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 ANSWER BRIEF

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

Over the past quarter-century, candidates preferred by Santa Monica's Latino voters have usually been elected at-large to its seven-member City Council, even though Latinos make up less than one-seventh of the City's eligible voters. Some of those Latino-preferred candidates have themselves been Latino, and three of the seven seats are currently held by Latino Councilmembers. No alternative election system, including districts, could enhance Latino voters' already-powerful influence on election outcomes. Accordingly, the Court of Appeal held that the City's at-large election system has not diluted Latinos' voting strength, precluding liability under the California Voting Rights Act (CVRA).

This Court has asked "What must a plaintiff prove in order to establish vote dilution under the [CVRA]?" In answering that question, the Court should provide a clear, administrable standard that comports with the statute's text and legislative history, while steering clear of the significant constitutional and justiciability issues that would arise if jurisdictions were required, for race-based reasons, to replace well-functioning at-large election systems chosen by their voters with alternative systems, with no beneficial real-world effect on election outcomes. At the least, the Court should not adopt a standard for dilution that would *reduce* a protected class's influence over election outcomes—which is precisely what plaintiffs here are proposing.

The CVRA was modeled on section 2 of the federal Voting

Rights Act, which does not contain the word "dilution." Federal courts have nevertheless long held that section 2 requires proof that the challenged election system has diluted the voting power of a minority group. They have also held that dilution can be shown only through evidence that a minority group would account for a majority of voters in a hypothetical district; plaintiffs have no claim under section 2 when forming such a district is demographically impossible.

The majority-minority requirement follows not from section 2's text, but from concerns that the statute would become unconstitutional or judicially unmanageable without it. For those reasons, federal courts have consistently declined to recognize claims that a minority group would have more "influence" under an alternative election system, even if that group would remain too small to elect its preferred candidates. Relying on racial classifications to require a shift to districts may be permissible when it advances a compelling purpose—giving a cohesive minority group a newfound ability to elect its preferred candidates—but it is unconstitutional when it would have no practical effect. Courts also have been unable to articulate any judicially manageable standard for differentiating between valid and invalid influence claims.

The CVRA makes "dilution . . . of the rights of voters who are members of a protected class" a prerequisite to liability. (Elec. Code, § 14027.) But the statute expands the concept of dilution beyond that recognized by federal courts; it authorizes claims premised on the dilution of a protected class's ability not

just "to elect candidates of its choice" in a majority-minority district, but also "to influence the outcome of an election." (*Id.*, §§ 14027, 14028(c).) This Court must therefore decide how much broader than section 2 the CVRA can be without creating the constitutionality and justiciability concerns that have led federal courts to insist on the majority-minority requirement.

There is room to expand vote-dilution claims beyond section 2's narrow ambit—by interpreting the CVRA to authorize claims where the relevant minority group would account for a near-majority of voters in a hypothetical district with a history of reliable crossover support from other voters. Under those conditions, the minority group would have meaningful "influence" on "the outcome of an election"—a likely (though not guaranteed) ability to elect candidates of its choice.

This case does not meet that test. In Santa Monica, Latino voters, who have usually been able to elect their preferred candidates in at-large elections, are too small in numbers and too dispersed for any alternative electoral scheme meaningfully to increase their electoral influence. In particular, districts would *decrease* Latino voters' electoral influence by packing one-third of them in a district where they would be too few to meaningfully influence election outcomes, while stranding the other two-thirds in overwhelmingly white districts in which they would have no such influence.

In an effort to escape these demographic realities, plaintiffs propose a nebulous, multifactor test for dilution with no legal basis, which would impose liability even when a minority group

would be unable to elect its preferred candidates under any alternative scheme. Plaintiffs' test is reverse-engineered to result in liability in this case—and in almost every case—and would force jurisdictions to adopt new electoral systems that would offer no practical benefit to minority voters and would violate the federal Constitution.

The Court should reject plaintiffs' unprincipled proposal and hold that the CVRA departs from section 2's strict majority-minority requirement, but remains limited by the constitutionality and justiciability concerns underpinning it. In so doing, the Court should affirm the judgment of the Court of Appeal.

If the Court is not inclined to affirm, it should decline plaintiffs' invitation to decide the case for them. It should instead remand to the Court of Appeal to apply any new "dilution" standard to the facts in the first instance, and to address alternative grounds for a judgment in the City's favor that the Court of Appeal never reached.

BACKGROUND

I. Santa Monica's government and elections.

Santa Monica has about 90,000 residents. (Court of Appeal Opn. at 2.) Latinos account for 13.6% of the City's voting-eligible population. (*Id.* at 2-3.)

The City is governed by seven Councilmembers who serve four-year terms. (Opn. at 16.) Four Council seats are available in presidential-election years; the remaining three are available

in gubernatorial-election years. (*Id.* at 3-4.) Councilmembers are elected at-large: All voters, no matter where they live, have a say in electing every Councilmember; they may cast as many votes as there are open seats. (*Ibid.*)

Before adopting this system, the City experimented with others. Between 1906 and 1914, the City was divided into seven districts, each of which elected one councilmember. (Opn. at 4.) From 1914 to 1946, the City was run by three commissioners elected at-large to designated posts, with separate elections for each. (*Ibid.*) In 1946, at the urging of local minority leaders, the voters chose to return to a seven-councilmember system, this time elected at-large, and they abandoned designated posts—which tend to restrict minorities' electoral opportunities—such that that the top three (or four) highest vote-getters would win. (*Id.* at 5-7.)

The system adopted in 1946 remains in place today. The City has never returned to districts, though proposals to do so have twice appeared on the ballot. In 1975 and 2002, voters overwhelmingly rejected returning to districts. (Opn. at 7, 16.) And it was not just white voters who had a strong preference for at-large elections; in 2002, for example, 82% of Latino voters rejected districts. (26AA11613, 28AA12328; RT5862:21-5864:9.)

Santa Monica voters elected their first African-American Councilmember in 1971, their first Latino Councilmember in 1990, and their first Asian-American Councilmember in 1992. (RT8296:20-21; RT8346:1-10.)

When this case went to trial in 2018, two Councilmembers

were Latino; another Councilmember lived in the Pico Neighborhood, which plaintiffs contend has been under-represented. (RT4823:3-4, RT7811:6-13; p. 49, *infra*.) Shortly after trial, one Latino Councilmember (who won three at-large Council elections) left the Council to assume a seat on the State Board of Equalization.

In November 2020, voters elected two additional Latino Councilmembers. (Motion for Judicial Notice (MJN) at 9.) One of them, Oscar de la Torre, is married to one of the plaintiffs and is the former chairman of the other. (RT6163:12-6164:2.) He joined the Council after winning five straight at-large School Board elections. (28AA12328-12331.) Both of the newest Latino Councilmembers also live in the Pico Neighborhood. (MJN at 13.)

The undisputed evidence—statistical analyses of election returns—shows that, over the last quarter-century, Latino voters' preferred candidates have usually won Council elections, and almost always won other City elections, even though Latino voters have never accounted for even one-seventh of the electorate. (See 25AA11006-11012, 28AA12328-12332.)

II. Plaintiffs' lawsuit and the trial.

Plaintiffs sued the City in 2016, claiming that its at-large system violated the CVRA and that by adopting and maintaining that system it had intentionally discriminated against minorities in violation of Equal Protection. (1AA70; 4AA1141.)

During the 2018 bench trial, each side called an expert to present statistical estimates of different ethnic groups' support

for various candidates. (Because ballots are secret, it is impossible to determine how many members of any minority group voted for any candidate, but it is possible to estimate voting patterns by comparing election returns against precinct-level demographic data. RT2957:3-28.) The two experts produced essentially identical estimates of voting behavior. (Compare 28AA12328-12332 with 25AA11006-11012.)

Plaintiffs argued the CVRA requires proof of racially polarized voting alone. (E.g., 3AA931, 4AA1394, 6AA2214-2215, 14AA5429, 22AA9731-9732.) In the alternative, plaintiffs sought to establish vote dilution through expert witnesses, who purported to show Latino voters would be better off with another election system. (See 24AA10706-10707.)

III. The trial court entered judgment for plaintiffs.

The trial court issued a tentative decision stating only that it found in favor of plaintiffs on both causes of action. (22AA9966.) Plaintiffs proposed a statement of decision and judgment (24AA10353, 24AA10368), which the trial court adopted with scarcely any changes. (Opn. at 18.)

As for plaintiffs' CVRA claim, the court concluded voting was racially polarized in Council elections by examining only white and Latino voters' respective levels of support for *Latino-surnamed* candidates. (24AA10681-10682.) The court excluded the possibility that Latino voters might prefer non-Latino-surnamed candidates.

The trial court also decided voting patterns in other City

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." (24AA10692-10693.) The court did not mention that 14 of the 16 Latino-surnamed candidates who ran in local non-Council elections between 2002 and 2016 *won*. (24AA10693-10694; 26AA11611, 26AA11657, 26AA11692, 26AA11733, 27AA11868, 27AA11947, 27AA11995, 28AA12253.)

The court expressed doubt that "'dilution' is a separate element of a violation of the CVRA." (24AA10706.) It then stated, in one sentence, that plaintiffs had proven vote dilution by "present[ing] several available remedies (district-based elections, cumulative voting, limited voting and ranked choice voting), each of which would enhance Latino voting power over the current at-large system." (24AA10706-10707.) In another sentence, it expressed confidence in the district map proposed by plaintiffs. (24AA10707.)

As for plaintiffs' Equal Protection claim, the court decided the City intentionally discriminated against minority voters in adopting and maintaining its election system. (24AA10716-10727.)

The court ordered the City to adopt plaintiffs' seven-district map and hold a special district-based election in July 2019; it also prohibited any Councilmembers elected at-large from serving after August 15, 2019. (24AA10738.)

Plaintiffs then "asked the trial court to order the City to pay [them] about $22 million in attorney fees and costs." (Opn. at 21.)

IV. The Court of Appeal reversed the judgment in full.

The City appealed. (24AA10740.) Plaintiffs and the trial court refused to acknowledge the appeal stayed the entire judgment. (25AA10873, 25AA10888.) The City filed a petition for a writ of supersedeas (25AA10888A), which was granted. (25AA10889A.)

In its appellate briefing, the City explained, among other things, why the CVRA requires vote dilution and how dilution must be defined. (E.g., AOB-49-60.) Plaintiffs' brief, by contrast, stated that the statute "contains no dilution element at all," or, if it does, that plaintiffs had satisfied it by showing that Latino voters, who account for 13.6% of voters in the at-large system, would account for 30% of voters in a hypothetical district. (Opn. at 32, 34-35.)

At oral argument, Justice Wiley asked plaintiffs' counsel to identify some administrable definition of dilution that could separate valid from invalid claims. Counsel responded that "there is no bright line legal rule" and would not exclude the possibility of CVRA liability even where a protected class's share of voters rose from 14% in an at-large system to only 15% in a district. (MJN, Ex. A at 28-30.)

The Court of Appeal unanimously reversed the judgment.

As for plaintiffs' CVRA claim, the Court of Appeal did not

reach the question whether plaintiffs had proven racially polarized voting. It resolved the claim solely on dilution.

The court began with the CVRA's text. (Opn. at 26-27.) It requires proof that 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, as a result of the dilution or the abridgement of the rights of voters" belonging to a protected class. (Elec. Code, § 14027.)[1] Because "dilution" is not defined by the statute, it must carry its "ordinary meaning": "making something weaker by mixing in something else." (Opn. at 27.) Dilution occurs when a group that could elect its preferred candidates under one election system cannot do so because a government uses another system. (*Id.* at 28-31.) Dilution does not occur, however, when a group both cannot elect its preferred candidates under the current system *and* would still be unable to do so under some alternative system. (*Ibid.*)

Plaintiffs argued Latinos cannot elect their preferred candidates under the current at-large system (in which they account for 13.6% of eligible voters and vote for up to three or four candidates in each election) but could do so in a district (in which they would account for, at most, 30% of eligible voters and could vote for only one candidate). (Opn. at 30-31.)

The Court of Appeal disagreed. "Dilution requires a showing," the court held, "not of a merely marginal percentage

[1] Plaintiffs have never claimed the City's election system "abridges" the rights of voters.

increase in a proposed district, but evidence the change is likely to make a difference in what counts in a democracy: electoral results." (Opn. at 37.)

The court rejected plaintiffs' argument that the CVRA does not require evidence of dilution in the first place. The court noted that plaintiffs had "devoted only one sentence" to that argument in their brief and then "abandoned" it for purposes of oral argument—"and for good reason." (Opn. at 32.) The statute, the court explained, expressly requires evidence of "dilution." (*Id.* at 32-34.)

The court also rejected plaintiffs' argument that, even if the City's current election system does not dilute Latinos' ability to *elect* their preferred candidates, plaintiffs had shown the system dilutes Latinos' "ability to influence the outcome" of elections. According to plaintiffs, it was enough to prove dilution that Latinos are 13.6% of voters citywide but might be 30% of voters in a district, since 30% is greater than 13.6%. (Opn. at 34-35.) The Court of Appeal disagreed, holding plaintiffs failed to propose any principled definition of increased "influence" on electoral outcomes that would allow courts to distinguish between worthy and unworthy cases. To the contrary, plaintiffs' proposed formulation "would give a winning cause of action to any group, no matter how small, that can draw a district map that would improve its voting power by any amount, no matter how miniscule." (*Id.* at 35.) Adopting this definition would not change election outcomes, but "would merely ensure plaintiffs always win." (*Id.* at 36.)

It was no answer, the court reasoned, to point to non-Latino voters who might "'cross over' and vote for Latino candidates" in the hypothetical district. (Opn. at 36.) The premise of plaintiffs' case is that voting is racially polarized—that non-Latinos vote differently from Latinos. Any reliance on crossover voting "arbitrarily embraces racially polarized voting when it helps and abandons it when it hurts. It creates a manipulable standard boiling down to plaintiff always wins." (*Ibid.*)

The court left open the possibility that "'influence' claims in theory could be valid if evidence showed a near-majority of minority voters in a hypothetical district would often be sufficient for the minority group to elect its preferred candidates." (Opn. at 36-37.) But the court did "not decide that question . . . , for this case presents no such district"; Latinos would make up no more than 30% of the voters in the proposed district, and the undisputed evidence shows that Asian and African-American voters in Santa Monica vote very differently from Latinos. (*Ibid.*; 25AA11006-110012.)

