No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

City of Santa Monica,
Appellant-Defendant,
v.
Pico Neighborhood Association, et al.,
Respondents and Plaintiffs.

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge
Presiding
Superior Court Case No. BC616804

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, I, the undersigned counsel, certify that no person or entity, other than the parties, has a financial interest in the outcome of the proceeding or an ownership interest in any of the parties.

Respectfully submitted,

Dated: December 27, 2019 **SHENKMAN & HUGHES**

/s/Kevin Shenkman
Kevin Shenkman

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I. INTRODUCTION

After a six-week expert-intensive trial and post-trial remedy hearings, the Superior Court issued a 71-page Statement of Decision, finding that Appellant's at-large system for electing its City Council violated the California Voting Rights Act, Elections Code §§14025-14032 ("CVRA"), as well the California Constitution's Equal Protection clause. Relying on 5064 pages of live trial testimony and 428 trial exhibits, as well as voluminous briefing from the parties, the trial court found that Santa Monica's system was intended, from its inception, to limit racial minorities' electoral power, and for 72 years has largely achieved that illegitimate purpose. Over that time only one Latino (Tony Vazquez) has ever been elected to the Santa Monica City Council–alone of 71 people to serve on the city council – even though Latino voters overwhelmingly support Latino candidates. This lack of representation for Latinos, who are 16% of the City's population and most concentrated in the city's Pico Neighborhood, meant they were powerless to stop the City from dissecting their community with a freeway and turning their home into the City's toxic waste and trash dump site. To remedy these voting rights violations, the Superior Court ordered Appellant to elect its council from seven districts, one of them being a Latino "influence" district centered around the Pico Neighborhood, consisting of 30% Latino eligible voters.

The City's appeal largely ignores the extensive evidentiary record relied upon by the trial court, that court's findings, and the explicit language of the CVRA. The well-founded decision below is clearly correct.

First, the trial court followed the CVRA's direction in focusing on elections in which Latino candidates ran, and the electorate's support (or lack thereof) for those Latino candidates. (See Elec. Code, §14028(b) ["The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class" .... "One circumstance that may be considered ... is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class ... have been elected"].) The evidence showed that meaningful Latino candidates are overwhelmingly preferred by Latino voters, yet Latino candidates almost always lose. Those losses come in a context of a history of discrimination against minorities, caustic racial appeals in city council elections, staggered elections that are known to enhance vote dilution, and a city government that is unresponsive and hostile to the Latino community – all factors probative of a CVRA violation. (See Elec. Code, §14028(e).)

Appellant's attempt to redirect this Court to elections in which no Latino candidates ran and elections for offices other than its governing board, or to voting for lesser preferred white

candidates, contradicts the CVRA's explicit mandate and undermines the trial court's discretion to weigh all of the evidence before it in conducting the "searching practical evaluation" of the political reality to determine the existence of racially polarized voting ("RPV"), as instructed by the United States Supreme Court in *Thornburg v. Gingles* (1986) 478 U.S. 30 ("*Gingles*").

Second, the trial court's adoption of a by-district remedy that includes an "influence district" is specifically contemplated by the CVRA. (See Elec. Code §14027 [at-large method of election cannot impair "the ability of a protected class ... to influence the outcome of an election."].) Appellant's complaint that the district plan results in fewer Latinos in other districts is immaterial. As the United States Supreme Court has repeatedly held, states may use influence districts to remedy voting rights violations.

Third, as two California appellate court decisions and a recent Ninth Circuit decision have made clear, the imposition of a district plan to remedy a violation of the CVRA is absolutely proper under the federal and California constitutions.

Fourth, the trial court's Equal Protection finding was firmly grounded in the law and evidence. The trial court found discriminatory intent based on evidence of explicit racial considerations in adopting and maintaining the at-large system in 1946 and 1992, including a recorded hearing of the vote in

1992 in which the City Council refused to change the at-large system even though it knew of its discriminatory origins and effects, with one City Council member explicitly wanting to keep the Pico Neighborhood voiceless so low-cost housing could continue to be concentrated there. The trial court found disparate impact based on evidence of: (1) a lack of Latino electoral success; (2) Appellant's unresponsiveness to the Latino community; and (3) vote dilution – any one of which would be sufficient to show disparate impact. Appellants' argument that no Equal Protection violation could be found in the absence of the possibility of a majority Latino district is contrary to the very cases it relies on.

California courts have addressed the CVRA in three published decisions, in each case upholding and reiterating the importance of the CVRA.[1] Those three courts have emphasized the remedial purpose of the CVRA, and the corresponding liberality with which it should be interpreted to achieve that purpose. (E.g. *Jauregui*, 226 Cal.App.4th at 805-807.) The trial court's judgment is a faithful application of the CVRA and its remedial purpose to an extensive evidentiary record, which the Superior Court in its considered discretion found proved that

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[1] *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781; *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223; and *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660.

Appellant's long history of discrimination against Latinos resulted in a violation of the CVRA and Equal Protection. This Court should affirm the judgment and allow Santa Monica's Latino voters to finally have the say they deserve in their city's governance.

II. STATEMENT OF THE CASE

A. Pretrial Proceedings

Respondents filed their original Complaint on April 12, 2016, asserting two causes of action: 1) violation of the CVRA; and 2) violation of the Equal Protection clause of the California Constitution. (1AA70-80.) On February 23, 2017, Respondents filed their First Amended Complaint, asserting the same two causes of action, and Appellant demurred. (4AA1141-1185.) The Superior Court overruled Appellant's demurrer. (5AA1564-1589.) Appellant filed a writ petition challenging the Superior Court's ruling, which this Court denied, and the California Supreme Court denied Appellant's subsequent petition for review. (RA13-14.)

Appellant filed a summary judgment motion, and on June 19, 2018 the Trial Court denied that motion. (5AA1615-1643; RA17-25.) Appellant again sought writ relief, which again was denied by this Court. (RA27.)

B. Trial

Trial commenced on August 1 and concluded September 13,

2018. (24AA10670). Over those six weeks, the Trial Court heard from nine fact witnesses – mostly elected officials and community activists in Santa Monica – and seven expert witnesses. (RT1801-9232.) The parties submitted their closing briefs, and on November 8, 2018 the Trial Court issued its Tentative Decision in favor of Respondents on both causes of action. (22AA9726-9801; 22AA9846-9878; 22AA9933-9947; 22AA9966-9967.)

C. Post-Trial Proceedings and Judgment

Having tentatively found in favor of Respondents, the Superior Court invited the parties to further brief the selection of appropriate remedies. (22AA9966-9967; 24AA10735-10736.) The Superior Court acknowledged that Respondents had presented several election systems at trial that would improve Latinos' voting power in Santa Monica and thus remedy the intentional vote dilution caused by the at-large system, but nevertheless afforded Appellant *another* opportunity to indicate its preferences; however, Appellant declined to do so. (24AA10733-10736.) The parties submitted their briefs, and the Trial Court held a series of hearings. (23AA10072-10112; 23AA10169-10188; 23AA10205-10219; 23AA10256-10352; RT9601-9635; RT9901-9939.)

Ultimately, the Superior Court decided that district elections are best suited to remedy the demonstrated history of

discrimination and vote dilution in Santa Monica. (24AA10733-10735.) With Appellant waiving any remedial submission, the court found the district map designed by Respondents' expert demographer to be legal and appropriate, and indicated that it would order all future elections be conducted consistent with that district map. (24AA10733-10737; 24AA10739; RT9938-9939.)

On January 3, 2019, Respondents submitted a Proposed Statement of Decision and Proposed Judgment, as the Superior Court directed. (24AA10353-10410.) Appellant filed voluminous objections, and on February 13, 2019 the Superior Court ruled on those objections (modifying the proposed judgment and proposed statement of decision in some instances), issued its Statement of Decision and entered Judgment. (24AA10649-10663; 24AA10667-10739.)

The Statement of Decision in this case is exceptionally detailed and explains the Superior Court's factual findings and legal analysis. (24AA10669-10739.) **Yet, Appellant's opening brief largely ignores the Statement of Decision** – ignoring much of the facts and evidence the Superior Court found compelling, and failing to refute the legal analyses applicable to Respondents' claims and the significant authority cited by the Superior Court.

III. THE EVIDENCE AND SUPERIOR COURT'S FINDINGS

A. CVRA

California courts have addressed the CVRA in three published decisions: *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223; and *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660. In its Opening Brief, Appellant flees from those decisions, claiming they "have no bearing on the issues in this case." (AOB p. 25). On the contrary, those three decisions accurately describe the elements, purpose and history of the CVRA – essential to addressing the issues in this case.

First, those decisions explained what must be shown, and what need not be shown, to establish a violation of the CVRA – specifically, showing RPV establishes that an at-large election system dilutes minority votes and therefore violates the CVRA. (*Rey*, 203 Cal.App.4th at 1229 ["To prove a CVRA violation, the plaintiffs must show that the voting was racially polarized. However, they do not need to either show that members of a protected class live in a geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."]; *Jauregui*, 226 Cal.App.4th at 798 ["The trial court's unquestioned findings [concerning RPV] demonstrate that defendant's at-large system dilutes the votes of Latino and African American voters."].)

Second, those decisions explained the remedial purpose of the CVRA, and the corresponding liberality with which it should be interpreted to achieve that purpose. (E.g. *Jauregui*, 226 Cal.App.4th at 805-807 ["The Legislature intended to provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act of 1965 ... [R]emedial legislation is to be liberally or broadly construed. [The CVRA] specifically fall[s] within the definition of remedial legislation"].)

1. Racially Polarized Voting

To demonstrate RPV, Respondents provided statistical evidence, using the ecological regression method approved by the federal courts and explicitly called for by the CVRA (Elec. Code, §14026; *Gingles*, 478 U.S. at 52-53; RT3021:2-3021:19; RT3057:22-3199:24; RT6762:27-6811:25), as well as non-statistical evidence (such as Latino political groups' endorsements, and racially-tinged attacks against Latino candidates) that reinforced the statistical evidence showing that Latino voters in Santa Monica prefer Latino candidates for city council but non-Latino voters oppose those same candidates. (E.g. RT3061:10-3062:16; RA53.)

Caltech professor Dr. Morgan Kousser, whose opinions on RPV have been adopted in every CVRA trial in this State,[2]

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[2] See, e.g. *Jauregui*, 226 Cal.App.4th at 790 ["The court finds the opinions expressed by Dr. Kousser to be persuasive"].

presented his ecological regression, weighted ecological regression and ecological inference analyses for each of Appellant's elections for which sufficient data is available that involved at least one candidate recognized as Latino by the Santa Monica electorate – a total of seven elections. [3] (RT2943:11-2946:4; RT3025:17-3035:4; RT3057:22-3199:24; RA56-76.) Contrary to Appellant's assertion, Dr. Kousser provided group voting estimates for *every* candidate – not just Latino candidates – in those elections. (RA56-76.) Based on those statistical analyses, Dr. Kousser identified a pattern: when serious Latino candidates run for Appellant's city council, Latino voters cohesively support those candidates, but the non-Latino majority does not support those candidates in sufficient proportions and thus those candidates lose. (RT3057:22-3199:24; RT3209:28-3219:12.)

Focusing on the group voting estimates for Latino candidates, just as the U.S. Supreme Court did in *Gingles* and other courts have done since, Dr. Kousser found that the non-Hispanic white majority voted statistically significantly differently from Latinos in 6 of the 7 elections (using a 95% confidence interval). (RT3062:18-3063:17; RT3064:11-3066:12;

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[3] Polling expert Jonathan Brown surveyed Santa Monica voters and found that certain candidates were widely recognized as Latino, while others were widely recognized as not Latino. (RT2775:5-2776:4; RT2786:14-2787:1; RT2854:1-2856:7; RA50.)

