No. B295935

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

City of Santa Monica,
Petitioner-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

RESPONDENTS' PETITION FOR REHEARING

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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: July 24, 2020

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ Morris J. Baller
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I. INTRODUCTION

Respondents seek a rehearing because the Court's July 9, 2020 Opinion ("Opinion") contains several critical legal and factual mistakes that, once corrected, would require the affirmance of the Superior Court's findings that the City of Santa Monica's at-large election method for its city council violated the rights of Latino voters under both the California Voting Rights Act ("CVRA") and the California Constitution's Equal Protection Clause.

The Opinion's holding that the inability to create a hypothetical majority minority district in Santa Monica is fatal to the CVRA claim contravenes the plain language of the statute in three ways: (1) section 14028(c) specifies that geographic compactness or concentration "may not preclude a finding of a violation of" the CVRA (Elec. Code § 14028(c).); (2) section 14028(a) states that "*[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 or in elections incorporating other electoral choices by the voters of the political subdivision" (emphasis supplied); and, (3) section 14027(a) recognizes claims that a minority's "ability to influence the outcome of an election" is impaired by at-large elections. Indeed, these three provisions of the CVRA reflect the California Legislature's recognition that "geographical compactness would

not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system." (See, e.g., Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3.)

The Opinion also errs in ignoring the trial court's factual finding, based on contested expert testimony and other evidence, that Latino-preferred Latino candidates who lost citywide often would have won election had the contest been limited to the remedial district proposed by Respondents. Correcting these errors in the Opinion can result in nothing other than affirmance of the Superior Court's finding that the at-large system in Santa Monica violates the CVRA.

On the Equal Protection Claim, the Opinion failed to follow clearly established principles governing the evaluation of factual evidence for determining the existence of intentional discrimination. Most starkly, the Opinion fails to cite or follow *Village of Arlington Heights v. Metro. Housing Dev. Corp* (1977) 429 U.S. 252, which held that in order to find an Equal Protection violation a trial court need not find that discrimination was the defendant's "sole" or "primary" purpose, just that a discriminatory purpose infected the actor's decision-making. *Id.* at 265. In *Arlington Heights*, the Supreme Court provided a non-exhaustive list of factors courts should consider in evaluating

government decisions for discriminatory intent. *Id*. at 267-268. The trial court meticulously analyzed the factors specifically listed by the Supreme Court and concluded, and found as a fact, that "Defendant's at-large election system was adopted and/or maintained with a discriminatory intent on at least two occasions – in 1946 and in 1992." (24AA10716 [Statement of Decision, p. 48].) The Opinion omits a large portion of the evidence of discriminatory intent presented at trial, even including the evidence the trial court specifically cited in its Statement of Decision, thus the Opinion failed to consider *all* of the evidence *collectively*. Once all of the evidence is viewed under the proper light, it becomes clear that the Opinion should be corrected and the Superior Court affirmed on its Equal Protection holding.

For all of these reasons, Respondents respectfully request the Court grant rehearing and affirm the Superior Court's decision.

II. ARGUMENT

A. This Court Should Grant Rehearing on the California Voting Rights Act Claim.

The Opinion states that plaintiffs must prove "dilution" of minority voting power by drawing a hypothetical majority-minority city council district in order to show a violation of the California Voting Rights Act ("CVRA"). (Opinion at 31.) That holding directly contravenes the plain language of sections

14028(c), 14028(a), and 14027 that, respectively, prohibit courts from requiring proof of a minority-concentrated remedial district at the liability stage, provide that liability is established based on proof of racially polarized voting, and recognize claims when a minority group can show that its "ability to influence the outcome of an election" is impaired by an at-large election system.

The legislative history of the CVRA likewise repeatedly emphasizes that the CVRA "allow[s] a showing of dilution or abridgement of minority voting rights by showing the first two Thornburg requirements without an additional showing of geographical compactness .... [G]eographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system." (See, e.g., Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3.) That clear statutory text and legislative history has led all other appellate courts that have addressed the CVRA to conclude the CVRA "does not require that the plaintiff prove a compact majority-minority district is possible for liability purposes." (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789.[1])

[1] *See also Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669 ("The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of

The Opinion also fails to apply the correct standard of review to the trial court's factual findings, and rests on several omissions or misstatements regarding the trial court's findings of fact and/or the substantial evidence supporting those findings.

1. The Court's Decision Conflicts with the Plain Language of the California Voting Rights Act

a. The Court's Holding is Directly Contrary to Section 14028(c).

The Opinion holds that CVRA plaintiffs must be able to show a district in which protected class voters constitute a majority, or potentially a near-majority. (Opinion at 31 (Plaintiffs cannot show dilution because "there are too few Latinos to muster a majority" in any possible district).) That holding runs directly contrary to Section 14028(c), which directs that "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a

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action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the Gingles requirement that, to establish liability for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible."); *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 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.").

finding of racially polarized voting, or a violation of Section 14027 and this section." (*Accord Jauregui, supra*, 226 Cal.App.4th at p. 789; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669; *Rey v. Madera Unified School Dist.*(2012) 203 Cal.App.4th 1223, 1229.)

b. "Vote Dilution" is Not a Separate Element Required for a CVRA Claim.

The Opinion draws the purported "vote dilution" element of the CVRA from the language in Section14027 providing that an at-large election system may not be applied in a manner that impairs "the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the *dilution* or the abridgment of the rights of voters" who are members of a "protected class." (Opinion at 26.)

That reading of the CVRA contradicts the explicit language of Section 14028(a), which plainly states that "*[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 or in elections incorporating other electoral choices by the voters of the political subdivision." This language leaves no room for imposition of an additional "vote dilution" element separate and apart from providing racially polarized voting, in determining whether a violation of Section 14027 has been proven. The legislative history confirms the

point.[2] Although purporting to apply the rule against surplusage, the Opinion itself violates this rule, rendering the first sentence of Section 14028(a) without effect.

As the other three appellate decisions interpreting the CVRA and its legislative history demonstrate, the CVRA purposefully eliminates the requirement found under the federal Voting Rights Act that plaintiffs establish a hypothetical compact majority-minority district—the very showing that this Court requires to establish "vote dilution"—at the liability stage. (*See Jauregui, supra*, 226 Cal.App.4th at 788-89; *Rey, supra*, 203 Cal.App.4th at 1229; *Sanchez*, 145 Cal.App.4th at 669.)

The Opinion incorrectly states that Respondents "expressly and conclusively abandoned this argument." (Opinion at 32.) In oral argument, Respondents' counsel stated that he conceded the issue only "*for purposes of this argument*"—acknowledging that as the Court did not appear to be open to persuasion on this issue, counsel intended to focus his remaining time, and the Court's attention, on the substantial evidence supporting the trial

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[2] See, e.g., Assem. Com. on Elections, Reapportionment and Constitutional Amendments, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Mar. 18, 2002, p. 1 (The CVRA "[e]stablishes that voter rights have been abridged if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.").

court's finding that even if dilution was required to be proven, Plaintiffs had established "dilution" by the evidence presented at trial. That tactical decision by Respondents' counsel to focus his limited time in oral argument on issues and arguments that appeared more likely to persuade the panel cannot fairly be construed as more broadly abandoning any issue.

Not only did Plaintiffs' counsel *not* "abandon" this argument, but he could not do so. Counsel is powerless to make a stipulation or a concession of law that is "contrary to the Legislature's plain directive." (*People v. Castillo* (2010) 49 Cal.4th 145, 171; *see also Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 629 ["interpretation of the Constitution, statutes, and ordinances is a subject within the authority of the courts, not the parties"]; *see also Young v. United States* (1942) 315 U.S. 257, 259 (["[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties."]).) This Court should strike from the Opinion any language regarding counsel's alleged abandonment of the argument that the CVRA does not require a separate showing of vote dilution both because such statements are incorrect, and because counsel's purported concession is immaterial to the determination of the statutory elements for establishing liability under the CVRA.

c. The Opinion Negates the CVRA's Explicit Protection of Electoral Influence.

The Opinion's dilution test is expressly premised on whether the protected class, as a result of the at-large voting system, "lost the power to elect a representative of its choice." (Opinion at 29.) However, Section 14027 addresses not only the ability of a protected class to "elect candidates of its choice," but also to "influence the outcome of an election." The Court's holding gives no effect to the second phrase, effectively reading it out of the statute, and is therefore an improper statutory construction. (*See*, e.g., *People v. Leiva* (2013) 56 Cal.4th 498, 506.)

2. Dilution of a Minority's Influence or Ability to Elect Does Not Require Showing That A Majority-Minority District Can Be Created.

