No. S263972

In the Supreme Court of the State of California

CITY OF SANTA MONICA,
Defendant and Appellant,

v.

PICO NEIGHBORHOOD ASSOCIATION,
Plaintiffs and Respondents.

Second Appellate District, Case No. B295935
Los Angeles County Superior Court, Case No. BC616804
The Hon. Yvette M. Palazuelos, Judge

AMICUS BRIEF OF ATTORNEY GENERAL ROB BONTA IN SUPPORT OF NEITHER PARTY

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ISSUE PRESENTED

What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act (Elec. Code, § 14025 *et seq.*)?

STATEMENT OF INTEREST

The Attorney General is the State's chief law officer, with a duty to see that state law is uniformly and adequately enforced. (Cal. Const., art. V, § 13.) The Attorney General possesses "broad powers" to protect the public interest, including "'the power to file any civil action or proceeding directly involving the rights and interests of the state,'" or which the Attorney General "'deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.'" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15, citation omitted.) The California Voting Rights Act (CVRA) is a critical tool for ensuring fair and equal elections and preventing unlawful vote dilution in the State. The Attorney General has a strong interest in its validity and in ensuring that it is correctly interpreted so as to fulfill these important purposes.

Given this interest and the cumulative experience of his office, the Attorney General is uniquely positioned to assist this Court with the statutory interpretation question in this case. Accordingly, the Attorney General respectfully submits this amicus curiae brief to assist this Court in interpreting the CVRA.

SUMMARY OF POSITION

The California Voting Rights Act, Elections Code section 14025 *et seq.*, protects the rights of voters in the State. The Legislature enacted the statute to help ensure fair and equal local elections by offering more expansive protection from vote dilution than the federal Voting Rights Act does. Since its passage, the statute has played a key role in helping to diversify local governing boards and councils. Yet courts have had few occasions to interpret the CVRA's language. This case presents the first opportunity for the Court to interpret this important statute and its "vote dilution" standard. The Attorney General files this brief to assist the Court with this statutory interpretation question, but takes no position on the particular claims or factual disputes raised by the parties in this case or on the proper disposition. The Office of the Attorney General has consulted with the Office of the California Secretary of State in filing this brief, and that Office agrees with the positions set forth in this brief.

To establish vote dilution under the CVRA, there must be a showing that an at-large electoral system in particular has precluded a protected class from exercising the power it would otherwise have to meaningfully influence the outcome of elections if the at-large system had not been adopted. To meet this standard, a plaintiff need not show that a district could be drawn that would have a majority of residents in the protected class; to the extent the court of appeal suggested this was a requirement, it erred. Nor must a plaintiff show that a district could be drawn that would have a near-majority of residents in the protected

class, as the City of Santa Monica contends. Rather, a plaintiff need only show an at-large electoral system is responsible for the protected class's lack of electoral influence based on a totality of the circumstances and the specific facts of the particular case.

STATUTORY BACKGROUND

I. THE FEDERAL VOTING RIGHTS ACT

In enacting the CVRA, the California Legislature sought to expand the protections for Californians beyond those contained in the federal Voting Rights Act of 1964 (FVRA). The federal Act provides that "[n]o voting qualifications or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color." (52 U.S.C. § 10301(a).) This provision is violated if a protected class of citizens has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (*Id.*, § 10301(b).)

The U.S. Supreme Court has set forth three requirements that must be met to sustain a claim that the use of an at-large multimember governing body violates this prohibition because it dilutes the votes of a protected class. These are referred to as the *Gingles* factors, after *Thornton v. Gingles* (1986) 478 U.S. 30. First, the protected group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." (*Gingles*, *supra*, at p. 50.) Second, the protected group "must be able to show that it is politically cohesive." (*Id.*, at p. 51.) Third, the protected group "must be able to demonstrate that the . . . majority votes

sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." (*Ibid.*)

II. THE CALIFORNIA VOTING RIGHTS ACT

In 2002, the California Legislature enacted the California Voting Rights Act. Like the FVRA, it was intended to help ensure fair elections by protecting against vote dilution, but it was also intended to offer more expansive protection tailored to the unique demographics of California. (See e.g., Plaintiffs' Mot. for Judicial Notice, Ex. A ("Plaintiffs' MJN") at A-038, A-060, A-075.) The CVRA regulates elections for the governing boards of political subdivisions within the state, including cities, counties, and districts formed under state law. (Elec. Code, §§ 14026, subds. (a), (c); 14027.)[1] Under the CVRA,

> [a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class . . .

