No. S263972

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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Pico Neighborhood Association; Maria Loya,
*Respondents and Plaintiffs*,
v.
City of Santa Monica,
*Appellant-Defendant*.

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# BRIEF OF FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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

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IRA M. FEINBERG
(Bar No. 64066)
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
Telephone: (212) 918-3000
Fax: (212) 918-3100
ira.feinberg@hoganlovells.com

ERIN CHAPMAN
(pro hac vice pending)
PATRICK C. HYNDS
(pro hac vice pending)
DEREK CENTOLA
(pro hac vice pending)
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

May 27, 2021

*Counsel for Amicus Curiae FairVote*

## CERTIFICATE OF INTERESTED ENTITES OR PERSONS

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

FairVote believes that implementing modified at-large remedies, including ranked-choice and cumulative voting, will allow voters to elect representatives who better reflect their communities' and society's diversity. FairVote encourages public officials, judges, and voters seeking to address unlawful vote dilution to consider these other ways to conduct elections. To this end, FairVote has filed *amicus curiae* briefs in cases concerning whether particular remedies are permissible under the California Voting Rights Act and the federal Voting Rights Act, including in the Court of Appeal in this case. (See *Pico Neighborhood Ass'n v. Santa Monica* (July 9, 2020, B295935) [review granted and opn. ordered nonpub. Oct. 21, 2020, S263972]; *Higginson v. Becerra* (9th Cir. 2019) 786 F.App'x 705, 706; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660; *United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411.) FairVote has also published scholarship advocating for the use of alternative voting systems. (See, e.g., Spencer et al., *Escaping the Thicket: The Ranked*

*Choice Voting Solution to America's Districting Crisis* (2016) 46 Cumb. L.Rev. 377; Richie & Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress* (2013) 47 U.Rich. L.Rev. 959.) In 2010, FairVote conducted a successful education campaign in the Village of Port Chester, New York after the Village was ordered to implement cumulative voting to address its violation of the federal Voting Rights Act. (See Port Chester Elections Draw National Attention, FairVote (Jun. 18, 2010) ≤https://tinyurl.com/28an89xy≥ [as of May 21, 2021].) FairVote also assisted in the implementation of ranked-choice voting in Eastpointe, Michigan as part of a Consent Judgment and Decree that resulted from a federal Voting Rights Act vote-dilution claim. (See Losinski, *Eastpointe to Host Educational Meeting on Ranked Choice Voting*, Roseville-Eastpointe Eastside (Aug. 13, 2019) ≤https://tinyurl.com/2fypxptj ≥ [as of May 21, 2021].)

Because of this expertise regarding remedies available in vote dilution cases, FairVote can offer important additional context relating to the issue before the Court: What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act (Elec. Code, §§ 14025-14032)?

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## INTRODUCTION

For years Latinos in Santa Monica have voted cohesively and consistently for Latino city council candidates. Yet, year after year, under the City's traditional at-large voting system, the Latino electorate has struggled to elect a single councilmember to the City's seven-member city council, even though Latinos have made up approximately one seventh of the voting-age population.

Petitioners contend—and the trial court found—that the City's traditional at-large voting system was to blame. As the trial court explained, with one rare exception, that system had allowed a cohesive white majority to marshal the votes to win almost every single seat, every single election. To remedy this vote dilution, the trial court ordered Santa Monica split into seven districts, with each district electing one representative. (Trial Ct. Op. at 65-66, 71, ¶¶ 91-94, 99-100.) Under that plan, the trial court found that the Pico Neighborhood district, which has a little more than 30% Latino citizen voting-age population, would provide the Latino electorate in Santa Monica with "the increased ability [to] . . . elect candidates of their choice or influence the outcomes of elections." (*Id.* at 66, ¶ 94.)

The trial court also found that other alternative systems would remedy the vote dilution in Santa Monica. It held that "[e]ven if 'dilution' were [a separate] element of a [California Voting Rights Act ("CVRA")] claim," apart from racially polarized voting, the plaintiffs had proved vote dilution because they had "presented several available remedies (district-based elections,

cumulative voting, limited voting and ranked-choice voting), each of which would enhance Latino voting power over the current at-large system." (*Id*. at 38-39, ¶ 53.)

The Court of Appeals reversed. It reasoned that because plaintiffs had not shown that Latinos could comprise a majority of voters in any district when the city is divided into seven election districts, they had "failed to show the at-large system was the reason Latinos allegedly have had trouble getting elected to the City Council." (Ct. of Appeals Op. at 31.) Notwithstanding the City's efforts to defend it, that decision was wrong in several fundamental respects.

For one, the Court of Appeal's focus on majority-minority districts misconstrued the text and purpose of the CVRA. Contrary to the history of the CVRA and the holdings of other courts, the Court of Appeals concluded that in order to prove vote dilution, plaintiffs must be able to show that they could elect a preferred candidate in a district system. (See *id.* at 30-31.) This holding gutted two central provisions of the CVRA. First, the CVRA explicitly protects a minority group's "ability to *influence* the outcome of an election," not just its ability to *elect* a preferred candidate. (Elec. Code, § 14027 [emphasis added].) Second, the CVRA permits remedies other than district-based systems, yet the Court of Appeals narrowly focused on how the plaintiffs would fare in a district system—as if it was the *only* electoral system that could be implemented as an appropriate remedy.

The City—making the same assumption that the ability to "elect" a preferred candidate is the only relevant test—now goes beyond the Court of Appeals' holding and argues that Petitioners "could not elect their preferred candidates under *any* election system." (Resp.'s Answer Br. at 68 [hereinafter "AB"].) The evidence established and the trial court agreed, however, that several modified at-large electoral systems available under the CVRA—including limited voting, cumulative voting, and ranked-choice voting—could have allowed Latino voters in Santa Monica to elect a representative of their choice or, at minimum, to significantly improve their ability to influence an election. (See Trial Ct. Op. at 39, ¶ 54.)

