No. 100999-2

In the Supreme Court of the State of Washington

GABRIEL PORTUGAL, *ET AL.*,

Plaintiffs-Respondents,

v.

FRANKLIN COUNTY,
Defendant,

and

JAMES GIMENEZ,
Intervenor Defendant-Appellant.

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AS AMICUS CURIAE IN SUPPORT OF THE INTERVENOR DEFENDANT-APPELLANT

DANIEL I. MORENOFF
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835 (phone)
(214) 504-2633 (fax)
dan@americancivilrightsproject.org

JONATHAN F. MITCHELL
Washington Bar No. 52483
Mitchell Law PLLC
111 Congress Avenue,
Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Interest of Amicus Curiae

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, which has worked for a decade on the intersection of American redistricting law and race. The ACR Project is dedicated to protecting and where necessary restoring the equality of all Americans before the law.

Summary of the Argument

In 2018, the Washington Legislature enacted the Washington Voting Rights Act (the "WVRA"). The WVRA supplements the federal Voting Rights Act (the "FVRA") with additional protections for "protected classes" including "language minority group[s], as this class is defined in the [FVRA]."

In 1975, when it added the relevant language to the FVRA, Congress crafted a concise definition of "language minorities or language minority group[s]"—"persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." Maybe too concise – neither the FVRA, nor the WVRA, define "persons … of Spanish heritage."

This Court faces an issue of first impression. Nowhere in America have parties litigated the meaning in the FVRA of "persons … of Spanish heritage." Every case nominally applying this language has seen the parties assume the meaning of the phrase without analysis.

Unfortunately, their universal assumption is wrong – those cases have granted irrelevant relief to the wrong people, without beginning to address the very-real concerns of those Congress

protected in 1975. The historical context, the FVRA's text (supported by contemporaneous usage), the whole enactment rule, and the legislative history all point toward the same meaning of "persons … of Spanish heritage," as adopted into the WVRA by the Washington Legislature. The relevant portion of the FVRA (and, so, the WVRA) protects America's native-Spanish speakers who face linguistic barriers to their communication with the larger American electorate, not Hispanics as Hispanics.

The Court must reverse the judgment below and remand the case with instructions to dismiss, because the plaintiffs have not pled, argued, or proven that they are members of any "protected class" with standing to pursue a remedy under the WVRA.

Argument

I. Enactments and Statutory Definitions

The WVRA forbids Washington's subdivisions from using methods of election impairing the equal opportunity of protected classes to elect candidates of their choice.[1] The WVRA defines "Protected class" to "mean a class of voters who are members

[1] RCW 29A.92.020.

of a race, color, or language minority group, as this class is referenced and defined in the [FVRA]."[2]

Congress enacted the relevant portion of the FVRA in 1975, as the FVRA came up for renewal of its pre-clearance mechanism for the second time. Its 1975 amendments guaranteed members of language minorities the same protections and remedies the FVRA had previously afforded against discrimination based on race or color.[3] Congress simultaneously specified that "The term 'language minorities' or 'language minority group[s]' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[4]

II. Oddity and Meaning of the Statutory Definition

This definition is odd. It describes three groups in parallel language emphasizing ethnicity ("persons who are American Indian, Asian American, [or] Alaskan Natives"), and adds another

---

[2] RCW 29A.92.010.

[3] 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400, §§ 203, 206 (1975) (current version at 52 U.S.C. § 10301).

[4] *Id*. at § 207.

described through the roundabout, nonparallel locution "of Spanish heritage."[5]

What did that word choice signify to the original interpretive community of ordinary speakers of American English in 1975? Standard tools of statutory interpretation clearly answer the question. The historical context, the text itself (supported by contemporaneous usage), Congress's enacted legislative findings, and the relevant legislative history all point in the same direction. The law protects language minorities—specifically those "of Spanish heritage"— Americans whose native language is Spanish, a disadvantaged group differing from the ethnic group "Hispanics."

A. Historical Context

When Congress amended the FVRA in 1975, the FVRA had been on the books for a decade, its emergency preclearance mechanism had expired and been renewed once before, in 1970, for five additional years, and was up again for renewal.

