No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 8

CITY OF SANTA MONICA,

Appellant-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

APPELLANT'S REPLY TO AMICUS BRIEFS OF FAIRVOTE AND POLANCO ET AL.

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

Gov. Code, § 6103

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I. INTRODUCTION

It is telling that the two amici supporting respondents—FairVote and retired Senator Richard Polanco et al.—steer clear of the central issues in this appeal: whether the City's at-large elections demonstrate legally significant racially polarized voting (that is, whether candidates preferred by Latino voters are usually defeated by white bloc voting), and whether the City adopted and maintained its at-large electoral system for the express purpose of discriminating against minority voters. Because the answer to both questions is no, the judgment against the City under the CVRA and Equal Protection Clause should be reversed on these grounds alone, and this Court need not even consider amici's arguments.[1]

The FairVote and Polanco briefs address only one question: whether the City's current at-large electoral system has diluted Latino voting strength. And they get the answer wrong. There is no basis in federal law, the CVRA's legislative history, or the analyses of respondents' experts for concluding that the voting

[1] FairVote and Polanco also do not weigh in on the trial court's error in disregarding Elections Code section 10010. The City agrees with the analyses of that statute presented by the other amici, the California League of Cities, the California Special Districts Association, and the Santa Monica Transparency Project. (See also Gov. Code, § 34877.5, subd. (b) ["If the legislative body is changing from an at-large method of election to a district-based election, as those terms are defined in Section 14026 of the Elections Code, the legislative body *shall* hold public hearings pursuant to Section 10010 of the Elections Code."], italics added.)

strength of Santa Monica's Latino voters would be improved over the current at-large system by either an "influence" district that is only 30% Latino or an alternative at-large scheme in which Latino voters would not exceed the threshold of exclusion. For example, the Supreme Court has never blessed influence districts in section 2 Voting Rights Act cases, contrary to the assertion of Polanco. (Polanco 27.) And actual Latino voters accounted for only 6.5% of eligible voters in the 2016 election, not 12.0% (which is still lower than the threshold of exclusion in any event), as FairVote incorrectly reports. These are just two of the many misreadings of the law and the record that animate the FairVote and Polanco briefs.

Polanco's preference for districts and FairVote's preference for alternative at-large schemes are just that—preferences. These policy prescriptions are part of a political debate that has taken place intermittently in Santa Monica for over a century. The City's governing body and/or its voters were asked to decide, in 1906, 1914, 1946, 1975, 1992, and 2002, what system of elections and governance would suit the City best. (AOB 17-19.) After a brief dalliance with districts (from 1907 through 1914), the City's elected leaders and voters alike have consistently expressed a preference for at-large elections and have rejected multiple calls to reinstate districts—and they have done so for a host of valid, non-discriminatory reasons.

In 1946, Santa Monica's most prominent minority leaders urged voters to adopt the current at-large system, and no minorities or minority groups advocated for a district-based

system. There was concern at the time that in districted systems, "[e]ach member log-rolls for his [district]" and "frequently puts the interest of his section above the welfare of the whole city." (28AA12381.) In 1975, voters overwhelmingly rejected a switch to district-based elections for a variety of nondiscriminatory reasons. And, it is undisputed that no major African-American or Latino leaders advocated in favor of district elections in 1975, while a Latino school board member and the City's two African-American councilmembers at the time opposed the switch. (AOB 18.) In 1992, the Charter Review Commission supported a change in the election system, but could not agree on a replacement, as it was unable to resolve the many legitimate, nondiscriminatory concerns about switching to either of the alternatives. (E.g., 25AA10935-10937, 25AA10940.) And in 2002, voters (including the vast majority of Latino voters) again overwhelmingly rejected a proposed switch to district-based elections; the public dialogue on the issue again focused on the valid, nondiscriminatory reasons why districts are suboptimal in Santa Monica, including that a districted system encourages each councilmember to elevate the interests of his or her district over the interests of the City as a whole. (ARB 68.)

Santa Monica's elected leaders and voters may one day change their minds and decide that they no longer believe at-large elections to be in the City's best interests. Until that day, the City should not be *compelled* to abandon its longstanding election system absent proof that the system has caused the dilution of a protected class's voting strength by preventing minority-preferred

candidates from winning elections. There is no such proof in this case. To the contrary, the undisputed evidence shows that Latino-preferred candidates (both Latino and non-Latino) regularly win Santa Monica at-large elections, and that switching to the districts ordered by the trial court would likely diminish Latino voting strength. As a result, the judgment should be reversed.

II. POLANCO ADVANCES A FLAWED INTERPRETATION OF THE CVRA THAT LACKS ANY LIMITING PRINCIPLE.

Polanco urges the Court to adopt an extreme and unprecedented interpretation of the CVRA that not even the trial court was willing to endorse.

Apparently recognizing that the CVRA's text requires a finding of vote dilution, Polanco nevertheless argues that vote dilution actionable under the CVRA may be established by racial bloc voting alone—that is, a mere statistical difference in voting support between white voters and Latino voters. Indeed, Polanco argues that racial bloc voting itself was the "problem" at which the CVRA was "aimed." (Polanco 15-18.) In Polanco's view, therefore, a plaintiff may establish a city's violation of the CVRA (exposing that city to a massive fee award and requiring it to abandon its electoral system), even if minority-preferred candidates prevailed in 100% of elections, so long as the plaintiff can prove that white voters do not support minority-preferred candidates to the same statistical degree as minority voters.[2]

[2] FairVote, for its part, at least acknowledges that the CVRA requires proof of vote dilution, that is, "that structural aspects of an election system weaken a minority group's" voting

Respondents, too, once advanced this theory (e.g., 4AA1394), but declined to renew it in drafting the trial court's statement of decision or their appellate brief. Respondents abandoned this position for good reason: It would support CVRA liability in every jurisdiction across the State. A member of *any* protected class, even a vanishingly small one, could allege and prove that its members voted differently from the majority of voters, even if the challenged electoral system caused no harm to the protected class because its members' preferred candidates always won, despite the differences in voting.