The reference in Section 14027 to the ability of a protected class to "influence the outcome" of an election alludes to a familiar concept in federal Voting Rights Law. "Influence districts" are those "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." (*Bartlett v. Strickland* (2009) 556 U.S. 1, 13; *see also Georgia v. Ashcroft* (2003) 539 U.S. 461, 482 [describing and favorably discussing the concept of "influence districts"]; *Vecinos De Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 990-

91; *Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter* (W.D. Tenn. 1995) 877 F.Supp. 1096, 1100-1107.)

These cases offer reasonable standards this Court could adopt to determine when a district with a protected class that constitutes less than a majority of the citizen-voting-age population would be able to affect the outcome of elections in a meaningful influence district. (See, e.g., *Vecinos de Barrio Uno*, 72 F.3d at 991 ["the district court should make a searching evaluation of the degree of influence exercisable by the minority, consistent with the political realities, past and present … Although we are unwilling to prescribe any numerical floor above which a minority is automatically deemed large enough to convert a district into an influence district, we believe that when, as now, a minority group constitutes 28% of the voting age population, its potential influence is relevant to a determination of whether the group lacks a meaningful opportunity to participate in the electoral system."]; *McWherter*, 877 F. Supp. at 1105 [influence district will be shown where the minority population votes as a bloc, as demonstrated by the racially polarized voting analysis, "and comprises at least 25% of the voting-age population" in the proposed district]; see also *Georgia v. Ashcroft* (2003) 539 U.S. 461 at 482 [courts assessing influence districts should consider "the likelihood that candidates elected without decisive minority support would be willing to take the

minority's interests into account"] (citation omitted); *id.* at 487-89 [discussing gains in districts that had 25% to 50% minority voting populations as evidence the drafters of the districting plan sought "to increase blacks' effective exercise of the electoral franchise in more districts," including "influence and coalitional districts"].)[3]

Another concept that emerges from federal voting rights jurisprudence, and one which is relevant to the ability of a protected class to "elect candidates of its choice" (*see* Elec. Code § 14027), is the "cross-over district." In a cross-over district, although "minority voters make up less than a majority of the voting-age population," the minority population "at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." (*Bartlett, supra*, 556 U.S. at 13; *see also* Opinion at 36-37 [declining to decide whether "dilution" might be satisfied by evidence that "a near-majority of minority voters in a

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[3] The Opinion inappropriately discounts the Supreme Court's opinion in *Georgia v. Ashcroft* because it was a FVRA Section 5 case, not a Section 2 case. Opinion at 36. But the Supreme Court's opinion constitutes persuasive authority with regard to the nature and value of influence districts – a concept that the California Legislature incorporated into the CVRA with language (in § 14027) protecting minority voters against deprivation of their "ability to influence the outcome of an election."

hypothetical district would often be sufficient for the minority group to elect its preferred candidates"].)

3. The Opinion Fails to Apply the Appropriate Standard of Review to the Trial Court's Factual Findings Regarding Dilution, Which Are Supported by Substantial Evidence.

This Court's opinion misstates and omits factual findings made by the trial court in support of its conclusion that Plaintiffs satisfied any requirement of vote dilution, even as Appellant sought to define that requirement. Further, the Court fails to apply the correct standard of review, which requires affirmance because the trial court's findings are supported by substantial evidence.

a. The Opinion Misstates and Omits the Trial Court's Factual Findings Relevant to the Proposed "Dilution" Element

After the trial, *Defendant* proposed the following standard for vote dilution: "that some alternative method of election would enhance Latino voting power." (24AA10706, *quoting* 22AA9861 (Defendant's Closing Brief).) The trial court found that this requirement, if it existed, was satisfied by evidence Plaintiffs presented at trial. (24AA10706-07.) The trial court made the following findings, most of which are omitted from this Court's discussion of the evidence relevant to the "vote dilution" element:

- "[T]he district map developed by [Plaintiffs' expert] Mr. Ely" was likely to "*improv[e] Latino's ability to*

elect their preferred candidate or influence the outcome of such an election," *24AA10707* (emphasis added);

- Remedies other than district elections, "such as cumulative voting, limited voting and ranked choice voting ... would improve Latino voting power in Santa Monica," 24AA10733;
- "[G]iven the local context in this case—including socioeconomic and electoral patterns, the voting experiences of the local population, and the election administration practicalities present here—a district-based remedy is preferable," *id.*;
- The expert analysis of precinct level elections results presented by David Ely "shows that the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district of Mr. Ely's plan than they do in other parts of the city – *while they lose citywide, they often receive the most votes in the Pico Neighborhood district*," 24AA10734 (emphasis added);
- "In contrast to 13.64% of the city-voting-age-population in the city as a whole Latinos comprise 30% of the citizen voting-age-population in the Pico Neighborhood district," *id.*;

- "The particular demographics and electoral experiences of Santa Monica suggest that the seven-district plan would … result in the increased ability of the minority population to elect candidates of their choice or influence the outcome of elections," *id.*;
- "Testimony established that Latinos in the Pico Neighborhood are politically organized in a manner that would more likely translate to equitable electoral strength," 24AA10735;
- "Testimony also established that districts tend to reduce the campaign effects of wealth disparities between the majority and minority communities, which are pronounced in Santa Monica," 24AA10735;
- "Jurisdictions that have switched from at-large elections to district elections as a result of CVRA cases have experienced a pronounced increase in minority electoral power, including Latino representation. *Even in districts where the minority group is one-third or less of a district's electorate, minority candidates previously unsuccessful in at-large elections have won district elections*," 24AA10734 (emphasis added).

(*See* Opinion at 31, 36-37 (neither acknowledging nor disputing that the Superior Court made these findings).)

The Opinion also refuse to consider evidence that Latino voters *could* elect their candidates of choice in the proposed remedial district, asserting that although Plaintiffs stated at oral argument that "plaintiff Maria Loya would have won using the seven-district map the trial court adopted," that "[t]he trial court, however, made no such finding." The Opinion fails to acknowledge that trial court *did* find, based on expert analysis of voting patterns at the precinct level, that "the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district of Mr. Ely's plan than they do in other parts of the city – while they lose citywide, *they often receive the most votes in the Pico Neighborhood district*" (24AA10734 (emphasis added)), which, of course, is enough to win election. That finding was supported by evidence that Maria Loya and other Latino-preferred Latino candidates came in first in the precincts that make up the remedial district, and would have won a seat on the council in a district comprised of those precincts. *See* Sec. 3.c, below.

The Opinion also incorrectly states that Plaintiffs did not mention this evidence in their brief on appeal, and therefore forfeited it. (*See* Opinion at 37.) To the contrary, in their appeal brief Respondents described and summarized the expert evidence presented by Mr. Ely analyzing voting patterns in the proposed remedial district in past elections and concluding that while

Latino preferred Latino candidates "lose citywide" in the elections he analyzed, they "often receive more votes than any other candidate in the Pico Neighborhood district." (See Resp. Br. p. 31 [citing RT2318:7-2325:19; 25AA11002-11004; RA29-30].) That record evidence which they cited lays out precisely what the Opinion incorrectly claims Respondents never argued before oral argument—that Maria Loya would have won in a district election system. (RT2320:14-2322:2; RA29; 25AA11003.) Moreover, Respondents' Brief was responding to the standard urged on the trial court by the City of Santa Monica in its briefing below—which was whether the benchmark alternative system would "enhance Latino voting power," or give the Latino community "greater opportunity" to elect candidates of their choice. (22AA9861-62.) This Court's Opinion sets out a standard even more demanding than the one Appellant argued for, requiring Plaintiffs to show the potential for Latino voters to elect their candidate of choice, which the Opinion presumes can only be shown by a majority-minority district.

The trial court's factual finding that Latino-preferred Latino candidates who lost citywide often would have won election had the contest been limited to the remedial district proposed by Respondents at trial should be enough to satisfy the principle articulated by the Opinion that dilution occurs where the protected class, as a result of the at-large voting system, has

"lost the power to elect a representative of its choice." (Opinion at 29.) As set out below, the facts and evidence underlying those findings are substantial. If, however, this Court concludes that the trial court's findings were inadequately detailed to address the demands of its newly-crafted standard (*see* Opinion at 31, 37 [criticizing the trial court's findings as insufficient]), then the appropriate course of action would be to remand to the trial court for further factfinding. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802-03, citing *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 972-973 for the proposition that "when [the] trial court applies [an] incorrect standard that keeps it from resolving factual disputes, remand for further factfinding [is] appropriate.")

b. The Opinion Fails to Apply Substantial Evidence Review to the Trial Court's Findings

The Opinion did not announce the standard of review that it applied to the trial court's findings regarding vote dilution on the CVRA claim. It is plain, however, that it accorded no deference to the trial court's factual findings. (*See* Opinion at 31, 37.)