Amicus agrees with Petitioners that a plaintiff can make out a vote dilution claim under the CVRA by showing racially polarized voting alone. (See Pet'r Opening Br. 41-44 [hereinafter "OB"].) If the Court decides that plaintiffs must show something more, though, the Court should conclude that a plaintiff can establish vote dilution by showing that minority voters would be able to elect a preferred candidate, or that their ability to influence the election would be improved, under *any* accepted electoral system—including a district-based system *or* a modified at-large system. That holding would reflect the reality that vote dilution can be remedied in a variety of different ways that do not involve drawing districts, including by implementing alternative voting systems, such as ranked-choice voting, cumulative voting and limited voting.

This proposed rule is easily satisfied here. Because Latino voters make up approximately 13.6% of the citizen voting-age population in Santa Monica, they have more than enough eligible voters to win a seat in a seven-seat race under several alternative voting systems—including, as explained in detail below, a limited voting, cumulative voting or ranked-choice voting system. And because the record demonstrates that Latinos in Santa Monica vote cohesively and are somewhat dispersed across the City, objective factors demonstrate that their voting power and ability to, at minimum, influence elections would be improved under a modified at-large voting system. Petitioners have thus established vote dilution under the CVRA, as properly interpreted, and this Court should accordingly reverse.

In this brief, Amicus offers the Court additional context on modified at-large electoral systems—including limited voting, cumulative voting, and ranked-choice voting. It will explain how those systems have been shown to improve the voting strength of minority groups, and how these electoral systems can be used as a benchmark to identify when a minority group's ability to influence an election or elect a preferred candidate have been diluted—as they have been here—within the meaning of the CVRA.

## ARGUMENT

### I. PLAINTIFFS CAN ESTABLISH VOTE DILUTION UNDER THE CVRA BY SHOWING THAT MINORITY VOTERS COULD ELECT A PREFERRED CANDIDATE IN A MODIFIED AT-LARGE SYSTEM.

Under the CVRA, courts have the power to remedy vote dilution through the use of district and non-district remedies, including modified at-large election systems. A number of modified at-large systems have an established track record of enhancing the voting power of minority voters. Because these remedies are available and have proven effective at remedying vote dilution, the courts can—and should—use them as a benchmark to determine whether the voting strength of a minority group has been diluted under the existing voting system. A look at these alternative voting systems shows that the trial court correctly concluded that Latinos in Santa Monica would be able to elect a representative of choice under several modified at-large systems. Accordingly, the Court of Appeals should have concluded that plaintiffs established vote dilution under the CVRA.

#### A. The CVRA Makes Modified At-Large Systems And Other Non-District Remedies Available to Remedy Vote Dilution.

The two most common types of electoral systems are district-based and at-large systems. In a district-based electoral system a community is divided into geographic slices called districts. The people who live in each district elect a

representative to represent the residents of the district. In an at-large system, on the other hand, every voter, no matter where they live, votes for a representative—or multiple representatives—to represent the community at large. Which of these electoral systems a jurisdiction employs has a huge impact on the ability of minority groups to meaningfully participate in the electoral process. (See Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 743 ["The ability of a cohesive minority to compete successfully at electoral politics . . . is often dependent on how the competition is structured."].)

It is well documented that at-large electoral systems can be employed in a way that harms minority representation. (See, e.g., *Thornburg v. Gingles* (1986) 478 U.S. 30, 47 ["This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population."] [internal quotations omitted]; Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 337-38.) Because each voter can cast one vote for each open seat in a winner-take-all at-large system, a majority of voters voting as a bloc will defeat minority-preferred candidates every time. For decades, white majorities weaponized at-large voting systems to suppress the voting power of minority groups by switching to an at-large system just as a minority group became large enough to elect a

representative of its own in a district-based system. (See Lockard, *Another Consideration in Minority Vote Dilution Remedies: Rent-Seeking* (2006) 2 Rev. L. & Econ. 397, 400-01.)

By design, the CVRA protects against this kind of vote dilution.[1] It prescribes 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 . . . ." (Elec. Code, § 14027.) The CVRA specifies how vote dilution is shown (Elec. Code, § 14028), and when a plaintiff can show dilution, it gives courts the power to "implement appropriate remedies." (Elec. Code, § 14029.)

Those "appropriate remedies" include modified at-large voting systems. As the City is forced to admit (AB at 46), the plain text of the CVRA permits such alternative remedies.[2]

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[1] While the CVRA focuses on vote dilution of at-large systems, other electoral devices have also been used to harm minority representation, such as two-round elections, anti-single shot laws, gerrymandering, and staggered terms. (See Lockard, *supra*, at pp. 401, 403 fn.23.)

[2] The City has forfeited the argument that non-district remedies are unavailable under the CVRA by not raising that argument below. (See Appellant's Opening Brief 55-56, *City of Santa Monica* v. *Pico Neighborhood Ass'n*, No.B295935 [2d App. Div. Oct. 18, 2019] [explaining that non-district remedies are not appropriate in this case but not arguing that they are unavailable under the CVRA].) (See, e.g., *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 410, *as modified on denial of reh'g* (Oct. 1, 2014); *People v. Tully* (2012) 54 Cal.4th 952, 983 fn.10

Specifically, Section 14029 allows courts to impose "appropriate remedies, *including* the imposition of district-based elections that are tailored to remedy the violation." (Elec. Code, § 14029 [emphasis added].) The statute's use of "including" makes clear that district-based remedies are not the exclusive remedies, and that the CVRA permits the use of a variety of "appropriate remedies . . . tailored to remedy the violation." (See *id.*) The legislative history confirms this. Senator Polanco's Statement to the Senate Elections & Redistricting Committee noted that the CVRA "does not say that district elections are the only means" of election. (Statement on S.B. 976 Before the Senate Elec. & Redistricting Com. (May 2, 2001) at p. 3 [statement of Senator Polanco]). Instead, the CVRA "allows a court to impose remedies[,] including district elections" or "other options" such as "proportional voting." (*Id.*) During the signing of Senate Bill 976, Governor Gray Davis stated that "[u]pon a determination that a violation has occurred, the court shall fashion appropriate remedies, including *but not limited to* single district elections." (Gov. Gray Davis, July 9, 2002 Signing Statement for Senate Bill 976 [emphasis added].)

