No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CITY OF SANTA MONICA,
Appellant-Defendant,
v.
PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,
Respondents and Plaintiffs.

BRIEF FOR FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804

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February 4, 2020

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CERTIFICATE OF INTERESTED ENTITES OR PERSONS

FairVote is a non-profit organization headquartered in Takoma Park, Maryland that advocates for fairer political representation through election reform. Since its founding in 1992, FairVote has been committed to advancing ranked-choice voting, also known as a single-transferable-vote ("STV") method, in both single-member-district and at-large voting systems. It does so by conducting original research and advocating for electoral reforms at the local, state, and national levels.

FairVote believes that implementing alternative at-large remedies, including ranked-choice and cumulative voting, will allow voters to elect representatives who better reflect their communities' and society's diversity. FairVote encourages public officials, judges, and voters seeking to address unlawful vote dilution to also consider other ways to conduct elections. To this end, FairVote has filed *amicus curiae* briefs in other cases concerning whether particular remedies are permissible under the California Voting Rights Act or the federal Voting Rights Act. *See, e.g.*, *Higginson v. Becerra,* 786 F. App'x 705, 706 (9th Cir. 2019); *Sanchez v. City of Modesto,* 145 Cal.App.4th 660 (2006); *United States v. Vill. of Port Chester,* 704 F. Supp. 2d 411 (S.D.N.Y. 2010). FairVote has also published scholarship advocating for the use of alternative at-large voting schemes. *See, e.g.*, Andrew Spencer, Christopher Hughes, & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis,* 46 Cumb. L. Rev. 377 (2016); Rob Richie & Andrew Spencer, *The Right Choice for Elections: How*

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Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress, 47 U. Rich. L. Rev. 959 (2013). In 2010, FairVote conducted a successful education campaign in the Village of Port Chester, New York after the Village was ordered to implement cumulative voting. *See Port Chester Elections Draw National Attention*, FairVote (Jun. 18, 20 10), https://www.fairvote.org/port_chester_elections_draw_nation al_attention. FairVote also assisted in the implementation of ranked-choice voting in Eastpointe, Michigan as part of a Consent Judgment and Decree that resulted from a federal Voting Rights Act vote-dilution claim. *See* Brendan Losinski, *Eastpointe to Host Educational Meeting on Ranked Choice Voting*, RosevilleEastpointe Eastside (Aug. 13, 2019), https://www.candgnews.com/news/eastpointe-to-host-educational-meeting-on-rankedchoice-voting--114520.

Because of this expertise regarding remedies in vote-dilution cases, FairVote can offer the Court important additional context relating to one of the core issues in this case: whether the district-based system ordered by the trial court or an alternative system could remedy the vote dilution of Santa Monica's Latino voters; and, if so, whether the availability these alternative systems underscores that Santa Monica's existing at-large system impermissibly dilutes the votes of Latino voters in violation of the California Voting Rights Act.

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INTRODUCTION

Appellant argues that no alternative voting system will allow Latino voters in Santa Monica to elect their candidate of choice. Appellant's Br. 55-56. This is false. Alternative voting systems would allow Latino voters in Santa Monica to, at a minimum, influence the outcome of an election and in all likelihood to elect their preferred candidate. In particular, three different alternative systems of voting—cumulative voting, limited voting, and the single-transferrable form of ranked-choice voting—are available as remedies under the California Voting Rights Act ("CVRA") and would allow Latino voters in Santa Monica the opportunity to at least influence the outcome of an election, which is all that the CVRA requires. *See* Cal. Elec. Code §§ 14027 & 14029.

The trial court properly found that the current electoral system unlawfully dilutes the votes of Santa Monica's Latino voters. Should this Court find that the district-based remedy ordered by the trial court is an insufficient or ineffective remedy, one of these alternative at-large systems or other fair-voting remedies can and should be imposed. Moreover, the availability of these alternative systems that would allow the Latinos of Santa Monica to influence the outcome of an election underscores the harm that Santa Monica has done to its Latino citizens by maintaining an at-large system that impermissibly diluted their votes: it prevented them from being able to influence how their city was governed. This court should ensure that this harm comes to an end by affirming the decision below.

