No. S263972

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Plaintiffs and Respondents,

v.

CITY OF SANTA MONICA,

Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE THE LEAGUE OF WOMEN VOTERS OF SANTA MONICA, THE ALLIANCE OF SANTA MONICA LATINO AND BLACK VOTERS, HUMAN RELATIONS COUNCIL SANTA MONICA BAY AREA, AND COMMUNITY FOR EXCELLENT PUBLIC SCHOOLS, IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF SANTA MONICA; PROPOSED ORDER

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 Honorable Yvette M. Palazuelos, Judge Presiding

CHRISTOPHER M. HARDING
(SBN: 76681)
harding@hlkklaw.com
1250 Sixth Street, Suite 200
Santa Monica, California 90401
Telephone: (310) 393-1007

THE LAW OFFICE OF JOSEPH PERTEL
JOSEPH A. PERTEL (SBN: 181657)
jpertel@yahoo.com
2801 Ocean Park Boulevard, #276
Santa Monica, California 90405
Telephone: (310) 503-5791

Attorneys for Amici Curiae The League of Women Voters of Santa Monica, et al.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF THE CITY OF SANTA MONICA

The League of Women Voters of Santa Monica, the Alliance of Santa Monica Latino and Black Voters, the Human Relations Council Santa Monica Bay Area, and Community for Excellent Public Schools seek leave to file the attached Amicus Brief in support of the City of Santa Monica ("City"). Below is a description of these organizations and their interest in this lawsuit.

1. The League of Women Voters of Santa Monica ("League"): The League is a non-partisan political organization that encourages informed and active participation in government and seeks to influence public policy through education and advocacy. https://my.lwv.org/california/santa-monica. Advocacy for voting rights, including expanded access to the vote and voter empowerment, are core components of the League's mission. The League supports representative democracy and systems that produce fair and accurate community representation reflecting the diversity of the community including Santa Monica's Latino and Black communities. The League does not endorse or oppose specific candidates or political parties.

2. The Alliance of Santa Monica Latino and Black Voters ("Alliance"): The Alliance is an *ad hoc* coalition of Latino and Black residents of Santa Monica who share an opinion grounded in decades of experience that Santa Monica's Latino and Black voters have greater voting power and influence under the City's at-large election system than they would have under a

district elections system, as evidenced by the success of Latino and Black voters in electing the candidates of their choice, including Latino and Black candidates. The Alliance is co-chaired by civic leaders Antonio Vazquez, Santa Monica's first Latino Mayor (2015-2016), a City councilmember elected to office three times for a total of ten years (1990-1994 and 2012-2019) and a long-time Santa Monica resident (currently an elected member of the State Board of Equalization), and Nat Trives, Santa Monica's first Black Mayor (1975-77), a City councilmember elected to office two times for a total of eight years (1971-79) and a long-time Santa Monica resident.

3. Human Relations Council Santa Monica Bay Area ("HRC"): HRC is a non-profit organization that promotes a culture of fair treatment, inclusion, and equal access to opportunities, including equal voting rights. http://hrcsantamonica.org/. HRC is a multi-racial organization that views diversity as a vital community asset. HRC supports diverse and inclusive representation in all of our community's institutions including the Santa Monica City Council and Santa Monica's other elected boards. HRC does not endorse or oppose specific candidates or political parties.

4. Community for Excellent Public Schools ("CEPS"): CEPS is a non-profit organization consisting of parents, teachers and civic leaders who share a commitment to ensuring excellent public schools in Santa Monica and Malibu, pre-kindergarten through community college. http://www.excellentpublicschools.org/. For more than 20 years,

CEPS has advocated for various funding measures at the state and local levels to support public education. CEPS also endorses candidates for Santa Monica City Council, the Santa Monica Malibu Unified School District ("SMMUSD") Board of Education and the Santa Monica College ("SMC") Board of Trustees. CEPS is proud of its track record of helping to elect racially-diverse candidates to local public office. CEPS supports Santa Monica's system of at-large elections, which ensures elected officials approach issues from a community-wide perspective and because at-large elections have successfully ensured broad and inclusive community representation on the City Council and other elected boards including for Santa Monica's Latino and Black communities.

This Court granted review on a single issue: "What must a Plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" This Amicus Brief presents the Amici's position on the CVRA vote dilution issue from Amici's unique perspective as Santa Monica-based community organizations with a deep understanding of Santa Monica civic culture, government and political life. From their perspective, this Amicus Brief demonstrates that Santa Monica has achieved significant success in ensuring voting power for Latino and Black voters and electing their preferred candidates (including Latino and Black candidates) under its existing at-large election system.

Of direct relevance to this lawsuit, since the CVRA was adopted in 2002, Latino voters have regularly elected both Latino candidates and Latino-preferred candidates to the Santa Monica

City Council at a rate significantly above the percentage of Latino voters. And Latino voters have achieved substantial success in electing Latino and Latino-preferred candidates to the SMMUSD Board of Education and the SMC Board of Trustees, as well as Latino candidates to the Santa Monica Rent Control Board. (*See* Appendices B & C and discussion in section IB, *post*.)

In the attached Brief, Amici argue that the appropriate baseline for assessing dilution under the CVRA should be whether the protected class in question -- here, Latinos -- has been denied the ability to elect the candidates of their choice ("Latino-preferred candidates") roughly proportional to their percentage in the jurisdiction's voting population. A rough proportionality baseline is supported by United States Supreme Court opinions addressing vote dilution under section 2 of the Federal Voting Rights Act. (*See, e.g., Thornburg v. Gingles* (1986) 478 U.S. 30; *Johnson v. De Grandy* (1994) 512 U.S. 997; and *Bartlett v. Strickland* (2009) 556 U.S. 1.)

A rough proportionality baseline also comports with the CVRA's language and the common meaning of the term dilution. This baseline would serve the CVRA's purpose of protecting members of protected classes against having their votes given less weight compared to others. This baseline would provide an objective standard based on actual election results (not speculation about the hypothetical impact of district elections) that would eliminate much of the confusion and uncertainty that has enveloped the CVRA. And this baseline would encourage other at-large jurisdictions to follow Santa Monica's lead and

build multi-racial political coalitions that support protected-class candidates for local elected office including Latino candidates, Black candidates and other protected-class candidates.

Amici believe the CVRA serves an important public purpose to empower protected-class voters by protecting their equal voting rights and preventing dilution of their voting power. However, Amici are concerned that replacing at-large elections with district elections in Santa Monica would have the perverse effect of reducing Latino voting power and candidate success. This Court should address the vote dilution issue in the context of Santa Monica's specific circumstances: for nearly 20 years since the CVRA's adoption in 2002, multi-racial coalitions have successfully elected Latino and Latino-preferred candidates to the City Council and other public offices at a higher rate than non-Latino and non-Latino-preferred candidates, with both Latino and Latino-preferred representation exceeding the percentage of Latino voters in the community. (*See* Appendices B & C.)

No party in this action authored this Brief in whole or part. Nor did any party or person contribute money toward the

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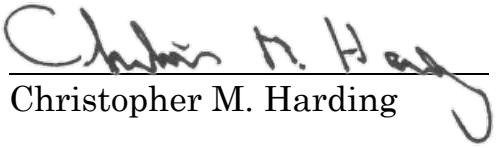
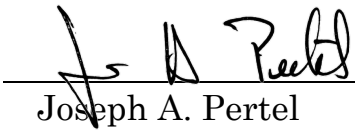
research, drafting, or preparation of this Brief, which was authored entirely on a pro bono basis by the undersigned counsel.

Dated: June 7, 2021



Christopher M. Harding

LAW OFFICE OF JOSEPH PERTEL

By: 

Joseph A. Pertel

Attorneys for Amici Curiae The League of Women Voters of Santa Monica, the Alliance of Santa Monica Latino and Black Voters, the Human Relations Council Santa Monica Bay Area, and Community for Excellent Public Schools

AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF SANTA MONICA

I. INTRODUCTION

A. The City of Santa Monica and At-Large Elections.

The City of Santa Monica is a charter city of approximately 8 square miles in size. Its residential population is about 90,000. Its voting population was 13.6% Latino at the time of trial. (RT 2470:8-10.)[1] For more than a decade, Latino membership on the City Council has exceeded 13.6%.[2]

Santa Monica is governed by a seven-member City Council elected at-large for four-year terms. City Council elections are held in November of even-numbered years concurrent with presidential and gubernatorial elections. Santa Monica's voters

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[1] Citations to "RT" refer to the Reporter's Transcript. According to more recent data, the percentage of Santa Monica's Latino voters has declined to 9.9%. *See* Appendix A, the Declaration of Gary Brown, which includes voter demographics data from the Political Data website (https://www.politicaldata.com).

[2] Latina Gleam Davis has served on the City Council since her appointment in 2009 by prevailing in four consecutive at-large elections (2010, 2012, 2016 and 2020). Latino Antonio Vazquez served on the City Council from 2012-2019 and was succeeded (upon his election to the State Board of Equalization) by Latina Ana Jara who served through December 2020. Since December 2020, three Latinos have served on the City Council: Gleam Davis, Oscar de la Torre and Christine Parra, as well as one Black councilmember, Kristin McCowan. As a result, Black and Latino representatives currently hold four of seven seats (57%) on Santa Monica's City Council despite the fact that members of these protected classes constitute only about 11.7% of the City's voting population. (The percentage of Latino voters in the City is currently 9.9% (*see* note 1 *ante*) and the percentage of Black voters in the City is 1.8%. *See* Appendix A.)

may vote for four candidates for City Council in presidential years and for three candidates for City Council in gubernatorial years.

Thus, under Santa Monica's at-large system, each Santa Monica voter has the opportunity to vote for seven candidates for City Council in a four-year election cycle. (27AA11947, 27AA11994, RT2591:24-28.)[3] Every two years, the City Council selects one of its members to serve as Mayor.[4]

Santa Monica's at-large City Council elections have been in place since voters approved a new City Charter in 1946. At-large elections are also used to elect the seven-member Santa Monica Malibu Unified School District ("SMMUSD") Board of Education and the seven-member Santa Monica College ("SMC") Board of Trustees. [5] And at-large elections are used to elect Santa Monica's five-member Rent Control Board.[6]

Santa Monica's voters have rejected ballot measures to establish district elections for City Council on two occasions. In 1975, City voters decisively defeated Proposition 3, which would have amended the City Charter to establish district elections for City Council. This measure did not have significant support from

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[3] Citations to "AA" refer to the Appellant's Appendix filed in the Court of Appeal.

[4] Santa Monica City Charter section 604.

[5] SMMUSD and SMC include the City of Santa Monica and portions of Malibu (both the City of Malibu and unincorporated portions of Malibu). The percentage of Latino voters in SMMUSD and Santa Monica College is 9.1%. *See* Appendix A. For Santa Monica election results, *see* the City's website at https://www.smvote.org.

[6] Santa Monica City Charter section 1803, subdivision (d).

Latino or Black civic leaders and was opposed by Santa Monica's Latino school board member and its two Black councilmembers. (26AA11593-11594.)

In 2002, the Santa Monica voters again overwhelmingly rejected a ballot measure (Measure HH) that included proposed amendments to the City Charter and Municipal Code to establish district-based City Council elections. The record indicates that 82% of Latino voters voted against this district election measure. (26 AA 11613, 28 AA 12328; RT 5862:21-5864:9.)