Even assuming *arguendo* that vote dilution is a separate element under the CVRA, the Court of Appeal should have reviewed the trial court's findings on that element under the substantial evidence standard, which applies "[w]hen findings of

fact are challenged in a civil appeal." *(Oregel v. Am. Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100-01.) As stated above, the trial court made specific findings showing that Latino voters in Santa Monica, as a result of the at-large election system, have "lost the power to elect a representative of [their] choice." (Opinion at 29.) Substantial evidence review is appropriate in light of the pragmatic, fact-specific analysis necessary to determine whether a different voting system would afford the minority materially greater influence, or a greater ability to elects its preferred candidates—either alone, or with the support of cross-over voters. (See, e.g., *Vecinos de Barrio Uno*, 72 F.3d at 991 ["the district court should make a searching evaluation of the degree of influence exercisable by the minority, consistent with the political realities, past and present"]; *Cooper v. Harris* (2017) 137 S. Ct. 1455, 1460 [determining that a district "functioned as a 'crossover' district" based on twenty years of election history].)

c. The Opinion Fails to Address the Substantial Evidence Supporting the Trial Court's Findings Regarding Dilution.

Substantial evidence in the trial record supports the trial court's factual findings regarding vote dilution (listed above), but the Opinion did not acknowledge or address that evidence. It should have done so. (*See Donovan v. Poway Unified Sch. Dist.* (2008) 167 Cal.App.4th 567, 581-82 [substantial evidence review

requires the Court of Appeal to review the entire record, drawing every reasonable inference in favor of the prevailing party].)

The trial court's finding that Latino-preferred Latino candidates "perform much better in the Pico Neighborhood district" than citywide, and that "they often receive the most votes in the Pico Neighborhood district," 24AA10734, is supported by an expert analysis completed by Mr. Ely recreating prior elections in an illustrative remedial district based on the Pico Neighborhood area, using precinct level data. (RT2318:7-2319:23.) Mr. Ely used the results of past elections to estimate outcomes if only the voters in the illustrative district had voted. (*Id.*) Mr. Ely's analysis demonstrated that Latino-preferred Latino candidates Maria Loya in 2004 and likely Oscar de la Torre in 2016 both would have won had the election been limited to the boundaries of the illustrative district. Loya "was in first place by a significant margin" in the 2004 election's actual voting in the precincts making up the illustrative Pico Neighborhood district. (RT2322:1-2, 25AA11003.) Under the set of estimates that Mr. Ely regarded as the most reliable, Latino-preferred candidate de la Torre in 2016 would have won in the illustrative district, notably receiving more votes than another candidate who was also from that district and who, unlike de la Torre, won citywide. (RT2324:8-15, 25AA11004.) Additionally, Mr. Ely's analysis showed that Latino-preferred Latino candidate Tony

Vazquez in 1994 received "significantly more [votes] than any of the other candidates got" in the illustrative district, although he was not a resident of the district. (RT2319:24-2324:15; 25AA11002.)

Based on his analysis, Mr. Ely gave his expert opinion that "based on historical election patterns, election results" the illustrative district has "a very real possibility of producing a very different outcome than what the citywide elections have provided in terms of representation" for the Latino community in the remedial district encompassing the Pico Neighborhood. (RT2329:3-21.)

Mr. Ely's recreation of prior elections also constitutes significant evidence supporting the trial court's broader finding that "the seven-district plan would … result in the increased ability of the minority population to elect candidates of their choice or influence the outcome of elections." (24AA10734.)

The trial court's finding that Latino voters could have elected Latino and other candidates of their choice from the proposed remedial district was further supported by the testimony of elections expert Professor Justin Levitt that:

- The Latino community in the Pico Neighborhood is both politically active and well organized, with devoted leaders, meaning that Latino voters in this neighborhood are more likely to vote cohesively in

future elections, and strengthening their ability to influence the outcome of district elections and the political process. (RT 6950:20-6952:6.)

- City Council campaign spending in Santa Monica is very high compared with other cities of similar size. (RT6927:5-6928:11.) District elections would reduce the costs of elections and "help alleviate" financial barriers to minority-supported candidates in a context of significant wealth disparities between the majority and minority communities, which are especially pronounced in Santa Monica. (RT6928:23-6929:27; RT2292:19-2295:15; RT2302:4-2303:14; RT2430:11-2432:3; RT7057:11-7063:24.)
- District elections have resulted in greater representation of minority communities in this State and nationally, even in districts where the minority voting population falls within the range of 25% to 50% of the total voting population. (RT6932:14-6932:26; RT6935:24-6938:18; RT6939:7-6942:20; RT6946:5-6947:21; RT7065:19-7067:19.)
- Influence districts are also beneficial because candidates and elected officials are more compelled to be responsive to the needs of the minority community. (*See* RT 6947:4-21.)

Based on this substantial evidence, the trial court adopted Plaintiffs-Respondents' proposed remedial district map that included a district nearly identical to the Pico Neighborhood illustrative district. (24AA10707, 10733-34.)

The evidence also supported the trial court's further finding that non-district-based remedies including "cumulative voting, limited voting and ranked choice voting ... would improve Latino voting power in Santa Monica" (24AA10733.) That evidence included testimony by Professor Levitt discussing those alternative voting systems. (*See* RT 6955:7-6956:23 [explaining cumulative voting as a potentially effective remedy]; RT 6967:9-23 [explaining limited voting]; RT 6975:5-6979:20 [explaining ranked choice voting].) Professor Levitt explained that in Santa Monica, with its seven-seat Council, simultaneous elections for all seven seats would mean a voting bloc would be assured of winning a seat if it can command just 12.5% of the votes, known as the "threshold of exclusion."[4] (RT 6955:7-6958:13 [cumulative

[4] In its appellate briefing, the City of Santa Monica incorrectly described the threshold of exclusion as the percentage of votes *required* to win. That is not the case – the threshold of exclusion is the percentage of votes needed to *guarantee* that a candidate wins. (*See* RT2978:5-2979:4.) A candidate could win an election with a lower percentage of votes than the threshold of exclusion if, for example, there were more candidates than available seats and each candidate received at least some votes. (*See id.*; RT2978:5-2979:4.)

voting]; RT6967:25-6970:16 [limited voting]; RT6977:16-6979:20 [ranked choice voting]; RT7051:27-7053:20 [further discussing the concept and comparing it to a 50% threshold of exclusion for the current at-large system].) The Latino proportion of the electorate in Santa Monica, which the evidence demonstrated to be highly politically cohesive, was 13.64% at the time of trial—greater than the threshold of exclusion for a seven-seat race with any one of these at-large remedies. (24AA10680, 24AA10685-86, 24AA10693-94, 24AA10734.)

Professor Levitt went on to describe historical evidence that cumulative voting and limited voting, particularly when accompanied with appropriate education about the system, "has been effective in providing minorities, even a low proportion of minorities, the opportunity to both influence and elect candidates of choice," including in jurisdictions where the minority proportion of the electorate was *less* than the threshold of exclusion. (RT6963:1-6965:10 (cumulative voting); RT6971:14-6972:18 (limited voting).) In conclusion, Professor Levitt opined that cumulative voting, limited voting, or ranked choice voting, if implemented in a seven-seat election, would allow the Latino population in Santa Monica more opportunity to elect candidates of their preference or to influence the outcome of elections. (RT6965:12-6966:18 [cumulative voting]; RT6974:19-RT6975:4 [limited voting]; RT7053:24-7054:9 [ranked choice voting].)

Professor Levitt's testimony, unrebutted at trial, constitutes substantial evidence supporting the trial court's finding that the alternative electoral systems of cumulative voting, limited voting, or ranked choice voting would also "improve Latino voting power in Santa Monica." (*See* 24AA10733.)

B. This Court Should Grant Rehearing on the Equal Protection Claim

In its Opinion, this Court overturned extensive and specific factual findings by the trial court, after a lengthy trial, that led the trial court to the ultimate factual finding that Appellant had committed intentional discrimination in adopting and maintaining its at-large election system. Those findings were based on disputed, but also extensive and specific, testimony of expert and lay witnesses as well as many documents. In reversing the findings of intentional discrimination, the Opinion failed to follow clearly established principles governing the determination of whether and how intentional discrimination should be found based on factual evidence, and appellate courts' review of trial courts' findings and inferences relating to discriminatory intent. Application of correct standards for determining intentional discrimination and review of such a determination should, in this case, have resulted in affirmance of the Superior Court's ruling that Appellant's adoption and

maintenance of its at-large election system was motivated by a discriminatory purpose.