RT3068:1-3071:25; RT3076:8-3077:12; RT3079:2-3079:15; RT3082:15-3083:1; RT3171:5-3173:16; RT3181:18-3183:22.) Comparing the Latino support for the Latino and non-Hispanic white candidates, respectively, Dr. Kousser found that in all but one of those six elections a Latino candidate received the most Latino votes, often by a large margin. (*Ids.*; see also 24AA10686.) Dr. Kousser further explained that in all but one of those elections – an unusual election in which none of the incumbents elected 4 years earlier sought re-election – those Latino candidates who received the most Latino votes lost despite overwhelming Latino support. (*Ids.*) This pattern of electoral defeat, as Dr. Kousser explained, makes the RPV in Appellant's elections legally significant. (*Ids.*; RT4960:21-4960:24.) Dr. Kousser concluded: "[b]etween 1994 and 2016 [] Santa Monica city council elections exhibit legally significant racially polarized voting" and "the at-large election system in Santa Monica result[s] in Latinos having less opportunity than non-Latinos to elect representatives of their choice" to the city council. (RT3209:28-3219:12; RT4960:21-4960:24.)

Appellant also presented an expert, Dr. Jeffrey Lewis, who likewise estimated group voting behavior in several elections. (RA193-215.) While Dr. Lewis refused to opine on the existence of RPV (as he had done in prior cases), his estimates differed only slightly from those of Dr. Kousser, and Dr. Lewis confirmed that

his analyses demonstrate all the indicia of RPV: 1) the Latino candidates for city council generally received the most votes from Latino voters; 2) those Latino candidates received far less support from non-Hispanic whites; and 3) the differences in levels of support between Latino and non-Hispanic white voters are statistically significant. (*Id.*; RT5524:20-5526:8; RT5536:20-5537:9; RT5555:12-5556:25.) In addition to the elections specified by the CVRA, Dr. Lewis also provided group voting estimates for school board, college board and rent board elections, and confirmed that in all those elections too there is a statistically significant difference in voting behavior between Latinos and non-Hispanic whites. (RA193-215; RT5522:27-5524:3; RT5528:1-5530:1; RT5530:14-5532:10; RT5533:22-5535:3; RT5536:2-5537:9.)

Corroborating Dr. Kousser's conclusion, another voting rights expert, Justin Levitt, evaluated Dr. Lewis' estimates. (RT6762:27-6811:25.) Professor Levitt came to the conclusion that Dr. Lewis' analysis makes inescapable – Appellant's elections exhibit RPV that is so "stark" that it is in some instances similar to the polarization "in the late '60s in the Deep South." (RT6762:27-6811:25.)

The Superior Court considered all of that evidence and agreed with the conclusions of Dr. Kousser and Professor Levitt – evaluating all of the candidates in each of the relevant elections,

Appellant's elections are plagued by RPV. (24AA10677-10700.) The Superior Court summarized its findings concerning the relevant elections:

- In 1994, Latino voters' top choice was the lone Latino candidate – Tony Vazquez – but he lost;
- In 2002, Latino voters' top choice was the lone Latina candidate – Josefina Aranda – but she lost.
- In 2004, Latino voters' top choice was the lone Latina candidate – Maria Loya – but she lost.
- In 2008, the lone Latina candidate – Linda Piera-Avila –received significant support from Latino voters, but she lost.[4]
- In 2012, an unusual election because of the "special circumstance" that no incumbents who had won four years earlier sought re-election, the leading Latino

[4] The Superior Court recognized that Ms. Piera-Avila was not the top choice of Latino voters, but the contrast between the levels of support she received from Latinos and non-Hispanic whites, respectively, was nonetheless consistent with RPV, just as the *Gingles* court found very similar levels of support for an African-American candidate to evidence RPV. (24AA10688), citing *Gingles*, 478 U.S. at 81, appen. A; see also *Teague v. Attala County* (5th Cir. 1996) 92 F.3d 283, 289 [election in which minority candidate "could not realistically be considered a serious candidate given the paucity of support … from any segment of the voting population" does not undermine finding of racially polarized voting].)

candidate, Tony Vazquez, was heavily favored by Latino voters but did not receive nearly as much support from non-Hispanic white voters. He barely won, coming in fourth place in the four-seat race.[5]

- In 2016, Latino voters' top choice was Latino candidate, Oscar de la Torre, who received even more support from Latinos than did Mr. Vazquez in the same election, but Mr. de la Torre lost.

(24AA10687-10689.)

The Superior Court summarized its "functional view of the political process" based on its "searching and practical evaluation of reality" (*Gingles*, 478 U.S. at p. 66) in Appellant's city council elections:

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[5] In *Gingles*, the Supreme Court described RPV as occurring where "the minority group ... is politically cohesive … [and] the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances ... – usually to defeat the minority's preferred candidate." (478 U.S. at 51.) In its opening brief, Appellant incompletely reproduces the *Gingles* court's recitation of what RPV is, replacing the phrase "in the absence of special circumstances" with an ellipsis, giving the false impression that all victories by minority-preferred candidates suggest a lack of RPV. (AOB p. 26.) *Gingles* says the exact opposite. (478 U.S.at 57 ["the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest."].)

> This is the prototypical illustration of legally significant racially polarized voting – Latino voters favor Latino candidates, but non-Latino voters vote against those candidates, and therefore the favored candidates of the Latino community lose.

(24AA10688-10689, quoting *Gingles*, 478 U.S. at 58-61 ["We conclude that the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."].)

2. Probative But not Necessary Factors Establishing a Violation of the CVRA

Respondents also presented evidence of the factors enumerated in Elections Code section 14028(e) that are "probative but not necessary to establish a violation" of the CVRA:

- Santa Monica's troubling history of discrimination, including: restrictive real estate covenants that segregated Santa Monica and were supported by 70% of Santa Monica voters in 1964 who voted to allow racial discrimination in housing; segregation in the use of swimming facilities; and the repatriation of Latinos and English-literacy voting restrictions enforced throughout California, including Santa

Monica. (RT3755:6-3756:11; RT8637:17-8639:24; RT8630:8-8631:27; RA41, RA255-256.)

- Appellant staggers its elections – a practice known to enhance the dilutive effects of at-large elections. (RT6813:17-6814:21.)

- Whites enjoy significantly greater income and educational outcomes than Latinos and African-Americans in Santa Monica, a difference far greater than the national disparity – a problem that inhibits Latinos' full participation in the political process. (RT2292:19-2294:22 and RT2302:13-2303:14 [objections later overruled at RT2429:10-11]; RT8770:28-8772:15; RA49.)

- Subtle, and even overt, racial appeals – for example, depicting a Latino candidate as the leader of a Latino gang and attacking his support for non-citizen voting – plague Appellant's elections, resulting in Latino candidates' losses and discouraging them from even running. (RT2145:11-23; RA278-279; RA291-292.)

- Appellant's city council and government has been unresponsive, even hostile, to the Latino community concentrated in the Pico Neighborhood. (RT2316:10-2317:27; RA28; 25AA11001.) Its council-appointed commissions are nearly devoid of Latinos, and the city's most undesirable features (the freeway, trash facility, maintenance yard, hazardous waste collection and storage, park emitting poisonous

> methane gas and train maintenance yard) have been placed in the Pico Neighborhood, often at the direction of Appellant or its council members. (RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8774:21-8788:15; RA39-40; RA294-295; RA297-346; RA346)

The Superior Court found this qualitative evidence "further support[s] a finding of racially polarized voting in Santa Monica and a violation of the CVRA." (24AA10701; see also 24AA10700-10706; *Jauregui*, 226 Cal.App.4th at 794 ["Section 14028, subdivisions (b), (c) and (e) identify other factors that may be considered in determining whether racially polarized voting has occurred."].)

3. Remedies for Vote Dilution

Respondents also presented evidence that several election methods would enhance Latino voting power over the current at-large system – exactly the standard for "dilution" proposed by Appellant. (22AA9861; RT2314:7-2330:5; RT6817:2-6819:16; RT6919:14-7054:23; 25AA11000-11004; RA29-30; RA42-48.)

David Ely, whose maps have consistently been adopted by California courts in CVRA cases, presented an exemplary map dividing Santa Monica into seven equipopulous districts. (RT2330:14-2331:27; RA46-48.) Focusing on a remedial district comprising the Pico Neighborhood, Mr. Ely recreated prior elections and found that Latino candidates preferred by Latino

voters perform much better in that remedial district than in other parts of the city – while they lose citywide, they often receive more votes than any other candidate in the Pico Neighborhood district. (RT2318:7-2325:19; 25AA11002-11004; RA29-30.) As explained by Professor Levitt, the strong political organization of Latinos in the Pico Neighborhood, and the wealth disparities in Santa Monica, further suggest that Latino-preferred candidates will fare better in district elections. (RT6927:5-6929:27; RT6950:20-6954:6.) Professor Levitt also testified that district elections have resulted in greater representation of minority communities in this State and nationally, even in districts that are not majority-minority but are within the range the U.S. Supreme Court has identified as "influence districts." (RT6932:14-6932:26; RT6935:24-6938:18; RT6939:7-6942:20; RT6946:5-6947:21; RT7065:19-7067:19; *Georgia v. Ashcroft* (2003) 539 U.S. 461, 470-471, 482 [defining "influence district" as a "district[] with a [minority] voting age population of between 25% and 50%" and noting "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."].)

Professor Levitt also explained how cumulative voting, limited voting and ranked choice voting – election methods employed by other cities, and sometimes ordered by courts in

CVRA and federal Voting Rights Act ("FVRA") cases – would also each improve Latinos' ability to elect representatives of their choice, beyond the Santa Monica status quo. (RT6817:2-6817:28; RT6954:8-6980:26; RT7051:27-7054:23.) Specifically, Professor Levitt compared the Latino proportion of eligible voters to the "threshold of exclusion," a measure accepted by the federal courts for assessing the equitable opportunity to elect, while also detailing instances where these systems have effectively remedied vote dilution even where the minority proportion is below the threshold of exclusion. (RT6955:8-6958:13; RT6960:14-6961:27.)

The Superior Court agreed: "Plaintiffs presented several available remedies (district-based elections, cumulative voting and ranked choice voting), each of which would enhance Latino voting power over the current at-large system." (24AA10702-10703.)

B. Equal Protection

When voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all ...." (*N.C. NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases].) Respondents presented, and the court found, substantial evidence of discriminatory intent, and disparate impact, in

Appellant's adoption and maintenance of its at-large election system.

1. Disparate Impact

Respondents demonstrated the discriminatory impact of Appellant's at-large elections following Appellant's adoption of that system in 1946, and its maintenance in 1992, in several ways, any one of which is sufficient: 1) the consistent losses of Latino candidates; 2) the unresponsiveness of Appellant's at-large-elected council members to the needs of the Latino community; and 3) the vote dilution discussed above. (RT2316:10-2317:27; RT3035:14-3039:22; RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8774:21-8788:15; 25AA11001; RA28; RA39-40; RA294-295; RA297-343; RA346; see *White v. Regester* (1973) 412 U.S. 755, 766-770 [affirming judgment of equal protection violation based on findings of infrequent electoral success by Latino and African-American candidates and unresponsiveness of elected officials to the Latino and African-American communities].)

In the four decades following Appellant's adoption of the at-large system in 1946, ten Latino candidates sought a city council seat; all of them lost. (RT3035:14-3036:3; RA54.) Understanding the support of Latino voters was unnecessary for success in the at-large system, Appellant's city council members placed all of the undesirable features of the city in the Latino-concentrated

Pico Neighborhood. (RT2316:10-2317:27; RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8774:21-8788:15; 25AA11001; RA28; RA39-40; RA294-295; RA297; RA346) For example, Appellant directed that the 10-freeway run through the Pico Neighborhood, displacing a significant number of minority residents, largely without compensation. (RT3491:17-3492:21; RT6078:18-6081:8; RA346.)