This is precisely the scenario that federal courts have sought to avoid in recognizing the constitutional issues posed by "influence" districts and in deeming them judicially unmanageable. "'Influence' cannot be clearly defined or statistically proved" (*Rodriguez v. Pataki* (S.D.N.Y. 2004) 308 F.Supp.2d 346, 379 (three-judge panel)), so there is no "objective limit to [influence] claims." (*Illinois Legislative Redistricting Comm'n v. LaPaille* (N.D.Ill. 1992) 786 F.Supp. 704, 715 (three-judge panel).)

In addition to leading the Court unnecessarily into a thicket of thorny constitutional and justiciability questions (AOB 57-59, ARB 46-47), which Polanco never addresses, Polanco's theory is

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strength. (FairVote 11-12.) As discussed below, however, FairVote errs in expanding vote dilution to encompass the weakening of minority "influence," without defining that influence and without tying it to the election of minority-preferred candidates.

illogical. Bloc voting alone cannot be the harm that the Legislature meant to target, because the standard remedy in VRA section 2 cases, and the only remedy specifically identified in the CVRA itself (Elec. Code, § 14029), is district-based elections—which do not eliminate persistent bloc voting. As recognized in the CVRA, bloc voting calls for a statutory remedy only when it causes a group to lose the electoral power that it ought to have.

In other words, the CVRA must include elements of causation and injury, or it would have no principled limits. The Legislature recognized as much, which is why the CVRA requires precisely those elements, authorizing liability only in the event of an "impair[ment]" of a protected class's voting strength "as a result of the dilution or the abridgment of the rights of voters who are members of a protected class." (Elec. Code, § 14027.)

There is a final reason why Polanco cannot be correct that a municipality may be liable under the CVRA based solely on bloc voting. As with districts, alternative at-large methods do not eliminate persistent racial bloc voting. Thus, if the Court were to require the City to adopt an alternative *at-large* method of election (e.g., ranked-choice-voting), as FairVote urges, the supposed bloc voting would persist. As a result, the City would remain vulnerable to further lawsuits under the CVRA, which would continue to apply to it as a political subdivision with an "at-large method of election." (Elec. Code, § 14027.) If a defendant could be sued again, despite being ordered to adopt an alternative at-large method of election as a remedy for a CVRA violation, on the basis that voters continue to vote differently along racial lines, that

defendant would be consigned to a never-ending treadmill of liability until it adopted districts. But the Legislature did not make district-based elections *mandatory* across the State, and so cannot have intended to adopt Polanco's extreme view of CVRA liability. (See Polanco RJN 63[3] ["This Bill Does Not Mandate the Abolition of At-Large Election Systems."].)

III. AMICI CONFIRM THAT LATINOS COULD NOT ELECT CANDIDATES OF THEIR CHOICE UNDER AN ALTERNATIVE ELECTORAL SYSTEM.

Section 2 of the federal Voting Rights Act requires plaintiffs to prove that an alternative electoral system—typically, a districting plan—would enhance a minority group's ability to elect candidates of its choice. (AOB 50.) Federal courts have rejected arguments that plaintiffs could prevail under any other circumstances, including when a minority group might gain more "influence" in elections, even if that group still could not elect candidates of its choice. (AOB 57-58; ARB 40-41, 46-47.)

The CVRA departs from federal law in this respect, allowing plaintiffs to bring "influence" claims. (Elec. Code, § 14027.) Although FairVote and Polanco both argue that Latino "influence" in Santa Monica elections would be greater under an alternative system, they never clearly explain what the term means. Greater "influence," as compared to the status quo, must mean that under

[3] The materials attached to Polanco's request for judicial notice are not consecutively numbered, and so the City cites pages by their place in the document. In this case, the City is citing the sixty-third page in the document, which is labeled at the bottom right as "Page 25 of 37."

an alternative system, Latinos would, despite their low numbers and lack of compactness in Santa Monica, be more able to elect candidates of their choice with the help of white crossover voting or other-minority coalition voting. So the issue presented by the FairVote and Polanco briefs is whether the Pico district ordered by the trial court, or an alternative at-large system, would, as compared to the status quo, enhance Latinos' ability to elect candidates of their choice. The undisputed evidence in this case demonstrates that the answer to that question is no.

A. Polanco Illustrates That the Proposed Influence District in This Case Is Unworkable.

Polanco's defense of the district imposed by the trial court rests on a series of purported reasons why a 30% Latino district is not so different from a 50% district. These reasons are not persuasive, as they depend on the misreading of, among other things, federal law, the legislative history of the CVRA, and the analysis of respondents' expert.

1. The Supreme Court Has Never Authorized Influence Districts in Vote-Dilution Cases.

Polanco contends that the United States Supreme Court "recognized the legitimacy and desirability" of influence districts in *Georgia v. Ashcroft* (2003) 539 U.S. 461, 482-483. (Polanco 27; see also FairVote 27-28 [suggesting the same].) The Court has done no such thing.