1. The Opinion Applied Incorrect Legal Standards in Its Review of the Trial Court's Finding of Intentional Discrimination

a. The Opinion Fails to Apply the Correct Standard for Evaluating Evidence in Order to Determine Whether Appellant Committed Intentional Discrimination

The task of a trial court in ruling on allegations of intentional discrimination in violation of the Equal Protection Clause is, as the Opinion correctly states, to inquire whether the evidence demonstrates that the defendant acted with a discriminatory purpose. (Opinion at 40, citing *Washington v. Davis* (1976), 426 U.S. 229.) But as explained in *Washington v. Davis'* essential successor and explanatory decision, *Village of Arlington Heights v. Metro. Housing Dev. Corp* (1977) 429 U.S. 252, in order to find an Equal Protection violation a trial court need not find that discrimination was the defendant's "sole" or "primary" purpose, just that a discriminatory purpose infected the actor's decision-making. *Id.*at 265. The Opinion correctly observes that, under *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, mere awareness of possible discriminatory effects of an action, as opposed to intention to discriminate, will not satisfy a plaintiff's burden of proof. However, such an intention can, under *Arlington Heights* – and where proven must

be - inferred from circumstantial evidence. (*Arlington Heights*, 429 U.S. at 266 ("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."))

In *Arlington Heights*, the Supreme Court provided a non-exhaustive list of several factors courts should consider in evaluating government decisions for discriminatory intent. (*Id.* at 267-268.) Even Appellant and its expert historian acknowledged the analysis of discriminatory intent must follow the rubric outlined in *Arlington Heights*. (RT7526:14-7527:1.) Adhering to that analysis is important because it is exceptionally rare for discriminators to proclaim their racially discriminatory intent; rather, circumstantial evidence is sufficient to establish discriminatory intent. The trial court meticulously analyzed the factors specifically listed by the Supreme Court (see 24AA10714-10715 [Statement of Decision pp. 46-47] (accurately reciting factors and how they are to be applied); 24AA10718-10721 [Statement of Decision pp. 50-53] (analyzing evidence as to 1946 events in light of those factors); 24AA10721-10727 [Statement of Decision pp. 53-59] (analyzing evidence as to 1992 events in light of those factors).) It concluded, and found as a fact, that "Defendant's at-large election system was adopted and/or maintained with a discriminatory intent on at least two

occasions—in 1946 and in 1992. (24AA10716 [Statement of Decision p. 48].)

This Court's Opinion does not even cite *Arlington Heights*, nor does it systematically apply the factors it lists in a "sensitive inquiry" into the evidence. Nor does it acknowledge that the trial court made findings of fact that Appellant had acted with a discriminatory purpose based on its own analysis of the evidence before it at trial. Instead, the Opinion simply re-interprets the evidence, or some of it, by its own unarticulated standards, and substitutes its own fact-finding and inferences for those of the trial court. The Opinion's failure to apply the proper standards for determination of whether discriminatory intent was demonstrated renders this Court's conclusion legally erroneous.

b. The Opinion Fails to Follow the Rule that a Trial Court's Findings of Intentional Discrimination, When Based on Substantial Evidence, May Not Be Disturbed by an Appellate Court.

A trial court's finding of intent to discriminate on the part of a defendant is a finding of fact that, like any other such finding, must be reviewed under a "clearly erroneous" or "substantial evidence" test. (See *Rogers v. Lodge* (1982) 458 U.S. 613, 622 (determinations of discriminatory 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." Therefore, "deference

[is] require[d] [of] reviewing courts to [] a trial court's findings of fact … [that an] at-large system [] is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact.") quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 287-288 [requiring application of FRCP's Rule 52(a) standard on appellate review of such findings and expressly stating that a "finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race … is a pure question of fact …. It is not a question of law and not a mixed question of law and fact."]; *White v. Regester* (1973) 412 U.S. 755, 769-770; *Horsford v. Bd. Of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 375 [requiring review of findings of intentional discrimination under "substantial evidence" standard with appropriate deference to the trial court as finder of fact.].)

A "sensitive inquiry into such circumstantial and direct evidence" as to Appellant's discriminatory intent is precisely what the trial court did here, but this Court refused to acknowledge its primacy as the finder of fact or of the limited scope of review applicable to such fact findings. The Opinion cites *Rogers v. Lodge* only for a different proposition than the one quoted above, ignoring its recitation of the proper standard of review, and does not even mention *Horsford* or acknowledge the deferential standard of review that it holds must be applied.

Under *Horsford*, this Court owed substantial deference to the result of the trial court's assessment of the factual evidence if it was based on substantial evidence. As shown below, the trial court's findings were amply based on such evidence. The Court's application of a pure *de novo* standard of review was, therefore, legal error.

Horsford is critically important to the analysis of discriminatory intent for another reason—*Horsford* holds that one piece of evidence of discriminatory intent, no matter how circumstantial it might be, can be important to give context to other evidence, and so all of the evidence must be viewed collectively. (*Horsford*, 132 Cal.App.4th at 377 ["unwind[ing] the various strands of plaintiffs' evidence, discounting each strand, in an attempt to show that the jury could only speculate that race may have played a part in the[] decisions" is not sufficient to reverse a trial court's inferences based on the evidence collectively], quoting *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1046); see also *NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 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."].) By omitting a large portion of the evidence of discriminatory intent presented at trial, and even the evidence the trial court included in its Statement of Decision, the Opinion

fails to consider *all* of the evidence *collectively*. In *Horsford*, the court made particular note of "the more general evidence of [the defendant's] racism," and explained, "[t]his evidence of overall attitude and actions was relevant evidence to support the related inferences that either [the defendant]'s asserted reasons for the adverse actions toward plaintiffs were pretextual or, even if the asserted reasons contributed to the actions, racial animus also was a substantial factor in the decision." (*Id.* at 377.) In this case, the trial court similarly made note of the general evidence of Appellant's racially discriminatory actions around the time of the relevant decisions in 1946 and 1992 – e.g. what the lone Latino council member called "institutional racism." (24AA10726 [Statement of Decision, p. 58].) Yet, the Opinion ignores that evidence, among other evidence, in crediting Appellant's disputed non-discriminatory explanation for its actions and the statements of its council – precisely what the *Horsford* cautioned against. (*Horsford* at 377-378.) The failure to consider all of the evidence collectively is legal error.

c. The Opinion's Justifications for *De Novo* Review of the Finding of Discriminatory Intent are Legally Incorrect and Factually Unfounded.

The Opinion seeks to justify the application of *de novo* review by claiming that the most direct evidence of discriminatory intent was documentary—video, written reports,

newspaper articles, advertisements, etc. (Opinion at 38-39.) But that ignores the extensive testimony from expert historians—Dr. Kousser for Respondents and Dr. Lichtman for Appellant. The U.S. Supreme Court recognized in *Hunter v. Underwood* (1985) 471 U.S. 222, that the deferential "clear error" review applies even where the evidence of "intent available to the courts below consist[s] of" documentary evidence such as "the proceedings of the [alleged discriminatory actors], [and] historical studies, and the testimony of [] expert historians." (*Id.* at 229.)

The extensive testimony offered by expert historians in this case undercuts any argument for the propriety of *de novo* review. Yet, the Opinion claims this testimony—*interpreting* historical events, proceedings and documents, such as newspaper articles and advertisements, and offering historical context for all of that—is inappropriate in a case, such as this one, concerning the discriminatory intent of historical actors.[5] But a myriad of cases have found such expert testimony from historians to be both appropriate and critically helpful to the Court's task. (See, e.g., *Hunter v. Underwood* (1985) 471 U.S. 222; *Garza v. County of Los Angeles* (C.D. Cal. 1990) aff'd 918 F.2d 763 (9th Cir. 1990) ["The 1981 Plan cannot be analyzed in a vacuum. As illustrated by the

[5] Dr. Kousser, hired by Appellant in 1992 to study the origins of the city's at-large system, was qualified as an expert in Santa Monica history, as well as the methods of historians more generally. (RT3219:18-RT3222:24.)

testimony of J. Morgan Kousser, a professor of History at the California Institute of Technology, if the Court examines the changes in District 3 in the context of the demographic changes in the County as a whole, as well as the place where Hispanics lived and moved to during that period of time, the pattern is persuasive evidence that the lines were drawn and maintained with a racially discriminatory design."]; *Bolden v. Mobile* (S.D. Ala. 1982) 542 F.Supp. 1050, 1075 ["The court concludes on the basis of this analysis and on the basis of the testimony of plaintiffs' expert historian, that the 1874 statute reorganizing Mobile's municipal government was adopted with the insidious purpose of maintaining at-large general municipal elections … in order to foreclose the possibility of blacks being elected."]; *Moore v. Brown* (S.D. Ala. 1982) 542 F.Supp. 1078, 1105 ["The court concludes on the basis of this analysis and on the basis of the plaintiffs' expert historian that the 1876 act creating the at-large elections for the school board was adopted with the invidious purpose of electing only whites and excluding blacks."].)

