No. S263972

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF SANTA MONICA,

Appellant-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents-Plaintiffs.

CITY OF SANTA MONICA'S ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Second Appellate District, Division Eight, Case No. B295935
Los Angeles County Superior Court No. BC616804
The Hon. Yvette M. Palazuelos, Judge Presiding

Gov't Code, § 6103

CITY OF SANTA MONICA
GEORGE CARDONA (135439)
Interim City Attorney
George.Cardona@smgov.net
1685 Main Street, Room 310
Santa Monica, California 90401
Telephone: (310) 458-8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR. (132099)
TBoutrous@gibsondunn.com
MARCELLUS A. MCRAE (140308)
MMcrae@gibsondunn.com
*KAHN A. SCOLNICK (228686)
KScolnick@gibsondunn.com
TIAUNIA N. HENRY (254323)
THenry@gibsondunn.com
DANIEL R. ADLER (306924)
DAdler@gibsondunn.com
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Appellant-Defendant, City of Santa Monica

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

I certify under rule 8.208 of the California Rules of Court 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.

DATED: September 4, 2020 Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous
Theodore J. Boutrous, Jr.

Attorneys for Appellant-Defendant City of Santa Monica

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (*continued*)

Statutes

Rules

INTRODUCTION

Plaintiffs' petition falls short of this Court's demanding standards for review, which is unnecessary here either to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b).)

Plaintiffs' first issue is unworthy of review for the simple reason that it depends on a demonstrably false premise. The Court of Appeal did *not* hold that the California Voting Rights Act (CVRA) requires proof "that it is possible to create a geographically compact district in which a majority of the voters are members of the protected class." (Pet. at p. 10.) To the contrary, the court expressly stated that it "need not decide" that issue. (Opn. at p. 37.)

Instead, the court relied on the plain language of the CVRA to hold that a plaintiff must prove that minority votes have been diluted, which "requires a showing, not of a merely marginal percentage increase [in minority voting strength] in a proposed district, but evidence that the change [from at-large voting to districts] is likely to make a difference in what counts in a democracy: electoral results." (Opn. at p. 37.)

The court rejected plaintiffs' contention that the CVRA requires no proof of dilution at all—a position that plaintiffs waived in their briefing and then abandoned during the oral argument, "and for good reason." (Opn. at p. 32.) The court likewise rejected plaintiffs' alternative theory that *any* "improvement" in minority voting power, however small, will

demonstrate vote dilution and compel a transition from at-large to district-based elections. Such a "manipulable" standard "would merely ensure plaintiffs always win"—even where, as here, an alternative electoral system would make no practical difference in the outcome of elections. (Opn. at p. 36.)

Plaintiffs otherwise contend that review is warranted because this case involves the CVRA or voting rights generally. (E.g., Pet. at pp. 12, 26-28). But the Court of Appeal did not call into question the wisdom of the CVRA or limit its application in future cases; nor did it address whether at-large elections or district-based elections are better in the abstract. This case instead presents a pedestrian question of law: whether courts must give effect to statutory text requiring evidence of vote "dilution." That is the *only* question of law relating to the CVRA that the Court of Appeal decided, and the answer, as that court's opinion explained, is obvious.

Contrary to plaintiffs' suggestion, the Court of Appeal's opinion will not have a sweeping impact on other cases. (Pet. at pp. 28-30.) Since the CVRA's enactment nearly two decades ago, few CVRA cases have been filed, hardly any have been litigated through trial, and the only three published appellate decisions addressing the CVRA before this one left open the most basic questions about the statute, including "What elements must be proved to establish liability under the CVRA?" (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 690.) The Court of Appeal here did nothing more than confirm that the Legislature meant what it said when it used the word "dilution." To the

extent that holding will have any broader impact, it will be by deterring meritless suits like this one—where plaintiffs sought a radical overhaul of a well-functioning electoral system chosen by a charter city's voters despite the absence of evidence that it would make any difference. Deterring such suits will achieve the Legislature's aim in passing the CVRA, which was to expand the potential scope of vote-dilution claims without mandating the use of district-based elections across the State.

Plaintiffs' second issue asserts that the Court of Appeal erred in evaluating the evidence of intentional discrimination without giving appropriate deference to the trial court's findings. This issue, too, rests on a false premise. The Court of Appeal rejected plaintiffs' Equal Protection claim on *legal* grounds—holding that the trial court applied the wrong legal standard by failing to insist on evidence of discriminatory intent. (See, e.g., Opn. at pp. 41-42 ["Plaintiffs must show the government adopted or maintained the election system for the purpose of racial discrimination. A knowledge of a disparate impact is not enough. The trial court departed from these equal protection standards."], citations omitted.)