B. Santa Monica Campaigns and Elections: Latino Voting Power in Electing Latino and Latino-Preferred Candidates.[7]

Plaintiffs present a false and misleading picture of Santa Monica election campaigns as heavily influenced by racially-

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[7] This Brief's factual presentation is based on the record and on the results of Santa Monica elections for City Council, SMMUSD Board of Education, SMC Board of Trustees and Santa Monica Rent Control Board. All of these election results are a matter of public record. For Santa Monica election results, *see* the City's website at https://www.smvote.org/. In *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 405, fn. 14 [11 Cal.Rptr.2d 51], this Court discussed the benefits of reviewing submissions from amici curiae, including declarations, and noted:

> "Both our rules and our practice accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs. (Cal. Rules of Court rule 14(b).) Amicus Curiae presentations assist the court by broadening its perspective on the issues raised by the parties."

Accordingly, Amici request judicial notice of the Santa Monica election results for 1990-2020 pursuant to Evidence Code sections 452(h) and 459. Judicial notice of election results was granted in

polarized voting, with Latino voters allegedly facing race-based barriers to electing the candidates of their choice. Santa Monica (though imperfect) is one of America's most progressive communities, with racially-diverse political coalitions and elected bodies. This is confirmed by Santa Monica's election results.[8]

Santa Monica campaigns involve a complex interplay of slate campaigns by various organizations and individual candidate campaigns. The slates are usually multi-racial and often overlap, with candidates receiving multiple endorsements. The most common slates are Santa Monicans for Renters' Rights ("SMRR"),[9] the Santa Monica Democratic Club[10] (there is no Republican Club active in Santa Monica election campaigns), Community for Excellent Public Schools ("CEPS"),[11] Santa

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Yumori-Kaku v. City of Santa Clara (2020) 59 Cal.App.5th 385, 408, fn. 7 [273 Cal.Rptr.3d 437] at plaintiffs' request (including one of the attorneys representing plaintiffs in this case, Robert Rubin); *Edelstein v. City & County of San Francisco* (2020) 29 Cal.4th 164, 170, fn. 3 [126 Cal.Rptr.2d 727] (taking judicial notice of municipal election results); and *Huntington Beach City Council v. Superior Ct.* (2002) 94 Cal.App.4th 1417, 1424, fn. 2 [115 Cal.Rptr.2d 439].

[8] *See* Appendices B & C for the success of Latino and Latino-preferred candidates in City Council and School Board elections.

[9] *See* Caruso, *SMRR Backs Incumbents*, Santa Monica Lookout (Aug. 31, 2020), *available at:* https://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2020/August-2020/08_31_2020_SMRR_Backs_Incumbents.html

[10] *See* Harter, *School Board Candidates Vie for Endorsements in a Crowded Race*, Santa Monica Daily Press (Sept. 12, 2020), *available at:* https://www.smdp.com/school-board-candidates-vie-for-endorsements-in-crowded-race/196342.

[11] *See* Dixson, *Political Groups Release Endorsement Information*, Santa Monica Daily Press (Sept. 14, 2020), *available*

Monica Forward,[12] public employee unions (police, fire, teachers, etc.),[13] and in 2020 a "Change Slate" that supported non-incumbent candidates dissatisfied with the overall direction of City government.[14] Endorsements in City Council elections do not break down along racial lines. Rather, they turn on local issues that matter to voters and the endorsing organizations: development, housing, traffic, rent control, public safety, public education, homelessness, etc. Crossover voting is common in Santa Monica elections.[15]

Latino voters, in concert with other voters, have achieved substantial success in electing Latino candidates in Santa Monica's at-large elections used for electing the City Council, School Board, SMC Board of Trustees and Rent Control Board.[16]

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at: https://www.smdp.com/political-groups-release-endorsement-information/196370

[12] *See* Caruso, *Santa Monica Forward Endorses Two Incumbents, Challenger,* Santa Monica Lookout (Sept. 17, 2018), *available at:* *https://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2018/September-2018/09_17_2018_Santa_Monica_Forward_Endorses_Two_Incumbents_Challenger.html*

[13] *See* footnote 11, *ante.*

[14] *See* Catanzaro, *'Change Slate' Plus Incumbent Maintain a Santa Monica City Council* Lead, Santa Monica Mirror (Nov. 4, 2020), *available at:* https://smmirror.com/2020/11/change-slate-plus-incumbent-maintain-santa-monica-city-council-lead/.

[15] In Santa Monica crossover voting cuts in multiple directions, as white candidates are often Latino-preferred and sometimes Latino candidates are not Latino-preferred. (*See* Appendices B & C.)

[16] The CVRA focuses primarily on Latino-preferred candidates (whether Latino or non-Latino). (*See* Elec. Code, § 14027 [prohibiting at-large elections from being imposed in a manner

To be sure, not every Latino candidate wins. Plaintiffs point to Antonio Vazquez's loss in his campaign for City Council in 1994.[17] In doing so, however, they fail to mention that Mr. Vazquez won City Council elections in 1990, 2012 and 2016, and served as Santa Monica's mayor from 2015 to 2016. They further ignore the fact that Mr. Vazquez's spouse, Maria Leon Vazquez, has won *six* consecutive at-large elections to the SMMUSD School Board (2000, 2004, 2008, 2012, 2016 (uncontested)[18] and 2020) even though there are a smaller percentage of Latino voters in SMMUSD than in the City of Santa Monica.[19] And they ignore

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that impairs a protected class' ability to elect candidates of its choice].) Nonetheless, because this Brief is based in part on election results as reported on the City's website (https://smvote.org), this Brief emphasizes the success of both Latino and Latino-preferred candidates. In this regard, the City has pointed to uncontroverted evidence that Latino voters sometimes prefer non-Latino candidates. (25AA11006-11012, 28AA12328-12332.) For City Council elections beginning in 2002, the winning Latino-preferred candidates (including both Latinos and non-Latinos) consist of the following: Kevin McKeown (2002), Kevin McKeown (2006), Richard Bloom (2008), Ken Genser (2008), Kevin McKeown (2010), Pam O'Connor (2010), Terry O'Day (2010), Gleam Davis (2012), Antonio Vazquez (2012), Terry O'Day (2012), Ted Winterer (2012), Kevin McKeown (2014), and Antonio Vazquez (2016). (The record does not contain evidence of Latino-preferred candidates for the 2018 and 2020 elections.) Notably, both Latino and Latino-preferred candidates have won a greater percentage of contested City Council seats (22.2% and 43.3% respectively) than Santa Monica's percentage of Latino voters at the time of trial (13.6%). (*See* Appendix B.)

[17] Plaintiffs' Opening Brief at p. 62.

[18] In the 2016 School Board election, there was no formal election because the number of candidates equaled the number of seats.

[19] *See* footnote 5, *ante*.

Latina Gleam Davis' four successful City Council campaigns in 2010, 2012, 2016 and 2020.[20]

Amici have reviewed Santa Monica City Council election results beginning in 2002 (when the Legislature adopted and Governor Gray Davis signed the CVRA). These election results (including the names of all candidates) are available on the City's website at https://www.smvote.org and are summarized in Appendix B. These election results show:

- Latino/Latino-surnamed candidates made up 14.6% of all City Council candidates from 2002-2020, which is slightly

[20] The trial court acted contrary to the law in finding Gleam Davis not to be Latina based upon a telephone survey conducted by plaintiffs. As the City points out in its Answer Brief (p. 56), there is no legal authority supporting the trial court's survey-based determination of Ms. Davis' ethnicity. Ms. Davis' biological father was Mexican. At trial, Ms. Davis, who was adopted at an early age, testified that she understands herself to be Latina. (RT9080:5: "It's my understanding I'm Latina.") Ms. Davis testified that she has known she was adopted from early childhood (RT9076;22-23: "I've known I was adopted for as long as I can remember"). Ms. Davis further testified: "I know I'm Latina, as long as I've known I was adopted." (RT9077:21-24.) Ms. Davis also testified that she took the initiative to confirm she was Latina through Ancestry DNA and 23andMe via saliva tests and that she publicly describes herself as "Latina, but that I was not raised in a Latina household." (RT9079:2-9, 9080:20-24.) In addition, Ms. Davis testified that before this lawsuit was filed she had a conversation with then PNA president Oscar de la Torre and mentioned that her father was Latino. (RT9081:2-18.) Ms. Davis further testified that she considers her Latina heritage "a matter of ethnicity" (RT9082:3-14), and that she is open about her Latina ethnic heritage in general conversation and never takes any steps to conceal it. (RT9080:6-18, 9080:20-9081:1, 9083:1-4.)

higher than the Latino share of Santa Monica's voting population at the time of trial (13.6%).

- Latino/Latino-surnamed candidates made up 21.6% of the winning City Council candidates from 2002-2020, significantly more than the Latino share of Santa Monica's voting population at the time of trial (13.6%).

- Latino/Latino-surnamed City Council candidates won at a rate of 42.1% from 2002-2020, significantly more than 26.1% for non-Latino candidates.[21]

Moreover, Latino-preferred candidates have achieved extraordinary success in Santa Monica City Council elections. The record indicates that Latino-preferred City Council candidates won 13 of 16 contested City Council elections involving a Latino-preferred candidate (81.25%) and constituted 43.3% of all City Council winners from 2002-2016, well-above Santa Monica's percentage of Latino voters at the time of trial (13.6%).[22]

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[21] At trial, plaintiffs focused on a handful of losing Latino candidates for City Council. In doing so, plaintiffs ignored that the vast majority of candidates for Santa Monica City Council lose. This is because typically there are many more candidates for City Council than there are City Council seats to be filled. But Latino and Latino-preferred candidates succeed in winning elections at a significantly higher percentage than non-Latino and non-Latino-preferred candidates. *See* Appendix B.

[22] *See* Appendix B. The record does not contain evidence concerning Latino-preferred candidates in the 2018 and 2020 City Council elections.

This pattern of Latino and Latino-preferred candidate success is even more pronounced for School Board elections beginning in 2002, as summarized in Appendix C:[23]

- From 2002-2020, Latinos made up a disproportionately high percentage of School Board candidates: 25.8% compared to SMMUSD's Latino voting population of 9.1%.
- Latino candidates for School Board won at an extraordinary rate (86.7%) compared to non-Latino candidates (51%).[24] And Latino-preferred candidates won at an even higher rate, 94.1% (16 of 17), substantially greater than the winning rate of non-Latino-preferred candidates: 36% (9 of 25).[25]

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[23] *See* Appendix C.

[24] Plaintiffs and their counsel were well aware of the extraordinary success of Latino School Board candidates when they filed this lawsuit in April 2016 seeking, *inter alia*, to invalidate at-large elections for SMMUSD's School Board (even though the plaintiffs' complaint did not name SMMUSD as a defendant). Indeed, Oscar de la Torre (who until recently was the President of plaintiff Pico Neighborhood Association) was a member of the School Board at the time this lawsuit was filed along with two other Latino members (Maria Leon Vazquez and Dr. Jose Escarce). In other words, plaintiffs sought to invalidate at-large elections for School Board (claiming vote dilution) when the School Board was 42.9% Latino (three of seven members) compared to a Latino voting population of 9.1%. *See* Appendix A.

