S263972

In the

Supreme Court

of the

State of California

PICO NEIGHBORHOOD ASSOCIATION et al.,

Plaintiffs and Respondents,

v.

CITY OF SANTA MONICA,

Defendant and Appellant.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B295935
SUPERIOR COURT OF LOS ANGELES · HON. YVETTE M. PALAZUELOS · NO. BC616804

APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF OF BRUCE A. WESSEL IN SUPPORT OF NEITHER PARTY

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF NEITHER PARTY

Under California Rules of Court, Rule 8.520(f), Bruce A. Wessel hereby applies for leave to submit this *amicus curiae* brief in support of neither party.

Amicus Bruce A. Wessel ("Amicus") is a Santa Monica resident with nearly forty years of experience as a redistricting lawyer. He is a partner emeritus at Irell & Manella LLP in Los Angeles. Amicus has represented numerous parties in California redistricting cases including a lead defendant in *Cano v. Davis* (C.D. Cal. 2002) 211 F.Supp.2d 1208, *aff'd without opinion*, (2003) 537 U.S. 1100, a case that included racial gerrymandering claims. He represented two members of the Los Angeles County Board of Supervisors during the remedy phase of *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763 when there was a conflict between members of the Board of Supervisors as to the appropriate remedy. He represented the Petitioner in *Legislature v. Deukmejian* (1983) 34 Cal.3d 658. He represented the members of the California Democratic Congressional Delegation in *Badham v. Eu* (N.D. Cal. 1988) 694 F.Supp. 664.

As a law clerk for U.S. District Court Judge Edward Rafeedie, Amicus observed a federal Voting Rights Act trial under Section 2 of the Voting Rights Act leading to a decision that struck down an at-large voting system in Big Horn County Montana. *Windy Boy v. County of Big Horn* (D. Mont. 1986) 647 F.Supp. 1002 (Rafeedie, J. sitting by designation).

Amicus served on a congressional redistricting commission as an appointed member in Connecticut in 1981. He was a

research assistant to the Special Master for the redistricting of Puerto Rico in 1982.

Amicus submits that his experience in these redistricting matters, as well as his study of case law and scholarship, will assist the Court on the narrow issue addressed in this brief—federal constitutional law relating to the use of race in drawing districts.

No party in this action authored this Brief in whole or part. Nor did any party or person contribute money toward the research, drafting, or preparation of this Brief, which was authored entirely on a pro bono basis by Amicus and the undersigned counsel.

Dated: June 10, 2021 Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY

I. INTRODUCTION

Amicus submits this brief to underscore the importance of *Cooper v. Harris* (2017) 137 S. Ct. 1455 and *Bethune-Hill v. Virginia State Bd. of Elections* (2017) 137 S. Ct. 788 in understanding the U.S. Supreme Court's current racial gerrymandering jurisprudence. In *Cooper* the Court unanimously held that one of two challenged congressional districts was unconstitutional. In *Bethune-Hill,* the Court unanimously held that the trial court's finding that race did not predominate in drawing 11 legislative districts was legally erroneous and all eleven districts might be found unconstitutional on remand.

Of the 14 districts reviewed by Supreme Court in these two cases, one was ruled constitutional, two were ruled unconstitutional, and the lower court's decision that 11 districts were constitutional was vacated for further consideration under the correct legal standard. Many legal scholars have explored the importance of these decisions and their views are discussed in this brief. The U.S. Supreme Court's application of the Equal Protection Clause to voting rights cases always deserves our attention. When the often-fractured Court speaks with one voice, there is even more reason to listen.

II. *BETHUNE-HILL* AND *COOPER* ESTABLISH THE CURRENT STANDARDS FOR ASSESSING RACIAL GERRYMANDERING CLAIMS

Twenty-eight years ago in *Shaw v. Reno* (1993) 509 U.S. 630 the U.S. Supreme Court recognized an Equal Protection claim based on the excessive use of race in redistricting. In *Cooper v. Harris* (2017) 137 S. Ct. 1455 the Court affirmed a three-judge district court decision striking down two North Carolina congressional districts as unconstitutional. *Id.* at 1466.

