No. 23-500

IN THE

# Supreme Court of the United States

JAMES GIMENEZ,

*Petitioner*,

v.

FRANKLIN COUNTY, A WASHINGTON MUNICIPAL ENTITY, CLINT DIDIER, RODNEY J. MULLEN, LOWELL B. PECK, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE FRANKLIN COUNTY BOARD OF COMMISSIONERS, GABRIEL PORTUGAL, BRANDON PAUL MORALES, JOSE TRINIDAD CORRAL, AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

## PETITIONER'S REPLY BRIEF


Joel B. Ard
ARD LAW GROUP PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
(206) 701-9243

Bryan Weir
*Counsel of Record*
Taylor A.R. Meehan
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
bryan@consovoymccarthy.com

*Counsel for Petitioner*


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## REPLY

Respondents devote their brief to supposed vehicle problems, which they assert preclude this Court's review. None of them has merit. Gimenez has standing. The Court can resolve his challenge, which is to a specific part of the Washington Voting Rights Act and its application to Franklin County, not to the entire law. And the Court should resolve his challenge, which raises an important federal question under Rule 10: whether a state law must satisfy strict scrutiny before it can require changes to election procedures because of race.

On the merits, no one can dispute that Washington designed the WVRA specifically to eliminate the guardrail that keeps the federal Voting Rights Act from running headlong into the Equal Protection Clause. The *Gingles* 1 precondition limits federal challenges to only those locations where minority voters could make a majority of a compact, reasonably configured district. *Allen v. Milligan*, 599 U.S. 1, 18 (2023). Washington has no such limit—by design. All that is left to establish liability under the WVRA then—and force localities like Franklin County to switch from at-large elections to elections by districts—are the "second and third *Gingles* factors," which themselves are just "racially polarized voting" among voters. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). That statutory scheme triggers strict scrutiny, not the rational basis review applied by the Washington Supreme Court. The Court should thus either summarily reverse to require the Washington

Supreme Court to apply strict scrutiny or grant the petition for plenary review.

**I. This case is an ideal vehicle.**

1. Respondents contend (at 18-24) that Gimenez "lacks standing to challenge the WVRA." Respondents did not challenge Gimenez's standing below. Respondents "opposed Gimenez's arguments on the merits, but they *agreed* that direct review" of his claim "was appropriate." App. 20 (emphasis added). In his petition, Gimenez pointed out that Respondents "agreed that direct review was appropriate" before the Washington Supreme Court, *see* Pet. 12, yet Respondents make no attempt to reconcile that concession with its standing argument.

Nor did the Washington Supreme Court "decline[] to consider whether Gimenez has standing," as Respondents newly claim. BIO 18. "Washington applies the standing test used by the United States Supreme Court." *In re Reyes*, 315 P.3d 532, 544 (Wash. Ct. App. 2013). And like federal courts, Washington courts cannot assume a party has standing and then reject a claim on the merits. *See State v. Johnson*, 315 P.3d 1090, 1099 (Wash. 2014) (en banc) ("Where a party lacks standing for a claim, we refrain from reaching the merits of that claim."); *Angelo Prop. Co., LP v. Hafiz*, 274 P.3d 1075, 1085 (Wash. Ct. App. 2012) ("Lack of subject matter jurisdiction renders a trial court powerless to decide the merits of the case."). It would thus have been wildly inappropriate for the Washington Supreme Court to "decline[] to consider whether Gimenez has standing," as Respondents say it did (at 18), and then reach the merits of his case.

The court did no such thing. On appeal, *amici* argued that Gimenez "lack[ed] standing to appeal *as a matter of right*" under state appellate procedure. App. 4 n.4 (emphasis added); *see* One America Amicus Br. at 7 (arguing Gimenez didn't have standing to appeal under Washington Rule of Appellate Procedure 3.1). The court merely found it unnecessary to "reach … amici's argument." App. 4 n.4.

In any event, there is no question that Gimenez has standing. Before the WVRA, Franklin County had at-large general elections where Gimenez could vote for all county commissioners. But after the WVRA forced Franklin County to replace its at-large system with general elections by districts, Gimenez can vote for only one commissioner. Respondents themselves acknowledge this harm. *See* BIO 23 n.11. That change reduced the number of candidates for whom Gimenez may vote.

That harm is sufficient for standing. The Fifth Circuit has explained, for example, that a plaintiff has standing where he was "deprived of his pre-existing right to vote for all the members of the city council which has jurisdiction over the city where he lives." *League of United Latin Am. Citizens v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011); *see e.g.*, *Higginson v. Becerra*, 733 F. App'x 402, 403 (9th Cir. 2018) (rejecting the same argument against a voter's standing to challenge the California Voting Rights Act). The same is true for Gimenez here.

