No. S263972

In the

Supreme Court

of the

State of California

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

PETITIONERS' OPENING BRIEF

After a Published Decision of the Court of Appeal
Second Appellate District, Division Eight
Case No. BC295935
(Subsequently Depublished by this Court)

Appeal from the Superior Court of Los Angeles
Case No. BC616804
Honorable Yvette M. Palazuelos

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I. ISSUE CERTIFIED FOR REVIEW

What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?

II. INTRODUCTION

In enacting the California Voting Rights Act ("CVRA"), the Legislature sought to expand the protections of the federal Voting Rights Act ("FVRA") to better address the unique diversity and politics of California. The CVRA did just that and has been a resounding success—eliminating "winner-take-all" at-large elections that hindered minority voters' effective participation in local elections in hundreds of political subdivisions, and dramatically increasing minority representation in local government.

That success is owed to the simplicity of the CVRA, relative to the FVRA, and the CVRA's corresponding greater protection of minority voting rights. A CVRA plaintiff prevails on a vote dilution claim by proving racially polarized voting in relevant elections, either alone or in conjunction with other historical, socio-economic, and political factors, and the availability of an alternative election system that would improve minority voters' political strength. Plaintiffs prove racially polarized voting by showing that the minority group is politically cohesive and the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. To

establish vote dilution under the CVRA, plaintiffs do not need to prove the minority is concentrated enough to be the majority in a single member district. Nor do they need to prove that minority voters would be able to elect a candidate of their choice under an alternative election system; it is sufficient to show an alternative election system would enable them to "influence the outcome of an election" in a way they were not previously afforded.

Whether an alternative system would improve minorities' ability to elect candidates of their choice or influence the outcome of elections requires "a searching practical evaluation of the past and present reality," guided by objective standards. For the remedy adopted by the trial court here—district elections—those objective factors include: (1) the minority's proportion of the electorate in a potential remedial district or districts, compared to its proportion in the entire jurisdiction; (2) the degree of support received by minority-preferred candidates and ballot choices in past elections within a potential remedial district; and (3) other political, social, and economic conditions impacting minority voters' ability to compete in alternative systems, as compared with at-large elections. While the compactness or concentration of a minority community may be a factor in selecting an appropriate remedy, a court cannot require that the minority constitute a majority in a proposed district, as the Legislature explicitly

eschewed that inflexible requirement adopted under federal law as ill-suited to California's distinct demographic and political conditions.

Applying these principles here, the trial court found that Plaintiffs proved that racially polarized voting had plagued Defendant's at-large city council elections for at least the last quarter century, leading to a dilution of the Latino vote. The trial court also found that other historical, socio-economic, and political factors, specified in the CVRA, supported its finding that Defendant's at-large election system diluted the Latino vote and violated the CVRA. Finally, the trial court found that a district election system with a Latino "influence" district was the most appropriate remedy, because, while other remedies would also afford Latino voters the ability to elect candidates of their choice, or at least influence the outcome of elections, district elections would best accomplish that remedial purpose on the facts of this case.

While this case was on appeal, that district-election remedy was stayed. Too long denied full participation in the democratic process, Santa Monica's Latino voters should not have to continue to suffer from Defendant's disempowering at-large system. This Court should reinstate the trial court's judgment, finding a violation of the CVRA and ordering district elections.

III. BACKGROUND

A. Statutory Framework

In 2002, the Legislature enacted the CVRA to implement the equal protection and voting rights guarantees of the California Constitution. (Elec. Code § 14031.)[1] The CVRA is intended to "provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act of 1965" (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 806), and tailor voting rights protections to California's unique diversity (see *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669, citing and quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.).

To accomplish this goal, the Legislature selectively incorporated some aspects of the FVRA, but deliberately and significantly departed from others. The framework for vote dilution claims under the FVRA, announced in *Thornburg v. Gingles* (1986) 478 U.S. 30 ("*Gingles*"), thus provides essential context for the CVRA, but is only a starting reference, not an end point, to understanding the CVRA.

[1] Further statutory references are to the Elections Code unless otherwise noted.

1. The *Gingles* Framework and the Federal Debate About Dilution of Influence

Gingles acknowledged the Supreme Court's longstanding recognition that "at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (*Gingles, supra,* 478 U.S. at p. 47, quoting *Burns v. Richardson* (1966) 384 U.S. 73, 88.) As the Court explained, "[t]he theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." (*Gingles, supra,* 478 U.S. at p. 48; s*ee also, Rogers v. Lodge* (1982) 458 U.S. 613, 616 ["At large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* of the representatives of the district. … The minority's voting power in a multimember district is particularly diluted when bloc voting occurs …."].)

Gingles set out three "preconditions" to a successful vote dilution claim under Section 2 of the FVRA. First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district" ("*Gingles* Prong 1") (478 U.S. at p. 50); second, "the minority group must be able to show that it is politically cohesive" (*id.* at p. 51) ("*Gingles* Prong 2"); and third, the "majority [must] vote[]

sufficiently as a bloc to enable it -- in the absence of special circumstances … usually to defeat the minority's preferred candidate" ("*Gingles* Prong 3") (*ibid.*, citation omitted). *Gingles* Prongs 2 and 3 are collectively referred to as "racially polarized voting." (*Id.* at p. 56; *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551.)

Under *Gingles*' framework, once the "preconditions" are established, federal courts apply a "totality of the circumstances" test to consider the extent of racially polarized voting together with other qualitative factors identified in the Senate Judiciary Committee Report that accompanied the 1982 amendments to Section 2—the "Senate Factors." (*Gingles, supra,* 478 U.S. at pp. 37-38, 43-46, 80; see, e.g., *Old Person v. Cooney* (9th Cir. 2000) 230 F.3d 1113, 1120, 1128-29.)

Gingles also sparked a debate over FVRA protection for minorities outside potential majority-minority districts. Two alternatives were central: (1) minority voters' practical ability to elect candidates while constituting less than the majority of a district, with some crossover support; and (2) minority voters' practical ability to influence elections even when they could not drive the election of their own preferred candidate. Based on the text of the FVRA, the *Gingles* majority limited its opinion to claims alleging impairment of the minority's "ability *to elect* the representatives of their choice," stating that it had "no occasion to consider" possible claims alleging an impairment of the minority's "ability to *influence* elections."

(*Gingles, supra,* 478 U.S. at p. 46 fn.12, emphasis in original.) And, it limited its opinion to districts affording the ability to elect because they were majority-minority. The "ability to elect" standard tracks the language of Section 2, which, unlike the CVRA, addresses only election structures that result in members of the protected class "hav[ing] less opportunity than other members of the electorate ... to elect representatives of their choice," not less opportunity to influence election outcomes. (52 U.S.C. § 10301(b).)

Justice O'Connor's concurring opinion noted the "artificiality" of this distinction and criticized the majority-minority district requirement of Gingles Prong 1 for failing to account for instances where a minority constituting less than 50% of a district can elect its preferred candidates with supporting white crossover votes. (*Gingles, supra,* 478 U.S. at p. 89 fn.1, O'Connor, J., concurring.) Justice O'Connor further cautioned that courts should "bear in mind that 'the power to influence the political process is not limited to winning elections.'" (*Id.* at p. 99, citation omitted.)

Over the following two decades, the Supreme Court and lower courts weighed in on whether and in what form the electoral power of such minority groups is entitled to protection or recognition under the FVRA. In several contexts, courts held that influence districts should be considered in assessing a minority's voting power. (See, e.g., Justice O'Connor's majority opinion in *Georgia v. Ashcroft* (2003) 539 U.S. 461, 480-83

[discussing theories of effective political representation and holding the minority's ability to exercise political power through "influence districts" relevant to retrogression analysis in FVRA Section 5 cases] (superseded by statute); *Vecinos De Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 979, fn. 2, 990-91, collecting cases; compare Justice Stevens' majority opinion in *Chisom v. Roemer* (1991) 501 U.S. 380, 396-398 [discussing whether the ability to elect candidates is essential to a claim under FVRA Section 2] with Justice Scalia's dissent, pp. 409-410 & fn. 2 [same, and recognizing a textual distinction in the statute between the ability "to elect" and an ability "to influence"].) Indeed, in *Georgia*, the Court acknowledged that influence districts—"where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process"—may in some circumstances be the most effective way to enhance minority voting strength. (539 U.S. at p. 482.)

Then, in *Bartlett v. Strickland* (2009) 556 U.S. 1, the Supreme Court reaffirmed the majority-minority district requirement of *Gingles* Prong 1 and ruled that dilution of electoral capacity attainable only through influence or crossover voting was not a cognizable claim under Section 2 of the FVRA. (*Id.* at p. 26.) While ruling that Section 2 does not require the creation of influence districts, the *Bartlett* plurality was careful to note positive aspects of influence districts, and also confirmed that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition

exists." (*Id.* at pp. 23-24.) *Bartlett*'s preclusion of influence or crossover dilution claims under Section 2 occasioned strong dissents from Justices Souter, Ginsburg, and Breyer, each agreeing that the law should recognize the functional ability of a cohesive political minority to elect its preferred candidates even in districts where it constitutes less than a majority. (See *id.* at pp. 26-48.)

