No. 97739-9

SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY, a Washington municipal entity; AL FRENCH, an individual taxpayer and current Spokane County Commissioner; JOHN ROSKELLEY, an individual taxpayer and former Spokane County Commissioner; and WASHINGTON STATE ASSOCIATION OF COUNTIES, a Washington non-profit association

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF *AMICI CURIAE* ACLU OF WASHINGTON AND ONEAMERICA

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ATTORNEYS FOR AMICUS CURIAE ACLU OF WASHINGTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

I. INTRODUCTION

The Washington Voting Rights Act (WVRA) was enacted in 2018 to ensure that local electoral systems do not violate the state or federal constitutions by denying race, color, or language minority groups an equal opportunity to elect candidates of their choice. It prohibits political subdivisions, including counties, from maintaining discriminatory electoral systems; provides voters a state cause of action to remedy violations of the Act; and grants political subdivisions the authority to voluntarily remedy a potential violation in a manner responsive to local circumstances.

Although the WVRA is not subject to challenge here, the superior court raised the WVRA in upholding the statute at issue: SHB 2887 (2018), which Appellants argue violates the uniformity clauses of Washington's Constitution. The parties, while offering competing characterizations of the WVRA, both agree that the WVRA does not violate the uniformity requirements. Indeed, as explained in this brief, the WVRA complies with the uniformity clauses, and the Court should not interpret these clauses in any manner that calls the WVRA's constitutionality into question or limits the flexible remedies available under it.

II. IDENTITIES AND INTERESTS OF AMICI

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonprofit, nonpartisan organization with over 135,000 members

and supporters. It is dedicated to the preservation and defense of civil liberties and civil rights. The ACLU has expertise in the right to vote and its intersection with the uniformity clauses of the Washington State Constitution at issue in this case, as well as their implications regarding the WVRA.

OneAmerica is the largest organizing, civic engagement, and advocacy organization in Washington State with grassroots community members across the state. OneAmerica's mission is to advance justice and democracy by building power in immigrant and refugee communities at the local, state, and federal level, with key allies. OneAmerica's intended impact is to bring tangible improvement to the lives and opportunities of its members and communities by electing people from their own communities into office, creating a more reflective democracy. OneAmerica's members advocated for more than six years for reforms to Washington State election laws, finally succeeding in 2018 by getting the Legislature to enact the WVRA which allows local jurisdictions to change election systems that deny minority voters equal opportunity to elect candidates of choice.

III. STATEMENT OF THE CASE

Amici concur with and adopt the statement of the case set forth in the Brief of Respondent State of Washington at pp. 2-4.

IV. ARGUMENT

A. The Legislature enacted the Washington Voting Rights Act to ensure that local electoral systems do not impair minority voting rights.

The vast majority of local elections in Washington State are conducted using at-large voting systems.[1] When voting patterns in a jurisdiction are racially polarized, at-large voting systems allow white majority voting blocs to dominate elections and prevent racial and language minority voting blocs from having a fair and equal chance to be heard and represented by elected officials of their choice. As a result, numerous jurisdictions across the state, including counties, for years have almost entirely shut out Latinx and other minority candidates from elected office, despite having significant numbers of voters from minority communities. For example, as of 2016, Latinx residents made up nearly 60 percent of the population in Adams County and more than 50 percent of the population in

[1] *See* Zachary Duffy, *Unequal Opportunity: Latinos and Local Political Representation in Washington State*, The State of the State for Washington Latinos 20 (Dec. 11, 2009), https://www.walatinos.org/2009/12/unequal-opportunity-latinos-and-local-political-representation-in-washington-state (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)."

Franklin County, yet Latinx residents made up less than 3.6 and 2.7 percent of office holders in those counties, respectively.[2]

A number of these jurisdictions risk being in violation of Section 2 of the federal Voting Rights Act (VRA). 52 U.S.C. § 10301. In fact, two cities, Yakima and Pasco, faced such litigation and were required to change their election systems as a result. *See* Mem. Op. and Order, *Glatt v. City of Pasco*, No. 4:16-cv-05108-LRS (E.D. Wash. Jan. 27, 2017), ECF No. 40; Final Injunction & Remedial Districting Plan, *Montes v. City of Yakima*, No. 2:12-cv-3108-TOR (E.D. Wash Feb. 17, 2015), ECF No. 143. In both cities, Latinx residents made up more than 40 percent of the population, yet not one Latinx candidate had won a contested election for City Council under the at-large election system.