That Washington could have "replace[d] all at-large systems in the state with districts without offending the Constitution" makes no difference. BIO 23

n.11. It is beyond dispute that, even if a legislature has the authority to act on a particular issue, it cannot do so based on race. *See, e,g*, *City of Richmond v. United States,* 422 U.S. 358, 379 (1975) ("[A]cts generally lawful may become unlawful when done to accomplish an unlawful end."). In other words, race-based injuries are a "constitutional harm" that courts can redress. BIO 23 n.11.

The Respondents' lengthy focus (at 20-23) on a different standing theory—"[w]here a plaintiff resides in a racially gerrymandered district"—is inapposite. *United States v. Hays*, 515 U.S. 737, 744-45 (1995). Gimenez's claim is that the state law unconstitutionally replaces at-large elections with elections by districts. He does not ask for a redrawn single-member district as a plaintiff would in a racial gerrymandering case.



2. Respondents next argue (at 11-18) that the Court should deny the petition because it is a facial challenge to the WVRA. It isn't. "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). It is "really just a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Gimenez makes no such claim. He did not challenge the WVRA in its entirety; he challenged only the WVRA's form of dilution, which forced Franklin County to change its electoral system based on racially polarized voting. That is an as-applied challenge.

To argue otherwise, Respondents point to statements from Gimenez's reply brief before the Washington Supreme Court to recast this case as something it never was. BIO 12. To be sure, the "line between facial and as-applied challenges can sometimes prove 'amorphous.'" *Bucklew*, 139 S. Ct. at 1128. But from the start, Gimenez has specifically challenged the WVRA as it relates to Franklin County's forced change of election system. *See* Gimenez Opening Br. (SCOWA) 45 ("The Act requires Franklin County to switch from at-large electoral elections to district based elections[.] ... Plaintiffs ask this Court to force Franklin County to abandon at-large elections under WVRA solely due to racial reasons.") *id.* at 47 ("WVRA requires the court to make race predominate over all other factors in compelling Franklin County to abandon at-large general elections and draw new commissioner district maps."). Respondents are simply wrong to say (at 12) that Gimenez "continually elected not to challenge the specific order and district map entered by the trial court." He repeatedly did so. *See, e.g.*, Gimenez Opening Br. (SCOWA) at 53-54 ("This Court should reverse the judgment below and remand the case with instructions to dismiss it.").

Whatever the taxonomic label, the WVRA's vote-dilution rule was applied to Franklin County and is subject to strict scrutiny. *See Bucklew*, 139 S. Ct. at 1128; Pet. 19-22. The Washington Supreme Court said it wasn't. And only this Court can fix that error.

3. Finally, Respondents highlight (at 25) that there is no circuit split on the question presented. Gimenez never contended there was. But that does not preclude

this Court's review of the important federal question raised by the Washington Supreme Court's decision on its state voting law, which has been replicated elsewhere. Review is warranted where a state court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). That is precisely the posture here.

The Washington Supreme Court has held a law that requires municipalities to switch from at-large elections to elections by district because of race is not subject to strict scrutiny. If that decision stands, voting rules for millions of Washingtonians will change because of race—specifically, racially polarized voting among voters, even if the government did nothing to perpetuate that racially polarized voting. Without this Court's review, at the very least millions of others in California, Oregon, New York, and Virginia will face the same result. *See* Pet. 26-27.

Respondents only real rejoinder is to repeat that there is no circuit split. The Court should not "wait and see if these laws give rise to … differing constitutional interpretations." BIO 26. As Gimenez already explained (Pet. 23-27, 30), the WVRA and its mirrors are designed to impose immense pressure on municipalities to settle by combining irrefutable liability—based on the existence of racially polarized voting—with expansive attorney's fees and cost recoveries for plaintiffs. That resulted in staggering recoveries against municipalities that have tried to vindicate the Constitution's guarantees rather than settling. Pet. 25-26. Those recoveries only incentivize municipalities to settle quickly.

This case was no exception. Franklin County concluded that "the citizens of Franklin County exhibit polarized voting," and accordingly decided that it could not "in good faith oppose Plaintiffs' current Motion for Summary Judgment" and changed its voting rules. App. 95-96; Pet. 11. Even though the County explained "that the current election system was not imposed to discriminate against any protected class" and "has been used in Franklin County for decades," the County saw its only option as conceding liability and switching to single-member districts. *Id.*

Nor can the Court rely on voters like Gimenez to intervene and bring cases to it. Gimenez, in his capacity as a voter, pursued his Equal Protection Clause challenge all the way to the state supreme court. And for his efforts, the Washington Supreme Court ordered $67,055 in fees to be paid by him to plaintiffs because he "forced the plaintiffs to spend an entire year litigating this case." App. 41, 57. With the Washington Supreme Court's precedent in place, at great cost to Gimenez, no future voter will follow his footsteps in Washington. And it is highly unlikely any voter would risk the same in any other state.

