



September 11, 2020

The Hon. Chief Justice Tani Gorre Cantil-Sakauye
and Hon. Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: ***Amicus Curiae Letter in Support of Petition for Review***
Pico Neighborhood Association, et al. v. City of Santa Monica, No. S263972
California Supreme Court, Case No. S263972
Court of Appeal, Second Appellate District, Division Eight, Case No. B295935

Dear Chief Justice and Associate Justices of the California Supreme Court:

Asian Americans Advancing Justice–Asian Law Caucus (Advancing Justice–ALC), Asian Americans Advancing Justice–Los Angeles (Advancing Justice–LA), Asian Law Alliance (ALA), the Asian Pacific Environmental Network (APEN), and Khmer Girls in Action (KGA) respectfully submit this amicus curiae letter, pursuant to rule 8.500(g) of the Rules of Court, in support of plaintiffs and respondents’ Petition for Review. If the Court of Appeal’s decision in *Pico Neighborhood Ass’n, et al. v. City of Santa Monica* is allowed to stand, it would seriously undermine and impair the California Voting Rights Act (“CVRA”), and with it the voting rights of millions of Californians. The *Pico* decision fundamentally alters anti-discrimination law to prevent all but the most obvious and egregious racial discrimination from being redressed by the courts. The Court of Appeal’s decision is wrong, and must be corrected by this Court.

**INTEREST OF ADVANCING JUSTICE–ALC, ADVANCING JUSTICE–LA,
ASIAN LAW ALLIANCE, ASIAN PACIFIC ENVIRONMENTAL NETWORK, AND
KHMER GIRLS IN ACTION**

Advancing Justice–ALC, Advancing Justice–LA, ALA, APEN, and Khmer Girls in Action all have a significant interest in the preservation and proper interpretation of the CVRA and the Equal Protection Clause of the California Constitution.

Founded in 1972, Advancing Justice–ALC is a nonprofit, public-interest organization that promotes, advances, and represents the legal and civil rights of Asian Pacific American communities. Advancing Justice–ALC strives to create informed and educated communities empowered to assert their rights and participate actively in American society, through the provision of legal services, educational programs, community organizing, and advocacy. Advancing Justice–ALC also helps set national policies on voting rights, language access, and census taking.

Advancing Justice–ALC has worked closely with Asian American and other immigrant communities in jurisdictions that have transitioned to district-based election systems because of the CVRA, helping a variety of community members voice their concerns and interests to advocate for better representation and district lines that reflect their communities. Recognizing the importance of fair systems of representation for a fully functioning democracy, Advancing Justice–ALC has also spent considerable time and resources working to ensure that the 2020 Census counts everyone in preparation for redistricting in 2021. Advancing Justice–ALC is also preparing to work with community groups around the state to engage in redistricting and advocate for equal representation.

Since 1983, Asian Americans Advancing Justice–Los Angeles has been a leading legal and civil rights organization for Asian Americans and Pacific Islanders (AAPIs). Today, Advancing Justice-LA serves more than 15,000 individuals and organizations in California every year. The mission of Advancing Justice-LA is to advocate for civil rights, provide legal services and education, and build coalitions to positively influence and impact AAPIs and to create a more equitable and harmonious society. Pursuing that mission includes advocating on behalf of AAPIs and other underrepresented people for full and fair representation in all levels of the political process. To that end, Advancing Justice-LA works with community partners in advocating on behalf of underrepresented communities for fair voting practices, including transitions from at-large to by-district voting under the CVRA. Advancing Justice-LA has devoted and continues to devote considerable resources toward ongoing fair voter representation advocacy, including under the CVRA, that is expected to expand as redistricting efforts commence in 2021. An unjust interpretation of the CVRA would significantly impair the work being done by Advancing Justice-LA on behalf of AAPI and other underrepresented communities.

ALA, founded in 1977, is the only legal services organization located in Santa Clara County that focuses on legal issues impacting the Asian American community. ALA has a long history of involvement with voting rights issues. In 1982, ALA pursued a case, along with Latino civil rights groups, to preserve bilingual services at the County of Santa Clara Social Services Department. In 1988, ALA worked with Latino civil rights groups to challenge the County of Santa Clara’s planned implementation of a “ten minute” voting rule. In the 1990’s ALA successfully advocated with the Chinese and Vietnamese communities for bilingual assistance and bilingual ballots.

ALA has represented Asian American voters in CVRA actions. Because of the CVRA, these jurisdictions have transitioned to new election systems that give Asian American voters the opportunity to exercise more political power in local elections. Immediately after transitioning to district-based elections, the jurisdictions have more candidates from historically underrepresented communities running for office, emboldened by the new election system and the opportunity to run in smaller districts where candidates can knock on every door and be competitive even with smaller campaign funds.