The Court of Appeal's opinion does not remotely depend on the standard of review. After holding that the trial court applied the wrong legal standard, the court correctly held that there is "*no evidence* the City had the *purpose* of engaging in racial discrimination" in 1946, "when the City adopted its at-large system, [or] in 1992, when the City left this at-large system unchanged." (Opn. at p. 42, italics added.) Plaintiffs point to no

such evidence in their petition (because there is none). Plaintiffs instead insist that the Court of Appeal had no business reviewing historical newspaper articles or a videotape of a 1992 City Council meeting, even to check whether they contained a shred of evidence of discriminatory purpose. That is not how appellate review works, as cases cited by the Court of Appeal demonstrate. (E.g., *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256 [reversing after bench trial for lack of evidence of intentional discrimination].)

In sum, the Court of Appeal's decision is narrow and correct. It presents no unsettled questions of law, and it creates no splits with other courts. The Court should deny the petition.

STATEMENT OF THE CASE

Plaintiffs are a neighborhood organization and an unsuccessful candidate from the 2004 City Council election. They filed this case in 2016. Their core theory was that the City's at-large method of electing its Council diluted Latino votes and intentionally discriminated against Latino voters. (Opn. at p. 16.)

At the time of the trial in 2018, two of the City's seven Councilmembers "self-identified as Latinos," which meant that "the percentage of self-identified Latinos on the City Council was about 29 percent, which is about twice the percentage of voting-age Latinos in Santa Monica." (Opn. at p. 16.)

On the CVRA's element of "racially polarized voting," the statistical evidence of election results at trial was undisputed; the

parties differed only as to which candidates and which elections should count. Plaintiffs' theory, which the trial court adopted, was that the analysis is limited to Latino and white voters' respective levels of support for candidates with Latino surnames. (Opn. at p. 19.) The City, by contrast, argued that plaintiffs' myopic focus on Latino-surnamed candidates was unconstitutional and based on false stereotypes about Latino voters—i.e., that they would support only Latino-surnamed candidates no matter who was running. (See Part III, *post*.) The City also demonstrated that when candidates of all ethnicities are taken into account, the vast majority of candidates preferred by Latino voters won City Council elections, precluding a finding of racially polarized voting as a matter of law. (*Ibid*.)

On the CVRA's separate element of vote "dilution," plaintiffs argued, and the trial court agreed, that switching from an at-large system to a district-based system would "enhance Latino voting power." (Opn. at pp. 19-20.) Plaintiffs' expert divided the City into seven districts—one of which was drawn to maximize the Latino voting population residing within it, resulting in a district in which 30% of the voting population was Latino. (*Id*. at p. 30.) Plaintiffs' theory was that Latinos make up only 14% of the voting population citywide, so going from an at-large election to a district-based scheme would be better for Latino voters—or at least the approximately one-third of the City's Latino voters who would reside in the proposed district—since 30% is more than 14%. (See Opn. at pp. 30-31.)

In response, the City showed that plaintiffs' proposal would

actually diminish Latinos' (and other minorities') voting power compared with the status quo. Under the current at-large system, all voters citywide have a say in electing all seven of their representatives on the Council. Each voter may cast up to three or four votes depending on the number of seats up for election, so candidates often win elections with the support of 35% of voters (or less). (AOB, Addendum.)

District elections work much differently; voters have a say in electing only one of seven Councilmembers, and each voter may cast only one vote in a winner-take-all election for a particular district. So if the premise of plaintiffs' case—that voting in the City is sharply polarized along racial lines—were correct, then Latinos voters making up 30% of the new district would be too few in number to make any meaningful difference in the outcome of elections in that district even if they all voted for the same candidate. (Opn. at pp. 34-37.) And Latino voters in the six other districts (collectively two-thirds of the City's Latino voting population) would be submerged in overwhelmingly white districts. (AOB at p. 53.)

Nonetheless, despite recognizing that "'it is impossible to predict with certainty the results of future elections,'" the trial court "found the evidence showed 'some alternative method of election would enhance Latino voting power.'" (Opn. at p. 20.)

As for plaintiffs' Equal Protection claim, they argued, and the trial court agreed, that the Board of Freeholders who adopted the current system in 1946 intended to discriminate against minorities because they understood that at-large elections (which

had been in place in Santa Monica since 1914) could diminish minorities' influence on elections. (Opn. at pp. 4, 20.) Similarly, plaintiffs argued, and the trial court agreed, that the City Councilmembers who studied alternate election systems in 1992 but declined to switch from the current system made that decision intentionally to discriminate against minorities because they understood that at-large elections could diminish minorities' influence on elections. (*Id*. at pp. 20, 46.)

Following the six-week bench trial, the court "basically adopted [plaintiffs'] statement of decision," "likewise adopted the district map drawn by [plaintiffs'] expert as the appropriate remedy," and entered judgment for plaintiffs. (Opn. at p. 21.)

The City appealed, which resulted in the Court of Appeal opinion of which plaintiffs now seek review.

During the pendency of the City's appeal, plaintiffs "asked the trial court to order the City to pay [them] about $22 million in attorney fees and costs." (Opn. at p. 21.)