As for plaintiffs' Equal Protection claim, the court held "there was no evidence the City had the *purpose* of engaging in racial discrimination." (Opn. at 42.) In fact, the evidence proved the opposite. (*Id.* at 42-49.)

STANDARD OF REVIEW

"Statutory interpretation 'is an issue of law, which we review de novo.'" (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183.) Review is also de

novo when an "appeal involves the application of a statute to undisputed facts." (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1384.)

ARGUMENT

In defining "dilution," the Court should account for both the Legislature's intent to broaden liability in vote-dilution cases *and* the reasons federal courts have declined to do so.

Federal courts have held votes cannot be diluted unless it is possible to draw a majority-minority district, where a cohesive minority group could be assured of the ability to elect a candidate of its choice. Drawing less-concentrated districts along racial lines would be unconstitutional because the necessary racial classifications would serve no compelling interest. It would also be impossible to establish any principled cutoff between valid and invalid claims.

Plaintiffs' theory of the case—that an election system dilutes minority voting power whenever it is possible to draw a district where minority voters would be 25% of the electorate—runs headlong into these problems. "Dilution" requires a measurable change in voting power, and a group that small cannot change electoral outcomes in a winner-takes-all district, particularly where the premise of plaintiffs' case is that Latinos and non-Latinos prefer different candidates.

It is possible to avoid the problems identified by federal courts *and* still expand vote-dilution claims, as the Legislature intended, by requiring plaintiffs to prove that a protected class

would account for a near-majority of voters in a hypothetical district and that the class would sometimes, if not always, be able to elect its preferred candidates.

At a minimum, there can be no vote dilution when an alternative system would *reduce* a protected class's voting power. This case illustrates how districts can destroy the electoral influence a group already has. Latino voters' preferred candidates have usually been elected in Santa Monica's at-large system. Switching to districts would weaken Latinos' voting strength by "packing" some into a district—where they would be nowhere near a majority and would lack enough crossover support to elect their preferred candidates—and "cracking" the rest across several districts where they would have no electoral influence.

I. Vote dilution is an element of the CVRA.

The CVRA requires plaintiffs to prove 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, as a result of the dilution . . . of the rights of voters who are members of a protected class." (Elec. Code, § 14027(a).)

In the statement of decision that plaintiffs wrote, the trial court expressed doubt that "'dilution' is a separate element of a violation of the CVRA." (24AA10706.) Likewise, in their petition for review, plaintiffs questioned whether the CVRA "imposes a so-called 'dilution' element that is separate and apart from racially polarized voting." (Pet. at 24.)

Now, for the first time, plaintiffs claim the CVRA "can be interpreted in *two* reasonable ways." (OB-40, italics added.) The first is to ignore the statutory term "dilution." The second is what the Court of Appeal correctly held: The CVRA requires plaintiffs to prove that "an alternative election method would afford the protected class the opportunity 'to elect candidates of its choice' or 'influence the outcome of an election' they were not previously afforded." (*Ibid.*; accord Opn. at 30-31.)

A. The Court should reject plaintiffs' argument that dilution is not an independent element of the CVRA.

Section 14027 requires "dilution" caused by an at-large system. Plaintiffs argue this language has no independent meaning because the next section states that "[a] violation of Section 14027 is established if it is shown that racially polarized voting occurs" in the relevant elections. (OB-42.)

The Court of Appeal persuasively explained why collapsing racially polarized voting and dilution into a single element is poor statutory interpretation. For one thing, three sections of the CVRA "require plaintiffs to satisfy *both* the dilution element of section 14027 and section 14028's requirement of racially polarized voting." (Opn. at 33.) "These statutory passages require sections 14027 and 14028 to have independent content." (*Ibid.*)

For another, plaintiffs' interpretation violates the rule against surplusage. (Opn. at 32-34.) Had the Legislature intended the CVRA to turn on racially polarized voting alone, it

would have written a shorter, simpler statute. And, as the Court of Appeal correctly noted, the choice of the word "dilution" was hardly accidental. It "has been a core part of the voting rights vocabulary" for decades. (*Id.* at 34.) Although the word does not appear in section 2, the federal statute on which the CVRA was based, it routinely appears in section 2 cases. (E.g., *Thornburg v. Gingles* (1986) 478 U.S. 30.) "It would have been incongruous," the Court of Appeal concluded, "to make a key word nugatory." (Opn. at 34.)

Plaintiffs also suggest that certain "qualitative factors" set out in section 14028(e) might establish vote dilution "in combination with" racially polarized voting (OB-42-43), but there is no authority for that proposition. Those factors track the "Senate factors" addressed in section 2 cases; the Senate factors become relevant only *after* plaintiffs have proven vote dilution by showing it is possible to create a majority-minority district that will result in the election of more minority-preferred candidates. (E.g., *Johnson v. Hamrick* (11th Cir. 1999) 196 F.3d 1216, 1220.)

Finally, reading "dilution" out of the CVRA would violate the federal Constitution. It would force jurisdictions to abandon their voting systems and adopt new ones, for race-based reasons, solely based on differences in voting patterns or qualitative factors, even if minority voters would fare no better in the new system. (See Parts II.A-B, *infra*.)[2]

[2] Reading vote dilution out of the statute would also eliminate the "statewide concern" that justifies the CVRA's application

B. Plaintiffs adopt the holding of the very decision from which they appeal.

Likely because they do not expect this Court to write "dilution" out of the CVRA, plaintiffs spend the rest of their brief following the Court of Appeal's "dilution" analysis step for step.

Both begin with the plain meaning of "dilution": to *weaken* something. (OB-45; Opn. at 27.) Both also explain that it is impossible to determine whether something has been "diluted" without reference to an "undiluted benchmark." (OB-46; Opn. at 30.) And both agree that courts have long applied this principle to vote-dilution claims under section 2. (*Ibid.*) In fact, both cite the same case, *Reno v. Bossier Parish School Board* (1997) 520 U.S. 471, for the proposition that "plaintiffs must postulate an alternative voting practice to serve as the benchmark undiluted voting practice, because the concept of vote dilution necessitates the existence of an undiluted practice against which the fact of dilution may be measured." (Opn. at 30; OB-46.) Without this benchmark, a plaintiff could never prove that the challenged voting system has harmed minority voters. (E.g., *Gingles*, 478 U.S. at 50, fn. 17.)

The parties agree, then, that the CVRA's dilution element requires courts to determine whether a protected class would have meaningfully greater voting strength under some hypothetical election system. The dispute is over how to put that requirement into practice.

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to charter cities. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 800.)

II. The Court should adopt an objective, administrable standard for dilution that avoids constitutionality and justiciability concerns that federal courts have long identified.

Section 2 plaintiffs must prove dilution by showing it is possible to create a majority-minority district. (*Bartlett v. Strickland* (2009) 556 U.S. 1 (plurality opn.).) The CVRA softens that requirement, permitting a finding of dilution where switching to districts will increase a protected class's ability "to influence the outcome of an election." (Elec. Code, § 14027.)

The question for the Court is what increasing "influence" means and how far the CVRA can stray from federal law without becoming judicially unmanageable or unconstitutional.

The answer must be that a minority group has increased "influence" over the "outcome of an election" only if its preferred candidates would win more often, even if not in every election. If the group's preferred candidates would not win even under some alternative system, then any additional "influence" would have no real-world effect on the "outcome" of elections.

Forcing a jurisdiction to abandon its chosen electoral system under those circumstances would have the *opposite* effect from what the Legislature intended. It would (a) weaken the overall voting strength of the relevant minority group, concentrating some minority voters in one winner-takes-all district where they would never win and scattering the rest across districts where they could not concentrate their votes; (b) violate the voters' constitutional right to choose their own election system, because there would be no compelling interest

requiring them to change it; and (c) subject cities to liability (and massive fee awards) for *resisting* a change that would dilute minority voting strength. These are the consequences of plaintiffs' theory that the CVRA creates liability wherever a minority group would have a slightly larger share of the voting population in one district (of seven) than in a charter city's voter-chosen at-large system.

Courts have rightly condemned "dilution" theories like plaintiffs', which reflect no manageable standards and raise serious federal constitutional concerns. (See, e.g., *Bartlett*, 556 U.S. at 21-23.) The Court should therefore adopt an objective, administrable measure of increased "influence": proof that a protected class would be a near-majority in a hypothetical district and that the group's preferred candidates are reliably supported by enough crossover votes that they would likely win.

A. Federal courts have rejected influence claims as non-justiciable and unconstitutional.

A section 2 violation occurs when members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (52 U.S.C. § 10301(b).) That language does not require plaintiffs to prove it is possible to draw a majority-minority district.

Yet in *Gingles*, the U.S. Supreme Court required proof of a majority-minority district as a prerequisite for a section 2 claim. That requirement ensures the challenged electoral system has actually injured the protected class by diluting its voting

strength: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." (478 U.S. at 50, fn. 17.) The Court had no occasion to decide whether a minority group too small to form a majority of voters in a hypothetical district could state a section 2 claim on the theory that the district would allow it to "influence the outcome of an election even if its preferred candidate cannot be elected." (*Bartlett*, 556 U.S. at 12-13.)

After *Gingles*, lower courts uniformly deemed "influence" claims non-justiciable because there is no principled line between valid and invalid claims. For example:

- *McNeil v. Springfield Park District* (7th Cir. 1988) 851 F.2d 937, 947: "Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections."
- *Illinois Legislative Redistricting Commission v. LaPaille*, 786 F.Supp. 704, 716 (N.D.Ill. 1992) (three-judge panel): "If 10% of the voters can 'swing' an election, perhaps so can 1% or 0.1%. A single voter is the logical limit."
- *Dillard v. Baldwin County Commissioners* (11th Cir. 2004) 376 F.3d 1260, 1267-69: "We cannot conceive of any method by which we could award [the plaintiff] relief in this case without awarding similar relief to even smaller minority groups in future cases."

In time, the U.S. Supreme Court began to echo these concerns. In *Holder v. Hall* (1994) 512 U.S. 874, 881 (plurality opn.), for example, the Court explained that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2."

The Court also suggested that influence claims might be unconstitutional. If section 2 protected mere "influence," "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." (*LULAC v. Perry* (2006) 548 U.S. 399, 445-446 (plurality opn.).)

Eventually, in *Bartlett v. Strickland* (2009) 556 U.S. 1, the Court held that Section 2 does not authorize "influence" claims, and that section 2 plaintiffs must prove the possibility of a majority-minority district.[3] The Court offered many persuasive justifications for the majority-minority requirement, some of which are summarized below; the Court also explained why the standard is neither arbitrary nor a response to some peculiar feature of section 2.

First, the very concept of "influence" dilution is internally inconsistent. To establish a violation of section 2 (or the CVRA), plaintiffs must prove, among other things, that the majority votes

[3] *Bartlett* was a three-justice plurality opinion, but only because Justices Thomas and Scalia would have gone further than the plurality by eliminating the *Gingles* framework entirely. (556 U.S. at 26 (conc. opn. of Thomas, J.).)

as a bloc to defeat minority-preferred candidates. (*Gingles*, 478 U.S. at 50-51.) But if there is ample crossover voting to support minority-preferred candidates—which is the premise of any influence-centric theory—then "[i]t is difficult to see how the majority-bloc-voting requirement could be met." (*Bartlett*, 556 U.S. at 16.)

Second, the majority-minority rule provides "straightforward guidance" to lower courts and public officials, whereas a "less exacting standard that would mandate" influence districts "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." (*Bartlett*, 556 U.S. at 17-18; see also *Miller v. Johnson* (1995) 515 U.S. 900, 914, 927-928 [condemning race-based assumptions about voter behavior].) A court weighing an influence claim would have to answer, among other questions, "How reliable would the crossover votes be in future elections?" and "What are the historical turnout rates among white and minority voters and will they stay the same?" (*Bartlett*, 556 U.S. at 17.) These and other questions "are speculative, and the answers . . . would prove elusive," because courts "'are inherently ill-equipped' to 'make decisions based on highly political judgments' of the sort that [influence] claims would require." (*Ibid.*) Making "predictive political judgments" would be especially difficult, the Court explained, about "regional and local jurisdictions that often feature more than two parties or candidates," such as "nonpartisan contests for a city commission." (*Id.* at 18.) In such elections, "voters' personal affiliations with

candidates and views on particular issues can play a large role." (*Ibid.*)

Third, the majority-minority rule "avoid[s] serious constitutional concerns under the Equal Protection Clause." (556 U.S. at 21.) The Constitution forbids predominantly race-based remedies unless they are narrowly tailored to serve compelling government interests. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463-1464.) Courts have long assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Id.* at 1464.) It therefore may be necessary to engage in racial classifications when doing so gives a minority group an ability to elect candidates of its choice that it would not otherwise have. (*Id.* at 1472; see also *Bush v. Vera* (1996) 517 U.S. 952, 982 (plurality opn.) [race-based redistricting cannot survive strict scrutiny unless "'the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority'"].) But ordering public entities to draw districts to maximize minority *influence* "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" (*Bartlett*, 556 U.S. at 21-22.) Far from bringing us toward "'the goal of a political system in which race no longer matters,'" mandating influence districts would impermissibly "require courts to make inquiries based on racial classifications and race-based predictions." (*Id.* at 18, 21.)

The Court acknowledged that public entities are free to draw influence districts during the redistricting process "as a

matter of legislative choice or discretion." (*Bartlett*, 556 U.S. at 23.) But courts may not *order* public entities to adopt them.

Accordingly, even though diluted-influence claims are not inherently incompatible with section 2's text, federal courts have consistently held that plaintiffs may not assert them.

B. The Court should interpret the CVRA in a way that ensures minority groups have meaningful "influence," without creating the significant problems identified by federal courts.