Historians utilize their education, training and experience to evaluate historical documents and what they reveal – a task well outside the expertise of a judge without training as a historian. Claiming that experts are not permitted to testify about what is revealed by a document, the Opinion (at page 40) cites *Winans v. New York & Erie R. Co.* (1859) 62 U.S. 88, in

which the Court stated that expert testimony cannot be used to prove "the proper or legal construction" of a patent because the ultimate construction of a patent is a legal issue. (*Id.* at 101.) But the Opinion fails to recognize that *Winans* actually recognized that expert testimony may be useful and appropriate to aid the court in construing patent claims in the proper historical context: "[e]xperts may be examined to explain terms of art, and the state of the art, at any given time." (*Id.* at 100.) Not only is the interpretation of a single patent document - which the courts have held is ultimately a legal, not factual, issue (see *Markman v. Westview Instruments, Inc.* (1996) 517 U. S. 370) - not analogous to an historian's analysis of numerous historical documents in the context of the era and setting from which those documents came, but any suggestion in the century and a half old *Winans* case that expert testimony is not properly considered in patent claim construction has long since been rejected. (See *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.* (2015) 574 U.S. 318 [recognizing that expert testimony is appropriate for the purpose of construing patent claims, and reversing the Federal Circuit Court of Appeal's application of *de novo* review of the district court's underpinning factual findings].) Unlike the ultimate issue of patent claim construction, which is a question of law (see *id.; Markman, supra*), as shown in part 1.b above, the ultimate issue of discriminatory intent is a factual question. That the

testimony of expert historians is appropriate in Equal Protection cases like this, is so well established that even Appellant conceded the point in the Trial Court: "The testimony of expert historians is sometimes admitted in Equal Protection cases." (9AA3300.)[6]

Moreover, the testimony and statements relevant to the issue of discriminatory intent were not limited to expert historians. In addition to the expert testimony, at least three individuals involved in Appellant's 1992 maintenance of the at-large system provided testimony concerning Appellant's actions in 1992 – Tony Vazquez, Robert Holbrook and Morgan Kousser. Mr. Vazquez, a council member at the time – the only Latino ever elected to the Santa Monica City Council – described the "institutional racism" of that Council. (24AA10726; RA287, RT3460:23-RT3461:20.)[7] Robert Holbrook, another

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[6] This issue was not briefed by the parties in this Court, yet it is critical to this Court's disposition of the appeal. (See Gov't Code § 68081; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *California Casualty Ins. Co. v. App. Dept.* (1996) 46 Cal.App.4th 1145, 1147.)

[7] The Opinion criticizes Respondents' counsel for not asking Mr. Vazquez whether he believes his colleague(s) on the City Council in 1992 maintained the at-large system for a discriminatory purpose. (Opinion, p.8.) But when Respondents offered the statements of Robert Holbrook regarding the motivations of his colleagues on the 1992 City Council, Appellant objected and the Trial Court sustained the objection. (RT3602:5-RT3609:28.)

councilmember in 1992, provided a written statement regarding his observations from the City Council's 1992 deliberations. (RT3609:14-28, [admitting redacted statement by Mr. Holbrook].) Dr. Kousser described his involvement in the consideration of a change from the at-large system in 1992. (RT3219:18-3222:24; RT3227:3-3228:12; RT3230:12-3232:19.)

And finally, the videotape of the council meeting, which the trial court viewed, includes hours of statements by various people, including the council members who ultimately decided to maintain the at-large system. (RA179.) As the California Supreme Court ruled in *Shamblin v. Brattain* (1988) 44 Cal.3d 474 "an appellate court should defer to the factual determinations made by the trial court" where those determinations are based on witnessses' statements, regardless of "whether the trial court's ruling is based on oral testimony or declarations" that can be reviewed by the appellate court just the same as the trial court. (*Id.* at 479.) This historical evidence of statements made by actors in the events at issue in this case constitute evidence of a very different type than that in *Scott v.*

Moreover, Appellant could have just as easily called Dennis Zane to testify, perhaps to proclaim that his intent was non-discriminatory, and Mr. Zane was on Appellant's witness list. But Mr. Zane did not testify. If this Court draws some inference from Respondents' counsel not asking Mr. Vazquez an objectionable question, shouldn't an equal and opposite inference be drawn from Appellant's failure to have Mr. Zane testify at all?

Harris (2007) 550 U.S. 372, the lone case cited in the Opinion for the contrary view. In *Scott*, the court independently reviewed a police chase video, not an historic record from decades earlier, and the video did not include statements by key individuals. Moreover, the video in *Scott* was the only evidence of what transpired; here, the video of the July 1992 council meeting is not the only evidence of the council's discriminatory intent. For example, evidence of the statewide effort in the 1980s and 90s to replace at-large city council elections with elections by district for the purpose of increasing Latino voting power provides an important historical context to the City Council's vote on a Charter amendment in 1992. That vote was, in fact, the culmination of a movement from 1986 to 1992 to substitute district for at-large elections in Santa Monica that led to a 14-1 vote by a Charter Commission to end the at-large system, a system that the Commission said was "inadequate" with respect to "empowering ethnic communities to choose Council members." (RT3348:11-3348:22; 25AA10930; RA181-183.) Further, the racial climate and other circumstances in Santa Monica, and the "institutional racism" perpetuated by the Santa Monica city council in the early 1990s, for example, provides important context for the council meeting video and what was said by council members. (24AA10726; RA287, RT3460:23-RT3461:20.) The Opinion ignores this and other voluminous contextual

evidence offered in the Trial Court. Moreover, in *Scott* the court noted "there have not yet been factual findings by a judge or jury"; rather, the undisputed video was the only evidence used to decide the *legal* question of whether there was a violation of the Fourth Amendment. (*Id.* at ___.) Here, there was a trial, and the trial court made factual findings on the question of discriminatory intent. Under a proper view of the law governing appellate review, those findings are entitled to deference.

The Opinion also criticizes the Trial Court's findings because the Trial Court required Respondents to draft the statement of decision. That order was entirely appropriate and consistent with the California Rules of Court. A prevailing "party may be, and often should be, required to prepare the statement [of decision]," particularly where the task of preparing a statement of decision is anticipated to be time-consuming. (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 129, n. 5; Cal. Rules of Court, rule 3.1590, subds. (c), (f).) The process by which the Trial Court crafted its Statement of Decision offers no reason to disregard that decision and erroneously apply a *de novo* standard of review.

2. The Trial Court's Factual Findings and Inferences Should be Affirmed Because They are Based on Substantial Evidence

a. The Opinion Erred in Failing to View the Findings and Inferences Drawn by the Trial Court in a Light Most Favorable to Respondents

"Pursuant to the relevant standard of review … the facts of a discrimination claim [must be set forth] in the light most favorable to plaintiffs as the prevailing parties." (*Horsford* at 368, citing *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639.)[8] Yet the Opinion does the exact opposite: it selectively recites certain facts in the light most favorable to Appellant, the non-prevailing party in the trial court, often with no support in the record. In the process, the Opinion misstates and omits many facts found by the trial court, and substantial evidence in the record supporting those factual findings.

i. Errors in the Opinion's Reading of the Factual Record

The following lists some of the facts incorrectly stated in the Opinion relating to the 1946 adoption of the at-large system:

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[8] Review under the substantial evidence standard involves an undertaking to "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court."

- The recitation of Santa Monica's demographics in 1946 on page 6 of the Opinion, is incorrect. In 1946, Latinos were generally counted as "white" by the U.S. Census. Therefore, it is impossible to know from the Census data what proportion of Santa Monica was non-Hispanic white in 1946. But, based on the earliest reliable data from the Census concerning the Latino proportion of Santa Monica, it is likely that a significant portion of the 95.5% identified as "White or Anglo" were, in fact, Latino. (RT3496:7-3499:13; RT4400:14-4405:9)
- The Opinion (p. 7) asserts that no minority residents opposed the 1946 charter amendment. That is false. On the contrary, Dr. Kousser's ecological inference analysis of the 1946 election results, finding a near-

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(*Jessup Farms v. Baldwin* (1983) 33 Cal. 3d 639, 660 (citations omitted).) This standard of review is "deferential" to the factual findings of the trial court. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th. 1040, 1053. Where the trial court is called on to make credibility judgments, its decisions will stand so long as they are not arbitrary. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) Where different inferences may reasonably be drawn from the undisputed evidence, the "fact that it is possible to draw some inference other than that drawn by the trier of fact is of no consequence." (*Jessup Farms,* 33 Cal. 3d at 660.) Deference to the trial court embraces both express and implied factual findings. (*People ex rel. Dept. of Corrections v. Speedee Oil Change 5 Systems, Inc.* (1999) 20 Cal. 4th 1135, 1143.)

perfect correlation between a) support for the 1946 charter amendment and b) opposition to the contemporaneous Proposition 11, a proposition that sought to ban racial discrimination in employment and establish a Fair Employment Practices Commission, suggests that the 1946 charter amendment found significantly more opposition among minority residents than it did among non-Hispanic white residents. (RT3484:22-3489:12; RA176; RA180; 24AA10717-10718; 24AA10720.) More important than the intentions of minorities are the discriminatory intentions of the non-Hispanic white Freeholders – what is actually at issue in this case. The high correlation in Santa Monica between votes against fair employment and votes for the at-large 1946 Charter provides potent evidence that those non-Hispanic whites who harbored racially discriminatory views overwhelmingly supported the Charter. (RT3761:16-3764:18.)

