No. S263972

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF SANTA MONICA,

Defendant and Appellant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Plaintiffs and Respondents.

CITY OF SANTA MONICA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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

Gov't Code, § 6103

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INTRODUCTION

The amicus briefs underscore why plaintiffs' view of the California Voting Rights Act cannot possibly be correct. The CVRA's purpose is to restore to protected classes the electoral power that at-large election systems can sometimes take away. But the statute does not outright prohibit at-large elections, and this case shows why: despite their relatively small share of the voting population in Santa Monica (13.6%), Latino voters are electing candidates of their choice (both Latino and non-Latino), and switching to a district-based system (as plaintiffs propose) would reduce their electoral power, not enlarge it.

By any measure of electoral power, Latino voters have long been punching above their weight in Santa Monica City Council elections. An objective analysis shows that Latinos have been able to elect their preferred candidates over 70% of the time over the last quarter century. Latino voters have also been successful by another measure—their ability to elect preferred candidates who are also Latino. Since 2012, at least two of the Council's seven members have been Latino. There are currently *four* Latino Councilmembers. Only two of the current

Councilmembers are non-Hispanic white—in a City that is over 70% non-Hispanic white. No matter how one looks at it, this record of significant Latino electoral success does not cry out for an order requiring the City to scrap its current electoral system in favor of a new one.

In fact, switching to a district-based election system would destroy the remarkable influence that Latino voters now have on City elections, despite their low numbers. If the trial court's remedy (the shift to districts urged by plaintiffs) were reinstated, one-third of Latino voters in Santa Monica would be packed into a district where they would lack the numbers to elect their preferred candidates, and the other two-thirds would be scattered across six other districts—where they would be outnumbered by white voters by as much as eleven to one. For that reason, some of the City's most prominent minority leaders have urged this Court to affirm the Court of Appeal's judgment. This also may explain why Latino voters in Santa Monica have twice rejected a change to the current electoral system.

In short, there is no wrong here, and the purported remedy would only do great harm to a protected class the CVRA was meant to help. As the Attorney General correctly observes: "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." (AG Br. at 26.)

The amici supporting plaintiffs do not address the many reasons why Santa Monica was such a poor candidate for a CVRA suit. Nor do they seriously attempt to craft any administrable standard that would provide guidance to lower courts and to public entities that have been sued or might be sued. Instead, several contend that defendants are liable under the CVRA whenever there are differences in voting patterns between racial groups. The Attorney General rightly rejects that simplistic interpretation of the statute, which reads out the textual requirement of dilution and would result in liability even when the relevant protected class could not possibly have meaningful electoral power under any election system.

Another amicus, longtime voting-rights attorney Bruce Wessel, explains why that result would also make the CVRA unconstitutional. The statute cannot authorize a shift away from at-large elections and the drawing of districts for the overriding purpose of segregating voters on the basis of race when that change will not further any compelling state interest. The only

potentially compelling interest here is curing vote dilution. But because there isn't any vote dilution here—Latinos are already electing their preferred candidates, and they would not have more voting strength under any other election system—a purportedly remedial district drawn for the sole purpose of packing Latinos would violate the Equal Protection Clause.

The Court should craft an administrable, objective test for vote dilution that will offer meaningful guidance to lower courts and public entities alike, while steering clear of the significant constitutional problems that can arise when requiring a change in electoral systems for race-based reasons without sufficient justification. The City has proposed such a test; plaintiffs and their supporting amici have not.

ARGUMENT

I. Vote dilution is an independent element of the CVRA.

Some amici endorse plaintiffs' notion that liability under the CVRA turns solely on bare differences in voting patterns. (OB at 41-44; e.g., UCLA Br. at 10-14, 17-18; AAAJ Br. at 19-20.) The Court of Appeal persuasively debunked that theory. (Opn. at 32-34.) So does the Attorney General, describing it as "myopic"

and impossible to reconcile with the text of the CVRA—it would "render section 14027's requirement that an at-large system have 'impaired' a protected class's voting rights a nullity." (AG Br. at 15.) And it would mean that a plaintiff could win a CVRA case even when switching to a different election system would make no difference whatsoever: "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." (*Ibid.*; see also RT2582:7-9 [plaintiffs' expert: "There's certainly circumstances where I think that district elections don't provide a benefit"].)

In other words, without the independent element of dilution, a voting-differences-alone theory of liability would have no limiting principle. Any claim would be valid, so long as the plaintiff could prove that the minority and majority preferred different candidates.

The amici who disagree with the Court of Appeal, the City, and the Attorney General do not respond to these concerns. They do not explain how their proposal gives independent effect to section 14027, including the words "dilution" and "impair[ment]." Nor do they explain how any court could adopt their reading of the statute and then decline to find liability in *any* case involving

differences in voting patterns—even when the minority group is obviously too small to have meaningful electoral influence under any system. (But see Civ. Code, § 3532 ["The law neither does nor requires idle acts."].)

Instead of addressing these basic problems, one amicus, the UCLA Voting Rights Project, crafts a new theory of statutory interpretation altogether, devoting nearly its entire brief to the proposition that its voting-differences-alone theory must be correct because it is supported by "social science." (UCLA Br. at 17-34.) The Project cites many articles in support of this theory. But it never claims that the Legislature actually considered any of them. And most of those articles were published after the CVRA was enacted in any event. (See, e.g., *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172 [document not considered by Legislature does not "help[] ascertain legislative intent"].)

In short, the idea that courts can begin and end their CVRA analysis with the observation that voters of different ethnic groups vote differently would be a flawed construction of the statute, and would radically and unconstitutionally expand its scope. Dilution is an independent element of the CVRA.

II. The amicus briefs underscore that the Court should adopt an objective, administrable standard for dilution that avoids constitutionality and justiciability problems.

The City has urged the Court to adopt a test for dilution that is principally numerical—could the relevant minority group account for a near-majority in a hypothetical district, and is there evidence that the group would attract enough crossover support from other voters to meaningfully influence election outcomes? By contrast, plaintiffs and their allies propose a vague, I-know-dilution-when-I-see-it standard. The Court should adopt the City's proposal because, among other reasons, it would avoid the serious constitutional questions raised by an anything-goes approach, and it would provide useful guidance to lower courts deciding CVRA claims and public entities attempting to discern whether they are on the right or the wrong side of the law.

A. Inherently race-based changes to an election system are unconstitutional if they will not improve minority voting power.

Plaintiffs' interpretation of the CVRA runs headlong into constitutional problems. (Ans. Br. at 26-48.) Specifically, courts may not impose a change in election system for predominantly race-based reasons unless doing so advances a compelling state

interest. (Ans. Br. at 31.) Remedying vote dilution may be such an interest. (*Ibid.*) But here, the trial court ordered the City to scrap its longstanding electoral system in favor of a district-based system—in which the plaintiffs' expert drew the Pico District with the express purpose of concentrating as many Latino voters as possible into that district (see RT2566:3-2567:8, RT2577:8-2579:18)—even though the purportedly remedial district will have so few Latino voters that they will not have meaningful electoral influence. (Ans. Br. at 60-65.) Absent any meaningful increase in electoral influence, ordering the adoption of an election system premised on the idea of sorting voters on the basis of race or ethnicity would advance no compelling interest, and would therefore violate the Equal Protection Clause.

Most amici ignore this problem. Only the two amici who submitted briefs in favor of neither side, the Attorney General and longtime voting-rights lawyer Bruce Wessel, address constitutional questions at length. (AG Br. at 20-24; Wessel Br. at 7-24.) And the Attorney General addresses the wrong question—i.e., whether district lines drawn to comply with the CVRA are regular enough to satisfy the Constitution (a question not raised here).

Only Mr. Wessel squarely confronts the question that *is* presented by this case: whether it violates the Equal Protection Clause to order the adoption of a new election system for the purpose of concentrating a racial or ethnic group, even when that group still will not be large enough to elect its preferred candidates or meaningfully influence election results. The answer to that question is yes, which is why this Court should reject the proposal of plaintiffs and certain amici to adopt a standard for "influence" so amorphous as to authorize predominantly race-conscious districting efforts that would not have any impact on election results.

1. The Attorney General focuses on the wrong constitutional question.

The Attorney General argues that this case doesn't present a constitutional question because cities ordered to draw districts will not necessarily do so in an unconstitutional way. (AG Br. at 21-22 & fn. 3.) That argument misses the point. It is premised on an idea that the U.S. Supreme Court has already rejected—that districts can be unconstitutional only if their lines do not comply with traditional districting principles.

The Court held in *Shaw v. Reno* (1993) 509 U.S. 630, 644, that a district can be unconstitutional when it is "so bizarre on its face that it is 'unexplainable on grounds other than race.'" But the Court soon clarified that *Shaw* "was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation." (*Miller v. Johnson* (1995) 515 U.S. 900, 912.) The question is instead whether race was the "dominant and controlling rationale in drawing . . . district lines" in the first place. (*Id.* at 913.) In other words: "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." (*Bethune-Hill v. Virginia State Bd. of Elections* (2017) 137 S.Ct. 788, 798.)