Justice Kagan wrote the opinion of the Court:

> A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. . . . The Equal Protection Clause of the Fourteenth Amendment . . . prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race. …"
>
> ….
>
> When a voter sues state officials for drawing . . . race-based lines, this Court's decisions call for a two-step analysis. First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within and without a district." *Miller v. Johnson* (1995) 515 U.S. 900, 916 … Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. *Bethune-Hill*, 580 U.S., at ___, 137 S. Ct., at 800. 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. *Ibid.*

Cooper, 137 S. Ct. at 1463-64.

The district court in *Cooper* called District 1 a "textbook example" of race-based districting and the Court easily upheld the finding that race predominated in the drawing of that district. *Id.* at 1469. Thus, the second step—whether there was a compelling reason to use race in drawing the district— was decisive. *Id.* at 1469 ("The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders.").

Cooper concluded that District 1 could not survive because there was no likelihood of a violation of § 2 of the Voting Rights Act:

> [E]lectoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. . . . In the lingo of voting law, District 1 functioned, election year in and election year out, as a 'cross-over' district, in which members of the majority help a 'large enough' minority to elect its candidate of choice.
>
> ….
>
> [Accordingly, North Carolina's] "belief that it was required to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a 'strong basis in evidence,' but instead a pure error of law…. In sum: Although States enjoy leeway to take race-based actions reasonably necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. . . . North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

Id. at 1463-64, 1467-68, 1472. The judgment of the Court on District 1 was unanimous. *Id.* at 1487, n. 1 (partial concurrence and partial dissent).

The Court's decision in *Cooper* arose from a three-judge district court. Notably, there was also a parallel state case "finding that in District 1 the VRA justified the [state's] use of race. . . ." *Cooper*, 137 S. Ct. at 1467.[1] *Cooper* rejected the defendants' argument that the state court ruling on the constitutionality of District 1 bound the federal courts. Rather, federal courts were free to reach a different conclusion and did just that in *Cooper*. *Id.* at 1468.[2]

In summarizing the state of racial gerrymandering jurisprudence in light of *Cooper*, the Ninth Circuit wrote:

> [T]he City Council generally may not act with race as a predominant motivating factor…Doing so would be presumptively unlawful under the Equal Protection Clause of the Fourteenth Amendment, unless the City can meet the demanding burden of showing that such action was narrowly tailored to serve a compelling interest.

Lee v. City of Los Angeles (9th Cir. 2018) 908 F.3d 1175, 1178. Leading voting rights scholars have recognized *Cooper's* significance, even if they sometimes differ on how the decision

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[1] The state case included a ruling from the North Carolina Supreme Court. *Dickson v. Rucho* (2015) 368 N.C. 481, modified on denial of reh'g (2016) 368 N.C. 673.

[2] In two unpublished decisions the Ninth Circuit first held that a plaintiff had standing to pursue a racial gerrymandering challenge to a CVRA-related decision in federal court and later held that the plaintiff had failed to allege that race predominated in the city's decision and, therefore, strict scrutiny did not apply. *See Higginson v. Becerra* (9th Cir. 2018) 733 Fed.Appx. 402; *Higginson v. Becerra* (9th Cir. 2019) 786 Fed.Appx. 705.

will affect cases going forward. Prof. Richard Hasen of UC Irvine School of Law writes:

> More than two decades after *Shaw*, the racial gerrymandering claim has been resurrected, but in a form almost beyond recognition . . .
>
> … Given the absence of sufficient racially polarized voting in the old District 1, thanks to crossover voting, the new District 1 could not be justified as necessary to remedy a Voting Rights Act violation.

Richard L. Hasen, "Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool" (June 13, 2017). ACS Supreme Court Review (Symposium), UC Irvine School of Law Research Paper No. 2017-32. ("Hasen").

Professor Daniel Tokaji, Dean of the University of Wisconsin Law School, concludes:

> States seeking to justify racial targets will thus be left to rely on Section 2. And *Cooper* makes it harder for them to do so successfully. Recall that the Court unanimously struck down one of North Carolina's challenged congressional districts. Given the district's history of crossover voting . . ., with many whites voting for black-preferred candidates, there was no good reason to believe that Section 2 required a majority-black district.