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ARGUMENT

I. MULTIPLE ALTERNATIVE AT-LARGE VOTING SYSTEMS ARE AVAILABLE UNDER THE CVRA TO REMEDY VOTE DILUTION.

The CVRA allows trial courts to impose a variety of remedies after a finding of vote dilution. As Appellant concedes, those remedies include a number of alternative at-large voting systems. *See* Appellant's Br. at 55-56 (discussing alternative at-large systems, but not contesting legality).

A. California Passed the CVRA to End the Use of Election Systems That Result in Vote Dilution.

At-large elections are the most common form of election systems in California. *See Jauregui v. City of Palmdale*, 226 Cal.App.4th 781, 788 (2014). In an at-large system, there are no districts, and candidates run to represent the entire city or county, rather than a subset thereof. *See id.* If an at-large system is set up so that each voter casts one vote for each open seat, it can pose serious problems for minority constituencies. In such a system, the largest block of voters that votes together will win every available seat, even if they make up only one person more than 50% of voters. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47-48 & nn.13-14 (1986). The preferences of the minority constituency could thus be "dilute[d]" or "submerge[d]" by the preferences of the majority, even a narrowly-held one. *See id.* at 48.

The CVRA protects against such vote dilution. The "CVRA provides a private right of action to members of a protected class where, because of 'dilution or the abridgement of the rights of

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voters,' an at-large election system 'impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.'" *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 667 (2006) (quoting Cal. Elec. Code §§ 14027, 14032); *see also* Cal. Elec. Code §§ 14025-14032. "To prove a violation, plaintiffs must show racially polarized voting," and do not need to "demonstrate an intent to discriminate on the part of voters or officials." *Sanchez*, 145 Cal.App.4th at 667.

Not only does the CVRA provide for a private right of action when structural aspects of an election system weaken a minority group's ability to elect a candidate of choice, it also allows plaintiffs a private right of action when the group's ability to "influence" the outcome of an election has been impaired. Cal. Elec. Code § 14027 (prohibiting at-large elections "that impair[ ] the ability of a protected class to elect candidates of choice *or its ability to influence the outcome of an election*.") (emphasis added); *see also Sanchez*, 145 Cal.App.4th at 667-69. A member of the protected class can thus bring a claim to challenge the impairment of the class's ability to influence an election—a so-called influence claim. Cal. Elec. Code §§ 14027, 14032. Permitting influence claims is a key feature of the CVRA. *See* Marguerite Mary Leoni & Christopher E. Skinnel, *The California Voting Rights Act*, at 2-5, League of Cal. Cities (July 22, 2003), https://tinyurl.com/qmdo69a.

The CVRA also dispensed with the compactness requirement imposed under the Federal Voting Rights Act

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("FVRA"). Under the FVRA, a minority group has to establish that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *See Gingles*, 478 U.S. at 50. This does not need to be shown under the CVRA. *See* Cal. Elec. Code § 14028(c); *see also Sanchez*, 145 Cal.App.4th at 680. As a result, the CVRA "provide[s] a broader basis for relief from vote dilution than available under the federal Voting Rights Act." *Jauregui*, 226 Cal.App.4th at 806.

B. Several Alternative At-Large Voting Systems Comply with the CVRA and Would Help Protect the Right of a Protected Class to Elect Its Preferred Candidate or at Least Influence the Outcome of an Election.

The trial court correctly concluded—and Appellant does not contest (Appellant's Br. at 55-56)—that multiple at-large voting systems are available remedies under the CVRA. *See* Trial Ct. Op., at 65, ¶ 91 (noting that "other 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," but ultimately deciding that "a district-based system is preferable" in this case).