REASONS FOR DENYING REVIEW

I. Review of Plaintiffs' CVRA Issue Is Not Necessary to Secure Uniformity of Decision or Settle an Important Question of Law.

In their first issue presented for review, Plaintiffs portray the Court of Appeal as "holding" (Pet. at p. 10) the very thing that the court said it "need not decide." (Opn. at p. 37.) Plaintiffs also fail to identify any conflict with other appellate decisions, and they have waived and/or abandoned the positions they now take in support of review. At bottom, plaintiffs are merely seeking

correction of a purported error, which is not a valid basis for this Court's review.

A. Plaintiffs Advance a False Premise.

The petition rests on a mischaracterization of the Court of Appeal's opinion. The Court of Appeal did not "hold," as plaintiffs repeatedly assert (Pet. at pp. 10, 13, 22, 25, 29), that the CVRA follows federal law in requiring plaintiffs to prove that a protected class would account for a majority of eligible voters in a geographically compact district. In fact, the court explained that it "need not decide" that question. (Opn. at p. 37.)

The Court of Appeal acknowledged that the CVRA authorizes "influence" claims—that is, demands for a shift to districts in which the relevant minority group would account for something less than a majority of eligible voters in a given district, but would still have meaningfully more influence on the outcome of an election compared with the current system. (See Opn. at pp. 30, 34-37.) But the court declined to define the precise contours of a valid influence claim because "this case presents no such district." (*Id.* at pp. 36-37.)

Nowhere in their petition do plaintiffs attempt to reckon with the Court of Appeal's analysis of "influence" as requiring something more than an "unrealized increase in a group's percentage." (Opn. at pp. 34-37.) Indeed, throughout the entire life of this case, plaintiffs have *never* offered a judicially manageable and constitutional standard for influence claims. Rather, they have consistently "propose[d] a definition of [influence] that would give a winning cause of action to any

group, no matter how small, that can draw a district map that would improve its voting power by any amount, no matter how miniscule." (*Id.* at 35.)

Federal courts adjudicating claims under section 2 of the Voting Rights Act, on which the CVRA is based, have rejected influence claims as non-justiciable and unconstitutional for decades. (See, e.g., *Bartlett v. Strickland* (2009) 556 U.S. 1, 21-26 (plurality opn.) [rejecting concept of influence districts to "avoid[] serious constitutional concerns under the Equal Protection Clause"]; *Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267 ["This 'influence dilution' concept … has been consistently rejected by other federal courts"].) As a result, federal courts insist on proof of the possibility of a geographically compact majority-minority district in every section 2 case. (*Bartlett*, *supra*, 556 U.S. at pp. 14-22.)[1]

In enacting the CVRA, the California Legislature relaxed this geographic-compactness requirement. (See Elec. Code, § 14028, subd. (c).) But that does not mean that anything goes, as plaintiffs would have it. The shortcomings of plaintiffs' approach became especially apparent at oral argument before the Court of Appeal. Counsel for plaintiffs was unable to identify any manageable standard for influence—insisting instead that "there is no bright-line legal rule," so a member of a minority group

[1] Notwithstanding the Court of Appeal's extensive rebuttal of this point (Opn. at p. 36), plaintiffs continue to insist, incorrectly, that federal law sanctions influence districts. (Pet. at pp. 21–22 & fn. 6.)

could potentially have a valid CVRA claim even if that group's share of eligible voters rose from 14% in an at-large system to only 15% in a districted system.[2]

This is just the kind of "absurd result[]" the Court of Appeal held would follow from plaintiffs' conception of "influence." (Opn. at p. 35.) "To define 'influence' as Pico proposes would merely ensure plaintiffs always win," because one could presumably always gerrymander a hypothetical district in such a way as to show a de minimis increase in a minority group's voting strength, even though there would be no actual difference in the outcome of elections. (*Id.* at p. 36.)

The actual facts of this case perfectly illustrate why the concept of "vote dilution" must be tied to some objective comparison of electoral outcomes under an alternative voting system. Plaintiffs premised their entire lawsuit on the theory that voting in Santa Monica is polarized along racial lines to such a "stark" degree that it is "similar to the polarization 'in the late '60s in the Deep South.'" (RB at p. 25.) Significantly, according to plaintiffs, this polarization was not just between Latino voters and white voters, but also between Latino voters, on the one hand, and Asian and Black voters, on the other. (See, e.g., RB at p. 62 [referring to a "coalition of non-Hispanic Whites, Asians and

---

[2] The City has obtained the certified transcript of the oral argument before the Court of Appeal and would be happy to provide it to this Court upon request. But the City is not permitted to attach the transcript to this answer. (Cal. Rules of Court, rule 8.504(e).)