(§ 14027.) An "at-large method of election" is a system where all voters within the relevant jurisdiction vote for all members of the relevant governing board of that subdivision. (§ 14026, subd. (a).) This is in contrast to a "district" method of election, where each member of the governing body is required to come from a distinct region of the political subdivision, and only residents of that

[1] Future statutory references are to the Elections Code unless otherwise stated.

region vote for that particular seat on the governing body. (§ 14026, subd. (b).)

The statute defines a "protected class" as "a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965." (§ 14026, subd. (d).) A "voter who is a member of a protected class and who resides in a political subdivision where a violation . . . is alleged" may bring suit to enforce the CVRA. (§ 14032.) The voter can "establish[]" a violation of the CVRA by "show[ing] that racially polarized voting occurs in elections for members of the governing body . . . or in elections incorporating other electoral choices by the voters . . ." (§ 14028, subd. (a).) The statute defines "racially polarized voting" as,

> voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965, in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.

(§ 14026, subd. (e).)

The CVRA lays out several factors a court may consider in determining whether there is a violation of the CVRA. (§ 14028, subds. (b), (e).) The statute also delineates two limitations on the court's analysis of whether a violation has occurred. First, "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting" or of a statutory violation, even though it can be "a factor in determining an appropriate remedy." (§ 14028, subd. (c).) Second, no proof of intent to discriminate by voters or

officials is required to prove a violation. (§ 14028, subd. (d).) If a violation is proven, a court "shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." (§ 14029.)

LEGAL STANDARD

In interpreting a statute, the Court's "'fundamental task'" is to "'determine the Legislature's intent so as to effectuate the law's purpose.'" (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190, citation omitted.) The Court "'first examine[s] the statutory language, giving it a plain and commonsense meaning.'" (*Ibid*, citation omitted.) It does not, however, examine the language "'in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize'" the entire statutory scheme. (*Ibid*, citation omitted.) Where "'the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.'" (*Ibid*, citation omitted.) Where the language "'permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'" (*Ibid*, citation omitted.)

ARGUMENT

The CVRA forbids the use of an at-large voting system when it dilutes or abridges voters' rights by impairing a protected class's ability to elect its chosen representative or to influence the outcome of an election. While racially polarized voting is a part of proving a CVRA violation, the act requires more than a

showing of mere racial differences and cohesion in voting—that is, that the protected class votes as a bloc, other voters vote as a bloc, and the protected class's preferred candidate loses. To prove a CVRA violation, a protected class must demonstrate that under the at-large voting system, it is deprived of the ability to meaningfully influence the outcome of an election it would have had if the at-large system had not been adopted.

Contrary to suggestions by the appellate court, this does not require a plaintiff to demonstrate that a district could be drawn where the protected class is a majority. The statutory text and legislative history are clear that the Legislature intended to eliminate the first *Gingles* factor as a requirement to show vote dilution and a CVRA violation.

Nor must a plaintiff show that a district could be drawn where the protected class is a near-majority, as the City of Santa Monica argues. Such a standard similarly conflicts with the statutory text and purpose. For one, that standard ignores the Legislature's elimination of the first *Gingles* factor. It also improperly concentrates on districting as a remedy, to the exclusion of possible alternative remedies, and narrowly focuses on the protected class's ability to elect a preferred candidate while ignoring that the CVRA protects both that *and* a protected class's ability to influence an election's outcome—which may include, for example, supporting a compromise candidate or blocking an unfavorable candidate. Nor, contrary to the City of Santa Monica's argument, is such a standard necessary to ensure the CVRA is constitutional.