The availability of alternative remedies is clear from the text of the CVRA. Section 14029 allows courts to impose "appropriate remedies, *including* the imposition of district-based elections that are tailored to remedy the violation." Cal. Elec. Code § 14029 (emphasis added). The statute's use of "including" establishes the availability of any number of "appropriate remedies . . . tailored to remedy the violation." *Id.* The legislative history confirms this. The Judiciary Committee's

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analysis of the bill devoted an entire paragraph to making clear that the CVRA "does not mandate the abolition of at-large election systems." Assemb. Comm. on Judiciary, Analysis of Sen. Bill No. 976, at 3 (2001-2002 Reg. Sess.), *as amended* Apr. 9, 2002 (capitalization removed) (hereinafter "Judiciary Committee Analysis"). And during the signing of Senate Bill 976, Governor Gray Davis stated that "[u]pon a determination that a violation has occurred, the court shall fashion appropriate remedies, including *but not limited to* single district elections." Gov. Gray Davis, July 9, 2002 Signing Statement for Senate Bill 976 (emphasis added).

California courts agree that the CVRA allows for remedies beyond single-member districts. In multiple decisions, they have held that the CVRA affords a range of remedies. In *Jauregui*, this Court explained that the California legislature intended the CVRA's remedial powers "to be broadly construed to remedy dilution of the votes of protected classes." 226 Cal.App.4th at 808. The Superior Court in San Bernardino County expressly concluded that "both the statutory language and legislative history of the CVRA support the conclusion that the court has broad authority to implement an array of appropriate remedies," including "at-large remedies, such as cumulative voting." *Garret v. Highland,* No. CIVDS 1410696, 2016 WL 3693498 at *2 (Cal. Super. Ct. Apr. 6, 2016). The Superior Court in Orange County imposed an alternative at-large remedy. *See Sw. Voter Registration Educ. Project v. Mission Viejo*, No. 30-2018-00981588-CU-CR-CJC (Cal. Super. Ct. July 26, 2018), Stipulation

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for Entry of J. at 3 ¶ 1 (ordering implementation of cumulative voting in at-large system with the unstaggering of elections as remedy in CVRA suit). The parties to a suit in the Superior Court in Riverside County are poised to enter into a stipulated agreement that will impose one single-member district and one four-member district, where both will use ranked choice voting. *See* Proposed Stipulated Judgment at 1, *Salas et al. v City of Palm Desert*, No. PSC1909800 (pending Sup. Ct. Cal. 2020).

In addition to granting California courts the power to implement alternative voting systems, the CVRA also gives the courts the power to ensure the effectiveness of alternative voting systems by imposing additional remedies. *See* Lawyers' Comm. for Civil Rights of the S.F. Bay Area, *The California Voting Rights Act* (2014), https://www.lccr.com/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf (CVRA "is written broadly" to allow for "creative remedies"). For instance, at the same time a court imposes an alternative voting system, it may also order a locality to unstagger its council members' terms so that more members are up for reelection at once. *See, e.g.*, *United States v. Vill. of Port Chester,* 704 F. Supp. 2d 411, 450–51, 453 (S.D.N.Y. 2010) (adopting Port Chester's remedial plan under the FVRA, which included unstaggered terms in conjunction with cumulative voting); *Mission Viejo*, Stipulation for Entry of J. at 3 ("In order to maximize the remedial effectiveness of the cumulative voting system adopted herein . . . all five seats on the City Council shall be elected at the same time."); *see generally City of Lockhart v.*

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United States, 460 U.S. 125, 135 (1983) (noting that "[t]he use of staggered terms . . . may have a discriminatory effect").

II. ALTERNATIVE AT-LARGE SYSTEMS WOULD ALLOW LATINOS TO ELECT A CANDIDATE OF THEIR CHOICE IN SANTA MONICA.

In its decision below, the trial court found that the votes of Latino voters were diluted in Santa Monica's at-large system. *See* Trial Ct. Op., 38-39, ¶¶ 53-54. To remedy the violation, the trial court imposed a district-based system, which the court projected will result in a Latino electorate of approximately 30% in at least one district. *Id.* at 65-70, ¶¶ 93-98. For the reasons that Respondent explains, the trial court's thorough, fact-based opinion correctly concluded that a district-based system could remedy vote dilution in Santa Monica. *See* Respondent's Br. at 21-41.