Blacks that defeated the overwhelmingly Latino-preferred candidate for [City] council in 1994"].) Yet if this were true, a 30% Latino district in Santa Monica would ensure that Latino voters in that district would *never* have meaningful influence on election outcomes—because the other 70% of voters in the district would necessarily prefer a different candidate. And the result would be even worse for Latino voters in the six other districts. This is why the Court of Appeal described plaintiffs' approach as "arbitrarily embrac[ing] racially polarized voting when it helps and abandon[ing] it when it hurts. It creates a manipulable standard boiling down to plaintiff always wins." (Opn. at p. 36.)

The Court of Appeal correctly concluded that, whatever influence may mean, it cannot be so flexible as to allow *any* claim of "dilution," even when under a hypothetical alternative voting scheme the relevant minority group would still "have no practical numerical influence on any voting system." (Opn. at p. 35.) As one court put it, "If 10% of the voters can 'swing' an election, perhaps so can 1% or 0.1%. A single voter is the logical limit." (*Illinois Legislative Redist. Comm'n v. LaPaille* (N.D.Ill. 1992) 786 F.Supp. 704, 716 (three-judge panel).) Plaintiffs' consistent failure to articulate any principle that would limit their definition of influence confirms that it must be wrong.

B. Plaintiffs Have Not Identified Any Conflict with the Few Published CVRA Cases.

Plaintiffs purport to identify a conflict between the holding of the Court of Appeal in this case and the three other published decisions addressing the CVRA. (Pet. at pp. 13-14, 25, 29.) But

that conflict depends entirely on plaintiffs' misstatement of the Court of Appeal's decision. In particular, plaintiffs contend there is disagreement among the lower courts over the question whether the CVRA requires proof of a geographically compact majority-minority district. (*Ibid.*) But no court—including the Court of Appeal in this case—has held that it does.

In any event, even a cursory review of those decisions reveals that they do not address the issues decided by the Court of Appeal. In one case, the court upheld a trial court's reduction of the plaintiffs' claimed attorneys' fees after the defendant school district conceded liability immediately after plaintiffs filed suit. (*Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223.) In another, the court held that the CVRA applies to charter cities because "vote dilution" was a "statewide concern"; the defendant city, which had a Latino population of approximately 54.4%, did not challenge "the trial court's findings concerning voter dilution." (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789, 792, 800, 802.) And in the third, the court held that the statute was not facially unconstitutional, and expressly refrained from deciding several basic questions about the statute, including its elements. (*Sanchez*, *supra*, 145 Cal.App.4th at p. 690.)

C. Plaintiffs Abandoned the Question Whether the CVRA Requires Dilution, Which is Unworthy of Review in Any Event.

Plaintiffs half-heartedly suggest that this Court might grant review to decide whether dilution is even an element of the CVRA. (Pet. at pp. 23-24.) According to plaintiffs, the Court of

Appeal was wrong in concluding that the CVRA "imposes a so-called 'dilution' element that is separate and apart from racially polarized voting." (Pet. at p. 24.) This secondary issue is unworthy of review for five reasons.

First, plaintiffs waived it. As the Court of Appeal observed, plaintiffs presented the dilution-is-not-a-separate-element argument in "only one sentence" in "its 95-page brief." (Opn. at p. 32.)

Second, plaintiffs "abandoned" this position at oral argument, "and for good reason." (Opn. at p. 32.) During the argument, the court asked plaintiffs whether they were abandoning their dilution-is-not-a-separate-element argument: "You're abandoning that argument, right?" Plaintiffs' counsel responded in the affirmative: "for purposes of this argument, I will abandon that, yes." The court then confirmed: "Well, this is the argument in the case. So you've abandoned that argument."

Third, as the Court of Appeal explained, the argument is plainly wrong in any event, both because it contradicts the statutory text—which makes plain that proof of "dilution" and racially polarized voting alike is required—and because it violates the rule against surplusage. (Opn. at pp. 32-34.) Plaintiffs do not even acknowledge these obvious problems with their theory.

Fourth, as the Court of Appeal also noted, dilution has long been a central focus of federal voting-rights cases. (See Opn. at p. 30, citing *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480.) Courts must be able to measure a minority group's voting

strength under a challenged system against some objective benchmark of undiluted strength. If the current strength is no lower than the hypothetical ideal, there can be no liability: "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." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 50, fn. 17.)

Fifth, if CVRA plaintiffs could establish liability and force municipalities to scrap at-large election systems without proof of vote dilution, it would raise serious constitutional concerns. The U.S. Constitution forbids the imposition of any race-based remedy unless that remedy is narrowly tailored to serve a compelling government interest. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463-1464.) Courts have assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Id*. at p. 1464.) But if the CVRA allowed for liability and a race-based remedy premised on bare differences in voting behavior alone—without proof that the current at-large system is diluting a minority group's voting strength—then districts would be required just about everywhere in California, and they would be drawn predominantly on the basis of race; indeed, that would be the only motivation for drawing them in the first place. "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race

no longer matters." (*Shaw v. Reno* (1993) 509 U.S. 630, 657.)