President Gerald Ford had been in office for less than a year, after his predecessor Richard Nixon had been disgraced by the

---

[5] *Id.*

Watergate scandal. Early in the Nixon presidency, administration officials had essentially conjured the new term "Hispanic" into the English language on the advice of an Ad Hoc Committee.[6] That committee had initially been established by Secretary of Health, Education, and Welfare Caspar Weinberger, before later expanding to include representatives from the Census Bureau and the Office of Management and Budget. At its inception, the new term was applied to all those whose "origin or descent" was "Mexican," "Puerto Rican," "Cuban," "Central or South American," or "Other Spanish."[7] By 1975, the term Hispanic had spread into common usage, with organizations using it in their names cropping up widely.[8] At the 1975 amendments, there

---

[6] VOXXI, *How the Federal Government Settled on Calling Us 'Hispanic,'* The Huffington Post (Sep. 23, 2013), https://www.huffpost.com/entry/latino-or-hispanic_n_3956350.

[7] *Measuring Race and Ethnicity Across the Decades: 1790-2010: Mapped to 1997 U.S. Office of Mgt. and Budget Classification Standards*, U.S. Census Bureau (2015), https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html.

[8] *See* Hispanic Scholarship Fund, https://www.hsf.net/about-hsf/; Hispanic Organization of Latin Actors, https://www.holaofficial.org/ourmission/; The Association of Hispanic Arts,

was an accepted term for those whose "origin or descent" was in or from such Spanish-speaking lands.

The U.S. Commission on Civil Rights had recently released a series of relevant papers, including a "Survey of Preliminary Research on the Problems of Participation by Spanish Speaking Voters in the Electoral Process"[9] and "The Excluded Student, Mexican American Education Study, Report III."[10] These papers identified barriers to voting faced by "non-English speaking persons"[11] and a related "systematic failure of the educational

---

https://web.archive.org/web/20051218072115/http://www.latinoarts.org/about_aha.html (all founded in 1975). *See also* The Hispanic Congressional Caucus, https://chc.house.gov/about (founded 1976).

[9] S. Rep. No. 94-295, at 26 (1975), *reprinted in* U.S.C.C.A.N. 774, 792 (citing to U.S. Comm'n on C.R. Staff Memorandum, at 997 (Apr. 23, 1975)).

[10] *The Excluded Student - Report III: Educational Practices Affecting Mexican Americans in the Southwest*, Dr. Hector P. Garcia papers (1972), available at http://archivesspace.tamucc.edu/repositories/4/archival_objects/4917 (Special Collections and Archives, Mary and Jeff Bell Library, Texas A&M University-Corpus Christi) (last accessed July 5, 2021).

[11] *Id*. at 26.

process" that had generated comparatively "high illiteracy rates" and high-school dropout rates above 50% among that population.[12] And contemporaneous research backed up their conclusions: The Lyndon B. Johnson School of Public Affairs spent 1975-1976 investigating conditions in Texas's "colonias," which it defined as "poor, rural unincorporated communit[ies with] no formal ties with the governments of cities and towns," and which therefore lacked "the kinds of services and amenities offered in urban areas such as piped water, treated sewerage [sic], and street maintenance."[13] It concluded that residents were "almost exclusively Mexican-American"[14] and "the poorest of the poor."[15] While the LBJ School assumed and therefore failed to mention it, in 1975, colonia residents (like the residents of the entire border region) overwhelmingly spoke Spanish.[16]

---

[12] *Id.* at 28.

[13] MARK ESTES, KINGSLEY E. HAYNES & JARED E. HAZLETON, *Colonias in the Lower Rio Grande Valley of South Texas: A Summary Report* (1977).