California courts agree that the CVRA allows for remedies beyond single-member districts, and that the CVRA permits a range of remedies. In *Jauregui v. City of Palmdale*, for example, the Court of Appeals explained that the California Legislature

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[explaining that arguments not raised in the courts of appeal are forfeited].)

intended the CVRA's remedial powers "to be broadly construed to remedy dilution of the votes of protected classes." ((2014) 226 Cal.App.4th 781, 808.) To that end, the *Jauregui* court held that the CVRA empowered California courts to order at least those remedies that have been ordered by federal courts in federal Voting Rights Act cases, which include cumulative voting, limited voting and ranked-choice voting.[3] (*Id.* at 807.) Likewise, the Superior Court in San Bernardino County expressly concluded that "both the statutory language and legislative history of the CVRA support the conclusion that the court has broad authority to implement an array of appropriate remedies," including "at-large remedies, such as cumulative voting." (*Garrett v. City of Highland* (Cal. Super. Ct. Apr. 6, 2016) No. CIVDS 1410696, 2016 WL 3693498 at *2.) The Superior Court in Orange County similarly imposed an alternative at-large remedy. (See *Sw. Voter Registration Educ. Project v. City of Mission Viejo*, No. 30-2018-00981588-CU-CR-CJC, [Cal. Super. Ct. Orange Co. July 26, 2018]

[3] Examples of such federal Voting Rights Act cases include the following: *Dillard v. Chilton County Bd. of Educ.* (M.D. Ala. 1988) 699 F.Supp. 870; *United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411 [adopting cumulative voting]; *United States v. Town of Lake Park, Fla.* (S.D. Fla. Oct. 26, 2009), No. CV 09-80507-MARRA, 2009 WL 10727593, at *2-3 ¶ 2, 4 [adopting limited voting]; *United States v. Eastpointe* (E.D. Mich. Jun. 26, 2019) No. 4:17-CV-10079 (TGB) (DRG) 2019 WL 2647355 at *2-3 ¶¶ 4-6 [adopting ranked choice voting], and *Huot et al v. City of Lowell* No. 1:17-cv-10895-DLC [D. Mass Jun. 13, 2019], Consent Decree, ECF 106 at 10 [listing ranked-choice voting as one of several "Agreed-To Electoral Systems"].

Stipulation for Entry of J. at 3 ¶ 1 [ordering implementation of cumulative voting with the unstaggering of elections as remedy in CVRA suit].) And the Superior Court in Riverside County imposed a remedy requiring the use of district elections along with ranked-choice voting. (See *Salas v City of Palm Desert*, Case No. PSC1909800, [Cal. Super. Ct. Riverside Co. Nov. 22, 2019] Stipulation for Entry of J. at 1.)

These cases belie Defendant's belated claim that "there is almost no support for alternative at-large systems" as a remedy to vote dilution claims. (AB at 46-47.) Unsurprisingly, the only support Defendant cites for that proposition is a decades-old *federal* Voting Rights Act case, where the court concluded only that cumulative voting was "an inappropriate remedy for a Section 2 claim . . . imposed on the election of state court judges." (*Cousin v. Sundquist* (6th Cir. 1998) 145 F.3d 818, 829.) That holding has no relevance in the CVRA context, where the availability of non-district remedies is supported by the text of the statute, the legislative history, and the caselaw. (See *supra*, at pp. 15-20.)

In addition to granting California courts the power to implement alternative voting systems, the CVRA also gives courts discretion to implement multiple changes to an election system short of scrapping the system altogether. Again, the statute gives courts broad discretion to "implement appropriate remedies" as long as they "are tailored to remedy the violation." (Elec. Code, § 14029.) The Court of Appeal in *Jaurgeui* explained

that courts should read this provision broadly. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 805-06, 807-08 [citing *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530] ["[A] remedial statue's protective purpose is to be construed liberally on behalf of the class of persons it is designed to protect."].)

As part of this broad discretionary power, courts may ensure the effectiveness of remedial electoral systems by imposing additional remedies, including the unstaggering of elections. (See Lawyers' Comm. For Civil Rights of the S.F. Bay Area, *The California Voting Rights Act* (2014), ≤https://lccrsf.org/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf≥ [as of May 21, 2021]. [The CVRA "is written broadly" to allow for "creative remedies"].) Unstaggering elections forces all seats to be open for election at one time. When implemented alongside a modified at-large system a remedy for vote dilution, unstaggering an election can further lower the minimum number of votes required for a candidate to be elected. (See *Sw. Voter Registration Educ. Project v. Mission Viejo*, No. 30-2018-00981588-CU-CR-CJC (Cal. Super. Ct. Jul. 26, 2018), Stipulation for Entry of J. at 3 ["In order to maximize the remedial effectiveness of the cumulative voting system adopted herein . . . all five seats on the City Council shall be elected at the same time."]; see also *Garrett v. City of Highland, Cal.* (Cal. Super. Ct. Apr. 6, 2016) No. CIVDS 1410696, 2016 WL 3693498, at *4 [ordering simultaneous election of all five newly formed district-based city council

members in a special election]; *cf. United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 450-51, 453 [remedial plan under the FVRA, which included implementing unstaggered terms alongside cumulative voting]; see generally *City of Lockhart v. United States* (1983) 460 U.S. 125, 135 [noting that "[t]he use of staggered terms . . . may have a discriminatory effect."].)[4]

### B. Modified At-Large Systems Can Improve the Voting Power of Minority Groups.

Not all at-large electoral systems entrench majority power. Indeed, several "modified" at-large electoral systems have proven to be effective tools for *enhancing* minority voting power over the

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[4] The City's concerns (AB at 47) that unstaggering elections can lead to accountability and stability concerns are overstated. For one, non-staggered terms can actually lead to greater accountability. Indeed, when every seat is up for election at the same time, the entire council is forced to be accountable to the entire electorate. (See Weston, *One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement* (2012) 121 Yale L.J. 2013, 2025-26.) As for stability, the fact that incumbents have well-documented advantages over new candidates makes it very unlikely that every single seat would turn over at the same time. (See Ansolabehere & Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000* (2002) 1 Elec. L.J. 315, 328 ["The incumbency advantage is a nation-wide phenomenon. It is equally powerful at state and federal levels." ].) In fact, *staggering* elections causes its own problems, among them, the fact that, following redistricting in some California districts, some voters may have the opportunity to vote twice while other voters do not have the opportunity to vote at all within the same four-year time period. (See Weston, *supra*, at p. 2015.)

more traditional at-large system, such as the one employed by Defendant. (See Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 746 [noting specifically cumulative voting, limited voting, and the single-transferrable form of ranked-choice voting]; Lockard, *Another Consideration in Minority Vote Dilution Remedies: Rent-Seeking* (2006) 2 Rev. L. & Econ. 397, 406.)