2. The CVRA

In designing the CVRA, the Legislature drew heavily on *Gingles* and its progeny, but also marked a path distinct from the FVRA in several significant respects—particularly in its embrace of claims that a minority's ability to *influence* elections may be impaired by an at-large voting system, and its related embrace of claims that a minority's ability to elect its preferred candidates has been diluted even when the minority is not sufficiently geographically compact to constitute a majority in a single-member district. The core provisions of the CVRA are briefly summarized here; a more detailed analysis follows in Section V, *infra*.

Section 14027 provides that "[a]n at-large method of election may not be imposed or 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[.]"[2] The explicit safeguard against dilution of a protected class's ability not just to "elect candidates of its choice," as in Section 2 of the FVRA (52 U.S.C. § 10301(b)), but also to "influence the outcome of an election," deploys the state's ability to exceed a federal statutory floor, decisively aligning the CVRA with the protections envisioned by Justices O'Connor, Souter, Ginsburg and Breyer. Thus, the Legislature acknowledged the pivotal role a cohesive bloc of voters may play even when they cannot constitute a district's numerical majority.

Section 14028(a) provides 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." Racially polarized voting is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the [FVRA], in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." (§ 14026(e).)

[2] The CVRA defines "protected class" as "a class of voters who are members of a race, color, or language minority group …." (§ 14026(d).)

The remainder of subdivisions (a) and (b) of Section 14028 provide additional guidance for the racially polarized voting analysis, selectively adopting principles from some FVRA cases and rejecting the contrary principles expressed in others, as discussed below. Two elements of this guidance are of particular significance here: first, the command that "[t]he occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class;" and second, the direction that "[o]ne circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of [the defendant]." (§ 14028(b).)

Section 14028(c), specifying, "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy" underscores the Legislature's determination to draft a statute without the limitations of *Gingles* Prong 1. (See also Senate Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, p. 4,

[acknowledging the CVRA departs from the federal requirement "that a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate," because this elimination would "presumably make it easier to successfully challenge at-large [elections]"].)

Section 14028(e) lists qualitative factors that are "probative, but not necessary factors to establish a violation of Section 14027 and this section." The non-exhaustive list includes "the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, … the extent to which members of a protected class 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, and the use of overt or subtle racial appeals in political campaigns." These qualitative factors track the "Senate Factors" announced with the 1982 amendment to the FVRA. (See *Gingles*, *supra*, 478 U.S. at pp. 36-37, 43-46, 80; *Old Person*, *supra*, 230 F.3d at pp. 1120, 1128-29.)

Section 14029 provides that "[u]pon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." In determining whether a particular remedy is "appropriate," the court may consider whether members of a

protected class are "geographically compact or concentrated." (§ 14028(c).)

B. Proceedings Below

In 2016, Plaintiffs Pico Neighborhood Association and Maria Loya filed this case, asserting Defendant's at-large method of electing its City Council impairs the ability of Latino voters to elect their preferred candidates, or at least to influence the outcome of council elections. (1AA70-80; 4AA1141-1162.) The case was tried over six weeks in August and September 2018. (24AA10670.) Following a series of post-trial briefs and hearings, on February 13, 2019 the trial court entered judgment for Plaintiffs and issued a detailed Statement of Decision, finding Defendant's at-large elections violate the CVRA and the Equal Protection Clause of the California Constitution. (24AA10669-10739; 24AA10649-10664.) The trial court ordered the implementation of district-based elections with a remedial district encompassing the Latino-concentrated Pico Neighborhood, which it determined would effectively remedy the vote dilution established at trial. (24AA10707; 24AA10733-10735; 24AA10739.)

1. Trial and Findings of the Trial Court

Over the course of the six-week trial, the trial court heard testimony from seven experts and nine lay witnesses. Witnesses testified regarding, among other things: statistical analyses of voting behavior in Santa Monica

city council and other elections;[3] the challenges Latino candidates have experienced campaigning in the at-large system;[4] the history of discrimination experienced by Latinos in Santa Monica, socioeconomic disparities, and the many environmental and other harms heaped upon the Latino-concentrated Pico Neighborhood over many years;[5] and the viability of several remedial election systems—districts, limited voting, cumulative voting, and ranked choice voting.[6]

a. The Trial Court Found a Stark Pattern of Racial Polarization in Santa Monica's Elections.

The trial court accepted the estimates of voter support from each major racial group for each city council candidate over the past 24 years that both Plaintiffs' and Defendant's experts calculated using the well-established ecological regression method. (24AA10679-10694.)

The trial court found that the analyses of both sides' experts revealed "a consistent pattern of racially polarized voting." (24AA10680; see also

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[3] See, e.g., RT3021:2-3021:19; RT3057:22-3089:12; RT3171:5-3199:24; RT5515:22-5524:19; RT5528:1-5537:9; RA56-76; RA193-215.

[4] See, e.g., RT2145:11-2145:23; RT3453:11-3453:28; RA281-282; RA291-292.

[5] See, e.g., RT2292:19-2294:22; RT2302:13-2303:14 [objections later overruled at RT2429:10-11]; RT2316:10-2317:27; RT3755:6-3756:11; RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8630:8-8631:27; RT8637:17-8639:24; RT8770:28-8772:15; RT8774:21-8788:15; RT9153:25-9156:14; 25AA11001; RA28; RA39-40; RA41; RA49; RA255-256; RA285-287; RA294-295; RA297-346; RA346.

[6] See, e.g., RT6817:2-6819:16; RT6919:14-7073:22.

244AA10677-10694.) Those analyses demonstrated that "[i]n most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for Defendant's city council, but despite that support, the preferred Latino candidate loses."[7] (24AA10680.)

The trial court found both sides' experts' analyses showed a consistent, statistically significant difference in the voting behavior of non-Hispanic white and Latino voters in six out of the seven elections since 1994 involving Latino candidates.[8] The trial court further found that "Latino voters cohesively support those Latino candidates," who in all but one of those six elections "received the most Latino votes, often by a large margin."[9] Each of the Latino candidates preferred by Latino voters received markedly (and statistically significantly) less support from non-

[7] Plaintiffs' expert, Dr. Morgan Kousser, offered his expert opinion that Santa Monica elections were racially polarized. (See, e.g., RT3184:5-3184:27; RT3187:19-23; RT3194:4-3194:9; RT3219:1-3219:12.) Though he had done so in other cases, Defendant's expert, Dr. Jeffrey Lewis, refused to opine on whether Defendant's elections exhibit racially polarized voting, but conceded that all of the indicia of racially polarized voting were present. (RA193-215; RT5524:20-5526:8; RT5536:20-5537:9; RT5555:12-5556:25.) Another Plaintiffs' expert, Professor Justin Levitt, evaluated Dr. Lewis' estimates, and concluded that Defendant's elections exhibit "stark" racially polarized voting. (RT6762:27-RT6764:22; RT6771:20-6799:4; RT6804:7-6811:25.)

[8] 24AA10686; 24AA10690; RT3021:2-3021:19; RT3057:22-3089:12; RT3171:5-3199:24; RT5515:22-5524:19; RT5528:1-5537:9; RA56-76; RA193-215.

[9] 24AA10686; see also 24AA10690; RT3021:2-3021:19; RT3057:22-3089:12; RT3171:5-3199:24; RT6762:27-6764:22; RT6771:20-6799:4; RT6804:7-6811:25; RA56-76; RA193-215.

Latino voters, and "in all but one of those six elections," "the Latino candidate most favored by Latino voters lost." (24AA10685-86; 24AA10690.)

The trial court made specific findings concerning each of the relevant elections (24AA10687-10689):

- In 1994, Latino voters' top choice was the lone Latino candidate – Tony Vazquez – but he lost.
- In 2002, Latino voters' top choice was the lone Latina candidate – Josefina Aranda – but she lost.
- In 2004, Latino voters' top choice was the lone Latina candidate – Maria Loya – but she lost.
- In 2008, the lone Latina candidate – Linda Piera-Avila – received significant support from Latino voters, but she lost.[10]
- In 2012, an unusual election in which no incumbents who had won four years earlier sought re-election, the leading Latino candidate, Tony Vazquez, was heavily favored by Latino voters but did not receive nearly as much support from non-Hispanic white voters. He barely won, finishing fourth in the four-seat race.
- In 2016, Latino voters' top choice was Latino candidate Oscar de la Torre, who received even more support from

[10] The trial court recognized Ms. Piera-Avila was not the top choice of Latino voters, but the contrast between the levels of support she received from Latinos and non-Hispanic whites, respectively, was nonetheless consistent with racially polarized voting. (24AA10688 [comparing majority and minority support for Piera-Avila to evidence of racially polarized voting in *Gingles*].)

> Latinos than did Mr. Vazquez in the same election, but Mr. de la Torre lost.

The trial court found that as a result of that pattern of racially polarized voting there has been a near-complete absence of Latinos elected to the city council despite cohesive support from Latino voters—"only one Latino has been elected to the Santa Monica City Council in the 72 years of the current election system – 1 out of 71 to serve on the city council." (24AA10681.)

The trial court rejected Defendant's arguments that in these multi-member elections, the success of non-Latino candidates who received some Latino support, but less than the Latino candidates, undermined the pattern of racially polarized voting. (24AA10697-10700.) Citing the "demonstrated salience of the race of the candidates," the trial court gave greater weight to the pattern of racial bloc voting associated with Latino candidates who were strongly backed by Latino voters, in line with both FVRA jurisprudence and the language of the CVRA. (24AA10697-24AA10700, collecting cases; see also § 14028(b).) The trial court refused Defendant's invitation to discount Latinos' inability to elect the Latino candidates who "received the most Latino votes, often by a large margin" because lesser-preferred white candidates who necessarily garnered the second, third or fourth-most Latino votes were successful. (24AA10697-24AA10700.)

b. The Trial Court Found Additional Qualitative Evidence That Supported a Finding of Impairment of Voting Rights.