The CVRA is potentially broader than section 2 because it authorizes challenges to an at-large election system when an alternative scheme would enhance a protected class's "ability to influence the outcome of an election," even if that group would not be guaranteed the "ability . . . to elect" its preferred candidate in a majority-minority district. (Elec. Code, § 14027.) The question for this Court, then, is how the ability to influence the outcome of an election differs from the ability to elect, and just how broad influence claims can be without becoming unconstitutional or unmanageable.

The Legislature could not have intended to impose liability under the CVRA—requiring governments to scrap at-large elections and pay substantial fee awards—whenever plaintiffs can draw a district in which a minority group may have some marginal increase in "influence," even if it would not result in the election of more minority-preferred candidates. (See OB-49 [acknowledging any increase in influence must be "meaningful"].) To the contrary, the CVRA's legislative history suggests the point

of increasing minority groups' "influence" on electoral "outcome[s]" was to get their preferred candidates *elected*. (E.g., MALDEF, letter to Assemblywoman Corbett, May 31, 2002 [criticizing "severe underrepresentation" of minority groups on governing boards].)

Were the rule otherwise, California courts would be forced to adopt the judicially unmanageable standards that federal courts have consistently rejected, and to impose districts in virtually every case. But the Legislature disavowed any intention to "mandate that any political subdivision convert an at-large election system to a single-member district system." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 976 (2001-2002 Reg. Sess.) Apr. 9, 2002, p. 1.) The Legislature avoided making districts mandatory because they sometimes (as in this case) dilute minority voting strength. (E.g., Opn. at 23.)

The canon of constitutional avoidance is another reason not to endorse a maximalist expansion of vote-dilution claims. The Court should construe the CVRA and its phrase "ability to influence the outcome of elections" "'in a manner that avoids a serious constitutional question.'" (*People v. Chandler* (2014) 60 Cal.4th 508, 524.) Ordering a public entity to adopt districts could arguably serve a compelling state interest, if they would give a minority group the newfound ability to elect its preferred candidates. But ordering a jurisdiction to adopt districts for the sole purpose of concentrating as many minority voters as possible in a single district—even if it would not meaningfully enhance that group's voting power—amounts to an unconstitutional racial

classification for its own sake. (See *Miller*, 515 U.S. at 922 [racially driven districting unconstitutional without compelling state interest].) In other words, cities cannot constitutionally be carved into districts based on racial classifications without good reason. And increasing the size of a minority group in a district, even if the increase will have no real-world effect, is not a good reason.[4]

In interpreting the CVRA, the Court should thread the needle between the Legislature's decision to expand section 2 and the problems that too great an expansion would create. Specifically, the Court should hold that a plaintiff may prove vote dilution under the CVRA either by showing that:

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[4] Plaintiffs argued below that courts have already upheld the constitutionality of the CVRA. But no case has addressed the question presented here—whether the CVRA would be unconstitutional as applied if it compelled a government to adopt districts (and, in drawing those districts, focus principally on race by maximizing the concentration of a minority group in one district) even though they would not improve a minority group's ability to elect and would even dilute the group's overall voting power. *Higginson v. Becerra* (9th Cir. 2019) 786 F. App'x 705 decided that cities can *voluntarily* adopt districts without triggering strict scrutiny, at least where the plaintiff does not contend that the districts are drawn primarily based on race. *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660 held the CVRA is *facially* constitutional. And *Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385 rejected a constitutional argument premised on the defendant's contention that there was no racially polarized voting, which the court also rejected. None of these cases diminishes what the U.S. Supreme Court has repeatedly said about the dangers of relying on racial classifications absent a compelling interest.

1. a minority group would be large and compact enough to constitute a majority in a single-member district, such that the at-large system "impairs the ability of a protected class to elect candidates of its choice"; or

2. an alternative election system would enhance a minority group's "ability to influence the outcome of an election" because that group's preferred candidates would often, even if not always, be elected in the alternative system.

(Elec. Code, § 14027). To meet the second standard, a plaintiff must show that the minority group would account for a *near*-majority in a hypothetical district and that the group's preferred candidates are reliably supported by enough crossover votes that they would likely win in the district. A near-majority-plus-crossover-support rule would expand the scope of voting-rights claims, but do so in a sensible, judicially manageable way.

A minority group's "influence" over "the outcome of an election" can be meaningful only if that group has *some* say in which candidates win. If a group gained a greater share of the electorate, but its preferred candidates were still defeated, then any purportedly greater "influence" would be meaningless—no different from an 0-162 baseball team pointing out how close every game was. (See *Overton v. City of Austin* (5th Cir. 1989) 871 F.2d 529, 542 ["It would be a Pyrrhic victory for a court to create a single-member district in which a minority population . . . continued to be defeated at the polls"] (conc. opn.

of Jones, J.).)[5]

But if a group's "influence" were sufficient to allow it to elect its preferred candidates at least sometimes—as a near-majority in a district with demonstrated crossover support—then courts could avoid unconstitutionally mandating a move to districts based on racial classifications without a reasonable likelihood that those districts would yield minority-preferred winners. Nor would courts face the impossible task of trying to draw principled distinctions between changes in voting-bloc size that are too small to have any real-world effect.

The CVRA's drafters called attention to the problem of near-majorities having no remedy under federal law, even though their influence in a district might be enough elect candidates of their choice. (E.g., Sen. Polanco, sponsor of Sen. Bill No. 976 (2001-2002 Reg. Sess.), letter to Governor, July 2, 2002 ["If the minority community were at 49 percent, then the federal courts cannot provide a remedy."].) The legislative history also reflects the recognition that drawing districts with less than a near-majority of minority voters would be futile: "If the minority

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[5] The Court should reject any argument that minority voters accounting for a small share of voters in a hypothetical district, although they may not be able to elect their preferred candidates, would at least have a chance to play spoiler and swing an election to a candidate they do not prefer. Courts have cautioned against that sort of "influence." (E.g., *LULAC*, 548 U.S. at 445-446 [this conception of influence raises constitutional concerns]; *Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543, 554 [Latinos should not be "relegated to casting a veto" between majority-preferred candidates].)

community is not sufficiently geographically compact, it is unclear what benefit would result from eliminating at-large elections." (Assem. Com. on Elections, Reapportionment and Constitutional Amendments, Analysis of Sen. Bill 976, Mar. 18, 2002, p. 5.)

There is also support for a near-majority rule in the dissenting opinions in *Bartlett v. Strickland* (2009) 556 U.S. 1, in which five justices refused to permit influence claims. The four dissenters believed that section 2 claims might be viable even if it is impossible to draw a majority-minority district.

In one dissent, Justice Breyer offered an objective alternative to the majority-minority rule: "a numerical ratio that requires the minority voting age population to be twice as large as the percentage of majority crossover votes needed to elect the minority's preferred candidate." (556 U.S. at 46 (dis. opn. of Breyer, J.).) Justice Breyer concluded that this "2-to-1 rule" would "make a critical difference" "in districts with minority voting age populations that range from 40% to 50%." (*Id.* at 48.) He also predicted that "districts where the minority population is below 40% will almost never satisfy the 2-to-1 rule." (*Ibid.*)

In a separate dissent, Justice Souter similarly concluded districts with minority populations as low as about 40% might be able to influence electoral outcomes by electing minority-preferred candidates. (556 U.S. at 33 (dis. opn. of Souter, J.).) But he observed that "[n]o one . . . would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition." (*Id.* at 34.)

He also foreshadowed the Court of Appeal's decision here in reasoning that there may be "an analytical limit to claims based on [influence] districts," because there cannot simultaneously be majority bloc voting against a small minority's preferred candidates *and* sufficient crossover voting to elect those candidates. (*Ibid.*; see Opn. at 36.)

Though the dissenters did not favor strictly mathematical tests, they plainly did not envision liability in cases like this one—where the purportedly remedial district would be at most 30% Latino, where plaintiffs' case is premised on whites and Latinos voting "stark[ly]" differently (OB-58), and where the undisputed record shows that Asian and African-American voters generally do not support Latino-preferred candidates. (25AA11006-110012.) The upshot of those premises is that Latinos in the new district would consistently be outvoted in winner-takes-all elections.

The Court should adopt a near-majority rule to avoid serious constitutional concerns and impossible line-drawing problems.

C. Plaintiffs' lax standard for "influence" would create the constitutionality and justiciability problems identified by federal courts.

Plaintiffs propose an ambiguous, multifactor standard for vote dilution and influence that runs headlong into the constitutionality and justiciability concerns identified above.

According to plaintiffs, courts should consider three factors when deciding whether district-based schemes would increase

electoral "influence" over at-large systems: "the minority proportion of the electorate" in a hypothetical district, recent "electoral behavior," and "other historical, political, social, and economic factors impacting minority voters' ability to compete in district elections." (OB-48.) Plaintiffs' proposal not only is legally wrong, but would effectively mandate districts everywhere, contrary to the Legislature's intent. And in many cases (including this one), it could *weaken* the voting strength of the very voters the CVRA was intended to benefit.

1. Plaintiffs' 25% threshold for "influence" has no basis in law.

Plaintiffs argue a district will "often" increase electoral influence "where a politically cohesive minority makes up 25% or more of the citizen-voting-age population of a district." (OB-48-49.) They claim federal cases support this proposal. (*Ibid.*) Not even close. Federal courts have *never* endorsed influence claims in vote-dilution cases. (Part II.A, *supra*.) Plaintiffs plucked their 25% threshold from thin air, doubtless because it is just below Latinos' share of voters in their proposed district (30%).

Plaintiffs invoke the separate opinions of Justices Breyer and Souter in *Bartlett* and of Justice O'Connor in *Gingles*. (OB-16-19.) But neither Justice Breyer nor Justice Souter endorsed a threshold for "influence" anywhere near as low as 25%. (Part II.B, *supra*.) And Justice O'Connor gave an example of a district in which African-Americans "would constitute 30% of the voters," which "would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but

impossible without such support." (*Gingles*, 478 U.S. at 86 (conc. opn. of O'Connor, J.).)

Plaintiffs also rely on *Georgia v. Ashcroft* (2003) 539 U.S. 956. (OB-16-17, 49, 55.) But that case is irrelevant, as the Court of Appeal correctly concluded (Opn. at 36), because it addressed *section 5* of the Voting Rights Act, not section 2. The U.S. Supreme Court has repeatedly explained, including in *Georgia* itself, that section 2 and section 5 "'combat different evils and, accordingly, . . . impose very different duties.'" (*Georgia*, 539 U.S. at 478; accord *Bartlett*, 556 U.S. at 24-25.) "Section 5 applies only in certain jurisdictions specified by Congress." (*Hall*, 512 U.S. at 883.) In those jurisdictions, section 5 requires "a proposed change in a voting practice [to] be approved in advance by the Attorney General or the federal courts," to ensure that the proposed change does not "'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" (*Ibid.*) In *Georgia*, the Court "refuse[d] to equate a § 2 vote dilution inquiry with the § 5 retrogression standard." (539 U.S. at 478.) This Court should do the same, because the CVRA addresses vote dilution, not retrogression. (Elec. Code, § 14027.)

Plaintiffs' three other citations are equally misleading. In *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter* (W.D.Tenn. 1995) 877 F.Supp. 1096, 1101, the court stated—on the very page plaintiffs cite—that courts had uniformly (apart from one district court) "rejected the contention that § 2 entitles minority groups to an influence district," and

that "the problem of whether the Voting Rights Act *requires* the creation of influence districts does not arise in the present case." The question was instead "whether the voluntary creation of influence districts by a legislature should be counted as a factor weighing against finding a § 2 violation." (*Id.* at 1101-1102.) In other words, the court addressed whether defendants could defeat liability by pointing to existing influence districts—*not* whether courts must create them.

Likewise, in *Vecinos de Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, the defendants argued an existing influence district (in a half-at-large, half-districted system) weighed against liability, and the court suggested that Latinos might therefore already have "a meaningful opportunity to participate in the electoral system." (*Id.* at 978, 991.) On remand, the district court entered judgment for the defendants, partly because of this influence district. (*Vecinos de Barrio Uno v. City of Holyoke* (D.Mass. 1997) 960 F.Supp. 515, 527.)

Finally, *Wilson v. Eu* (1992) 1 Cal.4th 707 addressed the propriety of influence districts created during the decennial redistricting process, not the validity of "influence" claims in vote-dilution lawsuits. This Court did not "undertak[e] a definitive resolution of the validity of section 2 'influence' claims." (*Id.* at 753.)

In short, there is *no* support for plaintiffs' 25% cutoff, which they propose *solely* because it makes their 30% district seem reasonable.

2. Plaintiffs' method of predicting increased "influence" is flawed and unrealistic.

Plaintiffs next argue that in evaluating potential influence in a district-based system, courts should "consider the performance of candidates and ballot issues preferred by the protected class in the precincts making up a potential remedial district or districts." (OB-51.) According to plaintiffs, if "minority candidates preferred by the minority community" lost in at-large elections, but may have earned a higher share of votes "in the potential remedial district," that difference is "strong evidence that the district will improve minority voting power." (*Ibid.*)

In suggesting this factor, plaintiffs also hedge their bets, asserting that "the absence of evidence that minority-preferred candidates were the top vote getters in a potential district should not be conclusive" (OB-51), even though only the *top* vote-getter is elected in a district. Plaintiffs speculate that minority candidates may have been deterred from running—even though five Latino candidates ran in the most recent Council election (MJN at 10-11)—or that minority voters may have voted for candidates "more likely to win" rather than "candidates they prefer." (OB-51-52.) This proposed factor, in other words, boils down to a rule that plaintiffs win (or at least cannot lose).

Plaintiffs propose this factor not because any court has endorsed it—they cite no such cases—but because it follows what their own expert did at trial. (See Part IV.A, *infra*.) Yet even that expert admitted his analysis was "in no way predictive of what would happen in a district election." (RT2610:23-25; accord

RT2601:13-16.) For example:

- In an at-large system, voters citywide may cast up to four votes in an election; in a district, voters would cast only one vote for one open seat. There is no way to know which candidate a voter would have supported if she had cast only one vote. (RT2605:14-2606:10.)
- A district-based election system would almost certainly impose a residency requirement. (RT2602:18-2603:10.) Consequently, most candidates running in an at-large system would not even be *eligible* to run in a purportedly remedial district. (25AA10999.)