[14] *Id.*

[15] *Id.*

[16] The 1970 Census obscures this fact by combining "persons of Spanish Language" and those with "Spanish Surnames" into a single reported category. See Persons of Spanish Language

Recognizing that "the problems facing colonia residents … are many," it "focuse[d] on water-related problems, including access to clean drinking water and sanitary sewage disposal," as these were "some of the most immediate, tangible concerns of colonia residents."[17]

It was in this context that the Ford Administration sent Assistant Attorney General Stanley Pottinger to Congress in March 1975 to explain "President Ford's recommended bill[s]," which "propose[d] . . . changes [that] should be made in the [FVRA]."[18] Pottinger told Congress that:

---

or Spanish Surname (1970), https://legacy.lib.utexas.edu/maps/atlas_texas/pop_spanish_lang_1970.jpg. The 1980 Census separately reported the number of respondents speaking Spanish at home: it reflects that Cameron County, Hidalgo County, Willacy County, and Starr County—which today participate in the Rio Grande Valley Partnership—were overwhelmingly Spanish speaking five years after 1975. *See Characteristics of the Population: General Social and Economic Characteristics –Texas*, U.S. Department of Commerce, Bureau of the Census (1980), Table 172 "Nativity and Language for Counties: 1980" (showing that 78.85% of these counties' residents aged 5 or above spoke Spanish at home).

17 Estes et al., *supra* note 13.

18 *The Extension of the Voting Rights Act: Hearing Before the Subcommittee on Civil Rights and Constitutional Rights of the H.*

> The proponents of additional legislation have suggested two major legislative needs in this area. First, they point out that some states in which large numbers of non-English speaking Puerto Ricans, Mexican Americans or Native Americans reside conduct English-only elections, despite the existence of some court rulings that such minorities are entitled to bilingual elections. Second, they have alleged that other forms of discrimination against these minorities are sufficiently prevalent in some non-covered states to warrant expanding the special coverage provisions [for pre-clearance] to cover such states.[19]

Pottinger told Congress, right after the Administration had coined a phrase for the ethnic descendants of peoples from Spanish-speaking lands, that it should alter the FVRA to protect "non-English speaking Puerto Ricans [and] Mexican Americans" who had suffered "sufficiently prevalent" discrimination to warrant protection in voting. The bills he proposed were

---

Judiciary Comm., 94th Cong. at 1-2 (1975) (statement by J. Stanley Pottinger, Asst. A.G., Civil Rights Division).

[19] *Id.* at 45.

eventually incorporated into and enacted as the FVRA amendments of 1975.

B. Text: "Persons … Who are of Spanish Heritage"

What did the phrase "of Spanish heritage" mean to an ordinary English speaker in 1975?[20] In the mid-1970s, "heritage" would have been understood by readers to be that which one received from one's family. Then-current dictionaries defined the word to mean "property that descends to an heir,"[21] "something transmitted by or acquired from a predecessor,"[22] "that which comes or belongs to one by reason of birth,"[23] and, in legal usage, "that which has been or may be inherited by legal descent or succession" or "any property ... that devolves by right of inheritance."[24] And the inheritance in question is specified in the

---

[20] 1975 Amendments, *supra* note 3.

[21] Definition of "heritage," in WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967).

[22] *Id.*

[23] Definition of "heritage," in THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE: THE UNABRIDGED EDITION (1973).

[24] The Oxford English Dictionary defines "heritage" as having a primary meaning dating back to 1225 of "[t]hat which has been or may be inherited," with related usages: "that which

statute: "Spanish." Given a natural reading and contemporary dictionary evidence, the phrase "persons who are … of Spanish heritage" seems to mean those who inherited the Spanish language from their forbearers—those for whom it is a "mother tongue," a native language "learned on a mother's knee."

For this last sub-category of "language minority," unlike the prior three, the legislative language focuses on linguistic inheritance, not on ethnic descent. Congress's language protects "American Indian[s], Asian American[s], [and] Alaskan Natives" regardless of what language they speak; for these groups, Congress focused on immutable demographic characteristics. But for the last ("persons who are ... of Spanish heritage"), Congress avoided this construction, just after the U.S. government had coined an applicable term of art —"Hispanic"— perfectly capturing its content. Instead, Congress chose the enacted phraseology, which focuses protection on those who inherited the Spanish *language*, rather than those of Hispanic ethnic descent.

---

comes from the circumstances of birth; an inherited lot or portion; the condition or state transmitted from ancestors" dating to 1621. *See* Definition of "heritage," *in* OXFORD ENGLISH DICTIONARY (2019 ed.).