Daniel Tokaji, "Restricting Race-Conscious Redistricting," The Regulatory Review, (July 31, 2017), https://www.theregreview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting/. ("Tokaji").

Professor Rick Pildes of NYU School of Law observes:

> *Cooper* now adds further bricks to the barrier against unnecessary racial redistricting by holding that the VRA does not require—and the Constitution does not permit—the intentional creation of majority-minority

> districts if interracial political coalitions are already providing minorities effective electoral opportunities.
>
> … Put in other terms, the decision confirms that states must adhere to the view that the intentional creation of majority-minority districts is a 'second best' remedial device, to be used only when clearly required.

Rick Pildes, "Symposium: The court continues winding down unnecessary racial redistricting", SCOTUSblog (May 22, 2017), https://www.scotusblog.com/2017/05/symposium-court-continues-winding-unnecessary-racial-redistricting/. ("Pildes").

Professor Justin Levitt of Loyola Law School (an expert for Petitioners in this case) writes that *Shaw* claims going forward will be factually intensive:

> In directing the evaluation of future cases, the [*Cooper*] Court rejected bright-line absolutes in favor of a richer understanding of the fact-finding compelled by the doctrine: both the logic of the *Shaw* line, such as it is, and the logic of the Voting Rights Act.

Justin Levitt, "Race, Redistricting, and the Manufactured Conundrum," (2017) 50 Loy. L.A. L. Rev. 555, 599 ("Levitt").

While the constitutionality of District 1 in *Cooper* turned on whether there was a compelling reason to use race in drawing the lines, the constitutionality of District 12 turned on whether race predominated in the drawing of the district. 137 S. Ct. at 1473 ("[District 12's] legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent configuration."). Plaintiffs argued race explained the redesign of the district while the State denied that. *Id.* The district court in *Cooper*, after a trial, found that race did so predominate and the

Court upheld that decision. *Id.* at 1474. Justice Kagan explained that "[a] plaintiff's task . . . is simply to persuade the trial court – without any special evidentiary prerequisite – that race (not politics) was the pre-dominant consideration in deciding to place a significant number of voters within or without a particular district." *Id.* at 1479 (citation omitted)."[3]

In 2017 the Court also decided *Bethune-Hill v. Virginia State Bd. of Elections* (2017) 137 S. Ct. 788, vacating a district court ruling that race did not predominate in the drawing of eleven state legislative districts. Justice Kennedy wrote the opinion of the Court. In addition, for a twelfth district (District 75) the Court affirmed the district court's ruling that District 75 survived strict scrutiny.

On the issue of racial predominance, *Bethune-Hill* held that the district court misunderstood relevant precedents:

> a conflict or inconsistency between the enacted plan and traditional districting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering. . . . So there may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent . . .

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[3] Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, dissented in part, and would have reversed the district court's ruling on racial predominance in District 12. *Id.* at 1486-1504. Justice Alito applied *Bethune-Hill* and *Cooper* in *Abbott v. Perez* (2018) 138 S. Ct. 2305, 2314 (application of Equal Protection Clause in the field of districting is "complicated").

Id. at 799. Further, "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district. . . . The ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole." *Id.* at 800. The Court remanded so that the district court could apply this standard to eleven of the twelve challenged districts and apply strict scrutiny if appropriate.[4] Justices Alito and Thomas did not believe a remand on the racial predominance issues was necessary and would have found, as a matter of law, that once a state concedes there was a racial target for a district, the district must satisfy strict scrutiny. *Id.* at 803.

Upholding the district court's ruling that District 75 was constitutional, the Court found that compliance with Section 5 of the VRA (still in force in 2011 when the district was adopted) was a compelling reason to use race in drawing the district. *Id.* at 801 ("the State had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating section 5.")