As the City pointed out in its reply brief (ARB 40-41), *Georgia v. Ashcroft* addressed only section 5 of the Voting Rights Act, not section 2. (539 U.S. at 465-466.) These statutes are

entirely different: section 2, like the CVRA, creates a cause of action for vote dilution, but section 5 targets "retrogression" by prohibiting certain jurisdictions from implementing any changes to their voting schemes without executive or judicial preclearance. (*Holder v. Hall* (1994) 512 U.S. 874, 883 (plur. opn.).) "Retrogression is not the inquiry in § 2 dilution cases," and so "a voting practice that is subject to the preclearance requirements of § 5 is not necessarily subject to a dilution challenge under § 2." (*Id.* at 884.) Put simply, "[t]he inquiries under §§ 2 and 5 are different." (*Bartlett v. Strickland* (2009) 556 U.S. 1, 24 (plur. opn.); see also *League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 446 (opn. of Kennedy, J., concurring).)

Accordingly, although, in a section *5* case, "a court must examine whether the plan adds or subtracts 'influence districts'" (*Georgia*, 539 U.S. at 463), it would contradict Supreme Court law to do so in a section *2* case. In *Bartlett*, the Court rejected influence districts in the section 2 context, holding that "'the lack of such districts cannot establish a § 2 violation,'" which depends on a minority group being large and compact enough to constitute a majority in a hypothetical and constitutionally permissible district. (556 U.S. at 24-26.)

In short, respondents and amici will find no support in federal law for the "influence" district ordered by the trial court.

2. The Legislative History Cited by Polanco Is Largely Irrelevant and Supports the City in Any Event.

Polanco relies heavily on the CVRA's legislative history to bolster the arguments about the purported remedial effectiveness of a 30% district in Santa Monica. But the legislative history is largely beside the point—if anything, it supports the City's view that the Legislature cannot have intended there to be CVRA liability in a scenario such as this.[4]

As a preliminary matter, the City does not dispute that in enacting the CVRA, the Legislature did away with the VRA's majority-minority requirement (the first "*Gingles* precondition") as a prerequisite to liability. Thus, much of Polanco's and FairVote's briefs are irrelevant, as they are devoted to proving a point that is not in dispute. (E.g., FairVote 12-13; Polanco 19-20.)

But in eliminating the VRA's 50% bright-line rule, the Legislature could not have meant to create a cause of action for *any* group, no matter how small. Indeed, Polanco's own contemporaneous remarks in his legislative file suggest the opposite—more than once he contended that the CVRA was

[4] The legislative history cited by Polanco (Polanco 15-20) also shines no light on any of the key legal disputes in the case. It does not explain, for example, how to identify minority-preferred candidates, whether there might be multiple such candidates in a single at-large election, whether courts should ignore candidates preferred by Latino voters unless those candidates are themselves Latino, how to treat minority candidates with Anglo surnames (like Davis), or how much weight should be given to elections not involving minority (or minority-surnamed) candidates.

designed to create a remedy for minority groups that fell just shy of the numbers necessary to sustain a section 2 claim. In a letter urging then-Governor Davis to sign the bill, for example, Polanco explained: "If a minority community were at *49 percent*, then the federal courts cannot provide a remedy." (RJN, Author's File 54 (LRI History), italics added; see also Polanco 20 [citing press release making same point].)

The City, too, has acknowledged that it might be possible for a district with a near-majority of minority voters to give those voters an increased ability to elect candidates of their choice—especially if there were evidence of reliable crossover or coalition voting. (AOB 59, fn. 13; ARB 51-52.)[5] But the trial court's decision is premised on the *absence* of crossover voting by whites.[6] And there is no evidence of reliable "coalition" voting by other minority groups; indeed, respondents' new theory on appeal is that African-American and Asian voters band together with whites in

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[5] This acknowledgment reflects both the CVRA's elimination of the majority-minority requirement for liability (though the compactness and concentration of the minority may still be considered for determination of remedy) (Elec. Code, § 14028(c)) and its reference to vote dilution impairing a minority's "ability to influence the outcome of an election." (*Id.*, § 14027.)

[6] The City contends to the contrary that whites and Latinos vote sufficiently alike for Latino-preferred candidates usually to succeed under the current at-large system. As noted above, neither Polanco nor FairVote takes on the City's arguments in this regard. If the City is correct, then there can be no legally sufficient racially polarized voting, and therefore no liability. (AOB 52, fn. 10.)

Santa Monica to *defeat* the preferences of Latino voters. (RB 61-62; see AOB 53; ARB 25; 25AA11006-11012.)

The legislative history confirms that there is a meaningful difference between Polanco's hypothetical 49% Latino district and the trial court's 30% Latino district. For example, numerous analysts commented that it was "unclear what benefit would result from eliminating at-large elections" for a non-geographically compact minority group. (RJN 56, 129, 308.) Or as another analyst asked, "If a minority group is not geographically compact, how will single-member districts change the results?" (RJN 320.) When the bill's sponsors and supporters "were questioned as to the particulars of how the bill would operate," they "did not refute the contentions." (RJN 295.) This case presents precisely the situation in which neither vote dilution nor a remedy that advances the purposes and goals of the legislation can be found.