The trial court made additional findings on several of the qualitative factors set out in Section 14028(e), which the court found "further support" its determination that Defendant's at-large election system violated the CVRA. The existence of these factors is undisputed.

History of Discrimination. The trial court recited a troubling history of discrimination against Latinos in Santa Monica, including: (1) restrictive real estate covenants; (2) 70% percent of Santa Monica voters supporting a proposition to repeal the Rumford Fair Housing Act "and therefore again allow racial discrimination in housing"; (3) segregation in public facilities; and (4) discriminatory programs such as English-literacy requirements for voting and a "repatriation" program that sought to force Mexican-American legal immigrants and even citizens out of the country.[11]

Voting Procedures that Exacerbate the Dilutive Effect of At-Large Voting. The trial court found that "the staggering of Defendants' city council elections enhances the dilutive effect of its at-large election system." (24AA10703; RT6813:17-6814:21 [expert testimony that

[11] 24AA10701-02; RT3755:6-3756:11; RT8637:17-8639:24; RT8630:8-8631:27; RA41, RA255-256; *see also Garza v. County of Los Angeles* (C.D. Cal. 1990) 756 F.Supp. 1298, 1339-40, cited in 24AA10701-02.

staggered elections make it "more possible for the majority to field candidates for every single seat and to win each of those races"].)

Socioeconomic Effects of Past Discrimination. The trial court found that the disposable wealth disparity between white residents and Latino and African American residents in Santa Monica, due in part to the housing discrimination discussed above, was "far greater than the national disparity," and that disparity disadvantaged Latino voters and candidates in Santa Monica's extraordinarily expensive city-wide elections.[12]

Racial Appeals in Political Campaigns. The trial court found that Santa Monica's elections have been plagued by both overt and subtle racial appeals—including depictions of a Latino candidate as the leader of a Latino gang, and repeated questions of a Latina candidate regarding "whether she could represent all Santa Monica residents or just 'her people.'" (24AA10704-10705; RT2145:11-23; RA278-279; RA291-292.)

Lack of Responsiveness to the Latino Community. The trial court found that environmental burdens (*e.g.* hazardous waste storage and a landfill now emitting methane) were disproportionately sited in the Latino-concentrated Pico Neighborhood, including "undesirable elements—*e.g.*, the 10-freeway and train maintenance yard—[that] were placed in the Pico

[12] 24AA10703-10704; RT2292:19-2294:22 and RT2302:13-2303:14 [objections later overruled at RT2429:10-11]; RA49.

Neighborhood at the direction, or with the agreement, of Defendant or members of its city council." The court further found that the City's commissions were "nearly devoid of Latino members,"—only one out of Defendant's 106 commissioners was Latina—which is significant both for city planning and as a barrier to political advancement.[13]

c. The Trial Court Found Several Alternative Election Systems Would Remedy the Dilution of Latino Voting Power in Santa Monica.

The trial court held Defendant's violation of the CVRA was established by the evidence of racially polarized voting and the additional qualitative factors. (24AA10672-10677.) Defendant argued that in order to establish a violation Plaintiffs must also show "that some alternative method of election would enhance Latino voting power." (24AA10706, quoting 22AA9861 (Defendant's Closing Brief).) Accepting this position *arguendo*, the trial court made that precise finding, *i.e.*, that several election methods—district elections, cumulative voting, limited voting, and ranked choice voting—would each enhance Latino voting power in Santa Monica, giving Latinos greater ability not just to influence elections but also to elect candidates of their choice. (24AA10706-10707, 24AA10733-10735.)

[13] 24AA10705-10706; RT2316:10-2317:27; RT6078:18-6081:20; RT6083:10-28; RT7968:28-7989:23; RT8774:21-8788:15; 25AA11001; RA28; RA39-40; RA294-295; RA297-346.

District elections. The trial court found that district elections, including a remedial district centered on the Pico Neighborhood, would be an effective remedy, "improving Latinos' ability to elect their preferred candidate or influence the outcome of such an election." (24AA10707, 10734.) The court cited the following factors:

(1) the demographics of the remedial district, in which Latinos would comprise "30% of the citizen voting age population," in contrast with only 13.64% citywide (24AA10734; RA48; RT2470:8-2470:10; RT6943:20-6950:16);

(2) the precinct-level results of past city council elections, which showed the Latino candidates preferred by Latino voters winning the remedial district (24AA10707, 24AA10734; RT2318:7-2330:4; RA 29-30, 25AA11002-11004);

(3) evidence that Latinos in the Pico Neighborhood are politically organized in a manner that would "likely translate to equitable electoral strength" in a district system (24AA10735; RT 6950:20-6952:6);

(4) evidence that district elections, by reducing the size of the electorate and geographic area candidates have to cover in their campaigns, would "reduce the campaign effects of wealth disparities between the majority and minority communities, which are pronounced in Santa Monica"

(24AA10735; RT6921:18-6929:27; RT2292:19-2295:15, RT2302:4-2303:14 [objections later overruled at RT2429:10-11]; RT2430:11-2432:3; RT7056:23-7059:3; RT7061:7-7063:24; RA49); and,

(5) evidence from other jurisdictions that recently adopted district elections showing that "[e]ven 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; RT6932:14-6932:26; RT6935:24-6938:18; RT6939:7-6942:20; RT6946:5-6947:21; RT7065:19-7067:19.)

Non-District Remedies. The trial court also found that non-district remedial election systems including "cumulative voting, limited voting, and ranked choice voting ... would improve Latino voting power in Santa Monica."[14] (24AA10733.) Expert testimony at trial established that in a

[14] In a cumulative voting system, voters can "cumulate" their votes by casting more than one of their available votes for a single candidate. (RT 6955:7-6956:23.) Limited voting limits the number of votes a voter can cast to fewer than the number of seats to be filled at the election. (RT 6967:9-23.) Ranked choice voting allows voters to rank candidates in their order of preference; the voter's single vote is initially allocated to his/her most preferred candidate and, as the count proceeds and candidates are either elected or eliminated, the votes for eliminated candidates are transferred to other candidates according to the voter's stated preferences. (RT 6975:5-6979:20.)

seven-seat race, corresponding to Defendant's seven-seat council, utilizing any of these non-district remedies, a voting bloc would be assured of winning a seat with just 12.5% of the votes, known as the "threshold of exclusion."[15] The Latino proportion of the electorate in Santa Monica, which the racially polarized voting analysis had 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 of these non-district remedial systems. (24AA10680, 24AA10685-86, 24AA10693-94, 24AA10733-34; RT2470:8-2470:10.) The trial court also heard historical evidence that cumulative voting and limited voting have been "effective in providing minorities, even a low proportion of minorities, the opportunity to both influence and elect candidates of choice," even in jurisdictions where the minority proportion of the electorate was *less* than the threshold of exclusion. (RT6963:1-6965:10 (cumulative voting); RT6971:14-6972:7 (limited voting).) Based on this unrebutted evidence, the trial court found that these non-district remedies would also "improve Latino voting power in Santa Monica." (See 24AA10733.)

[15] RT 6955:7-6958:13 [cumulative voting]; RT6967:25-6970:16 [limited voting]; RT6975:28-6979:20 [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].

d. The Trial Court Ordered Appropriate Remedies.

Based on its finding that Santa Monica's at-large election system impaired Latino voting rights in violation of the CVRA, the trial court entertained remedial proposals. Although Defendant refused to offer a remedial plan, it indicated a preference for district elections. (24AA10735-10737; 23AA10181.)

The trial court found that "given the local context in this case—including socioeconomic and electoral patterns, the voting experience of the local population, and the election administration practicalities present here—a district-based remedy is preferable." (24AA10733.) For this finding, the court relied on (1) expert analysis of prior voting patterns in the precincts comprising the remedial district, (2) the significantly greater proportion of the Latino citizen-voting-age population in the remedial district as compared with the city as a whole, (3) testimony regarding the degree of political organization among Latino voters in the Pico Neighborhood, and (4) testimony that district elections would reduce the campaign effects of the "pronounced" wealth disparities between the majority and minority communities in Santa Monica. (24AA10733-35.)

The trial court further ordered prompt and orderly special elections for all seven council seats "[i]n order to eliminate the taint of the illegal at-large election system." (24AA10737-38, collecting authorities and noting that relief for voting rights violations should be prompt.)

2. Appellate Proceedings

Defendant appealed from the judgment and obtained a writ of supersedeas, delaying effective relief pending resolution of the appeal. On July 9, 2020, the Court of Appeal reversed in a published decision holding that Plaintiffs cannot succeed under the CVRA, essentially because it is not possible to draw a majority-Latino district. Plaintiffs filed a petition for rehearing, which was denied.

This Court granted Plaintiffs' Petition for Review and, on its own motion, ordered the Court of Appeal decision depublished.[16] This Court certified the following question for review: "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?"