Under a modified at-large system, voters still elect representatives "at large"—that is, to represent the entire jurisdiction, rather than individual districts. But instead of casting one vote for one candidate to represent the entire district, they modify the electoral system in various ways—whether by (as in a cumulative voting system) changing the number of votes that a voter can cast for each candidate, or limiting the number of votes a voter can cast (limited voting), or by allowing voters to rank candidates (ranked-choice voting).

Limited voting, cumulative voting, and ranked-choice voting are all at-large electoral systems that can make it easier for minorities to elect a candidate of their choice, by lowering the number of votes that any one candidate needs to win a seat. (See Lockard, *Another Consideration in Minority Vote Dilution Remedies: Rent-Seeking* (2006) 2 Rev. L. & Econ. 397, 406; Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 746.)

To see why, it is helpful to understand how many votes, or the amount of support from the electorate, it takes to win a seat

under various voting systems. In a winner-take-all at-large system, voters cast one vote for each open seat. A candidate in a competitive race—that is, one where there is at least one other candidate—needs to receive just over fifty percent of the vote to ensure election. Receiving fifty percent of the vote plus one vote *guarantees* that the candidate wins a seat because once the candidate has one vote more than half of the available votes, there are not enough votes left for any other candidate to cobble together enough votes to beat her. Even if a competitor received every other remaining vote, they would fall two votes short of securing election. Political scientists refer to this amount of votes needed to clinch a seat as the "threshold of election" or the "threshold of exclusion" since it is the point at which a candidate has enough votes to exclude the possibility that there would be a tie or that another candidate would win the seat instead. (See generally Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More* (2010) 30 St. Louis U.Rev. 97, 103; 241, 253 fn.47.)

This "threshold" number of votes needed for election changes if an electoral system is set up so that voters cast only one vote *for all the open seats* or are able to cumulate their votes for open seats (such as in cumulative voting). If, for example, all of the candidates in a race are competing for two open seats, and each voter can cast only one vote, as with limited voting or ranked-choice voting, the number of votes that any candidate needs to win a seat decreases. In that case, a candidate could

guarantee election by receiving one vote more than one third (or 33%) of the votes cast. If they did so, they would exclude the possibility that two other candidates could beat them: Even if another candidate tied or exceeded our candidate's 33% plus one, our candidate would still be guaranteed a seat because there would simply not be enough votes remaining for any other candidate to exceed them, guaranteeing that the candidate would be one of the two top vote-getters. Accordingly, in a race with two open seats where each voter can cast only one vote, the threshold of exclusion is 33% of the vote plus one. In other words, a candidate can be elected with the support of a smaller share of the voting electorate than they would in a traditional at-large election. As shown in the chart below, this threshold number of votes, or share of the voting electorate, a candidate needs to win a seat continues to decrease as the number of open seats increases.[5]

[5] The formula for calculating the threshold of election for cumulative, limited, and ranked-choice voting in a race where each voter casts only one vote is 1/(1+n) + 1 vote, where *n* equals the number of open seats to be filled. (See Yanos, *Reconciling the Right to Vote with the Voting Rights Act* (1992) 92 Colum. L.Rev. 1810, 1860.)

| Election Thresholds for Cumulative, Limited and Ranked-Choice Voting | |
|---|---|
| **Seats Open for Election** | **Percentage Share of the Voting Electorate Required to Guarantee Election** |
| 1 | 50% + 1 |
| 2 | 33.3% + 1 |
| 3 | 25% + 1 |
| 4 | 20% + 1 |
| 5 | 16.7% + 1 |
| 6 | 14.3% + 1 |
| 7 | 12.5% + 1 |

Cumulative voting, limited voting, and ranked-choice voting all decrease the share of electorate necessary to win.[6] That makes it easier for minority groups to elect a representative than in a traditional at-large system like that employed by Defendant.[7] To see how that plays out in practice, it is helpful to understand how each voting system works.

[6] In a ranked-choice voting system, voters are not necessarily limited in the number of candidates that they can *rank*, but they still *cast* only one counting vote. (*See infra*, at pp. 28-30.)

[7] It is worth noting that non-district remedies, such as cumulative voting, limited voting and ranked-choice voting, also avoid the concerns that the City raises in its brief about race-based districting. (AB at 31-32, 53-54.) These non-district remedies improve minority representation without requiring the government to engage in any drawing of district boundaries at all, and so the line of cases concerning racial gerrymandering starting with *Shaw v. Reno* (1993) 509 U.S. 630 have no application at all to these remedies.

**1. Limited voting.**

Limited voting limits the number of votes that each voter may cast in an at-large election where multiple seats are open. (See generally *Moore v. Beaufort Cty.* (4th Cir. 1991) 936 F.2d 159, 160 [affirming district court's imposition of limited voting].) Under a limited voting system, instead of casting a number of votes equal to the number of open seats, voters are given a smaller number of votes. (*Id.*) For example, if there are seven open seats on the city council, a voter might be able to cast a ballot for three, or two, or just one candidate. Because each vote in a limited voting scheme is more powerful than in a traditional at-large voting scheme, a limited voting system allows an organized minority constituency to focus their efforts on electing a preferred candidate. (See Taebel et al. *Alternative Electoral Systems As Remedies for Minority Vote Dilution* (1990) 11 Hamline J. Pub. L. & Pol'y 19, 25.) The most effective type of limited voting for this purpose is single or "bullet" voting, which gives voters one single, powerful vote. (See *id.*)

Limited voting systems can be used to remedy vote dilution. By limiting the number of votes each voter can cast, a limited voting system prevents the majority from drowning out the votes of the minority. (Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 758.) Like other modified at-large systems, it does so because it lowers the total number of votes a minority group needs to be able to elect a candidate. (See *supra*,

at pp. 22-26; see also generally Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution* (1990) 11 Hamline J. Pub. L. & Pol'y 19, 25.)