Moreover, it was *only* because "insuring vote dilution does not occur" is a matter of "statewide concern" that the Court of Appeal in *Juaregui*, *supra*, held that the CVRA may override the California Constitution's grant of control to charter cities over their municipal elections. (226 Cal.App.4th at pp. 798-800, 802; see also *id.* at p. 802 [CVRA "do[es] not apply to city-wide council elections unless vote dilution has occurred."]

For all these reasons, there can be no serious dispute that the Court of Appeal correctly held that the CVRA requires proof of dilution. That holding—which follows directly from the text of the statute itself, as well as the federal case law that the CVRA follows—is hardly a recipe for "doubt and confusion" among the lower courts. (Pet. at p. 28.)

D. Plaintiffs Otherwise Request Correction of a Purported Error, Not Review of an Unsettled Question of Law.

Plaintiffs' final CVRA-related contention is that even if the statute does require dilution, the Court of Appeal ignored evidence of such dilution in this case. (Pet. at pp. 14, 23.) Plaintiffs do not even respond to the Court of Appeal's conclusion that the trial court's "fleeting reference" to certain evidence was "perfunctory," "insubstantial," and insufficient to support the judgment and that Plaintiffs "forfeited" any argument as to other evidence by failing to brief it. (Opn. at pp. 31, 37.) In any event, the issue does not demand review because it amounts to a request to correct a purported misapplication of the law to the

particular facts of this case, rather than to resolve an unsettled question of law.

II. Review of Plaintiffs' Standard-of-Review Issue Is Not Necessary to Secure Uniformity of Decision or Settle an Important Question of Law.

Plaintiffs' second issue, like the first, depends on a misreading of the Court of Appeal's opinion, which turned on a *legal* error. And even if the issue were fairly presented, it is, at most, just another request for the correction of a purported error.

A. The Court of Appeal's Opinion Turns on a Legal Error, Not on Disputed Facts.

Plaintiffs repeatedly suggest that the Court of Appeal resolved disputed facts in rejecting their Equal Protection claim. (E.g., Pet. at pp. 40-41.) In reality, the Court of Appeal held that the trial court committed *legal* error by applying the wrong legal standard and as a result found a constitutional violation absent any evidence of discriminatory intent. The Court of Appeal identified this legal error numerous times in its opinion. (E.g., Opn. at p. 37 ["The court, however, applied an erroneous legal standard to reach these faulty conclusions."]; *id.* at p. 46 ["As a matter of law, this series of actions was not purposive race discrimination. The trial court erred again by applying the wrong legal standard."].)

Rather than confronting the purely legal basis of the Court of Appeal's decision, plaintiffs assert that the court "ignore[d] the controlling legal standards for determining whether a public entity has committed intentional discrimination." (Pet. at p. 39,

initial caps omitted.) To the contrary, the Court of Appeal correctly explained those standards at length, "illustrat[ing] the difference between the mental states of purpose and knowledge: between acting with the goal of achieving an end, which is purpose, and merely acting with awareness a side effect will result, which is knowledge." (Opn. at p. 40; see also *id.* at p. 42 ["Plaintiffs must show the government adopted or maintained the election system for the purpose of racial discrimination. A knowledge of a disparate impact is not enough."].)

After holding that the trial court erred in applying the wrong legal standard, the Court of Appeal, applying the correct legal standard, held no evidence showed that the Board of Freeholders in 1946 or the Councilmembers in 1992 *purposefully intended* to weaken minority voting strength. (Opn. at p. 49.) The result here was therefore the same as in a case cited by the Court of Appeal, *Personnel Administrator of Massachusetts v. Feeney* (1979) 442 U.S. 256. In both cases, a trial court purported to find evidence of discrimination, and in both cases, an appellate court held that the record demonstrated, at most, evidence of the decisionmakers' "awareness of consequences" rather than affirmative intent to discriminate. (*Id.* at pp. 260, 278-279; Opn. at pp. 40-49.) This result is not unusual. (See, e.g., *Crawford v. Bd. of Educ.* (1980) 113 Cal.App.3d 633, 645-646 [reversing after trial in school-desegregation case because "there was no evidence of acts done with specific segregative intent and discriminatory purpose"]; see also *Crawford v. Board of Educ.* (1982) 458 U.S. 527, 545 ["we see no reason to challenge the

Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose"].)

Notably, *Feeney* and *Crawford* expressly followed *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, the decision plaintiffs baselessly accuse the Court of Appeal of ignoring. (Pet. at p. 41.) In other words, by deciding this case in precisely the same way as the courts in *Feeney* and *Crawford*, the Court of Appeal was following the very law plaintiffs contend controls this case. Plaintiffs are disappointed only because that law does not command a rubber stamp of a trial court's legal conclusions even when they are unsupported by the slightest evidence of intentional discrimination.

Tellingly, plaintiffs did not even address this issue during the oral argument before the Court of Appeal, even after receiving a tentative decision that "included the equal protection analysis presented [in the opinion], including our statement of the standard of review and our analysis of the 1946 news clippings and the events of 1992." (Opn. at p. 49.)