[25] *See* Appendix C. For School Board elections, Latino-preferred data is available for elections from 2002-2014. The pattern of Latino-preferred candidate success also holds true for the SMC Board of Trustees. The City's Answer Brief (pp. 58-59) indicates that in the five Board of Trustees elections since the CVRA was adopted for which Latino-preferred data is available (2004, 2006, 2008, 2014 and 2016), Latino-preferred candidates won six of eight races (75%).

To assess Latino voting power and candidate success, it is especially instructive to look at the composition of Santa Monica's four elected bodies when the lawsuit was filed (April 2016) and when this case went to trial (August 2018):

- April 2016: When this lawsuit was filed, the City Council had two Latino members (Antonio Vazquez and Gleam Davis), the School Board had three Latino members (Dr. Jose Escarce, Oscar de la Torre and Maria Leon Vazquez), the SMC Board of Trustees had one Latina member (Dr. Margaret Quinones-Perez), and the Rent Control Board had one Latino member (Steve Duron).

- August 2018: When this lawsuit went to trial, the City Council had two Latino members (Antonio Vazquez and Gleam Davis), the School Board had two Latino members (Oscar de la Torre and Maria Leon Vazquez), the SMC Board of Trustees had one Latina member (Dr. Margaret Quinones-Perez), and the Rent Control Board had one Latino member (Steve Duron).

In other words, both when this lawsuit was filed and when it went to trial, each of Santa Monica's four elected bodies included Latino representatives at a percentage *above* the percentage of Latino voters in the respective jurisdictions.[26]

[26] The percentages of Latino representation at the time of this lawsuit's filing and the time of trial compared to Latino voter percentages are as follows:

- Time of lawsuit's filing (April 2016): City Council (28.6% compared to 13.6%); School Board (42.9% compared to 9.1%); SMC Board of Trustees (14.3% compared to 9.1%); and Rent Control Board (20% compared to 13.6%).
- Time of trial (August 2018): City Council (28.6% compared to 13.6%); School Board (28.6% compared to 9.1%);

This picture of successful Latino voter empowerment in Santa Monica, measured by actual election results, is underscored by the City Council election results in November 2020. Although there were 21 candidates running at-large for 4 four-year seats,[27] the race quickly became a contest between two coalitions of candidates:

- Incumbents Ted Winterer, Gleam Davis (Latina), Ana Jara (Latina), and Terry O'Day, who were endorsed by Santa Monicans for Renters' Rights (except O'Day), the Santa Monica Democratic Club, Community for Excellent Public Schools, and Santa Monica Forward.

- Non-incumbents Oscar de la Torre (Latino), Phil Brock, Christine Parra (Latina), and Mario Fonda-Bonardi, who were part of the "Change Slate."

The results of the 2020 City Council election defy plaintiffs' simplistic version of Santa Monica politics. One member of the incumbent slate, Latina Gleam Davis, won; all three of her running mates (two whites and one Latina) lost. As for the Change Slate, three members were elected: Phil Brock, Latino Oscar de la Torre and Latina Christine Parra. The Change

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SMC Board of Trustees (14.3% compared to 9.1%); and Rent Control Board (20% compared to 13.6%).

[27] In addition, there was an uncontested election for the remaining two-year portion of a City Council seat previously occupied by Greg Morena due to his resignation. Kristin McCowan, who is Black, was appointed in June 2020 to fill this vacancy. Ms. McCowan ran and was elected with the highest number of votes among any of the candidates in the City Council election. *See* City's website at https://www.smvote.org.

Slate's only losing candidate, Mario Fonda-Bonardi, is not a member of a protected class.[28]

Although the vast majority of Santa Monica voters are white,[29] the record shows that over the last quarter century candidates preferred by Latino voters (including Latino candidates) have usually won. (25AA11006-11012, 28AA12328-12332.) Overall, the percentage of Latino candidates elected to public office has generally exceeded the percentage of Latino voters in Santa Monica. This is especially true in the 21st century since the CVRA took effect. Between 2002 and 2016, 14 of the 16 Latino-surnamed candidates who ran in non-City Council elections won. (24AA10693-10694; 26AA11611, 26AA11657, 26AA11692, 26AA11733, 27AA11868, 27AA11947, 27AA11995, 28AA12253.) The only plausible explanation for these election results is a combination of strong Latino voter support for Latino candidates and very substantial white crossover voting for such candidates.[30]

At present, under the City's at-large system for electing councilmembers, the City Council's racial breakdown is three Latino councilmembers, one Black councilmember, and three white councilmembers.[31] One of the newly elected

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[28] *See* City's website at https://www.smvote.org.

[29] The most recent voter registration information for the City of Santa Monica indicates that white (non-Latino) voters exceed 80% of total registered voters. *See* Appendix A.

[30] *See* discussion of racially-polarized voting in section IVE, *post*.

[31] The present make-up of the Santa Monica City Council may be found on the City of Santa Monica's website at

councilmembers – Latino Oscar de la Torre -- was until recently the president of plaintiff Pico Neighborhood Association. Previously, Mr. de la Torre served on the SMMUSD Board of Education for 18 years (2002-2020), having won *five* consecutive School Board elections in 2002, 2006, 2010, 2014 and 2018.[32] The School Board, too, is elected on an at-large basis.

Currently, the City Council, School Board, Board of Trustees and Rent Control Board (with a combined total of 26 elected members) collectively include six Latino members. [33] In other words, Latinos hold 23% of these elected offices.[34]

C. The CVRA's Impacts on Local Agency Election Systems.

Since taking effect, the CVRA has been utilized to pressure many local jurisdictions to convert from at-large to district elections. This includes more than 100 California cities of varying

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https://www.smgov.net/departments/council/content.aspx?id=13705.

[32] These election results may also be found on the City's website at https://www.smvote.org.

[33] These Latino officeholders consist of Gleam Davis, Oscar de la Torre and Christine Parra (City Council), Maria Leon Vazquez (School Board), Dr. Margaret Quinones-Perez (SMC Board of Trustees), and Steve Duron (Rent Control Board).

[34] Black officeholders occupy one seat on the City Council (Kristin McCowan), one seat on the School Board (Keith Coleman), and one seat on the SMC Board of Trustees (Barry Snell). In other words, Black officeholders occupy 14.3% of the seats on each of these elected bodies, which exceeds the percentage of Blacks in the voting population (which is less than 2% in each of the three jurisdictions). (*See* Appendix A. For Santa Monica election results, *see* the City's website at https://www.smvote.org.)

sizes, including small cities of less than 10,000 residents.[35] Nearly all at-large/district election conversions have occurred in response to threatened (not actual) CVRA lawsuits, as most cities and other local agencies have conceded prior to litigation in fear of the CVRA's lack of clarity combined with its provision requiring defendants to pay plaintiffs' legal fees if plaintiffs prevail. (*See* Willon, "*A voting law meant to increase minority representation has generated many more lawsuits than seats for people of color*," Los Angeles Times (Apr. 9, 2017).)[36] Such fee claims can be enormous. In this case, plaintiffs' attorneys are seeking about $22 million in attorney's fees for their work in the trial court (and pretrial) alone.[37]

The most recent CVRA litigation threat was made by plaintiffs' counsel in this case against the City of Irvine. Remarkably, plaintiffs' counsel included in their Irvine demand

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[35] Plaintiffs' Opening Brief acknowledges the far-reaching consequences of CVRA threats of litigation and, more rarely, actual litigation, when it calls the CVRA a "resounding success" at eliminating at-large elections "in hundreds of political subdivisions …." (*See* Plaintiffs' Opening Brief at p. 10.) Nonetheless, there remain many jurisdictions in California (including cities, school districts and community college districts) that continue to elect their members in at-large elections.

[36] *Available at:* https://www.latimes.com/politics/la-pol-ca-voting-rights-minorities-california-20170409-story.html.

[37] *See* the Court of Appeal's Opinion at p. 21 ("…Pico has asked the trial court to order the City to pay it about $22 million in attorney fees and costs.") *See also* Plaintiffs' Motion for Attorney Fees and Expenses, p. 2 (moving for "…fees in the amount of $13,419,398.25 to Shenkman & Hughes PC, $4,380,806.25 to the Parris Law Firm, $2,342,463.75 to the Law Offices of Milton C. Grimes, and $1,278,676.13 to the Law Office of Robert Rubin, as well as expenses of $905,725.14…")

letter a claim of Asian vote dilution even though Irvine's Asian voters make up about 40% of Irvine's registered voters and Asian officeholders make up 60% of Irvine's City Council. Unlike nearly all jurisdictions, Irvine has chosen to resist.[38]

II. QUESTION PRESENTED

This Court granted review on the following question: "What must a Plaintiff prove in order to establish vote dilution under the California Voting Rights Act?"[39]

III. STANDARD OF REVIEW

In their Reply Brief, plaintiffs ask this Court to apply the federal "clearly erroneous" standard of appellate review to the trial court's findings with respect to vote dilution and racially-polarized voting.[40] Plaintiffs fail to explain why federal law rather than California law should govern appellate review of a CVRA decision in the California courts. Plaintiffs also argue for deferential appellate review under the substantial evidence standard.[41] In so arguing, plaintiffs ignore that this Court has adopted a rule of general application requiring *de novo* appellate review of not only legal issues but also mixed questions of law and fact such as those raised in this case.

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[38] Amici's Request for Judicial Notice Exhibit A contains both the letter threatening CVRA litigation against the City of Irvine and the Irvine City Attorney's response.

[39] This Court also ordered the Court of Appeal's opinion to be depublished (but not vacated). Thus, the Court of Appeal's opinion remains the law of the case insofar as it resolved plaintiffs' second cause of action (Equal Protection) in favor of the City and against plaintiffs.

[40] *See* Plaintiffs' Reply Brief at p. 32.

[41] *See* Plaintiffs' Reply Brief at pp. 32-34.

This Court's decision in *Haworth v. Superior Court* (2010) 50 Cal.4th 372 [112 Cal.Rptr.3d 853], is controlling here. In *Haworth*, this Court explained that most mixed questions of law and fact are subject to *de novo* appellate review:

> "One reason that mixed questions of law and fact are reviewed *de novo* in most cases is 'because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." (*Haworth v. Superior Court*, *supra,* 50 Cal.4th at p. 385.)[42]

The rule of law requiring *de novo* appellate review of most mixed questions of law and fact was well-established in 2002 when the CVRA was adopted. For example, in *Crocker National Bank v. City & County of San Francisco* (1990) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139], this Court explained when mixed questions of law and fact require *de novo* review:

> "If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is

[42] Plaintiffs' Reply Brief (p. 33) cites to *Haworth* in its discussion of the standard of appellate review but inexplicably ignores its holding that *de novo* review is required for mixed questions of law and fact that "require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." (50 Cal.4th at p. 385.)

> predominantly legal and its determination is reviewed independently. (Citation omitted.)"

The standard of appellate review applicable in CVRA cases was addressed in the Court of Appeal's recent decision in *Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal. App. 5th 385 [273 Cal.Rptr.3d 437], where the court applied *Haworth* to require *de novo* appellate court review of the mixed questions of law and fact presented. The court explained:

> "Here, the central issue on appeal is whether findings of racially-polarized voting are legally cognizable under California voting rights law if they do not appear to meet the 'usually' standard for the third *Gingles* factor. This requires the application of law to facts. (*Haworth, supra,* 50 Cal.4th at p. 384, 112 Cal.Rptr.3d 853, 235 P.3d 152.) What is more, in the context of state voting rights, it requires careful consideration of legal concepts developed under the rubric of the federal law and inevitably involves the exercise of judgment about the values expressed therein. (*See ibid.*)
>
> We apply our independent judgment in accordance with these principles."

