No. S263972

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CITY OF SANTA MONICA,

Defendant and Appellant,

v.

PICO NEIGHBORHOOD ASSOCIATION, et al.,

Plaintiffs and Respondents.

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE JOHN K. HAGGERTY IN SUPPORT OF DEFENDANT-APPELLANT CITY OF SANTA MONICA

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, Trial Judge

Service required on California Attorney General under California Rules of Court, Rule 8.29(c)(1)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This Certificate of Interested Entities or Persons is being submitted *in pro se* by, and on behalf of, Amicus Curiae John K. Haggerty. The undersigned hereby certifies that, other than the citizens of the city of Santa Monica, California, whose rights under the California Constitution to vote, to an equal protection of the laws, and to govern their own municipal affairs, especially the manner in which they elect their municipal officers, are at stake in this case, the undersigned knows of no entities or persons that must be listed under subdivisions (e)(1) and/or (e)(2) of rule 8.208 of the California Rules of Court.

Dated: May 25, 2021

/s/ John K. Haggerty
John K. Haggerty, *In Pro Se*
Amicus Curiae

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APPLICATION OF AMICUS CURIAE JOHN K. HAGGERTY TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT CITY OF SANTA MONICA

Amicus Curiae John K. Haggerty ("Amicus") hereby respectfully applies to the Court for leave to file the attached amicus curiae brief in support of defendant-appellant City of Santa Monica in the above-entitled case pursuant to rule 8.520(f) of the California Rules of Court.

As a citizen of Santa Clara, a California charter city, since 2002 (and of California since 1980) who has voted in over 95 percent of the elections in California since 1980, Amicus along with all of his fellow citizens have two vital and interrelated constitutional rights at stake in this case, namely: **(1)** their right under article XI, section 5, of the California Constitution to govern the non-partisan, municipal affairs of their charter cities, especially the manner in which they elect their city councils, free from the interference of a partisan Legislature; and **(2)** their right under article I, section 7, of the California Constitution and the 14th Amendment to the federal Constitution to an equal protection of the laws governing their elections.

More specifically, the California Voting Rights Act (CVRA), enacted by the Legislature in 2002, upon which plaintiffs-respondents-petitioners ("plaintiffs") and the trial court rely in this case, violates the express provisions of article XI, section 5, *supra*, by authorizing the trial courts of our state to compel charter cities to use race based district elections in direct violation of both their democratically enacted charters and the Equal Protection guarantees of both of our Constitutions. Thus, in multiple ways the CVRA, which the Legislature passed on a strict political party line basis, has grievously violated the constitutional laws of our land.

The only published opinion which has analyzed the constitutionality of the CVRA under article XI, section 5, *supra*, *Jauregui v. City of Palmdale* (2nd Dist. 2014) 226 Cal.App.4th 781 ("*Jauregui*"), incorrectly held that the CVRA does not violate that provision. Amicus filed an amicus curiae brief in *Yumori-Kaku v. City of Santa Clara* (6th Dist. 2020) 59 Cal.App.5th 385, in which he urged the Court of Appeal to reject that holding on several grounds including its lack of an equal protection analysis. After briefly discussing his request and observing that the City of Santa Clara had not joined in it, the court wrote, "We decline the invitation to depart from the *Jauregui* court's reasoning and holding." (*Id.* at 430.) Sadly, the City of Santa Clara did not petition this Court for a review.

The CVRA further violates the rights of Californians to an equal protection of the law under the California and federal Constitutions in that it unprecedentedly authorizes trial courts to compel the cities of our state to create race based election districts <u>even where no intentional governmental racial discrimination has been shown</u>. (See Elec. Code, § 14028, subd. (d); *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2313, 2324-2325 (a showing of discriminatory intent is required).)

Accordingly, Amicus is now applying to this Court for leave to file the attached amicus curiae brief because: **(1)** as more fully discussed in that

brief, *Jauregui* was incorrectly decided as to both article XI, section 5, *supra*, and the Equal Protection guarantees of our Constitutions; **(2)** the reasons which the court in *Yumori-Kaku*, *supra*, gave for declining to review *Jauregui* **(**i.e., **(i)** that the charter city in that case did not join in the request for such a review; **(ii)** an intervening advisory vote of the citizens of that city suggested an openness to district elections; and **(iii)** judicial deference to subsequent legislative declarations of intent**)** do not adequately address or protect the vital constitutional interests which all Californians have in governing the municipal affairs of their charter cities and receiving an equal protection of the laws;[*] **(3)** given the strong precedential effect of published decisions of the California Court of Appeal, charter cities will be greatly discouraged by *Jauregui* from pursuing their constitutional rights in future cases such that these vitally important matters might not reach the Supreme Court for decades, if they ever do; **(4)** many charter cities may also be reluctant to upset the Legislature for political or funding reasons such that they would refrain from asserting the valuable rights of their citizens under article XI, section 5, *supra*; **(5)** the First, Third, Fourth and Fifth Appellate Districts have yet to address this matter at all such that the charter cities in those districts might never obtain justice in this regard; **(6)** as even the court in *Jauregui* noted, "[m]ost local governance bodies in California are elected on an at-large basis" (226 Cal.App.4th at 788); and **(7)** should this Court determine that *Jauregui* was incorrectly decided, then the entire position of plaintiffs and the trial court in this case (and all of the many other such cases) lacks a constitutional basis.