Here, the sole reason the trial court ordered the City to abandon at-large elections and to adopt districts was race-based: to enhance the voting power of Latinos. (See 24AA10680-10681, 24AA10686, 24AA10706-10707.) And that court required the City to adopt the Pico District, drawn by plaintiffs' expert with the express purpose of maximizing the share of Latino voters within it. (See 24AA10734, 24AA10727-10728, 24AA10739, RT2566:3-2567:8, 2577:8-2579:18.) The question is whether that exercise in voter segregation can be constitutional when it is also

pointless—that is, when it would not change election outcomes. The Attorney General does not address that question.

In addition to ducking the central constitutional question, the Attorney General makes three other incorrect observations. First, he suggests that courts can avoid constitutional problems by ordering remedies other than districts. (AG Br. at 20.) But ordering a city to adopt *any* remedy for a race-based reason, even though it will not change election outcomes, is unconstitutional. (See *Bethune-Hill*, 137 S.Ct. at 798; *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 227.) In any event, the trial court in this case ordered the City to adopt districts, and plaintiffs and various amici continue to insist that this Court should reinstate that order. (E.g., OB at 72-73; Scholars Br. at 31; FairVote Br. at 47.)

Second, the Attorney General suggests that the question of remedy is entirely separate from the question of liability. (AG Br. at 21-22, fn. 3.) But that contention is inconsistent with his own articulation of the dilution element, which is premised on a comparison of minority voting strength under the current system against its strength under a hypothetical alternative system. (*Id.* at 14.) And under settled principles of statutory interpretation,

when determining whether a defendant is liable under the CVRA, a court must also decide whether there is some constitutionally permissible remedy. (Cf. Civ. Code, § 3523 ["For every wrong there is a remedy."].) If there is no valid way to change an electoral system to increase minority voting strength, that's a sure sign the electoral system was not the problem to begin with. And a race-based finding of liability, which may require a municipality to pay significant costs and attorneys' fees, would be unconstitutional if there is no remedy that will change election outcomes.

Third, the Attorney General says the U.S. Supreme Court's decision in *Bartlett v. Strickland* (2009) 556 U.S. 1 does not support the City's constitutional argument. (AG Br. at 22-23.) That case is distinguishable, the Attorney General contends, because it addresses "the requirements and language of the FVRA," not the CVRA, which allows plaintiffs to prove that an election system has diluted not just a minority group's ability to elect its preferred candidates, but its ability to influence election outcomes. (*Id.* at 22.)

The trouble with that argument is that section 2 *itself* does not require plaintiffs to prove that an election system has robbed

a minority group of its ability to elect its preferred candidates. (See 52 U.S.C. § 10301.) Courts have *interpreted* the statute that way to avoid the same constitutional problems that the City has described in this brief and its answer brief on the merits. For years, the U.S. Supreme Court declined to address the question whether section 2 authorized "influence" claims. (*Bartlett*, 556 U.S. at 12 [collecting cases].) Only in *Bartlett* did the Court conclude that it finally "must consider the minimum-size question." (*Ibid.*) And it there decided that the avoidance of constitutional concerns required foreclosing influence claims and insisting on the possibility of a majority-minority district. (*Id.* at 21.)

In other words, it is the doctrine of constitutional avoidance, *not* anything in the text of section 2, that has compelled federal courts to consistently reject influence claims.

The Attorney General also chalks up these concerns to "federalism issues" that "are inapplicable to the CVRA, a state statute." (AG Br. at 23.) That might be a plausible reading of one portion of *Bartlett*, in which the Court addresses many of the practical impediments to recognizing influence claims (556 U.S. at 18-19), but it does not account for the portion of the opinion

that actually addresses the doctrine of constitutional avoidance. (*Id.* at 21-23.) The CVRA is not an exception to the Equal Protection Clause. Nor is there a reason why the CVRA would be exempt from the U.S. Supreme Court's central concern in *Bartlett*—that recognizing influence claims would lead to widespread use of pernicious racial classifications and "a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor.'" (*Id.* at 21-22.)

Finally, the Attorney General observes that "*Bartlett* was clear that States were free to *choose* to use crossover or influence districts should they so desire." (AG Br. at 23.) True, the Court did say that influence districts might be proper as a matter of "legislative choice or discretion," but only if the decision to adopt them were "based on proper factors." (*Bartlett*, 556 U.S. at 23.) Nowhere in *Bartlett* did the Court endorse the idea that a State may compel a race-based move to influence districts that will not improve (and here would harm) a protected class's electoral power. The California Constitution similarly bars the State from compelling a charter city to move to districts under these circumstances. (See Part II.B, *post*.)

2. Mr. Wessel persuasively explains why a districting remedy can be unconstitutional even if the district lines are regular.

Mr. Wessel addresses the point that the Attorney General missed: that switching to a district-based election system can violate the Equal Protection Clause even when the district lines follow traditional districting principles. In other words, unnecessary racial districting or redistricting is unconstitutional. Mr. Wessel illustrates the point by discussing two recent U.S. Supreme Court decisions, *Cooper v. Harris* (2017) 137 S.Ct. 1455 and *Bethune-Hill v. Virginia State Board of Elections* (2017) 137 S.Ct. 788.

In *Cooper*, the Court held that North Carolina violated the Constitution when it packed African-American voters into districts where they already had the power to elect candidates of their choice. (137 S.Ct. at 1481-1482; see Wessel Br. at 9-12.) The problem in *Cooper* was not necessarily the shape of the new districts; it was that they didn't need to be drawn in the first place. (See 137 S.Ct. at 1470 [African-American voters had already been electing their preferred candidates for decades].) In other words, *Cooper* stands for the proposition that race-

conscious changes to an election system may be made only when they will improve the electoral power of a minority group; if the changes would not yield different election results, they are unnecessary and unconstitutional. (*Id.* at 11-12.)

Bethune-Hill makes much the same point. There, the Court rejected the argument that the Attorney General makes here—that a district-based election system must be constitutional as long as the districting lines are regular. "[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." (137 S.Ct. at 799; see Wessel Br. at 13-14.) The inquiry is necessarily broader than that: Any election system adopted principally for race-based reasons will be unconstitutional unless it serves a compelling state interest. (*Bethune-Hill*, 137 S.Ct. at 801.)

Mr. Wessel notes that among the many ways that a party might show that an election system was adopted for impermissibly race-based reasons is the use of "racial targets"—that is, efforts to draw districts with a certain share of minority voters. (Wessel Br. at 18.) That is precisely what plaintiffs'

expert did here. His starting point was, above all else, to maximize the share of Latino voters in a district. (See RT2566:3-2567:8, 2577:8-2579:18.)

This effort at segregating voters by race could be permissible if it advanced some compelling state interest. (Wessel Br. at 8, 10.) Here, however, as in *Cooper*, there is no compelling interest, because there is no vote dilution to remedy. (*Id.* at 21.) Plaintiffs' proposed district would therefore be an unconstitutional racial gerrymander.

3. The relevant minority group's share of the electorate in a district is relevant.

Some amici, including the Attorney General, argue that the City's proposed near-majority standard runs afoul of Elections Code section 14028(c), which states that "[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 a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." (AG Br. at 17-19; AAAJ Br. at 11-12.) But there is a glaring flaw in this argument: The "dilution" standard that these same amici propose, like plaintiffs' proposed standard, *also* depends on a

minority group's compactness and concentration. The only difference is degree.

The Attorney General, for example, says that "the geographic concentration or diffusion of the protected class" is one of many factors relevant to "[p]roving that an at-large voting system has precluded a protected class's meaningful ability to influence electoral outcomes." (AG Br. at 24-25.) And Asian Americans Advancing Justice appear to echo plaintiffs' erroneous view that federal courts have endorsed dilution-of-influence claims where the relevant minority group would account for at least 25% of a hypothetical district's voters. (See AAAJ Br. at 22-23 & fn. 2; OB at 48-49.)

Accordingly, the parties and amici agree that although section 14028(c) removes the majority-minority-district requirement of federal law, this does mean that courts assessing CVRA vote-dilution claims must entirely ignore the minority group's share of a hypothetical district's electorate. There are three reasons why this is the case. First, it is impossible to assess dilution without that basic demographic fact. A court weighing a CVRA claim must determine whether an alternative system would increase a protected class's ability "to elect

candidates of its choice" or "to influence the outcomes of an election." (Elec. Code, § 14027.) There can be no such increase when a dispersed minority group accounts for a low share of voters citywide *and* a low share of voters in a district.

Amici's own citations demonstrate as much. The only empirical evidence of the effect of switching to districts cited by any amici—a study cited by the UCLA Voting Rights Project—underscores the propriety of a near-majority standard. (UCLA Br. at 26, citing Loren Collingwood & Sean Long, CAN STATES PROMOTE MINORITY REPRESENTATION? ASSESSING THE EFFECTS OF THE CALIFORNIA VOTING RIGHTS ACT (2019) 57 Urb. Aff. Rev. 731.) The study shows that switching to districts in California has improved minority voting strength *only* when the minority group is large and compact—not when, as in this case, the group is small and dispersed.