Yumori-Kaku, supra, 59 Cal.App.5th at p. 410.)

De novo appellate review is especially important in the case at hand, where the CVRA's legal principles and their underlying values are such critical components in deciding the two issues presented: vote dilution (Elections Code section 14027) and racially-polarized voting (Elections Code section 14028). Moreover, the need for *de novo* appellate review is accentuated by the CVRA's lack of clarity with respect to dilution at the time of trial.

Accordingly, this Court should confirm that the proper standard of appellate review of the mixed questions of law and fact presented by this case is *de novo* review.

IV. ARGUMENT

A. Vote Dilution Is a Distinct Element of a CVRA Claim Tied to Actual Election Results for Protected-Class Candidates of Choice.

This Court's analysis of the CVRA's vote dilution requirement should begin with the CVRA's language. Three key points are relevant to the question presented:

1. The term "dilution" only appears once in the CVRA: in section 14027. As used in section 14027, dilution is one of two ways in which protected-class voters may have their voting rights impaired by at-large elections. The other way -- "abridgement" -- is not at issue in this lawsuit nor raised in the question presented by this Court's grant of review. Thus, for all practical purposes in this case, vote dilution is synonymous with section 14027.

2. Section 14027 ties dilution to "the ability of a protected class to elect the candidate of its choice or its ability to influence the outcome of an election . . . ." Thus, election results for the candidates preferred by protected-class voters are crucial to determining dilution.

3. The CVRA requires a violation of both section 14027 (vote dilution) and section 14028 (racially-polarized voting) to trigger a judicial remedy. Elections Code section 14029 states:

> "Upon 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."

The central importance of election outcomes under the CVRA is supported by the Court of Appeal's recent decision in *Yumori-Kaku v. City of Santa Clara, supra,* where the court explained the CVRA's approach to vote dilution as follows:

> "The Act provides a private right of action for members of a protected class to challenge at-large election methods in their political subdivision. . . . To prove a section 14027 violation, the protected class must prove that the challenged voting method impairs its ability to elect preferred candidates or influence election outcomes because of the dilution or

> abridgment of its voting rights." (*Yumori-Kaku, supra,* 59 Cal.App.5th at p. 392.)

The court then concluded:

> "… [T]he plaintiff must establish that racially-polarized voting is present and that the method of voting impairs the protected class members' ability to elect their choice of candidates or influence the election outcome." (*Id.* at p. 395.)

Thus, a CVRA lawsuit, to be successful, requires proof of both racially-polarized voting and vote dilution. The CVRA does not mandate district elections upon proof of racially-polarized voting unless proof of vote dilution is also established.[43]

B. The United States Supreme Court's Opinions Addressing Vote Dilution Under the Federal Voting Rights Act, Including *Johnson v. De Grandy*, Should Inform this Court's Approach to Vote Dilution Under the CVRA.

The United States Supreme Court (and other federal courts) have more than three decades of experience in addressing the meaning of vote dilution under the FVRA. Although there are differences between the CVRA and FVRA, Amici submit that the United States Supreme Court's opinions addressing vote dilution

[43] Plaintiffs argue that proof of racially-polarized voting, by itself, constitutes proof of vote dilution (i.e., proof of a violation of Section 14027). Amici disagree. *See* section IVC, *post*. Regardless, as discussed in section IVE, *post*, plaintiffs cannot prove racially-polarized voting given the disproportionate success of Latino and Latino-preferred candidates in Santa Monica. *See* Appendices B & C.

should inform this Court's interpretation of vote dilution under the CVRA.[44]

1. The United States Supreme Court Has Adopted a Rough Proportionality Baseline for Assessing Vote Dilution.

Since the mid-1980s, the United States Supreme Court's opinions addressing the FVRA have used rough proportionality to assess vote dilution, either as a "baseline" or as a factor entitled to "great weight." Rough proportionality considers the success of candidates preferred by protected-class voters compared to the percentage of protected-class voters in the jurisdiction.

Three key United States Supreme Court decisions address vote dilution and rough proportionality, including two cases (*Thornburg v. Gingles* (1986) 478 U.S. 30 [106 S.Ct. 2752] and *Johnson v. De Grandy* (1994) 512 U.S. 997 [114 S.Ct. 2647]) where rough proportionality provided the legal basis for the Court's holding that no vote dilution had occurred. Notably, these Supreme Court decisions speak of rough proportionality in terms of the protected-class' "candidates of choice," not more narrowly of protected-class candidates only.

a. *Thornburg v. Gingles* (1986) 478 U.S. 30: The *Gingles* case is best known for its three prerequisites for assessing vote dilution under the FVRA: (i) the ability to create a majority-minority district, (ii) the minority group is politically cohesive, and (iii) the majority group votes sufficiently as a bloc to enable it "usually to defeat the minority's preferred candidates."

[44] *See* section IVB2, *post*.

(*Thornburg v. Gingles, supra,* 478 U.S. at pp. 50-51.) If these three prerequisites are satisfied, then the analysis proceeds to assess vote dilution based on the totality of the circumstances in accordance with 52 U.S.C. section 10301, subdivision (b). (*Id.* at p. 43.)

But *Gingles* also adopted and applied a rough proportionality baseline to determine vote dilution as a key part of its totality of the circumstances analysis. In fact, rough proportionality was the basis for the Supreme Court's denial of the FVRA challenge to one of the multi-member districts at issue.

Justice Brennan's plurality opinion (joined by Justice White) and Justice O'Connor's concurring opinion (joined by Chief Justice Burger and Justices Powell and Rehnquist) make this clear:

- Justice Brennan's opinion regarding one of the multi-member legislative districts at issue -- House District 23 -- is particularly relevant here. Although the Supreme Court generally upheld the district court's findings, the Supreme Court reversed the district court with respect to House District 23. In support of this ruling, Justice Brennan explained:

> "The District Court did err, however, in ignoring the significance of the sustained success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation by black residents. This persistent proportional

> representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect *representatives of their choice* is not equal to that enjoyed by the white majority." (*Thornburg v. Gingles, supra,* 478 U.S. at p. 77, emphasis added.)

- In her concurring opinion, Justice O'Connor also endorsed use of rough proportionality to assess vote dilution under the FVRA, though in slightly different language:

> "I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. *But as a general rule, such success is entitled to great weight* in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and *to elect representatives of their choice*. With respect to House District 23, the District Court's failure to accord black electoral success such weight was clearly erroneous, and the District Court identified no reason for not giving this degree of success preclusive

> effect. Accordingly, I agree with Justice Brennan that appellees failed to establish a violation of § 2 in District 23." (*Thornburg v. Gingles, supra,* 478 U.S. at pp. 104-105 (conc. opn. of O'Connor, J.), emphasis added.)[45]

b. *Johnson v. De Grandy* (1994) 512 U.S. 997: In Justice Souter's opinion for the Court, joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor and Ginsburg, the Court adopted a rough proportionality baseline for assessing vote dilution in the context of reviewing the boundaries of single-member legislative districts. Justice Souter wrote:

> "… minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' shares in the voting-age population. While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether

[45] Justice Stevens, joined by Justices Marshall and Blackmun, dissented with respect to District 23, giving deference to the district court's decision under the federal "clearly erroneous" standard of appellate review without articulating the place of rough proportionality in assessing a FVRA claim. Justice Stevens, however, subsequently supported a rough proportionality baseline in both *Johnson v. De Grandy, supra* and *Bartlett v. Strickland*, (2009) 556 U.S. 1 [129 S.Ct. 1231].

> members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and *to elect representatives of their choice*.'" (*Johnson v. De Grandy, supra,* 512 U.S. at p. 1000, emphasis added.)

Justice Souter's opinion then explained that vote dilution had not been established because the 1992 reapportionment measure being challenged, Florida's Senate Joint Resolution 2-G (SJR 2-G), "would provide minority voters with an equal measure of political and electoral opportunity." (*Johnson v. De Grandy, supra,* 512 U.S. at p. 1012.) In support of this statement, Justice Souter's opinion reasoned:

> "The record establishes that Hispanics constitute 50 percent of the voting-age population in Dade County and under SJR 2-G would make up supermajorities in 9 of the 18 House districts located primarily within the county. … In other words, under SJR 2-G Hispanics in the Dade County area would enjoy substantial proportionality." (*Id.* at p. 1014.)

Justice Souter's opinion then concluded: "… we see no grounds for holding in these cases that SJR 2-G's district lines diluted the votes cast by Hispanic voters." (*Id.* at pp. 1014-15.)[46]

c. *Bartlett v. Strickland* (2009) 556 U.S. 1: In *Bartlett*, the Court split over the *Gingles* first prerequisite (i.e., the "majority-minority" rule), with the majority supporting a majority-minority requirement and the dissent (written by Justice Souter) arguing for the near-majority standard advocated by the City in its Answer Brief.

In his dissenting opinion, Justice Souter (joined by Justices Stevens, Ginsburg and Breyer) further addressed use of rough proportionality as a baseline for assessing vote dilution. Justice Souter began by highlighting the importance of establishing an undiluted baseline:

> "First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength …." (*Bartlett v. Strickland, supra,* 556 U.S. at p. 29.)

Justice Souter then explained that the Court had previously adopted a rough proportionality baseline, citing to *Johnson v. De Grandy*, *supra*:

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[46] Conversely, lack of proportional electoral success does not prove dilution. As recognized in Justice Souter's opinion, "[l]ack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances including the extent of the opportunities minority voters enjoy to participate in the political processes." (*Johnson v. De Grandy, supra,* 512 U.S. at pp. 1011-12.)

> "We have held that the better baseline for measuring opportunity to elect under § 2, although not dispositive, is the minority's rough proportion of the relevant population. [Citation omitted.] Thus, in assessing § 2 claims under a totality of the circumstances, including the facts of history and geography, *the starting point is a comparison of the number of districts where minority voters can elect their chosen candidate with the group's population percentage*." (*Ibid*., emphasis added.)[47]

In arguing for a CVRA approach to dilution that differs from the FVRA, Plaintiffs focus on the "influence" language in section 14027.[48] But this argument ignores that section 14027 ties "influence" to "election outcomes."[49] The rough

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[47] This rough proportionality baseline for assessing vote dilution has also been used by the lower federal courts. In *Old Person v. Cooney* (2000) 230 F.3d 113, the Ninth Circuit considered lack of proportionality between the number of Native American-majority districts compared to the Native American share of the relevant population in upholding a district court decision that a districting plan for the state legislature diluted the Native American vote in violation of the FVRA. Conversely, in *African-American Voting Rights Legal Defense Fund, Inc. v. Villa* (1997) 54 F.3d 1345, the Eighth Circuit held that proper consideration of proportionality established that no vote dilution had occurred.

[48] *See* Plaintiffs' Opening Brief at pp. 18-19.

[49] The relevant phrase in Elections Code section 14027 is: "… to influence the outcome of an election …."

proportionality baseline established in the FVRA cases thus encompasses the influence language in section 14027: to the extent election outcomes have been "influenced," such influence will be reflected in actual election results and accounted for in assessing whether a protected class has elected the candidates of their choice roughly proportional to their percentage in the voting population. Thus, section 14027's "influence" language and the United State Supreme Court's rough proportionality baseline are consistent with each other.