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[*] Plaintiffs have cited *Yumori-Kaku*, *ante*, in *passim* throughout their recently filed Reply Brief. Several of plaintiffs' attorneys also represented the plaintiffs in *Yumori-Kaku*. In fact, the attorney who authored the Reply Brief in this case also authored the Answer of the plaintiffs in *Yumori-Kaku* to the amicus curiae brief which Amicus filed in that case.

Amicus has read all of the briefs which have been filed with the Court in this case. The attached brief will assist the Court because it provides the Court with a detailed analysis of *Jauregui*. It also discusses how the infirmities of the CVRA with respect to the Equal Protection guarantees of the California and federal Constitutions should be considered by the Court in conjunction with the infirmities of the CVRA with respect to article XI, section 5 of the California Constitution since both of these sets of constitutional infirmities are interrelated and overlapping.

Amicus, a California attorney since 1987, has prepared and filed many appellate briefs. He is the sole author of the attached brief. He has not received any compensation for preparing or submitting that brief.

Respectfully submitted,

Dated: May 25, 2021

/s/ John K. Haggerty

John K. Haggerty, *In Pro Se*
Amicus Curiae

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BRIEF OF AMICUS CURIAE JOHN K. HAGGERTY IN SUPPORT OF DEFENDANT-APPELLANT CITY OF SANTA MONICA

INTRODUCTION

Amicus Curiae John K. Haggerty ("Amicus"), a resident and voting citizen of the city of Santa Clara, California, since 2002, is filing this brief in support of defendant-appellant City of Santa Monica ("City") to assist the Court address two interrelated constitutional principles in this case.

First, this brief discusses how the statute, known as the "California Voting Rights Act" (CVRA), enacted in 2002 (Elec. Code, §§ 14025-14032), on its face, violates the longstanding, express, constitutional rights of charter cities, such as City, under article XI, section 5, of the California Constitution, to govern their own non-partisan municipal affairs (especially the very manner in which they choose to elect their non-partisan municipal officials) free of political interference from an often partisan Legislature.

Second, this brief discusses how the CVRA violates the right of all Californians to an equal protection of the law under both the California and federal Constitutions in an unprecedented manner by authorizing courts to compel California cities to create race based election districts even where no intentional governmental racial discrimination has been shown.

The only published decision to have analyzed the constitutionality of the CVRA under article XI, section 5, *supra*, *Jauregui v. City of Palmdale* (2nd Dist. 2014) 226 Cal.App.4th 781 ("*Jauregui*"), incorrectly held that the CVRA did not violate that provision. In *Yumori-Kaku v. City of Santa Clara* (6th Dist. 2020) 59 Cal.App.5th 385, Amicus filed an amicus curiae brief asking the Court of Appeal to reject this holding on several important constitutional grounds including its lack of an equal protection analysis. After a brief discussion that court expressly declined to do so. (*Id.* at 430.)

The remaining Appellate Districts have not addressed whether the CVRA violates the rights of charter cities and their citizens under article

XI, section 5, *supra*. Consequently, this Court should now promptly address on a statewide basis the vital issue of whether or not the Legislature (which passed the CVRA on a strict political party line basis) may authorize trial courts to compel our cities to disobey their democratically enacted charters in violation of a democratically enacted constitutional provision.

Amicus urges this Court to reject *Jauregui* for failing to protect the vital interests which the people of our state have in barring the Legislature from violating the express constitutional rights of our charter cities and their citizens to govern their own municipal affairs (especially their elections) free of unprecedented statutes such as the CVRA which compel them to create and use unconstitutional, race based election districts.

DISCUSSION

I. RE THE CONSTITUTIONAL ISSUES RAISED BELOW AND THE SCOPE OF AN AMICUS CURIAE BRIEF.

In this case City has raised the unconstitutionality of the CVRA under article XI, section 5, of the California Constitution as its Fifteenth Affirmative Defense which reads in full as follows:

> Plaintiffs' FAC seeks a remedy that violates Article XI, section 5(b) of the California Constitution insofar as that provision expressly identifies the conduct of city elections as a municipal affair, the City of Santa Monica is a charter City that has adopted at-large elections as the method to conduct its City Council, School Board and Rent Control Board elections and plaintiffs have failed to establish any conflict between state law and the City's election provisions. (5AA1612:6-13 (City's Answer to Plaintiffs' FAC).)

In addition, in its Opening Brief to the Court of Appeal in this case, City stated that it is a charter city and that the "California Constitution provides that its ordinances 'supersede state law with respect to "municipal affairs,"' including city elections." (City's AOB at 59-60.) City also noted the effect of *Jauregui* on that principle. (*Id.* at 60, fn. 14.) Consequently, at both the

trial and appellate court levels in this case City has asserted its rights as a charter city under article XI, section 5, of the California Constitution.