The authors sorted cities into two subsets: "low Latino," or any city with "a Hispanic population below 41.65%," and "high Latino," or any city "with Latino population at 41.65% or higher." (Collingwood & Long, 57 Urb. Aff. Rev. at 748.) The authors "expect[ed] to observe minimal racial representation differences" in the low-Latino cities and "large effects" in the high-Latino

cities. (*Id.* at 755.) And that is precisely what they found: that "the real-world effects of laws like the CVRA will most clearly manifest in high-minority cities that continue to elect city councils at-large." (*Id.* at 756.) The study, in other words, directly supports the City's near-majority standard—*not* the idea that districts will increase electoral influence even without a large minority population.

Similarly, although other amici assert that districts can change election outcomes even when a district is far short of 50% minority (Scholars Br. at 21), the article they cite for that proposition relies almost exclusively on an amicus brief from the United States, which itself endorses the very near-majority standard the City has proposed in this case. (Bernard Grofman et al., DRAWING EFFECTIVE MINORITY DISTRICTS: A CONCEPTUAL FRAMEWORK AND SOME EVIDENCE (2001) 79 N.C. L. Rev. 1383, 1389, fn. 27, citing Brief of Amicus Curiae United States, *Valdespino v. Alamo Heights Indep. Sch. Dist.* (2000) 528 U.S. 1114, available at https://www.justice.gov/osg/brief/valdespino-v-alamo-heights-indep-school-district-invitation.) In that pre-*Bartlett* brief, the United States expressed concern about a "flat 50% rule" that would bar claims from groups that were "compact,

politically cohesive, and substantial in size yet *just short of a majority*." (Italics added.) That brief did not remotely endorse the notion that a 25% district would pass muster under section 2 or the Constitution.

Second, there would be no way to draw a meaningful line between valid and invalid CVRA claims without some consideration of the size of the minority group in a hypothetical district. A group might make an impressive showing under a fact-specific standard, proving such things as a lack of responsiveness from the defendant's governing body. But that showing would be irrelevant if the group would account for only a small sliver of the electorate no matter how elections were run.

That fact evidently does not trouble the Scholars, who argue that a "minority community realizes greater political influence" whenever "a jurisdiction moves from at-large to district-based elections, and one or more of the resulting districts have a greater proportion of minority voters than the jurisdiction as a whole." (Scholars Br. at 7.) Plaintiffs made much the same point at oral argument below when they refused to exclude the possibility of CVRA liability even where a protected class's share of voters would rise from 14% in an at-large system to just 15% in

a district. (Ans. Br. at 17.) The problem with that standard is that in *every* city it will be true that switching to districts will create at least one district with at least a slightly higher minority population than the rest of the city. Accepting the premise that even marginal increases in "political influence" can support a CVRA suit would be tantamount to mandating districts statewide, with no real-world impact on election results. It would also run contrary to the CVRA's text, which nowhere references "political influence," instead requiring an increase in the ability to influence "the *outcome* of an election." (Elec. Code, § 14027, italics added.)

Third, if the CVRA nevertheless required courts to order cities to concentrate such small minority groups into districts, the statute would be unconstitutional. Compelling a switch from at-large elections to districts may be permissible when it restores to a minority group the power that the group should have possessed all along. But ordering such districts would be an impermissible exercise in racial classifications if it would not change election outcomes. The Court should not endorse purposeless electoral segregation. (See Part II.A.2, *ante*; Ans. Br. at 31-34.)

Switching to districts might well be good policy in many cities. And cities are free to do just that, provided that they do not make unjustified racial classifications, deliberately sorting voters on the basis of race even when there is no compelling justification for doing so. But whether districts make for good policy or bad, they should not be *judicially compelled* except when they will result in a meaningful increase in minority voting strength. Any test for dilution must accord with this principle. And, because districts won't advance that potentially compelling interest here, it would be unconstitutional to force the City to abandon its current system.

B. Charter cities' constitutional right of self-governance is an independent constitutional impediment to ordering a change in election system where there is no vote dilution.

One amicus, John Haggerty, contends that the CVRA is unconstitutional insofar as it abridges charter cities' constitutional right to govern their own affairs. (E.g., Haggerty Br. at 12.) The City agrees that the statute would be unconstitutional as applied to the facts of this case if it authorized the imposition of an alternative electoral system even

if that system would not improve minority voting power. (See Ans. Br. at 24-25, fn. 2.)

Charter cities have a constitutional right to govern their own affairs. (Cal. Const., art. XI, § 5.) That right can be overcome only when a charter city's affairs implicate matters of "statewide concern." (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 564.)

Meaningfully improving the electoral power of a minority group in a city could well be an issue of statewide concern. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 798-799; but see *id.* at 810 (concurring opn. of Mosk, J.) [questioning "whether election in one municipality is a matter of statewide concern"].) The U.S. Supreme Court has long assumed that compliance with section 2 of the federal Voting Rights Act qualifies as a compelling state interest. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1464.) Complying with the CVRA might qualify, too.

The Court need not decide that question, however, because there can be no statewide interest in race-based districting that will *not* meaningfully improve the voting power of the relevant minority group. Here, districting would, far from improving

Latino voting power, actually weaken it. (Part II.C, *post*.) As a result, there is no possible statewide interest that could justify displacing the City's right of self-governance. And imposing districts under those circumstances would therefore unconstitutionally invade Santa Monica's right of self-governance.

Mr. Haggerty devotes much of his brief to the question whether *Jauregui*, which held that the CVRA addresses an issue of statewide concern, was rightly decided. (Haggerty Br. at 16-28.) This Court need not resolve that question, because *Jauregui* is distinguishable from this case. There, the defendant did not contest the trial court's finding of vote dilution. (226 Cal.App.4th at 792.) Here, by contrast, the City has argued from the inception of this case that its election system does not dilute Latino voting power, and the Court of Appeal reversed on that ground.

The City's right of self-governance is another independent constitutional impediment to the imposition of districts absent dilution.

C. At the very least, there cannot be dilution where an alternative electoral system would *harm* the minority group's ability to elect its preferred candidates.

The Attorney General agrees with the City that courts deciding CVRA claims "should also consider whether alternative systems would instead *harm* the protected class." (AG Br. at 26; accord Ans. Br. at 44-46.)

The Attorney General offers an example of how abandoning traditional at-large elections might harm the protected class: "if multiple members . . . 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." (AG Br. at 26.) After all, "[i]t 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." (*Ibid.*) That is precisely the problem in this case, no matter how the Court looks at it.

If Latino-preferred candidates' historical success rate is what counts (as the City contends), then switching to districts would harm the City's Latino voters. Those voters have been able to elect the majority of their preferred candidates in the last quarter century. (Ans. Br. at 60.) Under a district-based system,

by contrast, one-third of Latino voters would be packed into a district where they would not have the numbers to elect their preferred candidates—especially given that plaintiffs insist voting is extremely racially polarized. (*Id.* at 62-63.) And the other two-thirds of Latino voters would be cracked across six districts where they would represent too small a share of the electorate to change electoral outcomes. (5AA1666, 5AA1675; RA46-47.) So under *any* district-based system, Latino voters would even on their best day be able to elect only one candidate of choice, and only with substantial support from other voting groups. That would hardly be progress, given that Latino voters have frequently elected multiple preferred candidates in a single election. (25AA11007, 25AA11010, 25AA11011.)

On the other hand, if Councilmembers' ethnic backgrounds and places of residence are what counts, as plaintiffs and several amici argue, then adopting a district-based system in Santa Monica would also harm those who, according to plaintiffs, are underrepresented. The Council currently has four Latino members, one African-American member, and two non-Hispanic white members—in a city that is over 70% non-Hispanic white. (League of Women Voters' Opp. to Mtn. to Strike, Declaration of

Nathaniel Trives, ¶ 17; RA47.) And at least three Councilmembers, two Latino and one African-American, live in plaintiffs' purportedly remedial Pico District. (City's Motion for Judicial Notice at 13.) Reinstating the trial court's districting scheme would ensure that *at most* one of those members could remain on the Council.

Under the current system, by contrast, under plaintiffs' and certain amici's view of Santa Monica elections, all of those Latino Councilmembers are likely to stay on the Council by virtue of incumbency. Councilmember de la Torre, for instance, notes that "[i]n the previous 25 years" before the 2020 election, "only two incumbents had lost reelection" bids. (de la Torre Br. at 11.) FairVote also contends that "incumbents have well-documented advantages over new candidates." (FairVote Br. at 22, fn. 4.) And plaintiffs themselves have throughout this litigation emphasized the importance of incumbency, consistently arguing that Latino candidates were able to prevail only because incumbents declined to run or because they had become incumbents themselves. (E.g., 22AA9737, 22AA9774, 22AA9776, 22AA9778, 22AA9796; COA Respondents' Br. at 24, 25-26, 56, fn. 11, 61, fn. 13.)