C. Clarification Through Whole Enactment: Relevance of Congress's Legislative Findings

Congress's enacted legislative findings both prove that this was the meaning of "persons who are ... of Spanish heritage" in the statute and explain why it was the congressional focus. Congress found "that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English."[25] It found that English-language-only elections "excluded from participating in the electoral process" "language minority citizens."[26] The prohibition of denials or abridgements of the right to vote because of language-minority group status immediately follows these findings.[27]

Congress's focus in creating a new protected class was entirely on the ability of communities of Americans "from environments in which the dominant language is other than English"[28] to participate in the larger political discussion and electoral

---

[25] 1975 Amendments, *supra* note 3, at § 203(f)(1).

[26] *Id.*

[27] *Id.* at § 203(f)(2).

[28] *Id.* at § 203(f)(1).

process. It was not concerned about English-speaking Hispanics, who had played central roles in American law, politics, and history for generations.[29] Perhaps recognizing this history, and seeing how it differed from the histories of the three other newly protected groups, Congress's findings underscored that the 1975 amendments sought to protect not Hispanics as Hispanics, but only those Hispanics whose linguistic heritage prevented them from participating in politics and society in similar ways, whatever their personal, ethnic background.[30]

---

[29] Prominent examples of Americans retroactively categorizable as "Hispanic," who spoke English and successfully participated in American public life long before enactment of the 1975 Amendments, include: Justice Benjamin Cardozo, who proudly traced his lineage to Spain, but "confessed in 1937 that his family preserved neither the Spanish language nor Iberian cultural traditions." AVIVA BEN-UR, *Sephardic Jews in America: a Diasporic History* 86 (2012); Senator Charles Dominique Joseph Bouligny, elected from Louisiana in the 1820s; and Octaviano Ambrosio Larrazolo, born in Chihuahua before serving New Mexico as both Governor and Senator in the early 1900s. *Larrazolo, Octaviano Ambrosio*, U.S. House of Representatives: History, Art & Archives, https://history.house.gov/People/Detail/15032401304.

[30] English-speaking Hispanic can still enjoy FVRA protection. When they are part of a minority racial group (in a given state or locality), such individuals would have the same protections

D. Consistency of Legislative History

The legislative history further underscores both the original understanding of the phrase and Congress's reasoning for adopting it. The relevant legislative history includes both President Ford's signing statement and the Senate Judiciary Committee's Report on the 1975 amendments.

---

as any other English-speaking racial minority. *See* Pottinger statement, *supra* note 19, at 7 ("In my view . . . the Voting Rights Act, in its various protections against discrimination on account of race or color, does to some extent already cover Mexican-Americans and Puerto Ricans."); *Rice v. Cavetano*, 528 U.S. 495, 512 (2000) (holding that "race" was expansive and covers each ethnic and racial group, separately); *Or v. Mitchell*, 400 U.S. 112, 147 (1970) (recognizing *before* the 1975 Amendments that the FVRA protected "not only Negroes but Americans of Mexican ancestry"); *Harding v. Co. of Dallas*, 948 F.3d 302, 308-15 (5th Cir. 2020) (holding that non-Hispanic whites in a "majority-minority" locality share the same protections under the FVRA as any other racial minority and applying to their Section 2 claim the same legal standards developed in cases brought by other racial minorities). However, not all Hispanics share a race, under either the modern usage of the term (compare racial descriptions of a Dominican and a Chilean) or the understanding of race at the 1965 enactment of the original FVRA (in 1960, the Census Bureau reclassified all perceived Mexican-Americans as "White," but did not do the same to perceived Puerto Ricans).

When President Ford signed the amendments into law, he was brief and to the point, leaving no doubt as to his understanding of the amendments. "The bill I will sign today … broadens the provisions [of the FVRA] to bar discrimination against *Spanish-speaking Americans*."[31]

The Senate Report, at far greater length, makes the same point. The Report clarifies that the "focus" of the amendment "is to insure that the [FVRA]'s special temporary remedies are applicable to states and political subdivisions where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) *significant concentrations of minorities with native languages other than English reside*."[32] Indeed, the Senate Judiciary Committee's Subcommittee on Constitutional Rights crafted the amendment as a result of "7 days of hearings and testimony from 29 witnesses … document[ing] a systematic pattern of voting discrimination and exclusion against *minority group citizens who are*

---

[31] Remarks of the President at the Signing of the Voting Rights Act, The Rose Garden (Aug. 6, 1975) (digitized from Box 14 of the White House Press Releases at the Gerald R. Ford Presidential Library) (emphasis added).