That there is no circuit split does not diminish this case's importance. This Court does not hesitate to hear cases that are exceptionally important even in the absence of a circuit split. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020). And by providing clarity on the issue now, the Court's decision would provide guidance across the

country for states that have passed similar laws or are considering doing so right now. *See* Pet. 27. The question presented satisfies Rule 10's criteria.

**II. The WVRA triggers strict scrutiny.**

The Court's redistricting precedents have long struck a careful balance between compliance with the federal Voting Rights Act and the Equal Protection Clause, lest states and localities be subject to "competing hazards of liability." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018); Pet. 5-8. The three *Gingles* factors together preserve that balance. The first of those factors—the compactness requirement—plays the most critical role. Pet. 7-8. It is the constitutional guardrail that ensures Section 2 does not become a rule requiring "maximum possible voting strength" for one minority group over another in any and all locales and indefinitely into the future. *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009) (plurality op.); *see also Allen*, 599 U.S. at 43-45 (Kavanaugh, J., concurring). Without *Gingles* 1, the other two factors' focus on racially polarized voting would control the analysis, which would raise "serious constitutional questions" by "unnecessarily infus[ing] race into virtually every redistricting." *Id.* at 21 (quotation marks omitted).



The Washington Legislature explicitly rejected the *Gingles* 1 compactness requirement when it enacted the WVRA. As the Supreme Court of Washington explained, "[u]nlike Section 2" of the federal Voting Rights Act, "the WVRA specifically rejects the first *Gingles* factor as a threshold requirement: 'The fact that members of a protected class are not geographically compact or concentrated to constitute a majority

in a proposed or existing district-based election district shall not preclude a finding of a violation.'" App. 14 (quoting RCW §29A.92.030(2)); *see also id.* at 36 ("Gimenez further points out, correctly, that Section 2 of the FVRA has a threshold requirement for vote dilution claims that the WVRA does not have."). By jettisoning any requirement similar to the *Gingles* 1 requirement, the WVRA requires race-based changes to voting systems anywhere there is racially polarized voting. Even in diverse and integrated communities where no minority group would form a majority in a single-member district, the communities must change their voting schemes because voters of different races prefer different candidates. *Cf. Allen*, 599 U.S. at 28-29 (explaining "that is because as residential segregation decreases … satisfying traditional districting criteria such as the compactness requirement 'becomes more difficult'"). All that's left to show dilution under the WVRA is racially polarized voting. Strict scrutiny applies to such a scheme. *See* Pet. 19-22.

Respondents contend that "the WVRA doesn't mandate changes based only on racially polarized voting" because "a plaintiff must also show discrimination in the form of vote dilution." BIO 28. Respondents' arguments reveal the tautology of the Washington scheme. Washington prohibits vote "dilution." App. 76; Wash. Rev. Code §29A.92.020. And such vote "dilution" occurs when "[e]lections in the political subdivision exhibit polarized voting." *Id.* §29A.92.030(1)(a). The WVRA eschews any other way of proving vote dilution under the VRA—including, of course, *Gingles*

1.[1] The WVRA's command to change voting schemes is "unexplainable on grounds other than race," *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)—a point the Washington Supreme Court never considered, Pet. 13, 20-21.

## CONCLUSION

Petitioner does not ask the Court to decide whether the WVRA writ large violates the Equal Protection Clause. *See* BIO i. Petitioner asks only that this Court subject the WVRA's command that Franklin County change its voting scheme, based on race, to strict scrutiny. It may be that Washington has grounds for legislating with such a broad racial brush. But it first must put those grounds to a more searching inquiry. The Court can ensure that happens either by summarily reversing or granting plenary review on the merits.



[1] "Proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required for a cause of action to be sustained." App. 78; RCW §29A.92.030(6). Nor is it "necessary" to show a "history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at large elections, … [or] the extent to which members of a protected class bear the effects of past discrimination." *Id.*

Respectfully submitted,

Joel B. Ard
ARD LAW GROUP PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
(206) 701-9243

Bryan Weir
*Counsel of Record*
Taylor A.R. Meehan
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
bryan@consovoymccarthy.com

*Counsel for Petitioner*

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