Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

September 10, 2020

The Honorable Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Santa Monica v. Pico Neighborhood Association*, S263972
Letter Supporting Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

FairVote files this letter as *amicus curiae* pursuant to Rule 8.500(g) of the California Rules of Court and urges this Court to grant the petition for review.

I. Interest of Amicus Curiae

FairVote is a non-profit organization headquartered in Takoma Park, Maryland that advocates for fairer political representation through election reform. Since its founding in 1992, FairVote has been committed to advancing ranked-choice voting in both single-member-district and at-large voting systems. It does so by conducting original research and advocating for electoral reforms at the local, state, and national levels.

FairVote believes that implementing alternative at-large remedies, including ranked-choice and cumulative voting, will allow voters to elect representatives who better reflect their communities' and society's diversity. FairVote encourages public officials, judges, and voters seeking to address unlawful vote dilution to also consider other ways to conduct elections. FairVote has participated as *amicus curiae* in cases involving issues of vote dilution under the California Voting Rights Act and the federal Voting Rights Act. (See, e.g., *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660; *United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F. Supp. 2d 411.)

II. This Court Should Grant Review.

This Court's intervention is needed because, among other things, the decision below incorrectly focused on whether Petitioners could elect a representative in a district system. This was contrary to both the text and legislative history of the California Voting Rights Act (CVRA). It was also a departure from prior decisions of the Courts of Appeal—and a consequential one. Because Petitioners established at trial that they could elect a representative in an alternative system, they had established exactly what the decision below insisted they establish: that they would be able to change the electoral results in an alternative system. This Court's intervention is thus necessary to square the decision below with both the CVRA and precedent from the Fifth District Court of Appeal as well as Division Five of the Second District Court of Appeal. This Court should step in.

A. The Court of Appeal's Definition of Dilution and Focus on Majority-Minority Districts Misconstrued the Text and Purpose of the CVRA.

The decision below took the position that, to make a showing of vote dilution, plaintiffs must point to "evidence the change is likely to make a difference in . . . electoral results." (Op. at 37.) Applying this standard, the Court of Appeal rejected Petitioners' vote-dilution claim "because the result with one voting system is the same as the result with the other: no representation." (Op. at 31.) In evaluating whether a change to another electoral system would make such a difference, however, the Court focused exclusively on whether Latinos would be able to make a difference in one particular kind of electoral system: a district system. And, then, in evaluating that system, the Court focused exclusively on the fact that Latinos could not make up a majority of the voters in a district. "The reason for the asserted lack of electoral success in Santa Monica," the Court reasoned, "would appear to be that there are too few Latinos to muster a majority, *no matter how the City might slice itself into districts or wards*." (*Id.*, italics added.) In doing so, the Court ignored a key feature of the CVRA: To make out a vote dilution claim, plaintiffs are not required to show that they could draw a majority-minority district.

As Petitioners correctly point out in their Petition for Review, the CVRA's legislative history explicitly shows that the Legislature sought to make the CVRA more expansive than the federal Voting Rights Act. One of the ways that it did so was by eliminating the requirement that a plaintiff show that a geographically compact majority-minority district was possible in order to prove vote dilution. (Petition for Review at 19 [hereinafter "PFR"] [citing Senate Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, p. 4]; PFR at 20 [citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3].)

Previous decisions of the Courts of Appeal have recognized as much. For instance, in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669, the Fifth District Court of Appeal explained that "the Legislature wanted to eliminate the [ ] requirement that, to establish *liability* for dilution under section 2 of the [federal Voting Rights Act], plaintiffs must show that a compact majority-minority district is possible." (See also *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789 ["[T]he California Voting Rights Act does not require that the plaintiff prove a 'compact majority-minority' district is possible for *liability* purposes."].) In light of all this, the Court of Appeal below was wrong to insist that the plaintiffs establish a violation by reference to a district system. This departure from precedent will sow confusion in the lower courts about how to approach a key provision of the CVRA meant to protect the constitutional rights of Californians. This Court's intervention is thus "necessary to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

B. The Court of Appeal Was Wrong to Disregard Evidence Establishing that Latino Voters Could Have Elected a Representative of Choice Under Alternative At-Large Voting Systems.

The decision below's focus on majority-minority districts was not only an error, but a consequential one, because plaintiffs established at trial that Santa Monica's Latino voters could have elected a representative of choice under multiple alternative at-large voting systems. In particular, Petitioners provided evidence at trial that cumulative voting, limited voting, and ranked choice voting would permit Santa Monica's Latino voters to elect a preferred candidate. (PFR at 24.) Record evidence showed that Latinos make up 13.64% of the eligible voters in Santa Monica, (Trial Ct. Op. at 66, ¶ 94; see also R.T. at 2470), and with a seven-seat, at-large election using, for example, ranked choice voting, support from just 12.5% of the voters would guarantee the election of a preferred candidate.[1] Expert testimony showed that the same would hold true in a limited voting scheme where all voters have one vote and all seven seats are up for election at once; and under a cumulative voting system with seven seats up for election. (See R.T. at 6957-58; R.T. at 6970; see also *United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F. Supp. 2d 411, 450 ["Courts evaluate whether cumulative voting will actually give

[1] The 12.5% figure is determined by calculating the threshold of exclusion—that is, the precise number of votes that a candidate must receive to guarantee election. (See Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 253 n.47 (1995).) The formula can be represented mathematically as [v/(1+n)], where v equals the total number of votes and n equals the number of open seats to be filled. (See Alexander Athan Yanos, *Reconciling the Right to Vote with the Voting Rights Act*, 92 Colum. L. Rev. 1810, 1860 (1992); Pildes & Donoghue, *supra*, at 254-255 n.50; 253 n.47.)

minorities the opportunity to elect candidates of their choosing using a commonly-accepted and reliable political science concept called the 'threshold of exclusion.'"].)