[32] S. Rep. No. 94-295, at 9 (1975), reprinted in U.S.C.C.A.N. 774, 775 (emphasis added).

from environments in which the dominant language is other than English."[33] The Report went on:

> The definition of those groups included in 'language minorities' was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices ... No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish 79.8 percent; and Russian, 85.7 percent.[34]

The Committee even postulated a potential reason for these differences:

> the historical experience of these groups is far different from the European immigrants who came to North American [sic] and eventually became part of the Great Melting Pot. For the most part, the Spanish-heritage, American

---

[33] *Id*. at 24 (emphasis added).

[34] *Id*. at 31.

Indian and Alaskan Native groups were living on territory suddenly annexed by the United States; in most cases their ancestors had been living on the same land for centuries. These groups stayed on their original lands after the annexation, and while mobility certainly existed within their own cultures, opportunity for mobility within the European-dominated American culture was often denied them, most frequently by poor educational institutions and unresponsive political institutions.[35]

Accordingly, the Report reflects that Congress crafted the amended language to directly address "the problems of 'language minority groups,' that is, racial minorities whose dominant language is frequently other than English."[36] The Report diagnoses that "[t]he central problem documented is that of dilution of the vote—arrangements by which the votes of minority electors are made to count less than the votes of the majority."[37] It flatly states that "Language minority group as defined in this

---

[35] *Id*. at 38-39.

[36] *Id*. at 38.

[37] *Id*. at 27.

title, means minority persons who have a native language other than English,"[38] then it explains that under the amendments, "[a]ll of the special remedies of the [FVRA] are extended to citizens of language minority groups" based on Congress's finding "that these minority citizens are from environments in which the dominant language is other than English."[39]

The Report establishes that Congress chose this language knowing full well that it had other alternatives. It describes one such potential alternative in footnote 14, citing a letter from Meyer Zitter, the Population Division Chief at the Census Bureau, to the House Judiciary Committee, dated April 29, 1975, in which he argued for a definition of "Persons of Spanish heritage" encompassing: "(a) 'persons of Spanish language' in 42 States and the District of Columbia; (b) 'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico and Texas; and (c) 'persons of Puerto Rican birth or parentage in New Jersey, New York and

---

[38] *Id*. at 46.

[39] *Id*.

Pennsylvania."[40] But this alternative definition not only didn't make it into the text of the statute, it didn't even make it into the text of the Committee Report. The footnote reflects a road not taken, rather than contradictory evidence.

The legislative history makes plain what the text, legislative context, and legislative findings made nearly certain. Congress knew how to define a protected class by descent, birth, or parentage. It had available the newly coined governmental term "Hispanic" to capture that alternative. And it chose instead to protect "persons who are … of Spanish heritage" — not all those in the Hispanic minority, but only those Hispanics "who have a native language other than English."[41]

III. Judicial History: an Unlitigated, Mistaken Reading Misapplies the Provision

Despite this evidence for the original public meaning of the statutory text, no prior case litigated since 1975 under either §§ 2 or 5 of the FVRA has either interpreted the protected class of "persons who are … of Spanish heritage" to include only those

---

[40] *Id*. at 24.

[41] 1975 Amendments, *supra* note 3.

Hispanics whose native language is Spanish or seen the parties dispute the meaning of the phrase. No plaintiff (whether private or from DOJ) has sought relief for, specifically, a population of native Spanish speakers as Spanish speakers. No defendant government or public official sued in an official capacity has argued that the phrase protects native-Spanish-speaking Hispanics, rather than Hispanics in general.