Similarly, the effects of the at-large system were felt immediately following Appellant maintaining that system in 1992. Just two years later, Tony Vazquez, the only Latino ever elected to Appellant's city council, was ousted in an election he said revealed "the racism that still exists in our city." (RT3035:14-3036:3; RA278-279; RA291-292.) And, as discussed above, many more Latino candidates have run since then and lost despite being the top choice of Latino voters. Latinos have even been excluded from council-appointed commissions, just like the council itself. (RT8774:21-8788:15; RA298-343.) During those years, Appellant's adverse treatment of the Pico Neighborhood continued as it added to the previously-sited undesirable elements (*e.g.*, the trash facility, maintenance yard, hazardous waste collection and storage and park emitting poisonous methane gas) another one – the train maintenance yard. (RT6078:19-6081:20; RT6083:10-6083:28; RT9154:25-9156:14; RA39-40; RA294-295; RA297; RA346.)

The Superior Court found all of this supports its conclusion that Appellant's at-large election system has had a disparate impact on Latinos. (24AA10705-10706; 244AA10718; 24AA10725.)

2. Discriminatory Intent

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" including "the historical background of the decision." (*Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 266-267.) Respondents provided, and the trial court relied on, both direct and circumstantial evidence of Appellant's discriminatory intent in adopting and maintaining its at-large elections in 1946 and 1992.

a. 1946

In 1946, proponents and opponents of at-large elections bluntly recognized that the at-large system would impair minority representation –it would "starve out minority groups," leaving "the Jewish, colored [and] Mexican [no place to] go for aid in his special problems" "with seven councilmen elected AT-LARGE ... mostly originat[ing] from [the wealthy White neighborhood] North of Montana [and] without regard [for] minorities." (RT3470:17-3476:9; 25AA10890; 25AA11005.) Proponents condescendingly rationalized the at-large system,

arguing that minorities would be better off with wealthy white representatives who would somehow be sympathetic to their needs. (25AA10889; RA177-178.)

A Board of Freeholders – all white and nearly all from the wealthier northern half of the city where deed restrictions prohibited racial minorities – was empaneled to draft a new city charter. (RT3227:3-3228:12; RT3476:26-3477:14; 25AA10927-10928.) At a time when racial tensions were high in Santa Monica, amid signs of white leaders' fear of non-white population growth, and abjectly racist official action was common from Santa Monica's government (e.g. adopting a resolution calling for all Japanese Americans to be deported following the War), the Freeholders initially voted to offer voters a hybrid district election option, but then reversed course and offered only an at-large option. (RT3483:14-3484:24; RT3494:6-3495:27; RT3662:14-3666:3; RA184-187.)

At the same time Santa Monica voters approved the at-large election system, they also opposed Proposition 11, which would have banned racial discrimination in employment. (RT3484:22-3486:17.) Statistical analysis of the 1946 election results shows the same voters who opposed Proposition 11 also voted for the at-large charter. (RT3487:12-3489:12; RA176, 180.)

b. 1992

The evidence of discriminatory intent surrounding the

deliberate maintenance of the at-large election system in 1992 is even more robust. A Charter Review Commission prepared a report of its recommendations, and the City Council's deliberations were videotaped. (25AA10891-10998; RA179.)

At-large elections had become targeted throughout California for diluting Latinos' votes. (RT3461:21-3463:8.) The Charter Review Commission understood that also, and recommended, by a nearly unanimous vote, that Appellant's at-large system be scrapped because it prevented minorities and the Pico Neighborhood from having a seat at the table. (25AA10913-10914, 25AA10930.) Indeed, Appellant's own consultant reported that the at-large system had been adopted for that discriminatory purpose in 1946. (RA77-103.)

Nonetheless, Appellant's Council, by a 4-3 vote, refused to change the system that elected them. (RA179 [timestamp: 3:34:30-3:39:35].) One councilmember, Dennis Zane, candidly explained his reasons: with a member representing the Pico Neighborhood, Appellant would no longer be able to place a disproportionate share of low-cost housing into the minority-concentrated Pico Neighborhood, where the majority of the City's low-cost housing was already located (RT3345:24-3350:11; RA179 [timestamp: 2:09:18-2:09:34]); the Latino neighborhood would have a representative who would not tolerate that. (RT3375:7-3384:20; RA179 [timestamp: 1:07:36-1:12:29]).) Mr. Zane

characterized this as a tradeoff between Latino voting rights and more undesirable low-cost housing clustered in the Latino neighborhood – "so you gain the representation but lose the housing" – and chose to deny Latinos representation in order to preserve the majority's power to dump low-cost housing on the Pico Neighborhood. (*Id.*)[6]

c. Findings of Intentional Discrimination

Describing the video of Appellant's 1992 council meeting as "direct evidence of the [discriminatory] intent of the then-members of [Appellant]'s City Council" (24AA10722-10723), the Superior Court considered all of the direct and circumstantial evidence, under the rubric instructed by the U.S. Supreme Court in *Arlington Heights*. (24AA10714-10727.) Based on all of that evidence, the Superior Court found that Appellant's at-large system was adopted and maintained with a discriminatory purpose in 1946 and 1992, either of which would require remedial relief. (24AA10716.) And, contrary to Appellant's assertion now, the Superior Court explicitly found that the evidence

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[6] Appellant draws a different inference from Zane's remarks, but the Superior Court drew the well-supported inference that Mr. Zane wanted to maintain the power of his political group to continue placing low-cost housing in the Pico Neighborhood, and diluting the votes of its minority residents was the vehicle to accomplish that goal. The factual inferences of the Superior Court are not properly second-guessed by this Court. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-928)

"demonstrates a deliberate decision to maintain the existing at-large structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population." (24AA10727.)

The court started, in each instance, by assessing the discriminatory impact of Appellant's at-large elections, because discriminatory impact is probative evidence of discriminatory intent. (24AA10718, 24AA10725; see *Arlington Heights,* 429 U.S. at 266-268.) As discussed above, the Superior Court found discriminatory impact in multiple ways following the adoption and maintenance of the at-large system in both 1946 and 1992.

For context, the Superior Court took note of the historical background of Appellant's decisions in 1946 and 1992. (24AA10718-10720; 24AA10725-10726.) In 1946, the increasing proportion of non-whites in Santa Monica, the all-white composition of the Freeholders, and the racial tensions in Santa Monica evidenced by the Zoot Suit riots, Appellant's resolution calling for all Japanese Americans to be deported after the War and the need for a "Committee on Interracial Progress," the court found, all militated in favor of finding discriminatory intent. (24AA10718-10720.) As the court also noted, in 1992 Appellant's consultant, Dr. Leo Estrada, concluded that a council district could be drawn with a combined majority of Latino and African-American residents, and the Council members understood that

district elections would benefit minorities and undermine the slate politics that had facilitated their election. (24AA10725-10726.) Appellant's early-1990's council also adopted a curfew that Appellant's lone Latino council member described as "institutional racism." (24AA10726.)

The Superior Court also found the sequence of events leading up to the adoption and maintenance of at-large elections in 1946 and 1992 supports finding discriminatory intent in each instance. (24AA10720-10721; 24AA10726.) In 1946, as the Superior Court noted, the Freeholders waffled about giving voters a choice of having some district elections, but ultimately chose to present only an at-large option while recognizing that district elections would enhance minority representation. (24AA10720-10721.) In 1992, the issue of district elections was intertwined with racial justice, as the Superior Court found and as demonstrated by the Charter Review Commission's report and the advocacy of Santa Monica's minority leaders. (24AA10726.) The Commission reported that the Latino-concentrated "Pico neighborhood ... feel[s] most disenfranchised and least listened to in City affairs"; "the at-large system is generally considered an obstacle to ethnic empowerment"; and "between 1979 and the 1990 election ... minorities had no presence on the Council." (25AA10923; 25AA10929-10930.)

The Superior Court found substantive and procedural

departures from the norm, in both 1946 and 1992, also support finding discriminatory intent. In 1946, the local newspaper called the Freeholders' reversal on allowing voters the option of district elections, in the wake of discussion of minority representation, "unexpected." (24AA10721.) And, in 1992, while Appellant's council adopted nearly all of the Charter Review Commission's recommendations, it refused, on "the central issue" addressed by the Commission, to scrap its at-large elections – as the Commission recommended with near unanimity, because of their deleterious effect on minority representation. (25AA10930 ["the at-large system is felt to be inadequate" with respect to "empowering [] ethnic communities to choose Council members."]; 24AA10726-10727.)

The robust legislative and administrative history in 1992, as the Superior Court found, provides substantial evidence of Appellant's discriminatory purpose. (24AA10727.) The court also found the legislative and administrative history in 1946, while less voluminous, probative, noting particularly the statements by proponents and opponents of at-large elections demonstrating all sides' understanding that at-large elections diminished minorities' electoral influence and retaining them at least in part to achieve that end. (24AA10721.)

IV. STANDARD OF REVIEW

Though Appellant describes various standards of review that are generically applicable to legal or factual questions, Appellant fails to specify the standards of review applicable to the claims in this case. The reason is simple: application of the appropriate deferential standards of review mandates affirmance.

A. CVRA

This Court must affirm the trial court's rulings on vote dilution under the CVRA if they are supported by substantial evidence. (*Jauregui*, 226 Cal.App.4th at 792 [citing cases describing the substantial evidence standard - "The trial court's dilution findings are presumed to be correct."].) Federal courts addressing the existence of RPV in FVRA cases agree -- "the ultimate finding of vote dilution [is] *a question of fact* subject to the clearly-erroneous standard of [FRCP] 52(a)." (*Gingles*, 478 U.S. at 78 (emphasis added).) This deference to the trial court follows from the requirement that, in examining evidence of RPV and vote dilution, a trial court must engage in "an intensely local appraisal of the design and impact of the contested electoral mechanisms." (*Id.* at 79). "[T]here is no simple doctrinal test for the existence of legally significant racial bloc voting," and "the degree of racial bloc voting that is cognizable as ... vote dilution [] will vary … according to a variety of factual circumstances," so

trial courts are required make nuanced determinations about what each election demonstrates, the weight to be accorded to each election, and other evidence put before them. (*Id.* at 57-58; *see also Ruiz v. City of Santa Maria*, 160 F.3d 543, 553-54 [reversing trial court decision that mechanically identified Latino-preferred candidates and tallied their electoral victories and losses rather than weighing the evidence under the required "searching practical evaluation of the past and present reality."])

Substantial evidence review is based on the premise that "[t]he trial court, as trier of fact, has the duty to weigh and interpret the evidence and draw reasonable inferences therefrom." (*Guimei v. Gen. Elec. Co.* (2009) 172 Cal.App.4th 689, 698.) The Court of Appeals "cannot reweigh the evidence or draw contrary inferences." (*Ibid.*) To the contrary, "all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible ... the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment." (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 114; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-928 [same].)

B. Equal Protection

The same limited scope of review applies to the trial court's findings of intentional discrimination. (*Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 375.) "The issue of whether the differential impact [of an at-large system] resulted from an intent to discriminate on racial grounds 'is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard.'" (*Rogers v. Lodge* (1982) 458 U.S. 613, quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 287-288.) Deferential review of trial court findings is warranted because determinations of discriminatory impact and intent "represent[] ... a blend of history and an intensely local appraisal of the design and impact of the [electoral system] in the light of past and present reality, political and otherwise." (*Id.* at 622, quoting *White v. Regester* (1973) 412 U.S. 755, 769-770.) This "intensely local appraisal" requires that "special deference is owed the trial court's superior vantage point." (*Washington v. Finlay* (4th Cir. 1981) 664 F.2d 913, 920).

C. This Is Not a "Cold Record" Case

Seeking to avoid the deferential standard of review applicable to the claims in this case, Appellant cites two cases that applied a *de novo* standard because those courts were addressing a "cold record." (AOB p. 24, citing *Flores v. Axxis Network & Telecommunications, Inc.* (2009) 173 Cal.App.4th 802

and *People v. Avila* (2006) 38 Cal.4th 491.) But this case is nothing like those cases. In *Flores* the court addressed only the construction of an arbitration agreement, and in *Avila* the court addressed a trial court's ruling based solely on written answers to a juror questionnaire and no other interaction with the potential jurors. (*See Flores*, 173 Cal.App.4th at 805; *Avila,* 38 Cal.4th at 529.)[7] In contrast, the evidence in this case was presented over a six-week trial through nine live fact witnesses and, notably, seven live expert witnesses. (See *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 204 ["[T]he weight to be given [to] the opinions of the experts" is a matter "within the exclusive province of the trier of fact."].)