Endorsing plaintiffs' proposal would therefore require courts to predict how minority and majority voters would have voted in a different election system if different candidates had been running. The Court should heed the U.S. Supreme Court's advice and decline to require lower courts to make such counterfactual race-based predictions—which are likeliest to be inaccurate in local elections in any event. (*Bartlett*, 556 U.S. at 18.)

3. Plaintiffs' remaining proposed factors are similarly unhelpful.

Plaintiffs recommend that courts examine various "political circumstances and socio-economic conditions" to determine whether minority voters would have more "influence" in a district-based system, even if they would still lack the numbers to elect candidates of their choice. (OB-52.) But it is unrealistic to

expect judges to assess how these factors might impact voter engagement, turnout, and voting patterns. (*Bartlett*, 556 U.S. at 17.) It is also likely unconstitutional; statutes should not be interpreted "to require courts to make inquiries based on racial classifications and race-based predictions." (*Id.* at 18.)

Plaintiffs' proposed political and socioeconomic factors are a poor measurement of dilution for another reason, too: They would counsel in favor of liability in nearly every case. For example, plaintiffs suggest that courts consider differences in campaign costs between district-based and at-large systems, even though they also posit that costs in at-large systems will "typically" be higher. (*Id.* at 52-53.) Similarly, plaintiffs argue that courts should impose districts when there is any "significant income or wealth disparity between the minority and majority communities" (OB-52)—even though there is such a gap across the entire State.

Plaintiffs' suggestion that all or most contributions to a candidate will come from members of that candidate's own racial or ethnic group also reflects, like plaintiffs' entire case, a lamentably narrow worldview that courts have rightly rejected. (E.g., *Ruiz*, 160 F.3d at 551.)

4. Plaintiffs endorse districts even when they would *harm* minority voters.

Plaintiffs' proposed factors would call for districts in nearly every case—even where, as in Santa Monica, districts would *reduce* minority voting strength. When voters are too few or too spread out, districts will "pack" some into an ineffective winner-

takes-all district and "crack" the rest across the remaining districts—an "absurd consequence[]" the Court should "presume the Legislature did not intend." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.)

But that is precisely what would happen in Santa Monica. Plaintiffs want to pack one-third of the City's Latinos into a district where they would account for only 30% of voters. Plaintiffs never mention that the other two-thirds would be submerged in overwhelmingly white districts. (RA46-47.) If voting really is polarized along racial lines, as plaintiffs claim, Latino voters would have no voting power in *any* of these districts.

In section 2 cases, courts overlook the diminished voting strength of voters outside of a remedial district when the voters inside that district will be able to elect candidates of their choice. (E.g., *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1414.) But where, as here, the protected class would remain a relatively small minority group even in the target district, the electoral fate of their fellow class members cannot be ignored. Whatever marginal "influence" those in the target district might gain would be offset by the "influence" that voters in other districts lose—especially because voters in an at-large scheme may vote for more candidates and can join with voters citywide to fill one of the open seats. That is exactly what Latinos have successfully done in Santa Monica for decades. (Part III.B.2, *infra*.)

The Court could resolve this case simply by holding that, at

the very least, a CVRA plaintiff cannot prevail when alternative election systems would *diminish* a minority group's influence.

5. Plaintiffs' proposal for measuring "influence" through non-district remedies is even less coherent.

In addition to proposing unmanageable standards for assessing whether districts prove dilution, plaintiffs briefly address the prospect of increasing "influence" through non-district remedies. (OB-54-56.) There are three reasons not to take this proposal seriously.

First, this case does not squarely present the issue. Plaintiffs sought a district-based remedy from the outset, and the trial court said effectively nothing about at-large alternatives. (24AA10706-10707, 24AA10733.) The Court of Appeal correctly described the trial court's "treatment of these alternatives" as "perfunctory"; "[t]he court did not define" them or "attempt to analyze how each might satisfy the dilution element. This fleeting reference [in the trial court's decision] is insubstantial and cannot support the judgment." (Opn. at 31.)

Second, neither the CVRA nor its legislative history even mentions such remedies. To be sure, the statute arguably leaves open the possibility of non-district remedies. (Elec. Code, § 14029.) But the CVRA targets only "at-large method[s] of election." (*Id.*, § 14027.) A defendant switching to any alternative at-large system would therefore remain vulnerable to suit.

Third, there is almost no support for alternative at-large

systems. A few cases have endorsed them. Many more have rejected them. (E.g., *Cousin v. Sundquist* (6th Cir. 1998) 145 F.3d 818, 829-831.) Tellingly, plaintiffs cite two decisions upholding *settlements*, rather than imposing at-large remedies following an adjudication of liability. (OB-54 [*Dillard* and *Eastpointe*].)

If the Court does entertain alternative at-large systems as a yardstick for dilution, it should not accept plaintiffs' invitation to rely solely on the "threshold of exclusion." (OB-54-55.) For one thing, satisfying the threshold might give minority voters only the ability to elect *one* candidate. In some cases, including this one (Part III.B.2, *infra*), minority groups have elected *multiple* representatives of their choice under an at-large system. So switching to an at-large alternative might *reduce* minority voting power.

For another thing, plaintiffs' proposal requires the destaggering of elections, making all seats vacant simultaneously. Giving voters a say only once every four years instead of every two would limit accountability. It would also promote instability, because a governing body might turn over completely every election.

Plaintiffs' proposal also only partly accounts for basic political factors that impact whether an alternative at-large system proves votes have been diluted. Plaintiffs correctly acknowledge that minority voters' cohesion "impacts their ability to effectively exercise voting strength" in alternative systems. (OB-56.) But so do registration and turnout. Given substantial

disparities in registration and turnout across ethnic groups—and there are stark differences in Santa Monica (25AA11006-11012, 28AA12378, RT8301:2-11)—barely clearing the threshold of exclusion is unlikely to enhance minority voters' ability to elect their preferred candidates in any election, much less every election.

III. If the Court does not affirm, it should remand the case to the Court of Appeal.

Plaintiffs devote much of their brief to a question on which the Court did not grant review: whether they proved Latino votes have been "diluted" in Santa Monica under their definition of that term. (OB-56-72.) Plaintiffs invite this Court to decide the case in their favor in one fell swoop—to "affirm the trial court's judgment and allow the ordered changes to Santa Monica's election system to proceed without further delay." (*Id.* at 73.)

But that would not be the correct disposition for several reasons. One is technical: This Court is reviewing not "the trial court's judgment," but the Court of Appeal's. (Cal. Const. Art. VI, § 12(b); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.)

There are four other reasons why this Court should not decide whether plaintiffs proved vote dilution under their preferred standard.

First, it is the wrong standard, so whether plaintiffs satisfied it is irrelevant.

Second, even if this Court agrees with plaintiffs' multifactor standard, the Court is one of final review, not first view. It

should follow its usual practice and decline to apply a new legal standard to the facts in the first instance, instead remanding to the Court of Appeal to do so. (E.g., *Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 242; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.)

Third, there is no emergency that would justify departing from that usual practice. Plaintiffs insist this Court should decide whether they proved dilution under a newly announced standard because "Santa Monica's Latino community has already waited far too long for their voting rights." (OB-57.) But Latino voters currently have *more* representation of the kind plaintiffs seek—Latino candidates and candidates from the "Latino-concentrated Pico Neighborhood" (OB-65)—than they could ever hope to achieve under a district-based system.

Three current Councilmembers are Latino (Davis, de la Torre, and Parra). (MJN at 9.) At the time of the trial, two Councilmembers were Latino (Davis and Vazquez). If there were any merit to plaintiffs' theory of this case—that all Latino voters always vote for Latino candidates, and that non-Latino voters rarely do so—then creating a district with the highest possible percentage of Latino voters would, at most, result in the election of *one* Latino candidate. The same is true of candidates from the Pico Neighborhood, where at least two current Councilmembers (de la Torre and Parra) live. (*Id.* at 13.) Ironically, were this Court to reinstate the trial court's judgment and give plaintiffs the "remedial" district they seek, the Pico Neighborhood would lose at least one representative, and the City would lose one or

two Latino Councilmembers (de la Torre and Parra would need to run against each other, and *both* might lose).[6]

Fourth, taking the unusual step of resolving the vote-dilution question under a new standard would not end the case because there are independent grounds for affirming the Court of Appeal's judgment.

That court's opinion addressed only whether plaintiffs had proven dilution; it did not decide whether they had proven legally significant racially polarized voting—that is, whether Latinos vote cohesively for the same candidates, but those candidates usually lose as a result of majority bloc voting for different candidates. (Opn. at 27; *Gingles*, 478 U.S. at 50-51.)

The parties extensively briefed that question below. (AOB-15-40; RB-45-62; ARB-15-39.) Although the Court of Appeal did not reach it (Opn. at 26-27), and although this Court did not grant review on a question not decided below, plaintiffs nevertheless urge this Court to address and answer it in their favor. (OB-58-64.)

Laying out the full racially-polarized-voting analysis—in a brief dedicated principally to answering the one question the Court posed—would require more words than the rules permit.

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[6] Plaintiffs also ignore that the trial court's districting plan violated Elections Code section 10010, which requires that maps be drawn with the public's input at a series of hearings. Those public hearings never happened here; the trial court instead rubber-stamped a map drawn by plaintiffs' expert. (RT9938:12-9939:12.) Because the Court of Appeal reversed on other grounds, it did not reach this issue. (Opn. at 49.)

But even the discussion that follows should demonstrate why this Court should not decide the issue in the first instance.

A. Whether voting is racially polarized should be reviewed de novo.

Review is de novo when an appeal calls for "the application of a statute to undisputed facts." (*Poole*, 61 Cal.4th at 1384; accord *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.) This is just such an appeal.

The facts informing the question whether voting in Santa Monica is racially polarized—election returns and experts' statistical analysis of them—are undisputed. (See 25AA11006-11012, 28AA12328-12332; accord OB-59.) The parties dispute only the legal standards for deciding whether those facts show racially polarized voting.

Federal courts have consistently held those questions of law warrant de novo review. For example, the parties dispute how to determine whether candidates are Latino-preferred—which can be resolved "[a]s a matter of law." (*Clay v. Bd. of Educ. of City of St. Louis* (8th Cir. 1996) 90 F.3d 1357, 1361.) The parties also dispute whether Latino-preferred candidates have usually lost because of majority bloc voting. That, too, is a legal question reviewed de novo. (*Cousin*, 145 F.3d at 823.)

B. The trial court applied the wrong legal standards in determining that voting in Santa Monica is racially polarized.

To satisfy the racially-polarized-voting element, plaintiffs had to prove Latinos vote cohesively for the same candidates, but those candidates "usually" lose as a result of majority bloc voting

for different candidates. (*Gingles*, 478 U.S. at 50-51.) Plaintiffs claim Santa Monica's elections are characterized by "stark racially polarized voting" that has prevented Latinos "from electing the Latino candidates whom they strongly preferred." (OB-58.) Neither the law nor the undisputed facts support that claim.

As for the law, plaintiffs' theory depends on the odious and unconstitutional assumption that Latino voters can prefer only candidates with Latino surnames. As for the undisputed facts, they show Latino voters' preferred candidates usually *win* in Santa Monica.

1. The trial court unconstitutionally focused on candidates' ethnicity rather than voters' preferences.

The first step in the racial-polarization analysis is identifying the minority-preferred candidates.

Plaintiffs offer a simple heuristic—just look at the candidates with Latino surnames. (E.g., OB-24-26, 59-60.) The trial court did exactly that, confining its analysis to 10 Latino-surnamed Council candidates. (24AA10685-10686.) The court thus adopted the methodology of plaintiffs' expert, who focused not on the actual preferences of Latino voters, but only those "candidates who are Latino-surnamed." (RT4239:2-4241:20.) The expert analyzed each election solely by examining white voters' and Latino voters' respective support for Latino-surnamed candidates; it did not matter to him which candidates received the highest share of Latino votes. (*Ibid.*; 4978:10-20.)

This stereotyping of Latino voters was unconstitutional. In decisions that the CVRA incorporates by reference (Elec. Code, § 14026(e)), federal courts have consistently held it violates Equal Protection to presume that minority voters can prefer only minority candidates. Such a presumption "would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate." (*Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600, 607.)

Every circuit that has considered the question has reached the same conclusion:

- *Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543 [collecting decisions from nine circuits]: Adopting the presumption would "provide judicial approval to 'electoral apartheid.'"
- *Clay v. Board of Education of City of St. Louis* (8th Cir. 1996) 90 F.3d 1357, 1361: "The notion that a minority candidate is the minority preferred candidate simply because of that candidate's race offends the principles of equal protection."
- *NAACP, Inc. v. City of Niagara Falls* (2d Cir. 1995) 65 F.3d 1002, 1016: The trial court's erroneous approach "would project a bleak, if not hopeless, view of our society."

The U.S. Supreme Court has similarly forbidden any voting system that "reinforces the perception that members of the same

racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." (*Shaw v. Reno* (1993) 509 U.S. 630, 647.)

Plaintiffs say nothing of the constitutional problems inherent in the trial court's approach. Rather, they defend their focus on Latino-surnamed candidates by invoking section 14028(b), which specifies that "[t]he occurrence of racially polarized voting shall be determined from examining the results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class." (OB-61.)

But that section merely suggests that elections involving minority candidates will be the most probative. It does not state that, in such elections, courts should examine *only* the votes for minority candidates. To the contrary, the very next sentence appropriately leaves open the possibility that minority voters might prefer non-minority candidates: "*One circumstance* that may be considered in determining a violation of [the CVRA] is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class . . . have been elected to the [relevant] governing body." (Elec. Code, § 14028(b), italics added.) If the Legislature had meant the focus on minority candidates to be exclusive rather than illustrative, it could have said so. But that is not how the statute is written, and for good reason—such an approach would be

unconstitutional.