The Ninth Circuit summarized the combined application of *Cooper* and *Bethune-Hill* as being a two-part test:

> Claims that voting districts have been drawn on race-based lines are evaluated under a two-step analysis: (1) the

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[4] On remand, all eleven districts were ruled unconstitutional. *Bethune-Hill v. Virginia State Bd. Of Elections* (E.D. Va. 2018) 326 F.Supp 3d 128. An appeal of that ruling was dismissed on jurisdictional grounds. *Virginia House of Delegates v. Bethune-Hill* (2019) 139 S. Ct. 1945.

> plaintiffs must first prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"; and (2) if the plaintiffs do so, the burden shifts to the defendant "to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end."

Lee at 1182.

III. THE TRIAL COURT'S APPLICATION OF TWO-PART TEST IN THIS CASE

The Trial Court's opinion did not reference *Cooper* and only mentioned *Bethune-Hill* in a footnote (24AA10712).[5] The Trial Court's opinion did reference *Shaw* and *Sanchez v. City of Modesto* (2006) 145 Cal.App. 4th 660. *Sanchez* rejected a facial challenge to the CVRA but recognized that an as applied challenge to a remedy would be viable. *Id.* at 666 ("The city may, however, use similar arguments to attempt to show as applied invalidity later …. For example, if the court entertains a remedy that uses race, such as a district-based remedy in which race is a factor is establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here.");

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[5] The Trial Court's decision states "just last year, in *Bethune-Hill* the Supreme Court upheld a Virginia state senate district against a challenge on the theory that it was predominantly driven by race, but in a manner designed to meet strict scrutiny through compliance with the Voting Rights Act." (24AA10712). The Trial Court is referring to the ruling on District 75 in *Bethune-Hill*, one of the twelve districts challenged. The other eleven districts in *Bethune-Hill* were ultimately ruled unconstitutional on remand.

see also *Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 427 ("In theory, the City has a valid basis for trying to raise an as-applied challenge.").

Addressing a possible constitutional challenge to its remedy, the Trial Court's opinion states as to the first part of the test: "[T]he remedy selected by this Court was not based predominately on race – the district map was drawn based on the non-racial criteria enumerated in Elections Code section 21620."[6] (24AA10708).

Notwithstanding this statement, race was certainly one factor considered by the Trial Court in approving the map. The Trial Court explained that the Latino citizen-voting-age-population in the newly created Pico Neighborhood district would be 30%, in contrast to 13.64% for the city as whole, and "Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district . . . than they do in other parts of the city. . ." (24AA10734). Further, the Trial Court found that "Latinos in the Pico Neighborhood are politically organized in a manner that would more likely translate to equitable electoral strength." (24AA10735).

The Trial Court also addressed the second part of the test. The opinion states the while "federal cases have not considered

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[6] Elections Code § 21620 provides that "[i]n establishing the boundaries of the districts, the council may give consideration to the following factors: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity, and compactness of territory, and (4) community of interest of the districts."

the CVRA specifically, the Supreme Court has repeatedly implied that remedies narrowly drawn to combat racially polarized voting and discriminatory vote dilution will survive strict scrutiny." (24AA10712).

The Trial Court then stated that its remedy "satisfies strict scrutiny in application here, whereas described below, the dilution remedied was proven to be the product of intentional discrimination." (24AA10713).

The Trial Court did not analyze whether compliance with the CVRA (as opposed to compliance with the federal VRA) was a compelling reason for using race in districting.

IV. THE RACIAL GERRYMANDERING ISSUES RAISED BY THIS CASE

In *Bethune-Hill* and *Cooper*, the Supreme Court provided important guidance as to how to address racial gerrymandering claims. This Court should rigorously apply their teachings. In this section, Amicus identifies the racial gerrymandering issues raised by this case.

A. Did Race Predominate in the Design of the Pico Neighborhood District?

As Levitt explains, "predominance has proved to be clearer in concept than in application." Levitt 565. *Bethune-Hill* teaches that the evidence of the "purpose and intent" in forming the challenged district matters and that courts "must consider all of the lines of the district at issue." *Bethune-Hill* at 800.

Amicus does not seek to address whether race predominated in the design of the Pico Neighborhood district,

except to note that the Trial Court's opinion on that issue is sparse.