Even if this Court were to agree, however, with Appellant's contention that the district-based remedy will not be effective in allowing Santa Monica's Latino voters to elect their preferred candidate, *see* Appellant's Br. at 51-55, the Court could order other remedies that would allow Santa Monica's Latino voters to elect their preferred candidate. Latinos make up 13.64% of the eligible voters in Santa Monica. Trial Ct. Op., at 66, ¶ 94. With that substantial a population, during a special election with all seats up for election at the same time—as the trial court envisioned below, *see* Trial Ct. Op., at 69, ¶ 97—Latinos in Santa Monica could elect a representative of their choice under at least three different alternative voting systems: a limited-voting, cumulative-voting, or a single-transferable-vote system.

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A. Limited Voting

Limited voting limits the number of votes that each voter may cast in an at-large election in which multiple seats are open. *See generally Moore v. Beaufort Cty,* 936 F.2d 159, 160 (4th Cir. 1991) (affirming district court's finding that use of a limited voting method is not contrary to state or federal policy). Under a limited voting system, instead of casting a number of votes equal to the number of open seats, voters have a smaller number of votes to cast. *Id.* For example, if there are seven open seats on the city council, a voter might be able to cast a ballot for three candidates, or two, or even just one candidate. Because each vote in a limited voting scheme is more powerful than in a traditional block-voting scheme, a limited voting system permits an organized constituency to focus their efforts on electing a preferred candidate. *See* Delbert A. Taebel, Richard L. Engstrom, & Richard L. Cole, *Alternative Electoral Systems As Remedies for Minority Vote Dilution,*11 Hamline J. Pub. L. & Pol'y 19, 19, 25 (1990). The most effective type of limited voting for this purpose is single or "bullet" voting—which gives voters a single vote, and is particularly effective at providing minority constituencies the opportunity to elect candidates of their choice. *See id.*

Bullet voting would greatly increase the ability of Latino voters to elect a city council candidate of their choice in Santa Monica. The minimum number of votes needed to elect a candidate is sometimes called the "threshold for election" or the

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"threshold of exclusion."[1] *See* Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More,* 30 St. Louis U. Pub. L. Rev. 97, 103 (2010) (hereinafter "*Cumulative and Limited Voting*"); Pildes & Donoghue, *supra,* at 253 n.47. If all seven city council seats in Santa Monica were open for election, and voters were limited to one vote, then all Latino voters would need to insure the election of their preferred representative would be one vote more than one eighth of the votes cast, or 12.5% of the votes.[2] Since Latino voters make up 13.64% of Santa Monica's electorate, Trial Ct. Op., at 66, ¶ 94, under this system Latinos would have more than enough voting strength to elect at least one candidate of their choice.

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[1] The threshold for election is the precise number of votes that a candidate must receive to guarantee themselves a seat, regardless of how many votes the other candidates receive. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States,* 1995 U. Chi. Legal F. 241, 253 n.47 (1995). In a single-seat race, a candidate could guarantee herself a seat by winning one-half of the votes plus one; in a two-seat race, a candidate could win a seat outright with one-third of the votes plus one; and so on. *See id.* The formula for calculating the threshold of election can be represented mathematically as $[1/(1+n)] + 1$ vote, where n equals the number of open seats to be filled. *See* Alexander Athan Yanos, *Reconciling the Right to Vote with Voting Rights Act*, 92 Colum. L. Rev. 1810, 1860 (1992); Pildes & Donoghue, *supra*, at 254-255 n.50; 253 n.47.

[2] If there were seven seats open and each voter could only cast a single vote, the threshold of exclusion would be $[1/(1 + 7)]$ plus one vote. *See supra* n.1.

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B. Cumulative Voting

The same is true under a cumulative-voting system. Compared to the Santa Monica's current plurality at-large system, cumulative voting is another at-large voting method that provides greater opportunities for minority groups with cohesive interests to elect a candidate of their choice. *See* Pildes & Donoghue, *supra*, at 292 ("Because the system is neutral with respect to the minorities it empowers, any sufficiently large minority that votes cohesively can, in principle, attain one seat."); *cf.* Cal. Corp. Code § 708 (allowing corporate shareholders to use cumulative voting). Cumulative voting eliminates the requirement that voters allocate each available vote to different candidates. Pildes & Donoghue, *supra*, at 254. Instead, voters have the option to cast all of their votes for a single candidate or several votes for multiple candidates. For example, if a cumulative voting method were in place in a jurisdiction, like Santa Monica, with seven open seats, a voter could allocate all seven votes to one candidate, or two votes each to three candidates and one to another, or any other variation she might prefer. The seven candidates who receive the most votes would be elected by a plurality.