2. This Court Should Adopt the United States Supreme Court's Rough Proportionality Baseline for Assessing Vote Dilution.

The CVRA does not directly address the relevance of FVRA case law on vote dilution in construing the CVRA's vote dilution provision. Nevertheless, there are persuasive reasons why this Court should adopt the FVRA case law's rough proportionality baseline in clarifying the CVRA's vote dilution provision:

- As recognized in *Yumori-Kaku v. City of Santa Clara, supra*, "[t]he liability determination for a voting rights violation under California law in many respects mirrors the process articulated in the leading federal cases." (*Yumori-Kaku, supra,* 59 Cal.App.5th at p. 395.) And other California appellate courts have also relied on FVRA cases in addressing the CVRA. *See Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667 [51 Cal.Rptr.3d 821]; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 806 [172 Cal.Rptr.3d 333]; and *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 1233 [138 Cal.Rptr.3d 192].

- The CVRA and FVRA share a common purpose: to protect the equal voting rights of protected classes. (*See* Elec. Code, § 14031 [the CVRA is intended to implement the California Constitution's equal protection and right to vote provisions] and *Thornburg v. Gingles*, *supra,* 478 U.S. at p. 44 [the FVRA is intended to protect the equal voting rights of protected-class voters]). As Justice Souter's opinion in *Johnson v. De Grandy, supra,* recognized, rough proportionality is designed to ensure equal voting power for Latinos, Blacks and other protected classes. (*Johnson v. De Grandy*, *supra,* 512 U.S. at p. 1014, fn. 11.)

- Section 14027 requires an assessment of "the ability of a protected class to elect candidates of its choice" and certainly the election of Latino-preferred candidates in proportion to the electoral strength of Latino voters matters in analyzing this question. Thus, there is a textual basis in the CVRA for a rough proportionality baseline.

- Plaintiffs cite to the dictionary definition of dilution as "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."[50] A rough proportionality baseline comports with this dictionary definition of dilution; consistent with this definition, rough proportionality treats electing Latino-preferred candidates roughly proportional to the percentage of Latino voters as "non-dilution."

[50] *See* Plaintiffs' Opening Brief at p. 45.

- The CVRA was approved in 2002, twenty years after the relevant provision of the FVRA (section 2) was last amended. Thus, the California Legislature adopted the CVRA informed by twenty years of FVRA case law. This included the United States Supreme Court's use of a rough proportionality baseline for assessing and resolving vote dilution claims in *Thornburg v. Gingles, supra,* and *Johnson v. De Grandy, supra.*

- Although it is generally agreed that the CVRA does not include the *Gingles* first prerequisite (i.e., the ability to create a majority-minority district as a predicate to liability), the CVRA's legislative history lacks any evidence that the Legislature intended to deviate from the FVRA case law's use of rough proportionality as a "baseline" or factor entitled to "great weight." Counsel for Amici have reviewed the legislative history of the CVRA (Senate Bill 976 adopted in 2002) as provided by plaintiffs in their Request for Judicial Notice.[51] Amici have found nothing in the CVRA's legislative history supporting the notion that the CVRA was intended to deviate from the FVRA case law's rough proportionality baseline.

To the contrary, the two organizations identified throughout the CVRA's legislative history as the CVRA's sponsors -- MALDEF and the ACLU -- explained in correspondence submitted to the Legislature and the Governor that the CVRA was designed to address the severe lack of

[51] Amici support Plaintiffs' Request for Judicial Notice of these legislation history materials concerning the CVRA, filed May 12, 2021.

proportionality in local government for Latinos, Blacks and other protected classes. Specifically:

- MALDEF submitted multiple letters in support of the CVRA that described the lack of proportionality between the Latino population and Latino officeholders as the problem the CVRA was designed to address.[52] In a letter to Governor Gray Davis dated July 3, 2002, MALDEF Staff Attorney Steven Reyes wrote:

> "Although California has already become a majority-minority state, Latino political representation at the local level has not kept pace with the staggering growth of the Latino community over the past decade. In 2000, Latinos comprised 33% of California's population. Yet that same year, according to the 2000 National Association of Latino Elected Official's (NALEO) annual directory, Latinos represented only 2.8% of the total number of county elected officials in California (58/2,013), and only 10.5% of all municipal elected officials (308/2,913). This stark disparity underscores the continued need for measures, legislative or otherwise, to help the governing bodies

[52] *See* Plaintiffs' Request for Judicial Notice ("RJN") Exhibit A at pp. 103-104, 162-163, 165 & 168.

> of local government better reflect the communities they serve. This Act provides an opportunity to create a political leadership that is both diverse and responsive to the needs and concerns of the Latino community."[53]

- The ACLU, in a letter dated May 31, 2001 to State Senator Richard Polanco (the CVRA's author), also identified the CVRA's purpose as addressing "severe underrepresentation of African-Americans, Latinos and other protected groups on local governing boards." The letter continued: "Statewide, the underrepresentation of minority groups on these boards has been dismally and consistently low for decades."[54]

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[53] *See* Plaintiffs' RJN Exhibit A at pp. 103-104. In a prior letter dated May 2, 2001, MALDEF Legislative Counsel Elizabeth Guillen referenced the problem of racially-polarized voting and stated: "When such voting patterns persist in at-large elections, they result in severe underrepresentation of Latinos and other protected groups on local governing boards. Statewide, the underrepresentation of minority groups on those boards has been dismally and consistently low for decades." (*See* Plaintiffs' RJN Exhibit A at p. 168.)

[54] *See* Plaintiffs' RJN Exhibit A at p. 164. The CVRA's legislative record contains similar letters from other organizations supporting the CVRA as a means of ensuring that the governing boards of local government are reflective of the communities they serve. *See*, e.g., letter from LULAC to Governor Gray Davis dated July 3, 2002 (Plaintiffs' RJN Exhibit A at p. 154), letter from the Mexican-American Political Association to Governor Davis dated July 6, 2002 (Plaintiffs' RJN Exhibit A at p. 156), letter from the Southwest Voter Registration Education Project to Governor Davis dated July 8, 2002 (Plaintiffs' RJN Exhibit A at p. 105), and letter from the NALEO Educational

The MALDEF and ACLU letters identifying underrepresentation of Latinos, Blacks and other protected groups as the problem addressed by the CVRA, submitted in a context where the FVRA case law incorporated a dilution baseline ("rough proportionality") directed at correcting such underrepresentation, is powerful evidence that the CVRA should be construed to utilize rough proportionality as its baseline for assessing dilution.[55]

Finally, use of a rough proportionality baseline for assessing vote dilution under the CVRA would insulate the CVRA from an "as applied" attack under the United States Constitution's Equal Protection Clause. In *Cooper v. Harris* (2017) __ U.S. ___ [137 S.Ct. 1455] (opinion for the Court by Justice Kagan, joined by Justices Ginsburg, Breyer, Sotomayor and Thomas), the United States Supreme Court invalidated race-based redistricting where race was the predominant factor in drawing district lines. The Supreme Court did so because such redistricting failed to comply with the compelling state interest test for a race-based remedy. The Supreme Court explained the applicable legal standard as follows:

> "…[i]f racial considerations predominated over others, the design of the district must withstand strict scrutiny. (Citation

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Fund to Governor Davis dated July 3, 2002 (Plaintiffs' RJN Exhibit A at p. 77).

[55] As a matter of public policy, a rough proportionality baseline would promote and incentivize multi-racial political coalitions in local at-large elections that pursue racial diversity on local elected boards (an established practice in Santa Monica).

> omitted.) The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end. (Citation omitted.) This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965." (*Cooper v. Harris, supra,* 137 S. Ct. at pp. 1463-64.)

Given that the United States Supreme Court has endorsed rough proportionality as the vote dilution baseline under the FVRA, such a baseline would likely serve as a constitutional safe harbor if adopted by this Court for the CVRA. However, if this Court were to adopt plaintiffs' approach to dilution, it would risk the CVRA's constitutionality as applied in circumstances such as Santa Monica's where Latino voters are already achieving electoral success substantially above their percentage share of the electorate.[56]

C. Plaintiffs' Approach to Vote Dilution is Contrary to the CVRA's Purpose, Language and Structure.

1. Plaintiffs' Primary Vote Dilution Argument is Contrary to the CVRA.

Plaintiffs' primary dilution argument is that vote dilution is established merely by proving racially-polarized voting. Plaintiffs state in their Opening Brief: "The plain language of the CVRA provides that vote dilution is established by proof of

[56] *See* Appendices B & C.

racially-polarized voting."[57] Plaintiffs then quote (out of context) the lead phrase from section 14028, subdivision (a), which addresses racially-polarized voting: "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 …."[58]

In so arguing, plaintiffs essentially read all of section 14027's dilution language out of the CVRA, an approach that must be avoided whenever possible. (*City of San Jose v. Superior Court* (2006) 5 Cal.4th 47, 55 [19 Cal.Rptr.2d 73] ["We ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead giving every word some significance."].) Moreover, this approach is contrary to the rule of interpretation that statutory provisions are not to be read in isolation from the statute as a whole. As this Court stated in *State Farm Mutual Automobile Ins. Co v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 Cal.Rptr.3d 343]:

> "… we do not consider … statutory language in isolation. Instead, we examine the entire substance of the statute in order to determine the scope

[57] Plaintiffs' Opening Brief at p. 41.

[58] *Id.* at p. 42. In section IVE, *post*, Amici address racially-polarized voting, including the *Gingles* third prerequisite requiring that plaintiffs prove white bloc voting usually defeats the protected-class' preferred candidate. Amici explain that Santa Monica's election results refute plaintiffs' claim of racially-polarized voting in Santa Monica. Thus, even if plaintiffs were to prevail in arguing that dilution is synonymous with racially-polarized voting, plaintiffs should still lose on remand.

> and purpose of the provision, construing its words in context and harmonizing its various parts. Moreover, we read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain its effectiveness." (Citations omitted.)

The opening phrase of section 14028, subdivision (a), thus should not be read as conflicting with and trumping all of section 14027 concerning dilution. Rather, these provisions should be read together and harmonized, with Section 14027's dilution provision retaining its distinct meaning and effect.

Plaintiffs' position concerning vote dilution is also contrary to the overriding rule of statutory interpretation that a measure is to be construed in accordance with its purpose. (*San Leandro Teachers Ass'n v. Governing Bd.* (2009) 46 Cal.4th 822, 831 [95 Cal.Rptr.3d 164].) If the CVRA's vote dilution provision were construed as plaintiffs argue, then district elections would be compelled in circumstances unrelated to the CVRA's purpose of protecting the equal voting rights of protected classes. As the City's Answer Brief observes, the plaintiffs' approach to vote dilution essentially boils down to "plaintiffs win (or at least cannot lose)."[59]

This latter point is not hyperbole or exaggeration. In fact, plaintiffs' counsel in this case have pursued such a position in local jurisdictions up and down the State. Perhaps the most

[59] City's Answer Brief at p. 42.

extreme example is the City of Malibu, the archetype of a very affluent, predominantly white jurisdiction with little racial diversity.[60] Nevertheless, in October 2019 counsel for plaintiffs made written demand on the City of Malibu to replace its at-large City Council elections with district elections or face a CVRA lawsuit. In a July 10, 2020 news article, the *Malibu Times* newspaper explained this litigation threat:

> "Malibu received its demand letter last Oct. 28, alleging that Malibu's at-large voting system violated the CVRA and calling for the city to adopt district-based elections.
>
> 'Voting within the City of Malibu is racially polarized, resulting in minority vote dilution, and, therefore, the city's at-large elections violate the California Voting Rights Act of 2001,' Grimes [one of plaintiffs' attorneys] wrote -- despite the fact Latinos only make up 8.7 percent of the population (according to recent government estimates), and despite the fact that residents of different races are

[60] The City of Malibu's protected-class registered voters are a small percentage of Malibu's voters: 4.2% for Latinos and 0.8% for Blacks. *See* Appendix A.