V. ARGUMENT

A. The Superior Court Properly Found Appellant's Elections Violate the CVRA.

A violation of the CVRA "is established if it is shown that racially polarized voting occurs." (Elec. Code §14028(a).) Appellant is absolutely correct that "[t]he Supreme Court articulated the standard for racially polarized voting in Gingles." (AOB p. 25). The Superior Court applied precisely that standard here, citing *Gingles* repeatedly. (24AA10671; 24AA10676;

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[7] The *Avila* court noted that if the "trial judge [] observes and speaks with a prospective juror" the "trial court's rulings on motions to exclude for cause are afforded deference on appeal." (*Id.* at 529.)

24AA10678-10679; 24AA10682-10683; 24AA10686; 24AA10688-10689; 24AA10699-10700; 24AA10703; 24AA10705)

Fulfilling its obligation to conduct a "searching practical evaluation" of the political reality in weighing the evidence of RPV (*Gingles,* 478 U.S. at 79), the Superior Court considered: 1) the statistical evidence estimating the support from each major ethnic group for each candidate in each relevant election; 2) the qualitative evidence of voter preferences such as endorsements and racial appeals; 3) the consistent electoral losses of Latinos preferred by Latino voters; and 4) the social and historical circumstances of the Latino community that interact with the at-large system.

The Superior Court recognized an unmistakable pattern from the statistical and qualitative evidence – when serious Latino candidates run for Appellant's city council, they are overwhelmingly preferred by a cohesive community of Latino voters, but generally still lose. (24AA10680.) Contrary to Appellant's unfounded criticism (AOB pp. 28, 57), the Superior Court did not *assume* Latino candidates were preferred by Latino voters; the evidence proves they were. In five of Appellant's seven elections between 1994 and 2016 involving at least one Latino candidate, the preferred Latino candidate received the overwhelming support of Latino voters. (24AA10686-10689). In 1994 Latinos' top choice was Tony Vazquez; in 2002 it was

Josefina Aranda; in 2004 it was Maria Loya; in 2012 it was Tony Vazquez; and in 2016 it was Oscar de la Torre. Each of those candidates received dramatically (statistically significantly) less support from non-Hispanic white voters. (24AA10684-10690). As a result, with only one exception (2012) in which the Superior Court found "special circumstances," those candidates lost. (24AA10686-10688.)

That is precisely what the U.S. Supreme Court in *Gingles* stated constitutes RPV – Latino voters prefer Latino candidates, but non-Hispanic white voters do not, and so they usually lose. (*Gingles,* 478 U.S. at 61.)

That Appellant's elections exhibit RPV was not a close call. Dr. Kousser opined that they are plagued by RPV; Professor Levitt concurred; and Appellant's RPV expert refused to offer any opinion at all. (RT3057:22-3199:24; RT5555:12-5556:25; RT6791:1-6793:26).

Appellant attempts to muddy this clear pattern of Latino voter disenfranchisement by making several arguments that are directly refuted by the plain language of the CVRA, as well as case law concerning the CVRA and FVRA. According to Appellant, the Superior Court: 1) considered the wrong elections; 2) erred in focusing on the Latino candidates who were the top choices of Latino voters; 3) erred in identifying Latino voters' preferences; and 4) should have never considered the social and

historical factors the CVRA identifies as "probative but not necessary to establish a violation" of the CVRA (Elec. Code, §14028(e)). (AOB pp. 26-49). None of Appellant's criticisms of the Superior Court has any merit.

1. The Superior Court Properly Focused on City Council Elections Involving At Least One Latino Candidate.

Appellant criticizes the Superior Court for focusing, though not exclusively,[8] on city council elections involving at least one Latino candidate. But that is exactly what the CVRA commands:

> A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision …. The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class …."

(Elec. Code §14028(a) and (b).)[9]

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[8] The Superior Court did consider exogenous elections, but gave those elections their proper weight. (24AA10691-10694)

[9] Appellant argues that reading the CVRA to direct courts to focus on endogenous elections involving minority candidates is absurd because that would preclude liability in cases where minority candidates had never run in the challenged at-large system. (AOB p. 35.) Not so. The CVRA also provides that RPV can be established by analyzing "other electoral choices that affect the rights and privileges of members of a protected class," such as Proposition 187. In any event, in this case there are plenty of endogenous elections involving Latino candidates to analyze for RPV.

The overwhelming majority of FVRA cases agree. Elections for the governing body at issue ("endogenous elections") – Appellant's city council, in this case – are far more probative of RPV than elections for other offices ("exogenous elections"). (See, e.g., *Bone Shirt v. Hazeltine* (8th Cir. 2006) 461 F.3d 1011, 1021, 1027 [citing case law that exogenous elections are "not as probative as endogenous elections," and commenting the defendant's RPV analysis "diluted the proper analysis" by relying on exogenous elections.].) In *Gingles*, the case announcing the standard for determining RPV, only endogenous elections were considered. (*Gingles*, 478 U.S. at 81 [Appendix A.])

The Superior Court's non-exclusive focus on endogenous elections is particularly appropriate in this case. Several witnesses, two of whom had been candidates for Appellant's city council as well as an exogenous board, testified about the major differences between the city council elections and the exogenous elections for those boards with more circumscribed powers. (RT3624:8-3624:28; RT6397:6-6398:5; RT6502:17-6503:5; RT6510:2-6510:27; RT6511:23-6512:5.) In any event, the success of minority candidates in exogenous elections cannot properly be used as Appellant seeks – to undermine a finding of RPV in the endogenous elections actually at issue in the case. (See *Cottier v. City of Martin* (8th Cir. 2006) 445 F.3d 1113, 1121-22 [reversing district court's reliance on exogenous elections to undermine RPV

in endogenous elections]; *Rural West Tenn. African American Affairs Council v. Sundquist* (W.D. Tenn. 1998) 29 F.Supp.2d 448, 457 ["[V]oting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about endogenous elections."].)

The overwhelming majority of FVRA cases also agree that elections involving minority candidates are far more probative of RPV than all-white elections. (See, e.g., *U.S. v. Blaine County* (9th Cir. 2004) 363 F.3d 897, 911 [rejecting defendant's argument that trial court must give weight to elections involving no minority candidates]; *Ruiz,* 160 F.3d at 553-554 ["minority v. non-minority election is more probative of racially polarized voting than a non-minority v. non-minority election" because "[t]he Act means more than securing minority voters' opportunity to elect whites."]; *LULAC v. Clements* (5th Cir. en banc 1993) 999 F.2d 831, 864.) In fact, the *only* elections considered by the *Gingles* court, were those involving a minority candidate. (*Gingles,* 478 U.S. at 81, appen. A.) The fact that elections involving minority candidates are deemed more probative by the Supreme Court, and are expressly preferred by the text of the CVRA, does not indulge any improper stereotype about the preferences of minority voters. It simply recognizes that if polarized preferences for distinct candidates exist — a fact that must be proven rather than assumed in every case, and a fact

proven here at trial — some elections make for a more revealing testing ground than others.

2. The Superior Court Properly Focused on the Latino Candidates Preferred by Latino Voters.

Appellant also criticizes the Superior Court for focusing exclusively on the levels of support for Latino candidates. But the Superior Court's focus was both not exclusive and entirely warranted. The Court found that "in all but one of those six elections . . . , a Latino candidate received the most Latino votes." (24AA10686.) It is only possible to know which candidate received the most Latino votes by evaluating Latino votes for each of the candidates in each relevant election, as the Superior Court did. And once the Court recognized that the Latino voters in fact overwhelmingly preferred Latino candidates in most of the relevant elections, the Court correctly assessed dilution of the minority's electoral power by focusing on the voting patterns for or against those candidates most preferred by the minority community.

Moreover, countless FVRA cases have relied on the comparison of minority and majority levels of support for the minority candidates established as the preferred candidates of the minority community—just as the Superior Court did in this case. (24AA10682-10689; see, e.g., *Campos v. Baytown* (5th Cir. 1988) 840 F.2d 1240, 1248-1249 [finding RPV based on differing

levels of support for minority candidates from minority and white voters, respectively]; *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1416-1417 [same]; *Teague v. Attala County* (5th Cir. 1996) 92 F.3d 283, 291 [describing evidence of differing levels of support for black candidates from white and black voters, respectively, as "overwhelming evidence of racial polarization"]; *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1335-37 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990) [summarizing the bases on which the court found RPV: "the results of the ecological regression analyses demonstrated that for all elections analyzed, Hispanic voters generally preferred Hispanic candidates over non-Hispanic candidates .... Of the elections analyzed by plaintiffs' experts non-Hispanic voters provided majority support for the Hispanic candidates in only three elections"].)[10] Indeed, in *Gingles*, the case Appellant concedes set the standard for RPV, the Supreme Court only considered the levels of support Black candidates received from Black and White voters, respectively. (*Gingles,* 478 U.S. at 81 [Appendix A].)

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[10] Appellant incorrectly suggests that *Cano v. Davis* (C.D. Cal. 2002) 211 F.Supp.2d 1208 rejects this approach of focusing on the levels of support for minority candidates. Rather, *Cano* focused on the minority candidates and acknowledged that "Latinos prefer Latino candidates in far higher proportions than do non-Latinos" but found no RPV because - unlike in Appellant's council elections - those Latino candidates usually won. (*Id.* at 1236-1238.)

Appellant argues that the Superior Court's primary focus on Latino candidates is somehow improper, or even unconstitutional, because it "presume[s] that minority voters can prefer only minority candidates." (AOB p. 28.) The Superior Court presumed nothing; rather, it examined the data – obtained by the methods approved in *Gingles* and the text of the CVRA – that demonstrates that when serious Latino candidates run for Appellant's council they are overwhelmingly preferred by Latino voters, and expressly found that "[i]n most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for city council." (24AA10680; RT3057:22-3199:24; RA56-76.)

3. The Superior Court Properly Identified Latino-Preferred Candidates; It is Appellant's Rigid Mechanical Approach That Is Contrary to Law.

Confronted with the inescapable reality that Latino candidates overwhelmingly preferred by Latino voters almost always lose the relevant elections, Appellant resorts to criticizing the Superior Court for performing the "searching practical evaluation" commanded by *Gingles* to identify Latinos' preferred candidates, instead of the novel and impractically mechanical approach proposed by Appellant. Specifically, Appellant argues that the Superior Court was required to designate any candidates who received the second, third, or fourth most Latino votes in a

particular election as "Latino-preferred" and treat them as equally-preferred by Latino voters as the Latino candidate who received the most Latino votes, as long as those other candidates received a vote from at least 50% of Latinos and 95% confidence intervals for the respective estimates overlap. That restrictive approach, which Appellant conjures out of whole cloth, amounts to a rule that minority voters must accept the loss of a clearly preferred candidate as a "win" if a distant consolation prize squeaks across the finish line, and would effectively require the minority community in a polarized environment to run losing minority candidates for every seat to make out a CVRA claim. It also runs contrary to the weight of FVRA authority and the remedial purpose of the CVRA. (See *Jauregui,* 226 Cal.App.4th at 807; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2. [In enacting the CVRA, the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act."].) Appellant's approach also directly contradicts *Gingles'* prescription for proof of RPV:

> "We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."