In short, under the current at-large system, Latino voters have been able to elect their preferred candidates, some of whom have been Latino and some of whom have hailed from the Pico Neighborhood. (Ans. Br. at 13-14, 49, 60; RT4823:3-4, RT7811:6-13.) Switching to a district-based system would be a recipe for Latino disenfranchisement, not empowerment.

Asian Americans Advancing Justice contend that the City's position is "contradictor[y]" because, in its view, Latino voters have "only marginal influence in the first place." (AAAJ Br. at 25.) Not so. A small, dispersed minority group, like Latinos in Santa Monica, can have significant voting power in a traditional at-large system and *lose* that power in a switch to districts. Under the current system, voters can each cast up to three or four votes. (Opn. at 3-4.) But they can strategically elect to vote for only one candidate; this strategy, known as single-shot or bullet voting, maximizes the chance that their top choice will be elected. (See, e.g., *N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.* (2d Cir. 1995) 65 F.3d 1002, 1022 [describing advantages of bullet voting in seven-councilmember at-large system like Santa Monica's].) Latinos' votes, whether for one or multiple candidates, are likely to matter because the last candidate to get

elected often does so with a small share of the electorate. (E.g., 27AA11994 [victory with only 6,696 votes, about 11% of votes cast].)

All of that would change in a district-based system. Voters could each cast only *one* vote, and only for the subset of candidates running in a winner-take-all election in their district. Latino voters would be outnumbered over two to one in their best district and over eleven to one in their worst. (RA46-47.) If plaintiffs were right that voting is racially polarized, then switching to winner-take-all district-based elections would virtually guarantee that Latinos will always be outvoted. (See RT7258:4-10; RT7575:6-16, RT8334:17-8335:1.)

D. The Court should give clear, objective guidance to courts and public entities facing threatened or filed CVRA suits.

The League of California Cities and the California Special Districts Association, representing about 1,400 public entities, explain that public entities have adopted districts principally because of the risk of bearing both sides' litigation costs in the event of a loss. That risk has been considerable since the enactment of the CVRA 20 years ago. The statute is not a model of clarity, and, unlike its federal counterpart, has generated

scarcely any published authority. Only one decision has addressed even the *elements* of a CVRA claim—the Court of Appeal's opinion in this case. (Opn. at 25.)

Without any appellate guidance on what the CVRA requires a plaintiff to prove, and with the plaintiffs' bar using the CVRA's one-sided fee-shifting provision to ratchet up the pressure, public entities have understandably declined to fight the vast majority of suits filed against them. The Court is now in a position to provide that guidance—and it should do so in a clear, objective, administrable way.

1. Courts and parties must be able to draw lines between meritorious and meritless claims.

Plaintiffs and certain amici urge this Court to maintain the hazy status quo that existed before the Court of Appeal's decision in this case—they want this Court to adopt a vague, fact-intensive standard that will make it virtually impossible for courts to determine CVRA liability as a matter of law, and that as a practical matter will result in a statewide shift to district-based elections regardless of what that means for minority voters.

Asian Americans Advancing Justice, for example, contend that "the CVRA embraces a case-specific, fact-intensive analysis" that "affords courts substantial flexibility to determine, on a case-by-case basis, whether there is a violation." (AAAJ Br. at 11, 22.) And the Attorney General calls for courts to "consider the totality of circumstances and take a flexible approach," under "a highly fact-dependent standard." (AG Br. at 24.)

But leaving the question whether a defendant has violated the CVRA to the unfettered discretion of a trial court—with no objective benchmarks to guide it—is a formula for arbitrary decision-making, not the development of sound case law that will give public entities at least some sense of whether their election systems are on the right or wrong side of the CVRA. (See, e.g., *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 954-955 [criticizing "a wide-ranging and flexible test" for being "complex and manipulable"]; *Exacto Spring Corp. v. Comm'r* (7th Cir. 1999) 196 F.3d 833, 835 [multi-factor tests "cannot [themselves] determine the outcome of a dispute because of [their] nondirective character" and thereby "invite[] the making of arbitrary decisions based on uncanalized discretion or unprincipled rules of thumb"].)

This case perfectly illustrates what a free-ranging, non-exclusive, multi-factor test for dilution looks like in practice. The trial lasted six weeks and, over the City's objection, devolved into an evidentiary free-for-all on dozens of issues having nothing to do with whether the City's at-large election system dilutes Latino voters' electoral influence—including purported methane gas leaks in city parks, supposed campaign fundraising violations, residents' use of HEPA air filters, the number of liquor stores and auto-repair shops in the Pico Neighborhood, allegations of racial profiling by police, the placement of the I-10 freeway and City maintenance yards more than a half-century ago, and plaintiffs' telephone survey of whether certain City Council candidates were "perceived as Latino." (See generally 22AA9743-9746, 22AA9826-9828, 22AA9864-9866.) Due in part to the anything-goes scope of the trial, plaintiffs' counsel claim to have generated more than $10 million in fees and costs in the trial court alone (which they asked the court to multiply by a factor of 2.2). (See Opn. at 21.) This Court should not endorse a test for vote dilution that would make this case a model for how to try a CVRA lawsuit.

Put differently, plaintiffs and the amici who support them argue that the question whether an election system has caused

vote dilution is *always* case-specific and fact-dependent—that courts can *never* decide it as a matter of law. (E.g., OB at 47-54; AAAJ Br. at 11-12, 22-24.) That makes no legal or practical sense. Suppose a city had a small minority group that accounted for 2% of its voting population, and that it would be possible to draw a district in which that group would account for 6% of eligible voters. Could a trial court really not decide as a matter of law that this group was too small to have meaningful "influence" under *any* electoral system? Does *every* CVRA case need to proceed to discovery and a trial? If so, even victorious defendants would suffer a practical defeat by shouldering the considerable costs of years-long litigation and facing the uncertainty of a fact-dependent analysis with no clear guiding principles.

In reality, a decision that liability cannot be ruled out in *any* case, no matter the basic demographic and electoral facts, would be worse than an invitation to arbitrariness. It would sound the death knell for CVRA litigation and at-large elections. Public entities have already been reluctant to litigate CVRA cases. Without any clear, administrable test—or even basic guardrails approximating the outer edge of liability—public entities facing CVRA suits would be completely unable to analyze

whether their election systems would survive judicial scrutiny. As a result, it is hard to imagine that any defendant would choose to put up a fight, much less hold out long enough for the Court of Appeal or this Court to weigh in. (Cf. *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 [describing the "risk of 'in terrorem' settlements that class actions entail," where defendants are "pressured into settling questionable claims" if there is "even a small chance" of losing].)

In short, a decision that CVRA cases are subject to no objective standard and must all be resolved on an unpredictable and case-specific basis would chill further CVRA litigation and arrest the development of CVRA-specific case law. Such a decision would effectively accomplish what the Legislature expressly declined to do—ending at-large elections statewide. (Ans. Br. at 33.)

There is a good reason the Legislature wanted to avoid that extreme result, as the League of California Cities and the California Special Districts Association explain. Though districts can sometimes empower minority voters, they can also lead to the parochialism, log-rolling, and even outright corruption associated with ward politics. (See, e.g., League of Cities Br. at 13-14.)

Those were the problems that drove lawmakers across the country to abandon district-based elections in the Progressive Era in the first place. (See, e.g., *City of Mobile, Ala. v. Bolden* (1980) 446 U.S. 55, 70, fn. 15, superseded by statute on other grounds; *Kirksey v. City of Jackson* (5th Cir. 1981) 663 F.2d 659, 663.) And of course, district-based election schemes can themselves be potent tools for race-based gerrymandering and minority disenfranchisement. (See, e.g., *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1481-1482 [striking down unconstitutional racial gerrymander].) In fact, in this case, districts are likely to hurt the protected classes that the CVRA was designed to help (see Part II.C, *ante*)—which is one of the reasons local minority leaders have publicly opposed districts. (See League of Women Voters Br. at 6-8, 53-57; League of Women Voters' Opp. to Mtn. to Strike, Declaration of Nathaniel Trives.)

2. At least in this case, the question of vote dilution can be decided as a matter of law based on objective, undisputed facts.

This case presents the perfect opportunity for the Court to avoid the accidental demolition of at-large elections statewide, and to give trial courts and public entities meaningful guidance on the limits of the CVRA. First, Santa Monica's demographic

and electoral history are so unusual that the Court could decide, as the Court of Appeal did, that whatever a good CVRA claim might look like, the one advanced by plaintiffs isn't it. (Opn. at 36-37.) Second, the key facts informing the question of vote dilution—Latino voters' ability to elect their preferred candidates under the current system and whether they would gain voting power under any alternative system—can be decided as a matter of law.