Finally, the bill's sponsor, several supporters, and numerous committees also made clear that the CVRA did not "mandate the elimination of at-large elections." (RJN 165 [letter to then-Governor Davis from the Mexican American Legal Defense and Education Fund]; accord *id.* at 63, 132, 161, 165, 289.) Some observers worried, however, that the statute would be misread in this way, and might become a "full employment act" for plaintiffs' attorneys. (RJN 294, 320.) This concern was prescient. (See, e.g., Phil Willon, A Voting Law Meant to Increase Minority Representation has Generated Many More Lawsuits than Seats for People of Color (L.A. Times, Apr. 9, 2017).)

3. Contrary to Polanco's Claims, Ely's Analysis Does Not Show that Latino Voters Would Have More "Influence" in the Purportedly Remedial District.

Polanco also presents an equivocal discussion of respondents' expert's (Ely) "election recreations"—by which Ely attempted to show what the results would have been in the hypothetical Pico district if the 1994-2016 elections had been district-based, rather than at-large—to illustrate the supposed "effectiveness" of the trial court's remedy. (Polanco 23-26.) Polanco both *defends* Ely's analysis (by highlighting Ely's recreation of the 2004 election) and at the same time *rejects* it (by offering a host of reasons why Ely's analysis was neither realistic nor predictive). (*Ibid*.)

Notwithstanding Polanco's attempts to defend it, Ely's analysis does not advance respondents' arguments about vote dilution or the purported remedial effectiveness of district elections in Santa Monica. Rather, as the City has explained, Ely's analysis shows that Latino voters would be no better off, and in most cases would be *worse* off, in a district election system. (AOB 54-55, ARB 41-42.)

At most, Ely was able to show that in the 2004 election, Loya would have received the most votes in the Pico district, even though she did not prevail in the at-large election. (26AA11537.)[7]

[7] For the 1994 election, Ely's analysis showed that Vazquez would have received the most votes in the Pico district. (26AA11536.) But Ely acknowledged that this result was meaningless, because Vazquez did not live in the Pico district, so he would not have been eligible even to run in that district as a candidate. (RT2601:6-2603:22.)

But for the 1996, 2002, 2008, 2012, and 2016 elections, Ely's analysis showed that the candidate who won in the district was also a Latino-preferred candidate who won citywide. (26AA11536-11538.) And even if the focus is on Latino-surnamed candidates, for the 1996, 2002, 2008, and 2012 elections, Ely's analysis showed that a *non*-Latino surnamed candidate would have received the most votes in the Pico district. (26AA11536-11538.) And according to Ely's analysis, Latino-surnamed candidates who did not prevail in the at-large election—such as Alvarez in 1996, Aranda in 2002, Piera-Avila in 2008, and de la Torre in 2016—also would not have prevailed in the Pico district. (*Ibid.*)

In fact, in 2012, Ely's analysis showed that O'Day—a non-Latino-surnamed candidate who was Latino-preferred and who lives in the Pico Neighborhood—would have received the most votes in the Pico district. (26AA11537-11538.) This means that if the 2012 election had been held using districts, and if Vazquez had been eligible to run in the Pico district, he would have lost to O'Day—even though *both* O'Day and Vazquez were Latino-preferred and both prevailed citywide in 2012 in the at-large system.

Consequently, Ely's analysis does not show that Latino voters would have increased voting strength in the Pico district. And even if one focuses (erroneously) on the success of Latino *candidates*, rather than the success of candidates preferred by Latino *voters*, Ely's analysis shows that Latino candidates typically fare no better, and would sometimes fare *worse*, in the districted system than they do in the at-large system. Districts

would therefore be a terrible result for Latino voters in Santa Monica, particularly because there is no dispute that the majority of the City's Latino voters live outside the Pico district; those voters would have no ability to elect candidates of their choice in a districted system, unlike under the current at-large system. (AOB 53; ARB 44.)

4. A 30% Latino Influence District Would Be Ineffective Given the Polarization Found by the Trial Court.

The trial court's judgment is premised on a fundamental contradiction—for the purportedly remedial "influence" district to be effective in enhancing Latinos' voting strength, there must be the very crossover voting by white voters that the court (erroneously) found does not exist. (See AOB at 52-53 & fn. 10; ARB at 41.) The effectiveness of the Pico district is even more doubtful given the absence of evidence in Santa Monica of non-white "coalition" voting—Asian and African-American voters generally do not support the same candidates as Latinos. (AOB at 52-53; ARB at 24-25.)

Thus, if Latinos must go it alone in a district in which they account for only 30% of eligible voters, they will not be able to elect candidates of their choice, even if 100% of Latino voters in that district cast their ballots for the same candidate. Federal courts have rejected proposed influence districts for this very reason. (See, e.g., *Rodriguez*, 308 F.Supp.2d at 379 ["this would be a particularly inopportune case to recognize influence claims under section 2 because there is no evidence that the failure to create a

[proposed coalition district] has diluted meaningful influence for minority voters in Suffolk County. While blacks and Hispanics combined would be 40.2% of the VAP and 33.7% of the CVAP in Plaintiffs' Proposed District 4, … the plaintiffs cannot prove that blacks and Hispanics vote cohesively"].)

Polanco calls this inherent contradiction a "fallacy," and offers a highly engineered hypothetical ostensibly to prove as much. (Polanco Br. 25-26.) In this hypothetical, two candidates—Candidates A and B—running for a single seat in an at-large system are compared against the same candidates running for a single seat in an "influence" district. (*Ibid*.) But Polanco's hypothetical not only depends on false premises, it actually proves the *opposite* point.