(*Gingles,* 478 U.S. at 61.) That Latinos can elect their second, third or fourth choices as long as they are white – the most that Appellant's approach could prove given the facts of this case – does not warrant reversal of the Superior Court's searching practical evaluation of Appellant's elections. (*Ruiz,* 160 F.3d at 554 [reversing district court's decision which used a "simple mathematical approach" to judge whether white bloc voting was sufficient to usually defeat minority-preferred candidates, rather than conducting the required "searching practical evaluation" of the evidence]; *Collins v. City of Norfolk* (4th Cir. 1989) 883 F.2d 1232, 1238 [rejecting district court's treatment of all candidates who received more than 50% of minority vote in a multi-seat election as the minority's representatives of choice: "great care must be exercised in identifying the minority's preferred candidates"]; *Meek v. Metro. Dade County* (11th Cir. 1990) 908 F.2d 1540, 1548 ["Whether a given [] candidate ... is the preferred representative [of the minority] requires appraisal of local facts within the ken of the district court and best left to it."].) Even one of the cases cited by Appellant actually cautions against Appellant's rigid mechanical approach to identifying Latino-preferred candidates. (See AOB p. 36, citing *Askew v. City of Rome* (11th Cir. 1997) 127 F.3d 1355, 1379 ["The Court, therefore, concludes that no hard and fast rule can be set forth defining who is truly a '[minority] preferred candidate' .... This

inquiry is somewhat subjective."].)

Courts deciding whether a candidate receiving the second-most minority votes should be considered "minority-preferred" have declined to do so when faced with statistical estimates similar to those found by Dr. Kousser and Dr. Lewis in this case. For example, the *Collins* court reversed the district court's identification of a white candidate as black-preferred when that white candidate was estimated to have received 15% less support from black voters than the black candidate. (*Collins*, 883 F.2d at 1238.) In *Harper v. City of Chicago Heights* (N.D. Ill. 1993) 824 F.Supp. 786, the court declined to label an incumbent black candidate as black-preferred where she received just 11% less support from black voters than another black candidate who was the top choice of black voters.[11] (*Id.* at 790-791.) Here, with only one exception, the gap between Latino voters' support for their most-preferred Latino candidates and their support for their second, third and fourth choices – candidates whom Appellant insists should be equally treated as Latino-preferred – is greater than 11%. (RA56-57; RA62-63; RA65-66; RA68-69; RA71-72;

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[11] This is very similar to the estimates for Appellant's 2016 election. Oscar de la Torre received 10-20% greater support from Latino voters than did the incumbent Latino councilmember, Tony Vazquez. (RA74; accord RA203, RA209.) Mr. de la Torre, the Latino-preferred candidate pursuant to the teaching of *Harper*, lost. (24AA10688.)

RA74-75; accord RA201-203.) In that circumstance, there is a "presumption" that the second choices of minority voters are not "minority-preferred," and Appellant has done nothing to rebut that presumption. (See *Collins*, 883 F.2d at 1238.)

Appellant's mechanical approach is particularly inappropriate in analyzing multi-seat elections, like Appellant's council elections. As Respondents' experts explained, multi-seat races can mask RPV because minority voters may have more votes to cast than truly preferred candidates in the race. (RT2593:2-2594:24; RT3083:27-3085:12; RT7280:21-7283:26.) In such an election, when minority voters exercise their right to cast all their votes it is "'virtually unavoidable that certain white candidates would be supported by a large percentage'" of minority voters, even though they are just the least objectionable option. (*Ruiz*, 160 F.3d at 553-554, quoting *Citizens for a Better Gretna v. City of Gretna* (5th Cir. 1987) 834 F.2d 496, 502; *see also Harper*, 824 F.Supp. at 790 [same].)

Appellant's approach is also defective in that it is colorblind, even though Santa Monica voters are not. The Ninth Circuit, for example, rejected a district court's "mechanical approach" identical to what Appellant proposes here because that approach viewed the victory of a white candidate who was the second-choice of Latinos in a multi-seat race as undermining a

finding of RPV where Latinos' first choice was a Latino candidate who lost:

> "the Act's guarantee of equal opportunity is not met when ... [c]andidates favored by [minorities] can win, but only if the candidates are white .... The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight.

(*Ruiz,* 160 F.3d at 553-554; see also *Gretna,* 834 F.2d at 502 ["That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."]; *Smith v. Clinton*, (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd, 488 U.S. 988 [it is not enough to avoid liability under the FVRA that "candidates favored by blacks can win, but only if the candidates are white."]; *Jenkins v. Red Clay Consol. Sch. Dist. Bd.* (3d Cir. 1993) 4 F.3d 1103, 1128-1129; see also *Gretna,* 834 F.2d at 502 ["Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference."].)[12]

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[12] That is not to say that minority voters may not prefer non-minority candidates; indeed, the Superior Court recognized as much. (24AA10700 ["No doubt, a minority preferred candidate could be a non-minority"].) But that does not mean that the

Recognizing the electoral pattern over 22 years – "where the choice is available, Latino voters strongly prefer a Latino candidate running for city council" – the Superior Court was perfectly justified in focusing on those candidates' losses. (24AA10680.)

Moreover, by treating the identification of a candidate as "Latino-preferred" as a yes/no proposition, Appellant's approach ignores Latinos' order of preference. (See *Ruiz* 160 F. 3d at 554 [reversing the district court's finding of no RPV based on the success of white candidates who were the second-choice of Latinos: "The district court should also consider the order of preference non-Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates."]; *Meek,* 908 F.2d at 1547 ["*Gingles* addresses not only a group's ability to elect a satisfactory candidate (that is, a candidate for whom the minority voter is *willing* to cast a vote), but the group's ability to elect its *preferred* candidate"]; *Harper*, 824 F.Supp. at 790-791 [finding RPV based on statistical evidence "that generally white bloc voting has been able to defeat the black candidate running first among black voters in Chicago Heights," even though black voters' second

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success of a non-minority candidate should bear the same evidentiary weight as the loss of a more-preferred minority candidate.

choice candidate, who was also black, won].) The Superior Court recognized that Latinos' first choice was a Latino candidate every time a serious Latino candidate ran, and, with only one exception which the Superior Court found exhibited special circumstances, that Latino first-choice lost. (24AA10686-10689.)

Ultimately, the identification of minority-preferred candidates is driven by practical facts on the ground rather than artificial mathematical thresholds. There is no reason to disturb the Superior Court's conclusions. Appellant's analysis demonstrates only that Latinos can elect their second, third or fourth choices as long as they are white. That neither reflects equal opportunity, nor undermines the Superior Court's findings.

4. Focusing on the Most Probative Evidence, the Superior Court Correctly Found that Latino-Preferred Candidates Usually Lose.

Five Latino candidates were overwhelmingly preferred by Latino voters, receiving the most Latino votes of any candidate in their respective races: Vasquez in 1994, Aranda in 2002, Loya in 2004, Vasquez in 2012, and de la Torre in 2016. All received dramatically lower support from white voters, and all, except for Vasquez in 2012, ultimately lost. (RA56-76; 24AA10685-10688.) Vasquez's success, moreover, is explained by special

circumstances, as described above.[13] (24AA10686-10688; *see Gingles*, 478 U.S. at 51, 57.) Focusing on the most probative elections, the record plainly supports the conclusion that majority bloc voting in Santa Monica is sufficient "in the absence of special circumstances ... usually to defeat the minority's preferred candidate." (*Id.* at 51.)

5. Tony Vazquez Was Defeated in 1994 By the Bloc Vote of Non-Latinos.

According to Appellant, the 1994 electoral loss of the only Latino ever elected to Appellant's council (Tony Vazquez), should have been disregarded because that loss was due to a lack of support from black and Asian voters. (AOB, pp. 47, 64-65). But Appellant cites no authority discounting a Latino candidate's loss because that candidate received less support from one non-Latino subgroup (e.g. black or Asian) than another non-Latino subgroup (e.g. non-Hispanic white).

On the contrary, the same argument Appellant makes here was rejected in *Meek*. In *Meek*, "[t]he district court concluded that because Non Latin Whites by themselves [did] not block the electoral success of Blacks, Blacks had not succeeded in proving that Non Latin Whites caused the defeat of 'minority' voters"; the

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[13] Even if Vazquez could properly be considered a Latino preferred candidate in 2016 (but see *Harper*, 824 F.Supp. at 791), the reelection of an incumbent is typically considered a special circumstance (see *Gingles*, 478 U.S. at 57).

defeat of Black candidates was caused by a lack of support from Hispanics. (908 F.2d at 1545). The appellate court reversed, explaining: "The district court erred in failing to recognize that coalitions can form a legally significant voting bloc, and that a coalition of Hispanics and Non Latin Whites could form the relevant majority voting bloc for the purpose of the third *Gingles* factor." (*Id.* at 1545-1546.) Just as in *Meek*, it is the coalition of non-Hispanic Whites, Asians and Blacks that defeated the overwhelmingly Latino-preferred candidate for Appellant's council in 1994.

The CVRA is in accord with the *Meek* court's rejection of Appellant's restrictive view. In defining RPV, the CVRA specifies that the appropriate comparison is between "the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in *the rest of the electorate*," not just one part of "the rest of the electorate." (Elec. Code, §14026 (emphasis supplied).)

6. The Superior Court Properly Considered Evidence of the Factors Listed in Section 14028(e).

Appellant also criticizes the Superior Court for considering the social and historical factors the CVRA expressly provides are "probative" of a violation of the CVRA. (Elec. Code §14028(e).) Those social and historical factors combine with the expense of

at-large elections to dilute the vote of an historically and economically disadvantaged minority. (See *Gingles,* 478 U.S. at 47 ["The essence of a [vote dilution] claim is that a certain electoral law [such as at-large elections] interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters."].)

While similar factors are considered in FVRA cases only after certain preconditions are demonstrated, the CVRA is different – "Section 14028, subdivision[] ... (e) identif[ies] other factors that may be considered in determining whether racially polarized voting has occurred." (*Jauregui,* 226 Cal.App.4th at 794). So, while showing RPV is a prerequisite to consideration of the "Senate factors" in a FVRA case, under the CVRA consideration of the factors listed in section 14028(e) is part of the RPV analysis itself.[14]

7. The Superior Court Properly Found Appellant's At-Large System Dilutes the Latino Vote.

Disregarding that under the CVRA, "dilution" is established by showing RPV (see Elec. Code 14028(a) ["A

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[14] Appellant's contrary interpretation would render Section 14028(e) meaningless. If the 14028(e) factors should only be considered after the existence of RPV is shown, they would be considered only if the violation of the CVRA had already been established (see Elec. Code §14028(a)) – making those factors superfluous.

violation of Section 14027 [which prohibits dilution due to at-large elections] is established if it is shown that racially polarized voting occurs"]), Appellant argues that Respondents failed to prove vote "dilution" because Respondents failed to prove any alternative election system could give Latinos a "greater opportunity to elect candidates of [their] choice" than the current system. (AOB p. 50.) Appellant contends that because Latinos are not numerous and compact enough to comprise the majority of a single-member district, no election system could help them. (AOB p. 51.)

The CVRA expressly rejects Appellant's view. Unlike the FVRA, which prohibits only election procedures that result in members of a protected class having "less opportunity ... to elect representatives of their choice" (52 U.S.C. §10301(b)), the CVRA prohibits at-large elections "that impair[] the ability of a protected class to elect candidates of its choice *or its ability to influence the outcome of an election*." (Elec. Code, §14027, emphasis supplied.) The CVRA thus contemplates that an influence district, or another election method entirely, may be an appropriate remedy, and expressly rejects the FVRA's requirement that plaintiffs show the potential for a majority-minority district. (Elec. Code §14028(c) ["The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized

voting, or a violation of [the CVRA]"; *Sanchez,* 145 Cal.App.4th at 669.)

Moreover, as Professor Levitt's unrebutted testimony details (RT6817:2-6817:28; RT6919:14-6954:6), and the Superior Court expressly found (24AA10728-10731), several different election systems would improve Latinos' voting power – exactly the "dilution" standard Appellant urged the Superior Court to apply. (22AA9861.) The Superior Court based its finding that district elections would improve Latinos' voting power on demonstrated election behaviors of the Pico Neighborhood district in past elections, as well as the experiences of other cities where Latinos have been elected in districts without a majority Latino electorate. (24AA10733-10735.) Other election systems, such as cumulative voting, limited voting and ranked choice voting would, as the unrebutted testimony of Professor Levitt explained and the Superior Court found, also improve Latinos' voting power. (RT6817:2-6817:28; RT6954:8-6980:26; RT7051:27-7054:23; 24AA10733.)