Instead, in cases spanning 48 years, the voting rights bar has treated the phrase as a synonym for "Hispanic."[42] As a result,

---

[42] *E.g.*, *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (discussing the rights of "Hispanics" and "Latinos" under § 2 of the FVRA, without analysis of which provision of § 2 was applicable); *LULAC v. Perry*, 548 U.S. 399, 425, 427 (2006) (describing the FVRA's requirement that "members of [a racial group not] … have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," before assessing opportunities of "Latinos" through an extensive discussion of Census data on Hispanics); *Rodriguez v. Bexar County*, 385 F.3d 853, 859-71 (5th Cir. 2004) (describing FVRA claims that a map "diluted the influence of Hispanic votes" and then addressing the merits by reference to Hispanic Census data); *LULAC v. Clements*, 999 F.2d 831, 838 (5th Cir. 1993) (describing how "Plaintiffs contend that electing trial judges … violates § 2 of the [FVRA] by . . . diluting the voting power of Hispanics and blacks" by "proceed[ing] on behalf of language and ethnic minorities in different combinations in different counties");

no court before this one has had the opportunity to consider whether the rights of America's native-Spanish-speaking population under the FVRA are implicated in litigation brought by a Hispanic population of indeterminate language diet or whether those rights could possibly be served by any relief sought and obtained by the self-appointed, English-speaking spokespeople for Hispanics as a whole. To date, every redistricting case ostensibly affording relief to "persons who are … of Spanish heritage" – including this case, below – has instead afforded relief to "Hispanics"—a group Congress chose *not* to protect in the 1975 amendments.

IV. Materiality of Difference, as Demonstrated by Status of the Protected Class, Today

"Persons who are of … Spanish heritage" does not include all Hispanics, but only those Hispanics "who have a native

---

Rodriguez v. Pataki, 308 F. Supp. 2d 346, 371, 443, 373-74 (S.D.N.Y. 2004) (citing statutory language and definition at n.28 and Supreme Court's "instruct[ion], when voting rights claims are based on a combination of distinct ethnic and language minority groups," but then analyzing "persons of … Spanish heritage" entirely by reference to Hispanic Census data).

language other than English."[43] They were the Americans Congress found to have consistently been diluted into districts with a majority they could not understand, who did not know of or care about their specific needs and left them with "poor educational institutions and unresponsive political institutions."[44] Residents of the colonias, lacking clean water and sewage services, epitomized this group.

The difference remains material. Today, approximately 83% of Hispanic Census respondents speak English "well" or better.[45] Indeed, 48 years later, the conditions of the average Hispanic person in America look markedly different, and better, than they did in 1975. For example, the middle quintile of American Hispanic households has gone from a Census-estimated mean income of $38,222 (in 2019 dollars) to $56,285 in 2019—a 46.9%

---

[43] 1975 Amendments, *supra* note 3.

[44] *Id.*

[45] *English proficiency among Hispanics U.S. 2019*, STATISTA (2021), https://www.statista.com/statistics/639745/us-hispanic-english-proficiency/. This figure is for all Hispanic respondents, including non-citizens. It is likely that the figure for American citizens who are Hispanic is considerably higher.

increase;[46] for comparison, the same period saw the mean income for the middle quintile of White, non-Hispanic Americans go from $53,910 (in 2019 dollars) to $76,252 in 2019—an increase of only 37.8%.[47] The same period saw the overall Hispanic household median and mean incomes rise from $51,124 and $59,698, respectively, to $68,703 (up 34.4%) and $98,088 (up 64.3%).[48] The twenty years spanning from 2000 to 2020 saw the share of American "Hispanics with a bachelor's degree or higher nearly double."[49]

But it does not appear that the same can be said of America's native-Spanish-speaking citizens. To return to the emblematic

---

[46] Historical Income Tables: Households, U.S. Census Bureau (2020), https://www.census.gov/data/tables/time-series/demo/income-poverty/historicalincome-households.html.