IV. STANDARD OF REVIEW

Determining the proper legal standards that apply to a CVRA claim presents a pure question of law that this Court reviews *de novo.* (*Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771 ["We review questions of statutory interpretation *de novo*"].) The trial court's findings of fact and weighing of the evidence leading to its finding of vote dilution is reviewed under the deferential substantial evidence standard. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; *Jauregui, supra,* 226

[16] The Court of Appeal also reversed the judgment for Plaintiffs on their Equal Protection claim. This Court did not grant review of that portion of the Court of Appeal's decision, but did depublish the entirety of that decision.

Cal.App.4th at p. 792 [citing cases describing the substantial evidence standard - "The trial court's dilution findings are presumed to be correct."]; *accord Gingles, supra*, 478 U.S. at p. 78 ["the ultimate finding of vote dilution [is] a question of fact subject to the clearly-erroneous standard of [FRCP] 52(a)"].)

V. ARGUMENT

A. The CVRA Recognizes California's Authority to Protect the Ability of Minorities to Influence Elections.

The Legislature enacted the CVRA in recognition of California's unique demographics, embracing a robust, functional view of potential minority political power in California that the Legislature determined was not sufficiently incorporated in federal law. *Gingles* is not a constitutional mandate, but a case interpreting a particular federal statute; California can, and did, go farther. Central to the CVRA's statutory scheme is the Legislature's decision to create protection untethered from *Gingles* Prong 1, which links vote dilution to a particular type of remedy (*i.e.*, districts) and a rigid benchmark for undiluted voting power (*i.e.*, a majority within a compact district). (Compare *Gingles, supra*, 478 U.S. at p. 50 with § 14028(c) ["The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section."].)

The legislative history of the CVRA confirms that the Legislature saw *Gingles* Prong 1 as an unduly rigid barrier to a functional assessment of vote dilution, and intentionally created a state statute without that limitation. The June 4, 2002 Bill Analysis of SB 976 by the Assembly Judiciary Committee explains, after summarizing the *Gingles* pre-conditions:

> This bill would allow a showing of dilution or abridgement of minority voting rights by showing [*Gingles* Prongs 2 and 3] 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. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).

(Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3; see also *Amici* Sen. Richard Polanco's Motion for Judicial Notice (B295935), Exhibit A, Enrolled Bill Memorandum (July 1, 2002) ["This bill enacts the California Voting Rights Act of 2001 that is very similar to the federal Voting Rights Act but with one key exception. In 1985, the Supreme Court imposed three pre-conditions (Gingles factors) for determining if a protected class' voting rights have been/are being diluted. One of the three conditions is that the plaintiff must show that the protected class is geographically compact enough that it would be a majority in a single district (and presumably elect

its own candidate). This bill provides that such a finding is not necessary and that a protected class need only demonstrate the other two Gingle[s] factors."].) The Legislature underscored its intention to expand voting rights protections by pairing the elimination of *Gingles* Prong 1 with the explicit protection, in Section 14027, of a protected class's ability, not only to "elect candidates of its choice," but also to "influence the outcome of an election."

The purpose and significance of this legislative choice is illuminated by reference to federal jurisprudence. The debate among federal legislators and jurists over *Gingles*' reserved question about the viability of claims that at-large elections dilute minority electoral influence highlighted compelling arguments about the value and functional significance of districts and electoral systems in which a cohesive protected class is able to "play a substantial, if not decisive, role in the electoral process." (*Georgia, supra*, 539 U.S. at p. 482; see also, e.g., *Gingles, supra*, 478 U.S. at p. 46 fn.12; *id.* at pp. 89-90 & fn. 1, 98-100 (O'Connor, J., concurring); *Bartlett, supra*, 556 U.S. at pp. 32-35 (Souter, J., dissenting); *Vecinos, supra*, 72 F.3d at pp. 990-91.)

Those arguing for recognition of a cohesive minority's ability to exercise political power through "influence" districts emphasized a pragmatic assessment of voting strength. As one court wrote, after citing a collection of federal cases, "These precedents merely confirm the lessons of

practical politics: the voting strength of a minority group is not necessarily limited to districts in which its members constitute a majority of the voting age population, but also extends to every district in which its members are sufficiently numerous to have a significant impact at the ballot box most of the time." (*Vecinos, supra*, 72 F.3d at p. 991.) Scholars have echoed this observation. (See, e.g., J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law* (1993) 27 U.S.F. L.Rev. 551.)

This insight into the nature of voting rights and political power is at the heart of the CVRA. Every published decision concerning the CVRA has recognized the clarity of this legislative choice. (See *Sanchez, supra*, 145 Cal.App.4th at p. 669; *Jauregui, supra*, 226 Cal.App.4th at p. 789; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 1229.) Yet, the Court of Appeal below entirely ignored the text embracing this legislative choice and the insight it reflects, and instead substituted its own preference over the unmistakable intention of the Legislature.[17]

The CVRA's protection of a cohesive minority's ability to exercise influence over election outcomes is also integral to the Legislature's effort

[17] In focusing exclusively on the ability to elect, the Court of Appeal did not merely ignore CVRA text protecting influence. Even in the context of the ability to elect, the logic of that court depends on an improper assumption, contrary to the evidence adduced at trial, that voting is 100% based on race and without crossover support.

to tailor voting rights protections to California's diversity—the "'unique situation where we are all minorities.'" (See *Sanchez, supra*, 145 Cal.App.4th at 669, quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.) By moving beyond *Gingles* Prong 1, the CVRA extends voting rights protection to smaller but still significant minority communities as well as minority voters who live in jurisdictions that are only moderately racially segregated. For the numerous California jurisdictions that fall into these categories, voting rights remedies like influence districts or the use of cumulative, limited, or ranked choice voting have the potential to secure a more equitable electoral playing field, making local government elections more "'fair and open.'" (See *Sanchez, supra*, 145 Cal.App.4th at p. 669, quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

Thus, unlike the FVRA, the CVRA was specifically designed to encompass jurisdictions where minority voters have electoral preferences distinct from voters of the racial majority, but the geography and demographics of the jurisdiction do not permit creation of a compact majority-minority district. Moreover, the Legislature's departures from the federal framework demonstrate its purpose to provide "a broader basis for relief from vote dilution than available under the federal Voting Rights Act." (*Jauregui, supra*, 226 Cal.App.4th at p. 806.) The CVRA's purpose

to expand voting rights protections in California beyond those of the FVRA, and specifically to embrace a pragmatic notion of political power, provides vital context for the questions posed by this appeal.

B. Plaintiffs Prevail on a Vote Dilution Claim Under the CVRA by Showing Racially Polarized Voting, Alone or in Combination with Historical, Socioeconomic and Political Factors, and by Showing That a Different Electoral System Would Afford Minority Voters the Ability to Elect Their Preferred Candidates *or* Influence Election Outcomes.

What a plaintiff is required to show to prove vote dilution under the CVRA is a question of statutory interpretation, whose resolution depends on the construction of Sections 14027, 14028 and 14029. (See *Meza v. Portfolio Recovery Assocs. LLC* (2019) 6 Cal.5th 844, 856 [Statutory language should be interpreted "in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment."].) These statutory provisions can be interpreted in two reasonable ways, as set out below. The result in each instance, however, is, the same—plaintiffs prevail on a CVRA claim by showing: (1) racially polarized voting in an at-large jurisdiction, alone or in combination with other qualitative factors, and (2) an alternative election method would afford the protected class the opportunity to "elect candidates of its choice" or "influence the outcome of an election" they were not previously afforded. (See §§ 14027, 14028.) A CVRA plaintiff need *not* show what the appellate court below required—that the minority

community is geographically concentrated enough to comprise the majority of a single-member district. (See § 14028(c).)

No matter which interpretation this Court adopts, the evidence and findings below are more than adequate to sustain the trial court's finding that Defendant's at-large elections unlawfully dilute Latino votes in violation of the CVRA.

In construing statutory language, this Court seeks to "'determine the Legislature's intent so as to effectuate the law's purpose.'" (*Meza, supra,* 6 Cal.5th at p. 856, quoting *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617.) The Court "first examine[s] the statutory language, giving it a plain and commonsense meaning." (*Ibid.*) "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Ibid.*) When the statute is capable of "more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*) Accordingly, we start with the words of the CVRA.

1. The Plain Language of the CVRA Provides that Vote Dilution Is Established by Proof of Racially Polarized Voting.

The plain language of the CVRA provides that evidence of racially polarized voting in at-large elections, either alone or in combination with

qualitative factors from Section 14028(e), establishes the vote dilution proscribed by Section 14027.

In this plain text reading, Section 14027 describes the nature of the harm targeted by the CVRA—*i.e.*, at-large elections that "impair[] the ability of a protected class" to "elect candidates of its choice" or "influence the outcome of an election" as a result of vote dilution—and Section 14028 sets out the standards of proof for showing a violation of the CVRA. The language of Section 14028(a) is quite explicit on this point:

> 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 …

(emphasis added.) Similarly, subdivision (e) of Section 14028 provides that other qualitative factors, such as a history of discrimination and its continuing effects and evidence of racial appeals in political campaigns "are probative, but not necessary factors to establish a violation of Section 14027 and this section." Subdivisions (c) and (d) identify factors expressly excluded from the analysis of whether the CVRA has been violated, specifically, whether members of the protected class are "geographically compact or concentrated," and "intent ... to discriminate against a protected class." (§§ 14028 (c), (d).)