Ultimately, to prove a CVRA claim, a plaintiff must demonstrate that under an at-large voting system, a protected class has less ability to meaningful impact an election's outcome than it would have if the at-large system had not been adopted. The test to determine whether this standard is met must account for the wide variety of localities and communities and the wide variety of demographics within the State. It must also be flexible enough to stand the test of time and to accommodate ongoing demographic and societal changes in the State. It should take into account the unique facts of a specific locality, including the demographic makeup of the community, the cohesiveness and concentration of the protected class, the representativeness of the elected officials compared to the community's makeup, the history of the locality and its elections, and the potential outcomes of elections under other possible viable electoral systems. Such a standard best reflects the CVRA's text and will best protect the rights the legislation was intended to safeguard.

I. A PLAINTIFF MUST DEMONSTRATE AN AT-LARGE VOTING SYSTEM IN PARTICULAR HAS DILUTED THE PROTECTED CLASS'S ELECTORAL INFLUENCE

A statute's text is the starting place for statutory interpretation. (See, e.g., *Smith*, *supra*, at p. 190.) Section 14027 provides that:

> An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class . . .

That is, the CVRA prohibits an at-large method of election that "impairs" a protected class's ability to influence electoral outcomes. To "impair" is to "diminish the value" of a thing (Black's Law Dict. (11th ed. 2019); see also *id.* [defining "impairment" as "[t]he quality, state, or condition of being damaged, weakened, or diminished".) Thus, under the CVRA's plain language, it forbids the use of an at-large electoral system when the use of such a system diminishes or weakens the electoral power of a protected class.

This is reinforced by the statute's use of the terms "dilution" and "abridgement" when defining a violation. To "dilute" something is to "diminish[] a thing's strength or lessen[] its value; [to] weaken[] or thin[] out" something. (Black's Law Dict. (11th ed. 2019).) To "abridge" something is likewise to "reduce or diminish" it. (Black's Law Dict. (11th ed. 2019).) This language reiterates that section 14027 seeks to eliminate a situation where a protected class's voting power or rights have been diminished. Thus, the CVRA targets the use of an at-large voting system in a specific situation: where it takes away a protected class's meaningful ability to influence election outcomes that the class would otherwise have had under a different electoral system.

This interpretation is not altered by section 14028, subdivision (a), which provides that:

> A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.

The CVRA defines racially polarized voting as "voting in which there is a difference . . . in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and . . . by voters in the rest of the electorate." (§ 14026, subd. (e).)

A myopic view of section 14028 alone might suggest that a CVRA violation exists when an at-large electoral system is used and any "difference" whatsoever exists between the electoral choices of voters in the protected class and those of other voters. (E.g., OBM 41-44.) The CVRA's language does not support such an interpretation, however, since the Court does not interpret statutory language "'in isolation, but in the context of the statutory framework as a whole.'" (*Smith*, *supra*, at p. 190, citation omitted.) The Court's ultimate task is to effectuate the Legislature's purpose and to avoid an absurd outcome. (*Ibid.*) Finding a CVRA violation based solely on racial differences in voting would render section 14027's requirement that an at-large voting system have "impaired" a protected class's voting rights a nullity. (Cf. *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided."].) For instance, in some localities a protected class may be so small that its level of influence would be the same regardless of the voting system in place. The meaning of section 14028, subd. (a) is not to expand the Act beyond its central purpose of remedying dilution and abridgement; rather, it is to establish that such dilution and abridgment results when racially polarized voting occurs at a

scale that affects the ability to influence election outcomes under an at-large election system.

II. A PLAINTIFF NEED NOT DRAW A MAJORITY DISTRICT TO ESTABLISH A CVRA CLAIM

The CVRA does not, however, require a plaintiff to show that a district could be drawn where the protected class would be a majority in order to establish a valid CVRA claim. Portions of the court of appeal decision suggest otherwise. (E.g., Opn. 31 ["Pico failed to prove the City's at-large system diluted the votes of Latinos. Assuming race-based voting, 30 percent is not enough to win a majority and to elect someone to the City Council . . ."]; *id.* ["The reason for the asserted lack of electoral success in Santa Monica would appear to be that there are too few Latinos to muster a majority, no matter how the City might slice itself into districts."].) Those statements were error.