This potential for limited voting to allow minority groups to elect their preferred candidates is not theoretical. Minority groups have had success in limited voting systems in Alabama, Georgia, North Carolina, and other places. (See Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev.743, 758-60.) In Alabama, for example, after limited voting was implemented, Black candidates won races in 13 out of the 14 municipalities where they were on the ballot. (See Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 349.) And in 10 of those 13 communities, the winning candidates were the first Black candidates ever to win a seat. (See *id.*)

**2. Cumulative voting.**

Cumulative voting systems are another modified at-large electoral system that can improve the voting power of minority groups. In a cumulative voting system, voters are not required to use each of their available votes to vote for different candidates. (See Pildes & Donoghue, *Cumulative Voting in the United States* (1995) 1995 U. Chi. Legal F. 241, 254.) Instead, they have the option to cast one vote for several different candidates, or to use all of their votes for a single candidate (a voting strategy known

as "plumping"), or whatever combination they chose. In a three-seat city council race, for example, a voter could cast all three of her votes for one candidate, or two votes to one candidate and one to another, or one vote for each of three candidates. Just like in a traditional at-large system, the three candidates who receive the most votes are elected by a plurality. (See generally Engstrom, *Modified Multi-Seat Electoral systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 749.)

In a cumulative voting system, voters with a strong preference for one candidate can make that preference known by putting all of their votes on their preferred candidate. (*Id.* at 749; Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico* (1989) 5 J.L. & Pol. 469, 476-77.) That allows minority groups with a cohesive common interest to act together to elect at least its preferred candidate. (See Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution* (1990) 11 Hamline J. Pub. L. & Pol'y 19, 25 ["By permitting minority voters to vote more intensively for their preferred candidates, this system enhances their prospects of electing the candidates of their choice."]; *cf. United States v. Vill. of Port Chester* (2010) 704 F.Supp.2d 411, 450 [finding the Hispanic population to be cohesive enough "to take advantage of their voting power under a cumulative voting plan"].) In practice, that makes it easier for minority groups to elect a candidate of their choice, because it allows them to organize their communities to cast their votes toward the election

of a preferred candidate.[8] (See Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 750.)

Like limited voting systems, cumulative voting systems decrease the size of the voting electorate that a candidate needs to guarantee election from the 50% plus one needed in a traditional at-large system. (*See supra*, at pp. 28-29.) This makes it easier for minority groups to elect a preferred candidate.

This has played out in practice, too. The Hispanic population in Alamogordo, New Mexico, for example, elected their preferred candidate after instituting cumulative voting for three at-large city council seats. (See Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 752-54.) Cumulative voting allowed the Hispanic population, which constituted 24% of the voting population, to elect the first Hispanic candidate to the city council in nearly two decades. (*Id.*)

In fact, in the late 1980s and early 1990s, "[w]herever minority candidates ran under a cumulative voting system, they won for the first time in decades (or for the first time ever)." (Mulroy, *The Way Out: A Legal Standard for Imposing*

[8] Cumulative voting is a familiar concept in California corporate elections. In fact, it is expressly required by the Corporations Code for this exact reason: to ensure a minority group of shareholders has some representation on corporate boards of directors. (Corp. Code, § 708.)

*Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 349.)

### 3. The single-transferable vote form of ranked choice voting.

A single-transferable vote system similarly makes it easier for minority groups to elect preferred candidates. In a single-transferable vote form of ranked-choice voting, voters rank candidates in their order of preference. When votes are tabulated, all first-choice votes are tallied, and any candidate who receives the minimum number of votes required to win a seat is elected—just as they would be in a traditional, at-large election.[9] In a traditional at-large system, any votes a candidate receives beyond the number of votes required to be elected are effectively wasted, since the candidate did not actually need those votes to get elected. In a ranked-choice voting system, however, those votes are not wasted. Instead, they are proportionally "transferred" to those voters' second-choice candidates. (See Yanos, *supra*, at p. 1859.)

After the transfer, assuming no other candidate has obtained the requisite proportion of votes, the candidate with the fewest votes is eliminated, and each vote cast for the eliminated candidate is transferred to those voters' second choices. (*Id.* at p. 1861.) This process of (1) transferring unused votes, (2)

[9] (See Yanos, *supra,* at pp. 1859-60; Pildes & Donoghue, *supra*, at pp. 254-55 fn.50.)

eliminating the candidate with the least votes, (3) and transferring votes cast for that candidate to voters' next choices, continues until all open seats are filled. (*Id.* at pp. 1860-61; see also *Dudum v. Arntz* (9th Cir. 2011) 640 F.3d 1098, 1101.)

Like limited voting and cumulative voting, ranked-choice vote systems have improved minority groups' voting power. For example, "[a]fter the first preference vote election for New York City community school boards in 1970, the percentage of Black and Hispanic community school board members dramatically jumped to levels approximating the Black and Hispanic percentages of [ ] New York's population." (Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 350.)

The U.S. Department of Justice has also used ranked-choice voting to improve the voting power of minority groups. (See Consent J. and Decree at ¶¶ 4-8, *United States v. Eastpointe* (E.D.Mich. Jun. 26, 2019) No. 4:17-CV-10079 (TGB) (DRG) 2019 WL 2647355, at *2.) Much like this case, where at the time of trial "only one Latino ha[d] been elected to the Santa Monica City Council in the 72 years of the current election system," (Trial Ct. Op. at 13, ¶ 21), at the time the U.S. Department of Justice filed the case against Eastpointe, Michigan, "no African American candidate had ever been elected to the Eastpointe City Council," (*United States v. Eastpointe* (E.D.Mich. 2019) 378 F.Supp.3d 589, 595.) To remedy this vote dilution, the parties agreed to

implement ranked-choice voting. (See *Eastpointe* (E.D.Mich. Jun. 26, 2019) No. 4:17-CV-10079 (TGB) (DRG) 2019 WL 2647355, at *1-3, Consent J. and Decree at ¶¶ 4-8.) That system has worked. (See FairVote, *RCV in Action: Eastpointe's City Council Election*, FairVote (Dec. 2, 2020), https://www.fairvote.org/rcv_in_action_eastpointe_s_city_council_election. [as of May 24, 2021] ["Since adopting [ranked choice voting], Eastpointe has seen a higher number of African-American candidates winning office."].) Implementing a ranked-choice voting system in Santa Monica would likewise improve the ability of Latinos to elect a candidate of their choice.