[47] *Id.*

[48] *Id.*

[49] Don Beyer, The Economic State of the Hispanic Community in America: Keys to Building a Better Economy after COVID-19 (2020), https://www.jec.senate.gov/public/cache/files/23062796-f531-43cf-bbc1-d68a0e7c3244/hhm2020-economicstateofthehispaniccommunityinamerica-final.pdf.

example, the colonias still exist. Texas continues to define a colonia as a:

> neighborhood or community [in] a geographic area located within 150 miles of the Texas-Mexico border that has a majority population composed of individuals and families of low and very low income[, who] lack safe, sanitary and sound housing and are without basic services such as potable water, adequate sewage systems, drainage, utilities, and paved roads.[50]

Following decades of court-misinterpretation of the 1975 FVRA amendments to address the representation of "Hispanics" as Hispanics, while ignoring the specific needs of America's native-Spanish-speaking linguistic minority, hundreds of thousands of Americans continue to live in such isolated poverty.[51]

---

[50] Background on the Colonias, Texas Department of Housing & Community Affairs, http://www.tdhca.state.tx.us/oci/background.htm (last visited, Mar. 17, 2023).

[51] *Colonias*, Texas Commission on Envir. Qual., https://www.tceq.texas.gov/assets/public/border/colonias-text.pdf (estimating colonias population at about 400,000); Shannon Kelleher, "NO-MAN'S LAND": THE TEXAS COLONIAS WAITING DECADES FOR RUNNING WATER, *The*

"Almost 55 percent of colonia residents do not graduate from high school"[52]—a statistic unmoved from the mid-1970s. More generally, where Spanish-speaking Hispanics comprise the majority, educational institutions consistently underperform as compared to other areas, just as they did in 1975.[53]

Guardian, Aug. 8, 2022, https://www.theguardian.com/us-news/2022/aug/08/running-water-texas-borderland-colonias (estimating colonias population at about 840,000, "including more than 134,000 that are not served by public water systems, waste treatment facilities, or both.").

[52] Patrick Strickland, *Living on the Edges: Life in the Colonias of Texas Elections*, AL JAZEERA (2016), https://www.aljazeera.com/features/2016/11/5/living-on-the-edges-life-in-the-colonias-of-texas.

[53] At one point in 2021, according to the information made available by the Texas Education Agency, Texas had 10 Independent School Districts whose student populations were at least 80% Hispanic that also had a majority of students enrolled in bilingual or English-language-learner programs. *2018–19 Texas Academic Performance Reports*, Texas Education Agency, https://rptsvr1.tea.texas.gov/perfreport/tapr/2019/index.html. Eight had lower percentages of students registering STAAR scores at grade level than the state average. Excluding the ISD with insufficient test-takers to disclose data, all nine had average ACT scores below the state norm. Six had average SAT scores below the state norm.

Simply put, the judicial interventions in the name of the group Congress *didn't* choose to protect through the 1975 FVRA amendments has accomplished *next to nothing* for the group that Congress *did* seek to explicitly protect. For 48 years, courts have compelled the drawing of districts affording America's Hispanic population the opportunity to elect its preferred candidates in nominal reliance on the language of the 1975 FVRA amendments. But America's native-Spanish-speaking citizens have neither disappeared, nor seen the drawing of districts where *they* comprise a majority. Native-Spanish-speaking Hispanics remain subject to dilution among a larger, English-speaking population, even if judicial interventions have required the English-speaking majority in which they remain diluted to look slightly more like them.

That was not the end sought by Congress. It is indefensible under the enacted statute. The native-Spanish-speaking beneficiaries whom Congress sought to protect have yet to even *begin* to receive the protection enacted almost five decades ago. The relief granted in their name has totally missed the mark, instead sweeping into its ambit others whom Congress chose *not* to

include in the new protected class and further racializing America's politics.

Not only have we not completed the work set for us by Congress in 1975; arguably, we have not yet begun it.

V. Relevance to Case Before the Court

At no point have the plaintiffs pled or argued, much less proven, that they are non-English-speaking Hispanics denied an equal opportunity to elect their preferred candidates in Franklin County. At no point have the plaintiffs pled or argued, much less proven, that Franklin County has a sufficiently large native-Spanish-speaking citizen population for any district to be drawn to afford such a community an equal opportunity to elect its preferred candidates of choice. The map the plaintiffs would have this Court continue to impose on Franklin County was designed without consideration of the presence of any such native-Spanish-speaking population and no evidence before the Court suggests that this map will prevent the dilution of native-Spanish-speaking Americans' votes in a nominally "Hispanic" district that would pay no more attention to their needs than does the English-speaking countywide majority.

