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SUPREME COURT OF THE STATE OF WASHINGTON

GABRIEL PORTUGAL, ET AL.

RESPONDENTS,

VS.

FRANKLIN COUNTY,

DEFENDANT,

AND

JAMES GIMENEZ,

APPELLANT.

ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. Introduction

The Washington Constitution protects the right to vote. Wash. Const. art. I, §19. To do so, the Legislature enacted the Washington Voting Rights Act (WVRA) which provides for protections against vote dilution through a voter initiated suit or through voluntary changes by a local government. RCW 29A.92.005. Respondents are three Latino¹ voters (Latino Voters) who brought suit against Defendant Franklin County (County) under the WVRA. Latino Voters alleged that the use of at-large elections for the County Commission caused impermissible vote dilution of the Latino community. The underlying lawsuit is settled, but Appellant James Gimenez (Gimenez) challenged the constitutionality of the WVRA

¹ Respondents use the terms “Latino” and “Hispanic” interchangeably to refer to individuals who self-identify as Latino or Hispanic. Additionally, the terms “Latino” and “Hispanic” mean persons of Hispanic/Spanish origin as defined by the United States Census Bureau and U.S. Office of Management and Budget (OMB).

during the proceedings of the suit and has now appealed the trial court's decision.

Recognizing the Legislature's right under the Washington Constitution to remedy vote dilution, the trial court upheld the WVRA. Respondents agree that determining the constitutionality of the WVRA is a fundamental and urgent issue of broad public import that requires prompt and ultimate determination by this Court under RAP 4.2(a)(4). Elections are not replicable and there is an urgent need for final resolution of this litigation. This Court should accept direct review and affirm that the WVRA is constitutional.

II. Counterstatement of the Issues Presented for Review

- (1) Is a party who challenges the constitutionality of a law under the Uniform Declaratory Judgement Act required to provide notice to the Washington Attorney General of the challenge?
- (2) Does the WVRA violate the Wash. Const. Art. 1 § 12?

(3) Is a named governmental defendant who is responsible for, or condones, the intervention of a third party to challenge the WVRA's constitutionality also responsible for possible attorney fees incurred to defeat the intervenor's challenge?

III. Nature of Case and Decision

After filing the statutorily required notice letter with the County in October 2020, Latino Voters filed suit under the WVRA. Specifically, they alleged that the use of at-large methods of election for County Commissioner districts had the effect of diluting Latino voters from being able to elect candidates of choice. CP 1-18. To remedy the vote dilution, Latino Voters requested that the trial court order single-member district elections for County Commissioner seats. *Id.*

Gimenez's counsel was initially retained by one of the named defendants in the suit, County Commissioner Clint Didier, for the purpose of directly challenging the WVRA's constitutionality. *See* CP 444 ("Commissioner Didier

announced that the UCLA firm is suing [] County... Commissioner Didier has hired Joel Ard to represent him personally.”). Commissioner Didier ardently opposed imposition of single member districts throughout the notice period and the litigation.² Latino Voters opposed Commissioner Didier’s intervention given that he was already a party to the case and Ard filed an intervention on behalf of another County citizen, Gimenez. *See* CP 260-66.

Before Gimenez intervened in the case, Latino Voters filed a motion for summary judgment that was uncontested by the County, as the County’s expert concluded that electoral conditions in the County violated the WVRA. *See* CP 168-257. The trial court granted summary judgment finding a violation of the WVRA. *See* CP 258-9.

Thereafter, at Commissioner Didier’s direction, the

² *See* County Commissioner’s Meeting (Jan. 11, 2022) from 1:01:30 to 1:03:32 (Commissioner Didier continued to push for at-large districting even after told that at-large districting would violate the Federal Voting Rights Act.)

Commission discharged its attorneys, retained counsel from a neighboring county, and filed a motion to vacate the summary judgment order. The County offered no new evidence and no new expert opinion. Despite this, the trial court vacated the partial summary judgment, which prevented Latino Voters from obtaining relief for the 2022 elections.³ No new trial date was scheduled, and no scheduling order was entered. Due to several unusual incidents, Latino Voters also filed a motion to transfer venue, which was not granted. CP 377-524.

In November 2021, Gimenez filed their motion for judgment on the pleadings challenging the WVRA's constitutionality. Gimenez also contested Latino Voters' standing. In response, Latino Voters filed a motion to dismiss for lack of subject matter jurisdiction because Gimenez was required, but failed, to notify the Washington Attorney General. CP 643-648. The motion for judgment on the pleadings was denied by the trial court. CP 678-681.