Commentators have diverse views on predominance. Levitt acknowledges that compliance with race-neutral factors does not mean race did not predominate in the design of a district: "[T]he simple fact that district boundaries happen to line up with race-neutral factors does not offer complete immunity to a *Shaw* claim, if other evidence is available to prove that the redistricting body's obsession with race was the runaway reason to move a significant number of voters into or out of the district." Levitt 567

Tokaji believes the use of numerical targets in district design triggers strict scrutiny: "Taken together, *Bethune-Hill* and *Cooper v. Harris* limit states' use of racial targets when drawing district lines. . . . these cases make it easier to show that race predominated in drawing district lines. *Cooper v. Harris* is especially significant, because it suggests that predetermined racial targets will trigger strict scrutiny." Tokaji, *supra*

Another voting rights scholar, G. Michael Parsons, carefully analyzes the predominance rulings in *Cooper* and *Bethune-Hill*, noting that predominance was central to *Bethune-Hill* while a secondary issue in *Cooper*. He recommends that "while legislators should exercise caution in employing demographic targets, it remains the case that the use of racial targets (such as 50%) should not *automatically* trigger strict scrutiny." G. Michael Parsons, "Cooper v. Harris: Proxy Battles and Partisan War," Modern Democracy (May 23, 2017),

https://moderndemocracyblog.com/2017/05/23/cooper-v-harris-proxy-battles-partisan-war/.

In their opening brief, Petitioners explain the factors considered by the Trial Court in selecting their proposed districting map as remedy. Those factors included: "(1) the minority's proportion of the electorate in a potential remedial district or districts, compared to its proportion in the entire jurisdiction; [and] (2) the degree of support received by minority-preferred candidates and ballot choices in past elections within a potential remedial district . . ." (OB-11). An advocate for the proposition that race predominated in the design of Pico Neighborhood district would point to these and similar statements in the record to show that race was the predominant reason for the design of the district.

Petitioners' Reply Brief references the Trial Court's "finding" that the remedy "was not predominantly based on race." (RB-18). The brief then cites *Cooper* for the federal rule that trial court findings on racial predominance are subject to clear error review. *Id.* In *Cooper* the district court made an independent finding, after a trial, that race did predominate at the legislative level and that finding was affirmed. Here the Trial Court was not reviewing a legislatively-crafted plan but rather its own plan, where it intentionally ordered a Latino influence district designed by Petitioners' expert.

There would likely be no deference to the Trial Court's "finding" as to its own purpose in choosing the plan that Petitioners proposed. Those arguing that race did not

predominate might say that once the Trial Court found a violation of the CVRA and chose single-member districts as a remedy, any districting plan would necessarily create a district with a higher percentage of Latino voters than the city as a whole, given residential patterns. But that does not appear to be part of the record in this proceeding. Instead, there is conclusory paragraph in the Trial Court's opinion that race was not a predominant factor because the remedial district was based on grouping together "areas with similar demographics (e.g. socio-economic status)," leaving "historic neighborhoods . . . intact," and using "natural boundaries." (24AA10733). In a racial gerrymandering challenge to the Pico Neighborhood district, a court would decide whether the desire for a 30% Latino citizen voting age population drove the design of the district more than natural boundaries, historic neighborhoods, and non-racial demographics.[7]

B. Does the Use of Race Satisfy Strict Scrutiny?

The Trial Court also addressed the second step of the test: whether there was a compelling reason to use race in creating the Pico Neighborhood district thereby satisfying strict scrutiny. The Trial Court observed that "the Supreme Court has repeatedly implied that remedies narrowly drawn to combat racially

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[7] Relying on *Bethune-Hill*, the Ninth Circuit comprehensively addressed the racial predominance issue in *Lee v. City of Los Angeles* (9th Cir. 2018) 908 F.3d 1175, a helpful model for showing how to demonstrate that the design of a district is not predominantly based on race.

polarized voting and discriminatory vote dilution will survive strict scrutiny." (24AA10712). To be more precise, the Supreme Court has assumed that compliance with the federal VRA is a compelling reason to use race. *Cooper* at 1469 ("we have long assumed that complying with the VRA is a compelling interest").

