v. Town of Lake Park*, No. 09-80507, 2009 WL 10727593 (S.D. Fla. Oct. 26, 2009).

§ 29A.92.030(1)(b), a county may be able to continue right along with its at-large system while implementing limited voting, cumulative voting, or ranked choice voting.

A court could also mandate a shift from at-large elections to districts but ensure compactness in drawing district lines. The WVRA eliminates compactness as a threshold requirement for a dilution claim but permits its consideration as "a factor in determining a remedy. App. 14; Wash. Rev. Code § 29A.92.030(5). Compact single-member districts represent another application of the statute which Gimenez would necessarily concede is constitutional, since his sole complaint is the statute's supposed disregard for compactness. Because Gimenez asserts a facial challenge on an incomplete record, he is unable to point to a single case, including Franklin County, where a county in Washington has replaced an at-large system with one or more noncompact districts.

Further, the statute reaches vote abridgement, not simply dilution. Wash. Rev. Code § 29A.92.020, 29A.92.030(1)(b). As the Washington Supreme Court observed: "The WVRA protects voters from all forms of abridgment, not just dilution. Gimenez does not explain why a group must demonstrate compactness to prove that their voting rights have been abridged by, for instance, the discriminatory administration of literacy tests." App. 38. Yet another constitutional application of the statute occurs, then, when a court enjoins practices that abridge citizens' votes but don't involve districting. Again, Gimenez doesn't argue otherwise.

Lastly, Gimenez's challenge to the WVRA raises all the red flags of striking down a statute on its face. It rests entirely on speculation layered over a "factually barebones record." *Wash. State Grange*, 552 U.S. at 450. Because he ignores the actual court order and district lines mandated in this case, it is pure speculation as to whether any of the new districts created in Franklin County are noncompact. For all the record indicates, none are. By the same token, there is no "necessity of deciding" the question Gimenez presents, *id.*, because there is no showing that the result reached by the trial court commits the sin his petition targets: a noncompact district. Any decision would therefore risk "formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied" in Franklin County. *Id.*

Above all, the decision Gimenez seeks from this Court "threaten[s] to short circuit the democratic process," *id.* at 451 by undermining not only the will of the people of Washington as embodied in the duly enacted WVRA, but also the will the people of Franklin County, whose elected commissioners chose to comply with that law and implement district voting in order to address palpable and longstanding vote dilution. Washington is attempting to govern its own political subdivisions as a matter of state law, and it could have required *all* of them to use single-member districts, as other states have. *See, e.g.*, N.M. STAT. § 3-12-1.1 (2013). Instead, the Washington Legislature adopted a flexible approach, granting localities multiple options so long as the jurisdiction is mindful of possible dilution.

There is no reason for the Court to decide Gimenez's claim of facial invalidity. If the WVRA produces an unconstitutional result in an actual case put before the Court with a developed record and without threshold defects, the Court can consider its constitutionality then.

B. Gimenez Lacks Standing

Gimenez transparently lacks standing to challenge the WVRA. There is little point in granting certiorari simply to affirm the dismissal of his claim for elementary lack of standing.

The Washington Supreme Court declined to consider whether Gimenez has standing to challenge the constitutionality of the WVRA, App. 39-40, but this Court has "an obligation to assure [itself] of litigants' standing under Article III before proceeding to the merits of a case," since federal judicial power extends only to actual cases and controversies. *Dept. of Educ. v. Brown*, 600 U.S. 551, 560 (2023) (cleaned up).

To have standing, "the plaintiff must have suffered an injury in fact … fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Neb.*, 143 S. Ct. 2355, 2365 (2023); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). The injury must be "concrete, particularized, and actual or imminent." *Davis v. F.E.C.*, 554 U.S. 724, 733 (2008). To be "particularized," an injury "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up); *Lujan*, 504 U.S. at n. 1. Put differently, the plaintiff must show he has "a personal stake in the

outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Moreover, it is the plaintiff's burden to allege facts that, if proven, would establish standing. *Spokeo*, 578 U.S. at 338; *see also Gill v. Whitford*, 585 U.S. 48 (2018). These averments must "affirmatively appear in the record" rather than be "gleaned from the briefs and arguments" on appeal. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546-47 (1986); *accord Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998).

Importantly here, the plaintiff's personal stake in the case cannot be shown by "assert[ing] a generalized grievance against governmental conduct of which [the plaintiff] does not approve." *United States v. Hays*, 515 U.S. 737, 745 (1995). Rather, this Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984).