³ RCW 29A.92.(3)(a).

By written order, the trial court rejected all of Gimenez's arguments, holding that (1) the WVRA was not repealed by implication by subsequent legislation; (2) the WVRA, as a remedial statute, grants standing to voters who are members of a race, color, or language minority group and is "not limited to those who are a minority within the specific county in question"; and (3) the WVRA does not violate the Washington or United States Constitutions. *Id.* In finding the WVRA constitutional, the court stated that, "Intervenor has failed to establish that there are no set of circumstances where the WVRA would be valid." *Id.* at 680.⁴

Thereafter, the County again changed counsel and Latino Voters filed a motion to schedule a trial. A new trial date was set for May 11-17, 2022, after the deadline set by statute.⁵ Prior

⁴ The court's order is also consistent with the Ninth Circuit's precedent in *Higgins v. Becerra*, 786 Fed. Appx. 705 (9th Cir. 2019)(finding the California Voting Rights Act constitutional under the Equal Protection Clause of the Fourteenth Amendment.).

⁵ RCW 29A.92.100 ("In an action filed pursuant to this chapter, the trial court shall set a trial to be held no later than on year after the filing of a complaint, and shall set a discovery and motions calendar accordingly.").

to trial, witnesses were deposed, and trial exhibits were exchanged. Gimenez, while included in correspondence, did not take part in any discovery, including the court-ordered pre-trial conference.

After extensive negotiations, the case settled. Under the terms of the settlement, the County agreed to implement single-member district based elections starting in 2024 while using the County's approved map. CP 1300-1304. The agreement also included the payment of some attorneys' fees. *Id.*

Unbeknownst to Latino Voters, Commissioner Didier, although voting in favor of the settlement in Commission public meetings, was simultaneously working with Gimenez and his counsel to subvert the settlement. Resp. Appx. A. at 12 (“Francis, Clint alerted me that you might be discussing settlement. I certainly don’t expect [my] client to stand in way of a favorable resolution...”) As part of this plan, Gimenez sought attorney’s fees from Latino Voters. *See* Resp. Appx. B, Ex. C at 2 (In an email communication to Plaintiffs, Gimenez’s

counsel stated, “While I note that I think I might legitimately tally other additional hours as responsive to that Motion, Mr. Gimenez will consider his concerns resolved for payment of \$9,850.”).

On May 9, 2022, the trial court entered an agreed order implementing the settlement terms. Gimenez appeared virtually at this hearing and tried to prevent the order’s entry. The trial court denied Gimenez’s motion for fees. Gimenez appealed to this Court.

IV. Grounds for Direct Review

This Court should grant direct review pursuant to RAP 4.2(a)(4) for the following reasons. First, this Court is the appropriate court to make the ultimate determination of the constitutionality of legislative enactments. Second, time is of the essence. Latino Voters and the County cannot wait to determine how and when to implement the new election system while this issue is in the Court of Appeals. Lastly, this Court must also determine if notice to the Attorney General under RCW

7.24.110, is required when a party challenges the constitutionality of Washington statutes and the proper interpretation of the attorneys' fees provision of the WVRA.

A. This Court is the Best Suited Court to Determine the Constitutionality of the WVRA

This Court is tasked with the role of interpreting the Washington Constitution. Indeed, this Court “is the final arbiter of the meaning of Washington statutory law.” *In re Petersen*, 138 Wn.2d 70, 80-81, 980 P.2d 1204 (1999). Here, the trial court ruled on the constitutionality of the WVRA and engaged in statutory interpretation. The trial court’s determinations, however, are not final. A determination by an intermediate Court of Appeal would also not provide final resolution to the presented issues. Only this Court can provide finality to legal questions presented by this case. As such, direct review is warranted under RAP 4.2(a)(4).

B. The Constitutionality of the WVRA Presents a Case of Broad Public Import that Requires Prompt and Ultimate Determination

Cases involving voting rights, elections, and the structure of local governments are urgent issues of fundamental rights and of broad public importance that require prompt and ultimate determination. *See Foster v. Sunnyside Valley Irr. Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984). Elections are finite and every election that continues under a dilutive map harms voters. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (finding that Latinos in Los Angeles County suffered an injury of intentional vote dilution that “has been getting progressively worse, because each election has deprived Hispanics of more and more of the power accumulated through increased population.”).