In *Cooper*, as noted above, the Court found there was no compelling interest to use race because there was no risk of violation of Section 2. As Tokaji explains: "[T]he Court unanimously struck down one of North Carolina's challenged congressional districts. Given the district's history of crossover voting in that district, with many whites voting for black preferred candidates, there was no good reason to believe that Section 2 required a majority-black district." Tokaji, *supra.*

The Trial Court's ruling on racially polarized voting is not before this Court, but it is worth noting that if there were a federal challenge to a remedy here, there would be an independent examination of any finding of racially polarized voting.

One error in the Trial Court's ruling stands out. The Trial Court incorrectly believed that it was required to look at the electoral success of the "Latino candidate most favored by Latino voters" in order to determine whether racial polarization was "legally significant." (24AA10688). When the Trial Court examined the 2016 election, it considered it relevant that the losing Latino candidate "Mr. de la Torre received more support from Latinos than did [the winning Latino candidate] Mr. Vazquez." Indeed, the Trial Court believed "[t]his is a

prototypical illustration of legally significant racially polarized voting." (24AA10688). It is not.

According to Petitioners' expert, in 2016 Mr. de la Torre received 88% Latino support and Mr. Vazquez 78.3% Latino support (24AA10688). In the Ninth Circuit, as a matter of law, both candidates were Latino-preferred, not just Mr. de la Torre. *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 553 (adopting bright-line rule: "a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred"); see also *Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600, 611-12 (finding that it was an error to not "automatically" treat both first choice and second choice of minority voters as minority-preferred candidates where both had overwhelming support).[8] Mr. Vazquez's victory, and Mr. de la Torre's loss, does not prove "legally significant" polarized voting, nor is the 2016 election a "prototypical illustration" of racially polarized voting. Rather, the 2016 election simply shows that one Latino-preferred Latino candidate won and the other did not.[9]

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[8] As the Ninth Circuit explained in *Ruiz*, not all circuits have a bright-line rule on defining minority-preferred candidates but it is appropriate for California courts to follow the Ninth Circuit rule because any federal court challenge to a California districting plan would be filed in the Ninth Circuit.

[9] Notably, Mr. de la Torre won in 2020 and currently serves on the City Council.

Finally, there is a significant question not squarely addressed by the Trial Court: if Petitioners cannot prevail under the federal VRA but have viable claim under the California VRA, is compliance with California VRA a compelling reason to use race in drawing districts for federal constitutional purposes? While the Supreme Court has assumed (but not decided) that compliance with the federal VRA justifies the use of race in drawing a district, it has never addressed whether compliance with the California VRA is a compelling interest.

The Petitioners are apparently aware of the racial gerrymandering issue presented by the creation of the Pico Neighborhood district as a Latino-influence district because they discuss alternative non-district race-neutral remedies in their briefs. (RB-18, n. 1) ("non-district remedies . . . are unquestionably race-neutral [and] would have afforded Latino voters a meaningful remedy"); (OB-31-32) (discussing non-district remedies). If a violation of the California VRA is found on remand, then the lower courts will need to face the Equal Protection Clause issue as to the remedy. How this Court rules on where the California VRA has a different standard than the federal VRA may be relevant to that analysis.

V. CONCLUSION

Application of the Equal Protection Clause in districting has drawn substantial attention from the federal courts in recent years. The limitation on racial gerrymandering has evolved in unpredictable ways as our country, the makeup of the Supreme Court, and the strategies of voting rights lawyers have changed.

In *Sanchez v. City of Modesto*, the Court of Appeal recognized that "meaty constitutional issues" arise when race is used in creating a district. *Sanchez* at 665. Thus, this case is not only about statutory interpretation and the intent of the California Legislature. If there is liability, it will also be about the degree to which race can constitutionally be used by courts to create a particular city council district.

Dated: June 10, 2021 Respectfully submitted,

LOWENSTEIN & WEATHERWAX LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.486(a)(6).)

The text of this brief, including footnotes, and excluding the 365-word application for leave to file the brief, consists of 4,634 words as counted by Microsoft Word, the computer processing program used to generate the brief.

Dated: June 10, 2021 Respectfully submitted,

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County of Los Angeles)
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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

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