In short, the outcome of this case depends on the straightforward application of a longstanding principle of constitutional law. The outcome would be the same on *any* standard of review—which makes this case a particularly poor vehicle for raising a standard-of-review issue.

B. Appellate Review of Videos and Historical Documents Is Appropriate.

The Court of Appeal did exactly what an appellate court is

supposed to do: review the evidence to determine whether it supports the judgment. In this case, that evidence—newspaper articles, the report of the Charter Review Commission, and a videotape of a 1992 City Council meeting—did no such thing. To the contrary, on this record, no reasonable factfinder could conclude that Santa Monica adopted and maintained its election system for discriminatory reasons. Plaintiffs' efforts to dodge this basic fact do not make a compelling case for review.

First, plaintiffs concoct a purported split in authority. They contend that the Court of Appeal's decision is at odds with *Hoberman-Kelly v. Valverde* (2013) 213 Cal.App.4th 626. (Pet. at pp. 16-17, 33, 35, 42.) That case, an appeal from a trial court's order setting aside the suspension of a driver's license, has been cited by only one published decision (another license-suspension case) in the seven years since it was decided, and not for the proposition for which plaintiffs now cite it. (*Munro v. Dept. of Motor Vehicles* (2018) 21 Cal.App.5th 41, 59.) In any event, *Hoberman* does not stand for the proposition that appellate courts must blindly defer to a trial court's interpretation of a video. In that case, the Court of Appeal watched the video and concluded that it *supported* the trial court's findings. (213 Cal.App.4th at pp. 628-630, 633 ["it [wa]s clear from the video" that the petitioner had not been properly advised of her rights].)

Not so here. The Court of Appeal held that the 1992 Council meeting video "'quite clearly contradicts" plaintiffs' theory of the case, which was "'so utterly discredited' … as to dictate judgment for the City." (Opn. at pp. 46-47.) That makes

this case not like *Hoberman*, but like *Scott v. Harris* (2007) 550 U.S. 372, 380-381, in which the U.S. Supreme Court held that a video dictated judgment as a matter of law for one party. In both *Scott* and this case, the outcome did not turn on the standard of review, but on the answer to a *legal* question—whether video evidence satisfied an element of a claim on any standard.

Plaintiffs labor to distinguish *Scott* on the ground that the evidence there was *solely* a videotape. (Pet. at p. 34.) That is false: The Eleventh Circuit opinion that the Supreme Court reversed relied on, among other things, deposition testimony and expert reports. (*Harris v. Coweta Cty.* (11th Cir. 2005) 433 F.3d 807, 810, 814 & fn. 8, 817.) But even if it were true, that would make *Scott more* like this case rather than less—because the only evidence on which the trial court relied in purporting to find discriminatory intent in 1992 was the video of the Council meeting. (24AA10723-10724.)

Plaintiffs' claim of a "voluminous trial record" and an "extensive body of evidence" (Pet. at p. 34) is an exercise in revisionist history. In the lower courts, they focused exclusively on the comments of Councilmember Zane during the Council meeting about how district voting would impede affordable-housing efforts—plaintiffs went so far as to describe that comment as a "'smoking gun' admission." (E.g., RB at pp. 37-38, 88-89; 22AA9749.)[3] The Court of Appeal examined the entire

[3] Beyond Zane's comments during the Council meeting, plaintiffs' only other evidence about 1992 was the Charter Commis-

videotape and concluded "[i]t contains nothing showing a purpose of racial discrimination." (Opn. at p. 47.) To the contrary, "[i]n context and beyond question, Zane's comment was not a statement of discrimination against Latinos. The entire exchange, in context, was a substantive and cogent discussion of the pluses and minuses of district voting. There were no coded messages of hostility to Latinos or revealing Freudian slips." (*Ibid.*)

Second, plaintiffs speculate that the Court of Appeal's careful scrutiny of the 1992 City Council meeting videotape will have "far-reaching consequences" due to "court closures caused by the pandemic," which have resulted in more "witness testimony via teleconferencing." (Pet. at pp. 42-44.) Plaintiffs are overreaching. The Court of Appeal correctly observed that there was no relevant eyewitness testimony offered at trial on the issue of discrimination. (Opn. at p. 38.) The court also noted that the videotape of the 1992 Council meeting was not the equivalent of a witness examination under oath, so the trial court necessarily made no credibility determinations to which an appellate court ought to defer. (*Id*. at pp. 38-39.)

Accordingly, the Court of Appeal expressly distinguished its

---

sion Review Report that the Court of Appeal described in detail at pages 8–10 and 46 of its opinion. That report "was high-minded and comprehensive, but perplexing," because it offered "no consensus alternative" to the status quo, but rather recommended that the City "delay action and gather more information" (Opn. at p. 46)—which is precisely what the City Council did.