Recognizing the impact that voting related cases have on the public, this Court has granted direct review in cases involving legislative acts placing requirements on elective offices of local governmental bodies. *See Spokane Cnty. v. State*, 196 Wn.2d 79, 83, 469 P.3d 1173 (2020); *State ex rel. Royal v. Bd. of Yakima*

Cnty. Comm'rs, 123 Wn.2d 451, 455, 869 P.2d 56 (1994); *City of Seattle v. State*, 103 Wn.2d 663, 667, 694 P.2d 641 (1985).

This issue impacts not just impact Latino Voters in Franklin County, but all voters in Washington. Under the WVRA, school boards, city councils, and county commissions across the state are encouraged to voluntarily change their electoral systems to remedy vote dilution. RCW 29A.92.040.⁶

The resolution of this case is urgent. County elections under new voting systems will be taking place in 2024. The affected parties in this case, voters, and political subdivisions statewide, cannot wait months through the appeals process for resolution. Given the previous and current behavior of the County and its individual commissioners, the implementation of this settlement relies on the finality of a ruling by this Court upholding the

⁶ This WVRA provision has already influenced the Pasco School District #1, within Franklin County, to leave behind their at-large electoral system. *See Board of Directors Election System, PASCO SCHOOL DISTRICT #1*, <https://www.psd1.org/domain/2058> (last visited Jul. 9, 2022).

WVRA's constitutionality before the May 2024 candidate qualifying period. Direct review is merited under RAP 4.2(a)(4).

C. RCW 7.24.110 Requires Notice to the Attorney General When the Constitutionality of a Legislative Enactment is Challenged

Generally, if the language of a statute is clear, its meaning “is to be derived from the language of the statute alone.” *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). RCW 7.24.110, states:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

The fact that this provision only applies to matters under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24.110, is not clear from a plain reading of the statute and rather seems to broadly apply to any constitutional challenge to a statute.

Indeed, a lower court of appeals described the statutory provision as “confusingly” worded. *Matter of Adoption of C.W.S.*, 196 Wn. App. 1064 at *4 (2016). Other Courts of Appeals opinions have had conflicting guidance regarding this notice provision. *See Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 160–61, 135 P.3d 946 (2006)(“A plaintiff who seeks to have a statute declared unconstitutional must provide the Attorney General with notice of the action. RCW 7.24.110.”); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 846, 347 P.3d 487 (2015)(dismissal of constitutional claims challenging the facial constitutionality of a statute is appropriate where the Attorney General has not been notified).

Regardless of the procedural maneuvering of Gimenez to challenge that law, Gimenez failed to notify the Attorney General of his constitutional challenge to the WVRA. This Court should address that failure.⁷

⁷ There is also a question of whether Gimenez is an “aggrieved party” under RAP 3.1.

D. A Named Defendant That Induces the Intervention of a Third Party Should be Responsible for Attorney Fees and Costs Associated with the Prevailing Party

The WVRA permits the award of attorney fees to the prevailing plaintiff or plaintiffs. *See* RCW 29A.92.130. Here, Gimenez is undoubtedly responsible for any attorney fees that Latino Voters may be awarded. The responsibility of Commissioner Didier and the County, however, are unclear. Commissioner Didier has induced the intervention of Gimenez, and the County's litigation strategy has allowed Commissioner Didier's intervention as a private citizen. *See* CP 344. Both should be responsible for fees arising from this appeal.

The attorney fee provision in the WVRA, and how such provision ought to be enforced, has never been addressed by *any* court and is a matter of first impression. The question of responsibility and enforcement of fees is an issue meriting direct review by this Court under RAP 4.2(a)(4).

V. Conclusion

In passing the WVRA, the Legislature enacted monumental voting rights protections to effectuate the guarantees in the Washington Constitution. Latino Voters suffered from vote dilution due to the use of the at-large method of election for County Commissioner. Latino Voters ask this Court to grant direct review under RAP 4.2(a), to ultimately and urgently resolve key issues for fair elections in our state.

* * *

This document contains 2,350 words, excluding the parts of the document exempted from the word count by RAP 18.17.

July 11, 2022

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Certificate of Service

I hereby certify under penalty of perjury under the laws of the United State of America that on July 11, 2022, I filed the foregoing Brief, Case No. 100999-2, through the Washington State Appellate Courts' Secure Portal which gives electronic notice of the filing to all active parties in the case.

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