Latino voters have consistently been able to elect candidates of their choice in Santa Monica. (Ans. Br. at 60.) Switching to districts would only diminish their voting power. Plaintiffs' expert drew a map to maximize the number of Latinos in the "Pico District," and Latinos will nevertheless account for only 30% of eligible voters there. (RT2566:3-2567:8, RT2577:8-2579:18; RA47.) Under plaintiffs' own theory of the case—stark racially polarized voting—those voters would be outvoted in a district where the largest voting group by far would still be white. (RA44-46.) Latino voters would also have no support from other minority groups, since plaintiffs' own expert's analysis shows that those groups do not vote for the same candidates as Latinos. (25AA11006-110012.) On these facts, the Court can conclude as a

matter of law that there is no vote dilution in Santa Monica, and that switching to districts would achieve nothing except a violation of the Constitution, because the City would have been ordered to pack Latinos into a district where they wouldn't have any greater voting power.

Other qualitative factors suggested by amici theoretically could matter in a case much closer than this one. If a minority group were large enough that, under certain circumstances, it would be reasonable to expect it to have more power at the ballot box than under the challenged system, then it might make sense to inquire into whether those plus factors push it over the top. That is the purpose of Elections Code section 14028, subdivision (e), which sets out factors that mirror the "Senate factors" considered in section 2 cases. (OB at 21.)

But the Attorney General suggests that courts should "*start* by looking to factors laid out in section 14028, subdivision (e)." (AG Br. at 24, italics added.) This is a curious suggestion—the text of section 14028(e) states that the factors "are probative, *but*

not necessary factors to establish a violation" of the CVRA. (Italics added.)

Starting with those factors would also be completely out of step with the federal law on which they are modeled. Federal courts consider the Senate factors only *after* deciding that all three *Gingles* factors—one of which is vote dilution under the federal majority-minority standard—are satisfied. (*Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 982-983.) "If one or more of the *Gingles* factors is not shown, then the defendants prevail," and the court does not review the Senate factors. (*Johnson v. Hamrick* (11th Cir. 1999) 196 F.3d 1216, 1220.)

There is good sense in that approach. "The inquiry into the *Gingles* preconditions is a preliminary one, designed to determine whether an at-large system potentially violates § 2." (*United States v. Charleston Cty.* (4th Cir. 2004) 365 F.3d 341, 348.) "An at-large system cannot be responsible for diluting minority strength unless minority voters cohesively support particular candidates, the minority-preferred candidates are being systematically defeated by white bloc voting, and those defeats would not be occurring under a system of single-member districts." (*Ibid.*; accord *Growe v. Emison* (1993) 507 U.S. 25, 40-

41 ["Unless these points are established, there neither has been a wrong nor can be a remedy."].) The Senate factors serve only to confirm what the *Gingles* preconditions already nearly conclusively show—a violation of section 2. (*Uno*, 72 F.3d at 983 ["cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a section 2 claim because other facts undermine the original inference" of liability].)

The Court should therefore reject the Attorney General's proposal that courts *begin* with an analysis that the CVRA itself says is optional and that is meant to *confirm*, not *establish*, that a defendant's electoral system has caused vote dilution. Elsewhere in his brief, the Attorney General gets it right: "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." (AG Br. at 15.)

In sum, although plaintiffs and the amici who support them would prefer the uncertainty and malleability of a standard for CVRA liability that requires consideration of the section 14028(e) factors in all cases, a decision embracing such a standard would provide inadequate guidance to trial courts and potential CVRA defendants alike—and render the CVRA unconstitutional

because it would permit race-based orders compelling changes in election systems without any meaningful increase in minority voting strength.

E. A rough-proportionality standard is an administrable, objective cross-check for dilution.

The League of Women Voters and other amici have proposed an alternative liability standard, grounded in U.S. Supreme Court precedent, that functions as a backstop or complement to the City's near-majority standard. (League of Women Voters Br. at 32-45.) The League urges the Court to avoid "speculation about the hypothetical impact of district elections" and instead to focus on Latinos' power under the current system. (*Id.* at 9.) If Latinos are already electing preferred candidates in proportion to their share of the electorate, the League argues, then the current system cannot possibly have diluted their voting power. (*Id.* at 32-45.)

That argument makes sense. For one thing, persistent proportional representation calls into question the notion that a minority group has had inadequate influence on election outcomes. (E.g., *Clarke v. City of Cincinnati* (6th Cir. 1994) 40 F.3d 807, 813 ["'persistent proportional representation' . . . is

presumptively inconsistent with the existence of a § 2 violation"]; *African American Voting Rights Legal Defense Fund, Inc. v. Villa* (8th Cir. 1995) 54 F.3d 1345, 1355-1356 [proportionality supported conclusion that defendant city was not liable under section 2].)

For another, a minority group's past electoral influence is observable, at least through statistical inference. That group's *future* influence, by contrast, can only be guessed, requiring judges "to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term." (*Bartlett*, 556 U.S. at 17.) This is, in large part, why federal courts have "consistently rejected" nebulous claims premised on a minority group's expanded "influence." (*Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267.) The argument that a modest increase in a minority group's share of the electorate necessarily improves influence is "speculative and unpersuasive." (*Illinois Legislative Redistricting Commission v. LaPaille* (N.D. Ill. 1992) 786 F.Supp. 704, 716 [three-judge panel].)

The Court might therefore reasonably adopt a proportional-representation test as a cross-check that follows application of a

near-majority test. The two tests together would ensure that defendants are not held liable when the minority group either (a) is too small to meaningfully influence elections under any election system or (b) has been able, whatever its size, to elect its preferred candidates in the current system.

A focus on proportional representation cannot be the only test in every case, however. When minority populations become small enough, they should not be expected to elect their candidates of choice under any electoral system. (See AG Br. at 15.) Consider an extreme example: A group accounting for only 1% of the voting population should not be expected to elect its preferred candidates 1% of the time. It might also be said that Santa Monica's Latino voters, who account for only 13.6% of the City's voting population, should not be expected to elect their preferred candidates 13.6% of the time either. (Opn. at 1-2.) But whether, as a mathematical matter, that group should or should not be able to elect candidates of its choice makes no difference; as a practical matter, it *has* been able to do so 73% of the time. (Ans. Br. at 60.) That fact should foreclose liability no less than the impossibility of Latinos accounting for a large enough share of the voting population of any hypothetical district.

III. Alternative at-large remedies are not properly before the Court and are inappropriate in this case.

Although the CVRA allows courts to impose remedies other than districts, that issue is not properly before this Court: Plaintiffs sought a district-based remedy from the outset, the trial court addressed alternative at-large remedies only in conclusory fashion, and for that reason the Court of Appeal declined to address them at all.

In any event, even if considered on the merits, alternative at-large remedies should not be imposed here because they would not improve Latino voting power in Santa Monica.

A. Alternative at-large remedies are not properly before this Court because plaintiffs have not pursued them and the lower courts did not meaningfully address them.

The trial court ordered "the City to implement district-based elections for its City Council in accord with the seven-district map presented at trial." (Opn. at 21.) It did not meaningfully consider or analyze the propriety of alternative at-large election systems—stating only the bare conclusion that alternative remedies "such as cumulative voting, limited voting and ranked choice voting[] are possible options in a CVRA action and would improve Latino voting power in Santa Monica."

(24AA10733.) The Court of Appeal declined to address these alternatives because the trial court's "treatment of [them] was perfunctory"—no more than a "fleeting reference," without any "attempt to analyze how each might satisfy the dilution element." (Opn. at 21.)

FairVote devotes its entire brief to the propriety of alternative at-large systems, but fails to mention that the Court of Appeal did not address that issue. And it defends the trial court's consideration of alternative at-large remedies only in a single footnote, asserting that the court "found that a modified at-large system would improve the voting power of Latinos in Santa Monica"—even though the court did not provide any reasoning or analysis to support that statement. (FairVote Br. at 36, fn. 10.)

This Court should decline to consider modified at-large election systems given the lower courts' lack of meaningful engagement with that issue. Because the Court of Appeal's "opinion [] did not address" at-large alternatives, this Court should—in keeping with its usual practice—likewise "decline to consider [the] argument." (*In re J.G.* (2019) 6 Cal.5th 867, 878, fn. 3.) Plaintiffs have sought a district-based remedy from the outset of this litigation and have not meaningfully advocated for

the adoption of alternative at-large elections. (24AA10706-10707, 24AA10733.) For this reason too, whether alternative at-large remedies are appropriate is "beyond the legitimate scope of the issues presented by the instant case," and the Court should therefore "decline to address" it. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 80, fn. 9.)

If this Court nonetheless concludes that the case squarely presents the issue of alternative at-large remedies, it should, "[a]s [it has] often done in such situations, [] remand the case for the Court of Appeal to determine" whether alternative at-large remedies are appropriate. (*Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 730; accord *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, fn. 3 ["As the Court of Appeal did not address this argument, we will not reach it"].)

B. Alternative at-large remedies would not be appropriate in any event.

FairVote's arguments are not only outside the scope of this appeal, but also wrong. Although alternative at-large remedies are potentially available under the CVRA (see Elec. Code, § 14029), the facts here do not warrant their imposition. Neither

FairVote nor plaintiffs have demonstrated that any alternative at-large election system would give Latinos greater voting power or electoral influence in Santa Monica.