Moreover, even if City had not raised this important matter below, as a respected treatise on California appellate procedure notes:

> An appellate court has discretion to consider a new legal issue raised in an amicus brief "when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy." 2 CEB Civil Appellate Practice, § 14.39, p. 14-18 (citing *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn.3; *Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 503).)

Accordingly, the Court should answer this vitally important question of law which was raised below and which critically affects the constitutional rights of all of the charter cities of our state and their millions of citizens.

II. THE CONSTITUTIONAL HISTORY OF BOTH OUR NATION AND OUR STATE DEMONSTRATE A LONGSTANDING, VITAL INTEREST IN PROTECTING THE RIGHTS OF OUR CHARTER CITIES TO GOVERN THEIR OWN MUNICIPAL AFFAIRS FREE OF OUTSIDE POLITICAL INTERFERENCE.

In the Declaration of Independence the Founders of our American Republic straightforwardly set forth, as one of their main grievances against King George III, that his government in London was "taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments". (¶ 23 (emphases added).) Shortly after they prevailed against King George III, in order to limit the powers of the new central government they were creating, the Founders included in the Bill of Rights to our federal Constitution the Tenth Amendment which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. (Emphases added.)

Thus, the Declaration of Independence and our federal Constitution both demonstrate a strong intent on the part of the Founders of our American Republic to limit the powers and jurisdiction of the central government.

The original 1849 Constitution of California did not provide charter cities with a strong jurisdiction over their municipal affairs. During its early history California law tended to treat cities as creatures of the state which could be and were heavily regulated by the Legislature. However, by 1879 Californians had become so dissatisfied with how the Legislature was mishandling their municipal affairs (with heavy doses of political cronyism and inept micromanagement)[1] that they included a provision in the new Constitution that they adopted that year which granted charter cities the right to control their own municipal affairs. In the following decades, as some courts construed this provision too narrowly, the voters repeatedly strengthened it[2] so that it now reads in pertinent parts as follows:

> **(a)** . . . City charters adopted pursuant to this Constitution . . . with respect to municipal affairs shall supersede **all** laws inconsistent therewith.
>
> **(b)** It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) **plenary** authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and terms for which the several

[1] For good discussions of these legislative abuses see David, *California Cities and the Constitution of 1879: General Laws and Municipal Affairs* (1980) 7 Hastings Const. L.Q. 643, 644-649 (https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol7/iss3/3/); and Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause* (2013) 41 Pepperdine L.Rev. 587, 590-598 (https://digitalcommons.pepperdine.edu/plr/vol41/iss3/3).

[2] See Stroud, at note 1, *ante*, 41 Pepperdine L.Rev. at 598-602.

> municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. (Cal. Const., art. XI, § 5 (added June 2, **1970** by Prop. 2)(emphases and boldface added).)

Thus, just as the Founders of our American Republic were prompted by their unpleasant experiences with George III to declare our independence and pass the Tenth Amendment to protect us from mismanagement by faraway politicians in London and Washington, the voters of our state were prompted by the gross mismanagement of our cities by state legislators in our early history to enact and repeatedly strengthen the provisions of our state Constitution which grant our charter cities and their citizens control over their municipal affairs especially their elections.

III. THE *JAUREGUI* CASE WAS INCORRECTLY DECIDED.

As noted above, in this case plaintiffs rely heavily upon *Jauregui v. City of Palmdale* 226 Cal.App.4th 781, which held that the CVRA does not violate the municipal affairs provisions of article XI, section 5, *supra*. For each of the following reasons *Jaurequi* was incorrectly decided:

A. *Jauregui* Did Not Adequately Consider The Language Used By The Voters In Article XI, Section 5, Of The California Constitution.

The language used in subdivision (b) of article XI, section 5, *supra*, is unambiguously powerful. The term, "plenary", *supra*, means "1 : complete in every respect : ABSOLUTE, PERFECT, UNQUALIFIED". (Webster's 3d New Internat. Dict. (1993) p. 1739 (all caps. in original). See also Black's Law Dictionary 10th Ed. (1995), p. 1341 (defining the term, "plenary", as "1 : Full; complete; entire <plenary authority>").)

The fact that the voters used this highly emphatic term clearly indicates that, with respect to the specific subject of municipal elections,

the voters wanted the courts to respect their intent that statutes, enacted in Sacramento, should not trump the constitutional right of charter cities and their citizens to determine how they elect their municipal officers.

Indeed, the language in subdivision **(a)** of article XI, section 5, *supra*, that "with respect to municipal affairs [city charters] shall supersede all laws inconsistent therewith" should have been sufficient to convey the intent of the voters in this regard. (Emphasis added.) However, as noted above, several court decisions in the decades following the adoption of the 1879 Constitution narrowly construed the scope of the municipal affairs provisions of that Constitution which prompted the voters to add the more emphatic language of subdivision **(b)**, *supra*, so as to more convincingly demonstrate their intent that the Legislature should not interfere with the manner in which charter cities elect their municipal officers.