> scattered all over the city -- not concentrated in one spot."[61]

The CVRA demand letter delivered to the City of Malibu should not come as a surprise. Indiscriminate demands for district elections -- detached from the CVRA's purpose of advancing protected-class voter empowerment and equality -- are the logical outgrowth of plaintiffs' position concerning vote dilution.

Plaintiffs' approach is, quite clearly, inconsistent with the Legislature's intent in adopting the CVRA. Had the Legislature intended to mandate district elections everywhere, then a simple measure imposing a blanket requirement of district elections (or a prohibition against at-large elections) would have been the obvious path. But the Legislature chose a different path, and they did so deliberately. Throughout the legislative process for the CVRA (SB 976), the CVRA's author assured his colleagues (and the Governor) that the CVRA did not mandate the abolition of at-large elections. This was confirmed in a report to the Assembly Committee on Judiciary for its June 4, 2002 hearing:

> "This Bill Does Not Mandate the Abolition of At-large Election Systems. Unlike prior legislation regarding at-large methods of election, discussed

[61] The threatened Malibu CVRA litigation has been placed on hold pending the outcome of this lawsuit involving Santa Monica. *See* Tallal, *Santa Monica Voting Rights Suit Could Set Precedent for Malibu*, The Malibu Times, Jul. 10, 2020, at http://www.malibutimes.com/news/article_443aa8ec-c2f6-11ea-b194-4bf884021b49.html.

> below, this bill does not mandate that any political subdivision convert at-large districts to single-member districts. Instead, this bill simply prohibits at-large election systems from being used to dilute or abridge the rights of voters in protected classes." (Emphasis in the original.) [62]

2. Plaintiffs' Alternative Vote Dilution Argument Fails to Provide a Workable Baseline and Is Inconsistent with the CVRA.

Plaintiffs also present an alternative argument concerning vote dilution. This argument concedes that the CVRA requires both racially-polarized voting and proof that district elections would improve the protected class's ability "to elect its preferred candidates or influence election outcomes."[63] But plaintiffs then conflate and confuse vote dilution with racially-polarized voting, thus circling back to their primary dilution argument discussed above.[64]

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[62] This report may be found at plaintiffs' RJN Exhibit A at pp. 128-129.

[63] Plaintiffs' Opening Brief at pp. 44-47.

[64] *See* Plaintiffs' Opening Brief at p. 46 ("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") and p. 58, heading 1 ("The Trial Court Correctly Found that Defendant's City Council Elections Exhibit Racially Polarized Voting Which Dilutes Latinos' Voting Strength").

Plaintiffs' alternative argument acknowledges the need for a benchmark for assessing whether vote dilution has occurred.[65] As plaintiffs recognize, dilution is a comparative term.[66] But plaintiffs argue that the benchmark for comparison purposes should be "a reasonable alternative voting practice,"[67] which necessarily requires speculation about future election outcomes under a different elections system (e.g., district elections). Plaintiffs' proposed benchmark for assessing vote dilution is not an objective, measurable standard grounded in past election results.

Indeed, the degree of speculation required by plaintiffs' alternative approach to vote dilution is extraordinary. As the City's Answer Brief observes, even plaintiffs' own expert witness conceded that his analysis was "in no way predictive of what would happen in a district election."[68]

Moreover, plaintiffs' speculative benchmark of how Latinos might fare under a district elections system is contrary to the CVRA's structure. Under the CVRA, district elections are one of the potential remedies only upon proof of a CVRA violation. (*See* Elec. Code, § 14029 ["Upon 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."].) Nothing in the CVRA supports plaintiffs' argument that the threshold question of

[65] *Id.* at p. 47.
[66] *Id.* at p. 45.
[67] *Id.* at p. 46.
[68] *See* City's Answer Brief at p. 42.

whether the CVRA has been violated hinges on speculation about what would happen if district elections were in place. Nor is speculation about the impact of district elections relevant under Elections Code section 14028, subdivision (b), which references past elections and not hypothetical future elections.[69]

Finally, Justice Souter in his *Bartlett v. Strickland* dissent (joined by Justices Stevens, Ginsburg and Breyer) rejected essentially the same approach to vote dilution as plaintiffs are taking in this case. Justice Souter explained:

> "First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength (citation omitted). Several baselines can be imagined; one could, for example, compare a minority's voting strength under a particular districting plan with the maximum strength possible under any alternative. Not surprisingly, we have conclusively rejected this approach; the VRA was passed to guarantee minority voters a fair game, not a killing. *See Johnson v. De Grandy* (1994) 512 U.S. 997, 1016-1017, 114 S.Ct. 2647, 129 L.Ed.2d 775."

[69] Nor do any of the "other factors" referenced in section 14028, subdivision (e), provide any support for plaintiffs' proposed benchmark.

(*Bartlett v. Strickland, supra,* 556 U.S. at pp. 28-29 (dis. opn. of Souter, J.).)

Amici submit that Justice Souter's reasoning should be followed by this Court in clarifying the meaning of vote dilution. Like the FVRA, the purpose of the CVRA is to achieve equality for protected-class voters. A vote dilution baseline of rough proportionality serves this purpose; plaintiffs' proposed baseline of hypothetical election results under an alternative election system does not.

Accordingly, Amici urge this Court to adopt rough proportionality as the CVRA baseline for assessing dilution.

D. In Santa Monica, District Elections Would Make Winning Elections More Difficult for Latino Candidates and Dilute the Voting Power of the Vast Majority of Santa Monica's Latino Voters.

Plaintiffs base their case largely on speculation that a conversion from at-large to district elections in Santa Monica will somehow enhance the power of Latino voters to elect their preferred candidates. Amici believe a realistic assessment of the facts shows the opposite: Latino voters and their preferred candidates would be harmed rather than helped by imposition of district elections in Santa Monica.

1. District Elections Would Harm Latino (and Black) Candidates in the Proposed Pico Neighborhood District and City-Wide.

District elections would be problematic for Latino candidates in Santa Monica, including Latino incumbents seeking re-election. A shift from at-large to district elections would pose a particular problem for three recently-elected

protected-class City Council members: Oscar de la Torre, Christine Parra and Kristin McCowan (two Latinos and one Black). All three live in the proposed Pico Neighborhood district ordered by the trial court at plaintiffs' request. If the CVRA is construed to impose district elections, these three councilmembers, as well as all future protected-class candidates from this voting district, would be forced to compete against each other for a single seat. The loss of two of these three minority City Council seats would be inevitable.

In addition, the two Latina officeholders on the School Board and SMC Board of Trustees (Ms. Leon Vazquez and Dr. Quinones-Perez) would face much more difficult elections because neither resides in the Pico Neighborhood. And other Latino candidates seeking election outside the Pico Neighborhood would also face overwhelmingly white electorates -- far less diverse than in existing at-large elections.

2. <u>District Elections Would Dilute the Votes of the Vast Majority of Latino Voters Who Live Outside the Proposed Pico Neighborhood District</u>.

The record confirms that the vast majority of Santa Monica's Latino voters (about two-thirds) reside outside the Pico Neighborhood district ordered by the trial court.[70] Requiring district elections in Santa Monica would clearly dilute the power of such Latino voters to elect candidates of their choice because they would be voting in districts with significantly lower

[70] *See* City's Answer Brief at pp. 11, 45, 63.

percentages of Latino voters than the city-wide percentage of such voters.

This dilemma was captured by writer Frank Gruber, a member of the Santa Monica League of Women Voters, in a recent column entitled "To district or not to district":

> "There was a lot of discussion in the Court of Appeal ruling about whether a non-majority Latinx district could be a suitable remedy under the CVRA for discrimination against minority voters, and the plaintiffs have appealed on the grounds that it should not be necessary under the CVRA to have a majority-minority district. To me, however, that discussion skips the primary question; namely, what happens to the voting power of the majority of Latinx residents not included in the 'Latinx district'? The plaintiff's remedy, districts, would put a lot, but not a majority, of Latinx residents in a district where they theoretically would have more power and representation in one election every four years. Meanwhile a majority of Latinx residents (along with all other voters in the city) would lose the right every two years to vote for four or three council

> members. How would that increase Latinx voting power? A minority of Latinx voters would trade the right to vote for all council members for a somewhat better chance of electing a Latinx candidate in one district, but the majority of Latinx voters would lose the right to vote for all council members while getting nothing in return."[71]

The record in this case supports Mr. Gruber's observations and concerns. At trial, the City demonstrated that Latino voters outside the proposed Pico Neighborhood district would be submerged into six overwhelmingly white districts. (RT5354:25-5355:11, RT6947:23-6948:7, RT7215:17-23.) This same point is true for the City's Black and Asian voters. (RT8338:23-8339:11, RT8340:20-8341:15, 25AA11006-11012.)

This Court has held that it is appropriate to consider the practical, real-world consequences of competing statutory interpretations. (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567 [67 Cal.Rptr.3d 468].) In assessing vote dilution under the CVRA, this Court should consider all Latino voters in Santa Monica and not only the minority of such voters who reside in the proposed Pico Neighborhood district.

[71] Gruber, *To district or not to district,* The Healthy City Local (Nov. 27, 2020): Frank Gruber's Santa Monica blog, at https://thehealthycitylocal.com/2020/11/27/to-district-or-not-to-district/.

Finally, it is important to note that a majority of Santa Monica's Latino voters prefer at-large elections rather than district elections. Indeed, when presented with a ballot measure to convert from at-large to district elections in 2002, Latino voters voted overwhelmingly (82%) to reject this measure. (26AA11613, 28AA12328; RT5862:21-5864:9.)[72] And many leaders in Santa Monica's Latino community support at-large elections and oppose conversion to districts.[73] This makes perfect sense: Why would Latino voters trade seven votes for City Council every four years for a single vote only when the City's at-large election system is generating such positive results for Latino voters and both Latino and Latino-preferred candidates?

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[72] *See Solomon v. Liberty County Com'rs* (2000) 221 F.3d 1218, 1234. (In rejecting a FVRA challenge to at-large elections, the Eleventh Circuit quoted the district court's finding that "black and white voters in Liberty County voted overwhelmingly against single-member districts….").

[73] Amicus Antonio Vazquez is one such leader. And at trial, long-time Santa Monica Latina leader Ana Jara (who resides in the Pico neighborhood) testified in support of the City's at-large election system. Ms. Jara is active in the Human Relations Council Santa Monica Bay Area. She also served on the Santa Monica City Council from 2019 to 2020 (to fill a vacancy created when former Councilmember Vazquez was elected to the State Board of Equalization).