In enacting the CVRA, the Legislature was clear that it intended to eliminate the first *Gingles* factor, which requires a federal plaintiff to demonstrate that a district could be drawn where the protected class is a majority. (E.g., Plaintiffs' MJN at A-065, A-074, A-085, A-126.) This legislative intent led to the language in section 14028 stating that "the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting." Under this provision, that a plaintiff class is not compact or concentrated enough to form a majority district cannot preclude a finding of a CVRA violation, as it could preclude a finding under the *Gingles* factors. The City itself concedes that the CVRA has a broader sweep than the federal Act and that the CVRA

eliminated the first *Gingles* factor. (ABM 32-35.) A plaintiff thus need not show that a majority-minority district could be drawn to establish a CVRA violation.

III. A PLAINTIFF NEED NOT DRAW A NEAR-MAJORITY DISTRICT TO ESTABLISH A CVRA CLAIM

While acknowledging that a plaintiff not need establish a district with a majority of protected class voters, the City contends that to show vote dilution, a plaintiff must at least demonstrate that a district could be drawn where the protected class is a near-majority of voters. (ABM 35.) This is also too stringent a standard and unaligned with legislative intent. It deviates from the CRVA's statutory text and scheme in at least three key aspects. And, contrary to the City's arguments, such an interpretation is not necessary for the CVRA to pass constitutional muster.

A. A near-majority standard is contrary to the statute

First, the City's proposed standard, like the suggestion by the court of appeal that a plaintiff must draw a majority-minority district, would reinstate the very *Gingles* requirements of compactness and concentration that the Legislature intentionally omitted. (Cf. § 14028, sub. (c).) Like a majority-minority district requirement, a need to prove that a district could be drawn with near-majority of protected class voters typically requires that a protected class have a certain degree of geographic compactness and concentration in order to constitute the required portion of one district. But the Legislature explicitly removed the need for

geographic compactness and concentration as requirements to establish a violation of the CVRA. (Cf. *ibid.*)

Second, the City's standard focuses almost exclusively on the imposition of districts as a remedy for a CVRA violation. But the CVRA's text provides that districting is not the only possible remedy: the statute states that upon finding a violation, a court "shall implement *appropriate* remedies, *including* the imposition of district-based elections, that are tailored to remedy the violation." (§ 14029, emphasis added.) This language plainly envisions the possibility of non-districting remedies where appropriate. The legislative history similarly echoes that imposing district-based elections was meant to be one possible remedy, not the only possible remedy. (E.g., Plaintiffs' MJN at A-107, A-129.)

As other briefs detail more fully, there are non-districting remedies that could, in a specific case on specific facts, be an appropriate remedy. (OBM 54-56; Brief of Fairvote as *Amicus Curiae* at pp. 22-33.) Such alternatives might include modified at-large voting systems, such as cumulative voting (where one voter may cast multiple votes for a single candidate) or limited voting (where one voter may cast only one vote despite there being multiple open seats). (*See* Brief of Fairvote as *Amicus Curiae* at pp. 27-31.) Of course, any remedy a court imposes, whether it involves districting or not, needs to be an "appropriate" one. (§ 14029.) For instance, the remedy must be legal under state law and the Constitution. It also must be capable of practical implementation that ensures a fair, safe, and

accurate election, and one that could be certified by the Secretary of State as required by law.[2] And the remedy must not disadvantage the protected class. For example, a remedy that includes an unfamiliar electoral system might need to include a plan to provide adequate information and outreach in diverse languages so that members of the protected class could effectively participate. But if, in a particular case, a plausible and implementable non-district alternative exists, a court is free to impose it as a remedy.