Thus, the court in *Jauregui* did not adequately consider: (a) the addition of the above emphatic and specific language into our Constitution by the voters; and (b) the legal and political history of our American and Californian republics which prompted the voters to add that language.

B. *Jauregui* Did Not Conduct An Equal Protection Strict Scrutiny Analysis Of The CVRA As Discussed In The *Sanchez* Case.

In an earlier case, *Sanchez v. City of Modesto* (5th Dist. 2006) 145 Cal.App.4th 660, the court was asked to decide whether the CVRA, on its face, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (That court was apparently not asked to determine whether the CVRA also violated article XI, section 5, *supra*.) The court in *Sanchez* held that the CVRA did not, on its face, violate the Equal Protection Clause because the CVRA does not require courts to compel cities to use district elections; it also authorizes courts to compel cities to use "cumulative" citywide elections (a non-race based remedy that,

as such, does not give rise to Equal Protection Clause concerns) as an alternative remedy. (145 Cal.App.4th at 670. See Elec. Code, § 14029.)

However, the court in *Sanchez* did note that the CVRA, as applied, would violate the Equal Protection Clause if a court were to compel a city to implement district elections by drawing districts in a race based manner (as the CVRA not only authorizes but encourages) that did not withstand the strict scrutiny analysis which the Equal Protection Clause requires of all race based government actions. (*Id* at 665, 688.) As the court explained, a strict scrutiny analysis is required whenever a statute: (a) refers to race even where that statute purports to provide for equal treatment (as the CVRA does); and/or (b) provides for a race based remedy (as the CVRA also does). (*Id.* at 688 (discussing *Loving v. Virginia* (1967) 388 U.S. 1 (re ban on interracial marriage), and *Johnson v. California* (2005) 543 U.S. 499 (re prison racial segregation)).) As the court in *Sanchez* noted:

> There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw-Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny. (*Id.* (referring to *Shaw v. Reno* (1993) 509 U.S. 630, 637-649 (re electoral redistricting) and *Bush v. Vera* (1996) 517 U.S. 952, 958-959 (same)) (emphasis added).)

However, the court in *Jauregui* never discussed this constitutional issue (which the court in *Sanchez* had described as "meaty") even though it was reviewing a statute that empowered courts to compel charter cities to use race based district elections. (*Sanchez*, *supra*, 145 Cal.App.4th at 665.)

Thus, the court in *Sanchez* discussed Equal Protection issues but not article XI, section 5, issues while the court in *Jauregui* discussed article XI, section 5, issues but not Equal Protection issues. The case now before this

Court involves an unprecedented statute that unconstitutionally authorizes state courts to compel cities to use race based district elections even where no intentional governmental racial discrimination has been shown. (Elec. Code, § 14028, subd. (d). See also *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2313, 2324-2325 (a showing of discriminatory intent is required).)

Consequently, the Court should consider the heavy extent to which the equal protection concerns, risks, and burdens arising out of the use of race based district elections (as authorized and encouraged by the CVRA) impacts all California charter cities together with how the CVRA impacts the constitutional right of California charter cities and their citizens under article XI, section 5, *supra*, to decide the manner in which they elect their councils. By thoroughly addressing these vital, overlapping constitutional concerns together, the analysis of this Court will be far more complete than the analyses which are found in *Jauregui* and *Sanchez.*

C. *Jauregui* Incorrectly Determined That The Election Of Municipal Officers Is A Matter Of Statewide Concern.

In *Jauregui* the court pursued the following four-part analysis which California courts have used in deciding whether a statute violates article XI, section 5, of the California Constitution: (1) does the statute involve a municipal affair? (2) if so, is there a conflict between the statute and the municipal affair? (3) if so, does the statute address a matter of statewide concern? (4) if it does, is the statute reasonably related to that concern and is it narrowly tailored in addressing that concern? (See *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17; *State Building & Construction Trades Council v. City of Vista* (2012) 54 Cal.4th 547, 556.)

In *Jauregui* the court held that the CVRA involves a municipal affair that is in conflict with city charters that provide for at-large elections. (226 Cal.App.4th at 796-798.) Moving on to the third factor, a majority of the

Jauregui court concluded that the CVRA addressed a matter of statewide concern which it said was racial dilution in elections which it equated with "integrity in the electoral process". (*Id.* at 801.) In his concurring opinion, however, Justice Mosk expressed some skepticism on this point when he noted, "Another issue that is difficult is whether an election in one municipality is a matter of statewide concern." (*Id.* at 805.)