Giving effect to the plain language of Section 14028, proof of racially polarized voting in the jurisdiction's at-large elections, either alone or in combination with the qualitative Section 14028(e) factors, establishes

the vote dilution that Section 14027 declares the CVRA is designed to combat. (See §§ 14028(a), (e), 14027.) The CVRA is reasonably read in this way because Section 14028 expressly states how a violation of Section 14027 is shown. (*Green v. State of California* (2007) 42 Cal.4th 254, 260 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous," citation omitted].)

This interpretation is also consistent with the legislative history, which reflects the Legislature's desire to craft a statute in which *Gingles* Prong 1 (proof that a majority-minority district can be created) is unnecessary, and to focus the analysis on *Gingles* Prongs 2 and 3, which together constitute racially polarized voting. (See Assembly Judiciary Committee Bill Analysis, S.B. 976, June 4, 2002 ["This bill would allow a showing of dilution or abridgement of minority voting rights by showing [Gingles Prongs 2 and 3] without an additional showing of geographical compactness"]; Assembly Committee on Elections Bill Analysis, S.B. 976, April 2, 2002 [the bill "[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"].)[18]

[18] The appellate courts have recognized this legislative choice reflected in the statutory language and legislative history of the CVRA. (*Rey*, *supra*, 203 Cal.App.4th at p. 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

Contrary to the Court of Appeal's assumption, this interpretation would *not* eliminate the need for a court to consider whether there are any effective remedies. On the contrary, the CVRA directs that "*appropriate* remedies" be implemented (§ 14029, emphasis added) and that the geographical compactness of the minority community "may be a factor in determining an appropriate remedy" (§ 14028(c)). "Appropriate remedies" are only those that redress the electoral harms the minority communities experience. (See, e.g., *Dillard v. Crenshaw County, Ala*. (11th Cir. 1987) 831 F.2d 246, 250; *Harvell v. Blytheville Sch. Dist. No. 5* (8th Cir. 1997) 126 F.3d 1038; see also *Louisiana v. United States* (1965) 380 U.S. 145, 154.)

2. Alternatively, Vote Dilution Under the CVRA Requires Showing, in Addition to Racially Polarized Voting, that an Alternative Election System Would Improve Minority Voters' Ability to Elect Their Candidates of Choice or Influence Election Outcomes.

The second interpretation of the statutory language—requiring CVRA plaintiffs to also show that an alternative election system would improve the minority's ability to elect its preferred candidates or influence election outcomes to establish vote dilution—gives effect to the ordinary

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geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."]; *Jauregui*, *supra*, 226 Cal.App.4th at p. 798 ["The trial court's unquestioned findings [concerning racially polarized voting] demonstrate that defendant's at-large system dilutes the votes of Latino and African American voters."].)

meaning of the language of Section 14027. By showing racially polarized voting, either alone or in combination with the 14028(e) factors, as well as a benchmark election system that would afford the minority community a greater opportunity to elect candidates of its choice or exercise a meaningful if not decisive influence over election outcomes, CVRA plaintiffs establish that the at-large system results in the "impairment of the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (§§ 14027, 14028.)

This interpretation is supported by the ordinary meaning of the language of Section 14027, specifically the words "dilution" and "impair." To dilute something means "to diminish the strength, flavor, or brilliance of (something) by or as if by admixture," or, figuratively, "[t]o weaken, take away the strength of force of" the thing diluted. (Merriam Webster Online, *dilute*, v., https://www.merriam-webster.com/dictionary/dilute; Oxford English Dictionary (1989), *dilute*, v.). Similarly, "impair" means "to diminish in function, ability, or quality: to weaken or make worse." (Merriam Webster Online, *impair*, v., https://www.merriam-webster.com/dictionary/impair; see also Oxford English Dictionary (1989), *impair*, v. ["to make worse, less valuable, or weaker; to lessen injuriously; to damage, injure"].)

Both "impairment" and "dilution" are comparative—to weaken something, it must have some strength in an unweakened state, *i.e.*, an

undiluted benchmark. Accordingly, FVRA cases have recognized that "dilution" refers to a weakening of a group's voting power due to an electoral system, and is measured by comparison of that electoral system to a different potential system. (*Reno v. Bossier Par. Sch. Bd.* (1997) 520 U.S. 471, 480 ["Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a Section 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice."]; *Holder v. Hall* (1994) 512 U.S. 874, 880.)

By showing racially polarized voting, a CVRA plaintiff demonstrates that under the challenged at-large system the protected class of voters lack the ability to elect candidates of their choice. (See *Gingles, supra,* 478 U.S. at p. 51 ["In establishing" "that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, … usually to defeat the minority's preferred candidate … the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."].) The Section 14028(e) factors, where they are established, can provide further qualitative support for this conclusion by highlighting historical, political or socioeconomic facts that explain how and why, in a particular jurisdiction, the at-large system disadvantages the minority. Finally, by showing that a benchmark alternative system would afford minority voters a greater ability

to elect candidates of their choice or influence the outcome of elections (in other words, to "play a substantial, if not decisive, role in the electoral process" (see *Georgia, supra*, 539 U.S. at p. 482)), the CVRA plaintiff establishes that the minority's voting power is weakened by the existing at-large system—*i.e.*, diluted.

C. An Impairment of Voting Rights Under the CVRA Can Be Determined Based on Objective Factors.

Whether the analysis is part of an evaluation of whether the minority's voting rights have been "impair[ed]" (§ 14027) or whether a particular remedy is "appropriate" (§ 14029), courts are perfectly capable of judging whether an alternative election system will improve minority voters' ability to elect their preferred candidates or influence election outcomes.

As with most voting rights issues, evaluating the effectiveness of a proposed remedy or benchmark alternative system requires "a searching practical evaluation of the past and present reality," and should be guided by localized data and objective standards. (*Gingles, supra*, at p. 45; see also Grofman, Handley & Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence* (2001) 79 N.C. L. Rev. 1383, 1423 ["A case-specific functional analysis … must be conducted to determine the percentage minority necessary to create an effective minority district."].) While that "searching practical evaluation"

may differ in minor respects between cases, courts can rely on objective factors to determine whether an alternative system would confer greater voting power on cohesive minority voters, as set out below.

1. District Remedies

To evaluate whether district elections would afford a minority community the ability to elect its preferred candidates or exercise electoral influence, courts should consider: (1) the minority proportion of the electorate in a potential remedial district or districts, compared to that of the jurisdiction as a whole; (2) electoral behavior, including the degree of support received by minority-preferred candidates and ballot choices in past elections within a potential remedial district; and (3) other historical, political, social, and economic factors impacting minority voters' ability to compete in district elections, as compared with at-large elections.

Protected Class Proportion of the Electorate. The minority proportion of the electorate in a potential district is obviously one important predictor of whether that district will provide the minority with an ability to elect its preferred candidates or influence the outcome of elections. It therefore makes sense that under the CVRA the geographic compactness of a minority community "may be a factor in determining an appropriate remedy." (§ 14028(c).)

Federal cases suggest that where a politically cohesive minority makes up 25% or more of the citizen-voting-age population of a district, it

will often be able to exercise meaningful electoral "influence." In *Georgia, supra*, the Supreme Court approvingly discussed a plan to improve African American voting strength by creating "more influence and coalitional districts" with black voting-age populations ranging between 25% and 50%. (539 U.S. at pp. 482, 487.) Prior to *Georgia*, other federal courts reached similar assessments about the proportion of the minority voters corresponding to meaningful electoral influence in a district. (See *Rural W. Tenn. African-American Affairs Council v. McWherter*, 877 F.Supp. 1096, 1101 (W.D. Tenn. 1995) (three judge court) [an "influence district exists when members of a minority group compose 25% or more of the voting-age population of a district"]; see also *Vecinos, supra,* 72 F.3d at pp. 990-91 ["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 assessing a violation of voting rights].) Without identifying a lower bound, this Court too has regarded as "influence districts" two districts where minorities comprised 35.9% and 46% of the electorate, respectively. (*Wilson v. Eu* (1992) (Appendix) 1 Cal.4th 707, 771 & fn.43, 773.)

Such a rule of thumb finds support in the current demographic and political realities in California, where communities of color often comprise

significant portions, but less than half, of voters in a potential district. As expressed in their amicus letter in support of the Petition for Review, the Latino, African American, and Asian American Legislative Caucuses credit their members' electoral success to influence districts with corresponding minority proportions as low as 20%.[19] Additionally, a rule of thumb in the range of 25% is particularly appropriate for the non-partisan municipal elections governed by the CVRA (see Cal. Const. art. II, section 6) because those elections often involve more than two candidates, allowing a candidate to win with well below 50% of the vote.

While the minority proportion of the proposed remedial districts is important, it is not the only relevant consideration, and any rigid minimum percentage should be eschewed. (See *Vecinos*, *supra*, 72 F.3d at pp. 990-91 [declining to "prescribe any numerical floor above which a minority is automatically deemed large enough to convert a district into an influence district," and directing lower courts to identify influence districts through a "searching evaluation of the degree of influence exercisable by the minority, consistent with the political realities, past and present"].)

Even if 25% were taken to be a minimum level, it would be met and exceeded in this case, as discussed below.

[19] Amicus Curiae Letter in support of Petition for Review submitted by members of the Latino, Asian and Pacific Islander, and African American Legislative Caucus (August 20, 2020) at pp. 1-2, 4.