These rules are no less applicable when, as here, a party alleges a violation of the Fourteenth Amendment's Equal Protection Clause. In *Allen*, for example, a nationwide class of Black parents of children in public schools sued the IRS for failing to ensure denial of tax-exempt status to discriminatory private schools, as the tax code required. *Id.* at 739. The asserted injury was "the mere fact of Government financial aid to discriminatory private schools" and the claim that the illegal exemptions "impair[ed] their ability to have their public schools desegregated." *Id.* at 752-53. The Court found standing lacking because the plaintiffs "complain[ed] simply that the

government is violating the law," and because they had not themselves suffered discrimination. *Id.* at 755. Rather, only "those persons who are personally denied equal treatment" have standing to assert a violation of the Equal Protection Clause. *Id*. at 754; *accord Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

More specifically, this Court has repeatedly held that a plaintiff only has standing to assert a claim of the sort Gimenez presents – racial gerrymandering of electoral districts under the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases – if he has been consigned to the specific district being challenged, and not simply some other newly configured district. That is true even if *all* district lines change, as they inevitably do, in the larger redistricting that occurred.

Hence, in *Hays*, this Court held that Louisiana voters unable to show they lived in the specific districts that had been racially gerrymandered lacked standing. *Hays*, 515 U.S. at 744-45. "[W]here a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference," the Court clarified. *Id.* Without such a residency requirement, a "plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id*. The plaintiffs' assertion of a global "right not to be placed into or excluded from a district because of the color of their skin" was unavailing in *Hays* because they failed to show "that *they* have suffered such treatment." *Id*. at 747 (emphasis in original).

The rule of *Hays* has been applied repeatedly since. The Court invoked it a year later in *Shaw v. Hunt*, where certain plaintiffs' claims were rejected for lack of standing because they offered no "specific evidence that *they personally* were assigned to their voting districts on the basis of race." 517 U.S. 899, 904 (1996) (emphasis added). The Court also applied the *Hays* rule in a case arising from redistricting in Alabama. *See Ala. Legis. Black Caucus v. Ala.*, 575 U.S. 254 (2015). That decision reiterates that racial gerrymandering claims apply "district-by-district," and that race must have infected "the drawing of the boundaries of one or more *specific electoral districts*." *Id.* at 262-263 (emphasis in original). This limitation on standing ensures that the plaintiff has suffered a particularized injury: "being personally subjected to a racial classification." *Id.* at 263 (cleaned up). Racial gerrymandering "directly threaten[s] a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State." *Id.* (emphasis in original); *see also N.C. v. Covington*, 585 U.S. 969, 976 (2018) ("[I]t is the segregation of the plaintiffs – not the legislature's line-drawing as such – that gives rise to their claims…. [T]he plaintiffs have standing to challenge racial gerrymanders only with respect to those legislative districts in which they reside"); *Gill v. Whitford*, 585 U.S. 48, 65-67 (2018) (no standing for partisan gerrymandering claims because plaintiffs did not proceed district-by-district and alleged no facts "showing disadvantage to themselves as individuals" (cleaned up)).

Gimenez patently flunks these basic tests of standing. His pleading in the trial court, a motion to intervene and answer and counterclaim asserting the

unconstitutionality of the WVRA, claims only that "Intervenor will be harmed inasmuch as he will not be able to vote in a commissioner district whose boundaries were drawn based on race-neutral criteria." CP 1325. His motion to intervene asserts "an interest in voting … in commissioner districts which are not drawn on race-based lines," and states that he "wants to continue to vote in commissioner districts whose boundaries are drawn on a race-neutral, not a race-conscious basis." CP 260-262. He makes no claim of having been assigned to a specific district that was racially gerrymandered. Indeed, he fails to mention or complain about "the drawing of the boundaries of one or more *specific electoral districts*" in Franklin County at all, and completely ignores the specific voting map ordered by the lower court. *Ala. Legis. Black Caucus,* 575 U.S. at 262. The record is silent about where Gimenez lives or votes; for all one can tell, he resides in a perfectly compact district not shaped by the race of voters in any way.