Third, the City's standard focuses almost exclusively on a protected class's ability to elect its chosen candidate. But the CVRA protects both the protected class's ability "to elect candidates of its choice" and its ability "to influence the outcome of an election." (§ 14027.) In this respect, the CVRA is notably and intentionally different from the federal Voting Rights Act, which protects only voters' ability to "elect representatives of their choice." (52 U.S.C. § 10301(b).) A protected class can "influence" an election's outcome beyond just electing a chosen candidate, such as by forming a coalition with another group to elect a candidate acceptable to each or by blocking an unacceptable candidate. Contrary to the City's argument, under the CVRA, a protected class's achievement of such opportunities is not "meaningless." (ABM 35.) It is precisely what the Legislature, in enacting the CVRA, intended to protect.

[2] See, e.g., § 19006, sub. (a) [requiring electoral systems to be certified by the Secretary of State prior to use].

B. A near-majority standard for vote dilution is not constitutionally mandated

Finally, the City argues that the Court should adopt its proposed standard to avoid concerns over the federal constitutionality of the CVRA. It contends that plaintiffs' reading of the CVRA "would force jurisdictions to abandon their voting systems and adopt new ones, for race-based reasons . . . even if minority voters would fare no better in the new system." (ABM 24; see also ABM 32.) That poses a problem, the City says, because "cities cannot constitutionally be carved into districts based on racial classifications without good reasons," and "increasing the size of a minority group in a district, even if the increase will have no real-world effect, is not a good reason." (ABM 34.) The City advocates for its proposed near-majority standard as a way to preserve the CVRA's constitutionality by avoiding "meaningless" outcomes where "a group gain[s] a greater share of the electorate, but its preferred candidate [is] still defeated." (ABM 35.) In other words, the City argues that other interpretations of the CVRA will lead to the impermissible use of race in the drawing of districts as a remedy.

To start, as discussed above, the CVRA does not *require* the use of districts as a remedy, let alone districts that, as drawn, may be constitutionally impermissible. The statute directs a court to implement "appropriate remedies." (§ 14029.) These are not limited to the imposition of district-based elections (see *ante* pp. 18-19), and an appropriate remedy in a given case may not even involve drawing district lines at all.

Nor, if a court *does* elect to use districts as a remedy, does the CVRA require those districts be drawn in such a way as to violate the Constitution. That those drawing districts are aware of race does not render the districts unconstitutional. (E.g., *Bush v. Vera* (1996) 517 U.S. 925, 958 (plur. opn. of O'Connor, J.) ["Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."].) Rather, a particular district violates the Equal Protection Clause when race is the predominant factor in drawing the district and the drawing body subordinated other traditional districting factors to race. (*Bethune-Hill v. Virginia State Board of Elections* (2017) 137 S.Ct. 788, 797.) If a locality does draw districts to comply with a court-imposed remedy, it must draw them in a manner that accords with the Constitution—both as a result of the Supremacy Clause and because of the CVRA's requirement of "appropriate" remedies. (§ 14029; cf. *Oregon State Police Officers Ass'n v. Peterson* (9th Cir. 1992) 979 F.2d 776, 778 ["We cannot assume as a matter of course that Oregon units of government will violate the law."].) If there are cases where that does not happen, affected voters can then challenge the allegedly unconstitutional district. The hypothetical possibility of such violations provides no reason for this Court to deviate from an interpretation of the statute more in line with its text and purpose.[3]

[3] This illustrates a fundamental legal flaw in the City's argument: a *remedy* is typically understood to be distinct from a *violation* and an unconstitutional remedy does not ordinarily undermine a separate finding of a violation. (*E.g.*, *Simon v. San*

In arguing the contrary, the City relies on *Bartlett v. Strickland* (2009) 556 U.S. 1. (E.g., ABM 29, 31, 37.) *Bartlett* considered whether an at-large election system violated the federal Voting Rights Act when a majority-minority district could not be drawn but a "crossover" district could be—that is, a district where the protected class is not a majority but is sufficiently large that, with support from non-minority voters, it can elect its preferred candidate. (*Bartlett*, *supra*, at pp. 12-14 (plur. opn. of Kennedy, J.).) The case held that no federally actionable dilution occurred in such circumstances. (*Id.* at pp. 25-26.)