Because the trial court nonetheless resorted to stereotyping, it disregarded the actual preferences of Latino voters. For example:

- In the 1996 Council election, the Court examined voting only for Alvarez (24AA10685, RT3064:18-27)—Latino voters' *seventh* choice. (25AA11007.) Latinos nearly unanimously supported three non-Latino-surnamed candidates, two of whom won; the trial court did not even mention them. (25AA11007; RT3061:2-9, RT7131:23-7133:22.)
- In the 2008 election, the trial court analyzed voting only for Piera-Avila. (24AA10685, RT3082:15-3083:1.) But she received far less Latino support than two non-Latino-surnamed candidates, both of whom won—and the trial court ignored. (25AA11010, RT4986:26-4987:4, RT7144:7-7145:5.)

The trial court was not even faithful to its own unconstitutional approach, as it inexplicably declined to examine the 2014 election, in which a Latino-surnamed candidate (Muntaner) ran. (25AA11143, 28AA12332.) There, too, Latino voters were motivated by more than ethnicity; she tied for *eighth* among Latino voters. (28AA12332.) Her performance was not anomalous; other Latino-surnamed candidates have similarly won little Latino support. (E.g., 25AA11007 [Alvarez], 25AA11011 [Gomez, Duron].)

These are just a few of the many ways in which plaintiffs

cherry-picked the data to fit their narrative. They also argued below, for example, that the victories of two Latino candidates, Vazquez and Davis, should be ignored. (Respondents' Br. at 23, fn. 3; 26-27; 56, fn. 11; 61, fn. 13.) They even convinced the trial court that Councilmember Davis is not actually Latina because, according to a telephone survey of 400 City residents, "the Santa Monica electorate does not recognize her as Latina." (24AA10684-10685, fn. 7.) Unsurprisingly, the court cited no legal authority supporting its survey-based ethnicity test. The CVRA defines protected classes by reference to federal law (Elec. Code, § 14026(d)), which in turn defines the protected class of Latinos as "persons who are . . . of Spanish heritage." (52 U.S.C. §§ 10303(f)(2), 10310(c)(3).) Councilmember Davis's father was Mexican, indisputably making her a member of that class. (RT9077:17-20, RT9079:19-9080:26, RT9124:9-9134:4.)

The trial court's conclusion that voting in Santa Monica is racially polarized depends entirely on this sort of reverse-engineering of plaintiffs' preferred outcome.

2. Under the correct legal standards, the undisputed facts show there is no racially polarized voting in Santa Monica.

The undisputed evidence belies plaintiffs' assertion that voting in Santa Monica is racially polarized; Latino-preferred candidates usually *win*.

a. The evidence is undisputed.

The parties' experts estimated from election returns how members of certain ethnic groups voted; their analyses were

essentially identical. (Compare 28AA12328-12332 with 25AA11006-11012.) Those analyses have been attached to this brief for the Court's convenience. (Cal. Rules of Court, rule 8.520(h).)

The illustrative table below shows plaintiffs' expert's estimates of voting behavior in the 1996 Council election.

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Michael Feinstein	149.1 (25.0)	-259.7 (57.1)	-3.6 (18.9)	41.5 (2.2)	36.4
Asha S. Greenberg	-114.1 (30.5)	312.4 (69.5)	78.2 (23.0)	34.7 (2.7)	36.2
Ken Genser	96.5 (20.3)	-147.0 (46.3)	1.2 (15.3)	37.9 (1.8)	33.9
Paul Rosenstein	48.1 (12.0)	33.4 (27.3)	26.3 (9.0)	31.7 (1.1)	32.6
Kelly Olsen	106.4 (20.6)	-121.1 (47.0)	-7.5 (15.6)	32.7 (1.8)	30.6
Frank D. Schwengel	-91.9 (28.8)	282.7 (65.6)	57.8 (21.7)	28.3 (2.5)	30.3
Shari L. Davis	-63.2 (24.3)	175.8 (55.4)	42.1 (18.3)	26.1 (2.1)	26.0
Donna Dailey Alvarez	22.2 (12.9)	160.3 (29.4)	34.5 (9.7)	15.8 (1.1)	22.0
Richard Bloom	51.9 (12.9)	28.5 (29.4)	-3.6 (9.7)	10.0 (1.1)	12.9
Susan L. Mearns	32.6 (6.9)	-38.3 (15.7)	-0.8 (5.2)	10.8 (0.6)	10.0
Jeffrey Hughes	14.7 (4.7)	-18.8 (10.8)	-0.7 (3.6)	7.7 (0.4)	6.9
Jonathan Metzger	0.6 (3.8)	19.2 (8.6)	6.4 (2.8)	4.9 (0.3)	5.2
Larry Swieboda	-1.1 (3.0)	2.0 (6.9)	4.4 (2.3)	3.2 (0.3)	2.9

(25AA11007.)

The rightmost column shows the actual percentage of votes received by each candidate. (The sum of these numbers exceeds 100% because each voter could cast up to three votes in this election.) The other columns contain statistical point estimates and, in parentheses, standard errors. The point estimates and standard errors can be used to produce a "confidence interval," which is a range of values within which the true value likely falls. (RT4097:28-4098:23, RT6772:20-6773:16.)

Both sides' experts used 95% confidence intervals.[7] That

[7] A 95% confidence interval is calculated by multiplying the standard error by 1.96 and then adding and subtracting the

interval for Alvarez's share of Latino votes in 1996, for example, ranges from -3.1% (which is logically impossible) to 47.5%. (RT4105:25-4106:17.) When confidence intervals overlap, the estimates are not statistically significantly different. (RT3064:28-3065:12.) For example, the confidence intervals for Latino support for Feinstein, Genser, and Olsen overlap.

b. Latino-preferred candidates are identified through data, not assumptions.

In analyzing election tables like the one reproduced above, the trial court looked only at the two highlighted cells—Latino and white support for the *Latino-surnamed* candidate. (24AA10684-10690.) But the entire table matters. Only by examining *all* the cells in the "Latino" column, for example, can the Court determine whether and to what extent candidates—whatever their ethnicity—were preferred by Latino voters.

To identify minority-preferred candidates, courts begin not with the assumption that they are minorities themselves, but with data. In multi-seat elections like those in Santa Monica, where voters might prefer multiple candidates, courts first narrow the field to those candidates who would have won had the election been held "only among the minority group in question." (*Ruiz*, 160 F.3d at 552; accord *Lewis*, 99 F.3d at 614; *Clay*, 90 F.3d at 1361-1362.) Courts then determine whether the group preferred some candidates more strongly than others. Courts

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result from the point estimate. (RT3066:7-9, RT4096:1-3, RT5849:3-15.)

discount winning candidates who were clearly not as strongly minority-preferred as losing candidates. (*Niagara*, 65 F.3d at 1017.) But they do not discount winning candidates who received roughly the same minority support as losing candidates. (*Id.* at 1018; *Levy v. Lexington County* (4th Cir. 2009) 589 F.3d 708, 716.) Finally, some courts also hold that candidates cannot be considered minority-preferred if they won too small a share of the minority vote. (E.g., *Niagara*, 65 F.3d at 1018-1019 [deeming candidates minority-preferred only if supported by at least 50% of minority voters].)

In the Council elections analyzed by the parties' experts, there were 22 Latino-preferred candidates:

- 1994: Finkel, O'Connor, Vazquez
- 1996: Feinstein, Greenberg, Olsen
- 2002: Aranda, McKeown
- 2004: Loya
- 2006: McKeown
- 2008: Bloom, Genser
- 2010: McKeown, O'Connor, O'Day
- 2012: Davis, O'Day, Vazquez, Winterer
- 2014: McKeown
- 2016: de la Torre, Vazquez

(25AA11006-11012, 28AA12328-12332.)

Plaintiffs suggest that the City identifies as Latino-preferred winning white candidates who received far less Latino support than Latino-surnamed candidates. (OB-60-64.) Not so. The City's approach expressly accounts for the order of Latino

voters' preferences. Consequently, the City disregards some winning candidates because they won significantly less Latino support than losing candidates. (E.g., 25AA11008 [O'Connor, 2002]; 25AA11009 [Bloom, 2004]; 25AA11012 [O'Day, 2016].)

c. Latino-preferred candidates have usually won Council elections.

With the Latino-preferred candidates properly identified, a court can assess whether those candidates have typically lost Council elections as a result of white bloc voting, as the CVRA requires. (OB-10; *Gingles*, 478 U.S. at 50-51, 56.)

Here, the undisputed data show precisely the opposite. *Sixteen* of the 22 Latino-preferred candidates won. (See 25AA11006-11012, 28AA12328-12332.) And of the six who lost, only three (Aranda in 2002, Loya in 2004, and de la Torre in 2016) were arguably defeated by white bloc voting; the others lost, despite sufficient white support, because of inadequate support from other ethnic groups. (See 25AA11006-11007; see also AOB-46-48.)

That Latino-preferred candidates usually win is a sufficient basis for a judgment against a CVRA plaintiff. (E.g., *Askew v. City of Rome* (11th Cir. 1997) 127 F.3d 1355, 1381, 1385 (per curiam).)

IV. Plaintiffs did not prove the City's election system has diluted Latino votes in any event.

If the Court announces a new standard for proving dilution, it should decline plaintiffs' invitation to reach the question whether they proved it at trial. But if the Court does reach that

question, it should affirm the Court of Appeal's judgment.

The parties agree that, under any definition of "dilution," courts must determine how often a protected class has been able to elect its preferred candidates and how often it *should* be able to do so in an "undiluted" system. (OB-45-46.)

Plaintiffs have never given an honest accounting on either side of the ledger. Although Latinos account for not even one-seventh of the City's electorate, they have nevertheless usually been able to elect their preferred candidates. (Part III.B, *supra*.) And plaintiffs did not prove that Latino-preferred candidates would *ever* be likely to win under some alternative system, much less that they would win more often. Accordingly, plaintiffs failed to prove dilution under any definition of that term.

A. Plaintiffs did not prove Latino voters would elect more of their preferred candidates in a district-based system.

Plaintiffs argue the district map drawn by their expert "would improve Latino voting power over the current at-large system" for five conclusory reasons, none of them persuasive. (OB-66-70.)

First, plaintiffs say the Latino share of the voting population in their proposed district (30%) would be greater than the Latino share of the voting population citywide (14%). (OB-67.) But the Court of Appeal properly rejected that simplistic argument. (Opn. at 34-36.) Plaintiffs' proposal has no limiting principle, as they conceded at oral argument below; *any* marginal increase in a group's share of the voting population would suffice,

even if it would be too small to make any real-world difference.

Plaintiffs' argument is also wrong because it rests on fuzzy math. They argue 30% (Latinos' share of eligible voters in a district) is larger than 14% (Latinos' share of eligible voters citywide). But those numbers are not comparable. Voters in the current at-large system cast up to four votes apiece, whereas voters in a district-based system would cast only one. Because at-large elections in Santa Monica have always been competitive, with voters spreading their votes across a broad field of candidates, many of those candidates have been able to win a Council seat with the support of a small share of the electorate. (25AA11006-11012.) In districts, by contrast, there can be only one winner. As a result, Latino-preferred candidates who can narrowly prevail in the at-large system might lose in district-based elections.

If anything, abandoning the City's at-large system for districts is a recipe for harming Latino voters, not empowering them. The premise of the trial court's decision was insufficient white crossover voting for Latino-preferred candidates. (E.g., 24AA10680.) Under plaintiffs' theory that there is a "stark pattern of racially polarized voting" (OB-23-24, OB-57-58), creating a 30% Latino district where voters can choose only one candidate in winner-takes-all elections would ensure that Latinos would be routinely outvoted. (See RT7258:4-10; RT7575:6-16, RT8334:17-8335:1.) And it is no answer to point to potential support from other minority groups, because undisputed election data show that Asian and African-American voters vote

differently than Latino voters. (See 25AA11006-11012.)

Plaintiffs also never mention what will happen to Latinos who live *outside of* the proposed district. They account for two-thirds of the City's Latino population (RT5352:25-5355:2), and would be isolated in the remaining six overwhelmingly white districts. (RT5354:25-5355:11, RT6947:23-6948:7, RT7215:17-23.) The same would be true for African-American and Asian voters. (See RT8338:23-8339:11, RT8340:20-8341:15.) Plaintiffs' purported remedy therefore resembles the "packing" and "cracking" of minority voters that frequently gives rise to vote-dilution claims in the first place. (See Opn. at 28.) In fact, it is *worse*, because at least minorities in the typical "packed" (majority-minority) district are effectively guaranteed one representative of their choice. Here, by contrast, even Latinos in the "packed" (30%) district would be unable to elect their preferred candidates.

Second, plaintiffs argue that "districts with similar Latino voter proportions in other cities have allowed Latinos to elect their preferred candidates." (OB-67.) But *nothing* in the record shows that those candidates were preferred by Latinos; the record shows only that the candidates were themselves Latino. (RT6938:1-5; RT6942:12-14.) Regardless, in each district cited by plaintiffs, Latinos' share of the electorate was nearly 50%—a far cry from the 30% here—illustrating the benefits of the near-majority "dilution" standard that the City proposes. (RT6937:16-21; RT6940:10-14.)

Third, plaintiffs claim one of their experts showed that

Latino voters would have been able to elect their preferred candidates in the proposed district. (OB-67-69.) Plaintiffs made a muddled version of this argument so cursorily below that the Court of Appeal deemed it "forfeited." (Opn. at 37.) Whether plaintiffs preserved the argument or not, it is wrong. Their expert tallied the votes each candidate received in an area roughly approximating the proposed district. (26AA11536-11538.) He emphasized, correctly, that his analysis was "in no way predictive of what would happen in a district election." (RT2610:23-25.)

The expert's analysis does not show that Latino voters would have been able to elect more preferred candidates in the proposed district. Nor could it have: He never examined who the preferred candidates were; he instead followed another expert's assumption that *Latino-surnamed* candidates must have been Latino-preferred. (RT2599:15-23.)