Surprisingly, the *Jauregui* majority opinion's chief authority in this regard was *Johnson v. Bradley* (1992) 4 Cal.4th 389. (*Id.* at 801.) *Johnson* involved a charter city ordinance that provided for the public financing of its municipal elections which was in conflict with a statute that prohibited cities from publicly financing their municipal elections. However, in *Johnson*, the Court: (1) decided to look behind the stated purposes of the statute and the ordinance both of which purported to advance electoral integrity: (2) found that the ordinance did a better job of advancing that purpose than the statute; and (3) held in favor of the charter city under article XI, section 5, *supra*. Thus, *Jauregui* diverges from *Johnson* in the following two critical respects: (a) *Johnson* upheld the rights of a charter city to determine how it elected its municipal officers whereas *Jauregui* did not; and (b) *Johnson* wisely looked behind the stated purposes of a statute whereas *Jauregui* did not.

Were the Court in this case to look behind the stated purposes of the CVRA it might on its own motion take judicial notice[3] of the following matters: **(1)** the CVRA was: (a) passed by the Legislature in 2002 on a strict political party line basis with Democratic Party legislators voting for it and Republican Party legislators voting against it; and (b) signed into law by a

[3] As Amicus understands it, the California Rules of Court only authorize *parties* to file a formal request for a court to take judicial notice of a matter. In any event, the matters which are listed in this paragraph are matters of official record or common knowledge. (See also footnotes 4-6, *post*.)

Democratic Governor;[4] **(2)** it is generally accepted that since 2000 most of the non-white voters in our state have been significantly more inclined to vote for Democratic Party candidates (see *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2314 ("a voter's race sometimes correlates closely with political party preference"));[5] and **(3)** both parties have a long tradition of recruiting their legislative candidates from members of city councils whom the party leaders use as "farm teams" to develop the political talents and name recognition of their legislative candidates.[6] As such, by increasing the number of members of a party on the ostensibly non-partisan city councils of our state, a political party will definitely obtain a substantial political advantage over it rivals.

It is also worth noting, as the court did in *Sanchez*, *supra*, that "[t]he reality in California is that no group forms a majority." (145 Cal.App.4th at

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[4] According to the official website of the California Legislature, the CVRA (then known as SB 976): (a) passed in the Assembly on June 20, 2002, with 47 Democratic members voting for it and 25 Republican members voting against it (https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=200120020SB976); (b) passed in the Senate on June 24, 2002, with 22 Democratic Senators voting for it and 13 Republican Senators voting against it (*id.*); and (c) was approved by Governor Gray Davis, a Democrat, on July 9, 2002 (https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200120020SB976).

[5] See also the authoritative, The Almanac of American Politics (2018), founded by the highly regarded political scientists, Michael Barone and Charlie Cook, which states: "California's increasing Latino voter share has given Democrats enormous margins. [¶] . . . The second group now bolstering Democratic fortunes is Asian Americans. . . . Asian voters have become an important factor in the lopsided margins by which Democrats carry the San Francisco Bay Area and Los Angeles County." (*Id.* (now chiefly authored by Richard E. Cohen and James A. Barnes) at p. 147.)

[6] In 2019 Amicus conducted a review of the biographies of the legislators, which are available at the California Legislature's official website (http: www.legislature.ca.gov/your_legislator.html), which revealed that 20 of the 40 Senators (50%) and 38 of the 80 Assembly members (47.5%) at that time had been members of city councils.

666. See also *id.* at 666, fn. 1 (noting census data that in 2006 only 46.7 percent of Californians were non-Hispanic whites), and 669 (quoting an Assembly Report on the CVRA that in the California of 2002 "we are all minorities").) These numbers provide the Court with another reason to look behind the stated purposes of the CVRA and protect the longstanding, express, constitutional rights of California charter cities and their citizens to determine the manner in which they elect their municipal officers.

The court in *Jauregui* did not cite a single case in which a court upheld a statute affecting municipal elections where article XI, section 5, had been asserted. Instead, it cited: *California Fed. Savings*, *supra*, 54 Cal.3d 1 (re a state bank tax); *State Building & Construction Trades*, *supra*, 54 Cal.4th 547 (municipal prevailing wage ordinance upheld); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (re public employment meet-and-confer statute that was not actually in conflict with a city charter); *Baggett v. Gates* (1982) 32 Cal.3d 128 (re a police officer bill of rights); and *Professional Firefighters Inc. v. City of Los Angeles* (1960) 60 Cal.2d 276 (statute allowing public employees to unionize upheld as a matter of statewide concern).)

Only two of these cases, *Baggett* and *Professional Firefighters*, *supra*, in any way discussed the emphatic, specific provisions of subdivision **(b)** of article XI, section 5, *supra*, but again only in the context of public employee relations, not municipal elections. In *Baggett*, *supra*, the California Supreme Court explained that: (a) at most, the statute only marginally impinged the city charter: and (b) there was a statewide interest in avoiding police employee strikes that could endanger, not only the residents of a city, but every Californian who is visiting or working in that city. The court in *Baggett* explained that one of the primary factors that determine what is a municipal affair is the concept of extraterritorial effect. (*Id.* at 139-140. See also *City of Santa Clara v. Von Raesfeld* (1970) 3

Cal.3d 237, 246-247 (statute re financing of sewage treatment plants affecting entire San Francisco Bay Area was a matter of statewide concern that preempted city charter finance provisions); Sato, *"Municipal Affairs" in California* (1972) 60 Cal. L.Rev. 1055, 1058-1060, available at: https://scholarship.law.berkeley.edu/californialawreview/vol60/iss4/1/.) Thus, if a charter provision only affects the residents of a city, it is far more likely to be a municipal affair. Unlike the city charter provisions regarding public employee relations in *Baggett*, *supra*, the municipal election charter provisions in this case only affect the citizens and council members of City.