FairVote's arguments all depend on the proposition that alternative at-large remedies would result in "the Latino electorate in Santa Monica [being] sufficiently large enough to pass the threshold of exclusion." (FairVote Br. at 46.) There are two problems with that theory. First, under the City's current at-large election system, Latino voters have often elected multiple preferred candidates in a single election. (25AA11007, 25AA11010, 25AA11011.) FairVote's argument regarding the threshold of exclusion relates only to the ability of Latino voters to elect a single preferred candidate. FairVote has not shown that Latino voters in an alternative system would be able to elect *more* candidates of their choice—or otherwise enjoy more electoral influence—than they do under the current system.

Second, FairVote has not shown that an alternative at-large system would result in the election of *any* Latino-preferred candidates. FairVote believes that courts should measure a protected class's electoral power solely through a simple comparison of the relevant minority group's share of the voting

population and the threshold of exclusion. (FairVote Br. at 36-37.) But that approach would always overstate minority electoral influence in an alternative at-large system—and would lead courts to hold municipalities liable under the CVRA and impose remedies that have no real-world effect on a protected class's "ability . . . to elect candidates of its choice or its ability to influence the outcome of an election." (Elec. Code, § 14027, subd. (a).)

FairVote itself acknowledges that the dilution inquiry depends on more variables than the relevant minority group's share of the voting population and the threshold of exclusion. Courts must also consider the relevant minority group's cohesion and turnout and determine whether any alternative voting systems could plausibly allow that group to elect its preferred candidates. (FairVote Br. at 42-43; see also *id.* at 41-42 ["a vote dilution claim [under the CVRA] asks whether a minority group's electoral *potential* . . . has been hampered by the current voting system"].)

That is precisely the approach advanced by the City in its answer brief. (Ans. Br. at 26.) It is also the approach adopted by other courts that have evaluated vote-dilution claims and

considered whether alternative at-large systems would provide a plausible remedy. For example, in *United States v. Euclid City School Board* (N.D.Ohio 2009) 632 F.Supp.2d 740—a case cited by both the City and FairVote (Ans. Br. at 66-67; FairVote Br. at 41)—the court declined to limit its analysis to a comparison of the minority voting population and the threshold of exclusion. It instead concluded that African-Americans would exceed the threshold of exclusion only after considering their potential turnout rate. African-American voters accounted for 40% of the electorate—well above the 25% threshold of exclusion—but a small share of actual voters. (*Euclid*, 632 F.Supp.2d at 745-746.) The court assumed that African-American turnout would be much higher under an alternative system—two-thirds the rate of white voters. (*Id.* at 763, 768-770.) On that assumption, African-American voters would account for 27% of the electorate and therefore exceed the 25% threshold of exclusion. (*Id.* at 770.)

The Latino share of Santa Monica's voting population (13.6%) is not only three times smaller than the African-American share of the voting population in *Euclid* (40.2%)—it also barely exceeds the threshold of exclusion of 12.5%. And that is before accounting for less-than-perfect cohesion among Latino

voters (25AA11006-11012) or their low historical registration and turnout rates (28AA12378). Under the two-thirds assumption from *Euclid*, Latinos would account for only 9% of the electorate—well short of the threshold of exclusion. FairVote thus fails to demonstrate—and the record does not support—that any modified at-large system would plausibly result in Latino voters exceeding the threshold of exclusion.

FairVote also relies on the unpublished trial court decision in *Garrett v. City of Highland* (Cal. Super. Ct. Apr. 6, 2016) 2016 WL 3693498. (FairVote Br. at 21-22.) That decision is not citable and has no precedential value. (Cal. Rules of Court, rule 8.1115(a); *In re Molz* (2005) 127 Cal.App.4th 836, 845 ["trial [court] decisions, of course, have no precedential authority"].) It also undermines FairVote's point because it illustrates why courts cannot limit their dilution analysis to a comparison of the minority group's share of the electorate to the threshold of exclusion.

Upon finding that the defendant's at-large elections violated the CVRA, the court in *Garrett* considered whether alternative at-large systems such as cumulative voting would be an effective remedy. (2016 WL 3693498, at *2.) But in doing so,

the court explained "that the appropriate measure for comparison to the threshold of exclusion is the Latino proportion of the voters who actually cast ballots in recent elections"—that is, the court looked at *turnout*, not just eligible voters. (*Ibid.*) And because Latino turnout "varied between 20.1% and 25.2%" in the four most recent elections—"significantly less than the [33.3%] threshold of exclusion"—the court held "that cumulative voting is not likely to be an effective remedy, and thus it is not an 'appropriate remedy' under the CVRA." (*Id.* at *3.) The same is true here.

FairVote otherwise attempts to show that alternative at-large remedies are commonly imposed in voting-rights cases. (FairVote Br. at 18-20.) If anything, its motley collection of authorities proves the opposite—that those alternatives are unusual and disfavored by courts. In almost every single decision cited by FairVote, the court ordered the defendant to adopt an alternative at-large system with the defendant's consent.

Most of the cases settled. (FairVote Br. at 19-20 & fn. 3, 27, 32, citing *Sw. Voter Registration Educ. Project v. City of Mission Viejo* (Cal. Super. Ct. Orange Co. July 26, 2018) No. 30-2018-00981588-CU-CR-CJC; *Salas v. City of Palm Desert* (Cal.

Super. Ct. Riverside Co. Nov. 22, 2019) No. PSC1909800; *United States v. Eastpointe* (E.D. Mich. Jun. 26, 2019) 2019 WL 2647355; *United States v. Town of Lake Park, Fla.* (S.D. Fla. Oct. 26, 2009) 2009 WL 10727593; and *Moore v. Beaufort Cty.* (4th Cir. 1991) 936 F.2d 159.) The decisions therefore say nothing about the circumstances under which the CVRA requires a court to order an unwilling defendant to adopt an alternative at-large election system.

Another decision, *United States v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 453, ordered the adoption of an alternative at-large system that the defendant itself proposed over the plaintiffs' objection. Here, of course, Santa Monica never proposed any alternative at-large election system.

In short, alternative at-large election systems are uncommon, and FairVote's brief does not show why this should be the rare case where one of those remedies would be appropriate. As the Attorney General explains, a municipality's at-large election system cannot be found to impair a protected class's electoral influence if "alternative systems would not meaningfully increase the 'influence' of [the] protected class." (AG Br. at 25.) Here, basic math shows that no alternative at-

large system would enhance Latino voting power—the very same problem that makes plaintiffs' proposal of a district-based system improper under the CVRA. As a result, plaintiffs cannot prove vote dilution by reference to alternative at-large systems.

IV. Minority-preferred candidates can and should be identified solely on the basis of objective elections analysis.

As explained above, some amici supporting plaintiffs contend that CVRA cases are fact-intensive affairs not fit for resolution as a matter of law. (E.g., AAAJ Br. at 11-12, 23-24; de la Torre Br. at 14-15.) This case demonstrates the opposite, because every part of it can be decided as a matter of law. That includes the identification of minority-preferred candidates when assessing the question of racially polarized voting.

The parties agree that candidates can be identified objectively, without resort to evidence showing that candidates are perceived to be authentic representatives of a minority group. But the parties disagree on what objective evidence counts. Plaintiffs and some amici focus solely on the ethnicity of the candidates. The City, by contrast, focuses solely on election data, declining to assume that Latino voters always prefer Latino or Latino-surnamed candidates.

If this Court weighs in on the question of racially polarized voting (a question the Court of Appeal did not decide, and on which this Court did not grant review), the Court should adopt the City's approach, which is supported by a large body of federal case law condemning the stereotyping of minority voters as blind supporters of those who happen to share their ethnicity or race.

A. The parties agree that minority-preferred candidates can be identified objectively.

The heart of plaintiffs' case is their expert's elections analysis. Its validity does not depend on the sort of fact-intensive analysis that some amici claim is essential in every CVRA case.

In deciding whether voting is racially polarized, courts must determine whether minority-preferred candidates have usually lost because of white bloc voting. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51.) Plaintiffs agree with this standard. (E.g., OB at 43.) The CVRA, after all, incorporates by reference federal case law on racially polarized voting. (Elec. Code, § 14026, subd. (e).)

To complete the racial-polarization analysis, courts must answer three questions: (1) Which candidates are minority-preferred? (2) Have they usually lost the relevant elections? and

(3) If so, are those losses attributable to white bloc voting or some other cause? All three of those questions can be answered with expert voting analysis alone, rather than through qualitative evidence—which is precisely how plaintiffs answered them here.

Plaintiffs relied on their expert to identify Latino-preferred candidates. His method was simple: Look for the candidates with Latino surnames. (E.g., RT4239:2-4241:20.) Plaintiffs introduced no qualitative evidence about those candidates or their connections to Latino voters. And for good reason. Courts have criticized efforts to paint candidates as authentic or inauthentic representatives of a racial or ethnic group. The Second Circuit, for instance, has declined to require district courts to "assess candidates' authenticity in matters racial—an unavoidably malleable, highly subjective inquiry"—and has "instead adopt[ed] a bright-line rule": "a candidate cannot be 'minority-preferred' if that candidate receives support from fewer than 50% of minority voters." (*N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.* (2d Cir. 1995) 65 F.3d 1002, 1018-1019.)