Even if that assumption were accurate, the analysis shows that Latino-surnamed candidates who lost at-large elections generally would have lost in a district, too. (26AA11536-11538.) If anything, districts would have taken away more victories than they might have granted. Vazquez, a three-time Council election winner, could not have run in the district in the first place because he did not live there; and he would have lost in 2012 anyway to a white resident of the Pico Neighborhood, O'Day—even though *both* were preferred by Latino voters and prevailed in the City's at-large system. (26AA11537, 27AA11947; RT2641:14-2643:8, RT7811:6-13.) And today, if the City were

forced to convert to districts, it would lose at least one Latino Councilmember, since those who live within plaintiffs' proposed district would need to run against each other (and might all lose).

Fourth, plaintiffs say at-large elections in Santa Monica are expensive. (OB-69-70.) That matters, they suggest, because "Latino candidates are not wealthy enough to self-finance their campaigns and Latino voters lack sufficient disposable wealth to contribute" to them; plaintiffs believe things might be different in a district-based election scheme. (*Ibid.*) Plaintiffs are once again painting with a broad brush, ignoring the differences among Latino voters and Latino candidates and assuming the former must always prefer the latter. This is the sort of narrow thinking that voting-rights statutes are meant to combat, not promote.

Finally, plaintiffs assert in one sentence that the Latino community is "politically organized in a manner that would 'likely translate to equitable electoral strength' in a district system." (OB-70.) Unsupported assertions about local politics do not change the numbers. Latinos would be too few, however well-organized they might be, to elect their preferred candidates under plaintiffs' proposal—one 30% Latino district and six other districts where Latinos would be between 5% and 13% of the voters. (RA47.)

B. Plaintiffs did not prove Latino voters would elect more preferred candidates under an alternative at-large system.

Plaintiffs also argue, in passing, that Latinos would have greater voting strength in a different at-large system. (OB-70-

72.) It is unsurprising that plaintiffs devote so little space to this argument; the Court of Appeal correctly concluded that the trial court's decision, which plaintiffs wrote, said so little on the subject it was effectively unreviewable. (Opn. at 31.)

In any event, plaintiffs' second dilution theory, like the first, runs aground on indisputable demographic facts. No matter the election system, Latinos are too few to be assured of electing their preferred candidates.

Plaintiffs contend Latinos have the numbers to elect their preferred candidates, "even with no help from non-Latinos," because they would exceed the "threshold of exclusion" in a hypothetical alternative at-large system in which all seven Council seats become available simultaneously. (OB-71.) But meeting the threshold of exclusion would *at best* ensure that Latino voters could elect one of seven candidates—even though they are doing far better under the current system. (Part III.B.2, *supra*.)

Further, courts evaluating vote-dilution claims premised on alternative at-large systems do not assume votes have been diluted strictly on the basis of the threshold of exclusion. They instead consider whether the relevant minority group's cohesion and turnout would be sufficient for them to elect their preferred candidates in such a system.

In *United States v. Euclid City School Board* (N.D.Ohio 2009) 632 F.Supp.2d 740, 746, 769-770, for example, the court assumed African-American voters would vote at two-thirds the rate of non-minority voters under an alternative at-large scheme

(which was about triple the historical rate). Under that two-thirds turnout ratio, African-Americans (who accounted for 40% of eligible voters) would exceed the threshold of exclusion. (*Id.* at 745, 770 & fn. 30.) Here, by contrast, Latinos account for just 13.6% of the City's eligible voters, barely more than the threshold of exclusion without making any adjustments for less-than-perfect cohesion and historically low registration and turnout. (E.g., RT8301:2-11, 28AA12378 [low registration]; 25AA11006-11012 [inconsistent cohesion and low registration and turnout].) Even modest adjustments for those factors would result in a Latino share of the electorate well below the threshold of exclusion.

Plaintiffs also argue, for the first time, that Latinos might be able to elect their preferred candidates even if their numbers fall short of the threshold of exclusion. (OB-71-72.) They cite not a single case supporting that proposition. And in resting this new (and therefore waived) theory on the existence of "some majority-crossover voting," they have again embraced the very crossover voting that they insist is not present in Santa Monica. As the Court of Appeal put it, plaintiffs "arbitrarily embrace[] racially polarized voting when it helps" (when establishing that element of their claim), but "abandon[] it when it hurts" (when trying to prove vote dilution). (Opn. at 36.) The Court should reject this heads-plaintiffs-win-tails-defendants-lose approach to CVRA liability.

CONCLUSION

Public entities and lower courts need a clear, administrable definition of "dilution" that will show when a minority group has suffered harm caused by an at-large election system. Plaintiffs' reverse-engineered, anything-goes approach would trivialize the dilution requirement and put the CVRA in constitutional jeopardy by allowing small minority groups to prevail even though they could not elect their preferred candidates under *any* election system.

In Santa Monica, Latinos have consistently elected their preferred candidates under an at-large system, punching well above the weight of their numbers. Plaintiffs' proposed districts would only disenfranchise Latinos by packing one-third of them into a district where they would be too few to exercise any meaningful influence over which candidates are elected, and stranding the rest in six districts where they would account for a small share of voters.

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: March 22, 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 13,999 words, as counted by Microsoft Word, excluding the tables, this certificate, and the signature blocks.

DATED: March 22, 2021

Kahn A. Scolnick

ADDENDUM: Expert Analyses of Election Results

1994 (Ex. 272)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Bob Holbrook	-108.9 (38.6)	371.7 (70.7)	37.7 (20.6)	34.4 (2.6)	36.5
Pam O'Connor	113.2 (27.3)	-177.9 (50.0)	5.6 (14.5)	40.1 (1.8)	36.3
Ruth Ebner	-103.5 (32.7)	323.5 (60.0)	44.5 (17.4)	34.4 (2.2)	35.7
Tony Vazquez	145.5 (28.0)	-209.4 (51.2)	19.2 (14.9)	34.9 (1.9)	33.2
Bruria Finkel	122.4 (28.4)	-234.8 (52.0)	5.1 (15.1)	37.6 (1.9)	33.0
Matthew P. Kann	-81.3 (30.8)	260.1 (56.4)	25.5 (16.4)	23.1 (2.1)	24.4
Bob Knonovet	-6.4 (7.5)	50.8 (13.8)	5.4 (4.0)	8.7 (0.5)	8.9
Ron Taylor	51.3 (6.1)	-35.7 (11.2)	9.9 (3.2)	4.8 (0.4)	6.3
John Stevens	37.4 (5.6)	9.8 (10.3)	3.1 (3.0)	3.6 (0.4)	5.6
Wallace Peoples	8.5 (6.7)	42.0 (12.3)	12.0 (3.6)	3.5 (0.5)	5.3
Joe Sole	11.8 (3.9)	-2.7 (7.2)	1.2 (2.1)	2.9 (0.3)	3.2

1996 (Ex. 275)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Michael Feinstein	149.1 (25.0)	-259.7 (57.1)	-3.6 (18.9)	41.5 (2.2)	36.4
Asha S. Greenberg	-114.1 (30.5)	312.4 (69.5)	78.2 (23.0)	34.7 (2.7)	36.2
Ken Genser	96.5 (20.3)	-147.0 (46.3)	1.2 (15.3)	37.9 (1.8)	33.9
Paul Rosenstein	48.1 (12.0)	33.4 (27.3)	26.3 (9.0)	31.7 (1.1)	32.6
Kelly Olsen	106.4 (20.6)	-121.1 (47.0)	-7.5 (15.6)	32.7 (1.8)	30.6
Frank D. Schwengel	-91.9 (28.8)	282.7 (65.6)	57.8 (21.7)	28.3 (2.5)	30.3
Shari L. Davis	-63.2 (24.3)	175.8 (55.4)	42.1 (18.3)	26.1 (2.1)	26.0
Donna Dailey Alvarez	22.2 (12.9)	160.3 (29.4)	34.5 (9.7)	15.8 (1.1)	22.0
Richard Bloom	51.9 (12.9)	28.5 (29.4)	-3.6 (9.7)	10.0 (1.1)	12.9
Susan L. Mearns	32.6 (6.9)	-38.3 (15.7)	-0.8 (5.2)	10.8 (0.6)	10.0
Jeffrey Hughes	14.7 (4.7)	-18.8 (10.8)	-0.7 (3.6)	7.7 (0.4)	6.9
Jonathan Metzger	0.6 (3.8)	19.2 (8.6)	6.4 (2.8)	4.9 (0.3)	5.2
Larry Swieboda	-1.1 (3.0)	2.0 (6.9)	4.4 (2.3)	3.2 (0.3)	2.9

2002 (Ex. 278)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Pam O'Connor	58.6 (22.8)	-27.0 (51.2)	25.1 (31.2)	46.2 (2.4)	43.4
Kevin McKeown	76.8 (23.0)	-21.9 (51.7)	12.9 (31.5)	44.3 (2.4)	42.8
Bob Holbrook	-31.2 (29.1)	179.7 (65.4)	49.0 (39.9)	34.6 (3.0)	36.2
Abby Arnold	45.8 (17.9)	-45.1 (40.2)	16.3 (24.5)	38.9 (1.9)	35.2
Matteo Dinolfo	-9.2 (23.1)	100.4 (51.9)	22.5 (31.7)	26.9 (2.4)	27.1
Josefina S. Aranda	82.6 (12.6)	24.4 (28.2)	10.6 (17.2)	16.5 (1.3)	21.3
Chuck Allord	-5.6 (10.1)	22.9 (22.8)	8.3 (13.9)	10.9 (1.1)	10.1
Jerry Rubin	6.0 (7.8)	-20.4 (17.6)	16.9 (10.7)	8.9 (0.8)	7.8
Pro Se	16.5 (5.9)	-12.5 (13.3)	15.7 (8.1)	4.9 (0.6)	5.4

2004 (Ex. 281)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Bobby Shriver	23.6 (20.3)	45.3 (60.0)	-3.6 (26.9)	51.5 (3.3)	16.5*
Richard Bloom	54.9 (13.8)	-19.4 (40.8)	23.7 (18.3)	35.2 (2.3)	11.8*
Herb Katz	5.1 (22.5)	121.7 (66.5)	-5.8 (29.9)	27.8 (3.7)	10.3*
Ken Genser	39.4 (13.6)	-9.4 (40.2)	21.8 (18.1)	28.2 (2.2)	9.4*
Patricia Hoffman	40.0 (13.1)	-31.7 (38.7)	24.9 (17.4)	27.3 (2.1)	8.9
Matt Dinolfo	-1.4 (23.9)	66.6 (70.6)	-7.7 (31.7)	25.1 (3.9)	8.3
Maria Loya	106.0 (12.3)	-74.0 (36.5)	19.2 (16.4)	21.2 (2.0)	8.1
Kathryn J. Morea	4.1 (16.6)	15.9 (49.1)	6.0 (22.1)	21.8 (2.7)	6.9
Michael Feinstein	28.2 (9.6)	2.4 (28.3)	12.1 (12.7)	16.0 (1.6)	5.6
David Cole	1.3 (3.8)	60.2 (11.3)	7.2 (5.1)	6.2 (0.6)	3.0
Leticia M. Anderson	15.6 (4.1)	11.7 (12.0)	11.2 (5.4)	5.5 (0.7)	2.4
Bill Bauer	3.2 (4.3)	38.9 (12.6)	7.7 (5.6)	5.2 (0.7)	2.4
L. Mendelsohn	0.9 (3.2)	38.1 (9.4)	12.8 (4.2)	5.0 (0.5)	2.3
Tom Viscount	11.6 (4.5)	-0.3 (13.4)	5.3 (6.0)	5.4 (0.7)	2.0
Jonathan Mann	3.7 (2.5)	13.7 (7.4)	4.2 (3.3)	3.0 (0.4)	1.3
Linda Armstrong	4.6 (1.8)	13.1 (5.3)	4.8 (2.4)	1.1 (0.3)	0.7

2008 (Ex. 284)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Bobby Shriver	-4.5 (15.7)	38.0 (40.2)	60.5 (20.0)	52.7 (2.5)	47.7
Richard Bloom	49.7 (8.0)	12.0 (20.4)	43.5 (10.1)	40.2 (1.2)	39.7
Ken Genser	55.1 (9.5)	-6.3 (24.2)	32.5 (12.0)	38.8 (1.5)	37.6
Herb Katz	7.0 (13.1)	86.5 (33.5)	48.8 (16.7)	32.3 (2.0)	33.7
Ted Winterer	16.9 (11.1)	-8.0 (28.4)	37.8 (14.1)	25.6 (1.7)	23.6
Susan Hartley	20.7 (9.0)	58.9 (23.0)	23.8 (11.4)	16.7 (1.4)	19.5
Michael Kovac	3.2 (5.3)	16.0 (13.6)	23.6 (6.8)	12.6 (0.8)	12.4
Jerry Rubin	20.9 (6.6)	-3.4 (16.8)	19.5 (8.4)	11.6 (1.0)	11.9
Linda M. Piera-Avila	33.3 (5.2)	27.3 (13.4)	6.4 (6.7)	5.7 (0.8)	9.1
Herbert Silverstein	0.4 (5.1)	4.6 (13.0)	4.3 (6.5)	7.7 (0.8)	6.8
John Blakely	5.2 (3.8)	11.1 (9.6)	10.6 (4.8)	4.9 (0.6)	5.5
Jon Louis Mann	9.3 (3.2)	16.4 (8.2)	6.4 (4.1)	3.4 (0.5)	4.7
Linda Armstrong	14.0 (2.4)	19.1 (6.2)	4.4 (3.1)	2.9 (0.4)	4.7