Past Precinct-Level Results. Courts should also consider the performance of candidates and ballot issues preferred by the protected class in the precincts making up a potential remedial district or districts. Where minority candidates preferred by the minority community lose in at-large elections, but perform much better in the potential remedial district, perhaps even garnering the most votes of any candidate in that district, that is strong evidence that the district will improve minority voting power. (See *Gingles, supra,* 478 U.S. at p. 89 fn. 1 (O'Connor, J., concurring) ["[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice."].)

Where this evidence exists, it should be given decisive weight. On the other hand, the absence of evidence that minority-preferred candidates were the top vote getters in a potential district should not be conclusive. (RT2585:26-2587:8.) As is well known, at-large election systems often deter minority candidates, who would be preferred by minority voters, from running. (See, e.g., *Westwego Citizens for Better Government v. City of Westwego* (5th Cir. 1989) 872 F.2d 1201, 1208-1209, fn. 9 [discriminatory at-large election systems can dissuade minority candidates—they "'don't

run because they can't win'"].) And, minority voters may rationally cast votes for candidates more likely to win majority support over candidates they prefer but who they understand are unlikely to succeed. (RT3084:2-3085:12; RT3087:4-3087:28.) For these reasons, and because the CVRA protects against the dilution of a cohesive minority's ability to influence election outcomes, the absence of evidence that minority-preferred candidates received the most support in the precincts making up a potential remedial district should not preclude a determination that district elections would enable the minority to "elect candidates of its choice" or "influence the outcome of an election." (See § 14027; cf. *Westwego Citizens for Better Government, supra,* 872 F.2d at pp. 1208-09 fn. 9.)

Local Political Factors. Finally, political circumstances and socio-economic conditions may also be important in assessing whether district elections would improve minority electoral efficacy. For instance, a significant income or wealth disparity between the minority and majority communities, particularly where citywide campaigns have historically been expensive, may support a finding that a district system will provide the minority significantly greater opportunity than an at-large system. At-large campaigns are typically more expensive than district election campaigns because at-large campaigns must reach a much larger electorate. (RT6921:1-6921:14; RT6928:23-6929:27; RT6928:23-6929:27; RT7056:23-7059:3; RT7061:7-7063:11.) District elections, with their

correspondingly smaller electorate and geographic footprint, render inexpensive campaign activities, such as door-knocking and phone-banking, more effective, thus reducing the political advantages of having superior financial resources. (*Ibid.*) A minority community that has been unsuccessful in expensive at-large elections due in part to its inferior financial resources, could reasonably be expected to fare better in district elections. (*Ibid.*; see also Collingwood, L. & Long, S., *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act* (Dec. 31, 2019) Urban Affairs Review, p. 5, citing Berry, B. & Dye, T., *The Discriminatory Effects of At-Large Elections* F.S.U. L. Rev. (1979) 7 Fla. St. U. L. Rev. 85.) By way of further example, if the minority community is politically well organized within the potential district and has dedicated hard-working leaders willing to seek elective office, the potential district is more likely to enable minority voters to elect their preferred candidates or influence the outcome of elections. (RT6920:20-6920:28; RT6950:20-6952:6; RT7063:12-7063:24.)

All of this, and more as warranted by the facts, should be considered as part of a court's "searching practical evaluation" of a potential district remedy. (*Gingles*, *supra*, at p. 45; *Vecinos*, *supra*, 72 F.3d at pp. 990-91.)

As discussed in Section V.D below, the evidence from trial and the trial court's findings address these factors in this case, supporting the trial court's conclusion that district elections would provide an effective

remedy—improving Latino voters' ability to elect candidates of their choice or at least influence the outcome of elections.

2. Non-District Remedies

While district-based systems are the most common remedies used in voting rights cases, the CVRA also permits the imposition of non-district remedies like cumulative voting, limited voting and ranked choice voting. (*Sanchez, supra,* 145 Cal.App.4th at p. 670 ["a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems, [such as] cumulative voting"]; *Jauregui, supra,* 226 Cal.App.4th at p. 807 ["the appropriate remedies language in section 14029 [authorizes] orders of the type approved under the [FVRA]."]; *United States v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 448-53 [ordering cumulative voting]; *Dillard v. Cuba* (M.D. Ala. 1988) 708 F.Supp. 1244, 1245-1246 & fn. 3 [upholding settlement requiring limited voting]; *United States v. City of Eastpointe* (E.D. Mich., June 26, 2019, No. 4:17-CV-10079) 2019 U.S. Dist. LEXIS 110885, at *4-6 [ranked choice voting].)

In judging the likely effectiveness of these non-district remedies, courts generally compare the "threshold of exclusion" to the minority proportion of eligible voters citywide. (*Port Chester, supra,* 704 F.Supp.2d at p. 450.) The threshold of exclusion is "the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable

circumstances." (*Ibid.*, quoting *Cottier v. City of Martin* (D.S.D. 2007) 475 F.Supp.2d 932, 937; RT7051:27-7053:20.) The threshold of exclusion for each of these non-district remedies is calculated from the number of seats available – 1/(1+N) where N is the number of available seats. (*Port Chester, supra,* 704 F.Supp.2d at p. 450; RT6955:7-6958:13; RT6967:25-6970:16; RT6975:28-6979:20.) For example, for Defendant's seven-seat council the threshold of exclusion is 12.5%. (RT6955:7-6958:13; RT6967:25-6970:16; RT6975:28-6979:20.) Where the minority proportion of eligible voters exceeds the threshold of exclusion, as in this case, these non-district remedies provide the minority with an ability to elect its preferred candidate. (RT7051:27-7053:20.) Even where the minority proportion is less than the threshold of exclusion, these non-district remedies may still enable minority voters to play a "substantial, if not decisive" role in elections (see *Georgia, supra,* 539 U.S. at p. 482) and may even afford the minority the practical opportunity to elect candidates of its choice, as the most comprehensive study of the issue to date has found. (RT6963:1-6965:10; RT6971:14-6972:7; R. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 758-759 (1992).)

Courts may also consider other social and political factors relevant to whether these non-district remedies will improve minority voting power, or to whether they will be more or less effective than other remedial

alternatives. For example, the likelihood that minority voters will coalesce around a limited set of candidates impacts their ability to effectively exercise voting strength in a cumulative voting system, and so a history of strong citywide political organization among minority voters may be relevant to a cumulative voting remedy's effectiveness. (RT7063:12-7063:17.)

Each of these objective factors, for district remedies and non-district remedies alike, can be analyzed in the particular circumstances of a given jurisdiction to give a clear indication of whether a benchmark alternative election system would enable the minority to "elect its preferred candidates" or "influence the outcome of an election." (§ 14027.) Here, the trial court did so, and found that the alternative systems would.

D. The Trial Court's Findings, Based on Substantial Evidence, Satisfy Every Element Necessary to Establish Dilution Under the CVRA.

This case presents detailed factual findings by the trial court and a robust factual record on each of the elements of a vote dilution claim under the CVRA—racially polarized voting, the optional qualitative Section 14028(e) factors, and the availability of appropriate remedies. (See Section V.B, *supra*.) Those factual findings, and the trial court's reasoning, all detailed in its Statement of Decision (24AA10669-10739), aptly illustrate how vote dilution under the CVRA is established. To fully address what a plaintiff must "prove in order to establish vote dilution under the California

Voting Rights Act", and thus provide guidance to the lower courts as well as to political subdivisions contemplating changes to their elections to comply with the CVRA, this Court should review the trial court's findings on each of these elements.[20]

Equally important, addressing the trial court's finding of dilution will also serve judicial economy and secure a long-awaited resolution of the challenge to Defendant's continuing use of at-large elections without further delay. The trial court's remedial order has been stayed for nearly two years. Further delay is unnecessary and unwarranted; Santa Monica's Latino community has already waited far too long for their voting rights.

The trial court's well-reasoned findings, based on an extensive trial record, and a "searching practical evaluation of the past and present reality," leave no doubt Defendants' at-large elections impair Latino voting rights as a result of vote dilution. (See *Gingles, supra*, 478 U.S. at p. 79.) The trial court found a stark pattern of racially polarized voting, a pattern of

[20] The application in this case of the standards governing a vote dilution claim under the CVRA is "fairly included" in the issue presented. (Cal. Rules of Court rule 8.516(a)(1).) Moreover, the showing required to establish dilution under the CVRA is an important issue "presented by this case," and the parties have ample opportunity to brief the issue. (See Cal. Rules of Court rule 8.516(b)(2).) By applying these standards to the facts of this case, this Court will also be providing a ruling that will govern cities and special districts throughout the State as they seek to fairly implement election systems consistent with the CVRA. When the U.S. Supreme Court defined the contours of vote dilution claims under the FVRA in *Gingles*, it likewise applied its standards to the facts of that case.

losses by Latino candidates supported by Latino voters, multiple qualitative Section 14028(e) factors, and that Latino voters would have a greater opportunity to elect their preferred candidates or influence the outcome of elections under several alternatives to the at-large system. Because the trial court's findings are all supported by substantial evidence and correctly apply the law, they should be affirmed.

1. The Trial Court Correctly Found that Defendant's City Council Elections Exhibit Racially Polarized Voting Which Dilutes Latinos' Voting Strength.