### C. Modified At-Large Electoral Systems Supply a Benchmark That Courts Can Use to Determine Whether the Current Electoral System Dilutes Minority Votes.

Because modified at-large voting systems are available, effective remedies for vote dilution, they supply a sensible benchmark that courts can—and should—use to determine whether a minority group's voting power has been diluted within the meaning of the CVRA. At a basic level, asking how a minority community would fare in a modified at-large electoral system is a reasonable replacement of the FVRA's requirement—expressly rejected in the adoption of the CVRA—that a plaintiff be able to show that they could draw a compact majority-minority district. (See Elec. Code, § 14028(c).) Even putting aside the CVRA's protection of the "ability to influence" (Elec. Code, § 14027), which reflects the Legislature's intent to impose remedies

even where a minority community is unlikely to have an "ability to elect" under any alternative system, plaintiffs could establish vote dilution under the CVRA if they could show racially polarized voting and that the citizen voting-age population of their minority group exceeds the threshold of exclusion for *any* alternative electoral system. By making such a showing, alongside proof that they have usually not been able to elect their preferred candidate under the current system, plaintiffs should be able to show that by choosing not to implement an alternative system, the municipality has impermissibly diluted the minority group's votes within the meaning of the CVRA.

Contrary to the Court of Appeal's holding below, (Op. at 31), and what the City repeatedly argues in its brief, (e.g., AB at 11, 26, 34-35), nothing in the CVRA requires that a plaintiff prove vote dilution by showing that a minority-preferred candidate can win in a geographically compact single-member district. In fact, the legislature expressly repudiated any such requirement. (Elec. Code, § 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 . . . ."].) In passing the CVRA, the Legislature explicitly sought to make it easier for plaintiffs to prove vote dilution than it is under the federal Voting Rights Act. (See Senate Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, at 4; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended

Apr. 9, 2002, at 4.) One way that it did so was by choosing not to require that plaintiffs show that a geographically compact majority-minority district is possible in order make out a claim for vote dilution. (See Senate Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, at 4; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at 4.) In doing so, the Legislature made clear that proving that the minority group could draw a majority-minority district where it could win is *not* a prerequisite to showing that vote dilution exists.

The Courts of Appeal agree. In *Sanchez v. City of Modesto*, the Fifth District Court of Appeal explained that "the Legislature wanted to eliminate the . . . requirement that, to establish *liability* for dilution under section 2 of the [federal Voting Rights Act], plaintiffs must show that a compact majority-minority district is possible." ((2006) 145 Cal.App.4th 660, 669; see also *Yumori-Kaku v. City of Santa Clara* (2020) 273 Cal.Rptr.3d 437, 445 ["The Legislature eliminated the first *Gingles* precondition requiring plaintiffs to show they are sufficiently large and geographically compact to enable a majority-minority district . . . ."]; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789 ["[T]he California Voting Rights Act does not require that the plaintiff prove a 'compact majority-minority' district is possible for *liability* purposes."].) In this light, the Court of Appeal below was wrong to insist, and the City is wrong

to embrace the idea, that plaintiffs must establish a violation by reference to a district-based electoral system.[10]

### D. Latinos in Santa Monica Established Vote Dilution By Reference to Modified At-Large Electoral Systems.

Petitioners have shown that Latinos in Santa Monica could elect a preferred candidate under a modified at-large electoral system. Record evidence shows that each of the three modified at-large electoral systems discussed above—limited voting, cumulative voting, and ranked-choice voting—would allow Latino voters in Santa Monica to elect a preferred candidate or, at a minimum, influence the outcome of an election. (RT6955-66; RT6967-75; RT6975-79; RT7051-54.)

The trial court agreed. (Trial Ct. Op. at 65, ¶ 91 ["[O]ther remedies, such as cumulative voting, limited voting and ranked choice voting, are possible options in a CVRA action and would improve Latino voting power in Santa Monica . . . ."].) The evidence presented at trial established that, under the bullet-voting form of limited voting, cumulative voting, and ranked-choice voting, the threshold of exclusion for Santa Monica's seven-seat city council, assuming all seven seats are open for election at the same time, would be 12.5%. (RT6957-58; RT6970.)

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[10] Defendant argues (AB at 46) that this case does not squarely present the issue of whether a plaintiff can prove vote dilution by reference to non-district-based systems. Not so. In fact, the trial court explicitly found that a modified at-large system would improve the voting power of Latinos in Santa Monica. (Trial Ct. Op. at 65, ¶ 91.)

Because the record shows that the Latino electorate in Santa Monica makes up 13.64% of the citizen voting-age population,[11] Latinos have enough votes to elect their preferred candidate under any of those three electoral systems. (See Op. at 3; Trial Ct. Op. at 66, ¶ 94; RT2470.) So, by choosing not to implement one of those systems, despite the demonstrated record of racially polarized voting (see Trial Ct. Op. at 9-22, ¶¶16-30), Santa Monica impermissibly diluted Latino votes. Thus, the plaintiffs here proved vote dilution.

## II. PLAINTIFFS CAN ALSO ESTABLISH VOTE DILUTION BY SHOWING THAT AN ALTERNATIVE SYSTEM WOULD IMPROVE THEIR ABILITY TO INFLUENCE THE OUTCOME OF THE ELECTION.

As we have shown, Petitioners presented evidence that they could elect their preferred candidate in a modified at-large system, and that is sufficient, along with a showing of racially polarized voting, to establish a claim for vote dilution under the CVRA. This Court thus need not address what a future plaintiff would need to show to make out a vote dilution claim when the record demonstrates that the group is not large enough to elect a representative on its own under an alternative electoral system.

If the Court chooses to address the issue, however, it should conclude that to make out a vote dilution claim under the CVRA, it is sufficient to show that a modified at-large electoral system

[11] *See infra*, at pp. 40-42 for a discussion of why the citizen voting-age population is the correct metric.

would improve minority voters' ability to "influence" elections—which is all that the CVRA requires—and that the plaintiffs did so here. (Elec. Code, § 14027.) In doing so, the Court should reject the overly narrow "influence" standard proposed by Defendant. (AB at 34-35.)