The City has argued that this Court should also adopt a bright-line rule on the theory "'that the ballot box provides the best and most objective proxy for determining who constitutes a

representative of choice'" (*Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 552)—and that it rely on undisputed expert analysis of group voting behavior in applying it. (Ans. Br. at 51, 59.)

Neither of the parties' competing approaches to identifying Latino-preferred candidates—plaintiffs' focus on surnames and the City's focus on the objective data—requires any difficult, fact-specific analysis. Plaintiffs' approach, whatever its other faults, requires only that a court consult the Census Bureau's list of Spanish surnames, and the City's approach requires an objective comparison of undisputed numbers on a table. These analyses do not require flexibility or the exercise of discretion, as some amici have insisted. Any discretionary analysis would "'degenerate into racial stereotyping of a high order.'" (*Ruiz*, 160 F.3d at 552.) "Questions such as whether a candidate, in a campaign, 'addressed predominately minority crowds and interests' suggest the existence of a racial political orthodoxy that courts should not legitimate, much less profess or promote." (*Niagara*, 65 F.3d at 1018.)

Accordingly, performing the required elections analysis is not a fact-intensive affair requiring any deference to the trial court.

B. Some amici, like plaintiffs, focus on the wrong objective information—the ethnicity of candidates, rather than the preferences of voters.

Plaintiffs' analysis of Santa Monica elections has always been limited to Latino-surnamed candidates. Rather than beginning with data and neutral principles to determine which candidates Latino voters preferred, plaintiffs instead begin and end with the stereotype that those voters must always prefer Latino-surnamed candidates. (See, e.g., RT4239:2-4241:20, RT4978:10-20 [plaintiffs' expert describing this approach]; 24AA10685-10686 [trial court adopting that approach].) The U.S. Supreme Court and at least nine federal courts of appeals have condemned this sort of stereotyping as unconstitutional. (Ans. Br. at 53-54.)

That unbroken line of cases has not persuaded the amici supporting plaintiffs. Like plaintiffs themselves, these amici also focus exclusively on *minority* candidates rather than *minority-preferred* candidates, assuming those two categories to be one

and the same.

The Scholars, for example, describe the principle that minority voters prefer minority candidates as a matter of "co-ethnic bonds," "co-ethnicity," "linked fate," or even "group consciousness." (Scholars Br. at 23-29.) The UCLA Voting Rights Project similarly contends that voting is all about race. It chalks up differences in voting patterns to the "racial animus" of white voters, and asserts that city government always boils down to the "politics of ethnicity"—elected representatives distributing "economic goods" to their own "groups" because of their "shared interests." (UCLA Br. at 20-32.)

These amici enthusiastically endorse what the U.S. Supreme Court has called "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" (*Miller v. Johnson* (1995) 515 U.S. 900, 912.) This Court should join federal courts in rejecting this reductionist theory of racial essentialism. Courts may not rely on "'stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred . . . by history and the

Constitution.'" (*Ibid.*)

The idea that Latino voters necessarily prefer Latino candidates is not just normatively troubling, but also descriptively inaccurate. In Santa Monica, for example, Latino voters have often preferred non-Latino Council candidates, even when Latino-surnamed candidates were also running. (Ans. Br. at 55 [describing this pattern in 1996, 2008, 2012, and 2014 elections].) Even plaintiff Loya herself did not conform to her own stereotype of Latino voters—she supported a white candidate for the Council in 2002, despite the fact that a Latino-surnamed candidate ran in that same election. (RT2185:26-2188:24; see also AG Br. at 25 [acknowledging that "voters in the protected class" do not always prefer candidates who are members of that protected class].)

In an effort to bend the facts to fit their theory that Latino voters always prefer Latino-surnamed candidates, plaintiffs and FairVote dismiss Latino-surnamed candidates who attracted little Latino support as not "serious." (OB at 62-64; FairVote Br. at 47.) Even the trial court—which otherwise rubber-stamped the plaintiffs' proposed statement of decision, over hundreds of other objections lodged by the City—rejected this contrived

distinction between "serious" and "non-serious" Latino-surnamed candidates. (24AA10667.)

Simply put, the way to identify candidates preferred by a minority group is not to assume that they themselves must also be members of that group. Nor is it to find convenient ways to dismiss candidates who don't fit a particular theory of minority voting behavior. It is instead to begin with the voting data. Only that way can a court answer the question whether minority-preferred candidates have consistently been able to win or lose under a challenged election system. Here, that objective analysis demonstrates that Latino-preferred candidates—some themselves Latino, some not—have overwhelmingly won Council elections in Santa Monica. (Ans. Br. at 58-60.)

V. Differences in voting patterns are irrelevant unless they cause the minority-preferred candidate to lose.

The central thesis of several amici—that a violation of the CVRA can be proven through differences in voting patterns alone—is wrong not only because it writes the dilution requirement out of the statute (Part I, *ante*), but also because it trivializes the independent element of racially polarized voting.

The CVRA incorporates federal case law on racially polarized voting. Under that case law, voting is not racially polarized in any legally significant way unless the relevant minority group cohesively votes for candidates who usually lose because of white bloc voting. (*Gingles*, 478 U.S. at 50-51.) But under some amici's approach, there would be CVRA liability even when the minority-preferred candidates regularly *win*.

The UCLA Voting Rights Project, for instance, notes that voters of different racial and ethnic groups varied in their degree of support for President Obama and former Los Angeles Mayor Antonio Villaraigosa. (UCLA Br. at 21-22, 24.) But those differences, standing alone, are irrelevant. President Obama and Mayor Villaraigosa *won* those elections. The support they received from white voters may have been weaker than the support they received from other voters, but it was enough to prevail.

The trial court, in adopting plaintiffs' proposed statement of decision, likewise erroneously focused on bare differences in voting patterns, without considering whether candidates *won*. It decided that voting patterns in certain Santa Monica elections "support the conclusion that the levels of support for Latino

candidates from Latino and [white] voters, respectively, is always statistically significantly different, with [white] voters consistently voting against the Latino candidates who are overwhelmingly supported by Latino voters." (24AA10693.) The court did not mention that 14 of the 16 Latino-surnamed candidates who ran in those elections *won*. (24AA10693-10694; 26AA11611, 26AA11657, 26AA11692, 26AA11733, 27AA11868, 27AA11947, 27AA11995, 28AA12253.)

When the minority-preferred candidate wins, any differences in voting patterns must be legally irrelevant, because the minority group has been able to elect its preferred candidates. At least one court has chided plaintiffs' lead expert for focusing on those differences alone, without considering whether they caused the minority-preferred candidate to lose. (League of Women Voters Br. at 59-60, citing *Cano v. Davis* (C.D.Cal. 2001) 211 F.Supp.2d 1208, 1238, fn. 34 [three-judge panel].)

VI. Amici's concerns are fundamentally political, not legal.

Instead of addressing the issue on which this Court granted review, the amici supporting plaintiffs mostly recite various intangible benefits that they believe will follow a switch to

districts. Some amici, for example, speculate that district-based elections would transform the City and, in districts with a "concentrated" population of Latinos, lead to "Spanish language media markets, local non-profit advocacy groups, centers of worship, as well as local and culturally competent service providers." (Scholars Br. at 22.) Another amicus predicts that districts will result in "the allocation of goods and services" to minority populations and "psychological[]" improvement for minority voters. (UCLA Br. at 32, 34.) Amici also believe that the creation of districts would foster "co-ethnic bonds between candidates or legislators of color and the minority communities they represent." (Scholars Br. at 23-24.)

This is all political commentary, not legal argument. It does not help this Court with its task: drawing a principled distinction, in accordance with constitutional limitations, between election systems that violate the CVRA and those that do not. The Legislature has already determined that public entities should be required to adopt alternative election systems *only* when courts determine that there is evidence of vote dilution and legally significant racially polarized voting. To the extent amici advocate for a different approach, premised on the umpteen

intangible benefits that they believe necessarily flow from the panacea of district-based elections, their views are irrelevant to the issue of statutory interpretation before the Court.

A. The purported secondary benefits of districts on which amici focus would not change election results in this case.

A CVRA plaintiff must prove vote dilution—that some alternative election system would give a minority group the voting power it should have had all along. Although amici insist that a minority group can have significant voting power even when it would account for a tiny share of a district, the empirical evidence they cite demonstrates the opposite.

The UCLA Voting Rights Project cites a study on the impact of switching to districts on minority representation—but, as explained above, it shows that switching changes election results *only* in cities with sufficiently large minority populations (at least 41.65%). (UCLA Br. at 26, citing Collingwood & Long, 57 Urb. Aff. Rev. at 734; see p. 25-26, *ante*.)