Consequently, Gimenez cannot claim to have been "personally denied equal treatment." *Allen*, 468 U.S. at 755. Voting rights are "individual and personal in nature," *Gill*, 585 U.S. at 65 (quotation omitted), and Gimenez has never alleged that his have been limited. This accounts for the curiosity of his being virtually absent from his own petition, which describes him simply as a "Hispanic Franklin County voter, [who] intervened to challenge the WVRA's constitutionality" but says nothing about any particularized injury he might have suffered. Pet. 3. Instead, Gimenez's complaint is simply that the WVRA "requires local governments" throughout the entire state to "change election systems based on

race." Pet. 14. This is nothing more than a nonspecific complaint "that the government is violating the law," *Allen*, 468 U.S. at 755, or, put differently, "a generalized grievance against governmental conduct of which [Gimenez] does not approve." *Hays*, 515 U.S. at 745; *Gill*, 585 U.S. at 66. As such, it fails to confer standing.[11]

Nor could Gimenez claim standing on the basis of somehow representing the interests of Franklin County rather than his own. Pet. 12 (stating that Gimenez "intervened to defend the County's existing system"). The duly elected government of Franklin County was the defendant in this lawsuit and chose to settle the case. In order to intervene as a matter of right, Gimenez was required to demonstrate his own, personal "interest relating to the… transaction which is the subject of the action." Wash Sup. Ct. Civ. R. 24(a)(2), which he did by asserting his individual desire to vote in "commissioner districts which are not drawn on race-based lines." CP 260. His motion to intervene urged the trial court to allow him to "join the lawsuit" so that he could "defend *his* interests" – not the county's interests – "which [were] not adequately represented by existing parties to the case." CP 263. (emphasis added). There is no basis in the record, such as a proper and official endorsement from the Franklin County Commission, permitting Gimenez to

---

[11] It is true that, leaving race aside, Gimenez, like all Franklin County voters, will have to vote in a specific district rather than county-wide, but there is no constitutional harm in that and Gimenez himself concedes that Washington could simply replace *all* at-large systems in the state with districts without offending the Constitution. Pet. 19-20.

litigate on the county's ostensible behalf against the wishes of its properly constituted government. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.").

Gimenez's inability to borrow standing from Franklin County in these circumstances is apparent from *Bender*, where a school board member attempted to appeal a judgment against the board in a First Amendment lawsuit, though the board itself declined to appeal. *Bender*, 475 U.S. at 538-39. There, as here, the intermediate appellate court ignored the question of standing, but this Court held that the board member could not proceed: "Mr. Youngman's status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal …. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 544. All the more so, of course, for someone like Gimenez, who isn't even an elected member of county government and has no authorization appearing in the record to litigate for it.

"[T]his Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill*, 585 U.S. at 72. Gimenez has no personal rights to vindicate here because the record lacks any factual allegation of particularized injury. The Court should therefore deny his petition.

C. There is No Circuit Split or Other Compelling Reason to Grant Gimenez's Petition

There is no other pressing reason to grant Gimenez's petition that might justify overlooking the ways in which it represents a poor candidate for certiorari. Lower courts have not divided on the WVRA, or on state-level voting rights statutes more generally. California's voting rights law is not identical to Washington's,[12] but to the degree that statute is relevant at all, lower courts have uniformly rejected challenges to it. *See Higginson v. Becerra*, 786 Fed. Appx 705, 2019 WL 6525204 (9th Cir. 2019)(mem.); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2007). These include a Ninth Circuit decision where challengers made arguments word-for-word identical to those here. App. 37. Yet that court found the issues so obvious that the decision is unpublished. *See Higginson,* 786 Fed. Appx. This Court then denied review. *See Higginson v. Becerra*, 140 S. Ct. 2807 (2020).

Gimenez warns that "[m]any political systems in states with similar laws are abandoning the at-large system in the face of racially polarized voting." Pet 25. But this is hardly a reason to grant his petition. After all, Gimenez concedes that there is no constitutional barrier to a state simply replacing *all*

---

[12] H.R. Doc. No. 107443, 64th Leg., Reg Sess. (Wash. 2015), https://app.leg.wa.gov/committeeschedules/Home/Document/107443.

at-large voting with districts. Pet. 19-20. And this Court has acknowledged that at-large systems are especially threatening to minority voting rights. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population" (cleaned up)); *accord Allen v. Milligan*, 599 U.S. 1, 18 (2023) ("Such a risk [of minority vote dilution] is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices" (quotations omitted)); *Growe v. Emison*, 507 U.S. 25, 40 (1993) ("We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts"). Eradicating persistent racial discrimination may be the reason some jurisdictions are abandoning at-large voting rather than, as Gimenez none too subtly implies, greedy civil rights lawyers. Pet. 25-26.

In the same vein, Gimenez decries that other states are now passing their own voting rights laws, though he cites only three: New York, Virginia, and Oregon. Pet. 26-27. None of these laws have been challenged, let alone generated conflicting decisions this Court might feel the need to correct or harmonize. Far better for the Court to wait and see if these laws give rise to litigation and differing constitutional interpretations. And far better to wait and see how other states craft such laws before this Court wades through the weighty federalism issues presented by a

federal court overriding state legislative choices governing their subdivisions' electoral systems. At some point, if a real litigant who has actually been harmed by a specific districting decision brings an as-applied challenge to one of these laws, the Court can decide on review. For now, Gimenez's parade of horribles in other states is unconvincing.