First, the relevant comparison is not between a single seat in an at-large system and a single-seat in a district. Rather, the relevant comparison is between (a) a long list of candidates for *three or four seats* under an at-large system and (b) a presumably shorter list of candidates for a *single seat* in a district. This changes the entire analysis. The elections addressed by the trial court featured an average of roughly 12 candidates, and candidates won with somewhere between 24.9% and 66.0% of the vote. (25AA11006-11012.) And white votes were always split across a wide range of candidates, with no candidate apart from a member of the Kennedy family (Bobby Shriver) receiving the support of more than 47% of white voters. (25AA11009.)

Second, if the hypothetical at-large election featured on page 25 of Polanco's brief is corrected to account for the actual facts of

Santa Monica's elections, it would have resulted in "Candidate A" (the strongly Latino-preferred candidate) being *elected*. Candidate A received 39.55% of the total vote, which was enough to prevail in *every* at-large Council election analyzed by Dr. Kousser. (25AA11006-11012.)

In lieu of Polanco's ill-conceived hypothetical, consider instead respondents' experts' own analysis of what happened in an *actual* election. Figure 1 shows Dr. Kousser's estimates of voting behavior in the 2016 election, in which 10 candidates ran for four seats. Figure 2 shows Mr. Ely's estimates of the number of votes each candidate would have won in his hypothetical Pico District.

Figure 1. **Table VII-1: 2016 Election**

B. Weighted Regression

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Terry O'Day	55.3 (6.2)	4.6 (22.4)	21.0 (8.2)	38.7 (1.6)	37.3
Tony Vazquez	78.3 (9.0)	-20.4 (32.5)	12.3 (11.8)	36.6 (2.3)	35.7
Ted Winterer	38.1 (10.9)	-54.4 (39.3)	5.3 (14.3)	43.3 (2.7)	35.1
Gleam Davis	43.8 (7.6)	-12.6 (27.5)	24.4 (10.0)	37.6 (1.9)	34.5
Armen Melkonians	8.8 (9.6)	80.1 (34.6)	10.0 (12.6)	22.9 (2.4)	24.4
Oscar de la Torre	88.0 (6.0)	43.2 (21.8)	20.2 (7.9)	12.9 (1.5)	21.8
James T. Watson	0.8 (5.1)	24.6 (18.4)	28.8 (6.7)	11.2 (1.3)	11.9
Mende Smith	11.5 (4.5)	12.6 (16.2)	14.4 (5.9)	9.5 (1.1)	10.1
Terence Later	1.4 (4.7)	22.9 (17.0)	6.1 (6.2)	10.1 (1.2)	9.9
Jonathan Mann	9.6 (3.1)	5.0 (11.4)	7.6 (4.1)	7.7 (0.8)	7.7
No Vote	64.2 (32.7)	294.5 (118.0)	250.0 (43.0)	169.5 (8.2)	
Av. # of Candidates Voted For**	3.4	1.1	1.5	2.3	2.3
Total Actual	8.9	5.9	5.0	80.1	

- 4 winners

N= 54 Ethnic percentages based on turnout at 2016 election. Candidate percentages based on number of mail or in person ballots. Weights based on number of mail or in person ballots.

** = (400 – % No Vote) /100 = total vote for City Council/ballots

Figure 2.

	2016		
	Min	Max	Share
BALLOTS	3899	6123	4806
ODAY	1470	2237	1807
WATSON	442	792	582
WINTERER	1093	1699	1354
VAZQUEZ	1580	2287	1906
SMITH	392	655	503
DELATORRE	1559	2046	1763
DAVIS	1297	1986	1591
LATER	310	529	410
MELKONIANS	766	1222	951
MANN	327	510	384

Figure 1 shows that more than half of Latino voters favored de la Torre, Vazquez, and O'Day. Vazquez and O'Day prevailed, but the City does not count O'Day as Latino-preferred because he received substantially less Latino support than a losing Latino-preferred candidate, de la Torre. (AOB 44; ARB 36.) Thus, in the actual at-large election, one of two Latino-preferred candidates (Vazquez) won.

Figure 2, by contrast, suggests that O'Day would have prevailed in the winner-take-all Pico district. Vazquez received the most votes there, but Ely acknowledged that Vazquez would not have been eligible to run in the Pico district, as he lives outside that district. (See p. 13, fn. 7, *ante*.) Both O'Day and de la Torre do live in the district, and O'Day received more votes than de la Torre in two of Ely's three estimates of the votes cast there. Thus, although a Latino-preferred candidate (who also happens to be Latino) was able to prevail under the at-large system in 2016, the only evidence concerning voting patterns in the purportedly remedial Pico district shows that a less-Latino-preferred white candidate might have prevailed in that district.

5. Neither Anecdotal Evidence Nor Settlements Relating to Other Cities Shed Any Light on the Elements or Meaning of the CVRA.

Federal law, the CVRA's legislative history, and respondents' expert's analysis do not support the trial court's purportedly remedial district. Polanco and FairVote therefore seek refuge in the experiences of other cities, contending that they illustrate the transformative power of influence districts and alternative at-large schemes. (FairVote 14-15, 20-23; Polanco 26-30.) But this argument is meritless for two reasons.

First, it is little more than an effort to introduce new evidence on appeal that the trial court excluded.