Bartlett does not, however, support the City's arguments as to how California's state statute should be interpreted. First and foremost, *Bartlett* was a statutory interpretation case that analyzed the requirements and language of the FVRA. As the plurality opinion explained, that Act "requires a showing that minorities 'have less opportunity than other members of the electorate to . . . elect representatives of their choice.'" (*Bartlett, supra*, at p. 14 (plur. opn. of Kennedy, J.) [quoting 52 U.S.C. § 10301(b)] [alteration in original].) The CVRA, in contrast, protects both the ability to elect a chosen representative *and* to

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Paolo U.S. Holding Co. (2005) 35 Cal.4th 1159, 1190 [holding that punitive damages violated Due Process Clause without disturbing finding of liability]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361 [remanding for resentencing in accordance with Eighth Amendment without disturbing conviction].) The possibility that a hypothetical remedy might be unconstitutional does not make the standard for finding a violation, let alone the entire statute, unconstitutional.

influence an election's outcome. (See *ante* p. 19 [analyzing language of § 14027].) This key textual difference renders the holding in *Bartlett* inapplicable here.

Nor are the constitutional avoidance concerns expressed in *Bartlett* of much weight here. The plurality opinion in *Bartlett* expressed concerns about courts being required to intervene in "regional and local jurisdictions that often feature more than two parties or candidates." (*Bartlett*, *supra*, at p 18 (plur. opn. of Kennedy, J.).) But this concern reflected the federalism issues that arise when federal courts apply federal law to override districting choices made by States and localities. Municipal elections are mainly a matter for state regulation, and Congress may regulate them only as an exercise of its enforcement powers under Section 2 of the Fifteenth Amendment or Section 5 of the Fourteenth Amendment. (See *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 308; *Katzenbach v. Morgan* (1966) 384 U.S. 641, 646-647.) In so doing, Congress may impose upon the States only requirements that are congruent with and proportional to the States' violations of those amendments. (See, e.g., *City of Boerne v. Flores* (1997) 521 U.S. 507, 520.) A narrower construction of the federal Act eliminates concerns that might arise as to Congress's incursion on state autonomy. But such concerns are inapplicable to the CVRA, a state statute. Indeed, the plurality in *Bartlett* was clear that States were free to *choose* to use crossover or influence districts should they so desire. (*Bartlett, supra*, at pp. 23-24 (plur. opn. of Kennedy, J.).) A majority of the U.S. Supreme Court had no concerns that such

districts violated Equal Protection (*Ibid.*; see also *id.* at pp. 41-44 (dis. opn. of Souter, J.).)

IV. A FINDING OF VOTE DILUTION SHOULD BE BASED ON THE TOTALITY OF THE CIRCUMSTANCES

Based on the statutory text and the legislative purpose, in order to establish a CVRA violation, a plaintiff must demonstrate that an at-large voting system has removed a protected class's meaningful ability to influence electoral outcomes. (See *ante* at pp. 13-16.) In determining whether a plaintiff meets this standard, a court should consider the totality of circumstances and take a flexible approach. To be sure, this is a highly fact-dependent standard. But, as the Legislature recognized in enacting the CVRA, California is a large and diverse state. (E.g., Plaintiffs' MJN at A-038, A-060, A-074.) Its localities feature a variety of sizes, demographics, histories, and political patterns. Any strictly mechanical test would cause tension with the statutory language and purpose and hinder the accurate identification of vote dilution. Had the Legislature desired a more concrete test—such as requiring a plaintiff demonstrate that a district could be drawn with a specific percentage of voters in the protected class—it could have included (or amended the CVRA to include) such language.

Proving that an at-large voting system has precluded a protected class's meaningful ability to influence electoral outcomes should thus turn on the totality of circumstances and facts of a specific case. A court should start by looking to factors laid out in section 14028, subdivision (e), such as the history of discrimination in the locality. It can also look to additional facts

about the specific locality and its electoral history, including the demographic makeup, the geographic concentration or diffusion of the protected class, the current and historical makeup of the relevant multimember governing body compared to the demographic makeup of the community, and the history of electoral results. In undertaking this analysis, a court should be careful to avoid overly focusing on a single snapshot in time. Instead, it should consider electoral results across time and over demographic changes, though it must adhere to the CVRA's instructions about the relative probative value of elections before and after the CVRA controversy arose. (See § 14028, subd. (a).)