Despite these disparities in representation, prior to the WVRA, state statutes prohibited many jurisdictions from taking action on their own to fix electoral systems that deny or abridge minority communities' opportunity to elect candidates of their choice. As the Legislature found when passing the WVRA, Washington laws "narrowly prescribe[d] the methods by which [political subdivisions, including counties, could] elect members of their

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[2] Lilly Fowler, *WA to protect against voting discrimination with new law,* Crosscut (March 6, 2018), https://crosscut.com/2018/03/washington-voting-rights-act-legislature-discrimination-law-jay-inslee.

legislative bodies" even when this "resulted in an improper dilution of voting power for [race, color, or language] minority groups." RCW 29A.92.005; *see also* RCW 35A.12.180 (2015). As the Attorney General of Washington recognized, local governments thus "face[d] difficult decisions and potential legal risk regardless of" whether they kept their electoral systems, potentially in violation of the federal VRA or other laws, or voluntarily adopted new electoral systems, potentially in violation of state law. AGO 2016 No. 1, *Authority of Code Cities to Modify System for Electing City Council Members to Comply with Federal Voting Rights Act* (Jan 28. 2016).

B. The WVRA remedied the harms of the prior electoral scheme by granting authority to counties to redress vote dilution and abridgment, and by expanding the remedies available to voters.

Against this backdrop, the Legislature enacted the Washington Voting Rights Act in 2018. The purpose of the Act was not, as Appellants assert, only "to insure [sic] compliance with the federal constitution and federal Voting Rights Act." AOB at 31. To be sure, the rights protected by the WVRA are already enshrined in the federal and Washington state constitutions and safeguarded by the VRA. However, in enacting the WVRA, the Legislature intended to *build on* these protections. For example, the WVRA affirmatively grants authority to political subdivisions, including counties, to voluntarily remedy potential violations without

having to wait to be sued; explicitly provides for broad remedies that are tailored to local needs; and creates a mechanism for jurisdictions and communities to work together to implement new election systems. *See* RCW 29A.92.005.

Under the WVRA, a county need not wait to be sued to ensure that its electoral system is fair to minority voters. The Act permits any political subdivision to voluntarily "change its electoral system" to remedy a potential violation. RCW 29A.92.040. In its findings, the legislature acknowledged that narrow prescriptions in state statutes often prohibited local jurisdictions from addressing the "improper dilution of voting power for . . . minority groups." RCW 29A.92.005. Thus, in enacting the WVRA, the legislature "modif[ied] existing prohibitions in state laws" to ensure that political subdivisions "may voluntarily adopt changes on their own . . . so that minority groups have an equal opportunity to elect candidates of their choice or influence the outcome of an election." *Id*.

Nor is a political subdivision that seeks to make a voluntary change limited to any one particular remedy. *Id.* Rather, the WVRA grants every county the same authority to adopt a remedy that is locally appropriate. Indeed, the WVRA explicitly states that its provisions "supercede[] other state laws and local ordinances to the extent that those state laws or ordinances would otherwise restrict a jurisdiction's ability to comply with

this chapter." RCW 29A.92.710. This flexibility in selecting a remedy is a core feature of the WVRA.

This is especially important for non-chartered counties, whose electoral systems are otherwise generally prescribed by state law. *See, e.g.*, RCW 36.32.020, 36.32.040, 36.32.050. When faced with a potential violation of the Act, the WVRA authorizes each non-chartered county to, for example, implement a districted general election, or change election dates to align with statewide or federal elections, among other remedies. *See* RCW 29A.92.040 (authorizing changes "including, but not limited to, implementing a district-based election system"). Whatever the remedy, the Act envisions that it will be chosen "in collaboration with affected community members," RCW 29A.92.005, and imposes strict notice and public hearing requirements if a subdivision chooses to switch to districted elections or redraw district lines. RCW 29A.92.050.

In sum, in enacting the WVRA, the Legislature gave all counties the power to choose from a wide range of remedies to fix local electoral systems that systematically deny race, color, and language minority groups equal opportunity to elect candidates of their choice.

C. Any ruling, whether affirming or reversing the decision below, should not cast doubt on the constitutionality of the WVRA.