Interestingly, the court in *Jauregui* did not discuss *Cawdrey v. City of Redondo Beach* (1993) 15 Cal.App.4th 1212, which held that a city charter provision establishing term limits for municipal officers was a municipal affair, not a matter of statewide concern. (*Id.* at 1226-1228.) The court based this holding on subdivision **(a)** of article XI, section 5, *supra*, not the more emphatic, specific subdivision (b), *supra*. (*Id.* at 1227 (approach of charter opponents would "nullify" subdivision (a) because under that approach "virtually all aspects of modern city government are of statewide concern"). See also *Johnson*, *supra*, 4 Cal.4th at 403-404 (relying solely upon subdivision (a) to uphold a city campaign finance ordinance).)

The court in *Cawdrey* also noted that the term limit charter provision had little, if any, extraterritorial effect because it only affected the citizens of the city and council members (who have no powers outside the city). (*Id.* at 1228.) In the case before this Court the at-large elections provided in the charter of City also have little, if any, extraterritorial effect as they only affect the citizens and council members of City.

For all of the foregoing reasons, the majority in *Jauregui* was incorrect in holding that the provisions in the charter of City for the at-large election of its municipal officers involve a matter of statewide concern.

D. The Existence of the Federal Voting Rights Act Also Reveals Why Municipal Elections Are Not A Matter Of Statewide Concern.

The year in which article XI, section 5, of the California Constitution was enacted by the voters of our state (1970) is significant because it was only five short years after the United States Congress had enacted the historic federal Voting Rights Act (FVRA). California voters are still well aware of this iconic moment in our nation's history, along with the historic civil rights march in Selma that helped bring it about and the famous photograph of President Johnson signing the FVRA into effect on August 6, 1965, with the Reverend Martin Luther King, Jr., standing behind him.

As a result of this heightened awareness in 1970 of the then recently enacted FVRA and its rigorous enforcement mechanisms, the California voters could much more readily entrust to our charter cities full "plenary authority" over municipal elections (as they did), fully confident that, if any charter city engaged in racial discrimination in its elections, it would be subject to rigorous lawsuits under the FVRA. (Cal. Const., art. XI, § 5(b).)

It is highly unlikely that the California voters in 1970 ever intended to allow partisan politicians in the Legislature to: (a) disregard the complete "plenary authority" over municipal elections which they were entrusting to our charter cities (see discussion of term, "plenary", in subsection III(A), *supra*); and (b) enact a duplicative CVRA that would double the expensive litigation to which the cities of our state would be subject. Indeed, the very reason why California voters first began granting our charter cities control of their municipal affairs in the first place, back in 1879, was because they no longer wanted a partisan Legislature to be interfering in those affairs. (See discussion in section II, *supra*.)

Thus, in addition to disregarding the language and history of our Constitution, by enacting the CVRA a partisan Legislature also disregarded the sovereign will and thoughtful wisdom of the people of our state.

E. *Jauregui* Also Incorrectly Determined That The CVRA Was Reasonably Related To A Statewide Concern.

Regarding the fourth, final part of the municipal affairs analysis which California courts conduct under article XI, section 5, *supra*, namely, whether the CVRA is reasonably related to its purported statewide concern and narrowly tailored to address that concern, the CVRA, itself, states that it was "enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution."[7] (Elec. Code, § 14031 (referring, respectively, to the equal protection and voting provisions of the California Constitution).)

However, the CVRA is not reasonably related to either of these two concerns. The CVRA actually undermines the right to vote, set forth in article II, section 2, of the California Constitution, by blatantly disregarding both the provisions of the charters of our many cities and article XI, section 5, of the California Constitution, itself, all of which were democratically enacted by several millions of California voters.