2012 (Ex. 287)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Ted Winterer	56.7 (14.9)	-16.0 (53.3)	-4.7 (18.2)	40.9 (3.3)	36.9
Terry O'Day	63.9 (8.0)	-32.8 (28.8)	36.0 (9.8)	37.3 (1.8)	35.7
Gleam Davis	50.2 (8.2)	-19.6 (29.3)	36.3 (10.0)	32.9 (1.8)	31.7
Tony Vazquez	92.7 (9.0)	23.9 (32.2)	7.1 (11.0)	19.1 (2.0)	24.9
Shari Davis	1.6 (12.3)	57.2 (44.1)	11.3 (15.0)	23.2 (2.7)	22.6
Richard McKinnon	5.0 (9.6)	41.4 (34.6)	4.2 (11.8)	17.1 (2.1)	16.7
John Cyrus Smith	8.7 (4.8)	78.9 (17.2)	11.6 (5.9)	10.2 (1.1)	14.0
Frank Gruber	15.1 (11.2)	55.9 (40.0)	-18.3 (13.6)	11.7 (2.4)	12.9
Jonathan Mann	19.8 (4.5)	-0.4 (16.2)	15.8 (5.5)	10.2 (1.0)	10.7
Bob Seldon	-11.0 (7.5)	96.3 (26.7)	7.0 (9.1)	5.4 (1.6)	8.9
Armen Melkonians	-0.6 (4.0)	25.8 (14.2)	18.8 (4.9)	7.4 (0.9)	8.3
Terence Later	-0.5 (5.6)	7.2 (20.2)	10.0 (6.9)	8.6 (1.2)	7.8
Jerry Rubin	9.5 (3.4)	-15.5 (12.3)	11.1 (4.2)	7.2 (0.8)	6.4
Robert Gomez	30.4 (3.3)	14.7 (11.8)	8.2 (4.0)	2.9 (0.7)	6.1
Steve Duron	5.0 (2.6)	16.8 (9.4)	5.0 (3.2)	4.4 (0.6)	5.1

2016 (Ex. 290)

Candidate	Latino	Asian	Est. Black	Est. Non-Hispanic White	Actual %
Terry O'Day	55.3 (6.2)	4.6 (22.4)	21.0 (8.2)	38.7 (1.6)	37.3
Tony Vazquez	78.3 (9.0)	-20.4 (32.5)	12.3 (11.8)	36.6 (2.3)	35.7
Ted Winterer	38.1 (10.9)	-54.4 (39.3)	5.3 (14.3)	43.3 (2.7)	35.1
Gleam Davis	43.8 (7.6)	-12.6 (27.5)	24.4 (10.0)	37.6 (1.9)	34.5
Armen Melkonians	8.8 (9.6)	80.1 (34.6)	10.0 (12.6)	22.9 (2.4)	24.4
Oscar de la Torre	88.0 (6.0)	43.2 (21.8)	20.2 (7.9)	12.9 (1.5)	21.8
James T. Watson	0.8 (5.1)	24.6 (18.4)	28.8 (6.7)	11.2 (1.3)	11.9
Mende Smith	11.5 (4.5)	12.6 (16.2)	14.4 (5.9)	9.5 (1.1)	10.1
Terence Later	1.4 (4.7)	22.9 (17.0)	6.1 (6.2)	10.1 (1.2)	9.9
Jonathan Mann	9.6 (3.1)	5.0 (11.4)	7.6 (4.1)	7.7 (0.8)	7.7

ER estimated shares of ballots cast (weighted)

Year	Office	Alternative	Votes	Asian		Black		Latino/a		White	
				Est.	Std. Error	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error
2002	Board of Education	EMILY BLOOMFIELD	11,885	58%	20%	24%	15%	45%	8%	48%	1%
2002	Board of Education	JULIA BROWNLEY	11,793	73%	26%	21%	20%	58%	10%	46%	1%
2002	Board of Education	OSCAR DE LA TORRE	9,541	2%	34%	24%	26%	107%	13%	34%	2%
2002	Board of Education	SHANE MCLOUD	9,250	102%	22%	36%	17%	25%	9%	35%	1%
2002	Board of Education	BRENDA GOTTFRIED	7,582	86%	24%	41%	18%	18%	9%	29%	1%
2002	Board of Education	ANN COCHRAN	3,889	16%	13%	69%	10%	14%	5%	14%	1%
2002	City Council	PAM O'CONNOR	10,797	-26%	54%	31%	41%	53%	21%	46%	3%
2002	City Council	KEVIN MCKEOWN	10,675	-14%	55%	23%	42%	67%	21%	44%	3%
2002	City Council	ABBY ARNOLD	8,779	-38%	42%	31%	32%	36%	17%	39%	2%
2002	City Council	BOB HOLBROOK	8,711	139%	68%	9%	51%	-10%	26%	36%	3%
2002	City Council	MATTEO DINOLFO	6,600	76%	54%	-12%	41%	5%	21%	28%	3%
2002	City Council	JOSEFINA S ARANADA	5,562	61%	26%	33%	20%	69%	10%	16%	1%
2002	City Council	CHUCK ALLORD	2,469	18%	24%	3%	18%	-4%	9%	11%	1%
2002	City Council	JERRY RUBIN	1,989	-13%	18%	29%	14%	2%	7%	9%	1%
2002	City Council	PRO SE	1,433	2%	13%	34%	10%	10%	5%	4%	1%
2002	Measure HH	No	14,244	13%	51%	50%	39%	82%	20%	57%	2%
2002	Measure HH	Yes	7,697	80%	55%	21%	42%	4%	21%	32%	3%
2002	Measure II	No	14,409	55%	44%	64%	34%	69%	17%	57%	2%
2002	Measure II	Yes	7,874	40%	40%	6%	30%	20%	16%	33%	2%
2004	Board of Education	MARIA LEON-VAZQUES	16,337	-11%	31%	-15%	17%	98%	9%	44%	2%
2004	Board of Education	JOSE ESCARCE	16,307	35%	27%	-38%	15%	74%	8%	44%	1%
2004	Board of Education	ANA M JARA	13,722	-78%	43%	-13%	24%	113%	13%	37%	2%
2004	Board of Education	KATHY WISNICKI	12,994	176%	48%	0%	27%	12%	15%	31%	2%
2004	City Council	BOBBY SHRIVER	17,486	70%	69%	-11%	39%	14%	22%	52%	4%
2004	City Council	RICHARD BLOOM	12,503	-42%	47%	8%	27%	61%	15%	36%	2%
2004	City Council	HERB KATZ	10,577	119%	78%	-18%	44%	4%	24%	29%	4%
2004	City Council	KEN GENSER	9,838	-56%	44%	-3%	25%	53%	14%	29%	2%
2004	City Council	PATRICIA HOFFMAN	9,603	-34%	46%	21%	26%	41%	14%	27%	2%
2004	City Council	MARIA LOYA	9,009	-66%	44%	16%	25%	106%	14%	21%	2%
2004	City Council	MATT DINOLFO	8,746	97%	84%	-2%	47%	-13%	26%	25%	4%
2004	City Council	KATHRYN J MOREA	7,656	86%	55%	22%	31%	-13%	17%	21%	3%
2004	City Council	MICHAEL FEINSTEIN	5,867	-27%	32%	8%	18%	33%	10%	17%	2%
2004	City Council	DAVID COLE	3,065	59%	13%	8%	7%	1%	4%	6%	1%
2004	City Council	LETICIA M ANDERSON	2,536	-3%	14%	5%	8%	21%	4%	6%	1%
2004	City Council	BILL BAUER	2,473	35%	14%	7%	8%	4%	4%	5%	1%
2004	City Council	L MENDELSOHN	2,327	20%	10%	6%	6%	7%	3%	5%	0%
2004	City Council	TOM VISCOUNT	2,152	-7%	15%	2%	9%	14%	5%	6%	1%
2004	City Council	JONATHAN MANN	1,326	9%	9%	3%	5%	5%	3%	3%	0%
2004	City Council	LINDA ARMSTRONG	793	12%	6%	5%	3%	5%	2%	1%	0%

ER estimated shares of ballots cast (weighted)

				Asian		Black		Latino/a		White	
Year	Office	Alternative	Votes	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error
2004	College Trustees	SUSAN AMINOFF	14,402	4%	27%	19%	15%	48%	8%	40%	1%
2004	College Trustees	ROBERT G RADER	11,168	-11%	29%	8%	16%	33%	9%	33%	1%
2004	College Trustees	M R QUINONES	9,500	61%	17%	11%	10%	55%	5%	21%	1%
2004	College Trustees	M DOUGLAS WILLIS	9,427	-39%	23%	23%	13%	39%	7%	28%	1%
2004	College Trustees	CHARLES DONALDSON	6,809	71%	25%	3%	14%	40%	8%	14%	1%
2004	College Trustees	TONJA MCCOY	5,509	20%	17%	24%	9%	15%	5%	14%	1%
2004	College Trustees	SUSANNE TRIMBATH	4,326	18%	16%	10%	9%	13%	5%	11%	1%
2006	Board of Education	EMILY BLOOMFIELD	11,528	33%	24%	6%	18%	59%	9%	47%	1%
2006	Board of Education	OSCAR DE LA TORRE	10,607	9%	31%	36%	24%	95%	12%	40%	1%
2006	Board of Education	KELLY MCMAHON PYE	10,105	35%	34%	26%	26%	46%	13%	41%	2%
2006	Board of Education	BARRY A SNELL	9,004	29%	25%	37%	19%	24%	9%	38%	1%
2006	Board of Education	SHANE MCLOUD	6,806	67%	26%	30%	20%	34%	10%	25%	1%
2006	Board of Education	SIDONIE SMITH	3,629	48%	16%	37%	12%	21%	6%	12%	1%
2006	City Council	KEVIN MCKEOWN	10,390	21%	41%	36%	31%	58%	16%	42%	2%
2006	City Council	PAM O'CONNOR	9,588	-2%	37%	55%	29%	45%	14%	39%	2%
2006	City Council	BOB HOLBROOK	8,870	99%	56%	-6%	43%	24%	21%	35%	3%
2006	City Council	TERRY O'DAY	8,454	54%	34%	25%	26%	25%	13%	34%	2%
2006	City Council	GLEAM OLIVIA DAVIS	6,871	1%	30%	26%	23%	20%	11%	30%	1%
2006	City Council	JENNA LINNEKENS	2,257	2%	16%	14%	12%	4%	6%	10%	1%
2006	City Council	TERENCE LATER	1,949	34%	23%	11%	17%	8%	9%	6%	1%
2006	City Council	MARK C MCLELLAN	1,518	16%	12%	9%	9%	1%	4%	6%	1%
2006	City Council	LINDA ARMSTRONG	1,389	6%	12%	14%	9%	18%	4%	4%	1%
2006	City Council	JONATHAN MANN	1,170	9%	8%	3%	6%	8%	3%	4%	0%
2006	College Trustees	NANCY GREENSTEIN	11,841	-3%	24%	53%	18%	62%	9%	49%	1%
2006	College Trustees	LOUISE JAFFE	11,440	33%	37%	6%	28%	65%	14%	47%	2%
2006	College Trustees	DAVID B FINKEL	10,106	15%	27%	53%	21%	34%	10%	42%	1%
2006	College Trustees	ANDREW WALZER	9,395	6%	32%	50%	24%	53%	12%	38%	2%
2006	College Trustees	TOM DONNER	6,500	55%	28%	27%	21%	28%	11%	25%	1%
2006	College Trustees	SUSANNA KIM BRACKE	3,789	38%	18%	30%	14%	16%	7%	14%	1%
2006	Rent Control Board	JENNIFER KENNEDY	9,058	-12%	47%	60%	36%	41%	18%	37%	2%
2006	Rent Control Board	M KORADE-WILSON	8,604	15%	45%	40%	34%	49%	17%	34%	2%
2006	Rent Control Board	ZELIA MOLLICA	7,534	8%	40%	63%	30%	46%	15%	29%	2%
2006	Rent Control Board	ROBERT KRONOVET	4,576	74%	30%	17%	23%	19%	11%	16%	1%
2008	Board of Education	BEN ALLEN	22,153	29%	19%	37%	12%	39%	7%	45%	1%
2008	Board of Education	MARIA LEON-VAZQUEZ	21,966	19%	20%	19%	13%	101%	8%	40%	1%
2008	Board of Education	JOSE ESCARCE	19,256	30%	16%	20%	11%	68%	6%	36%	1%
2008	Board of Education	CHRIS BLEY	17,535	85%	16%	45%	11%	24%	6%	32%	1%
2008	City Council	BOBBY SHRIVER	24,258	50%	27%	44%	18%	2%	11%	52%	2%
2008	City Council	RICHARD BLOOM	20,205	16%	17%	30%	11%	56%	7%	40%	1%

ER estimated shares of ballots cast (weighted)