E. If this Court Addresses Racially-Polarized Voting, the Court Should Confirm that Under the CVRA Racially-Polarized Voting Requires Proof that White Bloc Voting Usually Defeats Latino Voter-Preferred Candidates and that Such Bloc Voting is Inconsistent With Santa Monica's Election Results.

This Court granted review on a single issue only: vote dilution. Nevertheless, plaintiffs persist in briefing all issues related to its CVRA claim including racially-polarized voting, an issue not encompassed by this Court's grant of review and not reached by the Court of Appeal below in its opinion.[74] Although Amici expect this Court to proceed consistent with its limited scope of review and reserve the issue of racially-polarized voting for further proceedings on remand, Amici are addressing racially-polarized voting in this Brief in response to plaintiffs' arguments.

In the event this Court addresses racially-polarized voting, this Court should provide guidance as to what is required to prove racially-polarized voting under the CVRA. In particular, this Court should confirm that:

- The CVRA incorporates the FVRA case law concerning racially-polarized voting (*see* Elec. Code § 14026, subd. (e)); and
- Under the FVRA case law, racially-polarized voting requires proof that a white bloc vote will usually defeat the

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[74] *See* Plaintiffs' Opening Brief at pp. 40-41, 58-64 and Plaintiffs' Reply Brief at pp. 35-41.

combined strength of minority support plus white crossover votes. (*Thornburg v. Gingles*, *supra*, 478 U.S. at p. 56.)[75]

Plaintiffs give lip service to the "usually defeat" requirement, but sidestep its implications in Santa Monica. And plaintiffs' main expert witness at trial, Dr. Kousser, has previously had his approach to racially-polarized voting rejected in court as inconsistent with the "usually defeat" legal standard.

This occurred in *Cano v. Davis* (2002) 211 F.Supp. 2d 1208, a decision rejecting a FVRA challenge by a three-judge panel (Circuit Judge Reinhardt and District Judges Snyder and Morrow). In rejecting Dr. Kousser's testimony on racially-polarized voting, the court stated:

> "Dr. Kousser's conclusion that there is racially-polarized voting in the area encompassed within SD 27 focuses exclusively on the relative percentage of Latino and white voters who chose the Latino candidate. It does not address whether the percentage of white (non-Latino) voters who voted against the candidate was sufficient to defeat him or her. Consequently, to the extent Dr. Kousser concludes that there is 'racially-

[75] The CVRA cases that address racially-polarized voting cite to this rule. *See*, e.g., *Jauregui v City of Palmdale, supra,* 226 Cal.App.4th at p. 789; *Sanchez v. City of Modesto, supra*, 145 Cal.App.4th at p. 688; and *Yumori-Kaku v. City of Santa Clara, supra,* 59 Cal.App.5th at p. 394.

> polarized' voting in the district, it is not the type of 'legally significant' polarization about which *Gingles* speaks.'" (*Cano v. Davis, supra,* 211 F.Supp. 2d at p. 1238, fn. 34.)

The court in *Cano* then focused on the crucial importance of white cross-over voting and election results in assessing racially-polarized voting:

> "Plaintiffs' evidence does show that Latinos prefer Latino candidates in far higher proportions than do non-Latinos; but it also shows that substantial numbers of non-Latinos support Latino candidates, with a result that Latino candidates actually win elections. Thus, the evidence of racial polarization is insufficient as a matter of law to establish the 'effects' required in a vote dilution case." (*Id.* at p. 1238.)

In other words, election results are controlling: racially-polarized voting is not established unless it usually has adverse electoral consequences for protected-class voters and their preferred candidates. That requirement is baked into the FVRA case law's definition of racially-polarized voting. Proof that Latino voters tend to vote for Latino candidates and white voters tend to vote for white candidates, by itself, is insufficient to prove racially-polarized voting.

Notably, in *Yumori-Kaku v. City of Santa Clara, supra*, Dr. Kousser testified with respect to racially-polarized voting that "the most important fact, ascertained without any statistical analysis whatsoever, is that all of the Asian-American candidates lost." (*Yumori-Kaku, supra,* 59 Cal.App.5th at p. 400.) Amici agree with Dr. Kousser that election results matter most in assessing racially-polarized voting (as they do in assessing vote dilution). In Santa Monica, of course, the situation is quite the opposite: Latino-preferred candidates usually win.

Indeed, the record shows that between 2002-2016, Latino-preferred City Council candidates had a success rate of 81.25% (13 of 16).[76] This same point holds true for the School Board: from 2002-2014, Latino-preferred School Board candidates had a success rate of 94.1% (16 of 17).[77]

Thus, Santa Monica's election results since the CVRA was adopted in 2002, in combination with the FVRA case law, refute plaintiffs' position on racially-polarized voting. With Latino-preferred candidates winning elections at such extraordinary rates, 81.25% in City Council elections and 94.1% in School Board elections, plaintiffs cannot possibly satisfy the racially-polarized voting/"usually defeat" requirement.

Santa Monica election results prove that Santa Monica is a classic cross-over city where a combination of Latino votes and white cross-over votes usually elect Latino-preferred candidates. Every member of the City Council (and the School Board, SMC

[76] *See* Appendix B.
[77] *See* Appendix C.

Board of Trustees and Rent Control Board) has an incentive to listen to every voter. And Latino voters matter to every member of the City Council (and the members of the other elected bodies in Santa Monica) because Latino voters are often the difference between winning and losing. Given the success of Latino-preferred candidates in Santa Monica's at-large elections, replacing such elections with district elections would have the perverse effect of reducing Latino voting power and Latino-preferred candidate success. That is why Amici have joined together to file this Brief.

V. CONCLUSION

One can easily imagine jurisdictions with at-large elections that effectively dilute the voting power of Latinos and the chances of their preferred candidates to be elected. But the City of Santa Monica (and SMMUSD and SMC) are not such jurisdictions.

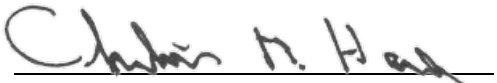
In Santa Monica, Latinos have achieved significant political success -- both as voters and as candidates for City Council and other elected offices. Indeed, since the CVRA was adopted in 2002, both Latino and Latino-preferred candidates have succeeded in at-large elections at a statistical level well-above the percentage of Latinos in the community's voting population. And Latino and Latino-preferred candidates for City Council win at a substantially higher rate than other candidates. Santa Monica, like all communities, faces challenges posed by systemic racism and the attendant inequalities that affect Latinos, Blacks and others. But there is no basis in law or the

record to conclude that the Latino vote in Santa Monica has been "diluted" by any reasonable measure of dilution. Santa Monica election results, which matter most in assessing vote dilution and racially-polarized voting, prove otherwise.

Accordingly, Amici urge this Court to clarify the meaning of vote dilution under the CVRA and remand this case to the Court of Appeal to address the City's appeal concerning both vote dilution and racially-polarized voting, with the Court of Appeal to exercise *de novo* review in accordance with this Court's decisions in *Haworth v. Superior Court, supra,* and *Crocker National Bank v. City & County of San Francisco, supra.*

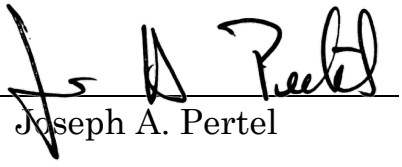
Dated: June 7, 2021

Respectfully submitted,



Christopher M. Harding

LAW OFFICE OF JOSEPH PERTEL

By: 

Joseph A. Pertel

Attorneys for Amici Curiae The League of Women Voters of Santa Monica, the Alliance of Santa Monica Latino and Black Voters, the Human Relations Council Santa Monica Bay Area, and Community for Excellent Public Schools

APPENDIX A: DECLARATION OF GARY BROWN REGARDING VOTER DEMOGRAPHICS

I, GARY BROWN, declare:

1. I am the owner and operator of Political Data LLC, a software and data company that gathers voter information and other political data from various official sources including the Los Angeles County Registrar-Recorder/County Clerk's office. Our data is used by political campaigns and other clients.

2. One product we provide is registered voter demography data within various jurisdictions and districts categorized by ethnicity. Registered voter demography data as to ethnicity is compiled by us in an online database that is accessible through our proprietary website: www.politicaldata.com.

3. To determine the ethnicity of registered voters within a given jurisdiction or district, we are using 2010 census data refined by updated projections, our proprietary ethnic surname dictionary, voter registration declared place of birth, voter registration declared preferred language, and our proprietary database of identified race and ethnicity. The principal purpose of our ethnic and racial identification efforts is to assist political organizations with targeted communications to specific groups of voters by ethnicity and race.

4. Our database currently indicates the following demographic data as to ethnicity for registered voters in the City of Santa Monica, Santa Monica Malibu Unified School District,

Santa Monica Community College District, and City of Malibu, respectively:

City of Santa Monica:
African-American – 1,318 (1.8%)
Asian (All) – 4,348 (6.0%)
Latino – 7,252 (9.9%)
Not African-Amer., Asian, or Latino – 60,147 (82.3%)
Chinese – 1,473 (2.0%)
Filipino – 449 (0.6%)
Japanese – 737 (1.0%)
Korean – 579 (0.8%)
Vietnamese – 289 (0.4%)
Armenian – 395 (0.5%)
East Indian – 713 (1.0%)

Santa Monica Malibu Unified School District:
African-American – 1,406 (1.7%)
Asian (All) – 4,709 (5.5%)
Latino – 7,766 (9.1%)
Not African-Amer., Asian, or Latino – 71,132 (83.7%)
Chinese – 1,592 (1.9%)
Filipino – 491 (0.6%)
Japanese – 797 (0.9%)
Korean – 633 (0.7%)
Vietnamese – 316 (0.4%)
Armenian – 487 (0.6%)
East Indian – 781 (0.9%)
Jewish – 6,868 (8.1%)
Persian – 950 (1.1%)

Santa Monica Community College District
African-American – 1,406 (1.7%)
Asian (All) – 4,702 (5.5%)
Latino – 7,764 (9.1%)
Not African-Amer., Asian, or Latino – 71,072 (83.7%)
Chinese – 1,591 (1.9%)
Filipino – 491 (0.6%)
Japanese – 797 (0.9%)
Korean – 629 (0.7%)
Vietnamese – 316 (0.4%)

Armenian – 487 (0.6%)
East Indian – 781 (0.9%)

City of Malibu
African-American – 68 (0.8%)
Asian (All) – 193 (2.2%)
Latino – 364 (4.2%)
Not African-Amer., Asian, or Latino – 8,034 (92.8%)
Chinese – 65 (0.8%)
Filipino – 26 (0.3%)
Japanese – 31 (0.4%)
Korean – 27 (0.3%)
Vietnamese – 12 (0.1%)
Armenian – 76 (0.9%)
East Indian – 47 (0.5%)
Jewish – 836 (9.7%)
Persian – 78 (0.9%)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 13th day of May, 2021 at Santa Ana, California.

GARY BROWN

APPENDIX B: SANTA MONICA CITY COUNCIL ELECTIONS DATA

1. Santa Monica Latino Candidate Success.

The chart below was prepared based upon Santa Monica City Council election results as shown on the City's website (https://smvote.org), including its archives. This chart includes Latino/Latino-surnamed candidates and winners.