In their brief, Petitioners set out some factors that courts may properly consider when determining whether alternative at-large election systems would improve the ability of a minority group to "influence" the outcome of an election. For instance, Petitioners ask the Court to consider the size of the minority electorate and whether it is sufficiently large enough to exceed the threshold of exclusion—or at least whether the minority population is large enough to "enable minority voters to play a 'substantial, if not decisive' role in elections." (See OB at 54-55.) Second, Petitioners direct the Court to "other social and political factors," such as "the likelihood that minority voters will coalesce around a limited set of candidates," and the "history of strong citywide political organization." (*Id.* at p. 55-56.)

FairVote agrees that these factors are relevant. In addition to these factors, however, courts may also consider: (1) the political cohesiveness of the group; (2) the number of candidates that have historically been on the ballot; (3) demographic trends in the jurisdiction; and (4) the geographic dispersion of the protected class. In this case, these factors, on balance, demonstrate that a modified at-large voting system would

increase the ability of Latino voters in Santa Monica to influence the outcome of an election.

A. **The Minority Group's Share of the Electorate.**

As Petitioners correctly assert, in considering whether a modified at-large voting system would improve the power of a minority group to influence an election, the Court should start by considering the size of the minority electorate and how close the minority electorate is to being able to elect a representative on its own without relying on votes from any other group. In technical terms, that means comparing the minority's total citizen voting-age population to the threshold of exclusion for the alternative voting system. (See Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 375-76 .)

If the minority electorate under the current electoral system is far from having enough votes to elect its preferred candidate, but under a modified at-large system the minority group would be within striking distance of having enough voters to win a seat on its own, that indicates that the alternative voting system would increase the minority group's influence on the election. (Cf. *Thornburg v. Gingles* (1986) 478 U.S. 30, 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."].)

This will be easy enough to determine since data on voting-age population is reliable and readily available. (See Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 375-76.) And unlike other mushy metrics—like compactness—that courts frequently apply in voting rights cases, the size of the minority citizen voting-age population and the threshold of exclusion can be determined by straightforward calculations. (*Id.* at pp. 370-71.)

While a court could conceivably rely on historical turnout data rather than the total citizen voting-age population in making this determination, as Defendant suggests (see AB at 65-67), that would be a mistake for a number of reasons. To start, as Defendant implicitly acknowledges (AB at 34-39), citizen voting-age population is frequently used in vote-dilution cases involving districts. (See *Bartlett v. Strickland* (2009) 556 U.S. 1, 14, 18-19 [Kennedy, J.] [plurality op.]; *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* (E.D. Mo. 2016) 219 F.Supp.3d 949, 956-57; *Johnson v. De Grandy* (1994) 512 U.S. 997, 1014.) Defendant offers no reason why citizen voting-age population should be used to determine whether votes have been diluted by reference to a district system but not to a modified alternative system, and there is none.

Moreover, relying on historical turnout data may have the effect of perpetuating historical discrimination. Indeed, in at least one case that Defendant relies on (AB at 66-67), the court expressly concluded that relying exclusively on historical minority voter turnout to determine whether a protected class will have enough votes to elect a representative of its choice is improper, because "turnout under a discriminatory system is not necessarily predictive of turnout under a non-discriminatory system," and relying too heavily on historical numbers can impose an "artificial[ ] cap" on "potential [ ] minority representation." (See *United States v. Euclid City Sch. Bd.* (N.D.Ohio 2009) 632 F.Supp.2d 740, 764-65; see also *United States v. Vill. of Port Chester* (2010) 704 F.Supp.2d 411, 451 [listing cases]; Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 377.) And while the court in *Euclid* did, to a degree, consider historical turnout data, at least one other federal court exclusively used citizen voting-age population as a measure when ordering cumulative voting as a remedy for vote dilution. (*Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* (E.D.Mo. 2016) 219 F.Supp.3d at 956-57.)

Moreover, using the citizen voting-age population is consistent with the purpose of laws prohibiting vote dilution. At bottom, a vote dilution claim asks whether a minority group's electoral *potential*—or *ability*, in CVRA terms—has been

hampered by the current voting system. (See *Growe v. Emison* (1993) 507 U.S. 25, 40 [explaining that the benchmark electoral system in the vote dilution analysis of the federal Voting Rights Act is used "to establish that the minority has *the potential* to elect a representative of its own choice . . . ."] [emphasis added]; *Thornburg v. Gingles* (1986) 478 U.S. 30, 50 fn.17 [explaining vote dilution under the federal Voting Rights Act is about a minority group's loss of potential to elect a preferred candidate].) It makes the most sense to answer that question by reference to the entire pool of potential voters, not just those who have voted in the past.

### B. The Political Cohesiveness of the Minority Group.

Courts may also consider the cohesiveness of the minority group when determining whether a modified at-large electoral system would improve the minority's influence in elections. The ability of modified at-large systems, like limited voting and cumulative voting, to empower minority voters requires minority voters to vote cohesively. (See generally Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 349; see also Engstrom, *Modified Multi-Seat Electoral Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 767 [limited voting and cumulative voting systems work best where voters coordinate their votes carefully].)

This factor will be easy to apply, because the political cohesiveness of a minority community is already something that courts consider when determining whether there has been racially polarized voting. (See *Gingles*, 478 U.S. at 31). That means that by the time a court is considering the propriety of non-district remedies like cumulative, limited or ranked-choice voting, it will have already made a determination about the political cohesiveness of the minority community. (See Elec. Code, § 14028(b) [explaining the analysis for determination of a violation of the CVRA]).

### C. The Number of Minority Candidates that Have Historically Been on the Ballot.

In evaluating whether a minority group's ability to influence the election would be improved under a non-district remedy, courts may also consider the number of minority candidates that have historically been on the ballot in the community. Some non-district remedies improve minority voting strength even when there are multiple minority-preferred candidates on the ballot, while others can be negatively affected by a minority group splitting its votes between multiple candidates. For example, in a ranked-choice voting system there is little danger of a cohesive minority group losing a seat if minority voters split their votes among multiple candidates. This is true because if one minority-preferred candidate is eliminated from a race, that candidate's votes will transfer to the voters' next-ranked choice. In this way, political cohesiveness around a

*single* preferred candidate is not required for ranked-choice voting to be an effective electoral system for a minority group. This means that a ranked-choice voting system could be especially effective at remedying vote dilution where a minority group has historically fielded multiple candidates.