II. The Washington Supreme Court Correctly Decided that the WVRA is Constitutional in Any Case

Even if Gimenez's petition presented a stronger case for review, his actual complaint about the WVRA presents no serious constitutional question.

First, as noted above, Gimenez has brought a facial challenge to the WVRA. As a result, all Plaintiffs have to show is that the law has any constitutional application, and for the reasons discussed above there is no question that it does, nor does Gimenez argue otherwise. *See supra*, Point I(A). The Court therefore will have no basis to reach Gimenez's particular, isolated and hypothetical complaint about the statute.

If the focus narrows only to the litigation of dilution claims and the remedy of creating new districts, the statute is still plainly constitutional. That's because Gimenez's challenge is premised on a basic misconstruction of the WVRA. Gimenez repeatedly describes the law as "requiring counties to replace at-large elections with districts drawn[] based on racially polarized voting alone." Pet. 16-17. "All they had to show was voting was racially polarized in

the county," he claims of the Latino voters. Pet. 3.[13] But the WVRA doesn't mandate changes based only on racially polarized voting – a plaintiff must also show discrimination in the form of vote dilution. Wash. Rev. Code § 29A.92.030(1)(b). As the Washington Supreme Court correctly recognized:

> [C]ontrary to Gimenez's interpretation, a political subdivision cannot be compelled to do *anything* pursuant to the WVRA based on the "single factor" of "racially polarized voting"…. In fact, the plain language of the WVRA provides that a plaintiff must prove *both* that "[e]lections in the political subdivision exhibit polarized voting" *and* that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(b)…. The WVRA does not compel local governments to do anything based on *race*. Instead, the WVRA may compel local governments to change their

[13] *See also* Pet. at i ("Without that requirement [compactness], a municipality must change from at-large elections to districts when there is racially polarized voting."); *id*. at 2 ("Washington requires local governments to dismantle existing at-large election systems… just because racially polarized voting exists."); *id*. at 9 ("In practice, a political subdivision violates the WVRA anywhere that voting is racially polarized.").

> electoral systems to remedy proven *racial discrimination*.

App. 32 (emphasis in original).[14]

To make the point even clearer, the Washington Supreme Court observed that the WVRA simply "codifies the following, indisputable propositions:" (1) voters can belong to a race, color, or language minority group; (2) polarized voting is possible, (3) polarized voting *plus* dilution can result in unequal electoral opportunities; and (4) the law can remedy discrimination based on effect as well as intent. App. 33-34. Rather than dispute this, Gimenez attacks a straw man – a law that would require voting changes without a showing of dilution, but which doesn't actually exist. Pet. 2. Similarly, Gimenez is equally wrong that liability under the WVRA attaches "without any further requirement that the County is responsible for any alleged dilution." Pet. 20. If vote dilution is occurring, it is because the jurisdiction devised and maintains a voting system, such as at-large voting, long known to cause it. *See supra.* at 25-26 (decisions recognizing that at-large systems pose greatest threat of diluting minority votes).

It is possible, of course, to have polarized voting without dilution, in which case there has been no

---

[14] Mirroring the inquiry under *Gingles*, Washington courts may also consider other factors beyond dilution and polarized voting in assessing whether a violation of the WVRA has occurred, such as the history of discrimination, the use of other discriminatory voting practices, financial access, the effects of past discrimination in other fields, and the use of racial appeals in campaigns. Wash. Rev. Code §29A.92.030(7); *Gingles*, 478 U.S. at 43-45.

violation of the WVRA. Wash. Rev. Code § 29A.92.030(1)(b). That would be true whenever members of a covered group are too few in number in a particular jurisdiction to elect candidates of their choice, despite polarized voting. Indeed, Gimenez backhandedly acknowledges this in asserting that, "[u]nder the statutory scheme, such 'racially polarized voting' is the reason why a county like Franklin may be forced to abandon its at-large system, while other counties *without racial diversity* or without racially polarized voting can keep at-large systems." Pet. 21 (emphasis added). A county without racial diversity will not have vote dilution, and as Gimenez concedes here, that means no changes will be necessary even though its voters are polarized. *See Gingles*, 478 U.S. at 50 n. 17 (district where "minority group is so small in relation to the surrounding white population" will not be able to elect candidates of choice in any case). Conversely, there may be counties where polarized voting exists but members of the protected class are nonetheless able to elect candidates of their choice though, for example, a modest degree of crossover voting. In that event, too, an at-large system would present no potential violation of the WVRA because there is no dilution.