"independent review" of the "historical artifacts" here from the more deferential review that would be applicable to a lower court's findings based on fact witness testimony and credibility. (*Ibid*.) There is nothing novel or review-worthy about that distinction. (See, e.g., *Hunt v. Cromartie*, 532 U.S. 234, 243 [on direct review of three-judge court's decision addressing race-based redistricting: "extensive review" is warranted because "the key evidence consisted primarily of documents and expert testimony," and "[c]redibility evaluations played a minor role"]; *People v. Avila* (2006) 38 Cal.4th 491, 529 ["deference is unwarranted when, as here, the trial court's ruling is based solely on the 'cold record'" of documentary evidence, as "the same information … is available on appeal"].)

Finally, plaintiffs suggest the Court of Appeal ignored crucial evidence supporting a finding of intentional discrimination. (Pet. at pp. 15, 39-41.) This purported flaw in the opinion is "particularly clear," plaintiffs say, because the Court of Appeal relied on the fact that minority leaders uniformly supported the new Charter in 1946. (*Id.* at p. 41.)[4] In a footnote,

[4] Twice in their petition, plaintiffs incorrectly state that the Court of Appeal relied only the "absence of public opposition to the proposed charter by minority leaders." (Pet. at p. 16; see also *id.* at p. 41.) But it was not simply the *absence* of public *opposition* by minorities; it was that "100 percent of the leaders of the minority community who expressed an opinion *supported* the City's action." (Opn. at p. 42, italics added; see also *id.* at pp. 5–6.) The trial court recognized this fact as well (24AA10719), even though that court inexplicably went on to

plaintiffs assert that the opinion was "incorrect in stating that minority leaders did not oppose at-large elections in 1946." (*Ibid.*, citing RT3481:6-3483:11.) But the evidence that the Court of Appeal purportedly ignored perfectly illustrates just how baseless plaintiffs' claim of discrimination was.

Plaintiffs cite a portion of the trial transcript that contains their expert's interpretation of a 1946 newspaper article titled, "New Charter Aids Racial Minorities." (28AA12404; ARB Addendum at p. 4.) (The title alone suggests that the article is a poor basis for a discrimination claim.) The article reports on a meeting at which a Freeholder explained to NAACP members that the new Charter would increase minority electoral opportunities by "two and a half times over the present charter." (*Ibid.*) The article does not mention district-based elections, no minorities or minority groups in 1946 were advocating for a return to district-based elections in Santa Monica, and it is undisputed that several NAACP members publicly advocated for the Charter (and at least one of the NAACP members also was a member of the Board of Freeholders who drafted the Charter). Yet plaintiffs and their expert somehow interpreted the article to say "that the minorities themselves recognize that the at-large system was not going to make them better off," and "if they really wanted something to make them better off, they could have a district system." (RT3482:22-3483:1.) Plaintiffs' expert admitted

---

conclude that minority leaders in 1946 were willing accomplices in their own disenfranchisement.

that he literally made that up, even though the article says no such thing. (RT4446:18-28 ["My interpretation is based solely on that document."].)

The Court of Appeal reasonably cut through such "highly partisan advocacy in the guise of evidence," focusing on the documents themselves. (Opn. at pp. 39-40.) In doing so, the court concluded, correctly, that *no evidence* supported the trial court's finding of intentional discrimination.

III. The Court of Appeal Had Ample Alternative Grounds to Enter Judgment in Favor of the City.

This Court should deny the petition not just because the issues presented do not meet the Court's standard for granting review, but also because plaintiffs' case is defective as a matter of law for independent reasons.

The most important defect is that the undisputed evidence demonstrates the absence of legally significant racially polarized voting in Santa Monica. The Court of Appeal did not address this element of plaintiffs' CVRA claim because it did not need to (Opn. at pp. 27, 37), but this element independently supports reversal of the trial court's judgment.

The CVRA requires plaintiffs to prove "racially polarized voting," as defined by "case law regarding enforcement of the federal Voting Rights Act of 1965." (Elec. Code, §§ 14026, subd. (e), 14028, subd. (a).) Under that federal case law, racially polarized voting means that minorities vote cohesively for the same candidates, but those candidates "usually" lose as a result of a majority bloc voting for different candidates. (*Gingles*, *supra*,

478 U.S. at pp. 50-51, 56.)

Courts determine whether voting is racially polarized by examining the results of elections and experts' estimates of the voting behavior of different ethnic and racial groups. Here, that evidence is undisputed. The estimates of the parties' experts are congruent, and the election results are a matter of public record. (See AOB at pp. 39-41.)

Central to the racial-polarization analysis is the identification of the candidates who are preferred by minority voters in a given election. In this case, the trial court erroneously proceeded on the basis that Latino voters in Santa Monica can prefer *only* candidates who have Latino surnames. (24AA10682-10688; see also Opn. at p. 19 ["The trial court rejected the City's argument the candidate's race was irrelevant under the California Voting Rights Act. The court ruled it would consider only Spanish-surnamed candidates…."].)