- It is not true, as asserted on pages 42 and 46 of the Opinion, that "[i]n 1946, 100 percent of the leaders of the minority community who expressed a public opinion supported the [the at-large system]." Nor is it true, as asserted on page 43 of the Opinion, that in

1946 the city "did what minority leaders asked." While minority leaders did not oppose the charter amendment once it was set, because it was better than the existing system, minority leaders were distressed by the Freeholders' decision to include only an at-large election option in the proposed charter. As Dr. Kousser explained, when the Santa Monica Outlook newspaper article describing one of the Freeholders meeting with the NAACP and is viewed in light of the Outlook's proclivities and agenda, it reveals that minorities were greatly concerned and distressed by the Freeholders' decision to include only an at-large option for the city charter. In response to an objection by Appellant to Dr. Kousser's testimony concerning this Outlook article, the Trial Court explicitly agreed with Dr. Kousser's analysis: "This is his interpretation of the article. And the inference is that they had the meeting because it was of concern to them. I think it's a reasonable inference." (RT3481:6-3483:11; 24AA10720.)

- It is not true, as asserted on page 42 of the Opinion, that "the people who knew best and cared most detected no City purpose of race discrimination against them." Certainly, there was no evidence to

suggest that. On the contrary, Dr. Kousser testified that people in Santa Monica in 1946, including minority groups and the Freeholders, were well aware that at-large elections would preclude representation of racial minorities. Documents reflecting public debate during that era confirm that this fact was repeatedly acknowledged. (See, e.g. 25AA10890; 25AA11005; 25AA10889; RA177-178; RT3470:17-3472:6; RT3472:23-3473:7; RT3475:18-3476:13; RT3473:19-3475:13; RT3478:28-3481:1.)

- It is not true, as asserted on page 23 of the Opinion, that "[s]ome abuses of ward politics are a matter of record here," or that "[w]idespread graft and corruption in city politics then led to reforming upheaval in municipal governance and swept away ward and district elections." On the contrary, there is no evidence of abuse, graft or corruption in Santa Monica during the period in which it utilized district elections. (7AA2397-2398.) Moreover, as Dr. Kousser explained, a "central purpose" of the "progressive" era move toward at-large elections was to "eliminate the election of working class people, particularly in the case of ethnic or racial minorities." (RT3226:24-3227:2; 7AA2396-2397, quoting Peyton McCrary,

"History in the Courts: The Significance of the *City of Mobile v. Bolden*," in Chandler Davidson, *Minority Vote Dilution* (Howard University Press, 1984), 47-64 at 55.)

The following lists some of the facts incorrectly stated in the Opinion relating to the 1992 decision to retain the at-large system:

- The 1992 Charter Review Commission did not "recommend[] inaction and further research." On the contrary, the Commission recommended, by a 14-1 vote, scrapping the at-large system. (RT3394:25-3395:15; 25AA10914; RA179 [at timestamp 1:56:25 – 1:56:37].)
- The City Council did not agree on "more study," and it did not "resolve simply to study the issue further," as erroneously stated on pages 8 and 46 of the Opinion. Rather, there was no further action on the matter at all, and it never came back to the council. (RT3464:13-3464:25.)
- It is not true, as asserted on page 17 of the Opinion, that "no eyewitness testified from personal knowledge gained in 1992 about the purpose of the City's actions that year." On the contrary, at least three individuals involved in Appellant's 1992

maintenance of the at-large system provided testimony concerning Appellant's council of 1992 relevant to its intent in maintaining the at-large system – Tony Vazquez, Robert Holbrook and Morgan Kousser. Mr. Vazquez, a council member at the time – the only Latino ever elected to the Santa Monica City Council – described the "institutional racism" of that Council and described how the council campaign of 1994 demonstrated "the racism that still exists in our city…The racism that came out in this campaign was just unbelieveable." (24AA10726; RA278-289; RA287; RA291-292; RT3453:8-3453:28; RT3460:23-RT3461:20.) Robert Holbrook, another councilmember in 1992, due to his failing health, provided a written statement regarding his observations from the City Council's 1992 deliberations. (RT3609:14-3609:28.) And, Morgan Kousser described his involvement in the consideration of a change from the at-large system in 1992. (RT3219:18-3222:24; RT3227:3-3228:12; RT3230:12-3232:19.)

- Contrary to the assertion on page 16 of the Opinion, there is absolutely no "record evidence [] that, [after the July 1992 council meeting], the City's staff []

provide[d] the City Council with further information about hybrid voting, at-large voting, [or] district voting." On the contrary, City staff never provided any further information, and these voting systems were never again discussed at any council meetings. (RT3464:16-3464:25.)

- The statement on page 11 of the Opinion -- that "only five of the 15 Commissioners favored district voting" – is false, or at least grossly misleading. Rather, 14 of 15 Commissioners recommended scrapping the at-large system. Of those 14, five picked districts as their first choice to replace the at-large system; eight picked single-transferable-vote as their first choice to replace the at-large system. Of the eight that picked single-transferable-vote as their first choice to replace the at-large system, four picked districts as their second choice to replace the at-large system. (25AA10914.)
- It is not true, as asserted on page 48 of the Opinion, that "[Respondents] claim Zane implied the Pico area was a dumping ground for undesirable low-income housing projects." Respondents never claimed that Zane implied anything about the Pico Neighborhood being the City's dumping ground, But Zane didn't

need to imply that; rather, the uncontroverted and unchallenged statements of other speakers made clear that the Pico Neighborhood was the dumping ground for all of the undesirable elements of the city, including the vast majority of affordable housing projects. (See, e.g., RT3346:26-3347:16 ["You all quizzed Mr. Willis on this whole issue of affordable housing. But, you know -- and he pointed out that Pico Neighborhood has more than half of the affordable housing in the city. Why is that? They have no representation on this council. So that's where it is. It's there because they had – the citizens had to threaten to sue the city to get you all to agree to put the next couple projects outside their neighborhood."]; RT3349:7-3350:11; RA179 [at timestamp1:59:23 -1:59:32].)[9] And everyone involved, including Mr. Zane, knew that the Pico Neighborhood was the location of not only the vast majority of the city's affordable housing, but also of environmental

[9] Respondents do not suggest that affordable housing is inherently bad; quite the contrary, affordable housing is, and has for a long time been, a necessary good for California. However, experience shows that *clustering* affordable housing in one area of a city causes significant problems for that area. In Santa Monica, affordable housing has been, and continues to be, clustered in the minority-concentrated Pico Neighborhood.

harms like the hazardous waste storage facility, trash facility and freeway and planning burdens like the city's vehicle maintenance yard. (See, e.g., RT7968:28-7989:22; RT3353:9-3357:8; RA39-40; RA294-295; RA297; RA346.) So, whether Zane wants to admit it or not, that is the reality and context in which his statements should be construed, and were construed by the Trial Court.

ii. Significant Omissions in the Opinion's Statement of the Factual Record Fail to Acknowledge the Evidence Supporting the Trial Court's Finding of Intentional Discrimination.

The Trial Court explained, but the Opinion omits, the following facts relating to Santa Monica's Latino population over the entire historical period surveyed in the evidence:

- Latinos in Santa Monica have been subjected to restrictive real estate covenants that have created limited housing opportunities for the Mexican-origin population and segregated the city - a policy supported by approximately 70% of Santa Monica voters in 1964. (24AA10701-10702; RT3755:6-3756:11; RT3457:19-3457:25; RA41);
- Latinos in Santa Monica endured the "repatriation" program in which many legal resident aliens and

American citizens of Mexican descent were forced or coerced out of the country. (24AA10701-10702; RA255-256; RT8630:8-8631:19);

- Latinos in Santa Monica have been harmed by segregation in public schools. (24AA10701-10702; RA255-256);
- Latinos in Santa Monica have been excluded from the use of public facilities such as public swimming facilities. (24AA10702; RA255-256);
- Latinos in Santa Monica suffered from the lasting effects of being excluded from voting by English language literacy being a prerequisite for voting until 1970. (24AA10702; RA255-256; RT8637:17-8639:24);
- The staggering of Defendant's city council elections enhances the dilutive effect of its at-large election system. (RT6813:17-6814:21);
- Latinos in Santa Monica bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. As revealed by the most recent Census, Whites enjoy significantly higher income levels than their Hispanic and African American neighbors in Santa Monica-a difference far greater than the national disparity.