Cumulative voting remedies vote dilution by allowing voters to express the intensity of their preference for any particular candidate. That allows groups with cohesive interests to act in concert to elect at least one candidate of their choice. *Cf. Port Chester*, 704 F. Supp. 2d at 450 (finding Hispanic population to be cohesive enough "to take advantage of their voting power

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under a cumulative voting plan"). Cumulative voting can therefore remedy vote dilution by giving minority groups a better chance to gain representation. *See* Robert Richie, Douglas Amy, & Frederick McBride, *How Proportional Representation Can Empower Minorities and the Poor*, FairVote, https://www.fairvote.org/how_proportional_representation_can_empower_minorities_and_the_poor (last visited Feb. 3, 2020).

Cumulative voting, like bullet voting, would allow Latinos in Santa Monica to elect a candidate of their choice. In a cumulative voting system, Latinos would again need one vote more than 12.5% of the vote to elect a candidate. Since they make up more than 12.5% of the electorate, under a cumulative voting system they would have the power to elect a candidate of their choice.

The positive effect that cumulative voting can have on a minority's ability to elect a candidate of choice is not theoretical. Take Olton, Texas as an example. In 1995, in a city council election in Olton, Latino voters—under a cumulative voting system—elected a Latino-preferred candidate despite the fact that the Latino voter turnout was 11 percentage points below the number needed to win a seat. Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in 15 Texas Communities,* 78 Soc. Sci. Q. 973, 984-985 (1997). The same thing happened in Rotan, Texas. In Rotan, the number of votes required to win a seat in the city's cumulative voting system was one vote more than 25%, but the Latino voting-age population was only 23% and Latinos were made up

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just 19% of registered voters. *Id.* Nevertheless, Latino voters were able to elect their preferred candidates. *Id.* Given all this, the evidence indicates that Latinos in Santa Monica could elect a candidate of their choice under a cumulative voting system.

C. Single-Transferable-Vote Form of Ranked Choice Voting

A single-transferable-vote system would also allow Latinos to elect a candidate of their choice. In a single-transferable-vote system of ranked-choice voting ("STV"), voters in an at-large district rank candidates in their order of preference. When votes are tabulated, all first-choice votes are tallied, and any candidate who receives the minimum number of votes required to win a seat is elected—just as they would be in a traditional, at-large election.[3] In a traditional at-large system, any vote a candidate receives beyond the threshold is effectively wasted, since the candidate did not actually need that vote to get elected. In an STV system, however, the unused votes are proportionally "transferred" to those voters' second-choice candidates. *See* Yanos, *supra*, at 1859. After the transfer, the candidate with the fewest votes is eliminated, and each vote cast for the eliminated candidate is transferred to voters' second choices. *Id.* at 1861. This process of (1) transferring unused votes, (2) eliminating the candidate with the least votes, (3) and transferring votes cast for that candidate to voters' next choices, continues until all open seats are filled. *Id.* at 1860-61; *see, e.g.*, *Dudum v. Arntz,* 640 F.3d 1098, 1101 (9th Cir. 2011).

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[3] *See* Yanos, *supra,* at 1859-60; Pildes & Donoghue, *supra*, at 254-55 n.50.

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Minority voters in an STV system can elect their preferred candidate even if their population does not exceed the number of votes required to win a single seat. To see why, imagine a seven-seat, at-large election where the county has a voting age population made up of 80% white voters, 10% Latino voters, 4% Asian Pacific Islander voters ("API"), and all other voters make up 6%. To win a seat requires one vote more than 12.5% of the votes cast. So, a cohesive white majority would have enough votes to win each of the first six seats, which would require a total of 12.5% times six seats, or 75% of the vote. Assuming that all people vote in accordance with their ethnic background, that means that when it comes time to tally the votes for the final seat, the ballots from only 5% of the white voters will be in play. In contrast, all of the ballots cast by cohesive minority groups will remain. The remaining votes, made up of votes from all the Latino voters who make up 10% of the total electorate, the other voters who make up 6%, the API voters who make up 4%, and the remaining white voters who make up 5% will together determine who wins the final seat. Since significantly more Latino voters remain than members of the other groups, a candidate preferred by Latino voters can—and likely will[4]—win the final seat for their preferred candidate.