Federal case law uniformly condemns the trial court's unconstitutional stereotyping of Latino voters. At least 10 circuits have "reject[ed] the position that the 'minority's preferred candidate' must be a member of the racial minority." (*Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543, 551 (per curiam) [collecting cases].) As one court put it, the trial court's presumption that voters necessarily prefer candidates of their own racial or ethnic groups "would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate." (*Lewis v. Alamance Cty.* (4th Cir. 1996) 99 F.3d 600, 607.) In the words of another court, "No legal rule should

presuppose the inevitability of electoral apartheid—least of all a rule interpreting a statute designed to implement the Fourteenth and Fifteenth Amendments to the Constitution." (*NAACP v. City of Niagara Falls* (2d Cir. 1995) 65 F.3d 1002, 1016.)

In focusing solely on Latino-*surnamed* candidates, the trial court disregarded the vast majority of candidates in Santa Monica's elections over the past quarter century—even when those candidates received virtually unanimous support from the City's Latino voters and *won*. This artificially narrow focus on candidates with Spanish surnames reflected plaintiffs' reverse-engineered and result-oriented presentation of the data. Other manipulations of those data include: (1) ignoring or discounting the three victories of a Latino candidate, Tony Vazquez, but relying on his sole loss; and (2) ignoring the three victories of a Latina candidate, Gleam Davis, because of an unscientific telephone survey purportedly showing that City voters did not sufficiently "recognize" her as Latina; and (3) focusing only on Latino-surnamed candidates who received substantial support from Latino voters, but ignoring the numerous Latino-surnamed candidates who received hardly any such support. (See ARB at pp. 23-37.)

These errors, among others, independently required reversal. When the undisputed facts are analyzed under the federal standards for racially polarized voting that the CVRA adopts, they confirm that Latino-preferred candidates usually *win* in Santa Monica. In the City Council elections analyzed by the parties' experts, 16 of the 22 Latino-preferred candidates

(73%) won—and of the few who lost, only three were even arguably defeated by white bloc voting. (AOB at pp. 36-48; ARB at pp. 23-39.) The same holds true if the analysis is limited, as plaintiffs argued, to only those eight Council elections in which a Latino-surnamed candidate ran—12 of the 18 Latino-preferred candidates (67%) won, and of the few who lost, only three were even arguably defeated by white bloc voting. (ARB at pp. 23-39.) Three out of 22 (or even 18) is a far cry from demonstrating that white bloc voting "usually" results in the defeat of minority-preferred candidates. (*Ibid.*)

In sum, plaintiffs' failure to prove that the City's election system has diluted Latino voting strength was only one of many fatal defects in the trial court's judgment. The Court of Appeal chose to resolve plaintiffs' CVRA claim on the narrow ground of vote dilution alone, but the result—reversal—would have been the same had the court confined its focus to the racial-polarization question instead. Latino voters are already electing candidates of their choice. There is no cause to abandon the City's well-functioning electoral system in favor of a districting plan that would limit rather than expand Latino voting power.

CONCLUSION

The Court should deny the petition for review.

DATED: September 4, 2020 Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous
Theodore J. Boutrous, Jr.

Attorneys for Appellant-Defendant City of Santa Monica

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.504(d)(1) of the California Rules of Court, the undersigned hereby certifies that this opening brief contains 6,816 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, and the signature blocks.

DATED: September 4, 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, California 90071-3197. On September 4, 2020, I served:

CITY OF SANTA MONICA'S
ANSWER TO PETITION FOR REVIEW

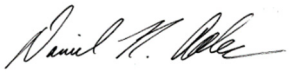
on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

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

Executed on September 4, 2020.



Daniel R. Adler

Respondents' Counsel	**Method of service**
Morris J. Baller (48928) Laura L. Ho (173179) Anne P. Bellows (293722) GOLDSTEIN, BORGEN, DARDARIAN & HO 300 Lakeside Dr., Suite 1000 Oakland, California 94612 Tel: 510-763-9800	Electronic service
Kevin Shenkman (223315) SHENKMAN & HUGHES PC 28905 Wight Road Malibu, California 90265 Tel: 310-457-0970	Electronic service
Milton Grimes (59437) LAW OFFICES OF MILTON C. GRIMES 3774 West 54th Street Los Angeles, California 90043 Tel: 323-295-3023	Electronic service
R. Rex Parris (96567) Ellery Gordon (316655) PARRIS LAW FIRM 43364 10th Street West Lancaster, California 93534 Tel: 661-949-2595	Electronic service
Robert Rubin (85084) LAW OFFICE OF ROBERT RUBIN 237 Princeton Avenue Mill Valley, CA 94941-4133 Tel: 415-298-4857	Electronic service

Hon. Yvette M. Palazuelos Judge Presiding Los Angeles County Superior Court 312 North Spring Street Los Angeles, CA 90012 Tel: 213-310-7009	Mail service