Year	Number of Candidates	Number of Latino/ Latino-Surnamed Candidates	Number of Winners	Number of Latino/ Latino-Surnamed Winners
2002	9	1	3	0
2004	16	1	4	0
2006	10	1	3	0
2008	13	1	4	0
2010	10	0	3	0
2010 (special)	5	1	2	1
2012	15	4	4	2
2014	14	1	3	0
2016	10	3	4	2
2018	7	0	3	0
2020	21	6	4	3
Totals:	**130**	**19**	**37**	**8**

- 14.6% of City Council candidates were Latino/Latino-surnamed (19 of 130), slightly higher than the percentage of Latino voters at the time of trial (13.6%).

- 21.6% of winning City Council candidates were Latino/Latino-surnamed (8 of 37), substantially greater than the percentage of Latino voters at the time of trial (13.6%).
- Latino/Latino-surnamed candidates won 42.1% of their City Council election campaigns (8 of 19). In contrast, non-Latino/non-Latino-surnamed candidates won 26.1% of their election campaigns (29 of 111).
- The eight (8) winning Latino/Latino-surnamed candidates are: Gleam Davis ('10, '12, '16, '20), Antonio Vazquez ('12, '16), Oscar de la Torre ('20), and Christine Parra ('20).

2. Santa Monica Latino-Preferred Candidate Success.

The following chart was prepared based on expert evidence in the record concerning the success of Latino-preferred candidates for City Council and the City's website of City Council election results. *See* Trial Exhibits 272, 275, 278, 281, 284, 287, 290 & 1653A (reproduced in the Addendum to City's Answer Brief) and https://www.smvote.org.

Year	Number of Candidates	Number of Latino-Preferred Candidates	Number of Winners	Number of Latino-Preferred Winners
2002	9	2	3	1
2004	16	1	4	0
2006	10	1	3	1
2008	13	2	4	2
2010	10	2	3	2
2010 (special)	5	1	2	1
2012	15	4	4	4
2014	14	1	3	1
2016	10	2	4	1
subtotals	102	16	30	13
2018	7	NA*	3	NA*
2020	21	NA*	4	NA*
Totals:	**130**	**16**	**37**	**13**

*NA means not available.

- According to the record, the thirteen (13) winning Latino-preferred candidates are Kevin McKeown ('02), Kevin McKeown ('06), Richard Bloom ('08), Ken Genser ('08), Kevin McKeown ('10), Pam O'Connor ('10), Terry O'Day ('10), Terry O'Day ('12), Ted Winterer ('12), Gleam Davis ('12), Antonio Vazquez ('12), Kevin McKeown ('14), and Antonio Vazquez ('16).
- For the years when Latino-preferred data is available (2002-2016):
    - Latino-preferred City Council winners constitute 43.3% of all City Council winners (13 of 30), substantially more than the percentage of Latino voters at the time of trial (13.6%).

- Latino-preferred City Council winners constitute 81.25% (13 of 16) of all Latino-preferred City Council candidates. In contrast, non-Latino-preferred candidates win only 19.8% of their elections (17 of 86).

- Latino-preferred City Council candidates constitute 15.7% (16 of 102) of the total number of candidates for the years when Latino-preferred candidates are known (2002-2016). This is more than the percentage of Latino voters at the time of trial (13.6%).

- Certain Latino/Latino-surnamed candidates who lost were not Latino-preferred. They are Gleam Davis ('06), Linda Piera-Avila ('08), Roberto Gomez ('12), Steve Duron ('12) and Zoe Muntaner ('14).

- Expert analysis of Latino-voter preferences for the 2018 and 2020 elections is not in the record, so the record does not show whether the three Latino/Latino-surnamed candidates who lost in 2020 (Dominic Gomez, Ana Jara and Zoe Muntaner) were preferred by Latino voters.

APPENDIX C: SANTA MONICA MALIBU UNIFIED SCHOOL DISTRICT ELECTIONS DATA

1. Santa Monica Latino Candidate Success.

The chart below was prepared based upon School Board election results as shown on the City's website (https://smvote.org), including its archives. This chart includes Latino/Latino-surnamed candidates and winners.

Year	Number of Candidates	Number of Latino/ Latino-Surnamed Candidates	Number of Winners	Number of Latino/ Latino-Surnamed Winners
2002	7	1	4	1
2004	4	3	3	2
2006	6	1	4	1
2008	4	2	3	2
2010	8	1	4	1
2012	6	2	3	2
2014	7	1	4	1
2016*	3	1	3	1
2018	5	1	4	1
2020	8	2	3	1
Totals:	**58**	**15**	**35**	**13**

* Because in 2016 there were three candidates for three School Board seats, no election was held. The chart includes the three candidates as winners, including Latina Maria Leon Vazquez.

- 25.9% of School Board candidates were Latino/Latino-surnamed (15 of 58), compared to only 9.1% Latino voters in SMMUSD.

- 37.1% of winning School Board candidates were Latino/Latino-surnamed (13 of 35), compared to only 9.1% Latino voters in SMMUSD.
- Latino/Latino-surnamed School Board candidates won 86.7% of their School Board election campaigns (13 of 15). In contrast, non-Latino/non-Latino-surnamed School Board candidates won only 51% of their School Board election campaigns (22 of 43).
- The thirteen (13) winning Latino/Latino-surnamed School Board candidates are: Oscar de la Torre ('02, '06, '10, '14, '18), Maria Leon-Vazquez ('04, '08, '12, '16, '20), and Jose Escarce ('04, '08, '12).
- The losing Latino/Latino-surnamed School Board candidates are: Ana Maria Jara ('04), and Esther Hickman ('20).

2. <u>Santa Monica Latino-Preferred Candidate Success</u>.

The following chart was prepared based on expert evidence in the record concerning the success of Latino-preferred candidates for School Board and the City's website of School Board election results. *See* Trial Exhibit 1653A (which is reproduced in the Addendum to the City's Answer Brief) and https://smvote.org.

Year	Number of Candidates	Number of Latino-Preferred Candidates	Number of Winners	Number of Latino-Preferred Winners
2002	7	2	4	2
2004	4	3	3	2
2006	6	2	4	2
2008	4	2	3	2
2010	8	2	4	2
2012	6	3	3	3
2014	7	3	4	3
subtotals	42	17	25	16
2016	3	NA*	3	NA*
2018	5	NA*	4	NA*
2020	8	NA*	3	NA*
Totals:	**58**	**17**	**35**	**16**

* NA means not available.

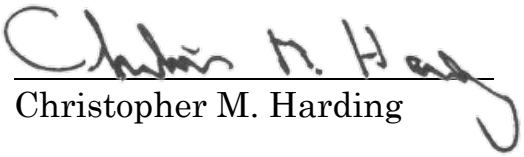
- According to the record, the sixteen (16) winning Latino-preferred School Board candidates are Oscar de la Torre ('02), Julia Brownley ('02), Maria Leon Vazquez ('04), Jose Escarce ('04), Oscar de la Torre ('06), Emily Bloomfield ('06), Maria Leon Vazquez ('08), Jose Escarce ('08), Oscar de la Torre ('10), Ralph Mechur ('10), Maria Leon Vazquez ('12), Jose Escarce ('12), Ben Allen ('12), Oscar de la Torre (14), Richard Tahvildaran-Jesswein ('14) and Laurie Lieberman ('14).

- For the years when Latino-preferred data is available (2002-2014):
    - Latino-preferred School Board candidates made up 40.5% of total candidates (17 of 42), substantially greater than the percentage of Latino voters in SMMUSD (9.1%).
    - Latino-preferred School Board candidates won at a rate of 94.1% (16 of 17), substantially greater than the winning rate for non-Latino-preferred candidates: 36% (9 of 25).
    - Latino-preferred School Board candidates won 64% of School Board seats (16 of 25), substantially greater than the percentage of Latino voters in SMMUSD (9.1%).
- The only Latino-preferred School Board candidate who did not win, Ana Jara ('04), testified in support of the City's position at trial. Ms. Jara is a board member of Amicus Human Relations Council Santa Monica Bay Area.
- Expert analysis of School Board elections is not in the record for the 2018 or 2020 elections, so the record does not show whether Latina Esther Hickman who lost in 2020 was Latino-preferred.

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this amici curiae brief contains 13,417 words, as counted by Microsoft Word, excluding the cover page, the application, the table of contents, the table of authorities, this certificate, and the signature blocks. This word count does include the Appendices attached to this brief.

DATED: June 7, 2021



Christopher M. Harding

PROPOSED ORDER

Amici Curiae's Application on behalf of The League Of Women Voters Of Santa Monica, et al., for leave to file their brief dated June 7, 2021, is hereby granted.

Date: _____, 2021 _____
Chief Justice

PROOF OF SERVICE

I, Christopher M. Harding, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years, and I am not a party to this action. My address is 1250 Sixth Street, Suite 200, Santa Monica, California 90401. On June 7, 2021, I served:

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE THE LEAGUE OF WOMEN VOTERS OF SANTA MONICA, THE ALLIANCE OF SANTA MONICA LATINO AND BLACK VOTERS, HUMAN RELATIONS COUNCIL SANTA MONICA BAY AREA, AND COMMUNITY FOR EXCELLENT PUBLIC SCHOOLS, IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF SANTA MONICA

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

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

SEE ATTACHED SERVICE LIST

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

☒ **BY U.S. MAIL:** By placing a true copy of the document(s) listed above for collection and mailing in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Santa Monica, California addressed as indicated on the attached service list.

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

Executed on June 7, 2021.

Christopher M. Harding

SERVICE LIST

Plaintiffs' Counsel	**Method of service**
Morris J. Baller (48928) mballer@gbdhlegal.com Laura L. Ho (173179) lho@gbdhlegal.com Anne Bellows (293722) abellows@gbdhlegal.com GOLDSTEIN, BORGEN, DARDARIAN & HO 300 Lakeside Dr., Suite 1000 Oakland, California 94612 Tel: 510-763-9800	Electronic service
Kevin Shenkman (223315) kshenkman@shenkmanhughes.com Mary Hughes (222662) mrhughes@shenkmanhughes.com SHENKMAN & HUGHES PC 28905 Wight Road Malibu, California 90265 Tel: 310-457-0970	Electronic service
Milton Grimes (59437) miltgrim@aol.com LAW OFFICES OF MILTON C. GRIMES 3774 West 54th Street Los Angeles, California 90043 Tel: 323-295-3023	Electronic service
R. Rex Parris (96567) rrparris@parrislawyers.com Ellery Gordon (316655) egordon@parrislawyers.com PARRIS LAW FIRM 43364 10th Street West Lancaster, California 93534 Tel: 661-949-2595	Electronic service

Robert Rubin (85084) — Electronic service
robertrubinsf@gmail.com
LAW OFFICE OF ROBERT RUBIN
237 Princeton Avenue
Mill Valley, CA 94941-4133
Tel: 415-298-4857

City of Santa Monica's Counsel

George Cardona (135439)
George.Cardona@smgov.net — Electronic service
CITY OF SANTA MONICA
1685 Main Street, Room 310
Santa Monica, California 90401
Tel: 310-458-8336

Theodore J. Boutrous Jr. (132099) — Electronic service
TBoutrous@gibsondunn.com
Marcellus A. Mcrae (140308)
MMcrae@gibsondunn.com
Kahn A. Scolnick (228686)
KScolnick@gibsondunn.com
Tiaunia N. Henry (254323)
THenry@gibsondunn.com
Daniel R. Adler (306924)
DAdler@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Tel: 213-229-7000

Trial court

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