The trial court agreed. It found that "other remedies, such as cumulative voting, limited voting and ranked choice voting, are possible options in a CVRA action *and would improve Latino voting power in Santa Monica*." (Trial Ct. Op. at 65, ¶ 91, italics added.) As Petitioners explain in their Petition for Review, these findings were supported by substantial evidence and entitled to deference. (PFR at 25-26.) As such, this should have been enough to establish that Latinos made out a vote dilution claim, even under the Court of Appeal's needlessly narrow definition of dilution. (See PFR at 22-25.) As the record evidence showed, an alternative voting system would allow for more than a marginal increase in the voting power of the Latinos of Santa Monica; it would allow for precisely what the decision below said counts: electoral results.

Indeed, it is, in part, *because of* the availability of non-district remedies that the CVRA recognizes that a majority-minority district is not required to show that a minority's vote has been diluted. Yet, the decision below refused to even consider these remedies. That result is contrary to both the language and purpose of the CVRA and should be reversed.

III. Conclusion

For these reasons, the Court should grant the Petition for Review.

Respectfully submitted,

Dated: September 10, 2020

/s/ *Ira M. Feinberg*

Ira M. Feinberg
(Bar No. 64066)
Hogan Lovells US LLP
390 Madison Avenue
New York, NY 10017
Telephone: (212) 918-3000
Fax: (212) 918-3100
ira.feinberg@hoganlovells.com

Erin R. Chapman
Patrick C. Hynds
Hogan Lovells US LLP
555 Thirteenth Street NW
Washington, D.C. 20004
Telephone: (202) 637-5600
Fax (202) 637-5910

Attorneys for Amicus Curiae

Proof of Service Attached.

PROOF OF SERVICE

I, Ramona Altamirano, am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 4085 Campbell Avenue, Suite 100, Menlo Park, California.

On September 10, 2020, I served the following documents described as: ***Santa Monica v. Pico Neighborhood Association*, S263972 Letter Supporting Petition for Review** on all interested parties addressed as follows:

Attorneys for Petitioners – Via TrueFiling

Kevin I. Shenkman
kishenkman@shenkmanhughes.com
Mary R. Hughes
mrhughes@shenkmanhughes.com
Andrea A. Alacron
Aalacron@shenkmanhughes.com
Shenkman & Hughes
28905 Wright Road
Malibu, CA 90265
(310) 457-0970

Morris J. Baller
mballer@gbdhlegal.com
Laura L. Ho
lho@gbdhlegal.com
Anne P. Bellows
abellows@gbdhlegal.com
Goldstein, Borgen, Dardarian, & Ho
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800

Robert Rubin
robertrubinsf@gmail.com
Law Office of Robert Rubin
237 Princeton Avenue
Mill Valley, CA 94941
(415) 298-4857

Milton C. Grimes
Law Offices of Milton C. Grimes
3774 West 54th Street
Los Angeles, CA 90043
(323) 925-3023

R. Rex Parris
Ellery S. Gordon
Parris Law Firm
43364 10th Street West
Lancaster, CA 93534
(661) 949-2595

Attorneys for Respondents – Via TrueFiling

Lane Dilg
City Attorney
Lane.Dilg@smgov.net
George Cardona
Special Counsel
George.Cardona@smgov.net
City of Santa Monica
1685 Main St., Room 310
Santa Monica, CA 90401
(310) 458-8336

Theodore J. Boutrous, Jr.
TBoutrous@gibsondunn.com
Marcellus A. Mcrae
MMcrae@gibsondunn.com
Kahn A. Scolnick

KScolnick@gibsondunn.com
Tiaunia N. Henry
THenry@gibsondunn.com
Daniel R. Adler
DAdler@gibsondunn.com
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Second Appellate District – Via U.S. Mail

Clerk, Court of Appeal
Second Appellate District, Division 8
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Los Angeles County Superior Court – Via U.S. Mail

Hon. Yvette M. Palazuelos (Judge Presiding)
Los Angeles County Superior Court
312 North Spring St.
Los Angeles, CA 90012
(213) 310-7009

***By TrueFiling Electronic Filing*:** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling System. Participants in the case who are registered TrueFiling users will be served by the TrueFiling System. Participants in the case who are not registered TrueFiling users will be served by regular U.S. Mail.

***By Mail*:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal service on that same day with postage thereon fully prepaid at Menlo Park, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I also declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 10, 2020, in Menlo Park, California.

Respectfully submitted,

/s/ Ramona Altamirano
Ramona Altamirano