This is particularly problematic for Latinos in Santa Monica's at-large elections due to the prohibitive cost of running campaigns in those elections - approximately one million dollars was spent in pursuit of the city council seats available in 2012, for example. There is also a severe achievement gap between White students and their African American and Hispanic peers in Santa Monica's schools that may further contribute to lingering turnout disparities. (RT2292:19-2294:22 and RT2302:13-2303:14 [objections later overruled at RT2429:10-11]; RA49; RT6921:15-6928:11; RT7057:11-7063:21);

- Disturbing racial appeals in political campaigns for Santa Monica city council have hindered the participation and success of Latino candidates. (24AA10704-10705; RT2145:11-23; RT3453:8-3453:28; RA278-279; RA291-292);
- Appellant, and particularly its city council, have been generally unresponsive to the needs of the Latino community. The elements of the city that most residents would want to put at a distance - the freeway, the trash facility, the city's maintenance yard, a park that continues to emit poisonous methane gas, hazardous waste collection and storage,

and, most recently, the train maintenance yard - have all been placed in the Latino-concentrated Pico Neighborhood. At least some of these undesirable elements - e.g. the 10-freeway and train maintenance yard - were placed in the Pico Neighborhood at the direction, or with the agreement, of Defendant or members of its city council. (RT2316:10-2317:27; RT6078:19-6081:20; RT6083:10-6083:28; RT7968:28-7989:23; RT8774:21-8788:21; RT9154:25-9156:14; RA39-40; RA294-295; RA297; RA346); and

- Defendant's various commissions (planning commission, arts commission, parks and recreation commission, etc.), the members of which are appointed by Defendant's city council, are nearly devoid of Latino members, in sharp contrast to the significant proportion (16%) of Santa Monica residents who are Latino. That near absence of Latinos on those commissions is important not only in city planning but also for political advancement: in the 25 years prior to the trial there had been 2 appointments to the Santa Monica City Council, and both of the appointees had served on the planning commission. (RA297-346; RT8774:21-8788:15; RT9135:10-20.)

With regard to proof of Appellant's discriminatory intent in adopting the at-large election system in 1946, the Opinion omits the following evidence, as proved in the record at trial:

- In 1946, proponents and opponents of the at-large system alike, bluntly recognized that the at-large system would impair minority representation. (RT3470:17-3472:6; RT3472:23-3473:7; RT3475:18-3476:13; RT3473:19-3475:13; RT3478:28-3481:1; 25AA10890; 25AA11005; 25AA10889; RA177-178.)
- The only two members of the Board of Freeholders who were also members of the "Interracial Progress Committee" opposed the 1946 charter's all at-large plan. (RT5126:24-5128:9; RT5129:17-5130:15.)
- The Board of Freeholders in 1946 was all white and there is no record of any persons of color being consulted by the body prior to its decision to offer only an at-large option in the proposed charter. (RT3754:17-3755:5; 25AA10927-10928; RA92.)
- The discriminatory impact of the at-large election system was felt immediately after its adoption in 1946. Though several ran, no candidates of color were elected to the Santa Monica City Council in the 1940s, 50s or 60s. Moreover, the impact on the minority-concentrated Pico Neighborhood between

1946 and the time of trial, also demonstrates the discriminatory impact of the at-large election system in this case. (24AA10718; 24AA10725; RT3453:11-3454:15; RT3491:5-3492:21; RT3498:27-3499:13; RT4543:19-4543:24; RA54-55.)

- The historical background of the decision in 1946 also militates in favor of a finding of discriminatory intent. At-large elections are well known to disadvantage minorities, and that was well understood in Santa Monica in 1946. (RT3470:17-3472:6; RT3472:23-3473:7; RT3475:18-3476:13; RT3473:19-3475:13; RT3478:28-3481:1; 25AA10890; 25AA11005; 25AA10889; RA177-178.) The non-white population in Santa Monica was growing at a faster rate than the white population – enough that the chief newspaper in Santa Monica, the Evening Outlook, was alarmed by the rate of increase in the non-white population. (RT3494:6-3495:27.) The fifteen Freeholders, who proposed only at-large elections to the Santa Monica electorate in 1946, were all white, and all but one lived on the wealthier whiter side of Wilshire Boulevard. (RT3227:3-3228:12; RT3754:17-3755:5; RA92; 25AA10927-10928.) At-large elections were, therefore, in their

self-interest, and at least three of the Freeholders successfully ran for seats on the city council in the years that followed. The Santa Monica commissioners had adopted a resolution calling for all Japanese Americans to be deported to Japan rather than being allowed to return to their homes after being interned, Los Angeles County had been marred by the zoot suit riots, and racial tensions were prevalent enough in Santa Monica that a Committee on Interracial Progress was necessary. (24AA10718-10719; RT3662:14-3666:3; RA184-187.)

- The local newspaper, the Outlook, which was the chief sponsor of the charter change in 1946, having agitated for the issue and endorsed the election of 13 of the 15 members of the Board of Freeholders who wrote the new charter, both opposed Proposition 11 and, in its editorials, sympathized with such racist views as the white southern position that the American Civil War was unnecessary because "a powerful moral conscience" among "leading Southerners" would have eventually abolished slavery and alleviated the necessity for southerners to "fight for their rights and their way of life." The Outlook also specifically noted that those who favored

district elections, such as "organized labor and the colored people" should recognize that "the interest of minorities is always best protected by a system which favors the election of liberal-minded persons who are not compelled to play peanut politics. Such liberal-minded persons, of high caliber, will run for office and be elected if elections are held at large." In other words, minorities should give up the chance to be represented because "liberal-minded" whites elected in an at-large system would take care of them. (See RT3473:19-3481:1; RA88; 25AA10889.) The parallel statement by Councilman Zane during the 1992 council meeting, indicating that Latino citizens had a choice between "representation" and such policy priorities as affordable housing, should be interpreted in light of the 1946 statement by the newspaper sponsor of at-large elections. These are the sorts of contextual facts that an expert witness can and did provide in reports and trial testimony, and that the Opinion ignores.

- At the same time as the 1946 Santa Monica charter amendment was approved, a significant majority of Santa Monica voters voted against Proposition 11, which would have outlawed racial discrimination in

employment, and Dr. Kousser's EI analysis shows a very strong correlation between voting for the charter amendment and against Proposition 11. (RT3484:22-3486:17; RT3487:12-3489:12; RA176; RA180; 24AA10720.)

- The sequence of events leading up to the adoption of the at-large system in 1946 likewise supports a finding of discriminatory intent. As Dr. Kousser detailed, in 1946, the Freeholders waffled between giving voters a choice of having some district elections or just at-large elections, and ultimately chose to only present an at-large election option despite the recognition that district elections would be better for minority representation. (RT3483:14-3484:16; RT3760:11-3761:15; 24AA10720-10721.)
- The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1946, the Freeholders' reversed course on offering to the voters a hybrid system (some district, and some at-large, elected council seats) in the wake of discussion of minority representation, and, after a series of votes the local newspaper called "unexpected," offered the voters only the option of at-

large elections. (RT3483:14-3484:16; RT3760:11-3761:15; 24AA10721.)

- Indeed, the Opinion contains no discussion at all of the 1946 Freeholders' decision to include only an at-large option in the charter amendment proposed to the electorate. Yet that is the decision the Trial Court found to be intentionally discriminatory in 1946. (24AA10720-10721.) Rather, the Opinion discusses only the decision to approve the 1946 charter amendment, once the discriminatory decision of the Freeholders to eliminate any district election option had already been made.

With regard to proof of Appellant's discriminatory intent in maintaining the at-large election system in 1992, the Opinion omits the following evidence, as proved by the record at trial:

- After winning a FVRA case ending at-large elections in Watsonville in 1989, voting rights attorneys began to file and threaten to file lawsuits challenging at-large elections throughout California on the grounds that they discriminated against Latinos. The Santa Monica Citizens United to Reform Elections (CURE), led by minorities such as Tony Vazquez, specifically noted the Watsonville case in urging the Santa Monica City Council to place the issue of substituting

district for at-large elections on the ballot, allowing Santa Monica voters to decide the question. (24AA10721-10722; RT3461:25-3463:8.)

- With the issue of the dilutive effect of at-large elections receiving increased attention in Santa Monica and throughout California, Appellant appointed a 15-member Charter Review Commission to study the matter and make recommendations to the City Council. As part of their investigation, the Charter Review Commission sought the analysis of Dr. Kousser, who had just completed his work in Garza regarding discriminatory intent in the way Los Angeles County's supervisorial districts had been drawn. Dr. Kousser was asked whether Santa Monica's at-large election system was adopted or maintained for a discriminatory purpose, and Dr. Kousser concluded that it was, for all of the reasons discussed above. (24AA10722; RT3219:18-3222:13; RA77-103.)
- Based on their extensive study and investigations, the near-unanimous Charter Review Commission recommended that Defendant's at-large election system be eliminated. The principal reason for that recommendation was that the at-large system

prevents minorities and the minority-concentrated Pico Neighborhood from having a seat at the table. The report noted that the City Attorney had stated to it that ending the at-large system would provide a defense against voting rights lawsuits because it would allow "an increased opportunity for minority representation." (24AA10722; RA145.)