The trial court's finding of a "consistent pattern of racially polarized voting" in Defendant's city council elections is supported by substantial evidence. (24AA10680; see also 244AA10677-10694.) Focusing on Defendant's city council elections involving at least one Latino candidate, as the CVRA directs (§§ 14028 (a) and (b)), both sides' experts' analyses revealed stark racially polarized voting, the result of which was, in the absence of special circumstances, Latino voters were invariably prevented from electing the Latino candidates whom they strongly preferred.[21] Each step of the trial court's racially polarized voting analysis complied with the express direction of the CVRA and the guidance from federal courts in cases under the FVRA.

[21] See 24AA10680, 24AA10684-10690, 24AA10700; RT3021:2-3021:19; RT3057:22-3089:12; RT3171:5-3199:24; RT5515:22-5524:19; RT5528:1-5537:9; RA56-76; RA193-215.

Section 14026(e), in defining "racially polarized voting," incorporates FVRA standards, which have described racially polarized voting as shorthand for *Gingles* Prongs 2 and 3, *i.e.*, that the protected class is "politically cohesive" and that the majority "votes sufficiently as a bloc to enable it—in the absence of special circumstances ... —usually to defeat the minority's preferred candidate." (*Gingles*, *supra*, 478 U.S. at pp. 51, 56; *Ruiz*, *supra*, 160 F.3d at p. 551.) Synthesizing these requirements, *Gingles* held that evidence that minority voters "strongly supported [minority] candidates, while, to the [minority] candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard." (478 U.S. at p. 61.)

As discussed above in Section III.B.1.a, that is exactly what the evidence demonstrated and the trial court found. Both sides' experts' ecological regression analyses produced group voting estimates that were nearly identical. (Compare RA56-76 with RA204-209.) In six of the seven city council races from 1994 to 2016 involving at least one Latino candidate, the non-Hispanic white majority voted statistically significantly differently from Latinos (using a 95% confidence interval)—specifically, the Latino candidates received much greater support from Latino voters than from non-Hispanic whites. (RT3057:22-3199:24; RA56-76; see also, *Campos v. Baytown* (5th Cir. 1988) 840 F.2d 1240, 1248-49 [finding racially polarized voting based on differing levels of support for minority

candidates from minority and white voters, respectively]; *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1416-17 [same].) In all but one of those six elections, a Latino candidate received the most Latino votes, often by a large margin; and in all but one of those elections—an unusual election in which none of the incumbents elected 4 years earlier sought re-election—those Latino candidates who received the most Latino votes lost despite overwhelming Latino support. (RT3057:22-3199:24; RT4960:21-4960:24; RA56-76; RA204-209.)

On appeal, Defendant has never challenged Plaintiffs' *Gingles* Prong 2 showing—that Latino voters in Santa Monica are "politically cohesive." (See *Gingles, supra*, 478 U.S. at p. 51.) Nor could it. Instead, Defendant has focused on *Gingles* Prong 3, arguing principally that non-Latino candidates who (in an election where voters cast votes for three or four candidates[22]) receive some support from Latino voters, but less than that of the Latino candidates preferred by Latino voters, have been elected. But that argument hardly advances Defendant's cause; the express language of the CVRA, persuasive authority from FVRA cases, and the trial court's

[22] In Defendant's elections, candidates run in a single race for the three or four seats that are up for election that year. Voters can cast votes for as many candidates as there are seats open, and the three (or four) candidates receiving the most votes citywide are seated on the City Council.

reasonable weighing of the evidence all require a rejection of Defendant's rationale.

The CVRA commands a focus on voting patterns and election outcomes for minority candidates who were the preferred candidates of minority voters. Section 14028(b) directs, in mandatory language, that "[t]he occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class." The overwhelming weight of FVRA authority concurs these elections are the most probative of racially polarized voting. (See, e.g., *U.S. v. Blaine County* (9th Cir. 2004) 363 F.3d 897, 911 [rejecting defendant's argument that trial court must give weight to elections involving no minority candidates]; *Ruiz, supra*, 160 F.3d at pp. 553-54 ["minority v. non-minority election is more probative of racially polarized voting than a non-minority v. non-minority election" because "[t]he Act means more than securing minority voters' opportunity to elect whites."].) The trial court's analysis complies with this direction, focusing on city council elections involving Latino candidates. (24AA10677-10690; 24AA10697-10700.)

Additionally, the trial court's findings as to the nearly uniform inability of Latino candidates to win city council elections is evidence of a

violation, as called out by Section 14028(b): "the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected" to the defendant's governing body. That legislative choice in the CVRA incorporates the principle, recognized in FVRA cases, that the "guarantee of equal opportunity is not met when ... candidates favored by [minorities] can win, but only if the candidates are white," (*Ruiz, supra,* 160 F.3d at p. 553, quoting *Clarke v. City of Cincinnati* (6th Cir. 1994) 40 F.3d 807, 809-10; see also *Citizens for a Better Gretna v. City of Gretna* (5th Cir. 1987) 834 F.2d 496, 502 ["That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."].)

The evidence at trial also supports a focus on voting patterns and electoral outcomes for Latino candidates who received the strong, and even overwhelming, support of Latino voters in the particular context of Santa Monica. Where the choice has been available in Defendant's elections, Latino voters have preferred the serious Latino candidates—Vazquez in 1994, Aranda in 2002, Loya in 2004, Vazquez in 2012, and de la Torre in

2016 were each the top choice of Latino voters, receiving the highest levels of Latino support of any candidate in their respective races.[23]

In multi-seat at-large elections like Defendant's, when minority voters exercise their right to cast all their votes it is "'virtually unavoidable that certain white candidates would be supported by a large percentage'" of minority voters, even though they are just the least objectionable option. (*Ruiz*, *supra*, 160 F.3d at pp. 553-54, quoting *Gretna*, 834 F.2d at p. 502.) Therefore, the Ninth Circuit explained, "the order of preference non-Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates" is paramount. (*Ruiz*, *supra*, 160 F.3d at p. 554 [reversing the district court's finding of no racially polarized voting based on the success of white candidates who were the second-choice of Latinos]; see also *Meek v. Metropolitan Dade County* (11th Cir. 1990) 908 F.2d 1540, 1547 ["*Gingles* addresses not only a group's ability to elect a satisfactory candidate (that is, a candidate for whom the minority voter is *willing* to cast a vote), but the group's ability to elect its *preferred* candidate"].) The trial court recognized that Latino voters' top choice was a Latino candidate every time a serious Latino

[23] 24AA10681-10682; 24AA10686-10689; RT3061:10-3061:20; RT3068:4-3069:4; RT3079:2-3079:11; RT3172:18-3172:23; RT3182:16-3183:11; RA56-57; RA62-63; RA65-66; RA71-72; RA74-75.

candidate ran, and, with only one exception which the trial court found exhibited special circumstances, that candidate lost. (24AA10686-10689.)

The trial court properly refused to "disregard or discount both the order of preference of minority voters and the demonstrated salience of the race of the candidates." (24AA10699.) On this record, and in the exercise of its duty to make a "searching practical evaluation," the trial court was well justified in giving decisive weight to the nearly unbroken string of losses experienced by Latino candidates who were cohesively preferred by Latino voters. (*See Gingles*, *supra*, 478 U.S. at p. 79.)

In sum, the evidence established that Latino voters have cohesively (indeed, overwhelmingly) supported Latino candidates in most elections where the choice was available. Those Latino-preferred Latino candidates universally received statistically significantly fewer votes from white voters, and, almost as universally, lost.[24] That is the epitome of racially polarized voting. (See *Gingles*, *supra*, 478 U.S. at p. 61 ["We conclude that the District Court's approach, … which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard" for racially polarized voting]; § 14028(b).)

[24] 24AA10685-10690; RT3059:13-3059:19; RT3061:10-3063:5; RT3068:4-3069:4; RT3079:2-3079:11; RT3172:18-3172:26; RT3182:16-3183:11; RA56-57; RA62-63; RA65-66; RA71-72; RA74-75.

2. The Trial Court's Findings of Additional Probative Factors Are Based on Substantial and Undisputed Evidence.

As set out above in Section III.B.1.b, the trial court found the "probative but not necessary" factors of section 14028(e) also supported the conclusion of racially polarized voting and vote dilution. Strong evidence supports that finding.

"The essence" of a vote dilution claim "is that a certain [electoral structure] interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." (*Gingles*, *supra*, 478 U.S. at p. 47.)

Here, as the trial court found, the continuing impact of historical discrimination against Latinos in Santa Monica, a gulf in wealth and income between Latino and white residents of Santa Monica combined with extraordinarily expensive campaigns, overt and subtle racial appeals in city council campaigns, and the use of dilutive staggered elections, all combine with the at-large system to prevent Latinos from electing their preferred candidates. The symptoms of this lack of electoral power are palpable – a disturbing lack of responsiveness to the Latino-concentrated Pico Neighborhood resulting in every undesirable feature of the city being sited there, poisoning the residents with environmental hazards. And, the lack of responsiveness to the Latino community is self-perpetuating; the City's many commissions—pipelines to city council appointments and election—

are nearly devoid of Latinos, and so council vacancy appointments have invariably gone to non-Latinos. (See Section III.B.1.b, *supra*, and record cites therein.) The trial court made detailed findings on all of this, and Defendant has never seriously disputed any of it.

3. As the Trial Court Found, and Substantial Evidence Demonstrates, Several Available Remedies Would Improve Latinos' Voting Power Over the Current At-Large System.