APEN is an Asian American environmental justice organization that fights for environmental, social, and economic justice, with a focus on Asian immigrant and refugee communities. An essential part of APEN’s work and model is engaging immigrant and refugee community members in leadership, so that they can advocate for the issues and solutions that matter the most to them.

APEN also engages immigrant and refugee voters in the electoral process. The CVRA is important to APEN's work because the CVRA helps ensure that Asian American communities have fair access to representation.

KGA is a community-based organization whose mission is to build a progressive and sustainable Long Beach community that works for gender, racial and economic justice led by Southeast Asian young women. KGA works to build leadership among youth, teaching them to be socially conscious and politically active and engaged, and supports youth-led campaigns to improve community and neighborhood conditions. Additionally, KGA supports voter engagement during electoral cycles and works to educate young voters to increase their participation in elections. The CVRA and the district-based elections systems it has prompted cities and school boards to adopt are important to our mission, since it helps create fair opportunity for our communities to meaningfully participate in elections.

With the onset of the COVID-19 pandemic, we have seen a rise in racism and xenophobia targeting Asian Americans. This anti-Asian sentiment is not new, and its effects continue to show in our democracy, limiting the participation and representation of Asian Americans. Our government implemented and enforced official anti-Asian and anti-immigrant policies in the late 19th to mid-20th centuries, restricted or completely banned immigration from specific countries in Asia, prohibited land ownership by Asian immigrants in California, imprisoned Japanese Americans, and undertook other anti-Asian policies, setting the foundation for modern day anti-Asian sentiment that has fueled hate-crimes against Asian Americans.

The CVRA is an important tool to combat the legacies of that history to ensure that all communities are able to participate equally in our democracy. The CVRA and its protections for underrepresented communities will be vital to our advocacy following the release of 2020 Census data and the redistricting process as local governments consider or reconsider their election systems. The Court of Appeal's opinion undermines these important protections and it is critical that this Court grant review of the decision. As organizations serving Asian American communities and leaders who serve diverse communities, we have a strong interest in judicial precedent that will protect the ability of minority groups to vindicate their rights under the CVRA.

REASONS WHY REVIEW SHOULD BE GRANTED

California Voting Rights Act

Since the California Legislature enacted the CVRA in 2002, hundreds of political subdivisions have transitioned from at-large election systems to more democratic and inclusive district-based elections systems. The CVRA has been instrumental in prompting this wave of change, with many jurisdictions voluntarily changing to district-based systems upon recognizing the discriminatory nature of at-large systems, while other jurisdictions have transitioned systems in response to demand letters or when compelled to do so by the courts.

The CVRA is tailored to address California's unique voting rights challenges and to provide remedies for the insidious forms of racial discrimination that, despite progress, still plague our

State. One of the key differences between the CVRA and the federal Voting Rights Act is that liability can be established under the CVRA even if the minority community is too geographically dispersed to comprise the majority of an election district. The statutory text is clear that geographical compactness is not required to find a violation of the CVRA. (See Elec. Code § 14028(c) [“The 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.”]; see also Elec. Code § 14027 [“An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026 .”] (emphasis added)).

Looking beyond the plain language of the statute, the legislative history also states that a viable action may exist under the CVRA when a majority-minority district cannot be drawn. For example, both committee bill analysis and the enrolled bill memorandum to the Governor explained that there are three requirements to establish liability until the federal Voting Rights Act, and that the third element—geographic compactness—would not be required under the CVRA. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) June 4, 2002, p. 2-3; see also Enrolled Bill Mem. on Sen. Bill No. 976 (2001-2002 Reg. Sess.) July 1, 2002.)

Every appellate court that has addressed the CVRA, until the *Pico* decision, has understood that the CVRA does not require a plaintiff to show a potential majority-minority district. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669 [“[T]he Legislature wanted to eliminate the Gingles requirement that, to establish liability for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible.”]; see also *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 1229.)

The applicability of the CVRA in jurisdictions where minority communities are not compact enough to make up the majority of a district is essential to achieve the CVRA’s antidiscrimination purpose in California. California is more residentially integrated than the rest of the nation, and much more so than the areas in which federal Voting Rights Act enforcement has traditionally occurred. Every major region in California is less segregated than the national average. (See Policy Link & USC Program for Environmental and Regional Equity (“PL&PERE”), An Equity Profile of the Nine-County San Francisco Bay Area Region (2017), p. 77 [since 1980s, Bay Area has been about half as residentially segregated by race as the national average]; PL&PERE, An Equity Profile of the Los Angeles Region (2017), p. 68 [Los Angeles County is “less [segregated] than the nation, and segregation has declined somewhat over time as the region has become more diverse”]; PL&PERE, An Equity Profile of Orange County (2019), p. 74 [“Orange County still remains less segregated than the state of California and the United States overall”]; PL&PERE, Advancing Health Equity and Inclusive Growth in the Sacramento Region (2018), p. 97 [“Segregation . . . is lower in Sacramento than the nation overall”]; PL&PERE, Advancing Health Equity and Inclusive Growth in Fresno County (2017), p. 99 [“Segregation . . . is lower in Fresno than the nation overall”].)