Of course, the court can also consider whether the multimember board that currently exists already reflects the demographic makeup of the community. Such outcomes will sometimes indicate that the at-large voting system has not meaningfully "impaired" the protected class's ability to exercise electoral influence. But the ability of members of the protected class to get elected will not always preclude concerns about the protected class's ability to exercise "choice" or "influence" in the electoral process, such as where voters in the protected class preferred an alternative candidate who was not elected.

In addition, a court can also consider the impact of alternative electoral systems on electoral outcomes, both districting and non-districting alternatives. (Cf. Brief of Fairvote as *Amicus Curiae* at pp. 33-36.) Where alternative systems would not meaningfully increase the "influence" of a protected class, it is not likely the at-large voting system has "impaired"

the protected class's exercise of electoral influence. In contrast, if the protected class would fare meaningfully better under multiple plausible alternative systems, this suggests that the at-large voting system has "impaired" the protected class's electoral influence and power. The court should also consider whether alternative systems would instead *harm* the protected class. For instance, if multiple members of the protected class on a governing body come from the same district, a district electoral system may in fact lead to less influence on the protected class's part. It is not likely that an existing at-large system has "impaired" a protected class's ability to influence elections if the alternatives would result in less influence.

In looking at alternative systems, a court should be careful that the system is one that can, as a practical matter, be implemented. That a system exists in theory does not ensure that it would be legal to order a locality to adopt it under state law or that it could be structured in a way that ensures a fair, safe, and secure election. If a court is considering alternative, non-district remedies, it should ensure there is a plan to practically implement the system in a way that can be certified by the Secretary of State and accounts for the realities of running an election, such as handling recounts or audits. Moreover, the court should consider how the new system might disadvantage protected class voters in practice and might require adequate information and outreach, including in diverse languages as needed, to ensure the protected class can effectively participate in an unfamiliar electoral system implemented as a remedy.

CONCLUSION

Regardless of its disposition of this case, this Court should clarify that the possibility of drawing a majority-minority or near-majority-minority district need not be shown to prove a violation of the CVRA. Instead, the Court should specify a standard for vote dilution that requires a plaintiff show an at-large voting system has removed the protected class's ability to exercise meaningful electoral influence and that looks to a variety of factors in making this determination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief of Attorney General Rob Bonta in Support of Neither Party uses a 13-point Century Schoolbook font and contains 5,438 words.

ROB BONTA
Attorney General of California

/s Kristin Liska

KRISTIN A. LISKA
Deputy Attorney General
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July 12, 2021

DECLARATION OF SERVICE

Case Name: *City of Santa Monica v. Pico Neighborhood Association, et al.*

Case No.: S263972

I declare: I am employed by the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am over the age of 18 years and not a party to this matter. Electronic filings are transmitted using the TrueFiling electronic system. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered with TrueFiling will be served by U.S Mail. I am familiar with the Office of the Attorney General's business practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage fully prepaid that same day in the ordinary course of business.

On July 12, 2021, I served the attached:

AMICUS BRIEF OF ATTORNEY GENERAL ROB BONTA IN SUPPORT OF NEITHER PARTY

[X] **BY ELECTRONIC SERVICE:** I transmitted a true copy of the foregoing document via this Court's TrueFiling system to the parties listed on the following "Electronic Service List."

[X] **BY U.S. MAIL:** I effected a true copy thereof to be enclosed in a sealed envelope and placed in the internal mail collection system at the Office of the Attorney General, at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed to the parties listed on the following "U.S. Mail Service List."

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed on this 12th day of July 2021, at Concord, California.

Vanessa Jordan

Vanessa Jordan

U.S. MAIL SERVICE LIST

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