The ability of an STV system to remedy vote dilution was recently affirmed by the United States Department of Justice. *See United States v. City of Eastpointe,* No. 4:17-CV-10079 (TGB)

[4] If only 2.5% of the non-Latino voters vote for the Latino preferred candidate, the Latino preferred candidate would win the seat.

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(DRG), 2019 WL 2647355, at *2 (E.D. Mich. Jun. 26, 2019) Consent J. and Decree at ¶¶ 4-8. Much like this case, where "only one Latino has been elected to the Santa Monica City Council in the 72 years of the current election system," Trial Ct. Op., at 13, ¶ 21, at the time the U.S. Department of Justice filed the case against Eastpointe, Michigan, "no African American candidate had ever been elected to the Eastpointe City Council," *United States v. Eastpointe,* 378 F. Supp. 3d 589, 595 (E.D. Mich. 2019). To remedy this alleged vote dilution, the parties agreed on the implementation of STV. *See Eastpointe,* 2019 WL 2647355, at *1-3 (E.D. Mich. Jun. 26, 2019) Consent J. and Decree at ¶¶ 4-8.

Thus, under each of these alternative voting systems, Latino voters in Santa Monica could elect a candidate of their choice—and they would certainly have a greater influence on the election of city council candidates and a greater opportunity to influence their election. In addition, none of these examples accounts for the real possibility that the Latino population in Santa Monica would vote even more cohesively under an alternative at-large system, due to their belief that their preferred candidate now truly had a chance of winning the election. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies,* 33 Harv. C.R.-C.L. L. Rev. 333, 350 (1998) ("[B]ecause these systems tend to allow less well-known candidates and parties to gain seats and prevent dominant groups from sweeping elections, electoral contests held under these systems tend to

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offer voters more choices and be more competitive, which in turn leads to higher participation rates.”).

Accordingly, even if this Court were to conclude that the district court’s chosen remedy was inadequate and unlikely to remedy the dilution of the votes of Latino voters, this Court should remand to the trial court with instructions to implement an alternative voting system.

III. EVEN USING APPELLANT’S UNSUPPORTED, WORST-CASE-SCENARIO PROJECTIONS, THE RECORD SHOWS THAT LATINOS WILL LIKELY BE ABLE TO ELECT THEIR PREFERRED REPRESENTATIVE OR, AT A MINIMUM, INFLUENCE THE OUTCOME OF AN ELECTION UNDER AN ALTERNATIVE AT-LARGE SYSTEM.

In the face of this evidence that Latino voters *could* elect a representative in Santa Monica under a number of different voting systems, Appellant is left to argue that the historical turnout numbers indicate that even if Santa Monica’s Latino population is large enough to theoretically win a seat, Latino voters will not turn out in high enough numbers to actually elect their preferred candidate or influence the outcome of an election. *See* Appellant’s Br. at 55-56. In particular, Appellant contends that this Court should “adjust[ ]” the 13.64% figure to account “for low historical turnout and inconsistent cohesion” among the Latino community. Appellant’s Br. at 56. After doing so, Appellant argues, the adjusted Latino electorate is “well below the 12.5% threshold of exclusion.’” *Id*. at 55-59.

This worst-case-scenario approach to projecting Latino turnout is impermissible and should not be followed. And even if

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it were followed, the ability of Latino voters to influence the outcome of an election would still be sufficient under the CVRA.

A. The Case Law Does Not Support Appellant's Argument That the Court Should Take Into Account a Worst-Case-Scenario Approach to Projecting Latino Voter Turnout.