The Scholars point to another study showing that districting can improve minority turnout: "the gap between white and Latino turnout is cut by an average of 37% in districts

that are between 15% Latino and 50% Latino, relative to districts that are less than 15% Latino." (Scholars Br. at 29.) That study is irrelevant to this case and cuts against amici's argument in any event.

The study is irrelevant because it addresses *re*districting—moving from districts with lower concentrations of minority voters to districts with higher concentrations. (Bernard L. Fraga (2018) THE TURNOUT GAP: RACE, ETHNICITY, AND POLITICAL INEQUALITY IN A DIVERSIFYING AMERICA 139.) This case is not about redistricting; it is about whether a court should force the City to switch from an at-large election system to a district-based system.

And even if the study's numbers held true for districting as well as redistricting, they would nevertheless undermine amici's argument. Plaintiffs' purportedly remedial Pico District would have a 30% Latino voting population. (25AA11001, RA47.) And Latino turnout over the last five elections studied by plaintiffs' expert was about 32%. (See 25AA11008-11012 [Latino share of ballots]; 26AA11620, 26AA11668, 26AA11754, 27AA11957, 28AA12240 [total ballots cast].) White voters in the hypothetical district, on the other hand, would account for about 45% of the

voting population. (25AA1001, RA47.) And white turnout over the last five elections studied by plaintiffs' expert was about 62%. (See 25AA11008-11012 [white share of ballots]; 26AA11620, 26AA11668, 26AA11754, 27AA11957, 28AA12240 [total ballots cast].) So even if the 30-percentage-point turnout gap between Latinos and white voters were cut by 37%, as amici contend, actual white voters would still outnumber actual Latino voters by two to one. In fact, even *erasing* the turnout gap still would not change election results, because the white population in the district would be 50% higher than the Latino population. (RA46-47.) If plaintiffs are right that racial polarization in Santa Monica elections is "stark" (OB at 58), then white voters would continue to have the power to outvote Latino voters in every winner-take-all election in the purportedly remedial district. And there is no dispute that the same would be true in the six other districts.

Accordingly, the purported secondary benefits of districts might inform a political discussion about the merits of *choosing* to switch to districts. But those benefits have little to do with the legal question whether a court should *impose* districts.

B. The benefits of district-based elections are not as clear-cut as amici claim in any event.

A focus on the secondary benefits of districts is not only irrelevant to the legal question before the Court, but also potentially inaccurate. Consider the 1992 report of the Santa Monica Charter Review Commission, heavily emphasized by plaintiffs below and discussed by the Court of Appeal. Although the Commission "emphasized its dominating goal of racial justice," only five of the 15 Commission members voted in favor of switching to district-based elections after a thorough study of the issue. (Opn. at 9-10.)[1]

In its evaluation of the Commission's report, the City Council in 1992 presented "many and searching" questions about whether changing from at-large voting would benefit the City's minority population. (Opn. at 11.) One councilmember, for example, raised the "troubling prospect" that "a district system could pit minorities against each other." (*Id*. at 13.) Another explained that switching from an at-large election to district-

[1] Nor did the Commission endorse alternative at-large election systems. It characterized proportional voting, for example, as "unusual, complex, and largely untested," requiring the City "to write software from scratch." (Opn. at 10; 25AA10916.)

based elections would make it "very difficult to get affordable housing projects passed," harming "the needs of the poor." (*Id.* at 14.)

These discussions, and the City Council's ultimate decision not to place district-based elections on the ballot, demonstrate that even for a city like Santa Monica that has the best of intentions with respect to racial justice, choosing a method of election is a complex and nuanced *political* question. It is for that reason that in enacting the CVRA, the Legislature gave municipalities the autonomy to adopt election systems of their choice so long as those systems do not result in vote dilution.

C. Mr. de la Torre's amicus brief underscores the political and personal nature of this lawsuit.

The amicus brief of Oscar de la Torre, currently a City Councilmember, provides perhaps the best illustration that amici's arguments are rooted in politics, not in law. In an effort to appear unbiased, Mr. de la Torre claims it is extraordinary that he—"a member of *Defendant's* city council"—would submit a brief supporting plaintiffs. (de la Torre Br. at 8.) But as Mr. de la Torre acknowledges in a footnote, he "is the husband of Maria Loya," a named plaintiff. (*Id.* at 7, fn. 1.) He's more than that:

He neglects to mention that until his recent election to the City Council, he served as the chairman of the other named plaintiff, the Pico Neighborhood Association. (RT6163:12-17.)[2]

Mr. de la Torre devotes much of his brief to his view that "democracy is not working in Santa Monica." (de la Torre Br. at 9.) He relies primarily on Santa Monica residents' alleged preference for district-based elections. (*Id.* at 18-19.) But this is merely the latest salvo in a decades-long political debate over the merits of switching to districts. The issue was twice presented to Santa Monica voters, in 1975 and in 2002, and voters overwhelmingly rejected districts both times. (Opn. at 7, 16.)

Mr. de la Torre sidesteps this inconvenient fact by claiming that the focus of those ballot measures was something other than

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[2] As a result of his connections to both plaintiffs in this case, the City Council found that Mr. de la Torre suffered from a common-law conflict requiring his disqualification from City Council discussions or decisions relating to this case. Mr. de la Torre then sued the City to challenge his disqualification. The City filed a demurrer in response. In an order issued on July 23, 2021, the trial court sustained the City's demurrer with leave to amend, concluding that the City Council was correct in finding a disqualifying conflict of interest. *Oscar de la Torre v. City of Santa Monica*, Los Angeles Superior Court, No. 21STCV08597. Mr. de la Torre has filed his amicus brief not as a Councilmember, but in his individual capacity.

districts. (de la Torre Br. at 19-20.) That is incorrect. Proposition 3, on the ballot in 1975, called for a switch back to district-based elections—a local newspaper story about the ballot initiative was headlined "Districting Stirs Feelings"—but was opposed by the City's two African-American Councilmembers and a Latino School Board member. (RT4697:26-4698:2; 26AA11606; 25AA11224-11226.) It is equally plain that the key issue on the ballot in 1992 was districts. The ballot measure was criticized and opposed—by local NAACP president Darrell Goode, among others—because district-based elections would have "divide[d] the city, pitting one neighborhood against the other" and "relieve[d] six councilmembers from having to listen to you – or your neighborhood." (RA190.) Perhaps it was for these reasons that some 82% of Latino voters voted against districts that year. (28AA12328.)

If Mr. de la Torre believes that attitudes have drastically changed and that now is the time to switch to districts, he and other Councilmembers may choose to place districts on the ballot yet again. But that choice is a political one, with no bearing on the legal question whether the City *must* do so.

Other similarly political arguments raised by Mr. de la Torre contradict the law of the case and concern issues that this Court declined to review. He characterizes the City's election system as "racially discriminatory," a "racist relic[]," and a symptom of "systemic racism" because the Council declined to place district-based elections on the 1992 ballot. (de la Torre Br. at 11, 21, 22.) Asian Americans Advancing Justice likewise attack at-large election systems as a symptom of "historical and present discrimination" that hampers minorities' ability to elect candidates of their choice. (AAAJ Br. at 35.) But as the Court of Appeal explained, plaintiffs "did not prove the City adopted or maintained its [at-large] system for the purpose of discriminating against minorities." (Opn. at 38; accord *id.* at 47, 49 ["the City did not act with a racially discriminatory purpose in 1946 or in 1992"].) To the contrary, "[a]ll minority leaders" supported the adoption of the City's current election system in 1946. (*Id.* at 6, 20.) And the Court of Appeal described the City's consideration of competing election systems in 1992 as "a model of civic engagement," unmarked by even "a hint of hostility to minorities." (*Id.* at 46.)

Plaintiffs asked this Court to review the Court of Appeal's ruling on their intentional-discrimination claim, but this Court declined to do so. The Court of Appeal's ruling remains in place and is not the subject of this Court's review. (See Cal. Rules of Court, rule 8.516(b)(1).)

Mr. de la Torre's arguments about the desirability of districts and the motivations of those who adopted or maintained the City's current election system have no bearing on the question this Court *did* agree to review: how CVRA plaintiffs must prove vote dilution. His brief, like the briefs of other amici, is effectively a letter to the Legislature urging it to replace the CVRA with a statute prohibiting at-large elections and imposing mandatory district-based elections in their place. The Legislature expressly declined to do just that when it enacted the CVRA. Perhaps amici will try to persuade the Legislature to change its mind. In the meantime, this Court should craft a clear, administrable standard that comports with the CVRA's text and the Constitution, without considering the political arguments that amici believe favor districts everywhere.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal. Alternatively, if the Court announces a new standard for dilution that does not necessarily require affirmance, it should remand to the Court of Appeal for the application of that new standard to the facts, or for a decision on the other issues that the Court of Appeal did not decide.

DATED: August 11, 2021

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this answer brief contains 13,925 words, as counted by Microsoft Word, excluding the tables, this certificate, and the signature blocks.

DATED: August 11, 2021

Kahn A. Scolnick

PROOF OF SERVICE

I, Daniel Adler, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On August 11, 2021, I served:

CITY OF SANTA MONICA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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