- That recommendation went to the City Council in July 1992, though the report by the city attorney to the city council in advance of that meeting made substantive changes to the Charter Review Commission report, softening the blow of the Charter Review Commission report by distorting some of its findings. (RT4953:6-4960:14.) The issue was the subject of a videotaped public city council meeting, excerpts of which were played at trial. (RA179; RT3303:13-3395:15; 24AA10722-10723.) One speaker after another – members of the Charter Review Commission, the public, an attorney from the Mexican American Legal Defense and Education Fund, and even a former councilmember – urged Defendant's City Council to change its at-large election system. (*Id.*) Many of the speakers specifically stressed that the at-large system

discriminated against Latino voters and/or that courts might rule that they did in an appropriate case. (See, e.g. RT3320:10-3320:27; RT3325:8-3331:21; RT3332:27-3333:13; RT3333:26-3334:9.) Every speaker who was a member of a racial minority supported district elections, and spoke about how the at-large election system denies representation to racial minorities. (RT3309:1-3312:8; RT3334:10-3345:22.) Though the City Council understood well that the at-large system prevented racial minorities from achieving representation – that point was made by the Charter Review Commission's report and several speakers and was never challenged – the members refused by a 4-3 vote to allow the voters to change the system that had elected them. (24AA10723; 25AA10914; 25AA10930; RT330_:23-3305:27; RT3345:24-3350:11; RT3351:3-3352:18; RT3352:21-3357:8; RT3358:6-3363:13; 3393:23-3395:15.) Councilmember Dennis Zane explained his professed reasoning – in a district system, Santa Monica would no longer be able to place a disproportionate share of affordable housing into the minority-concentrated Pico Neighborhood, where, according to the unrefuted remarks at the July 1992

council meeting, the majority of the city's affordable housing was already located (see RA179 [at timestamp 1:59:23 – 1:59:32]), because the Pico Neighborhood district's representative would oppose it. (24AA10723; RT3375:7-3384:20; RT3387:2-3389:28.) Mr. Zane specifically phrased the issue as one of Latino representation versus affordable housing: "So you gain the representation but you lose the housing." (24AA10723-10724; RT3378:15-3378:25.) While this professed rationale could be characterized as not demonstrating that Mr. Zane or his colleagues "harbored any ethnic or racial animus toward the … Hispanic community," it nonetheless reflects intentional discrimination—Mr. Zane understood that his action would harm Latinos' voting power, and he took that action to maintain the power of his political group to continue concentrating affordable housing in the Latino-concentrated neighborhood despite their opposition, similar to the way that environmental hazards had been sited in that neighborhood in the absence of its representation on the City Council. (See *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 778 (J. Kozinski, concurring) [finding that

incumbents preserving their power by drawing district lines that avoided a higher proportion of Latinos in one district was intentionally discriminatory despite the lack of any racial animus], cert. denied (1991) 111 S.Ct. 681.) Mr. Zane's remarks revealed that his immediate goal was to deny the minority-concentrated Pico Neighborhood its due representation. His secondary goal, and perhaps the reason he wanted to deny the minority-concentrated Pico Neighborhood representation, was to preserve his group's power to continue concentrating affordable housing in the Pico Neighborhood. Similar to the circumstances held to demonstrate discriminatory intent in Garza, Appellant's council "chose [minimizing Latino voting power and denying the minority-concentrated neighborhood representation] as the avenue by which to achieve [the] preservation" of its power to concentrate low-cost housing (and a host of undesirable features) disproportionately on the Pico Neighborhood. (*Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771.) No matter how much his remarks were couched in progressive buzz words, like "affordable housing," the fact remains

Councilman Zane's immediate purpose was to deny the Latino community representation in refusing to scrap the at-large system.

- The discriminatory impact of the at-large election system was felt immediately after its maintenance in 1992. The first and only Latino elected to the Santa Monica City Council lost his re-election bid in 1994 in an election marred by racial appeals – a notable anomaly in Santa Monica where election records establish that incumbents lose very rarely. (24AA10725; RT3453:11-3454:15.) Tony Vazquez blamed his 1994 loss on "the racism that still exists in our city .... The racism that came out in this campaign was just unbelievable," and this was not only Vasquez's retrospective view. There was evidence presented at trial of blatantly racially provocative newspaper advertisements against Councilman Vasquez in 1992. (24AA10726; RT2145:11-2145:23; RT3453:8-3453:28; RT3460:16-3461:20; RA278-279; RA291-292.)
- The historical background of the decision in 1992 also militates in favor of finding a discriminatory intent. At-large elections are well known to disadvantage minorities, and that was well understood in Santa

Monica in 1992. In 1992 the non-white population was sufficiently compact (in the Pico Neighborhood) that Dr. Leo Estrada, another academic consultant to the Charter Review Commission, concluded that a council district could at that time be drawn with a combined majority of Latino and African American residents. (24AA10725-10726; RT3457:5-3458:11.)

- The Santa Monica City Council of the early 1990s supported a curfew that Santa Monica's lone Latino council member described as "institutional racism," and the members understood that district elections would undermine the slate politics that had facilitated the election of many of them. (24AA10726; RT3458:17-3459:25; RT3460:16-3460:21.)
- The effect of ending the at-large system of elections on slate politics was repeatedly discussed in the report of the 1992 Charter Review Commission, and that report suggested that candidates independent of slates would be able to launch challenges that were "more serious than under the present [at-large] system. (25AA10938.)
- The Santa Monica chapter of the NAACP and the Mexican American Legal Defense and Education Fund (MALDEF) supported district elections in 1992.

The record shows overwhelming support among minority leaders and groups for district elections in 1992. (See, e.g., 25AA10934; RT3309:1-3312:8.)

- The sequence of events leading up to the maintenance of the at-large system in 1992, likewise supports a finding of discriminatory intent. In 1992, the Charter Review Commission, and the CURE group before that, intertwined the issue of district elections with racial justice, and the connection was clear from the video of the July 1992 city council meeting, immediately prior to Defendant's city council voting to prevent Santa Monica voters from adopting district elections. (See, e.g., RT3461:21-3465:12; RA179.)
- The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1992, the Charter Review Commission recommended scrapping the at-large election system, principally because of its deleterious effect on minority representation. While Appellant's City Council adopted nearly all of the Charter Review Commission's recommendations, it refused to adopt any change to the at-large elections or even submit the issue to the voters. (24AA10726-10727.)

b. Review of the Trial Court's Findings and Substantial Supporting Evidence Under Proper Standards Requires Affirmance of the Trial Court's Factual Finding of Discriminatory Intent.

As demonstrated above, the Opinion failed to follow correct legal standards in two major ways. First, it improperly reviewed the Superior Court's finding that Appellant had intentionally discriminated in adopting and maintaining the at large election system *de novo*, according the trial court's findings no deference and substituting its own evaluation of the evidence for that of the trier of fact, contrary to *Horsford* and United States Supreme Court caselaw from voting and other types of discrimination cases. Second, in assessing the evidence, it failed to follow well-established standards for determining whether an actor's intent to discrimination should be inferred from evidence, including circumstantial evidence, under the standards and using the factors set out in *Arlington Heights*. The Opinion's failure to assess the evidence on Appellant's discriminatory intent flowed as well from its misapprehension or misstatement of the facts that the Superior Court found and the substantial evidence supporting those facts, and its failure to acknowledge or consider other findings of the Superior Court and the evidence supporting them. Moreover, the opinion treats the selection of facts that it chose to address in isolation from the extensive historical record. When that record is taken as a whole, and the factual evidence

and findings are viewed in context, and the evidence is analyzed under the *Arlington Heights* rubric, as the Superior Court did, the factual findings and inferences of that court are shown to be perfectly reasonable and are supported by substantial evidence. The law requires that deference be afforded to those factual findings and inferences, and the evidence be viewed in the light most favorable to Respondents and to upholding the judgment. Analyzed properly, the Trial Court's finding that Appellant's actions were tainted by discriminatory intent, in both 1946 and 1992, should be affirmed.

CONCLUSION

The Court should grant rehearing, withdraw its Opinion, and affirm the judgment of the Superior Court.

Respectfully submitted,

Dated: July 24, 2020

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CERTIFICATE OF WORD COUNT

I, the undersigned appellate counsel, certify that this brief consists of 13,101 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: July 24, 2020

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PROOF OF SERVICE

I am a citizen of the United States, am over the age of 18 years, and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, CA 94612. I declare that on the date hereof I served the following documents:

RESPONDENTS' PETITION FOR REHEARING

☒ **By Electronic Service:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service address(es) as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 24th day of July 2020, at Oakland, California.

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