Two of the amici, Sergio Farias (a councilmember in San Juan Capistrano) and Juan Carrillo (a councilmember in Palmdale), were designated as witnesses at trial by the respondents. But the City successfully moved to exclude their testimony on several grounds, including that the cities they represent are nothing like Santa Monica. (16AA6525-6536, RT2655:7-2668:22.) Among numerous other differences (16AA6533), the Latino share of the Palmdale and San Juan Capistrano populations is many times larger than the Latino share of Santa Monica's population (59% and 37%, respectively, compared to just 16% in Santa Monica). (16AA6533.) The Latino populations in Palmdale and San Juan Capistrano are also more compact than the Latino population in Santa Monica; it was possible to draw two majority-Latino districts in Palmdale and a 44% Latino district in San Juan Capistrano. (16AA6554.)

To avoid inappropriate comparisons like the ones respondents unsuccessfully tried to draw below, the CVRA instructs courts to focus exclusively on the "political subdivision that is the subject of an action." (Elec. Code, § 14026; see also 16AA6530-6531.) Federal case law also calls for an "'intensely local appraisal of the design and impact of the contested electoral methods,'" not electoral methods used elsewhere. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 79.) Federal courts therefore routinely reject testimony concerning election results in "non-challenged jurisdictions." (*Old Person v. Cooney* (9th Cir. 2000) 230 F.3d 1113, 1121, fn. 7; e.g., *Magnolia Bar Assn., Inc. v. Lee* (5th Cir. 1993) 994 F.2d 1143, 1151 ["statewide voting statistics" could not shed light on " voting statistics from [the challenged] district"].) One court rejected the analysis of respondents' expert, Dr. Kousser, on the ground that he focused on "statewide" voting behavior, instead of "the voting patterns of urban, cosmopolitan Angelenos." (*Cano v. Davis* (C.D.Cal. 2002) 211 F.Supp.2d 1208, 1240 (three-judge panel).) "In a state that is as diverse as California," the experience of other cities is not "helpful in predicting" how districts might work in Santa Monica. (*Ibid.*)

Farias and Carrillo should not be able, as amici, to present the very same points they were not allowed to make on the stand. (Compare, e.g., Polanco 29-30 with RT2666:1-19 [recycling irrelevant offer of proof about San Juan Capistrano's rejection of sanctuary-city legislation].) An amicus curiae "accepts the case as he finds it"—he cannot use his brief to "launch out upon a juridical expedition of its own unrelated to the actual appellate record."

(*Prof'l Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12.) Courts routinely apply this "universally recognized" rule, refusing to consider new issues raised by amicus curiae that are outside the record. (*Younger v. State of California* (1982) 137 Cal.App.3d 806, 813.) The rule applies with added force when amici attempt to introduce evidence from irrelevant locales. (*E.g., People v. Peevy* (1998) 17 Cal.4th 1184, 1208, fn. 4 ["evidence of departmental policy in Los Angeles and Santa Monica" was of "limited relevance" in an action challenging policies in San Bernardino].)

But if the Court is nevertheless inclined to consider the experiences of other cities, including San Juan Capistrano, it should consider *all* the extra-record facts. For example, Polanco suggests that the "but for" cause of Farias's electoral loss in 2008 was the at-large election system. (Polanco 10-11.) But Polanco neglects to mention that in 2008, Farias ran as a *socialist* in Republican-leaning San Juan Capistrano; he won in 2016 only after disavowing the politics of his youth. (Gabriel San Román, Former Socialist Wins San Juan Capistrano Council Seat with Help from Conservative Activist (OC Weekly, Dec. 1, 2016).)

Second, the case studies cited by Polanco and FairVote, including the example of San Juan Capistrano, are irrelevant for the independent reason that they involved *settlements*, which tell us nothing about the legal requirements of the CVRA.

"Settlements are private contracts" that have no precedential value. (*In re Baby Prod. Antitrust Litig.* (3d Cir. 2013) 708 F.3d 163, 173; *Morrison v. Vineyard Creek L.P.* (2011)

193 Cal.App.4th 1254, 1262, fn. 4 ["The settlement had no precedential value."].) That some cities, including San Juan Capistrano, have settled CVRA cases tells us only that they were unwilling to defend the electoral systems adopted by their voters at the risk of paying millions in legal fees under the CVRA's one-sided fee-shifting provision (Elec. Code, § 14030), particularly given the absence of appellate guidance concerning the CVRA. (See generally Brief of Amici Curiae League of California Cities and California Special Districts Association.) There is no legal basis for inviting the Court to examine stipulated judgments set out in trial court orders, as FairVote does. (FairVote 14-15.)

Consent decrees are no different. (*Langton v. Hogan* (1st Cir. 1995) 71 F.3d 930, 935 ["[A] consent judgment . . . is not a ruling on the merits of the legal issue that . . . becomes precedent applicable to any other proceedings under the law of stare decisis."].) The example of Eastpointe, Michigan (FairVote 22-23), is therefore equally irrelevant. In any event, FairVote neglects to mention that the African-American population in Eastpointe was "at least 39% of the City's total population," or that it was "undisputed that a single-member Eastpointe district could be drawn in which black residents would constitute the majority" of eligible voters. (*United States v. City of Eastpointe* (E.D.Mich. 2019) 378 F.Supp.3d 589, 595, 602.) Here, Latinos account for only 16% of Santa Monica's total population (and less than 14% of its voting population), and respondents' expert strained to create a district in which Latinos accounted for even 30% of eligible voters.