Year	Office	Alternative	Votes	Asian		Black		Latino/a		White	
				Est.	Std. Error	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error
2008	City Council	KEN GENSER	19,119	-10%	18%	22%	12%	60%	7%	39%	1%
2008	City Council	HERB KATZ	17,189	48%	24%	13%	16%	33%	10%	34%	2%
2008	City Council	TED WINTERER	12,034	-49%	26%	2%	17%	44%	10%	27%	2%
2008	City Council	SUSAN HARTLEY	9,910	57%	16%	20%	11%	22%	7%	17%	1%
2008	City Council	MICHAEL KOVAC	6,340	8%	12%	14%	8%	12%	5%	13%	1%
2008	City Council	JERRY A RUBIN	6,064	3%	12%	26%	8%	18%	5%	11%	1%
2008	City Council	L M PIERA-AVILA	4,612	25%	10%	8%	7%	32%	4%	6%	1%
2008	City Council	H SILVERSTEIN	3,449	6%	9%	8%	6%	-2%	4%	8%	1%
2008	City Council	JOHN BLAKELY	2,778	9%	8%	13%	5%	6%	3%	5%	0%
2008	City Council	LINDA ARMSTRONG	2,393	17%	6%	8%	4%	12%	2%	3%	0%
2008	City Council	JON LOUIS MANN	2,376	17%	6%	10%	4%	7%	3%	3%	0%
2008	College Trustees	SUSAN AMINOFF	21,201	88%	16%	59%	10%	19%	6%	40%	1%
2008	College Trustees	ROBERT G RADER	20,432	79%	16%	58%	10%	24%	6%	39%	1%
2008	College Trustees	M QUINONES-PEREZ	19,878	76%	15%	42%	10%	58%	6%	35%	1%
2008	College Trustees	HEIDI HOECK	12,590	-28%	22%	11%	15%	62%	9%	25%	1%
2008	Rent Control Board	JOEL C KOURY	22,571	-15%	37%	26%	25%	97%	15%	43%	2%
2008	Rent Control Board	ROBERT KRONOVET	15,162	96%	26%	36%	17%	11%	10%	27%	2%
2008	Rent Control Board	CHRISTOPHER BRAUN	15,107	-6%	21%	-3%	14%	63%	8%	30%	1%
2010	Board of Education	LAURIE LIEBERMAN	15,600	20%	19%	40%	14%	46%	9%	42%	1%
2010	Board of Education	OSCAR DE LA TORRE	14,022	-2%	17%	43%	13%	94%	8%	33%	1%
2010	Board of Education	RALPH MECHUR	12,300	7%	16%	23%	12%	52%	8%	32%	1%
2010	Board of Education	NIMISH PATEL	10,588	31%	24%	10%	18%	20%	12%	29%	1%
2010	Board of Education	BARRY A SNELL	9,610	18%	17%	60%	13%	8%	8%	26%	1%
2010	Board of Education	PATRICK CADY	8,948	57%	14%	35%	11%	33%	7%	20%	1%
2010	Board of Education	CHRIS BLEY	8,930	88%	16%	56%	12%	9%	8%	20%	1%
2010	Board of Education	JAKE WACHTEL	4,874	51%	14%	18%	11%	1%	7%	11%	1%
2010	City Council (Full)	KEVIN MCKEOWN	16,336	12%	24%	39%	18%	63%	12%	43%	1%
2010	City Council (Full)	PAM O'CONNOR	14,532	15%	22%	46%	17%	52%	11%	38%	1%
2010	City Council (Full)	BOB HOLBROOK	12,773	56%	28%	32%	22%	19%	14%	34%	2%
2010	City Council (Full)	TED WINTERER	12,719	5%	28%	42%	21%	21%	14%	36%	2%
2010	City Council (Full)	JEAN MCNEIL WYNER	4,013	53%	13%	28%	10%	-14%	7%	10%	1%
2010	City Council (Full)	JERRY RUBIN	3,730	-9%	10%	22%	7%	11%	5%	10%	1%
2010	City Council (Full)	JON LOUIS MANN	3,525	10%	10%	7%	8%	26%	5%	8%	1%
2010	City Council (Full)	TERENCE LATER	2,931	2%	10%	17%	8%	5%	4%	8%	1%
2010	City Council (Full)	DANIEL CODY	2,764	11%	7%	7%	5%	4%	3%	7%	0%
2010	City Council (Full)	LINDA ARMSTRONG	1,700	5%	6%	2%	4%	16%	3%	3%	0%
2010	City Council (Short)	TERRY O'DAY	15,944	4%	21%	32%	16%	69%	10%	42%	1%
2010	City Council (Short)	GLEAM OLIVIA DAVIS	13,369	22%	16%	39%	12%	46%	8%	35%	1%
2010	City Council (Short)	ROBERT KRONOVET	7,155	64%	16%	40%	12%	7%	8%	16%	1%

Trial Exhibit 1653A_28

ER estimated shares of ballots cast (weighted)

Year	Office	Alternative	Votes	Asian		Black		Latino/a		White	
				Est.	Std. Error	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error
2010	City Council (Short)	SUSAN HARTLEY	6,329	21%	17%	29%	13%	27%	9%	15%	1%
2010	City Council (Short)	DAVID GANEZER	5,240	35%	13%	27%	10%	-8%	6%	14%	1%
2010	Rent Control Board (Full)	M KORADE WILSON	15,749	-33%	29%	33%	22%	99%	14%	40%	2%
2010	Rent Control Board (Full)	BILL WINSLOW	14,984	-9%	18%	42%	13%	62%	9%	40%	1%
2010	Rent Control Board (Full)	TODD FLORA	14,145	-7%	21%	37%	16%	70%	10%	37%	1%
2010	Rent Control Board (Short	CHRIS BRAUN	17,214	-15%	25%	45%	19%	91%	12%	44%	2%
2012	Board of Education	BEN ALLEN	21,421	46%	20%	34%	8%	59%	6%	44%	1%
2012	Board of Education	MARIA LEON-VAZQUEZ	17,579	28%	22%	29%	9%	92%	7%	32%	1%
2012	Board of Education	JOSE ESCARCE	15,747	54%	21%	20%	8%	62%	6%	29%	1%
2012	Board of Education	CRAIG FOSTER	11,692	48%	14%	21%	6%	24%	4%	23%	1%
2012	Board of Education	KAREN FARRER	8,394	58%	12%	17%	5%	12%	4%	15%	1%
2012	Board of Education	SETH JACOBSON	5,926	50%	12%	12%	5%	-2%	4%	11%	1%
2012	City Council	TED WINTERER	17,714	-13%	32%	13%	13%	47%	10%	41%	2%
2012	City Council	TERRY O'DAY	17,122	-4%	20%	36%	8%	61%	6%	36%	1%
2012	City Council	GLEAM OLIVIA DAVIS	15,214	28%	20%	42%	8%	41%	6%	31%	1%
2012	City Council	TONY VAZQUEZ	11,937	16%	20%	11%	8%	90%	6%	20%	1%
2012	City Council	SHARI DAVIS	10,843	48%	26%	16%	11%	0%	8%	24%	2%
2012	City Council	RICHARD MCKINNON	8,039	36%	21%	10%	8%	3%	6%	17%	1%
2012	City Council	JOHN CYRUS SMITH	6,612	49%	12%	7%	5%	14%	4%	12%	1%
2012	City Council	FRANK GRUBER	6,164	61%	24%	-7%	10%	8%	7%	11%	2%
2012	City Council	JONATHAN MANN	5,134	-2%	11%	13%	4%	21%	3%	10%	1%
2012	City Council	BOB SELDON	4,280	64%	17%	8%	7%	-7%	5%	7%	1%
2012	City Council	ARMEN MELKONIANS	3,957	22%	10%	15%	4%	2%	3%	8%	1%
2012	City Council	TERENCE LATER	3,755	-5%	12%	12%	5%	1%	4%	9%	1%
2012	City Council	JERRY P. RUBIN	3,069	-10%	8%	8%	3%	11%	3%	7%	1%
2012	City Council	ROBERTO GOMEZ	2,916	17%	8%	8%	3%	29%	2%	3%	1%
2012	City Council	STEVE DURON	2,464	23%	8%	4%	3%	5%	2%	4%	0%
2012	Rent Control Board	CD WALTON	12,444	17%	23%	34%	9%	44%	7%	24%	1%
2012	Rent Control Board	ILSE ROSENSTEIN	12,181	25%	24%	29%	10%	44%	7%	23%	2%
2012	Rent Control Board	ROBERT KRONOVET	10,917	96%	18%	24%	7%	8%	5%	20%	1%
2014	Board of Education	LAURIE LIEBERMAN	13,492	44%	20%	40%	11%	52%	8%	48%	1%
2014	Board of Education	R TAHVILDARAN-JESSWEI	10,910	51%	20%	29%	11%	54%	8%	37%	1%
2014	Board of Education	OSCAR DE LA TORRE	10,621	28%	17%	44%	9%	88%	7%	33%	1%
2014	Board of Education	RALPH MECHUR	10,529	60%	21%	26%	11%	32%	8%	37%	1%
2014	Board of Education	CRAIG FOSTER	8,479	39%	16%	16%	9%	42%	6%	29%	1%
2014	Board of Education	DHUN MAY	4,372	17%	13%	20%	7%	35%	5%	13%	1%
2014	Board of Education	PATTY FINER	4,372	29%	11%	22%	6%	26%	4%	13%	1%
2014	City Council	KEVIN MCKEOWN	10,138	58%	24%	18%	13%	52%	10%	34%	2%
2014	City Council	SUE HIMMELRICH	9,262	10%	19%	34%	10%	34%	8%	34%	1%

ER estimated shares of ballots cast (weighted)

Year	Office	Alternative	Votes	Asian		Black		Latino/a		White	
				Est.	Std. Error	Est.	Std. Error	Est.	Std. Error	Est.	Std. Error
2014	City Council	PAM O'CONNOR	6,696	21%	15%	26%	8%	37%	6%	22%	1%
2014	City Council	PHIL BROCK	5,854	66%	20%	14%	11%	8%	8%	19%	1%
2014	City Council	FRANK GRUBER	5,222	16%	17%	8%	9%	35%	7%	18%	1%
2014	City Council	JENNIFER KENNEDY	5,037	-13%	19%	18%	10%	28%	8%	19%	1%
2014	City Council	RICHARD MCKINNON	4,890	47%	19%	11%	11%	10%	8%	16%	1%
2014	City Council	MICHAEL FEINSTEIN	3,729	4%	13%	16%	7%	22%	5%	13%	1%
2014	City Council	TERENCE LATER	1,874	7%	12%	4%	7%	-1%	5%	7%	1%
2014	City Council	JERRY RUBIN	1,635	2%	8%	12%	4%	8%	3%	5%	1%
2014	City Council	JON MANN	1,594	4%	8%	15%	4%	7%	3%	5%	1%
2014	City Council	NICK BOLES	1,328	2%	7%	5%	4%	5%	3%	5%	0%
2014	City Council	WHITNEY SCOTT BAIN	1,317	15%	7%	8%	4%	6%	3%	4%	0%
2014	City Council	ZOE MUNTANER	791	-4%	6%	2%	3%	8%	2%	3%	0%
2014	College Trustees	NANCY GREENSTEIN	12,785	41%	18%	34%	10%	56%	7%	45%	1%
2014	College Trustees	LOUISE JAFFE	12,497	43%	21%	29%	11%	41%	8%	45%	1%
2014	College Trustees	BARRY A SNELL	10,209	61%	19%	37%	10%	37%	8%	35%	1%
2014	College Trustees	ANDREW WALZER	9,569	38%	15%	28%	8%	42%	6%	33%	1%
2014	College Trustees	DENNIS C W FRISCH	8,783	56%	19%	24%	10%	65%	8%	27%	1%
2014	College Trustees	MARIA LOYA	7,971	26%	17%	42%	9%	84%	7%	23%	1%
2014	Rent Control Board	NICOLE PHILLIS	7,790	-16%	23%	27%	12%	61%	9%	27%	1%
2014	Rent Control Board	STEVE DURON	6,746	-4%	19%	24%	10%	46%	8%	23%	1%
2014	Rent Control Board	TODD FLORA	6,480	-6%	17%	17%	9%	52%	7%	22%	1%
2016	City Council	TERRY O'DAY	19,263	40%	17%	28%	8%	45%	5%	37%	1%
2016	City Council	TONY VAZQUEZ	18,456	20%	22%	22%	10%	65%	7%	34%	2%
2016	City Council	TED WINTERER	18,156	-5%	26%	23%	12%	20%	8%	41%	2%
2016	City Council	GLEAM OLIVIA DAVIS	17,842	34%	21%	35%	10%	29%	6%	35%	2%
2016	City Council	ARMEN MELKONIANS	12,603	58%	21%	14%	9%	9%	6%	24%	2%
2016	City Council	OSCAR DE LA TORRE	11,256	25%	15%	26%	6%	87%	4%	14%	1%
2016	City Council	JAMES T WATSON	6,170	21%	12%	27%	5%	2%	4%	12%	1%
2016	City Council	MENDE SMITH	5,212	0%	11%	13%	5%	14%	3%	10%	1%
2016	City Council	TERENCE LATER	5,102	8%	12%	6%	5%	3%	3%	11%	1%
2016	City Council	JON MANN	3,959	8%	8%	11%	4%	6%	3%	8%	1%
2016	College Trustees	SUSAN AMINOFF	21,770	13%	17%	42%	8%	49%	5%	44%	1%
2016	College Trustees	M QUINONES-PEREZ	19,576	1%	18%	37%	8%	85%	5%	36%	1%
2016	College Trustees	ROB G RADER	19,246	43%	18%	39%	8%	37%	4%	37%	1%
2016	College Trustees	SION ROY	16,651	50%	18%	31%	8%	30%	5%	31%	1%
2016	Rent Control Board	CAROLINE M TOROSIS	15,596	4%	22%	43%	10%	35%	6%	31%	2%
2016	Rent Control Board	ANASTASIA FOSTER	13,825	-7%	21%	33%	10%	34%	6%	28%	2%
2016	Rent Control Board	E GOLDEN-GEALER	8,491	19%	12%	20%	5%	21%	4%	16%	1%
2016	Rent Control Board	C D WALTON	7,728	7%	13%	28%	6%	13%	4%	15%	1%

Trial Exhibit 1653A_30

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 March 22, 2021, I served:

CITY OF SANTA MONICA'S ANSWER BRIEF

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 22, 2021.

Daniel R. Adler

Respondents' Counsel	**Method of service**
Morris J. Baller (48928) Laura L. Ho (173179) Anne Bellows (293722) GOLDSTEIN, BORGEN, DARDARIAN & HO 300 Lakeside Dr., Suite 1000 Oakland, California 94612 Tel: 510-763-9800	Electronic service
Kevin Shenkman (223315) Mary Hughes (222662) SHENKMAN & HUGHES PC 28905 Wight Road Malibu, California 90265 Tel: 310-457-0970	Electronic service
Milton Grimes (59437) LAW OFFICES OF MILTON C. GRIMES 3774 West 54th Street Los Angeles, California 90043 Tel: 323-295-3023	Electronic service
R. Rex Parris (96567) Ellery Gordon (316655) PARRIS LAW FIRM 43364 10th Street West Lancaster, California 93534 Tel: 661-949-2595	Electronic service
Robert Rubin (85084) LAW OFFICE OF ROBERT RUBIN 237 Princeton Avenue Mill Valley, CA 94941-4133 Tel: 415-298-4857	Electronic service

Trial court

Hon. Yvette M. Palazuelos Judge Presiding Los Angeles County Superior Court 312 North Spring Street Los Angeles, CA 90012 Tel: 213-310-7009	Mail service