Nevertheless, the Court of Appeal in *Pico Neighborhood Ass'n, et al. v. City of Santa Monica* held that without the potential for a majority-minority district—a product of the segregation that is less prevalent in California than other states—there cannot be vote dilution. This holding disregards the plain language of the statute (Elec. Code 14028(c)) and the legislative history that makes clear that the legislature intended to depart from the three-part test of the federal Voting Rights Act to create a standard that works for California's diverse electorate. The Court of Appeal also disregarded the existing appellate decisions regarding the CVRA that recognized that compactness is not required by the CVRA.

The CVRA's flexibility regarding compactness ensures that diffuse residential patterns do not diminish the ability of any minority group to access the CVRA's protections. This flexibility is particularly important to Asian Americans in California, for whom political and social integration often remains elusive despite typically living interspersed with members of other racial groups. Among racial groups in California, Asian Americans are the least likely to live in neighborhoods where they comprise a majority. For context, approximately 3% of the State's Asian Americans live in such circumstances, compared to 85% of whites who reside in majority white areas, 29% of blacks in majority black areas, and 44% of Latinos in majority Latino areas. (Cho & Cain, *Asian Americans as the Median Voters: An Exploration of Attitudes and Voting Patterns on Ballot Initiatives in Asian Americans and Politics: Perspectives, Experiences, Prospects* (Chang edit., 2001) p. 136.) “[T]he Asian American experience is unusually multiracial and almost evenly divided between those who live in predominantly white neighborhoods and those who live in more heavily Latino and/or black neighborhoods.” (*Id.*)

The Court of Appeal's interpretation of the CVRA is flawed and would allow cities to discriminate against voters on the basis of race where minority groups are excluded from representation but are not compact enough to constitute a majority in a single-member district. This conclusion undermines the important anti-discrimination purpose of the CVRA, and if allowed to stand, would diminish the voting rights of Asian American Californians who are excluded from the electoral process through the use of at-large elections.

Equal Protection

The Court of Appeal's reversal of the trial court's careful and reasoned finding of discriminatory intent, if not reversed by this Court, would upend decades of anti-discrimination law. Under the standard announced by the Court of Appeal, victims of racial discrimination would have no recourse except in the most extreme and obvious instances of intentional discrimination. As long as the discriminatory actor proclaims their motives are innocent, according to the Court of Appeal, their explanation must be accepted and there can be no discriminatory intent, even when the trial court finds that explanation to be not credible.

The Superior Court evaluated all of the evidence at trial—direct and circumstantial—under the rubric of *U.S. v. Village of Arlington Heights* (1977) 429 U.S. 252, and found the “Arlington Heights factors” support the view that Santa Monica adopted the at-large system in 1946, and then maintained that system in 1992, with a discriminatory intent. The Court of Appeal, in contrast, ignored much of the evidence of discrimination and failed to apply the *Arlington Heights* test. The

Court of Appeal also engaged in inappropriate *de novo* review to find that there was no discriminatory intent, rather than deferring to the trial court that had reviewed all of the conflicting evidence during trial.

If allegations of racial discrimination are judged without context and circumstantial evidence is disregarded, then victims of racial discrimination will lack recourse except for in cases with the most blatant and explicit racism. Discriminatory actors will be free to discriminate against racial minorities as long as they simultaneously offer some pretext for their statements and actions. That has never been the law in California, and there is no reason for California courts to start accommodating racial discrimination in that way. We respectfully request that this Court correct the erroneous decision of the Court of Appeal in this case, so that courts do not repeat this flawed approach and require other victims of racial discrimination to clear a nearly insurmountable bar in order to prove discrimination.

Respectfully,



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PROOF OF SERVICE

In the Matter of PICO NEIGHBORHOOD ASSOCIATION v. CITY OF SANTA MONICA; Case No. S263971

I, Julia Marks, am a citizen of the United States, am over the age of 18 years, and am not a party to the above entitled matter. My business address is 55 Columbus Avenue, San Francisco, CA 94111. I declare that on the date hereof I served the following documents:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW FROM ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS ET AL.

By Electronic Service: Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service address(es) as set forth below

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*Via electronic submission through the TrueFiling web page at www.truefiling.com
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 11th day of September 2020, at Oakland, California.

/s/ Julia Z. Marks
Julia Z. Marks

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