As in every prior case invoking the rights of the protected "language minority" of "persons … of Spanish heritage," the plaintiffs in this case would have the Court misdeploy a law protecting such linguistically isolated individuals for the political benefit of the very group Congress chose *not* to protect through the FVRA's 1975 amendments. Unlike the courts involved in those prior cases, the Court has been presented with the clear reasons (grounded in the text, context, whole enactment, and legislative history of the FVRA) why it should not do so. The Court should take the opportunity this case of first impression affords it to start the process of assuring that the 1975 FVRA amendments (and the WVRA, which incorporated them) actually protect that at-risk population.

CONCLUSION

The Washington Legislature adopted for the WVRA the set of protected classes established by Congress in the FVRA. Neither affords standing or protection to Hispanics as Hispanics. The self-appointed, English-speaking spokespeople for all Hispanics who brought this case should not be allowed to misappropriate the legal protections of their Spanish-speaking relations.

The Court should reverse the lower court and remand with instruction to dismiss this unwarranted litigation.

Respectfully submitted.

/s/ Jonathan F. Mitchell

DANIEL I. MORENOFF
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835 (phone)
(214) 504-2633 (fax)
dan@americancivilrightsproject.org

JONATHAN F. MITCHELL
Washington Bar No. 52483
Mitchell Law PLLC
111 Congress Avenue,
Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Amicus Curiae

Dated: March 30, 2023

Certifications

I hereby certify that the foregoing brief contains fewer than 5,000 words, exclusive of the title sheet, the table of contents, the table of authorities, these certifications, the certificate of service, signature blocks, as calculated by Microsoft Word, the word processing software used to prepare this brief.

I further certify that I filed the foregoing document via the Washington State Appellate Court's filing portal, which gives notice of this filing to all counsel for all parties who have appeared in this matter.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Amicus Curiae

Dated: March 30, 2023

MITCHELL LAW PLLC

March 30, 2023 - 3:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,999-2
Appellate Court Case Title:	Gabriel Portugal et al. v. Franklin County et al.
Superior Court Case Number:	21-2-50210-4

The following documents have been uploaded:

- 1009992_Briefs_20230330155305SC601529_2883.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Franklin County Amicus.pdf
- 1009992_Motion_20230330155305SC601529_1416.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Franklin County Motion.pdf

A copy of the uploaded files will be sent to:

- ADaylong@floyd-ringer.com
- APearce@floyd-ringer.com
- Bernadette@uclavrp.org
- Chad@uclavrp.org
- Eddie@MorfinLawFirm.com
- HParman@perkinscoie.com
- SGOOlyEF@atg.wa.gov
- Sonni@uclavrp.org
- aharless@campaignlegal.org
- amulji@campaignlegal.org
- amuul@floyd-ringer.com
- bannona@brennan.law.nyu.edu
- blackmon@loevy.com
- bphillips@campaignlegal.org
- dan@americancivilrightsproject.org
- david@loevy.com
- dperez@perkinscoie.com
- ecampbell@floyd-ringer.com
- eddie4um509@yahoo.com
- ffloyd@floyd-ringer.com
- hhyatt@perkinscoie.com
- jeffrey.even@atg.wa.gov
- joel@ard.law
- jonathan@mitchell.law
- jstarr@perkinscoie.com
- lindsaydieselman@paulhastings.com
- mdanahy@campaignlegal.org
- mgaber@campaignlegal.org
- nathanieledmonds@paulhastings.com

- nstephanopoulos@law.harvard.edu
- rgreenwood@law.harvard.edu
- rhand@perkinscoie.com
- sarah.e.smith@atg.wa.gov
- sklotz@floyd-ringer.com
- sleeper@campaignlegalcenter.org
- tera.heintz@atg.wa.gov
- tiffanyc@mhb.com
- tortarantola@paulhastings.com
- vrichardson@campaignlegal.org
- weiserw@brennan.law.nyu.edu
- yurij.rudensky@nyu.edu

Comments:

Sender Name: Jonathan Mitchell - Email: jonathan@mitchell.law
Address:
111 CONGRESS AVE STE 400
AUSTIN, TX, 78701-4143
Phone: 512-686-3940

Note: The Filing Id is 20230330155305SC601529