Similarly, the CVRA actually undermines the Equal Protection guarantees of article I, section 7, of the California Constitution because (as discussed above in subsection III(B)) it authorizes and encourages race based measures (i.e., district elections) that the laws of our state and nation have uniformly viewed with deep suspicion and subject to strict scrutiny. The entire supposition upon which the district election "remedy" of the CVRA appears to be based--namely, that voters of a Race A will vote for a

[7] Interestingly, the CVRA, itself, does not provide that it was enacted to advance "integrity in the electoral process" as asserted in *Jauregui*, *ante*. (226 Cal.App.4th at 801 (emphasis added).) *Johnson*, *ante*, (which *Jauregui* cited in this regard) actually: (a) used the term, "integrity of the electoral process"; and (b) ruled in favor of a municipal campaign finance ordinance. (4 Cal.4th at 409 (emphasis added).) Moreover, campaign finance and disclosure laws, unlike the district elections at issue in this case, are focused on the integrity of candidates, not charter cities or their citizens.

candidate of Race A rather than a candidate of a Race B who is better qualified and has better policy proposals--deeply contradicts the colorblind, merit-based, equal protection ideals of our state. Race based policies, such as the CVRA encourages and authorizes, have no more place in California voting than they have in California public education, California public employment, or California public contracting where such policies are now prohibited by article I, section 31, of the California Constitution.

Accordingly, since it is not reasonably related to any of its purported statewide concerns, the CVRA is unconstitutional.

F. *Jauregui* Also Incorrectly Determined That The CVRA Was Narrowly Tailored To Address A Statewide Concern.

In addition to not being reasonably related to a statewide concern, the CVRA is not narrowly tailored for each of the following reasons:

First, as discussed above, the CVRA authorizes and encourages the overturning of a majority of the city charters in California by requiring our cities to use constitutionally suspect, race based district elections to elect their municipal officers in direct violation of the constitutional right of those cities to determine their own municipal affairs under article XI, section 5, of the California Constitution. The CVRA authorizes this radical "remedy" even though: **(a)** there is no longer a racial majority in California and most of its cities (see *Sanchez, supra,* 145 Cal.App.4th at 666, 669); and **(b)** there is no showing of intentional discrimination by a city (Elec. Code, § 14028, subd. (d); see also *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2313, 2324-2325 (a showing of discriminatory intent required)). In essence, a completely partisan Legislature has passed and is now using the CVRA as a sledgehammer to drive in a phantom tack. By its reasoning the two United States Senators for California must be elected by separate districts and our Governor must be replaced with an executive council consisting of three or more members, each elected from a separate district of California.

Second, as more fully discussed above in subsection III(D), the federal Voting Rights Act (FVRA) is already in place to empower persons to address the purported concerns of the CVRA. Indeed, the CVRA, itself, expressly recognizes the FVRA. (See Elec. Code, § 14026, subds. (d), (e).) Moreover, Congress, unlike the California Legislature, is not subject to the express limitations of article XI, section 5, of the California Constitution.

Third, district elections, whether or not they are race based, are detrimental to smaller cities (i.e., cities with less than 200,000 residents) because they result in: (a) council members becoming the "mini-mayors" of very small districts who horse trade with their fellow mini-mayors for extra public spending and planning permissions in their districts which hurts the city treasury and environment; and (b) civic divisiveness, sectionalism, and balkanization as occurs in the bigger cities (e.g., "I'm from the Sunset", "I'm from the Mission", rather than "I'm a San Franciscan").[8] Nor is there any evidence that cities that use district elections are better governed than those that use at-large elections. Is Los Angeles better governed than City?

Fourth, unlike cities that use at-large elections, cities that use district elections must incur the expense of redrawing their districts every ten years in response to the decennial Census. This redistricting process is expensive and divisive in itself. (*Abbott*, *supra*, 138 S.Ct. at 2314 ("[r]edistricting is never easy").) Moreover, if someone alleges that a city has drawn its district borders incorrectly, then that city will be subjected to expensive, complicated, and damaging voting rights litigation (*id.* at 2327 ("[l]itigating districting cases is expensive and time consuming" and causes electoral "uncertainty") involving all kinds of complex legal and statistical analyses (*id.* at 2315 ("a lawful districting plan is vulnerable to '"competing hazards

[8] See National League of Cities, *Cities 101--At-Large and District Elections* (12-14-2016) at: https://www.cityofws.org/DocumentCenter/View/13991/Cities-101---District-v-At-Large-Elections---National-League-of-Cities-pdf

of liability"""")). The briefs in this case provide this Court with abundant examples of these heavy costs and intricate complexities.[9] The redistricting and subsequent litigation, which the CVRA recklessly causes, is just another sad and unneeded source of costly division in our cities.

Fifth, the CVRA is also not narrowly tailored with respect to its one-sided attorneys' fees provisions. If a plaintiff prevails under the CVRA, then the charter city must pay the plaintiff's attorneys' fees but a charter city will not receive an award of "any costs" except where the plaintiff's claims were "frivolous, unreasonable, or without foundation." (See Elec. Code, § 14030.) This type of unfair attorneys' fees provision usually results in a cottage industry of lawsuits.[10] Given that the longstanding, express, constitutional rights of our cities and their citizens to govern their own municipal affairs under article XI, section 5, of our Constitution are at stake, there should either be no attorneys' fees provision (pursuant to the American system of litigation which our state generally follows) or a reciprocal provision (as in the more litigation averse England).

Accordingly, the CVRA is not narrowly tailored and, overall, the *Jauregui* court incorrectly held that the CVRA satisfies the third and fourth parts of the test which California courts apply in article XI, section 5, cases.