There are powerful reasons why it would be improper for the Court to accept Appellant's claim that it should adjust the numbers to take into consideration low Latino voter turnout. At least one court has expressly concluded that relying exclusively on historical minority voter turnout to determine whether a protected class will have enough votes to elect a representative of its choice is improper. *See United States v. Euclid City Sch. Bd.,* 632 F. Supp. 2d 740, 753 (N.D. Ohio 2009) (citing *Johnson v. De Grandy,* 512 U.S. 997, 1014 n.11 (1994)); *see also Vill. of Port Chester*, 704 F. Supp. 2d at 451 (listing cases). In *Euclid*, the court concluded that "focus[ing] only on historical turnout rates" "would be inappropriate" for a number of reasons. *Euclid*, 632 F. Supp. 2d at 763-66. The court explained, for instance, that "turnout under a discriminatory system is not necessarily predictive of turnout under a non-discriminatory system." *Id.* at 764. In other words, there is no reason to presume that minorities voting in a fair system would turn out in numbers as low as the numbers who voted under a system unfairly slanted against them, where they felt that their votes had little chance of making any difference. The *Euclid* court also noted that rapid demographic changes may also influence conclusions on future turnout. *Id.* at 765. In addition, the court explained that relying

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too heavily on historical numbers can impose an “artificial[ ] cap” on “potential [ ] minority representation.” *Id.* For all these reasons, the court concluded that “a proposed remedy may be acceptable even though it requires minorities to turnout above their historic rate in order to succeed in an election.” *Id.* at 766.

This Court should follow a similar approach here, and conclude that historical turnout numbers are not dispositive in projecting future turnout, especially considering the trial court’s findings of a history of discrimination and oppression disadvantaging Santa Monica’s Latino voters. *See* Trial Ct. Op., at 32-38 ¶¶ 42-52. Indeed, it could easily be the case—as the court in *Euclid* noted—that the possibility of winning representation could encourage *increased* organizing within Santa Monica’s Latino community that could very well result in greater than usual voter turnout. Moreover, as the trial court recognized, the low percentage of Latino voters “is due in part to the reduced rates of voter registration and turnout among eligible Latino voters.” Trial Ct. Op. at 28 ¶ 36 (citing *Perez v. Pasadena Indep. Sch. Dist.,* 958 F. Supp. 1196, 1221 (S.D. Tex. 1997)). Indeed, as the court in *Port Chester* recognized, “the opportunity to elect a candidate of choice tends to dramatically increase voter registration and turnout in the minority community.” *Port Chester*, 704 F. Supp. 2d at 451.

Moreover, Appellant’s argument that the Court should rely on historic turnout numbers to project how Latinos in Santa Monica will turn out in the future is impermissible, because it “‘would allow voting rights cases to be defeated” based on

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assumptions that are grounded in the "very barriers to political participation that Congress [or in this case, the California Assembly] sought to remove." *Terrebonne Parish Branch NAACP v. Jindal,* 274 F. Supp. 3d 395, 432 (M.D. La. 2017) (internal quotation marks omitted). Accordingly, Appellant's attempt to use low-ball projections for Latino turnout is unwarranted and should be rejected.

B. The CVRA Does Not Require a Plaintiff to Show that the Minority Group *Will* Be Able to Elect a Representative, Only That the Group Will Be Able to "Influence" an Election.

Even if the Court were to rely on historical turnout data, the evidence indicates that Latinos in Santa Monica would be within striking distance of electing a representative under any one of the alternative voting systems previously discussed. And that is more than enough to satisfy the requirements of the CVRA. The CVRA permits a finding of vote dilution when a protected class is weakened in its ability to *influence* an election, and does not require proof that the class could elect a candidate of its choice. Cal. Elec. Code § 14027. That requirement is more than satisfied here.

To see why, the Court need look no further than the 2016 turnout numbers. That year, the Latino candidate received 88% Latino support. Trial Ct. Op. at 18, ¶ 25. If we assume that the same percentage of Latinos would turn out to vote in the next election, they would make up 12.0% of the voting population—just shy of the 12.5% needed to elect their candidate under one of the alternative, at-large systems. But that means that Latino

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voters could easily *influence* the outcome of an election by banding together with a relatively modest number of voters from other groups to elect a candidate of their choice. *Cf. Georgia v. Ashcroft,* 539 U.S. 461, 463-64 (2003), *superseded by statute* ("influence district" is one "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process").