The trial court's finding that district elections, cumulative voting, limited voting, and ranked choice voting would each improve Latino voting power in Santa Monica is based on substantial and undisputed evidence, and satisfies the objective multi-factor standard set out above in Section V.C. (24AA10706-10707; 24AA10733-10735.)

a. District Elections

Analyzing a potential district plan presented by Plaintiffs' expert (RA46), the trial court reasonably concluded, based on substantial and unrebutted evidence, that district elections would improve Latino voting power over the current at-large system. The trial court found that unlike the at-large system, district elections would afford the Latino community the ability to elect candidates of their choice, or at least the ability to significantly influence elections. (24AA10706-10707; 24AA10733-10735.)

Minority Proportion. The trial court found that the significantly greater Latino proportion of the citizen voting age population in the Pico Neighborhood district (30.4%), compared to that in the city as a whole (13.6%), demonstrates that district elections would improve Latinos' voting power. (24AA10734-10735; RA48; RT2470:4-2470:10.) The unrebutted trial testimony revealed that districts with similar Latino voter proportions in other cities have allowed Latinos to elect their preferred candidates—something Latino voters had been consistently unable to do in the at-large elections in those other cities. (24AA10733-10734, citing Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* (2000), at 49-61; RT6932:14-6932:26; RT6935:24-6938:18 [describing Latino candidate's loss in at-large election and subsequent victory in district with 22% Latino voters]; RT6939:7-6942:20; RT6946:5-6947:21; RT7065:19-7067:19.)

While the Court of Appeal insisted that only a majority-Latino district could afford Latino voters any meaningful relief, that view is directly contrary to the statutory text, legislative history and purpose of the CVRA, as explained above in Section V.C. And, as explained below, the trial evidence (which the Court of Appeal expressly refused to consider) proves the Court of Appeal wrong.

Voting Patterns in the Pico Neighborhood District. After establishing that Latino voters consistently preferred Latino candidates

when the choice was available (24AA10686-10689), the trial court evaluated how those candidates performed in the Pico Neighborhood district. The Statement of Decision summarizes that analysis: "Mr. Ely's analysis of various elections shows that the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district … than they do in other parts of the city – while they lose citywide, they often receive the most votes in the Pico Neighborhood district," indicating district elections "would [] result in the increased ability of [Latinos] to elect candidates of their choice or influence the outcomes of elections." (24AA10734; see also RT2318:7-2330:4; RA 29-30, 25AA11002-11004.)

The 2004 election is illustrative. Plaintiff Maria Loya received the votes of essentially 100% of Latinos and just 21% of non-Hispanic whites. (RT3076:9-3077:2; RA65-66; RA204.) Despite that overwhelming support from Latino voters, Ms. Loya lost, placing seventh in an at-large election for four seats. (*Ibid.*) In the Pico Neighborhood district, where she resides, Ms. Loya received the most votes of any candidate – more than Bobby Shriver who beat every other candidate in their own neighborhoods. (RT2132:26-2134:14; RT2320:14-2322:2.) With district elections, she surely would have won. (*Ibid.*) The same was true for Tony Vazquez in 1994 when he enjoyed overwhelming support from Latino voters but lost at-large, while receiving the most votes in the Pico Neighborhood district. (RT2318:7-2320:6.) Mr. Ely explained that these results are not

anomalous, but typical of expected outcomes in the remedial district, and the trial court agreed. (RT2318:7-2330:4; 24AA10734.)[25]

Local Political Factors. The trial court further looked to local political and economic circumstances relevant to the likely impact of district elections—particularly the wealth and income disparity between Latino and white residents of Santa Monica, and between the Pico Neighborhood and other parts of the city, and the political organization of Latinos in the Pico Neighborhood. (24AA10735.) Its findings in this regard are also supported by substantial evidence.

Campaigning in Defendant's at-large elections is extraordinarily expensive, approaching $1 million. (RT6921:15-6928:22.) Such enormous cost is prohibitive for the Latino community, which has much less wealth than the non-Hispanic white community (a disparity much greater than in the rest of the United States), both because Latino candidates are not wealthy enough to self-finance their campaigns and Latino voters lack

[25] The Court of Appeal expressly disregarded the trial court's findings and evidence of voting patterns in the Pico Neighborhood district, claiming the trial court made no findings concerning this evidence and that Plaintiffs failed to mention this evidence in their appellate brief. (Court of Appeal Opinion, p. 37.) In their Petition for Rehearing, Plaintiffs pointed to precisely where they had described this evidence in their lone appellate brief (it was also discussed at length in the Amicus Curiae brief of Senator Polanco et al.), and precisely where in the Statement of Decision the trial court made these findings. (Petition for Rehearing, pp. 25-26.) Still, the Court of Appeal refused to correct its Opinion.

sufficient disposable wealth to contribute to their preferred candidates. (RT6921:15-6929:27; RT2292:19-2295:15, RT2302:4-2303:14 [objections later overruled at RT2429:10-11]; RT2430:11-2432:3.) District election campaigns are much less expensive; the smaller geography and electorate makes inexpensive campaign activities such as door-knocking and phone-banking more effective than the expensive mailers and print advertising that dominate at-large campaigns. (RT6928:23-6929:27.)

Additionally, as the trial court found, the Latino community in the Pico Neighborhood is politically organized in a manner that would "likely translate to equitable electoral strength" in a district system. (24AA10735; RT 6950:20-6952:6.)

b. Non-District Remedies

The trial court's finding that non-district remedial election systems, including "cumulative voting, limited voting, and ranked choice voting ... would improve Latino voting power in Santa Monica" is likewise supported by substantial evidence. (*See* 24AA10733.) The unrebutted evidence at trial demonstrates that these non-district alternative election systems would enable Latino voters to elect their preferred candidates – something they have not been able to do in the current system.[26]

[26] See RT6955:7-6966:18 [cumulative voting]; RT6967:9-6975:4 [limited voting]; RT6975:5-6979:20, RT7051:27-7054:9 [ranked choice voting].

The ability to elect under these remedies is evaluated by comparing the proportion of Latino eligible voters in the city to the "threshold-of-exclusion." (*Ibid.*; *Port Chester, supra*, 704 F.Supp.2d at p. 450.) At 13.64%, the Latino share of eligible voters citywide surpasses the threshold of exclusion under any of these remedies for a seven-seat race, corresponding to Defendant's seven-seat council—12.5%. (RT2470:8-2470:10; RT 6955:7-6958:13; RT6967:25-6970:16; RT6975:28-6979:20; RT7051:27-7053:20.) Because the Latino share of eligible voters exceeds the threshold of exclusion, the politically cohesive Latino voters in Santa Monica could elect their preferred candidates even with no help from non-Latinos. (RT7051:27-7053:20.)

Even if the Latino proportion of the electorate were slightly less than the threshold of exclusion, evidence shows that it is still likely cumulative voting, limited voting, or ranked choice voting would enable Latino voters to elect their preferred candidates, or at least significantly influence the election outcomes. As Plaintiffs' expert explained, the threshold of exclusion represents the "worst-case scenario." (RT6955:25-6958:13.) In Defendant's elections there is some majority-crossover voting for the Latino-preferred candidate in each election, just not enough to elect those candidates in the current at-large system. (RT3021:2-3021:19; RT3057:22-3089:12; RT3171:5-3199:24; RT5515:22–5524:19; RT5528:1-5537:9; RA56-76; RA193-215.) For that reason, minority candidates have been

successful with cumulative and limited voting systems even where the minority proportion is less than the threshold of exclusion. (RT6963:1-6965:10; RT6971:14-6972:7; Engstrom, *supra*, 21 Stetson L. Rev. at pp. 758-759.)

Based on the substantial evidence that district and non-district remedies alike would afford Latino voters in Santa Monica the ability not just to influence elections, but actually to elect their candidates of choice, there can be no doubt that Defendants' at-large system has diluted Latinos' votes.

VI. CONCLUSION

In the eighteen years since the CVRA was passed, hundreds of California jurisdictions—cities, school districts, water districts—have switched from discriminatory at-large election systems to fairer systems, largely district-based election systems, that afford minority voters a true voice in who represents them. The CVRA has performed remarkably well in fulfilling what the Legislature designed it to do—ensuring that the right to vote for all Californians is not unfairly or discriminatorily impaired or diluted. The CVRA's success, where the FVRA's effect had been limited, is due precisely to the Legislature's choices—most notably, to protect minority voters from dilutive at-large elections regardless of how compact or concentrated their communities may be.

The Court of Appeal's decision threatened to eviscerate that progress, wiping out the distinct choices made by the Legislature to craft a voting rights law that recognized California's unique demographic and geographic realities. This case presents the Court with its first and best opportunity to make crystal clear what the CVRA stands for and requires—that no at-large system may deny the rights of minority voters through racially polarized voting when there is an alternative election system that will allow those voters to elect candidates of their choice or to influence the outcome of the elections. This Court should affirm the trial court's judgment and allow the ordered changes to Santa Monica's election system to proceed without further delay.

Dated: December 21, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.2024(c)(1).)

I, the undersigned appellate counsel, certify that this brief consists of 13,987 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 2016 computer program used to prepare the brief.

Dated: December 21, 2020

Respectfully submitted,

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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:

REPLY IN SUPPORT OF PETITION FOR REVIEW

☒ **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

Via Electronic Filing/Submission:
(Via electronic submission through the TrueFiling web page at www.truefiling.com)

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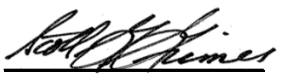
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 14th day of September 2020, at Oakland, California.



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