### D. Demographic Trends in the Jurisdiction

Courts may also consider how demographic trends in the jurisdiction may impact the ability of a minority group to influence the outcome of future elections with non-district remedies. This might mean, for example, that the court should consider whether minority populations are growing or shrinking or how neighborhood demographics are shifting. A growing African American population in Ferguson, Missouri, for instance, counseled in favor of ordering cumulative voting in *Missouri State Conference of the NAACP v. Ferguson-Florissant School District* to remedy the vote dilution in that case. ((E.D.Mo. 2016) 219 F.Supp.3d 949, 960-61.) The court explained that "[a] cumulative voting plan can accommodate the changing demographics" in the jurisdiction, while "allowing the relative voting power of any given demographic or interest group to shift with the relative voting size of the groups without having to wait for redistricting." (*Id.* at p. 960.)

### E. The Geographic Dispersion of the Minority Group.

Finally, in determining whether a non-district system would be effective at remedying vote dilution, courts should

consider the geographic dispersion of the minority group. When the minority group is too geographically dispersed, it can make it difficult for them to elect a representative in a district system that is required to be geographically compact even though they make up a significant proportion of the jurisdiction-wide electorate. (See Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution* (1990) 11 Hamline J. Pub. L. & Pol'y 19, 29; Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution* (1989) 5 J.L. & Pol. 469, 471.) Indeed, the effectiveness of district-based systems to improve minority voting power often relies, in part, on the geographical segregation that exists in many American cities (including Santa Monica). Yet, not all communities are segregated, and voting rights rules should not assume that housing segregation is present in every community.

Modified at-large remedies have accordingly proven particularly useful for enhancing minority voting power in more integrated communities. For example, some Hispanic populations in the Southwest are geographically integrated with the majority populations. (See Engstrom, *Modified Multi-Seat Electoral systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 746 [noting this is also sometimes the case for "African Americans in the rural South, where residential segregation is not as acute as it is in urban areas"]; see also Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justic e, at 11 (Feb. 11, 2021), https://www.brennancenter.org/our-

work/research-reports/redistricting-landscape-2021-22 [as of May 24, 2021]; Lewyn, *When Is Cumulative Voting Preferable to Single-Member Districting* (1995) 25 N.M. L.Rev. 197, 197-98.) The fact that these minority groups may be more integrated in their communities does not mean they do not suffer from vote dilution. (See Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution* (1989) 5 J.L. & Pol. 469, 476.) Where racially polarized voting exists, and a minority community is widely dispersed, a non-district remedy, such as cumulative voting, limited voting or ranked-choice voting, may be the most effective option for remedying vote dilution.

### F. Objective Factors Demonstrate Vote Dilution Here Because a Modified At-Large Voting System Would, at Minimum, Increase the Ability of the Latino Electorate in Santa Monica to Influence an Election.

These factors support a finding that the current electoral system in Santa Monica has undercut the ability of Latinos to influence election results. First, as previously discussed, the Latino electorate in Santa Monica is sufficiently large enough to pass the threshold of exclusion under a ranked-choice voting, cumulative voting, or limited voting system.

Second, evidence shows that Latinos in Santa Monica vote cohesively. (See Trial Ct. Op. at 18 ["The ecological regression analyses of these elections also reveals that when Latino candidates run for the Santa Monica City Council, Latino voters cohesively support those Latino candidates."].) As described

above in Section II.B, *supra,* this suggests that the Latino electorate would, in terms of their ability to influence elections, benefit from non-district remedies.

Third, Latinos in Santa Monica have ordinarily fielded no more than one serious candidate in each election—with the lone exception being 2016. (Trial Ct. Op. at 19-20, ¶ 27.) And Latinos have generally afforded those candidates their overwhelming support. (*Id.*; see also *id.* at 12-13, ¶ 21.) As a result, there is little risk that Latinos would split their votes and thus undermine the effectiveness of a cumulative voting or limited voting remedy.

In sum, Petitioners have shown by reference to these objective factors that any one of the non-district remedies considered by the Trial Court—cumulative voting, limited voting and ranked-choice voting—would afford Latino voters the ability to elect their preferred candidate in each election, or at least improve their ability to influence those elections. Having also shown racially polarized voting, Petitioners have therefore established that Santa Monica's at-large electoral system dilutes the votes of the City's Latino electorate.

## CONCLUSION

For the reasons stated above, and those stated in Petitioners' briefs, this Court should reverse the decision of the Court of Appeal with direction to affirm the trial court's judgment.

Further, this Court should reject the Defendant's request (AB at 69) that in the event of reversal, the Court should remand this case to the Court of Appeal for further consideration. If this Court adopts the standard for dilution presented in this brief and in the Petitioners' briefs, then the trial court's ruling that Petitioners had established that Santa Monica's at-large voting system dilutes the votes of the City's Latino electorate is plainly correct, and there is no need for a remand.

Respectfully submitted,

Dated: May 27, 2021

*/s/ Ira M. Feinberg*

Ira M. Feinberg
Attorney for Amicus Curiae
HOGAN LOVELLS US LLP

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(C)(1) of the California Rules of Court, the enclosed **BRIEF FOR FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS** is produced using 13-point Century Schoolbook typeface including footnotes and contains approximately 9,025 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word court of the computer program used to prepare this brief.

Respectfully submitted,

Dated: May 27, 2021

*/s/ Ira M. Feinberg*

Ira M. Feinberg
Attorney for Amicus Curiae
HOGAN LOVELLS US LLP

## PROOF OF SERVICE

I, Ramona Altamirano, am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 4085 Campbell Avenue, Suite 100, Menlo Park, CA 94025. On May 27, 2021, I served the following documents described as:

- **BRIEF OF FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

On the interested parties addressed as follows:

**SEE ATTACHED LIST OF PARTIES SERVED**

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

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

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

Executed on May 27, 2021, in South San Francisco, California.

Respectfully submitted,

By: */s/ Ramona Altamirano*
Ramona Altamirano

## SERVICE LIST

**Attorneys for Petitioners – Via TrueFiling**

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

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

**Attorneys for Respondents – Via TrueFiling**

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

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

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

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

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