The WVRA is a general law that creates uniform authority in keeping with the Washington Constitution's uniformity clauses. This is true regardless of which interpretation of the uniformity clauses the Court adopts. In fact, both parties correctly acknowledge that the adoption of their preferred rule would not impact the constitutionality of the WVRA. *See* Appellant Br. 30–32, No. 97739-9 (Feb. 3, 2020) ("[S]triking down SHB 2887 will not impact the Act."); Resp't Br. 10 n.4–5, No. 97739-9 (Mar. 4, 2020) ("Spokane correctly acknowledges the validity of the Washington State Voting Rights Act."). Indeed, through the WVRA, the Legislature is fulfilling its duty to provide for free and equal elections through general and uniform laws.

1. The Legislature must, by general and uniform laws, provide for county elections that are free and equal.

The Legislature's constitutional duty to establish a "uniform" system of county government and to provide for county elections "by general and uniform laws" should be read in accordance with other constitutional provisions governing elections. Const. art. XI, § 5. Indeed, the state constitution mandates that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Const. art. I, § 19. This provision protects

against direct prohibitions on voting as well as "dilution of the weight of a citizen's vote." *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724, 730, 665 P.2d 393, 397 (1983) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964)). As this Court has recognized, the express guarantee of free and equal elections "goes further to safeguard [the fundamental right to vote] than does the federal constitution." *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841, 846 (1984).

Therefore, insofar as the Constitution instructs the Legislature to provide for elections in the several counties, the Legislature must do so "by general and uniform laws," Const. art. XI, § 5, *and* those elections "shall be free and equal," guaranteeing to all citizens their fundamental right to vote. Const. art. I, § 19; *see Gold Bar Citizens for Good Gov't*, 99 Wn.2d at 734 ("Control of [the right to vote] is within the power of the Legislature so long as it does not destroy or impair the right contrary to the state or federal constitutions."). Narrowly reading the "general and uniform laws" provisions to require every county to have the same electoral system would necessarily conflict with the constitutional imperative that such counties have free and equal elections, because elections cannot be free and equal when a particular electoral system has the effect of diluting minority votes in certain counties.

2. The WVRA is a general and uniform law that fulfills the Legislature's duty to provide for county elections that are free and equal.

The WVRA is a general and uniform law as required by the Constitution. The Act imposes the same prohibition on all counties. RCW 29A.92.020 (no county may maintain an electoral system that results in abridgement or dilution of the right to vote of a protected class or classes). And the Act grants the same authority to all counties. RCW 29A.92.040 (any county may voluntarily change their electoral systems to remedy a potential violation). The Act, moreover, specifies the objective considerations necessary to determine when that authority may be exercised. RCW 29A.92.030 (delineating the elements of a WVRA violation and the facts relevant to proving such a violation). In addition, the Act provides uniform guidance on how counties may exercise their authority to remedy minority vote dilution, including strict notice and public hearing requirements. RCW 29A.92.050.

This system fits squarely within the category of uniform laws demarcated in *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn. App. 165, 181, 936 P.2d 1148, 1156 (1997). In that case, the appeals court held that a law was uniform because it provided "all counties . . . the authority to create public corporations" and "further provide[d] the proper purposes for which a corporation may be created." *Id.* Here, as in that case,

each county has the same authority, and may exercise it "depending upon that particular county's needs." *Id.* The WVRA is, therefore, well within the constitutional bounds set by the uniformity clauses. And indeed, it fulfills the Legislature's concomitant duty to provide for county elections that are "free and equal" as guaranteed by Article I, section 19 of the Washington Constitution.

V. CONCLUSION

The WVRA in no manner violates the uniformity requirements of the Washington Constitution. As such, no matter how it rules in this case, the Court should make clear that its ruling does not call into question the constitutionality of the WVRA. The Court should also not adopt any rule that would disturb the Legislature's constitutional obligation to provide, by general and uniform laws, for county elections that are free and equal. To that end, the Court should take care not to issue a ruling that might limit the types of remedies available under the WVRA.

RESPECTFULLY SUBMITTED this 18th day of May 2020.

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DECLARATION OF SERVICE

That on May 18, 2020 I arranged for filing of the foregoing **Brief of *Amici Curiae* Aclu of Washington and Oneamerica** with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

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DATED this 18th day of May, 2020, at Seattle, Washington.

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Chris Bascom, Legal Assistant

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