Appellant attempts to undermine the Superior Court's factual finding that the district map developed by Mr. Ely would improve Latinos' voting power, by pointing out that some Latinos reside outside of the remedial district of that map. But that same argument was rejected by the Ninth Circuit in *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407. (*Id.* at 1414 ["The

district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts in appellants' plan"]; see also *Campos,* 840 F.2d at 1244 ["The fact that there are members of the minority group outside the minority district is immaterial."].) In any districting, some districts will have a greater minority proportion than the city as a whole, and others will have less. Latinos comprise 30% of the eligible voters in the remedial district adopted by the Superior Court, a far greater percentage than in the city as a whole, and squarely within the range the U.S. Supreme Court identifies as "influence districts" that empower minority voters. (*Ashcroft,* 539 U.S. at 470-471, 482; 24AA10734-10735.)

Appellant attempts to undermine the Superior Court's factual finding that cumulative voting, limited voting and ranked choice voting would also improve Latinos' opportunity to elect candidates of their choice, by pointing to Latinos' purported lack of cohesion and low voter turnout. But relief cannot be denied outright, as Appellant seeks, because a minority group experiences lower voter turnout than the majority. (See *Blaine County,* 363 F.3d at 911 ["[I]f low voter turnout could defeat a Section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to

bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on."]; *U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 427 [ordering cumulative voting and unstaggering of elections -- "[I]t would be counterintuitive to determine that depressed turnout among Hispanics – a condition that may very well be a direct byproduct of the existing electoral regime – should be a reason to preclude the creation of a new electoral structure in Port Chester."].)[15] Moreover, the evidence shows that Latinos in Santa Monica are very cohesive, and there is no evidence that turnout among Latinos in Santa Monica is significantly lower than that of non-Latinos. (RT3057:22-3199:24; RA56-76.) The evidence does, however, show that cumulative and limited voting give minorities greater opportunity than plurality at-large elections, and have yielded electoral success even when the minority's proportion is below the threshold of exclusion. (RT6963:1-6964:7.)

B. The Superior Court's Application of the CVRA Does Not Violate the California or U.S. Constitutions.

Both the California and federal appellate courts have confirmed the CVRA passes constitutional muster. (*Sanchez,* 145

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[15] Some courts (e.g. *U.S. v. Euclid City School Bd.* (N.D. Ohio 2009) 632 F.Supp.2d 740) have recognized that low minority turnout can be considered in the selection of an appropriate remedy (because district elections, unlike cumulative, limited and ranked choice voting, reduce the effect of turnout disparities). That is far different from denying any remedy at all.

Cal.App.4th at 389-90; *Higginson v. Becerra* (9th Cir. Dec. 4, 2019) No. 19-55275, 2019 U.S.App. LEXIS 35992.) Appellant nonetheless argues the CVRA, or its unexceptional application to Appellant, is unconstitutional. Appellant's arguments are specious.

First, Appellant argues the Superior Court unconstitutionally "assum[ed]" that Latino candidates are preferred by Latino voters in Santa Monica. (AOB p. 57.) As the Statement of Decision makes clear, the Superior Court assumed nothing – the evidence proved that Latino voters strongly prefer Latino candidates. (24AA10686.)[16]

Second, Appellant argues the CVRA is unconstitutional where only an influence district, not a majority-minority district, is possible. But, as Appellant concedes, "some 'influence' claims could be justiciable and constitutional, particularly if there were some evidence ... a hypothetical district would often be sufficient for the minority group to elect its preferred candidates." (AOB p. 59, fn. 13.) As explained above in Sections III.A.3 and V.A.7, that is exactly what Respondents showed, and the Superior Court found, here. Contrary to Appellant's unsupported assertion, creating that effective remedial influence district in this case did

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[16] The only *assumption* that a candidate was Latino-preferred, without any statistical or qualitative evidence, is made by Appellant – that Tony Vazquez was preferred by Latino voters in 1990. (AOB, p. 41).

not involve any racial gerrymandering; it was merely the natural result of applying the traditional districting criteria of Elections Code section 21620. (RT2330:14-2331:27; RT2646:14-2647:1)

Third, Appellant argues the CVRA cannot be constitutionally applied to it because it is a charter city. That same argument was flatly rejected by this Court in *Jauregui*, 226 Cal.App.4th at 795-802. There is no reason to second-guess that holding here, particularly since the Legislature subsequently expressed its agreement with *Jauregui* and codified that decision through Assembly Bill 277 (2015).

C. The Superior Court's Finding of Disparate Impact Was Correct.

As discussed above in Section III.B.1, the evidence of the at-large system's disparate impact on Latinos was substantial, and the Superior Court found as such. Nonetheless, Appellant complains that the Superior Court erred in finding the adoption and maintenance of the at-large system had a disparate impact. Appellant's argument ignores the many ways in which disparate impact may be shown, as well as the mountain of evidence supporting the Superior Court's factual findings.

1. Disparate Impact Can Be Established in a Variety of Ways.

The U.S. Supreme Court has confirmed that disparate impact of an at-large (or "multi-member") system can be shown in several ways, any one of which suffices. (*White,* 412 U.S. 755).

Even the very quote from *Washington v. Finlay* (4th Cir. 1981) 664 F.2d 913 that Appellant includes in its opening brief makes the point that "vote dilution" is only one of several ways to show disparate impact of an at-large system. (AOB p. 61, quoting *Washington*, 664 F.2d at 919 ["vote dilution" is a "special form of discriminatory effect."].)

Disparate impact can also be shown by the lack of electoral success of minority candidates, even without demonstrating levels of polarization in any particular election. (See, e.g., *Rogers v. Lodge* 458 U.S. at 623 [affirming finding of disparate impact and unconstitutionality of at-large election system – "although there had been black candidates, no black had ever been elected to the Burke County Commission."]; *Bolden v. City of Mobile* (S.D. Ala. 1982) 542 F.Supp. 1070, 1076 [relying on the lack of success of black candidates over several decades to show disparate impact].) That is consistent with more recent proof that Latino voters in Santa Monica tend to support Latino candidates, and election data from long-past elections sufficient to show the preferences of minority voters is often unavailable.

Disparate impact can also be shown by unresponsiveness to the minority community. (*White*, 412 U.S. at 767, 769). In *Rogers*, for example, the U.S. Supreme Court noted with approval the district court's consideration of evidence of unresponsiveness to the minority community to show disparate impact: "Extensive

evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community." (458 U.S. at 625.) Indeed, some of the evidence of unresponsiveness to the minority community in *Rogers* is exactly the same as what Respondents presented, and the Superior Court found, in this case – for example, "the infrequent appointment of blacks to [] boards and committees" and unequal treatment of minority neighborhoods. (*Id.* at 626; compare RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8774:21-8788:14; RA39-40; RA294-295; RA297-343.)

The U.S. Supreme Court's decision in *White* affirming the finding that Texas' multi-member districts in two counties had a disparate impact and violated the Equal Protection Clause, is particularly instructive because the evidence and findings of the Superior Court in this case mirror those in *White*. In finding disparate impact, the district court pointed to 1) the infrequency of electoral success of Latino and African-American candidates; and 2) the unresponsiveness of elected officials to the Latino and African-American communities. (*Id.* at 766-769.) Based on those facts, the district court found the multi-member system had a disparate impact on the Latino and African-American communities in those counties. (*Id.*) The Supreme Court affirmed, and explicitly held that the district court's factual

findings, concerning the infrequency of minority candidate success and unresponsiveness to minority communities, established disparate impact:

> These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multi-member district, and, on this record, we have no reason to disturb them .... The District Court ..., from its own special vantage point, conclude[d] that the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district in the light of past and present reality, political and otherwise.

(*Id.* at 767, 769-770.)

Of course, disparate impact can also be shown, as Appellant acknowledges, by demonstrating vote dilution in the same manner as in a case challenging an at-large system under the FVRA or, in California, the CVRA, but that is not the exclusive way to show disparate impact. (AOB p. 61, quoting *Washington v. Finlay* (4th Cir. 1981) 664 F.2d 913, 919 ["vote dilution" is a "special form of discriminatory effect."]. In fact, the very case cited by Appellant for its contrary view – *Washington v.*

Finlay – cites *White* with approval, and recognizes that the disparate impact of an at-large system may be demonstrated by unresponsiveness to the minority community. (*Washington*, 664 F.2d at 921 ["Direct evidence of these subtleties is not likely to be available, and the only evidence of their existence and impact may lie in the circumstance that the officials in power are demonstrably 'unresponsive' ... to the needs and interests of the minority."])

2. Latinos' Consistent Electoral Failures, Appellant's Unresponsiveness to the Latino Community, and the Dilution of the Latino Vote, Each Demonstrate Disparate Impact.

Here, the Superior Court found disparate impact in all three of these ways. (24AA10718; 24AA10725.) As detailed in Section III.B.1, Latino candidates have had almost no electoral success in Appellant's at-large city council elections. The at-large system was successful at completely preventing any Latinos from being elected for over four decades following its adoption in 1946. (RT3035:13-3036:1; RA54.) Only one Latino out of 71 council members has ever been elected to Appellant's city council, and even he promptly lost re-election in a 1994 election he said revealed "the racism that still exists in our city," before narrowly regaining a seat 18 years later in an unusual election marked by

"special circumstances" (see pp. 24, 27 above; RA278).[17] As the Superior Court aptly explained, Appellant's council members recognize they do not need the support of Latino voters to be re-elected, and so they have been unresponsive, even hostile, to the needs of the Latino community, concentrated in the Pico Neighborhood. (See Section III.A.2.) The commissions appointed by Appellant are almost entirely devoid of Latinos (RT8774:21-8788:14; RA298-343) and the most undesirable and toxic features of the city have all been placed in the Latino-concentrated Pico Neighborhood, some at the explicit direction of Appellant's council members. (RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RA39-40; RA294-295; RA297; RA346.) Finally, as explained in Section V.A.7 above, Latinos have suffered vote dilution in Appellant's council elections, by any definition consistent with California law. Any one of these showings of disparate impact would be sufficient. (*Buskey v Oliver* (M.D. Fla. 1983) 565 F.Supp. 1473, 1481 ["[P]roof of discriminatory result may be made by establishing a number of relevant 'circumstantial factors,' primarily those found in the pre-*Bolden* cases of *White v. Regester* and *Zimmer v. McKeithen*."]

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[17] Appellant argues that Vazquez's 1994 defeat should have been disregarded because he had won in 1990, and his loss in 1994 was, according to Appellant, due to a lack of support from black and Asian voters. (AOB pp. 64-65.) As explained above (Section V.A.5), that same argument has been rejected as a matter of law.

(citations omitted).) Any one of these findings is sufficient; taken together, they are conclusive.

3. A Majority-Minority District Is Not Necessary to Show Disparate Impact

Appellant argues that "many courts" have held "the possibility of a majority-minority district" "applies to vote-dilution claims brought under the Equal Protection Clause," but fails to mention all the courts that have expressly rejected that view, and also fails to recognize that showing vote dilution is only one way to show disparate impact. (AOB p. 61.) The Ninth Circuit expressly rejected the same contention made by Appellant here. (*Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771 ["To impose [this] requirement ... would prevent any redress for [an election system] which was deliberately designed to prevent minorities from electing representatives in future elections governed by that [system]. This appears to us to be a result wholly contrary to ... the equal protection principles embodied in the fourteenth amendment."].) So have other courts, recognizing that it would be inappropriate to condone an at-large system tainted by discriminatory intent simply because the minority community is not large or compact enough to comprise a majority-minority district. (See, e.g., *Perez v. Abbott* (W.D. Tex. 2017) 253 F.Supp.3d 864, 944 (three-judge court) ["This Court agrees that, when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles*

precondition to show discriminatory effects."]; *Broward Citizens for Fair Dists. v. Broward County* (S.D. Fla., Apr. 3, 2012, No. 12-60317-CIV) 2012 WL 1110053, at *4-6 [same]; *Com. for a Fair and Balanced Map v. Ill. State Bd. of Elections* (N.D. Ill., Nov. 1, 2011, No. 1:11-CV-5065) 2011 WL 5185567, at *4 ["the first *Gingles* factor is appropriately relaxed when intentional discrimination is shown"].)