The Court should ignore the legally irrelevant and factually distinguishable examples offered by Polanco and FairVote.

B. FairVote's Brief Is an Unsuccessful Effort to Prove That the Trial Court's Error in Imposing an Ineffective District Was Harmless.

The FairVote brief reads like a pamphlet touting the perceived benefits of single-transferable-vote election schemes. FairVote evidently strongly prefers such schemes. The rest of the country does not; scarcely any cities have even experimented with a single-transferable-vote system, and nearly every city to do so later abandoned it. (E.g., Richard Briffault, Electing Delegates to a State Constitutional Convention (2005) 36 Rutgers L.J. 1125, 1152 ["two dozen cities adopted STV for elections to city councils in the period between 1917 and 1950, although only Cambridge, Massachusetts, uses the system today"].)

The Charter Review Commission, on whose report respondents so heavily rely (RB 40-41, 79, 82-83, 87, 92), noted that "many Commissioners … harbor serious doubts about [the] practicality" of single-transferable-vote systems. (25AA10942.) Among other drawbacks was the "complexity of the counting procedure," which "makes it difficult for most voters to understand the effects of their second and later ballot preferences." (25AA10942-10943.)

Of course, it makes no difference whether FairVote is right or wrong about such systems—the question presented by this appeal is legal rather than political. The Court is to decide whether Santa Monica *must* adopt a different electoral system, not

whether, as a policy matter, it *should*. The latter is a choice for the voters.

In support of its *legal* argument, FairVote has little to say. Like the Polanco brief, the FairVote brief is an effort to bridge the gap between small and big numbers—in this case, between the size of the Latino voting population that could reasonably be expected to vote and the share of actual voters necessary for Latino voters to, on their own, elect candidates of their choice. The inescapable fact is that the Latino voting population in Santa Monica is simply too small to be able, on its own, to elect candidates of its choice under an alternative at-large system. For that reason, and the dispositive fact that neither FairVote nor Polanco contests—namely, that under the current at-large system Latino voters *have* been able to elect their preferred candidates, notwithstanding their small numbers—there is no reason to compel Santa Monica to abandon its longstanding election system.

1. Latino Voters Would Not Exceed the Threshold of Exclusion and Be Able to Elect Candidates of Their Choice.

In attacking the City's analysis of alternative at-large systems (FairVote 25-27), FairVote addresses only a straw man. The City never argued that a protected class's ability to exceed the threshold of exclusion depends on *historical* turnout. Rather, it argued that this ability depends on a *reasonable assumption* of turnout under an alternative system, which is precisely what the cases hold. (AOB 55-56, ARB 42-43.) In *United States v. Euclid City School Board* (N.D.Ohio 2009) 632 F.Supp.2d

740, 769-770, for example, the federal government (the plaintiff in that case) contended, and the court agreed, that it would be reasonable to assume that two-thirds of eligible African-American voters would vote under an alternative at-large scheme. Because African-Americans accounted for 40.2% of eligible voters, they would exceed the threshold of exclusion (in that case, 25%) if two-thirds of them voted. (*Id.* at 745, 770 & fn. 30.) Similarly, in *United States v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 450-451, Latinos accounted for somewhere between 22% and 28% of eligible voters and would therefore exceed the threshold of exclusion (there, 14.3%) under reasonable turnout assumptions.

For Latinos to exceed the threshold of exclusion in this case (12.5%), their turnout would need to be at least *92%* (12.5% divided by 13.64%). Even if, as FairVote speculates, Latinos would end up voting in greater numbers under an alternative at-large scheme, FairVote has given the Court no reason to believe that *nearly 100%* of Latino voters would show up at the polls. Speculation about "increased organizing within Santa Monica's Latino community" (FairVote 26, italics omitted) cannot bridge that logical gap.[8] Under the very cases FairVote cites, Latinos in

[8] Indeed, an assumption of 92% turnout for a local municipal election is wildly unrealistic. By way of illustration, in the 2016 Presidential election, "a record 46% of Latino eligible voters [in California] turned out to vote, while 68% of Latino registered voters [in California] cast a ballot—an increase of 7% in both categories over the 2012 Presidential Election." (Latinos and the 2016 Presidential Election (Latino Community Foundation,

Santa Monica are too few in number to exceed the threshold of exclusion and be able to elect candidates of their choice.

2. FairVote's Defense of Mere Influence Only Proves That Alternative At-Large Schemes Would Be Unworkable in This Case.

FairVote contends that even if Latino voters would not have the ability to elect candidates of their choice under an alternative at-large scheme, they might at least be able to *influence* elections. (FairVote 27.) But that assertion depends on a misreading of the trial record.

FairVote states that 88% of eligible Latinos turned out to vote in 2016. (FairVote 27.) FairVote is mistaken—it misreads the election tables prepared by Dr. Kousser. Those charts show the extent to which Latinos *who actually voted* supported particular candidates, not the share of *eligible Latino voters* who did so.

Indeed, the charts themselves confirm as much. The 2016 chart shows that Latinos accounted for only 8.9% of actual voters (25AA11012), and the election returns show that 51,662 votes were cast. (28AA12240.) According to Dr. Kousser, then, approximately 4,598 Latinos voted in the 2016 Council election—which is roughly 6.5% of the City's 71,255 eligible voters. (5AA1676.) This is a far cry from the figure incorrectly reported by FairVote (12.0% of eligible voters, or 88% of Latinos' 13.64%

Dec. 13, 2016), available at https://latinocf.org/latinos-2016-presidential-election-turnout/.)

share of eligible voters, which would amount to approximately 8,550 voters). (5AA1676; FairVote 27.)