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[9] In this respect the California court system, itself, will also be greatly and unjustly burdened by the unconstitutional CVRA, its racial district election "remedies", and the task of judicially developing a unique, new and complex racial dilution analysis for our state (and our state alone).

[10] The San Jose Mercury News reported on the *Yumori-Kaku* case, *ante*, that Santa Clara "was one of many California cities that attorneys pushed into district elections in recent years by claiming [CVRA violations] in demand letters that threatened lawsuits. [¶] Many cities capitulate without much hassle, even if some officials disagree with the claims made by attorneys, as the lawsuits are often costly to fight". (Geha, *After 4 years, Santa Clara settles suit on voting rights*, Mercury News (April 25, 2021), p. A-6, also at: https://www.mercurynews.com/2021/04/23/santa-clara-settles-voting-rights-lawsuit-after-spending-6-million-four-years-on-legal-battles/.)

IV. THE RIGHT OF CHARTER CITIES TO GOVERN THEIR OWN MUNICIPAL AFFAIRS IS, ITSELF, A MATTER OF COMPELLING STATEWIDE CONCERN.

Before closing this brief, it is also important to note that the longstanding constitutional right of all of the charter cities of California and their citizens to govern their own municipal affairs (especially the election of their municipal officers) under article XI, section 5, of the California Constitution is, itself, a matter of compelling statewide concern. All of the voters of our state enacted this right. In fact, they have repeatedly voted to strengthen and fortify this right. (See section II, *supra*.) Consequently, this express constitutional right stands on an equal footing with the rights set forth in article I, section 7 (to an equal protection of the laws), and article II, section 2 (to vote), of the California Constitution that are asserted in the CVRA statute as its justification. (Elec. Code, § 14031.)

In addition, millions of Californians live and vote in charter cities throughout our state. It is vitally important to the quality of their lives that they control the municipal affairs of their cities especially including the election of their municipal officers. If they are not allowed to do this and partisan politicians in Sacramento once again subject our cities to political cronyism and inept micromanagement as they did in the early history of our state (see section II, *supra*), then our whole state will suffer grievously.

What would our state, our nation, our world, our history be without cities? No Rome, no Athens, no Jerusalem, no Paris, no London, no New York, no Tokyo, no Singapore, no San Francisco, no Santa Monica. All of these cities throughout their histories have been largely self-governing especially with respect to their municipal affairs. In addition to trade, that is how they have thrived. It is therefore in the vital interests of our entire state that our cities and their citizens continue to govern their own municipal affairs free of outside partisan, political interference, including, but not

limited to, statutes purporting to authorize courts to compel cities to create and use unconstitutionally race based election districts.

As the current conflict between the citizens of Hong Kong and the central government of China vividly demonstrates, the relationship between central governments and cities is not an arcane, theoretical abstraction. It is a matter of the utmost importance to our civilization and a matter of vital compelling statewide concern to the people of California.

CONCLUSION

In summary, the CVRA violates both article XI, section 5, of the California Constitution and the Equal Protection guarantees of both the California and federal Constitutions. Moreover, its violations of article XI, section 5, *supra*, add to and worsen its violations of the Equal Protection guarantees of our Constitutions (e.g., it serves no compelling or legitimate state interest for the Legislature to violate the plenary authority of charter cities). Likewise, its violations of the Equal Protection guarantees of our Constitutions add to and worsen its violations of article XI, section 5 (e.g., race based districts in the absence of any discriminatory intent are neither narrowly tailored measures nor reasonably related to a statewide concern).

For all of the foregoing reasons, Amicus respectfully requests that the Court: (a) hold that the CVRA is unconstitutional both, on its face, and also as applied through the compulsion of race based district elections; and (b) sustain the reversal of the judgment of the trial court accordingly.

Respectfully submitted,

Dated: May 25, 2021

/s/ John K. Haggerty
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CERTIFICATE OF WORD COUNT COMPLIANCE

I, John K. Haggerty, Amicus Curiae, hereby certify, pursuant to rule 8.204(c) of the California Rules of Court, that the foregoing brief, entitled "Brief of Amicus Curiae John K. Haggerty in Support of Defendant-Appellant City of Santa Monica", was produced using 13-point Times New Roman font, and including footnotes, but excluding tables and this statement, contains 6,200 words. In certifying this word count I rely upon the word count function of the computer software which I have used to prepare this brief.

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City of Santa Monica v. Pico Neighborhood Association, et al.,
Supreme Court Case No.: S263972

I, John K. Haggerty, declare that I am over the age of 18, a citizen of the United States, and not a party to this action. I am a resident of Santa Clara County and my business address is Post Office Box 2118, Santa Clara, California 95055.

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X On May 25, 2021, also sending a true copy thereof as an attachment to an e-mail from my e-mail address (i.e., johnkhaggerty@yahoo.com) to the following e-mail addresses of the following attorneys in this case:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Certificate of Service is executed this 26th day of May, 2021, at Santa Clara, California.