Gimenez is also wrong to claim that compactness serves as an indispensable "constitutional guardrail" preventing violations of the Fourteenth Amendment. Pet. 1-2, 17-18. Actually, the compactness requirement in *Gingles* and later decisions is a function of the terms of Section 2. *See Gingles*, 478 U.S. at 50 n. 17 (describing compactness as a necessary precondition to showing injury under § 2); *accord Allen,* 599 U.S. at 17 ("To succeed in

proving *a § 2 violation* under *Gingles*, plaintiffs must satisfy three 'preconditions,'" including compactness (emphasis added)); *Wis. Leg. v. Wis. Elect. Comm'n*, 595 U.S. 398, 402 (2022) (*Gingles* "provided a framework demonstrating *a violation* of that sort," *i.e.*, of § 2 (emphasis added)); *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) ("The [*Gingles*] Court identified three 'necessary preconditions' for a claim that the use of multimember districts constituted actionable vote dilution *under § 2*" (emphasis added)). As the Washington Supreme Court noted, Gimenez "does not cite a single case – from any court – that actually says what he claims," that is, that compactness is constitutionally mandated. App. 36. On the contrary, as that court observed, the line of cases Gimenez invokes here, beginning with *Shaw*, adjudicated as-applied challenges to specific gerrymandered districts. App. 36-37.

Gimenez relies heavily on the plurality opinion in *Bartlett* in this regard, but that decision doesn't hold that compactness is an essential constitutional "guardrail," either. Pet. 1-2. *Bartlett* didn't involve noncompact majority-minority districts, it simply rejected the very different claim that § 2 requires the drawing of districts where minority voters can only elect candidates of their choice with the help of crossover votes from the majority. *See Bartlett*, 556 U.S. at 14-23. Even then, *Bartlett* was careful to note, "[o]ur holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." *Id*. at 23. Other decisions have similarly observed that states may devise remedial measures different from those used to enforce § 2. *See Voinovich*, 507 U.S. at

156 ("Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true."); *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("To be sure, § 2 does not forbid the creation of a noncompact majority-minority district.").

Ultimately, the WVRA doesn't demand strict scrutiny because it doesn't "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The Washington Supreme Court correctly held that "the WVRA on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote." App. 35. Instead, it "mandates equal voting opportunities for members of every race, color, and language minority group. Therefore, Gimenez's facial equal protection claim triggers rational basis review, not strict scrutiny." *Id.* And there is no argument from Gimenez that the statute flunks the rational basis test.

Rather than discriminate against individuals or parcel out benefits or burdens according to membership in a racial group, the WVRA equally protects voters of *all* races, colors, and language minorities, and therefore does nothing more than prohibit discrimination in voting against everyone. Wash. Rev. Code § 29A.92.010(6) (any person in class of voters who are members of "a race"). That means white voters suffering vote dilution can sue under the WVRA, too – just like any other member of any other

race. Such a traditional remedial civil rights statute is not "expressly race-based," Pet. 3, and can hardly be equated with the sort of official discrimination that warrants strict scrutiny. *See Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 318 (2014) (Scalia, J., concurring) ("I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution."). As this Court has observed more than once, mere consciousness of race in districting – in this case, to remedy voting discrimination – is not prohibited. *See Allen*, 599 U.S. at 30 ("When it comes to considering race in the context of districting, we have made clear that there is a difference between being aware of racial considerations and being motivated by them. The former is permissible; the latter is usually not." (cleaned up)); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

CONCLUSION

The petition for writ of certiorari suffers significant threshold defects and lacks merit. This Court should deny review.

Respectfully submitted,

MARTIN J. SIEGEL, Director
CIANNE E. JIMENEZ
FAATIMA OVAIS
DAVID J. SEGAL
UNIVERSITY OF HOUSTON LAW CENTER
APPELLATE CIVIL RIGHTS CLINIC
4170 Martin Luther King Blvd.
Houston, Texas 77204
(713) 743-2094

EDWARDO MORFIN
MORFIN LAW FIRM PLLC
7325 West Deschutes Avenue
Suite A
Kennewick, WA 99336-6705
(509) 380-9999

CHAD W. DUNN
Counsel of Record
SONNI WAKNIN
BERNADETTE REYES
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90065
(310) 206-8431
chad@uclavrp.org

Counsel for Respondents