The contrary cases cited by Appellant, unlike the Ninth Circuit in *Garza*, did not squarely address the issue. There is no mention of the potential for a majority-minority district in *Rogers* or *Washington v. Finlay* – the first two cases cited by Appellant. The Eleventh Circuit, in *Johnson v. DeSoto County Board of Commissioners* (11th Cir. 2000) 204 F.3d 1335 merely said that it "doubt[s]" a plaintiff could "establish a constitutional vote dilution claim where his section 2 claim has failed," but then declined to actually decide the issue. (*Id.* at 1344-45 ["we need not resolve this question today"].) In Appellant's other cases the courts either merely cited *Johnson* without discussion (*Lowery v. Deal* (N.D. Ga. 2012) 850 F.Supp.2d 1326, 1331), or the plaintiffs did not argue the issue (*Skorepa v. City of Chula Vista* (S.D. Cal. 1989) 723 F.Supp. 1384, 1392).[18] Moreover, with the exception of

[18] Just one year after it was issued, *Skorepa* was overruled by the Ninth Circuit's holding in *Garza* that the potential for a majority-minority district is not required for an equal protection claim. (*Garza*, 918 F.2d at 771.)

Rogers (which says nothing about a majority-minority district), the cases cited by Appellant only considered whether disparate impact had been shown by "vote dilution," not whether disparate impact could be shown another way, such as the lack of minority electoral success or unresponsiveness to the minority community. (See *Johnson,* 204 F.3d at 1343; *Lowery,* 850 F.Supp.2d at 1330.)

Under Appellant's theory, cities would be free to intentionally discriminate against voters on the basis of race as long as the victimized racial group is not sufficiently large and compact to constitute a majority in a single-member district. This theory is fundamentally at odds with the Equal Protection Clause, as the Ninth Circuit held in *Garza*, and the California Legislature's intent in adopting the CVRA. As both the statutory text and legislative history demonstrate, the Legislature understood that minority voters' equal protection rights may be abridged by an at-large system regardless of whether a majority-minority district is possible. (See Elec. Code §§14028(c), 14031.) The Legislature's view is entitled to "significant weight." (*Pac. Legal Found. v. Brown* (1981) 29 Cal.3d, 168, 180.)

4. Appellant's Speculation About What Might Have Happened In the Absence of Its Discriminatory Actions, Does Not Undermine the Superior Court's Finding of Disparate Impact.

Appellant argues, without citing any authority, that the Superior Court should have ignored the unresponsiveness of its

city council to the Latino community because Respondents did not prove that a council elected in a different manner would have been more responsive. Never has any court evaluating an at-large election challenge required a showing that specific policy decisions would have been different if officials had been elected by a different method. Rather, courts are free to make the inference, based on the "all the relevant facts," that the council's unresponsiveness is caused at least in part by the at-large system, as the Superior Court did in this case. (See *Rogers,* 458 U.S. at 621; *White,* 412 U.S. at 766-770 [finding disparate impact of at-large system based on unresponsiveness to the minority community without any discussion of whether officials elected by a different method would have acted differently].) While Appellant disagrees with the Superior Court's factual findings that Appellant's unresponsiveness to Latinos is probative of impaired voting rights (24AA10705), it is not the province of this Court to second-guess those findings, or the Superior Court's inferences from the evidence presented during trial. (See *Rogers,* 458 U.S. at 621;*Washington*, 664 F.2d at 920 [describing "the Supreme Court's admonition that in vote dilution cases special deference is owed the trial court's superior vantage point in making the required 'intensely local appraisal of the design and impact' of a challenged voting system."], quoting *White*, 412 U.S. at 769.)

Finally, Appellant argues that its discriminatory maintenance of at-large elections - by refusing to allow the electorate to scrap the at-large system - should be excused because the electorate *might* have nonetheless voted in 1992 to keep the at-large system. (AOB p. 65.) Appellant, of course, cites no authority supporting its speculative argument.

The evidence suggests that Santa Monica voters would have voted to scrap the at-large system. The 1992 Charter Review Commission – a sampling of Santa Monica voters – expressed its near-unanimous support for eliminating the at-large system (because it prevented minorities from achieving representation on the council). (25AA10913-10914; 25AA10930.) And, the survey conducted by Jonathan Brown confirmed that same sentiment still exists among Santa Monica voters, as they favor district over at-large elections by a wide margin. (RT2856:25-2864:5; RA51.) Appellant points to the failure of a ballot measure in 2002, but unlike the question answered by the Charter Review Commission and the voters surveyed by Mr. Brown, the 2002 ballot measure was not simply about the at-large system. Rather, the 2002 ballot measure was packed with a smorgasbord of unpopular provisions unrelated to district elections – for example, switching to a strong mayor form of government. It was those other provisions that opponents attacked and ultimately led to its defeat. (RT5412:12-5416:6;

RA190.) In any event, even if the failure of the 2002 ballot measure were viewed as an endorsement of the at-large system, that would not cleanse that system of its discriminatory origins and history. (See *Brown v. Bd. of Com'rs of Chattanooga* (E.D. Tenn. 1989) 722 F.Supp. 380, 389 [striking at-large election system based on discriminatory intent in 1911 even absent discriminatory intent in maintaining that system in decisions of 1957, the late 1960s and early 1970s].)

D. The Superior Court Thoroughly Considered and Correctly Decided the Factual Issue of Appellant's Discriminatory Intent

To an even greater extent than for fact issues generally, discriminatory intent is a "factual issue," requiring the trial court to perform "an intensely local appraisal of the design and impact of the [government action] in the light of past and present reality, political and otherwise." (*Rogers,* 458 U.S. at 622, quoting *White,* 412 U.S. at 769-770.) To prevail on an equal protection claim, "plaintiffs are not required to show that [discriminatory] intent was the sole purpose of the [challenged government decision]," or even the "primary purpose," just that it was "a purpose." (*Brown,* 722 F.Supp. at 389, citing *Arlington Heights*, 429 U.S. at 265 and *Bolden,* 542 F.Supp. at 1072; see also *McCrory*, 831 F.3d at 220.)

Mere awareness of consequences does not itself establish discriminatory intent, as the trial court understood (24AA10715-10716); a decisionmaker must "select[] or reaffirm[ ] a particular

course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. *Feeney*, 442 U.S. 256, 279. But because "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence" (*Hunt v. Cromartie* (1999) 526 U.S. 541, 553), "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Arlington Heights*, 429 U.S. at 266.) In assessing discriminatory intent, the evidence must be viewed collectively, not in isolation; even if one piece of evidence does not, standing alone, reveal discriminatory intent, it may nonetheless support a finding of discriminatory intent in combination with other evidence. (*Horsford*, 132 Cal.App.4th at 377; *McCrory*, 831 F.3d at 214 ["In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees."].)

1. The Substantial Evidence of Discriminatory Intent Relied Upon by the Superior Court

The record contains ample direct and circumstantial evidence of discriminatory intent. To summarize some of the most important evidence:

- As recorded in the video of the 1992 council meeting, all of

the council members recognized the at-large system prevented Latinos from achieving meaningful representation, and yet a majority of the council voted to maintain that system, so that - as one council member revealed – their political group preserved the ability to dump more low-cost housing into the Latino-concentrated Pico Neighborhood, already burdened with most of the city's low-cost housing (RT3345:24-3350:11; RT3375:7-3384:20; RA179);

- In the Charter Review Commission report that preceded that meeting, 14 of 15 commissioners recommended scrapping the at-large system because "the at-large system [was] felt to be inadequate" with respect to "empowering ethnic communities to choose council members" (25AA10930);

- The 1946 newspaper editorials and advertisements demonstrated that both proponents and opponents of at-large elections understood such elections would prevent minority representation (RT3470:17-3476:9; RA177-178; 25AA10889-10890; 25AA11005);[19]

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[19] There is nothing unusual about the Superior Court looking to contemporaneous statements by community stakeholders other than the 1946 Freeholders or 1992 Councilmembers. (See *Ave. 6E Invs., LLC v. City of Yuma* (9th Cir. 2015) 818 F.3d 493, 505 ["The presence of community animus can support a finding of discriminatory motives by government officials, even if the

- There was a near-perfect correlation between support for the at-large charter in 1946 and opposition to Proposition 11, a pure gauge of racial attitudes (RT3484:22-3489:12; RA176; RA180); and

- The myriad additional evidentiary facts discussed above in Section III.B.2 and in the Statement of Decision itself.

Taken collectively, as it must be, this evidence amply supports the Superior Court's finding of discriminatory intent. (See *Horsford*, 132 Cal.App.4th at 377). That Appellant would interpret the evidence differently or prefer a different result is not grounds for reversal.

Faced with that evidence, which the Superior Court found compelling, Appellant at least concedes that the 1946 Freeholders and 1992 Councilmembers were aware that the at-large election system would have a discriminatory effect. (AOB p. 65.) It would be difficult to deny that awareness – in 1946 the contemporaneous newspaper articles and advertisements demonstrate that proponents and opponents of at-large elections alike recognized that fact, and in 1992 Appellant's own Charter Review Commission reported that fact to the city council and none of the council members disputed the point. (RT3470:17-3476:9; RA177-179; 25AA10889-10998; 25AA11005.) On the

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officials do not personally hold such views", citing a string of cases].)

contrary, the council members acknowledged that fact. (RA179 [timestamps: 1:07:36-1:12:29; 3:29:10-3:31:10; 3:31:59-3:32:24; 3:34:30-3:39:35].) Awareness of a likely discriminatory impact might not be conclusive on its own, as Appellant argues, but it is certainly strong evidence of discriminatory intent. (See *Arlington Heights*, 429 U.S. at 266 [foreseeable disparate impact is an "important starting point" in determining discriminatory intent]; *Ave. 6E Invs.,* 818 F.3d at 508 [city officials' awareness that decision "would bear more heavily on one race than another" evidences discriminatory intent].)

Appellant argues "[d]iscriminatory purpose ... implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (AOB p. 66.) So it does. And so did the Superior Court determine. The Superior Court expressly found the evidence "demonstrates a deliberate decision to maintain the existing at-large election structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population." (24AA10727.)

The Superior Court not only described the most direct evidence of discriminatory intent, it also addressed each of the Arlington Heights factors - the first of which is disparate impact.

(*Arlington Heights* 429 U.S. at 266; 24AA10718; 24AA10725).[20] Appellant repeats its argument that its adoption and maintenance of at-large elections had no disparate impact. Specifically, Appellant argues that the nearly unbroken string of electoral losses of Latino candidates,[21] and Appellant's unresponsiveness to the Latino community are "legally irrelevant." (AOB pp. 70-71, 79).[22] Far from being legally irrelevant, this evidence is exactly the sort that the U.S. Supreme

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[20] "[A] plaintiff need not establish any particular [Arlington Heights factor] in order to prevail." *Ave. 6E Invs.* 818 F.3d at504.

[21] Appellant also asserts there is no evidence of electoral losses by Latinos in the years following the adoption of the at-large system in 1946, but that is simply wrong. Dr. Kousser testified about those electoral losses (RT3035:14-3036:3), and the chart he prepared detailing those losses was admitted into evidence. (RA54-55.)