And Latino participation in the 2016 election was, if anything, unusually *high*—higher than in any other election analyzed by Dr. Kousser; Latinos accounted for barely 7% of actual voters in 2002 and 2004, and they accounted for only 5.6% of *registered* voters in 1994. (25AA11006, 25AA11008, 25AA11009.)

In sum, Latinos were not remotely "just shy of the 12.5% needed to elect their candidate under one of the alternative, at-large systems" (FairVote 27), either in 2016 or any other year.

3. Federal Courts Would Not Impose a Change in Election System Absent Evidence That the Relevant Minority Group Exceeds the Threshold Required to Elect Candidates of Its Choice.

Again suggesting that the population figures on which voting-rights cases inevitably turn somehow do not matter, FairVote contends that "[c]ourts can and do conclude that minority groups will be able to elect a candidate of their choice even when their total number of members is less than the threshold required to elect a candidate." (FairVote 28.) For this point, FairVote relies on *Dillard v. Chilton County Board of Education* (M.D.Ala. 1988) 699 F.Supp. 870. But *Chilton County* is no longer good law (if it ever was) for at least two reasons.

First, the Eleventh Circuit and the United States Supreme Court have both squarely rejected the argument that a plaintiff may prove a violation of section 2 of the Voting Rights Act without showing that an election system impairs a protected class's *ability*

to elect candidates of choice. In a subsequent case brought by the same plaintiff, the Eleventh Circuit "h[e]ld that a protected minority group pursuing a vote dilution claim under section 2 of the Voting Rights Act has no right to relief unless it can demonstrate that, in the absence of the challenged voting structure or practice, its members would have the ability to elect the candidate of its choice." (*Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1269.) Accordingly, if, as in this case, "the group is too small to elect candidates of its choice in the absence of a challenged structure or practice, then it is the size of the minority population that results in the plaintiff's injury, and not the challenged structure or practice." (*Ibid.*)[9] The Eleventh Circuit thus joined a chorus of other federal decisions "consistently reject[ing]" the "'influence dilution' concept." (*Id.* at 1267.) Likewise, in *Bartlett v. Strickland* (2009) 556 U.S. 1, the Supreme Court held that a section 2 violation cannot be proven on the basis

[9] *Chilton County* was likely *never* good law, because the Supreme Court laid out that very standard when articulating the need for a majority-minority requirement in *Thornburg v. Gingles* (1986) 478 U.S. 30, 50, fn. 17: "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." (See also, e.g., *Negron v. City of Miami Beach, Fla.* (11th Cir. 1997) 113 F.3d 1563, 1569 [reasoning that *Gingles* itself foreclosed influence claims].)

of a hypothetical influence or crossover district; only a majority-minority district will do.

Second, the remedy imposed in *Chilton County* is no longer lawful for another reason: Courts may not compel a political subdivision to increase the size of their governing boards to increase (or potentially increase) minority representation. The trial court in *Chilton County* ordered two governing boards to add two members apiece. The United States Supreme Court subsequently held in *Holder v. Hall* (1994) 512 U.S. 874 that no plaintiff may premise a section 2 challenge on the size of a defendant's governing body. (See also *Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1532 (en banc) ["under *Holder*, federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies"].) For that reason, the Eleventh Circuit has dissolved permanent injunctions entered in cases involving materially identical facts. (E.g., *Dillard*, 376 F.3d at 1262.)

In sum, the reasoning of *Chilton County*, already questionable the day the decision was issued, has been squarely rejected by intervening higher authority. Accordingly, that Latinos in Santa Monica are neither numerous nor compact enough for any alternative electoral system to increase their ability to elect candidates would indeed make it impossible for them to win relief in any federal court. And, for all the reasons already explained, even if the majority-minority requirement is relaxed by the CVRA to permit consideration of impairment of "influence," it remains impossible to find liability and impose a

remedy in this case without "open[ing] a Pandora's box of marginal [California] Voting Rights Act claims by minority groups of all sizes." (*Hastert v. State Bd. of Elec.* (N.D.Ill. 1991) 777 F.Supp. 634, 654 (three-judge panel); accord *McNeil v. Springfield Park Dist.* (7th Cir. 1988) 851 F.2d 937, 947 ["Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections."].)

IV. CONCLUSION

The FairVote and Polanco briefs get wrong the one question they address: whether the City's election system has resulted in the dilution of Latino voting power. Latino voters are already electing candidates of their choice in Santa Monica. And there is no basis—in federal case law or the text or legislative history of the CVRA—for imposing an alternative election system that would not increase, and in the case of the districting remedy ordered by the trial court likely diminish, Latino voters' electoral strength.

DATED: February 10, 2020 Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this opening brief contains 7,609 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, and the signature blocks.

DATED: February 10, 2020

Kahn A. Scolnick

PROOF OF SERVICE

I, Daniel Adler, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, CA 90071. On February 10, 2020, I served

APPELLANT'S REPLY TO AMICUS BRIEFS OF FAIRVOTE AND POLANCO ET AL.

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

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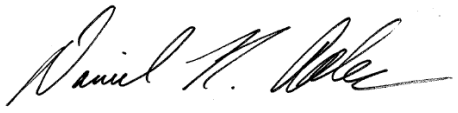

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