C. Courts Need Not Assume That a Minority Group That Has Fewer Members Than the Needed to Elect a Representative Can Never Elect a Candidate of Its Choice.

Finally, it is important to recognize that while courts often use the number of votes required to elect a candidate as a helpful benchmark in assessing whether a particular group will be able to elect a candidate of their choice, it is not a hard and fast rule. Courts can and do conclude that minority groups will be able to elect a candidate of their choice even when their total number of members is less than the threshold required to elect a candidate. *See Dillard v. Chilton Cty. Bd. of Educ.,* 699 F. Supp. 870, 874-75 (M.D. Ala. 1988).

In *Dillard*, the court explained that "[t]he threshold of exclusion"—that is, the number of votes a minority group would need to elect a representative—is "not an automatic cut-off point but rather is a broad guideline which may be helpful in assessing the impact on minorities of present and proposed election systems." *Dillard*, 699 F. Supp. at 875. Accordingly, the court imposed a cumulative voting system in order to "offer [minority] voters in the county the potential to elect candidates of their

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choice," even though the minority population was "less than the [ ] threshold" required to elect a candidate. *Id.*; *see also Euclid*, 632 F. Supp. 2d at 763.

This holding is consistent with precedent that demands a holistic approach to determining relative voting strength, and is not wedded to arbitrary numerical tests. The United States Supreme Court has found that in the FVRA context, courts must look at the "totality of circumstances" and "determine, based 'upon a searching practical evaluation of the 'past and present reality,' whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79. An overly strict reliance on whether a minority group has enough members to elect a candidate does precisely the opposite. Among other things, as the court in *Dillard* explained, it assumes a "worst case scenario" where a minority-preferred candidate will get zero votes from anyone outside the minority group. *Dillard*, 699 F. Supp. at 874; *see also* Engstrom, *Cumulative and Limited Voting*, 30 St. Louis U. Pub. L. Rev. at 103 (explaining that relying on the threshold-of-exclusion requires assuming, among other things, that "(1) the other voters cast all of the votes available to them, but (2) none of their votes are cast for the candidate preferred by the minority"). Even minor deviations from these worst-case assumptions will allow a minority voting bloc the power to elect a candidate of their choice.

Given these conditions, even if a minority group does not have quite enough members to elect a candidate of choice completely on their own, with no help from anyone else, that does

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not require a court to conclude—as Appellant urges—that the group will not be able to elect a candidate of their choice or, at minimum, influence the outcome of an election.

CONCLUSION

For the reasons stated in Respondent's brief, this Court should affirm the trial court's finding that the at-large election system used by the City of Santa Monica impermissibly dilutes the votes of Latino voters. But if the Court finds the trial court's chosen remedy to be ineffective, the Court should remand the case to the trial court with instructions to consider whether an alternative at-large voting system could remedy the dilution of Latino votes in Santa Monica found by the Court.

Respectfully submitted,

Dated: February 4, 2020

By: */s/ Ira M. Feinberg*
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed **BRIEF FOR FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE** is produced using 13-point Century Schoolbook type including footnotes and contains approximately 5,614 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: February 4, 2020

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PROOF OF SERVICE

I, Ramona Altamirano, am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 4085 Campbell Avenue, Suite 100, Menlo Park, CA 94025. On February 4, 2020, I served the following documents described as:

- **BRIEF FOR FAIRVOTE AS *AMICUS CURIAE* IN SUPPORT OS RESPONDENTS AND AFFIRMANCE**

on the interested parties addressed as follows:

SEE ATTACHED LIST OF PARTIES SERVED

By TrueFiling Electronic Filing**:** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling System. Participants in the case who are registered TrueFiling users will be served by the TrueFiling System. Participants in the case who are not registered TrueFiling users will be served by regular U.S. Mail.

By Mail**:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal service on that same day with postage thereon fully prepaid at XXXXX, XXXXX in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

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declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 4, 2020, in Menlo Park, California.

Respectfully submitted,

By: */s/ Ramona Altamirano*
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