[22] Appellant also argues that the evidence of unresponsiveness to the Latino community is misguided because it focuses on the Pico Neighborhood rather than just the Latino community. (AOB p. 71). But Appellant's argument ignores the fact that the Latino community is concentrated in the Pico Neighborhood (RT2299:10-2300:5; RT2316:10-2317:27; RA28; 25AA11000-11001; see also *Rogers*, 458 U.S. at 626 ["discriminatory pattern of paving county roads" accepted as evidence of disparate impact of at-large system].) Appellant's argument also ignores other evidence of unresponsiveness to the Latino community, for example the near complete absence of Latinos on Appellant's appointed commissions. (RT8774:21-8788:1414; RA298-343; *Rogers*, 458 U.S. at 626 [finding "the infrequent appointment of blacks to county boards and committees" evidences disparate impact of at-large system].)

Court has confirmed establishes disparate impact of at-large elections, as discussed above. (See *White*, 412 U.S. at 766-770; *Rogers*, 458 U.S. at 623, 625-626.)

2. This Court Should Not Reweigh the Evidence Based on Appellant's Incomplete and Misleading Description of Some of the Evidence Considered By the Superior Court.

The remainder of Appellant's argument that the Superior Court got it wrong when it concluded Appellant's at-large system was adopted and maintained, in 1946 and 1992, with a discriminatory purpose, is nothing more than a selective recitation of some of the evidence, focused on Appellant's purportedly exculpatory evidence, "drawing from it all the inferences favorable to [Appellant's] position and ignoring inferences favorable to [Respondents]." (*Horsford*, 132 Cal.App.4th at 377) Appellant's argument about the weight of the evidence and the inferences to be drawn from the evidence, were appropriately made to the Superior Court, but they are not appropriate on appeal; on appeal, this Court must "view[the evidence] in the light most favorable to the judgment" and indulge all "reasoned inference[s] that [Appellant] was [] motivated by racial considerations."] (*Id.* at 377-379.) The Superior Court expressly considered Appellant's contrary evidence, and found "the evidence of discriminatory intent outweighs the contrary evidence." (24AA10720.) The Superior

Court's balancing of the evidence is conclusive.

While focusing on the facts to its liking, Appellant ignores much of the evidence presented at trial by Respondents and which the Superior Court found compelling, for example:

- In addressing the historical background in 1946, Appellant ignores the racial composition of the Freeholders and that they all lived in the wealthy area of Santa Monica where minorities were barred by deed restrictions.
- In addressing the historical background in 1992, Appellant ignores that the issue of district elections was intertwined with racial equality, and at-large elections equated with discrimination against Latinos in California. And, Appellant ignores that Latino leaders led the movement for district elections in Santa Monica. (RA182-183). Appellant emphasizes the lack of minority leaders opposing the 1946 charter, so the prominence of Latino leaders advocating for district elections in 1992 must likewise be important.
- In addressing the substantive and procedural departures from the norm in 1946, Appellant ignores the Freeholders' reversal of their previous decision to offer voters a district-election option – a reversal the newspaper called "unexpected."
- In addressing the substantive and procedural departures from the norm in 1992, Appellant ignores that its city council adopted nearly all of the Charter Review Commission recommendations except changing the at-large system. (See *Ave. 6E Invs.*, 818 F.3d at 507 [A city's

decision to disregard the advice of its own committee, particularly where other recommendations are usually accepted, is a departure from the norm that can provide evidence of discriminatory intent], citing a string of cases).

Even where Appellant acknowledges the supporting evidence, Appellant invites this Court to commit legal error by drawing inferences different from those reached by the Superior Court based on the evidence. For example:

- In addressing councilman Zane's remarks that he was not willing to trade low-cost housing for minority voting rights, Appellant infers a benevolent motivation by ignoring others' remarks that reveal the majority of low-cost housing was clustered in the Latino-concentrated Pico Neighborhood. The point, understood well by the Superior Court, is that low-cost housing was packed in the Latino-concentrated Pico Neighborhood, and a district system in which that neighborhood could choose its representative would inhibit that continued dumping on the Pico Neighborhood. (RA179 [timestamps: 1:07:36-1:12:29; 2:09:18-2:09:34.) Appellant also makes much of Mr. Zane's purported support for a hybrid election system. In any event, the evidence, particularly the video of the 1992 council meeting, showed that everyone agreed 7 districts, not a hybrid system with fewer districts, were critical to minority representation because fewer districts would impair the ability to draw an effective district for Latinos concentrated in the Pico Neighborhood. (RA179 [timestamp: 3:29:10-3:31:10]). As the Superior Court

correctly found, this is similar to what the *Garza* court found to be intentional discrimination – maintaining an election system known to diminish Latinos' voting power "as the avenue by which to achieve" continued political power. (24AA10723-10724; *Garza*, 918 F.2d at 771). It does not matter that Mr. Zane's goal was preservation of his political group's power rather than self-preservation, and Appellant cites no authority suggesting that the dilution of minority votes may be used as the avenue by which to achieve political power so long as it is not the political power of one's self.

- In addressing the 1946 newspaper advertisement asserting at-large elections would "starve out minorities," Appellant disputes the Superior Court's inference that "minorities" refers to racial minorities, even though other contemporaneous newspaper advertisements and articles make clear that the issue was racial. (RA177-178; 25AA10889-10890; 25AA11005.)
- Appellant disputes the import of Dr. Kousser's regression analysis linking opposition to Proposition 11 (a statewide initiative to prohibit racial discrimination in employment) to support for at-large elections in 1946. While Appellant may not view Proposition 11 as a measure of racial attitudes, Dr. Kousser disagreed and so did the Superior Court. (RT3484:22-3486:17; 24AA10717-10718; 24AA10720)
- Appellant disputes that a Freeholder's talk with the NAACP reflects her recognition that at-large elections were

harmful to racial minorities' voting power (AOB p. 69, fn. 18), but that too is a perfectly reasonable inference reached by both Dr. Kousser and the Superior Court. (RT3481:8-3483:1; 24AA10720)

- In addressing the sequence of events in 1946, Appellant argues that at-large elections were better for minorities than any district election alternative, even though the Superior Court reached the exact opposite conclusion. While the Superior Court's finding is reasonable, Appellant's contrary inference is absurd. (See, e.g. *Rogers*, 458 U.S. at 616 ["At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives…. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts."].) While countless courts have found at-large elections to dilute minority voting strength, and that is true even when a majority-minority district is not possible (Elec. Code §14028(c)), no court anywhere has ever held that a switch from at-large to district elections diminished minority voting strength. The lone case Appellant cites for its contrary inference is *Garza*, but that case is far from supportive of Appellant's position; *Garza* addressed competing district configurations, not an at-large system (which would have been worse for Latinos than even the most gerrymandered district map).

This Court should not revisit the voluminous evidence of discriminatory intent simply because Appellant contends that different inferences could be drawn from some of that evidence. The Superior Court heard live testimony and reached a reasoned decision based on the totality of evidence presented at trial. The Superior Court was in the best position to judge that evidence, and it largely credited Respondent's evidence and discredited Appellant's. Those factual determinations are within the province of the trial court, and are not properly second-guessed on appeal.

In addition to omitting evidence, Appellant repeatedly mischaracterizes and misquotes the Superior Court's decision:

- In addressing the sequence of events in 1992, Appellant misquotes the Superior Court's decision, changing "racial justice" to "racial districts" (AOB p. 81), to obscure the undisputed fact that district elections were associated with racial justice and at-large elections associated with discrimination against Latinos.
- In addressing the legislative or administrative record in 1946, Appellant claims the Superior Court found there was no legislative or administrative record (AOB p. 75). But the Superior Court never said that. Rather, the Superior Court merely noted that there is no official report so we need to rely on published statements by proponents and opponents of the at-large system, all of which demonstrate that all understood at-large elections would dilute the minority

vote. (24AA10721.)

- In addressing the legislative or administrative record in 1992, Appellant claims that the Superior Court relied on only a legal conclusion. On the contrary, the Superior Court correctly pointed to the "Charter Review Commission report and the video of the July 1992 city council meeting," both of which provide direct evidence of discriminatory intent. (24AA10727.)

This Court should, and of course will, read the Superior Court's decision accurately rather than relying on Appellant's inaccurate translations of it.

Appellant's obfuscating approach is precisely what the court in *Horsford* criticized in affirming the finding of discriminatory intent in that case. (132 Cal.App.4th at 377-379 ["In summary, we find the Trustees' attack on the evidence to be unsupported by the law and to be based on a view of the record that fails to present the evidence in the light most favorable to the verdict."]). For the same reasons as expressed in *Horsford*, the Superior Court's discriminatory intent findings should be affirmed in this case.

E. The Superior Court Correctly Implemented a Remedy When Appellant Failed to Propose Any Remedy At All.

Lastly, Appellant mischaracterizes the law and the Superior Court's decision, arguing that the Superior Court somehow violated section 10010 of the Elections Code while

"implement[ing] appropriate remedies" as commanded by section 14029 of the Elections Code.

As Appellant acknowledges, "[s]ection 10010 ... mandates that *a public entity*" "solicit[] broad public input" before "propos[ing] a districting plan." (AOB p. 82 (emphasis added).) But Appellant refused to engage in that process, despite being given several opportunities to do so. (24AA10735-10736.) Faced with a petulant defendant, the Superior Court did precisely what the CVRA commands and the federal courts have held is the court's responsibility – the court fashioned a remedial plan. (24AA10736-10739; Elec. Code §14029; *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 ["If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."]).

Appellant contends the Superior Court reasoned that Section 10010 "applies only when a public entity is contemplating the adoption of districts, not when a court is ordering a remedy in a CVRA suit" (AOB p. 82), but Appellant's contention contradicts the Superior Court's statement of decision. (24AA10736-10737.) Rather, the Superior Court recognized, "section 10010 speaks to what a political subdivision must do (e.g. a series of public meetings) in order to ... propose a legislative plan remedy in a CVRA case", but correctly reasoned that the court is not responsible for conducting those meetings for Appellant.

(24AA10736-37.) As the trial court found, Appellant had ample opportunity to complete the required hearings and submit a remedial proposal, yet nonetheless failed to do so. (24AA10735-10736.)

Nothing in section 10010 requires the Superior Court to do anything differently. While Appellant quotes the relevant language of section 10010, Appellant ignores that language specifies "section 10010 applies to ... *a proposal that is required due to* a court-imposed change ... to a district-based election" (emphasis added), not the court-imposed change itself. Indeed, the rest of section 10010 makes the point even clearer: all of the directing language in section 10010 applies expressly, and solely, to "political subdivision[s]," a term defined by both section 10010 and the CVRA to encompass cities, counties, school districts, and special districts – not the courts. (Elec. Code §10010(a), (b) & (d)(1), §14026(c).) Section 10010 mandates that the "*political subdivision*" changing to district based elections "shall hold at least two hearings" to gather initial input, "*the political subdivision* shall publish and make available for release at least one draft map," and subsequently "*[t]he political subdivision* shall also hold at least two additional hearings," (Elec. Code §10010(a) (emphasis added).) Appellant's interpretation to the contrary would lead to absurd results – if a CVRA defendant refused to conduct the public meetings contemplated in section

10010 (as Appellant did in this case), the Superior Court, according to Appellant, would be powerless to implement any remedy, despite the command of Elections Code section 14029 that "[u]pon a finding of a violation of [the CVRA], the court *shall* implement appropriate remedies."

Respectfully submitted,

Dated: December 27, 2019 **SHENKMAN & HUGHES**

/s/Kevin Shenkman
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CERTIFICATE OF WORD COUNT

I, the undersigned appellate counsel, certify that this brief consists of 16,983 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word computer program used to prepare the brief.

Dated: December 27, 2019

SHENKMAN & HUGHES

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PROOF OF SERVICE

I, Stuart Kirkpatrick, declare as follows:

I am employed in the County of Alameda, State of California, I am over the age of eighteen years, and I am not a party to this action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, CA 94612, in said County and State. On December 27, 2019, I served the following document(s):

RESPONDENT'S BRIEF ON APPEAL

RESPONDENTS' APPENDIX

NOTICE OF LODGMENT OF EXHIBIT IN SUPPORT OF RESPONDENTS' BRIEF

On parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

☒ **(*State*)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 27, 2019, in Oakland, California.

/s/ Stuart Kirkpatrick
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